

SUPREME COURT OF NIGERIA
20TH APRIL, 2007. SC. 279/2003
CORAM:- A. I. KATSINA-ALU, U. A. KALGO, N. TOBI,
F. F. TABAI, I. T. MUHAMMAD, JJSC

FATAI OLAYINKA	APPELLANT
V.		
THE STATE	RESPONDENT

CRIMINAL PROCEDURE - Armed robbery - Weapons used - Tendering them is not compulsory - But depends on the circumstances of the case (H1)

CRIMINAL PROCEDURE - Armed robbery - Witnesses - Number of - Prosecution's failure to call a particular witness - May not be fatal in all cases (H2)

CRIMINAL PROCEDURE - Confessional statement - Objection to - As not being voluntary - Makes conducting trial within trial necessary - Before admitting it (H3)

EVIDENCE - Admissibility - Exhibits - Where wrongfully admitted - Court has a duty to expunge it - As any finding based on inadmissible evidence - Would be perverse (H4)

CRIMINAL PROCEDURE - Alibi - Appeals - Rejection of plea of alibi - Based on reliance placed upon inadmissible exhibit - Will be set aside as a perverse finding (H5)

CRIMINAL PROCEDURE - Fair trial - Armed robbery - Statements to Police - Where earlier statement of accused - Was not tendered by the prosecution - Fair trial guaranteed under the Constitution - Was not given (H6)

CRIMINAL PROCEDURE - Doubt - Armed robbery - Proof beyond reasonable doubt - Where not established - Appellant will be acquitted (H7)

FACTS

Before the High Court of Lagos State, the appellant was charged with the offence of armed robbery under s. 402 (2) (a) of the Criminal Code Law of Lagos State. The prosecution did not tender the offensive weapons allegedly used in the robbery. It also failed to call a couple whom appellant was said to have robbed, in the company of other suspects that absconded. When the prosecution sought to tender appellant's confessional statement (Exhibit A), his counsel raised objection on the ground that the statement was not voluntarily made.

Without conducting any trial within trial to ascertain the voluntary nature of the statement, the trial court admitted it in evidence. It also relied on that statement in rejecting appellant's plea of alibi. The trial court found the appellant guilty as charged and sentenced him to death by firing squad or hanging. His appeal to the Court of Appeal was dismissed. Dissatisfied, appellant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether it was right for the Court of Appeal to uphold the judgment of the trial Court convicting and sentencing the Appellant to death by hanging for the offence of armed robbery in view of the nature and quality of evidence adduced by the prosecution, the procedural irregularities and the apparent infraction of the Appellant's constitutional rights."

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

Armed robbery - Weapons used

1. With respect to the submission of the Appellant about the failure of the prosecution to tender the weapons of the alleged robbery and its effect on the prosecution I do not think there is any principle of law requiring the tendering of the weapons of an alleged robbery to establish the guilt of an accused person. **MARTINS v STATE** (supra) and **ALABI v STATE** (supra) cited by the Appellant in support of the submission did not lay down or restate any such principle. Whether or not the prosecution needed

to tender the weapons with which the Appellant allegedly committed robbery depends, by and large, on the character and circumstances of the case.

The PW2 Inspector Edwin Nweke said under cross-examination at page 26 lines 17-18 of the record that he was not aware if anything was recovered from the accused person. None of either the PW3 or Pw4 gave any evidence of the recovery of any weapons from the Appellant. There was therefore no assertion from any of the prosecution witnesses that any weapon was recovered from the person of the Appellant. None was also recovered from the alleged scene of crime. It is my view therefore that in the peculiar circumstances of this case, proof of any weapon of the alleged robbery was not necessary to establish the guilt of the Appellant. (p. 1823 E/1824 B)

Armed robbery - Witnesses - Number of

2. An important consideration is whether the failure to call Mr. Henry Masha and Mrs. Agnes Masha who were two of the three victims of the robbery, was necessarily fatal to the prosecution's case. The firmly settled principle of law from a long line of cases is that there is no obligation on the prosecution to call a host of witnesses. What matters really is not the number of witnesses called but rather the quality of the evidence from the witnessed called.

Thus, in so far as the role played by the Appellant in the robbery incidence is concerned, the materiality of their evidence cannot be disputed. They were not called. (p. 1824 E/1825 A)

Confessional statement - Objection to

3. At the trial on the 12/7/84 when the confessional statement of the Appellant was sought to be tendered through the PW2, learned counsel for the Appellant, Miss Idowu, objected to its admissibility on the ground that it was not voluntarily made. The learned trial judge however proceeded to admit same in evidence without any attempt to try this issue whether it was voluntarily made. With respect that approach was wrong. On the propriety of the approach, the Court of Appeal, per Oguntade

(J.C.A.) as he then was, had this to say:

"I think that the lower court was mistaken in its approach.

Where there is a dispute as to whether or not an accused made a statement voluntarily to the police, an issue as to admissibility is raised and the duty of the trial court is to try the voluntariness of the statement sought to be tendered....."

The above, aptly in my view, restates the principle when an accused person retracts a confessional statement on the ground that it was not voluntarily made. In such a situation the trial court has a duty to try this issue of the voluntariness or otherwise of the statement in what is called "trial within a trial." (p. 1825 C)

EVIDENCE - Admissibility - Exhibits

D 4. There is however an aspect of the case of the Appellant which appears to have been glossed over by the Court below. After rejecting Exhibit 'A' on the ground of its inadmissibility the Court of Appeal opined:

"The lower court remarkably did not rely on Exhibit 'A' in coming to the final conclusion in the case. I do not therefore see that there was any miscarriage of justice resulting from the improper evidence of Exhibit 'A'."

This opinion, with respect, does not appear to have flown from the totality of the evidence before the court. When evidence has been wrongly admitted, it is not a legal evidence and the court has a duty to expunge it from the record. Such evidence should be regarded as if it had not been tendered and admitted. The court cannot rely on it in reaching its ultimate decision. And any finding or decision based on such inadmissible evidence would be perverse and an appellate court faced with a situation has a duty to intervene. (p. 1826 A)

Rejection of plea of alibi

H 5. The alibi raised by the Appellant was thus rejected because details of it were not mentioned in exhibit "A". Having regard to the fact that Exhibit "A" was not a legal evidence, the learned trial judge was, in my view, wrong to rely on it to find against the Appellant. But for his reliance on

Exhibit “A” which did not form part of the legal evidence before the court, he would probably reach a different conclusion on the alibi raised by the Appellant. Exhibit “A” clearly influenced the learned trial judge’s conclusion on this issue of alibi. It is settled law that when a finding of fact is based on inadmissible evidence (oral or documentary) the finding is perverse and an appellate court has a duty to interfere there with and set it aside. The finding, I dare say, is liable to be set aside and is accordingly set aside. (p. 1826 H)

Fair trial - Armed robbery - Statements to Police

6. It is, at this juncture, necessary to emphasize that the statement of an accused person made to the Police, if not confessional, is the very foundation of his defence. In the instant case therefore, the prosecution had a duty to make the said statement or statements available to the Court. The Appellant might have raised his defence or defences therein and the court would have had the opportunity to examine them. In the absence of these statement or statements, the Appellant cannot be held to have had a fair trial guaranteed him under the Constitution.

In addition to the above, the evidence itself needs to be further examined with some circumspection. (p. 1827 H)

Proof beyond reasonable doubt

7. Further more it is not probable that the robbers who robbed the PW3 and the couple in the car would wait at the scene and even approach the self same vehicle they had only a short while earlier robbed.

On the whole and particularly having regard to (i) the trial court’s reliance on Exhibit “A” which was not a legal evidence before the court to dismiss the alibi and (ii) the prosecution’s failure to produce the statement(s) of the Appellant made prior to that in Exhibit ‘A’, there exists the likelihood of some miscarriage of justice. The consequence is that the prosecution’s case failed to meet the standard of proof beyond reasonable doubt. There are, in my view, some doubts which ought to be arid are hereby resolved in favour of the appellant.

In the event, this appeal succeeds. The judgment and conviction

of the Appellant by the trial court and its affirmation by the Court below are set aside. In its place I substitute a verdict of discharge and acquittal of the Appellant of the offences for which he stood trial. (p. 1829 A)

B NOTABLE POINTS OF INTEREST

TOBI JSC

1. Armed robbery - What prosecution must prove

In order to convict for armed robbery the prosecution must prove that
 C (a) There was an armed robbery. (2) The accused was armed. (3) The
 accused with the arms, or arm participated in the robbery which makes
 it armed robbery. Once the prosecution proves the above ingredients
 beyond reasonable doubt, failure to tender the offensive weapon cannot
 result in the acquittal of the accused person. This is because of the pos-
 D sibility of the accused person doing away with the offensive weapon
 after the commission of the offence in order to exculpate himself from
 criminal responsibility. Nothing stops an accused person from throwing
 away or hiding the offensive weapon completely outside the investigative
 E eyes of the Police. If there is compelling evidence that the accused per-
 son committed the armed robbery, failure to tender the offensive weapon,
 in the circumstances, cannot therefore be basis of acquittal. (p. 1831 F)

F MUHAMMAD JSC

2. Alibi & other defences - Duty of court

Learned Counsel for the appellant submitted that the appellant put for-
 ward the defence of alibi to the effect that he did not participate in the
 robbery neither was he arrested by the Police at the scene of the incident,
 G on the date the incident occurred. The appellant's father confirmed the
 appellant's statement that the appellant was with him in Ikorodu town on
 the date of the incident.

Now, once there is that defence as put forward by the appellant, it
 H is the responsibility of the prosecution to investigate and disprove the
 defence through credible evidence that will puncture the appellant's de-
 fence. The prosecution failed to do so in this case and the trial court as
 well, did not focus its attention properly on that defence of alibi put up by

the appellant. As stated earlier, it is a paramount principle of our law that when a defence, however weak, foolish unfounded, improbable, is raised by an accused person charged with a crime, that defence should fairly and impartially be considered by the trial Judge in order not to occasion a miscarriage of justice on the accused. That is the law and that is what we B abide by. (p. 1836 B)

REPRESENTATION

N. I. Quakers for the Appellant.

Mrs. O. A. Olayinka, Solicitor-General Lagos State, Mrs. J. E. Gbadebo, C D.P.P. Lagos State and Mrs. M. Asumah, Chief State Counsel Lagos State for the Respondent.

CASES REFERRED TO

ALABI v STATE (1993) 7 NWLR (Part 307) 511 at 526-527

OKONOFUA v STATE (1981) 6-7 SC 1 at 18

ADAJE v STATE (1976) 6-9 SC 18 at 28

GBADAMOSI v STATE (1992) 9 NWLR (part 266) 65

R v ONABANJO (1936) 3 WACA 42

R v IGWE (1960) SCN LR 158

AGBAJE v ADIGUN (1993) 1 NWLR (Part 269) 261 at 272

STAGE v EMINE (1992) 6 NWLR (Part 256) 658

ASANYA v STATE (1991) 3 NWLR (Part 180) 422

MARTINS v STATE (1997) 1 NWLR (Part 481) 355

R. v. Bio (1945) 11 WACA 46 at page 48

Nwuzoke v. State (1988) 1 N.W.L.R. (Pt. 72) 529

Nwaogu v. State (1992) 7 N.W.L.R. (Pt. 254) 429

STATUTES REFERRED TO

Criminal Code Law of Lagos State s. 402(2)(a)

Constitution of the Federal Republic of Nigeria 1999 s. 36(6)(a)

Criminal Procedure Act s. 215

LEAD JUDGMENT BY TABAI JSC

At the High Court of Lagos State, the Appellant was tried and convicted on a three count charge of armed robbery under section 402(2)(a) of the Criminal Code Law of Lagos State and was sentenced to death by firing squad or by hanging. The judgment of the High Court was on the 26th of July 1985. The trial judge was Honourable Justice I.O. Agoro. The offence was alleged to have been committed on the 14th of November 1981.

Dissatisfied, the Appellant appealed to the Court of Appeal. By its judgment of the 28th November 2003, the appeal was dismissed. He has come on further appeal to this Court. The parties, through their counsel, have filed and exchanged their briefs of argument. The Appellant's brief was prepared by Norrison I. Quakers of Olisa Agbakoba & Associates. That of the Respondent, was prepared by Mrs. Olaide Olayinka, Solicitor-General Lagos State. In the Appellant's Brief of Argument four issues were formulated for determination. Five issues were raised in the Respondent's Brief. For reasons which I shall state hereinafter, I shall reproduce only the 1st issue of the Appellant. The said issue is:

"Whether it was right for the Court of Appeal to uphold the judgment of the trial Court convicting and sentencing the Appellant to death by hanging for the offence of armed robbery in view of the nature and quality of evidence adduced by the prosecution, the procedural irregularities and the apparent infraction of the Appellant's constitutional rights."

The Respondent's issue one is, in substance, to the same effect as that of the Appellant.

On the first issue the substance of the arguments of Norrison I. Quakers in the Appellant's Brief are as follows:

The first submission is that to sustain a conviction of the Appellant under section 402(2)(a) of the Criminal Code Law of Lagos State the prosecution had a duty of tendering the offensive weapons allegedly used in the robbery and that the failure so to do casts a doubt on the guilt of the Appellant and which doubt, he contended, ought to be resolved in favour of the Appellant. For this argument he relied on *ALABI v THE STATE* (1993) 7 NWLR (Part 307) 511; *MARTINS v STATE* (1997) 1 NWLR

(Part 481) 355.

Next is the prosecution's failure to call two witnesses. The victims of the alleged robbery are stated to be Sunday Imosemi (PW3), Mr. Henry Masha and Mrs. Agnes Masha. It was the submission of learned counsel that the prosecution and the trial court relied solely on the uncorroborated evidence of the PW3 and the failure to call the said Mr. Masha and Mrs. Masha was grave and fatal to the prosecution's case. In support of this submission he cited THEOPHILUS v STATE (1996) 1 NWLR (Part 423) 138 at 141, CHUKWU v STATE (1996) 7 NWLR (Part 463) 686 at 689, NWOISI v STATE (1996) 6 SC 109; ASEMAKAHE v STATE (1965) NMLR 317. B
C

Another complaint of the Appellant is in the area of contradictions in the prosecution's case. Learned counsel for the Appellant submitted that there existed such contradictions in the case of the prosecution as rendered it doubtful and which doubts, he argued, ought to be resolved in favour of the Appellant. For this submission he relied on KHALEEL v STATE (1997) 8) NWLR (Part 516) 237 at 247. He gave particulars and details of these contradictions in paragraph 4.03 - 4.04 of the Appellant's Brief. These are contradictions as to the date of the commission of the offence, the weapons found on the Appellant at the time of the alleged offence and the place of the arrest of the Appellant. Still on contradictions and consequences, learned counsel referred to STATE v DANJUMA (1997) 5 NWLR (Part 506) 512 at 528-529, GIRA v STATE (1996) 4 NWLR (Part 443) 375 at 382; ONUBOGU v STATE (1974) 9 SC 1 and IBEH v STATE (1997) 1 NWLR (Part 484) 632 at 649) 650. D
E
F

Learned counsel for the Appellant further contended that the voluntariness or otherwise of the confessional statement was not examined by the trial court and submitted that the statement was, for that reason, inadmissible and conviction founded on it unjustifiable. He cited OKEKE STATE (1995) 4 NWLR (Part 392) 676 at 683; EGBOGHONOME v STATE (1993) 7 NWLR (Part 306) 383. Learned counsel for the Appellant asserted that the Appellant raised the defence of alibi and which ought to have been investigated. It was submitted that the failure to investigate same was fatal to the prosecution's case. Reliance was placed on PETER G
H

v STATE (1977) 2 NWLR (Part 490) 711 at 731.

B Appellant also alleged fundamental procedural irregularities in the arraignment of the Appellant which irregularities, he submitted, rendered the trial null and void. Counsel argued that the Appellant's arraignment recorded at page 18 of the record violates the provisions of section 33(6)(a) of the 1979 Constitution and section 36(6)(a) of the 1999 Constitution and section 215 of the Criminal Procedure Act. Counsel gave details of what he described as the non-compliance and cited KAJUBO v STATE (1988) 1 NWLR (Part 73) 721 and EREKANURE v STATE (1993) 5 C NWLR (Part 294) 392. It was submitted that the four conditions of a proper arraignment laid down in KAJUBO and EREKANURE were not complied with.

D The Appellant next raised the issue of proper identification. It was argued that from the circumstances of the case an identification parade ought to have been conducted and that the failure to so conduct the parade leaves the evidential burden of proof beyond reasonable doubt undischarged. In support of this submission, OKEKE v STATE (1995) 4 E NWLR (Part 392) 676 at 688; MADAGAWA v STATE (1988) 5 NWLR (Part 92) 60; ALABI v STATE (1993) 7 NWLR (Part 307) 51; CHUKWU v STATE (1996) 7 NWLR (Part 468) 686 at 690; BOZIN v STATE (1985) 2 NWLR (Part 8) 465; OKOSI v STATE (1982) 1 NWLR (Part 100) 645 and AD AMU v STATE (1986) 3 NWLR (Part 32) 865 were cited. F

G On this first issue the learned Solicitor-General of Lagos State, Mrs. Olaide Olayinka submitted that all the three ingredients of proof under section 402(2)(a) of the Criminal Code Law of Lagos State as laid down in BOZIN v STATE (supra) were established. There was no requirement that the offensive weapons used in the alleged robbery must be tendered, she argued. With respect to the failure of the prosecution to call the husband and wife victims of the alleged robbery, she argued that the prosecution was not bound to call every witness and that the failure H to call those husband and wife was not fatal to the prosecution's case and that the evidence of the single witness since believed by the trial court was enough to justify the conviction. For these submissions she relied on OFORKETE v STATE (2000) 7 SC (Part 1) 80 at 83;

IHEMEGBULAM ONYEGBU v STATE (1995), ALONGE V INSPECTOR GENERAL OF POLICE (1959) 4 FSC. With respect to contradictions it was argued that there were no such material contradictions as to the date of the commission of the alleged offence, the weapons found on the Appellant at the time of his arrest and the place of his arrest as to affect the probative value of the prosecution's case. B

As regards the Confessional Statement Exhibit 'A' the learned Solicitor-General referred to the opinion of the Court below at page 224 of the record and its rejection and submitted that the trial court rightly relied on other evidence apart from Exhibit "A" to sustain the conviction. C

As respects the alibi raised, it was the submission of the learned Solicitor-General for it to be investigated, the Appellant ought to have raised it at the earliest opportunity available to him and that it was too late in the day to raise it during the trial. For this submission he relied on EKEMSON v STATE (1989) 3 NWLR (Part 115) 455 and ONYEGBU v STATE (1995) 4NWLR (Part ...) D

Let me now consider the arguments which substance I have set down above. **With respect to the submission of the Appellant about the failure of the prosecution to tender the weapons of the alleged robbery and its effect on the prosecution I do not think there is any principle of law requiring the tendering of the weapons of an alleged robbery to establish the guilt of an accused person. MARTINS v STATE (supra) and ALABI v STATE (supra) cited by the Appellant in support of the submission did not lay down or restate any such principle. Whether or not the prosecution needed to tender the weapons with which the Appellant allegedly committed robbery depends, by and large, on the character and circumstances of the case.** On this issue of weapons of the alleged robbery the PW1, Inspector Timothy Emare said in his evidence in chief: E F G

"Before we reached the scene, I order my men to alight from the car. We all crawled to the scene with out weapons. After crawling for a distance of one electric pole, we sighted the accused person and members of his gang. There were about five members of the gang standing apart when we sighted them. They were all armed with cutlasses and short axes. H

Upon sighting the policemen in uniform, the accused and his gang ran into the bush. We chased the suspects and later arrested the present accused person.”

(See page 19 lines 20-31 of the record)

B Under cross examination the witness said:

“There was nothing found on the accused upon his arrest. But he and others were armed with cutlasses and axes.”

The PW2 Inspector Edwin Nweke said under cross-examination at page 26 lines 17-18 of the record that he was not aware if anything was recovered from the accused person. None of either the PW3 or Pw4 gave any evidence of the recovery of any weapons from the Appellant. There was therefore no assertion from any of the prosecution witnesses that any weapon was recovered from the person of the Appellant. None was also recovered from the alleged scene of crime. It is my view therefore that in the peculiar circumstances of this case, proof of any weapon of the alleged robbery was not necessary to establish the guilt of the Appellant.

An important consideration is whether the failure to call Mr. Henry Masha and Mrs. Agnes Masha who were two of the three victims of the robbery, was necessarily fatal to the prosecution’s case. The firmly settled principle of law from a long line of cases is that there is no obligation on the prosecution to call a host of witnesses. What matters really is not the number of witnesses called but rather the quality of the evidence from the witnessed called. See ALABI v STATE (1993) 7 NWLR (Part 307) 511 at 526-527; OKONOFUA v STATE (1981) 6-7 SC 1 at 18, ADAJE v STATE (1976) 6-9 sc 18 at 28.

The question is whether, from the peculiar circumstances of this case, it was safe to convict upon the eye witness account of the PW3 and without the evidence of either Mr. or Mrs. Masha or both? The case of the prosecution is that the Appellant and four others at large committed the offence. Specifically it was alleged that while two of the robbers both at large attacked and robbed the PW3, Sunday Imosemi of his properties, the Appellant and two others at large attacked and robbed Mr. and

Mrs. Masha of their properties including their passports. It is also the case of the prosecution that the Appellant was so identified by Mr. and Mrs. Masha as one of the three robbers that attacked them. **Thus, in so far as the role played by the Appellant in the robbery incidence is concerned, the materiality of their evidence cannot be disputed.** B
They were not called. Does the failure to call these witnesses fatal to the prosecution's case. Put in another way, does the evidence of the PW3 supported by that of the PW1 and PW4 sufficiently established the guilt of the Appellant beyond reasonable doubt? This calls for a careful examination of the evidence before the court. C

First of all, let me reiterate the position taken by the Court below with respect to the confessional statement of the Appellant Exhibit 'A'. **At the trial on the 12/7/84 when the confessional statement of the Appellant was sought to be tendered through the PW2, learned counsel for the Appellant, Miss Idowu, objected to its admissibility on the ground that it was not voluntarily made. The learned trial judge however proceeded to admit same in evidence without any attempt to try this issue whether it was voluntarily made. With respect that approach was wrong. On the propriety of the approach, the Court of Appeal, per Oguntade (J.C.A.) as he then was, had this to say:** D
"I think that the lower court was mistaken in its approach. E

Where there is a dispute as to whether or not an accused made a statement voluntarily to the police, an issue as to admissibility is raised and the duty of the trial court is to try the voluntariness of the statement sought to be tendered....." F

The above, aptly in my view, restates the principle when an accused person retracts a confessional statement on the ground that it was not voluntarily made. In such a situation the trial court has a duty to try this issue of the voluntariness or otherwise of the statement in what is called "trial within a trial." See GBADAMOSI v STATE (1992) 9 NWLR (part 266) 65; R v ONABANJO (1936) 3 WACA H 42; R v IGWE (1960) SCN LR 158. G

I agree with and fully endorse the lower court's rejection of the said Exhibit 'A'

There is however an aspect of the case of the Appellant which appears to have been glossed over by the Court below. After rejecting Exhibit ‘A’ on the ground of its inadmissibility the Court of Appeal opined:

B *“The lower court remarkably did not rely on Exhibit ‘A’ is in coming to the final conclusion in the case. I do not therefore see that there was any miscarriage of justice resulting from the improper evidence of Exhibit ‘A’.”*

C This opinion, with respect, does not appear to have flown from the totality of the evidence before the court. When evidence has been wrongly admitted, it is not a legal evidence and the court has a duty to expunge it from the record. Such evidence should be regarded as if it had not been tendered and admitted. The court can-
D not rely on it in reaching its ultimate decision. And any finding or decision based on such inadmissible evidence would be perverse and an appellate court faced with a situation has a duty to inter-
vene.

E See AGBAJE V ADIGUN (1993) 1 NWLR (Part 269) 261 at 272.

The main defence of the Appellant is alibi. He claimed that on the 14/11/81 when the robbery was allegedly committed, he was at Ikorodu with his father. The father also testified as DW2 to confirm the alibi
F raised by the Appellant. The Court had a duty to carefully consider any defence put forth by an accused person. See WILLIAM v STATE (1992) 8 NWLR (Part 261) 515. In rejecting the alibi raised by the Appellant, the learned trial judge said:

G *“It seems to me that the alibi put forward by the accused person was an after thought since nothing was mentioned on that point in his statement Exhibit “A” to the Police dated 24/11/1981. One would have thought the accused person would put forward the defence of alibi at the earliest possible moment after his arrest by the Police”*

H He thus rejected the alibi and concluded thus:

“I have therefore come to the conclusion that the present accused person has failed to adduce satisfactory evidence to establish his alibi.”

The alibi raised by the Appellant was thus rejected because

details of it were not mentioned in exhibit “A”. Having regard to the fact that Exhibit “A” was not a legal evidence, the learned trial judge was, in my view, wrong to rely on it to find against the Appellant. But for his reliance on Exhibit “A” which did not form part of the legal evidence before the court, he would probably reach a different conclusion on the alibi raised by the Appellant. Exhibit “A” clearly influenced the learned trial judge’s conclusion on this issue of alibi. It is settled law that when a finding of fact is based on inadmissible evidence (oral or documentary) the finding is perverse and an appellate court has a duty to interfere there with and set it aside. See STAGE v EMINE (1992) 6 NWLR (Part 256) 658, ASANYA v STATE (1991) 3 NWLR (Part 180) 422. **The finding, I dare say, is liable to be set aside and is accordingly set aside.**

Still on the defence of alibi raised by the Appellant, there is another aspect of the case of the Appellant not properly examined both by the trial court and the court below. The Appellant maintained that when he was arrested on or about the 16/11/81 he was taken to the Alade Police Station Somolu where he made a statement to the Police in the Yoruba language. The PW1 also said that when the Appellant was arrested he was taken to the Ikeja Police Station where he made a statement to the Police. (See page 20 lines 4-5 of the record). And the PW2 said that when the case was referred to him on the 24/11/81, the Appellant was brought to him with the case file. (See page 25 lines 2-3 of the record). It is clear from the foregoing and I find as a fact that before the 24/11/81 when Exhibit “A” was made, the Appellant had made one or two statements. These statements were not tendered and no explanation was offered as to why they were not tendered. On the 19/12/84, the Appellant testified to the effect that his earlier statement(s) to the Police was torn and in its place Exhibit “A” was dictated to him. The assertion may not be true. But the implication of the assertion is that the said statement or statements contained materials exculpatory of the Appellant. **It is, at this juncture, necessary to emphasize that the statement of an accused person made to the Police, if not confessional, is the very foundation of his defence. In the instant case therefore, the prosecution had a duty**

to make the said statement or statements available to the Court. The Appellant might have raised his defence or defences therein and the court would have had the opportunity to examine them. In the absence of these statement or statements, the Appellant cannot be held to have had a fair trial guaranteed him under the Constitution.

In addition to the above, the evidence itself needs to be further examined with some circumspection. The robbery was alleged to have taken place at about 7 p.m. It lasted for about 20 minutes. Immediately thereafter the PW3 drove to the Police Post along the Lagos - Ibadan Express Way and reported the incident to the Police. Various accounts were given of the distance between the alleged scene of robbery and the Police Post. The PW1 merely described the scene as Kilometer 7. The PW3 put the distance at about 1 kilometer in his evidence in chief. He put it at about 1 or 2 kilometers under cross-examination. The PW4 said it was about 7 kilometers. And so from the prosecution's story there was no certainty about the alleged scene of crime.

Be that as it may, the PW1, PW3 and PW4 each gave evidence of how the Appellant was arrested. The story was consistent. But was it possible?

It is that the PW3 took three uniformed policemen amongst them PW1 and PW4 into his car and drove back towards the scene. Some distance away the policemen alighted from the car and crawled for about a pole towards the scene. The PW1 said that they sighted the Appellant and four others all armed with cutlasses and short axes. They chased them and were able to arrest the Appellant. Describing the same incident the PW4 said that the PW3 drove his car back to the same spot while they took cover and waited for about 5 minutes before the robbers emerged from the bush apparently to attack the PW3 again and that it was at that stage that they chased the gang and arrested the Appellant. From this description the attack which started at about 7 p.m. lasted for about 20 minutes. It was after that attack that the PW3 drove to the Police Post 1 or 7 kilometers away, took the three policemen drove back to somewhere close to the scene from where the policemen started to crawl to

the scene. It is clear from this description that the Police could not have arrived at the scene earlier than 8 p.m. **Further more it is not probable that the robbers who robbed the PW3 and the couple in the car would wait at the scene and even approach the self same vehicle they had only a short while earlier robbed.**

On the whole and particularly having regard to (i) the trial court's reliance on Exhibit "A" which was not a legal evidence before the court to dismiss the alibi and (ii) the prosecution's failure to produce the statement(s) of the Appellant made prior to that in Exhibit 'A', there exists the likelihood of some miscarriage of justice. The consequence is that the prosecution's case failed to meet the standard of proof beyond reasonable doubt. There are, in my view, some doubts which ought to be arid are hereby resolved in favour of the appellant.

In the event, this appeal succeeds. The judgment and conviction of the Appellant by the trial court and its affirmation by the Court below are set aside. In its place I substitute a verdict of discharge and acquittal of the Appellant of the offences for which he stood trial.

All the other issues and arguments proffered thereon were merely academic and same are accordingly discountenanced.

KATSINA-ALU JSC

I have had the advantage of reading the judgment of my learned brother Tabai JSC in this appeal. I agree with it and, for the reasons he has given, I too allow the appeal and set aside the judgment of the court below.

KALGO JSC

I have read in draft the judgment in this appeal just delivered by my learned brother Tabai JSC. I agree with him that there is merit in the appeal and it ought to be allowed. I therefore allow the appeal, set aside the decisions of the trial Court and the Court of Appeal and acquit and discharge the appellant.

TOBI JSC

In January 1983, the appellant was charged with a 3-count charge of armed robbery contrary to section 402(2)(a) of the Criminal Code, Cap. 31, Laws of Lagos State, 1973. He pleaded not guilty to all the counts. The prosecution called four witnesses. The appellant gave evidence and called one witness. The learned trial Judge found the appellant guilty of all the counts. He was sentenced to death. His appeal to the Court of Appeal was dismissed. That court upheld the decision of the High Court.

The appellant has come to this court on appeal. He has formulated four issues for determination. The respondent has formulated five issues for determination. I intend to take Issues Nos. 1 and 2 formulated by the appellant. I will not take Issues Nos. 3 and 4. I see that Issue No. 3 is essentially academic after taking Issues 1 and 2. Issue No. 4 will not be taken because it goes beyond the realm of interpretation of the law to that of making the law. I should leave the latter function for the Legislature. I should reproduce the two issues I will take in this judgment for ease of reference

“1. Whether it was right for the Court of Appeal to uphold the judgment of the trial court convicting and sentencing the Appellant to death by hanging for the offence of armed robbery in view of the nature and quality of evidence adduced by the prosecution, the procedural irregularities and the apparent infraction of the Appellant’s constitutional rights.

2. Whether it was right for the Court of Appeal to confirm the conviction and sentence of the Appellant to death on the basis of the evidence obtained by the State, whilst the Appellant was in custodial police interrogation contrary to the provisions of Section 35(2) of the 1999 Constitution, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples Rights, which require legal representation for the Appellant at the time of interrogation.”

It is the submission of the appellant on Issue No. 1 that the absence or unavailability of the offensive weapon as well as two relevant

and material witnesses was detrimental to the case of the prosecution. He pointed out that the Court of Appeal relied on inconsistent and contradictory evidence and admitted confessional statement contrary to section 28 of the Evidence Act. He contended that the learned trial Judge failed to consider the defence of alibi and failure on the part of the prosecution to comply with section 215 of the Criminal Procedure Act in the arraignment of the appellant. He also took the identification of the appellant and submitted that there was no proper identification of the appellant. B

On Issue No. 2, appellant submitted that the evidence obtained by the Police against the appellant during interrogation was inadmissible because appellant was not afforded the services of a legal practitioner. He urged the court to apply the case of *Miranda v. Arizona* 384 US 436 (1996). C

It is the submission of the respondent that failure to tender the offensive weapon and the calling of the two witnesses is not prejudicial to the case of the prosecution. He pointed out that the issue of calling two relevant witnesses was not raised at the trial court and this court should therefore disregard it. He did not see any contradictions in the evidence of the prosecution witnesses. The respondent submitted that the objection raised on the admissibility of the confessional statement is misconceived as the Court of Appeal made a finding in favour of the appellant. D E

Failure on the part of the appellant to raise the defence of alibi was against the appellant's case, the respondent submitted. Respondent did not agree that there were procedural irregularities in the arraignment of the appellant. F

In order to convict for armed robbery the prosecution must prove that (a) There was an armed robbery. (2) The accused was armed. (3) The accused with the arms, or arm participated in the robbery which makes it armed robbery. Once the prosecution proves the above ingredients beyond reasonable doubt, failure to tender the offensive weapon cannot result in the acquittal of the accused person. This is because of the possibility of the accused person doing away with the offensive weapon after the commission of the offence in order to exculpate himself from criminal responsibility. Nothing stops an accused person from throwing G H

away or hiding the offensive weapon completely outside the investigative eyes of the Police. If there is compelling evidence that the accused person committed the armed robbery, failure to tender the offensive weapon, in the circumstances, cannot therefore be basis of acquittal.

B The appellant cited two cases to substantiate his submission. I was able to locate Alabi v. The State (1993) 7 NWLR (Pt. 307) 511. I was unable to locate Martins v. The State which counsel cited as (1997) 1 NWLR (Pt. 48) 355. It must be a wrong citation. Though Alabi was an armed robbery case, there was no issue of failure to tender the offensive
C weapon and so this court did not decide that issue.

And that takes me to the issue of the evidence of the two relevant and material witnesses that the appellant referred to in his brief. The two witnesses referred to by the appellant are Mr. Henry Masha and Mrs.
D Agnes Masha, two. In his evidence in-chief, PW3, Sunday Imesimi said at page 27 of the Record:

*"I remember that on 14/11/81 at about 7 p.m. while I was driving a Peugeot 504 GR Saloon BD 3144N along Ibadan/Lagos Express Road
E on that day. At a point near the Lagos end of the Toll Gate, I stopped by the road side to easy myself. There was a couple (husband and wife) in my vehicle while I was easing myself at the side of the road quite suddenly two men armed with hammer and axe emerged from the bush. One
F of the men slapped me on my right eye which hurt me. The other man hit me with a hammer on my head and body. I raised an alarm for help. Three other persons armed with axes also attacked the husband and wife in my vehicle. It was still bright at that time of day and I was able to see properly. My shoulder was dislocated with the hammer."*

G Appellant submitted that the above evidence ought to have been corroborated by Mr. and Mrs. Masha. Why, I ask. Is armed robbery one offence where corroboration of evidence of witness is needed for the conviction of an accused? Is the evidence of only one eye witness, like
H PW3, not enough to secure conviction? PW3 was a victim of the armed robbery. He saw it all. He suffered from it and his evidence need not be corroborated to secure conviction. It is the discretion of the prosecution to call witnesses to prove its case. The prosecution can decide to call a

few witnesses. The prosecution can decide to call a village of witnesses. The decision is with the prosecution. It does not lie with an accused person to dictate to the prosecution particular witness it should call to give evidence. That will be moving to the exclusive area of the prosecution in discharging the burden of proof placed on it. B

The appellant called the attention of the court to some inconsistent and contradictory evidence of the prosecution witnesses. The Court of Appeal found only one contradictory evidence. The court said at page 120 of the Record:

“The only contradiction observed is that whereas, PW1 said nothing was found on the Appellant on his arrest, PW4 said the Appellant had a cutlass. This so-called contradiction in my view is not a material one. It is sufficient to amount to robbery if an accused was in the company of persons who were armed and who committed stealing while armed even if the accused himself not armed.” C D

The issue is larger than the way the Court of Appeal had taken it. The effect of contradiction in the evidence of witnesses is that a witness or some of the witnesses told lie and it is not safe to convict the accused person on such evidence. And so the court gives benefit of doubt to the accused. E

In this case, PW1, the Inspector of Police who led the police team to effect arrest, said under cross examination:

“After arresting the accused person, I took him to our officer in-charge. There was nothing found on the accused upon his arrest. But he and others were armed with cutlasses and axes.” F

In his evidence in-chief PW3 said that he was hit with a hammer on his head and body. He also said that Mr. and Mrs. Masha were attacked with axes. G

PW4, a Police Corporal who accompanied PW1 to the scene of crime, said at page 29 of the Record:

“Three of us in uniform accompanied the complainant. At a point near the scene of incident, we left the complainant alone while the policemen took cover in the bush at the road side. After about five minutes we saw five men emerge from the bush. The men were armed with cut-

lasses, axes and knives, and they approached the complainant. In the meantime, we crawled in the bush. We pursued them and arrested one of them.”

As seen above, PW1 said that nothing was found on the appellant
 B at the time of the arrest. Neither PW3 nor PW4 said in evidence that the appellant was armed. All they said was that between three to five persons were armed. None of the witnesses specifically mentioned that the appellant was one of the three to five witnesses armed.

I take the issue of arraignment. *Kajubo v. The State* (1998) 1 NWLR
 C (Pt. 73) 721 is the *locus classicus*. It was held in that case that the charge or information shall be read over and explained to the accused to the satisfaction of the court by the Registrar or other officer of the court. Oputa, JSC in his concurring judgment said at page 737:

D “*The mandatory provisions of Section 215 of the Criminal Procedure Act that the information or charge should be firstly read over to the accused, then secondly, explained to the accused and thirdly, explained to him to the satisfaction of the court and not merely cosmetic; they are not*
 E *semantics - No. They are provisions considered necessary to ensure that the accused person understands and appreciates what is being alleged against him, to which he is required to make a plea... It is a notorious fact that English, the language of the court, the language in which charges*
 F *and information’s are drafted, is not the mother tongue of Nigerians. It is also correct that most Nigerians are illiterate in English and that even those of them who are literate may not easily follow and comprehend the language of the court. For these reasons, our Criminal jurisprudence and our 1979 Constitution considered it necessary that for there to be a proper*
 G *arraignment:*

(i) *The accused person shall be present in Court.*

(ii) *The charge or information shall be read to him in a language he understands.*

H (iii) *The charge or information after being read over in such language should then be explained to him avoiding as much as possible the use of technical language...”*

Did the arraignment comply with the above statement? Was the

charge read to the appellant in Yoruba, the language that he speaks? If it was not read in that language, did the arraignment comply with Kajubo? Kajubo apart, did the arraignment comply with section 33(6)(a) of the 1979 Constitution which provided that “every person who is charged with a criminal offence shall be entitled to be informed promptly, in the language he understands and in detail, of the nature of the offence.” I do not think so. See also Erekanure v. The State (1993) 5 NWLR (Pt. 294)392.

The so-called or purported arraignment is at page 18 of the Record: “Court: The charges on the Information have been read and explained to the accused person.

Plea: Count No. 1: Pleads ‘Not Guilty’.

Count No. 2: Pleads ‘Not Guilty’.

Count No. 3: Pleads ‘Not Guilty’.”

In my view, the above is not in compliance with a community reading of section 215 of the Criminal Procedure Law, Cap. 32, Laws of Lagos State and section 33(6)(a) of the 1979 Constitution and I so hold.

I do not think I will go to the area of confessional statement resulting from the custodial police interrogation. This is because the Court of Appeal correctly, in my view, rejected the confessional statement of the appellant. And that is the crux of the palaver or fuss the appellant has made in great detail in his brief.

It is in the light of the above and the more detailed reasons given by my, learned brother, Tabai, JSC, in his judgment that I too allow the appeal.

MUHAMMAD JSC

My learned brother, Tabai, JSC, permitted me to read in draft, the judgment just delivered. I am in full agreement with my learned brother’s reasoning process and conclusion. I will only want to add that the law has for long been settled in criminal law that it is the duty of a trial court to consider a defence no matter how improbable or stupid it might be. Failure to consider and examine a defence by the trial Judge does not only raise reasonable doubt in the case of the prosecution but also amounts

to a failure to perform a vital duty imposed on the trial Judge and such will amount to a miscarriage of justice which must result in the decision appealed against to be set aside and the conviction quashed. See: *Opayemi v. State* (1985) 2 N.W.L.R. (Ft. 5) 101; *Agbuluwa & Ors. v. Commissioner of Police* (1961) All N.L.R. (Pt. iv) 850; *Namsoh v. State* (1993) 5 N.W.L.R. (Pt. 292) 129; *Williams v. State* (1992) 8 N.W.L.R. (Pt. 26) 515; *Peter v. State* (1997) 3 N.W.L.R (Pt. 496) 625; *Tortim v. State* (1997) 2 N.W.L.R (Pt. 490) 711.

Learned Counsel for the appellant submitted that the appellant put forward the defence of alibi to the effect that he did not participate in the robbery neither was he arrested by the Police at the scene of the incident, on the date the incident occurred. The appellant's father confirmed the appellant's statement that the appellant was with him in Ikorodu town on the date of the incident.

Now, once there is that defence as put forward by the appellant, it is the responsibility of the prosecution to investigate and disprove the defence through credible evidence that will puncture the appellant's defence. The prosecution failed to do so in this case and the trial court as well, did not focus its attention properly on that defence of alibi put up by the appellant. As stated earlier, it is a paramount principle of our law that when a defence, however weak, foolish unfounded, improbable, is raised by an accused person charged with a crime, that defence should fairly and impartially be considered by the trial Judge in order not to occasion a miscarriage of justice on the accused. That is the law and that is what we abide by. See further *R. V. Bio* (1945) 11 WACA 46 at page 48; *Nwuzoke v. State* (1988) 1 N.W.L.R. (Pt. 72) 529; *Nwaogu v. State* (1992) 7 N.W.L.R. (Pt. 254) 429.

For the fuller reasons proffered in the leading judgment of my learned brother, Tabai, JSC, I too allow the appeal. Accordingly, I hereby set aside the judgment and quash the conviction of the appellant by the trial court which was affirmed by the court of Appeal, Lagos, I enter a verdict of discharge and acquittal in favour of the appellant.