

COURT OF APPEAL
ENUGU DIVISION
10TH MARCH, 2003. CA/E/1/2002
CORAM:- M. MOHAMMED, S.A. OLAGUNJU,
C.B. OGUNBIYI, JJCA

1. SUNDAY ANI
2. PETER ANI APPELLANTS
V.
THE STATE RESPONDENT

ARMED ROBBERY - Proof - Standard is proof beyond reasonable doubt
- Ingredients prosecution must prove to succeed - Include that the accused participated in the armed robbery (H1)

EVIDENCE - Witnesses - Reliability - Inconsistent testimony on material facts - Makes an evidence unreliable and it will be rejected (H2)

CRIMINAL PROCEDURE - Witnesses - Contradiction and inconsistency - To be of importance - Should be on material facts - Non conflicting evidence not embodied in statement to police - Can be given in court for emphasis (H3)

CRIMINAL PROCEDURE - Cross examination - Inconsistency - Identification of accused - Testimony of PW1 is not contradictory - As his further testimony under cross examination - Is an addition and not a retraction (H4)

CRIMINAL PROCEDURE - Evidence - Tainted witnesses - Though the phrase has no specific definition - Husband and wife that have no own purpose to serve - And whose evidence trial court found credible - Cannot be described as such (H5)

CRIMINAL PROCEDURE - Witnesses - Early disclosure of fact - Where

reason for not so doing was adequately explained - It does not make the testimony inconsistent - Cases cited by appellants - Are distinguishable (H6)

CRIMINAL PROCEDURE - Armed robbery - Evaluation of evidence - Was properly done by trial court - In finding appellants guilty (H7)

CRIMINAL PROCEDURE - Defences - Alibi - Meaning - Need for court to consider every defence - Evidence of alibi should not be disregarded - Unless there is a stronger evidence against it (H8)

CRIMINAL PROCEDURE - Alibi - Proof - Once accused is fixed at the scene of crime - Defence of alibi need not be investigated by police - Trial court was right in rejecting the defence (H9)

CRIMINAL PROCEDURE - Armed robbery - Proof - Duty of prosecution - Failure to call two prosecution witnesses - Occasioned no miscarriage of justice - Cases of Ahmed cited by appellants is distinguishable - Trial court rightly convicted appellants as charged (H10)

FACTS

Before the Enugu High Court, the appellants were charged with armed robbery contrary to s. 1 (2)(a) of the Robbery and Firearms Act. It was alleged that appellants while armed with gun and iron rod, robbed one Chime Ugwu (PWI) of his N300,000.00 cash in June, 1997. Appellants pleaded not guilty to the charge and raised the defence of alibi. Following evidence and addresses of counsel, the trial court found the appellants guilty of armed robbery and sentenced them to death by hanging. Being dissatisfied, the appellants have now appealed to the Court of Appeal praying the Court to set aside the trial court's judgment and to discharge/acquit them.

Appellants contended inter alia, that the testimonies of prosecution witnesses are inconsistent and full of contradictions. That the complainant's failure to make an early disclosure of his suspecting appellants

to their parents/villagers shows that his implicating them is an after thought and his evidence should be treated as unreliable. But the reason for the non-disclosure was adequately explained by the complainant (PW1). The Court of Appeal considered all the grounds of appeal raised vide four issues formulated by it, though appellants raised six issues.

ISSUES FOR DETERMINATION

(1) Whether or not there were material contradictions and inconsistencies in the evidence of the prosecution witnesses and consequent to which there was a failure of proof of the offence of robbery against the appellants beyond reasonable doubt.

(2) Whether the identification of the appellants by the prosecution witness (PW1) Chime Ugwu, the alleged victim of the crime, was proper when he did not disclose the identity of the appellants as the robbers that attacked him at the earliest opportunity to his villagers including DW1, the first appellant's father and an uncle to the second appellant. Furthermore, whether or not there was in fact an early disclosure of the robbers at the report made to the police at four corner Ozalla Police Station.

(3) Having regard to the evidence by the prosecution and taking into consideration the defences put forward by the appellants, whether or not the trial court did consider the defence of *alibi* raised.

(4) The effect of the failure of the prosecution to call Sgt. Oliver Ngana and Sgt. Mike Agwu; whether section 149(d) of the Evidence Act should not apply.

HELD (Unanimously dismissing the appeal per **OGUNBIYI JCA**)

ARMED ROBBERY - Proof - Standard

1. For the prosecution to succeed in proof of the offence of armed robbery, there ought to be proof of the following ingredients beyond reasonable doubt:

- (i) That there was a robbery or a series of robberies.
- (ii) That each robbery was an armed robbery.
- (iii) That the accused was one of those who took part in the armed robberies.

It is also trite law that the degree of the burden of proof placed on the prosecution is to prove the accused guilty beyond all reasonable doubts.

Section 138 of the Evidence Act places such burden beyond reasonable doubts. (p. 4056 D/G)

Witnesses - Reliability

- B 2. The position of the law is that where witnesses for a party give inconsistent and or contradictory testimonies especially on material facts their evidence on the point must be regarded as unreliable and rejected as such. The same principle of law was also enunciated in the further authorities of *Mogaji & Ors. v. Cadbury Nigeria Ltd.* (1985) 2 NWLR (Pt. 7) 393 and *Ike v. Ofokaja* (1992) 9 NWLR (Pt. 263) 42. (p. 4057 E)

Witnesses - Contradiction and inconsistency

- D 3. I would like to state at this point that for any contradiction and inconsistency to be accorded a premium of importance, they ought to be on material and not minor facts.

It is also permissible in law for purposes of emphasis for a witness to give evidence in court which is not contained in his statement to the police provided that such evidence is not in direct conflict with such statement. On the authority of the *State v. Udofia* 10 ENLR 69 at 72 such additions would not amount to inconsistency.

F It is also held in *Ogbu v. State (supra)* that not every minor inconsistency would be fatal to the prosecution's case.

In the decided authority of *Effia v. The State (supra)*, it was held that for the testimony of the prosecution witnesses to be grossly affected and therefore fatal, the conflict or the contradictions thereon must have been grave and fundamental. The same principle was applied in *Igbi v. The State* (2000) 3 G NWLR (Pt. 648) 169, (2000) 75 LRCN 303.

The inconsistencies and contradictions in my view, are minor and not material to have affected the prosecution's case. (pp. 4057 G/4061 G)

H **Cross examination - Inconsistency**

4. In highlighting some of the inconsistencies and contradictions the first of such was where the witness PW1 stated in chief that the appellant came to his house twice the day preceding the night of the incident and inquired

about his movement to the cattle market. During cross-examination however, he also said that the 1st accused counted money with him in his house. The question is whether or not this amounts to an inconsistency and contradiction as alleged by the appellants. It is obvious in my opinion that the making of the two statements did not amount to retraction of the former B for the latter. Rather it is an addition to that previously made. In other words, there was no indication that there was an abrogation or abandonment of the earlier statement made.

The other complaint was that relating to identity through the aid of a bush lantern, and the use of flashed torch light either on the victim PW1 or reflecting some where else. There was no contrary evidence that there was a burning lantern in the room to have aided identification. What was material was that there was a means of identification by use of some form of light through the lantern and or the torch light in addition. D

It is relevant to also restate that the witness PW1 is well conversant with both the appellants who reside in the same locality. The appellants are also well acquainted with PW1. What is more, the 1st appellant had lived with PW1 as an apprentice cow-dealer. PW1 did recognize the appellants' E voice when they spoke at the operation. There was no evidence that they were masked. (p. 4058 A)

Evidence - Tainted witnesses

5. On the accreditation by appellants of the evidence of PW1 and PW2 as F that being tainted witnesses, the same has no specific definition in our law of evidence. However, with the learned trial Judge having found their evidence credible they cannot therefore be properly described as such. Reference can be made to the case of *Pincent v. State* (1997) 1 NWLR (Pt. G 480) 234 at 245 - 246 paragraphs H -A. The two witnesses PW1 and PW2 are not accomplices because they did not have their own purpose to serve apart from putting forth the facts for doing justice. (p. 4059 D)

Witnesses - Early disclosure of fact

6. On the failure of PW1 in disclosing the accused to the villagers and DW4, the 1st appellant's father alike, the aspect and reason behind such H

have been adequately explained by PW1 who also gave the same instructions to PW2. The reason given was to prevent the accused from escaping. On the authority of *Onubogu v. The State* and also *Ike v. Ofokaja (supra)* the seeming inconsistencies and contradictions alleged do not hold especially where the witness PW1 had given cogent reasons explaining his line of action.

It follows therefore that the authorities of *Udeh v. The State* and *Ebre v. The State* cited by the appellants' counsel (*supra*) do not aid their case since the circumstances are distinguishable from that at hand. It is obvious that PW1 did inform the Police early enough and not only lately, and surfacing at the trial as the appellants would want this court to believe.

The trial court I hold arrived at a correct decision by rejecting the testimony of DW1 therefore and upholding that of PW1. (p. 4060 D)

Armed robbery - Evaluation of evidence

7. In my humble opinion the learned trial Judge adequately considered and evaluated the evidence adduced on both sides. I find no fault in his handling of this matter and upon the credible evidence before him. I agree entirely with the court below that the guilt of the appellants was proved beyond reasonable doubt. That the appellants robbed the victim PW1 is beyond dispute. There is overwhelming evidence in support of this fact. The learned trial Judge was not impressed by the stories of the appellants and thus rejected same. I cannot see any justification for my interfering with his assessment of the credibility of the appellants and the other witnesses in this case, especially having regard to the fact that the trial court is in the best position to assess the credibility of the witnesses. This is trite law and the case of *Nasamu v. The State* (1979) 6-9 SC 153 is in point. I find no such seeming and alleged contradictions, conflicts and inconsistencies in the evidence of the witnesses for the prosecution such as to render their evidence unreliable. I therefore resolve issues 1 and 2 against the appellants. (p. 4062 A)

Defences - Alibi - Meaning

8. It is an essential principle of a criminal trial that a defence however fanciful, stupid, or doubtful is deserving consideration. The authority of *Rex v. Barimah (supra)* is trite.

By an *alibi* it means that the accused was somewhere other than where the prosecution alleged he was at the time of the commission of the offence. Consequently, he could not have committed or participated in the commission of the offence with which he is charged. This is the principle laid down in the decided authority of *Gachi & Ors. v. The State* (1965) NMLR 333.

Also in the Supreme Court's authority of *Yanor v. State* (1965) NMLR pp. 337, 341-342 his Lordship Idigbe, JSC (as he then was) had this to say:

"A jury should be directed that they should not disregard evidence of *alibi unless there is stronger evidence against it.*" The phrase italicised is for the purpose of emphasis.

Alibi is the commonest of all defences. (p. 4062 E)

Alibi - Proof - Once accused is fixed at the scene of crime

9. Where *alibi* is set up the primary onus of establishing the guilt of the appellant is still on the prosecution but the evidential or secondary burden is on the appellant to adduce some evidence of where he was at the material time. That evidence may convince the jury or trial court; the authority of *R v. Lobell* (1957) 41 Cr. App. R. 100 at p. 104 is in point. The standard of proof of *alibi* is not beyond reasonable doubt but on the balance of probabilities as *per* that restated in the decision of *Bozin v. State (supra)*.

The accused DW2 and DW3, now the appellants both put up the said defence of *alibi* and unflinchingly claimed to be somewhere different from the scene of the crime at the material time. The detailed account of their whereabouts have been stated on their brief of arguments. PW1 however emphatically testified that the appellants were undoubtedly at the scene of crime and were in fact among those who robbed him.

Under cross-examination for instance PW1 said:

"I saw Sunday and Peter Ani the accused through the aid of bush lantern when they entered my room."

Further still, it is the law however, that once an accused person is

fixed at the scene of crime his defence of *alibi* must fail. This is trite in the case of *Ntam & Anor. v. State* (1968) NMLR 86 at 88. It follows therefore, that the investigation of *alibi* put up by the accused in the circumstance is unnecessary since the police are not expected to go on a wild goose chase in order to investigate as stated in *Gachi v. The State (supra)*.

Contrary to the submission made by the appellants' counsel, in my humble view, it is clear on the evidence by PW1 that the accused/appellants were fixed at the scene of the crime. Certainly and consequently, they could not possibly have been anywhere else different at the material time. The trial court was right therefore, in rejecting or not considering the defence of *alibi* raised. In other words and equally so, the court below is right when it held that the defence of *alibi* did not avail the appellants in this case.

(p. 4063 B & H/ 4064 B)

Armed robbery - Proof - Duty of prosecution

10. The respondents on their brief of arguments submitted that the prosecution is not duty bound to produce all the witnesses mentioned in a case. This to a certain extent is the position but subject however, in my humble view, to the duty bound on the prosecution to ensure that as a minister in the temple of justice all relevant facts available to them are placed before the court for the purpose of doing justice. In other words there should be no hoarding of facts from the court to aid at arriving at the just decision in a given case.

The question to be answered in the circumstance therefore is, whether the failure to call the said two police officers and the production of the various reports had occasioned a miscarriage of Justice and which would have otherwise tilted the judgment in favour of the appellants?

The three reports in question with one dated 10th and the two 20th July 97, form part of the record of the lower court before us. It is obvious in my opinion that having regard to the documents, no matter how well articulated, they cannot override or take the place of real evidence by eye witness and a victim to an incident.

The appellants cited the authority of *Ahmed v. State* (1999) 7 NWLR (Pt.612) 641 S.C.; (1999) 69 LRCN 1403 at 1426 where the vital witness for the prosecution in two separate interviews by the police made two in-

consistent statements. Her oral evidence was material to clarify whether or not the appellant in a murder case entered the victim's compound as alleged. There was a doubt as to where the incident took place and who actually saw the appellant stab the victim. There was a doubt which needed clearance. That was the reasoning that gave rise to the decision in that case. B

Comparatively, the case at hand and in this appeal is very much distinguishable from that under reference in *Ahmed v. State (supra)*. This I hold because unlike in that case, there was no material inconsistency or contradiction on the prosecution's case that needed clarification. There was also no doubt on the evidence of PW1 the victim of the robbery who was so certain of what he saw and which took place and by whom the offence was committed. The invocation of section 149(d) of the Evidence Act contended by the appellants is not in their favour. C

The learned trial Judge saw the appellants and all the other witnesses who testified. He was therefore in a stronger position to determine their credibility. D

In the light of all that I have said above, I am satisfied that the court below was right in rejecting the various defences raised on behalf of the appellants in this case. There is therefore, no justification in my respectful view in interfering with the judgment of the said court which found and convicted the appellants guilty of robbery by fire arms and sentenced them to death by hanging. (p. 4064 F) E F

NOTABLE POINT OF INTEREST

OGUNBIYI JCA

1. Need for witnesses to be sincere & truthful

Deducing from DW1's testimony he was unable to remember the date of the arrest of the accused persons but could however remember that PW1 came back three days later and instructed the arrest of the accused. Moreover, that the names of those arrested are not contained in exhibit 'F'. Query, if exhibit 'F' recorded by DW1 stated "unknown thieves", one wonders how he was able to make the arrests of the accused as rightly argued by the respondent's counsel, and that which the witness wanted the trial court to believe. G H

From all indications and in my humble deductions, PW1 must have disclosed the identity of the accused at the time he made the report to the Police Station and which was received by DW1. There could not therefore have been a report of “unknown thief or thieves” as claimed by him at exhibit ‘F’. (p. 4060 A)

REPRESENTATION

C. Arinze Onyia, Esq. for the Appellants

C.C. Eneh, Esq., Ag., D.P.P., Ministry of Justice, Enugu State for the Respondent

CASES REFERRED TO

- Udeh v. State (1999) 7 NWLR (Pt. 609) at p. 1
- D Ebre v. State (2001) 12 NWLR (Pt. 728) at 617
- Ogbu v. State (1992) 8 NWLR (Pt.259) 255, (1992) 10 SCNJ 88
- Effia v. State (1999) 8 NWLR (Pt.613) 1
- Bozin v. State (1985) 2 NWLR (Pt. 8) 465
- E Okosun v. A.-G., Bendel State (1985) 3 NWLR (Pt.12) 283
- Nwachukwu v. State (1985) 3 NWLR (Pt. 11) 218 at 269
- Onubogu v. The State (1974) 9 S.C. 1, (1974-1975] NSCC p. 358
- Aruna v. State (1990) 6 NWLR (Pt. 155) 125, (1990) 10 SCNJ at p. 5
- F Pincen v. State (1997) 1 NWLR (Pt. 480) 234 at 245 - 24
- Nasamu v. The State (1979) 6-9 SC 153
- Nasamu v. State (1979) All NLR 193, (1979) 6-9 SC 153
- Gabriel v. The State (1989) 5 NWLR (Pt.122) 459
- Ogoala v. The State (1991) 2 NWLR (Pt.175) 509

STATUTES REFERRED TO

- Evidence Act ss. 138, 149 (d)
- Robbery and Firearms (Special Provisions) Act, Cap. 398, Vol. XX11
- H LFN 1990 s. 1 (2)(a)

LEAD JUDGMENT BY OGUNBIYI JCA

This is an appeal by Sunday Ani and Peter Ani (accused/appellants)

against the judgment of the High Court of Enugu State, sitting at Enugu, presided over by Hon. Justice B.C. Nosike and delivered on the 5th. day of April, 2001.

The appellants were charged to court with armed robbery contrary to section l(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. B 398, Vol. XXII of the Laws of the Federation of Nigeria, 1990.

The particulars of the offence were that the appellants, on or about the 29th day of June, 1997, at Amagu Akegbe Ugwu in the Nkanu West Local Government, while armed with gun and iron rod robbed one Chime Ugwu of his N300,000.00 (three hundred thousand naira) cash. C

The charge was read over and explained to the accused/appellants and they pleaded not guilty. Following evidence and addresses of counsel, the learned trial Judge found the appellants guilty of armed robbery and sentenced them to death by hanging. D

Being dissatisfied with the judgment of the trial court, the accused/appellants have appealed to the Court of Appeal, praying the court to set aside the judgment of the trial court and make an order of discharge and acquittal of the appellants. E

From the original and further grounds of appeal filed, the appellants distilled six issues for determination:

1. Whether the prosecution proved its case beyond reasonable doubt in the light of the material contradiction and inconsistencies in the evidence of the prosecution witnesses to warrant the conviction of the appellants for armed robbery. F

2. Whether it was proper for the trial court to convict the appellants on the evidence of PW1 - Chime Ugwu (the alleged victim of the crime), when the said PW1 Chime Ugwu did not disclose to the Police or any person at all, at the earliest opportunity and when he made a report to the Police Station at the Four Corner Police Post Ozalla (exhibit 'F'), that he identified the appellants as the robbers that attacked him especially when the appellants hail from same village as him, and he knew them very well before the incident, the first having been his apprentice for some years. G H

3. Whether it was proper for the trial court to discountenance the evidence of DW1 - Inspector James Eze - the Police officer who handled

the matter in the first instance and who tendered exhibit ‘F’ as well as the evidence of DW4 the father of the first appellant and uncle to the second who alleged that there was malice between him and PW1 (the alleged victim of the crime) and that the PW1 was on a vengeance mission.

B 4. Whether the defence of *alibi* put up by the appellants should not have availed them.

C 5. Whether section 149(d) of the Evidence Act should not apply when the prosecution failed and or refused to produce (1) the original of the police investigation report by Sgt. Oliver Ngana dated 10/7/97 (2) the original of the police interim report by Sgt Mike Agwu dated 20/7/97 and (3) the original of the police investigation report by the same Sgt. Mike Agwu dated 20/7/97, even when notice to produce them were served on the prosecution.

D 6. Whether the conviction of the appellants for armed robbery can stand having regard to the totality of the evidence before the court and when the trial Judge did not consider, at all, the defences available to the appellants.

E On the 21st January, 2003, the date the appeal was slated for hearing, the learned respondent’s counsel was absent. He had however filed his respondent’s brief before the court. Consequent to Order 6 rule 9(5) of the Court of Appeal Rules, therefore, the appellant’s counsel Mr. C. Arinze Onyia F Esq., argued by adopting their brief dated 16th day of January and filed on the 22nd January, 2002. Counsel, however, abandoned ground No. 3 of their ground of appeal.

The said ground of appeal No. 3 is hereby struck out.

G On the 1st issue raised, the appellants in their brief of arguments examined the evidence of PW1 and re-stated firmly that the testimony of the witness put together gave rise to material contradictions and inconsistencies and urged the court to discountenance same. That the evidence against 1st H appellant that he counted money with him a day before the incident is an after-thought and should be disregarded especially when the witness never stated it anywhere and did not tell anybody. That PW1’s evidence relating to the flashing of torch light in his room is a figment of the witness’s imagination and that which ought to be disbelieved because they are not in accord

with the natural cause of events. That in exhibit 'F' the witness said the robbers were unknown to him. That the contradictions are to be resolved in favour of the appellants.

Furthermore, that PW2 gave two contradicting statements in exhibit 'B' and her statement in court on the number of gun shots she heard, which the counsel argued amounted to material contradiction. That the testimony of PW3 the investigating officer on his accompanying PW1 the complainant to the hospital was contradictory.

The counsel argued that the inconsistencies and contradictions are so material especially in a capital offence which carries a death penalty. Furthermore, that there is a contradiction as to the number of the thieves as per the testimony of PW1 who was not sure whether the number was two or five? That there was also the inconsistency as to who actually opened the door, that is to say whether it was any of the thieves or PW1 himself. That the inconsistencies and contradictions are so material and go to the root of the identification of the appellants, and same therefore created doubts which the counsel argued should be resolved in favour of the appellants. That the trial Judge palpably erred in law when he stated the absence of material contradiction in the evidence of PW1 from exhibit 'A'. That the Judge is precluded from choosing and picking what to and who to believe. The counsel urged the court to allow the appeal, therefore and set aside the judgment of the trial court.

The second issue raised is the propriety or not of the trial court in convicting the appellants on the evidence of PW1 especially where he failed to disclose the identity of the appellants at the earliest opportunity. This is having regard to the evidence by DW1 exhibit 'F', and also DW4 the first appellant's father and an uncle to the second appellant. That such failure to disclose is fatal to this matter and warranting the acquittal even on the said ground alone. To buttress his contention, the counsel cited the case of *Udeh v. State* (1999) 7 NWLR (Pt. 609) at p. 1, a Supreme Court decision, and also the case of *Ebre v. State* (2001) 12 NWLR (Pt. 728) at 617. That this court should discountenance the late identification. That the evidence of PW2, of the information by PW1 to her about the identification of the appellants should also be disregarded. That PW2 did not recognize the thieves

who were on the run, when she came out. The counsel urged this court to set aside the judgment of the trial court and acquit the appellants.

The learned counsel argued issues 3 and 4 together and first of all considered the defence of *alibi*. That the lower court erred by disregarding the evidence of DW1, DW2, DW3 and DW4 even when the appellants put up a very strong defence of *alibi*. That the evidence of DW1 in particular is very material and provides reasonable defence for the appellants but that the trial court did not consider it at all and the failure had occasioned a miscarriage of justice. The case of *Ebre v. The State (supra)* is in point.

Furthermore, that exhibit 'F' the certified true copy of Ozalla Police Station Crime Diary wherein PW1's complaint was lodged was not considered at all by the trial court. That the consideration of the said exhibit would have entitled the appellants to an acquittal. That the evidence of PW1 on identification was only an after-thought. That the appellants as DW2 and DW3 both put up the defence of *alibi* at the earliest opportunity and that which the trial court failed to consider. There was also no evidence that the police did investigate the said defence. DW2 gave an account of his whereabouts on the date of incident; that is to say on the 28th day of June, 1997 when he left to load sand at Nyama at about 12 noon, he closed at 6p.m. and returned home. He was seen by his parents and he slept with his sister and left their house around 7 am. That the particulars of his movements, that is DW2, the first appellant, disclosed his whereabouts, both a day preceding as well as the night of the incident. That the account given of his whereabouts by DW2 could not have made room to the claim by PW1 that the said appellant did previously enquire of his movements. That the non-investigation by the police of the 1st appellant's defence of *alibi* and the non-consideration at all, of this defence by the trial court should entitle the said appellant to discharge and an acquittal.

The learned counsel cited a number of decided authorities in support of his submission and argued that in the instant case, there is no manifestation or proof that the appellants were fixed at the scene of the crime. That the extra judicial statement of PW1 was not tendered by the prosecution to show that he had stated he identified the appellants at the scene of the crime. That the circumstance of the situation by PW1 did not give a strong

evidence of fixing the appellants at the scene of crime. That the police therefore ought to have investigated the *alibi* put up early enough by the appellants. The authority of *Okosi v. The State* (1989) 1 NWLR (Pt 100) at 642 is in point. With the seriousness of capital offences attracting death penalty, the counsel re-iterated that the burden of proof is so high and that beyond reasonable doubts; any iota of doubt which ought to be resolved in favour of the appellants. It is trite law that the defence of an accused person no matter how stupid it may appear should be considered. The authority in support is the case of *Rex v. Barimah* (1945) 11 WACA 49. A further authority is the case of *Nwanga Nwuzoke v. The State* (1988) 1 NWLR (Pt.72) 529.

In his defence of *alibi* DW3 also gave the detailed account of his whereabouts on the day in question wherein he left for a specific place at 8 a.m. on the 28th June, 1997 only to return home at 7 p.m. and eventually to a market place where he ate some food and returned home and slept.

That he did not see Sunday Ani the 1st appellant on the 28th or 29th June, 1997. That his mother knew he slept in the house and was the person who woke him up at about 9 a.m. The learned counsel further argued and re-iterated the failure of the trial court to have also considered the defence of *alibi* put up and consequent to which the second appellant is also entitled to discharge and an acquittal.

The authority of *Ebre v. State* (*supra*), as well as *Ozaki v. The State* (1988) 1 SCNJ 88, (1990) 1 NWLR (Pt.124) 92 both are in point.

That the court also failed to consider the evidence of DW4 who alleged malice by PW1 in respect of a previous happening between them. That the failure of PW1 to have raised an alarm on recognising the robbers is not in consonance with natural cause of events. The appellants' arrest two weeks after the incident would have served a reason for the trial court to consider and deduce that PW1 took time to make up his story.

The learned counsel cited a number of authorities also in support, especially the need by the trial court to have warned himself on the dangers of and the weight to attach to the evidence by PW1 and PW2 who are husband and wife.

In his submission on issue No. 5 the learned counsel contended that the failure of the prosecution to produce the originals of the police inves-

B
C
 tigation report by Sgt. Oliver Ngana and police interim report as well as police investigation report by Sgt. Mike Agwu should have warranted the invocation of section 149(d) of the Evidence Act on the presumption that those reports must be favourable to the appellants. Also that the extra judicial statements of PW1 which were not tendered in evidence were totally and materially inconsistent with his evidence in court. The counsel impressed upon this court to invoke its inherent jurisdiction and to look at all the documents before it whether tendered in evidence or not. This would amount to doing justice which is not only done but manifestly seen to be done. That the prosecution failed in its duty to produce evidence beneficial to the appellants and that this is against the course of justice.

D
E
 The final issue no.6 relates to whether the conviction of the appellants for armed robbery can stand, having regard to the totality of the evidence before the court? The counsel conceded that the said issue had been discussed in the course of the other issues preceding. However and for purpose of emphasis, the counsel answered the question raised in the negative and lamented that the trial court concentrated more on the case of the prosecution, while ignoring the case and defences of the appellants.

F
 The counsel on the totality urged this court to therefore set aside the judgment of the trial court and make an order of discharge and acquittal in favour of the appellants.

F
 The respondent's brief is dated July, 2002, and in respect of which six issues are formulated for determination and they are as follows:

- (1) Whether the charge of armed robbery was proved beyond reasonable doubt against the appellants.
- G
 (2) Whether there was a miscarriage of justice in view of the alleged inconsistencies in the prosecutions' case
- (3) Whether the issue of malice alleged by the defence had occasioned injustice to the appellants.
- (4) Whether the defence of *alibi* availed the appellants.
- H
 (5) Whether failure to call the two police officers namely; Sgt. Oliver Ngana and Sgt. Mike Agwu vitiated the case for the prosecution.
- (6) Whether the trial court failed or neglected to consider the defence version of the case.

On his brief of arguments the respondent on issue No. 1 reiterated the significance of the prosecution to establish the ingredients of the offence charged against the appellants. That having regard to the evidence by the prosecution witnesses there was no difficulty in the identity especially where the victim and the appellants knew each other before the offence was committed. That the circumstance of the case and taking together all the evidence adduced give rise to the offence of robbery having been proved. That the inconsistency alleged is so minor that same should not operate against the respondent's case. That the matter of exhibit 'F' the case diary by DW1 who recorded a report of burglary and stealing instead of robbery was properly disregarded by the trial court. Relying on the authority of *Ogbu v. State* (1992) 8 NWLR (Pt.259) 255, (1992) 10 SCNJ 88 and *Effia v. State* (1999) 8 NWLR (Pt.613) 1, (1999) 70 LRFN 1733 the learned counsel reiterated that the inaccuracies in the prosecutions' evidence do not go to the root of the case so as to warrant interference by this court. Further, that the so called previous allegation against PW1's son by DW4 cannot void the testimony of PW1 in the present charge.

On the defence of *alibi*, the learned counsel argued that the same does not avail the appellants but that which in the circumstance must therefore fail.

On the failure by prosecution to call two police witnesses who handled or participated in the investigation, the counsel summed that the prosecution is not duty bound to produce all the witnesses mentioned in a case or whose names appear in the information or indictment. That the complaint is unfounded both in fact and law.

That ground three of appellants' brief complaining on the weight of evidence is not a valid ground of appeal.

That the trial court did consider the evidence of both sides and the authorities consequent to the findings and decisions reached and hence there was no miscarriage of justice as alleged by the appellants.

Taking together the issues formulated by both appellants and the respondent on their briefs of arguments, I have summarised and reduced same to four main issues as follows:

- (1) Whether or not there were material contradictions and inconsis-

tencies in the evidence of the prosecution witnesses and consequent to which there was a failure of proof of the offence of robbery against the appellants beyond reasonable doubt.

(2) Whether the identification of the appellants by the prosecution witness (PW1) Chime Ugwu, the alleged victim of the crime, was proper when he did not disclose the identity of the appellants as the robbers that attacked him at the earliest opportunity to his villagers including DW1, the first appellant's father and an uncle to the second appellant. Furthermore, whether or not there was in fact an early disclosure of the robbers at the report made to the police at four corner Ozalla Police Station.

(3) Having regard to the evidence by the prosecution and taking into consideration the defences put forward by the appellants, whether or not the trial court did consider the defence of *alibi* raised.

(4) The effect of the failure of the prosecution to call Sgt. Oliver Ngana and Sgt. Mike Agwu; whether section 149(d) of the Evidence Act should not apply.

For the prosecution to succeed in proof of the offence of armed robbery, there ought to be proof of the following ingredients beyond reasonable doubt:

- (i) That there was a robbery or a series of robberies.
- (ii) That each robbery was an armed robbery.
- (iii) That the accused was one of those who took part in the armed robberies.

These requirements have been firmly laid down in the authorities of *Bozin v. State* (1985) 2 NWLR (Pt. 8) 465; *Okosun v. A.-G, Bendel State* (1985) 3 NWLR (Pt.12) 283, (1985) 2 NSCC 1327; *Nwachukwu v. State* (1985) 3 NWLR (Pt. 11) 218 at 269.

It is also trite law that the degree of the burden of proof placed on the prosecution is to prove the accused guilty beyond all reasonable doubts. Section 138 of the Evidence Act places such burden beyond reasonable doubts.

Three witnesses were called by the prosecution at the trial. PW1 was the victim of the crime, while PW2 was his wife and PW3 the investigating police officer attached to the State C.I.D. Enugu. The defence on their part

called four witnesses amongst whom were the two appellants and also the father of the 1st appellant.

It is not in dispute that an act of robbery was committed on the victim Chime Ugwu and accompanied with the use of violence as evidenced per the wound inflicted on his forehead. His evidence was corroborated by DW1, Inspector James Eze; there was no contradiction that PW1 went to the hospital where he received treatment. While the lower court firmly held and found the appellants responsible for the robbery committed on the said PW1, the appellants extensively and viciously denied and further alleged a mishandling of the case which had greatly occasioned a miscarriage of justice.

The 1st issue raised in line of the appeal is that which relates to material inconsistencies and contradictions in the prosecution's case. In other words that the prosecution did not prove the appellants' guilt of armed robbery beyond reasonable doubt.

A number of authorities have dwelt at length on the effect and what amounts to contradiction and inconsistency. For instance the authorities of *Onubogu v. The State* (1974) 9 S.C. 1, (1974-1975] NSCC p. 358 and *Aruna v. State* (1990) 6 NWLR (Pt. 155) 125, (1990) 10 SCNJ at p. 5 are relevant. **The position of the law is that where witnesses for a party give inconsistent and or contradictory testimonies especially on material facts their evidence on the point must be regarded as unreliable and rejected as such. The same principle of law was also enunciated in the further authorities of *Mogaji & Ors. v. Cadbury Nigeria Ltd.* (1985) 2 NWLR (Pt. 7) 393 and *Ike v. Ofokaja* (1992) 9 NWLR (Pt. 263) 42.**

I would like to state at this point that for any contradiction and inconsistency to be accorded a premium of importance, they ought to be on material and not minor facts.

It is also permissible in law for purposes of emphasis for a witness to give evidence in court which is not contained in his statement to the police provided that such evidence is not in direct conflict with such statement. On the authority of the *State v. Udofia* 10 ENLR 69 at 72 such additions would not amount to inconsistency.

It is also held in *Ogbu v. State (supra)* that not every minor inconsistency would be fatal to the prosecution's case.

In highlighting some of the inconsistencies and contradictions the first of such was where the witness PW1 stated in chief that the
B appellant came to his house twice the day preceding the night of the incident and inquired about his movement to the cattle market. During cross-examination however, he also said that the 1st accused counted money with him in his house. The question is whether or not
C this amounts to an inconsistency and contradiction as alleged by the appellants. It is obvious in my opinion that the making of the two statements did not amount to retraction of the former for the latter. Rather it is an addition to that previously made. In other words, there was no indication that there was an abrogation or abandon-
D ment of the earlier statement made.

The other complaint was that relating to identity through the aid of a bush lantern, and the use of flashed torch light either on the victim PW1 or reflecting some where else. There was no contrary
E evidence that there was a burning lantern in the room to have aided identification. What was material was that there was a means of identification by use of some form of light through the lantern and or the torch light in addition.

F It is relevant to also restate that the witness PW1 is well conversant with both the appellants who reside in the same locality. The appellants are also well acquainted with PW1. What is more, the 1st appellant had lived with PW1 as an apprentice cow-dealer. PW1
G did recognize the appellants' voice when they spoke at the operation. There was no evidence that they were masked.

In the authority of *Moses Magic v. The State* (2000) 2 LRCN CC 252, the appellant was well known to the prosecution witness before the date of the invasion of her premises. She was in the said night taken by the
H appellant to the dark back yard and subsequently raped. She was however able to identify the appellant and same was upheld.

In the authority of *Eyisi v. The State* (1999) 15 NWLR (Pt.691) 55 at 587, (2000) 82 LRCN 3701 Ogundare, JSC had this to say among

others:

“identification may take various forms visual identification, voice identification... identification parade etc.”

It is apparent to also signify that the witness PW1, the victim, was the only material eye witness to the incident. The authority of *Ogunye v. The State* (1999) 5 NWLR (Pt.604) 548 S.C., (1999) 2 LRCN 232 is in point where the only eye witness was the blood brother of the deceased, nevertheless, the appeal against the conviction of the accused was dismissed by the Court of Appeal.

Furthermore, on the authority of *Okosi v. State (supra)* it was held on identification that where there is no dispute about the identity and identification of an accused person by the witness, there will also be no reason why his evidence alone if believed, cannot ground and sustain a conviction even on a charge of murder. The same principle was also laid down in *Alonge v. I.G.P.* (1959) SCNLR 516, (1959) 4 FSC 203 and *Onafowokan v. State* (1987) 3 NWLR (Pt. 61) 538 at 552. **On the accreditation by appellants of the evidence of PW1 and PW2 as that being tainted witnesses, the same has no specific definition in our law of evidence. However, with the learned trial Judge having found their evidence credible they cannot therefore be properly described as such. Reference can be made to the case of *Pincent v. State* (1997) 1 NWLR (Pt. 480) 234 at 245 - 246 paragraphs H -A. The two witnesses PW1 and PW2 are not accomplices because they did not have their own purpose to serve apart from putting forth the facts for doing justice.**

Further still, I would now dwell on the allegation of the appellants relating to the disclosure by PW1 at the earliest opportunity. From the record of the trial court, at pages 45 - 48 Inspector James Eze attached to the Four Corner Ozalla Police Station was the police officer to whom PW1 first made report of the robbery. The said officer was not the investigating police officer but gave evidence for the appellants as DW1 and said;

“Two persons were arrested, I cannot remember the date of arrest. H The arrests were made based on the report made to me. The two persons I arrested based on the report are the accused persons. The name of those arrested are not contained in exhibit ‘F’. Chime Ugwu PW1 came back

about three days later and mentioned that he suspected two persons who should be arrested.”

Deducing from DW1’s testimony he was unable to remember the date of the arrest of the accused persons but could however remember that PW1 came back three days later and instructed the arrest of the accused. Moreover, that the names of those arrested are not contained in exhibit ‘F’. Query, if exhibit ‘F’ recorded by DW1 stated “unknown thieves”, one wonders how he was able to make the arrests of the accused as rightly argued by the respondent’s counsel, and that which the witness wanted the trial court to believe.

From all indications and in my humble deductions, PW1 must have disclosed the identity of the accused at the time he made the report to the Police Station and which was received by DW1. There could not therefore have been a report of “unknown thief or thieves” as claimed by him at exhibit ‘F’.

On the failure of PW1 in disclosing the accused to the villagers and DW4, the 1st appellant’s father alike, the aspect and reason behind such have been adequately explained by PW1 who also gave the same instructions to PW2. The reason given was to prevent the accused from escaping. On the authority of *Onubogu v. The State* and also *Ike v. Ofokaja (supra)* the seeming inconsistencies and contradictions alleged do not hold especially where the witness PW1 had given cogent reasons explaining his line of action.

It follows therefore that the authorities of *Udeh v. The State* and *Ebre v. The State* cited by the appellants’ counsel (*supra*) do not aid their case since the circumstances are distinguishable from that at hand. It is obvious that PW1 did inform the Police early enough and not only lately, and surfacing at the trial as the appellants would want this court to believe.

The trial court I hold arrived at a correct decision by rejecting the testimony of DW1 therefore and upholding that of PW1.

In respect of the inability of PW2 to have recognised the robbers despite the information by her husband PW1 it is in evidence that PW2 said:

"I cannot recognize the thieves because they have started running away when I came out."

Certainly it would have been fool hardy had PW2 said she recognised the robbers who were on the run. The fact that the information about the identity of the thieves was given to her by her husband does not *ipso facto* entitle her to say she recognised them if truly she did not. Her testimony confirmed that she was only told the identity of the thieves by her husband. The insinuation that exhibit 'B', undated, was made many days after the alleged robbery is a mere speculation which had not been substantiated. C

I would not hesitate in my respectful opinion to state that the expectation put on the victim PW1 should be that commensurate and appropriate having regard to his background. In other words a polygamist from a village set up, and a trader in cattle business is not expected to be of a chronological thinking, reasoning, and well thoughtout co-ordination the same way an enlightened person from urban set up would have been able to. D

On inconsistency as to the number of thieves on the day of incident, the question as to the actual number or whatever is very immaterial. It suffices that PW1 was robbed by some people and who have been identified by him. E

The next question has to do with the number of gunshots. PW2 in her written statement to the police exhibit 'B', said she heard a gun shot. In her testimony in court however, she made reference to two while PW1 also testified to some two gun shots. What is relevant in my view, is not the number of gunshots heard, but whether there was a gun shot at all as a result of the robbery. F G

In the decided authority of *Effia v. The State (supra)*, it was held that for the testimony of the prosecution witnesses to be grossly affected and therefore fatal, the conflict or the contradictions thereon must have been grave and fundamental. The same principle was applied in *Igbi v. The State* (2000) 3 NWLR (Pt.648) 169, (2000) 75 LRCN 303. H

The inconsistencies and contradictions in my view, are minor

and not material to have affected the prosecution's case.

Issue No. 2 had also been taken care of along with the 1st issue in the foregoing deductions so far arrived at. **In my humble opinion the learned trial Judge adequately considered and evaluated the evidence adduced on both sides. I find no fault in his handling of this matter and upon the credible evidence before him. I agree entirely with the court below that the guilt of the appellants was proved beyond reasonable doubt. That the appellants robbed the victim PW1 is beyond dispute. There is overwhelming evidence in support of this fact. The learned trial Judge was not impressed by the stories of the appellants and thus rejected same. I cannot see any justification for my interfering with his assessment of the credibility of the appellants and the other witnesses in this case, especially having regard to the fact that the trial court is in the best position to assess the credibility of the witnesses. This is trite law and the case of *Nasamu v. The State* (1979) 6-9 SC 153 is in point. I find no such seeming and alleged contradictions, conflicts and inconsistencies in the evidence of the witnesses for the prosecution such as to render their evidence unreliable. I therefore resolve issues 1 and 2 against the appellants.**

The third issue is that relating to the defence of *alibi* raised by the appellants and which they alleged was never considered by the trial court.

It is an essential principle of a criminal trial that a defence however fanciful, stupid, or doubtful is deserving consideration. The authority of *Rex v. Barimah* (*supra*) is trite.

By an *alibi* it means that the accused was somewhere other than where the prosecution alleged he was at the time of the commission of the offence. Consequently, he could not have committed or participated in the commission of the offence with which he is charged. This is the principle laid down in the decided authority of *Gachi & Ors. v. The State* (1965) NMLR 333.

Also in the Supreme Court's authority of *Yanor v. State* (1965) NMLR pp. 337, 341-342 his Lordship Idigbe, JSC (as he then was) had this to say:

"A jury should be directed that they should not disregard evi-

dence of *alibi* unless there is stronger evidence against it.” The phrase italicised is for the purpose of emphasis.

Alibi is the commonest of all defences as stated in *R. v. Liddle* (1928) 21 Cr. App. R. p. 3 at 13 per Hewart R.C.J. It does not require ingenuity but ordinary common sense to conceive that a person charged might say I was not there at the scene and at the time the alleged offence was committed.

Where *alibi* is set up the primary onus of establishing the guilt of the appellant is still on the prosecution but the evidential or secondary burden is on the appellant to adduce some evidence of where he was at the material time. That evidence may convince the jury or trial court; the authority of *R v. Lobell* (1957) 41 Cr. App. R. 100 at p. 104 is in point. The standard of proof of alibi is not beyond reasonable doubt but on the balance of probabilities as *per* that restated in the decision of *Bozin v. State* (*supra*).

The accused DW2 and DW3, now the appellants both put up the said defence of *alibi* and unflinchingly claimed to be somewhere different from the scene of the crime at the material time. The detailed account of their whereabouts have been stated on their brief of arguments. PW1 however emphatically testified that the appellants were undoubtedly at the scene of crime and were in fact among those who robbed him.

Under cross-examination for instance PW1 said:

“I saw Sunday and Peter Ani the accused through the aid of bush lantern when they entered my room.”

Furthermore, from the evidence of PW1 and even DW2 and DW3 it is not in question that they all know each other very well, with DW2 having lived with PW1 for four years when he, DW2, was his apprentice. DW3 is a friend to DW2 and also a relation. He also knows and visited the house of PW1. Moreover, they all live in the same neighbourhood called Amagu Akegbe Ugwu.

Further still, it is the law however, that once an accused person is fixed at the scene of crime his defence of *alibi* must fail. This is trite in the case of *Ntam & Anor. v. State* (1968) NMLR 86 at 88. It follows

therefore, that the investigation of *alibi* put up by the accused in the circumstance is unnecessary since the police are not expected to go on a wild goose chase in order to investigate as stated in *Gachi v. The State (supra)*.

B From all deductions of that before the trial court and stated on the record before us, it is obvious that the proximity of PW1 and the appellants having to live in the same locality, made it very convenient for the operation of the commission of the offence and only to return and thereby easily possible for the appellants to put up a defence of *alibi*. Contrary to the submission made by the appellants' counsel, in my humble view, it is clear on the evidence by PW1 that the accused/appellants were fixed at the scene of the crime. Certainly and consequently, they could not possibly have been anywhere else different at the material time. The trial court was right therefore, in rejecting or not considering the defence of *alibi* raised. In other words and equally so, the court below is right when it held that the defence of *alibi* did not avail the appellants in this case. I also resolve the said issue No. 3 against the appellants.

The fourth and the last issue to be considered is where mention is made of the prosecution's failure to call Sgt. Oliver Ngana and Sgt. Mike Agwu to produce the police investigation and the interim reports. On behalf of the appellants, their counsel calls for the invocation of section 149(d) of the Evidence Act and to presume those reports as favourable to the appellants.

The respondents on their brief of arguments submitted that the prosecution is not duty bound to produce all the witnesses mentioned in a case. This to a certain extent is the position but subject however, in my humble view, to the duty bound on the prosecution to ensure that as a minister in the temple of justice all relevant facts available to them are placed before the court for the purpose of doing justice. In other words there should be no hoarding of facts from the court to aid at arriving at the just decision in a given case.

The question to be answered in the circumstance therefore is, whether the failure to call the said two police officers and the pro-

duction of the various reports had occasioned a miscarriage of Justice and which would have otherwise tilted the judgment in favour of the appellants?

The three reports in question with one dated 10th and the two 20th July 97, form part of the record of the lower court before us. It is obvious in my opinion that having regard to the documents, no matter how well articulated, they cannot override or take the place of real evidence by eye witness and a victim to an incident.

The appellants cited the authority of *Ahmed v. State* (1999) 7 NWLR (Pt.612) 641 S.C.; (1999) 69 LRCN 1403 at 1426 where the vital witness for the prosecution in two separate interviews by the police made two inconsistent statements. Her oral evidence was material to clarify whether or not the appellant in a murder case entered the victim's compound as alleged. There was a doubt as to where the incident took place and who actually saw the appellant stab the victim. There was a doubt which needed clearance. That was the reasoning that gave rise to the decision in that case.

Comparatively, the case at hand and in this appeal is very much distinguishable from that under reference in *Ahmed v. State* (*supra*). This I hold because unlike in that case, there was no material inconsistency or contradiction on the prosecution's case that needed clarification. There was also no doubt on the evidence of PW1 the victim of the robbery who was so certain of what he saw and which took place and by whom the offence was committed. The invocation of section 149(d) of the Evidence Act contended by the appellants is not in their favour.

The learned trial Judge saw the appellants and all the other witnesses who testified. He was therefore in a stronger position to determine their credibility.

In the light of all that I have said above, I am satisfied that the court below was right in rejecting the various defences raised on behalf of the appellants in this case. There is therefore, no justification in my respectful view in interfering with the judgment of the said court which found and convicted the appellants guilty of robbery by

fire arms and sentenced them to death by hanging.

Finally, all the four issues raised in this case having been resolved against the appellants, I dismiss this appeal and affirm the judgment of the court below.

B

MOHAMMED JCA

C I have had the privilege before today of reading the judgment of my learned brother Ogunbiyi, JCA, which has just been delivered. I entirely agree that this appeal has no merit at all.

D However I wish to add a few words on the issue of the alleged failure of the trial court to consider all the defences available to the appellants before their conviction. It is true that in all cases attracting capital punishment as in the present case, it is incumbent upon the trial Judge to consider all the defences put up by the accused person expressed or implied in the evidence before the trial court. In other words however trivial, the defence must be looked into. See *Njoku v. The State* (1993) 6 NWLR (Pt. 299) 272. It is my
E view that in the present case that was precisely what the learned trial Judge did as fully articulated in the lead judgment.

Although it was also argued by the appellants that there were contradictions in the evidence of the prosecution, with the greatest respect to the
F learned counsel to the appellants, what were termed as contradictions are not contradictions as they do not touch on the substance of the case against the appellants fully established by the evidence on record. See *Nasamu v. State* (1979) All NLR 193, (1979) 6-9 SC 153. This is because by virtue of
G section 138 of the Evidence Act Cap. 112 of the Laws of the Federation of Nigeria, 1990, the commission of a crime by a person must be proved beyond reasonable doubt. The burden of such proof lies on the prosecution and it never shifts. If on the entire evidence, the court is left with no doubt that the offence was committed by the accused person, that burden is dis-
H charged and the conviction of the accused person will be upheld even on the evidence of single witness. See *Inusa Seidu v. State* (1982) 4 SC 41 at 68 - 69 where the Supreme Court per Obaseki, JSC (as he then was) stated -

“This court has repeatedly stated of recent that although the burden

on the prosecution is to prove his case against the accused beyond any reasonable doubt, the prosecution has a discretion to call only those witnesses required to unfold its case. The law does not impose on the prosecution the duty or function of both the prosecution and defence.”

The appellants having been charged with the offence of armed robbery and the prosecution having established that the appellants were among the armed robbers who were armed with offensive weapons with which they inflicted injury on their victim, PW1, before robbing him of the sum of N300,000.00, the finding by the trial court that the appellants were guilty of the offence of armed robbery can not be faulted. See *Okpolor v. State* (1990) 7 NWLR (Pt. 164) 581 at 590.

For the above reasons and those elaborately articulated in the lead judgment of my learned brother, Ogunbiyi, JCA, I too hereby dismiss this appeal and affirm the conviction and sentence of the appellants by the trial Enugu High Court of Justice presided over by Nosike, J.

OLAGUNJU JCA

I have had a preview of the judgment just delivered by my learned brother, Ogunbiyi, JCA. I agree with his

conclusion that the appeal lacks merit and should be dismissed in support of which I advance brief concurring comments on contradictions in the evidence of the prosecution witnesses, appellants’ defence of *alibi* and the number of witnesses required to sustain a conviction, which are the fulcras of the appellants’ challenge of their conviction for the offence of armed robbery.

*NP Firstly, on the issue of contradiction, a line is drawn as a matter of principle between ‘inconsistency’ and ‘contradiction’ in the evidence of a witness contrasted and defined in *Gabriel v. The State* (1989) 5 NWLR (Pt.122) 459, (1989) 20 NSCC (Pt. III) 349, 357; and *Ogoala v. The State* (1991) 2 NWLR (Pt.175) 509, (1991) 3 SCNJ 61, 72. It follows as a rule that minor discrepancies in the evidence of a witness do not destroy the credibility of the witness. In the same way, contradiction *per se* does not affect the evidence unless it is material in the sense that it relates to a matter

of substance and it is likely to raise doubt in the mind of the Judge about the guilt of the accused. A material contradiction, however, goes into the root of the evidence of a witness and it is fatal to the case of the party relying on it: see *Onyemena v. The State* (1974) 1 All NLR (Pt. 1) 522,530; *Nwabueze v. The State* (1988) 4 NWLR (Pt.86) 16, (1988) 7 SCNJ (Pt. 11) 248, 254; *Akpabio v. The State* (1994) 7 NWLR (Pt.359) 635, (1994) 7-8 SCNJ (Pt. III) 429, 459 - 462; and *Theophilus v. The State* (1996) 1 NWLR (Pt.423) 139, (1996) 1 SCNJ 79, 91-92. The judicial attitude to contradiction is brought out in bold relief in the decision of this court in *Ishola v. The State* (1977) 2 FCA 153, 206, where Nasir, P., said, *inter alia*, as follows:

“The appeal court will discountenance any microscopic and searching analysis and uncalled for commentary of the evidence of the witnesses of the prosecution with a view to establishing minute inconsistencies or discrepancies.”

On appeal, the decision was affirmed by the Supreme Court and reported as (1978) 9 -10 SC 81, 110 - 113.

Applying the principles to the facts of the case under review, I do not consider to be material the fact that the victim of the crime the PW1, deposed in his evidence-in-chief that the 1st appellant came to his house twice on the eve of the crime but added under cross examination that the appellant also counted money with him during one of his visits on that day. Nor can I regard as material any discrepancy between the evidence of the PW1, and his wife about the number of the robbers who came to the house or the number of gun shots fired by the robbers any more than the doubt raised about whether identification of the appellants could have been made by beaming a torchlight.

Secondly, as regards the defence of *alibi*, true enough, as laid down in *Yanor v. The State* (1965) 1 All NLR 193, 199; *Adedeji v. The State* (1971) 1 All NLR 75,79; and *Ozulonye v. The State* (1980) 2 NCR 343, it is the duty of the prosecution to disprove the defence of *alibi* set up by an accused person and to this end to investigate the *alibi*. Yet, where there is eye-witness evidence of participation by an accused in the crime it is a straight issue of credibility and if the evidence of the witness is believed by the court it displaces the defence of *alibi*: see *Akpan v. The State* (1991) 3

NWLR (Pt.182) 646, (1991) 5 SCNJ 1,5-6; and *Odu v. The State* (2000) 7 NWLR (Pt. 664) 283, 297. The learned trial Judge having believed the evidence of the PW1 that the appellants whom he knew very well before the date of the robbery were the two persons who robbed him, that evidence displaces the appellants' defence of *alibi* and it is immaterial that the police B did not investigate the *alibi*.

Thirdly, with regard to the contention that the prosecution did not call as witnesses two police officers among those who investigated the crime, the point is succinctly answered by the epigram of Oputa, JSC., in *Adelumola v. The State* (1988) 1 NWLR (Pt.73) 683, (1988) 3 SCNJ (Pt. 1) C 68,76, that 'truth is not discovered by majority vote, nor by counting hands or heads'. See also *Akintola v. Solano* (1986) 2 NWLR (Pt.24) 598, (1986) 17 NSCC (Pt. 1) 504, 509. It is sufficient for the conviction of an accused person if the prosecution called enough witnesses to satisfy the D proof of the allegations against the accused person whose testimonies the court finds to be cogent to establish the offence. In this regard, see also section 179 of the Evidence Act, Cap. 112 of the Laws of the Federation of Nigeria, 1990, where the minimum number of witnesses for proving E certain offences which does not include armed robbery is prescribed.

On this point, it remains to note that the submission of learned counsel for the appellants that this court should invoke sub-section 149(d) of the Evidence Act against the prosecution for failure to call as witnesses F Sgt. Oliver Ngana and Sgt. Mike Agwu who took part in investigating the crime is, with respect to the learned counsel, a misconception of the law as that sub-section which raises the presumption that the evidence withheld would be unfavourable to the person withholding it if the evidence G had been produced is applicable only where 'evidence' is withheld but not when particular '*witnesses*' are not called: see *Bella v. Kassim* (1969) 1 NMLR 148; and *Musa v. 'Yerima* (1997) 7 NWLR (Pt.511) 27, (1997) 7 SCNJ 109,125 & 133 - 134.

On the foregoing grounds and on more elaborate grounds in the H leading judgment I also affirm the judgment of the trial court and I dismiss the appeal.