

COURT OF APPEAL  
ENUGU JUDICIAL DIVISION  
HOLDEN AT ENUGU  
16TH MARCH, 1993. CA/E/65/92  
CORAM:- G.A. OGUNTADE, S.O. UWAIFO, S.A. AKINTAN JJCA

1. JOSEPH NNOLIM  
(ALIAS CHIKADELA MARKETING NIG.) ..... APPELLANTS  
2. SUNDAY NWAFOR  
(ALIAS S.J. NWAEZE ENTERPRISES NIG.)  
V.  
THE STATE ..... RESPONDENT

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APPEALS - Grounds of appeal - Issue of alibi - That does not arise from any of the grounds - Will not be considered - And alibi being of major consequence - Cannot be canvassed under the omnibus ground (H1)

CRIMINAL PROCEDURE - Proof - Duty on prosecution - Is to prove its case beyond reasonable doubt - As failure will lead to acquittal - And lingering doubt resolved in favour of accused (H2)

CRIMINAL PROCEDURE - Witnesses - Unresolved issue flowing from prosecution's evidence - If not resolved by further evidence - Prosecution would fail (H3)

CRIMINAL PROCEDURE - Burglary - Witnesses - Vital witness - Where from the state of prosecution's evidence - A party becomes a vital witness - Prosecution's failure to produce him is fatal (H4)

CRIMINAL PROCEDURE - Stealing - Witnesses - Conflict in evidence of two witnesses - Where not material - Both witnesses should not be regarded as unreliable (H5)

CRIMINAL PROCEDURE - Witnesses - Contradiction in the evidence of

two witnesses - Where doubt is created thereby - It should be resolved in favour of the accused (H6)

CRIMINAL PROCEDURE - Burglary - Stealing - Receiving stolen property - Proof - Where it was not shown free from doubt - That the alleged stolen property - Belongs to the complainant - Prosecution's case must fail - And the conviction set aside (H7)

### **FACTS**

Before the Anambra State High Court, Awka, the two appellants were tried on a three count charge of conspiracy, burglary and stealing. The trial judge acquitted and discharged both on the count of conspiracy. He convicted the 2<sup>nd</sup> appellant of the offences of burglary and stealing, while 1<sup>st</sup> appellant was found guilty of receiving stolen property in substitution. Each of the appellants being dissatisfied, appealed to the Court of Appeal.

From the state of the evidence, it seems the prosecution failed to prove its case beyond reasonable doubt. The property that was alleged to have been stolen, a video cassette recorder, Exhibit G, was not shown free from doubt to be the complainant's property. A vital witness that ought to have been called by the prosecution did not give evidence.

### **ISSUES FOR DETERMINATION**

(a) Could the video cassette recorder which the 2<sup>nd</sup> accused/appellant sold to the 1<sup>st</sup> accused on 22/2/88 almost five months before the house of the complainant was burgled on 16/6/88, (and his video cassette recorder stolen), be the complainant's video cassette recorder?

(b) The learned trial judge having found as a fact that the alleged video cassette recorder Exbit 'G' was not the video cassette recorder which the P.W.3 sold to the 2<sup>nd</sup> accused/appellant, was he right in convicting the 2<sup>nd</sup> accused/appellant of burglary and stealing of Exbt 'G' when the only evidence against him was that he bought a video cassette from p.w.3 on 20/2/88 which he sold to the 1<sup>st</sup> accused? Etc. see p.

**HELD** (Unanimously allowing the appeal per **UWAIFO JCA**)

***Grounds of appeal - Issue of alibi***

1. As regards issue (c) in appellants' brief of argument and issue (ii) in respondent's brief, each about alibi, I observe that that issue does not arise from any of the grounds of appeal in any manner. It has been repeatedly said that the only issues relevant for determination are those which can be associated with any of the grounds of appeal filed: see *Okoro v The State* (1988) 5 NWLR (pt.94) 255 at 272 per Karibi-Whyte JSC. I therefore do not consider it necessary to deal with the question whether an alleged alibi ought to have been investigated by the police. Besides, alibi is a fundamental issue of defence denying any connection with a particular offence charged. If it is properly raised but the police failed to investigate it, it becomes open to the convict to specifically complain of it in his ground of appeal. Its legal consequences are so far reaching that it is not an issue to be canvassed by the appellant under the omnibus ground of appeal. (p. 1471 D)

***Proof - Duty on prosecution***

2. It is a cardinal principle of law that the prosecution has a duty to prove its case beyond reasonable doubt. Where there is reasonable doubt, or put differently, where there is any lingering doubt, it should be resolved in favour of the accused: See *Bakare v The State* (1987) 1 NWLR (pt. 52) 579 at 587-588 per Oputa JSC. Failure to discharge that burden of proof will automatically lead to the acquittal and discharge of the accused: See *Ikemson v The State* (1988) 3 NWLR (pt.110) 455 at 466 per Belgore JSC. (p. 1478 B)

***Unresolved issue flowing from prosecution's evidence***

3. If in the prosecution of a criminal case, there is a vital issue either from the nature of the case or from the evidence led and there is one witness whose evidence would settle it one way or another, that witness ought to be called. It follows that if the prosecution makes a piece of evidence, oral or documentary, part of its case but that evidence calls for more exploration in order to resolve a vital issue, then it is the duty of the

prosecution to undertake such exploration.

If it fails to do so, the vital issue will remain unresolved. Consequently the prosecution would have failed to prove its case beyond reasonable doubt. I think this follows from the observation in Opayemi v The State B (1985) 2 NWLR (pt. 5) 101 at 108-109 per Uwais JSC. (p. 1478 E)

***Burglary - Witnesses - Vital witness***

4. It seems to me that the state of the evidence was such that Donmarts Nigeria Enterprises necessarily became vital witness. The cash sales invoice (exh. F) purported to have emanated from them does not contain the serial number and full description of the National Video recorder p.w.3 bought from them which he claimed to have sold to the 2<sup>nd</sup> appellant. It is they who would have been able, probably from their records, to supply the missing link and that would have determined if exhibit G was the Video Recorder or not. The police ought to have carried out the exploration. The burden was on the prosecution to produce that vital evidence. Since it failed to do so, it did not prove its case, in my view, E against the appellants beyond reasonable doubt. (p. 1480 D)

***Conflict in evidence of two witnesses - Where not material***

5. Now, this is not the sort of conflict that would disentitle the evidence of two witnesses to credibility. It looks most unusual to serve that purpose. It is not that p.w.3 gave evidence as to how a material aspect of an event in respect of a crime happened and p.w.4 gave evidence in respect of that same event differently. In that case the principle laid down in Onubogu v The State (1974) 9 S.C.1 at 20 will have to be resorted to. That principle does not seem to be appropriate here. Take for example that what p.w.4 alleged was said by p.w.3 was put in writing by p.w.3. The use that can be made of it is to discredit him with it if he said something contrary to it. Since it was not in writing, the immediate question H to ask is whether p.w.3 ever said so. That would turn on the credibility of p.w.4. If the learned judge believed him, then the fact of the allegation could only be used to discredit p.w.3. If he does not believe him or there is no basis upon which to found the truth or otherwise of that allegation,

then p.w.3's evidence remains untainted in the eye of the law. Therefore, obviously, the learned judge approached a consideration of the evidence of p.w.4 erroneously. Having done so erroneously, he purported to regard both witnesses as unreliable. That cannot be justified in any way. (p. 1481 H)

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### ***Contradiction in the evidence of two witnesses***

6. But even assuming that he was right that there was conflict on that aspect between the evidence of p.w.3 and p.w.4, the law acknowledges an approach which is clearly that the first consideration is whether the contradiction went materially to the charge against the appellants. Second, whether in the circumstances it did create a reasonable doubt in the case presented by the prosecution that the appellants had no right to the video recorder. Third, if there is such a doubt, in whose favor it should be resolved. The question here is whether p.w.3 identified the video recorder as the one he sold to the 2nd appellant. He said he did. The evidence of p.w.4. is that he could not as long as p.w.3 was not treated as a hostile witness, he cannot in the circumstances of the case be discredited as a witness. Rather, the contradiction if it is contradiction being material to the charge, the doubt created should have been resolved in favour of the appellants. A doubt created by prosecution witnesses whether an accused bought goods he is charged with stealing is definitely a doubt which goes materially to the charge against him. (p. 1482 E)

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### ***Receiving stolen property - Proof***

7. It seems to me it was not shown, free from doubt, that the video cassette recorder, exhibit G, was the property of p.w.1. It was vital that this be established. Not having so done, the prosecution did not prove the offences for which the appellants were convicted in accordance with the standard of proof required in criminal cases. In such a situation an appellate court will disregard the finding of a trial court when the evidence in support of that finding does not show that degree of certainty which should be the criterion in a criminal trial: see Abdullahi Isa v The Queen (1961) 2 SCNLR 347 at 350 per Ademole CJF.

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Accordingly, I find that the issues of burglary, stealing and receiving stolen property as far as the appellants are concerned would not arise. Were it to have been satisfactorily proved that the video cassette recorder belonged to p.w.1., the transaction of sale on 22/2/88 between the 1<sup>st</sup> and 2<sup>nd</sup> appellants would have been indefensible as genuine. The conclusion that the 2<sup>nd</sup> appellant committed burglary and stealing and the 1<sup>st</sup> appellant the offence of receiving stolen property would have been inevitable. But as it is, these appeals should be and are allowed. The conviction and sentence of each of the appellants are set aside. Each of them is acquitted and discharged. (p. 1483 B)

### NOTABLE POINTS OF INTEREST

#### AKINTAN JCA

- D 1. Evidence of identity of stolen property - Is unreliable  
The evidence led in support of the identity of the video later found in the 1<sup>st</sup> appellant's shop was also very unreliable. This is because the complainant failed to identify either his name or the serial number of his stolen recorder on the video recorder tendered in court. All that was relied on was a damage on the handle and that the serial number had been tampered with. Such evidence is not enough to support the contention that the video recorder was that of the complainant. The court is bound to take judicial notice of the fact that JVC video recorder models in issue before him were mass produced and sold in Nigeria and through out the world. It was not shown that the type of damage found on the one tendered was peculiar only to the complainant's set. (p. 1484 F)
- G 2. Receiving stolen property charge - No inference of knowledge  
The court also failed to take into consideration the circumstances surrounding the sale of the video recorder by the 2<sup>nd</sup> appellant to the 1<sup>st</sup> appellant. Thus, for example, it was not established that the prosecution H proved that the sale was made in circumstances, such as to time and place of sale and the amount paid being too low compared with normal market price, so as to warrant the inference that the purchaser knew that he was buying a stolen property. (p. 1485 A)

### **REPRESENTATION**

Nwannah Esq. For the Appellants.

G.C. Emenike Esq, Legal Officer, Anambra State, for the Respondent.

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### **CASES REFERRED TO**

Okoro v The State (1988) 5 NWLR (pt.94) 255 at 272

Modupe v The State (1988) 4 NWLR (pt.87) 130 at 138

Bakare v The State (1987) 1 NWLR (pt. 52) 579

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Onafowokan v The State (1987) 3 NWLR (pt.61) 538 at 544-545

Kalu v The State (1988) 4 NWLR (pt.90) 503 at 513

Ikemson v The State (1988) 3 NWLR (pt.110) 455 at 466

Opayemi v The State (1985) 2 NWLR (pt. 5) 101 at 108-109

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### **STATUTES REFERRED TO**

Criminal Code Cap. 36 Vol.1 Laws of Anambra State 1986, ss. 495(a), 379(a), 353(9)

Evidence Act s.148(a)

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### **LEAD JUDGMENT BY UWAIFO JCA**

At the Awka High Court, the two appellants were tried on a three-count charge of conspiracy, burglary and stealing. On 10 September, 1990, Ekwerekwu, J., gave judgment. The learned judge acquitted and discharged both on the count of conspiracy. He convicted the 2<sup>nd</sup> appellant of the offences of burglary and stealing. As regards the 1<sup>st</sup> appellant, he was found guilty of receiving stolen property in substitution for the offences of burglary and stealing. The 1<sup>st</sup> appellant was sentenced to 1 year I.H.L. or in the alternative, a fine of N1,000.00. The 2<sup>nd</sup> appellant was sentenced on count 2 to 3 years I.H.L. or a fine of N3,600.00 and on count 3, 1 year 6 months I.H.L. or a fine of N1,400.00, sentenced to run concurrently, fines cumulative.

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Each of the appellants complains against the judgment on three grounds which I state without their particulars, namely:

*“1. The learned trial judge misdirected himself in law and on the*

*facts when he held: I have not the least doubt that exhibit G belongs to P.W.1 and I accordingly hold.*

2. *The learned trial judge misdirected himself in law when he held that there is conflict in the evidence of P.W.3. and that of p.w.4 on the issue of the identification of exhibit G.*

3. *The verdict is unreasonable and cannot be supported having regard to the evidence.”*

The appellants then raised seven issues for determination as follows:-

(a) Could the video cassette recorder which the 2<sup>nd</sup> accused/appeal-  
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lant sold to the 1<sup>st</sup> accused on 22/2/88 almost five months before the house of the complainant was burgled on 16/6/88, (and his video cassette recorder stolen), be the complainant’s video cassette recorder?

(b) The learned trial judge having found as a fact that the alleged  
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video cassette recorder Exbit ‘G’ was not the video cassette recorder which the P.W.3 sold to the 2<sup>nd</sup> accused/appealant, was he right in convicting the 2<sup>nd</sup> accused/appealant of burglary and stealing of Exbt ‘G’ when the only evidence against him was that he bought a video cassette  
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from p.w.3 on 20/2/88 which he sold to the 1<sup>st</sup> accused?

(c) The learned trial judge having found as a fact that the police did not investigate the 2<sup>nd</sup> accused/appealant’s alibi raised at the earliest opportunity, was he right in importing the legal principle of “a stronger  
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evidence (of recent possession), against the said alibi in order to convict him”.

(d) If in fact Exbt ‘G’ was the complainant’s stolen video, was the trial judge right in attributing to the 2<sup>nd</sup> accused/appealant the recent possession of the 1<sup>st</sup> accused?

(e) Was there any other evidence connecting the 2<sup>nd</sup> accused/ap-  
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pellant with the burglary and stealing as charged, apart from the fact accepted by both the trial court, the 1<sup>st</sup>, 2<sup>nd</sup> accused/appealant and the P.W.3 that the 2<sup>nd</sup> accused/appealant bought a video cassette recorder  
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which he sold to the 1<sup>st</sup> accused in February, 1988 long before the complainant’s video was stolen?

(f) Did the prosecution prove its case against the 2<sup>nd</sup> accused/appealant beyond reasonable doubt as it was bound to do in a criminal



prosecution?

(g) If the answers to the above questions are in the negative, could the conviction of the 2<sup>nd</sup> accused/appellant be justified in the circumstances?

On his part the respondent's counsel raised the following three issues: B

“(i) *Whether or not Exh. ‘G’ was the Video Cassette Recorder which the 2<sup>nd</sup> accused/appellant bought from P.W.3 (Benny Brothers) on the 20<sup>th</sup> February, 1988;*

*(ii) Whether the appellant’s alibi, that he was at home at the time of the incident, should have been considered in his favour, particularly when the said alibi was not investigated; and* C

*(iii) Whether or not the provisions of Section 148(a) of the Evidence Act were appropriately applied in the appellant’s case.”*

Both parties have raised the same question in their first issue. In D my view, it forms the basis of the case and has to be very considered.

**As regards issue (c) in appellants’ brief of argument and issue (ii) in respondent’s brief, each about alibi, I observe that that issue does not arise from any of the grounds of appeal in any manner. It has been repeatedly said that the only issues relevant for determination are those which can be associated with any of the grounds of appeal filed: see Okoro v The State (1988) 5 NWLR (pt.94) 255 at 272 per Karibi-Whyte JSC. I therefore do not consider it necessary to deal with the question whether an alleged alibi ought to have been investigated by the police. Besides, alibi is a fundamental issue of defence denying any connection with a particular offence charged. If it is properly raised but the police failed to investigate it, it becomes open to the convict to specifically complain of it in his ground of appeal. Its legal consequences are so far reaching that it is not an issue to be canvassed by the appellant under the omnibus ground of appeal.** E F G

See, for example, Modupe v The State (1988) 4 NWLR (pt.87) 130 at 138 per Oputa JSC. H

Let me state in full the charge against the appellants before dealing with the relevant evidence and the crucial issue in this case. The infor-

mation against them reads as follows:-

“STATEMENT OF OFFENCE: COUNT ONE

*Conspiracy contrary to section 495 (a) of the Criminal Code Cap. 36 Vol. 1, Laws of Anambra State of Nigeria, 1986.*

PARTICULARS OF OFFENCE

B *Joseph Nnolim alias Chikadels Marketing Nigeria and Sunday Nwafor alias S.J. Nwaeze Enterprises Nigeria in the night of the 16<sup>th</sup> day of June 1988 at Neni in the Amawbia/Awka Judicial Division conspired with each other to commit felony in the Sate, to wit, burglary.*

C STATEMENT OF OFFENCE: COUNT TWO

*Burglary contrary to section 378(a) of the Criminal Code Cap. 36 Vol. 1, Laws of Anambra State of Nigeria, 1986.*

PARTICULARS OF OFFENCE

D *Joseph Nnolim alias Chikadela Marketing Nigeria and Sunday Nwafor alias S.C. Nwaeze Enterprises Nigeria in the night of the 16<sup>th</sup> day of June 1988 at Neni in the Amawbia/Awka Judicial Division broke and entered the dwelling house of Boniface Ezeadikwa with intent to commit*  
E *a felony therein.*

STATEMENT OF OFFENCE: COUNT THREE

*Stealing, contrary to section 353(9) of the Criminal Code Cap. 36 Vol.1, Laws of Anambra State of Nigeria, 1986.*

PARTICULARS OF OFFENCE

F *Joseph Nnolim alias Chikadels Marketing Nigeria, and Sunday Nwafor alias S.J. Nwaeze Enterprises Nigeria in the night in the Amawbia/Awka Judicial Division stole one 20 inch JVC Colour television set, one video cassette recorder model NV2000EN S/No. LIKE 03871 and rug all*  
G *valued N8,500.00 (eight thousand five hundred naira) property of Boniface Ezeadikwa.”*

There was no evidence in connection with the whereabouts of the JVC Colour television set or the rug. Mr. Boniface Ezeadikwa, (p.w.1),  
H *alleged that his house at Ezeneni Village in Nneni town was broken into on the night of 16 June, 1988 while he was away at No.112 Enugu Road, Abakiliki where he lived and carried on business as a transporter and trader, and the items listed in count 3 above stolen. He testified as to how*

he bought from one Mr. Moshezon for which he got a receipt (receipt reads M. Zion), one Sony TV, one Video recorder (NV-2000EN Serial No. LIKE 03871) and internal antenna (including a stabilizer). Although the receipt bears no date, p.w.1 said the sale took place on 20 June, 1987. The Sony TV and antenna were not among the items stolen. One JVC 20" Color TV valued N5,000.00 (although N3,450.00) was paid for it) and a rug valued N1,000.00, as well as the video recorder already mentioned were the items stolen. The JVC Colour TV was said to have been bought from Ibeano Bros. Enugu on 6 October, 1986.

A report of the burglary was lodged with the police who came to view the scene and took statements from p.w.1 and his caretaker. It appears p.w.1 made three statements: one on 18/6/88, a second one on 21/6/88 and a third one on 24/1/89. He on his own went in search of his stolen property at Nneni and Onitsha markets. On 20/6/88, at the electronics shop at Onitsha market, he saw a video cassette recorder, model NV2000 in the shop of the 1<sup>st</sup> appellant displayed for sale. He said he was immediately able to identify it as his own because he noticed that the hinges of the channel selector cover were broken just as they were at the time he bought the video . He observed now that the broken channel selector was celotaped. He asked the price from the sales assistant who said N2,500.00 He promised to come back the following day. He went to Agulu Police Station to lodge a report. The following morning three policemen went with him to the 1<sup>st</sup> appellant's said shop at No. 72/74 Iweka Road. They took possession of the video cassette recorder.

The 1<sup>st</sup> appellant on being told that the video cassette recorder was the stolen property of p.w.1 said it was sold to him by the 2<sup>nd</sup> appellant for N2,000.00 on 22/2//88 and produced a receipt to that effect, which was admitted as exh Q. On being accosted, the 2nd appellant said he bought it from a Benny Bros. & Co. Ltd of No. 159 Zik Avenue, Uwani, Enugu on 20/2/88 for N1,850.00 and produced a credit invoice to that effect: exh N. The Branch Manager of Benny Bros. & Co. Ltd, Mr. Chibuzo Chiekezie, who testified as p.w.3 confirmed he sold the video cassette recorder to the 2<sup>nd</sup> appellant and produced the carbon copy of the credit invoice forming part of a booklet. It was admitted as exh E.

He himself produced a cash sales invoice showing his company bought on 5/2/88 from Donmarts Nigeria Enterprises, No 1 Odo Osun Street, Off Omididum Street, Lagos, three electronics items including a National video recorder model NV2000.

B In the course of investigation, questions about the model and the serial number of p.w.1's video cassette recorder as compared to those found on the one recovered from the 1<sup>st</sup> appellant were raised. There was allegation that the serial number on the recorder was altered from  
C LIKE03871 to LIKE02777; that the model number NV2000EM was tempered with by the insertion of model Nv7000EM but with 7 having been cleverly altered to read 2; and finally, that the label PAL/SECAM SPEACIAL  
D cassette recorder model NV 7000EM. There was a demonstration made before the trial court to show that model NV2000 always ended with EN while NV7000 ended with EM.

The video cassette recorder in question was first tendered in court  
E as id.1 but later admitted as exhibit G. One Mr. Christopher Eyisi who claimed to work at the Government House Enugu as a Higher Technical Officer in electronic engineering, testified as p.w.5. The relevant aspect of his evidence is as follows:-

F *"This Exh. G is a national video model NV2000EN. EN stands for normal system which is a single system. The model is boldly written at the front of the back. The plate at the back of Exh.G has the model number altered. This particular plate at the back is not the correct plate. It belongs to model NV 7000EM. EM stands for multiple system. In a  
G similar video like Exh.G there is always the same number of operational button. Apart from the colour the credit design of this type of video will always be the same. The model number at the back of Ex. G is altered and that number which is now altered should have been NV 7000. The  
H plate at the back of Exh.G is changed and it bears a serial number In a attempt to change model 7000 to 2000 the person failed to change EM which is multiple system. The manual selector cover is broken from the parent body."*

The video recorder in question was seen by the trial court; so was the other one said to belong to model NV7000. None of the video recorders is before this court, nor having been taken into custody as exhibits by the trial court. Whatever facts of comparison or contrast or alleged alterations that were canvassed at the trial court are not within the visual advantage of this court. B

With the state of the evidence before the trial court, the learned judge took certain facts into account to resolve the issue of the ownership of the video cassette recorder, exhibit G. His reasoning based on the evidence was stated as follows, and I feel obliged to reproduce it in extenso: C

*“Commenting on the case, I have to consider the evidence of p.w.1, p.w.3, p.w.4 p.w.5, the 1<sup>st</sup> and the 2<sup>nd</sup> accused as follows to find out who owns Exh.G, the stolen video cassette recorder.* D

*(i) the video cassette recorder Exh.G is national. This fact is borne out from the evidence of p.w.1, p.w.3, p.w.4, p.w.5, the 1<sup>st</sup> and the 2<sup>nd</sup> accused.*

*(ii) P.W.1 identified Exh.G as his video in the shops of the 1<sup>st</sup> and the 2<sup>nd</sup> accused and in the presence of the 1<sup>st</sup> and 2<sup>nd</sup> accused through the damaged channel selector cover.*

*(iii) P.W.3 saw the damaged channel selector cover at the Agulu Police Station.*

*(iv) P.W.4 saw the damaged selector cover in the shops of the 1<sup>st</sup> and the 2<sup>nd</sup> accused and in their presence.* F

*(v) P.W.5 gave evidence that the channel selector cover was damaged.*

*(vi) The 1<sup>st</sup> accused said that when he bought the video he did not know whether the channel selector cover was intact or not.* G

*(vii) The 2<sup>nd</sup> accused said that the channel selector cover was intact and he saw it through the water proof.*

*Except the 1<sup>st</sup> and the 2<sup>nd</sup> accused, other witnesses testify that the video H cassette recorder in Exh.G has damaged channel selector cover as claimed by P.W.1. all agreed that Exh.G was national.*

*To establish further the ownership of Exh.G, I have to find out*

*from the evidence of the witnesses and the accused persons whether the witnesses and the accused persons saw the model number at the front of Exh.G and whether the model number at the front of Exh.G was intact as claimed by p.w.1.*

**B** (i) *According to the evidence of p.w.1, he said that at the front of the video Exh.G, the model number NV2000EN was intact. This is the model number in his evidence and in Exh.A which is the receipt Moshezion gave to p.w.1.*

**C** (ii) *P.w.3 testified that there was no alteration in the model number NV2000 when he sold the video to the 2<sup>nd</sup> accused.*

(iii) *P.w.4 testified that he checked Exh.G and saw model NV2000 clearly written in its front.*

**D** (iv) *P.w.5 says that Exh.G is model NV2000EN and the model boldly written in the front of Exh. G*

(v) *When the 1<sup>st</sup> accused bought Exh.G. from the 2<sup>nd</sup> accused, he did not know whether there was any alteration or not.*

**E** (vi) *The 2<sup>nd</sup> accused saw the model number NV2000 in the front of the Exh.G.*

*Apart from the evidence of the 1<sup>st</sup> accused, all the prosecution witnesses and the 2<sup>nd</sup> accused testify that the model number in the front of Exh.G is NV2000EN and intact as claimed by P.W.1.*

**F** *Still on ownership of Exh.G. Turning to the plate, the model and the serial numbers at the back of Exh.G, the prosecution witnesses viz: p.w.1, p.w.3, p.w.4 and p.w.5 and the 1<sup>st</sup> and the 2<sup>nd</sup> accused have this to say:*

**G** (i) *In the shops of the 1<sup>st</sup> and the 2<sup>nd</sup> accused and in their presence on 20/6/88, p.w.1. Showed the police the changed/altered plate, the model and the serial numbers at the back of Exh.G was altered from NV2000EN to NV2000EM while the serial at the back of Exh.G was supposed to be LIKE03871 as in Exh.A but he saw the serial number 11KDO2777 at the*  
**H** *back of Exh.G. The 7 in NV7000 was altered to 2.*

(ii) *When p.w.3 sold Exh.G to the 2<sup>nd</sup> accused on 20/2/88, he did not observe any alteration on Exh.G. When P.w.3 saw Exh.G at the Agulu police station on 21/6/88, there was alteration in the model num-*

ber at the back.

(iii) p.w.4 found alterations as in (i) above.

(iv) p.w.5 as an expert witness confirmed in his evidence the alterations on the plate and the model number at the back and that the serial number at the back was engraved thereon.

(v) The 1<sup>st</sup> accused did not know, when he bought the video on 22/2/88, whether there was alteration or not. He admits having seen the alteration in the model number at the back as NV2000EM. He denied making the alterations and that the alterations are as they were when he bought Exh.G.

(vi) The 2<sup>nd</sup> accused did not check the alterations in the model and serial numbers. He says that he has just observed the alterations.

From the evidence above, there is sufficient corroboration of the evidence of p.w.1 that Exh.G was altered as he showed in his evidence in court. The 1<sup>st</sup> accused confirmed that the alterations are as they were when he bought Exh.G. from the 2<sup>nd</sup> accused.

From the statement of the 1<sup>st</sup> accused in Exh.J. dated 21/6/88, it is clear that the alterations in Exh.G were made before p.w.1 and the police came into the picture.

In dealing with PAL/SECAM SPECIAL to determine the ownership, I believe that PAL/SECAM SPECIAL is common to the videos in Exh.B, C and G, whether it is model NV2000 or model NV7000. In the light of the foregoing observations from various testimonies, *supra*, I have not the least doubt that Exh.G belongs to p.w.1 and I accordingly so hold."

I do not think, with due respect, that the issue of ownership can be said to have been satisfactorily settled. Admittedly, the tendency is to have a deep personal feeling that the video recorder, Exh.G, may have been that of the p.w.1 and that it might have reached the possession of the 1<sup>st</sup> appellant in highly suspicious circumstances. But that does not resolve the vital issue whether exhibit G was the video recorder sold by p.w.3 to the 2<sup>nd</sup> appellant. That is the first issue which arises for determination as raised by the appellants and the respondent in their respective briefs of argument. In my view, that has turned out to be the crux of this

case. It is bound to be so particularly, as the evidence shows, there is dispute as to whether the model and serial numbers were tampered with, and having regard that the video recorder left the possession of the appellants and was in the custody of the police, the uncertainty as to whether in fact there were alterations and when they took place and by whom became unsettling. Besides, it is quite a task to decide the crucial issue of ownership from the rather wobbly state of the evidence of alteration or manipulation of marks of identification as alleged.

**It is cardinal principle of law that the prosecution has a duty to prove its case beyond reasonable doubt. Where there is reasonable doubt, or put differently, where there is any lingering doubt, it should be resolved in favour of the accused: See Bakare v The State (1987) 1 NWLR (pt. 52) 579 at per Oputa JSC. Onafowokan v The State (1987) 3 NWLR (pt.61) 538 at 544-545 per Kazeem JSC; Kalu v The State (1988) 4 NWLR (pt.90) 503 at 513 per Nnamani JSC. Failure to discharge that burden of proof will automatically lead to the acquittal and discharge of the accused: See Ikemson v The State (1988) 3 NWLR (pt.110) 455 at 466 per Belgore JSC.**

**If in the prosecution of a criminal case, there is a vital issue either from the nature of the case or from the evidence led and there is one witness whose evidence would settle it one way or another, that witness ought to be called. It follows that if the prosecution makes a piece of evidence, oral or documentary, part of its case but that evidence calls for more exploration in order to resolve a vital issue, then it is the duty of the prosecution to undertake such exploration. If it fails to do so, the vital issue will remain unresolved. Consequently the prosecution would have failed to prove its case beyond reasonable doubt. I think this follows from the observation in Opayemi v The State (1985) 2 NWLR (pt. 5) 101 at 108-109 per Uwais JSC.**

In the present case, it is the prosecution which tendered exhibit E (same as exh. N) and also exhibit F. These exhibits tend to show the sale and subsequent movement of a National video cassette recorder model NV2000 from Donmarts Nigeria Enterprises to Benny Bros & Co. Ltd.,



then to the 2<sup>nd</sup> appellant. Exhibit G is the document by which the 2<sup>nd</sup> appellant sold to the 1<sup>st</sup> appellant. Benny Bros. & Co. Ltd (through the evidence of p.w.3, the Branch Manager), the 2<sup>nd</sup> appellant and the 1<sup>st</sup> appellant say the said recorder is exhibit G in question. During his evidence-in-chief, p.w.3 tendered exhibit E with which he said he sold the recorder in question (i.e. Id.1 later admitted as exh.G) to the 2<sup>nd</sup> appellant on 20/2/88. He also tendered exhibit F with which he said he bought the said recorder from Donmarts Nigeria Enterprises. He testified *inter alia*:  
*"I sold the video to the 2<sup>nd</sup> accused together with the carton and the manual. I issued the 2<sup>nd</sup> accused a receipt when I sold the video to him ..... after about five months, the 2nd accused came with a policeman to our shed. The 2nd accused told me that the video I sold to him was suspected by the police that it was stolen. That I should explain to them. I explain to them how I got the video; showed them the particulars of the video and that was the receipt. I bought the video from Donmarts (Nig.) Enterprises at No 1 Odoshin Street, Lagos. I have a receipt issued to me by Donmarts (Nig.) Enterprises Lagos ..... When we got to the police station, the police showed me a video. The Id.1 is the video the police showed me. This is the video I sold to the 2<sup>nd</sup> accused ad it is ID 1. The video is identified by me."*

There was an attempt at a later stage by the prosecutor to treat p.w.3 as a hostile witness. When he applied to the court to do so, the court readily granted the application. But on referring to a portion of the statement made to the police by the witness, the prosecutor conceded that there was no contradiction and so he abandoned the process to treat p.w.3 as a hostile witness. It appears also that p.w.3 said the recorder is a PAL/SECAM Special although p.w.1 said his recorder was just the normal system not PAL/SECAM Special. As already indicated, p.w.5 who testified as if an expert said EN represented normal system while EM stood for multiple system. He then said in cross-examination:  
*"In a plate of 7000 serial number should be blank. In this Exh.G this serial number should not be here; the serial number must have been engraved by somebody. An example is Exh.G which has no serial number as it is NV7000. In Exh.G, there is inside it the model number MV2000EM*

*which contradicts the earlier evidence that the model number should be NV2000EN. This was on a paper neatly pasted inside."*

This is all very confusing. The witness appears to refer to exhibit G as belonging to serial number NV7000 whereas p.w.1 claims that his video (which he says is the said exhibit G) belongs to NV2000 series. Exhibit G, from what p.w.5 further said, is the EN type, which is the normal system. But EM was found inside it, which makes it multiple system. But the learned judge seemed to have been unable to understand the difference between PAL/SECAM Special and the normal system bearing in mind that p.w.1. disclaimed the PAL/SECAM Special inscription found on Exhibit G. The learned judge said:

*"I believe that PAL/SECAM SPECIAL is common to the videos in Exhs B, C and G, whether it is model NV2000 or model NV7000."* This certainly would tend to becloud a proper determination whether the appellants ought a PAL/SECAM SPECIAL video recorder or stole/received a normal system video recorder.

**It seems to me that the state of the evidence was that Donmarts Nigeria Enterprises necessarily became a vital witness. The cash sales invoice (exh.F) purported to have emanated from them does not contain the serial number and full description of the National Video recorder p.w.3 bought from them which he claimed to have sold to the 2<sup>nd</sup> appellant. It is they who would have been able, probably from their records, to supply the missing link and that would have determined if exhibit G was the Video Recorder or not. The police ought to have carried out the exploration. The burden was on the prosecution to produce that vital evidence. Since it failed to do so, it did not prove its case, in my view, against the appellants beyond reasonable doubt.**

The evidence of p.w.3 was against the case presented by the prosecution.. The learned trial judge apparently did not know what to do with it. He decided to take a course which, with all due respect, is incomprehensible to me. I shall quote him. He said:

*"Coming to the evidence of p.w.3, Chibuzor Chikezie, he identified Exh.G as the video he sold to the 2<sup>nd</sup> accused. But p.w.4, P.C.*

*Nicholas Oliokwe gave evidence of his investigation and said that p.w.3, Chibuzor Chikezie told him at the Agulu Police station that he (p.w.3) could not know the exact video he sold to the 2<sup>nd</sup> accused unless with the receipt he issued out which would bear the serial and the model numbers. That the reason why p.w.3 could not identify the video was because the receipt he issued to the 2<sup>nd</sup> accused did not bear the serial number. In view of this conflict in evidence of p.w.3 and p.w.4, I regard their evidence to that extend as unreliable and therefore disregard that evidence.”* B

I cannot see how the conflict identified by the learned trial judge in the evidence of p.w.3 and p.w.4 would rightly lead him to purport to disregard the evidence of p.w.3 which identified exhibit G as the video recorder he sold to the 2<sup>nd</sup> appellant; and thereby find it appropriate to convict on the remaining evidence. At no stage in his evidence did p.w.3 hesitate in identifying the recorder. At no stage in his evidence was any suggestion made to him that he told p.w.4 what he (p.w.4 later alleged as to the inability of p.w.3 to identify the recorder. What p.w.4 said in his evidence is this: D

*“Based on the statement made by the 2<sup>nd</sup> accused, I went to Benny Bros Electronics Nig. Ltd. At No. 159 Zik Avenue Uwani Enugu. There I met p.w.3 who is the Manager of Benny Brothers. I introduced myself to him, as a police officer and told him my mission. He made a statement voluntarily at Enugu. Thereafter he came to Agulu police station to identify Exh.G but he said he could not know the exact video he sold to the 2<sup>nd</sup> accused, unless with the receipt he issued out which would bear the model and the serial numbers. The reason why he could not identify the video was because the receipt he issued did not bear the serial number. Benny Brothers bought the video from Donmarts Lagos – see Exh. E.”* F G

Whereas p.w.3 said when he got to the police station, he identified exhibit G (the video recorder) as the one he sold to the 2<sup>nd</sup> appellant.

**Now, this is not the sort of conflict that would disentitle the evidence of two witnesses to credibility. It looks most unusual to serve that purpose. It is not that p.w.3 gave evidence as to how a material aspect of an event in respect of a crime happened and** H

p.w.4 gave evidence in respect of that same event differently. In that case the principle laid down in Onubogu v The State (1974) 9 S.C.1 at 20 will have to be resorted to. That principle does not seem to be appropriate here.

B Take for example that what p.w.4 alleged was said by p.w.3 was put in writing by p.w.3. The use that can be made of it is to discredit him with it if he said something contrary to it. Since it was not in writing, the immediate question to ask is whether p.w.3 ever said so. That would turn on the credibility of p.w.4. If the learned judge C believed him, then the fact of the allegation could only be used to discredit p.w.3. If he does not believe him or there is no basis upon which to found the truth or otherwise of that allegation, then p.w.3's D evidence remains untainted in the eye of the law. Therefore, obviously, the learned judge approached a consideration of the evidence of p.w.4 erroneously. Having done so erroneously, he purported to regard both witnesses as unreliable. That cannot be justified in any way.

E But even assuming that he was right that there was conflict on that aspect between the evidence of p.w.3 and p.w.4, the law acknowledges an approach which is clearly that the first consideration is whether the contradiction went materially to the charge against F the appellants.

Second, whether in the circumstances it did create a reasonable doubt in the case presented by the prosecution that the appellants had no right to the video recorder. Third, if there is such a doubt, in whose favor it should be resolved. The question here is whether G p.w.3 identified the video recorder as the one he sold to the 2nd appellant. He said he did. The evidence of p.w.4. is that he could not as long as p.w.3 was not treated as a hostile witness, he cannot in the circumstances of the case be discredited as a witness. Rather, H the contradiction if it is contradiction being material to the charge, the doubt created should have been resolved in favour of the appellants. A doubt created by prosecution witnesses whether an accused bought goods he is charged with stealing is definitely a doubt

**which goes materially to the charge against him.** In Ikemson v The State (1989) 3 NWLR (Pt. 110) 455 at 466, Belgore JSC said:

*“If there are contradictions in the evidence of the prosecution, and the contradictions go materially to the charge, doubt will be created and benefit of it must be given the accused person, in which case he will be discharged.”* B

**It seems to me it was not shown, free from doubt, that the video cassette recorder, exhibit G, was the property of p.w.1. It was vital that this be established. Not having so done, the prosecution did not prove the offences for which the appellants were convicted in accordance with the standard of proof required in criminal cases. In such a situation an appellate court will disregard the finding of a trial court when the evidence in support of that finding does not show that degree of certainty which should be criterion in a criminal trial: see Abdullahi Isa v The Queen (1961) 2 SCNLR 347 at 350 per Ademole CJF.** D

Accordingly, I find that the issues of burglary, stealing and receiving stolen property as far as the appellants are concerned would not arise. Were it to have been satisfactorily proved that the video cassette recorder belonged to p.w.1., the transaction of sale on 22/2/88 between the 1<sup>st</sup> and 2<sup>nd</sup> appellants would have been indefensible as genuine. The conclusion that the 2<sup>nd</sup> appellant committed burglary ad stealing and the 1<sup>st</sup> appellant the offence of receiving stolen property would have been inevitable. But as it is, these appeals should be and are allowed. The conviction and sentence of each of the appellants are set aside. Each of them is acquitted and discharged. If they have paid the fines imposed on them it is ordered that the money be refunded to them. It follows also that the video cassette recorder in question ought to be handed back to the 1<sup>st</sup> appellant. It is so ordered. E F G

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**OGUNTADE JCA**

I read before now the lead judgment of my learned brother Uwaifo J.C.A. I am satisfied that the guilt of the appellants was not established on the standard required by law.

B I would allow the appeal as in the lead judgment and discharge and acquit the appellants.

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**AKINTAN JCA**

C I had the privilege of reading the draft of the judgment just delivered by my learned brother, Uwaifo, J.C.A. The facts of the case and the issues raised in the appeal are well set out and discussed in the judgment. I agree with his reasoning and conclusions.

D The main issues to be proved by the prosecution in the case are whether the complainant's house was burgled by the 2<sup>nd</sup> appellant or his agents; whether the video recorder later found in possession of the 1<sup>st</sup> appellant was one of the properties stolen from the complainant's house  
E during the burglary; and whether the 1<sup>st</sup> appellant knew or could be deemed to know that the video recorder he bought from 2<sup>nd</sup> appellant was a stolen property at the time he bought it.

It is apparently clear from the evidence adduced by the prosecution that none of the appellants was identified at complainant's residence  
F when the place was burgled. The evidence led in support of the identity of the video later found in the 1<sup>st</sup> appellant's shop was also very unreliable. This is because the complainant failed to identify either his name or the serial number of his stolen recorder on the video recorder tendered in  
G court. All that was relied on was a damage on the handle and that the serial number had been tampered with. Such evidence is not enough to support the contention that the video recorder was that of the complainant. The court is bound to take judicial notice of the fact that JVC video  
H recorder models in issue before him were mass produced and sold in Nigeria and through out the world. It was not shown that the type of damage found on the one tendered was peculiar only to the complainant's set

The court also failed to take into consideration the circumstances surrounding the sale of the video recorder by the 2<sup>nd</sup> appellant to the 1<sup>st</sup> appellant. Thus, for example, it was not established that the prosecution proved that the sale was made in circumstances, such as to time and place of sale and the amount paid being too low compared with normal market price, so as to warrant the inference that the purchaser knew that he was buying a stolen property.

It is trite law that the onus of proof in criminal matters is placed strictly on the prosecution. Similarly, the standard of proof required is proof beyond reasonable doubt. Thus where the prosecution fails to discharge the burden of proof on it under the law or a doubt is created in the evidence relied on by the prosecution, the result is that the doubt must be resolved in favour of the accused: See Ikemson v. The State (1989) 3 N.W.L.R. (pt.110) 455 (S.C.); Kalu v. The State (1988) 4 N.W.L.R. (pt.90) 503 (S.C.) and Onafowokan v. The state (1987) 3 N.W.L.R. (pt 61) 538 (S.C.). I therefore agree that the prosecution has failed to prove its case against the two appellants in this case as required by law. They are accordingly entitled to be discharged and acquitted. I therefore allow the appeal, set aside the conviction and sentence imposed on each of them and substitute them with orders as in the leading judgment.

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