

SUPREME COURT OF NIGERIA
3RD APRIL, 2009. SC. 283/2005
CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,
W. S. N. ONNOGHEN, P. O. ADEREMI,
C. M. CHUKWUMA-ENEH, JJSC

KABIR ALMU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Alibi - Investigation of - Duty of prosecution - Once an accused pleads alibi - Giving details of his whereabouts - The prosecution has the burden of investigating it - Failure to do so is an admission of the story of the accused (H1)

CRIMINAL PROCEDURE - Alibi - Disproof - Whether achieved - In view of the evidence before the trial court - The prosecution has been unable to fix the appellant at the scene of crime - So the alibi was not disproved (H2)

CRIMINAL PROCEDURE - Proof - Contradictions - Effect - If there are contradictions in evidence of prosecution - Materially affecting the charge - Doubt will be created benefit of which must be given to accused (H3)

CRIMINAL PROCEDURE - Investigations - Identification parade - Necessity of - It is not necessary in this case - Where PW7 knew the appellant before the incident (H4)

FACTS

The appellant was arraigned before the Robbery and Firearms Tribunal of Katsina State where he was tried on a charge of robbery. The case of the prosecution was that the appellant robbed and fatally injured one Abdulkabir Lawal. The appellant denied the allegation and pleaded alibi, stating that he slept in the house of a friend. The friend testified seeing the appellant in his house when he woke up in the morning, but did not know when appellant entered the house.

However, there was evidence that the door to the house was closed before 9 p.m. each day as a matter of routine, and there was no sign of violence to the door or its lock. After hearing, the trial court found the appellant guilty as charged and sentenced him accordingly. Aggrieved, the appellant appealed to the Court of Appeal which dismissed the appeal. This is a further appeal by the appellant to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the identification parade of the Appellant was done in accordance with the Law.

(ii) Whether the appellant properly set up a defence of alibi.

(iii) Whether the prosecution proved its case beyond reasonable doubt.”

HELD (Unanimously allowing the appeal per **KATSINA-ALU JSC**)

Alibi - Investigation of - Duty of prosecution

1. Once an accused person has pleaded alibi and stated where he was at the time of commission of a crime and the person he was in company of, the burden of disproving same is on the prosecution; to investigate and prove its case beyond reasonable doubt. Failure to do so is an admission of the story of the accused. For his plea to be destroyed, the prosecution must adduce sufficient evidence to fix the appellant at the scene of the crime. (p. 802 C)

Alibi - Disproof - Whether achieved

2. In the first place, the appellant stated where he was at the time of the commission of the crime. Secondly, he gave the name of the person at whose house he slept. Thirdly there is evidence that this house is locked from 9pm till 6am. What is more there is no evidence from the prosecution that PW8’s house was broken into after 9pm on the fateful night. In the instant case, there is clearly no reliable evidence to fix the appellant at the scene of the crime. His alibi was not disproved. This is enough to dispose of this appeal in favour of the appellant. (p. 803 E)

EVIDENCE - Proof - Contradictions - Effect

3. From her testimony PW8 was a most unreliable eyewitness. In one breath she said she did not know the two persons who attacked her

husband. In another she said the appellant was one of the robbers and that she knew him before the incident. In yet another breath she denied instructing her younger brother to say in a letter written to the younger sister of the appellant that the appellant was one of the robbers that attacked her husband. The position of the law is clear. If there are contradictions in the evidence of the prosecution, and the contradictions materially affect the charge, doubt will be created and the benefit of it must be given to the accused person, in which case he will be discharged. (pp. 804 G/805 A)

Investigations - Identification parade - Necessity of

4. I am in agreement with counsel for the appellant that an identification parade was not necessary in this case since PW7 was picked out the appellant knew him before the incident. As a matter of fact according to PW9, the appellant is the brother of the deceased, the husband of PW7. There is also evidence that they all lived in the same quarters. (p. 805 D)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Benefit of doubt must enure to the accused

There are too many loose ends in the facts of this case that make one feel very unsafe to sustain the conviction and sentence of the appellant as it is settled law that where any doubt exists in the facts of a case in a criminal trial, the doubts must be resolved in favour of the accused person/appellant because it is better to allow nine guilty men to go free than to convict and punish one innocent man! (p. 812 C)

ADEREMI JSC

2. Alibi - Standard of proof is on a balance of probabilities

Although an ALIBI is commonly called a defence, it has to be distinguished from a statutory defence such as necessity. Suffice it to say that the standard of proof required to establish the defence of ALIBI is one based on the balance of probabilities (p. 813 E).

3. Alibi - Rebuttal is by proof of charge beyond reasonable doubt

Once an ALIBI has been raised, the burden is on the prosecution to investigate and rebut such evidence in order to prove its case beyond

reasonable doubt. There is nothing on record to show that the prosecution investigated the authenticity of the materials provided by the appellant. And the evidence the prosecution proffered did not, by any stretch of imagination, rebut that defence. (p. 814 G)

B REPRESENTATION

Idris Mohammed with him Usairu Usman for the Appellant.
A. G. Faskari (A. G. Katsina State) with him S. B. Usman (Ag DPP)
Hassan Yusuf (PSC) and Abu Umar (SC) for the Respondent.

C CASES REFERRED TO

- AMUSA OPOOLA ADIO & ANOR V. THE STATE (1986) 2 NWLR (Pt.24) 581
OGUONZEE V. STATE (1998) 5 NMLR (Pt.551) 521 at 546
D MAJA V. STOCEO (1968) 1 ANLR 141 at 149
WOLUCHEM V. GUDI (1981) 5 S.C. 291 at 295-64 at 326-9
OKULATE V. AWOSANYA (2000) 1 S.C. 107
NTAM V. THE STATE (1968) NMLR 86
Bozin v. The State (1985) ANLR 199
E Okosi v. The State (1989) 1 NWLR (pt.100) 642
Onubogu v. The State (1974) 9 S.C. 1
Ikemson v. The State (1989) 3 NWLR (Part-110) 455 at 472

F STATUTE REFERRED

Robbery and Firearms (Special Provisions) Act No 5, cap. 398, L.F.N., 1990, s. 1(2) (a)

LEAD JUDGMENT BY KATSINA-ALU JSC

- G The appellant was arraigned before the Robbery and Firearms Tribunal of Katsina State on a one count charge dated the 13th July, 1998 which alleged that the appellant on or about the 2nd day of August 1997 at Gambarawa Quarters Katsina robbed one Abdulkabir Lawal of the sum of =N55,700.00 (Fifty-five thousand, seven hundred Naira) and that at the time of the robbery, the appellant was armed with a knife with which he stabbed the victim (Abdulkadir Lawal) causing him severe injuries leading to his death contrary to section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act No. 5 Cap 398 Laws of the Federation of Nigeria 1990. He pleaded

not guilty to the charge. 11 witnesses testified for the prosecution. The appellant gave evidence in his own defence and called no witness. Learned counsel for both the prosecution and the defence addressed the Tribunal and in a reserved judgment, the learned trial Judge found the appellant guilty as charged and sentenced him to death. B

The appellant's appeal to the Court of Appeal was dismissed. He has now further appealed to this court upon 8 grounds of appeal. In his Brief of argument filed pursuant to the Rules of this court, he set out the following issues as calling for determination in this appeal to wit: C

"(i) Whether the identification parade of the Appellant was done in accordance with the Law.

(ii) Whether the appellant properly set up a defence of alibi.

(iii) Whether the prosecution proved its case beyond reasonable doubt." D

For its part, the respondent adopted the three issues formulated by the appellant.

Briefly, the facts of the case as found by the Tribunal are as follows. In the early hours of 2nd August, 1997 at Gambarawa Quarters Katsina, two men entered the room of one Abdulkabir Lawal where he lived with his wife Rukayya Abdul-kabir. The two men woke up Abdulkabir Lawal and started beating him. The men stabbed him with a knife. They demanded money from Abdulkabir Lawal. He gave it to them and they left. The victim cried for help. Some people came, took him to hospital where he died on the 4th day of August, 1997. The victim's wife Rukayya who was also in the house was an eye-witness to all that happened on that fateful night. She revealed that the appellant was one of the two persons who attacked her husband. I shall return to her evidence later in this judgment. E F G

Following the arrest of the appellant, he denied knowledge of the offence with which he was arrested. He pleaded alibi. In his statement to the police, and in his testimony at the trial he said on the fateful night, he slept in the house of his friend called Ali in Gabarau Quarters. H

As I have already indicated, the prosecution called 11 witnesses. The vital witnesses were however PW7 Rukayya, wife of the deceased, PW8 Abdulrasheed the appellant's friend at whose house he said he

spent the night in question and PW10 Amina Abdu who lived in the same house with PW8.

I think the most important issue for determination is the plea of alibi raised by the appellant. The appellant raised the defence of alibi at the earliest opportunity in his extra-judicial statement to the police. Both parties are agreed on this. The law is now settled in this connection. Once an alibi has been raised, the burden is on the prosecution to investigate and rebut such evidence in order to prove its case beyond reasonable doubt: See Bozin v. The State (1985) ANLR 199.

The defence of alibi is a radical one and simply means that, the accused was somewhere else at the material time an offence was committed and could not possibly be at the scene of the crime to partake in it. Thus, ***once an accused person has pleaded alibi and stated where he was at the time of commission of a crime and the person he was in company of, the burden of disproving same is on the prosecution; to investigate and prove its case beyond reasonable doubt. Failure to do so is an admission of the story of the accused. For his plea to be destroyed, the prosecution must adduce sufficient evidence to fix the appellant at the scene of the crime.***

The appellant's plea of alibi was given at the earliest opportunity - See Exhibit "D". In his evidence at the trial he testified as follows:

"I left the hospital at about 8.30pm on 2/8/97 to my friend's house. The name of my friend is Ali. I slept in the same room with him and in the morning we all went our ways I had to vacate my room in my house to sleep with a friend."

To disprove this alibi the prosecution called PW8 and PW10. The testimony of PW8 runs thus:

"PW8 - Male, Moslem affirmed S/Hausa Abdul-rasheed G. I live at Gobarau Quarters Katsina. I am a Primary School teacher I know the Accused person by my side. He was wearing a jacket and a trouser. He told me that there were visitor in his house and he left his room for the visitor to sleep in so he come to me to sleep in my room, I only saw him in the morning in my room I could not say when he entered the room as I was sleep then he entered. I went to bed around 9.00pm I was not alone in the house. There were many

of us sleeping in the house. We used to close the house at 10pm evening daily and open at prayer time in the morning following day. One Hajiya Habiba who used to open the house in the morning each day because she used to sell fire wood in front of the house. Later in after some few days I heard that the Accused person was involved in an armed robbery. That is all.” B

PW10 gave the following testimony -

“PW10- Female, muslim affirmed S/H.....

I live at Gobarau quarters Katsina. I know Abdulazi, Garba. He lives in Gobarau Katsina. He is my son. We live in the same house. On the 1/8/97 at around at about 9.30pm I was at home. I close my house every day at 9pm I closed the house on that day the 1/8/97 at 9pm the following day I opened the door to for the house after morning prayers. I said the morning prayers at 6am that is all.” C

What was the reaction of the Court of Appeal? The Court below held that: D

“..... With the testimonies of PW8 and PW10, it becomes imperative on the appellant to give clue on the manner and time he enters PW8’s room if his defence of alibi is to succeed.”

The reasoning of the court below is deeply flawed. ***In the first place, the appellant stated where he was at the time of the commission of the crime. Secondly, he gave the name of the person at whose house he slept. Thirdly there is evidence that this house is locked from 9pm till 6am.*** Surely the appellant discharged the onus placed upon him by giving particulars of his whereabouts. See *Okosi v. The State* (1989) 1 NWLR (pt.100) 642. ***What is more there is no evidence from the prosecution that PW8’s house was broken into after 9pm on the fateful night. In the instant case, there is clearly no reliable evidence to fix the appellant at the scene of the crime. His alibi was not disproved. This is enough to dispose of this appeal in favour of the appellant.*** E F G

I must not forget the evidence of PW7 the wife of the deceased. She gave an eye witness account of what happened. This is what she said. In her evidence-in-chief, she testified as follows: H

“Rukayya Abdulkabir. I live at Gambarawa Quarters Katsina. I know the accused person 2/8/97. Two people entered inside our house they woke my husband up and started beating him. I do not

know the two people but I saw their structures and all of them was black and one of them was limping. They entered the house in the night. When I woke up I saw Kabir Almu inside the house. I know him before the incident happened. He lived at Gambarawa Quarters. Beside beating my husband they also stabbed him with a knife.

B They asked my husband to give them money. He gave them some money and they left. He cried for help and people came rushing into the house and my husband was taken to the Hospital. He died at the Hospital. That is all."

(Underlining for emphasis).

C Under cross-examination by the court this witness said:

"PW7 - I am a muslim and a mother. To God I know the Accused person was among the two people who entered the house and was limping. If I saw my H/W. I will know it. This writing contained on this piece of paper handed to me is x not my H/W/ However I know whose H/W. It is one Muhammadu's H/W. Who also lives at Gambarawa Quarters. He is my younger brother. I directed that Muhammadu to write a letter to the Junior sister of the Accused person. I did not read the letter before it was sent."

E (Underlining for emphasis).

Still under cross-examination by counsel for the appellant the witness said:

"PW7 - No I did not write the letter. I am a Moslem the content of the letter did not agree with what I instructed him (Muhammadu) to write. He was not instructed to say that the Accused person is among the people who robbed my husband. At the time of incidence I did not see his face but I saw his face now. That is all."

(Underlining for emphasis).

G From her testimony PW8 was a most unreliable eyewitness. In one breath she said she did not know the two persons who attacked her husband. In another she said the appellant was one of the robbers and that she knew him before the incident. In yet another breath she denied instructing her younger brother to say in a letter written to the younger sister of the appellant that the appellant was one of the robbers that attacked her husband. The position of the law is clear.

H The onus always in a criminal offence is for the prosecution to prove beyond reasonable doubt the guilt of the accused and failure to do so, will

automatically lead to the discharge of the accused person - Onubogu v. The State (1974) 9 S.C. 1. ***If there are contradictions in the evidence of the prosecution, and the contradictions materially affect the charge, doubt will be created and the benefit of it must be given to the accused person, in which case he will be discharged.***

This leads me to the issue of identification parade. Identification parade is only necessary in the following circumstances:

1. Where the victim (witness) did not know the accused before and the first acquaintance with him is during the commission of the offence;

2. Where the victim (witness) was confronted by the defendant for a very short time; and

3. Where the victim (witness) due to time and circumstance might not have had the opportunity of observing the features of the accused.

I am in agreement with counsel for the appellant that an identification parade was not necessary in this case since PW7 was picked out the appellant knew him before the incident. As a matter of fact according to PW9, the appellant is the brother of the deceased, the husband of PW7. There is also evidence that they all lived in the same quarters. See Ikemson v. The State (1989) 3 NWLR (Part-110) 455 at 472.

One last point. A slipper was recovered at the scene of the crime. The prosecution contended that it belonged to the appellant. In the course of the trial the 'appellant was asked to try it on. He did. It did not fit. It became crystal clear that the slipper did not belong to the appellant. It must be borne in mind that the robber that attacked the deceased wore it.

One does not need a soothsayer to see that from the evidence I have highlighted that the appellant was not at the scene of the crime. The evidence called by the prosecution did not in anyway link him with the commission of the offence with which he was charged, tried and convicted. The prosecution clearly failed to prove its case beyond reasonable doubt as required by law.

In my judgment, this appeal has merit. It must be allowed. I therefore allow the appeal, set aside the appellant's conviction and sentence. He is consequently acquitted and discharged.

MUKHTAR JSC

The charge for which the appellant pleaded not guilty in the trial court reads as follows:-

*"That you KABIR ALMU of Gambarawa Quarters, Katsina in
B Katsina State on or about the 2nd day of August, 1997 at the same
address did an act to wit: robbed one Abdulkadir Lawal of the sum of
N55,700:00k (Fifty Five Thousand, Seven Hundred Naira), and at
the time of the robbery you were armed with a knife with which you
C stabbed him, causing him severe injuries leading to his death, and
thereby committed an offence punishable under Section 1(2)(a) of
the Robbery and Firearms (special provisions) Act No. 5 Cap. 398 of
1990 as amended and triable by the High Court."*

The prosecution called eleven witnesses to prove its case, while
D the accused/appellant gave evidence in his defence. The evidence
were evaluated by the learned trial judge, who at the end of the day
found the appellant guilty as charged and convicted him accordingly.
Dissatisfied with the judgment, the accused appealed to the Court of
Appeal, which affirmed the judgment of the trial court, and dismissed
E the appeal. Again, he was not satisfied with the decision, so he exer-
cised his constitutional right by appealing to this court on eight grounds
of appeal. In compliance with the rules of this court the parties ex-
changed briefs of argument which were adopted at the hearing of
the appeal. In the appellant's brief of argument were raised the fol-
F lowing issues for determination:-

(i) Whether the identification Parade of the Appellant was done
in accordance with the law.

(ii) Whether the appellant properly set up a defence of Alibi.

G (iii) Whether the prosecution proved its case against the appel-
lant beyond reasonable doubt.

In the respondent's brief of argument the above issues for de-
termination were adopted. In arguing issue (1) supra, the learned
counsel for the appellant stated the circumstances where identifica-
H tion parade becomes necessary, as:-

*"1. Where the victim did not know the accused before and the
1st acquaintance with him is during the commission of the offence;*

*2. Where the victim was confronted by the Defendant for a
very short time; and*

3. *Where the victim due to time and circumstance might not have had the opportunity, of observing the features of the accused.*” See *Ikemson v. State* 1989 3 NWLR part 110 page 455.”

The learned Counsel for the appellant has submitted that an identification parade is not necessary in the instant case as it is in evidence that PW7 who was made to conduct the identification parade by PW5 knew the appellant before the incident. This argument is reinforced by the evidence of PW7 in examination in chief which reads inter alia:-

“When I woke up I saw Kabir Almu inside the house. I know (sic) him before the incidence happened. He lived at Gambarawa Quarters.”

The submission of learned Counsel for the respondent is that though identification parade in the instant case might not have been necessary based on the authority of *Ikemson v. State* supra, the fact that it was conducted in this case, was not fatal to the prosecution’s case. He placed reliance on the cases of *Ogoala v. State* (1991) 2 NWLR part 175 page 509, and *Bashaya v. State* 1998 5 NWLR part 550 page 351.

Then there is the issue of the slippers allegedly left behind by the robbers, which did not fit into the appellant’s foot, which was buttressed by the observation of the learned trial judge, as can be seen in an excerpt of his judgement which reads inter alia:-

“It is also in the record that a blue Dan Maradi single leg slippers was recovered at the scene of the incidence (exhibit 4). But when it was tried by the accused person in court it was found out to be too small for his foot. I in view of this also collaborative or to be circumstantial evidence against the accused person.”

The learned counsel for the appellant has argued that once an accused person has pleaded alibi and stated where he was at the time of commission of a crime and the person he was in company of, the burden imposed on him by law is discharged. The burden is strictly on the prosecution to investigate and prove its case beyond reasonable doubt. Failure to do so is an admission of the story of the accused. He referred to the cases of *Yanor v. The State* 1965 ANLR part 199 page 201, and *Chukwu v. The State* 1976 7 NWLR part 463 page 686.

Indeed, the prosecution took steps to discharge this onus by

calling PW8 and PW10 to give evidence on the alibi raised by the appellant. In his evidence in chief PW8 testified as follows in support of the appellant's defence of alibi:-

B *"I know the Accused person by my side. He told me that there were visitor (sic) to sleep in so he come (sic) to me to sleep in my room. I only saw him in the morning I could not (sic) say when he entered. I went to bed around 9.00 p.m I was not alone in the house. There were many of us sleeping in the house. We used to close the house at 10 p.m morning daily and open at prayer time in the morning each day because she used to sell fire wood in front of the house."*

C Then there is the evidence of PW10, the mother of PW9 which reads thus:-

D *"I am a Abdulaziz, Garba (sic). He lives in Gabarawa Katsina. He is my son. We live in the same house. On the 1/10/97 at around at about 9.30 p.m I was at home. I close my house every day at 9 p.m. I close the house on that day the 1/10/97 at 9 p.m. The following day I opened the door to for (sic) the house after morning prayers. I said the morning prayers at 6 a.m."*

E The above pieces of evidence have no doubt buttressed the defence of alibi raised by the appellant, for they have corroborated and reinforced the fact that at the time of the crime, the appellant was not in the scene of the crime he was somewhere else. In this vein I disagree with Jega JCA, when in his judgment he found as follows on page 199 of the printed record of proceedings:-

F *"In the appeal at hand, the prosecution has done all that is expected of it by investigating the claim of alibi set up by the appellant and the evidence of PW8 PW10 negates the defence of alibi raised by him."*

G These facts should have been of paramount importance to weigh heavily in the minds of the learned justices of the Court of Appeal to exercise their lawful right of giving the appellant the benefit of the doubt. In a criminal case, where it is incumbent on the prosecution to prove its case beyond reasonable doubt, all surrounding H circumstances and the credible and unchallenged evidence before the court must be perused carefully by the court to determine whether in fact the accused did commit the crime. The law is settled that in a situation where the court entertains even the slightest of doubt, that doubt should be resolved in favour of the accused person. See

Oforlete v. State 2000 12 NWLR part 681 page 415.

It is in this wise that I will resolve whatever doubt that may exist in my mind on the veracity of defence of alibi raised in favour of the appellant, as the law demands. In the light of the discussions supra I also resolve the appellant's issues supra in his favour, and find merit in the appeal. The lead judgment delivered by my learned brother Katsina-Alu JSC has been read by me in advance, and I am in agreement with him that the appeal deserves to be allowed. I also allow it.

ONNOGHEN JSC

The appellant was charged before the High Court of Katsina State on the 11th day of November, 1999 with the offence of armed robbery allegedly committed on the 2nd day of August, 1997 at Gambarawa Quarters, Katsina State in which one Abdulkadir Lawa was robbed of the sum of #55,700.00 (fifty-five thousand, seven hundred naira) and stabbed with a knife which later resulted in his death in the hospital. He was tried, convicted and sentenced to death under section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, NO.5, Cap 398, Laws of the Federation of Nigeria, 1990, in the judgment of the trial court delivered on the 21st day of August, 2002.

The appeal against the conviction and sentence was dismissed by the Court of Appeal holden at Kaduna in appeal NO.CA/K/289/2002, on the 21st day of September, 2005. The instant appeal is against that judgment.

The issues for determination, as identified by learned counsel for the appellant Idris Mohammed Esq., in the appellant's brief of argument deemed filed on the 10th day of January, 2007 are as follows:-

"(i) Whether the identification parade of the appellant was done in accordance with the law.

(ii) Whether the appellant properly set up a defence of alibi.

(iii) Whether the prosecution proved its case against the appellant beyond reasonable doubt"

It is very clear that issue (iii) will only become relevant for consideration if issues (i) & (ii), which can really be treated together, are resolved against the appellant. If on the other hand they are

resolved in favour of the appellant, issue (iii) would thereby be rendered irrelevant and liable to be discountenanced. The reason is simply that if the defence of alibi put up by the appellant is upheld, then the charge must fail as a person who has not been proved to be present at a scene of crime cannot be said to have committed any crime at the said scene as he cannot be at two places at the same time. It is therefore, only when the appellant can be fixed at the scene of crime that the question/issue as to whether the charge against him was proved beyond reasonable doubt will become relevant and determinable.

It should be noted that the three issues identified by the learned counsel for the appellant were adopted by learned counsel for the respondent in the respondent's brief deemed filed on the 22nd day of October, 2008.

From the beginning and at first opportunity the appellant informed the police that he was not at the scene of crime the night in question as he was asleep in the room of a friend, whose name and particulars the appellant supplied in exhibit D, his statement to the police upon arrest and caution, where he stated thus:-

"I left the hospital at about 8.30pm on 2/8/97 to my friend's house. The name of my friend is Ali. I slept in the same room with him and in the morning we all went out ways, I had vacate my room in my male house to sleep with a friend".

The friend in question is PW8, called by the prosecution who actually confirmed that the appellant slept in his room in the night in question as he, PW8, woke up in the morning to find the appellant in the room. PW8 also told the court that he went to bed at 9.00pm when the appellant was not around but woke up the following morning to see the appellant; that the house was usually locked at 10.00pm each night by Hajiya Habiba who later testified as PW10 and opened each morning by her at prayer time.

There is no evidence of any breaking and entry into PW8's room or PW10's house on the night in question or on any other night relevant to the case. That being the case, the hard facts before the court point irresistibly to the conclusion that the appellant was in the room of PW8 before 10.00pm when PW10 locked the door thereto. There is no other reasonable explanation of the presence of the appellant in the room of PW8 in the following morning other than that he must have slept therein as claimed by him, the appellant not being spirit, but

fully human.

The burden is on the prosecution to prove beyond reasonable doubt that the appellant was not only at the scene of crime but that he committed the offence charged - see Adedeeji vs The State (1971) ALL NCR 75. The defence of alibi raised by an accused person to a charge is, as I earlier stated in this judgment, an absolute/complete defence to the charge, see Adio vs The State (1989) 5 NWLR (Pt. 31) 714; Onachukwu vs The State (1998) 4 NWLR (Pt.547) 576 AT 592; Odili vs The State (1977) 4. S.C. 1. B

It is also settled law that the standard of proof in a criminal trial is that of proof beyond reasonable doubt. In the instant case? can it be said that the prosecution has proved beyond reasonable doubt that the appellant was not only at the scene of crime in the night in question but that he actually committed or participated in the commission of the crime? I do not think so, having regards to the facts earlier stated in this judgment as regards the issue of alibi. C D

I am not unmindful of the settled principle of law that this court, the Supreme Court, does not make a practice of setting aside the concurrent findings of facts by the lower courts. In the instant case, the lower courts have concurrently found that the appellant was at the scene of crime and participated in the commission of the crime. E

However, from the available evidence on record, it is very clear that the concurrent finding is perverse and perversity of a finding of fact is a ground recognized by law for this court to intervene and set aside such concurrent finding. F

The finding that appellant could not have been both at PW8's room sleeping in the night in question and at the same time be committing an offence of armed robbery elsewhere completely makes the issue of identification of the appellant as a participant in the crime irrelevant, apart from the contradictions regarding the issue and the relevance of the identification parade to the facts of the case. G

To begin with, appellant was not a stranger to the parties in the case including the deceased and his wife (PW7). In fact he is said to be a relation of the deceased. These contradictions have been fully demonstrated in the lead judgment of my learned brother KATSINALU, JSC and I need not repeat them here except to mention the fact that one of the reasons why the appellant was identified as being one of the robbers is that he walks with a limp. The question is whether the H

identification parade was a standing one- which is the usual one necessary for facial recognition or other physical peculiarities or a walking parade which could have revealed the physical deformity of the perpetrator of the offence in question. I hold the considered view that without the participants at the parade being made to walk, it would be impossible for anybody to detect a person who walks with a limp, particularly as even the slippers allegedly found at the scene of crime and said to belong to the appellant did not fit when put on in open court.

It is for these and the more detailed reasons contained in the lead judgment that I too find merit in the appeal and allow same. There are too many loose ends in the facts of this case that make one feel very unsafe to sustain the conviction and sentence of the appellant as it is settled law that where any doubt exists in the facts of a case in a criminal trial, the doubts must be resolved in favour of the accused person/appellant because it is better to allow nine guilty men to go free than to convict and punish one innocent man.!

Appeal allowed.

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ADEREMI JSC

The appeal here is against the decision of the Court of Appeal sitting in Kaduna (hereinafter referred to as the court below) delivered on 21st September, 2005 in Appeal No. CA/K/289/2002; KABIR ALMU and THE STATE.

Briefly, the facts of this case are thus; the appellant was arraigned before the High Court of Justice, Katsina for the crime of armed robbery committed on the 2nd of August, 1997 at Gambarawa Quarters in the same Katsina State in which one Abdulkadir Lawal was robbed of the sum of N55,700.00 and in addition, stabbed by the accused with a knife. The said Abdulkadir Lawal eventually died as a result of loss of excessive blood. The appellant was arrested on the 5th of August, 1977 as one of the armed robbers that invaded the house of the deceased. He was arraigned on a one-count charge of armed robbery occasioning death pursuant to Section 1 (2) (a) of the Robbery and Firearms (Special Provision) Act No. 5 Cap 398 LFN 1990 before the High Court of Justice, Katsina and in a reserved judgment delivered on 'the 21st of August 2002, the appellant was

found guilty as charged. An appeal to the court below was, in a reserved judgment delivered on 21st September 2005, dismissed. It is against this judgment that the appellant has again appealed to this court. Three issues were formulated by the appellant and as set out in his brief of argument, they are in the following terms: -

“(1) Whether the identification parade of the appellant was done in accordance with the law.

(2) Whether the appellant properly set up a defence of ALIBI.

(3) Whether the prosecution proved its case against the appellant beyond reasonable doubt”

Suffice it to say that the respondent adopted the three issues formulated by the appellant as set out supra.

I have been privileged with a preview of the lead judgment written by my learned brother, Katsina-Alu, JSC and I do agree with him, given the facts of this case, that the most important issue here is the plea of ALIBI as raised by the appellant. Suffice it to say that the appellant raised the plea at the earliest opportunity at his disposal; indeed in his extra judicial statement to the police. The word “ALIBI” simply means “ELSEWHERE”. It is a matter peculiarly within the knowledge of the accused person. So therefore, a person who intends to raise it must provide facts or evidence to show that he was at some particular place other than where the prosecution says he was at any material time. Let me say that although an ALIBI is commonly called a defence, it has to be distinguished from a statutory defence such as necessity. Suffice it to say that the standard of proof required to establish the defence of ALIBI is one based on the balance of probabilities. See (1) OZAKI V. THE STATE (1990) 1 NWLR (pt.124) 92 and (2) ONUCHUKWU V. THE STATE (1998) 4 NWLR (pt.547) 576. However, to counter the plea of ALIBI, the prosecution must adduce sufficient and believable evidence fixing the appellant at the scene of the crime. Exhibit D is the extra-judicial statement of the appellant made to the Police immediately after his arrest. In it he said:

“I left the hospital at about 8.30 p.m. on 2/8/97 to my friend’s house. The name of my friend is Ali. I slept in the same room with him and in the morning we all went our ways. I had to vacate my room in my house to sleep with a friend.”

In his testimony before the court, the appellant had said, inter alia, in line with his extra-judicial statement thus: -

"I am on (sic) 2/8/97. It was a Friday. I was in my friend's room at Gabaran Quarters, Katsina. It was in the night I was to sleep in my friend's room. I slept in the room."

In its quest to disprove the plea of ALIBI raised by the appellant, the prosecution called a number of witnesses, chief among which were
 B PW8 and PW10. PW8 - Abdulrasheed in his testimony before the court said inter alia: -

*"I knew the accused on 2/1/97. I was at Gabaran Quarters Katsina. At about 4 a.m. I was sleep (sic) at the quarters. I was having
 C fever. I slept late when I woke I found the accused person by my side. He was wearing a jacket and a trouser. He told me that there visitor (sic) in his house and he left his room to the visitor to sleep in so he come (sic) to me to sleep in my room. I only saw him in the morning in my room. I could not say when he entered the room as I was asleep
 D then (sic) he entered. I went to bed around 9 p.m."*

Again, PW10 - Abdulazi Garba said inter alia: -

*"I live at Gabaran quarters Katsina. I am Abdulazi Garba. He lives in Gabaran Katsina. He is my son. We live in the same house. On
 E the 1/8/97 at around at about 9.30 p.m. I was at home, I close my door every day at 9 p.m. the following day I opened the door to for (sic) the house after morning prayers. I said the morning prayers at 6 a.m. that is all."*

Faced with these pieces of evidence, the court below reacted
 F thus: -

"With the testimonies of PW8 and PW10 it becomes imperative on the appellant to give clue on the manner and time he enters PW8's room if his defence of Alibi is to succeed."

With due respect to the court below, its reasoning is wrong in
 G law. It is now very well established in our criminal jurisprudence that when an accused raises the defence of ALIBI, all he need do is to introduce evidence or facts leading to that conclusion. Once an ALIBI has been raised, the burden is on the prosecution to investigate and rebut such evidence in order to prove its case beyond reasonable
 H doubt. There is nothing on record to show that the prosecution investigated the authenticity of the materials provided by the appellant. And the evidence the prosecution proffered did not, by any stretch of imagination, rebut that defence. In effect, the defence of ALIBI raised by the appellant certainly availed him. On it alone, the

appellant ought to have been discharged and acquitted.

I have been privileged to read the lead judgment of my learned brother, Katsina-Alu JSC. I agree with his reasoning and conclusion that this appeal is meritorious. For what I have said supra, but most especially for the fuller reasons contained in the lead judgment of my learned brother Katsina-Alu JSC, I also allow the appeal. Consequently, I set aside the appellant's conviction and sentence while I return a verdict of discharge and acquittal in his favour.

CHUKWUMA-ENEH JSC

This appeal is against the decision of the Kaduna Division of the Court of Appeal dismissing the accused's (appellant) appeal against his conviction and sentence to death passed on him by the Robbery and Firearms Tribunal of Katsina State.

For the point I take in this appeal, suffice it to say that I rely heavily on the facts as set out in the lead judgment of my learned brother Katsina-Alu, JSC. It is however enough to recall that the accused has denied any involvement in the murder of one Abdulkabir Lawal during an Armed Robbery Operation. He has pleaded alibi in his defence to the charge of Armed Robbery. In his statement exhibit D made at the earliest opportunity he has said that on the fateful night he has slept in the house of his friend Ali in Gabarau Quarters. To meet the need for a countervailing evidence to the accused's plea of alibi, the prosecution has to call PW8 and PW10 whose testimonies, in sum, have come to the effect that the accused has spent the fateful night in the Room of PW8 till the next morning although he, PW8, has been unaware of the time and manner he, the accused, has entered his Room. PW10, on the other hand, is categorical in her testimony that the door to the house of PW8 has been closed at about 9 p.m. that night till after the morning prayers the next day.

Against the force of these facts, the trial court as per page 61 of the Record LL. 11 to 20 has found thus:

"His friend who testified as a prosecution witness No. 10 stated that he only saw the accused person in his Room in the morning. He did not know when the accused person entered the Room though he admitted that he went to bed earlier that night as he was feverish. Alibi is only known to the person who raises it as it is only peculiar to

him and it is therefore a question of fact which must be proved. We have seen that the case under reference the accused person said he slept elsewhere his evidence and that of PW9 cannot amount to proof on Alibi as a defence in the matter.”

B Further down in the trial court’s judgment at pp. 61-62 it has observed from line 11 from the bottom of that page thus:

“..... but at what time did he enter the Room. This is a fact that could only be known by the accused person. One could also ask how did he enter the house since PW10 said she used to close the house at 9 p.m. daily. The accused person did not explain that. It is possible in view of the nearness of both the PW9 Residence and the scene of the crime for the accused person to commit the offence alleged and to go to PW9 house and spent the rest of the night there. To prove Alibi the accused person must show that such presumption stated above was not possible and to show also that at the material time of committing the crime he was at place far away thus not possible for him to commit the crime at the scene. I think the defence of Alibi the accused person suggest in his defence has failed in the scene (sic) that the accused person has shown or proved it.....”

E On the backdrop of the foregoing the Court of Appeal has agreed with the trial court herein where for it has found thus:

“.....with the testimonies of PW8 and PW10, it becomes imperative on the appellant to give clue on the manner and time he enters PW8’s Room if his defence of Alibi is to succeed.”

F I have set the reactions of both lower courts along side each other in order to bring home the complete misconception by both lower courts on whom lies the burden of proof in this matter and whether that burden shifts.

G It is a settled principle of our law expressed in high authorities of this court that the burden of proof in criminal cases does not shift, it lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused person. Even more so the onus does not shift onto the accused to establish any defence. This is so in cases of alibi. See: ONUBOGU V. THE STATE (1974) 9 S.C. 1, STEPHEN V. STATE (1986) 5 NWLR (Pt.46) 978 and IKEMSON V. STATE (1989) 1 CLRN 1. NWAGU V. THE STATE (1986) NSCC (Vol.4) 245. Also see: WOOLMINGTON V. D.P.P. (1935) AC 462. I make the above assertion in that as in this case where the accused

has set up a plea of alibi he is only obliged in law as he is alleging he has been somewhere else at the time the crime has been committed to furnish at the earliest opportunity to the police the particulars of his alibi. This is putting it at its highest degree of the nature of the responsibility on the accused in this case; in other words, the standard of proof is no higher than on balance of probability. This is so as it is a matter particularly within his peculiar knowledge. In the instant case the accused has done just that when in exhibit D - his statement to the police, he has divulged that he has slept in the house of PW8 that fateful night and there is credible evidence from PW10 to suggest that the door to PW8's house has been closed that night at about 9 p.m; and only has to be opened after morning prayers the next day. Having alleged these facts the onus is on the prosecution to displace them and so destroy the foundation of the alibi and to show that the accused has been at the scene of the crime at the material time. The prosecution has totally failed in these respects as the facts upon which the accused's alibi is rested have been proved to be well grounded.

There can be no doubt that the accused has succeeded in raising a reasonable doubt as to his being at the scene of the crime that fateful night.

It is an unplugged hole in the prosecution's case that notwithstanding the presence of other persons (apart from PW8, PW9 and PW10) who, it is alleged, have slept in PW8's house that fateful night, all the same, the prosecution has failed to show when and how the accused managed to gain ingress into PW8's Room after committing the alleged armed Robbery. No reason has been forthcoming from the prosecution for failing to call them to debunk this missing link in the prosecution's case. Thus, the accused's case has showed in this court of the unreasonableness of the concurrent findings of facts on the plea of alibi by both lower courts as not having flowed from the evidence accepted by both lower courts and so perverse. This point is well taken as the principles guiding the court's interference with concurrent findings of facts by both the trial court and the Court of Appeal in civil and criminal proceedings are similar and are otherwise applicable to this case. See: AMUSA OPOOLA ADIO & ANOR V. THE STATE (1986) 2 NWLR (Pt.24) 581; OGUONZEE V. STATE (1998) 5 NMLR (Pt.551) 521 at 546 per Iguh, JSC and at 580 per

Wali, JSC, also MAJA V. STOCEO (1968) 1 ANLR 141 at 149, WOLUCHEM V. GUDI (1981) 5 S.C. 291 at 295-64 at 326-9 and OKULATE V. AWOSANYA (2000) 1 S.C. 107. And so, this court rightly has intervened to re-appraise the case of alibi raised in this case afresh in order to prevent a miscarriage of justice. It is clear that the plea of alibi raised by the accused, on the peculiar facts of this case based on my reasoning above is tenable and I so hold.

More importantly, considering my findings of facts above on the case of plea of alibi by the accused in this matter along side the blithe disregard by the prosecution for the facts as regards the flawed identification parade (an issue exhaustively treated and decided upon in the lead judgment) in which the deceased's wife PW7 has purported to identify the accused as her husband's killer that fateful night in the wake of executing armed Robbery, a clear case scenario which has unmistakably raised a pervading doubt in regard to the credibility of the prosecution witnesses as a whole in this matter. See: NTAM V. THE STATE (1968) NMLR 86. The benefit of doubt in this regard should be exercised in the accused's favour. The court below, in my view, therefore, has erred in relying on the weak and unreliable prosecution's case to convict the accused.

It is on this note and much more solid reasoning and conclusions on the question of alibi and on other issues considered in the lead judgment of my learned brother Katsina-Alu JSC, which I have read in draft before now that I agree there is merit in this appeal and that it should be allowed. I also allow it and set aside the judgments of both lower courts in this matter. I abide by the orders contained in the lead judgment.

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