

SUPREME COURT OF NIGERIA

21ST MAY, 2004. SC.33/2003

**CORAM:- S.M.A. BELGORE, U. MOHAMMED, S.U. ONU,
U.A. KALGO, N. TOBI, JJSC**

CHIEF EMMANUEL EBRI	APPELLANT
V.		
THE STATE	RESPONDENT

CRIMINAL PROCEDURE - Evidence - Acquittal - Of one of jointly charged accused persons - Based on same inextricable evidence without more - Demands discharge of the others (H1)

CRIMINAL PROCEDURE - Alibi - Evidence - Failure to investigate alibi - Will not secure an acquittal - Where evidence pins an accused - To the scene of crime (H2)

APPEALS - Acquittal - Co-accused - Where acquitted on same inextricable evidence - Court of Appeal was bound - To also acquit the appellant (H3)

JUDICIAL PRECEDENTS - Acquittal - Supreme Court - Stare decisis - Umani's case - Being a binding precedent - Grounds acquittal of appellant - Who should have been held guilty (H4)

FACTS

The appellant and two other persons were charged with the murder of one Egoma Oden Obla (the deceased). On 29-1-2000 the accused persons abducted the deceased who has not been seen since then. Armed with guns, they beat him up and dragged him away. Eight witnesses gave evidence for the prosecution. Appellant denied the charge. He raised alibi both in his Statement to the Police and in oral evidence in court. The trial court found the 3 accused persons guilty of murder and sentenced them to death.

On appeal to the Court of Appeal, it quashed the conviction of the other 2 accused persons but dismissed the appellants's appeal. Being dissatisfied, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

I. Whether the conviction and death sentence of the appellant can be sustained in the face of the acquittal of the two co-accused persons.

II. Whether the prosecution established the case against the appellant beyond reasonable doubt to sustain the conviction and death sentence of the appellant.

III. Whether the Court of Appeal was right to uphold the conviction and death sentence of the appellant solely on the failure of his alibi.

HELD (Unanimously allowing the appeal per **TOBI JSC**)

Acquittal - Of one of jointly charged accused persons

1. The position of the law is that where two or more persons are charged with the commission of an offence, and the evidence against all the accused persons is the same or similar, to the extent that the evidence is inextricably woven around all the accused persons, the discharge of one must as a matter of law, affect the discharge of the others. This is because if one or more of the accused persons is discharged for want of convicting evidence, that must automatically affect all the others in the light of the fact that the evidence against all the accused persons is tied together, like Siamese twins at the umbilical cord with their mother.

For purposes of exculpating an appellant from criminal responsibility, conviction and sentence, there must be no additional evidence incriminating the appellant. Putting it in another language, the convicting evidence cannot be untied or separated in respect of the appellant vis-à-vis the co-accused persons. In other words, the evidence is joined together like Siamese twins, so much so that all the accused persons must either fall together or stand together.

CIMINAL PROCEDURE - Failure to investigate alibi

2. Where evidence of prosecution witnesses specifically and unequivocally pins down an accused person to the scene of crime and say that he

committed the offence, failure to investigate the alibi by the police will not result in an acquittal of the accused. In such a situation, the failure to investigate the alibi is not only superfluous but also otiose. In the light of the evidence of P.W.1, P.W.2 and P.W.3, specifically pinning him to the murder of the deceased, it was, with the greatest respect, not available to the Court of Appeal to discharge and acquit the 2nd appellant on the so-called alibi.

APPEALS - Acquittal - Co-accused

3. It is clear to me that the evidence in respect of the appellant is inextricably interwoven around the two co-accused persons who were discharged and acquitted by the Court of Appeal. In other words, it is the same evidence of P.W.1, P.W.2 and P.W.3, that gave rise to the conviction of the appellant that resulted in the discharge and acquittal of the two co-accused persons. In the circumstances, the Court of Appeal was bound to also discharge and acquit the appellant.

Acquittal - Supreme Court - Stare decisis

4. Similar issue arose in Umani v. The State (1988) 1 NWLR (Pt.70) 274, where Nnamani, JSC., in his leading judgment said at page 286:

“Those accused persons ought not to have been discharged. Luckily for them, however, their case is not before this court, there being no appeal against their discharge. What is, therefore, in issue is whether these errors do in any way affect the case of the appellant.”

Of course, the appellant in Umani’s case was discharged and acquitted by a majority judgment. And so I have no alternative than to discharge and acquit as the appellant, a person I think clearly committed the offence of murder. This is clearly one area where the law is really an ass. There is nothing I can do about it.

NOTABLE POINT OF INTEREST

TOBI JSC

1. Court of Appeal erred in acquitting some accused persons

I should mention by way of obiter whether the Court of Appeal was right

in discharging and acquitting the two co-accused persons. In my view, the court was clearly in error in discharging and acquitting the co-accused persons. As a matter of law and fact, there was enough to convict all the three accused persons and that is what the learned trial Judge did.

B But this court cannot take the issue further as there is no appeal by the prosecution.

REPRESENTATION

C OSANAKPO, SAN, (WITH HIM, O. NDUNELI), FOR THE APPELLANT.

PHILLIP EKPO, D.P.P. MINISTRY OF JUSTICE, CALABAR, CROSS RIVER STATE, FOR THE RESPONDENT.

D CASES REFERRED TO

Adele v. State (1995) 2 NWLR (Pt. 377) 269 at 293.
 State v. Aibangbee (1988) 7 S.C. (Pt. 1) 96; (1988) 3 NWLR (Pt. 84) 548
 Ikemson v. State (1989) 6 S.C. (Pt.1) 114; (1989) 3 NWLR (Pt.11) 455.

E Efe v. State (1976) 10 NSCC 643 at 678.
 Edim v. State (1971) 7 NSCC 296.
 Ogundipe v. The State (1994) 20 LRCN 303 at 306.
 Igho v. State (1978) 3 S.C. 87.

F

LEAD JUDGMENT BY TOBI JSC

The appellant and two other persons were charged with murder of Egoma Oden Obla. The case of the prosecution could be briefly stated.

G On 29th January, 2000, the appellant and two other persons abducted the deceased who has not been seen since then. The appellant and the two other persons beat up the deceased. They were all armed with guns. The deceased had a machete. The appellant and the two other persons struggled with the deceased to take the machete from him. They dragged him. The

H deceased shouted that Ekorì people should not allow Mkpani people to kill him. And so the deceased was last seen in armed hostile crowd of Mkpani people.

Eight witnesses gave evidence for the prosecution. The appellant

denied the charge. He raised alibi both in his statement to the police and in oral evidence in court. The learned trial Judge found the appellant and the two others guilty of murder and sentenced them to death. On appeal, the Court of Appeal dismissed the appeal of the appellant. The court quashed the conviction and death sentence of the other two co-accused persons. B The appellant has appealed to this court. The appellant formulated the following issues for determination:

"I. Whether the conviction and death sentence of the appellant can be sustained in the face of the acquittal of the two co-accused persons." C

II. Whether the prosecution established the case against the appellant beyond reasonable doubt to sustain the conviction and death sentence of the appellant."

III. Whether the Court of Appeal was right to uphold the conviction and death sentence of the appellant solely on the failure of his alibi." D The respondent adopted the above issues formulated by the appellant.

Learned Senior Advocate for the appellant. Dr. T.C. Osanakpo submitted on Issue No. 1 that when a court has totally discredited and rejected evidence of a witness and refused to use it as a basis of convicting an accused person, the court should decline to use the same evidence as a basis of convicting another accused person where the evidence linking the accused persons to the offence charged are inextricably interwoven and inseparable. In other words, if one is discharged and acquitted, the other should also be discharged and acquitted. He cited Adele v. State (1995) 2 NWLR (Pt. 377) 269 at 293. F

Relying on the evidence of P.W.1, P.W.2 and P.W. 3 learned Senior Advocate submitted that their evidence linking the appellant and the other two accused persons acquitted by the Court of Appeal are inextricably interwoven and inseparable. The sum total of the evidence of P.W.1, P.W.2 and P.W. 3 is to identify the appellant and the co-accused persons at the scene of the crime, learned Senior Advocate reasoned. G H

It was the submission of learned Senior Advocate that the Court of Appeal having discredited and rejected the evidence of the three witnesses in respect of the 2nd and 3rd accused persons, it could not prop-

erly utilize the same evidence to uphold the conviction of the appellant. He submitted that the decisions in State v. Aibangbee (1988) 7 S.C. (Pt. 1) 96; (1988) 3 NWLR (Pt. 84) 548 and Ikemson v. State (1989) 6 S.C. (Pt.1) 114; (1989) 3 NWLR (Pt.11) 455 are distinguishable from the present case and therefore inapplicable.

Learned Senior Advocate submitted on Issue No. 2 that in a criminal trial, the onus lies throughout upon the prosecution to establish the guilt of the accused beyond reasonable doubt. Where the prosecution's case is shaky, the accused would be entitled to have the benefit of such doubt resolved in his favour, counsel contended. He cited Aigbedion v. State (2000) 4 S.C. (Pt.I) 1, (2000) 7 NWLR (Pt. 666) 686 at 704.

In a murder charge, the burden is upon the prosecution to prove (a) that the deceased had died. (b) that the death of the deceased was caused by the accused and (c) the act or omission of the accused which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequence, counsel submitted. He cited Ogbe v. The State (1992) 2 NWLR (Pt.222) 164.

Learned Senior Advocate submitted that the prosecution did not prove the case against the appellant beyond reasonable doubt, as there was no credible evidence adduced by the prosecution of the death of the deceased. He cited the evidence of P.W.1. P.W. 2 and P.W. 3 and the case of Amayo v. State (2001) 12 S.C. (Pt.1) 1-18 NWLR (Pt. 745) 251 at 280.

Learned Senior Advocate argued that the inference of the death of the deceased made by the trial court and the Court of Appeal was based on speculation rather than on evidence adduced by the prosecution. The prosecution, counsel argued, did not lead any evidence to show that the appellant caused the death of the deceased or that the death of the deceased was an intentional act of the appellant.

It is the law that suspicion, no matter how strong can never take the place of legal proof and guilt of the accused person; for the court to act on suspicion to conclude that the accused committed the offence charged is for the court to speculate and that is not allowed. Learned Senior Advocate contended. He cited State v. Ogbubunjo (2001) 1 S.C.

(Pt.1) 90, (2001) 18 NWLR (Pt. 698) 576 at 590 at 591.

Citing Onyejekwe v. State (1992) 3 NWLR (Pt. 230) 444 at 453 and Igwego v. Ezeugo (1992) 5 NWLR (Pt.249) 561 at 576, learned Senior Advocate submitted that the concurrent findings at the trial court and the Court of Appeal of the death of Egoma Oden Obla can be inter- B
fered with. To learned Senior Advocate, the prosecution having woefully failed to establish intent to kill, it was wrong of the trial court to convict the appellant and the Court of Appeal to uphold the conviction.

On Issue No. 3, learned Senior Advocate adopted his earlier argu- C
ment that the Court of Appeal in acquitting and discharging the 2nd and 3rd accused persons discredited and rejected the evidence of the prosecution. Citing the case of State v. Aibangbee (supra), learned Senior Advocate submitted that the failure of an alibi does not absolve the prosecution D
from proving the guilt of the accused beyond reasonable doubt.

It was also the submission of learned Senior Advocate that the defence of alibi was wrongly rejected by the Court of Appeal. He argued that where an accused person has set up a defence of alibi at the earliest possible time, giving sufficient particulars of his whereabouts at the time E
of the commissions of the offence, it is incumbent on the prosecution to investigate and rebut the alibi. This is because once an accused person has set forth alibi, it is not his duty to establish by evidence the alibi for the prosecution to disprove it. He cited Ikemson v. State (supra) and F
Adedeji v. The State (1971) 1 AII NLR 75. He urged the court to allow the appeal.

Learned counsel for the respondent, Mr. Philip Ekpo, Director of Public Prosecution, submitted that the authority of Adele v. State (supra) G
can only apply where the evidence led by the prosecution against all the accused persons is inextricably interwoven and inseparable. Where the evidence led by the prosecution is not interwoven in all material respect but separate or where the discharge and acquittal of a co-accused is H
erroneous, then it does not automatically follow that an acquittal of one co-accused person must lead to the acquittal of the others. Each accused person's case will be determined on its merits if the evidence led by the prosecution is not interwoven, counsel argued. He cited Akpan v. The

State (2002) 7 S.C. (Pt. II) 21; (2002) 10 MJSC 78 at 87, Ikemson v. The State (1989) 6 S.C. (Pt.1) 114; (1989) LRCC 1 at 26; Kasan v. The State (1994) LRCN 28 at 52 and Abudu v. The State (1985) 1 NWLR (Pt.1) 55.

B Learned counsel submitted that the conviction of the appellant and the other two co-accused persons by the trial court was not only based on the evidence of P.W.1, P.W.2 and P.W.3, but on the totality of the evidence before it, including the unequivocal consistent and uncontradicted evidence of P.W. 1 to P.W.8, the exhibits and the other two co-accused persons and their witnesses before convicting the appellant and the other two. Counsel examined in some detail, the evidence of P.W.1, and P.W.3 in his brief and cited Efe v. State (1976) 10 NSCC 643 at 678; Edim v. State (1971) 7 NSCC 296; Ogundipe v. The State (1994) 20 LRCN 303 at 306 and Igho v. State (1978) 3 S.C. 87.

Dealing with the alibi raised by the appellant, learned counsel submitted that once an alibi is raise, the person raising it has a duty to supply full and sufficient particulars as to time, place, names of persons he was with at the material time and other relevant particulars to assist the police to investigate the alibi and test the truth or falsity of the alibi. He cited Ikemson v. State (supra), Bashaya v. State (1998) 4 S.C. 199, (1998) 58 LRCN without the page number and Okosi v. State without the citation and Njovens v. State (1973) 1 NMLR 33. An alibi which is economical with the truth by not supplying full and sufficient particulars cannot be an alibi, as the police cannot go on a wild goose chase, learned counsel contended. He dealt in some detail with the defence of alibi in paragraphs 4 .11 to 4 .19 of the respondent's brief.

G Learned counsel submitted that since the appellant and his cohorts had a common interest to abduct and kill, there was no need for additional evidence of individual participation since they were all acting in concert. He cited Ikemson v. State (supra).

H Relying in Akpan v. The State (supra) and Oguonzee v. State (1998) 4 S.C. 110, (1998) 58 LRCN 3512 at 3519, learned counsel submitted that since the concurrence of findings by the trial court and the Court of Appeal were overwhelmingly supported by evidence, they are not per-

verse and therefore, should be accepted by this court.

On Issue No. 2, learned counsel submitted that the prosecution proved its case against the appellant beyond required doubt as required by Section 138(1) of the Evidence Act, 1990. He cited Onafowokan v. The State (1987) 7 SCNJ 233 at 249. Dealing with the elements of the offence of murder, learned counsel submitted that the prosecution proved the essential elements of murder. He cited Ogba v. State (1972) 9 LRCN 362 at 366 and the evidence of P.W.1, P.W.2 and P.W.3. Submitting that the recovery of the body is not material for conviction, learned counsel cited Efe v. State (1976) 10 NSCC 643 at 678; Edim v. State (1971) 7 NSCC 296; Ogundipe v. State (1994) 20 LRCN 303 at 306 and Igho v. State (1978) 3 S.C. 87. B C

It was the submission of learned counsel that the prosecution led credible evidence disclosing an intentional act of the appellant and his group to murder the deceased. The trial court, counsel submitted, did not act upon suspicion or speculation but on the strength of evidence tendered before the court. D

On concurrent findings of fact, counsel contended that this is not a case in which the Supreme Court will interfere with concurrent findings of the two courts. He submitted that the case cited by learned Senior Advocate on the issue of concurrent findings cannot apply in this case. E

Dealing with Issue No. 3, learned counsel submitted that the trial court and the Court of Appeal rightly rejected the alibi of the appellant because of the strong and irresistible positive evidence by the prosecution identifying him and fixing him at the locus criminis. He submitted that the alibi raised by the appellant is weak, porous and unreliable. Counsel cited Ibrahim v. The State (1991) 3 LRCN 1010. He urged the court to dismiss the appeal. F G

The major issue raised by learned Senior Advocate for the appellant is that since the Court of Appeal discharged and acquitted the two co-accused persons, the conviction and sentence of the appellant cannot stand in law. **The position of the law is that where two or more persons are charged with the commission of an offence, and the evidence against all the accused persons is the same or similar, to the** H

extent that the evidence is inextricably woven around all the accused persons, the discharge of one must as a matter of law, affect the discharge of the others. This is because if one or more of the accused persons is discharged for want of convicting evidence, that must automatically affect all the others in the light of the fact that the evidence against all the accused persons is tied together, like Siamese twins at the umbilical cord with their mother.

In Umani v. The State (1988) 1 NWLR (Pt.70) 274, the trial Judge discharged the 1st, 2nd, 5th, 6th and 7th accused persons on the charge of murder on the ground that the defence of alibi succeeded. He however convicted the appellant for murder because he rejected the defence of alibi. Although the Court of Appeal dismissed the appeal, the Supreme Court allowed the appeal by a majority. The court held that the evidence on which the learned trial Judge has based his conclusion on the guilt to the appellant is the testimony of P.W.1, P.W.2 and P.W.3; testimony which in discharging the five accused persons he has at the very least cast so much doubt. In that wise, it is extremely hard to remove any doubt as to the guilt of the appellant.

In his leading judgment, Nnamani, JSC., said at pages 287 and 288:

“Except perhaps for 3rd accused who is still at large I do not know who else was supposed to be in his company. The evidence on which the learned trial Judge has based his conclusion on the guilt of the 4th accused (appellant) is the testimony of the P.W.1, P.W.2, P.W.3, testimony which in discharging the 5 accused persons he has at the very least cast so much doubt. I find it extremely hard to remove from my mind doubt as to the guilt of the appellant. It has to be remembered that apart from the testimony of P.W.1, P.W.2, P.W.3 there is no other evidence linking the appellant with this crime Such doubt exists in this case and I shall resolve it in favour of the appellant. Accordingly, I allow the appeal and set aside the judgment of the Kano High Court.....”

In Kalu v. The State (1998) 10 - 11 S.C. 19, (1988) 4 NWLR (Pt.90) 503, the appellant and another person were arraigned before the high Court of Imo State. The evidence led by the prosecution was that

the appellant and the second accused person in company of other armed persons, broke into the dormitory of the Asaga Boys Secondary School, Ohafia and murdered the deceased. During the trial, eight witnesses gave evidence for the prosecution, the most important of which were P.W.6 and P.W.7. the witnesses contradicted themselves.

The learned trial Judge held that the case against the 2nd accused was not established beyond reasonable doubt. He was therefore discharged and acquitted. Although the appeal of the appellant to the Court of Appeal, like in the case of Umani v. The State (supra) was dismissed, the Supreme Court allowed the appeal. The court held that where the evidence against two accused persons in a criminal case is in all material respect the same and a doubt is resolved by the trial Judge in favour of one of the accused persons, the same doubt should also be resolved in favour of the others. Consequently, if one is discharged and acquitted, the other should also be discharged and acquitted.

Delivering the leading judgment of the court, Kawu, JSC., said at pages 508 and 510.

“Now, one of the main complaints in this appeal is that the reasons given by learned trial Judge, as set out above, for doubting the testimony of P.W.6 in regard to the case against the 2nd accused, apply equally to the case against the appellant and that in the circumstances the appellant should also have been given the benefit of doubt. I think there is substance in this complaint.... It was for the reasons stated above that I reached the conclusion on the 28th day of June, 1988, that the conviction of the appellant cannot stand and accordingly allowed the appeal and set aside the conviction as already stated.”

In Adele v. The State (supra), Onu, JSC., citing Umani v. The State (supra), said at page 293:

“Indeed, it is now settled that when a trial Judge has totally discredited and rejected the evidence of a witness and regarded it as lacking in probative value and on the basis of that refused to use it as a basis for convicting another accused person, he should decline to use it as basis for convicting another accused person especially when, as in the instant case, the evidence in respect of appellant is inextricably interwoven around

the 7th accused who was discharged and acquitted.”

For purposes of exculpating an appellant from criminal responsibility, conviction and sentence, there must be no additional evidence incriminating the appellant. Putting it in another language, the convicting evidence cannot be untied or separated in respect of the appellant vis-à-vis the co-accused persons. In other words, the evidence is joined together like Siamese twins, so much so that all the accused persons must either fall together or stand together.

So much of the law. Let me take the evidence. P.W.1 said in examination-in-chief:

“On the 29th of January, 2000 while in my farm working I heard a voice shouting that Ekor people should not allow Mkpani people to kill me. When I heard this alarm from his farm I rushed towards his said farm. As I got there and hid at about twenty meters away behind a tree I saw the 1st, 2nd accused and 3rd accused beating up the deceased.... They beating (sic) Egoma and struggling to take his machete (sic) from him and dragged him. I knew the accused persons before the 29th of January, 2000 because we share a common boundary. They all came from Mkpani.”

Under cross-examination, witness said:

“I showed the police where the accused persons met Egoma and captured him.... I was standing where I was until they took Egoma away... I made to Ugep Police, I mentioned the three accused persons.”

P.W.2 said in examination-in-chief.

“I saw Egoma Oden Obia on 29th January, 2000 I went to Mkpani in the course of my business on that fateful date and picked passengers load at Mkpani along with my cyclist friend Eteng Ibr Ubi on our way coming back from Mkpani I met a group of people with my friend Egoma Oden Obia being dragged by them... The accused persons were the people I saw dragging Egoma. The three accused persons were the only persons I recognized amongst the group because I had known them but I can identify them if seen. The three accused persons and others wielded guns and machetes (sic). The said Egoma had a wound on the face... I asked the accused persons what offence the said Egoma committed that he was being dragged, Bassey Ofem Obia (2nd accused) told me that if I come

near them mine would be worse than that and so my friend tapped me and asked that we should go Egoma was being dragged along violently and as such could not resist them.”

Under cross-examination, witness said:

“I was the first to reach the scene where Egoma was being dragged They were wielding our native guns, I saw them with single barrel locally made long guns.”

P.W.3, said in examination-in-chief:

“I saw a crowd of over forty persons dragging a young boy whom I later recognised as Egoma Oden in the midst of the crowd who were all Mkpani men. The three accused persons were there along with the crowd and armed with single barreled. Amongst all of them two were holding Egoma on his jeans trousers.... As we moved nearer to them the 2nd accused told us that if we came nearer to them ors would be worse than that of Egoma. Egoma was bleeding from a wound on his face and there was mud all over his body. I was able to recognize the three accused persons and others whose names I do not know but can recognize them. I know Bassey Ofem Obla (2nd accused), Emmanuel Ebri Bassey (1st accused) and Tinted, Ubi Ofem Obla and Ubi Ofem Bassey (3rd accused).”

Under cross-examination, witness said:

“While there the 1st accused told the crowd that they did not instruct them to take the victim to Mkpani town. It was then I noticed that it was a serious affair and I tapped my friend to come so that we would leave the place because I had never seen Mkpani and Ekori fight since my birth.”

What did the Court of Appeal say in respect of the two co-accused persons who were 2nd and 3rd appellants respectively in that court? The Court of Appeal would seem to have upheld the alibi set up by the 2nd appellant. The court said at page 383:

“I am of the view that the alibi set up by the 2nd appellant as substantially affirmed by the prosecution had created a reasonable doubt as to this participation in the crime. That doubt ought to inure to the benefit of the 2nd appellant so as to entitle him to a discharge and acquittal and I so hold.”

Where evidence of prosecution witnesses specifically and unequivocally pins down an accused person to the scene of crime and say that he committed the offence, failure to investigate the alibi by the police will not result in an acquittal of the accused. In such a situation, the failure to investigate the alibi is not only superfluous but also otiose. In the light of the evidence of P.W.1, P.W.2 and P.W.3, specifically pinning him to the murder of the deceased, it was, with the greatest respect, not available to the Court of Appeal to discharge and acquit the 2nd appellant on the so-called alibi.

The appellant, who was the 1st appellant in the Court of Appeal also set up the defence of alibi. He said inter alia:

“On the 29th January, 2000, I was at Ajere Mkpami. The money I had could afford the hiring of two labourers to clear my farm, so I saw the D.W.4 and one other boy and I sent my son Ebri Bassey Ebri to call them for me. When the two labourers came I explained to them what I wanted and when we struck a bargain they went back to their houses to prepare themselves before coming to the farm. After they had eaten the food my wife cooked for me and I asked them to go towards the farm before I would use my motorcycle to pursue them. I subsequently followed them towards the farm with my motorcycle where I parked at a place where my motorcycle could no longer pass. We arrived the farm at about 7.30 a.m. At the bush I joined the labourers in clearing the bush. We were in the bush until about 4.00 p.m when they left for home and I entered my house at about 5.00 p.m.”

The Court of Appeal did not accept the alibi set up by the appellant. The court quoted a little portion of the alibi in Exhibit ‘E’, the statement of the accused to the police and said:

“This alibi is rather scanty. The names and addresses of the two boys mentioned were not stated nor was the time the 1st appellant went to farm indicated. With the paucity of the particulars of the alibi, one could not have expected the police to go on a wild goose chase.”

With respect, I do not entirely agree with the Court of Appeal. D.W.4 was one of the persons who was called as a labourer to work on

the farm of the appellant. His name is Ibiang Sampson Obongha. Although the two courts did not believe the evidence of D.W.4, that is not to say that the alibi had no content for investigation.

What was the alibi set up by the 2nd appellant that convinced the Court of Appeal. He said in his evidence in-chief:

“I remember the 29th day of January, 2000. I left my house as early as some minutes to 6.00 a.m. Picked a motorcycle and arrived the office at about a minute after 6.00 a.m. I signed the time book and waited for the master commenced by seven (7.00 a.m.) and addressed the general gang and assigned them to various operation for the day. Thereafter we waited for the Estate Manager to tidy up and invite us for the general field staff meeting where we submitted our reports based on our previous day’s duties as well as take instructions from the Manager for the day’s activities. This took us to eight (8.00 a.m). Thereafter I bought food in the Estate canteen and took my breakfast and then proceeded to the field to join my tappers. At the end of the day’s operation I arrived my house at 3.30 p.m. I know nothing about the murder of Egoma Obla as alleged by the prosecution.”

The above was the alibi accepted by the Court of Appeal. One of the reasons for rejecting the alibi of the appellant is that he did not mention the names of the two boys. I should say that the above alibi believed by the Court of Appeal, with the greatest respect, did not specifically mention any names. Certainly, what is good for the goose is also good for the gander. The point I am struggling to make is that if the 2nd appellant was discharged and acquitted, there was nothing peculiar or unique in the evidence against the appellant to warrant a conviction. This is not to say that the acquittal of the 2nd appellant was proper in the light of the facts of the case. I will return to that later:

Let me now take the 3rd appellant. The 3rd appellant was discharged and acquitted by the Court of Appeal because his name was not mentioned “at the earliest opportunity, that is, when the prosecution witnesses made their statements to the police.” The court relied on the case of Abudu v. The State (1985) 1 NWLR (Pt. 1) 55. This court held that whenever the case against an accused depends wholly or substantially on

the correctness of the identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special regard for caution before convicting the accused in reliance on the correctness of the identification. This court also earliest opportunity the name
 B or names of the person or persons seen committing an offence, a court must be careful in accepting his evidence given later and implicating the person or persons charged, unless a satisfactory explanation is given. This is because such delay makes the evidence of identity suspicious and
 C reduces the truth content of the evidence below acceptable and probative level.

This court did not hold in Abudu that a court cannot convict on an eye witness evidence which omits to mention at the earliest opportunity the name or names of the person or persons seen committing the of-
 D fence. What this court said is that it must be careful in accepting such evidence.

The above apart, the factual position does not justify the position taken by the Court of Appeal. The learned trial Judge, in his judgment at
 E page 183, said:

*“On the submission that the 3rd accused was not mentioned, the learned counsel has himself conceded that P.W.7 and P.W.8 explained that Ubi Eyeng in exhibit 8 referred to the 3rd accused person. In Bashaya
 F v. State (1998) 4 S.C. 199, (1998) 58 LRCN 3596 at 3597 the Supreme Court has authoritatively laid it down that it is not in all cases that identification parade is necessary and its absence is not fatal particularly where the offence was committed in broad day light with no obstruction of vision between the witnesses and the assailants.”*

**It is clear to me that the evidence in respect of the appellant is inextricably interwoven around the two co-accused persons who were discharged and acquitted by the Court of Appeal. In other words, it is the same evidence of P.W.1, P.W.2 and P.W.3, that gave
 H rise to the conviction of the appellant that resulted in the discharge and acquittal of the two co-accused persons. In the circumstances, the Court of Appeal was bound to also discharge and acquit the appellant.**

I should mention by way of obiter whether the Court of Appeal was right in discharging and acquitting the two co-accused persons. In my view, the court was clearly in error in discharging and acquitting the co-accused persons. As a matter of law and fact, there was enough to convict all the three accused persons and that is what the learned trial Judge did. But this court cannot take the issue further as there is no appeal by the prosecution. B

Similar issue arose in Umani v. The State (1988) 1 NWLR (Pt.70) 274, where Nnamani, JSC., in his leading judgment said at page 286: C

“Those accused persons ought not to have been discharged. Luckily for them, however, their case is not before this court, there being no appeal against their discharge. What is, therefore, in issue is whether these errors do in any way affect the case of the appellant.” D

Of course, the appellant in Umani’s case was discharged and acquitted by a majority judgment. And so I have no alternative than to discharge and acquit as the appellant, a person I think clearly committed the offence of murder. This is clearly one area where the law is really an ass. There is nothing I can do about it. E

In sum, the judgment of the Court of Appeal is set aside. The appellant is discharged and acquitted.

F

BELGORE JSC

The same set of evidence that linked the appellant with the crime tried linked the other accused persons already discharged and acquitted. There is no extra evidence to make the purported role of the appellant different from those the court below held found not proved. The doubt in the proof availing the other accused discharged and acquitted ought to extend to the appellant. I therefore agree with the judgment of Tobi, JSC., that the appellant is also entitled to discharge and acquittal. I also allow the appeal and enter a verdict of discharge and acquittal in favour of the appellant. G H

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother, Niki Tobi, JSC., in draft, and I agree that this appeal ought to be allowed. The evidence which the Court of Appeal relied upon to discharge the two co-accused of the appellant was inextricably interwoven with the defence put up by the appellant in trying to exculpate himself from the charge of murder of Egoma Oden Obla. It is not safe under the circumstances to discharge the two co-accused and affirm the conviction of the appellant when there is no separate evidence incriminating him for the offence charged.

I therefore allow the appeal and discharge and acquit the appellant.

D

ONU JSC

Having had the privilege to read before now the judgment of my learned brother, Tobi, JSC., just delivered, I entirely agree with him that the appeal is meritorious and ought therefore to succeed.

The facts of this case have been so exhaustively reviewed and spun out by my learned brother, in the leading judgment need any further restatement. It will suffice to first of all set out the first of the three issues proffered for our determination before I settle down to only Issue 1 which I consider germane and enough to dispose of this appeal.

ISSUE NO. 1

Whether the conviction and death sentence of the appellant can be sustained in the face of the acquittal of the two co-accused persons. The first and vital question for the consideration of the issue is whether the conviction and death sentence of the appellant can be sustained in the face of the acquittal of the two co-accused persons, Bassey Ofem Obla and Ubi Ofem Bassey who in the court below both ended up being discharged and acquitted while the appellant's appeal against the death sentence was dismissed.

It is now settled law, it is contended, that when a court has totally discredited and rejected evidence of a witness and refused to use it as a

basis of convicting an accused person, the court should decline to use the same evidence as a basis of convicting another accused person where the evidence linking the accused persons to the offence charged is inextricably interwoven and inseparable, which in effect means that if one tried for the same offence with another is discharged and acquitted, the other should also be discharged and acquitted as well. B

In the instant case, the conviction of the appellant and the two co-accused persons by the trial court was undoubtedly based on the cumulative evidence which P.W.1, P.W.2 and P.W.3 gave linking the appellant with the two co-accused persons acquitted by the court below. The sum total of the evidence of these three witnesses, it is argued, is to identify the appellant and the co-accused persons as participes criminis being at the scene of the crime and as together. In the not-too-dissimilar case of Fatai Adele v. The State (1995) 2 NWLR (Pt.377) 269 at 293 E – H D decided on the principle of whether the court below (court of Appeal) properly evaluated the evidence of P.W. 3 against the appellant before using it to confirm the conviction and sentence of the appellant by the High Court, this court held in conclusion. “Consequently, if one is discharged and acquitted, the other should also be discharged and acquitted as well”, See also Kalu v. The State (1988) 10 – 11 S.C. 19, (1988) 4 NWLR (Pt. 90) 503 at 505 and State v. Ogbubunjo (2001 1S.C. (Pt.1) 90, (2001) 2 NWLR (Pt.698) 576 at 590-591 E; 608F. Undoubtedly, the conviction of the appellant and the two co-accused persons by the trial court was based on the evidence of P.W.1, P.W.2 and P.W.3 linking the appellant and the two co-accused persons to the offence as set out hereunder as follows: F

P.W.1- “On the 29th of January, 2000, while in my farm working, I heard a voice shouting that Ekori people should not allow Mkpani people to kill me. When I heard this alarm from his farm I rushed towards the said farm. As I got there and hid at about twenty meters away behind a tree I saw the 1st, 2nd accused and 3rd accused beating up the deceased.” H G

P.W.2: “I went to Mkpani in the course of my business on that fateful date and picked passenger load at Mkpani along with my cyclist friend, Eteng Ibor Ubi. On our way coming back from Mkpani I met a

group of people with my friend Egoma Oden Obla being dragged my said cyclist friend Ibor Ubi. The accused persons were the people I saw dragging Egoma. The three accused persons were the only persons I recognized amongst the group because I had known them but I can identify them if see.”

P.W.3:- “On the 29th day of January, 2000, I was coming from Mkpani having picked indeed a woman passenger from Mkpani market to Ekori junction when I reach the spot where the road was bad near the Mkpani secondary school, I met the P.W.2 and he stopped me. I saw a crowd of over forty persons dragging a young boy whom I later recognised as Egoma Oden in the midst of the crowd who were all Mkpani men. The three accused persons were there along with the crowd and armed with single barrelled (sic).”

The above pieces of evidence coming from P.W.1, P.W.2 and P.W.3, linking the appellant and the other two accused persons acquitted by the court below of the offence charged clearly appears inextricably and inseparable and aimed in sum as depicting P.W.1, P.W.2 and P.W.3, identifying the appellant and the co-accused persons as being at the scene of the crime. As can be deciphered from the record, none of P.W.1, P.W.2 and P.W.3, gave additional evidence of the individual acts of the three accused persons at the scene of the crime either in the extra judicial statements to the police or in oral evidence before the trial court that would have the effect of separating the evidence against each of the accused persons. From the totality of the evidence of P.W.1, P.W.2 and P.W.3, upon which the conviction of the appellant and the co-accused persons could be obtained by the trial court and their evidence (of all three witnesses) from which only appellant could be convicted, there would appear clear that the criminal trial in the two courts below is equivocal – equivocal in the sense that such a conviction is consistent with both the guilt and the innocence of the two co-accused and the appellant vide The State v. Dr. Muhtari Kura (1975) 2 S.C. 83. Such a conviction cannot be allowed to stand. In short, the evidence of P.W.1, P.W.2 and P.W.3 against all three accused persons can be summarised thus: “We saw a group of hostile Mkpani people including the three accused persons ab-

ducting the deceased.” From this piece of evidence all three persons accused of killing the deceased or none of them should be convicted of the offence of the murder of the deceased.

However, the court below discredited and rejected the evidence of P.W.1, P.W.2 and P.W.3 when it acquitted and discharged the co-accused persons. The court below too, in doing so, held in respect of the 2nd accused person thus:

“I am of the view that the alibi (sic) set by 2nd appellant as substantially affirmed by the prosecution had created a reasonable doubt as to his participation in the crime. That doubt ought to enure to the benefit of the 2nd appellant so as to entitle (sic) him to a discharge and acquittal and I so hold.”

While in respect of the 3rd accused person the court below held that:

“On that score, I think a reasonable doubt has been created in the case of the prosecution. That doubt ought to enure in favour of the 3rd appellant.”

From the foregoing, I am of the firm view that the court below having discredited and rejected the evidence of P.W.1, P.W.2 and P.W. 3 in respect of the 2nd and 3rd accused persons, could not properly utilize the same evidence to uphold the conviction of the appellant, for both amount to contradiction in terms. For this reason, the cases of State v. Aibangbee (1988) 7 S.C. (Pt. 1) 96, (1988) 3 NWLR (Pt. 84) 548 and Ikemson v. State (1989) 6 S.C. (Pt.1) 114, (1989) 3 NWLR (Pt.110) 455 are, in my opinion, distinguishable from the instant case. This is the moreso because the court below acquitted the 2nd and 3rd accused persons whose fate was inextricably tied to the appellant’s – all there having been tried together and there was no appeal by the prosecution against the acquittal of the 2nd and 3rd accused.

In consequence of the foregoing, I have no hesitation in resolving the issue hereof in the appellant’s favour.

For the reasons I have given above and the more detailed and H comprehensive ones contained in the leading judgment of my learned brother, Niki Tobi, JSC., I too allow the appeal and enter a verdict of discharge and acquittal in the appellant’s favour.

KALGO JSC

I have read in advance the judgment of my learned brother, Tobi,
B JSC., delivered in this appeal. He has in it, painstakingly dealt with all the
issues raised and I have nothing useful to add. I fully adopt as mine his
reasoning and conclusions in the said judgment and find merit in the
appeal. I accordingly allow it, set aside the conviction and sentence passed
C on the appellant by the trial court and affirmed by the Court of Appeal
and hereby discharge and acquit him.

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