

SUPREME COURT OF NIGERIA
14TH JANUARY, 2005 SC. 203/2003
CORAM:- M. L. UWAIIS CJN, I. L KUTIGI, A. I. KATSINA-ALU,
S. O. UWAIFO, A. O. EJIWUNMI, I. C. PATS-ACHOLONU,
G.A. OGUNTADE, JJSC

1. CYRIACUS OGIDI
2. AUGUSTINE AWUZIE
3. PAUL UZOECHI APPELLANTS
4. CHUKWUDI OGIDI
V.
THE STATE RESPONDENT

CRIMINAL PROCEEDINGS - Record of proceedings - Impeachment of
- S. 36(7) of the 1999 Constitution - Supreme Court cannot find a viola-
tion of the section - Where the record is not formally impeached (H1)

CRIMINAL PROCEDURE - Proof beyond reasonable doubt - Trial court
- Must consider favourable and unfavourable evidence - Before finding
whether burden of proof is discharged (H2)

CRIMINAL PROCEDURE - Armed Robbery - Evidence - The totality of
evidence - Confirm 1st appellant's guilt - As rightly found by the lower
courts (H3)

CRIMINAL PROCEDURE - Armed robbery - Proof - Gaps in the evi-
dence of prosecution - Created a possibility of truth - In the accused
persons' evidence (H4)

CRIMINAL PROCEDURE - Conviction - Lies by an accused in parts of
his evidence - Is not a legal ground for his conviction (H5)

CRIMINAL PROCEDURE - Guilt - Circumstantial evidence - That is
capable of two possible interpretations - Cannot establish the guilt of the

accused (H6)

FACTS

Before the High Court Owerri, the appellants were charged with the offence of armed robbery. They were alleged to have robbed one Mrs. Nnakaihe and Innocent Nnakaihe of some properties while armed with offensive weapons on 1st June, 1997. The weapons used were locally made pistol and machetes. The 1st appellant was identified by two of the prosecution witnesses. Evidence revealed that when the robbers were interrupted by the local vigilante group they ran into the compound of the said appellant. When the Police executed a search, they found some of the stolen properties within the said compound.

It was as the Police came for the search about 12 hours after the robbery incident that they arrested the other appellants some of whom were found in the 1st appellant's house. They said they came to collect drugs from the 1st appellant who was a herbalist. They told lies in parts of their evidence. The trial court convicted all the appellants as charged and sentenced them to death. Their appeal to the Court of Appeal was dismissed by a majority judgment. But the minority judgment upheld only 1st appellant's conviction and allowed the appeal of 2nd to 4th appellants. The appellants have further appealed to the Supreme Court raising various issues similar in part to those raised by the 1st appellant. It was 1st appellant alone that raised a constitutional question.

ISSUES FOR DETERMINATION

“ 1. Whether the 1st appellant's fundamental right under Section 36(7) of the Constitution of the Federal Republic of Nigeria, 1999 was violated in this case and if so, did such violation not render the entire trial and conviction of the 1st appellant unconstitutional, null and void?

2. Whether there was cogent, convincing and satisfactory evidence of proper identification of the 1st appellant as one of the armed robbers that committed the offence of armed robbery in the dwelling house of Innocent Nnakaihe as stated in the information.

3. Whether the particulars of the offence stated in the charge and the essential ingredients of the offence of armed robbery were proved

beyond reasonable doubt to justify the conviction of the 1st appellant for armed robbery?

4. *Whether the conviction of the 1st appellant relying on the provisions of Section 149(a) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria was right?"*

HELD (Unanimously dismissing 1st appellant's appeal and allowing 2nd - 4th appellants' appeal per **OGUNTADE JSC**)

Record of proceedings - Impeachment of

1. Let me make the point here that the 1st appellant has not impeached the record of proceedings before me. In other words, it has not been shown that the record of proceedings before me is not a full and complete minutes of all that happened in court at the trial of the appellants. Any person who is contending that the record of proceedings before an appellate court is not a fair record of what happened at the court of first instance must first formally impeach the record of proceedings - *Usman Yarzadin & Anor. v. Kano* (1961) SCNLR 144. The record of proceedings not having been formally Impeached, it is not open to this court to speculate that other things happened in the court of trial which were not recorded in the record of proceedings. In *Fawehinmi Construction Co. Ltd. v. Obafemi Awolowo University* (1998) 5 S.C. 43; (1998) 6 NWLR (Pt. 553) 171 at 183, this Court per Belgore, JSC, observed that:

"Record of proceedings is the only indication of what took place in a court; it is not like minutes of a meeting; it is always the final reference of events, step by step, that took place in court."

It has not been shown to me that certain matters which ought to have been recorded were not recorded during the trial of the appellants. I must therefore, in this court accept the record of proceedings as error free. It is difficult for me to reach the conclusion at the 1st appellant's prompting that Section 36(7) of the 1999 Constitution was violated in relation to the 1st appellant at the trial. The 1st appellant's first issue must therefore be decided against him. (p. 312 A)

Proof beyond reasonable doubt

2. It is a correct and immutable principle of law that the prosecution must establish the guilt of an accused beyond reasonable doubt in a criminal case. See David Obue v. The State (1976) ANLR 139.

B The trial court must in fulfilment of this duty consider the totality of the evidence before the court i.e. aspects which are favourable and those not favourable. It is after such duty that the court then comes to a conclusion as to whether or not the case was established beyond reasonable doubt. (p. 315 B)

Armed Robbery - The totality of evidence

3. It seems to me that the 1st appellant’s counsel in his submissions to us had not adverted his mind to the totality of the evidence called by the prosecution. Leaving for a while the issue as to whether or not the appellant was properly identified, I must consider the evidence to the effect that when the robbers were chased away from the scene of crime, they ran into the house of 1st appellant. It must be borne in mind that P.W.1 and P.W.2 had known 1st appellant before the day the crime was committed. The natives and members of the local vigilante group lay in wait and when the day broke alerted the police. The police came to the house of the 1st appellant and several of the properties stolen from P.W. 1 were found in the house or compound of the 1st appellant. This was at a period of barely twelve hours after the robbery took place. The trial Judge commented on this aspect of the case against the 1st appellant at pages 119 to 120 of the record.

G The court below also affirmed these findings. It is my firm view that these findings were justified by the evidence against the 1st appellant. I ought not to disturb these concurrent findings of fact. On the whole, I am satisfied that the court below was right to have affirmed the conviction and sentence imposed on the 1st appellant. (p. 315 D)

Armed robbery - Proof - Gaps in evidence

4. Further, there had not been any description of the robbers seen running into the compound of the 1st appellant, which matched or linked

them with the 2nd to 4th appellants. There was no evidence that the compound of the 1st appellant was encircled by the members of the vigilante group such as to eliminate the possibility of any body going in and out of the compound.

These vital omissions or gaps in the evidence of prosecution witnesses left open the possibility that the evidence of the 2nd to 4th appellants that they came into the house of 1st appellant in the morning of 2-6-96 might be true. (p. 321 F)

Conviction - Lies by an accused

5. It is to be said here that the trial Judge held that because the 2nd to 4th appellants had lied in parts of their evidence they were to be convicted as robbers but as was held in *Haruna & Anor. v. The Police* (1967) NMLR 145 at 153:

“..... although a man may lie because he is guilty, he may just as well lie because he is stupid or afraid or both and whether he is guilty or not.”

And also in *Okpere v. The State* (1971) 1 All NLR 1 at 5, this court per Coker, JSC, observed:

“It has never been the law that the mere fact that a person told lies is by itself sufficient to convict him of an offence, unconnected with mendacity nor does the fact that an accused person has told lies relieve the prosecution of its duty of proving the guilt of the accused of the offence charged beyond all reasonable doubts.” (p. 321 H)

Guilt - Circumstantial evidence

6. Now, there is no doubt that the evidence against the 2nd to 4th appellants was mainly circumstantial. The circumstances were that the 2nd to 4th appellants were found in the house into which the robbers were seen running in the company of the 1st appellant who was positively identified as one of the robbers. In the *State v. Muhtari Kura* (1975) 2 S.C. 83; (1975) 2 S.C. (Reprint) 76 this court decided that when circumstantial evidence is capable of two possible interpretations, one against and the other in favour of the accused, then in that circumstance, there has been

no proof beyond reasonable doubt.

“Circumstantial evidence to support a conviction in a criminal trial, especially murder must be cogent, complete and unequivocal. It must be compelling and must lead to the irresistible conclusion that the prisoner and no one else is the murderer. The facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt” per Humphrey J in R v. Taylor and 2 Ors. 21 Cr. App. p. 20.

The evidence against the 2nd to 4th appellants falls far short of that needed to warrant the conclusion that they participated in the robbery. (p. 322 D)

NOTABLE POINTS OF INTEREST

D OGUNTADE JSC

1. Need for counsel to raise and argue the proper issue

The important observation I like to make by way of a preface to the consideration of 1st appellant’s first issue is that the issue he formulated relates only to the interpretation and application of Section 36(7) of the 1999 Constitution. I make this observation because the 1st appellant’s counsel in the guise of arguing the 1st appellant’s first issue went into lengthy discussion of matters which could only be relevant if 1st appellant had raised an issue relating to Section 36(6)(e) of the 1999 Constitution. (p. 310 F)

KUTIGI JSC

2. Breach of s. 36(7) of the Constitution - Will not vitiate the criminal trial

It cannot be denied that the trial court kept a “record of the proceedings” as demanded by Section 36(7) *ibid*. The omission to record the name of an interpreter who was shown to be engaged, is of no material significance in my view.

The only conclusion I have reached therefore is that the breach of Section 36(7) of the Constitution alone, is not sufficient to vitiate the trial. And I so hold. Every case will have to be decided based on its

particular facts and circumstances only. The breach of Section 36(7) *ibid* will not therefore attract the same penalty as a breach of Section 36(b) and (e) to vitiate the trial. (p. 327 A)

EJIWUNMIJSC

B

3. Presence of an interpreter - Shall be recorded by court

From a careful perusal of the lead judgment, per Oguntade, JSC., it is, I think, manifest that though recognition was given to the principle that it is desirable, and indeed a constitutional duty of the trial Judge, to record also on the subsequent days of the trial when use is made of the interpreter. But earlier on in that judgment, it was stated that whereas in the case under consideration, it was recorded that an interpreter was provided to take the plea of the defendants when arraigned, it must be presumed, in the absence of evidence to the contrary, that the interpreter who was in that case, the clerk of court, was present throughout the trial of the defendants and did, in fact, interpret Ibo language into English Language and vice versa as occasion required.

The question then is, whether such a wide presumption as stated E above is permissible or can be read into the very simple and clear provisions of Section 33 (7) of the 1979 Constitution (now Section 36(7) of the 1999 Constitution) as was stated above in the case of Anyanwu v. State (supra). I took the view that such a wide interpretation was not F within the intendment of the aforesaid provisions of the Constitution 1979 or 1999. In this regard, may I refer to what I said on that point in the Anyanwu v. State (supra) at page 140. It reads:-

“On the aspect of the complaint of the appellant that the court G failed to make a full recording of what transpired during the proceedings by recording that an interpreter was present in court to interpret the proceedings, there is no doubt that the complaint is valid in that regard. The provisions of Section 33(7) of the Constitution require that a court trying any criminal offence shall keep a record of proceedings. It is therefore absolutely important for courts involved in the trial of such offences H to scrupulously keep the records of the proceedings in accordance with the demands of the Constitution. Failure so to do may vitiate the trial as a

nullity.” (p. 333 E)

4. Making a full record of criminal proceedings - Is imperative

It follows that having regard to my earlier opinion that by virtue of the word “shall” in Section 36(7) of the Constitution of 1999, it is mandatory for a court trying any criminal offence to make a faithful recording of the proceedings in court which shall include the presence of the interpreter and also the part played by such an interpreter in the course of the proceedings. Hence, in my view, a court concerned with trying a person for a criminal offence is under a constitutional duty to ensure that an interpreter is in court who can interpret from English, the language of the court, to any language in the vernacular or vice versa.

However, for the appellant to take advantage of this provision of Section 36(7) of the Constitution, it must be shown that the printed record did not correctly incorporate all that transpired during the trial. This is because printed record of our courts remains sacrosanct until shown otherwise by positive proof by the party alleging its incorrectness. In the instant appeal, as the appellant has not gone beyond mere allegations that the printed record is incorrect, he cannot successfully claim that his constitutional right was breached. (p. 334 G)

REPRESENTATION

B. E. I. Nwofor SAN., (with him, B. O. B. Udube Esq.,), for the 1st Appellant.

H. E. Wabara Esq., (with him, G. N. Okonkwo, G. M. Mosi, F. O. Otiotio and Miss Rosemary Obue), for the 2nd Appellant.

Mrs. M. A. Essien, B. O. Ogbawi, P. C. Duru, for the 3rd Appellant. Chief A. G. B. Ogbor, for the 4th Appellant.

Mrs. C. O. Okoro, Solicitor-General, Imo State, (with him, I. C. Azuama, Assistant Director of Public Prosecutions, Imo State), for the Respondent.

CASES REFERRED TO

Okpere v. The State (1971) 1 All NLR 1 at 5

Usman Yarzadin & Anor. v. Kano (1961) SCNLR 144

Voolmington v. Director of Public Prosecution (1935) AC 462

Panalpina v. Wariboko (1975) 2 S.C 29 at 35 (Reprint) 27

Alhaji A. R. Animashaun v. University College Hospital (1996) 10 NWLR (Pt. 476) 65 at 76

Fawehinmi Construction Co. Ltd. v. Obafemi Awolowo University (1998) 5 S.C. 43; (1998) 6 NWLR (Pt. 553) 171 at 183

Queen v. Eguabor (1962) All NLR 385

State v. Gwonto (1983) All NLR 109

Anyanwu v. The State (2003) 13 NWLR (Pt. 783) 107

STATUTES REFERRED TO

Constitution of Nigeria, 1999 S. 6(3) & 5(e), 36(6) & (7)

Evidence Act S. 149(a)

Robbery & Firearms (Special Provisions) Act, 1990 S. 1 (2)(a)

LEAD JUDGMENT BY OGUNTADE JSC

The four appellants were arraigned before the Owerri High Court of Imo State on an information for the offence of armed robbery contrary to Section 1 (2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398, Laws of the Federation, 1990. The particulars of the offence as set out on the information stated that the appellants on 1st June, 1997, at Amazu Uno Arondizuogu in the Orlu Judicial Division while armed with offensive weapons to wit: locally made pistol and matchets, robbed Mrs. Ndidi Nnakaihe and Innocent Nnakaihe of some properties.

The appellants were tried by Ohakwe J., after each of the appellants had on 16-08-99 pleaded not guilty to the charge. The prosecution called four witnesses. Each of the appellants testified in his own defence. The 1st appellant alone called a witness who testified as D.W.5. The trial Judge on 17-12-99 delivered judgment in the case. Each of the appellants was found guilty of the offence and sentenced to death.

Dissatisfied, the appellants brought an appeal against the judgment.

The appeal came before the Court of Appeal, Port-Harcourt Division (hereinafter called the court below). The court below on 3-2-2003 delivered its judgment. The court by a majority dismissed the appeal. Nsofor and Adeniji, JJCA., were for a dismissal of the appeal by the four appellants.

B Ikongbeh JCA., in his minority judgment dismissed the appeal of the 1st appellant and allowed the appeal of the 2nd to 4th appellants.

The appellants have brought a further appeal before this court. In the 1st appellant's brief, the issues for determination in the appeal were identified as the following:

C " 1. Whether the 1st appellant's fundamental right under Section 36(7) of the Constitution of the Federal Republic of Nigeria, 1999 was violated in this case and if so, did such violation not render the entire trial and conviction of the 1st appellant unconstitutional, null and void?

D 2. Whether there was cogent, convincing and satisfactory evidence of proper identification of the 1st appellant as one of the armed robbers that committed the offence of armed robbery in the dwelling house of Innocent Nnakaihe as stated in the information.

E 3. Whether the particulars of the offence stated in the charge and the essential ingredients of the offence of armed robbery were proved beyond reasonable doubt to justify the conviction of the 1st appellant for armed robbery?

F 4. Whether the conviction of the 1st appellant relying on the provisions of Section 149(a) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria was right?"

The issues for determination as formulated by the 2nd, 3rd and 4th appellants converge at a point which is as to whether or not the court
G below was right in its view that the trial court was right to say that the prosecution established the guilt of the appellant beyond reasonable doubt. The 4th appellant raised an additional issue wherein he queried whether
H the circumstantial evidence available against him led irresistibly to his guilt. The respondent formulated two issues for determination but the two issues are well accommodated under the issues formulated by the four appellants.

The first issue raised by the 1st appellant is on Sections 6(3), 5(e) and 36(7) of the 1999 Constitution of the Federal Republic of Nigeria. I do not intend to set out here Section 6(3) and 5(e). It suffices to say that the provision says no more than that a State High Court is bound to exercise the powers conferred under Section 6 of the 1999 Constitution. Section 36(7), however, provides:

“7. When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedings and the accused person or any person authorized by him in that behalf shall be entitled to obtain copies of the judgment in the case within seven days of the conclusion of the case.”

Before I enter into a discussion of the arguments raised on the issue under consideration, it is important that I expose briefly the alleged omission on the record of proceedings of the trial court, which is the matter that has led to the issue under consideration. When on 16-08-99, the appellants were first arraigned, the record of proceedings at page 45 reads in part thus:

“Accused persons present in court. L. C. Azuama (Principal Legal Officer with Mrs. M. C. Enwerem (Senior Legal Officer) appear for the Attorney-General.

Amaedu Nwaiwu Esq., with B. N. Mbala Esq., appear for all the accused persons.

PLEA: The charge is read to the accused persons in Igbo language, which the accused persons understand and they plead as follows: 1st accused, Cyriacus Ogidi: Not guilty to the charge. 2nd accused, Augustine Awuzie: Not guilty to the charge. 3rd accused, Paul Uzoechi pleads not guilty to the charge. 4th accused, Chukwudi Ogidi pleads not guilty to the charge.”

The point worth noting from the above extract of proceedings for 16-08-99 is that the appellants were Igbo speaking and this fact necessitated the reading of the charge to them in Igbo language. Subsequent to the above, P. W. 1 and P. W.2 testified. The record of proceedings shows that both testified in Igbo language. Both P.W.3 and P. W.4 later testified in English language. There was nothing on the record of proceedings to

show that when P. W. 1 and P.W.2 testified in Igbo language, their evidence was interpreted into English language. There was also nothing on the record of the court indicating that when P.W.2 and P.W.3 testified, their evidence was interpreted to the appellants in Igbo language. Indeed
 B ,there was nothing on the record of the court to show that any interpreter was present in court. At the close of the prosecution's case, each of the appellants testified in Igbo language in his defence. The 1st appellant called as his witness, D.W.5, who also testified in Igbo language. Again
 C there was nothing on the record of the court to show that there was present in court an interpreter; nor was there any indication that the evidence of the appellants and D.W.5 was interpreted to the court in English language. It was against this background that the 1st appellant's counsel made his submissions as per the appellant's brief filed.

D In his 1st appellant's brief, counsel submitted that the trial court being a superior court of record under the 1999 Constitution was bound to observe the provisions of Section 36(7) of the Constitution. The cases
 E relied upon by counsel include *Fawehinmi Construction Co. Ltd. v. Obafemi Awolowo University* (1998) 5 S.C. 43; (1988) 6 NWLR (Pt. 553) 171; *Godwin Josiah v. The State* (1985) 1 NWLR (Pt. 1) 125; *Godwin Anyanwu v. The State* (2002) 6 S.C. (Pt. II) 67; (2002) 13 NWLR (Pt.783) 107; *Achineku v. Isagba* (1988) 4 NWLR (Pt. 89) 411
 F and *Abimbola v. Aderoju & 3 Ors.* (1999) 5 NWLR (Pt. 601) 100.

Our attention was drawn to pages of the record of proceedings on the dates when P.W.1, P.W.2, D.W.1, D.W.2, D.W.3, D.W.4 and D. W.5 testified. Counsel observed that although there was an indication from the record that the appellants only understood Igbo language, there was
 G nothing on the record of proceedings to show that the evidence given by Igbo speaking witnesses was interpreted from Igbo language into English language for the record of the court.

Counsel further submitted that since the record of proceedings
 H did not ex facie show that an interpreter was made available to the appellants, it was not open to the court to speculate on the point - *Panalpina v. Wariboko* (1975) 2 S.C. 29 at 35; *State v. Aibangbee* (1988) 7 S.C. (Pt. 1) 96; (1988) 3 NWLR (Pt. 84) 548 at 577; *Alhaji A.R. Animashaun v.*

University College Hospital (1996) 10 NWLR (Pt. 476) 65 at 76.

Discussing the consequences of the failure to observe these provisions of the 1999 Constitution, counsel submitted that this court must nullify the entire proceedings - *Olumesan v. Ogundepo* (1996) 2 NWLR (Pt. 433) 628; *Alhaji Musiliu Tewogbade v. Saliu Agbabiaka & 2 Ors.* B (2001) 5 NWLR (Pt. 205) 38 at 52/53; *Adigun v. Attorney-General of Oyo State* (1987) 1 NWLR (Pt. 53) 678; *Jonpal Ltd. v. Afribank Ltd.* (2002) 8 NWLR (Pt. 822) 290 at 304; *Federal Civil Service Commission v. Laoye* (1989) 4 S.C. (Pt. II) 1; (1989) 2 NWLR (Pt. 106) 652; *Aiyetan v. Nifor* (1987) 3 NWLR (Pt. 59) 48. Finally, counsel submitted that it was immaterial that failure to comply with the mandatory constitutional provisions did not lead to a miscarriage of justice: *Faustina Oviasu v. Dr. Victor Oviasu* (1973) 11 S.C. 315; (Reprint) 187 and *Ifezue v. Mbadugha* C (1984) 1 SCNLR. D

The 2nd to 4th appellants did not in their brief discuss the 1st appellant's first issue for determination. The respondent's counsel in his brief observed that the 1st appellant's grouse was not that the 1st appellant did not understand the language in which prosecution witnesses testified but rather as a matter of constitutional imperative, whether the evidence given by prosecution witnesses ought to have been interpreted into English language. Counsel directed the attention of the court to page 45 of the record of proceedings where it was stated that the charge was F read to the appellants in Igbo language. Counsel then submitted that the Constitution did not impose a duty to interpret the evidence given in a case to the accused and there was therefore, no right created in favour of the appellants - *Ex Parte Olakunri* (1985) 1 NWLR (Pt. 4) 688. He submitted also that the provision in Section 36(6)(e) that an interpreter be G provided for an accused was only in cases where the accused did not understand the language in which evidence was given. The same section, counsel said, did not imply that an interpreter be provided for the court *Ogbonna v. A-G Imo State* (1992) 1 NWLR (Pt. 220) 647 at 657. H Counsel said that the views expressed by Uwais JSC., (as he then was) in *Rabbo Damina v. The State* 1995 8 NWLR (Pt. 415) 513 fell far short of elevating the necessity to have an interpreter in court to a constitutional

requirement. Respondent's counsel submitted that if the 1st appellant was contending that the evidence of witnesses for the prosecution was not correctly interpreted, the 1st appellant would need to formally impeach the record of proceedings - Usman Yarzabadin & Anor. v. Kano NA (1961) SCNLR 244. Counsel submitted that the law required no more than that the trial be fair- Russel v. Duke of Norfolk & Ors. (1949) 1 All ER 109 at 118.

Counsel further argued that to the extent to which the necessity to use interpreters in court has no constitutional backing, any party that had consented to the use of a particular procedure in court, could not turn round to contend that that same procedure was wrong - Akhiwu v. The Principal Lotteries Officer, Mid- Western Nig. & Anor. (1972) 3 S.C. (Reprint) 175;(1972) All NLR 233; Tambaya Filani v. Bornu NA (1961) All NLR 473. Counsel observed that the omission being complained of by the 1st appellant was not the same, as it was in Fawehinmi Construction Ltd. v. Obafemi Awolowo University (1998) 6 NWLR (Pt. 553) 171 and Godwin Josiah v. The State (1985) 1 NWLR (Pt. 1) 125. On the case of Godwin Anyanwu v. The State (2002) 6 S.C. (Pt. II) 173; (2002) 13 NWLR (Pt. 783) 107, it was submitted that when the reasoning of the Supreme Court in the case was examined, it would be seen that it was not in all cases that an interpreter was not used that the proceedings would be vitiated. Finally, counsel submitted that minor irregularities and technicalities should not be permitted to defeat the end of justice - Okora v. The State (1990) 1 NWLR (Pt. 125) 128 and Obakpolor v. The State (1991) NWLR (Pt. 165) 113 at 116.

The important observation I like to make by way of a preface to the consideration of 1st appellant's first issue is that the issue he formulated relates only to the interpretation and application of Section 36(7) of the 1999 Constitution. I make this observation because the 1st appellant's counsel in the guise of arguing the 1st appellant's first issue went into lengthy discussion of matters which could only be relevant if 1st appellant had raised an issue relating to Section 36(6)(e) of the 1999 Constitution. For instance, at pages 12 and 13 of 1st appellant's brief, counsel highlighted -

“Key prosecution witnesses namely P.W.1 and P.W.2 testified at the trial in Igbo language against the 1st appellant but their evidence was recorded in English language (see pages 45 lines 31-33,46,47,48,50 lines 23-32, 51, 53 lines 5-32, 54, 55, 56).

(a) Whether or not any interpreter knowledgeable in both Igbo and English languages was present in court. B

(b) Whether or not such interpreter was duly sworn to interpret the proceedings.

(c) Whether or not such interpreter actually interpreted the evidence of P.W. 1 and P.W.2 from Igbo language into English language. C

(d) The name of such interpreter if any.”

2. Also the 1st appellant (as D.W.1) and indeed other accused persons (namely D.W.2, D.W.3 and D.W.4) and the 1st appellant’s witness D.W.5 all testified at the trial in Igbo language but their evidence were recorded in English language. (See pages 77 lines 16-30, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90 of the record. - D

“(a) Whether or not any interpreter knowledgeable in Igbo and English language was present in court. E

(b) Whether or not such interpreter was sworn to interpret the proceedings.

(c) Whether or not such interpreter actually interpreted the evidence of D.W.1, D.W.2, D.W.3, D.W.4 and D.W.5. from Igbo language into English language for the court to record. F

(d) The name of such interpreter, if any.”

The above passage from 1st appellant’s brief would only fall for consideration in the appeal if 1st appellant raised an issue under Section 36(6)(e) which provides: G

“(6) Every person who is charged with a criminal offence shall be entitled to -

(e) have without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the of fence.” H

The above provision, however, is not what I am concerned with in this judgment; and I shall not be drawn into a discussion or consideration of the provision and the question if the provision was breached in

the 1st appellant's trial. The simple question to be considered is: Was Section 36(7) of the 1999 Constitution violated in relation to the 1st appellant at the trial as to vitiate or nullify the proceedings leading to his conviction?

B Let me make the point here that the 1st appellant has not impeached the record of proceedings before me. In other words, it has not been shown that the record of proceedings before me is not a full and complete minutes of all that happened in court at the trial of the appellants. Any person who is contending that the record of proceedings before an appellate court is not a fair record of what happened at the court of first instance must first formally impeach the record of proceedings - Usman Yarzadin & Anor. v. Kano (1961) SCNLR 144. The record of proceedings not having been formally

C Impeached, it is not open to this court to speculate that other things happened in the court of trial which were not recorded in the record of proceedings: See Panalpina v. Wariboko (1975) 2 S.C 29 at 35 (Reprint) 27; State v. Aibangbee (1988) 7 S.C (Pt. II) 24; (1988) 3 NWLR (Pt. 84) 584 at 577; Alhaji A. R. Animashaun v. University College Hospital (1996) 10 NWLR (Pt. 476) 65 at 76. In Fawehinmi Construction Co. Ltd. v. Obafemi Awolowo University (1998) 5 S.C. 43; (1998) 6 NWLR (Pt. 553) 171 at 183, this Court per Belgore, JSC, observed that:

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“Record of proceedings is the only indication of what took place in a court; it is not like minutes of a meeting; it is always the final reference of events, step by step, that took place in court.”

G It has not been shown to me that certain matters which ought to have been recorded were not recorded during the trial of the appellants. I must therefore, in this court accept the record of proceedings as error free. It is difficult for me to reach the conclusion at the 1st appellant's prompting that Section 36(7) of the 1999 Constitution was violated in relation to the 1st appellant at the trial. The 1st appellant's first issue must therefore be decided against him.

H

The 1st appellant has raised two other issues. The two issues

taken together are a challenge to the quality of evidence called at the trial and upon which the conviction of 1st appellant was based. Was the guilt of 1st appellant established beyond reasonable doubt as required by law? I intend to consider together the case made against all the appellants at the trial and then to draw later the appropriate conclusions to be arrived at in respect of each of them. B

Now at the trial, there was the evidence of P.W. 1 and P.W.2 which positively identified the 1st appellant as one of the persons who committed the offence of robbery on 1-6-97. P.W.1 and P.W.2 had known the 1st appellant before 1-6-97 as they lived with him in the same C neighbourhood.

P.W.1 testified concerning the 1st appellant thus:

“On that day we were sleeping in the house, we heard gun shots in our compound, we became afraid. I carried my new born baby. I heard D when our door was deep broken. They said if we failed to open the door by ourselves and they open the door by themselves, they would kill us. By this time, my mother-in-law ran into the room where I was with my new born baby. When they forced the door open, two people carrying E guns entered. At the time, there was a lantern in my room, one of them carried it to the parlour. It was then I recognized one of the two persons known as Cyriacus Ogidi, (1st Accused person).”

P.W.2 also testified against 1st appellant thus: F

“On that day the 1st Accused and his gang robbed in my place. Around 12.30 midnight. G

On that day, I was sleeping on my bed in my room. I heard a knock on my door where my wife and children were sleeping. I opened the door of my room to know who was knocking. When I flashed my touch to see the person who was knocking, I saw the 1st Accused, he ran into my room and he was carrying matchet. When I flashed the torch-light he tried to cover his face not knowing that I had already seen him. When he was covering he, (sic) face with his hand, I ran away H through the back door of my house.”

At the trial, a statement previously made by P.W. 1 to the police was tendered in evidence as Exhibit A. This was to impeach the credibil-

ity of P.W. 1. In Exhibit A, P.W. I had said that he recognized the 1st appellant as he and his group were leaving her house. 1st appellant's counsel has submitted that the quality of evidence identifying the 1st appellant as one of the robbers was very poor. He pointed to the contradiction in the evidence given under oath by P.W. 1 and in her statement to the police Exhibit 'A. Counsel relied on the observation of Oputa, JSC., in Patrick Ikemson & 2 Ors. v. The State (1989) 6 S.C. (Pt. I) 114; (1989) 3 NWLR (Pt. 110) 455 at 466 where he said:

"The criminal law is full of cases of mistaken identity - see The trial of Adolph Bece ed. E.R. Watson (Edinburgh 1924). The case of Walter Graham Rowland (1947) 32 CR App R.29. In Rowland's case (supra), there was an identified parade and Rowland was identified by three independent witnesses. Yet later on, Wase confessed that he and not Rowland was the actual murderer. The courts have got to guard against cases of mistaken identity."

The trial Judge at pages 117 and 118 of the record in accepting the evidence of P. W. 1 and P.W.2 on how they saw and recognized the 1st appellant said:

"In her oral testimony and in Exhibit 'A' P.W. I said she knows the 1st Accused in person as being a native of Owerre Akokwa. In her evidence and in her statement to the police she said there was lantern in the room. She also said she saw the 1st Accused at the time of the incident in their house. The witness did not identify the 1st Accused by description but by seeing and recognition of the 1st Accused whom she knows in the house and compound. P.W.q was (sic) the scene of crime. For a contradiction to be fatal to a case, it must not only relate to material fact but must result in a miscarriage of justice see - Sule Oladejo Asariyu v. The State (1987) 4 NWLR Part 67, 709; Adebayo and Ors. v. The State (1992) 4 NWLR (Pt. 235), 267 at 275. I see no material contradiction in the evidence of P.W.I that undermines her credibility. I believe her story that she saw the 1st Accused at the scene of crime. Also, on the issue of contradiction in the evidence of P.W.2 and his credibility, I have read Exhibit B and considered it side by side with the evidence of P.W.2, the witness was consistent in his evidence that on hearing a knock at the

door of his house, he opened another door of his house, flashed his torchlight and saw the 1st Accused carrying a matchet. The witness said the 1st Accused chased him with the matchet and he ran away through a back door to his brother and both of them raised alarm following which the robbers were given a chase and they ran into the compound of the 1st Accused.” B

Both the majority and minority judgments of the court below agreed with the finding above of the trial court. **It is a correct and immutable principle of law that the prosecution must establish the guilt of an accused beyond reasonable doubt in a criminal case. See David Obue v. The State (1976) ANLR 139.** C

The trial court must in fulfilment of this duty consider the totality of the evidence before the court i.e. aspects which are favourable and those not favourable. It is after such duty that the court then comes to a conclusion as to whether or not the case was established beyond reasonable doubt. D

It seems to me that the 1st appellant’s counsel in his submissions to us had not adverted his mind to the totality of the evidence called by the prosecution. Leaving for a while the issue as to whether or not the appellant was properly identified, I must consider the evidence to the effect that when the robbers were chased away from the scene of crime, they ran into the house of 1st appellant. It must be borne in mind that P.W.1 and P.W.2 had known 1st appellant before the day the crime was committed. The natives and members of the local vigilante group lay in wait and when the day broke alerted the police. The police came to the house of the 1st appellant and several of the properties stolen from P.W. 1 were found in the house or compound of the 1st appellant. This was at a period of barely twelve hours after the robbery took place. The trial Judge commented on this aspect of the case against the 1st appellant at pages 119 to 120 of the record thus: F G H

“P.W.3 stated that he executed a search in the house and premises of the 1st Accused person and recovered the following items of property; telephone set, Exhibit M, two international Passports, Exhibits N,

N1, Video Cassette Exhibit O, Baby Napkins Exhibit P-P4, baby dresses Exhibits Q-Q2, clothes Exhibits T-T3, travelling bags Exhibits U-U2, beverages Exhibits W-W2, soap and tooth paste Exhibits Y-Y2. All the accused persons signed Exhibit H- Search Warrant, witnessing the recovery of these exhibits. Exhibits J, L, LI were recovered along the escape roots of the robbers. The P.W.I identified most of the exhibits as the ones robbed her by the robbery gang. The 1st accused denied that the exhibits were recovered in his compound but were found in a bush behind his compound. In Exhibit C, he stated I know why the police arrested me. I was arrested because the police saw some exhibits in my compound, that is in the small bush in my back yard. In Exhibit EE, the 1st Accused stated Actually the following items were recovered in my compound by the police. I do not know how these exhibits entered my compound. In Exhibit GG he also admitted that the police recovered the exhibits in his compound but does not know who kept them. From the evidence of P.W.3 and D.W.1 - (the 1st Accused) I find as a fact that Exhibits M, N, NI, "O" P-P4, Q-Q2, J-J3, U-U2, W-W2, Y-Y2 were recovered from the compound of the 1st Accused person, while Exhibits J, S, L, LI were recovered along the escape route of the robbers. From Exhibit 'D' the 1st Accused person, stated he saw people run through his compound and on 2/6/97, he could recognize one of them as 'Synco' who told him they went some-where and there was some problem Sinko was in my house by the time policemen came to arrest us. The witness said he saw Sinko between 3-4 a.m. on 2nd June, 1997. Under Cross-examination the 1st Accused stated he does not know anybody called Sinko."

The court below also affirmed these findings. It is my firm view that these findings were justified by the evidence against the 1st appellant. I ought not to disturb these concurrent findings of fact. On the whole, I am satisfied that the court below was right to have affirmed the conviction and sentence imposed on the 1st appellant.

I now consider the case against the 2nd to 4th appellants.

Now at the trial, there was the evidence of P. W. 1 and P.W.2 which positively identified the 1st appellant as one of the persons who

committed the robbery offence on 1-6-97. P.W.1 and P.W.2 had known 1st appellant before 1/6/97 as they lived in the same neighbourhood with him. Those who came to commit the offence were seen running with 1st appellant into 1st appellant's compound. The case against 2nd to 4th appellants on the other hand was based only on circumstantial evidence. B

The issue common to the 2nd to 4th appellant is whether or not the prosecution established the guilt of the three appellants on the standard required by law i.e. beyond reasonable doubt. At the trial, the prosecution called four witnesses. The P. W. 1 testified that on 1/6/97, while sleeping in her house at Amazulo, Arondiguogu, she heard the sound of gunshots. The door to her house was broken and two persons who each had a gun' came in. With the aid of a lantern, she recognized the 1st appellant. The two men beat P.W. 1 and her mother-in-law. They later carted away some valuable properties which included a radio cassette, umbrella, pomade, milk and soap. C D

P.W.2 testified that on the same 1-6-97, the 1st appellant and his gang aroused him from sleep at about 12.30 a.m. by banging the door to his room forcefully. With the aid of a torch light, P.W.2 saw the 1st appellant who was carrying a matchet. P.W.2 raised an alarm to alert the natives and the village vigilante group. The thieves took to their heels. P.W.2 and his neighbours chased them and they were seen to be entering the house of the 1st appellant. As the thieves ran away they dropped some of the articles they had stolen. P.W.2 and his neighbours lay in wait hoping that the thieves would come back to recover the items they dropped as they ran away. The thieves, true to the expectation of P.W.2, came back at about 5 a.m. to collect the articles that they had dropped earlier. The thieves saw P.W. 2 and his neighbours. They ran back into the house of the 1st appellant. P.W.2 and others waited till the day broke. They then reported to the police. The police came. They were led to the house of the 1st appellant into which the thieves had escaped. All the appellants were then arrested there. E F G H

P.W.3 was a police officer. He testified that following a complaint lodged at the Police Station where he worked, he and another officer went to the scene of crime. They were led to the house of the 1st appel-

lant. There, they executed a search warrant and recovered some items of property. They saw the 2nd and 4th appellants in the house of the 1st appellant. They took all of them to the Police Station.

B P.W.4 was the Investigating Police Officer. Under caution, he obtained statements which were voluntarily made from all the appellants. The statements of the appellants were tendered in evidence by P.W.4 as were the stolen articles recovered.

C The 2nd appellant testified in his own defence. He denied that he was one of those who committed the offence of robbery on 1-6-97. He said that on 31-5-97, he slept in his house at Umuezeaga, Akokwa. At about 10a.m. on 2-6-97, he went to the house of the 1st appellant to collect some medicine for his sickness as 1st appellant was a herbalist. In the house of 1st appellant, the 2nd appellant met the 3rd appellant with D his child. The 3rd appellant had also come to the 1st appellant for treatment. After a while, the police came into the house of 1st appellant. They arrested him as well as the 3rd appellant. The 2nd appellant identified the statements which he made to the police as Exhibits BB and BB1.

E The 3rd appellant testified that on 2/6/97, he took his child to the house of the 1st appellant, a herbalist for treatment. 1st appellant treated his child and while there, the 2nd appellant came in to receive treatment from 1st appellant. Suddenly, many persons trooped in. The 4th appellant F in handcuffs, was led in by the police. The 3rd appellant was arrested notwithstanding the fact that he denied knowing of any robbery. The statement of the 3rd appellant was tendered in evidence through him as Exhibit JJ.

G The 4th appellant testified that he was arrested by police while he was returning from his shed to his house to have his breakfast. He denied committing the offence of robbery. He adopted his statement to the police, Exhibits G and DD.

H The trial Judge in his judgment at page 118 of the record acknowledged that there was no direct evidence linking the 2nd, 3rd and 4th appellants with the offence. He said:

“From the evidence of the prosecution witnesses, I find no direct evidence of seeing or identifying the 2nd, 3rd and 4th accused persons at

the scene of crime. Matters can be proved by direct or circumstantial evidence. In a criminal charge before an inference of guilt of an accused person can be drawn from set of facts, it must pass the standard required of circumstantial evidence, which is that it must lead irresistibly to the guilt of the accused person; see the case of Ganiyu Gbadamosi and B Anor. v. The State (1992) 9 NWLR (Pt. 266) 465 at 500. Furthermore, it is necessary before drawing the inference of the accused's guilt to be sure that there are no other co-existing circumstances, which would weaken such inference. See Obalum Anekwe v. The State (1976) 9-10 C S.C. 255,264; Joseph Lori & Anor. v. The State (1980) 8-11 S.C. 81.

It is the evidence of P.W.2 that following the alarm, he and his brother raised the robbers took to their heels and were given a chase by members of the vigilante group who were on duty that night. It was his evidence that the robbers ran into the compound of the 1st accused and D that as the robbers were running some of the stolen items of property fell off from them and later around 5 a.m. The robbers came back to collect them and they were chased again and they ran into the compound of the 1st accused and that the robbers were in the house of the 1st accused till E the arrival of the police who arrested the 1st 2nd, 3rd and 4th accused person."

In successive order, the trial Judge rejected the evidence given by the 2nd to 4th appellants denying their involvement in the robbery of- F fence. The reasoning of the trial Judge found support from the majority judgment of the court below when Nsofor, JCA., who wrote the lead judgment said:

"The learned counsel for the appellants had contended that the G learned trial Judge having said that there was no direct evidence by the prosecution witnesses of having seen or recognized the 2nd, 3rd and 4th appellants at the scene of crime on 1/6/91, he ought to have acquitted and discharged each of them forthwith and that the trial Judge was in error to have resorted to circumstantial evidence. With respect to the learned coun- H sel, I do not share his opinion. The submission seems to me novel. Why? Because it is well settled law that in a criminal trial, an issue may be proved either by direct evidence or evidence aliunde. And it is not deroga-

tory to say that evidence is circumstantial.

Circumstantial evidence is as good and sometimes better than any other evidence. What is meant is that there is a number of circumstances which are accepted to make a complete unbroken chain of evidence. See B Idigbe, JSC, in *Valentine Adie v. The State* (1980) 1-2 S.C. 27 and its line of other cases. Witnesses may lie and sometimes do lie. But circumstances do not lie.”

In the dissenting judgment of Ikongbeh, JCA., at page 273, he reasoned thus:

C “From the portion of the judgment I just set out, it is clear that the judge based his decision to convict the 2nd-4th appellants on three main grounds, namely,

D (a) their presence at the 1st appellant’s house soon after the robbery.

(b) the fact that they could not give credible account of their presence there to the arresting police officer; and

E (c) the fact that no other occupant of the 1st appellant’s compound was seen at the time the police came to arrest the appellants.

As to (a), it is not clear whether the judge was referring to their presence in the night soon after the robbers entered the 1st appellant’s house or to their presence at the time of their arrest. His use of the expression “soon after the robbery” seems to suggest the former. The F evidence before the court was that the arrests of the appellants were made around 11.00a.m. and the search of the appellant’s house shortly thereafter. (See the evidence of the 1st appellant at page 83, which is corroborated by the endorsement on Exhibit H, the search warrant at G page 140 whichever one it is, I do not think that in the circumstance of this case, it supports the judge’s decision to convict the appellants. If it is the former we have already seen that the judge was mistaken in his view that the 2nd to 4th appellants were in that house that night. The evidence H of P.W.2 that he relied on to form that view contained nothing to support it.”

And in his final conclusion Ikongbeh, JCA., said:

“Clearly, the circumstantial evidence led by the prosecution fell far

short of the standard required to establish the fact that the persons who ran into the house of the 1st appellant with the latter were the 2nd -4th appellants, who were arrested there almost 12 hours later. Again, with respect to the Judge, there was no sufficient circumstantial evidence that the lies told by these appellants could conjoin with to establish the fact that they took part in the robbery some 12 hours previously. Their lies, if any, related not to the events of the previous night but to matters that had nothing to do with the offence they were being accused of. B

On the whole, I do not see any justification for the Learned trial Judge to convict the 2nd to 4th appellants of the robbery charged. The circumstantial evidence he relied on has not met the standard required. In the circumstances, I allow the appeal.” C

I must say, with respect to their Lordships of the court below who wrote and concurred in the majority judgment, that the minority judgment was quite objective and truly reflective of the approach to be followed when relying on circumstantial evidence as a basis for conviction in a criminal trial. The first observation to be made here is that P.W.2 who testified that he saw some robbers running into the compound of the 1st appellant did not state the number of the robbers he saw. Secondly, there was not a shred of evidence from any of the members of the vigilante group and P.W.2, as to the position they were in relation to the compound of 1st appellant such as to know and see if any persons went out of or went into the compound of the 1st appellant. **Further, there had not been any description of the robbers seen running into the compound of the 1st appellant, which matched or linked them with the 2nd to 4th appellants. There was no evidence that the compound of the 1st appellant was encircled by the members of the vigilante group such as to eliminate the possibility of any body going in and out of the compound.** D E F G

These vital omissions or gaps in the evidence of prosecution witnesses left open the possibility that the evidence of the 2nd to 4th appellants that they came into the house of 1st appellant in the morning of 2-6-96 might be true. It is to be said here that the trial Judge held that because the 2nd to 4th appellants had lied in parts H

of their evidence they were to be convicted as robbers but as was held in *Haruna & Anor. v. The Police* (1967) NMLR 145 at 153:

“..... although a man may lie because he is guilty, he may just as well lie because he is stupid or afraid or both and whether he is guilty or not.”

And also in *Okpere v. The State* (1971) 1 All NLR 1 at 5, this court per Coker, JSC, observed:

“It has never been the law that the mere fact that a person told lies is by itself sufficient to convict him of an offence, unconnected with mendacity nor does the fact that an accused person has told lies relieve the prosecution of its duty of proving the guilt of the accused of the offence charged beyond all reasonable doubts. (See Voolmington v. Director of Public Prosecution (1935) AC 462.

Now, there is no doubt that the evidence against the 2nd to 4th appellants was mainly circumstantial. The circumstances were that the 2nd to 4th appellants were found in the house into which the robbers were seen running in the company of the 1st appellant who was positively identified as one of the robbers. In *The State v. Muhtari Kura* (1975) 2 S.C. 83; (1975) 2 S.C. (Reprint) 76 this court decided that when circumstantial evidence is capable of two possible interpretations, one against and the other in favour of the accused, then in that circumstance, there has been no proof beyond reasonable doubt.

“Circumstantial evidence to support a conviction in a criminal trial, especially murder must be cogent, complete and unequivocal. It must be compelling and must lead to the irresistible conclusion that the prisoner and no one else is the murderer. The facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

per Humphrey J in *R v. Taylor* and 2 Ors. 21 Cr. App. p. 20.

The evidence against the 2nd to 4th appellants falls far short of that needed to warrant the conclusion that they participated in the robbery. If I had to determine the appeal of the 2nd to 4th appellants

on the merit, I would discharge and acquit them. I am unable to say the same with respect to the 1st appellant. There was certainly substantial evidence against him and the offence alleged is grave and punishable with death.

In the final conclusion I dismiss the appeal by the 1st appellant. I affirm the conviction and sentence imposed upon him. I allow the appeals of the 2nd to 4th appellants. I set aside the conviction and sentences imposed on them. I return a verdict of not guilty. I accordingly discharge and acquit them on the offence brought against them.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Oguntade, JSC. I entirely agree with him that the appeal by the 1st appellant lacks merit and that it should be dismissed. I also agree that the appeals by the 2nd, 3rd and 4th appellants succeed and that they are acquitted and discharged.

KUTIGI JSC

The only constitutional issue out of the five issues submitted by the appellants' counsel for resolution in this appeal reads as follows -

“Whether the 1st Appellant's fundamental right under Section 36(7) of the Constitution of the Federal Republic of Nigeria, 1999 was violated in this case and if so, did such violation not render the entire trial and conviction of the 1st Appellant unconstitutional, null and void?”

The issue was adopted and argued on behalf of all the 4 appellants since they were tried together.

I must say that counsel for the appellant in his brief did not confine himself to Section 36(7) (see below) of the Constitution but smuggled in and extended his argument to cover Section 36(6)(a) and Section 36(6)(e) (see below) of the Constitution completely forgetting that he did

not state or allege anywhere even in this court that the charge was not explained to the appellant, or that the appellant applied for an interpreter in the trial High Court and that the trial Judge denied him the assistance of an interpreter. The appellant is therefore not challenging or impeaching the record of proceedings in the case. And we are bound by the record. It is worthwhile to state that the appellant was represented by counsel throughout the trial in the High Court. There is no record that his counsel in the High Court asked for and was denied the use of an interpreter. He did not make any complaint or report to the trial Judge of the necessity to employ an interpreter for the benefit of his client, the appellant herein. I have no doubt at all in my mind that if it had been shown or established that the appellant or his counsel applied to the trial court for the assistance of an interpreter and that the court refused or denied him that assistance, that would have been a serious violation of Section 36(6)(e) (see below) which would have vitiated the trial. That was not the case here.

Turning to the provision of Section 36(7) of the Constitution (see below), it is clear that the court or tribunal trying any criminal offence is bound to keep a record of the proceedings, and thereafter the accused is entitled to obtain copies of the judgment in the case within seven days of the conclusion of the case. It is quite proper that an accused or his agent should be entitled to copies of the judgment. That is a right for the appellant. But I do not understand the sub-section to be saying that an accused person is entitled to tell the judge what to record or what not to record, or that everything that transpired in court should be recorded. The judge has some discretion. It is doubtless that the trial court in this case kept the record of proceedings which has not been challenged in any way. It is clear also that out of a total of nine (9) witnesses who testified in the case, 2 out of the 4 witnesses called by the prosecution testified in English while the remaining two spoke Igbo. All the 5 defence witnesses including the 4 appellants herein, testified in Igbo language. So only 2 out of 9 witnesses testified in English, the remaining 7 spoke Igbo. The record of proceedings is clearly in English. It appears to me quite reasonable to say that just as the testimonies in Igbo were interpreted and then re-

corded in English, so were the testimonies in English translated into Igbo for the appellants to understand.

I now return to the issue submitted for resolution above. I will start by setting out the provisions of Section 36(6)(a) & (e) as well as that of Section 36(7) of the Constitution thus -

“36(6) Every person who is charged with a criminal offence shall be entitled to -

(a) be informed promptly in the language that he understands and in detail of the nature of the offence.

(b)(omitted)

(c) (omitted)

(d) (omitted)

(e) have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence.

36(7) When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedings and the accused person or any person authorized by him in that behalf shall be entitled to obtain copies of the judgment in the case within seven days of the conclusion of the case.”

It is important to state here now that what gave rise to the issue of Section 36(7) above, is the absence or omission from the record of proceedings of the trial High Court of a recording or recordings to the effect that the appellants who only spoke Igbo language, had the proceedings interpreted to them in Igbo, English being the official language of the court and in which language court proceedings are recorded.

On the 16th day of August 1999 when the trial commenced, the notes show in part on page 45 as follows -

“PLEA: The charge is read to the accused persons in IGBO language which the accused persons understand and they plead as follows:

1st accused, Cyriacus Ogidi, NOT guilty to the charge

2nd accused, Augustine Awuzie, NOT guilty to the charge

3rd accused, Paul Uzoechi pleads NOT guilty to the charge

4th accused, Chukwudi Ogidi pleads NOT guilty to the charge

Thereafter, the prosecution opened its case and called its first wit-

ness, P.W. 1, who spoke in Igbo language. He was cross-examined by counsel. On 18/8/97 (see page 52 of the record) P.W.2 testified. He did so in Igbo. He was also cross-examined by counsel. P.W.3 testified next. He spoke in English and was cross-examined too. On 31/8/99 (see p. 60 B of the record), P.W.4 testified in English. He continued his evidence on 7/9/99 (see p. 65), He was also cross-examined.

P.W.3 was recalled on 16/9/99 when he gave further evidence in English and was cross-examined. The prosecution then closed its case. C The record of proceedings were all in English including that of plaintiff witnesses who spoke Igbo.

The defence thereafter presented its case. In short five witnesses testified on their behalf. D.W.1 spoke in Igbo. D.W.2 also spoke in Igbo. Again D.W.3 spoke Igbo. D.W.4 also testified in Igbo language. The last D witness for the defence, D.W.5, also spoke in Igbo. They were all cross-examined. The record of proceedings again were all in English. I cannot resist saying now that an interpreter must have been available who rendered the translations of the testimonies from Igbo into English and vice-versa. E Clearly, the record of proceedings does not show or state expressly anywhere that an interpreter was present in court when any of the witnesses on both sides testified. But it is important to bear in mind the fact that on the first day of trial on 16/8/99 as shown above, when the F plea was taken and recorded, the record reads in part -

“The charge is read to the accused persons in Igbo language which the accused persons understand...”

This shows that the charge was read and explained to the appellants before they pleaded. This to me is sufficient recording to show that G an interpreter was in fact employed or present at the hearing. It was therefore not necessary for the court to have made a record of the use of an interpreter on subsequent days of trial. The omission per se is not sufficient in my mind to vitiate the trial particularly when the appellants H have not complained -

(a) that there was In fact no Interpreter at all during trial, or

(b) that they did not understand or follow the proceedings during trial, or

(c) that they were denied the use of an interpreter by the court when requested to do so.

It cannot be denied that the trial court kept a “record of the proceedings” as demanded by Section 36(7) *ibid*. The omission to record the name of an interpreter who was shown to be engaged, is of no material significance in my view. B

The only conclusion I have reached therefore is that the breach of Section 36(7) of the Constitution alone, is not sufficient to vitiate the trial. And I so hold. Every case will have to be decided based on its particular facts and circumstances only. The breach of Section 36(7) *ibid* will not therefore attract the same penalty as a breach of Section 36(b) and (e) to vitiate the trial (see for example *Queen v. Eguabor* (1962) All NLR 385; *Lockman & Anor. v. The State* (1972) All NLR 498; *The State v. Gwonto* (1983) All NLR 109; *Anyanwu v. The State* (2003) 13 NWLR (Pt. 783) 107). C D

I completely agree with the conclusion in the lead judgment of my learned brother, Oguntade, JSC., which I read before now, that the trial of the appellants herein was valid and proper and was not vitiated by any breach of Section 36(7) *ibid* complained of as there was no breach. I also agree with him after reading the entire record of proceedings, that the appeals of the 2nd, 3rd & 4th appellants are meritorious. They were not sufficiently linked with the commission of the crime. They succeed on their merits. They are allowed. The appeal of the 1st appellant however, fails as lacking in merit and it is dismissed. I therefore acquit and discharge the 2nd, 3rd & 4th appellants. The appeal of the 1st appellant as I said is dismissed. His conviction and sentence are affirmed. F G

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Oguntade, JSC. I entirely agree with it. H

There was evidence in the course of the trial which positively identified the 1st appellant as one of the robbers. P.W 1 and P.W.2 who had known the 1st appellant before the night of the robbery positively

identified him in the course of the robbery with the help of a lantern.

This was not the case with the 2nd - 4th appellants. The case against them was circumstantial. Circumstantial evidence, to support a conviction in a criminal trial, must be cogent, complete and unequivocal.

B The facts must be incompatible with innocence. Circumstantial evidence must lead irresistibly to the guilt of the accused: See *The State v. Muhtari Kura* (1975) 2 S.C. 83; *R. v. Taylor & 2 Ors.* 21 Cr. App. R.20.

C In the instant case, the 2nd - 4th appellants denied any involvement in the robbery. Their offence was that they were at the house of the 1st appellant in the morning after the robbery. But they explained the circumstances that led to their being at the house of the 1st appellant where they were arrested some 12 hours after the robbery. The 4th ap-
D pellant, however, was not arrested at the house of the 1st appellant. He was arrested on his way home from his workshop for break more than 12 hours after the commission of the offence. This was so despite the fact that there was no evidence that any of the alleged robbers that ran
E into the house of the 1st appellant ever left that house before the police arrived the house. I am, in the circumstance, in total agreement with Ikongbeh, JCA., when he said in his minority judgment thus:

“Clearly, the circumstantial evidence led by the prosecution fell far
F short of the standard required to establish the fact that the persons who ran into the house of the 1st appellant with the latter were the 2nd - 4th appellants, who were arrested almost 12 hours later. Again, with respect to the Judge, there was no sufficient circumstantial evidence that the lies
G told by these appellants could conjoin with to establish the fact that they took part in the robbery some 12 hours previously. Their lies, if any, related not to the events of the previous night but to matters that had nothing to do with the offence they were being accused of.

H On the whole I do not see any justification for the learned trial Judge to convict the 2nd - 4th appellants of the robbery charged. The circumstantial evidence he relied on has not met the required standard. In the circumstances, I allow their appeal.”

In the result, the appeal of the 1st appellant is dismissed. His con-

viction and sentence are affirmed. The appeals of the 2nd, 3rd and 4th appellants are allowed. The judgment of the lower court is set aside. The 2nd, 3rd and 4th appellants are acquitted and discharged.

B

UWAIS CJN (Pronouncement Section 294(2)
of the 1999 Constitution)

Honourable Justice S. O. Uwaifo, who sat with us on this case and took part in the conference which we held on the case, agreed that the appeal by the 2nd, 3rd and 4th appellants shall be allowed and that the appeal by the 1st appellant should be dismissed.

D

EJIWUNMI JSC

I have had the privilege of reading before now the judgment just delivered by my learned brother, Oguntade, JSC., and with which I agree entirely. However, I need to add a few words of my own. As the facts in the appeal have been sufficiently set down in the lead judgment referred to above, I do not consider it necessary to reiterate them in this judgment. Suffice it to say that the issue in the main is whether the procedure which was followed by the trial court during the trial of the appellants was not in breach of the provisions of Section 36(7) of the Constitution of 1999. That question was put as Issue 1 in the brief filed for the 1st appellant thus:-

“(1) Whether the 1st appellant’s fundamental right under Section 36(7) of the Constitution of the Federal Republic of Nigeria, 1999 was violated in this case and if so, did such violation not render the entire trial and conviction of the 1st appellant unconstitutional, null and void?”

By the argument of learned counsel for the appellants, it seems clear that he pursued his complaint against the judgment of the court below on the premise that although the plea of the appellants were taken in the Igbo language and also the fact that P.W.2 and P.W.3 testified in the Igbo language, yet there was nothing on the record of the court to show

that any interpreter was present in court. On the basis of those facts, it is the submission of learned counsel for the 1st appellant that the 1st appellant's fundamental right under the provisions of Section 36(7) read together with the provisions of Section 6(3) (5) (e) of the Constitution of the Federal Republic of Nigeria was clearly violated. It is also his submission that the breach of the said provisions of the Constitution rendered the proceedings and judgment of the trial court as well as the judgment of the court below unconstitutional, null and void. This is because, argued learned counsel for the appellant, the said Section 36(7) of the Constitution is a mandatory provision of the Constitution designed to ensure fair hearing between parties in the trial of an action in any of the courts.

And as a result of that breach which he has classified as a breach of the fundamental constitutional right of the appellant, the entire proceedings be declared a nullity. In support of his submissions, he referred to several cases including the following:- *Olumesan v. Ogundepo* (1996) 2 NWLR (Pt. 433) 628; *Alhaji Musiliu Tewogbade v. Saliu Agbabiaka & 2 Ors.* (2001) 5 NWLR (Pt. 705) 38 at pp 52-53; *Adigun v. Attorney-General of Oyo State* (1987) 1 NWLR (Pt. 53) 678, (1987) 3 S.C. 250 at 309.

The learned counsel for the respondent, must be taken to have conceded the fact that the proceedings in the trial court was as alleged by the appellant. There, of course, cannot be any dispute as to what is contained in the Record of Proceedings as it is trite law that both the court and the parties are bound by the printed record. It does, however, appear that the contention of learned counsel for the respondent that the learned counsel who appeared for the appellant in the court below never alleged any misrepresentation of evidence nor did he object to the procedure adopted in the course of the trial by the trial court. He is, therefore, generally opposed to the plea of the appellant that the entire proceedings including the judgment and orders of the courts below be nullified.

Now the gravamen of the complaint of the appellant is that, though the appellant could speak and understand the Igbo language hence, their plea was recorded in the Igbo language, there was nothing on the record to show that there was an interpreter during the trial to translate the

evidence given and indeed the entire proceedings from the Igbo language to the English language and vice versa. By that absence of an interpreter, the provisions of Section 36(7) of the 1999 Constitution was breached. It reads in part thus: -

Section 36(7)

“When any person is tried for any criminal offence, the court or tribunal shall keep a record of the proceedingscopies of the judgment in the case and within seven days of.....

The first question that needs to be considered is, whether by the use of the word “shall” in the said Section 7 of the Constitution, the makers of the Constitution intended that the provision so enacted was intended to be a “command” or a mere directive. In order to answer this question, it is profitable to enquire about the usages attached to the word “shall” in the Dictionary. For this purpose, may I refer to The New Webster’s Dictionary of the English Language wherein it is defined thus: “used to express futurity or promise, intention or command.” In Black’s Law Dictionary (Sixth Edition), it is stated that and I quote;-

“Shall” As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term “shall” is a word of command, and one which has always or which must be given a compulsory meaning, as denoting obligation. The word in ordinary usage means “must” and is inconsistent with a concept of discretion.”

From the above references to the standard works wherein cogent and clear meaning to the use of the word “shall” in a statute or in ordinary parlance, there can be no doubt that when the word “shall” is used in the context of a statute or in ordinary parlance, it means that a command to do or not to do a particular act. There is no question of the exercise of discretion to do or not to do the envisaged act. In my humble view, when the word “shall” is used in the context of Section 36(7) of the Constitution, it seems to me, and having regard to the usage of the word referred to above, the clear intention of the makers of the Constitution is that the courts are commanded by the Constitution to record fully and faithfully

the transactions including the presence of interpreters who interpret the evidence at the trial and in what language such evidence was taken throughout the course of the proceedings.

The point now under consideration in this appeal fell for consideration in *Anyanwu v. The State* (2002) 6 S.C. (Pt. II) 173; (2002) 13 NWLR (Pt. 783) 107. In that case one of the questions before the court was, whether the absence from the printed record that an interpreter was in court and did interpret the evidence led at the trial from Igbo language to the English Language and vice versa, was a sufficient breach of the provisions of Section 33(7) of the 1979 Constitution (which is in pari materia with Section 36 (7) of the 1979 Constitution). In that case this court, per Ogundare, JSC, received with approval the reasoning of Lewis, JSC., who delivered the judgment of the court, at page 501 of the report and which reads thus:-

“Now whilst we must of course agree with Mr. Brown-Peterside that the record does not specifically show that the interpreter in English into Hausa and vice versa was present on the four days in question when the 5th, 6th, 8th and 9th prosecution witnesses gave evidence, we do not think that, once the learned trial Judge had recorded the interpreter as being affirmed on the first day of the trial, it was absolutely necessary for him to show on the record that the interpreter was present on every subsequent day. The presumption of regularity must apply and though, if he had noted his presence on each subsequent day, it would have put objections such as this completely out of the scope of counsel’s argument, we do not think there was an absolute requirement for him to do so.”

And on page 502 he added:

“However, if the 1st accused could affirmatively show that an interpreter was absent then we would certainly be prepared to agree that the objection had force but that was not the case here. Mr. Brown-Peterside did not seek to adduce evidence before us to show that the interpreter was not there on the days in question but he relied solely on the absence on the record of any definite statement that he was present...”

Ogundare, JSC., who wrote the lead judgment in the *Anyanwu*

case (supra) then said thus at page 127 of the report:

“In the case in hand, an interpreter was provided on 4/6/ 84 when the defendants were arraigned and their pleas taken - see page 29 of the record. This much the appellant conceded. It must be presumed, in the absence of evidence to the contrary, that the interpreter who was, in this case, the clerk of court was present throughout the trial of the defendants and did in fact interpret Ibo language into English language and vice versa as occasion required. I think the reasoning of this court in Locknan’s case is sound and logical; I have no reason to depart from it.”

And he then said further at pages 127-128, as follows:-

“In my respectful view, where an interpreter is provided at the commencement of the trial and a record of this is made, it is desirable, and indeed a constitutional duty of the trial Judge to record this fact also on the subsequent days of the trial when use is made of the interpreter.

Where, however, the Judge fails to make a record of the use of the interpreter in subsequent days the trial is not, per se, there vitiated.....

A breach of Section 33(6)(a) & (e) is, however fatal to a criminal trial as it raises the question whether an accused person so affected ever had a fair hearing.”

From a careful perusal of the lead judgment, per Oguntade, JSC., it is, I think, manifest that though recognition was given to the principle that it is desirable, and indeed a constitutional duty of the trial Judge, to record also on the subsequent days of the trial when use is made of the interpreter. But earlier on in that judgment, it was stated that whereas in the case under consideration, it was recorded that an interpreter was provided to take the plea of the defendants when arraigned, it must be presumed, in the absence of evidence to the contrary, that the interpreter who was in that case, the clerk of court, was present throughout the trial of the defendants and did, in fact, interpret Ibo language into English Language and vice versa as occasion required.

The question then is, whether such a wide presumption as stated above is permissible or can be read into the very simple and clear provisions of Section 33 (7) of the 1979 Constitution (now Section 36(7) of

the 1999 Constitution) as was stated above in the case of Anyanwu v. State (supra). I took the view that such a wide interpretation was not within the intendment of the aforesaid provisions of the Constitution 1979 or 1999. In this regard, may I refer to what I said on that point in the B Anyanwu v. State (supra) at page 140. It reads:-

“On the aspect of the complaint of the appellant that the court failed to make a full recording of what transpired during the proceedings by recording that an interpreter was present in court to interpret the proceedings, there is no doubt that the complaint is valid in that regard. C The provisions of Section 33(7) of the Constitution require that a court trying any criminal offence shall keep a record of proceedings. It is therefore absolutely important for courts involved in the trial of such offences to scrupulously keep the records of the proceedings in accordance with D the demands of the Constitution. Failure so to do may vitiate the trial as a nullity.”

In the instant case, it is common ground that nowhere throughout the trial that it was recorded that an interpreter was in court to interpret E proceedings of the trial from Igbo language to the English language. Yet it is manifest that the appellants pleaded to the charge for which they were arraigned before the High Court in Igbo language. Evidence was given in the Igbo language by some of the witnesses while some of them spoke in F English. All that happened with the acknowledged fact that the lingua franca of the court is English. Can it be assumed that because the trial Judge was of Igbo extraction and should speak and understand the Igbo language, the proceedings should not be interpreted from the Igbo language to the English and vice versa? I think not. The court, in any event, G must record the proceedings in the English Language, and will not address the court in any other language than the English Language. It follows that having regard to my earlier opinion that by virtue of the word “shall” in Section 36(7) of the Constitution of 1999, it is mandatory for a H court trying any criminal offence to make a faithful recording of the proceedings in court which shall include the presence of the interpreter and also the part played by such an interpreter in the course of the proceedings. Hence, in my view, a court concerned with trying a person for

a criminal offence is under a constitutional duty to ensure that an interpreter is in court who can interpret from English, the language of the court, to any language in the vernacular or vice versa.

However, for the appellant to take advantage of this provision of Section 36(7) of the Constitution, it must be shown that the printed record did not correctly incorporate all that transpired during the trial. This is because printed record of our courts remain sacrosanct until shown otherwise by positive proof by the party alleging its incorrectness. In the instant appeal, as the appellant has not gone beyond mere allegations that the printed record is incorrect, he cannot successfully claim that his constitutional right was breached. I will therefore resolve this issue against the 1st appellant. With regard to other issues raised in the appeal, I have, after due consideration, formed the view that the guilt of the 1st appellant was established beyond reasonable doubt. His conviction which was affirmed by the court below is hereby upheld by me. However, as the evidence laid against the 2nd - 4th appellants do not lead to the irresistible conclusion that they took part in the robbery. In the result, for the above reasons and the fuller reasons in the leading judgment, the affirmation of their conviction by the court below would be set aside. They are therefore ordered to be discharged and acquitted. The conviction of the 1st appellant is hereby confirmed and his appeal is dismissed accordingly.

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PATS-ACHOLONU JSC

I have read the judgment of my learned and noble Lord, Oguntade JSC., and I agree with him. The issue in this case as adumbrated by the appellants is a narrow one. In the course of his argument, the learned counsel for the appellants tried to improvise his case by enlarging the amplitude and horizon of the issue by attempting to incorporate a subsection of Section 36 of the Constitution to wit the point on interpretation which does not, in fact, form the fulcrum of his case. He cannot bring in new issues in an effort to embellish his case to give it a veil it never wore or conceived. In this court, parties are bound by the issues they framed

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and they cannot argue outside the orbit of the issues so formulated. The corner stone of this case has nothing to do with interpretation but the nature of the records kept by the trial court. He unwittingly confined himself to a narrow path.

B In my view, the appeal of the 1st appellant has nothing to urge on it and it is dismissed. With respect to the 2nd, 3rd and 4th appellants, I acquit and discharge them as the facts on them are merely tenuous. I abide by the consequential order in the lead judgment.

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