

COURT OF APPEAL
JOS DIVISION
14TH MAY, 2004. CA/J/155C/97
CORAM:- A. M. MUKHTAR, O. O. OBADINA, I. C. NZEAKO, JJCA.

1. ASENDE YAV
2. IORTUHWANGBAR
3. IORTIM KWAGHVIHI APPELLANTS
4. TSAVNANDE LIM
5. AKAV IGBUDU
V.
THE STATE RESPONDENT

CRIMINAL LAW - Criminal trespass offence - Evidence - Under s. 348 Penal Code - What prosecution must prove in order to succeed - Includes intention to commit offence and annoy the person in possession (H1)

CRIMINAL PROCEDURE - Criminal trespass - Possession of the land by the complainant - Being a necessary ingredient - Was proved by the prosecution (H2)

CRIMINAL PROCEDURE - Criminal trespass charge - Definition - As the offence implies possession - Failure to mention possession in the count is not detrimental (H3)

CRIMINAL PROCEDURE - Criminal trespass - Proof - Entry and intention - Were properly proved by the prosecution (H4)

CRIMINAL PROCEDURE - Criminal trespass - Proof - Mischief committed - Is a necessary ingredient of the offence - And was proved as rightly found by the trial court (H5)

CRIMINAL PROCEDURE - Burden of proof - Error of trial court - In stating that burden shifts to accused - Once prima facie case is established -

Did not occasion a miscarriage of justice - As the law was duly applied thereafter (H6)

CRIMINAL PROCEDURE - Alibi - Proof - Acquittal of some accused persons on ground of alibi - Will not automatically ground acquittal of co-accused in all cases (H7)

COURTS - Evidence - Evaluation of - Is trial court's primary duty - Appellate court will not interfere - Save the evaluation is perverse (H8)

FACTS

Before the High Court of Justice Markurdi, 8 accused persons were tried on a 2 count charge for the offence of criminal trespass. They were alleged to have broken into the home and compound of the complainant with the intention to and that they actually caused mischief within the said compound. The evidence revealed that the land was a cause of litigation between the complainant and some of the accused persons. While the trial court in the land suit found in favour of those accused persons, the High Court of appeal reversed the judgment, thereby finding in favour of the complainant.

On the date of the criminal trespass in issue, the accused persons were inter alia, alleged to have burnt down houses, dug up body of the complainant's late mother buried within the said compound and set it ablaze. Each of the accused persons denied the charge and gave evidence in defence. 5th accused died before judgment was delivered. 1st and 7th accused persons were discharged and acquitted based on their pleas of alibi which succeeded. 5 of the accused persons were found guilty and convicted. Being dissatisfied, they have now appealed to the Court of Appeal on four grounds of appeal and raised two issues for determination.

ISSUES FOR DETERMINATION

1. *Whether or not the prosecution had proved its case warranting the conviction and sentence of the appellants by the trial court.*
2. *Whether or not the trial court properly evaluated the evidence*

and considered the appellants' case before it in arriving at its judgment.

HELD (Unanimously dismissing the appeal per **NZEA KO JCA**)

Criminal trespass offence - Evidence - Under s. 348 Penal Code

1. It is common ground between the appellants and the respondent that in order to secure a conviction for the offence of criminal trespass under section 348 of the Penal Code, the prosecution is required to prove:

- (a) That the complainant had possession of the property in question.
- (b) That the accused entered into or upon the property or that he unlawfully remained there after having lawfully entered therein or thereto.
- (c) That he so entered and remained there with the intention:
 - (i) to commit an offence
 - (ii) to intimidate, insult, or annoy the person in possession.

The submission by the respondent that the prosecution did prove the essential ingredients of the offence is entirely correct, having regard to the evidence adduced at the trial, not only by PW1, PW2 and PW3 but by some of the defence witnesses. (p. 1689 A)

Criminal trespass - Possession of the land by the complainant

2. On the issue of not mentioning or proving possession, raised by the appellants, there is abundant evidence from which possession is inferred. A man who testified as did PW1 that he was in his house on 13/1/89 early in the morning with his brother PW2 when the accused sounding horns of doom and armed, entered his compound, and burnt his house etc, while others in their gang surrounded the compound, has clearly proved possession. That he buried his mother on the land where he had built a house for her - On this, all parties are agreed. It is further proof of his being in possession. It was not controverted that it was within the compound PW1 and PW2 hid in a broken anthill on that fateful day of the vicious entry into and attack on PW1's property.

I have looked through the evidence on record including that of the prosecution and defence witnesses. There is sufficient evidence that PW1 was living in his house on the land and was in exclusive possession when the appellants let hell loose thereon on 13/4/89. There is apart from this,

PW1's evidence wherein he consistently asserted the confirmation of his title to the land by the High Court in Makurdi on appeal, reversing the earlier decision awarding the land to the 8th accused's (5th appellant's) family. That evidence was not seriously challenged nor shaken in cross-examination. It was confirmed by PW2. To cap it all, there is even from defence witnesses, consistent evidence that the complainant/PW1 had his house on the land before the incident of 13/4/89. He was in possession.
(pp. 1689 D/1692 E)

C
Criminal trespass charge - Definition

3. Learned counsel for the state has correctly, in my view submitted that trespass is the violation and invasion of the possessory rights of a person and that the prosecution had proved that PW1 was in effective possession of the land and that he had legal title following the decision of the High Court, apart from his acts of possession.

He also correctly stated the law that offence of criminal trespass contrary to section 348 read with section 79 of the Penal Code as charged in the amended charge, when considered with the definition of the expression "*criminal trespass*" in section 342 of the Code charged in count 1 intrinsically implies possession. Therefore, whether the word "possession" is mentioned or not in the count, it is implied and not detrimental to the case of the prosecution. (p. 1690 F)

Criminal trespass - Proof - Entry and intention

4. As to the proof of entry and intention which the appellants submitted were not proved, I am in agreement with learned counsel for the state that their ingredients were proved. There is the evidence of PW1 and PW2 which so vividly testified to how the accused persons and their collaborators, numbering up to 50 surrounded the compound, some on trees and others identified in person and by name entered the compound, burnt their houses and desecrated the grave of the mother of PW1.

In his reply brief for the appellants, Mr. Horn, their learned counsel had attacked the submission of learned counsel for the state at page 13 paragraph 4.04 where, he was said to have contended that the appellants

complaint regarding proof of intention “was a triviality and otiose”. With respect, that contention at page 13, paragraph 4.04 of the respondent’s brief of argument, only goes to show that the appellants’ submission regarding proof of intention is without substance. That is correct. At page 7 of his brief, learned, counsel for the state had also correctly described the submission for the appellants as “grossly unfounded and misconceived.” B

For, what else could it be in the face of the evidence of PW1 and PW2 which shows that the accused and their collaborators had set out to cause doom - from every direction sounding horns of doom, surrounding PW1 ‘s compound, and wreaking havoc, thereon? (p. 1690 H) C

Criminal trespass - Proof - Mischief committed

5. I am in agreement with learned counsel for the appellants that it must be proved that the accused persons committed mischief. I should think it was proved and the learned trial Judge so found, and rightly in my respectful view. D

The learned trial Judge did consider the evidence of DW9 together with that of PW1, PW2 and PW3. He stated at pages 97 - 98 of the records from line 16 on 97 as follows: “*There is evidence that PW1’s houses were burnt down and a lot of properties belonging to PW1 were destroyed by angry rioters. See exhibits JI - 3 and K, evidence of defence, namely, DW9’s evidence confirmed the destruction done to PW1’s properties. DW9 being a witness for the accused persons, his evidence in respect of the destruction done to PW1 ‘s properties amounts to a solemn admission in favour of the prosecution’s case. Where the evidence of a witness who is called by a party supports the case of his opponent that evidence serves as a solemn admission in favour of the opponent. See the case of Salawu Olagunju Adeyeye v. Shittu Ajiboye & 4 Ors. (1987) 7 SC 1 at 13; (1987) 3 NWLR (Pt. 61) 432. Although that case was a civil case, I think the principle of law therein applies to this case.*” E F G H

The foregoing consideration and conclusion cannot be faulted. It is borne out by the evidence. (pp. 1694 B/1695 C)

Error of trial court - In stating that burden shifts to accused

6. I will consider the issue of burden of proof raised by the appellants with regard to which the learned trial Judge was criticized. This court is urged in this regard to disturb his finding for being perverse.

B It is trite law that the onus in criminal proceedings is not on the accused but on the prosecution and it is proof beyond reasonable doubt. See section 138(1) of the Evidence Act. *Okagbue v. Commissioner of Police* (1965) NMLR 232.

C In the part of the judgment which this court is urged to disturb, the learned trial Judge had evaluated the evidence of prosecution and defence witnesses and then stated at page 98 of the records as follows: *“Once the prosecution has properly proved a prima facie case against the accused, the burden is on him to disrupt the case of the prosecution”*.

D It is, I believe only a remark which has caused no miscarriage of justice. This is evident from his statement of the law and his findings stated before and after the words complained of by the appellants.

E When a court states that a prima facie case has been made or that the evidence discloses a prima facie case, it is that the evidence is such that if uncontradicted, and if believed, the evidence is sufficient to prove the case against the accused.

F It follows therefore that the expression may not aptly be used after the prosecution and the defence, have all led evidence and concluded their case and the trial Judge is obliged to examine all the evidence and determine if the prosecution has or has not proved its case beyond reasonable doubt as required by law and/or the accused is guilty or not of the offence charged.

G When the foregoing is considered against what the learned trial Judge said before and after the words complained of by the appellants, it will be obvious that the principles of proof beyond reasonable doubt had not been breached by him. For thereafter, he duly and properly applied the law. (pp. 1695 C/1696 D)

H

Acquittal of some accused persons on ground of alibi

7. The foregoing reasoning tantamounts to saying that the appellants must be discharged and acquitted because the 7th and 1st accused had been dis-

charged following their plea of alibi. That is fallacious and non-sequitur. It is the law, as earlier stated that the onus of proof beyond reasonable doubt is always on the prosecution in criminal proceedings. If the trial Judge has any doubt, he is obliged to give its benefit to the accused. This, in my view is what guides a trial court which decides to discharge an accused on a plea of B alibi after taking into account the totality of the evidence adduced before him. I believe that in such a case, the court's finding is limited to the plea of alibi and the persons who proffered that defence of alibi, not any other thing or accused. In *Okputu Obiode & Ors. v. The State* (1970) 1 All NLR 35 the C Supreme Court had held that the trial court which said it was satisfied with the plea of alibi of the 5th, 7th and 10th accused in the case, meant that on the totality of the evidence before it, the prosecution had not proved beyond all reasonable doubt its case that these accused persons were present and participated in the crime. D

Applying the principles and reasoning in that case and all that had been stated above to this matter, the argument put forward by Mr. Horn for the appellants cannot be sustained. In the case of *Adele v. The State* reported in (1995) 2 NWLR (Pt 377) 269, and in (1995) 2 SCNJ 256 also cited for E the appellants (as *Adole v. State*), the appellant did plead a defence of alibi as did the other accused who was said to have been seen with him but discharged by the lower court on his defence of alibi. This is quite unlike in *Obiode's* case (*supra*) and in the present case. Also in *Adele v. The State*, F the witness upon whose evidence the appellant was convicted had been totally discredited by the court below but the Appeal Court relied on that evidence to uphold the conviction. The Supreme Court frowned on that. In the present case, there was no question of the witnesses being totally discredited. The present case is more akin to the case of *Obiode v. The State*. G *Adele's* case does not therefore support the case of the appellants. (pp. 1699 B/1703 A)

COURTS - Evidence - Evaluation of

8. It is the law that it is the primary duty of the trial court to evaluate evidence before it and to make findings of fact from such evidence.

Where therefore there is sufficient evidence on record from which

the trial court made its findings of fact, clearly evaluating the evidence, the appellate court cannot interfere therewith. See *Onuchukwu v. The State* (1998) 4 NWLR (Pt. 547) 576. Except where perverseness can be identified, in the verdict either in respect of the application of the law or appreciation of the evidence, an appellate court cannot interfere with the findings of the trial court.

All the above, from the testimony of the appellants and their statements show that their learned counsel's complaint that the trial court did not consider their evidence in making his findings and that their oral evidence was at variance with their statement, is totally misconceived. The learned trial Judge duly considered it all. That the findings are perverse is not established. (pp. 1703 F/1708 D)

D REPRESENTATION

B. Hom , Esq. for the Appellants
M. A. Agber , Esq., (Deputy Director , Civil Litigation , Ministry of Justice Headquarters Benue State) for the Respondent

E

CASES REFERRED TO

- Salawu Olagunju Adeyeye v. Shittu Ajiboye & 4 Ors. (1987) 7 SC 1 at 13;
(1987) 3 NWLR (Pt. 61) 432
- F Okagbue v. Commissioner of Police (1965) NMLR 232
Obiode v. The State (1970) 1 All NLR 35
Okputu Obiode & Ors. v. The State (1970) 1 All NLR 35
Onafowokan v. The State (1987) 3 NWLR (Pt. 61) 538 at 544 -545
Adele v. The State reported in (1995) 2 NWLR (Pt 377) 269, and in (1995)
- G 2 SCNJ 256
Adeniji v. The State (2000) 2 NWLR (Pt. 645) 354
Onuchukwu v. The State (1998) 4 NWLR (Pt. 547) 576
Woluchem v. Gudi (1981) 5 SC 291
- H Akpabio v. The State (1994) 7 NWLR (Pt. 359) 635

STATUTES REFERRED TO

Penal Code ss. 79, 337, 342, 348

Evidence Act s. 138 (1)

LEAD JUDGMENT BY NZEAKO JCA

This is an appeal against the judgment of Ogbole J, sitting at the High Court of Justice, Makurdi, Benue State of Nigeria. In the judgment delivered in charge MHC/19c/92 on 7th June, 1996, of the 8 accused persons he found 5 of them namely the 2nd, 3rd, 4th, 6th and 8th accused, guilty of the two counts for which they were charged.

The 5th accused Ashikura Mtir had died before judgment, after he testified in his own defence. The 1st and 7th accused were discharged and acquitted, based on their respective pleas of alibi which succeeded. The amended charge for which they were convicted were as follows: Count 1:

That you Amile Gyuver, Asende Yav, Iortuhwa Ngbar, Iortim Kwaghvihi, Ashikura Mtir, Tsavenande Lim, Nengem Igbudu and Akar Igbudu.

On or about 13/4/89 at Ugambe Shangev Tiev in Konshisha L.G.A. within Benue State Judicial Division committed criminal trespass by entering into Yesem Ankyehe's compound without his consent and against his will with intent to with commit mischief by fire and thereby committed an offence punishable under section 348 of the P.C. read together with section 79 of P.C.

Count 2:

That you Amile Gyuve, Asende Yav, Iortuhwa Ngbar, Iortim Kwaghvihi, Ashikura Mtir, Tsavenenade Lim, Nengem Igbudu and Akar Igbudu.

On or about 13/4/89 at Ugambe Shangev Tiev in Konshisha L.G.A. within Benue State Judicial Division, committed mischief by fire to wit: You set fire on two houses of Yesem Ankyehe which were ordinarily used as dwelling houses and also the corpse of the said Yesem Ankyehe's mother which was exhumed from the grave and the said corpse burnt to ashes and thereby committed an offence punishable under section 337 of the P.C. read together with section 79 of the P.C. and triable by the High Court.

The prosecution at the trial in the court below, had adduced evi-

dence, calling 3 witnesses, while all 8 accused persons testified in their own defence and called one witness, DW9.

The 5 accused persons found guilty, were each sentenced to a fine of N 1,000.00 or one year imprisonment in Count 1 and to 3 years imprisonment without option of fine in Count 2, the sentences to run concurrently.

Dissatisfied, they have appealed to this court on 4 grounds.

Learned counsel for the parties had filed and exchanged briefs of argument as required by the rules of this court. The appellants' brief was filed on 11/11/98 while the respondent's was filed out of time on 25/4/2001 by leave of this court granted on 24/4/2001. The appellants also filed a reply brief on 30/9/03 out of time by leave of the court granted on 18/2/04.

From the 4 grounds of appeal, learned counsel for the appellants had settled two issues for determination thus:

1. Whether or not the prosecution had proved its case warranting the conviction and sentence of the appellants by the trial court.

2. Whether or not the trial court properly evaluated the evidence and considered the appellants' case before it in arriving at its judgment. Counsel did not however identify the grounds of appeal from which each issue was distilled.

Learned counsel for the respondent who adopted the same issues, however married issue No. 1 with ground 1 of the grounds of appeal and issue No.2 with grounds 2, 3 and 4.

The background facts which emerged from the records giving rise to this matter could be summarized thus:

There had been a land dispute involving the family of the complainant PW1 and PW2 on one hand and the family of the 7th and 8th accused who belong to a different kindred. All the accused persons belong to the same kindred. The parties are from Ishanger Tiev in Konshisha Local Government Area of Benue State. Evidence on record adduced by the prosecution was that the land dispute had ended on appeal to the High Court of Justice in favour of PW1's family against the 7th and 8th accused persons' family. PW1 and his brother PW2 had built thereon. They were living in the completed one of the houses which they had built on the land for the mother

of PW1 while they were building the second house when the incident giving rise to the charge occurred. Their mother who had earlier died had been buried on the land behind her said house.

The trespass and mischief for which the appellants, the deceased 5th accused and the other 2 discharged accused persons were charged with committing with others, not arraigned, were said to have occurred in the early hours of 13/4/89, at about 6 a.m. The case for the prosecution was that on that day, while the complainant PW1 and his brother PW2 were in their house which was on the land which the High Court had on appeal declared them owners, they heard horns being blown signifying an unusual event or doom approaching as described by learned counsel for the state. PW1 told his brother PW2 that these people were coming to bum their houses “again”. They did come, armed with guns, bows and arrows, and with the sound of horns of the appellants and the other blaring sound, surrounded their compound, shooting, etc. They burnt down houses including theirs and those of their brother, Uvue Utim. They dug up the grave of the mother of the complainant PW1, buried behind the house and set it on fire. PW1 and PW2 hid nearby in a broken anthill close by where they ran to for dear life and took refuge, and saw what went on. They later reported the matter to the police.

The appellants, each denied the charges, and gave evidence in his own defence, each telling his own different story which will be referred to later.

I will now consider the issues for determination.

The first issue questions whether the prosecution proved its case warranting the conviction and sentence meted out to the appellants by the trial court.

I agree that this issue arises from ground 1 of the grounds of appeal.

The issue is one relating to the basic principles of onus of proof in a criminal trial.

The grouse of the appellants is that the prosecution had failed to prove any of the essential ingredients of the offence of criminal trespass and mischief by fire in that possession was not mentioned or proved nor was entry and intention in respect of trespass, and in the case of the offence of

mischievous by fire, the prosecution failed to prove the required ingredients. It was submitted that in every criminal proceedings the onus is always on the prosecution to prove the guilt of the accused beyond reasonable doubt - section 138(1) of the Evidence Act, *Onafowokan v. The State* (1987) 7 SC 233 at 241 relied on. Learned counsel for the appellants further submitted that the burden does not shift and that the learned trial Judge was wrong to have held that the accused has a duty to disrupt the case of the prosecution where the latter properly proves a *prima facie* case in him. He invited the court to disturb this finding of the court as being perverse.

He further submitted that the prosecution did not even prove a *prima facie* case against the accused in view of the discharge of the 7th and 1st accused whose plea of alibi succeeded, and that no grave was burnt and that the learned trial Judge was in error in convicting the appellants on the same evidence of the prosecution which he had earlier disbelieved - *Adele (sic) v. The State* (1995) 2 SCNJ 256 at 262.

He urged this court to allow the appeal on this issue.

For the State, the Deputy Director, Civil Litigation, Mr. Agber's answer to the issue is that the prosecution, proved its case as required by law. He stated that the relevant ingredients of the offences were proved. He set out the ingredients required and proved. He referred to the evidence of PW1, PW2 and PW3 to show that the prosecution proved possession, entry into the land, the rampage into which the appellants went and the destruction caused by them. Learned counsel for the State conceded that in criminal trials, the burden of proof rests on the prosecution and it is proof beyond reasonable doubt. He cited *Ozaki v. State* (1990) 1 NWLR (Pt. 124) 92 at 115.

He submitted however that proof beyond reasonable doubt does not mean proof beyond every shadow of doubt - *Lori v. State* (1980) 8-11SC 81 at 89 cited. He added that the trial court did not shift the burden of proof to the accused but only reinstated the position of the law, pointing out that the trial court merely pointed out the position of the law which admits exceptions under section 138(2) and 191(3) of the Evidence Act. He relies on *Ikebudu v. Bornu N.A.* (1966) NNLR 44 and *Onakpoya v. State* (1959) 4 FSC 150, *Willie v. State* (1968) 1 All NLR 152.

It is common ground between the appellants and the respondent that in order to secure a conviction for the offence of criminal trespass under section 348 of the Penal Code, the prosecution is required to prove:

(a) That the complainant had possession of the property in question. B

(b) That the accused entered into or upon the property or that he unlawfully remained there after having lawfully entered therein or thereto.

(c) That he so entered and remained there with the intention: C

(i) to commit an offence

(ii) to intimidate, insult, or annoy the person in possession.

The submission by the respondent that the prosecution did prove the essential ingredients of the offence is entirely correct, having regard to the evidence adduced at the trial, not only by PW1, PW2 and PW3 but by some of the defence witnesses. D

On the issue of not mentioning or proving possession, raised by the appellants, there is abundant evidence from which possession is inferred. A man who testified as did PW1 that he was in his house on 13/1/89 early in the morning with his brother PW2 when the accused sounding horns of doom and armed, entered his compound, and burnt his house etc, while others in their gang surrounded the compound, has clearly proved possession. That he buried his mother on the land where he had built a house for her - On this, all parties are agreed. It is further proof of his being in possession. It was not controverted that it was within the compound PW1 and PW2 hid in a broken anthill on that fateful day of the vicious entry into and attack on PW1's property. F G

PW1 also testified to his right and title to the property in question, confirmed on appeal by the High Court in evidence which was not controverted. H

PW1 testified thus -

"... I know the accused, they live close to me, we are neighbours. On 13/4/89 I was in my house ... while I was there at the early hours of the day

i.e. at dawn (about 6a.m.) I heard a sound of horns ... the sounds of horns surrounded my compound. At the time ... myself and Tarhembe Ankyehe (PW2) were the only persons at home. I told Tarhembe that these people have come to burn my compound again. There was no where we could run to. We however found a heap of anthill a side of which was broken creating a hole therein and so we hid ourselves there ...”

He also testified that he built a house on the land occupied by his mother before her death and it was behind it he buried her.

PW2 testified -

“... I know PW1, on 12/4/89 I was in the same compound with PW1 where we were living. PW1 is my brother and I am living with him. I know the accused. We live close to them. While in the compound on 13/4/89, I saw all the accused persons in the compound where we were living. They came to make trouble with us and they did make trouble with us. On that fateful day... we woke up in the morning. We were trying to reconstruct buildings that were earlier destroyed by Mbamar people. We heard sound of trumpet all around us... We had earlier constructed four huts and roofed one before they came ...”

The foregoing is clear proof of the complainants being in possession of the property in question. Learned counsel for the appellants therefore has not correctly submitted that possession was not proved.

Learned counsel for the state has correctly, in my view submitted that trespass is the violation and invasion of the possessory rights of a person and that the prosecution had proved that PW1 was in effective possession of the land and that he had legal title following the decision of the High Court, apart from his acts of possession.

He also correctly stated the law that offence of criminal trespass contrary to section 348 read with section 79 of the Penal Code as charged in the amended charge, when considered with the definition of the expression “criminal trespass” in section 342 of the Code charged in count 1 intrinsically implies possession. Therefore, whether the word “possession” is mentioned or not in the count, it is implied and not detrimental to the case of the prosecution.

As to the proof of entry and intention which the appellants

submitted were not proved, I am in agreement with learned counsel for the state that their ingredients were proved. There is the evidence of PW1 and PW2 which so vividly testified to how the accused persons and their collaborators, numbering up to 50 surrounded the compound, some on trees and others identified in person and by name entered the compound, burnt their houses and desecrated the grave of the mother of PW1. B

In his reply brief for the appellants, Mr. Horn, their learned counsel had attacked the submission of learned counsel for the state at page 13 paragraph 4.04 where, he was said to have contended that the appellants complaint regarding proof of intention “was a triviality and otiose”. With respect, that contention at page 13, paragraph 4.04 of the respondent’s brief of argument, only goes to show that the appellants’ submission regarding proof of intention is without substance. That is correct. At page 7 of his brief, learned, counsel for the state had also correctly described the submission for the appellants as “grossly unfounded and misconceived.” C D

For, what else could it be in the face of the evidence of PW1 and PW2 which shows that the accused and their collaborators had set out to cause doom - from every direction sounding horns of doom, surrounding PW1 ‘s compound, and wreaking havoc, thereon? PW1 had sensed intention to cause doom and testified at page 24 of the records: E

“I heard horns, people were blowing horns. Sound of horn signifies an unusual event approaching ... I told Tarhembe that these people have come to burn my compound again “. F

They indeed later burnt his house. PW1 continued “... By then other people were surrounding our compound shooting guns and also were with bows and arrows ...” G

DW8, the 8th accused heard gun shots that early morning.

What, one may ask, does the mayhem unleashed as described by PW1 and PW2 portray, except intent by the appellants and their collaborators to trespass into the property in possession of the complainant, and to destroy it by fire? Intent is inferable and obviously proved. H

The submission of learned counsel for the appellants at page 3 para-

graph 6 of his reply brief, that had the learned trial Judge considered the totality of the evidence of DW9 that the cause of the trouble was that PW1 buried his mother on the disputed land, he would have come to the conclusion that exclusive possession was not proved, is illogical and totally unsupported by the evidence on record. How could learned counsel take out one line from the whole evidence of witnesses on both sides and out of context and base his reasoning thereon? That submission is far from the truth. DW9's evidence contradicts this submission. This submission transmits a deeper meaning that is not favourable to the appellants, than counsel who made it seems to appreciate. It portrays a concession that there was indeed trouble and DW9 testified to the cause which in counsel's view, the trial court ought to appreciate, had he properly evaluated the evidence - meaning in other words that the accused persons and their group had attacked the premises in dispute as they did because PW1 had buried his mother there. This is a justification of their act, rather than a denial. It does not help their case and no injustice arises if there was in deed failure of the court below to use the evidence in their favour.

I have looked through the evidence on record including that of the prosecution and defence witnesses. There is sufficient evidence that PW1 was living in his house on the land and was in exclusive possession when the appellants let hell loose thereon on 13/4/89. There is apart from this, PW1's evidence wherein he consistently asserted the confirmation of his title to the land by the High Court in Makurdi on appeal, reversing the earlier decision awarding the land to the 8th accused's (5th appellant's) family. That evidence was not seriously challenged nor shaken in cross-examination. It was confirmed by PW2. To cap it all, there is even from defence witnesses, consistent evidence that the complainant/PW1 had his house on the land before the incident of 13/4/89. He was in possession. DW4 testified that he had been there.

DW1 testified

"The round huts burnt belonged to PW1."

DW2 who was the 2nd accused stated at page 65 of the records-

"I know one Shikpen Igbudu. I guess that the distance between PW1 's

former house burnt and Shikpen Igbudu's house is about one Km From my house to PW's 1 is about 2Km. From my house you can see PW's house ..." This is clear evidence of the complainant being owner in possession of the burnt property.

DW6 testified - *"... I know PW1 before the incident. We have been going to farmer's meeting ... I have never been to his house... However, I know his house. It is by the road side. I used to pass \ there. From his house to the road is about 12 meters..."*

DW7 testified:

"I know PW's house. It is about half a kilo ..."

DW9 whose evidence the appellants rely on in this argument testified:

"... At the time we came we saw destruction, many houses were burnt down... The destruction I saw were in Ugambe area (PW's side). I went to find out the owners of the properties destroyed. They belonged to PW1. We saw one house burnt down. ..."

DW4 testified about PW1 as follows:

"... I have been to his house which was burnt in 1989. I am aware that his mother died and was buried in that house. At the time the mother died, I went there to see the corpse before it was buried. I do not know the time PW1 buried his mother. We are within the same area ... PW's house is on one side of the road while Shikpen Igbudu's is on another side of the road."

In the face of the foregoing there is sufficient evidence that PW1 was in possession at the time the appellants entered the land. That submission is misconceived.

As to the proof required to establish mischief by fire, the prosecution it was submitted failed to prove the necessary ingredients required by law. Learned counsel for the appellants identified that the prosecution must prove either intention or knowledge on the part of the accused to cause damage to the property and that the accused committed mischief, but that it had failed to do so. He did not further elaborate on this.

For the State, its learned counsel submitted that the prosecution proved the ingredients, that the PW1 and PW2 saw and identified the accused/

appellants clearly, not at night but from 6a.m. to 5p.m. at the scene of the crime - citing *Okpuruwu v. Okpokam* (1988) 4 NWLR (Pt. 90) 554. He pointed out that the evidence of DW9 even corroborated that of PW1 and PW2 as to the destruction caused. The evidence of PW1 and PW2, defence witnesses, DW1, DW2 and DW9 set out above unequivocally showed that the houses of the complainant PW1 and his brother Utim were burnt. It is therefore incorrect for the appellants to state that the offence of mischief by fire was not proved or the intention to commit same. Intention can be inferred from the evidence before the court. **I am in agreement with learned counsel for the appellants that it must be proved that the accused persons committed mischief. I should think it was proved and the learned trial Judge so found, and rightly in my respectful view.**

The learned trial Judge did consider the evidence of DW9 together with that of PW1, PW2 and PW3. He stated at pages 97 - 98 of the records from line 16 on 97 as follows: *“There is evidence that PW1’s houses were burnt down and a lot of properties belonging to PW1 were destroyed by angry rioters. See exhibits JI - 3 and K, evidence of defence, namely, DW9’s evidence confirmed the destruction done to PW1’s properties. DW9 being a witness for the accused persons, his evidence in respect of the destruction done to PW1’s properties amounts to a solemn admission in favour of the prosecution’s case. Where the evidence of a witness who is called by a party supports the case of his opponent that evidence serves as a solemn admission in favour of the opponent. See the case of *Salawu Olagunju Adeyeye v. Shittu Ajiboye & 4 Ors.* (1987) 7 SC 1 at 13; (1987) 3 NWLR (Pt. 61) 432. Although that case was a civil case, I think the principle of law therein applies to this case.*

Evidence of PW1 and 2 is the evidence of “eye witnesses”. They heard of the activities of the angry mob by their blowing of war trumpets and horns and surrounding PW1’s houses at the early hours of 13/4/89. PW1 and 2, took refuge in a partially excavated anthill nearby for fear of being attacked and killed. It was there they took a clear view of the mob in which the 2nd, 3rd, 4th, 6th and 8th accused were identified among the mobsters who caused the wanton destruction to PW1’s properties. In other words PW1 and 2 saw the accused persons personally as they set fire to PW1’s

houses and exhumed the corpse of his dead mother and burnt it in the grave. PW1 & PW2 personally saw the accused participating in the crime being committed by the mobsters.

“There is also evidence that although PW1 had a land dispute with one Shikpen Igbudu, a relation of some of the accused, he was still living there. He buried the corpse of his mother there. Therefore the evidence of the accused who stated that PW1 had packed away from the area in dispute five years before the date of incident is a blatant lie. If their story were true PW3 and DW9 would have not confirmed the destruction to the houses of PW1 and corpse or grave of his late mother.”

The foregoing consideration and conclusion cannot be faulted. It is borne out by the evidence.

I will consider the issue of burden of proof raised by the appellants with regard to which the learned trial Judge was criticized. This court is urged in this regard to disturb his finding for being perverse.

It is trite law that the onus in criminal proceedings is not on the accused but on the prosecution and it is proof beyond reasonable doubt. See section 138(1) of the Evidence Act. Okagbue v. Commissioner of Police (1965) NMLR 232, Obiode v. The State (1970) 1 All NLR 35; Ozaki v. The State (1990) 1 NWLR (Pt. 124) 92 SC; Onafowokan v. The State (1987) 3 NWLR (Pt. 61) 538 at 544 -545 also reported in (1987) 7 SCNJ 233 ??? per Igbi v. The State (2000) 3 NWLR (Pt. 648) 169 SC; Adeniji v. The State (2000) 2 NWLR (Pt. 645) 354; Oforlete v. The State (2000) 12 NWLR (Pt. 681) 415 SC; Idowu v. The State (2000) 12 NWLR (Pt. 680) 48 SC; The State v. Ajie (2000) 11 NWLR (Pt. 678) 434 SC; Oduneye v. The State (2001) 2 NWLR (Pt. 697) 311 SC; State v. Ogbubunjo (2001) 2 NWLR (Pt. 698) 576 SC.

In the part of the judgment which this court is urged to disturb, the learned trial Judge had evaluated the evidence of prosecution and defence witnesses and then stated at page 98 of the records as follows:

“Once the prosecution has properly proved a prima facie case against the accused, the burden is on him to disrupt the case of the prosecu-

tion”.

It is, I believe only a remark which has caused no miscarriage of justice. This is evident from his statement of the law and his findings stated before and after the words complained of by the appellants. This will be set out anon.

For, “prima facie” case in the sense is not the same as proof which occurs after evidence has been adduced by both parties as in the present case and the court is obliged at that stage to find whether the accused is guilty of the offence charged or not. Prima facie case in a criminal trial in a sense only means there is ground for proceeding with the trial. See *Abacha v. The State* (2001) 3 NWLR (Pt. 699) 35 at 46-47 per Oguntade JCA. In *Ikomi v. The State* (1986) 3 NWLR (Pt. 28) 340; *Aniagolu JSC* had this to say, regarding the nature or issue of a prima facie case” - “The issue is not whether the evidence is sufficient to ground a conviction”. See also *Ajiboye v. The State* (1994) 8 NWLR (Pt. 364) 587 at 597 per Kalgo, J.C.A. (as he then was) and *Ajidagba v. I.G.P.* (1958) SCNLR 60. **When a court states that a prima facie case has been made or that the evidence discloses a prima facie case, it is that the evidence is such that if uncontradicted, and if believed, the evidence is sufficient to prove the case against the accused.**

It follows therefore that the expression may not aptly be used after the prosecution and the defence, have all led evidence and concluded their case and the trial Judge is obliged to examine all the evidence and determine if the prosecution has or has not proved its case beyond reasonable doubt as required by law and/or the accused is guilty or not of the offence charged.

When the foregoing is considered against what the learned trial Judge said before and after the words complained of by the appellants, it will be obvious that the principles of proof beyond reasonable doubt had not been breached by him. For thereafter, he duly and properly applied the law.

I have earlier set out (above) an excerpt from the judgment of the learned trial Judge from line 16 on page 97 to line 15 on page 98. That forms part of what is being referred to herein. I will not repeat them here, but will

rather continue with the rest of the dictum of the court - from line 16 on page 98. Read together, this enables the words complained of by the appellants fall within their proper context showing their meaning, while the court reasoned within the law. The learned trial Judge continued thus:

"I believe the evidence of PW1, 2, 3 and DW9. I am satisfied that the prosecution has proved the prima facie case beyond reasonable doubt. It is a cardinal principle of our criminal law that in all cases the burden of proving that any person has been guilty of a crime or wrongful act (subject to certain exceptions not applicable in the case) is on the prosecution. If the commission of a crime is directly in issue in any civil or criminal proceedings, it must be proved beyond reasonable doubt, see section 138(1) Evidence Act. See also the case of Onafowokan v. The State (1987) 7 SC 233 at 241. Once the prosecution has properly proved a prima facie case against the accused, the burden is on him to disrupt the case of the prosecution. In this case it is my view that the prosecution has proved the case against the accused beyond reasonable doubt as required by law. To my mind, the accused on the other hand have failed to discharge that burden. I have gone through the statements of accused 2,3,4,6 and 8 made to the police and in my view, they are at variance with their oral evidence before the court. Where a witness including an accused person makes a statement to the police which is inconsistent with his oral testimony in court both of them should be disregarded by the court in its judgment. See the case of Saka Oladejo v. The State (1987) 7 SC 207. See also R. v. Colder (1960) 1 WLR 1169, 1172 (per Lord Parker C.J.). Not only that accused's oral testimonies are treated as disregarded but held unreliable. Where the evidence of the accused and their statements to the police are treated as disregarded and unreliable, the court must rely on the evidence of the prosecution and act on it accordingly. The oral evidence of the accused contains nothing but concocted stories. Mr. Nomisan contended that pieces of evidence adduced by prosecution contain contradictions. I have seen no material contradictions in the evidence adduced by the prosecution.

Having considered the totality of the evidence adduced before me and the circumstances of this case I am satisfied that the prosecution have proved their case beyond reasonable doubt as required by law."

The whole of the foregoing from the judgment of the learned trial Judge, shows that he did not place a burden on the appellants to prove their innocence as complained of by them in their brief. He duly cited and applied the legal principles regarding the onus of proof beyond reasonable doubt.

B That the learned trial Judge stated that the appellants had a duty to disrupt the case of the prosecution where the prosecution had proved a prima facie case does not mean that the appellants had to prove their innocence as submitted for them. The trial court's judgment exhibits a fair summary of the evidence and application of the law. The decision of the court
C will not be disturbed, as it is not perverse. For, it is trite law that a perverse finding is one which ignores the facts or evidence led before the court, or runs counter thereto, and leads to or occasions a miscarriage of justice, and an appellate court can only interfere with or disturb a finding when it is
D shown to be perverse. That is not the case herein. See *Edoho v. The State* (2004) 5 NWLR (Pt. 865) 17 at 47; *Odiba v. Azege* (1998) 9 NWLR (Pt. 566) 370; *Makinde v. Akinwale* (2000) 2 NWLR (Pt. 645) 435 SC; *Shell Petroleum Dev. Co. (Nig.) Ltd. v. Amaro* (2000) 10 NWLR (Pt. 675)
E 248; *Iko v. The State* (2000) 9 NWLR (Pt. 671) 54; *The State v. Ajie* (2000) 11 NWLR (Pt. 678) 434 at 449 Paragraph A-D, per Onu JSC, citing *MISR Ltd. v. Ibrahim* (1975) 5 SC 55; *Incar Nigeria Ltd. v. Adegboye* (1985) 2 NWLR (Pt. 8) 453; *Atolagbe v. Shorun* (1985) 1 NWLR (Pt. 2) 360; (1985)
F 4 SC (Pt. 1) 250 at 282.

In paragraph 3.7 of the appellants' brief of argument, it was submitted that the prosecution did not even prove a prima facie case against them. Their counsel referred to the 7th accused said to be the person who set fire to PW1's houses, and seen by PW1 at the scene of the crime but turned out
G not to be there, and was discharged and acquitted by the court on his plea of alibi. He also referred to the 1st accused. He argued that since from the evidence on record, it was the 1st accused who allegedly brought the 4th appellant to the scene of the crime, but 1st accused whom PW1 said threw
H fire into the mother's grave turned out not to be at the scene of the crime, and was discharged and acquitted on his plea of alibi, it follows that the 4th appellant too was not there. He concluded that it follows that no grave was burnt. He submitted that the court below was in error when it convicted the

appellants on the same evidence of the prosecution which it had earlier disbelieved. He referred to the case of Adele (sic) v. The State (1995) 2 NWLR (Pt. 377) 269; (1995) SCNJ 256 at 262 and urged this court to allow the appeal on this issue. This same submission was repeated in the appellants' reply brief, concluding that it was perverse for the court below to have convicted the appellants on the evidence of PW1 - Kwaghshir v. The State (1995) 3 NWLR (Pt. 386) 651; (1995) 4 SC 222 at 234 cited.

The foregoing reasoning tantamounts to saying that the appellants must be discharged and acquitted because the 7th and 1st accused had been discharged following their plea of alibi. That is fallacious and non-sequitur. It is the law, as earlier stated that the onus of proof beyond reasonable doubt is always on the prosecution in criminal proceedings. If the trial Judge has any doubt, he is obliged to give its benefit to the accused. This, in my view is what guides a trial court which decides to discharge an accused on a plea of alibi after taking into account the totality of the evidence adduced before him. I believe that in such a case, the court's finding is limited to the plea of alibi and the persons who proffered that defence of alibi, not any other thing or accused. In Okputu Obiode & Ors. v. The State (1970) 1 All NLR 35 the Supreme Court had held that the trial court which said it was satisfied with the plea of alibi of the 5th, 7th and 10th accused in the case, meant that on the totality of the evidence before it, the prosecution had not proved beyond all reasonable doubt its case that these accused persons were present and participated in the crime.

In the first instance, the 1st and 7th accused were discharged based on their plea of alibi which the court below accepted following the evidence of the investigating Police Officer - PW3. The other 5 accused/appellants had not the same plea of alibi and none was investigated or testified to and proved before the trial court as with those discharged. Secondly, the appellants had a different case from the case of those two, 1st and 7th accused. The evidence in respect of the convicted appellants is not the same as that upon which those discharged were discharged.

It is my view that the appellants who did not put forward a de-

fence of alibi cannot claim the benefit in the manner the appellants seek to do in this appeal.

The excerpts from the judgment earlier reproduced, show no doubt that before the learned trial Judge found the appellants guilty, he carefully considered the totality of the evidence before him. He came to the decision that there was evidence that PW1's houses were burnt down, that the evidence of DW9 confirms this, that the evidence of PW1 and PW2 is evidence of eye witnesses, from the partially excavated anthill nearby where they took refuge for fear that they took a clear view of the mob among which were 2nd, 3rd, 4th, 6th and 8th accused. PW1 and 2 saw the accused persons personally as they set fire on PW1's houses and exhumed the corpse of his mother and burnt it in the grave. PW1 and PW2 personally saw the accused participating in the crime being committed by the monsters. The learned trial Judge believed the evidence of PW1, 2, 3 and DW9 in this regard. I see no reason why he could do so, in spite of his accepting the defence of alibi of other accused persons against whom these witnesses also testified.

It is open to a trial court upon due consideration of the totality of the evidence adduced before him, to accept parts of the evidence of a witness and reject the other part depending on the circumstances of the case. See the case of *Obiode v. The State* (supra). This is what Fatayi Williams, JSC then said in that case which must guide us:

"With regard to the evidence against the appellants, the learned trial Judge was clearly satisfied, again on the totality of the evidence, that the prosecution had proved its case against them beyond all reasonable doubt. In fact, he stated unequivocally that he believed the evidence of the witnesses called by the prosecution. We agree, with Mr. Gbemudu that a trial Judge can, under certain circumstances, accept part of the testimony of a witness and reject the rest. Moreover, it is not impossible, particularly in a case where the identification of the accused person is crucial, for a trial Judge still to have some doubt, on the totality of the evidence as to the presence of that accused person at the scene of the crime, despite the fact that he finds the prosecution witnesses truthful. He may well feel, having regard to other equally convincing evidence, that the particular prosecution

tion witness might have been genuinely mistaken as to the identification of a particular accused. With that feeling comes the doubt the benefit of which must be given to the accused as the learned trial Judge did here to the 5th, 7th and 10th accused persons but that finding does not derogate from the finding in respect of the other accused persons whom he convicted”. B

Let me state here that in considering this matter, I have found the Supreme Court decision in *Obiode v. The State* (supra) most helpful and the decision is binding on this court, the issues and arguments therein virtually bearing some similarities to those in this appeal. It is most illuminat- C
ing and I shall deal with the facts at some length.

In that case, the complainants reside in village E, while the accused persons reside in village O, all neighbouring villages near Ughelli then in Midwest State of Nigeria. There was a land case pending in the High Court between them. Suddenly, hell was let loose, a group of people D
from village O raided the neighbouring village E, looted their property and set their houses on fire - 46 of them were destroyed in one part, with 10 buildings in another part.

The trial court discharged three of the accused, 5th, 7th and 10th E
on their defence of alibi. He convicted the other accused persons who with these others had denied the charge.

Interestingly, at the trial, of those convicted with the exception of 3rd, 4th and 6th accused who said they were at home on the day of the F
incident and the 8th accused who did not say where he was, the others said they were elsewhere. Argument virtually similar to that of learned counsel for the appellants herein was put up for the appellants in that case by Chief F.R.A. Williams. He argued-

*“That since the learned trial Judge was satisfied with the defence of G
alibi put forward by the 5th, 7th and 10th accused persons he could not have been satisfied beyond all reasonable doubt that the appellants partici-
pated in the burning and looting which formed the basis of the charge
against them. This according to Chief Williams, is because the learned trial H
Judge, having been satisfied that the 5th accused person was not present
and thus rejected his identification by the 3rd and 4th PWs who between
them, had also identified the 1st, 2nd 3rd and 6th accused persons, could*

not have been satisfied beyond all reasonable doubt as to the participation of these four accused persons. He also submitted that since the 2nd PW's identification of the 7th accused person was not believed, the learned trial Judge could not have been satisfied beyond all reasonable doubt that the 2nd PW truthfully identified the 4th accused. It was also contended by learned counsel that since the identification of the 10th accused by the 1st PW did not satisfy the learned trial Judge, this witness's identification of the 1st, 2nd, 4th and 9th accused persons could not have been beyond all reasonable doubt; and indeed to the extent that these witnesses said they saw the seven accused persons participating in the crime, they could not have been speaking the truth. In the learned counsel's submission, this point is all the more important when it is realized that in order to establish the defence of alibi, it is not necessary to prove the alibi beyond all reasonable doubt, it being sufficient to raise a defence based on balance of probabilities. In considering whether the learned trial Judge could have been satisfied with the case against the accused persons, Chief Williams finally submitted that the nature of their defence which was that the prosecution witnesses lied against them, was material."

The Supreme Court held among other things that

(2) The standard of proof required to establish the defence of alibi is one based on the balance of probabilities. Therefore when the trial Judge said that he was satisfied with their defence, he must be taken to mean, not that the prosecution witnesses were lying, but that on balance, it was probable that the 5th, 7th and 10th accused persons were elsewhere on the day of the incident.

(3) A trial Judge can, under certain circumstances, accept part of the testimony of a witness and reject the rest. Moreover, it is not impossible for a trial Judge still to have some doubt on the totality of the evidence, as to the presence of that accused person at the scene of the crime, despite the fact that he finds the prosecution witnesses truthful. He may well feel, having regard to other convincing evidence, that the particular prosecution witness might have been genuinely mistaken as to the identification of a particular accused. With that feeling comes the doubt the benefit of which must be given to the accused as the trial Judge did here to the 5th, 7th and 10th

accused person but that finding did not derogate from the finding in respect of other accused persons whom he convicted.

Applying the principles and reasoning in that case and all that had been stated above to this matter, the argument put forward by Mr. Horn for the appellants cannot be sustained. In the case of Adele v. The State reported in (1995) 2 NWLR (Pt 377) 269, and in (1995) 2 SCNJ 256 also cited for the appellants (as Adole v. State), the appellant did plead a defence of alibi as did the other accused who was said to have been seen with him but discharged by the lower court on his defence of alibi. This is quite unlike in Obiode's case (supra) and in the present case. Also in Adele v. The State, the witness upon whose evidence the appellant was convicted had been totally discredited by the court below but the Appeal Court relied on that evidence to uphold the conviction. The Supreme Court frowned on that. In the present case, there was no question of the witnesses being totally discredited. The present case is more akin to the case of Obiode v. The State. Adele's case does not therefore support the case of the appellants herein.

I determine Issue 1 against the appellants and dismiss the corresponding ground of appeal which is ground 1.

Issue No.2: This questions whether or not the trial court properly evaluated the evidence and considered the appellants' case before arriving at its decision.

It is the law that it is the primary duty of the trial court to evaluate evidence before it and to make findings of fact from such evidence.

Where therefore there is sufficient evidence on record from which the trial court made its findings of fact, clearly evaluating the evidence, the appellate court cannot interfere therewith. See Onuchukwu v. The State (1998) 4 NWLR (Pt. 547) 576; Woluchem v. Gudi (1981) 5 SC 291. Except where perverseness can be identified, in the verdict either in respect of the application of the law or appreciation of the evidence, an appellate court cannot interfere with the findings of the trial court - See Akpabio v. The State (1994) 7 NWLR (Pt.

359) 635, also Onuchukwu v. The State (supra).

In The State v. Aibangbee (1988) 3 NWLR (Pt. 84) 548 the Supreme Court had put it thus - that in the absence of compelling evidence indicating absence of erroneous appraisal of facts and erroneous conclusion, the Court of Appeal must show utmost restraint and reject any temptation to interfere with well considered findings made by the learned trial Judge in the court of first instance. The court in that case had followed Okafor v. Idigo III (1984) 6 SCNLR 481 and Sobakin v. The State (1981) 5 SC 75.

This issue - No.2 has virtually been answered while considering issue No. 1. It was shown that the court below, as can be seen from the excerpts from its judgment set out in extenso above, did evaluate and consider all evidence before it including the evidence of the prosecution witnesses, the accused and DW9. They were dealt with and findings made in respect thereof.

In addition to the part of the judgment of the court below on page 97 of the records set out earlier in dealing with Issue No.1, the learned trial Judge in further evaluation of the evidence of the witnesses and the accused made findings at page 98 also stated:

"I believe the evidence of PW 1,2,3 and DW9... In this case it is my view that the prosecution has proved the case against the accused beyond reasonable doubt as required by law. To my mind the accused on the other hand have failed to discharge that burden. I have gone through the statements of the accused 2nd, 3rd, 4th, 6th and 8th made to the police and in my view, they are at variance with their oral evidence before the court ... The oral evidence of the accused contains nothing but concocted stories..."

The court had earlier reviewed the evidence of the 2nd, 3rd 4th, 6th and 8th accused at page 96 of the record.

I am unable to find anything perverse concerning the verdict of the court below when all the circumstances of the case are taken into account as outlined by the court. Under Issue 1, enough has been stated about the evidence of the witnesses on both sides to answer the question here whether the learned trial Judge properly evaluated the evidence and considered the appellants' case. I would answer the question in the positive.

Should this view not be correct, let me further point out that the

particulars of the evidence of the appellants which the learned trial Judge referred to as concoction or being at variance with their statements in exhibits D, F, H1, H2 and H3 speak for themselves when their evidence are placed side by side with their statements to the police.

Exhibit D is the statement of the 2nd accused Asende Yav in which he admitted a land dispute which PW1 had with “my people”, as he put it. His was a bare denial of the offence and concluding that he never heard the corpse of PW1 ‘s mother was burnt.

In his evidence in court as DW2, he denied the offence. He alleged that PW1 left the land 5 years before the incident - The learned trial Judge called these “blatant lies”. He thus found this false. I have upheld this under issue No. 1 (supra), when the evidence of PW1’s acts of possession on the land were considered as proved. Also in cross-examination, DW2 said his house to PW1’s house is 2klms, whereas, in his evidence in chief he said it was 5klms. He said also in cross-examination, “from my house you can see PW1’s house” (p. 65 of the records).

All this was in an effort to deny knowing anything about the death of PW1’s mother, etc. The foregoing with the evidence of PW1, PW2, PW3 and DW9, before the court were all evaluated by the learned trial Judge.

The 3rd accused Iortuhwa Ingbar was DW3 and his statement is exhibit H “1”. He denied criminal trespass and burning the corpse of PW1’s mother whom he knew died and was buried in his “first compound”.

In court, he put up an alibi which was not in his statement exhibit H “1” and could not be investigated by the police. He said in court -

“On that day I was in my compound in Ugambe”.

He too said PW1 had left the land “long before 13/4/89 – more than 5 years.

The court found this “blatant lie” after evaluating the evidence as to whether PW1 being in possession was proved as denied by the appellants.

DW4, Tortim Kwaghivigh made a statement - exhibit H2, to the police. He denied the offence. He knew PW1’s mother died and that she was buried in his compound and did not know whether the corpse was burnt. In court he now testified that he did not know the compound allegedly burnt

and did not know where PW1 was before he came to the present compound. He also denied hearing of the death of PW1's mother and said he told police so. This is untrue. The court below was right after all when he found the accused's evidence in court at variance with the statement to the police B and treated the evidence as unreliable.

DW6 - Tsavnannde Lim is the 6th accused and the 4th appellant. His statement to the police is exhibit F. In it he said he built a house at Awajir and was farming there. He denied the offence. He knows the 1st PW's compound, he was aware his mother died, sometime also heard that his whole C compound was burnt down by Mbamar people and during that time his late mother's grave was dug open and the corpse set ablaze. He used to pass 1st PW's compound when going to market at Gungul to buy rice but before the PW1's compound was burnt, he had not passed that road because he now D bought his rice from Aliade and Awajir villages.

In his evidence in court, he tried to set up an alibi which was never mentioned in his statement exhibit F. He said he was at a rice mill on 13/4/89 the day of the incident and he used to leave home to work at the mill in the E morning and returned in the evening. When he closed from work in the evening that day, he saw one Inspector, Agia stationed at Awajir Police Station who told him there was riot at Mbamar, caused because, he said -

F "... the mother of PW1 died and was to be buried on the disputed land. The one of the accused Akaa Igbudu (8th accused) went to the police and reported at Awajir... PW1 went to Gungul and reported to the police station. This is what the police told me ..."

No alibi like the foregoing was in his statement exhibit F. The prosecution had no opportunity to investigate it as they did with DW1 and DW7. G The learned trial Judge quite rightly described it and the evidence of other accused as a concoction.

DW8 is Akav Igbudu. His statement to the police is exhibit H3. Vital H to the matter in issue is part of his statement which was that on the date of the incident he heard gun shots and went with the police to see what was happening, but saw nothing. Later in the statement, DW8 continued thus -

"At home (for amicable settlement by the councilor, DW9) the District Head Naha Koko blamed Yesem Ankyeke for inciting trouble because

the land had been in dispute and Tor Tiv has warned that no body should go there but Yesem disobeyed the order. Yesem left this very land to his home place Ugambe for over 3 years before this incident happened. There was no house there nor economic trees as claimed by him. This place in dispute belongs to Mbamar but Yesem settled on the land for a long time, but when B Yesem started exercising powers beyond his bounds by trying to acquire land by force, he entered into war with Ugambe and Mbamar but did not succeed so he left the place. Later, he reemerged from no where and started clearing land to build house that was broke out between his community C Ugambe and the opposing Mbamar community. I did not know who engaged him and his men in a war fight ... I did not take part in burning Yesem Ankyeke's compound".

It is to be observed that it was DW8's family of Igbudu which had land dispute with PWI and who was said to have won the case at the area D court but PWI won on appeal to High Court. He said he heard gun shots at about 6.30a.m. on the date in question, ran to the Awajir police station to report. He was "given two policemen to check what was happening". They approached the scene, and they went back to the police station and an entry E was made. In his evidence in court, DW8 said:

"On 13/4/89 I went in company of two policemen to PWI's house. On that fateful day I was sitting in my house when my wife went out and quickly rushed back to the house and woke me up and told me to listen to F what was happening outside. I heard some gun shot outside. I went and informed the police at Awaji. I heard the gun shot in the direction of Ugambe. When I brought the police and we went there, we did not meet anybody. I took the police to where PWI settled before and that same place there was a riot before. It was there someone was killed. When we went there, there was G no body."

"It was the time that my wife informed me that I went and informed the police and brought them to the house of PWI. I took two policemen to the house of PWI. I left my house at 5.30a.m. and reached the police station H at 5.45a.m. I was there at the police station before 6a.m. We left at about 6.30a.m. and reached PWI's house at about 7a.m. From my house to Awaji police station is 3 mins. I am not a title holder in my community. I told the

court that from my house to PW1's present house is about 5 miles. There was a riot in that place and somebody was killed. Those of us who live in that place were arrested and badly tortured. That is why I went and called the police when I heard the noise there the 2nd time. When we went there were
 B *witnessed grasses burnt."*

For this witness to say "there was no house" on the land and he and 2 Policemen saw nothing when they went to PW1's compound when DW9, the councilor who was their witness and PW3 the police said they saw burnt house etc, leaves DW8's evidence definitely unreliable.

C Comparing his evidence with his statement in exhibit H3 and that of other witnesses, justifies the learned trial Judge's findings. Granted he did not particularize, yet the learned trial Judge had considered all the evidence. He had accepted the evidence of PW1, PW2, PW3 and DW9, having also
 D gone through the evidence of the appellants i.e. 2nd, 3rd, 4th, 6th and 8th accused.

**All the above, from the testimony of the appellants and their statements show that their learned counsel's complaint that the trial
 E court did not consider their evidence in making his findings and that their oral evidence was at variance with their statement, is totally misconceived. The learned trial Judge duly considered it all. That the findings are perverse is not established.**

F The answer to Issue No.2 is therefore that the trial court properly evaluated the evidence and considered the appellants' case and arrived at a judgment which in fact and in law is correct. The issue is determined against the appellants. The corresponding grounds of appeal fail.

G In conclusion, I find no merit in this appeal as all the 4 grounds of appeal fail. They are hereby dismissed. The judgment of Ogbole J., is upheld. The conviction and sentence passed on the appellants are thereby affirmed.

H

MUKHTAR JCA

I have read the lead judgment delivered by my learned brother, Nzeako, JCA. The appellants certainly deserved being convicted for the offence they were charged with, and cannot be discharged and acquitted by this court. B
The prosecution proved its case beyond reasonable doubt, as rightly found in the lead judgment of this court, the judgment of the court below ought to be affirmed. In this vein, I also dismiss this appeal as it has no merit whatsoever.

C

OBADINA JCA

I have had the privilege of reading in draft, the judgment of my learned brother, Nzeako, JCA, just delivered. I agree entirely with his conclusion D
that the appeal lacks merit and should be dismissed. From the totality of the evidence before the trial court, I think the prosecution had proved its case to warrant the conviction and sentence of the appellants by the trial court. In the circumstances, for the reasons given in the lead judgment, E
I too dismiss the appeal.

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