

**SUPREME COURT OF NIGERIA**  
18TH APRIL, 2008 SC. 123/2005  
**CORAM:- N. TOBI, G. A. OGUNTADE, I. F. OGBUAGU, F. F. TABAI, I. T. MUHAMMAD, JJSC**

THE STATE ..... APPELLANT  
V.  
1. FATAI AZEEZ  
2. GANIYU LASISI  
3. KAREEM SHITTU  
4. RASHEED ADESOYE ..... RESPONDENTS  
5. ISSA KALAM ADESOYE  
6. NOAH ADEPOJU

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CRIMINAL PROCEDURE - Alibi - Meaning of - Alibi means that accused was somewhere - Other than where the crime was committed - At the time of commission of the crime - And so could not have participated in the commission (H1)

CRIMINAL PROCEDURE - Alibi - Proof of - Duty on accused - Upon putting up a defence of alibi - The only duty on an accused - Is to introduce credible evidence - In support thereof - On balance of probability - As done by the accused herein (H2)

CRIMINAL PROCEDURE - Proof - Standard of - Burden of proving alleged crime beyond reasonable doubt - Rests always on the prosecution - The same has not been discharged - From the evidence on record (H3)

CRIMINAL PROCEDURE - Witnesses - Duty to call - Prosecution is not under duty - To call all conceivable witnesses - But it is duty bound - To call all material witnesses (H4)

EVIDENCE - Evaluation of - Witnesses - Testimony of interested parties - Court has a duty to approach with caution - Evaluation of evidence led by parties - Who may have their own interests to serve (H5)

CRIMINAL PROCEDURE - Liability for crime - Joint criminal act - Where there is a joint criminal act - Prosecution has to either prove - Criminal intention on the part of each accused person - Or prove common intention - To warrant liability of all accused persons (H6)

CRIMINAL PROCEDURE - Alibi - Effect of successful plea - Where the defence of alibi succeeds - There is no need - For the court to consider other elements involved - In the offence charged (H7)

### **FACTS**

The Respondents were jointly arraigned and tried at the High Court of Kwara State for the offences of criminal conspiracy, causing grievous hurt and culpable homicide, contrary to sections 97(1), 248 (1) and 221 of the Penal Code. The deceased and the complainants were of one family. Together with the family of the respondents, the family of the complainants belonged to one extended family. However the complainants and the respondents have been quarreling over a piece of land prior to the event giving rise to arrest and prosecution of the respondents. It was the case of the prosecution that while the land dispute was pending in court, a machine operator was engaged by some persons claiming through the respondents to fell trees on the land, but the complainants stopped the operator. However, on the next day, the machine operator repeated the action whereupon the complainants seized his machine. Complainants subsequently invited a photographer and was in the process of taking photographs of the machine operator and the fallen trees when some people, numbering between 12 and 15 persons, emerged from the bush. Some of them were armed with locally made guns. They started shooting and the deceased was killed in the process. Each of the respondents put up a defence of alibi at the trial. It was apparent from the evidence on record that the plea of alibi was largely corroborated by the result of police investigation barring discrepancies of details in respect of time. The machine operator and the photographer were not called to testify during the trial.

After trial, the learned trial judge rejected the defence of alibi and found all the respondents guilty as charged. The respondents

appeal to the Court of Appeal was allowed however, and the respondents were discharged and acquitted on all the counts. Dissatisfied, the State has appealed to the Supreme Court against the judgment of the Court of Appeal.

***HELD*** (Unanimously dismissing the appeal per **MUHAMMAD JSC**)

***Alibi - Meaning of***

1. Alibi, originates from Latin. It stems from a combination of two words: “alius ”and “ibi” or “ubi” meaning: “other” and “There” or “where”, respectively. Put together under English usage, it means “elsewhere”.

Alibi means that the accused person was somewhere other than where the prosecution alleges he was at the time of the commission of the offence making it impossible for him to have committed or participated in the commission of the offence with which he was charged. Furthermore, it is a defence by which an accused person alleges that at the time when the offence with which he was charged was committed he was elsewhere. (p. 1691 A)

***Alibi - Proof of - Duty on accused***

2. Where an accused person has put up a defence of alibi, what the law requires him to do is to introduce evidence of alibi. The onus is on him to prove where he was at the time of the incident and he has to call evidence to support his defence of alibi. Once the defence of alibi is raised it is for the prosecution to investigate it properly as failure to do so could raise reasonable doubt in the mind of the court and will lead to quashing the conviction.

It is important to note from the outset that each of the respondents raised the defence of alibi at the earliest opportunity available to him and that was when each was arrested and requested to make a statement to the police.

PW.7 confirmed the veracity of the alibi raised. PW.8 said they found the alibi to be untrue. That in itself is contradictory. It is strong enough to create doubt in the mind of the learned trial Judge. That apart, on the balance of probability, which is the standard required in defence of alibi, it is clear that sufficient, credible evidence was led by the

accused persons to establish their claim on alibi.  
(pp. 1691 F/1694 H)

***Burden of proving alleged crime beyond reasonable doubt***

B 3. In any event, this is a criminal trial. The burden of proof of the crime alleged against the respondents, i.e. proof beyond reasonable doubt never shifts. It remains on the prosecution until satisfactorily discharged. I have no cause to doubt or disturb the finding of the lower court on the defence of alibi raised by the respondents. I uphold it.  
C

Now, assuming that I am wrong in my consideration of the defence of alibi raised by the respondents which favoured them and by that token, the court below, ought to, as well, be wrong having reached the same conclusion on the defence of alibi, then has the prosecution discharged the burden placed on it by the law?  
D

From the totality of the evidence placed before the learned trial Judge, there was the evidence of P.W.3 who said he saw 2nd accused shoot the deceased on one hand. On the other hand, P.W.s 2 and 4 presented evidence that was materially in conflict with that of P.W.3 in that they said they did not know who shot the deceased. This must cast doubt in the mind of the learned trial Judge on the prosecution's case. The law is well settled that where there is doubt in a criminal trial, such doubt is resolved in favour of the accused person. This court, per Wali, JSC, held in the case of Chukwu v. The State (1996) 7 NWLR (Pt. 463) 686 at 701 G-H, as follows:-  
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"Where prosecution's evidence is found to be contradictory on a material issue, the court should give the benefit of that doubt to an accused person that stems from the non-credibility of such evidence and discharge and acquit him." (pp. 1695 B/1709 B)  
G

***Witnesses - Duty to call***

H 4. The general law pertaining to calling of witnesses to testify in favour of a party in a criminal trial, especially the prosecution, is that it is not the requirement of the law that the prosecution must call all conceivable witnesses. The duty on the prosecution as placed by Section 138(1) of the Evidence Act, (Cap 112, LFM, 1990), is to call witnesses to establish their case beyond reasonable doubt. However, in

the discharge of that burden, It is the duty of the prosecution to see that it places before the trial court all available relevant evidence. This may not mean that a whole host of witnesses must be called upon the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called. See: R. v. Kuree (1941) 7 WACA 175. In fact in the case of In R. v. Harris (1927) a KB 587, Lord Hewart, CJ. had observed that the prosecution was bound to call “all the material witnesses before the court, even though they give inconsistent account.”

I entirely agree with the court below in its decision and the learned counsel for the respondents in his submission that in a capital offence such as the one for which the respondents were sentenced to death by hanging, the prosecution should have called independent witnesses who, from the evidence of the prosecution witnesses (as summarised above) were said to be at the scene of the incident, namely the machine operator and the photographer who played key roles in the matter. It is surprising how the prosecution sidelined independent witnesses who had a lot of say on the whole saga. Although the prosecution is not bound to call a particular witness in order to discharge the burden of proof placed on him by the law before securing conviction, yet the law is very emphatic that where there exists a vital point in issue and there are witnesses whose evidence would settle that issue one way or the other, these witnesses ought to be called. (pp. 1696 D/1700 G)

### ***EVIDENCE - Evaluation of- Witnesses***

5. The practice of evaluating evidence led by parties who are before a court of law and who were of same family but separated by scuffle, animosity and protracted dispute, has to be approached with caution, circumspection and care. It is worthy of note that from the evidence of P.W.s 2 - 4, it is clear that they are all members of the same family and they are the only people who claimed that they saw the accused persons commit the alleged crime that day. There is no independent witness from their side. But on the side of the respondents and from the depositions of their witnesses, all of the witnesses who testified before the trial court except D.W.3, Mufutau Azeez,

none of them was a relation to anyone of them. They were all independent witnesses who told the trial court what they knew on the day in question, in 1/4/2003.

These are indeed vital factors which require the utmost caution of a trial Judge before he weighs the evidence of the parties on his prob-  
 B verbal scale of justice. Several decisions of this court are in support of that practice. (p. 1702 A/G)

***Liability for crime - Joint criminal act***

C 6. The fundamental question always asked in an allegation of a joint act is the intention of each of the accused persons. Where there is a joint criminal act, an accused has nothing to rebut until the prosecution has established criminal intention or knowledge on the part of each and every accused person. The measure of liability is the extent  
 D of intention or knowledge of each accused. If several persons join in an act each having a different intention or knowledge, each is liable according to his own intention or knowledge and not further, from the record of appeal, there is no evidence to establish that the ac-  
 E cused persons had common intention to kill the deceased. Apart from the evidence of PW.3, no other witness said that he saw 2nd accused shoot the deceased. In such an allegation of a group or massive at-  
 F tack of a concerted nature, there is need for the prosecution to establish common intention. It was therefore wrong of the learned trial Judge to have lumped all the accused persons, especially the 1st,  
 3rd-6th respondents, against whom there was no direct evidence of shooting the deceased. It is the duty of the learned trial Judge to properly evaluate the evidence against each of the accused persons separately to enable him arrive at proper conclusion. (p. 1707 F)

G ***Alibi - Effect of successful plea***

H 7. The law is trite that where the defence of alibi succeeds, there is no need for the court to consider other elements involved in the offence charged as the accused were not at the scene of crime and the presumption is that they did not ipso facto, commit the crime charged. So there was no need for the court below to consider issues 1 and 2 which were formulated to cover the burden and standard of proof required in the establishment of the offences charged. A court of law

deals with live issues which will have bearing in one way or the other on any of the parties or all the parties before it. A court of law, cannot serve as a forum for moot trials or academic exercises. (p. 1710 H)

## **NOTABLE POINTS OF INTEREST**

### **TOBI JSC**

*1. Contradictions must be material and substantial to affect an accused's case*

It is the law that contradictions, in order to have effect on the case of an accused person, must be material, substantial and must relate unequivocally to the charge against the accused person. While I concede that dates and actual hours, minutes and seconds are material in the determination of the defence of alibi a court of law must consider the total package of the defence and not take pockets of the time element involved in the defence and conclude that there are contradictions. In a case, such as this where six accused person gave evidence and nine witnesses gave evidence on the defence of alibi there is bound to be discrepancies as to the times when the respondents were in a particular place and doing what.

It is my view that if the fifteen persons (and here I have added the Six respondents and the nine witnesses to make the number 15) had given evidence to the minuteness of the minutes and seconds, a, court of law will certainly suspect such evidence and the possibility of disbelieving the evidence on the ground that it is tutored almost to the level of a kindergarten recitation of the children in a classroom setting or its prototype. I am of the view that the contradictions which are not material, in themselves confirm the truth in the defence of alibi. (p. 1716 D)

*2. Material evidence withheld is presumed unfavourable to the party withholding it*

The Court of Appeal held that the prosecution ought to have called the photographer and the machine operator to give evidence. As I said earlier, this is a matter involving human element and should be considered in that light and not by any abstract notion. I should go further than the Court of Appeal by supplying Section 149(d) of the Evidence Act, 1990 and come to the conclusion that the prosecution

did not call the photographer and the machine operator because they could have given evidence against the prosecution. And this conclusion also goes in favour of dismissing this appeal.  
(p. 1718 C/E)

**B OGUNTADE JSC**

*3. Prosecution need not rebut the defence of alibi in a particular way*

Generally speaking, where the prosecution calls evidence strong and cogent enough to convince the court that an accused had been seen at the scene of crime committing an offence, the defence of alibi crumbles because the acceptance of the evidence of prosecution witnesses necessarily implied that the accused could not have been anywhere else than as stated by witnesses whose evidence has been accepted by the court. This position of the law was stated by this court in *Fatoyinbo v. A.G. Western Nigeria* (1966') WNLR 4 at 6-7, by Coker, JSC. He observed:-

*“.....Where a defence of alibi is suggested or timeously put forward by an accused person, the onus resting on the prosecution is no more than that of adducing as much evidence as, if accepted, would demolish the suggestion or inference that the accused person was not available at the scene of the crime at the material time and satisfy the court or jury of the contrary. Admittedly, where such a defence is put forward in such manner and at such time as to enjoin on the prosecution, the duty of investigating it, a failure to do so may cast some doubts upon the probability of the case for the prosecution. That does not warrant nor justify the suggestion that the prosecution has to rebut in a particular way the defence of alibi.”*

In the present case, it is not only that the prosecution had not derived anything useful from the investigation of the alibi raised by the respondents. No evidence which would appear to show that the alibi was not true was found. (p. 1723 B)

**REPRESENTATION**

**H** Toyin Pinhero, (with him; J. A. Mumini, DPP, Kwara State Ministry of Justice, Ilorin), for the Appellant.  
Rafiu A. Lawal Rabana (with him, Kizito Oji), for the Respondents.



**CASES REFERRED TO**

- Alani v. State (1993) 7 NWLR (Pt.303) 112 at 124  
 Gachi v. State (1965) 1 NMLR 333 at 335  
 State v. Ozaki (1986) 5 NWLR (Pt.40) 258 at 269  
 Adekunle v. State (1986) 5 NWLR (Pt. 123) 505 at 513  
 Bozin v. The State (1985) 7 S.C. 450 at 472 B  
 Okosi & Anor. v. State (1989) 2 S.C. (Pt. I) 126  
 Onuoha & Ors v. The State (1989) 2 S.C. (Pt. II) 115  
 Peter v. The State (1994) 5 NWLR (Pt.342) 45 at 71  
 Chia & Ors v. The State (1996) 6 NWLR (Pt.455) 465 at 480 C  
 Adele v. State (1995) 9 NWLR (Pt.377) 269  
 Onuchukwu v. State (1998) 4 S.C. 49; (1998) 4 NWLR (Pt.547) 576  
 Odili v. State (1977) 4 S.C 1; (1977) 4 S.C  
 Onafowokan v. State (1987) 3 NWLR (Pt.61) 538 D  
 Opeyemi v. The State (1985) 2 NWLR (Pt.5) 101  
 Ahmed v. The State (1998) 7 S.C. (Pt. I) 96; (1998) 7 SCNJ 60

**STATUTES & RULES REFERRED TO**

- Evidence act, Cap. 112, LFN. 1990; ss. 138 (i) and (d) E  
 Penal Code, ss. 97 (i) (c), 80, 81, 221, and 248 (i)  
 Supreme Court Rules (as amended in 1999); O. 6 r. 5 (i) (a), (2) & (3) and O. 27 r. 2 (i)

**LEAD JUDGMENT BY MUHAMMAD JSC**

At the Kwara State High Court of Justice (trial court), holden at Ilorin, 3 different charges were with the leave of the trial court, preferred against each of the 6 respondents herein, as accused persons. The 6 accused persons were tried jointly. Hereinbelow are the charges:

- “Charge No. 1: ;  
 That you (1) Fatai Azeez Adesoye  
 (2) Ganiyu Lasisi  
 (3) Kareem Shittu H  
 (4) Rasheed Adesoye  
 (5) Issa Kalam Adesoye  
 (6) Noah Adepoju on or about the 1st day of April, 2003, at

Lamodi Land along Adeleke Area of Offa in Offa Local Government Area of Kwara agreed to do an illegal act to wit shot dead one Raufu Balogun with locally made pistol and severely injuring Mukaila Abdulsalam Balogun and Rasheed Salam Balogun with gun shots and same act was done in pursuance of an agreement and you thereby committed an offence punishable under Section 97(1) of the Penal Code.

Charge 2:

That you (1) Fatai Azeez Adesoye

(2) Ganiyu Lasisi

(3) Kareem Shittu

(4) Rasheed Adesoye

(5) Issa Kalam Adesoye

(6) Noah Adepoju on or about the 1st day of April, 2003, at Lamodi Land along Adeleke Area of Offa in Offa Local Government Area of Kwara State did cause grievous (sic) to the persons of Mukaila Abdulsalam Balogun and Rasheed Salam Balogun by shooting a locally made pistol at them and thereby committed an offence punishable under Section 248(1) of the Penal Code.

Charge 3:

That you (1) Fatai Azeez Adesoye

(2) Ganiyu Lasisi

(3) Kareem Shittu

(4) Rasheed Adesoye

(5) Issa Kalam Adesoye and Noah Adepoju on or about the 1st day of April, 2003, at Lamodi Land along Adeleke Area of Offa in Offa Local Government Area of Kwara State did commit culpable homicide punishable with death in that you caused the death of one Raufu Balogun by shooting the deceased with a locally made gun with the intention of causing his death and you thereby committed an offence punishable under Section 221 of the Penal Code."

Each of the accused persons pleaded not guilty on each of the charges.

Hearing commenced on the 9th day of February, 2004. The prosecution called a total of 8 witnesses. Each of the accused persons testified in his own behalf and 9 witnesses in all testified for the defence.

At the close of evidence the two learned counsel on both sides addressed the trial court. The learned Attorney-General by consent of the counsel for the accused persons, filed and adopted a written address on oral address.

After evaluation of evidence placed before him viz-a-viz the prevailing law, the learned trial Judge, found all the 3 charges Proved beyond reasonable doubt against each of the accused guilty as charged and convicted each of the accused as charged. He finally sentenced each of the convicts to death by hanging on the 1st and the 3rd charges. On the 2nd charge, the learned trial Judge sentenced each of the convicts to 2 years imprisonment with hard labour.

Dissatisfied with the trial court's judgment, each of the condemned prisoners filed a separate Notice of Appeal to the Court of Appeal, Ilorin (court below) challenging the convictions and sentences passed on them by the trial court. The court below, per Abdullahi, JCA., stated, inter alia:-

*"This appeal is pregnant with some merits. The decision of the learned trial Judge convicting the appellants as charged cannot stand and it is hereby set aside. The conviction and sentence imposed by the lower court are hereby quashed. The appellants are discharged and acquitted on all the counts."*

The State, as respondent at the court below, now appellant before this court, felt aggrieved with the decision of the court below and filed its appeal to this court. The Notice of Appeal contained six grounds of appeal (pp. 296 - 304 of the printed record of appeal). Leave was granted by this court to the respondents to raise and argue a new point of law.

Briefs were settled by the parties in compliance with Order 6 Rule 5(1)(a) & (2) & (3) of the Supreme Court Rules, (as amended G in 1999). Learned counsel for the appellant, J. A. Mumini, Esq., (DPP, Kwara State Ministry of Justice) formulated the following issues:-

*"3.02. Issue 1 (Relates to Ground 1)*

*Whether the Court of Appeal was right to have held that the non-calling of two independent witnesses by the prosecution, created doubt on the case of the prosecution sufficient to discharge and acquit the respondents on the three count charge against them.*

*3.03 Issue 2 (Relate to Ground 2)*

*Whether having regard to the evidence led by the prosecution, the Court of Appeal was right to have held that the prosecution has failed to prove its case beyond reasonable doubt.*

*3.04 Issue 3 (Relates to Ground 3)*

B *Whether the Court of Appeal was right to have refused and or neglected to give considerations to the issues formulated by the parties before in this case.*

*3.05 Issue 4 (Relate to Grounds 4, 5 and 6)*

C *Whether the Court of Appeal was right to have refused and or neglected to adequately consider and properly examine the defence of alibi raised by all the respondents herein by contaminating same or mixing up same with the issue of non-calling of two witnesses”*

D Esq., submitted 3 issues for determination. They are as follows:-

*“1. Whether the lower court was wrong to have held that the defence of alibi exonerated the respondents (Grounds 2, 4, 5 and 6 of the Notice of Appeal)*

E *doubt. (Grounds 1, 2, 5 and 6 of the Notice of Appeal)*

*3. Whether in the circumstances of this case, the lower court was bound to review all the issues submitted for consideration. (Ground 3 of the Notice of Appeal).”*

F Permit me my Lords, before I come to consider the issues for determination, to render a concise story of the facts giving rise to this case. It all started as a result of land dispute. It all happened in the process of cutting of trees on the land in dispute. Some twelve people and others said, fifteen, emerged from the bush ; some of them armed  
G with locally made guns, came shooting. In the process one Rafiu Balogun died while others were injured. Eye witness accounts of P.W.s.2, 3 and 4 were given in addition to the evidence of P.W.s. 5, 6 and 8. The defence of alibi was put up by each of the accused persons. The trial court rejected that defence. The trial court having found  
H the prosecution to have proved its case beyond reasonable doubt sentenced the respondents accordingly as charged.

Let me now proceed to consider the issues and arguments made out by each of the parties to this appeal.

Issue No. 4 formulated by the appellant (issue No. 1 by the respondents) is on the defence of alibi raised by the respondents at the trial court. It is pivotal in this case. It is pertinent that I should consider it first. ***alibi, originates from Latin. It stems from a combination of two words: “alius ”and “ibi” or “ubi” meaning: “other” and “There” or “where”, respectively. Put together under English usage, it means “elsewhere”.*** See: Alani v. State (1993) 7 NWLR (Pt.303) 112 at 124, Gachi v. State (1965) 1 NMLR 333 at 335, State v. Ozaki (1986) 5 NWLR (Pt.40) 258 at 269, Adekunle v. State (1986) 5 NWLR (Pt. 123) 505 at 513. B

***Alibi means that the accused person was somewhere other than where the prosecution alleges he was at the time of the commission of the offence making it impossible for him to have committed or participated in the commission of the offence with which he was charged.*** See: Bozin v. The State (1985) 7 S.C. 450 at 472, Okosi & Anor. v. State (1989) 2 S.C. (Pt. I) 126; (1989) 1 NWLR (Pt.100) 642 at 666, Onuoha & Ors v. The State (1989) 2 S.C. (Pt. II) 115; (1989) 2 NWLR (Pt. 101) 23 at 37, Peter v. The State (1994) 5 NWLR (Pt.342) 45 at 71. ***Furthermore, it is a defence by which an accused person alleges that at the time when the offence with which he was charged was committed he was elsewhere.*** See: Chia & Ors v. The State (1996) 6 NWLR (Pt.455) 465 at 480, Okosi & Anor v. State (1989) 2 S.C. (Pt. I) 126; (1989) 1 NWLR (Pt. 100) 642 at 666. C

***Where an accused person has put up a defence of alibi, what the law requires him to do is to introduce evidence of alibi. The onus is on him to prove where he was at the time of the incident and he has to call evidence to support his defence of alibi. Once the defence of alibi is raised it is for the prosecution to investigate it properly as failure to do so could raise reasonable doubt in the mind of the court and will lead to quashing the conviction.*** See: Adele v. State (1995) 9 NWLR (Pt.377) 269, Onuchukwu v. State (1998) 4 S.C. 49; (1998) 4 NWLR (Pt.547) 576, Odili v. State (1977) 4 S.C 1; (1977) 4 S.C. (Reprint) 1; Onafowokan v. State (1987) 3 NWLR (Pt.61) 538. D

It is the finding of the trial court that the accuses' evidence on their defence of alibi is self contradicting and there were contradic- E

tions as to the times given in their evidence and that of their various witnesses. It held that the defence of alibi raised by the accused crumbled and had failed. After summing up the principles of law on alibi and the evidence of the parties on same, the court below on the other hand, held that the defence of alibi exonerated the respondents.

For clarity sake, I crave my Lords indulgence to recast the evidence made available before the trial court. **It is important to note from the outset that each of the respondents raised the defence of alibi at the earliest opportunity available to him and that was when each was arrested and requested to make a statement to the police.** The commission of the crime was said to have been done on the 1st of April, 2003, between the hours of 7.00 am to 7.30 am. Each of the respondents put up his defence of alibi as follows:-

(a) 1st respondent

In his statement to the police on his arrest which was admitted in evidence as Exhibit P1 the 1st respondent stated inter alia, as follows:-

*“on 1/4/2003, at about 07:00 hrs. while I was still sleeping that I saw my friend, Mustapha a.k.a. Boys city that woke me up and we were together till 07:40hrs. when my wife called that I should come and convey the children to school and as I was going my friend, Mustapha also left and from the school I went to Atanoba area to collect house rent from a Polytechnic lecturer, I met him with the landlord son named Sarafa Babalola. I left the place at about 08:30 hrs. for my house I then picked my Bank cheque book and told my second wife by name Wosilat that I wanted to go to Ibolo Community Bank Offa. As I was on my way I met Rashidat and Yemi both ‘F’ of Offa Polytechnic and I picked and dropped them at Owode Junction. As they were entering their school, I continue my journey to the Bank, at Ibolo Community Bank I met I.D. who told me to come back by 2.00pm for the money I wanted to withdraw. From the Bank I went to my brother’s house by name Ganiyu Lasisi near Queen’s Inn Hotel at Taiwo road Offa. It was there that one Isah Kalam came and informed us that there was serious fight at the site and as we were there discussing that we saw ALGON vehicle and the Inspector*

*Crime and Messeko said the DPO Offa wanted to see us and we followed him it was at the station that the police said I have killed person and I said no I did not kill any person as alleged against me by the complainant. The complainant were suspecting me and the others just because of the land dispute between the Asalofa and Balogun families."* B

This is what the 1st respondent repeated when he testified on his own behalf (pages 68 - 70 of the Record of Appeal). D.W.s. 1 & 2 testified in favour of the 1st respondent and confirmed what he said on his alibi.

P.W.7 who was a police investigator stated in respect of the 1st respondent as follows:- C

*"I can remember an officer of Ibolo Community Bank made statement to us in the course of our investigation in respect of the 1st accused. The Manager confirmed he saw 1st accused that morning but cannot say precisely the time."* D

The 2nd respondent stated that he was in his house together with two younger brothers of his whose names he had given to the police. He said 1st respondent came from Ibolo Community Bank and joined them in the house. E

The 3rd respondent told the police that on that day, i.e. 1/4/2003, he was at Ganiyu Lasisi (2nd respondent's) house.

The 4th respondent stated in his statement and evidence that he went to his friends house for a naming ceremony. He gave that friend's name to the Police. F

The 5th and 6th respondents also gave their own version of their alibi.

The result of the investigation conducted by the police on the alibi put up by the respondents shows in the main, that the alibi was well founded. P.W.7 for instance, stated:- G

*"I went to all the places where they said they were to establish their alibi. ....I remember that the 3rd accused said one Rabiū Brick-layer came to wake him up that day. The accused mentioned many people in his statement and I interviewed those that were available. All the people the (he) (sic) mentioned we went in (a but) to their houses and interviewed them, some orally and some written. Those that are in writing are filed at the back of the case diary..... The people H*

*we interviewed confirmed to us that they saw the accused at the time the accused told us they were with those people.*

P.W.8, Sgt. with the State CID, Homicide Section, Ilorin, stated on the alibi as follows:-

B *‘The accused made alibi statement and myself and the team led the accused to the scene of the crime we investigated the alibi and found them to be untrue and since the complainants say these are the people who did the act, we have no choice than to charge them to court.’*

C Answering questions put to him at cross-examination, P.W.8 stated:-

D *“1st accused statement he told me he was in the Bank ... He told me one Mustapha was with him till about 7.40am. We went to Mustapha’s house but did not meet him, we met his brother a Poly-technic student. He said he thereafter went to a Polytechnic lecturer to collect rent and we went to his house. We did not meet him too, we met his brother. I can’t remember what we did about Sarafa Babalola that he mentioned. We went to the Bank but our team leader with the 1st accused went in, I didn’t know what they dis-*  
E *cussed inside with Bank Manager and the team leader did not tell me. I cannot say whether the alibi was true or false. It is our team leader who can say that.*

F *On the 4th accused, we went to where he said she (he) attended a naming ceremony, the woman who gave birth could not talk to us, she was just crying but the husband said the 4th accused was there at the naming ceremony but we did not believe him.*

G *On the statement of the 6th accused. I confirmed that 6th accused works with NEPA at Offa. We did not see the Osamene he said he visited when he closed at 6.00am on his way home. We went there but did not meet the man. My team leader went with him to Mrs. Adeowoye that he mentioned, so I don’t know what their finding is.*

H *On 2nd accused statement he said she (he) was at home throughout, we went to his house and his family members said he was in till the time the police came to arrest him.”*

That has been the position of the investigation. **P.W.7 confirmed the veracity of the alibi raised. P.W.8 said they found the**



***alibi to be untrue. That in itself is contradictory. It is strong enough to create doubt in the mind of the learned trial Judge. That apart, on the balance of probability, which is the standard required in defence of alibi, it is clear that sufficient, credible evidence was led by the accused persons to establish their claim on alibi.*** It is a surprise as to what factors dissuaded the learned trial Judge so much so that he found the defence of alibi not sustainable. ***In any event, this is a criminal trial. The burden of proof of the crime alleged against the respondents, i.e. proof beyond reasonable doubt never shifts. It remains on the prosecution until satisfactorily discharged. I have no cause to doubt or disturb the finding of the lower court on the defence of alibi raised by the respondents. I uphold it.***

***Now, assuming that I am wrong in my consideration of the defence of alibi raised by the respondents which favoured them and by that token, the court below, ought to, as well, be wrong having reached the same conclusion on the defence of alibi, then has the prosecution discharged the burden placed on it by the law?***

Issue 1 is on non-calling of two independent witnesses by the prosecution. The submission of learned counsel for the appellant is that it was wrong of the learned Justice(s) of the Court of Appeal to hold that failure of the prosecution to call two witnesses was enough to create a doubt on the mind of the learned trial Judge and that he ought to have discharged and acquitted the respondents. The case of *Manship Namsoh v. The State* (1993) 5 NWLR (Pt.128) 132, relied on by the court below was grossly inapposite. Learned counsel stated the law that the prosecution is not bound to call any and every witness who were present at the locus criminis. It is only to call witness who would give relevant evidence in proof of its case. He cited the case of *Iziren v. The State* (1995) 9 NWLR (Pt.420) 385 at page 390.

The submission of learned counsel for the respondents is that there was no independent evidence adduced by the prosecution to prove this case. It is obvious from the statements made by P.W.2, P.W.3 and P.W.4 to the Police and their evidence in court that apart from P.W.s 2, 3 and 4, who were members of the deceased's family, there was the presence of a machine operator and a photographer at

the scene of the crime. None of these two, who could be regarded as independent eye-witnesses, was called to testify and there is no evidence on record as to why they were not so called by the prosecution. Learned counsel submitted further that PW.3 in his statement to the Police and evidence in court stated that it was workers at Olayani Block Industry that helped him get a taxi that took him to the General Hospital. PW.7 an investigating Police Officer gave evidence to the effect that he went to the block Industry near the scene but cannot remember taking any statement from the people there. All the above, argued learned counsel for the respondents, show that the prosecution had kept away vital witnesses whose evidence would have been unfavourable to the prosecution. He cited in support, the cases of Opeyemi v. The State (1985) 2 NWLR (Pt.5) 101, Ahmed v. The State (1998) 7 S.C. (Pt. I) 96; (1998) 7 SCNJ 60.

***The general law pertaining to calling of witnesses to testify in favour of a party in a criminal trial, especially the prosecution, is that it is not the requirement of the law that the prosecution must call all conceivable witnesses. The duty on the prosecution as placed by Section 138(1) of the Evidence Act, (Cap 112, LFM, 1990), is to call witnesses to establish their case beyond reasonable doubt. See: Oluwatoba v. The State (1985) 1 NSCC 306, Adamu v. State (1991) 6 S.C. 17; (1991) 4 NWLR (Pt.187) 530, Amuneke v. State (1992) 6 NWLR (Pt.217) 338. However, in the discharge of that burden, It is the duty of the prosecution to see that it places before the trial court all available relevant evidence. This may not mean that a whole host of witnesses must be called upon the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called. See: R. v. Kuree (1941) 7 WACA 175. In fact in the case of In R. v. Harris (1927) 2 KB 587, Lord Hewart, CJ. had observed that the prosecution was bound to call “all the material witnesses before the court, even though they give inconsistent account.” See further: Okonkwo v. Police (1953) 20 NLR 165.***

At the court below, there is a finding on the failure of the prosecution to call some independent witnesses. Below is what that

court said:-

*“Learned counsel for the appellants submitted that the prosecution should have called independent witnesses who from the evidence of the prosecution witnesses were supposed to be at the scene of the incident, namely the machine operator and the photographer. I cannot agree more with the learned counsel on this point. Though prosecution is not bound to call a particular witness to establish its case, in view of the enmity between the two families as I stated elsewhere in this judgment, the photographer and the machine operator had become material witnesses and failure to call them ought to have created doubt in the mind of the learned trial Judge as to the guilt of the appellants. I am also of the view that the failure to call the two witnesses has contaminated the entire case of the prosecutions in respect of the other appellants.”*

But, the trial court on the other hand, after correctly stating the general principles of the law pertaining to calling of several or multiple witnesses to establish a particular point in issue, concluded in the following words:-

*“So in my view without calling the machine operator, Yinusa Alabi and the photographer, there is sufficient credible evidence that fixed these accused person(s) at the scene of crime at the material time.”*

Of what significance would the evidence of the machine operator (Yinusa Alabi) and the photographer, be, had they been called to testify? To answer this question without mincing words, the record of appeal is the best guide. It is from the record that I see where the evidence of PW.2 gives us an insight of how and where the machine operator featured. PW.2 stated as follows:-

*“On 31/3/03, I was in my shop and I saw a boy with a Policeman he said he was asking for Rafiu Balogun and Mukaila Balogun the deceased. I asked him what was the matter and he said they came to seize the machine they were using to cut down tress (sic) at Lamudi. I told him this is a matter they can settle amicably instead of getting the Police involved. When they did not see the two people they were looking for I volunteered to help them look for their seized machine. When we saw it I gave it to the Policeman. They were about to leave when Rufai (deceased) came and he followed them to the*

*Police Station.*

*After a while, Rafiu came back and said the Police have settled the matter for them. That he was asked to release the seized machine to them and they were also told not to go and cut the trees again and they promised not to go there again.*

B *On 1/4/03, I have just finished saying my morning prayer and decided to go to where its alleged (sic), that they cut some trees because my own farm is also there. I called Mukaila Balogun to carry me to the place on his motor cycle. When we got there we met them*  
 C *again cutting the trees with that machine. We asked why they were cutting the tree after the Police had told them not to cut them again. The machine operator then said it was the boy we met with him that came to him early in this morning that the problem has been resolved and they can now cut the trees. We stopped him and told him*  
 D *to carry his machine and follow us to our compound. When we got home we invited a photographer so that we can go and take the photograph of the trees he had fallen down. I called on Murtala Balogun and he also came along on his motorcycle. We were about to go when Raufu Balogun the (deceased) came to open his shop.*  
 E *He asked what was the matter and I told him that the people went back to the farm to cut our trees again and that we were going to the scene to take the photograph. He decided to follow us and joined somebody on his motorcycle. On getting to the farm. We told the*  
 F *machine operator to stay by the fallen trees so as to take his photograph.*

*Suddenly people came from the bush and these accused also came out of the bush with shot (sic) guns. They were about 12 people that came out from the bush but those I can identify who I had known*  
 G *before are Ganiyu Lasisi, Kareem Shittu, Fatai Azeez, Rasheed Adesoye, Noah Adepoju and Issa Adesoye."*

On being cross-examined by the learned counsel for the respondents, PW.2 said, among other things:

*"The photographer and machine operator were at the scene.*  
 H *I don't know the name of the machine operator. I was one of the people that invited the photographer to the scene but I don't know his name. I don't know the name of the person who employed the service of the machine operator but it is likely to be the woman these*

*accused sold the land to. I don't know whether the machine operator and the photographer made statement to the police because I was not there. .... it was the machine operator and the photographer who first fled. They had run away before I did."*

Answering questions put to him by learned counsel for the respondents on the machine operator and the photographer, P.W.3<sup>B</sup> stated:-

*"The photographer and the machine operator were with us on the day of the incident. I don't know whether they were short (sic) I heard no such report that they were shot. The Police did not ask me anything about the photographer."*

Further, another witness, P.W.7 in answer to cross-examination put to him by learned counsel for the respondents said the following in connection to the machine operator:-

*"In the course of my investigation I discovered there is a machine operator employed to cut trees it is true he was arrested and his statement was obtained. I cannot remember whether the machine operator said he did not witness any gun shot the statement of machine operator is supposed to be in the file. I cannot remember recording the statement of the machine operator, because I don't speak Yoruba language."*

P.W.8, told the trial court in cross-examination on the machine operator, the following:-

*"I remember a machine operator but I was not the one who recorded his statement. I cannot say what he said in his statement since I did not record his statement. It is true I had access to the case diary but I cannot go on and start reading the content. The team leader was always in possession of the case file."*

The team leader mentioned in the excerpt above from P.W.8, refers to P.W.6, Inspector Thomas Meseko, who surprisingly, throughout his evidence did not mention the machine operator. He also did not mention anything on the photographer mentioned variously by all the witnesses as stated in the excerpts above.

Now, page 21 of the record of appeal contains a statement credited to the machine (Engine) Operator, Mr. Yinusa Alabi. He volunteered a statement to an officer of the State CID, Ilorin (province). This is what Mr. Alabi said (in part):-

*"I am a native of Ilorin. I did not go to school. It is engine operation that I have been doing at Igboosun village via Offa. On 31/3/2003, at about 07:00 hrs. one madam whom I did not know her name hired me to go and cut some trees at Adeleke road with one of her son and as we were cutting those trees, we saw some people who identified themselves as Balogun Family and they dragged us to Offa Police Station and they settle the matter for us at the Police Station and we all departed. Even my machine/engine that was seized was returned back to me at the Police Station.*

*On 1/4/2003, I went to the madam to collect my balance she then told me to go and cut the remaining one cashew tree that remained on that land. And as I cut down the tree around 07.20 hrs and as raised my eye up I saw the Balogun Family member who said I should stop work cutting. They then said the boy that accompanied me should go and call his mother as the boy left they said I should follow them with my machine to their father by name Alhaji Deja and the Baba said they should take me back and snapped me with the machine on it the said land and after, they have snapped me Alhaji Deja said I should go on my own way and that was how I left the place to our house and not quite long that our Magaji sent for me that my junior brother by name Safiu is being beaten and when I reached there they left my brother and I was arrested. I then asked them why they were arresting me and they told me that didn't I heard what happened where I just worked that morning or didn't I heard (sic) the sound of gun and I told them that I did not heard anything and they said I should take them to madam's house but we could not see the madam but she later sent her son to the Police Station and there I was detained I did not know what happen at the site because I have left the place. This is all I have to say."*

It appears there was no statement recorded from the photographer. In any event, even the statement of the machine operator, as reproduced above, was never tendered in evidence as the machine operator was not called to testify. **I entirely agree with the court below in its decision and the learned counsel for the respondents in his submission that in a capital offence such as the one for which the respondents were sentenced to death by hanging, the prosecution should have called independent wit-**

**nesses who, from the evidence of the prosecution witnesses (as summarised above) were said to be at the scene of the incident, namely the machine operator and the photographer who played key roles in the matter. It is surprising how the prosecution sidelined independent witnesses who had a lot of say on the whole saga. Although the prosecution is not bound to call a particular witness in order to discharge the burden of proof placed on him by the law before securing conviction, yet the law is very emphatic that where there exists a vital point in issue and there are witnesses whose evidence would settle that issue one way or the other, these witnesses ought to be called.**

This court stated the law, per Adio, JSC., (of blessed memory), in the case of State v. Nnolim (1994) 5 NWLR (Pt. 345) 394 at 406 C-D, that:

*“A vital witness is a witness whose evidence may determine a case one way or another. Failure to call a vital witness by the prosecution is fatal to the prosecution case.”*

See further: Omogodo v. The State (1981) 5 S.C. 5; (1981) 5 S.C. (Reprint) 4; Onah v. The State (1985) 3 NWLR (Pt.12) 836.

For whatever reason the machine operator (whose statement was already had on record) and the photographer, were not called to testify in this case, that failure, in my view is fatal to the prosecution's case. The machine operator and the photographer were said to be present at the scene of the crime. They saw, they heard and they had the experience of whatever transpired there. They would have told a better, objective and unprejudiced account of what actually transpired at locus aiminis. No one who comes across the facts of this case would imagine the two vital eye witnesses to be dropped from the prosecutions witnesses. Their evidence would have been more independent and objective.. .

Secondly, it is the finding of the learned trial Judge that the evidence of the P.W.s 1-6 with the exhibits is credible enough and nothing contradicted the evidence so the trial court had no choice but to believe same. But the court below on the other hand, held the view since it was the evidence of P.W.I- P.W.4 and that of the witnesses called by the appellants and having regard to the enmity between

the two families, the trial Judge should have been more wary in accepting the evidence of one side against the other especially where independent witnesses abound but they were not called by the prosecution for reasons very difficult to comprehend.

***The practice of evaluating evidence led by parties who are before a court of law and who were of same family but separated by scuffle, animosity and protracted dispute, has to be approached with caution, circumspection and care. It is worthy of note that from the evidence of PW.s 2 - 4, it is clear that they are all members of the same family and they are the only people who claimed that they saw the accused persons commit the alleged crime that day. There is no independent witness from their side. But on the side of the respondents and from the depositions of their witnesses, all of the witnesses who testified before the trial court except D.W.3, Mufutau Azeez, none of them was a relation to anyone of them. They were all independent witnesses who told the trial court what they knew on the day in question, in 1/4/2003.*** Other reasons as advanced by learned counsel for the respondents which were accepted by the lower court on why the learned trial Judge ought to be wary and cautious in accepting the prosecutions' witnesses evidence hook - line and sinker were that:

- i. PW.s 2, 3 and 4 were relations of the deceased who were bound to be interested parties.
- ii. PWs.2, 3 and 4's family which is the deceased family had been engaged in a protracted land disputes with the respondents' family which must have created ill-feelings.
- iii. PW.s 1 and 2 were not related to the respondent but fixed the presence of the respondents at different places between the time the offence was allegedly committed.

***These are indeed vital factors which require the utmost caution of a trial Judge before he weighs the evidence of the parties on his proverbial scale of justice. Several decisions of this court are in support of that practice.*** See: *Idahosa v. The Queen* (1965) NMLR 85.

This settles issue No. 1.

On issue 2, the learned DPP for the appellant submitted that



having regard to the evidence led by the prosecution the Court of Appeal was wrong to have held that the prosecution has failed to prove its case beyond reasonable doubt. The essential legal elements of the offence charged were established by the prosecution before the trial court. Learned counsel argued that the death of one Raufu Balogun was established via evidence of prosecution witnesses which ran through pages 35-37 of the record. The acts of the respondents which caused the death of the deceased were properly established and the roles played by each of the respondents were clearly stated by the prosecution witnesses and the trial court was not in doubt as to the role played by each of the respondents. The learned DPP further argued that where an accused is fixed at the scene of the crime by credible witnesses, the trial court was right to have refused the plea of alibi. He cited and relied on the case of *Adele v. The State* (1995) 2 NWLR (Pt.277) 269 at 272, *Onuoha v. The State* (1989) 2 S.C. (Pt. II) 115; (1989) 5 NWLR (Pt.548) 135. Learned DPP urged upon us that it was wrong of the lower court to go into the issue of reassessment of witnesses and credibility of same as that remained within the privilege of the trial court. He cited and relied on *Adele v. The State* (supra).

In his submissions, learned counsel for the respondents stated that the case of the prosecution is borne out in the evidence of P.W.s 2-4. P.W.2, he said, in his statement at page 6 and evidence at pages 35 - 40 of the record showed clearly that he did not know who shot him or shot the deceased out of the people that came to attack them as he had run away for his life. P.W.3 said he identified 3rd accused who shot him on the leg and 2nd accused person who shot the deceased on the hand and head. Learned counsel argued that there was no direct evidence made out against the 1st, 3rd, 4th, 5th and 6th accused persons. Further, from the evidence of all the accused persons both in their statements to the police and testimony in court, they all denied the allegation, the onus was therefore on the prosecution to link the accused persons to the death of the deceased. The prosecution had failed to do so and the learned trial Judge was in error to have convicted all the accused persons in the absence of any credible evidence against them.

The six respondents were convicted and sentenced to death by hanging under the provision of Section 221 of the Penal Code.

For the conviction and sentence of the trial court to stand, the law requires the prosecution to prove beyond reasonable doubt that:-

- (1) The death of a human being has actually taken place.
- (2) Such death has been caused by the accused person or

persons.

B (3) The act was done with the intention of causing death, or that it was done with the intention of causing such bodily injury as:-

(a) The accused knew or had reason to know that death would be the probable and not only the likely consequence of his act; or

C (b) The accused knew or had reason to know that death would be the probable and not only the likely consequence of any bodily injury which the act was intended to cause.

See: *Omini v. State* (1999) 9 S.C 1; (1999) 12 NWLR (Pt.630), *Ogba v. The State* (1992) 9 NWLR (Pt.222) 164, *Nwaeze v. The State* (1996) 2 NWLR (Pt.428) 11, *Gira v. The State* (1996) 4 NWLR (Pt.443) 375. The evidence led before a trial court by the prosecution may be direct or circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused beyond reasonable doubt. The onus is always on the prosecution, as a general rule and it never shifts. See: *Woolmington v. DPP* (1935) A.C 462. The obligation on the prosecution is to prove the whole crime, including the negative of defences which are in issue, such as alibi, raised in the present case. Accordingly, an accused who pleads not guilty, as did all the accused/respondents in this case, casts upon the prosecution the burden of proving the facts in issue and if, when the totality of the evidence has been heard and considered, the court is not satisfied beyond reasonable doubt, it must acquit. And, a reasonable doubt may be created in the mind of the trial Judge either by the evidence given by the defence or by the prosecution. *Woolmington v. DPP* (supra). All it means is that the prosecution must adduce such evidence, which, if believed, and if left uncontradicted and unexplained, it could be accepted by the trial court as proof. Thus, proof beyond reasonable doubt does not mean proof to a scientific certainty.

In the instant appeal the prosecution relied heavily on the evidence of P.W.s 2, 3 and 4. Their evidence was said to be direct as eye witnesses. Rasheed Abudlsalam Balogun was P.W.2. His evidence is

contained on pages 35 - 40 of the record of appeal. This is what he said, among other things:

*“On getting to the farm, we told the machine operator to stay by the fallen trees so as to take his photograph.*

*Suddenly people came from the bush and these accused also came out of the bush with shot (sic) guns. They were about 12 people that came out from the bush but those I can identify who I had known before are Ganiyu Lasisi, Kareem Shittu, Fatai Azeez, Rasheed Adesoye, Noah Adepoju and Issa Adesoye. We were commanded to raise our hands up. We were surrounded and threatened to shoot us if we refuse to hands up. Raufu Balogun (deceased) raised his hands up. I challenged them that why should we raise our hands up and I just heard the sound of the gun the bullet hit my hand, if I was not raising my hand it would have hit my head. Smoke had taken over the place and I managed to run away. As I was running away I was on the thigh (sic) and as I was running away I kept on hearing the sound of gun shot at the scene and I heard the shout of Raufu Balogun who was killed. I managed to escape and got to the town. Somebody helped to take me to the hospital. I also made a formal report and gave the names of those I can identify among the people who attacked us.”*

In answer to questions put to him at cross-examination by learned counsel for the respondents, P.W.2 stated:-

*“It is true I said I heard the sound of gunshot while I was running away and the shout of Raufu Balogun but I cannot say what happened to Mukaila also since I was already running away. I know these accused before this day of incidence. There is a protracted land dispute between my family and accused family. I cannot say whether people do hunt around the area. I saw all these accused that day. I did not fabricate lies against them... I don’t know whether the Police recover (sic) guns from them.”*

P.W.3 was Mukaila Balogun. He stated in his evidence as follows:-

*“Myself and Rasheed and Raufu Balogun (deceased) who went to bring a photographer with Muritala Balogun went back to the farm with the photographer. We instructed the operator to put the machine on the tress and hold it while the photographer will snap*

him in that position. That is how some people suddenly emerged from the surrounding bush, there were about 15 of them. I looked up and saw Ganiyu Lasisi (2nd accused); Fatai Adesoye (1st accused); Karimu Shittu (3rd accused); Rasheed Adesoye (4th accused); Noah (6th accused); Issa Kalam Adesoye (5th accused). He (Karimu Shittu) then shot me on my leg. It was Ganiyu Lasisi (2nd accused) who shot the deceased with the gun in his hand. He shot him on the head and Raufu Balogun was wrinking on the ground, the shoes fell from my leg. Karimu Shittu was speaking to Ganiyu Lasisi that I was too stubborn and, Ganiyu targeted my chest that day with the same gun with which he shot the deceased. The shot missed my chest and hit my left hand along my left side... The Police came to me at the General Hospital and asked what happened and who are the people that did this. I did not know whether. I was going to survive or die, so I immediately mentioned names of the perpetrators I mean these accused persons.”

P.W.4 was Muritala Balogun. He stated:-

“on 1/4/2003, I was about operating my shop close to 7.00 am when Mukaila Balogun came to say Rasheed said I should come, I followed them I mean (Rasheed, Raufu and Mukaila with the photographer) to the farm. On getting there we just heard “hands up” they have surrounded, Rasheed, Mukaila and Raufu Balogun. The people who surrounded them are fatai Adesoye, Ganiyu Lasisi, Noah Isiakalam Adesoye, Rasheed, Adesoye and Shittu. I know him as K. Shitta. I was behind them. I saw Fatai Adesoye with a gun, as I was asking (sic,) them why they were carrying guns when they are not Policemen I heard them shot Raufu Balogun on the head and I took to my heels and ran, away. I cannot say precisely who among Raufu Balogun (sic). I ran to the Police Station and reported... They (Police) asked me who are, the people that attacked us and I mentioned all these accused. Some Policemen were detailed to accompanied (sic) me to go and arrest them. We met 4 of the accused at Ganiyu Lasisi’s house. They are Fatai Adesoye, Isiakalam Adesoye, K. Shittu and Ganiyu Lasisi himself. The Police arrested the 4 of them.”

On cross-examination, P.W.4 said:-

“I remember I mentioned one Lekeleke to the Police as one of the people that I saw at the scene. He is not here now. The Police did

*not conduct a search in the house where the 4 of them were arrested. I may not know whether the Police later conducted a search in their houses. There was no gun found on them when they were arrested. The accused are from the same family and live within same compound but not in the same house. It is true we have a land dispute in the court with accused family but we have never resulted to physical combat if we see each other we will greet."* B

I find it pertinent my Lords, to reproduce the above depositions because of the following observations:

(a) the conviction of the 1st, 3rd, 4th and 6th respondents was based by the trial court on common intention to carry out an unlawful act. The learned trial Judge held among others: C

*"As to the certainty of who shot him, it is immaterial who among the accused shot him, since the accused have common intention the act of one of them amount (sic) to the act of the rest accused common intention need not be proved..... in this case even if the 2nd accused who shot the deceased, he is no more than the hand by which the other accused persons struck and in that case all must be liable for the murder of the deceased."* D

Section 80 of the Penal Code provides: E

*"Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention."* F

See also Section 81 of the same Code.

***The fundamental question always asked in an allegation of a joint act is the intention of each of the accused persons. Where there is a joint criminal act, an accused has nothing to rebut until the prosecution has established criminal intention or knowledge on the part of each and every accused person. The measure of liability is the extent of intention or knowledge of each accused. If several persons join in an act each having a different intention or knowledge, each is liable according to his own intention or knowledge and not further, from the record of appeal, there is no evidence to establish that the accused persons had common intention to kill the*** G H

**deceased. Apart from the evidence of PW.3, no other witness said that he saw 2nd accused shoot the deceased. In such an allegation of a group or massive attack of a concerted nature, there is need for the prosecution to establish common intention.** See the cases of Alarape v. The State (2001) 2 S.C. 114; (2001) 2 SCNJ 162, Ahmed v. The State (1998) 7 S.C. (Pt. I) 96; (1998) 7 SCNJ 560. **It was therefore wrong of the learned trial Judge to have lumped all the accused persons, especially the 1st, 3rd-6th respondents, against whom there was no direct evidence of shooting the deceased. It is the duty of the learned trial Judge to properly evaluate the evidence against each of the accused persons separately to enable him arrive at proper conclusion.** My learned brother, Oguntade, JCA., (as he then was), made a very sound proposition of the law in the case of Emeka v. State (1998) 7 NWLR (Pt.559) 556 at p. 584 B-D. He stated as follows:-

*“where there are more than one accused person, the court should consider the evidence against each of the accused persons separately following this procedure:*

- a. Firstly, the court must identify the nature and quantum of evidence against each of the accused persons.*
- b. Secondly, it must determine whether such evidence having regards to its source was legally receivable against each of the accused persons.*
- c. Thirdly, it must determine whether or not the evidence receivable are credible;*
- d. Fourthly, it must determine whether the evidence was sufficient and of character that can be relied upon to justify the pronouncement of a guilty verdict on the accused persons.”*

I am in full agreement with my learned brother, in his views shown above and I adopt them.

Further, all the accused persons denied the charges None of them made a confessional statement or any statement implicating the other. The onus of leading direct and positive evidence to show that all the accused had common intention squarely rested on the shoulders of the prosecution. There was need to lead evidence showing that the remaining five respondents knew that the 2nd accused

was carrying a gun. There was therefore no evidence of common intention and the conviction of at least the 1st, 3rd - 6th respondents cannot be sustained. See: Akinkumi v. The State (1987) 3 SCNJ 30, Onuegbe v. Queen (1957) SCNLR 130.

(b) The 2nd respondent, according to P.W.3, was the one who shot the deceased in his statement to the Police. He thereby placed the onus on the prosecution to prove his guilt beyond reasonable doubt. **From the totality of the evidence placed before the learned trial Judge, there was the evidence of P.W.3 who said he saw 2nd accused shoot the deceased on one hand. On the other hand, P.W.s 2 and 4 presented evidence that was materially in conflict with that of P.W.3 in that they said they did not know who shot the deceased. This must cast doubt in the mind of the learned trial Judge on the prosecution's case. The law is well settled that where there is doubt in a criminal trial, such doubt is resolved in favour of the accused person. This court, per Wali, JSC, held in the case of Chukwu v. The State (1996) 7 NWLR (Pt. 463) 686 at 701 G-H, as follows:-**

**"Where prosecution's evidence is found to be contradictory on a material issue, the court should give the benefit of that doubt to an accused person that stems from the non-credibility of such evidence and discharge and acquit him."**

See further: Adebayo v. Igbodale (1996) 5 NWLR (Pt. 450) 567 at 616, Ibeh v. State (1997) 1 NWLR (Pt.484) 632 at 650, Anehia & Anor. v. The State (1982) NSCC 85, Nasanmu v. The State (1974) ALL NLR, 193, The State v. Danjumai (1997) 5 SCNJ, 126.

Secondly, although a conviction may be made on the evidence of a single witness, it is always safer that the trial Judge warns himself of the danger of conviction on the uncorroborated evidence of such a witness more so in a case where there existed inter-family disputes. See: Iko v. The State (2001) 7 S.C (Pt. II) 115; (2001) 35 WRN 1 at 22-23; (2001) 14 NWLR (Pt.732) 221 at 241-242. The essence of the corroborative evidence is to give support or strength to the assertion of the prosecution. That is why, as a matter of practice, a trial court should be very slow to convict on uncorroborated evidence of the prosecution. Thus, in view of the several material contradictions in the evidence led by the prosecution, the conviction of the 2nd ac-

cused/respondent cannot stand. I resolve issue No. 2 in favour of all the respondents.

Issue No. 3 is on whether the lower court was right in not reviewing all the issues submitted to it for consideration. The concluding part of the lower court's judgment reads:-

B *"The decision of the learned trial Judge convicting the appellants as charged cannot stand and it is hereby set aside. The conviction and sentence imposed by the lower court are hereby quashed. The appellants are discharged and acquitted on all the counts.*

C *Having arrived at this conclusion, it will be an exercise in futility to give consideration to the remaining issues formulated by the parties to this appeal."*

It is to be noted that the appellant herein was the respondent at the court below. It was supposed to respond to the issues formulated by the appellants before the court below. However, as there is no law prohibiting a respondent from formulating his own issues for determination within the confines of the grounds of appeal filed by an appellant the issues so formulated by the respondent were thus, competent. Below are the issues formulated by the respondent in the court below:

Issue 1

F *Whether the prosecution proved its case beyond reasonable doubt to justify the conviction and sentence of all the appellants for the offences of criminal conspiracy and culpable homicide, contrary to Sections 97(1) and 221 of the Penal Code. (This relates to grounds 5 and 7 of the notice of appeal)*

Issue 2

G *Whether the prosecution did established (sic) a case of grievous hurt against the appellants before the trial court. (This relates to grounds 3, 4 and 6 of the notice of appeal.*

Issue 3

H *Whether the trial court was wrong to have overruled the defence of alibi raised by all the appellants (Relates to grounds 1 & 2 of the notice of appeal)."*

Issue No 3 was on the defence of alibi which the court below considered and came to the conclusion reached in setting aside the judgment of the trial court. **The law is trite that where the de-**



***fence of alibi succeeds, there is no need for the court to consider other elements involved in the offence charged as the accused were not at the scene of crime and the presumption is that they did not ipso facto, commit the crime charged.*** See: *Ukwunnenyi v. State* (1989) 7 S.C. (Pt. I) 64, *Udoebre & Ors. v. The State* (2001) 6 S.C. 1; (2001) 6 SCNJ 54, *Dogo & Ors. v. The State* (2001) 1 S.C. (Pt. II) 30; (2001) 1 SCNJ 315. ***So there was no need for the court below to consider issues 1 and 2 which were formulated to cover the burden and standard of proof required in the establishment of the offences charged. A court of law deals with live issues which will have bearing in one way or the other on any of the parties or all the parties before it. A court of law, cannot serve as a forum for moot trials or academic exercises.*** See: *Iweka v. SCOA Nig. Ltd.* (2000) 3 S.C. 21; (2000) 3 SCNJ 71, *Abimbola v. Abatan* (2001) 4 S.C. (Pt. I) 64; (2001) 4 SCNJ 73, *Bello v. Fayose & Ors.* (1999) 7 S.C. (Pt. II) 5; (1999) 7 SCNJ 286.

In the final result, I find no merit in this appeal and it is hereby dismissed. I affirm the decision of the court below which set aside the decision of the trial court by discharging and acquitting all the six accused persons/respondents.

### TOBI JSC

Rafiu Balogun is the deceased. He died as a result of a land dispute. The land dispute is pending in a court of law. The case of the State is that a machine operator was stopped by the Police from felling trees on the land in dispute. The following day, the machine operator repeated his action. The machine was seized from the operator. A photographer, who was invited by the deceased Rafiu Balogun, was in the process of taking photograph of the machine operator and the fallen trees when twelve people suddenly emerged from the bush. Some of them were armed with locally made guns. They started shooting. Rafiu Balogun was killed.

The respondents were charged for conspiracy, causing grievous hurt and culpable homicide punishable with death under Sections 97(1), 248(1) and 221 of the Penal Code. The learned trial

Judge convicted them as charged. The Court of Appeal allowed the appeal. The respondents were discharged and acquitted of all the counts.

Dissatisfied, the State has appealed to the Supreme Court. Briefs were filed and duly exchanged. The appellant formulated four issues for determination:-

Issue 1

*Whether the Court of Appeal was right to have held that the non-calling of two independent witnesses by the prosecution, created doubt on the case of the prosecution sufficient to discharge and acquit the respondents on the three count charge against them.*

Issue 2

*Whether having regard to the evidence led by the prosecution, the Court of Appeal was right to have held that the prosecution has failed to prove its case beyond reasonable doubt.*

Issue 3

*Whether the Court of Appeal was right to have refused and or neglected to give considerations to the issues formulated by the parties before it in this case.*

Issue 4

*Whether the Court of Appeal was right to have refused and or neglected to adequately consider and properly examine the defence of alibi raised by all the respondents herein by contaminating same or mixing up same with the issue of non-calling of two witnesses."*

The respondents formulated three issues for determination :-

*"1. Whether the lower court was wrong to have held that the defence of alibi exonerated the respondents.*  
*2. Whether the prosecution's case was devoid of reasonable doubt.*

*3. Whether in the circumstances of this case, the lower court was bound to review all the issues submitted for consideration."*

The appellant also filed a Reply Brief. The centre-piece of this appeal is the defence of alibi. The respondents raised it. Both the learned trial Judge and the Court of Appeal dealt with it. In law, if a defence of alibi succeeds that is the end of the case of the prosecution. The accused must be discharged and acquitted because he was

not at the scene of the crime.

All the respondents, very early in the case, in their statements to the Police, made their defences of alibi. Let me rehearse them. The 1st respondent, Fatai Azeez Adesoye, said in his statement to the Police at page 14 of the record:-

*“On 1/4/2003, at about 07:00 hrs. while I was still sleeping<sup>B</sup> that I saw my friend Mustapha a.k.a. Boys City that woke me up and we were together till 07:40hrs. when my wife called me and that I should go and convey the children to school... From the Bank I went to my brother’s house by name Ganiyu Lasisi, near Queen’s Inn<sup>C</sup> Hotel at Taiwo Road Offa. It was there that one Issah Kalam came and informed us that there was a serious fight at the site and as we were discussing that we saw ALGON Vehicle and the Inspector Crime and Messeko said the DPO Offa wanted to see us and we followed him it was at the Station that the Police said I have killed person and<sup>D</sup> I said no I did not kill any person as alleged against me by the complainant.”*

The 2nd respondent, Ganiyu Lasisi, said at page 9 of the record:-

*“I was in my house at Taiwo Road Offa with my two younger<sup>E</sup> brothers namely Kareem Shittu and (2) Fatal Azeez Adeboye. Fatai came from Ibolo Community Bank to my house that very day. My two younger brothers were outside while I was inside my house. Issa Kalam Adesoye who is a watchman at Dr. Olarinoye’s house along<sup>F</sup> Secretariat Road Offa came and told us that one man told him that there was a fight at site that morning. This is why he came to find out if any of us has gone to that site that morning. I told Issa Kalam that nobody from our family of Asalofa go to that site that very day while we were discussing this Police came and informed us that the DPO<sup>G</sup> Offa wants to see me and my brothers at the station. I asked Insp. Thomas Messeko that “what happened?” He answered that somebody fight at the site this morning and that he was thinking that we will not be at home. I told the Inspector Messeko that I have not gone out of my house that morning from there we were taken to Police<sup>H</sup> Station Offa from the Police Station Offa we were carried to Area Commander’s Office Omu-Aran.”*

The 3rd respondent, Kareem Shittu, said at page 16 of the

record:-

“On the 1st of April, 2003, while I was at Ganiyu Lasisi house beside Queen’s Inn Offa (my brother’s house) at about 9.15 am while I was discussing with Fatai Azeez Adesoye that myself & Rabi  
 B Bricklayer are just back from his house where we were told he went to bank as past 8.30 a.m. our senior brother Issa Adesoye met us and asked us if we heard any news that there was a shoot-out at Amode site this morning. I told him I was not aware since we have been to amode land since January this year. I was where we were  
 C discussing this issue news we have just heard that Inspector Messeko (crime)..... beside us at the road and told us that the DPO wants to see us at Owode Police Station Offa, he further told us that some people were engaged in a shoot out on the land in dispute between our Asalofa family and Balogun family. We followed the Inspector  
 D Crime in the ALGON JEEP they brought at about 9.30 myself and Ganiyu Lasisi, Fatai Azeez and Issa Adesoye came in a private car. At the Police Station, the four of us were told that the Balogun Family reported us to the Police this morning that we, Asalofa family, mem-  
 E bers came to attack them with guns this morning as a result of which a death was recorded and say wounded all from Balogun family.”

The 4th respondent, Rasheed Adesoye, said at page 11 of the record:-

“It was when the naming ceremony was performed that I ate  
 F that morning food immediately after the food I then left to my workshop very close to my friend’s house it was there I completed the engine of my motor I was repairing with my apprentice it was in that my workshop I was when I saw three Policemen and three Balogun people and when they came near me the Policeman told me that the  
 G DPO Offa Police Station wanted to see me in his office. At that time I was with pant only towel and jalamia it was there I told the Police that I forget my key in my house and that I have sent the duplicate they refused me to dress up. I later followed them to the Police Station. At the Police Station they asked what I know about the death of one  
 H Rafiu I then replied them that I did not know anything about his death and what I know is that I only went to my workshop to work.”

The 5th respondent, Issa Kalam Adesoye, said at page 13 of the record:-

*“On 1/4/2003, 9.00 am in the morning I saw one of the labourer who used to work with me. As he saw me he then told me that something had happened at the site and that some people were fighting whereby some of them sustained injuries, He said that as a result of the fight that was why he ran away from that place when he saw people fighting. He said that it was the family of Asalofa and Balogun family that are fighting we decided to see Asalofa family in which we belong to and when I saw my family I then asked them whether anyone of them went to the site they denied that they did not go there and that was why I came to acquire him them. As I was there with my family it was there I saw some Policemen and Balogun family that they came to arrest us. We were four in number that were arrested Issa Kalam Adesoye that is myself (2) Shittu Kareem; (3) Epo Mosa Fatai and (4) Ganiyu Lasisi. We were taken to Police Divisional Headquarters Offa and finally conveyed to Omu-Aran Area Commander Office where we made statement. This Rafiu that was shot dead, I have never seen him before even I did not know him at all I did not follow them to where the fight took place.”*

Finally, the 6th respondent, Noah Adepoju, said at page 18 of the record :-

*“I later came back to the office with the woman and when I reached the office I did not go anywhere it was when they send me to go and collect tribute from their office that I saw two Balogun with Policeman Official Offa by the DPO. The reason why I identified the two Balogun was the fact that I built my house at the disputed land in which court has decided that I should not and since then I have not been going there. It was because they asked me to pay them the sum of seventy thousand in which I have not paid kobo to them that is why they mentioned me that I am among the people that killed Rafiu I am alone I did not being to any of the two families that had quarrel over land.”*

I have taken the time to reproduce part of the statements of the respondents to the Police because of their consistency on the defence of alibi. All the respondents said they were in places other than the scene of crime. They took time and pains to explain where they were and I expected the Police to thoroughly investigate their defence of alibi.

At the hearing, D.W.I to D.W.9 gave evidence in respect of the defence of alibi presented very early in the day by the respondents in their statements to the Police. That apart, the respondents themselves substantially confirmed their defence of alibi when they gave evidence in court. I expected the learned trial Judge to give very careful consideration to their defence. The learned trial Judge said at pages 143 and 146 of the record:-

*“In the case at hand I find the evidences of the accused unreliable because their unsworn statements to the Police contradict and are in conflict with their evidence on oath and the contradictions that centre on time is material to this case that they cannot be ignored... So in my view, without calling the machine operator, Yinusa Alabi and the photographer, there is sufficient credible evidence that fixed these accused persons at the scene of crime at the material time. The accused evidence on their defence of alibi is self contradicting. There are contradictions as to the times given in their evidence, and that of their various witnesses. The defence of alibi raised by the accused therefore crumble and has failed.”*

It is the law that contradictions, in order to have effect on the case of an accused person, must be material, substantial and must relate unequivocally to the charge against the accused person. While I concede that dates and actual hours, minutes and seconds are material in the determination of the defence of alibi a court of law must consider the total package of the defence and not take pockets of the time element involved in the defence and conclude that there are contradictions. In a case, such as this where six accused person gave evidence and nine witnesses gave evidence on the defence of alibi there is bound to be discrepancies as to the times when the respondents were in a particular place and doing what.

It is my view that if the fifteen persons (and here I have added the Six respondents and the nine witnesses to make the number 15) had given evidence to the minuteness of the minutes and seconds, a court of law will certainly suspect such evidence and the possibility of disbelieving the evidence on the ground that it is tutored almost to the level of a kindergarten recitation of the children in a classroom setting or its prototype. I am of the view that the contradictions which are not material, in themselves confirm the truth in the defence of

alibi. The learned trial Judge was rather more concerned with arid legalism than the realities of the defence in the light of the large number of persons who gave evidence in the case. And that was why he found himself on the wrong side in the evaluation of the evidence in defence of alibi.

The latin expression, alibi, in its adverbial content and part of speech, simply means “elsewhere”. In the defence, the accused person said he was somewhere other than the place where the offence was committed or simply the scene of crime. It is a defence that places the accused person at the relevant time when the crime was committed in a different place. In view of the fact that it is humanly impossible for a human being to be in two places at a point in time, a successful defence totally exonerates or exculpates the accused person of criminal responsibility.

In considering the defence, a court of law will carefully examine the time element involved in it vis-a-vis the length or period of time it took the accused person to execute the crime. This is important because if it took the accused some considerable time to execute the crime, then the court should consider whether there could be a possibility of the accused leaving his earlier place to commit the crime. I do not think I sound clear. Let me make another attempt by way of illustration. For instance, if an accused person said in his defence that he was in a different place at say about 3.00 pm on the day the offence was committed and there is evidence that the offence, of say, bank robbery, took place between the hours of 2.00 pm and 5.00 pm, a court of law is entitled to come to the conclusion that the defence must fail. Let me also attempt a more complex illustration and relevantly on murder, as in this case with the inchoate offences of conspiracy and abetting. If the defence of alibi is on a particular date, say 10th of April, and the offences of conspiracy and abetting were committed between 8th to 12th of April, the defence of alibi cannot avail the accused person on the charges of conspiracy and abetting because the accused was available to commit the offences on 8th, 9th, 11th and 12th of April. Similarly, if the offence of murder was committed on 13th April, again, the defence of alibi will not avail him. I think I have made the point clearer and I should be happy if I have.

I realize that most of the witnesses of the prosecution were relatives of the deceased. While this may not necessarily taint their evidence, it is something that a trial Judge cannot easily ignore. Here are persons who have lost a loved one and the humanity in them may speak against the accused persons. There is the possibility of giving evidence against the accused persons by way of vendetta and all that. I expected this to have some worry in the mind of the learned trial Judge, particularly in the African setting and its ethos of being a brother's keeper. It did not.

The Court of Appeal held that the prosecution ought to have called the photographer and the machine operator to give evidence. The court said at page 267:-

*"Though prosecution is not bound to call a particular witness to establish its case, in view of the enmity between the two families as I stated elsewhere in this judgment, the photographer and the machine operator had become material witnesses and failure to call them ought to have created doubt in the mind of the learned trial Judge as to the guilt of the appellants."*

I entirely agree with the Court of Appeal. The two persons saw it all. They are more neutral witnesses than the ones who gave evidence from one of the feuding families. They gave evidence in vindication of their family position and in ruin of the family of the respondents. As I said earlier, this is a matter involving human element and should be considered in that light and not by any abstract notion. I should go further than the Court of Appeal by supplying Section 149(d) of the Evidence Act, 1990 and come to the conclusion that the prosecution did not call the photographer and the machine operator because they could have given evidence against the prosecution. And this conclusion also goes in favour of dismissing this appeal.

It is for the above reasons and the more detailed reasons given by my learned brother, Muhammad, JSC., in his judgment that I too dismiss the appeal.

H

### **OGUNTADE JSC**

This is an appeal brought by the State against the acquittal of the respondents by the Court of Appeal, Ilorin (hereinafter referred



to as the court below) on offences of criminal conspiracy, causing grievous hurt and culpable homicide contrary to Sections 97(1), 248(1) and 221 of the Penal Code. The respondents had earlier on 14th July, 2004, been convicted of these offences by Afolayan, J., of the Kwara State High Court. Each of the respondents was sentenced to 2 years imprisonment on the 2nd count of the charge under Section 248(1) and to death on the 1st and 3rd counts of the charge under Sections 97(1) and 221 respectively of the Penal Code. B

The respondents were dissatisfied with the judgment of the trial court. They brought an appeal before the court below. The court below on 21/02/05, allowed the appeal. The respondents were discharged and acquitted on the three counts of the charge brought against them. The State was dissatisfied with the acquittal of the respondents. It has brought this final appeal before this court. In the appellant's Brief filed by the State, the issues for determination in the appeal were identified as the following:- D

#### Issue 1

Whether the Court of Appeal was right to have held that the non-calling of two independent witnesses by the prosecution, created doubt on the case of the prosecution sufficient to discharge and acquit the respondents on the three count charge against them. E

#### Issue 2

Whether having regard to the evidence led by the prosecution, the Court of Appeal was right to have held that the prosecution has failed to prove its case beyond reasonable doubt. F

#### Issue 3

Whether the Court of Appeal was right to have refused and or neglected to give considerations to the issues formulated by the parties before it in this case. G

#### Issue 4

Whether the Court of Appeal was right to have refused and or neglected to adequately consider and properly examine the defence of alibi raised by all the respondents herein by contaminating same or mixing up same with the issue of non calling of two witnesses. H

The respondents formulated three issues for determination:-

*"1. Whether the lower court was wrong to have held that the defence of alibi exonerated the respondents.*

2. *Whether the prosecution's case was devoid of reasonable doubt.*

3. *Whether in the circumstances of this case, the lower court was bound to review all the issues submitted for consideration."*

My learned brother, Muhammad, JSC., has in his leading judgment exhaustively discussed the issues raised for determination in this appeal. I agree with him and adopt his reasoning as mine. I however wish to briefly discuss the aspect of the judgment of the court below touching on the defence of alibi which was raised by each of the respondents before the trial court. At pages 287 to 288 of the record of proceedings, the court below expressed succinctly while it was unable to agree with the trial court in the consideration of the defence of alibi raised by the respondents. The court below said per Abdullahi, JCA., who wrote the leading judgment:-

"The credibility of witnesses in resolving the culpability of an accused person charged with an offence who raises the defence of alibi cannot be over emphasized. In the case at hand, the prosecution called P.W.1, P.W.2, P.W.3 and P.W.4 who gave evidence disproving the defence of alibi raised by the appellants.

The appellants in their statements to the Police at the time of their arrest, each raised a defence of alibi. In the case of *Adedeji v. The State* (1971) 1 All NLR 75, it was held that once a defence of alibi has been promptly and properly put up the burden is on the prosecution to investigate it and rebut such evidence in order to prove the case against the accused beyond reasonable doubt. It has also been held in the case *Bosim v. The State* (1983) 2 NWLR (Pt. 8) p. 465, that the onus is on the prosecution to prove the charge against the accused beyond reasonable doubt and it never shifts and there is no onus on the accused to prove the alibi beyond that of introducing the evidence.

Having stated the law and all that pertaining to the defence of alibi, I now proceed to examine the evidence adduced by both sides for and against the alibi put up by the appellants. But before I do that I would pause here and state that in all their statements, the appellants stated that they were not at the scene of the incident. They also stated that they were arrested because of the long and protracted land dispute they have with Balogun family over a land matter. Need-

*less to say the deceased came from the Balogun family.*

*In the case of the 1st appellant, he made a statement to the Police and named two people who were with him between 6.35 and 8.45 a.m. Those witnesses were called who gave evidence confirming the story of the 1st appellant. But that does not mean his alibi should automatically be accepted. However, since it was the evidence of P.W.I-P.W.4 and that of the witnesses called by the 1st appellant and having regard to the enmity between the two families, the trial Judge should have been more weary (sic) in accepting the evidence of one side against the other especially where independent witnesses abound but they were not called by prosecutions (sic) for reasons which is very difficult to comprehend."*

The views of the court below above clearly show that it was unable to agree with the treatment accorded to the defence of alibi raised by the respondents by the trial court. Given the peculiar circumstances of this case, it was of the utmost importance that the evidence called by the prosecution be viewed with caution and circumspection. The prosecution witnesses and the respondents had been engaged in a running dispute over the ownership of the land by the family of the prosecution witnesses. There had therefore been mutual hatred for each other by the members of the family of the prosecution and the respondents.

In *Arebamen v. State* (1972) 4 S.C. 35 at 40-41: (1972) 4' S.C. (Reprint) 30, this court per Lewis, JSC., said:-

"In Our view, as we have said, though we agree that the onus is on the prosecution to disprove the alibi as the learned trial Judge rightly stated. Since we said in *Adedeji v. The State* SC 324/72 (unreported) of the 19th of February, 1971:-

*"We think that what he was intending to say, though he might have perhaps more happily phrased it, is that if an accused person wished to put forward an alibi, it is for him to offer evidence accordingly but if he does put the jury that the alibi on such evidence is established but for the prosecution to disprove the alibi. We must emphasize that there is no onus on the accused to satisfy the jury on the alibi once he has put forward evidence which might establish it (FR. v. Johnson) (1961) 1 WLR 1478 and Yanor v. The State (1965) NMLR 337."*

Now at pages 143-144 of the record, the trial court while considering the defence of alibi raised by the respondents said:-

- "It does not always follow that once the prosecution fails to investigate an alibi, such failure is fatal to the case of the prosecution. The trial Judge has a duty, even in the absence of investigation to consider the credibility of the evidence adduced by the prosecution vis-a-vis the alibi. If the accused's evidence in court had been what they stated in their statement to the Police the failure of the Police to investigate and check the reliability of the alibi would have been fatal to the case of the prosecution. In this case where the statements of the accused are inconsistent and contradict in material facts and their evidence on oath it will be like engaging the Police in a worthless exercise of investigating a bottomless defence. See the case of Onyegbe v. The State (1995) 5 SCNJ 275 at 277.*
- The evidential burden to establish with credible evidence the defence of alibi is on the accused person relying on such defence. This is not to say that the responsibility of the prosecution to prove their case beyond reasonable doubt shifts if the prosecution has adduced sufficient and accepted evidence to fix the accused at the scene of crime at the material time and the accused has failed to adduce credible evidence as to his where about at the material time, the defence of alibi is logically demolished. See Peter v. The State (1997) 3 KLR at 504.*
- In the case at hand I find the evidence of the accused unreliable because their unsworn statements to the Police contradict and are in conflict with their evidence on oath and this contradiction that centres on time is material to this case that they cannot be ignored. See the case of Akpan v. The State (2001) 7 S.C. (Pt. II) 29; (2001) 7 SCNQR 235 at 248-249 holden 2.*

*Identification of an accused, in this case as done by PW.2, 3 and 4 is a question of fact to be considered by the court. PW.2 said he knew these 6 accused before and was able to recognise them by name. PW.4 who reported the case to the Police gave the names of the accused to the Police before the Police embarked on going round their houses to arrest them. The circumstances in this case were such that the witnesses PW.2, 3 and 4 recognised their assailant."*

It is apparent from the views expressed above by the trial Judge

that the prosecution had not at all investigated the defence of alibi raised by the respondents. The trial Judge was of the view that because the offences were committed between 7 and 7.30 a.m. and that the prosecution witnesses and the respondents had known themselves before the incident, there was no doubt that the respondents' alibi had been punctured. Generally speaking, where the prosecution calls evidence strong and cogent enough to convince the court that an accused had been seen at the scene of crime committing an offence, the defence of alibi crumbles because the acceptance of the evidence of prosecution witnesses necessarily implied that the accused could not have been anywhere else than as stated by witnesses whose evidence has been accepted by the court. This position of the law was stated by this court in *Fatoyinbo v. A.G. Western Nigeria* (1966) WNLR 4 at 6-7, by Coker, JSC. He observed:-

*".....Where a defence of alibi is suggested or timeously put forward by an accused person, the onus resting on the prosecution is no more than that of adducing as much evidence as, if accepted, would demolish the suggestion or inference that the accused person was not available at the scene of the crime at the material time and satisfy, the court or jury of the contrary. Admittedly, where such a defence is put forward in such manner and at such time as to enjoin on the prosecution, the duty of investigating it, a failure to do so may cast some doubts upon the probability of the case for the prosecution. That does not warrant nor justify the suggestion that the prosecution has to rebut in a particular way the defence of alibi."*

In the present case, it is not only that the prosecution had not derived anything useful from the investigation of the alibi raised by the respondents. No evidence which would appear to show that the alibi was not true was found. In this connection, the evidence of P.W.7 at pages 53 and 54 of the record is eye-opening. He said:-

*"I obtained only the statement of 3rd accused. I remember that the 3rd accused said one Rabiú Bricklayer came to wake him up that day. The accused mentioned many people in his statement and I interviewed those that were available. All the people the (sic) mentioned we went in a but (sic) to their houses and interviewed them, some orally and some written. Those that are in writing are filed at the back of the case diary. The case file is the Ministry of Justice (sic)."*

B *I can remember an officer of Ibolo Community Bank made statement to us in the course of our investigation in respect of the 1st accused. The manger (sic) confirmed he saw 1st accused that morning but cannot say precisely the time. I can not remember any other person that made statement. The people we interview (sic) confirmed that they saw the accused at the time the accused told us they were with those people."*

C The respondents had been bitterly engaged in a dispute over the ownership of the land. The independent persons around who might have possessed no particular urge to support either of the parties were not called. The inclination of the trial Judge to accept the evidence of prosecution witnesses who testified that the respondents were at the scene of crime overlooked the fact, the motive for giving such evidence was material in the particular circumstances of this D case. If the motive was to eliminate the respondents who were their opponents in a land dispute, it would be irrelevant for the court to consider whether the parties had known each other before the incident and that the incident occurred when there was enough light to aid identification. Indeed identification in such setting would be in- E consequential.

It is for this and the more lucidly stated reasons in the leading judgment of my learned brother, Muhammad, JSC., that I would also dismiss this appeal as unmeritorious.

F \_\_\_\_\_

### **OGBUAGU JSC**

G This is an appeal against the judgment of the Court of Appeal, Ilorin Division (hereinafter called "*the court below*") delivered on 21st February, 2005, allowing the appeal of the respondents to it and setting aside the decision of the Kwara State High Court, Ilorin Judicial Division on 14th July, 2004, presided over by Afolayan, J., convicting and sentencing the respondents to death in respect of counts 1 and 3 and in respect of count 2 to a term of imprisonment.

H However, dissatisfied with the said judgment the appellant has appealed to this court on six (6) grounds of appeal. It has formulated four (4) issues for determination namely:-

3.02. Issues 1 (Relates to Ground 1)

Whether the Court of Appeal was right to have held that the non-calling of two independent witness by the prosecution created doubt on the case of the prosecution sufficient to discharge and acquit the respondents on the three count charge against them.

### 3.03 Issue 2 (Relates to Ground 2)

Whether having regard to the evidence led by the prosecution, the Court of Appeal was right to have held that the prosecution has failed to prove its case beyond reasonable doubt. B

### 304 Issue 3 (Relates to Ground 3)

Whether the Court of Appeal was right to have refused and or neglected to give considerations to the issues formulated by the parties before it in this case. C

### 3.05 Issue 4 (Relates to Grounds 4, 5 and 6) .

Whether the Court of Appeal was right to have refused and or neglected to adequately consider and properly examine the defence of alibi raised by all the respondents herein by contaminating same or mixing up same with the issue of non-calling of two witnesses.” D

On their part, the respondent’s formulated three (3) issues for determination, namely

*“1. Whether the lower court was wrong to have held that the defence of alibi exonerated the respondents. (Grounds 2, 4, 5 and 6 of the notice of appeal).”* E

*2. Whether the prosecution’s case was devoid of reasonable doubt. (Grounds 1,2,5 and 6 of the notice of appeal),* F

*3. Whether in the circumstances of this case, the lower court was bound to review all the issues submitted for consideration. (Ground 2 of the notice of appeal).”*

When this appeal came up for hearing on 24th January, 2008, after the learned counsel for the parties, had adopted their respective Briefs, and the appellant’s learned counsel-Mumini, Esqr, urged the court to allow the appeal while the learned counsel for the respondents - Lawal Rabana, Esqr., urged the court to dismiss the appeal.

Thereafter judgment was reserved till today.

I had the privilege of reading before now, the leading judgment of my learned brother, Muhammad, JSC., just delivered. I agree with him, that the appeal fails. However, for purposes of emphasis, I will make my own contribution. H

I will take issues 1 and 2 of the appellant and issue 2 of the respondents' first and together. At page 269 of the records, the court below per Tijani Abdullahi, JCA., in his "*conclusion*" stated inter alia, as follows:-

B *"In sum in the light of all what I have been saying the non-calling of those two independent witnesses (i.e. the photographer and the machine operator) as I have stated elsewhere in this judgment, in the circumstances of this case ought to have created doubt in the mind of the learned trial Judge as to the guilt of the appellants."*

C His Lordship referred to the case of *Manship Namson v. The State* (1993) 5 NWLR 128 at 132, as to the effect or consequence of a doubt created in the mind of a trial Judge about the guilt of an accused person - i.e. there must be the resolution of such a doubt in D favour of the accused person.

From the evidence-in-chief of the PW.2 at pages 36 and 37 of the records the said machine operator and the photographer were present at the scene or site of the alleged crime when people numbering about twelve (12) which included the respondents, suddenly E arrived at the said site or scene. In other words, these two persons - the machine operator and the photographer, witnessed all that happened at the said scene or site as described or stated by the witness in his said testimony before they fled therefrom. He stated that it was a lie that the respondents, were not present at the scene or site on the F date in question.

Under cross-examination at page 39, the following appear inter alia:-

G *".....The photographer and the machine operator were at the scene..... It was the machine operator and the photographer who first fled. They had ran away before I did....."*

He had admitted at page 39 thereof that:-

*"There is a protracted land dispute between my family and accused family....."*

H I note that the PW.s 1 to 4. are members of the same family of Asalofa. This case being a murder case, there was the need and in fact of importance, of calling the said machine operator and the photographer who were rightly, in my view, described by the court be-



low as independent witnesses. Again, having regard to the admission by the P.W.2 of the fact that both families, have a protracted land dispute, the learned trial Judge with respect, ought to and should have been very cautious and wary, in holding as he did, that the charges had been proved beyond reasonable doubt against the respondents. B

In a line of decided authorities, it is now settled that it is the duty of the prosecution, to place before the court, all available relevant evidence, That this does not mean of course, that a whole host of witnesses, must be called upon the same point, but that it does mean that if there is a vital point in issue (as in the instant case leading to this appeal) and there is one witness whose evidence would settle it one way or the other that witness ought to be called. See the cases of R. v. Essien 4 WACA 112 at 113, R. v. Eneme 7 WACA 134, Rex v. George Kurce 7 WACA 178, Wambai & Anor. v. Kano N.A. (1965) D 1 NMLR 15 and Gana v. The State (1973) NMLR 52, Just to mention but a few. C

In the case of Opayemi v. The State (1985) a NWLR (Pt. 5) 101. It was held inter alia, that the failure of the prosecution to call a vital witness in a criminal case, is fatal to its case because, in such a situation, the prosecution, has not proved its case beyond reasonable doubt. That where a reasonable doubt is raised in a criminal proceedings as to the guilt of the accused, the doubt will be resolved in favour of the accused person. See also the cases of Queen v. Obiase (1962) 1 ANLR (Pt. 4) 151, James Ikhiane v. C.O.P (1977) 6 S.C. 119 at 122; (1977) 6 S.C. (Reprint) 78, Umani v. The State (1988) 2 S.C. (Pt. I) 88 at 110, Oghor v. The (1990) 3 NWLR (Pt. 139) 480 at 503, citing the cases of Kalu v. The State (1988) 10-11 S.C. 19; (1988) 4 NWLR (Pt. 90) 503 at 510; (1988) 10-11 SCNJ 1, Edet O. G Ekpe v. The State (1994) 12 SCNJ 131 at 136 and The State v. Musa Danjuma (1997) 5 SCNJ 126 at 130-137. F

It is a matter of practice, and this is also settled, for the court to caution itself or to be wary if the evidence before it, is tainted by some relationship between the witnesses. See Opayemi v. The State (supra). But I will add quickly that it has however, been held that relationship by blood per se, is not sufficient to disqualify the evidence of a witness. See the cases of Onafowokan & Anor. v. The H

State (1986) 2 NWLR (Pt. 23) 496 and Akpan v. The State (2001) 7 S.C. (Pt. II) 29; (2001) 7 SCNJ 567 at 596 - per Karibi-Whyte, JSC., (Rtd.).

There was also the defence of alibi raised by the respondents both in their statements to the Police and in their evidence in court in which at least an Inspector of Police - P.W.7 at page 53 of the records, swore that all the respondents, denied the allegation and that after observing the scene, he went to all the places where the respondents said they were to establish their alibi. Under cross-examination at page 54 thereof, he stated that,

“.....*The people we interview (sic) confirmed that they saw the accused at the time the accused told us they were with those people.....*”

I will come to this defence of alibi when considering issue 1 of the respondents.

From the foregoing, I am satisfied that the court below, was justified in its finding as a fact and holding as it did, that there was doubt which ought and should have been created in the mind of the learned trial Judge in all the circumstances arising from the evidence before him. I therefore, render my answer in respect of issues 1 and 2 of the appellant in the affirmative. Since the respondents’ issue 1 is couched in the negative, my answer is that the court below, was not wrong to have held that the defence of alibi exonerated the respondents.

This should have been the end of this appeal, but since I had indicated that I will deal with the issue of alibi. I will now do so even briefly, I had stated the evidence of the P.W.7 in this regard. The P.W.8 - a Sgt. who was under a team leader, after testifying at page 56 of the records in his evidence-in-chief that they (*“We investigated the alibi and found them to be untrue”*)- (which amounted to a contradiction of the said evidence of his superior/ senior officer - P.W.7) under cross-examination at page 57 thereof, confessed in substance, that he went with their team leader for all the investigations and that in respect of the 1st respondent, it was the said team leader and the 1st respondent, who went to see the Bank Manager (who the P.W.7 had stated confirmed that he saw the 1st respondent that morning but could not say precisely the time) and that he did not know what

they discussed and that his said team leader, did not tell him what they discussed. He then swore inter alia, as follows:-

*"I cannot say whether the alibi was true or false."*

In respect of the 4th respondent who said he attended a naming ceremony, he said the woman who gave birth to the baby, could not talk to them but it was her husband who told them that the 4th respondent was there/present at the said naming ceremony, but that he did not believe him. He however, did not state the basis or reason for his unbelief. B

As regards the 6th respondent, he stated that it was his team leader who went with the 6th respondent to Mrs. Adeowoye that the 6th respondent mentioned and that he P.W.8 did not know what *"their finding is."* C

In respect of the 2nd respondent, P.W.8 stated that the 2nd respondent in his statement stated that he was at home throughout and that they went to his house and the family members of the 2nd respondent, said or confirmed that 2nd respondent was in his house till the Police came to arrest him. D

It is surprising that in spite of the evidence of these Police Officers and P.W.7 in particular who investigated the said claim of alibi and confirmed it, the learned trial Judge, found the contrary. It is now firmly established in a plethora of decided authorities of this court, that the defence of alibi is complete, once the accused person, discloses to the Police, his whereabouts without more at the time of the commission of the crime. Once an accused person sets up a defence of alibi the burden of disproving it, rests on the prosecution. See the cases of Yanor & Anor. v. The State (1965) NMLR 337, Adeyeye & Ors v. The State (1968) NMLR 48 49, The State v. Obinga & Ors. (1965) NMLR 172 at 174. In other words, where an accused person sets up on alibi in answer to a charge, he does not thereby assume responsibility of proving the answer. See the case of Akpan Ikono & Anor. v. The State (1973) S.C. 331; (1973) 5 S.C. (Reprint) 167. The onus still lies on the prosecution to prove beyond reasonable doubt that the accused person, was not only at the scene of the crime, but that he committed the offence. There is in law, no burden of proof on an accused person who puts forward an alibi as his defence. F G H

It is also settled that it is the law in Nigeria that the burden is not

upon an accused person, to prove his innocence or that no crime was committed. This is why it has been held that it is a mistaken approach to say that an accused person is under an obligation, to explain himself to prove facts especially within his knowledge. See the cases of *Mandilas & Karaberries Ltd, v. Inspector General of Police* B 3 FSC 20, (1958) WNLR 241, *R. v. Allygalle* (1936) 2 All ER 116 and *R. v. Genevirates* (1936) 3 All ER 36. This is why it has been held that where a trial court, has erred in evaluating the facts found by it, an appellate court, can re-examine the whole facts and come to an independent decision as the court of trial. See the cases of *Samuel C Omobo v. Commissioner of Police* (1965) 66 NMLR 42, *Fatoyinbo v. Williams* 1 FSC 87 and *Benmax v. Aristin Motor Co. Ltd.* 1955 A.C 370; (1955) All ER 326. Thus, where the defence of an accused person such as an alibi, is not properly and adequately investigated, D a conviction must be quashed. See the case of *Rex v. Modem & Anor.* 12 WACA 224 at 226. In summary, it is also settled that it will be a misdirection to refer to any burden as resting on an accused person in a case where he raises the plea of alibi. See *Ikono & Anor. v. The State* (supra).

E From the foregoing, it is with respect, a misconception on the part of the appellant, to state or even suggest or allege in its issue 4, that the court below *“refused and/or neglected to adequately consider and properly examine the defence of alibi raised by all the respondents.....”* F I hold that the court below adequately considered the said plea. My answer therefore, to issue 1 of the respondents is rendered in the Negative. The court below, was not wrong to have held that the defence of alibi exonerated the respondents.

In the final analysis or result, I too, see no merit in this appeal G which I too, dismiss and affirm the said judgment of the court below.

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### **TABAI JSC**

H The Balogun family of Offa which is the family of deceased and the family of the respondents were involved in a land dispute. The matter was in court and in respect thereof was an injunction restraining both parties from doing anything on the land pending the determination of the case. The allegation was that in or about the 1st

of April, 2003, on the said land in dispute the respondents attacked members of the Balogun family and in the process killed the deceased and injured others. The 6 respondents were charged, tried and convicted by the trial court. Dissatisfied with the trial court's decision they went on appeal to the Court of Appeal. In the judgment on the 21st of February, 2005, the Court of Appeal allowed the appeal, set aside judgment of the trial court and entered in its place a judgment which discharged and acquitted each of the respondents. B

Dissatisfied the appellant has come on appeal to this court. The appellants formulated four issues for determination. The respondents formulated three. These have been adequately dealt with. I shall however by way of emphasis comment briefly on the two issues of the alibi raised and the effect of the failure of the prosecution to call the two independent witnesses on which the court below premised its decision. With respect to the defence of alibi the settled D principle of law is that once the defence is properly raised by an accused person the Police has a duty to investigate it and the prosecution a duty to disprove it. This principle has been applied in numerous cases among them *Salami v. State* (1988) 7 S.C. (Pt. M) 89; (1988) 3 NWLR (Pt. 85) 670, *Nwabueze v. State* (1989) 4 NWLR E (Pt. 86) 16, *Okoduwa v. State* (1988) 2 NWLR (Pt. 76) 333, *Ozaki v. The State* (1990) 1 S.C. 109; (1990) 1 NWLR (Pt. 124) 92.

In this case, each of the respondents gave detailed account of where he was at the time of the alleged attack and for the prosecution to prove its case beyond reasonable doubt it has a duty to investigate its falsity. This was not done by the prosecution. The failure so to disprove the truth of alibi asserted is fatal to the prosecution's case. See further *Balogun v. A.G. Ogun State* (2002) 2 S.C. (Pt. II) 89; (2002) 6 NWLR (Pt. 763) 512. I am not unmindful of the principle G that where the prosecution adduces sufficient evidence to fix the accused person at the scene of crime, the defence can be discounted. This is the principle in *Ahmed v. State* (2001) 12 S.C. (Pt. I) 135; (2001) 18 NWLR (Pt. 746) 622. There was evidence from some of the witnesses that tended to fix the respondents at the scene of H crime to defeat the plea alibi raised. But court below cautioned against relying on the testimony of such witnesses because of the fact that they belong to the opposing Balogun family. I entirely agree with this

reasoning of the Court of Appeal.

The other issue upon which the court below founded its decision is the failure to call the independent witnesses that is witnesses, the machine operator and the photographer who were alleged to be present at the scene. On this issue the court below at page 267 of the record stated:-

*"Though the prosecution is not bound to call a particular witness to establish its case, in view of the enmity between the two families as I stated elsewhere in this judgment the photographer and the machine operator had become material witnesses and failure to call them ought to have created doubt in the mind of the learned trial Judge as to the guilt of the appellants."*

Again I fully endorse the above reasoning and conclusion. For the foregoing considerations and the fuller reasons set out in the leading judgment of my learned brother, Muhammad, JSC. I also dismiss the appeal.

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