

SUPREME COURT OF NIGERIA
16TH JULY, 2010. SC. 46/2009, SC. 47/2009
CORAM:- D. MUSDAPHER, W. S. N. ONNOGHEN,
F. F. TABAI, M. S. MUNTAKA-COOMASSIE,
O. O. ADEKEYE, JJSC

IKECHUKWU SUNDAY	APPELLANT
AND		
THE STATE	RESPONDENT
AND		
HYGUINUS OFORMATA	APPELLANT
AND		
THE STATE	RESPONDENT

CRIMINAL PROCEDURE - Charges - Leave to prefer - Application - Sufficiency of materials - Though no proof of evidence was filed and served on appellants - Prosecution did present sufficient materials - To enable the judge exercise his discretion (H1)

EVIDENCE - Testimony of witnesses - Presumption of consistency - Where an accused person fails to contradict a witness's testimony - Though he had opportunity to do so - The testimony is presumed to be consistent (H2)

EVIDENCE - Evaluation - Duty on trial court - Whether discharged - Trial court has ably performed its duty of evaluation - And has properly ascribed probative value to the evidence led (H3)

CRIMINAL PROCEDURE - Calling of witnesses - Duty on prosecution - The prosecution is duty bound to call such number of witnesses - As is necessary to prove the offences charged (H4)

EVIDENCE - Criminal procedure - Contradictions alleged - Whether proved - There is no material contradiction in the evidence of prosecution - Such as to create doubts in its case (H5)

EVIDENCE - Alibi - Failure to investigate - Effect on prosecution's case - Notwithstanding such failure to investigate - If prosecution leads

positive evidence fixing accused person to scene of crime - The alibi will collapse (H6)

EVIDENCE - Crime - Identification parade - Dispensing with - Where the accused person and the prosecution witness knew themselves - Before the alleged crime - There is no need for an identification parade (H7)

JUDGMENTS - Forms - Failure to date and sign - Means of proof - Where the record of appeal indicates that the judgment was dated and signed - As in the instant case - The manuscript need to be tendered to prove otherwise (H8)

FACTS

The appellant, together with three others, were arraigned and tried at the High Court of Kano State on a two-count charge of conspiracy and armed robbery. The case for the prosecution was that the accused persons had on 10th September, 2000, conspired and robbed the house of one Alhaji Danjuma Ali Garko in Na'Ibawa Quarters, of cash and jewelry. After hearing, the trial court found each of the accused persons guilty as charged and sentenced them accordingly.

Dissatisfied, the appellants each filed a separate notice of appeal to the Court of Appeal. But the appeals were each dismissed. Still dissatisfied, they have come on a further and final appeal to the Supreme Court. The court has also granted them leave to raise and argue fresh issues not argued at the courts below. Accordingly, it is now appellants' argument inter alia, that the prosecution did not place sufficient materials before the trial court to enable it exercise its discretion when the application for leave to prefer charges against the accused persons was made. Moreover, appellants argued that the learned trial judge failed to date and sign the judgment in accordance with the provisions of the Criminal Procedure Code and that as such, the judgment was a nullity.

ISSUES FOR DETERMINATION

(i) Whether the discretion of the learned trial judge in granting the leave to prefer the charge against the Appellant was exercised in accordance with the law.

(ii) Whether there was enough credible and admissible evidence before the learned Justices of the Court of Appeal for confirming and affirming the conviction and sentence of the Appellants.

(iii) Whether the non-compliance of the judgment of the learned trial judge with the mandatory provisions of the section 269 (1) of the Criminal Procedure Code did not vitiate the entire proceedings and thus rendering it a nullity.

(iv) Whether having regard to the entire circumstances of the case the prosecution did not withhold evidence thereby denying the appellants fair trial.

(v) Whether the Appellants' defence of alibi was adequately considered and rightly rejected by the courts below.

(vi) Whether having regard to the circumstances of this case the learned Justices of the Court of Appeal were right to hold that an identification parade was unnecessary.

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

Charges - Leave to prefer - Sufficiency of materials

1. It is true that no proof of evidence was filed and served on the Appellant and so the Appellant might not have had the benefit of knowing, in advance, the details of what each of the prosecution witnesses was to say against him. But the name of each of the witnesses and the substance of what he or she was to say were given at pages 1-2 of the record.

In view of the foregoing facts and circumstances about the charges, the names of the witnesses and what each was to say and the fact that learned counsel for the Appellant Mr. S. O. Oche expressly stated that he had no objection to the preferment of charges against the appellant, could the learned trial judge be held to have had sufficient materials before him to exercise his discretion in granting the leave? I shall answer this question in the affirmative. (p. 2597 E/2598 A)

Testimony of witnesses - Presumption of consistency

2. It clear from the record that the Appellant hadn't the slightest mis-giving about the consistency between the testimony of any of the prosecution witnesses and his or her earlier statement to the police and that apparently accounted for why no attempt was made by him to contradict any of them with such previous statement to the police.

In situations and circumstances such as this, there is a rebuttable presumption that the testimony of a witness is consistent with his earlier statement to the police. Thus in this case the Appellant had all the opportunities to rebut that presumption, but he never did. Can he be heard, in the circumstances, to complain that the none
B filing of proof of evidence was prejudicial to his fair trial? I shall answer this question in the negative. (pp. 2598 C/2599 A)

Evaluation - Duty on trial court - Whether discharged

C 3. I have examined the evidence of each of the prosecution witnesses, that of the Appellant and other defence witnesses including his brother Churchill Sunday who testified as DW6 and his wife Ifeoma Sunday who testified as DW7. I have also carefully examined the judgment of the trial court, that of the court below and the address of
D counsel for the parties in their respective briefs of argument on this all pervading issue. First off all I agree with the view of the court below that the trial court in a most comprehensive manner evaluated the totality of the evidence adduced before it. I am satisfied that as the court of trial, it very ably performed its duty of evaluation of the
E evidence and properly ascribed probative value thereto.
(p. 2602 G)

Calling of witnesses - Duty on prosecution

F 4. I agree with the view of the trial court and affirmed by the court below that the prosecution was not bound to call each and every witness. The prosecution was at liberty to call only such number of witnesses as was necessary to establish proof of the offences charged beyond reasonable doubt. On this question, the Court of Appeal per
G Oredola JCA at page 261 had this to say:-

*“It is trite that it is the sole duty of the prosecution to prove its case beyond reasonable doubt by calling all material witnesses. This ‘onus probandi’ must be duly satisfied and once this has been done, it does not matter if some potential or likely witnesses were not called
H by the prosecution. After all the prosecution is not duty bound to call all available witnesses. It is a fact of life that if a part suffices, the whole is not required”.*

I agree entirely with the above reasoning. As the trial court rightly pointed out there was no evidence which Alhaji Garko or any

of the other named persons would have given which was not already before the court. (p. 2603 B)

Criminal procedure - Contradictions alleged - Whether proved

5. Next is the issue of contradictions in the case of the prosecution. The learned trial judge examined this in his judgment at pages 105-107 of the record and came to the conclusion that there were no contradictions of any significance or substance that created doubts in the case of the prosecution. The court below also examined the issue of contradictions and came to the same conclusion of there being no contradiction of any substance in the case of the prosecution. I have also considered the issue carefully and I am unable to find a single material contradiction in the evidence of the prosecution. On this issue of contradictions therefore, I have no reason whatsoever to interfere with the concurrent findings of the courts below. (p. 2604 D)

Alibi - Failure to investigate - Effect on prosecution's case

6. On this issue of alibi the court below at page 247 of the record stated:

“The law is that the police have a duty to investigate an alibi. However, the omission to investigate cannot be a carte blanche to set an accused person free; rather it should be tested against the evidence of the prosecution...”

And after quoting verbatim the opinion of the trial court on this issue of alibi the Court of Appeal at page 250 of the record concluded thus:

“It is therefore my finding that the learned trial judge has adequately considered the alibi presented by the Appellants and has rightly rejected same in the light of overwhelming evidence fixing the Appellants at the scene of the crime on the date in question”.

Here again I have no reason to interfere with the concurrent findings of the two courts below. A plea of alibi by an accused person simply means that he was “elsewhere” at the time of the alleged offence. If therefore the prosecution can lead strong and positive evidence which fixes the accused person at the scene of crime and which evidence the court accepts the alibi naturally collapses.

In this case the rather weak and belated alibi of the appellant was

outweighed by the strong eye-witness accounts of the PW1, 2, 3 and 5 and I have therefore no difficulty in holding that the alibi was rightly rejected. (p. 2605 A)

Crime - Identification parade - Dispensing with

- B 7. On this issue the court below at page 245 of the record said:
"In the conduct of identification parade there are no hard and fast rules that must be strictly adhered to.....
In the appeal at hand in the course of the investigation as shown in the testimony, the identities of the accused persons were too well
C *known. In fact bearing the circumstances of this case identification parades carried out were unnecessary in the sense that the witnesses knew very well the accused persons that carried out the robbery operation."*
- D I am unable to fault the above findings and conclusions of the court below. That the appellant and other accused persons and some of the prosecution witnesses knew themselves before the alleged crime of the 10th September, 2002 is amply supported by the evidence on record. (pp. 2605 G/2606 C)

E
JUDGMENTS - Forms - Failure to date & sign - Means of proof

- 8. The indication at page 118 of the record is that the judgment was duly signed and dated and that, in my view, is due compliance with section 269 (1) of the Criminal Procedure Code. In the circumstances
F of this case for the Appellant to successfully impugn the judgment of the trial court for non-compliance with section 269(1) of the Criminal Procedure Code he can only rely on the manuscript or the trial court's text in its original hand written state. In the absence of such a
G document the only presumption from the entries at page 118 of the record is that the judgment of the learned trial judge on the 24th of March, 2003 was duly signed and dated. (p. 2607 D)

REPRESENTATION

- H Dr. J. Y. Musa (with him I. H. Yamah, M. O. Onyilokwu, E. E. Eko, M. C. Sojachukwu, Theophilus Ejeh and Bassey Etubudo), for the Appellants.
Alhaji Aliyu Umar, A-G Kano State with him, Shuaibu Sule, D. P. P. Mustapha Mohammad D. D. P. P. Hafsat Wali (PSC) and Halima

Ahmad for the Respondent.

CASES REFERRED TO

BATURE vs. THE STATE (1994) 1 SCNJ 19 AT 39
ALAMU vs. STATE (2009) 10 NWLR (Part 1148) 31
ADAVA vs. STATE (2006) 9 NWLR (Part 984) 152 at 167 B
DAGGAYE vs. STATE (2000) 7 NWLR (Part 980) 637 at 668
ADEKUNLE vs. STATE (1989) 5 NWLR (Part 123) 505 at 513
OMOPUPA vs. THE STATE (2008) ALL FWLR (Part 445) 1648
PATRICK NJOVENS & ORS vs. THE STATE (1973) 1 NWLR 33 C
SAUDE vs. ABDULLAHI (1989) 4 NWLR (Part 116) 387 at 419
ISAH vs. THE STATE (2008) ALL FWLR (Part 443) 1243 at 1250
JAMES IKHANE vs. C. O. P. (1977) ALL NLR (reprint) 234 at 237
MANAWA OGBODU vs. THE STATE (1987) 1 N.S.C.C 429 at 437
LAYONU & ORS vs. THE STATE (1967) ALL NLR Page 210 at 214 D
IKOMI vs. THE STATE (1986) 3 NWLR (Part 38) 341 at 354

STATUTES & RULES REFERRED TO

Robbery and Firearms (special provisions) Decree 1984 as amended E
by Decree 62 of 1999; ss. 1 & s
Criminal Procedure Code of Kano State, ss. 269 & 185
Constitution of the Federal Republic of Nigeria, 1999, s. 36
Criminal Procedure (Application for leave to prefer a Charge in the F
High Court) Rules 1970
Evidence Act, s. 149

LEAD JUDGMENT BY TABAI JSC, CON

The Appellant together with three others, namely; Samuel G
Attah, Vincent Friday and Hyginus Oformata were charged and tried
at the Kano Judicial Division of the High Court of Justice Kano on a
two count charge of conspiracy and armed robbery. The charges
were laid out as follows:-

THE FIRST HEAD OF CHARGE H

*“That you Samuel Attah, Vincent Friday, Ikechukwu Sunday
and Hyginus Oformata on or about the 10th day of September,
2000 at Na’ibawa quarters Kano, within Kano Judicial Division agreed
to do an illegal act to wit, rob the home of Alhaji Danjuma Ali Garko*

at Na'ibawa of money and jewellery and the same act was done pursuant to the agreement and that you thereby committed an offence contrary to section 5 (b) of the Robbery and Firearms (Special Provisions) Decree 1984 as amended by Decree No. 62 of 1999."

THE SECOND HEAD OF CHARGE

B *"That you Samuel Attah of Na'ibawa quarters, Vincent Friday of Unguwa Uku quarters, Ikechukwu Sunday of Na'ibawa quarters and Hyginus Oformata of Unguwa Uku quarters within the Kano Judicial Division on the 10th day of September, 2000 at 8:30pm*
 C *while armed with guns committed the offence of armed robbery in the house of Alhaji Danjuma Ali Garko of Na'ibawa and robbed them of cash and jewellery worth N94,000.00 (ninety-four thousand mo-*
 D *ria) only thereby committed an offence punishable under section 1(2) (a) of the Robbery and Firearms (Special Provisions) Decree 1984 as amended by Decree No. 62 of 1999."*

Five witnesses testified for the prosecution while each of the accused persons and four other witnesses testified for the defence. At the close of evidence and after address of counsel for the prosecution and the defence the learned trial judge, in the judgment on the 24/
 E 07/03, found each of the accused persons guilty and each was accordingly sentenced to death. The Appellant and each of the others convicted with him appealed to the Court of Appeal. Each filed a separate notice of appeal. A joint brief of argument was filed for the
 F Appellant and the three others convicted along with him. In its unanimous judgment on the 6th of January, 2009 the appeal was dismissed. On the 9th of July, 2009 this Court granted the Appellant extension of time within which to appeal. He was also granted leave to raise and argue fresh issues never argued at the courts below. On behalf of
 G the parties briefs of argument have been filed and exchanged. The Appellant's Brief of Argument was prepared by Dr. J. Y. Musa and it was filed on the 15/10/09. He also prepared the Appellant's Reply Brief which was filed on the 15/12/09. The Respondent's Brief was prepared by Alhaji Aliyu Umar Hon. Attorney General Kano State
 H Ministry of Justice.

In the Appellant's brief Dr. J. Y. Musa formulated the following six issues for determination.

(i) Whether the discretion of the learned trial judge in granting the leave to prefer the charge against the Appellant was exer-

cised in accordance with the law.

(ii) Whether there was enough credible and admissible evidence before the learned Justices of the Court of Appeal for confirming and affirming the conviction and sentence of the Appellant.

(iii) Whether the non-compliance of the judgment of the learned trial judge with the mandatory provisions of the section 269 (1) of the Criminal Procedure Code did not vitiate the entire proceedings and thus rendering it a nullity. B

(iv) Whether having regard to the entire circumstances of the case the prosecution did not withhold evidence thereby denying the appellant fair trial. C

(v) Whether the Appellant's defence of alibi was adequately considered and rightly rejected by the courts below.

(vi) Whether having regard to the circumstances of this case the learned Justices of the Court of Appeal were right to hold that an identification parade was unnecessary. D

In the Respondent's Brief the learned Attorney-General Kano State adopted the Appellant's issue II and went on to formulate the following issues for determination .

(i) Whether leave to prepare the charge for the trial of the Appellant was properly sought and obtained? E

(ii) Appellant issue II of *"whether there was enough credible and - admissible evidence before the learned Justices of the Court of Appeal for confirming and affirming the conviction and sentence of the Appellant"* was adopted. F

(iii) Whether there was non-compliance with the provisions of section 269 (1) of the Criminal Procedure Code?

(iv) Whether the prosecution has withheld any evidence from the appellant? And G

(v) Whether the defence of alibi on behalf of the Appellant was adequately considered and rejected by the Court of Appeal?

On the various issues, the following is the substance of the submissions of Dr. J.Y. Musa:-

With respect to the Appellant's first issue learned counsel H pointed out the fact that no proofs of evidence was filed by the prosecution and none was served on the appellant and the other accused persons and submitted that the failure so to do violated the mandatory requirements of section 185 (b) of the Criminal Procedure Code

and the Criminal Procedure (Application for leave to prefer a charge in the High Court) Rules 1970. It was and submitted further that in the circumstances the Appellant was denied fair trial guaranteed him by section 36 (6) (b) of the 1999 constitution. It was further argued that the learned trial judge was not seized of materials upon which to
 B exercise his judicious and judicial discretion to grant the leave to prefer the charge against the Appellant and therefore that the leave granted in the circumstances was done without jurisdiction and therefore a nullity. For these submissions learned counsel for the Appellant
 C relied on *BATURE vs THE STATE* (1994) 1 SCNJ 19 AT 39; *MADUKOLU vs. NKEMDILIM* (1962) ALL NLR (Part 2) 581 at 589-590; *IKOMI vs THE STATE* (1986) 3 NWLR (Part 38) 341 at 354; *OHWOVORIOLE vs. FEDERAL REPUBLIC OF NIGERIA* (2003) FWLR (Part 141) 2019 at 2032-2033; *ABACHA vs. THE*
 D *STATE* (2002) FWLR (Part 118) 1224 at 1274-5. It was urged in the circumstances that this Court should invoke the provision of section 22 of the Supreme Court Act to quash the entire trial, conviction and sentence of the Appellant.

With respect to the second issue of whether there was enough
 E credible and admissible evidence before the learned Justices of the Court of Appeal for confirming the conviction and sentence of the Appellant, learned counsel referred to the evidence of the various prosecution witnesses and submitted that the answer was on the negative. Learned counsel referred to the evidence of the PW1 to the
 F effect that she knew the accused persons who were their neighbours and who passed by their house everyday very well and argued that the witness ought to have mentioned their names to the Police at the earliest opportunity and that no reason was given by the witness for
 G not disclosing the names of the robbers to the Police when the matter was reported. Counsel relied on *ISAH vs THE STATE* (2008) ALL FWLR (Part 443) 1243 at 1250. With respect to the evidence of the PW2 it was the contention of learned counsel that she was jelled in fear and having regard to the fact that she had a fleeting contact with
 H the robbers, she could not be said to have properly identified the 1st and 3rd accused persons.

Learned counsel referred to the evidence of the PW3 under cross examination that he made two statements, one at Yarakwa Police Station and the other at Bompai but which statements were not

tendered in evidence and submitted that the failure to tender the statements raises the presumption under section 149 (d) of the Evidence Act that they were unfavourable to the prosecution's case. He referred also to the evidence of the PW4 to the effect that some of the witnesses identified the accused persons at the identification parade and submitted that in the absence of evidence as to which of the prosecution witnesses identified which of the accused persons there was no evidence upon which to convict the Appellant. It was counsel's further submission that this piece of evidence about some of the witnesses identifying some of the accused persons without more amounted to a contradiction which has created a doubt and which should be resolved in favour of the Appellant. For these submissions he relied on JAMES IKHANE vs C. O. P. (1977) ALL NLR (reprint) 234 at 237; BOY MUKA vs THE STATE (1976) 10-11SC 305; NDIDI vs THE STATE (2007) ALL FWLR (Part 381) 1650-1651; OMOPUPA vs THE STATE (2008) ALL FWLR (Part 445) 1648.

On the Appellant's third issue for determination, learned counsel referred to the provision of section 269 (1) of the Criminal Procedure Code to the effect that every judgment must be dated and signed by the judge in open court at the time of pronouncing it and submitted that there is nothing at Page 118 of the record to show that the judgment was signed and that the non-compliance rendered the judgment a nullity and therefore that there was no judgment for the court below to affirm.

With respect to the Appellant's fourth issue for determination learned counsel once again referred to the evidence of the PW1, PW3 and PW5 about the statements they made and which were not tendered, nor filed by way of proof of evidence and submitted that by virtue of the provisions of section 149 (d) of the Evidence Act there should be a presumption that the statements if tendered would have been against the prosecution and in favour of the Appellant. For this submission reliance was placed on ABACHA vs THE STATE (supra) at Page 1299.

It was further submitted that it was the constitutional right of an accused person to see the statements made by prosecution witnesses against him and this was particularly so in capital offences. Learned counsel argued therefore that the failure to give the Appellant the statements made by prosecution witnesses against him

amounted to a denial of fair trial occasioning a miscarriage of justice. He relied on *LAYONU & ORS vs THE STATE* (1967) ALL NLR Page 210 at 214; *AKPABIO vs THE STATE* (1994) 7-8 SCNJ 429 at 454; *RANSOME-KUTI vs A. G. FEDERATION* (1985) 2 NWLR (Part 6) 211 at 229-230; *SAUDE vs ABDULLAHI* (1989) 4 NWLR (Part 116) 387 at 419 and *FEDERAL REPUBLIC OF NIGERIA vs IFEGWU* (2003) 15 NWLR (Part 842) 217.

As regards the appellant's fifth issue of whether the Appellant's defence of alibi was adequately considered and rightly rejected learned counsel referred to part of the judgment of the trial court at Page 108 of the record and submitted that the learned trial judge did not adequately consider the alibi raised and which failure, he argued, occasioned a miscarriage of justice. Learned counsel relied on *ADIGUN vs ATTORNEY-GENERAL OYO STATE* (1987) 1 NWLR (Part 53) 678 at 721.

On the sixth issue of whether in the circumstances of this case the learned Justices of the Court of Appeal were right to hold that identification parade was unnecessary, learned counsel referred to the evidence from various prosecution witnesses about four different identification parades after which only some of the PW1, PW3 and PW5 identified some of the accused persons and argued that the PW1, PW3 and PW5 simply conspired to lie against the appellant and others.

In conclusion learned counsel urged that the appeal be allowed. On his part the Hon. Attorney General of Kano State Alhaji Aliu Umar argued as follows: - He argued firstly that the Appellant and others were charged not under section 185 (b) of the Criminal Procedure Code Kano State but rather under the simplified procedure as provided under the Robbery and firearms (Special Provisions) Decree No. 5 of 1984 as amended by Decree. No. 62 of 1999 to address the menace of armed robbery.

On the issue of whether there was enough credible and admissible evidence to sustain the conviction learned counsel referred to aspects of the eye witness accounts of the PW1, PW2, and PW3 on the part played by the appellant and submitted that the findings of the trial court affirmed by the court below are supported by the evidence on record. With respect to contradictions it was his submission that there were no such contradictions so material as to affect the

credibility of the case of the prosecution. There was no contradiction as to the identity of the Appellant and the role he played. With respect to the Appellant's complaint about not making the statements of the prosecution witnesses available to him, it was argued that statements of witnesses made to the Police are not given to an accused at the trial as a matter of course and that if the Appellant was interested he ought to have asked for it. In support of this submission the learned Attorney-General relied on *GAJI vs THE STATE* (1975) 9 NSCC 294. B

With regard to the issue of whether there was compliance with the provisions of section 269 (1) of the Criminal Procedure Code the learned Hon. Attorney-General referred to the entries of Page 118 of the record: C

"(SIGNED)

HON. JUDGE 24/07/03" D

and submitted that there was full compliance with the letter and spirit of the provision.

On the question of whether the alibi raised by the Appellant was adequately considered and rightly rejected it was the submission of the learned Attorney-General that the findings by the courts below are supported by the evidence. He relied on *ALAMU vs STATE* (2009) 10 NWLR (Part 1148) 31; *DAGGAYE vs STATE* (2000) 7 NWLR (Part 980) 637 at 668; *ADAVA vs STATE* (2006) 9 NWLR (Part 984) 152 at 167. It was urged finally that the appeal be dismissed. E
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In the Appellant's Reply Brief learned counsel submitted that whether an application to prefer a charge is brought under section 185 (b) of the Criminal Procedure Code or under the Robbery and Firearms (Special Provisions) Act cap 398 Laws of the Federation of Nigeria 1990 filing of proof of evidence is sacrosanct and a fundamental requirement of fair trial. It was further argued that even under the Robbery and Firearms (Special Provisions) Act the requirement of filing of evidence is mandatory by virtue of the provisions of Rules 1 and 2 of the Robbery and Firearms Tribunals Rules of Procedure. Learned Counsel urged in conclusion that the appeal be allowed. G
H

I have considered the various issues raised and the addresses of counsel for the parties. The first issue pertains to whether there

were sufficient materials before the trial court which justified its discretion to prefer the charges against the Appellant. The issue is concerned with the court's exercise of its discretion. It is settled that every exercise of discretion is dictated by the facts and circumstances of the particular case. It follows therefore that in matters of discretion no one case is a binding authority for the exercise of discretion in a subsequent case.

What are the facts upon which the trial court exercised its discretion to grant the leave to prefer the charges against the Appellant. The charges are contained at pages 1-2 of the record. Page 2 also contains the following information.

In the Appellant's Reply Brief learned counsel submitted that whether an application to prefer a charge is brought under section 185 (b) of the Criminal Procedure Code or under the Robbery and Firearms (Special Provisions) Act cap 398 Laws of the Federation of Nigeria 1990 filing of proof of evidence is sacrosanct and a fundamental requirement of fair trial. It was further argued that even under the Robbery and Firearms (Special Provisions) Act the requirement of filing of evidence is mandatory by virtue of the provisions of Rules 1 and 2 of the Robbery and Firearms Tribunals Rules of Procedure. Learned Counsel urged in conclusion that the appeal be allowed.

I have considered the various issues raised and the addresses of counsel for the parties. The first issue pertains to whether there were sufficient materials before the trial court which justified its discretion to prefer the charges against the Appellant. The issue is concerned with the court's exercise of its discretion. It is settled that every exercise of discretion is dictated by the facts and circumstances of the particular case. It follows therefore that in matters of discretion no one case is a binding authority for the exercise of discretion in a subsequent case.

What are the facts upon which the trial court exercised its discretion to grant the leave to prefer the charges against the Appellant. The charges are contained at pages 1-2 of the record. Page 2 also contains the following information.

LIST OF WITNESSES

1. INSP MURTALA SALAU

To state his findings during investigation of the case.

2. HAJIYA MAIJIDDA DANJUMA

To state how the accused persons robbed her of her cash and jewelleryes.

3. HAJIYA ZAINAB DANJUMA

To state how the accused forcefully removed the key to her husband's saving box and robbed them of cash and jewelleryes contained in the box. B

4. HAKEEM DANJUMA :

To state how the accused forcibly robbed his mother of her cash and jewelleryes. C

5. MUSTAPHA DANJUMA

To state how the accused forced him to take them to his father's room.

SUMMARY OF EVIDENCE

The prosecution will lead evidence to show that the accused D persons threatened the victims with guns and other dangerous weapons thereby robbing them of cash and jewellery.

The above was stated to be for service on the accused persons. It was signed by Hadiza Suleiman (Mrs) Deputy Secretary Director Civil Litigation Ministry of Justice Kano. ***It is true that no proof of evidence was filed and served on the Appellant and so the Appellant might not have had the benefit of knowing, in advance, the details of what each of the prosecution witnesses was to say against him. But the name of each of the witnesses and the substance of what he or she was to say were given at pages 1-2 of the record.*** E F

And then at the beginning of proceedings on the 10/4/2001 at page 3 of the record the following is recorded:-

"Mrs. H. Suleiman for the State

Mr. S. O. Oche for the accused persons

Accused persons present in court

All speak English

Mrs. Suleiman- I have an application to prefer a charge against the accused persons G H

Mr. Oche:- I have no objection

Court:- Application is granted as prayed. Leave is granted to prosecuting counsel to prefer the charges mentioned in the charge sheet against the accused persons"

In view of the foregoing facts and circumstances about the charges, the names of the witnesses and what each was to say and the fact that learned counsel for the Appellant Mr. S.O. Oche expressly stated that he had no objection to the preferment of charges against the appellant, could the learned trial judge be held to have had sufficient materials before him to exercise his discretion in granting the leave? I shall answer this question in the affirmative. Given the facts and circumstances before the learned trial judge on the 10th of April, 2001, the only judicial and judicious exercise of his discretion was the granting of the leave sought, the none filing of proof of evidence notwithstanding. ***It is clear from the record that the Appellant hadn't the slightest misgiving about the consistency between the testimony of any of the prosecution witnesses and his or her earlier statement to the police and that apparently accounted for why no attempt was made by him to contradict any of them with such previous statement to the police.*** Part of the evidence of the PW1 under cross-examination is significant. At page 12 lines 4-9 of the record the witness said:-

"I made two statements to the police in respect of this matter, one at Yarakwa Police Station and one at Bompai CID. I cannot remember whether I wrote the statement or the police wrote it for me. I cannot recall whether I stated in my statements that I knew the residence of the accused persons. I simply told the police that thieves came to our house. I did not state whether they were known or unknown".

The above clearly shows that the Appellant through his counsel adequately laid the foundation for testing the veracity of the witness by contradicting her with her previous statements to the police. But this he never did. Learned Counsel for the Appellant in cross-examination of the PW3 created yet another opportunity to discredit the prosecution's case. At page 22 lines 4-6 of the record the witness said under cross examination:-

"I made a statement at Yarakwa Police Station and another at Bompai. If you discover a discrepancy between my statement and evidence I am prepared for any punishment".

The witness asserted with emphasis that there was no discrepancy, let alone contradiction between his evidence and his previous

statements to the police. This was yet another opportunity for the Appellant to call for the previous statements of the witness so as to discredit him. Again he did not do so. ***In situations and circumstances such as this, there is a rebuttable presumption that the testimony of a witness is consistent with his earlier statement to the police. Thus in this case the Appellant had all the opportunities to rebut that presumption, but he never did. Can he be heard, in the circumstances, to complain that the none filing of proof of evidence was prejudicial to his fair trial? I shall answer this question in the negative.***

On this issue therefore I hold that the non-filing of proof of evidence notwithstanding, there were sufficient materials before the learned trial judge which justified his discretion in granting the leave to prefer the charges against the Appellant. And this was particularly so since learned counsel for the Appellant said categorically that he did not oppose the leave sought.

The next issue is whether there was such admissible and credible evidence which justified the trial court's conviction of the Appellant and its affirmation or confirmation by the Court of Appeal. This is a wide and all embracing issue encompassing the issue of evaluation or proper evaluation which falls mainly within the domain of the trial court. In his judgement, the learned trial judge Mahmoud J. reproduced the charges at pages 61-62 of the record. And from pages 62-101 he recounted in details the evidence of each of the prosecution witnesses, that of each of the accused persons including the Appellant and other defence witnesses and the address of counsel both for the prosecution and the defence. He then proceeded to resolve the issues one after the other.

On the question of whether the failure of the prosecution to call the owner of the house, Alhaji Danjuma Ali Garko and three others as witnesses was fatal to the prosecution's case, the learned trial judge ruled that there was, in law, no duty on the prosecution to call all witnesses and that in this particular case they were not material witnesses. In his view, there was no evidence which the said witnesses would have given which was not already before the court and that section 149 (d) of the Evidence Act did not avail the Appellant.

The learned trial judge examined the issue of contradictions in the case of the prosecution and held that there were no contradic-

tions and that even if there were, they were not such contradictions which rendered the case of the prosecution manifestly unreliable.

Next was the issue of alibi raised by the Appellant. In examining the said issue, the learned trial judge agreed with and even re-stated the general principle that an alibi once properly raised must be investigated and disproved by the prosecution; that for such a plea of alibi to avail an accused person it must be raised at the earliest opportunity. The learned trial judge however rejected the alibi of the Appellant and the other accused persons on the grounds (i) that the alibi were all to the effect that they were at home and (ii) that the alibi were raised at the stage of trial and therefore an afterthought. And relying on the case of AHMED vs. STATE (2001) 18 NWLR (Part 746) 622 the learned trial judge held that the failure to investigate an alibi would not be fatal to the prosecution case where, as in the instant case, there is positive evidence which fixes the accused person at the scene of crime at the material time. In such a case, the learned trial judge emphasised, the alibi raised becomes effectively demolished. It was his conclusion therefore that in view of the strong and positive evidence of the prosecution which fixed the Appellant at the scene of the robbery at the material time and which evidence he believed, the alibi had no substance and was untenable.

The next issue which was examined in detail by the learned trial judge pertains to evidence of identification. On this issue the learned trial judge appeared to have been persuaded by the submission of Mrs. Suleiman for the prosecution to the effect that where, as in this case, the accused person and the victims of the offence knew themselves before the alleged offence identification was merely superfluous. With respect to the said evidence the learned trial judge referred to the evidence of the PW1 and PW5 that they saw the Appellant and the other accused persons everyday passing by their house or when the PW5 was on his way to and from school or whenever he went to play ball in the field near their house. He also referred to the evidence of the Appellant (3rd accused) who admitted being a former neighbour in that house. He also relied on the evidence of the DW6 who is a younger brother of the Appellant that he knew the family of Alhaji Danjuma Ali Garko very well. The learned trial judge also referred to the evidence of the DW7 who is the wife of the appellant to the effect that she knew the family of Alhaji Danjuma

Ali Garko.

Still on this issue of identification the learned trial judge referred to what he called the corroborative evidence of the 1st accused who admitted being a neighbour of Alhaji Danjuma Ali Garko and admitted knowing the PW1, 3 and 5 as he usually went to their house to fetch water. He also made some reference to the evidence of the 2nd accused person. On this issue of identification the learned trial judge concluded as follows:-

“It is clear from all these testimonies that the 1st and 3rd accused persons are neighbours or live in the same compound. That the 2nd and 4th accused persons used to visit either the 1st or 3rd accused persons. It is also in evidence before this court that the robbers did not mask or cover their faces on the night of the robbery. That there was light during the robbery operation. I believe the witnesses especially PW1, 2, 3 and 5 when they said they recognised the accused persons as their neighbours together with those who used to hang out with them as the persons that robbed their house on the night of September 2000. Having known them before the incident and having seen them in bright lights unmasked I am satisfied that the said witnesses properly identified the accused persons as those who robbed their house on the night of 10th September, 2000. This knowledge was confirmed by some of the defence witnesses as earlier found. An identification parade was therefore unnecessary. I hold therefore that even if there was any irregularity in the identification parade, it cannot affect the prosecution’s case. The identities of the accused persons as the persons who attacked and robbed the house of the prosecution witnesses are properly and well established”. (see pages 110-111 of the record).

The learned trial judge then proceeded to examine the issue of conspiracy raised before him. And by way of conclusion of his evaluation exercise the learned trial judge stated at page 115 of the record:-

“In sum, I find that all the four accused persons were the persons who robbed the house of the complainant on the night of 10th September, 2000. That they were armed with guns and they robbed the complainant’s household and jewellery. All the four accused persons I have already found were properly and positively identified by PWS 1,2,3 and 5. The only defence raised by all the accused persons is alibi which most of them raised only at the point of trial. I have

already found that the prosecution has disproved all the alibi. This they did by the positive and uncontroverted and undiscredited testimonies of PWS 1,2, 3 and 5 fixing all the accused persons at the scene of crime on the night of the robbery, 10th September, 2000. Their alibis therefore crumbled. From all my findings on all the issues raised in this judgement and all the surrounding circumstances of this case, I am satisfied that the prosecution has proved its case against the accused persons beyond reasonable doubt...”

On this issue of whether there is admissible and credible evidence on record to justify the concurrent findings of the two courts below, the Court of Appeal, Per Jega JCA, reproduced the above conclusion of the trial court and at page 239 of the record reasons as follows:-

“The learned trial judge appraised the totality of the evidence adduced before the court and accepted the overwhelming evidence of the prosecution while the alibi was considered and rejected.”

The Court of Appeal restated the principle about the duty of evaluation of evidence and ascription of probative value to same being within the province of the trial court and at page 241 of the record reasoned again:-

“In the appeal at hand the trial court in a most comprehensive manner properly evaluated the evidence adduced before it and made its findings thereon. There is a presumption that findings of facts of a trial court or Tribunal are right or correct and so remain until dislodged by the party who challenges such findings. The Appellants in the instant appeal have not dislodged the findings of facts made by the trial court, equally they have not shown that the findings are perverse or that the trial court drew wrong inferences from accepted facts to warrant us to interfere with the findings”

I have examined the evidence of each of the prosecution witnesses, that of the Appellant and other defence witnesses including his brother Churchill Sunday who testified as DW6 and his wife Ifeoma Sunday who testified as DW7. I have also carefully examined the judgment of the trial court, that of the court below and the address of counsel for the parties in their respective briefs of argument on this all pervading issue. First off all I agree with the view of the court below that the trial court in a most comprehensive manner evaluated the to-

talidity of the evidence adduced before it. I am satisfied that as the court of trial, it very ably performed its duty of evaluation of the evidence and properly ascribed probative value thereto.

On the question of whether the failure to call Alhaji Danjuma Ali Garko and three other named persons as witnesses was fatal to the case of the prosecution, ***I agree with the view of the trial court and affirmed by the court below that the prosecution was not bound to call each and every witness. The prosecution was at liberty to call only such number of witnesses as was necessary to establish proof of the offences charged beyond reasonable doubt. On this question, the Court of Appeal per Oredola JCA at page 261 had this to say:-***

“It is trite that it is the sole duty of the prosecution to prove its case beyond reasonable doubt by calling all material witnesses. This ‘onus probandi’ must be duly satisfied and once this has been done, it does not matter if some potential or likely witnesses were not called by the prosecution. After all the prosecution is not duty bound to call all available witnesses. It is a fact of life that if a part suffices, the whole is not required”.

I agree entirely with the above reasoning. As the trial court rightly pointed out there was no evidence which Alhaji Garko or any of the other named persons would have given which was not already before the court. Furthermore it is clear from the record that Alhaji Danjuma Ali Garko was not in his house when the robbery operation started and only came into the premises at the tail end when the robbers were hurrying away from the scene. He cannot therefore be properly categorised as one of the material witnesses. Even if Alhaji Garko or any of the other named persons were to be categorised as a material witness, the law imposes a duty to call only such number of witnesses as are necessary to prove the offence charged beyond reasonable doubt. In MANAWA OGBODU vs THE STATE (1987) 1 N.S.C.C 429 at 437 the supreme Court per Obaseki JSC reiterated this principle as follows:

“Where two or more persons are witnesses to an event, the law does not impose a duty on the prosecution to call all the persons as witnesses. What the law requires and the burden it imposed on the number of witnesses to be called is entirely that of the prosecution”

In the earlier case of REC vs. GEORGE KUREE (1941) 7 WACA the West African Court of Appeal had emphasised the same principle thus:

B *“It is well established that it is the duty of the prosecution to place before the court all available relevant evidence; this does not mean of course that a whole host of witnesses must be called upon the same point but it does mean that if there is a vital point in issue and there is a witness whose evidence would settle it one way or the other, that witness ought to be called”*;

C In the instant case all the material evidence about the robbery were, in my view, adequately covered in the evidence of the PWS 1, 2, 3 and 5. It is my view that having regard to the detailed evidence of the PWS 1, 2, 3 and 5 calling Alhaji Danjuma Ali Garko or any of the other named witnesses would have been a mere surplusage. On D this question therefore I hold that the failure to call Alhaji Garko or any of the other named persons as witnesses was not fatal to the prosecution’s case and *a fortiori* section 149 (d) of the Evidence Act does not avail the appellant.

E ***Next is the issue of contradictions in the case of the prosecution. The learned trial judge examined this in his judgment at pages 105-107 of the record and came to the conclusion that there were no contradictions of any significance or substance that created doubts in the case of the prosecution. The court below also examined the issue of contradictions and came to the same conclusion of there being no contradiction of any substance in the case of the prosecution. I have also considered the issue carefully and I am unable to find a single material contradiction in the evidence of the prosecution. On this issue of contradictions therefore, I have no reason whatsoever to interfere with the concurrent findings of the courts below.***

H I now come to the issue of alibi raised by the Appellant. His alibi was all to the effect that he was at the material time in his house. The trial court reasoned that investigating such alibi would mean contacting the wife and younger brother who however testified and whose evidence it disbelieved. The trial court also held that the alibi ought to have been raised early enough to enable the prosecution to investigate it and that raising it at the point of trial was an afterthought. And

it was also the trial court's view that failure to investigate an alibi may not necessarily be fatal to the prosecution's case once, as in this case, there is positive evidence which fixes the accused at the scene of the alleged offence.

On this issue of alibi the court below at page 247 of the record stated:

"The law is that the police have a duty to investigate an alibi. However, the omission to investigate cannot be a carte blanche to set an accused person free; rather it should be tested against the evidence of the prosecution..."

And after quoting verbatim the opinion of the trial court on this issue of alibi the Court of Appeal at page 250 of the record concluded thus:

"It is therefore my finding that the learned trial judge has adequately considered the alibi presented by the Appellants and has rightly rejected same in the light of overwhelming evidence fixing the Appellants at the scene of the crime on the date in question".

Here again I have no reason to interfere with the concurrent findings of the two courts below. A plea of alibi by an accused person simply means that he was "elsewhere" at the time of the alleged offence. If therefore the prosecution can lead strong and positive evidence which fixes the accused person at the scene of crime and which evidence the court accepts the alibi naturally collapses. See the cases of ADEKUNLE vs STATE (1989) 5 NWLR (Part 123) 505 at 513; PATRICK NJOVENS & ORS vs THE STATE (1973) 1 NWLR 33. In this case the rather weak and belated alibi of the appellant was outweighed by the strong eye-witness accounts of the PW1, 2, 3 and 5 and I have therefore no difficulty in holding that the alibi was rightly rejected.

With respect to the specific issue of identification and others I have earlier reproduced the findings and conclusion of the trial court at pages 110-111 of the record. **On this issue the court below at page 245 of the record said:**

"In the conduct of identification parade there are no hard and fast rules that must be strictly adhered to....."

In the appeal at hand in the course of the investigation as shown

in the testimony, the identities of the accused persons were too well known. In fact bearing the circumstances of this case identification parades carried out were unnecessary in the sense that the witnesses knew very well the accused persons that carried out the robbery operation”.

B And after making some references to parts of the evidence of the PW1, PW2, DW2, and DW3 the court at pages 246-247 of the record concluded as follows:

C *“In the light of the foregoing there were no doubts created in the identification of the appellants beside the fact that the conduct of the identification parade was unnecessary the identification parades carried out in the instant appeal satisfied the requirements of the law”*

D ***I am unable to fault the above findings and conclusions of the court below. That the appellant and other accused persons and some of the prosecution witnesses knew themselves before the alleged crime of the 10th September, 2002 is amply supported by the evidence on record.*** In part of her evidence at page 7 of the record the PW1 had this to say:-

E *“All the accused persons live in our neighbourhood and they pass by our house everyday...”*

Under cross-examination at page 9 of the record the witness again said:-

F *“The house where the accused persons live is not far from our house. I am therefore familiar with their faces, we have a borehole in our house so most of our neighbour fetched water in our house until this incident when our husband stopped it”.*

And Okpage 10 of the record the witness emphasised thus:

G *“I knew the accused persons very well before this incident. It was the police that arranged the first identification the manner they did. I can identify the accused persons even from one hundred people”*

In his testimony under cross-examination at page 22 of the record the PW3 also said:-

H *I knew the 1st and 3^d accused persons before the night of the incident and I did not have any problem identifying them”.*

He repeated this evidence at page 23 of the record.

The PW5 also gave evidence to the same effect. At page 27 of the record he said:-

“I see the accused persons. I know them. But I knew them

before they entered our house. There is a football field behind our house. Each time we went there to play football I normally used to see the accused persons”.

The above is clear proof that the PW1, PW3 and PW5 the appellant and the other accused persons knew themselves before the 10th of September, 2000. In the light of this evidence I hold that the court below was perfectly in order when it held that identification parade was after all unnecessary.

The last issue is whether there was compliance with the provisions of Section 269(1) of the Criminal Procedure Code. Section 269 (1) of the Criminal Procedure Code provides:

“Every judgement shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed or sealed by the court in open court at the time of pronouncing it”.

The indication at page 118 of the record is that the judgment was duly signed and dated and that, in my view, is due compliance with section 269 (1) of the Criminal Procedure Code. In the circumstances of this case for the Appellant to successfully impugn the judgment of the trial court for non-compliance with section 269(1) of the Criminal Procedure Code he can only rely on the manuscript or the trial court’s text in its original hand written state. In the absence of such a document the only presumption from the entries at page 118 of the record is that the judgment of the learned trial judge on the 24th of March, 2003 was duly signed and dated.

As I stated earlier in this judgement the Appellant’s 2nd issue of whether there was enough admissible and credible evidence that justify the conviction and sentence of the Appellant is all embracing. Under it I considered and resolved the various issues of sufficiency of the witnesses called by the prosecution, and whether the failure to call some named persons was fatal to the prosecution’s case. I also considered and resolved the issue of whether there were such material contradictions in the case of the prosecution which rendered it manifestly unreliable. The defence of alibi raised and the identification of the Appellant were also carefully examined. Having examined and resolved all the issues against the Appellant I hold that the appeal fails, and is accordingly dismissed. I have no reason to disturb

the concurrent decisions of the two courts below. In the event the appeal be and is hereby dismissed.

MUSDAPHER JSC

B I agree.

ONNOGHEN JSC

C I have had the benefit of reading in draft, the leading judgment of my Learned Brother Tabai, JSC., just delivered.

I agree with his reasoning and conclusion that the Appeals lack merit and should be dismissed. I accordingly dismiss same.

D

MUNTAKA-COOMASSIE JSC

E I had a preview of the leading judgment, in both SC. 46/2009 and SC. 47/2009, of my learned brother Francis Tabai JSC. I entirely agree with his reasoning which I adopt as mine. I have nothing more useful to add. Both appeals I agree lack merit same are therefore dismissed by me. Conviction and sentence ordered by the two courts below are affirmed.

F

ADEKEYE JSC

G I was privileged to read in draft the judgment just delivered by my learned brother, F. F. Tabai, JSC. The two appeals SC. 46/09, Ikechukwu Sunday v. The State and SC. 47/09, Hyginus Oformata v. The State, are against the judgment of the Court of Appeal, Kaduna delivered on the 6th of January 2009. The appeal at the Court of Appeal, Kaduna emanated from the judgment of the High Court of Justice, Kano State delivered on the 24th of July 2003. In the judgment, the learned trial judge convicted these two appellants with two other persons, Samuel Attah and Vincent Friday for the offence of robbery committed in the same incident and sentenced them to death. This court had already heard and determined the appeal against the conviction and sentence of the two other persons in the appeals - SC. 44/09 Samuel Attah v. The State and SC. 45/09 Vincent Friday

- dismissed the appeal and affirmed the judgments of the two lower courts on the 26th of March, 2010.

This court decided to consider the two appeals SC. 46/09 and SC. 47/09 together - because the robbery was committed in the same incident, at the same venue, against the same victims who later testified for the prosecution, and the counsel engaged to handle the case for the appellants and the respondents in the two appeals are same. The appeals were heard together. The court adopted this step in the interest of litigation time. B

The appeal in hand is considered on the same pedestal as that already disposed off by this court with the consent of parties because- C

- (1) Parties are the same.
- (2) The robbery incident is the same.
- (3) Venue of the robbery is the same house. D
- (4) Witnesses who testified for the prosecution are the same people.
- (5) Issues for determination are the same.
- (6) Argument and submission of counsel for the appellants and respondents are the same. E
- (7) Facts of the case placed before the court for evaluation and appraisal are the same.
- (8) Applicable principles of law are the same.

It is therefore inevitable that the reasoning and conclusion of this court in the appeals SC. 46/09 and SC. 47/09 must be on all fours with the reasoning and conclusion in the appeals SC. 44/09 and SC. 45/09 so as to avoid any conflicts in the judgments. F

With the reasons given in the former appeals and fuller reasons in the leading judgment, I also agree that the appeal SC. 46/09 and appeal SC.47/09 lack substance. They are therefore dismissed while the conviction and sentence ordered by the two lower courts remain subsisting and valid. G