

**SUPREME COURT OF NIGERIA**

9TH JULY, 2010, SC. 193/2008

**CORAM:- A. M. MUKHTAR, M. MOHAMMED,  
I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,  
O. O. ADEKEYE, JJSC**

OLAYINKA AFOLALU ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

---

CRIMINAL PROCEDURE - Evidence - Burden of proof - Discharge  
- It is discharged if on the entire evidence adduced - The court is left  
with no doubt - That the accused committed the offence (H1)

CRIMINAL PROCEDURE - Alibi - Disproof of - Where there is vital  
identification evidence of the accused - By prosecution witness - Be-  
lieved by the court - It destroys the defence of alibi raised (H2)

**FACTS**

Appellant was arraigned and tried at the High Court of Ekiti State holden at Ado-Ekiti on a two-count charge of armed robbery. On the first count he was said to have robbed one Idowu Fanikun, female, while armed with guns. On the second count he was said to have robbed one Mercy Ogunshakin, female, while armed with guns. The case of prosecution was that appellant and three others at large, while armed with guns, carried out a robbery operation along Igbede Road, Ilawe Ekiti and in the process robbed Mercy Ogunshakin and raped her daughter, one Ifedayo Ogunshakin - P.W.1. Though appellant raised a plea of alibi at commencement of trial, which plea was not investigated by police, P.W.1 gave positive evidence identifying appellant as one of the robbers.

According to P.W.1, she had known appellant before the event of the robbery as appellant was among a group of boys that habitually hung out in front of one Mogambo shop which was within the neighbourhood and was in the habit of calling her whenever she was passing there. After trial, the learned trial judge discharged and acquitted appellant on count one but found him guilty on count two and sentenced him accordingly. Aggrieved, appellant appealed against

the judgment to Court of Appeal but the appeal was dismissed. This is a further and final appeal to Supreme Court. It is appellant's contention that the identity evidence of PW.1 connecting him to the crime ought to have been treated with caution as she was the only person who identified appellant among those present at the scene.

**ISSUE FOR DETERMINATIONS**

*“Whether the accused was proved beyond reasonable doubt by the evidence adduced by the prosecution as the actual person that committed the offence of armed robbery at the house of the Complainant.”*

**HELD** (Unanimously dismissing the appeal per **MOHAMMED JSC**)  
***Burden of proof - Discharge***

1. The law is quite clear on the requirement of proof beyond reasonable doubt to secure conviction for any criminal offence by virtue of Section 138(1) of the Evidence Act. Therefore if on the entire evidence adduced before a trial Court, that court is left with no doubt that the offence was committed by the accused person, that burden of proof beyond reasonable doubt is discharged and the conviction of the accused person will be upheld even if it is on credible evidence of a single witness as happened in the case at hand. On the other hand, where on the totality of the evidence, a reasonable doubt is created, the prosecution would have failed in its duty to discharge the burden of proof which the law vests upon it thereby entitling the accused person to the benefit of the doubt resulting in his discharge and acquittal.

In the present case, the learned trial Judge having considered the entire evidence before him was left in no doubt whatsoever that the Appellant committed the offence of armed robbery to justify his conviction and sentence. (p. 2116 E)

***Alibi - Disproof of***

2. The law is indeed well settled that where, as against the defence of alibi raised by an accused person there is a visual identification evidence of the accused by the prosecution witness which the Court accepted and believed, such evidence will effectively destroy the defence of alibi raised.

In the case at hand therefore, the learned trial Judge was right, in my

view, in accepting, believing and acting on the visual identification evidence of PW1 who not only saw and identified the Appellant whom she knew before the date of the incident but who also together with other members of his gang subjected the witness to sexual harassment and violence for a number of hours, and clearly gave the witness enough opportunity to identify the Appellant; that the Appellant actively participated in the armed robbery operation of 27<sup>th</sup> April, 2002 to justify his conviction and sentence, is fully supported by the evidence. For the same reason, the Court below was quite right in affirming the conviction and sentence on the Appellant . (p.2117 A)

### **NOTABLE POINT OF INTEREST**

#### **MUHAMMAD JSC**

*1. Proof beyond reasonable doubt not beyond shadow of doubt*  
I think it is always helpful, anytime there is an allegation of lack of “proof beyond reasonable doubt” in a criminal trial, to remember the age long established principle of criminal law that “proof beyond reasonable doubt” is not “proof beyond shadow of doubt.” It is not, therefore, a proof beyond all possible or imaginary doubt that it is such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof “to moral certainty,” such proof as satisfies the judgment and conscience of the judge as a reasonable man, and applying his reason to the evidence before him that the crime charged has been committed by the defendant and so satisfies him as to leave no other reasonable conclusion possible. (p.2121 C)

#### **ADEKEYE JSC**

*2. Identification parade is not indispensable to conviction*  
*Identification parade is not obligatory, where there is good and cogent evidence linking the accused person to the crime on the day of the incident a formal identification parade may be unnecessary. Identification parade is not sine qua non to a conviction for a crime alleged, it is only essential in the following instances:-*

*(a) Where the victim did not know the accused before and his first acquaintance with him was during the commission of the offence.*

*(b) Where the victim or witness was confronted by the offender for a very short time and*

*(c) Where the victim due to time and circumstance might not have had the full opportunity of observing the features of the accused”.*

(a) - (c) above are not applicable in the circumstance of this appeal (p. 2127 E)

B

### **REPRESENTATION**

Akeem Agbaje with Clifford Aumige; for the Appellant  
Gbovega Oyewole - Attorney-General, Ekiti State with L. G. Ojo,  
Solicitor-General Ekiti State, Bola Wale Awe Director of Public Prosecution Ekiti State, G. Adaramola (D. D. M) and K. Balogun; for the Respondent.

C

### **CASES REFERRED TO**

- D R. v. Lawrence (1932) 11 NLR 6 at p. 7
- Offir v. State (1993) 4 NWLR (Pt. 290) 675
- Ahmed v. State (1998) 5 NWLR pt 550 pg. 493
- Madagwa v. State (1988) 5 N.W.L.R. (Pt. 92) 60
- Igwego v. Ezeugo (1992) 6 NWLR pt. 249 pg 561
- E Olayinka v. State (2007) 9 NWLR pt. 1040 pg. 561
- The State (1993) 5 N. W. L. R. (Pt. 296) 660 at 674
- Amina v. The State (1990) 6 NWLR pt. 155 pg. 125
- Nwagwu v. Okonkwo (1987) 3 NWLR pt. 60 pg. 314
- Ajibade v. The State (1987) 1 N. W. L. R. (Pt. 48) 205
- F Offorlete v. The State (2000) A. F. W. L. R. (Pt. 12) 2081
- The State v. Danjuma (1997) 5 N. W. L. R. (Pt. 506) 512
- Okosi v. A-G Bendel State (1989) 1 NWLR pt. 100 pg. 642
- Imhanria v. Nigerian Army (2007) 14 NWLR pt. 1053 pg. 76
- G Ukpabi v. The State (2004) A. F. W. L. R. (Pt. 218) 814 at 820

### **STATUTES REFERRED TO**

Robbery and Fire-arms (Special Provisions) Act, Cap 290, L.F.N., 1990, s. 1(2) (a)

- H Evidence Act, Cap 112, L. F. N., 1990

**LEAD JUDGMENT BY MOHAMMED JSC**

The Appellant who was the accused person at the Ado-Ekiti High Court of Justice of Ekiti State, was arraigned on a 2 count charge of armed robbery -

*“1. Robbing one Idowu Fanikun (F) of the sum of N225.00 (Two Hundred and Twenty Five Naira) while armed with offensive weapons to wit guns thereby committed and offence contrary to S. 1 (2) (a) of the Robbery and Firearms Special Provisions Act CAP 390 vol. XXII Laws of the Federation of Nigeria 1990 as amended by Tribunals Certain Consequential Amendments Decree No. 62 of 1999.”* <sup>B</sup>

*2. Robbing one Mercy Ogunshakin (F) of the sum of N1,750.00 (One Thousand, Seven Hundred and fifty Naira) while armed with offensive weapons to wit guns thereby committed an offence contrary to S. 1 (2) (a) of the Robbery and Firearms Special Provisions Act CAP 390 Vol. XXII Laws of the Federation of Nigeria D 1990 as Amended by Tribunals Certain Consequential Amendments Decree No. 62 of 1999.”* <sup>C</sup>

On the commencement of his trial, the Appellant pleaded not guilty to the 2 counts of the charge. The prosecution called 4 witnesses in its bid to prove the counts against the Appellant. At the close of the prosecution’s case, the Appellant elected to give evidence and called 3 other witnesses who testified in support of his defence. <sup>E</sup>

From the evidence on record, the case of the prosecution was that on 27<sup>th</sup> April, 2002, the Appellant and 3 others still at large, while armed with guns carried out a robbery operation along Igede Road, Ilawe Ekiti in Ekiti State of Nigeria and robbed one Mercy Ogunshakin and raped her daughter Ifedayo Ogunshakin who identified the Appellant as one of the members of the armed robbery gang. <sup>F</sup>

In his defence, the Appellant denied participating in the act of armed robbery as charged and set up a defence of alibi by claiming that at the time the robbery was committed, he was watching video film with his friends in the house of one of such friends. At the conclusion of the trial, the learned trial Judge found the Appellant not guilty of the first count of the charge and accordingly discharged and acquitted him. However, as for the second count of the charge, the learned trial Judge found that the prosecution had proved its case against the Appellant whose defence of alibi was rejected follow- <sup>G</sup> <sup>H</sup>

ing the positive and direct evidence of identification of the Appellant as one of the armed robbers who participated in the operation of 27<sup>th</sup> April, 2002 and therefore convicted and sentenced the Appellant to death according to the law. The Appellant's appeal to the Court of Appeal Ilorin was heard and dismissed in the judgment of that Court delivered on 10<sup>th</sup> December, 2007. The present appeal in this Court by the Appellant is against the affirmation of his conviction and sentence by the Court of Appeal. The only issue identified in the Appellant's brief for the determination of the appeal in this Court is –

*“Whether the accused was proved beyond reasonable doubt by the evidence adduced by the prosecution as the actual person that committed the offence of armed robbery at the house of the Complainant.”*

This issue was adopted by the Respondent in the Respondent's brief of argument.

In mobilizing support for the lone issue for determination, the learned Counsel for the Appellant complained that both the trial Court and the Court below have failed to observe some cardinal principles of law in the trial of the criminal case and in the handling of the Appellant's appeal; that in the trial of the case, the Appellant by virtue of the case of *Ameh v. The State* (1978) N. S. C. C. 368, ought to have been presumed innocent until the Court determines otherwise at the end of the trial; that had the two Courts below closely examined the defence of alibi raised by the Appellant, the evidence had clearly disclosed a cloud of doubt, the benefit of which ought to have been given to the Appellant to justify his discharge and acquittal on taking into consideration of cases like *Ukpabi v. The State* (2004) A. F. W. L. R. (Pt. 218) 814 at 820; *Gwawoh v. Commissioner of Police* (1974) N.S.C.C. 586 and *Ikono & Ors. v. The State* (1973) N. S. C. C. 352. Learned Counsel also accused the Court below of failing to consider other defences opened to the Appellant apart from the defence of alibi raised by him; that the evidence of the only witness who identified the Appellant, ought to have been treated with great caution in line with the decisions in *Nwuzoke v. The State* (1988) 1 N. S. C. C. 361; *Laoye v. The State* (1985) 2 N. S. C. C. 1251 and *Offorlete v. The State* (2000) A. F. W. L. R. (Pt. 12) 2081.

For the Respondent however it was argued that the Appellant's defence of alibi had been successfully destroyed by the evidence of

the prosecution placing the Appellant at the scene of the robbery at the time the Appellant claimed he was elsewhere; that the evidence of PW1 on the identity of the Appellant as one of the participants in the armed robbery was positive and unshaken; that as that evidence was believed and acted upon by the trial Court in convicting the Appellant and the Court of Appeal having confirmed that finding, B the complaint of the Appellant that the evidence of PW1 is not credible to support the conviction of the Appellant has no basis at all. The case of Eze v. The State (1985) 3 N. W. L. R. (Pt. 13) 429 was relied upon. Learned Counsel pointed out that the fact that the robbery C operation on the night of the incident lasted several hours during which PW1 interacted with the Appellant, the witness had sufficient opportunity to be in a position to identify the Appellant. The cases of Olalekan v. The State (2001) 18 N. W. L. R. (Pt. 746) 793 at 830 and Ajibade v. The State (1987) 1 N. W. L. R. (Pt. 48) 205 were picked D up in support of this submission. Learned Counsel concluded that the failure to conduct identification parade in this case or failure of the trial Court to look for corroborative evidence to support the evidence of PW1 who knew the Appellant before the date of the incident of the robbery, was quite unnecessary if cases like Ottis v. The E State (1993) 4 N. W. L. R. (Pt. 290) 675 at 681, Ugwumba v. The State (1993) 5 N. W. L. R. (Pt. 296) 660 at 674 are taken into consideration.

In the instant case, there is no doubt at all that the learned F trial Judge who saw and heard the evidence of the witnesses called by the prosecution especially the evidence of PW1 who saw and identified the Appellant and the evidence of the Appellant and his witnesses in support of his defence of alibi, was satisfied with the evidence of the prosecution that the offence of armed robbery under G Section 1 (2) (a) of the Robbery and Fire-arms (Special Provisions) Act, 1990, had been proved beyond reasonable doubt against the Appellant when he said at page 86 of the record -

*"In conclusion I wish to state that the totality and grand sum- H mation of the evidence before me lends credence to the fact that the ingredients of the offence of armed robbery have been proved against the accused person with particular reference to count 2 of this charge.*

*I am convinced beyond doubt that:*

*(1) There was a robbery at Igbede Road Ilawe-Ekiti on 27<sup>th</sup>*

April, 2002.

(2) That it was armed robbery.

(3) That the accused person standing trial in the instant case was one of the armed robbers.

B The totality of the evidence before (sic) points unmistakably to the fact that prosecution led credible, reasonable, convincing evidence to prove their case against the accused person beyond reasonable doubt.”

C These findings were confirmed on appeal by the Court of Appeal particularly with regard to the crucial evidence of identification of the Appellant as one of the participants in the robbery operation of 27<sup>th</sup> April, 2002. I have no reason whatsoever to disagree with these concurrent findings of the two courts below on the role of the Appellant in the commission of the offence as charged. The attempt D by the learned Counsel to the Appellant to find avenue for the escape of the Appellant from the grip of the law by attacking the evidence of the prosecution’s star witness PW1 who had been with the Appellant and his gang between 8.25 pm to 1.00 am, had woefully failed as the evidence of the witness remained unshaken even under E cross-examination.

***The law is quite clear on the requirement of proof beyond reasonable doubt to secure conviction for any criminal offence by virtue of Section 138(1) of the Evidence Act. Therefore if on the entire evidence adduced before a trial Court, that court is left with no doubt that the offence was committed by the accused person, that burden of proof beyond reasonable doubt is discharged and the conviction of the accused person will be upheld even if it is on credible evidence of a single witness as happened in the case at hand. On the other hand, where on the totality of the evidence, a reasonable doubt is created, the prosecution would have failed in its duty to discharge the burden of proof which the law vests upon it thereby entitling the accused person the benefit of the doubt resulting in his discharge and acquittal.*** See Alonge v. Inspector-General of Police (1959) S. C. N. L. R. 576; Fotoyimbo v. Attorney-General of Western Nigeria (1966) W. N. L. R. 4 and The State v. Danjuma (1997) 5 N. W. L. R. (Pt. 506) 512. ***In the present case, the learned trial Judge having considered the entire evidence***



***before him was left in no doubt whatsoever that the Appellant committed the offence of armed robbery to justify his conviction and sentence.***

With regard to the Appellants' defence of alibi, ***the law is indeed well settled that where, as against the defence of alibi raised by an accused person there is a visual identification evidence of the accused by the prosecution witness which the Court accepted and believed, such evidence will effectively destroy the defence of alibi raised*** See Njovens v. State (1973) 5 S. C. 17; Madagwa v. State (1988) 5 N.W.L.R. (Pt. 92) 60. In ***the case at hand therefore, the learned trial Judge was right, in my view, in accepting, believing and acting on the visual identification evidence of PW1 who not only saw and identified the Appellant whom she knew before the date of the incident but who also together with other members of his gang subjected the witness to sexual harassment and violence for a number of hours, and clearly gave the witness enough opportunity to identify the Appellant; that the Appellant actively participated in the armed robbery operation of 27<sup>th</sup> April, 2002 to justify his conviction and sentence, is fully supported by the evidence. For the same reason, the Court below was quite right in affirming the conviction and sentence on the Appellant.***

Finally, this appeal being one against concurrent findings of the High Court of Justice of Ekiti State and the Court of Appeal Ilorin Division, the law is trite that this Court will not interfere with such concurrent findings unless exceptional reasons have been shown by the Appellant to exist justifying such interference. See Manawa Ogbodu v. The State (1987) 2 N.W.L.R. (Pt. 54) 20. In the instant case, I see no exceptional reasons at all to warrant interfering with the concurrent findings of the Courts below. Consequently, I see no merit at all in this appeal. The appeal is dismissed and the conviction and sentence of death passed on the Appellant by the trial Court and affirmed by the Court below, are hereby further affirmed.

H

**MUKHTAR JSC**

The appellant was arraigned before the High Court of Justice holden at Ado-Ekiti on the following two court charge:

- “(1) *Robbing one Idowu Fanikun (F) of the sum of N225.00 (two hundred and twenty five naira) while armed with offensive weapons to wit guns thereby committed an offence contrary to section 1 (2)(a) of the robbery and firearms special provisions Act Cap: 390 Vol. XXII, Laws of the Federation of Nigeria 1990 as amended by Tribunal certain consequential amendments Decree No. 62 of 1999.*
- (2) *The accused person is also alleged to have robbed one Mary Ogunshakin (F) of the sum of N1,750.00 (One thousand seven hundred and fifty naira) on the 27<sup>th</sup> day of April 2002 at Igede road, Ilawe-Ekiti, while armed with offensive weapons to wit guns thereby committed an offence contrary to section 1(2)(a) of the robbery and Firearms (special provisions) Act Cap. 38898 Vol. 22 Laws of the Federation of Nigeria 1990 as amended by Tribunal Certain Consequential amended decree No. 62 of 1999.”*

The appellant was discharged and acquitted on the first count, but was convicted and sentenced to death by hanging by the neck on the second count, by the learned trial court. The appellant appealed to the Court of Appeal which dismissed the appeal and affirmed the conviction and sentence of the learned trial court.

Aggrieved by the decision of the Court of Appeal, the appellant has appealed to this court on six grounds of appeal from which a single issue for determination was distilled. The learned counsel exchanged briefs of argument. The single issue raised in the appellant’s brief of argument is:-

- “*Whether the accused was proved beyond reasonable doubt by the evidence adduced by the prosecution as the actual person that committed the offence of armed robbery at the house of the complainant.*”

The issue raised in the respondent’s brief of argument is in pari materia with the above issue. It is a fact that an accused person when arraigned is presumed innocent until he is proved guilty in accordance with the principles of law. The law provides that the prosecution who alleges crime must prove its case beyond reasonable doubt with strong and credible evidence. See section 138 of the Evidence Act Cap. 62 of the Laws of the Federation 1990 which stipu-

lates the following:-

*“138(1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.*

*(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of section 141 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.*

*(3) If the prosecution proved the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the accused”.*

In the instant case, the prosecution proved its case beyond reasonable doubt, and the burden of proving reasonable doubt shifted to the appellant. Proof beyond reasonable doubt does not however translate to proof beyond shadow of doubt. See *Miller v. Minister of Pensions* 1947 2 All E.R. page 372.

It is a cardinal requirement that there must be proper and correct identification of an accused person in a case of this nature, and in the instant case I make bold to say that there was no mistaken identity whatsoever as is illustrated by the evidence of the victim, which inter alia reads thus:-

*“I know the accused person. I knew him when he came to rob in our house. He took N1,750.00 and also raped (sic). I have met the accused before this incident. I met him in the front of Mogambo’s shop at Oke-Ilawe. He was in the habit of calling me but I never answered him.....The moon was shining so I could see the faces of the men, two guns were later passed to them. I was asked to remove my dress, I resisted, they now said I will be shot. Three of the men raped me, the accused standing before the court was the very right person that raped me”.*

The witness never wavered in the course of cross examination; and her evidence was corroborated by the evidence of PW 2. There is no doubt that there was proper identification of the appellant, as PW 1 in fact knew him even before the incident. The ingredients of the offence the appellant was charged for were proved by credible and uncontradicted evidence, and so the prosecution proved its case beyond reasonable doubt.

On the defence of alibi raised by the appellant, the evidence

of identification given by PW 1 is so overwhelming that the said defence couldn't have been sustainable. PW 1 actually saw him, and had known him before the day of the incident, when he made overtures to her. She had no iota of doubt about his identity, his presence at her house on the day of the incident, and his full participation in the crime for which he was charged. In the circumstances there was no chance for the success of any alibi not to talk of a weak one. In addition, there was no need for an identification parade, as there was no room for any doubt, and the evidence was tight and unchallenged. In the circumstances, the prosecution has adduced credible evidence to demolish the plea of alibi, and so the defence is inconsequential to the benefit of the appellant. See *Njovens v. State* 1973 5 SC. 17.

On the totality of these, I agree with the learned trial judge in his conclusion that:-

*"I am convinced beyond doubt that:-*

*(1) There was robbery at Igede Road, Ilawe-Ekiti on 27/4/2002.*

*(2) That it was armed robbery. (3) That accused person standing trial in the instant case was one of the armed robbers."*

The totality of the evidence before me point unmistakably to the fact that the prosecution led credible, reasonable, convincing evidence to prove their case against the accused person beyond reasonably doubt.

The lower court was quite in order to have affirmed the above decision and consequently dismiss the appeal, as it lacked merit. This appeal is against two concurrent findings of the lower courts, which the law enjoins this court not to interfere with, unless there is perversity, the findings are not supported by evidence, and miscarriage of justice has been occasioned. See *Igwe v. State* 1982 9 S.C. 172, *Sobakin v. State* 1981 5 SC. 75, and *Chinwendu v. Mbamale* 1980 3-4 SC. 31. I find none of these shortcomings in the instant appeal, so I will not disturb the lower court's decision.

I have read in advance the lead judgment delivered by my learned brother Mohammed J.S.C. I agree with him that the appeal is devoid of merit, and deserves to be dismissed. I also dismiss it in its entirety.

**MUHAMMAD JSC**

My learned brother, Mohammed, JSC, has afforded me the opportunity to read before now, his lead judgment just delivered. I am in agreement with my learned brother in his conclusion that the appeal lacks merit and it should be dismissed.

Learned counsel for the appellant formulated the following B issue for determination:

*“Whether the accused was proved beyond reasonable doubt by the evidence adduced by the prosecution as the actual person that committed the offence of armed robbery at the house of the complainant.”* C

Learned counsel for the respondent raised the same issue in his respondent’s brief of argument. I need not reproduce it.

I think it is always helpful, anytime there is an allegation of lack of “proof beyond reasonable doubt” in a criminal trial, to remember the age long established principle of criminal law that “proof beyond reasonable doubt” is not “proof beyond shadow of doubt.” It is not, therefore, a proof beyond all possible or imaginary doubt that it is such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof “to moral certainty,” such E proof as satisfies the judgment and conscience of the judge as a reasonable man, and applying his reason to the evidence before him that the crime charged has been committed by the defendant and so satisfies him as to leave no other reasonable conclusion possible. It F therefore imposes a duty on the prosecution to prove the main ingredient of the offence charged against the accused person to the satisfaction of the trial judge. See: *R. v. Lawrence* (1932) 11 NLR 6 at p. 7; *R. v. Mofor* (1944) 10 WACA 251.

For the proof of the offence of armed robbery as in this case, G the requirement of the law on the prosecution is for the latter to prove with satisfaction that:

- i. there was a robbery
- ii. that robbery was an armed one
- iii. that the accused was one of the armed robbers or the H robber.

See: *Martins v. The State* (1997) 1 NWLR (Pt. 481) 355; *Offir v. State* (1993) 4 NWLR (Pt. 290) 675.

In his findings, the learned trial judge stated inter alia:

*“in conclusion I wish to state that the totality and grand summation of the evidence before me lends credence to the fact that the ingredients of the offence of armed robbery have been proved against the accused person with particular reference to court (sic) 2 of this charge.*

B *I am convinced beyond doubt that:*

*1. there was robbery at Igbede Road, Ilawe-Ekiti on 27/4/2002*

*2. that if (sic) was armed robbery,*

C *3. that accused person standing trial in the instant case was one of the armed robbers.*

*The totality of the evidence before the points(sic) unmistakably to the fact that the prosecution led credible, reasonable, convincing evident(sic) to prove their case against the accused person beyond reasonable doubt.”*

D The Court of Appeal affixed its stamp of authority on the above finding of the trial court when it held as follows:

*“In the final result, I find that there is no reason to tamper with the finding of the learned trial judge..... A thorough evaluation and appraisal of the evidence adduced before the trial court shows that the learned trial judge arrived at the justifiable and unimpeachable conclusion that the contradictions pointed out by the appellant were not material contradictions. Whether evidence is material or not depends on the issues in the case. In this case, the issue is whether the appellant was one of the robbers on the date in question and whether they were armed. It will not be of any help to the appellant to ignore the substance of this case and to go chasing shadows. The 2<sup>nd</sup> issue is consequently resolved against the appellant.”*

G The above dicta from the trial court and the Court of Appeal, confirms to me that the decision appealed against by the present appellant is a concurrent decision of two courts. It is trite law that except where special circumstances are shown, this court hardly interferes with such a decision. It always affirms such concurrent decisions. I H affirm the decision of the two lower courts without any hesitation.

Just before I drop my pen, permit me my Lords to express my fear and sympathy for our younger ones both males and females. The females are always prone to sexual abuse even by armed robbers. Imagine how PW1, a 19 year old girl, was raped according

to her evidence by the three armed robbers with the appellant taking the pride of place as the 1<sup>st</sup> to violate her womanhood. This act is quite despicable and traumatic to such a young girl. The gravity of this offence alone is enough to send the appellant to the stiffest punishment provided for the offence. It inflicts terror, trauma, demoralization and sickness to the victim which has no compensation, even if it were to be so. On the prevalence of armed robbery in our society, I fully endorse the observation made by the learned trial judge when he said:

*"The menace of armed robbery is not decreasing in our society. It is worrisome. It is unsettling, the punishment for the offence of this nature, in our lands have not changed. A signal must be sent to other youngsters who can think of nothing productive to do then to terrorize and rob citizens living in their homes peacefully. The land must be purged of this evil."*

I agree. It must also send same signal to all those like minded persons males or females, citizens of this country or foreigners whose means of livelihood is hinged on the evil practice of intimidating, terrorizing, maiming, abducting or depriving innocent people of their health or wealth; property or personality or even life. These are priceless commodities and no one should be allowed to tamper with them in an illegal, neigh; crude manner. Once the perpetrators are caught and condemned, the law must take its own course.

Finally, for the fuller reasons given by my learned brother, Mohammed, JSC, I too dismiss the appeal. I affirm the concurrent decisions of the trial court and the court below

### **ADEKEYE JSC**

I was privileged to read before now the judgment just delivered by my learned brother Mahmud Mohammed, JSC.

The appellant was charged to court with an offence of armed robbery contrary to section 1 (2) (a) of the robbery and firearms special provision Act Cap 290 Vol. 22 Laws of the Federation of Nigeria 1990 as amended by the Tribunals Amended Decree No. 62 of 1999.

He was convicted and sentenced to death on the 27<sup>th</sup> of April 2002. In his appeal to the Court of Appeal Ilorin, the Learned Jus-

tices confirmed the conviction and sentence of the trial court. The facts of the case and the issues for determination raised by the appellant in his appeal to this court are as stated by my Lord in his leading judgment.

I only wish to pass comments on some legal points raised in the appeal. Under the 1999 Constitution of this Country as it affects our adversarial Criminal Legal System - an accused person is presumed innocent until proven guilty by a competent court. This presumption of innocence places a burden on the prosecution to prove a case beyond reasonable doubt in accordance with section 138 of the Evidence Act Cap 112 Laws of the Federation. In the process, the prosecution has to prove all essential elements of an offence as contained in the charge. The prosecution has the responsibility of proving all the essential elements of the offence charged, by producing vital material evidence and vital witnesses to testify during the proceedings. The essential ingredients of the offence of armed robbery are as follows:-

- (a) That there must be robbery or series of robberies
- (b) That the robbery or each robbery was an armed robbery
- (c) That the accused was one of those who took part in the armed robbery.

It is settled law that for the prosecution to succeed in proof of the offence of armed robbery there must be proof beyond reasonable doubt of these ingredients. Proof of a case beyond reasonable doubt does not mean proof beyond any iota or shadow of doubt. The burden of such proof which lies on the prosecution never shifts. If on the entire evidence the Court is left with no doubt that the offence was committed by the accused that burden is discharged and the conviction of the accused person will be upheld even on the evidence of a single witness.

- Bozin v. The State 2 NWLR pt. 8 page 465
- Amina v. The State (1990) 6 NWLR pt. 155 pg. 125
- Okosi v. A-G Bendel State (1989) 1 NWLR pt. 100 pg. 642
- Nwachukwu v. The State (1985) 1 NWLR pt. 11 pg. 218
- Ani v. The State (2003) 11 NWLR pt. 83 pg. 142
- Uwagbo v. State (2007) 6 NWLR pt. 1031 pg. 606

Before a trial court comes to the conclusion that an offence had been committed by an accused person, the court must look for



the ingredients of the offence and ascertain critically that acts of the accused come within the confines of the particulars of the offence charged.

Amadi v. The State (1993) 8 NWLR pt. 314 pg. 644

Alor v. State (1997) 4 NWLR pt. 501 pg. 511

In the appeal the appellant challenged the trial court's reliance on the evidence of PW 1 in respect of the identification of the appellant and that there was need for corroboration of such evidence in the circumstance where there were three adults with the same lighting conditions, and only PW 1 was able to identify the robbers. The evidence of PW 1 in the circumstance should have been corroborated. Usually if there is no dispute about the identity and identification of an accused person by a witness, there will be no reason why his evidence alone if believed cannot ground a conviction even on a charge of murder, particularly where the evidence is material enough to be capable of being believed.

Usufu v. The State (2007) 3 NLR pt. 1020 pg. 94

Effiong v. The State (1998) 8 NWLR pt 562 pg. 362

Garbo v. State (2006) 6 NWLR pt. 977 pg. 524

The court of law needs not take into account the number of witnesses for each side to a dispute as a relevant factor in deciding which side is to succeed. What is primarily relevant is the quality of the evidence adduced before the court.

Aglri v. Ogbah (2006) NWLR pt. 990 pg. 65

Oguonze v. State (1998) 5 NWLR pt. 55, pg. 521

Garko v. State (2006) 6 NWLR pt. 977 pg. 524

More important is that the assessment of credibility of a witness is a matter within the province of the trial court as it is only the court that has the advantage of seeing, watching and observing the witness in the witness box. The Court also has the liberty and privilege of believing him and accepting his evidence in preference to the evidence adduced by the defence. On the issue of credibility of witnesses the appraisal of evidence and the confidence to be reposed in the testimony of any witness, an appellate court cannot on printed evidence usurp the essential function of the trial court which saw, heard and watched the witnesses testify. The trial court on the overall evidence and watching the demeanor of PW 1, believed her evidence of properly identifying the appellant in connection with the

offence of robbery.

On the issue of corroboration raised by the appellant - what evidence constitutes corroboration for the purpose of statutory and common law rules as defined by Lord Reading CJ in the case of *R V Baskerville* (1916-1917) ALL ER Reprint 38 at pg 43 - when he said

B -

*“We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or contending to connect him with the crime. In other words, it must be evidence which implicated him, that is, which confirms in same material particular not only the evidence that the crime had been committed, but also that defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the-rule of practice at common law or within that class of offence for which corroboration is required by statute”*

C

D

The case of *DDP v. Hester* (1972) 57

Criminal Appeal Report 212 at pg. 229 where Lord Morris said:-

*“The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient, satisfactory and credible”*

E

F

The case of robbery does not fall within the class of offences where corroboration is required by statute. The trial court had rightly believed the evidence against the appellant before him in proof of the offence of robbery.

G

Identification of the appellant by the PW 1, while PW 2 who was equally present at the venue of robbery could not identify the appellant was equally subject of controversy by the appellant.

PW 1 had an edge over PW 2 in identifying the appellant during the night of the robbery according to her under-mentioned evidence.

H

*“My mum was with the landlady outside while I was in the sitting room reading, I heard noise outside but the moon was shining. I saw torch light flashing towards me about three of them who had entered the house”.*

She had enough light around her to identify the appellant when he came in with the others as she was then reading. PW 1 said further:-

*I have met the accused before this incident. I met him in the front of Mogambo shop at llawe. He was in the habit of calling me but I never answered him”*

*Yes, I know the accused person very well, yes, he used to call me sometimes when I am passing in the neighborhood. They are a gang always standing in front of Mogambo’s shop.* B

There is evidence on record to the effect that:-

*“(1) The appellant was not a stranger to PW1 before the night of the incident*

*(2) She had known him - as he was in the habit of calling and making advances to her in the neighborhood.* C

*(3) It was not the appellant alone -but they moved in a gang or group and the whole lot of them were always standing in front of Mogambo’s shop at llawe.*

*(4) The armed robbery incident in their residence lasted between 8.25pm to 1.am in the early hours of the morning.* D

*(5) She was raped by all the robbers - while the appellant was the first person to rape her.*

*(6) The armed robbers held torchlight’s which they were flashing and this gave her the opportunity to see their faces clearly.* E

*(7) The robbers were not masked-during the incident.*

*Identification parade is not obligatory, where there is good and cogent evidence linking the accused person to the crime on the day of the incident a formal identification parade may be unnecessary. Identification parade is not sine qua non to a conviction for a crime alleged, it is only essential in the following instances:-* F

*(a) Where the victim did not know the accused before and his first acquaintance with him was during the commission of the offence.* G

*(b) Where the victim or witness was confronted by the offender for a very short time and*

*(c) Where the victim due to time and circumstance might not have had the full opportunity of observing the features of the accused”.* H

(a) - (c) above are not applicable in the circumstance of this appeal

Chukwu v. State (1996) 7 NWLR pt. 463 pg. 686

Khalet v. State (1997) 8 NWLR pt. 516 pg. 237

Eyisi v. State (2000) 15 NWLR pt. 961 page 555  
 Okosi v. State (1989) 1 NWLR pt. 100 pg. 642 .  
 Offi v. State (1993) 4 NWLR pt. 290 pg 675  
 Ikemson v. State (1989) 3 NWLR pt. 110

The appellant also raised in his issues the matter of inconsistencies and contradictions in the evidence of the prosecution and identified the areas of conflict. The answer to this is simple and straight forward and decided cases have laid down the principle that before any conflicts or contradictions or even discrepancies in the evidence of the witnesses for the prosecution can be fatal to the prosecution's case the conflicts or contradictions must be substantial or fundamental to the main issue in question before the trial court and therefore necessarily create same doubt in the mind of the trial court then an accused is entitled to the benefit there from.

Chukwu v. State (1996) 1 NWLR pt. 423, pg. 139  
 Ahmed v. State (1999) 7 NWLR pt. 612 pg. 641  
 Aigbadion v. State (2000) 4 SC (Part 1) pg. 1

The appellant also queried why the landlady of PW1 and PW2, who in his opinion was a material witness as she was around when the robbers arrived at the scene of robbery was not called as a witness. There are different categories of witnesses in the course of criminal trials. There are vital witnesses whose evidence may determine the case one way or the other and failure to call a vital witness is fatal to the prosecutions case. A witness who knows something significant about a matter is a vital witness.

Imhanria v. Nigerian Army (2007) 14 NWLR pt. 1053 pg.

76

A marginal witness is one whose evidence will tilt the balance of a case one way or the other

Okonji v. State (2002) 5 NWLR pt. 759 pg. 21 .

It is noteworthy that all the appellant is worried about is his connection with the robbery. The trial court was satisfied with the evidence of PW1 and PW2 on that issue.

The law does not impose any obligation on the prosecution to call a host of witnesses to prove its case, all it needs to do is to call enough material witnesses to prove its case and in doing so, it has a discretion in the matter. The right of the prosecution to call witnesses required to prove its case is not a mere privilege but a prerogative.

It does not lie in the mouth of the defence to urge the prosecution to call a particular witness. Where the prosecution fails to call a particular witness there is nothing stopping the defence from calling that witness.

Olayinka v. State (2007) 9 NWLR pt. 1040 pg. 561

Imhanria v. Nigerian Army (2007) 14 NWLR pt. 1053 pg. B

76

The appellant complained also that had the trial court and that Court of Appeal properly evaluated the evidence of the prosecution it would not have resolved that the appellant has to prove his alibi without the prosecution proving its case beyond reasonable doubt. He relied on the case of C

Ahmed v. State (1998) 5 NWLR pt 550 pg. 493

This Court will not belabour the issue on this point. The connotation of alibi is that the accused was somewhere other than where the prosecution alleged that he was at the time of the commission of the offence. D

In raising the defence of alibi, the accused must at the earliest opportunity furnish the police with full details of the alibi, to enable the police to check the details. Failure of the accused to do so weakens the defence. The accused must offer evidence as to where he was at the time of the crime and with whom he was at the material time. E

Nsofor v. The State (2002) 10 NWLR pt. 775 Pg. 274

Balogun v. A-G Ogun State (2002) 6 NWLR pt. 763 pg. 512 F

Onyegbu v. State (1995) 4 NWLR pt. 391, pg. 510

Ifejirika v. State (1999) 3 NWLR pt. 391, pg. 59

Eyisi v. State (2000) 12 S Pt. 1 pg. 24

Njikwuemeni v. The State (2001) 14 WRM pg. 96

The appellant in the instant appeal failed to raise the defence of alibi timeously to enable the police to investigate the details. G

Where the evidence unequivocally fixed the accused to the scene as the one committing the offence the defence of alibi no more avails him. The evidence of PW1 overwhelmingly pinned the appellant to scene of robbery. H

Sowemimo v. State (2004) 11 NWLR pt. 885 pg. 515

Finally, the Supreme Court will not interfere with the concurrent findings of the two Lower Courts on issues of facts except there is established a miscarriage of justice or a violation of some

principles of law or procedure.

National Insurance Corporation of Nigeria v. Power and Industrial Engineering Company Ltd. (1986) 1 NWLR pt. 27 pg. 1

Enang v. Adu (1981) 11 -12 SC pg. 25

Nwagwu v. Okonkwo (1987) 3 NWLR pt. 60 pg. 314

B Igwego v. Ezeugo (1992) 6 NWLR pt. 249 pg 561

There is nothing in this appeal to warrant the interference with the judgment of the Courts below now on appeal.

With fuller reasons given by my Lord Mahmud Mohammed  
C in the leading judgment, I dismiss the appeal and affirm the conviction and sentence of the appellant by the Lower Court.

D

E

F

G

H