

**SUPREME COURT OF NIGERIA**  
MONDAY 25TH FEBRUARY, 2002. SC. 160/2001  
**CORAM:- A. B. WALI, E. O. OGWUEGBU,**  
**U. MOHAMMED, U. A. KALGO, UWAIFO, JJSC**

SEGUN BALOGUN ..... APPELLANT  
V.  
ATTORNEY-GENERAL OF OGUN STATE ..... RESPONDENT

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CRIMINAL LAW - Conspiracy - Distinctive nature - It is a separate and distinct offence - And it is independent of the actual commission of the offence to which it relates (H1)

CRIMINAL PROCEDURE - Conspiracy - Establishment of - It is inferred from circumstantial evidence - And from common intention of accused persons - Even though armed robbery did not materialize (H2)

CRIMINAL PROCEDURE - Conspiracy - Conviction for - Validity - Appellant was rightly convicted of the offence - Irrespective of the altering of conviction for armed robbery - To attempted armed robbery (H3)

EVIDENCE - Contradictions - Establishment of - Evidence Act ss.199 & 209 - Onus of compliance - Defence needs to comply with the sections - Since it has duty to cross-examine prosecution witness (H4)

CRIMINAL PROCEDURE - Identification parade - Relevance of - It is necessary to test witness's power of recognition - And when there is doubt as to who was seen in connection with an offence (H5)

CRIMINAL PROCEDURE - Identification parade - When irrelevant - It becomes unnecessary where witness claims to have seen a definite person - In which case the credibility of such witness is put to test (H6)

ALIBI - Plea of - Sustainability - To sustain the plea - Accused must give adequate particulars of his whereabouts - At time of the com-

**204** Balogun v. A-G Ogun State (2002) 2 KLR (pt. 133) 203; (2002) 6  
mission of the offence (H7)

ALIBI - Proof - Burden of - It is not for accused to prove the defence  
- Prosecution must disprove same - As part of its duty to prove the  
offence - Beyond reasonable doubt (H8)

ALIBI - Plea of - How to raise - Accused must raise the defence  
promptly and properly - And burden of proving the offence - Does  
not shift to accused (H9)

ALIBI - Proof - Standard of - Where prosecution adduced evidence  
to disprove the defence - It is left for accused to discredit such evi-  
dence - Based on balance of probabilities (H10)

ALIBI - Proof - Prosecution evidence - Effect - Where prosecution  
leads unassailable evidence - Which shows that accused was at crime  
scene - The defence collapses (H11)

JUDGMENTS - Errors - Correction of - Imposition of sentence un-  
der Robbery & Firearms Act s. 2(1) - Was a clerical error made by  
court - Which can be corrected (H12)

SUPREME COURT - Powers - Supreme Court Act s. 26 - Even when  
there is no appeal against sentences - The Court can suo motu cor-  
rect any error made by Court of Appeal (H13)

ARMED ROBBERY - Mandatory sentence - Justification for - Seri-  
ousness of offences charged in this case - Justified the mandatory  
sentence of life imprisonment (H14)

### ***FACTS***

A three-man gang of armed robbers invaded the premises of Toyin Agarawu i.e. PW1 on 9<sup>th</sup> March 1997 at night. PW1 was able to recognize the three of them with the aid of the security light in his compound. He raised alarm which resulted in the armed robbers breaking his entrance door by force. The robbers left after three hours of futile effort in search of money to steal. PW1 later discovered that they had strangled his security guard to death. Thereafter, PW1 lodged

a report at Ijebu-Igbo Police Station. He mentioned the names of accused/appellant and the two others as the armed robbers. Appellant was later arrested on 7<sup>th</sup> May 1997.

Accordingly, appellant was arraigned before the High Court of Ogun State on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to sections 5(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 LFN 1990, respectively. In his statement, appellant denied being one of the gang members. He rather raised a defence of alibi. At the end of trial, the judge was not satisfied with appellant's plea of alibi. Hence, appellant was convicted of the offences as charged and was sentenced to death by firing squad. Dissatisfied, appellant filed appeal at the Court of Appeal, Ibadan Division. The court partly allowed the appeal by substituting the conviction to conspiracy to commit robbery and attempted robbery. Aggrieved further, appellant appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether the learned Justices of Appeal were right in relying on contradictory evidence to convict the appellant of the offences of conspiracy to commit robbery and attempted robbery.*

*2. Whether the learned Justices of Appeal were right in holding that the defence of alibi raised by appellant was properly rejected."*

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

*CRIMINAL PROCEDURE - Conspiracy - Distinctive nature*

**1. They are consistent with the principle laid down in *Ogbozor v. Inspector-General of Police* (1964) 1 All NLR 9 and *Lawson v. The State* (1975) 4 SC 115 that conviction for conspiracy does not become inappropriate simply because the substantive offence has not been successfully proved. It is a known principle of law that conspiracy to commit an offence is a separate and distinct offence and is independent of the actual commission of the offence to which the conspiracy is related. The offence of conspiracy may be fully committed even though the substantive offence may be abandoned or aborted, or may have**

**become impossible to commit.** (p. 215 G)

*CRIMINAL PROCEDURE - Conspiracy - Establishment of*

**2. Conspiracy to commit an offence is quite often inferred from circumstantial evidence. As a result of lack of evidence that money or property was stolen by the appellant and others on that occasion, the offence of armed robbery was not established. But the evidence is clear that the men had a common purpose, namely, to rob with violence. That was what can be inferred that they conspired to do. The fact of that conspiracy remained even though the armed robbery itself did not materialize, because there was no property available to be stolen at the appropriate time and place.** (p. 216 B)

*CRIMINAL PROCEDURE - Conspiracy - Conviction for - Validity*

**3. I am satisfied in the circumstances that the court below was right in the present case to uphold the conviction of the appellant for conspiracy to commit armed robbery even after the conviction for armed robbery had been altered to attempted armed robbery. The failure in the evidence of PW1 to establish that money or property was stolen or property was stolen was a failure to prove a necessary ingredient of the offence of armed robbery. This was a result of the contradiction between his statements to the police and his evidence in court. Notwithstanding that contradiction, which was an act of PW1, the common intention to rob with violence that was conceived and attempted to be implemented by the appellant and others was by no means any longer inchoate but had been fully formed and remained an offence of conspiracy to commit armed robbery although no stealing took place.** (p. 216 E)

*EVIDENCE - Contradictions - Establishment of*

**4. I am of the view, however, that the court below misapplied the observation of this court in *Kwagshir v. The State* (supra) at pages 661-662 as to how to establish any contradiction between the evidence of a witness and the statement previously made by him in the cross-examination by virtue of sections 199 and 209 of the Evidence Act. In the present case in**

**which the evidence and statement of a prosecution witness (PW1) were involved, the court below expressed the view that the onus was on the prosecution to ensure compliance with those sections. That is, with due respect, an erroneous view. It is the defence that would, in the particular instant, have to comply with the provisions of those sections 199 and 209 of the Evidence Act since it would be its duty to cross-examine PW1 if it so wished. It is not the duty of the prosecution unless when it confronts, in the course of cross-examination, a defence witness who has given evidence inconsistent with any statement he made to the police.** (p. 216 H) <sup>B</sup> <sup>C</sup>

*CRIMINAL PROCEDURE - Identification parade - Relevance of*  
**5. An identification parade will be useful when a witness claims to have seen an unfamiliar person who escaped from a crime scene in circumstances which require putting to test the witness's power of recognition based upon the physical features and/or other peculiarities of the person he claims to have seen. There must be real doubt as to who was seen in connection with the offence to require identification parade.** (p. 218 C) <sup>D</sup> <sup>E</sup>

*CRIMINAL PROCEDURE - Identification parade - When irrelevant*  
**6. Such a parade is absolutely unnecessary when the witness claims to have seen a familiar or definite person whom he perhaps names or knows his abode or family connection. In such a situation it is the credibility of the witness that will be open to be tested at the appropriate time rather than the staging of a farcical identification parade for a person whose mind has been firmly fixed upon a particular suspect.** (p. 218 D) <sup>F</sup> <sup>G</sup>

*ALIBI - Plea of - Sustainability*

**7. I think the difficulty created by the deficiency in that alibi is that it was not sufficiently particularized. The law is that it is not enough for an accused to raise the defence of alibi at large. He must give adequate particulars of his whereabouts at the time of the commission of the offence to assist the police to make a meaningful investigation of the alibi. If the accused** <sup>H</sup>

**said he was in a particular locality or with a particular person or persons, he must give a lead as to the specific place, the names and/or addresses of who to contact and the relevant period he was away from the scene of crime. (p. 219 G)**

**B** *ALIBI - Proof - Burden of*

**8. The second aspect of what the learned Justice said was that the appellant failed to establish in his alibi that he could not have been at the scene of crime on the night of the incident. This is a misdirection, with due respect, which suggests that an accused person has the burden of proving his alibi. The law is clearly that if an accused person puts forward the defence of alibi, it simply means he was somewhere else and not at the scene of crime when the offence with which he is charged was committed. The onus is not on him to prove that defence but on the prosecution to disprove it as part of the duty on it to prove the charge against an accused beyond reasonable doubt. (p. 220 B)**

**E** *ALIBI - Plea of - How to raise*

**9. The duty of the accused is to raise the defence promptly and properly. The onus on the prosecution to prove the charge against an accused person beyond reasonable doubt never shifts and when alibi is relied on as a defence the duty on the accused does not initially go beyond introducing the evidence or facts of alibi. (p. 220 E)**

*ALIBI - Proof - Standard of*

**G** **10. But where the prosecution has adduced evidence intended to disprove the defence of alibi raised by an accused, it is then the accused has the onus to lead evidence in order to weaken or discredit the evidence of the prosecution. In that regard, the standard of proof required of the accused is on the balance of probabilities. (p. 220 F)**

*ALIBI - Proof - Prosecution evidence - Effect*

**11. When, of course, the prosecution is able to lead cogent and unassailable evidence which shows that an accused was**

***at the scene of crime at the material time, his alibi, when placed alongside the evidence against him in the normal evaluation of evidence, collapses.*** (p. 220 H)

*JUDGMENTS - Errors - Correction of*

**12. It seems to me that in the circumstances, the learned Justice did not intend to impose lesser sentence than the law statutory mandates. He mistakenly, in my view, allowed the sentencing to be affected by his earlier reference to section 2(1) of the Act which he quoted. That subsection reads:**

***“2(1) Any person who, with intent to steal anything assaults any other person and at or immediately after the time of assault, uses or threatens to use actual violence to any other person or any property in order to obtain the thing intended to be stolen shall upon conviction under this Act be sentenced to imprisonment for not less than fourteen years but not more than twenty years.”***

**It must be appreciated that the above is in respect of mere attempted robbery and not attempted armed robbery having regard to section 2(2) of the Act. What the learned Justice did by imposing the sentences prescribed under section 2(1) can, in my view, be regarded as a clerical error which can be corrected as such.** (p. 223 A)

*SUPREME COURT - Powers*

**13. But even if it were not such a clerical error but that the court below was minded to impose those sentences, this court has the power to regard the sentences thus imposed as erroneous and to correct the situation. It was in this connection that this court invited counsel on both sides in the course of hearing this appeal, to address it on the propriety of the lower court imposing sentences less than the statute has mandated; and they did. Even though, as argued by learned counsel for the appellant, there was no appeal against the sentences, yet this court can intervene under section 26 of the Supreme Court Act, 1960 which provides:**

***“26. On the hearing of an appeal under this Part (i.e. Part V-Appeals in Criminal Cases from the Court of Appeal),***

***the Supreme Court may exercise any power that could have been exercised by the Court of Appeal.....”***

***(Parenthesis supplied)***

***As I said, notwithstanding that there is no appeal against the sentences, this court has the power to correct suo motu what was wrongly done by the court below.*** (p. 223 E)

*ARMED ROBBERY - Mandatory sentence - Justification for*

***14. A fortiori, in the present case, the statute recognizes the seriousness of the offence of attempted armed robbery and the conspiracy relating thereto. It has accordingly imposed a mandatory sentence of life imprisonment. Any reduction in the sentence cannot be justified under whatever circumstances. This appeal is dismissed and accordingly, I alter the sentence imposed by the court below on the appellant to that of life imprisonment in respect of the two convictions.*** (p. 224 B)

### **REPRESENTATION**

Afolabi Fashanu for the Appellant

E Chief Oluseyi Oyebolu, Attorney-General Ogun State, with Mr. N. I. Agbelu, D.P.P. Ogun State for the Respondent

### **CASES REFERRED TO**

- F Kwaghshir v. The State (1995) 3 NWLR (pt.386) 651
- Erim v. The State (1994) 5 NWLR (pt.346) 522
- Ogbozor v. Inspector-General of Police (1964) 1 All NLR 9
- Ogoala v. The State (1991) 2 NWLR (pt.175) 509
- Williams v. The State (1992) 8 NWLR (pt.261) 515
- G Obiode v. The State (1970) 1 All NLR 35
- Yanor v. The State (1965) NMLR 337
- Bozim v. The State (1985) 2 NWLR (pt.8) 465
- Balogun v. The state 20 NLR 148
- R. v. Gbenu Ihunu (1943) 9 WACA 61
- H Haruna v. The state (1972) All NLR 738
- Ntam v. The State (1968) NMLR 86
- Njovens v. The State (1973) 5 SC 17
- Onuchukwu v. The State (1998) 4 NWLR (Pt. 547) 576
- Ozaki v. The State (1990) 1 NWLR (Pt. 124) 92



**STATUTES REFERRED TO**

Evidence Act Cap. 112 LFN 1990, ss. 199 & 209

Robbery & Firearms (Special Provisions) Act Cap. 398 LFN 1990, ss. 1(2)(a), 2(1)(2) & 5(b)

Supreme Court Act 1960, s. 26

B

**LEAD JUDGMENT BY UWAIFO JSC**

The appellant was arraigned on a two-count charge at the Ogun State Robbery and Firearms Tribunal under the Robbery and Firearms (Special Provisions) Act (Cap. 398) Laws of the Federation of Nigeria 1990 (the Act). The first count was conspiracy to commit armed robbery contrary to section 5(b) while the second count was armed robbery contrary to section 1(2) (a) of the Act. On 14 January, 2000, upon the evidence before the tribunal, Oduntan, J. who presided found the appellant guilty on both counts. He convicted him on each and accordingly sentenced him to death by firing squad. The Court of Appeal, Ibadan Division, allowed the appeal against those convictions and the sentence and substituted for the convictions, conspiracy to commit robbery and attempted robbery. I shall refer later to the matter of the sentences awarded.

The appellant has now appealed against those convictions to this court and has set down the following two issues for determination:

*“1. Whether the learned Justices of Appeal were right in relying on contradictory evidence to convict the appellant of the offences of conspiracy to commit robbery and attempted robbery.*

*2. Whether the learned Justices of Appeal were right in holding that the defence of alibi raised by appellant was properly rejected.”*

The facts relied on were that on 9 March, 1997, a gang of armed robbers invaded the premises of Toyin Agarawu, who testified as PW1, at No. 1 Anoye Street, Oke-Agbo, Ijebu-Igbo at night. He was woken up by his wife who had heard the groaning of their night guard, and then peeped through his bedroom window overlooking the back of his house. The security light (otherwise referred to as halogen light) was on and this helped him to see a group of men among whom he recognized three of them. These were the appellant, one Tajudeen Oluwalambe and one Dokun Asegbe. He watched

them for about three minutes before raising an alarm as to the presence of thieves. As a result of the alarm, the men fired at his direction and the shot ripped off the netting of his bedroom window, at the same time hitting the back of his head. He then ran away from that position and hid himself in another room.

B The men eventually broke the entrance door and forced their way into the house. They accosted the wife of PW1 and demanded for money. She claimed she had none in the house. They met PW1 where he was hiding and also demanded for money. He told them the only money he had in the house was on the table. They ransacked the house for about three hours before they left. As would be discovered by PW1 later, the men had killed his security guard by strangulation. Within a couple of hours, a report was lodged by PW1 at the Ijebu-Igbo police station. He made a statement to the police in which he named the appellant and two others. He led the police to appellant's house but appellant was not found at home.

On 7 May, 1997, PW1 received information that the appellant and his colleagues were at a local beer parlour in town. He went there and saw the appellant and two others drinking. He ordered for a bottle of soft drink while he secretly sent for the police. On sensing what the PW1 was up to, the appellant got out of the beer parlour and attempted to escape. The PW1 promptly followed and grabbed him. In an ensuing struggle, both fell into a gutter but p.w.1 held fast on to him. The appellant's two colleagues hurriedly left the place and drove off in a car they had parked nearby. The police later came and got the appellant apprehended and taken to the police station.

In his statement to the police on 8 May, 1997, the appellant denied being one of those who had gone to PW1's house to rob there and kill his night guard. He alleged that on 3 May, 1997, he and PW1 fought at a locality called Itamerin in Ijebu-Igbo in a canteen when PW1 ordered a bottle of beer for him. He said he turned down the offer because of the bad blood that had existed between him and PW1 because he (appellant) had refused to participate in vigilante work with PW1 and others at Itamerin; and that for refusing the beer, the PW1 engaged him in a fight. He said he was a driver to one Baba-Ijebu now at Seme border and that on 9 March, 1997 he and his family were at Seme border with the said Baba Ijebu. In his evidence in court he said he had known PW1 for over 25 years and

that he had been involved in the vigilante operation for their neighbourhood for one and a half months in 1996 when he left Ijebu-Igbo that year for Seme border to drive for one Baba Ijebu there. He claimed that it was on 6 May, 1997 that he and the said Baba Ijebu with a charter party drove down to Ijebu-Igbo from Seme border in his vehicle to attend a burial ceremony. It was after he discharged his passengers that he took the vehicle to a car wash. While the car was being washed, he took time off to go to a nearby beer parlour to have some drink. It was there the PW1 met him and they had an encounter which led to a fight between them.

In his appeal to the Court of Appeal against his convictions, the appellant raised two issues for determination, namely (1) whether the prosecution proved the offence of conspiracy to commit armed robbery and the offence of armed robbery beyond reasonable doubt and (2) whether the appellant had been positively identified with the offences charged having regard to the alibi raised by him and the contradictory evidence led by the prosecution on the identification of him. The court below held that there were no material conflicts in the evidence led by the prosecution in support of the charge. In his leading judgment, Akintan JCA observed inter alia:

*“The main argument raised in the appellant’s brief regarding conflicts in the evidence led by the prosecution in support of the charge was in respect of the description of how PW1 came to recognize the appellant and two others whose names he also gave to the police. It is alleged that since the witness failed to mention that he was able to see the robbers through the aid of the halogen light which was on in his compound that day in his statement to the police, such failure amounted to a material conflict between what he wrote in his statement to the police and his oral testimony before the court. I do not believe that what is said to be a conflict amounts to any conflict. In fact reading through the statements made by the witness (PW1) to the police and his evidence given at the trial as recorded by the learned trial judge, I do not find any conflict that could warrant disturbing the findings of fact made by the learned judge.*

*The account of the incident given both to the court and in his statements to the police was that a gang of robbers came to his house on the night of the incident.... He further told the court that he was able to see the robbers clearly because of his security light that was*

on at the material time. The alleged minor disparities between what was recorded in the witness (sic) statement to the police and his evidence in court are what are expected in an unconcocted evidence given from human memory. There is therefore no merit in the allegation that there were material conflicts in the evidence led by the prosecution in support of the charge.”

In his argument before this court by learned counsel for the appellant, the contradiction referred to is in regard to the statement made to the police as per exhibits A and A1 by PW1 and his evidence in court in regard to whether the armed robbers stole any property on the occasion in question. In the said exhibit A, he said the armed robbers demanded for money and when he told them that he had at home the sum of #1,000.00 they took it away along with his ring and necklace. He repeated in exhibit A1 that they collected #1,000.00 from him and some jewelry from his wife worth about #2,000.00. But in his evidence, he merely said as follows:

“They asked me to bring out my money. I told them I had no money inside the house, and that the only money I had was on the table in the house. They started ransacking everywhere in the house. They were in my house for about three hours. I lay there shivering. I did not get up until I heard the early Muslim call to prayer by which time the robbers had gone.”

No mention was made of money or jewelry allegedly taken away by the armed robbers in this oral testimony. The question before the court below was whether it could be said that it had been established by the prosecution that the armed robbers stole anything on that occasion.

Learned counsel for the appellant drew attention to the fact that the court below accepted that there was contradiction between the statements to the police and the oral testimony of PW1 on the point whether anything was stolen. He referred to a passage from the judgment of Akintan JCA inter alia as follows;

“As already set out above, the witness failed to tell the court in his evidence in court that the robbers stole anything from him. But he categorically confirmed that the robbers stole #1,000.000, his ring and neck-chain in his two afore-mentioned statements.

Although the position of the law is that before any contradiction can be established between the evidence of a witness and the

*statement made previously by the witness, the statement must be brought to the attention of the witness for explanation, if possible in accordance with the provisions of sections 199 and 209 of the Evidence Act (Cap. 112), Laws of the Federation, 1990 (see Kwagshir v. The State (1995) 3 NWLR (pt. 386) 651), the onus of ensuring compliance with the requirement of the provisions of those sections of the Evidence Act was, in the instant case, on the prosecution. The prosecution failed to do so despite the fact that the contradiction in question was in respect of an important ingredient which the prosecution had to prove before it could succeed on the second count of robbery.*

*As the contradiction in the instant case is very material to the second count of robbery, it is imperative that it must be resolved in favour of the accused/appellant. His conviction and the sentence of death imposed on him for robbery can therefore not stand. The conviction and sentence of death imposed on him are accordingly set aside."*

Learned counsel for the appellant, in this court, now submits (1) that since it was the same evidence which was led in support of the armed robbery that was led on the offence of conspiracy to commit armed robbery and since the conviction for armed robbery had been set aside, the conviction for the conspiracy to commit armed robbery cannot stand; (2) that the conviction and sentence on conspiracy should be set aside since the substantive offence of armed robbery was not proved beyond reasonable doubt. Learned counsel cited *R. v. Cooper & Compton* (1947) 2 All ER 701; *Adebayo v. The State* (1987) 2 NWLR (pt. 57) 468; *Atano v. A.G. Bendel State* (1988) 2 NWLR (pt. 75) 210; and *Erim v. The State* (1994) 5 NWLR (pt. 346) 522. I have to say that these authorities cannot help the appellant in the present case. All the Nigerian authorities cited above decided contrary to what learned counsel in the present case has contended for. ***They are consistent with the principle laid down in Ogbozor v. Inspector-General of Police (1964) 1 All NLR 9 and Lawson v. The State (1975) 4 SC 115 that conviction for conspiracy does not become inappropriate simply because the substantive offence has not been successfully proved. It is a known principle of law that conspiracy to commit an offence is a separate and distinct offence and is independent of***

***the actual commission of the offence to which the conspiracy is related. The offence of conspiracy may be fully committed even though the substantive offence may be abandoned or aborted, or may have become impossible to commit.***

In the present case, the evidence is that the appellant and  
 B others were together armed in the premises of PW1 from whom they  
 made demand for money under threat. ***Conspiracy to commit an  
 offence is quite often inferred from circumstantial evidence.  
 As a result of lack of evidence that money or property was  
 C stolen by the appellant and others on that occasion, the of-  
 fence of armed robbery was not established. But the evidence  
 is clear that the men had a common purpose, namely, to rob  
 with violence. That was what can be inferred that they conspi-  
 red to do. The fact of that conspiracy remained even though  
 D the armed robbery itself did not materialize because there was  
 no property available to be stolen at the appropriate time and  
 place.*** The facts of *R. v. Cooper & Compton* (supra), one of the  
 authorities cited by learned counsel for the appellant, were such that  
 with the quashing of the conviction for stealing on four counts, the  
 E conviction for conspiracy to steal, based on the facts in regard to  
 those counts, was found by the English Court of Appeal, on the pe-  
 culiar circumstances of those facts, to have become untenable.

***I am satisfied in the circumstances that the court be-  
 low was right in the present case to uphold the conviction of  
 F the appellant for conspiracy to commit armed robbery even  
 after the conviction for armed robbery had been altered to  
 attempted armed robbery. The failure in the evidence of PW1  
 to establish that money or property was stolen was a failure  
 G to prove a necessary ingredient of the offence of armed rob-  
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 bery although no stealing took place. I am of the view, how-  
 ever, that the court below misapplied the observation of this***

***court in Kwaghshir v. The State (supra) at pages 661-662 as to how to establish any contradiction between the evidence of a witness and the statement previously made by him in the course of cross-examination by virtue of sections 199 and 209 of the Evidence Act. In the present case in which the evidence and statement of a prosecution witness (PW1) were involved, the court below expressed the view that the onus was on the prosecution to ensure compliance with those sections. That is, with due respect, an erroneous view. It is the defence that would, in the particular instant, have to comply with the provisions of those sections 199 and 209 of the Evidence Act since it would be its duty to cross-examine PW1 if it so wished. It is not the duty of the prosecution unless when it confronts, in the course of cross-examination, a defence witness who has given evidence inconsistent with any statement he made to the police.***

The purpose sections 199 and 209 of the Evidence Act serves is two-fold: one is that a witness may be cross-examined as to previous statements made by him in writing relative to the subject matter; in that case such writing need not be shown to him: the other is that the witness may be contradicted with such writing after his attention is drawn to those parts of the writing which are to be used for the purpose of contradicting him. In the present case there is nothing on record that the PW1 was contradicted in cross-examination with his statements to the police through the procedure laid down. As that issue was not taken on appeal at any time, I say nothing more on it except to repeat that it did not rest on the prosecution to comply with that procedure in the present instant, as the court below erroneously held, since the prosecution could not adopt the procedure to contradict its witness unless under the extraordinary procedure of first having him declared as a hostile witness, a procedure entirely inapplicable upon the facts of the present case.

Still on the issue of contradiction, learned counsel for the appellant has argued that when the incident was still fresh in the mind of PW1, he did not mention identifying the appellant through the aid of the security light in his compound in his statement (exh. A) to the police, but that he gave this in evidence for the first time. He contends that since the appellant was not arrested until some two months

after the crime, the identification evidence of PW1 of the appellant was unsatisfactory particularly that no identification parade was conducted after the arrest. Learned Attorney-General for the respondent has submitted first, that the trial court found that there was no contradiction between exhibit A and the evidence of PW1 which finding was affirmed by the court below although that court added that there were minor discrepancies; and second, that in the circumstances of this case identification parade was unnecessary and if held would have been a ruse. I think the learned Attorney-General is right. In my view, such an identification parade would be nothing other than a parody of a parade conducted to no purpose.

***An identification parade will be useful when a witness claims to have seen an unfamiliar person who escaped from a crime scene in circumstances which require putting to test the witness's power of recognition based upon the physical features and/or other peculiarities of the person he claims to have seen. There must be real doubt as to who was seen in connection with the offence to require identification parade: see Ogoala v. The State (1991) 2 NWLR (pt. 175) 509. Such a parade is absolutely unnecessary when the witness claims to have seen a familiar or definite person whom he perhaps names or knows his abode or family connection: see Williams v. The State (1992) 8 NWLR (pt. 261) 515; Bashaya v. The State (1998) 5 NWLR (pt. 550) 351. In such a situation it is the credibility of the witness that will be open to be tested at the appropriate time rather than the staging of a farcical identification parade for a person whose mind has been firmly fixed upon a particular suspect.*** In the present case the PW1 named the appellant as one of the armed robbers he saw that night. He said he had known the appellant for over ten years before the incident. The appellant himself said he and the PW1 lived in the same neighborhood and that he had known PW1 for some twenty-five years. The PW1 had taken the police to appellant's house a couple of hours after the commission of the crime and encountered him later at a beer parlour which led to his being arrested by the police. What then is it that an identification parade is intended to ensure? The contention about lack of identification parade by learned counsel for the appellant is completely without merit.



In regard to the defence of alibi raised by the appellant, the learned Justice of Appeal said that all an accused needs to do is merely to put forward promptly and properly facts of such defence to the police and that the onus is on the prosecution to disprove those facts and not on the accused to prove the defence of alibi. Having said that, the learned Justice proceeded to observe as follows: B

*“The appellant, in the instant case, told the police in his statement that he was working as a driver to a man known as Baba Ijebu who resides at Seme border. But he failed to be specific as to where he was at the material time the crime in question was committed. The story would have been a different one if, for example, he had told the police that he was with his employer at the material time on the night of the incident. But the alibi he gave to the police was insufficient to justify the inference that he could not have been at the scene of the crime as at the time the crime was committed. It follows, therefore, that although the appellant promptly raised the defence of alibi, he however failed to establish in his said alibi that he could not have been at the scene of the crime on the night of the incident.”* C

With due respect, I think the underlined portion in particular of the passage quoted above, is likely to mislead both as to the facts as stated by the appellant and as to the burden placed on him by law in regard to the defence of alibi. The appellant told the police in his statement: “On 9/3/97 I was in Semen (sic) with my family. Sunday Baba Ijebu my (car) owner can as well testify that I was in Seme on 9/3/97.” From these facts, it is not easy to accept the view of the learned Justice that the appellant could not justify the inference that he could not have been at the scene of crime as at the time the offence was committed just because he had not categorically told the police that he was with his employer at the material time on the night of the incident. In my respectful view, had the appellant told the police that he was with Baba Ijebu in Seme border at the specific time on the night of the incident, that would not have enhanced the alibi he raised. E

***I think the difficulty created by the deficiency in that alibi is that it was not sufficiently particularized. The law is that it is not enough for an accused to raise the defence of alibi at large. He must give adequate particulars of his whereabouts at the time of the commission of the offence to assist the police to make a meaningful investigation of the alibi. If the accused*** F

**said he was in a particular locality or with a particular person or persons, he must give a lead as to the specific place, the names and/or addresses of who to contact and the relevant period he was away from the scene of crime:** see *Obiode v. The State* (1970) 1 All NLR 35. In this particular case, it was certainly not enough for the appellant to say he was with Baba Ijebu at Seme border on 9 March, 1997. Seme border is not a particularized address and it seems to me that the police would not be expected to go on a wild goose chase at Seme border over an alibi.

**The second aspect of what the learned Justice said was that the appellant failed to establish in his alibi that he could not have been at the scene of crime on the night of the incident. This is a misdirection, with due respect, which suggests that an accused has the burden of proving his alibi. The law is clearly that if an accused person puts forward the defence of alibi, it simply means he was somewhere else and not at the scene of crime when the offence with which he is charged was committed. The onus is not on him to prove that defence but on the prosecution to disprove it as part of the duty on it to prove the charge against an accused beyond reasonable doubt. The duty of the accused is to raise the defence promptly and properly:** see *Yanor v. The State* (1965) NMLR 337; *Njovens v. The State* (1973) 5 SC 17. **The onus on the prosecution to prove the charge against an accused person beyond reasonable doubt never shifts and when alibi is relied on as a defence the duty on the accused does not initially go beyond introducing the evidence or facts of alibi:** see *Bozim v. The State* (1985) 2 NWLR (pt.8) 465. **But where the prosecution has adduced evidence intended to disprove the defence of alibi raised by an accused, it is then the accused has the onus to lead evidence in order to weaken or discredit the evidence of the prosecution. In that regard, the standard of proof required of the accused is on the balance of probabilities:** see *Obiode v. The State* (1970) 1 All NLR 35; *Ozaki v The State* (1990) 1 NWLR (pt. 124) 92. **When, of course, the prosecution is able to lead cogent and unassailable evidence which shows that an accused was at the scene of crime at the material time, his alibi, when placed alongside the evidence against him in the normal evaluation of evidence,**

**collapses:** see *Ntam v. The State* (1968) NMLR 86 at 88; *Njovens v. The State* (1973) 5 SC 17 at 65; *Onuchukwu v The State* (1998) 4 NWLR (pt. 547) 576 at 592.

In the present case, it has not been shown that the PW1 was mistaken as to having seen the appellant in company with others in his compound on the night in question armed with a gun. He had known the appellant for years in the same neighbourhood. There is no doubt about this as the appellant himself confirmed it. The appellant said that he knew the PW1 very well and that PW1 also knew him and his family very well. The defence of alibi put up by the appellant was very weak. The strong evidence by PW1 which fixed the appellant at the scene of crime at the material time has easily demolished that alibi. I therefore do not find any merit in the appeal.

The question of the sentences passed on the appellant by the court below after the conviction for armed robbery had been substituted with conviction for attempted armed robbery remains to be properly settled. The attention of both counsel was drawn to this by this court in the course of hearing the appeal. Both were asked to address us on it. Learned counsel for the appellant while conceding that the sentence prescribed by law for attempted armed robbery is life imprisonment, contended that the appellant did not appeal against sentence and therefore there would be no cause for revisiting the sentence of 20 years' imprisonment imposed by the court below. Learned Attorney-General on the other hand admitted that he did not advert to the fact that 20 years' sentence was imposed otherwise he would have formally appealed against it. But he submitted that the sentence of life imprisonment was mandatory and that since it could not be reduced, he urged this court to correct the error.

The court below per Akintan JCA towards the conclusion of the judgment set aside the conviction of the appellant for armed robbery. The learned Justice then reproduced section 2 of the Act. Section 2, subsection (1) deals with persons unarmed but who with intent to steal, assaults any other person or at or immediately after the assault, uses or threatens to use actual violence etc, and shall on conviction be sentenced to not less than fourteen years but not more than twenty years. Subsection (2) reads thus:

*"(a) any offender mentioned in subsection (1) of this section is armed with any fire-arms or any offensive weapon or is in company*

*with any other person so armed; or*

*(b) at or immediately before or immediately after the time of the assault the said offender wounds or uses any other personal violence to any person, the offender shall upon conviction under this Act be sentenced to imprisonment for life."*

B The learned Justice was obviously aware that the statutory sentence is imprisonment for life. This is further confirmed by what he said just after reproducing the provisions of section 2(2) above as follows:

C *"As the evidence led at the trial in this case is sufficiently in support of attempted robbery as provided in section 2 of the Act quoted above, I accordingly find the accused/ appellant guilty of attempted robbery for which the sentence provided is imprisonment for life."*

D Learned counsel for the appellant assumed that the court below imposed sentence of life imprisonment on the appellant when he stated in the appellant's brief of argument thus:

E *"The court below allowed the appeal in part. The court set aside the conviction and sentence imposed by the trial court and substituted in its stead conviction for conspiracy and attempted robbery. The court also varied the sentence to life imprisonment."*

F However, it is in the last paragraph of the judgment of Akintan JCA that a mistake was made in regard to the sentence. That paragraph follows the last pronouncement of the learned Justice that the sentence provided under the Act for attempted robbery was life imprisonment, and reads thus:

G *"In conclusion, therefore and for the reasons set out above, the conviction and sentence of death imposed on the appellant are hereby set aside. In their place, I hereby substitute a conviction for conspiracy to commit robbery and attempted robbery. The appellant is therefore sentenced to 10 years I.H.L. on the 1<sup>st</sup> count of conspiracy; and 20 years I.H.L. on the 2nd count of attempted robbery. The sentences are to run concurrently and should start from*  
H *the date of this judgment."*

The above conclusion, obviously, does not flow from what the learned Justice reasoned all along on the question of the sentence to be imposed on a conviction for attempted armed robbery, which is life imprisonment. By section 5 of the Act, it is also clear that

the appellant cannot be sentenced to less than life imprisonment for the conspiracy.

***It seems to me that in the circumstances, the learned Justice did not intend to impose lesser sentence than the law statutorily mandates. He mistakenly, in my view, allowed the sentencing to be affected by his earlier reference to section 2(1) of the Act which he quoted. That subsection reads:*** B

***“2(1) Any person who, with intent to steal anything assaults any other person and at or immediately after the time of assault, uses or threatens to use actual violence to any other person or any property in order to obtain the thing intended to be stolen shall upon conviction under this Act be sentenced to imprisonment for not less than fourteen years but not more than twenty years.”*** C

***It must be appreciated that the above is in respect of mere attempted robbery and not attempted armed robbery having regard to section 2(2) of the Act. What the learned Justice did by imposing the sentences prescribed under section 2(1) can, in my view, be regarded as a clerical error which can be corrected as such.*** D E

***But even if it were not such a clerical error but that by the court below was minded to impose those sentences, this court has the power to regard the sentences thus imposed as erroneous and to correct the situation. It was in this connection that this court invited counsel on both sides in the course of hearing this appeal, to address it on the propriety of the lower court imposing sentences less than the statute has mandated; and they did. Even though, as argued by learned counsel for the appellant, there was no appeal against the sentences, yet this court can intervene under section 26 of the Supreme Court Act, 1960 which provides:*** F G

***“26. On the hearing of an appeal under this Part (i.e. Part V- Appeals in Criminal Cases from the Court of Appeal), the Supreme Court may exercise any power that could have been exercised by the Court of Appeal...”*** H

***As I said, notwithstanding that there is no appeal against the sentences, this court has the power to correct suo motu what was wrongly done by the court below.*** In *R. v. Gbenu Ihunu*

(1943) 9 WACA 61, the appeal was simply against conviction in a case of burglary by a gang of men who descended by night upon a certain house and burgled it by force. The appeal was dismissed and the court increased the sentence from three years' I.H.L. to five years' I.H.L. on the ground, in the view of the court, that the public must be  
 B protected against burglary of that nature carried out by gangs. ***A fortiori, in the present case, the statute recognizes the seriousness of the offence of attempted armed robbery and the conspiracy relating thereto. It has accordingly imposed a***  
 C ***mandatory sentence of life imprisonment. Any reduction in the sentence cannot be justified under whatever circumstances. This appeal is dismissed and accordingly, I alter the sentence imposed by the court below on the appellant to that of life imprisonment in respect of the two convictions.***

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### WALI JSC

I have been privileged to read before now, the lead judgment of my learned brother Uwaifo, JSC and I entirely agree with his  
 E reasoning and conclusion for dismissing the appeal. I adopt them as mine.

### OGWUEGBU JSC

F I had the privilege of reading in draft the judgment just delivered by my learned brother Uwaifo, JSC and I agree with his reasoning and conclusion.

The practice of including a count for conspiracy to commit  
 G an offence in an information as well as a count for actually committing it, where evidence to support the two counts is the same should be discouraged and where both counts are included as in this case, the conspiracy does not merge in the substantive offence. An acquittal on the count charging the substantive offence does not automatically render a conviction on the other count inconsistent. See *Balogun v. State* 20 NLR 148 & *Erim v. State* (1994) 2 NWLR (Pt. 346) 522.

H Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused and done in pursuance of an apparent criminal purpose common between them. See *Haruna & Ors. v. The*

state (1972) All NLR 738 at 754. The common criminal acts short of stealing were proved by the prosecution. In the peculiar circumstances of this case, it is incorrect to contend that an acquittal on the count charging the substantive offence, renders the conviction on the other count unreasonable or inconsistent unless the evidence is distinct on each charge. The court below convicted the appellant of attempted robbery as a result of material contradiction which it found in the oral testimony of PW1 and his extra-judicial statements (Exhibits “A”, “A1” and “B”) as to whether the robbers stole anything from the complainant.

The appeal is accordingly dismissed by me. I also alter the sentences imposed by the court below on the appellant to that of life imprisonment.

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**MOHAMMED JSC**

I agree that this appeal has failed and I dismiss it. My learned brother, Uwaifo, J.S.C, has considered all the salient issues raised in this appeal and I agree with him that the appeal is without merit. It is patently clear that under Section 2 (1) and (2) of the Robbery and Firearms (Special Provisions) Act, (Cap 398), Laws of the Federation, conviction for attempted armed robbery entails a sentence of life imprisonment. The term of imprisonment is mandatory and once an accused is convicted of attempted armed robbery the trial court has no choice, but to impose what the statute provides. I therefore agree that the proper sentence for the appellant, after conviction of attempted armed robbery is life imprisonment. I therefore amend the sentence imposed by the court below from 20 years to imprisonment for life for the appellant.

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**KALGO JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother Uwaifo JSC in this appeal. I entirely agree with his reasoning and conclusions reached therein and find that there is no merit in the appeal on the conviction for the offence of conspiracy to commit armed robbery contrary to S. 5(b) and Punishable under S. 1(2) (a) of the Robbery and Firearms (Special Pro-

visions) Act. Cap. 398 Laws of the Federation of Nigeria 1990. On the conviction for the offence of armed robbery contrary to S.1(2) (a) of the said Act, I agree that based on the evidence available at the trial, the Court of appeal was right to substitute the conviction to that of attempted armed robbery.

B        The sentence for attempted armed robbery is life imprisonment. I therefore dismiss the appeal and substitute a sentence of life imprisonment as done by my learned brother Uwaifo JSC in the leading judgment. The appeal fails completely.

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