

SUPREME COURT OF NIGERIA
5TH DAY OF MARCH, 2010, S.C. 161/2009
CORAM:- N. TOBI, A. M. MUKHTAR, I. F. OGBUAGU,
J. O. OGBE, J. A. FABIYI, JJSC

ABUBAKAR TIJANI SHEHU APPELLANT
V.
THE STATE RESPONDENT

CHARGES - Contents - "Time" - Meaning - Time in section 202 of CPC Law of Kogi State - Refers to the day the offence was committed - Not to the hour of the day (H1)

CRIMINAL PROCEDURE - Defences - Alibi - Manner of raising - Once an accused person discloses his whereabouts - At the material time to the police - Demand for further particulars would amount to requiring him to prove his innocence (H2)

CRIMINAL PROCEDURE - Alibi - Failure to investigate - Effect - Where the defence is properly raised - But the police fails to investigate it - It may warrant an invocation of s. 149 (d) of Evidence Act - Against the prosecution (H3)

EVIDENCE - Crime - Proof - Effect of suspicion - Suspicion however strong cannot take the place of legal proof - Nor can it found or lead to a conviction (H4)

FACTS

Appellant was arraigned and tried on a one count charge of mischief by fire punishable under section 337 of the Penal Code before the High Court of Kogi State. The case of the prosecution was that appellant entered the chambers of the president of the Upper Area Court, Ebogogo and set it and the files therein on fire intending to cause destruction of the building and the case files. It was in evidence that appellant had two pending criminal cases before the Upper Area court in one of which he was an accused while he was the complainant in the second. However, there was no eye witness identifying appellant as the culprit. Moreover, though appellant raised a

plea of alibi, the police never investigated the plea.

Nonetheless, at the end of trial, the learned trial judge found appellant guilty as charged and sentenced him accordingly. Aggrieved, appellant appealed to Court of Appeal but his appeal was dismissed. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Was the Court of Appeal right in holding that there was compelling, cogent and positive circumstantial evidence which could only point to the guilt of the Appellant and none other?"

2. Was the Court of Appeal right in holding that the evidence adduced by the prosecution witnesses was not based on mere suspicion but established the guilt of the Appellant beyond reasonable doubt?"

3. Was the Court of Appeal right in holding that the defence of alibi raised by the Appellant could not avail the Appellant ?

4. Did the omission to state in the Charge Sheet the time of the day of the alleged offence of mischief by fire said to have been committed by the Appellant not occasion a miscarriage of justice."

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

CHARGES - Contents - "Time" - Meaning

1. I will also reproduce herein, the provisions of Section 202 of the Criminal Procedure Code (hereinafter called the "C.P.C.") It states as follows:

"The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom, or the thing, if any, in respect of which, it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged".

As rightly stated in the case of Garba & ors. v. The State (supra), the charge in the instant case, complies with the specimen of the charge contained in Appendix B of the CPC made in pursuance of Section 100 of the CPC Cap. 30 of the Laws of Northern Nigeria, 1963 applicable to Kogi State. The draft charge in the said Appendix, does not contain any provision for the hour of the day the crime was committed. I also hold that the time stated in Section 202 (supra) is with reference to the day the offence was committed and not to the

hour of the day. (p. 1176 A)

Alibi - Manner of raising

2. It is no longer in doubt that if an alibi is properly raised, it is the duty of the prosecution, to investigate it. It is however, the duty of the accused person relying on an alibi, to give detail of the alibi he has set up, to enable the prosecution or the Police to investigate it. His duty, involves letting the police know at the earliest opportunity where and with whom he was at the material time.

The defence is complete, once an accused person discloses to the Police, his whereabouts without more at the time of the commission of the crime. To demand for further particulars, would amount to shifting to accused person, the burden of proving his innocence. (p. 1177 D/F)

Alibi - Failure to investigate - Effect

3. As a matter of fact, by the said argument in paragraphs 7.2 to 7.5 of the Respondent's Brief, in my respectful but firm view, he was shifting the onus of proof on the Appellant to establish his innocence. I note that in the said paragraph 7.2 of the Brief, he submitted inter alia: (and which is settled law in a number of decided authorities)

Where alibi is set up the primary onus of establishing the guilt of the Appellant is still on the prosecution but the evidential or secondary burden is on the Appellant to adduce some evidence of where he was at the material time".

But yet, in spite of the above, he submitted that in the instant case, the Appellant was not able to discharge the burden placed on him. With respect, I do not agree with this submission. The Appellant did. His assertion of his whereabouts on the date and time of the crime, I repeat, was NEVER investigated by the Police who was not called as a witness by the Prosecution. I think I can rightly invoke Section 149 (d) of the Evidence Act against the Respondent. (p. 1178 G/1179 A)

Crime - Proof - Effect of suspicion

4. Indeed, the said words of the elders referred to by the learned trial Judge at page 38 of the Records, is confirmation that the whole case against the appellant is based on suspicion or speculation. It said it all.

There could not have been compelling, cogent and positive circumstantial evidence, which could only point to the guilt of the Appellant and none other.

It is now firmly settled that it is elementary proposition, that suspicion however strong, will not found or lead to a conviction. In other words, it cannot take the place of legal proof. (p. 1180 E/H)

NOTABLE POINT INTEREST

TOBI JSC

Alibi - Disproving of - Court may have to deal with minutes

Where an accused relies on the defence of alibi, it is the duty of the prosecution to disprove the defence and prove that the accused was at the scene of the crime and in fact committed the crime.

And here, the court will be dealing with the hours, the minutes and possibly the seconds, if the facts of the case will make the seconds necessary. It may not be so, as it is not so in many cases. This does not mean that it is impossible.

In this appeal, the appellant said he was in his house at the material time the offence was committed. The burden was on the prosecution to show that he was not in his house but at the scene of crime and in fact committed the crime. That did not happen. (p. 1183 A)

REPRESENTATION

Silva Ogwemoh Esq., for the Appellant with him, Usman Mohammed, Esqr. & Shehu Adamu, Esqr.

B. Dambo, Esq., for the Respondent with him, Udomezue, Chumike Nwagwu (Miss).

CASES REFERRED TO

Adio v. The State (1986) 3 NWLR (Pt. 31) 714

State v. Ajie 2000 11 NWLR part 678 page 435

Akpan v. The State (1986) 3 NWLR (Pt. 27) 225

Okere v. State 2001 2 NWLR part 697 page 397

Chukwu v. State 1996 7 NWLR part 463 page 686

Namsoh v. State 1993 5 NWLR part 292 page 129

Bamaiyi v. The State (2006) 12 NWLR (Pt. 994) 221

State v. Ogunbanjo 2001 2 NWLR part 698 page 576

Ozaki & anor. v. The State (1990)1 NWLR (Pt. 124) 92
Adamu & ors. The State (1986) NWLR (Pt. 32) 865 @ 881
Olakaibe v. The State (1990) 1 NWLR (Pt. 129) 632 @ 644
Obakpolor v. The State (1991)1 NWLR (Pt. 165) 153 @ 124,129,135
Garba & 2 ors. v. The State (1999) 11 NWLR (Pt. 627) 422 @ 440 B
Dogo & 4 ors. v. The State (2001 3 NWLR (Pt. 699) 192 @ 208, 210
FRN v. Senator Adewunmi (2007) 10 NWLR (Pt. 1042) 399 @ 423-424
Ndukwe v. LPDC. (2007) 5 NWLR (Pt. 1026) 1 @ 52, 53, (2007) 2 C
KLR (Pt. 230) 1003 @ 1044-1055

STATUTES REFERRED TO

Penal Code, s. 337 D
Evidence Act, 1990, s. 199
Criminal Procedure Code of Kogi State, ss. 202 & 282
Criminal Procedure Act, s. 167

LEAD JUDGMENT BY OGBUAGU JSC E

This is an appeal against the Judgment of the Court of Appeal, Abuja Division (hereinafter called “the court below”) delivered on 13th January, 2009, dismissing the Appellant’s appeal and affirming the Judgment of the High Court of Kogi State sitting at Okene - per Olusiya, J. delivered on 22nd May, 2007, convicting and sentencing the Appellant on a one count charge of mischief by fire punishable under Section 337 of the Penal Code to two (2) years imprisonment without an option of fine and a fine of N5,000.00 (five thousand naira) or to imprisonment for nine (9) months in default. F G

Dissatisfied with the Judgment, the Appellant has appealed to this Court on seven (7) Grounds of Appeal which without their particulars, read as follows:

“GROUNDS 1: (sic)

The Learned Justices of the Court of Appeal erred in law H when they held that the prosecution proved the case against the Appellant beyond reasonable doubt, when in actual fact there was no evidence to show that the accused in fact committed the offence and thereby occasioned a miscarriage of justice.

GROUND 2:

The Learned Justices of the Court of Appeal erred in law when they held that there were compelling, cogent and positive circumstances which point to the guilt of the Appellant and no other without more and thereby occasioned a miscarriage of justice.

B **GROUND 3:**

The Learned Justice of the Court of Appeal erred in law when they held that omitting the time of the day the offence was committed in the charge against the Appellant did not occasion a miscarriage of justice.

C **GROUND 4:**

The learned Justice (sic) of the Court of Appeal erred in law in holding that the defence of alibi was not available to the Appellant and thereby occasioned a miscarriage of justice.

D **GROUND 5:**

The Learned Justices of the Court of Appeal misdirected themselves and drew wrong inferences which cumulatively occasioned a miscarriage of justice.

E **GROUND 6:**

The Learned Justice (sic) of the Court of Appeal erred in law in failing to resolve the many conflicts in the evidence of the prosecution witnesses in favour of the Appellant.

GROUND 7:F *The judgment of the lower court is manifestly against the weight of evidence before the court".*

The facts of this case are that the Appellant was arraigned in the trial court on a one court charge which reads as follows:

G *"That you ABUBAKAR TIJANI SHEHU on or about the 26th day of November, 2002 at the Upper Area Court Ebogogo in Okene Local Government Area of Kogi State in the Kogi State Judicial Division committed mischief by fire, to wit; you entered the Chambers of the President of the Upper Area Court Ebogogo and set it and the files therein on fire intending to cause destruction of the building and the case files and you thereby committed an offence punishable under Section 337 of the Penal Code".*

[the underlining mine]

The Appellant pleaded Not Guilty. Five (5) witnesses testified for the prosecution while the Appellant and his wife, testified after his

learned counsel's No Case submission, was overruled. Both in his Statement to the Police after his arrest and in his evidence in court, he relied on the defence of Alibi. I note that the learned trial court refused to admit his said Statement to the Police on 30th November, 2002, on the ground that the learned Prosecuting Counsel who tendered the Statement, did not comply with the Provisions of Section 199 of the Evidence Act, 1990. At the conclusion of the defence and addresses by the learned counsel for the parties, as noted earlier in this Judgment, the learned trial Judge in his considered Judgment, found the Appellant guilty and convicted and sentenced him. His appeal to the court below, was dismissed hence the instant appeal.

The Appellant has formulated four (4) issues for determination namely,

"1. Was the Court of Appeal right in holding that there was compelling, cogent and positive circumstantial evidence which could only point to the guilt of the Appellant and none other?"

2. Was the Court of Appeal right in holding that the evidence adduced by the prosecution witnesses was not based on mere suspicion but established the guilt of the Appellant beyond reasonable doubt?"

3. Was the Court of Appeal right in holding that the defence of alibi raised by the Appellant could not avail the Appellant ?

4. Did the omission to state in the Charge Sheet the time of the day of the allege offence of mischief by fire said to have been committed by the Appellant not occasion a miscarriage of justice?"

I note that it is stated that the above issues were/are raised from the six (6) grounds of appeal in the Notice of Appeal which I note at page 128 of the Records, is not dated but stated in the Brief as dated on 12th June, 2009.

On its part, the Respondent formulated three issues for determination. They read as follows:

"(1) Whether the Court of Appeal was right to have come to the finding that from the overwhelming circumstantial evidence, the prosecution witnesses were able to prove the guilt of the Appellant beyond reasonable doubt.

(2) Whether the Court of Appeal was right in holding that the charge was good in law even though it did not state the actual time the offence of mischief by fire was committed.

(3) Whether the Court of Appeal considered and rightly rejected the defence of alibi put up by the Appellant”.

I note that in the argument of the above issues, Issue 1 is said to be distilled from Grounds 1, 2, 3, 5, 6 and 7 of the Grounds of Appeal While issue 2 is stated to cover Ground 3 and that that issue, B is in respect of Grounds’ 3 and 4 of the Grounds of Appeal.

Since the Respondent has included Ground 7 of the Grounds of Appeal under Issue 1, it need be stated by me that it is now settled that in couching of an omnibus ground in criminal cases, the words C used are “..... is unwarranted having regard to the evidence adduced” and not “having regard to the weight of evidence” as in civil Cases. See the cases of *Akibu v. Opaleye & anor* (1974) 11 S.C 189 and *Adelesola & ors. vs. Akinnide & ors.*, (2004) 5 SCNJ. 235; (2004) 5 S.C. (Pt. II) 71 @ 76-77; (2004) 12 NWLR (Pt. 887) 295 D @ 310-311. See also the cases of *Aladesuru v. The Queen* (1956) A.C. 49; 39 Cr. App. R. 184 P.C.; and *Enilari & 2 ors. v. The State* (1986) 3 NWLR 604 S.C. That in a criminal appeal, the point is not the preponderance of evidence on one side which outweighs the evidence on the other side.

E But in the case of *Mbam Iboko & ors. v. Police* (1965) NMLR 384 S. C. - per incuriam, it is stated that High Court Judges should see that it is a pardonable mistake and the words “weight” should be deleted and counsel should be invited to argue the appeal with the right approach as laid down in the case of *Queen v. Omisade & ors.* F (1964) NMLR 67 @ 78. In other words, although such ground may be incompetent, the court, in an effort to do substantial justice, may allow an amendment in additional grounds or perhaps, ignore it and proceed on the merits of the appeal. I will therefore, regard and treat G the couching of Ground 7 of the grounds of appeal as a pardonable mistake on the part of the learned counsel for the Appellant.

I will take quickly issue 4 of the Appellant which is covered by Ground 3 of the Grounds of Appeal together with issue 2 of the Respondent, since it appears to me, that the learned counsel for both H parties, have made too much fuss or weather in respect thereof in their respective Brief. I note that in the said charge, the time when the offence was allegedly committed, is not stated. This fact is conceded at page 28 of the Records by the learned counsel for the Respondent in his Address in the trial court. But he referred to the evi-

dence of the PW5 who mentioned the time of the day the incident took place and submitted in the two lower courts that the Appellant was not misled nor did he suffer any failure of justice. The learned trial Judge at pages 37 and 38 of the Records in his Judgment, relied on the evidence of the PW5 and on Section 382 of the Criminal Procedure Code. Said he inter alia:

“Although the charge did not state or specify the time of the day of the commission of the alleged offence by the accused person, the evidence of P.W.5 filled in that gap P.W.5 told the Court that the time was 3.00 a.m. on 26/1/2002. Even if this was a defect in the charge, the evidence of P.W.5 had cured it and no failure of justice had been occasioned thereby”.

The court below at pages 97 to 102 of the Records, dealt with the same issue in Issue 1 in that court. It also reproduced the provisions of Section 202 of the Criminal Procedure Code and referred to the case of Garba & 2 ors. v. The State (1999) 11 NWLR (Pt. 627) 422 @ 440 C.A. and reproduced part of the concurring Judgment of Salami, JCA (now President) and held firstly, agreeing with the submission of the learned counsel for the Respondent that the alleged omission, did not occasion any miscarriage of justice to the Appellant and that not being a requirement of the law, is/was not injurious and could not be said to have vitiated the trial and conviction of the Appellant.

Secondly, it held that is submitted by the learned counsel for the Respondent, since the Appellant did not object to the charge, that this amounted to a waiver since the law is trite that any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later - i.e. that any objection to a formal defect in a charge, must be taken before the plea, otherwise, the objection would be deemed to have been waived. It referred to and relied on the cases of Adio v. The State (1986) 3 NWLR (Pt. 31) 714; Agbo v. The State (2006) 6 NWLR (Pt. 977) 545 and Bamaïyi v. The State (2006) 12 NWLR (Pt. 994) 221. It further held that it is settled law that an accused person who acquiesced to an irregular procedure of his trial, cannot complain about the irregularity on appeal, if it did not lead to a miscarriage of justice. It finally, resolved the issue against the Appellant and in favour of the Respondent.

For purposes of emphasis, ***I will also reproduce herein, the provisions of Section 202 of the Criminal Procedure Code (hereinafter called the “C.P.C.”) It states as follows:***

“The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom, or the thing, if any, in respect of which, it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged”.

As rightly stated in the case of Garba & ors. v. The State (supra), the charge in the instant case, complies with the specimen of the charge contained in Appendix B of the CPC made in pursuance of Section 100 of the CPC Cap. 30 of the laws of Northern Nigeria, 1963 applicable to Kogi State. The draft charge in the said Appendix, does not contain any provision for the hour of the day the crime was committed. I also hold that the time stated in Section 202 (supra) is with reference to the day the offence was committed and not to the hour of the day. The non-inclusion of the time in the charge, I hold and agree with the Respondent in their Brief, is a mere irregularity.

By virtue of Section 167 of the Criminal Procedure Act, an objection to a charge for any formal defect on the face of thereof, must be taken immediately after the charge has been read over to the Accused. See the case of Obakpolor v. The State (1991) 1 NWLR (Pt. 165) 153 @ 124,129,135 cited and relied on by the Respondent. (It is also reported in (1991) 1 SCNJ. 91).

In the case of Agbo v. The State (supra) @ 584 – 585 it is also reported in (2006) 1 SCNJ. 332 @ 351; (2006) 1 S.C (Pt. II) 73 @ 96 - 97; (2006).135 LRCN 808 @ 882-848; (2006) 2 SCM 1 @ 7-25; (2006) ALL FWLR (pt. 309) 1380 @ 1395 - 1412; (2006) 4 JNSC (Pt. 13) 253 @ 262-282; (2006) Vol. 6 QCCR (Quarterly Criminal Cases Reports) 48 @ 65-82 and (2007) 10 WRN (Weekly Reports of Nigeria) 95 @ 110-132, I dealt with this issue as to the time or stage, an objection to a charge for any formal defect in the charge, should and ought to be taken and the consequence of failure to do so. See also the cases of Ndukwe v. LPDC. (The Legal Practitioners Disciplinary Committee) & anor. (2007) 5 NWLR (Pt. 1026) 1 @ 52, 53 cited and relied on in the Respondent’s Brief (it is also reported in (2007) 2 SCNJ. 1 @ 34 - 43; (2007) 1 - 2 S.C. 253 @

301 - 316; (2007) 146 LRCN 804 @ 833. - 841; (2007) All FWLR (Pt. 359) 1211 @ 1251-1261; (2007) 5 SCM 106 @ 142-152; (2007) 29 NSCQR 518 @ 568-581 and (2007) 2 KLR (Pt. 230) 1003 @ 1044-1055; and FRN v. Senator Adewunmi (2007) 10 NWLR (Pt. 1042) 399 @ 423-424 (it is also reported in (2007) 4 SCNJ. 243).

I also agree with the Respondent in their Brief, that there is no miscarriage of justice for the alleged omission. My answer therefore, to the said Issue 4 of the Appellant is in the Negative and in respect of the said Issue 2 of the Respondent, is rendered in Positive/Affirmative.

I will now deal with issue 3 of the parties. Alibi as is now firmly settled, means “some where else”. See the case of Ozaki & anor. v. The State (1990)1 NWLR (Pt. 124) 92; (1990) 1 SCNJ. 76 and Garba & ors. v. The State (supra). ***It is no longer in doubt that if an alibi is properly raised, it is the duty of the prosecution, to investigate it. It is however, the duty of the accused person relying on an alibi, to give detail of the alibi he has set up, to enable the prosecution or the Police to investigate it. His duty, involves letting the police know at the earliest opportunity where and with whom he was at the material time.*** See the cases of Akpan v. The State (1986) 3 NWLR (Pt. 27) 225; Obakpolor v. The State (supra); Akpan v. The State (1991) 5 SCNJ. 105 and Ogoda v. The State (1991)8 SCNJ. 61 just to mention but a few. ***The defence is complete, once an accused person discloses to the Police, his whereabouts without more at the time of the commission of the crime. To demand for further particulars, would amount to shifting to accused person, the burden of proving his innocence.*** See the cases of Ozaki & anor. v. The State (supra); Ozuluonye & 11 ors. v. The State (1981) 1 NCR 38 CA; Ihekwe v. Police (1980) IMSLR 538.

I have noted earlier in this Judgment, that the Appellant, made a Statement to the Police and during his defence about his whereabouts. This/it was rejected by the learned trial Judge when it was tendered under Cross-examination by the prosecution. See pages 8 and 9 of the Records. What he stated in his evidence at the trial court at page 22 thereof and under cross-examination at page 24, are clear. Said he in-chief inter alia:

“On 26/11/2002 I was in my house throughout that day except when I went to see my lawyer between 12 noon and 12.30 p.m. to discuss my case in the Upper Area Court, Okene. I remained in my house thereafter throughout that day with my wife”. [the underlining mine]

B I note that his wife testified on his behalf as DW2. I note also that the Police who investigated the matter, if any, never testified. In fact the alibi, was never investigated by the Police. There is no evidence from the prosecution, that the Appellant was ever seen at the scene at the time of the crime. PW5 -the eye witness at page 17 of the Records, testified that at about 3.00a.m, “he discovered that the Chambers of the President of Upper Area Court, Ebogogo, was on fire” and that he shouted for help. That he ran to the people living nearby who came to assist him in putting out the fire. Said he on oath:

“There was no electricity light at the Upper Area court; Ebogogo at that timeThe window of the chambers of the president of the Upper Area court, Ebogogo, had no louvers but it had burglary proof”.

E I note that this witness, did not say that there was moon light at that time. He did not say he saw the Appellant.

With the greatest respect, I am not impressed or persuaded by the argument or distinction that the learned counsel for the prosecution drew at pages 18 and 19 of their Brief between the said statement the Appellant made at the first opportunity at the time of his arrest by the Police and his evidence on oath at the trial. With respect, the latter, was not an after thought as falsely submitted by the Respondent’s learned counsel. Again, I hold that it was not a glib defence not worthy of positive consideration as it was/is not an attempt to smuggle in the defence for the first time in his evidence in court as stated by the court below at page 120 of the Records. **As a matter of fact, by the said argument in paragraphs 7.2 to 7.5 of the Respondent’s Brief, in my respectful but firm view, he was shifting the onus of proof on the Appellant to establish his innocence. I note that in the said paragraph 7.2 of the Brief, he submitted inter alia: (and which is settled law in a number of decided authorities)**

“My Lords, alibi is a defence available to an accused person

(the Appellant in the instant case) who normally raises it early as a suspect or later as an accused person in Police investigation room.

Where alibi is set up the primary onus of establishing the guilt of the Appellant is still on the prosecution but the evidential or secondary burden is on the Appellant to adduce some evidence of where he was at the material time”.

But yet, in spite of the above, he submitted that in the instant case, the Appellant was not able to discharge the burden placed on him. With respect, I do not agree with this submission. The Appellant did. His assertion of his whereabouts on the date and time of the crime, I repeat, was NEVER investigated by the Police who was not called as a witness by the Prosecution. I think I can rightly invoke Section 149 (d) of the Evidence Act against the Respondent. He called his wife who confirmed his assertion. Their evidence, was not controverted in cross-examination. As a matter of fact, the reliance by the two lower courts on the evidence of PW5 who was also even arrested and arraigned in the Chief Magistrate’s Court in Lokoja and whose fate was or is yet to be determined, with respect, was the greatest injustice meted to the Appellant who was never fixed to the said crime by that witness. It is also a cardinal principle of law that no claim of alibi, Should be disregarded by the prosecution without a check. See the cases of Yamu v. The State (1965) NMLR 337, 357; Odidika v. The State (1977) 2 S.C 21 and Nwosisi v. The State (1976) 6 S.C. 109. My answer to the said issue of the parties, is rendered in emphatic Negative. I find as fact and hold that the Plea of alibi availed the Appellant.

This brings me to Issue 2 of the Appellant. I have no hesitation whatsoever, in agreeing with all the submissions in paragraphs 5.5 to 5.12 of the Appellant’s Brief. There is evidence by the PW4 the Registrar of the said Upper Area Court under cross-examination, that some of the staff of that court including the PW5, were also arrested and that PW5 told her that he did not know how the fire incident started. It was the PW4 who told the Police as admitted by her in cross-examination, that she suspected the Appellant and she confessed, that she did not see him set fire to the court building. What is more, there is even no evidence that the building was destroyed, burnt or damaged. What were burnt were files. So ingredient (iii) of the charge was not established by the prosecution. Regrettably and

unfortunately, the two lower courts relied on the alleged boasts or threats of the Appellant to the said witnesses. I note that it was (not to set fire on the building of the court), but in respect of the PW1 - that very soon, he the Appellant would do something that will make the case to be started afresh. This witness under cross-examination, stated/
 B admitted that he did not report the alleged threat by the accused person, to the Police and that he did not see him set the fire to the said court. In respect of PW2 - "the very good friend" of the Appellant, stated that the Appellant told him that the trend of the case
 C between the PW1 and the Appellant in the Upper Area Court, Ebegogo, was going to change and that he the witness, should watch out. PW3 - the President of the Court in his evidence in-chief, testified that he did not know the cause of the fire incident. Under cross-examination, he confirmed that majority of the staff of that court,
 D were arrested and detained by the Police. Why not? If I or one may ask. As I noted earlier in this Judgment, PW5 testified that although the windows of the Chambers had no louvers, it had burglary proof. So, there is the possibility that one or more of the staff, may or must have entered the said Chambers including the PW5, and set it on
 E fire. These are possibilities and probabilities.

Indeed, the said words of the elders referred to by the learned trial Judge at page 38 of the Records, is confirmation that the whole case against the appellant is based on suspicion or speculation. It said it all. Said His Lordship:
 F

*"The witch cried in the night and the child died in the morning, the killer of the child is no other person than the witch. To put it in another way, when the neighbourhood witch manifests in the night and the child mysteriously dies in the morning, one doesn't need
 G any prescience to understand that there is a good case for murder".*

It didn't say murder by who or it is perhaps, by the witch even though there are possibilities that the child may have died from many other causes death. Perhaps, this saying is akin to that of my people that a man should not suffer diarrhoea on the very day that a goat is
 H missing or stolen" (i.e. as a result of eating or drinking goat pepper soup), the diarrhoea may have been caused by or through other sources such as eating or drinking some contaminated food or water. All the above are based on suspicion or speculation. **There could not have been compelling, cogent and positive circumstantial**

evidence, which could only point to the guilt of the Appellant and none other.

It is now firmly settled that it is elementary proposition, that suspicion however strong, will not found or lead to a conviction. In other words, it cannot take the place of legal proof. See the cases of Okafor v. Commissioner of Police (1965) B NMLR 89 & 90; Abieke & anor. v. The State (1975) 9-11 S.C. 97 @ 110; (1975) ALL NLR (Pt. 1) 57; Ikham v. Police (1977) 6 S.C. 119 @ 122; Adamu & ors. v. The State (1986) NWLR (Pt. 32) 865 @ 881; R v. Egwuonye (Pt....) 15 WACA 1; R v. Wallace 23 CAR 52; Idowu v. The State (1998) 9 SCNJ. 40 @ 56; (1998) 11 NWLR (Pt. 574) 354 @ 370; per Onu, JSC citing several other cases therein. C

I agree with the submission in paragraph 5.6 page 10 of the Appellant's Brief of Argument and this is also now firmly settled in a line of decided authorities, that it is better for ten guilty persons to escape than one innocent person to or should suffer. In other words, it is better to acquit ten guilty men, than to convict an innocent man. See the cases of Stephen Ukorah v. The State (1977) 4 S.C. 167 @ 177; Olakaibe v. The State (1990) 1 NWLR (Pt. 129) 632 @ 644 C.A. - per Kolawole, JCA (of blessed memory). In the case of Saidu E v. The State (1982) 4 S.C. 41 @ 69 - 70, Obaseki, JSC stated inter alia, as follows:

"It does not give the Court any joy to see offenders escape the penalty they richly deserve but until they are proved guilty under the appropriate law in our law courts, they are entitled to walk about in the streets and tread the Nigerian soil and breathe the Nigerian air as free and innocent men and women" F

On his part, Sir Matthew Hale is quoted as once remarking that: G

"It is better that 5 criminals escape Justice rather than one innocent person to be punished for an offence he did not commit".

So be it with the Appellant. In all the circumstances of the evidence before the Court which are borne out from the Records, I will give the benefit of my doubt, in favour of the Appellant and render my answer to Issue 2 of the Appellant, in the Negative. H

In respect of the last issue - i.e. Issue 1 of the parties, without much ado, from all I have said in respect of Issues 2 and 3 of the Appellant and Issue 3 of the Respondent, my answer to this issue is

definitely rendered in the Negative. The Appellant is entitled to the benefit of my doubt and I find as a fact and hold that the prosecution were unable to and did not prove its case beyond reasonable doubt. With respect, the hollow and inconsequential purported circumstantial evidence relied on by the learned counsel for the Respondent
B and the two lower courts, cannot be supported or sustained by me or this Court having regard to what I have stated in respect of issues 2 and 3 of the Appellant and issue 3 of the Respondent.

I note that there are concurrent findings of facts by the two
C lower courts, but the attitude of this court is that when the findings of facts, are either erroneous in substance or will lead to a miscarriage of justice as has been shown by me in this Judgment among other things, this Court can interfere. See the cases of Dogo & 4 ors. v. The State (2001 3 NWLR (Pt. 699) 192 @ 208, 210; (2001) 1 SCNJ. 315
D citing the cases of Nasamu v. The State (1979) 6-9 S.C. 153; Sobakin v. The State (1981) 5 S.C. 75 and Adio v. State (1986) 2 NWLR (Pt. 24) 581; Chief Akpan & 2 ors. v. Chief Uma Otong & 3 ors. (1996) 12 SCNJ. 213 @ 234 - per Iguh, JSC. citing several other cases therein and Nneji & 3 ors. v. Chief Chukwu & 7 ors. (1996) 12
E SCNJ. 388 - per Ogwuegbu, JSC citing some other cases therein.

In conclusion, I have no hesitation in finding as a fact and holding that there is merit in this appeal. It succeeds and it is accordingly allowed by me. I hereby set aside the Judgment of the court below affirming the Judgment of the trial court. The Appellant is found
F Not Guilty and he is accordingly, Acquitted and Discharged. As can be seen, the Appellant, since after May, 2009 has served out the term of his imprisonment. If he did not pay the said fine, he has to be in prison may be, till the end of this month. It is a pity. It is unfortunate.
G

TOBI JSC

I have read in draft the judgment of my learned brother,
H Ogbuagu, JSC and I agree with him.

The burden of proof in a criminal case is on the prosecution. The prosecution has to prove the case beyond reasonable doubt.

Where the prosecution fails to prove the case beyond reasonable doubt, the accused must be discharged and acquitted. There

are no two ways about this.

Alibi, a defence available to an accused person, simply means that the accused person was “elsewhere” and not in the scene of crime at the material time the crime was committed. Where an accused relies on the defence of alibi, it is the duty of the prosecution to disprove the defence and prove that the accused was at the scene of the crime and in fact committed the crime. Where the prosecution fails to prove that the accused was at the scene of crime and committed the crime, a court of law has no option than to discharge and acquit the accused.

And here, the court will be dealing with the hours, the minutes and possibly the seconds, if the facts of the case will make the seconds necessary. It may not be so, as it is not so in many cases. This does not mean that it is impossible.

In this appeal, the appellant said he was in his house at the material time the offence was committed. The burden was on the prosecution to show that he was not in his house but at the scene of crime and in fact committed the crime. That did not happen. The prosecution did not so prove and this court has no option or alternative than to resolve the doubt in favour of the appellant and I do so.

I see so much merit in this appeal and I too allow it.

MUKHTAR JSC

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Ogbuagu JSC, and I agree with him that the appeal has merit. I will however highlight some of the issues raised in the briefs of argument. The charge against the appellant, for which he pleaded not guilty reads as follows:-

“That you ABUBAKAR TIJANI SHEHU on or about the 28th day of November 2002 at upper Area Court Ebogogo in Okene Local Government Area of Kogi State in the Kogi State Judicial Division committed mischief by fire to wit; You entered the chambers of the President of the Upper Area Court Ebogogo and set it and the files therein on fire intending to cause destruction of the building and the case files and you thereby committed an offence punishable under Section 337 of the Penal Code”.

Evidence were adduced, and the learned trial judge found the

prosecution's case proved and convicted the appellant of the offence he was charged. Unhappy with the conviction he appealed to the Court of Appeal, which affirmed the decision of the trial court and concluded thus in its lead judgment:-

B *"In the outcome, though the Appellant was convicted upon circumstantial evidence, it is, nevertheless, proof beyond reasonable doubt of the guilt of the Appellant".*

C The appellant has now appealed to this court on seven grounds of appeal. Briefs of argument were exchanged. In the appellant's brief of argument are the following issues for determination.

"1. Was the Court of Appeal right in holding that there was compelling, cogent and positive circumstantial evidence which could only point to the guilt of the Appellant and none other?"

D *2. Was the Court of Appeal right in holding that the evidence adduced by the prosecution witnesses was not based on mere suspicion but established the guilt of the Appellant beyond reasonable doubt?"*

3. Was the Court of Appeal right in holding that the defence of Alibi raised by the Appellant could not avail the Appellant?"

E *4. Did the omission to state in the charge sheet the time of the day the alleged offence of mischief by fire said to have been committed by the Appellant not occasion a miscarriage of justice?"*

F The issues formulated in the respondent's brief of argument are in pari materia with the appellant's issues. I will start this judgment with the treatment of issue (1) supra. The position of the law is that for circumstantial evidence to sustain conviction, the following conditions must be met:-

G (1) The evidence must irresistibly and unequivocally lead to the guilt of the appellant.

(2) No other reasonable inference could be drawn from it.

(3) There must be no co-existing circumstances which could weaken the inference.

H The above principles and conditions have been adequately espoused in the case of *Idowu v. State*, 1998 11 NWLR part 574 page 354.

Now, to the salient pieces of evidence, given in the trial, which I will reproduce below:-

P.W.1, a man who was involved in series of court cases with

the appellant gave the following evidence:-

“On 19/11/2002, I came to Okene High Court where I had a civil case with the accused person. The criminal aspect of that case was before the Upper Area Court, Ebogogo.

Outside the Okene High Court, the accused told me that I should be happy that I had an upper hand in the case before the Upper Area Court but that very soon he will do something that will make the case to be started afresh.....

The accused told me outside the High Court Okene, that I should be ready to bring my witnesses back to court in the case before the Upper Area Court, Ebogogo”.

When cross-examined the witness testified inter alia thus:-

“I did not report the threat of the accused to the Police because I was trying to avoid having another case with him since I had about eight cases with him in court, five of which were before the Upper Area Court, Ebogogo. It is true that in one of the cases before the Upper Area Court, Ebogogo, the Accused person was the complainant. I am the complainant in one (sic) the cases pending before the Upper Area Court, Ebogogo. The case file was not burnt. I don't know whether the file of the case in which the accused was the complainant was burnt.”

P.W. 2's evidence reads thus:-

“..... He told me that he had no problem with anybody except the P.W. 1 with whom he had a case in which the court had ruled that he (the accused) had a case to answer. The accused further told me that the trend of the case in the Upper Area Court, Ebogogo was going to change and that I should watch out. On 28/11/2003, a friend of mine by name Philip Ogunade, told me that the Upper Area Court building, at Ebogogo had been burnt down.”

In the course of cross-examination P.W.4, the registrar of the Upper Area Court, testified as follows:-

“It is true that I did say in my statement to the Police that the accused person used to boast to my hearing that the case would be started afresh. The case file in which P.W.1 was complainant was not burnt because it was in my office.”

Now, are these pieces of evidence strong and cogent enough to infer that the appellant set the Upper Area Court building on fire? I think not, for a careful perusal of the evidence does not disclose that

the appellant was seen either near the vicinity of the court or on the premises of the incident. The only tangible evidence are the threats and boasts of the appellant that one of the cases will start afresh, which could be given different interpretations, one of which could be that a superior court would order a rehearing on appeal. Besides, the appellant had series of cases in the said Area Court, one of which he was a complainant. Would he actually want all the case files including the one he was a complainant burnt? I think not. The appellant may have boasted, the appellant may have voiced out threats, but he did not specify the action he was contemplating to take and that I believe casts some doubt into the belief that he set fire on the building for which he should have been given the benefit of the doubt. The law is trite that when there is doubt in the commission of a crime by an accused person such doubt should be resolved in favour of the accused. See State v. Ajie 2000 11 NWLR part 678 page 435, State v. Danjuma 1997 5 NWLR part 566 page 512, and Chukwu v. State 1996 7 NWLR part 463 page 686. The lower courts should have given the appellant the benefit of the doubt, and I am of the view that in the circumstance the Justice in the lower court erred when he held in the lead judgment thus:-

“From the record, it is glaring that the learned trial Judge in his judgment took into account matters which he ought to have taken into account, and did not shut his eyes to the obvious. He drew the light inference from adduced evidence.”

I do not agree with the above finding, for the evidence were not cogent, and compelling. It is settled law that all such qualities must exist in, the adduced evidence to ground and sustain conviction of an accused person. See Ijiofor v. State 2001 9 NWLR part 371, Ukorah v. State 1977 4 S.C. 167, Adie v. State 1980 1 - 2 SC 116, and State v. Ogunbanjo 2001 2 NWLR part 698 page 576.

It is on record that the appellant raised the defence of alibi vide his written statement to the police and his oral testimony in court. In his statement to the police, can be seen the following relevant excerpt:-

“On 26/11/2002, I did not pass Upper Area Court Ebogogo’s premises or road let alone showing (sic) down to look at the court premises and direction of the chambers. On 26/11/2002 0700 hrs to 12 noon, I was in my house with my wife Sefi preparing to go out

to see my lawyer Barrister Afeigbe. At about 12 noon, I went to see Barrister Afeigbe whom I discussed with concerning my case coming up on 28/11/2002 at Upper Area Court Ebogogo. I left there for my house at about 12.30 p.m. where I was throughout."

Then in his oral evidence in court he said:-

"On 26/11/2002 I was in my house throughout that day except when I went to see my lawyer between 12 noon and 12.30 p.m. to discuss my case in the Upper Area Court, Okene. I remained in my house thereafter throughout that day with my wife."

This piece of evidence was not debunked in the course of cross examination, so it remained good and credible evidence that should have been relied upon and ascribed with probative value. See *Okere v. State* 2001 2 NWLR part 697 page 397.

Having raised the defence of alibi at the earliest opportunity, it was the duty of the prosecution to investigate the veracity of the defence. It did not, so it failed in its duty and shirked its responsibility in ensuring that the appellant was given the opportunity to avail himself of the defence he truly perceived he had. The position of the law is that the prosecution is duty bound to investigate any defence of alibi raised by an accused person thoroughly, and failure to do so could cast reasonable doubt in the mind of a learned trial judge. See *Namsoh v. State* 1993 5 NWLR part 292 page 129, *Olayinka v. State* 2007 9 NWLR part 1040, page 561. If the prosecution had discharged its duty accordingly the trial court would have probably been otherwise convinced of the innocence of the appellant, and discharged and acquitted him, thereby avoiding miscarriage of justice.

In the light of the above and the fuller ones in the lead judgment, I also allow the appeal and discharge and acquit the appellant.

OGEBE JSC

I read before now the lead judgment of my learned brother Ogbuagu, JSC just delivered and I agree entirely with his reasoning and conclusion.

There was no evidence to sustain the conviction of the appellant. Accordingly, I allow the appeal and discharge and acquit the appellant of the charge preferred against him.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, Ogbuagu, JSC. I agree with the reasons ably advanced therein to arrive at the conclusion that the appeal is meritorious and should be allowed.

B I wish to chip in just a few words of my own. The appellant was arraigned at the trial court on a one count charge of mischief by fire punishable under section 337 of the Penal Code. He was convicted and sentenced to two (2) years imprisonment without option of fine and a fine of N5,000.00 (Five Thousand Naira) or to imprisonment for nine (9) months in default.

C The appellant felt unhappy with the decision of the trial court. He appealed to the Court of Appeal (court below) which dismissed his appeal. He has further appealed to this court. The issues formulated by both sides of the divide have been set out in the lead judgment.

Let me take the issue relating to alibi at this point in time. Alibi simply means elsewhere. Whenever an accused puts up a plea of alibi, it is his duty to furnish the prosecution with the full particulars of the alibi. He must furnish his whereabouts and those present with him at the material time of the incident. It is the duty of the prosecution to investigate same carefully. The prosecution has the duty to disprove same. Failure to investigate will invariably lead to the acquittal of the accused person. See: Yanor v. The State (1965) NMLR 337; Queen v. Turner (1957) WRNLR 34; Bello v. Police (1956) SCNLR 113; Gachi v. The State (1973) 1 NMLR 331 and Odu & Anr. v. The State (2001) 10 NWLR (Pt. 772) 668.

F It is extant in the record of appeal that the appellant promptly made a plea of alibi to the police. He said he was in his house throughout on the fateful day in company of his wife except when he went to see his lawyer between 12 noon and 12:30 p.m. The Police should have made a careful investigation from other inmates of the accused's abode; his wife inclusive. The police failed to carry out this salient duty. Failure in this regard is detrimental to the prosecution's case. On this score, the appellant is entitled to an order of acquittal.

H In convicting the appellant, the trial court relied on circumstantial evidence. The court below towed the same line.

It is clear that circumstantial evidence must be narrowly ex-

amined with utmost care. To be sufficient for a conviction, it must point to only one conclusion, namely, that the offence had been committed and that it was the accused who had committed it.

See: Nasiru v. The State (1999) 2 NWLR (pt. 589) 87; Teper v. R (1952) A.C 480; The Queen v. Ororosokode (1960) SCNLR 501 at 504, The State v. Nafiu Rabi'u (1980) 1 NCR 4 at 50. B

In employing circumstantial evidence to ground a conviction, the totality of same must be cogent, compelling and unequivocal. It must point only at the direction of the appellant and to no other person. It must lead conclusively and indisputably to his guilt. See: Peba v. The State (1980) 8-11 SC 76; Omogodo v. The State (1981) 5 SC 5. This is in line with the dictate of section 138 (3) Evidence Act. C

The circumstantial evidence relied upon in this case is rooted in crass suspicion which cannot sustain a valid conviction. PW.5, the guard did not see the appellant at the scene that night. The same witness is also facing a similar charge at the Chief Magistrate's Court, Lokoja in respect of the same incident. It is clear that the evidence is equivocal and equally points at PW 5. I cannot fathom how such circumstantial evidence can sustain the conviction of the appellant. It was erroneous for the two courts below to have found otherwise. D E

I wish to state briefly that the time of the commission of the offence should have been stated in the charge. Such is very material to avoid springing surprise on the accused. A charge should not be framed in such a manner which depicts that 'a trap is set to catch the accused person'. F

It was not proved that it was the appellant who set the fire that gutted the court on the fateful day. The vital ingredient of the offence was not established in my considered view. It is only where all the essential ingredients of an offence charged have been satisfactorily proved by the prosecution that same is proved beyond reasonable doubt. See: Alabi v. The State (1993) 7 NWLR (Pt. 307) 511 at 523. G

Certainly, this case was not proved beyond reasonable doubt. The above is just a tip of the ice-berg. My learned brother said it all. The appeal has merit. It is hereby allowed by me as well. I endorse all the consequential orders contained in the lead judgment. H