

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 2009. SC. 20/2007
CORAM:- D. MUSDAPHER, I. F. OGBUAGU,
I. T. MUHAMMAD, P. O. ADEREMI,
M. S. MUNTAKA-COOMASSIE, JJSC

IHEONUNEKWU NDUKWE APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Alibi - Duty on party raising it - He has the burden of establishing the circumstances of the alibi - Appellant failed to so establish - So police had nothing to investigate (H1)

CRIMINAL PROCEDURE - Proof - Identity of accused - Where prosecution witnesses who knew him closely - Identify him at the scene of crime - Their evidence is reliable - If the defence does not demolish it (H2)

EVIDENCE - Contradictions - Concurrent Findings - Where there is no material contradiction in the evidence of PWs 1 & 2 - Concurrent findings of lower courts to that effect were justified (H3)

FACTS

The appellant was arraigned and tried before the High Court of Abia State for murder punishable with death for allegedly causing the death of one Michael Anaba. The case of the prosecution was that the appellant was married to the sister of the deceased. Following some misunderstanding between them, the appellant's wife had gone to live with the deceased. After some futile attempts to bring her back, the appellant had come to the deceased's house on the fateful night and shot him dead.

After hearing, the trial court convicted the appellant and sentenced him accordingly. Aggrieved, he appealed to the Court of Appeal which dismissed the appeal. He has brought this further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"(i) Whether the Court of Appeal was right when it held that

the identity of the Appellant in the commission of the offences charged was proved by the prosecution,

(ii) Whether the Court of Appeal was right when it held that the prosecution proved the charge against the Appellant beyond reasonable doubt."

HELD (Unanimously dismissing the appeal per **MUNTAKA-COOMASSIE JSC**)

Alibi - Duty on party raising it

1. Once the accused person successfully and correctly raised the defence of alibi, then it is the duty of the police to investigate in order to verify the claim of the accused. Failure of the police to investigate is fatal to the case of the prosecution. The burden of establishing the circumstances of alibi remains on the accused. He must all along supply the details of his whereabouts.

In this case the Appellant could not produce evidence of his whereabouts at the material time. His account of his whereabouts is sketchy and unreliable. His account of alibi was not reflected by the Record of proceedings before the court. The police in my view therefore cannot give the court substantiated or reliable evidence of the alibi. Consequently I hold that there is no investigatable material concerning the alibi made by the accused. (p. 428 D)

Proof - Identity of accused

2. The evidence of PWs 1 and 2 who knew the accused person closely identified the accused at the Scene of this dastardly act. Their evidence is reliable. The defence failed to produce evidence to demolish that of the prosecution even though he got opportunity to do so, by calling witness or witnesses to support him. (p. 429 C)

Contradictions - Concurrent Findings

3. As far as I am concerned there is no material contradiction in the evidence of PWs 1 & 2 in this appeal. Since the learned trial judge and court below did not find or discover any material contradiction the finding of the trial court, that there was no contradictions in the evidence of PW1 and PW2, was ably and competently made. The decision of the court below in affirming the decision of the trial court vis-a-vis the so called contradiction is perfectly justified, both lower

courts did make a correct finding. In this court we have no cause to disbelieve PW1 and PW2. (p. 429 D)

NOTABLE POINTS OF INTEREST

OGBUAGU JSC

1. Alibi or improper identification are independent defences

I have earlier stated in this Judgment, that the defence of Alibi, was slotted in the argument in respect of Issue 1 of the Appellant, I say so because, in my respectful view, the defences relating to Identification and Alibi, are two independent and different defences. When identification is raised as an issue, the principle, is more appropriate, in circumstances where identification parade, is considered necessary and had been conducted. In other words, an identification parade, is not necessary, in circumstances where the victim or witness, recognized the offender or accused person, while the matter, was still fresh in his/her mind, as the person who committed the crime alleged.

(p. 434 E)

2. There is no inflexible rule of rebutting alibi

It is now settled that even though it is the duty of the prosecution, to check on a statement of alibi by an accused person and disprove the alibi or attempt to do so, there is no inflexible and or invariable way of doing this. If the prosecution, adduces sufficient and accepted evidence to fix a person at the scene of crime at the material time, his alibi, is thereby logically and physically, demolished and that would be enough to render such plea, ineffective as a defence. (p. 439 B)

3. The accused has the onus of proving his alibi

His Lordship further held that but the onus of establishing Alibi, being a matter within the personal knowledge of an accused person, lies on him. That it is not enough, for the accused person, to say to the court, that he was not at a particular place away from the scene of the crime. That he has to prove his assertion. That even if the police have failed to investigate such assertion, the accused person, has the onus of adducing evidence on which he relies for his defence of alibi. So, it can be seen that the failure of the police, to investigate, does not, automatically, mean failure of the prosecution's case. There is a rider, which places such onus, on the accused person on the

balance of probability. (p. 440 D)

4. Family members are competent witnesses

It is also settled that the mere fact that witnesses are relatives or friend of the deceased, does not mean that they are not competent witnesses for the prosecution. This is because, it does not make the evidence inadmissible, but that fact, can only make a court or Tribunal, to be circumspect in the reception of their evidence and to treat such evidence, with caution. It must be stressed and this is also settled that a case is not lost, on the ground that those who are witnesses, are members of the same family or community. What is important, is their credibility and that they are not tainted witnesses. (p. 442 G)

REPRESENTATION

D Dr. I.N. Ijiomah for the appellant with him, Mrs. O.O. Ibiam. Chief Okey Amaechi (Attorney-General for Abia State) for the respondent with him, Mr. U.T. Nwachukwu, Director, Citizens Rights, Mr. I.C. Nwachukwu, Assistant Director, Mr. Emenike Okoro, Chief State Counsel and Mrs. Nkiru Adindu, Assistant Chief State Counsel.

CASES REFERRED TO

Ofortete V. The State (2000) 7 WRN p. 86 at pp. 109 - 110
 Ahmed V. The State (2003) WRN page 1 at 20
 F Effa V. The State (1998) 2 NWLR (pt.537) 273 at p. 290
 Akor and others V. The State (1992) 4 NWLR (pt 234) 198 at 204
 Theophilus Eyisi & 2 Ors V, The State (2000) 82 L.R.C.N 307 at 316
 Balogun V. A.G Ogun State (2000) 94 LRCN 260
 Manor & Anor Vs. The State (1965) 1 All MLR 193
 G Ahile Gandi & Anor Vs. The State (1965) NMLR 333
 Sale Dagaya Vs. The State (2006) 134 LRCN 397 at 432
 Ikemson V. The State (1989) 1 CLRN p1 at p 25

STATUTE REFERRED TO

H Criminal Code, Cap 30, Vol II, Laws of Eastern Nigeria, 1963, s. 319

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The Appellant herein was arrested and arraigned properly before the High Court of Justice in Isiala Ngwa High Court Abia State

for murder punishable with death in that he caused the death of one Michael Anaba on 25/9/82.

The prosecution called three (3) witnesses including the Registrar of Isiala Ngwa High Court who tendered the Certificate of Record of previous evidence of the I. P. O and the evidence of the medical doctor in previous proceedings in the case before another judge as well as the statement of the accused person to the police. B

As stated earlier, hearing started in earnest. At the end of the prosecution's case, the accused person now appellant testified in his own defence and called no witness. Both counsel for the appellant and the prosecution copiously addressed the court on several contentious issues and the possible defence of the appellant. C

At the end of the trial and addresses of learned counsel, and in a considered judgment, the learned trial judge found the appellant guilty as charged. He convicted the appellant as such and sentenced him to death. D

The trial judge has this to say on pp. 26-27 of the record:-

"..... From the totality of the evidence before the court, I am satisfied that the prosecution proved its case beyond reasonable doubt as is required by Section 137 (i) of the Evidence Law, for the law would fail to protect society if it permitted remote or fanciful possibilities to deflect the course of Justice. In the result, I find the accused guilty as charged and is accordingly convicted; and was sentenced to death". E

(Italics mine for clarity) F

Being aggrieved by the above decision of the trial High Court, the appellant, unsuccessfully, appealed to the Court of Appeal Port-Harcourt Division herein called court below. The court below in a reserved judgment unanimously dismissed the appeal of the appellant and confirmed the decision of the trial court delivered on 10/4/95 by Isuama J, The Court below says:

"In this appeal, with the testimonies of proof of death by the report of the doctor tendered on his behalf by the IPO, PW3, the death of the deceased is proved to be by gun shot. The testimonies of the PW1 and PW2 show the perpetrator of the act of murder is the accused person who was identified at the scene. Upon consideration of the defence of the accused person of uncertain identity and alibi and of allegation of hearsay evidence of PW2, the defences of the H

defence of accused person is inadequate and indeed incompetent to effect the clear evidence of proof of identity by the prosecution of the accused person. Consequently the charge of murder against the accused person is proved beyond reasonable doubt. The court below was right to convict and sentence the accused person. I resolve the 2nd and 3rd issues in the two briefs of the appellant and respondent against the accused appellant and affirm the judgment of the court below of Isuama J. On 10/4/95 see pp 8-9 of the Record of Proceedings”.

(Italics mine for clarity) .

Still dissatisfied with the above judgment of the court below, the Appellant has now further appealed to this court on the Notice of appeal containing three grounds of appeal. Shorn of their particulars they are reproduced hereunder:-

Ground One

“The learned Justices of the Court of Appeal erred in law when, in affirming the decision of the trial court, rejected the defence of Alibi put up by accused in the trial court,

Ground Two

The Learned Justices of the Court of Appeal erred in law when, in affirming the decision of the trial court; they held that the identity of the accused in the Commission of the offence charged was proved by the prosecution.

Ground Three

The learned Justices of the Court of Appeal erred in law when they affirmed the decision of the trial court to the effect that the prosecution proved the charge against the accused beyond reasonable doubt”.

Based on the above grounds of the appeal the appellant formulated two issues for our consideration of this appeal as follows:-

(i) Whether the Court of Appeal was right when it held that the identity of the Appellant in the commission of the offences charged was proved by the prosecution,

(ii) Whether the Court of Appeal was right when it held that the prosecution proved the charge against the Appellant beyond reasonable doubt.

The respondent formulated three (3) issues for the determination of the appeal thus:-

1. *Whether the appellant was properly and sufficiently identified as the person who killed the deceased in this case.*

2. *Whether the Court of Appeal was right in upholding the rejection of the defence of Alibi set up by the appellant at the trial court.*

3. *Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant at the trial court.* B

Before I delve into the arguments on the issues formulated I think it would not be out of place if I attempt to restate brief facts of this case.

BRIEF FACTS C

As gathered from the case, on the 25/9/82 at about 10.00pm the deceased, Michael Anaba, while having rest on his easy chair at the back yard of his house, was shot with a gun by the accused person, Mr. Iheonunekwu Ndukwe, and escaped thereafter. An alarm D was raised but the accused was not able to be apprehended on the spot on that day. However one Esidi ran to the scene from the deceased's house and testified to the fact that he pursued the accused but he escaped. He testified as PW2. The widow of the deceased Mrs. Salome Anaba testified as PW1 that at the time of the E incident she was bathing her child at the said back yard. She added that when the accused entered the said back yard the deceased, her husband, asked the accused "why are you here at this time", thereafter the accused shot the deceased with a gun on his head and he fell F down.

Salome Anaba was all along at the same back yard, rushed to the scene to see what had happened she collided with the appellant as he was trying to escape. There was a lantern at the back-yard and accosted the appellant in these words:- "*Iheonunekwu have you killed my husband*"?. The appellant set up an alibi and said he had an accident at Achara on his way back from the deceased's house.

On issue one, learned appellant's counsel Dr. I. N. Ijiomah, submitted that where a person is charged with the offence of murder the prosecution in order to prove the charge must establish the following:- H

1. That the person alleged to have been murdered is dead
2. The cause of his death
3. That it was the act of the accused that caused the death of

the deceased. He strongly relied on the cases of Ahmed V. The State (2003) WRN page 1 at 20; and Effa V. The State (1998) 2 NWLR (pt.537) 273 at p. 290.

Learned counsel, rightly in my view, has done the right thing by, understandably, accepting that the prosecution proved beyond
B reasonable doubt that the deceased was shot on the head with a gun and he died.

Counsel continued to contend that what is relevant and live is whether it was the accused, now appellant, that shot the deceased.
C He further expatriated to the effect that the shooting of the deceased took place on 25th day of September, 1982 and the accused was arrested on 26th day of September, 1982, he there and then put up a defence of alibi in his voluntary statement to the police which was tendered in court and marked exh. C - D.

D According to the learned counsel the police are supposed to investigate the said alibi. But in this case they did not. The police/prosecutor really cross-examined the appellant in court over this issue of alibi and could not discover any contradiction. That being the case, the learned counsel submitted that the prosecution must have
E been taken to have accepted the alibi - Ofortete V. The State (2000) 7 WRN p. 86 at pp. 109 - 110.

It is clear to me that the record of the trial court where Appellant's counsel cross examined the Accused vis-a-vis defence of alibi raised by the accused was not reflected in the trial court's record.
F Both trial court and court below did not discuss the Issue of alibi not to talk about using it in favour of the appellant. Learned Appellant's counsel did nothing to show that he was attacking the trial court's record.

G On the Issue of alibi the learned counsel for the Appellant submitted that the accused person raised the Issue of alibi timeously but the police refused or failed to investigate and produce the result of their investigation as evidence in court, to allow the trial court to decide for itself whether the alibi could be sustained or not. He adopts
H and relies on the statement of Oputa JSC in the case of Ikemson V. The State (1989) 1 CLRN p1 at p 25. Paragraph E"

Learned counsel posited further that it is for the police to inform the court why it did not investigate the alibi. He then submitted that having told the court so, the court will examine the evidence and

see if the view taken by the police is correct. He submitted further that investigation of alibi is a duty that is done by the police before the accused is charged to court. So, the reason why the police did not investigate an alibi, even if it is because of the quality of prosecution witnesses, ought to have been ascertained by the police before the case is charged to court. Thus, the accused version in the matter should be put alongside the reason given by the police and then tried by the court. Learned counsel then condemned the action of the learned justices of the court of appeal for supplying such a reason, *Suo motu*, in their adjudicatory role. B

On whether or not the accused actually adduced evidence in support of his alibi, the learned counsel maintained that the accused raised his alibi timeously only that the police failed to investigate it and refused to state the reasons why. C

After exhaustively discussing the issue of alibi raised by the Appellant learned counsel argued that both lower courts failed to consider the Issue of alibi properly and also court below refused to evaluate the evidence adduced by the prosecution which was said to be contradictory. Having failed to do so, learned counsel urged us to hold that the conclusion reached by the court below on the alibi of the accused person is perverse and wrong. For this and other submissions under this issue one, this court is urged to resolve the issue in favour of the Appellant and allow this appeal on this ground. See pp 3 - 16 of the Appellant's Brief. D E

Under Issue No 2, counsel contended that the prosecution in this case failed to prove their case against the Appellant as required by law. Learned counsel, on page 17 submitted that "So far as the duty of the court in ascertaining that a criminal case is proved beyond reasonable doubt involves considering the totality of the evidence before the court, i.e. aspects which are favourable and those not favourable, the trial court did not discharge its duty in this respect and the court below which undertook to evaluate the evidence also failed to discharge this duty. There is no gain saying, the counsel added, that the trial court in its unimaginably short judgment did not at all consider the case of the accused. That court refused to advert its mind to the address by the accused's counsel in which he pointed out the contradictions in the evidence of both PW1 and PW2 and the contradictions are irreconcilable. He finally submitted that the court F G H

below did not consider this loose state in the prosecution's evidence. He then added that if it had done so, it would have come to the conclusion that the prosecution did not prove its case against the accused beyond reasonable doubt.

In its own brief of argument filed on 18/4/07, the Respondent B submitted that the major plank of the Appellant's submissions is this: That the accused person was not sufficiently or properly identified given the alibi he set up and also the fact that the 1st and 2nd prosecution witnesses might have a purpose of their own to serve. The C Respondent contended that the appellant was not a stranger to the PW1 and PW2. They knew him very well, and in fact intimately, before the date of commission of the offence. The appellant, counsel added, on his own viva voce said that he had no problems or quarrels with either the deceased, PW1 or PW2. Learned counsel then D submitted that the appellant was properly and sufficiently identified. They further submitted that there was no mistake in the identification of the appellant. The PW2 is the wife of the Appellant there was lantern therefore identification of the Appellant could not be a problem. In fact both witnesses (PW1 & PW2) knew the accused before E the incident which made them to recognise the accused easily.

They relied on the following decided cases:-

(1) Akor and others V. The State (1992) 4 NWLR (pt 234) 198 at 204.

(2) Theophilus Eyisi & 2 Ors V, The State (2000) 82 L.R.C.N F 307 at 316;

(3) Balogun V. A.G Ogun State (2000) 94 LRCN 260.

Learned Respondent's counsel emphatically submitted that PW1 and PW2 did not just identify the appellant but they also G recognised him having known him before - The State V Aibangbee (1988) 3 NWLR (Pt. 84) 548 per Nnamemeka Agu JSC; see also Bassey Akpan Archibong v. The State (2007) 143 L.R.C.N 228; In R. V Turn Bull (1976) 3 AU E.R. 549 - 552 where Lord Widgery C.J H Stated "Recognition may be more reliable than identification of a stranger.....".

The Respondent's counsel finally submitted under Issue 1 that there is no mistake in identifying and recognising the appellant by the PW1 and PW2. It prays thus:-

"My Lords, in the face of the positive identification of the ap-

pellant by the deceased, PW1 and PW2, persons who knew him prior to the date of commission of the offence, we urge the Supreme Court to hold that the Court of appeal was right when it held that the identity of the appellant was properly and sufficiently proved in this case. We urge the Supreme Court to resolve our issue No. 1 in the respondent's favour." B

(Italics mine for emphasis)

On Issue No 2, the Respondents counsel contended that the Appellant relied heavily on the defence of alibi which the trial High Court rejected and which rejection was upheld by the Court of Appeal. In his defence the accused said that on his way back from the deceased's house he had an accident at Achara and became unconscious. He was carried to the house of another Sister of his called Mabel at Achara. He further testified that when he regained consciousness, he went home through Umuezegbu Village and that it was dark when he arrived his house that day. He said he slept in his house with his wife called Emily, that night. See page 20 line 27 - page 21 lines 1-6 of the record of proceedings. Above is the accused's explanation vis-a-vis the alibi. The respondent's counsel on P8 2nd paragraph countered by saying: C D E

"However, the prosecution fixed the appellant at the Scene of Crime at the material time. The prosecution witnesses Nos. 1 and 2 saw the appellant committing the offence. Whereas PW1 saw him committing the crime i.e. shooting the deceased and even accosted him, the PW2 rushed out from her room to see what was happening after she heard a gunshot and the voice of the deceased asking the appellant what he came to do at that time. The appellant who was escaping after the dastardly act pushed her aside and ran away. The PW2 recognised the deceased (Sic) - the accused - very well as he was her husband and as there was a lamp that lit up the Scene". The above is the explanation of the Respondent's counsel in his attempt to debunk the plea of alibi. F G

Not only that, counsel continues, in the face of the recognition and fixation of the appellant at the Scene of the crime and as the perpetrator of the crime, the appellant did not tender any evidence or call any witness to support his defence of alibi. He relies on the case of Ntam & Anor Vs. The State (1968) NMLR 68. It was held: "Where the prosecution witnesses, (PW1 & PW2) testify that they saw H

the accused committing the offence charged, but he sets up an alibi, there is a straight Issue of credibility and it is therefore necessary for him to call or adduce evidence to prove the alibi Ntam & Anor v. The State (1968) NMLR 68"

B Learned Respondents counsel submitted that the law is that it is the duty of the accused to introduce the evidence of alibi and to State his whereabouts and both are within the accused's personal knowledge. Failure of the accused to do that the prosecution does not have to disprove it. The evidential burden in such a case rests on the appellant. He cites in support the case of Manor & Anor Vs. The State C (1965) 1 All MLR 193; Ahile Gandhi & Anor Vs. The State (1965) NMLR 333; see also Sale Dagaya Vs. The State (2006) 134 LRCN 397 at 432 per Niki Tobi JSC.

On time factor the Respondents Counsel contended that the D piece of evidence sighting the appellant at 6.00 pm was not contradicted at all by the defence, yet they are querying why the learned justices of Appeal asked at what time? The alibi did not just rhyme or gel (it is not a matter of course). It is not enough for the appellant to say it was dark when he got home at that night and that he slept with E his wife. The court of Appeal's question "at what time" is most apposite he contended. It was on record that under Cross -examination the accused admitted that he was challenged because it was very late in the night - Issue of time shall be taken seriously - SALE DAGAYA Vs. THE STATE (Supra) at 430.

F The Learned counsel for the Respondent further argued on their pp 11 -12 thus: -

"My Lords, majority of the appellant's argument in respect of the defence of alibi are speculative. Most of the things canvassed G here are not borne out of the record of proceedings transmitted for the purposes of this appeal. For instance there is nowhere in the records where it could be found that the appellant raised his defence of alibi at the earliest opportunity. There is also nothing from the records to show that the police did not investigate the alibi set up by H the appellant. We wonder from where the appellant got all the facts with which he argued forcefully on the lack of police investigation of the alibi. The alleged statement of the appellant tendered as Exhibit "CC1 at the trial court did not form part of the records transmitted for this appeal. The certified true copy of the evidence of the investi-

gating police officer (IPO) in a previous testimony tendered in court, as Exhibit "B" is also not part of the record transmitted for this appeal. It is equally discernible from the records that the present appellant's counsel was not the counsel that represented him at the trial in the High Court. So from where did he get the facts with which he is Lampooning the trial court and the Court of Appeal? B

The appellant cleverly imported the issue of uninvestigated alibi at paragraph 4:04 of his brief when he submitted" when the accused testified in court he re-enacted the said alibi which he made in his statement to the police...."

Unfortunately neither the said statements of the accused nor the IPO's testimony in Court formed part of the records transmitted for the appeal. We urge my Lords to discountenance every and all argument made by the appellant in relation to the uninvestigated alibi as same was not borne out by the records of proceedings transmitted for the instant appeal. In C.B.N. & 6 ORS VS MR. AITE OKOJIE (2004) 10 NWLR (PT.882) 488 at 513 the Court of Appeal per Galadima JCA said:- C

"There is presumption that a record of appeal or proceedings once certified and transmitted to the appellate court is correct and unless the contrary is proved, the appellate court is entitled to look at or refer only to the record before it in deciding any issue in dispute in the appeal and not to the one brought to it informally by one of the parties when the appeal is heard. Learned counsel further added as follows:-"And in LT. YAHAYA T. TAKUBU VS CHIEF of NAVAL STAFF & 2 ORS (2004) 1 NWLR (PT.853) 80 at 113-114 the Court of Appeal following the dictum laid down by Olatawura JSC in PETER ADEBOYE ODOFIN & AMOR VS CHIEF AGU (1992) 3 NWLR (PT 229) 350 at 374 said "when a counsel has realised that the record of appeal is incomplete, it is his duty as an officer of the court in the temple of justice to promptly inform the court and where he feels that after due search in the lower court, he can take other steps to convince the court that the record before the court, though certified as true copy of the proceedings was indeed wrongly certified, he should know what next to do. But to proceed to argue as learned counsel to the respondent did in the instant case, by proffering explanations as to where some unexhibited volume can be found was wrong. E F G H

My Lords, for the purposes of this appeal, there is nothing to show that the alibi of the appellant was timeously raised. We submit that the appellant cannot speculate on the contents of documents that are not before the honourable court”.

The Respondent further contended that there is nothing Sacrosanct in raising an alibi. The prosecution must adduce cogent evidence to check on a statement of alibi by the appellant in order to disprove the alibi there is no immutable or inflexible way of doing that. In one of the Supreme Courts cases the accused person called witness to support his alibi nonetheless the Supreme Court held that once the prosecution is able to lead cogent and unassailable evidence which fixes the accused at the Scene of Crime at the material time, his alibi naturally collapses - *Ezekiel Adekunle v. The State (1989) 5 NWLR (part 123) 505*; *Tunde Adara & Anor v. The State (2006) 135 LRCN 703*.

Respondent continues and submitted that “In the instant case, no witness was called by the appellant to support his defence of alibi”. Learned counsel for the Respondent reviewed the ingredients of the offence of murder and evidence law in a very meticulous manner and concluded that on the totality of the evidence adduced by the prosecution, when pitched against that of the appellants, the prosecution proved its case beyond reasonable doubt and therefore urges this court to hold that the court below was right in affirming the conviction and sentence of the appellant in this appeal.

Before I analyse the submissions of both counsel I shall refer to the Appellant’s reply Brief filed on 1/11/2007 which concentrated on the burden of proof in Criminal cases. Learned counsel for the appellant again raised the issue of whether or not the accused person raised the defence of alibi. He also discussed the alleged lack of record of non - investigation of the alibi. I refer to pages 1 - 7 of the reply Brief, He in conclusion submitted thus:-

“I submit that it Is (Sic) duty of the police to have asked Appellant the time he arrived at his house or what he meant by the word “dark” in relation to when he arrived at his house that day. Police would have given the Accused’s answer in evidence and then save Respondent the problem of raising loose ends in the time element in the Accused’s alibi. I submit that any doubtful fact in the accused’s alibi is for the Police to supply. Accused in his alibi gave the necessary

lead for them to follow, but they failed to do their work and thereby weakened the prosecution's case. I urge my Lords to so hold."

He then urges us to hold that the appeal succeeds and it ought to be allowed.

My Lords, the above exercise is meant to highlight what had happened in both the trial court and the court below, and to produce the submissions of learned counsel to the parties - Appellant and Respondent - before us.

The facts which cannot be altered are that the appellant Iheonunekwu Ndukwe was charged with the murder of Michael Anabe by shooting him with a gun on 25th day of September, 1982 at Agburuike village punishable under section 319 of the Criminal Code, Cap 30 Vol. II Laws of Eastern Nigeria 1963. It is also to be noted that the learned trial judge after considering the prosecution's case found him guilty, convicted him and sentenced him to death. The appeal of the Appellant to the court of Appeal was dismissed and the death sentence was unanimously affirmed. He appealed to this court and both appellant and Respondent filed their respective Briefs of argument and the Appellant, in addition, filed a reply Brief. I have gone through all the Briefs and the submissions of both learned counsel I think it is now trite that in this type of criminal cases the burden is on the prosecution to adduce evidence in proof of their case before an accused person is convicted. Considering Section 319 of the Criminal Code, before the accused is convicted of murder the prosecution must prove beyond reasonable doubt the following:-

1. That the deceased has died
2. That the death of the deceased resulted from the act of the Accused/Appellant; and
3. That the act of the Accused was intentional with knowledge that death or grievous bodily harm, was its probable consequence. See Section 138 (i) of the Evidence Act.

Both Appellant and the prosecution agreed that two of the above ingredients were proved beyond reasonable doubt i.e. that Iheonunekwu Ndukwe died as a result of a gunshot. The evidence is so strong that the Appellants counsel agreed that the prosecution proved both ingredients beyond reasonable doubt. The crucial point is whether or not the prosecution proved the 3rd ingredient i.e. that the deceased died as a result of the accused's act. In other words, did

the appellant shoot the deceased? If the prosecution was found to have adduced credible evidence to show that it was the accused who fired the gun at the deceased and killed him then conviction must be confirmed.

In this case, the Appellant's counsel contended that the prosecution could not have proved that it was the accused person who killed the deceased. They argued that the accused/Appellant was somewhere distant from the Scene of Crime how could he be said to have shot the deceased? In a nutshell the appellant raised the plea of alibi allegedly in his statement to the police. If what the accused pleaded is real or established then in law one of the ingredients of the offence of murder is missing. That being the case, the prosecution would have failed to prove their case against the appellant beyond reasonable doubt.

The prosecution denied flatly the defence of alibi as raised by the defence. They insisted that the Appellant was fixed at the Scene of the Crime by the evidence of PW1 and PW2.

Briefly I will say, after closely analysing the submissions of both counsel and the record of proceedings, that ***once the accused person successfully and correctly raised the defence of alibi, then it is the duty of the police to investigate in order to verify the claim of the accused. Failure of the police to investigate is fatal to the case of the prosecution. The burden of establishing the circumstances of alibi remains on the accused. He must all along supply the details of his whereabouts.***

In this case the Appellant could not produce evidence of his whereabouts at the material time. His account of his whereabouts is sketchy and unreliable. His account of alibi was not reflected by the Record of proceedings before the court. The police in my view therefore cannot give the court substantiated or reliable evidence of the alibi. Consequently I hold that there is no investigatable material concerning the alibi made by the accused. Can we blame the police for refusing to investigate the so called alibi when none is in existence? With respect, the accused cannot, even on the balance of probability, prove the alibi raised by him. If the alibi raised by the Appellant was strengthened by his evidence we would have blamed the police for failure to investigate the defence of alibi - *Obiode v. The State (1970) 1 All*

NLR 35, My Lords, it is the law that where an accused person has raised an alibi and clearly stated his whereabouts before the trial commences, and the prosecution failed to take any steps to verify or disprove it, the court will be right to hold that the prosecution failed to prove its case beyond reasonable doubt. In other words, one of the important ingredients would have been missing; therefore the prosecution cannot then say that it was the accused who killed the deceased Obinga & Ors Vs The State (1965) NMLR 172. B

It is incumbent upon the appellant to supply, adduce or elicit where he was at the material time; that is all about alibi i.e. that the appellant was “elsewhere” which is within his knowledge; that he was at a place other than where the prosecution says he was at the material time. C

In the case at hand, ***the evidence of PWs 1 and 2 who knew the accused person closely identified the accused at the Scene of this dastardly act. Their evidence is reliable. The defence failed to produce evidence to demolish that of the prosecution even though he got opportunity to do so, by calling witness or witnesses to support him. As far as I am concerned there is no material contradiction in the evidence of PWs 1 & 2 in this appeal. Since the learned trial judge and court below did not find or discover any material contradiction the finding of the trial court, that there was no contradictions in the evidence of PW1 and PW2, was ably and competently made. The decision of the court below in affirming the decision of the trial court vis-a-vis the so called contradiction is perfectly justified, both lower courts did make a correct finding. In this court we have no cause to disbelieve PW1 and PW2.*** D E F

I refer to Nasamu Vs. The State (1979) 6 - 9 SC. P 112 at 116 G Per Eso JSC where he made the following statements:-

“The emphasis in the passage is on “material point” and we would like to state here that not every contradiction, however minute, would be what is material, however, depends on the facts of each case. It must be such a contradiction that one of the witnesses contradicting the other on has no further duty of conducting either an identification parade to identify the appellant or to call any other evidence to rebut any purported alibi put up by the appellant. See Matthew Orimoloye Vs The State (1984) 10 SC. 138; Muhammadu Akanbi V. H

The State (1984) 10 SC. 272.” Per Wali JSC in Ibrahim V. State (1991) 4 NWLR (pt 186) 399 at p 419. Paragraphs E - F.

It is also to be noted in this appeal that there are concurrent decisions of the two lower courts below in rejecting the plea of alibi loosely raised by the appellant. Both decisions were never shown to be perverse.

For the foregoing reasons this appeal fails, same is hereby dismissed. The conviction and Sentence of the appellant by the trial court for murder under Section 319 Criminal Act as affirmed by the court below are hereby affirmed.

MUSDAPHER JSC

I have read before now the judgment of my Lord Muntaka-Coomassie just delivered and I entirely agree. Based on the concurrent findings of facts by the lower courts, the appeal is bound to fail and it is accordingly rejected by me. I dismiss the appeal and affirm the conviction of the appellant for the murder of Michael Anaba.

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Port-Harcourt Division (hereinafter called “the court below”) delivered on 11th July, 2006, affirming the conviction and sentence to death of the Appellant by the High Court of Abia State sitting at Okpuala Ngwa High Court, Isiala Ngwa on 10th April, 1995.

Dissatisfied with the said decision, the Appellant appealed to this Court on three Grounds of Appeal. Without their particulars, they read as follows:

“GROUND ONE

The Learned Justices of the Court of Appeal erred in law when in affirming the decision of the trial Court rejected the defence of Alibi put up by Accused in the trial court.

GROUND TWO

The Learned Justices of the Court of Appeal erred in law when in affirming the decision of the trial Court, they held that the identity of the Accused in the Commission of the offence charged was proved by the prosecution.

GROUND THREE

The Learned Justices of the Court of Appeal erred in law when they affirmed the decision of the trial court to the effect that the prosecution proved the charge against the Accused beyond reasonable doubt”.

The Appellant formulated two issues for determination, namely, B

“2.01 Whether the Court of Appeal was right when it held that the identity of the Appellant in the commission of the offence charged was proved by the prosecution.

‘2.02 Whether the Court of Appeal was right when it held that the prosecution proved the charge against the Appellant beyond reasonable doubt”. C

The Respondent on its part, formulated three issues for determination, namely,

“3.01 Whether the appellant was properly and sufficiently identified as the person who killed the deceased in this case. D

3.02 Whether the Court of Appeal was right in upholding the rejection of the defence of Alibi set up by the appellant at the trial court.

3.03 Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant at the trial court”. E

Before going into the merits of the appeal, I note that both learned counsel for the parties, did not state under what ground or grounds of appeal, their said issues, were distilled from. It is now settled that issue for determination, must relate to and derived from the ground of appeal otherwise such issue, is incompetent and it is therefore, liable to be struck out. See the cases of Alhaji Animashaun v. University College Hospital (1996) 12 SCNJ. 179 @ 184; Chief Agbaisi & 3 ors. v. Obikorefe & 6 ors. (1997) 4 NWLR (Pt.502) 630 @ 650; (1997) 4 SCNJ. 147 @ 157 citing several other cases therein, and recently, Falola v. Union Bank of Nigeria PLC (2005) 2 SCNJ-209 @ 221; (2005) 2 S.C. (Pt.II) 62 just to mention but a few. For an issue to be sustained, it must be formulated within the parameters of a ground of appeal and not on the totality of the issues formulated. See the case of Biocon Agrochemicals (Nig.) Ltd. & ors. v. Kudu Holdings (PTY) Ltd. & anor. (2000) 15 NWLR (Pt.699) 493; (2000) 12 SCNJ. 272. F

I note that no issue as to Alibi was raised on Ground 1 of the H

grounds of appeal. Rather, in the Appellant's Brief, the argument in respect of Alibi, was slotted in the argument in respect of Issue 1 that dealt with issue of the identity of the Appellant. This, in my respectful view, is not right having regard to the principles stated by me above. However, since the Respondent in its issue 3.02, has raised it and it is distilled and it arises from the said Ground 1 of the Grounds of Appeal, I will deal with it.

The facts relevant to this case as was the case of the prosecution briefly stated, are that the Appellant, is the husband of P.W.2 who is the sister of the deceased. As a result of some misunderstanding between the Appellant and his wife - P.W.2, PW2, left their matrimonial home and moved to the house/home of the deceased who was her elder brother. The Appellant on 25th September, 1982, about 12 noon, in company with one of his sisters, one Nwugo, visited the deceased with traditional drink in order to explore the possibility of reconciliation with the said run-away wife. The deceased refused to accept the said drink on the ground that he had reported the matter to their Church Authorities and invited the Appellant and his said sister, to come to the said Church on 28th September, 1982 when the matter will be looked into or dealt with by the Church Authorities. They left. In the evening of that 25th September, 1982, about 6 p.m., the deceased saw the Appellant and his son on a motorcycle which they rode into his deceased's compound. The Appellant reopened or introduced the same issue that brought them to the deceased's house earlier on that day. The son of the Appellant rode away with the said motorcycle leaving the Appellant behind. After a while, the Appellant left and the deceased went to his maternal home and returned to his house about 7 p.m. After having his meal and bath, he relaxed on his easy chair in order to rest.

At about 10 p.m. of that same day, the Appellant came into the deceased's compound through the back yard door. The deceased on seeing him, called the Appellant by name and asked him thus: 'Theonunekwu why are you here at this time?' The Appellant there and then, shot the deceased with a gun and the deceased fell down and died. The P.W.1 - the deceased's wife, who was all the time at the said backyard bathing her child, saw and heard all that happened and there and then accosted the Appellant in the following words:

"Theonunekwu have you killed my husband?" Of course, she

knew the Appellant very well before the date of the incident and raised an alarm immediately. The PW2 rushed out to the backyard after hearing the gun shot to see what happened. There is the evidence, that the PW2 collided with the Appellant who pushed her away as he was trying to escape and did in fact, escape. There was a lighted lantern at the said backyard that enabled the PW1 and PW2 recognize the Appellant that night. B

The Appellant in his Statement to the Police, set up an Alibi that he had a motorcycle accident at a place called Achara on his way back from the house of the deceased and that he was unconscious and was carried to the house of another sister of his - one Mabel at Achara where he stayed till he regained consciousness. That he went through one village - Umuezegbu or Umuezeku to his home when it was dark and that he slept in his house that night. C

At the trial, the PWs 1 and 2, testified and were cross-examined. PW3, is/was an Asst. Chief Registrar in the Registry of the trial court who tendered the Certified True Copy of the previous proceedings before another Judge. The Appellant testified and did not call any witness. At the conclusion of the evidence, both learned counsel for the parties, addressed the court on 28th March, 1995 and on 10th April, 1995, the learned trial Judge, delivered a very short Judgment convicting the Appellant for murder and sentenced him to death. E After stating the charge, the following appear;

"The prosecution called three witnesses and tendered exhibits 'A' to 'F' and dosed its case. The accused testified on his own behalf and called no witness. Both learned counsels addressed the court exhaustively. F

From the totality of the evidence before the court, I am satisfied that the prosecution proved its case beyond reasonable doubt as is required by Section 137(1) of the Evidence Law, for the law would fail to protect society if it permitted remote or fanciful possibilities to deflect the course of justice. In the result, I find the accused guilty as charged and is accordingly convicted. G

ALLOCUTUS: The Accused pleads for leniency. H.U. Chukwuemeka Esq., pleads for Utmost Leniency. H

SENTENCE: By the mandatory provision of section 319(1) of the Criminal Code, Cap. 30 Vol. II laws of Eastern Nigeria. 1963, applicable in Abia State, Iheonunekwu Ndukwe is hereby sentenced

to death for the murder of Michael Anaba. May God have mercy on you “.

(the underlining mine)

When this appeal came up for hearing on 20th November, 2008, Dr. I.N. Ijeomah - Learned Counsel for the Appellant, adopted
 B their Brief and urged the Court to allow the appeal. Chief Amaechi -
 Attorney-General, Ministry of Justice, Abia State, leading four other
 learned counsel, also adopted their Brief. By way of oral amplifica-
 C tion, of their paragraph 4.06 of their Brief, he referred to the evi-
 dence of PWs 1 and 2 who he stated, saw the Appellant and knew
 him and recognized him. He cited and relied on the case of Eyesi &
2 ors. v. The State (2000) 35 NWLR (Pt.691) 555 @ 562: (it is also
 reported in (2000) 12 SCNJ. 104; (2002) 82 LRCN where 3071) he
 D stated that it was held that recognition, is more than identification. I
 note that this case, appears as No. 02 in the List of the Authorities at
 page 20 of their said Brief. The learned Attorney-General, also re-
 ferred to paragraph 5.06 at page 6 ending at page 10 of their Brief
 on the issue of Alibi and submitted that no legally Alibi, was set up by
 the Appellant. That legally speaking, there was no Alibi legally raised.
 E He finally, urged the Court to dismiss the appeal and affirm the deci-
 sion of the court below. Thereafter, Judgment was reserved till to-
 day.

I have earlier stated in this Judgment, that the defence of Alibi,
 F was slotted in the argument in respect of Issue 1 of the Appellant, 1
 say so because, in my respectful view, the defences relating to Identi-
 fication and Alibi, are two independent and different defences. When
 identification is raised as an issue, the principle, is more appropriate,
 in circumstances where identification parade, is considered necessary
 G and had been conducted. In other words, an identification parade, is
 not necessary, in circumstances where the victim or witness, recog-
 nized the offender or accused person, while the matter, was still fresh
 in his/her mind, as the person who committed the crime alleged. See
 the case of Ukpabi v, The State (2004) 11 NWLR (Pt.884) 439 @
 H 449; (2004) 6 SCNJ. 112 (@ 118-119 - per Uwaifo, JSC; (2004) 6-
7 S.C. 27 @ 31, 37. Indeed, in this case, the case of Eyisi & ors, v.
The State (supra), was referred to with approval. It was also noted
that the above principle, was laid down in the English case of R v.
Turnbul (1976) 3 All E.R. 549 @ 551; (1976) 3 WLR 445 @ 447

approved by this Court in the case of Zakari Abudu v. The State (1985) 1 NWLR (Pt.1) 55, 61, 62. See also the case of Mbenu v. The State (1988) 1 NWLR (Pt.84) 615 @ 628; (1988) 7 SCNJ. 211.

At page 31 of the Supreme Court Report; at page 445 - 449 of the NWLR and page 121 of the SCNJ Report, Uwaifo, JSC, in the case of Ukpabi v. The State (supra), in his lead judgment, stated inter alia, as follows:

"It is true that whenever the case against an "accused person depends wholly or substantially on the correctness of the identification of the accused, and the defence alleges that the identification was mistaken, the court must closely examine the evidence. In acting on it, it must view it with caution, so that any real weakness discovered about it must lead to giving the accused the benefit of the doubt. This is the principle laid down in R. v. Turnbull (supra). It has been approved in this country: See Abudu v. The State (1985) 1 NWLR (Pt.1) 55 at 61-62; Mbenu v. The State (1988) 1 NWLR (Pt.84) 615 at 628, In my view, the principle is more appropriate in circumstances where identification parade was considered necessary and had been conducted.

In the present case, there was no question of a formal identification parade. It was not necessary. What happened here was that P.W.2 recognised one of those who robbed him while the matter was still fresh in his mind and, incidentally, the man was still in the neighbourhood and within easy reach, as it were. As said by Lord Widgery, C.J., in R v. Turnbull (supra) at page 552:

"Recognition may be more reliable than identification of a stranger".

Musdapher, JSC in his concurring Contribution at page 452 of the NWLR, page 33 of the Supreme Court Report and page 121 of the SCNJ Report, stated inter alia, that the law is settled that the question whether an accused is properly identified as the one who was a party to the commission of the criminal act, is a question of fact to be considered by the trial court (I will add, an Appellate Court) on the evidence adduced for that purpose.

Edozie, JSC, in his own concurring Contribution at pages 37 H of the Supreme Court Report and 456 of the NWLR Report, stated inter alia, that identification evidence, is evidence tending to show that the person charged with an offence, is the same, as the person who was shown committing the offence. That where a trial court is

faced with identification, it should be satisfied that the evidence of identification, established the guilt of the accused beyond reasonable doubt.

In other words, there is the need for caution by the court considering the evidence of identification, to see whether there is any weakness in the evidence. Therefore, an accused person, must be given the benefit of doubt, where any weakness is discovered. Thus, there is the need, to consider all the facts and circumstances in each case.

I note that the concurrent findings of fact in the said case (supra), were not disturbed by this Court. In effect or in other words, an identification parade, is essential in situations or cases, where the victim or witness, did not know the accused person before and was confronted by the offender for a very short time and in which time and circumstances, he might not have had the full opportunity of observing the features of the accused person. See the cases of Ikemson & 2 ors. v. The State (1989) 6 S.C. (Pt.I) 112: (1989) 3 NWLR (Pt.110) 455; (1989) 6 SCNJ. 54 @ 65; Otti v. The State (1993) 5 SCNJ. 143; Ugwumba v. The State (1993) 6 SCNJ. (Pt.II) 217 and the lucid Judgment of Onu, JSC, in the case of Alabi v. The State (1993) 9 SCNJ. (Pt.I) 109 @ 119 - 123 and many others.

An identification evidence, is one tending to show that the person charged with the offence, is the same person who committed the offence. In summary, an identification parade, is limited to cases of real doubt or dispute as to the identity of an accused person or his connection with the offence charged. See the case of Obikpolor v. The State (1991) 1 SCNJ. 91. It is not conducted and it is not necessary, where a witness or victim, knew the culprit or accused person well before and gave his name as in the instant case leading to this appeal.

Lord Widgery, CJ. in the case of R. v. Turnbull (supra) @ 551, in his immutable words, stated inter alia, although fully reproduced in the Respondent's Brief, as follows:

"..... At what distance. In what light? Was the observation impeded in any way..... Had the witness ever seen the accused before? How often? ... Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows Mistakes in recognition of

close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened but the poorer the quality, the greater the danger".

Alibi on the other hand and as rightly stated by the court below at page 80 of the Records means "elsewhere". B

In the instant case leading to this appeal, I or one may ask, was/is there any weakness in the evidence of the PW1 and PW2? Both of them knew the Appellant thoroughly and very well before the time of the incident leading to the shooting of the deceased that night by the Appellant. In her evidence in-chief, she gave a vivid account of the coming to their house about noon of the date of the incident, of the Appellant with his sister - Nwugo; the purpose of their visit, the presentation of kola nuts to them by the deceased, the deliberations, why the deceased refused the drink presented to him by the Appellant and the invitation to the Appellant and his said sister by the deceased, for them, if they so wished, to the Church on 28th September, 1992 when the report to the Church Authorities by the deceased, would be looked into. C D E

PW1 on oath, testified about the second coming of the Appellant with his son known as Nnabuko Nnabugwu Iheonunekwu and who were met by the deceased, at the entrance of their compound about 6 p.m. of the date they came, on a motor-cycle. Her entire evidence in-chief appears at pages 7 to 9 of the Records. At pages 9 and 10 thereof, she swore inter alia, as follows; F

"Eside is the wife of the accused. There was a lantern at the backyard by which we could see. I was not far from my husband as I was seeing by the same lantern. I recognized the accused as he came through the backyard. I also called the accused by his name. After the accused shot my husband, he fell down and blood rushed from his head. He died on the spot. I raised alarm and people gathered. When people came and saw what happened, they began to search for the accused, but did not see him. G H

I went and reported to our village head, called Jacob Ajjala. When I reported to him, he said he saw the accused running towards Umunezekwu road Jacob Ajjala has died. I also reported the matter at the Police Station, Mbawsi. "

She was not ruffled during her being cross-examined. In fact, she testified at page 10 of the Records, inter alia, that the distance where she was washing/ bathing her child, to the distance where the deceased was sitting, was about twelve feet. At page 12 thereof, she swore, that the light of the lantern was sufficient or enough for her to
 B see clearly. That the distance from which the Appellant shot the deceased, was about one yard and maintained that the deceased also called the Appellant by name. She swore that she was in good terms with the Appellant before the incident.

C I have gone this far because, this is a murder case and in order to show or demonstrate that the evidence of PW1 overwhelmingly, demolished the purported defence of alibi of the Appellant who was not a stranger to either the deceased or PW1 and PW2 - the later who sufficiently and properly in my respectful view, not only identified the Appellant, but clearly recognized him that night. The presence of the Appellant that night, was unequivocally fixed by the PWs
 D 1 and 2.

PW2, is the wife of the Appellant and it would be ridiculous to even suggest that she could not recognize or identify the Appellant in
 E the back-yard which was lit by a lantern that enabled her do so. The identification of the Appellant, was by visual identification which is one of the forms of identification; the others being by either voice or identification parade. See the cases of Eyisi &ors. v. The State (supra) and Balogun. Attorney-General Ondo State (2004) LRCN 260 also
 F cited in the Respondent's Brief.

At pages 79 and 80 of the Records, the court below - per Omage, JSC, stated inter alia, as follows:

G "..... In the instant appeal the testimony of PW1 is unimpeachable as to the identity of the accused person. This is supported by the testimony of the wife of the accused person who could not fail to identify her husband when in fact there was no evidence that there was a crowd at the scene of sighting. In the event the proof of identity of the accused person at the scene is complete and its beyond reasonable doubt. The testimony of PW1 alone has established
 H the identity of the accused person as he was virtually at the scene of murder. See F. O. RAPHAEL v. COMMISSIONER OF POLICE 1971 NMLR 16".

I agree. In my respectful view the identification of the Appel-

lant by the PW1 and PW2, as found and held by the court below, was/is positive and unequivocal. The identity was properly and sufficiently proved in this case, giving rise to the instant appeal. I see no mistake on the part of the two witnesses, in the identification of the Appellant as the killer of the deceased. The Appellant in his evidence in-chief, at page 21, of the Records, stated that “there was no quarrel between PW1, PW2 and myself as a result of the death of Ubani”.

It is now settled that even though it is the duty of the prosecution, to check on a statement of alibi by an accused person and disprove the alibi or attempt to do so, there is no inflexible and or invariable way of doing this. If the prosecution, adduces sufficient and accepted evidence to fix a person at the scene of crime at the material time, his alibi, is thereby logically and physically, demolished and that would be enough to render such plea, ineffective as a defence. See the case of Patrick Njovens & ors. v. The State (1973) (1) NMLR 331: (1973) NMLR 76; See also the cases of Bello v. Police (1959) WRNLR 124; R. v. Turner (1957) WRNLR 34; Gachi & ors. v. The State (1965) NMLR 333; (1965) NMLR 333; Yanor & anor. v. The State (1965) NMLR 337; (1965) 1 ANLR 199,

Indeed, in the case of Nwabueze & ors. v. The State (1988) 7 SCNJ. (Pt.II) 248 @ 260 - per Nnaemeka-Agu, JSC. stated inter alia, as follows:

“..... It is well to remember that since the decisions of this Court in Gachi & ors. v. The State (1965) NMLR 333 @ 335 and Yanor & anor. vs. The State (1965) NMLR 337 which were followed in the case of Christian Nwosisi vs. The State (1976) 6 S.C. 109 and several other decisions the defence of alibi has ceased to be the type of cheap panacea that it used to be in the hands of criminals. Now not only has the accused an evidential burden of eliciting some evidence with all necessary particulars which can be checked to show that she was somewhere else at the time the offence charged was committed at the locus of the crime but also, if the prosecution investigates the alibi and calls some evidence in disproof, of it, the Judge, not disregarding the defence of alibi, is yet entitled to consider it from the backgrounds of other stronger evidence, if any, linking the accused person with the crime charged”.

In the instant case, the court below, rightly in my respectful view, considered the unimpeachable evidence of the PW1 and PW2

fixing the Appellant with the crime that night at the scene. It must always be borne in mind that the onus is on the accused person, to establish, on the balance of probabilities, the plea of Alibi raised by him. See John Peter v. The State (1997) 3 SCNJ 48 - per Ogundare, JSC citing the cases of Gachi v. The State (supra); Obiode v. The State (1970) 1 All NLR 35 and Galidika v. The State (1972) 2 S.C. 21. See also the case of Augustine Onuchukwu & 2 ors. v. The State (1998) 4 SCNJ. 36 @ 48 - per Mohammed, JSC about the circumstance where a plea of Alibi, is demolished citing Njovens & ors. v. The State (supra). Much fuss, with respect, has been raised in the Appellant's Brief, about the failure of the prosecution, to investigate the defence of Alibi of the Appellant. In the case of Odu & anor. v. The State (2001) 5 SCNJ. 115 @ 120 this Court - per Mohammed, JSC, stated that although there are occasions on which failure to check on Alibi may cast doubt on the reliability of the case for the prosecution, yet where there is positive evidence which cancels the alibi, the failure to investigate the alibi, would not be fatal to conviction.

His Lordship further held that but the onus of establishing Alibi, being a matter within the personal knowledge of an accused person, lies on him. That it is not enough, for the accused person, to say to the court, that he was not at a particular place away from the scene of the crime. That he has to prove his assertion. That even if the police have failed to investigate such assertion, the accused person, has the onus of adducing evidence on which he relies for his defence of alibi. See also Yanor & anor. v. The State (supra). So, it can be seen that the failure of the police, to investigate, does not, automatically, mean failure of the prosecution's case. There is a rider, which places such onus, on the accused person on the balance of probability.

In my recent Judgment in the case of Ime David Idiok v. The State (2008) 73 NWLR (Pt.1104) 223 @ 235-243; (2008) 4 SCNJ. 196 @: 202-209; (2008) 4-5 S.C. (Pt. 1) 84 @ 88-100; (2008) 4 SCM 59 @ 64 - 70, I dealt with a similar issue. In summary, once an accused person, is fixed at the scene of the crime, his defence of alibi, must fail. See also my Judgment in the case of Bassey Akpan Archibong v. The State (2007) 143 LRCN 228 @ 266 cited and partly reproduced in the Respondent's Brief.

Before concluding this issue, I note that the Appellant said he slept in his wife's -(Emily's house) till morning. He did not call her as a witness. He did not say what time of the day or night he went to the said house. He also stated that he had a motorcycle accident on his way. He did not say whether it was the same motorcycle, his said son, had rode away with after their visit at 6 p.m. to the deceased's compound. He did not call any of his two sisters - (Nwogu) - the one who came with him to the deceased house at 12 noon of that day or (Mabel) - the one who he asserted carried him while unconscious after the purported or alleged motorcycle accident. He did not say, at what time of the day, he left his said sister's (Mabel's) house after regaining consciousness. He did not call his said son Nnabugwu. I suppose, all these people were vital and material witnesses. More so, since his evidence and those of his witnesses, will be on the balance of probabilities.

In the case of Ezekiel Adekunle v. The State (1989) 5 NWLR (Pt.123) 505 cited and relied on in the Respondent's Brief (it is also reported in (1989) 12 SCNJ 184 the accused person, called some witnesses to support of his defence of alibi. Yet this Court, still held that once the prosecution was/is able to lead cogent and unassailable evidence, which fixed or fixes the accused person at the scene of crime at the material time, his alibi collapsed or collapses. I note as rightly stated in the Respondent's Brief, in his submissions at the trial court, the learned counsel for the Appellant - Chukwuemeka, Esqr., never made any reference to an uninvestigated alibi. I note that the Appellant stated that he went home after regaining consciousness through Umuezegbu village. It is the road PW1 had stated late Jacob Ajiala - (the village head), told her he saw the Appellant running towards after killing the deceased.

However, at page 80 of the Records, the court below, stated inter alia, as follows:

"..... Such alibi however is proved only on a balance of probability. In the given case, in the instant appeal the alibi tendered by the accused person is irrelevant to the time the accused person was positively identified as being at the scene of murder. Reasoning and logical thinking shows that the accused person is assured of the support of his wife Mabel (sic) (this wife is Emily while one of his sisters is Mabel) that the accused spent the night in her house but at

what time? The accused did not state what time he arrived at the house of his wife or where he was at about 10 p.m. the time identified in the statement of the PW1 and the statement of the deceased. "Itheonunye, (sic) what are you doing here at this time? Where therefore an accused person has failed to adduce evidence in support of his alibi, the police is blameless for not investigating the same. See INEKWE V. THE STATE (1999) 9 NWLR (PT.617) 43".

It can be seen under what context or circumstances, the court below, came to the last sentence above.

I am satisfied and I so hold, that the defence of Alibi of the Appellant, is bogus and does not avail him at all. My answers therefore, to the two issues of the Appellant and the three issues of the Respondent are in the affirmative.

There is also the concurrent decisions of the two lower courts and this Court, on the decided authorities, cannot interfere.

In concluding this Judgment, I wish to state firstly, that although summary of evidence, may not be sufficient, an Appellate Court, has the power to evaluate the evidence before it, as an appeal, is in the nature of a re-hearing. In other words, where a trial court, fails in evaluating facts found by it, an Appellate Court, can re-examine the whole facts and come to an independent decision as the trial court. See the case of Samuel Omobo v. Commissioner of Police (1965-66) MNLR 42 -per Obaseki, J. (as he then was) citing the cases of Fatoyinbo v. Williams 1 FSC 87, Benmax v. Austin Motor Co. Ltd. (1956) A.C. 370; (1956) 1 AER 326 and Ayayi v. Ojubo (1955-56) WRNLR 145.

This is exactly, what the court below did in the instant case leading to this appeal.

Secondly, it is also settled that the mere fact that witnesses are relatives or friend of the deceased, does not mean that they are not competent witnesses for the prosecution. See the case of Arena & anor. v. The State (1982) 4 S.C. 78 @ 92; Chukwu v. The State (1992) 1 NWLR (Pt.217) 225; (1992) 1 SCNJ. 57 (a). 61. This is because, it does not make the evidence inadmissible, but that fact, can only make a court or Tribunal, to be circumspect in the reception of their evidence and to treat such evidence, with caution. See the case of Onafawokan & anor. v. The State (1986) 2 NWLR (Pt.23) 496. It must be stressed and this is also settled that a case is not lost,

on the ground that those who are witnesses, are members of the same family or community. What is important, is their credibility and that they are not tainted witnesses. See the cases of Chukwu v. The State (supra) and Ogunneze v. The State (1998) 58 LRCN 3512; It is also reported in (1998) 4 SCNJ. 226) also cited in the Respondent's Brief. B

Thirdly, the writing of a Judgment, is said to be an art and there are more than one way of going about it. It is possible, to have as many variations as there are Judges. See the case of Onuoha v. The State (1988) 3 NWLR (Pt.83) 460 @ 464; (1988) 7 SCNJ (Pt. C 1) 20 @ 24. What is important, is that all evidence adduced must be considered. See the cases of Adamu v. The State (1991) 6 SCNJ. 23 @ 40 — per Belgore, JSC (as he then was); and Awopejo & 6 ors. v. The State (2001) 12 SCNJ. 293 @ 302. There is no Constitutional requirement as to the particular format. See the cases of Usiobaifo & anor. v. Usiobaifo & anor. (2005) 3 NWLR (Pt.913) 665 @ 684; (2005) 1 S.C. (Pt.II) 60; and Osolo & 15 ors. v. Chief Ogolo & 5 ors. (2005) 12 SCNLR 181. In the Respondent's Brief, the format in an Appellate Court, is stated and the case of Olum Ogba & 2 ors. v. Israel J. Onwuzo & anor. (2005) 13 LRCN 2448 @ 2463 is cited/ E referred to. (It is also reported in (2005) All FWLR 581 @ 590); (2005) 6 SCNJ 83 @ 94: (2005) 6 SC (Pt.1) 41 @ 48-49 - per Akintan. JSC.

Fourthly, it is settled that what an appeal has to decide, is whether F the, decision of the trial court or intermediary Appellate Court, was/ is right and not what its reasons were. See the cases of Ukejianya v. Uchendu (1950) 13 WACA 45 @ 46; Ayeni & ors. v. Sowemimo (1982) 5 S.C. 6 @ 73 - 74 and Odukira v. Ogunbiyi (1998) 8 NWLR (Pt.561) 339 @ 330 C.A. I have reproduced earlier in this Judg- G ment, the opening statements of the learned trial Judge.

I have had the privilege of reading before now, the lead Judg- ment of my learned brother, Muntaka-Coomassie, JSC, just delivered. I agree with his conclusion that the appeal fails. I too dismiss it and I also hereby, affirm the said decision of the court below. H

MUHAMMAD JSC

Mr. Michael Anaba was the deceased. He was said to have

been murdered by Mr. Iheonunekwu Ndukwe, the appellant on the 25th day of September, 1982. It was alleged that there was a misunderstanding between the appellant and the deceased. PW1 told the trial court that the appellant and his sister were at the deceased's house by about 12 noon on that day. They went there for peace making or settlement. The deceased welcomed their visit but informed the appellant and his sister that he (deceased) had already reported the matter to church authorities and that if they wanted to hear about the matter they should come to the church on 28th of September, 1982. They stood up and left. Later on that day at about 10.00pm, the appellant came to the deceased's residence through the back yard. He found the deceased resting in his easy chair. The appellant was said to have shot him with a gun on his head. He died on the spot. The appellant then ran away. Appellant was later arrested and subsequently taken to the trial court. After hearing, the trial court found the appellant guilty of the offence of murder and sentenced him to death.

Dissatisfied, the appellant appealed to the court below. The appeal was unanimously dismissed on the 11th July, 2006.

Further appeal was filed to this court by the appellant.

In their respective brief filed by the parties, the appellant on his side formulated two issues for determination viz:

"1. Whether the Court of Appeal was right when it held that the identity of the appellant in the commission of the offence charged was proved by the prosecution.

2. Whether the Court of Appeal was right when it held that the prosecution proved the charge against the Appellant beyond reasonable doubt"

The respondent on its part, formulated the following three issues:

"1. Whether the appellant was properly and sufficiently identified as the person who killed the deceased in this case.

2. Whether the Court of Appeal was right in upholding the rejection of the defence of Alibi set up by the appellant at the trial court.

3. Whether the Court of Appeal was right by affirming the conviction and sentence of the appellant at the trial Court"

My learned brother, Muntaka-Coomassie, JSC, has treated this

appeal along the line of issues formulated by the appellant. I will only want to add on the issue of alibi argued by the appellant under issue 1 as well as issue two of the respondent. Issue one, strictly speaking, is on the identity of the appellant. But, I think, identity of an accused person in a criminal trial is quite different from a defence of alibi raised by an accused. Whereas the former connotes the act of proving that a person, subject or article before the Court is the very same that he or it is alleged, charged, or reputed to be, as where a witness recognises the accused as the same person whom he saw committing the crime or where handwriting, stolen goods, counterfeit coin etc; are recognised as the same which one passed under the observation of the person identifying them, Alibi, (the latter) on the other hand, is a defence that places the accused/defendant at the relevant time of crime in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party. I am not therefore, comfortable with the formulation of the issue under which the defence of alibi was argued by learned counsel for the appellant. The saving grace however, is that the defence of Alibi has been raised in ground one of the notice and grounds of appeal as contained on pp 86-87 of the printed record of appeal before this court. Secondly, it is the principle and practice of appeal courts, since the introduction of brief writing, that inelegance in a brief of argument should not defeat merit of a case. The court should draw the best it can out of such a badly written brief. Thirdly, and fortunately, the learned counsel for the respondent has formulated his second issue on the defence of Alibi.

Alibi, is a Latin word meaning 'elsewhere'. It is a plea raised by a person accused of committing an offence that by the time the offence was alleged to have been committed he was 'elsewhere'. Thus, having regard to the time and place when and where he is alleged to have committed the offence, he could not have been present. It indeed postulates the physical impossibility of the presence of the accused at the scene of his presence at another place.

The submission of learned counsel for the appellant on the issue of Alibi is that the defence of alibi was made in the accused's statement to the Police which was tendered in evidence as Exhibits C-D. The Police, he said, did not investigate the alibi at all when the accused testified in court, he restated the said alibi. The prosecution

cross-examined the accused and did not allege any contradiction between accused's evidence of alibi in court and the one he made in his statement to the police. Although there were some lapses in recording the answers given by the accused to questions put which at the cross-examination, it is discernible that the prosecution did not specifically challenge the alibi of the accused and that by this lapse, the prosecution accepted the alibi. Learned counsel cited and relied on the case of Oforlete V. The State (2000) WRN p.86 at pp 109-110. The learned counsel submitted further that the trial court did not consider this defence of alibi at all. There was no evaluation of any of the issues in the case by the trial court. It was the court below that undertook to evaluate the evidence of alibi and other issues. Learned counsel submitted that the conclusion reached by the court below on the defence of alibi by the accused is perverse and wrong in law.

Learned counsel for the respondent made his submissions on the defence of alibi. He stated that the appellant's submission discloses that he relied heavily on the defence of alibi which the trial court rejected and which rejection was upheld by the Court of Appeal. Further, no witness was called to support the alibi. Learned counsel urged this court to ignore the defence of alibi forcefully put up in this appeal and to uphold the rejection of the plea of alibi by the Court below.

Where an accused person seeks to rely on the defence of Alibi, it is trite law that he has a duty to let the Police know at the earliest opportunity where and with whom he was at the material time. See: Akpan V. The State (1987) 2 NSCC 720. Another principle of the law is that since the burden of proving the guilt of an accused person beyond reasonable doubt lies on the prosecution and does not shift, once the defence sets up an alibi, it is for the prosecution to lead evidence to disprove it. However, the evidential burden of proof lies on the accused person who sets up such a defence. This burden is no more than a duty on accused person to adduce evidence which would tend to show that he was somewhere else other than where the prosecution alleges he committed the crime. See: Gachi and ors. V. The State. (1965) NMLR 333. Yanor and ors. V. The State (1965) NMLR 337 (1965) All NLR 199; Njovens and Ors. V. The State (1973) NMLR 331; Odidika V. The State (1988) 1 NSCC 137. Thus, because of the

burden on the prosecution to prove the guilt of the accused person beyond reasonable doubt, once a defence of alibi is set up there is a duty on the prosecution to investigate it once it was made known to it at the earliest opportunity. See: *Obinga and Ors. V. Police* (1965) NMLR 172. A court of trial faced with evidence tending to show that the accused person was somewhere else at the time of the commission of the crime is under a duty to test such evidence against the evidence led by the prosecution in rebuttal, and if on the whole the court is in doubt as to the guilt of the accused such accused must enjoy the benefit of such doubt and be acquitted. In Yanor's case *supra*, Idigbe, JSC, at page 342 stated:

"While the onus is on the prosecution to prove the charge against an accused the latter has however, the duty of bringing the evidence on which he relies for his defence of alibi; when such evidence has been adduced, the court should consider it in the light of the evidence adduced by the prosecution in support of the charge against the accused and if in the end the court is unable to reach a decision on the question whether the evidence in support of the case is stronger than that produced in support of the alibi, the accused must be acquitted,"

It is in the light of the above settled principles relating to the defence of Alibi that I would take a look at what transpired in this case, in his evidence in chief, the appellant as DW1 testified before the trial court. In what appeared to be a statement in defence of his absence from the scene of crime, the appellant stated:

"I went to the house of the deceased on the 25th day of September 1982. I went there at about 1:30pm to 2:pm. I went with my sister by name Nwugo. I went there because my wife went to his house and I carried wine to him. My wife's name is Esidi Ndukwe. I met him in his house. He received us very well and entertained us. I told him that I came because of my wife. He gave me a date to come back and said he was going to his maternal home for a matter, i left with my sister on my motorcycle and dropped her in her own house. My sister is from Umuegu, On my way to my house I had an accident in a place called Achara. After the accident, I was unconscious and was carried to the house of another sister called Mabel at Achara. After I regained consciousness I went home through Umuezegbu village. It was dark when I arrived at my house that day. I did not go to

any other place when I returned home after the accident. I slept in my house that night slept with my wife called Emily in my house that day, i was arrested on 26th September, 1982 in my house. I did not go to the house of the deceased by ten p.m that day. I did not go through the fence and I did not shoot the deceased with gun that day”

While being cross-examined, DW1 said:

“I told the police I gave the wine to my sister Nwaugo to take home and on my way to Achara to visit Mabel another sister I had accident. Achara is within Agburike. I stayed at Achara until it was dark.”

(Underlinings supplied for emphasis).

This is suggestive of the defence of alibi. But can this evidence be strong enough to thrust upon the prosecution the duty to investigate the alibi raised at this stage? Did the appellant raise alibi as a defence at the earliest opportunity when being interrogated by the Police?

From the statement of the accused made to the Police and which was tendered and admitted as Exhibits ‘C’, and C1 it is clear that there is nothing indicating the defence of alibi from the accused person. Akpan V. The State (Supra).

Secondly, to discharge the evidential burden placed by law on him, the accused had a duty to call witnesses who could testify to his alibi. The appellant mentioned some persons who, according to him had knowledge or must be deemed to have knowledge of his alibi. These included:

(a) The unnamed persons who “carried” him to the house of another sister called Mabel at Achara, after the accident which made him unconscious.

(b) his sister by name Mabel at Achara,

(c) his wife called Emily with whom he slept in his house that night. See: Gachi and Ors. V. The State (Supra), Yanor and Ors V. The State (Supra).

Thus, as there was no evidence on alibi before the trial court, the learned trial judge rightly, in my view, made the following findings:

“From the totality of the evidence before the court, I am satisfied that the prosecution proved its case beyond reasonable doubt as

is required by section 137 (1) of the Evidence Law, for the law would fail to protect society if it permitted remote or fanciful possibilities to deflect the course of justice”

The court below, in its judgment, per Omage. JCA, observed:

“The word alibi means elsewhere, it is true that persecution has the duty to investigate the defence of alibi made by the accused person. No evidence is tendered in the proceeding in the court below that the prosecution investigated the alibi of the accused person. Such alibi however, is proved only on a balance of probability. In the given case, in the instant appeal the alibi tendered by the accused person is irrelevant to the time the accused person was positively identified as being at the scene of murder Reasoning and logical thinking shows that the accused person is assured of the support of his wife Mabel, that the accused spent the night in her house but at what time? The accused did not state what time he arrived at the house of his wife or where he was at about 10 p.m the time identified in the statement of the PW1, and, the statement of the deceased : “Theonunye, what are you doing here at this time”. Where therefore an accused person has failed to adduce evidence in support of his alibi, the Police is blameless for not investigating same. See: INEKWE V. The State (1999) 9 NWLR (pt.617) 43”

Furthermore, in a situation of this nature, where there is strong, pungent and compelling evidence of witnesses of unimpeachable character as to the identity of the accused person, the defence of alibi sought to be relied upon by the appellant would be a mere thrash. Such an alibi is porous and cannot be relied upon by any reasonable court or tribunal to defeat the evidence of eye witnesses for example, PW1 or the wife of the accused who can hardly mistake the identity of her husband. PW1 for instance said:

“My husband returned from his maternal home at about 7p.m. My husband thereafter ate his food, took his bath and began to rest at our back yard sitting on his easy chair. At about 10 p.m whilst in that position he took out his snuff container to use. I was also at the back yard bathing my child. The accused came in through the back-yard at that time and my husband saw him and said “IHEONUNEKWU why are you here at this time”. As my husband said this, the accused shot him with gun on his head and he fell down and I raised alarm saying “Theonunekwu, have you killed my hus-

band". As I raised this alarm, the sister of my husband, named Esidi, came out to the back-yard. When Esidi was coming out from the house to the back-yard, she collided with the accused and the accused ran away.

Esidi is the wife of the accused- There was a lampton (sic) at the back-yard by which we could see. I was not far from my husband as I was seeing by the same lampton (sic). I recognized the accused as he came through the back-yard and I also called the accused by his name. After the accused shot my husband, he fell down and blood gushed from his head. He died on the spot. I raised alarm and people gathered."

PW2 was the appellant's wife. She stated in her evidence, inter alia, the following:

"On 25/9/82 I was inside the room. My elder brother Michael Anaba was at the back yard. I heard my brother say "Theonunekwu what have you come to do now". I heard a gun shot sound. I started to run out to see what happened. As I ran out, the accused push me and ran away and I saw my brother lying at the veranda dead. We raised alarm and people came. I recognized the accused because he is my husband. There was lamptan (sic) there and so I recognized the accused"

From the totality of the above, I agree entirely with Omage, JCA, in his reasoning that:

"In the instant appeal the testimony of PW1 is unimpeachable as to the identity of the accused person. This is supported by the testimony of the wife of the accused person who could not fail to identify her husband when in fact there was no evidence that there was a crowd (sic) at the scene of sighting. In the event the proof of identity of the accused person at the scene is complete and it is beyond reasonable doubt. The testimony of PW1 alone has established the identity of the accused person as she was virtually at the scene of murder."

The appellant must own-up his misdeeds. The law can hardly be of any succour to him. The punishment is in a requital form. Life is so sacred and precious that even an insect would not like to lose its own. I agree with my brother, Muntaka-Coomassie, that this appeal lacks merit. I, too, dismiss the appeal. I affirm the decision of the court below.

ADEREMI JSC

The appellant was charged before the High Court of Justice, Ngwa, Abia State for murder of one Michael Anaba on the 25th of September, 1982.

Evidence was led before the trial court with the prosecution calling three witnesses one of which was the Registrar of the trial court who tendered the Certificate of Record of the previous evidence of the Investigating Police Officer and the evidence of the Medical Officer all in the previous proceedings before another judge, as well as the statement of the accused/appellant to the police. The accused/appellant also gave evidence but did not call any witness. At the end of the proceedings, counsel for both parties addressed the court and in a reserved judgment, the learned trial judge held that the accused, now appellant, was guilty as charged. The judge accordingly convicted the accused/appellant and sentenced him to death on the 10th of April, 1995.

Briefly, the facts are that the deceased, Michael Anaba, was relaxing on a chair at the backyard of his house on the 25th of September, 1982 at about 10.00 pm when the accused/appellant came in and shot him with a gun and escaped. Though an alarm was raised, the accused could not be apprehended on the spot. But one Esidi who later testified as PW2 ran to the scene immediately the alarm was raised; she claimed he pursued the accused/appellant but he escaped. One Mrs. Salome Anaba, the wife of the deceased who testified as PW1 said she was bathing her child at the backyard of the house when the accused/appellant came. She heard her husband asking the accused/appellant why he was there at that time and what she saw was that the accused/appellant shot her husband, the deceased, on the head and he (deceased) immediately fell down. She claimed that she accosted the accused/appellant in the following words:

“Theonunekwu have you killed my husband?”

The defence of the accused/appellant was that of ALIBI - claiming that on that day and at the material time, he had an accident at Achara on his way from the deceased's house. Suffice it to say that the accused/appellant relied heavily on the defence of ALIBI. At the end of the trial, the learned trial judge believed the evidence of PW1

and PW2 both of who said they saw the accused/appellant at the scene. Consequently, the defence of ALIBI was rejected.

I have read the briefs of arguments of the appellant and the respondent laid before us. I need not reproduce the contents any-
 B more here for same have exhaustively been incorporated into the
 lead judgment of my learned brother - Muntaka-Coomassie JSC.

The defence of ALIBI simply means “ELSEWHERE” - in
 practical terms, all it is saying is that he (the suspect) was at some
 particular place other than where the prosecution are saying he was
 C at the time material to the commission of the crime. But the facts
 forming the basis of the defence are a matter peculiarly within the
 knowledge of the accused person. It therefore follows that the bur-
 den of leading evidence of the fact or providing materials that will
 lead to the establishment of the defence is on the accused. Let me
 D further say that an accused person can discharge the said evidential
 burden incumbent on him by only giving sufficient particulars of that
 place he claimed he was at the time the crime was committed and of
 course of the person who can testify to his being there. Once suffi-
 cient particulars are supplied by him, the duty shifts to the prosecu-
 E tion who must investigate the ALIBI and set out to disprove it. Let it
 be said, however, that the onus on the prosecution to prove the
 charge against the accused beyond reasonable doubt never shifts.
 See UKWUNNENYI V. THE STATE (1989) 4 NWLR (pt.114) 131.
 F It is sufficient for me to say that the standard of proof required to
 establish the defence of ALIBI is one based on the balance of prob-
 abilities. But, will the defence of ALIBI avail the appellant in the cir-
 cumstances of this case? The combined effect of the testimonies of
 PW1 and PW2 is to the effect that not only did the two witnesses
 G identify the accused/appellant, they quite recognised him, having
 known him before. In R. V. TURN BULL (1976) 3 A.E.R. 549, Lord
 Widgery CJ reasoned: -

*“Recognition may be more reliable than identification of a
 stranger”*

H The trial court believed the evidence of PW1 and PW2 as one
 that is positive and credible fixing the accused/appellant at the scene
 of crime. What is more, it is my view that the accused/appellant, go-
 ing through the records, gave the prosecution insufficient or shaky
 materials to use even if investigation of the defence of ALIBI were to

be carried out. I wish at this stage to remind myself that it is a firm principle of our criminal jurisprudence that no matter how stupid a defence put up may be, it must still be considered by the court. I bear this in mind. But I cannot gloss over the direct and positive evidence of PW1 and PW2 both of who clearly recognised the accused/appellant as the person who committed the crime. The ALIBI, even raised, has been rebutted by that direct and positive evidence. See *NJOVENS V. THE STATE* (1923) 5 S.C. 17. The court below was right in its holding.

For all I have said, but most especially for the detailed reasoning and conclusion reached by my learned brother, Muntaka-Coomassie, JSC in the lead judgment, I say that this appeal is unmeritorious. It must be dismissed and I also dismiss it. I endorse the conviction and sentence of the appellant by the trial court for murder of Michael Anaba as affirmed by the court below.

E

F

G

H