

SUPREME COURT OF NIGERIA
FRIDAY 12TH JULY, 2013. SC. 192/2011
CORAM:- I. T. MUHAMMAD, J. A. FABIYI, S. GALADIMA,
M. D. MUHAMMAD, S. S. ALAGOA, JJSC

OLANREWAJU AYAN APPELLANTS
V.
THE STATE RESPONDENTS

ALIBI - Proof - Prosecution has onus to adduce credible evidence to disprove alibi - But accused must firstly discharge the evidential burden of setting up facts - On which alibi can rest (H1)

ALIBI - Defence - Investigation - Where alibi has been promptly set up - Prosecution must carry on an investigation - But failure to do so would not always be fatal to prosecution's case (H2)

ALIBI - Defence - Inconsistencies - Where material facts of the defence are found to be false - Prosecution is not bound to investigate - As no alibi is established (H3)

ALIBI - Defence - Accused at crime scene - Where presence of accused is fixed at the scene - The defence is defeated and need no investigation (H4)

COURTS - Issue - Determination - Court decides live issues between the evidence and prevailing law - And does not manufacture evidence for parties - As a party wins on the strength of his evidence (H5)

APPEALS - Dismissal - Basis - Appeal court can only dismiss appeal - If the appeal appears to be a non starter - And the court does not reevaluate evidence - Except there are genuine complaints (H6)

FACTS

Before the High Court of Ekiti State Holden at Ikole Ekiti, accused/appellant along with three others was arraigned on a three count charge of conspiracy to commit murder, attempted murder

and murder. They pleaded not guilty and the matter went on to trial. It is the case for prosecution/respondent that PW1 sent the deceased - one Mayowa on an errand. The said Mayowa did not return home and a search party was thus conducted on the orders of the Oba of the town. During the search, PW2 was accosted by one Sunday Jegede (formerly 1st accused in the matter, but now deceased). The said Jegede promptly alerted some persons hiding in the bush and three persons including appellant came out in response to his call to attack PW2.

Although the assailants were armed with a knife, PW2 managed to escape from them. They were subsequently arrested. Appellant raised the plea of alibi saying in one breath that he was in police custody and in another breath that he was at Ibadan at the time of Mayowa's murder and the search for him in the bush. PW2 testified that appellant was one of the three persons who hearkened to the call of Jegede and came out to fight him (PW 2). Appellant did not deny that he fought PW2 but denied attempting to kill him. After evaluating the evidence before it, the court found each of the three accused guilty as charged. They were sentenced to death on count two and life imprisonment on count three. Aggrieved, appellant appealed to the Court of Appeal. The appeal was dismissed which led to appellant filing appeal to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right to uphold the judgment of the trial court to the effect that the appellant's defence of alibi was rejected and disbelieved despite the failure of the prosecution to tender the report of police investigation on the alibi to court and also in view of the contradicting statements of PW2 and PW3

2. Whether the Court of Appeal was correct in law to uphold the judgment of the trial court that the appellant was among the four people that attacked PW2 and killed the deceased in view of the evidence before the court."

HELD (Unanimously dismissing the appeal per **I. T.**

MUHAMMAD JSC)

ALIBI - Proof

1. Now, ALIBI is a question of fact that must be established or discredited by credible evidence. Once the prosecution has discharged the onus placed on it by adducing evidence against the defence put forward by the accused then the onus shifts on the accused to call evidence to weaken or discredit the evidence of the prosecution.

In any event, it is the law that while the onus rests on the prosecution to disprove an alibi, the accused has first to discharge the evidential burden of setting up enough facts on which an alibi can rest. (p. 3724 C)

ALIBI - Defence - Investigation

2. It is the law as well, that where a defence of alibi has been promptly and properly put up, the burden is on the prosecution to investigate it and rebut such evidence in order to prove the case against the accused person beyond reasonable doubt. Although there may be occasions on which failure to check an alibi may cast doubt on the reliability of the case for the prosecution, it is not in all cases that such failure to investigate an alibi would be fatal to the prosecution's case. (p. 3724 E)

ALIBI - Defence - Inconsistencies

3. That apart, it is to be noted generally, that in a claim of an alibi, where the material facts of it are found to be false, such as when a person claimed that he was in a particular place or with a particular person(s) but it turned out in investigation that he was not there at the material time, as in this case, that claim must be held to be patently false. For clarity sake, there were inconsistencies in the material facts of the alibi raised by the appellant: [1] In his extra-judicial written statement to the Police, the appellant claimed that he was in Ibadan at the time the crimes were committed.

But in his testimony in court at page 83 of the record of appeal, he stated that he was in Police custody, then changed it on second thought that he was in Ibadan at Sango. Again, he said that he was at Eleyele looking for petrol. Sango and Eleyele are not the same though both are in Ibadan. Thus it is

not clear whether the appellant was at Sango or at Eleyele. These contradictions in the appellant's alibi cannot be explained away as a result of being 'jittery' as the appellant's counsel has argued. Thus, where the accused person gives conflicting stories as to his whereabouts at the material time under consideration, there is no duty on the prosecution to investigate the alibi and in such a case, no alibi is established. The conflicting stories of the appellant in the instant case have even rendered his alibi as not established. Thus, it means that the respondent was not even duty bound to investigate it and whether or not the alibi is investigated, it will not invalidate the conviction of the appellant. But, however, to be at the safer side, the alibi was investigated and rebutted by the respondent. (p. 3726 D)

ALIBI - Defence - Accused at crime scene
4. Again, appellant never denied or rebutted that he was arrested with the other co-accused on the fateful night at Oke Ayedun Police station on the 28th of November, 1998. This gives a presumption that the appellant was at the scene of the crime. It is the law my lords, that where the presence of an accused is fixed at the scene of the crime, the defence of alibi, no matter how beautifully put up is defeated and need no investigation. (p. 3727 D)

COURTS - Issue - Determination
5. Appellant's issue no.2 is whether the court below was correct in law in upholding the judgment of the trial court that the appellant was among the four people that attacked PW2 and killed the deceased in view of the evidence before the court. I think I should make it clear to the learned counsel for appellant that the primary duty/responsibility of a trial court is to decide living issues between the evidence and the prevailing law where the balance of justice favours such a party. It is not part of the trial court's duty/function to manufacture evidence for any of the parties. A party wins on the strength of his evidence (case) and loses where his evidence (case) is patently weak, unsupportable and unjustifiable. (p. 3727 G)

APPEALS - Dismissal - Basis

6. On the other hand, an appeal court can only affirm or dismiss an appeal before it or strike it out, if it appears to be a non-starter. It is not the function of an appeal court to reassess or re-evaluate evidence except where there are genuine complaints from the appellant which justify doing so. (p. 3728 B)

REPRESENTATION

M. M. O. Olopade, for Appellant
Bola Aidi, for Respondent

CASES REFERRED TO

Chukwu v. State (1996) 7 NWLR (pt. 463) 686
Agu v. State (1985) 2 NSCC 1197
Ntam v. State (1967) NSCC 1
Ozaki v. State [1990] 1 NWLR (pt. 124) 92
Njovent v. State (1973) NSCC 257
Omotola v. State (2009) 8 ACLR 29
Mbele v. State (1990) 4 NWLR (pt. 145) 485
Schroder v. Major [1989] 2 NWLR (pt. 101) 20
Ochomma v. Unosi (1965) NMLR 321
Adeniji v. Adeniji (1972) 1 ALL NLR (pt. 1) 298
Yanor v. State (1965) NMLR 337
Queen v. Turner (1957) WRNLR 113
Odu v. State (2001) 5 SCNJ 115
Oduntan v. Akibu (2000) 7 SC (pt. 2) 106

STATUTES REFERRED TO

Criminal Code Cap. 30 Vol. II Laws of Ondo State 1978, ss. 313 [1], 320, 324
Criminal Code Act, s. 319

LEAD JUDGMENT BY I. T. MUHAMMAD JSC

From the facts contained in the record of appeal placed before this Court, the appellant, herein, along with three others, were charged with a three-count of conspiracy, attempted murder and murder.

The counts are as follows:

“Count 1

STATEMENT OF OFFENCE

Conspiracy to commit felony to wit murder contrary to section 324 of the Criminal Code Cap. 30, Vol. 11 Laws of Ondo State of Nigeria
B *1978 as applicable in Ekiti State.*

PARTICULARS OF OFFENCE

SUNDAY JEGEDE (M), OLUWATOSIN ABOKOKUYANRO (M), SUNDAY ODO (M), OLANREWAJU AYAN (M) on about 29th day of November, 1993 at Iyinfe Farm, Oke Ayedun Ekiti in the
C *Ikole Judicial Division conspired to murder one Mayowa Adeleye (M)*

COUNT 11

STATEMENT OF OFFENCE

D *Murder, Contrary to section 313 [1] of the Criminal Code Cap. 30, Vol. 11, Laws of Ondo State 1978 as applicable in Ekiti State.*

PARTICULARS OF OFFENCE

SUNDAY JEGEDE (M), OLUWATOSIN ABOKOKUYANRO (M), SUNDAY ODO (M), OLANREWAJU AYAN (M) on or about the
E *29th day of November, 1993, at Iyinfe Farm, Oke Ayedun Ekiti in Ikole Judicial Division murdered one Mayowa Adeleye [M]*

COUNT 111

STATEMENT OF OFFENCE

F *Attempted Murder, contrary to section 320 of the Criminal Code Cap. 30 Vol. 11, Laws of Ondo State 1978 as applicable in Ekiti State.*

PARTICULARS OF OFFENCE

SUNDAY JEGEDE (M), OLUWATOSIN ABOKOKUYANRO (M),
G *SUNDAY ODO (M), OLANREWAJU AYAN (M) on or about 29th day of November, 1998 at Iyinfe Farm, Oke Ayedun Ekiti in Ikole Judicial Division attempted to murder one FALADE OJO (M). ”*

The plea of each of the accused persons was taken wherein each pleaded “not guilty” in all the counts. Out of the four accused
H persons before the trial court, one of them, Mr. Sunday Jegede died in course of the proceedings and his name was struck out.

The case of the appellant was that he was not at the scene of the crime, that he traveled to Ibadan and visited some people on the fateful day and that he was not among the people arrested by PW 2

and brought before the Kabiyesi of the town.

The case proceeded for full trial. After taking and evaluating the evidence before him, and having considered the final addresses by the parties, the learned trial judge found each of the three [3] accused guilty as charged under section 319 of the Criminal Code. He sentenced each of them to death on count two (2) and life imprisonment on count three (3). It appears that only the 3rd convict filed and pursued his appeal to the court below. The court below after giving its considered opinion dismissed the appeal. Dissatisfied further, appellant appealed to this court on four grounds of appeal.

Briefs were filed and exchanged. Learned counsel for the appellant formulated the following issues for determination thus:

“1. Whether the Court of Appeal was right to uphold the judgment of the trial court to the effect that the appellant’s defence of alibi was rejected and disbelieved despite the failure of the prosecution to tender the report of police investigation on the alibi to court and also in view of the contradicting statements of PW2 and PW3 arising from grounds 1 and 4.

2. Whether the Court of Appeal was correct in law to uphold the judgment of the trial court that the appellant was among the four people that attacked PW2 and killed the deceased in view of the evidence before the court.”

Learned counsel for the respondent adopted the issues formulated by the appellant.

My noble lords should note that appellant’s first issue is on the defence of ALIBI raised by the appellant. ALIBI, (a Latin word) is a specific legal term, according to Garner [a dictionary of Modern Legal Usage, 2nd edition, Oxford, 41] referring to the defence of having been at a place other than the scene of crime. The argument of learned counsel for the appellant on the defence of alibi put forward by the appellant is that there was evidence before the trial court and the lower court that immediately the appellant was arrested, he timorously raised that defence in his statement to the Police and that it was made within 3 days of his arrest. The appellant’s alibi was to the effect that he was not at the scene of the crime and that he was not in town when the offence of murder was committed and that PW6 confirmed that the alibi was investigated and found to be true. The trial court and the lower court erred in law to have ignored the evidence

of PW6 on this vital point in arriving at the decision to reject the appellant's defence of alibi. Learned counsel for appellant cited and relied on the case of *Chukwu v. State* (1996) 7 NWLR (pt. 463) 686.

In his submission on the issue of ALIBI, the learned counsel for the respondent stated that the evidential burden was faithfully discharged by the prosecution by duly investigating the ALIBI of the appellant and duly rebutting the same with other evidence that squarely discredited same. He cited the reference made by the learned counsel to the appellant in paragraph 4.4 of his brief where confirmation of investigating the ALIBI was done by PW6 at page 79 of the record. The respondent thus, clearly discharged the duty on him to investigate the ALIBI pleaded by the appellant.

Now, ALIBI is a question of fact that must be established or discredited by credible evidence. Once the prosecution has discharged the onus placed on it by adducing evidence against the defence put forward by the accused then the onus shifts on the accused to call evidence to weaken or discredit the evidence of the prosecution.

In any event, it is the law that while the onus rests on the prosecution to disprove an alibi, the accused has first to discharge the evidential burden of setting up enough facts on which an alibi can rest. See: AGU V. THE STATE (1985) 2 NSCC 1197. It is the law as well, that where a defence of alibi has been promptly and properly put up, the burden is on the prosecution to investigate it and rebut such evidence in order to prove the case against the accused person beyond reasonable doubt. Although there may be occasions on which failure to check an alibi may cast doubt on the reliability of the case for the prosecution, it is not in all cases that such failure to investigate an alibi would be fatal to the prosecution's case. See: NTAM & ANOR V. THE STATE (1967) NSCC 1, OZAKI V. THE STATE [1990] 1 NWLR (part 124) 92 at page 96. Moreover, if the alibi had been true it would have been open to the appellant to call witnesses in support thereof. See: NTAM & ANOR. V. THE STATE (supra). In OZAKI'S case [supra], this Court observed:

"However, it does not always follow that once the prosecution failed to investigate an alibi, such a failure is fatal to the case of the prosecution. The trial court has a duty, even if the absence of inves-

tigation to consider the credibility of the evidence adduced by the prosecution vis-a-vis the alibi. "The holding of the learned trial judge has brought the issue out clearly when, at page 132 of the Record of appeal, he stated as follows:

"I do not agree with the learned counsel that the prosecution did not investigate the defence. I think the prosecution on the contrary did. For, the PW6 made it clear in his testimony that all the persons mentioned by the 3rd accused were called and they confirmed his story. The only thing that the police did not do was, perhaps, to go to Ibadan. But I hardly understand what they could have gone to do at Ibadan if the police called all the persons named in his statement and they had talked to them and they confirmed what he said. The question is whether, notwithstanding, what these people told the police about the [sic] where he went to, the police thought the 3rd accused and his friends told the truth or that they merely cooked up the stories to save his neck. I doubt if anyone will because these clearly are facts which render the 3rd accused person's claim impotent."

It is thus beyond any peradventure that the learned trial judge considered the defence of the appellant on alibi and rejected same. The lower court also without much ado, affirmed the same where UWA, JCA, held, inter alia, as follows:

"The PW6 also stated that he questioned the people the appellant mentioned he was with, on the other hand the PW2 had narrated how he was attacked by the four people including the appellant in the bush surrounding the uncompleted building in the night of the incident; within the vicinity where the body of the deceased was found on 30th November, 1998. At the scene in the bush the late Sunday Jegede called out the appellant and other three people from the bush, all four assailants of the PW2 were arrested and taken to the Police station."

The appellant did not lead evidence to the contrary, that is, that he was not one of the four people that the PW encountered in the bush that night of 29th of November, 1998, and the issue of the mistaken identity of the appellant did not and could not have arisen because the PW2 knew the appellant and called him by name in course of trial. The learned trial judge at page 133-134 of the records was therefore right to have held and made the following observation

thus, concerning the appellant:

“He was actually one of those accused persons arrested near Igbo Oro on the night when the PW2 was fought there. PW2 knew him and unmistakably identified him as one of the persons who fought him. He did not deny that he fought the PW2, what he denied was the allegation that he attempted to kill the PW2. As a matter of fact he did not deny that he was at Igbo Oro, the creation of the other accused persons and himself. PW2 called him by his sobriquet but surely identified him as standing in the dock. Furthermore, PW2 gave account of how the accused persons were called by Sunday Jegede, one after the other, and they emerged from the bush and the 3rd accused inclusive. The 3rd accused was one of the four suspects arrested in the bush on the night of 29th of November, 1998 and taken before the Oba and who the Oba asked the police to keep an eye on. Throughout, he did not deny being arrested that night and taken to the Oba.”

In my humble opinion the learned trial judge was right in disbelieving and rejecting the appellant’s defence of alibi and I so hold.”

That apart, it is to be noted generally, that in a claim of an alibi, where the material facts of it are found to be false, such as when a person claimed that he was in a particular place or with a particular person(s) but it turned out in investigation that he was not there at the material time, as in this case, that claim must be held to be patently false. For clarity sake, there were inconsistencies in the material facts of the alibi raised by the appellant: [1] In his extra-judicial written statement to the Police, the appellant claimed that he was in Ibadan at the time the crimes were committed.

But in his testimony in court at page 83 of the record of appeal, he stated that he was in Police custody, then changed it on second thought that he was in Ibadan at Sango. Again, he said that he was at Eleyele looking for petrol. Sango and Eleyele are not the same though both are in Ibadan. Thus it is not clear whether the appellant was at Sango or at Eleyele. These contradictions in the appellant’s alibi cannot be explained away as a result of being ‘jittery’ as the appellant’s counsel has argued. Thus, where the accused person gives conflicting stories as to his whereabouts at the material time

under consideration, there is no duty on the prosecution to investigate the alibi and in such a case, no alibi is established. See: OZAKI V. THE STATE [Supra]. The conflicting stories of the appellant in the instant case have even rendered his alibi as not established. Thus, it means that the respondent was not even duty bound to investigate it and whether or not the alibi is investigated, it will not invalidate the conviction of the appellant. But, however, to be at the safer side, the alibi was investigated and rebutted by the respondent.

Furthermore, in his cross-examination he admitted that he was arrested at Oke-Ayedun Police Station on the 28th of November, 1998. He was arrested with the other co-accused on the fateful night. He never denied this fact. Thus, appellant was at the scene of the crime.

Again, appellant never denied or rebutted that he was arrested with the other co-accused on the fateful night at Oke Ayedun Police station on the 28th of November, 1998. This gives a presumption that the appellant was at the scene of the crime. It is the law my lords, that where the presence of an accused is fixed at the scene of the crime, the defence of alibi, no matter how beautifully put up is defeated and need no investigation. See: NJOVEN V. STATE (1973) NSCC 257 at p. 278; OMOTOLA & ANOR. V. STATE (2009) 8 ACLR 29 at p. 144.

Finally, on this issue, it can be seen that both the trial court and the appeal courts are agreed in their decisions that the defence of alibi would not avail the appellant. Such decisions are on concurrent finding of facts. It is the practice of this court not to interfere with such findings unless they are perverse; manifestly wrong or occasion a miscarriage of justice. None of these factors is found in this appeal. I hereby, decide issue one in favour of the respondent. See: MBELE V. THE STATE (1990) 4 NWLR (part 145) 485.

Appellant's issue no.2 is whether the court below was correct in law in upholding the judgment of the trial court that the appellant was among the four people that attacked PW2 and killed the deceased in view of the evidence before the court. I think I should make it clear to the learned counsel for appellant that the primary duty/responsibility of a trial court is to decide living issues between the evidence and the prevailing

law where the balance of justice favours such a party. See: SCHRODER V. MAJOR [1989] 2 NWLR (part 101) 20; PASCUTTO V. ADECANTO (NIG.) LIMITED (1997) 1 NWLR (part 529) 467 at page 486. **It is not part of the trial court's duty/function to manufacture evidence for any of the parties. A party wins on the strength of his evidence (case) and loses where his evidence (case) is patently weak, unsupportable and unjustifiable.** See: SAMPSON OCHONMA V. UNOSI (1965) NMLR 321; ADENIJI V. ADENIJI (1972) 1 ALL NLR (part 1) 298 at page 305.

On the other hand, an appeal court can only affirm or dismiss an appeal before it or strike it out, if it appears to be a non-starter. It is not the function of an appeal court to reassess or re-evaluate evidence except where there are genuine complaints from the appellant which justify doing so. See: OMOROGIE & ORS V. IDUGIEMWANYE & ORS (1985) 2 NWLR (part 5) 41; ABISI V. EKWEALOR (1993) 6 NWLR (part 302) 643 at page 683. It appears from the record that the court below is satisfied with the exercise carried out by the trial court. That was why it affirmed the trial court's decision. It is thus, the finding of the learned trial judge on the evidence placed before him that:

"Here I must say that the totality of the evidence before me both from the prosecution and DW1 and particularly what happened on the night of 29/11/1998, the attack launched on the PW2 in their attempt to murder him, all pointed this court to one direction that it was these same accused persons who attacked PW2 and murdered Mayowa Adeleye earlier in the day, that day. This is one of the inferences this court can reasonably draw from the conduct of the accused persons, undertaking ritual killings and from the totality of evidence given in this court".

The trial court then went ahead to find the three accused persons including the appellant, guilty of the offences charged, convicted and sentenced each of them to the various sentences they are to serve. Can anyone do any better than did the trial court? Is it not the trial court that saw, heard and assessed the demeanour of the witnesses? That of course is the primary role of any reasonable trial court. The court below, in its concluding part, rightly in my view, observed:

"In my humble view, all these put together, the chain of events

is complete, that leads irritably to the inference that the appellant is guilty beyond reasonable doubt of the offence for which he was convicted and sentenced."

It will not serve any useful purpose for this court to review the evidence placed as learned counsel for the appellant would want this court to do. The court below did the same and it arrived at same conclusion with the trial court. I am not convinced that there is any of the factors: such as perversity of the trial court's decision or that a miscarriage has been caused to the appellant, which can make this court re-visit the evidence placed before the trial court. All the findings of facts contained therein, as held by the court below, are unsailable. There is no basis for me to interfere. See: *EBBA V. OGO* (1984) 1 SCNLR 372.

I find this appeal unmeritorious and do hereby, dismiss it. I affirm the concurrent decisions of the two courts below.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, I. T. Muhammad, JSC. I agree with the reasons therein set out to arrive at the conclusion that the appeal lacks merit and deserves to be dismissed.

The appellant was arraigned along with three others on three counts which include the murder of one Mayowa Adeleye; inter alia. In the two courts below, he relied mainly on his plea of alibi. Same was rejected and he has decided to further prop it before this court.

Alibi, in essence, means elsewhere. The appellant maintained that he was away in Ibadan at the material time. It was the duty of the prosecution to investigate same. It was the responsibility of the appellant to furnish particulars of his alibi and his whereabouts and those present with him at the material time of the incident. Failure by the police to investigate may lead to the appellant's acquittal. See: *Yanor v. The State* (1965) NMLR 337; *Queen v. Turner* (1957) WRNLR 113; *Odu & Anor. v. The State* (2001) 5 SCNJ 115 at 120; (2001) 10 NWLR (pt. 772) 668. In this matter, PW 6 - the Investigator maintained that he investigated the plea of alibi put up by the appellant. He said that he confirmed from the people mentioned by the appellant that he traveled to Ibadan. Curiously, when the appellant was

cross-examined, he admitted that he was arrested at Oke-Ayedun Police Station on 28/11/1998 with the other co-accused on the fateful night. There is no doubt about it that cross-examination, if rightly employed, is a potent tool for perforating falsehood. The two courts below were right when they failed to place any serious premium on the plea of alibi put up by the appellant.

The concurrent finding of fact in respect of the plea of alibi was not perverse. It did not engender or occasion miscarriage of justice. This court will not interfere with same in the prevailing circumstance. See the case of *Oduntan v. Akibu* (2000) 7 SC (Pt. 2) 106.

For the above and the detailed reasons adumbrated in the lead judgment which I hereby adopt, I too feel that the appeal should be dismissed. I order accordingly and hereby affirm the judgment of the Court of Appeal.

D _____

GALADIMA JSC

The Appellant along with three others were arraigned with a three-count charge of conspiracy to murder and murder of one Mayowa Adeleye (under counts I and II) and for attempting to murder one Falade Ojo (under count III).

Each of the accused persons pleaded not guilty. Out of the four accused person's one of them, Mr. Sunday Jegede died before the trial. In the course of the proceedings, his name was accordingly struck out.

The case proceeded to full trial. The case of the Appellant herein was that he was not at the scene of the crime as he had travelled to Ibadan where he visited some people on the fateful day. He also asserted that he was not among the people arrested by PW2 and brought before chief of the town.

After due consideration of the evidence before him, the learned trial Judge found each of the 3 accused persons guilty as charged under Section 319 of the Criminal Code. Each of them was sentenced to death on count two and life imprisonment on count three. In the court below only the 3 convicted persons appealed and their appeal was dismissed.

Appellant appealed to this court on 4 Grounds of Appeal raising 2 issues for determination which were adopted by the Respon-

dent. The two issues for determination are:

“1. Whether the Court of Appeal was right to uphold the Judgment of the trial court to the effect that the appellant’s defence of alibi was rejected and disbelieved despite the failure of the prosecution to tender the report of police investigation on the alibi to court and also in view of the contradicting statements of PW2 and PW3 arising from grounds 1 and 4.

2. Whether the Court of Appeal was correct in law to uphold the Judgment of the trial court that the appellant was among the four people that attacked the deceased in view of the evidence before the court. “

The Appellant’s First issue is on the defence of ALIBI. The contention of the learned counsel for the Appellant on the defence of alibi put forward by the appellant is that there was evidence before the two courts below that following the appellant’s arrest he promptly raised the defence in his statement to the police to the effect that he was not at the scene of the crime and that the truth of his claim was confirmed by the PW 6. On his part learned counsel for the respondent stated that the prosecution discharged the evidential burden of proof that the Appellant was at the scene of the crime.

Alibi means being elsewhere, non-presence. It is the duty of an accused person who pleads it to furnish sufficient particulars of same. He must furnish his whereabouts and those present with him at the material time. It is left for the prosecution to disprove the claims of the accused person. Failure to investigate and check an alibi may cast doubt on the credibility of the case of the prosecution. See AGU V. THE STATE (1985) 2 NSCC 1197. However it is not in all cases that such failure to investigate an alibi would be fatal to the prosecution’s case. See NTAM & ANOR. V. THE STATE (1967) NSCC 1. And OZAKI V. THE STATE (1990) 1 NWLR (Pt. 124) 92 at 96. However in the case at hand, the learned trial Judge found that the prosecution investigated the Appellant’s defence of alibi. At page 132 of the Record he stated thus:

“I do not agree that the learned counsel that the prosecution did not investigate the defence. I think the prosecution on the contrary did. For, the PW6 made it clear in his testimony that all the persons mentioned by the 3rd accused were called and they confirmed his story. The only thing that the police did not do was, per-

haps to go to Ibadan. But I hardly understand what they could have gone to do at Ibadan, if the police called all the persons named in the statement and they had talked to them and they had confirmed what the (sic) said...”

B The above, is the part of the extract of the Judgment of the learned trial Judge. He considered the defence of alibi put up by the Appellant, but rejected same, and he stated the reason thus:

C *“The question is whether notwithstanding, what these people told the police about where he went to, the police thought the 3rd accused and his friends told the truth or that they merely cooked up the stories to save his neck. I doubt if anyone will because these clearly are facts which render the 3rd accused person’s claim impotent.”*

Impugning on the potency of the claim of the appellant, the court below per Uwa JCA, held, inter alia that:

D The learned trial Judge at pages 133 - 134 of the records was therefore right to have held and made the following observation thus, concerning the appellant:

E *‘He was actually one of those accused persons arrested near Igbo Oro on the night when the PW2 was fought there (sic). PW2 knew him and unmistakably identified him as one of persons who fought him. He did not deny that he fought PW2. What he denied was the allegation that he attempted to kill PW2. As a matter of fact he did not deny that he was at Igbo Oro, the creation of the other accused persons and himself. PW2 called him by his sobriquet but*
F *surely identified him as standing in the dock.*

Furthermore, PW2 gave account of how the accused persons were called by Sunday Jegede one after the other, and they emerged from the bush and the 3rd accused inclusive. The 3rd accused was
G *one of the four suspects arrested in the bush on the night of 2nd November, 1998 and taken before the Oba and who the Oba asked the police to keep an eye on. Throughout, he did not deny being arrested that night and taken to the Oba’*

H In his extra-judicial written statement to the police, the Appellant claimed that he was in Ibadan on the fateful day when the deceased was killed. But in his testimony in court at the trial, at page 83 of the record of appeal, he stated that he was in Ibadan at Sango. He again changed his story and stated that he was at Eleyele, Ibadan looking for petrol. His whereabouts at the material time in question.

The Appellant was unable to explain away his whereabouts. The prosecution should not therefore ordinarily be asked to shoulder the burden of investigating the defence of alibi put up by Appellant. In any case, the prosecution cautiously investigated and rebutted the alibi.

The Prosecution case has been further strengthened by the admission of the Appellant, during his examination when he stated that he was arrested at Oke-Ayedun Police Station on 28/11/1998 with the other co-accused on the fateful night. B

The concurrent findings of facts by the two courts below that the defence of alibi did not avail the appellant, in the circumstance of this case, cannot be interfered with, since such findings were not manifestly perverse, erroneous or have occasioned miscarriage of justice. C

In sum, I have made this little contribution, considering the detailed analysis of salient facts of this case and applicable case law by my learned brother I. T. MUHAMMAD JSC in the leading Judgment. D I find too, that the appeal is lacking in merit and it is accordingly dismissed. The concurrent decisions of the two lower courts are affirmed. Appeal dismissed.

E

M. D. MUHAMMAD JSC

I had the opportunity of reading the lead judgment of my learned brother I. T. Muhammad JSC, before now and entirely agree with his lordship's reasoning and conclusion that the appeal lacks merit. Purely for the sake of emphasis, I take the liberty of emphasizing, in my own words, the reasons advanced in lead judgment for the dismissal of the appeal. In doing so I rely on the statement of facts that brought about the appeal as fully captured in lead judgment. F G

The appellant has further appealed to this Court from the judgment of the court below affirming the trial court's decision convicting him and his co-accused for murder under Section 319 of the Criminal Code. He does so on four grounds from which he distilled two issues for the determination of the appeal thus:- H

“(1) Whether the Court of Appeal was right to uphold the judgment of the trial court to the effect that the appellant's defence of alibi was rejected and disbelieved despite the failure of the prosecution to tender the report of police investigation on the alibi to

court and also in view of the contradicting statements of PW2 and PW3.

(2) *Whether the Court of Appeal was correct in law to uphold the judgment of the trial court that the appellant was among the four people that attacked the deceased in view of the evidence before the court.”*

In arguing the appeal, learned appellant’s counsel insists that the two lower courts have wrongly disbelieved and disregarded appellant’s defence of Alibi. It is submitted by learned counsel that the defence was raised in appellant’s statement to the police and at the earliest opportunity which fact was corroborated by PW6.

Learned respondent’s counsel, on the other hand, disagreed. He submitted that having fixed the appellant to the scene of the crime, the respondent had discharged the burden the law placed on it. A conviction that had proceeded on the basis of the evidence that placed the appellant to the scene and at the time of the commission of the crime, learned counsel contended, cannot be wrong.

This Court in a seemingly endless chain of authorities has defined the word ALIBI, which it held to be a radical defence, to mean that an accused was somewhere else at the time of the commission of an offence and could not possibly have, at the same time, been at the scene to partake in it. See *Sowemimo v. The State* (2004) 11 NWLR (pt 885) 515 at 526 and *Jerome Akpan & ors v. State* (2002) 12 NWLR (pt 780) 189. In particularly *Aiguoreghian v. The State* (2004) 3 NWLR (pt 860) 367 at 401, the court restated that:-

“...an alibi means that the accused was somewhere other than where the prosecution alleges he was at the time of the commission of the offence.”

See also *Gachi & ors v. The State* (1965) NMLR 1 and *Okosun & 2 ors v. AG Bendel State* (1985) 3 NWLR 283. What needs to be determined in resolving appellant’s two issues is whether indeed the concurrent findings of fact of the two courts below fixing the appellant to the scene of the offence and convicting him for the offence are based on evidence on record. If the evidence on record does not show that the respondent had investigated appellant’s alibi or in spite of the failure to investigate the alibi fixed the appellant to scene of crime, then appellants’ summation cannot be glossed over for this court would be under duty to interfere with the concurrent findings

of the two courts which appellant would have succeeded in showing to be perverse. In affirming the trial court's finding disbelieving appellant's defence of alibi, the court below at page 133-134 of the record held thus:-

"He was actually one of those accused persons arrested near Igbo Oro on the night when the PW2 was fought there. PW2 knew him and unmistakably identified him as one of the persons who fought him. He did not deny that he was at Igbo Oro... PW2 called him by his sobriquet but surely identified him as standing in the dock. Furthermore PW2 gave account of how the accused persons were called by the Sunday Jegade one after the other, and they emerged from the bush and the 3rd accused inclusive. The third accused was one of the four suspects arrested in the bush on the night of 2nd November 1998 and taken before the Oba who the Oba asked the police to keep an Eye on. Throughout, he did not deny being arrested that night and taken to the Oba."

"I do not agree with the learned counsel that the prosecution did not investigate the defence. I think on the contrary the prosecution did. For the PW6 made it clear in his testimony that all the persons mentioned by the 3rd accused were called and they confirmed his story. The only thing that the police did not do was, perhaps to go to Ibadan. But I hardly understand what they could have gone to do at Ibadan. If the police called all the persons named in the statement and they had talked to them and they had confirmed what he said... The question is whether notwithstanding what these people told the Police about where he went to, the police thought the 3rd accused and his friends told the truth or that the merely cooked up the stories to save his neck. I doubt if anyone will because these clearly are facts which render the 3rd accused person's claim important."

It is significant to note that the appellant was the 3rd accused at the trial court and the foregoing concurrent findings of the two court's on his alibi that clearly evolve from the evidence on record must persist. See Edwin Ezigbo v. The State (2012) 50 NSQR 136 and Olaiya v. State (2010) 5 NCC 13.

Undoubtedly, the respondent from the evidence it led, particularly the evidence of PW6, and appellant's evidence under cross-examination, had not only investigated the alibi but had by cogent evidence not only placed the appellant on the scene of crime but also

proved his participation in the commission of the offence. Learned appellant's counsel maintained that appellant's story should have been preferred. I find this rather naive and illogical for it is unreasonable to believe a person who in his account was persistently inconsistent and self contradictory. In any event, the principle has always been that the evaluation of evidence where the credibility of those who testified becomes an issue remains the primary duty of the trial court who saw and observed those witnesses in the course of their testimony. In the case at hand where the appellant has clearly failed to establish that the trial court did not discharge that duty, his further invitation that we interfere with the trial court's findings as affirmed by the court below must remain unattended. See *State v. Ajie* (2000) 7 SC (part 1) 24; and *Bashaya v. State* (1998) 5 NWLR (part 550) 351.

For the foregoing and more so the fuller reasons stated in the lead judgment, I resolve the two issues against the appellant and dismiss the appeal. I abide by the consequential orders made in the lead judgment.

ALAGOA JSC

I read before now and in draft form, the judgment just delivered by my learned brother Ibrahim Tanko Muhammad, JSC and I agree with his reasoning and conclusion reached. I wish however to say a few words by way of contribution to a well researched and written judgment.

This is an appeal against the judgment of the Court of Appeal Ilorin Division which affirmed the conviction and sentence of the Appellant on charges of murder and attempted murder. The Appellant had been arraigned along with other accused persons at the High Court Ikole Ekiti on a three count charge of conspiracy to commit murder, and attempted murder, wherein they pleaded not guilty and the matter went on to be heard.

They were accordingly convicted and the Appellant who was 3rd accused appealed to the Court of Appeal which dismissed the appeal hence a further appeal to this court. The facts as presented by the prosecution at the trial court was that the deceased - one Mayowa had been sent by his mother - PW1 to go and give food to his father and thereafter to go to the farm to get water yam for their lunch. The

said Mayowa did not return home and a search was conducted on the orders of the Oba of the town which involved a certain age grade. While the search was on, PW2 who was one of the search party was accosted by one Sunday Jegede who had initially been the 1st accused in the trial court but later died and had his name struck out. The said Sunday Jegede told PW2 that there was no way he could get out. He then alerted those in the bush and the three accused persons including the Appellant came out in response to his call. The said Sunday Jegede had a knife or sword which PW2 managed to wrestle from him and was able to make good his escape. All three were apprehended and taken to the Oba's palace. When Sunday Jegede was asked by the Oba why he had a sword, he said he needed it to earn a living for himself and that the bush where he was arrested from was the place where he earned a living. DW2 was on the scene when PW 1 sent her son Mayowa to his father and to the farm and testified that he was told by Sunday Jegede that he was going to make a head. It was not until Mayowa's body was found without his head that he became aware that he, Sunday Jegede may have murdered Mayowa but DW2 was a part of the murderous gang. The Appellant raised the plea of alibi saying in one breath that he was in police custody and in another breath that he was at Ibadan at the time of Mayowa's murder and the search for him in the bush. PW 2 testified that the Appellant was one of the three accused persons who hearkened to the call of Sunday Jegede and came out to fight him (PW 2). The Appellant did not deny that he fought PW2 but denied attempting to kill him.

This is one case in which the Appellant has put much premium on alibi as his defence. "*Alibi*" in very simple language means, "*I was not present when what is complained about happened.*" Of the plea of alibi this court in *MATTHEW OBAKPOLOR V. THE STATE* (1991) 1 NWLR (PART 165) 113 held as follows -

"It is no proof of alibi for an accused person merely to assert as in this case that he was not at the scene of crime and could not have been there because he was elsewhere."

In *KENNETH OGOALA V. THE STATE* (1991) 2 NWLR (PART 175) 509, this court stressed the need for an accused person relying on the defence of alibi to furnish sufficient particulars of his whereabouts on the day and time the crime was committed. The investigat-

ing police officer PW6 in his own evidence maintained that all the people called by the Appellant maintained that he traveled to Ibadan on the day the crime was said to have been committed. The thoroughness of the investigation by the police of this defence of alibi is in doubt. It is the duty of the police to thoroughly investigate a defence
 B of alibi when raised. See ADEDEJI V. THE STATE (1971) 1 ALL NLR 75. None or improper investigation of an alibi could lead to an accused person's acquittal but this should not be seen as sacrosanct. Sometimes the sheer weight of other available evidence is enough to
 C crush the defence of alibi. See RASHEED OLAIYA V. THE STATE (2010) 3 NWLR (PART 1181) 423; MITCHAEAL HAUSA V. STATE (1994) 6 NWLR (PART 350) 281. See also DANLAMI OZAKI & ANOR. V. THE STATE (1990) 1 NWLR (PART 724) 92 where this Court per Obaseki, JSC held as follows-

D *"Where the accused person gives conflicting evidence as to his whereabouts at the material time and consideration, there is no duty to investigate the alibi. In such a case no alibi is established."*

How could the Appellant say in one breath that he was in police custody and in another breath that he was at Ibadan at the
 E time the crime was committed? This is to say the least not only conflicting but contradictory. This is a concurrent finding of guilt of the Appellant by the High Court and the Court of Appeal. The attitude of the Supreme Court by a long line of authorities is not to set aside
 F concurrent judgments of two lower courts except where they are perverse or there is some fundamental error or a violation of some fundamental principles of law or procedure which have occasioned a miscarriage of justice. See OGUNBIYI V. ADEWUNMI (1988) 5 NWLR (PART 93) 275; AKEREDOLU v. AKINREMI (1989) 3 NWLR (PART
 G 108) 164. OSHOBOJA v. AMIDA (2009) 18 NWLR (PART 1172) 188; NWANKWO v. E.D.C.S.U.A. (2007) 5 NWLR (PART 1027) 377; ELEMCHUKWU IBATOR & ORS V. BARAKURO & ORS (2007) 9 NWLR (PART 1040) 475. I do not find the decisions of the two lower courts to be bedeviled by any of these cankerworms.

H It is for these reasons and the fuller reasons contained in the lead judgment of my learned brother that I too dismiss the appeal and affirm the judgment of the court below.