

SUPREME COURT OF NIGERIA
FRIDAY 27TH MARCH, 2015. SC. 255/2012
CORAM:- M. S. MUNTAKA-COOMASSIE,
O. RHODES-VIVOUR N. S. NGWUTA, K. B. AKA'AH,
C. C. NWEZE, JJSC

MOHAMMED IBRAHIM APPELLANT
V.
THE STATE RESPONDENT

CHARGES - Language of - Fair hearing - 1999 Constitution s. 6(a)
- Every person charged with an offence - Shall be informed promptly
in language he understands and in details - Of nature of the offence
(H1)

CHARGES - Drafting - Omissions - Weight - Non material errors in
stating particulars of offence are of no moment - Unless accused was
in fact misled by such error (H2)

CHARGES - Objection - Time - Objection to a charge for any formal
defect - Shall be taken immediately after the charge had been read
over to accused - Before he takes his plea (H3)

ARMED ROBBERY - Ingredients - Proof - Prosecution must prove
factual reality of a robbery - Participation of accused in the robbery -
And that he was armed with firearms (H4)

ARMED ROBBERY - Proof - Failure in PW testimony - Non direc-
tion by trial court on effect of failure to name appellant - Occasioned
a miscarriage of justice (H5)

CRIMINAL PROCEDURE - Proof - Material witness - Where there is
a vital point in issue - And there is one witness whose evidence would
settle it one way or the other - That witness ought to be called (H6)

CRIMINAL PROCEDURE - Proof - Burden of - Evidence Act s. 38 -
Accused in criminal trials would not be convicted - Unless prosecu-
tion proves the offence beyond reasonable doubt (H7)

FACTS

Accused/appellant was arraigned before the High Court of Oyo State Ibadan on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to sections 6(b) and 1(2)(a) of the Robbery & Firearms Act. He was alleged to have committed the offence with some others (now at large) at Igouil Petrol Station Boluwaji Ibadan. At the trial, five witnesses were called by prosecution/respondent to support its case against appellant. However, evidence adduced by PW2 (Mrs. Omolara Adebimpe) the victim of the robbery which linked appellant with the robbery was based on suspicion. All witnesses for respondent gave evidence contrary to the charge against appellant.

They testified that the robbery took place at No.1 and 3 Bode Adebimpe Close Boluwaji Road Ibadan, whereas appellant was charged for robbery that allegedly occurred at Igouil Petrol Station Boluwaji Ibadan. Appellant testified for himself and called no witness. At the end of trial and notwithstanding that there was no evidence to support the charge, the learned trial Judge convicted and sentenced appellant to death. Aggrieved, appellant appealed to the Court of Appeal Ibadan Division. The court dismissed the appeal and affirmed the judgment of the trial court. Aggrieved further, appellant appealed to Supreme Court.

ISSUE FOR DETERMINATION

Whether, following the fundamental irreconcilable conflict between the charge and the evidence adduced at the trial court, the lower court, rightly, affirmed the trial court's conviction of, and death sentence on, the appellant when there was no nexus between the offence charged and the conviction?

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

CHARGES - Language of - Fair hearing

1. By virtue of section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), every person who is charged with any offence shall be entitled to be

informed promptly in the language he understands and in detail, of the nature of the offence. Ostensibly, therefore, the statutory prescription that every charge shall state the offence for which the accused person is standing trial stems from this constitutional mandate. (p. 1007 E)

CHARGES - Drafting - Omissions - Weight

2. Occasionally, however, charges so drafted may contravene any of the rules of drafting charges, such as the rules against ambiguity; duplicity; misjoinder of offenders and misjoinder of offences.

On its part, section 166 (supra) is designed to salvage charges which exhibit non-material errors in stating the offence or the particulars which ought to be stated and the omission to state the offence unless the accused person was, in fact, misled by such error or omission. To be misled the defect must be fundamental and misleading. (p. 1007 G)

CHARGES - Objection - Time

3. By section 167 (supra), on the other hand, any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge had been read over to the accused and not later. Put differently, an accused person is under obligation to raise any objection to any formal defect to a charge before he takes his plea. Where he fails to do so, he is presumed to have understood the charge preferred against him. (p. 1008 C)

ARMED ROBBERY - Ingredients - Proof

4. Now, ever since the evolution of the offence of armed robbery as a specie of capital offence in our adversarial criminal justice system, our appellate courts have sagaciously enunciated the specific ingredients of this offence which must be proved to warrant a conclusion that the prosecution has discharged the burden of proving its commission beyond reasonable doubt.

These cases are unanimous on the point that the three-fold ingredients which the prosecution must prove in order to

secure a conviction for the said offence are: (a) the factual reality of a robbery; (b) the participation of the accused person in the said robbery operation and (c) that, at the material time when the offence was being committed, he was either armed with firearms or an offensive weapon or that he was in the company of a person who was so armed. (p. 1008 H)

ARMED ROBBERY - Proof - Failure in PW testimony

5. Thus the only explanation for his failure to mention the appellant's name was that he did not see him [the appellant] during the robbery incident (if indeed there was any such incident in their residence).

Against this background, the appellant's counsel urged the court to reverse the concurrent findings of the lower courts to the effect that the appellant was linked with the said offence. In the instant case, there was a non-direction by the trial court on the effect of PW3's failure to mention the appellant's name at the earliest opportunity. Yet the lower court endorsed its [the trial court's approach]. It is in this context that I hold the view that the submission of the appellant's counsel on this point is as forceful as it is unanswerable. As I had noted above, the trial court's said omission was a non-direction which occasioned a miscarriage of justice. (p. 1010 E)

CRIMINAL PROCEDURE - Proof - Material witness

6. The net effect is that there is nothing in the testimonies of the five witnesses linking the appellant with the commission of the said offence. Even PW2's sister, who, according to PW2 and PW3, witnessed the robbery incident and received threats of ravishment from the said hoodlums, was not summoned to testify. It is true that the prosecution only has a duty to call witnesses to establish its case beyond reasonable doubt.

It however has an obligation to place all available relevant evidence before the trial court. The State v Azeez (supra). Thus, where there is a vital point in issue [as in the instant case where the identity of the appellant was put in issue by the evidence of the PW3] and there is one witness [again, as in the instant case where the sister of the PW2 was alleged

to have seen the robbers and even received threats of ravishment from them] whose evidence would settle it one way or the other, that witness ought to be called. (p. 1011 E)

CRIMINAL PROCEDURE - Proof - Burden of

7. It was against this background that Obi, of counsel for the appellant, contended that in all criminal trials, an accused person would not be convicted unless the Prosecution proves the offence charged beyond reasonable doubt, citing section 138 of the Evidence Act [then applicable]; that is, establishes every particular of the offence charged, failing which a favourable verdict would be entered for the accused person. There is considerable force in this submission.

The law, therefore, does not impose a duty on the accused person to purge himself of guilt. Rather, it imposes an obligation on the prosecution to prove his [the accused person's] guilt beyond reasonable doubt.

This is an offshoot of the impregnable canon ordained in section 36 (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). This section guarantees the right to the presumption of innocence. This court has interpreted the section [section 36 (5)] as imposing the burden of proving the guilt of an accused person on the prosecution. (p. 1012 B/F)

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NOTABLE POINTS OF INTEREST

NWEZE JSC

1. Criminal procedure – Standard of proof

As I had observed elsewhere, in our system of criminal justice, proof is not analogous to the requirement of proof in the Science of numbers, otherwise known as Mathematics. Unlike mathematics, where proof is attained through inflexible formulae and answers are arrived at with inviolable certitude, proof in criminal trials is attained against the background of the burden codified in section 138 (1) of the Evidence Act. (p. 1012 D)

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AKA/AHS JSC***2. Evidence – Contradictory charge – Effect***

The evidence given by PW2 and PW3 is that the robbery took place at Nos 1 and 3 Bode Adebimpe Close, Atagba Road, Boluwaji Area, Ibadan. No evidence was led to show the proximity of Igouil petrol station to the private residence of PW2 at Nos 1 and 3 Bode Adebimpe Close, Atagba Road, Boluwaji Area, Ibadan. There is therefore a discrepancy between the location of the alleged crime (locus criminis) and the evidence led. In spite of this discrepancy, the prosecution did not apply to amend the charge to align the evidence adduced to the charge. The law is that where the charge laid is at variance with the evidence tendered, the conviction of the appellant will not stand. (p. 1019 H)

D REPRESENTATION

Uche V. Obi, with O. S. Toki; A. M. Sanusi and S. R. Akinrinade, for the appellant; M. O. Adebayo, Honourable Attorney General, Oyo State, with S. A. Aborisade, for the respondent.

E CASES REFERRED TO

- Oteki v. AG Bendel State [1986] 2 NWLR (pt. 24) 648
 Oyebade v. Tiv Native Authority (1967) N. N. L. R. 71
 Amadi v. State [1993] 8 NWLR (pt. 314) 644
 Queen v. Zakwakwa of Yororo [1960] NSCC 8
 Ibukunle v. State [2007] All FWLR (pt. 354) 209
 Oaiya v. State (2010) 2 SCM 163
 Nwokedi v. Commissioner of Police (1977) All NLR 11
 Aruna v. State (1990) 6 NWLR (pt. 155) 125
 AG Federation v. Chanri (1965) All NLR 338
 Alor v. State (1974) 4 NWLR (pt. 501) 511
 Okewu v. FRN [2012] 1 NWLR (pt. 1305) 237
 Agbo v. State [2006] 1 SCNJ 332
 Uwaekweghinya v. State (2005) 3 SCNJ 32
 Amala v. State [2004] 12 NWLR (pt. 888) 520
 Ezeze v. State [2004] 14 NWLR (pt. 894) 491

STATUTES REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap R11 LFN 2004, ss.

1(2)(a), 6(b)

Criminal Procedure Law of Oyo State, ss. 166, 167, 168

Constitution of the Federal Republic of Nigeria 1999, s. 36(5)

Evidence Act 2011, s. 258

BOOKS REFERRED TO

Fundamentals of Criminal Procedure Law in Nigeria

Criminal Procedure in Nigeria Law & Practice

Criminal Trial Procedure

LEAD JUDGMENT BY NWEZE JSC

The appellant in this appeal [as accused person] was arraigned before the High Court of Oyo State, Holden at Ibadan, on a two-count charge of conspiracy to commit armed robbery and armed robbery contrary to sections 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap R. 11, Vol. 14, Laws of the Federation of Nigeria, 2004. He was alleged to have committed the said offences with others at large on March 7, 2005 at Igouil Petrol Station, Boluwaji, Ibadan.

Sequel to his plea [expectedly, he pleaded not guilty], the Prosecution called five witnesses in proof of the allegations against him. Eighteen exhibits were, equally, tendered through the said witnesses. On his part, the appellant, apart from testifying in his defence, did not call any other witness. In its judgment of February 27, 2009, the court (hereinafter, simply, referred to as “the trial court”) convicted and sentenced him to death by hanging.

Following the dismissal of his appeal against that judgment by the Court of Appeal, Ibadan Division (hereinafter called “the lower court”), he, then, approached this court, urging it to determine the six issues he formulated from his Grounds of Appeal. These issues were framed thus:

1. Whether, following the fundamental irreconcilable conflict between the charge and the evidence adduced at the trial court, the learned Justices of the court of Appeal were right to have affirmed the conviction and death sentence passed on the appellant when it was clear that there was no nexus between the offence charged and the conviction?

2. Whether the learned Justices of the Court of Appeal were

right to have affirmed the conviction and death sentence passed on the appellant for conspiracy to commit armed robbery and armed robbery when it was clear, from the record, that the Prosecution failed to prove the offences against the appellant beyond reasonable doubt as required by law?

B 3. Whether the learned Justices of the Court of Appeal were right in affirming the conviction and death sentence on the appellant when, given the character of evidence that was led at the trial court, it was clear that the verdict was unreasonable, unwarranted and unsupportable?

C 4. Whether the decision of the lower court affirming the conviction and death sentence on the appellant was right when it was evident from the record that both the learned trial Judge and the learned Justices of the lower court woefully failed in their duty to
D consider all the defences open to the appellant before arriving at the said conviction and affirmation?

5. Whether the learned Justices of the lower court were right to have affirmed the conviction and death sentence passed on the appellant by the trial court when, going by the record, it was clear
E that the defence of duress was available to the appellant?

On its part, the Prosecution put forward a sole issue which counsel couched in these words:

Whether the court below was right to affirm the appellant's
F conviction on the basis that the respondent proved its case beyond reasonable doubt?

Armed with the far-reaching insights gained from my intimate and painstaking reading of the statements of the said offences and the totality of the testimonies of the Prosecution's witnesses, I take the
G view that only issue one is determinative of this appeal. The justification for this approach would soon be self-evident. In this regard, the sole issue that would guide my consideration of the agitations of the appellant against the judgment of the lower court, which affirmed his conviction and sentence by the trial court, is the question:

H Whether, following the fundamental irreconcilable conflict between the charge and the evidence adduced at the trial court, the lower court, rightly, affirmed the trial court's conviction of, and death sentence on, the appellant when there was no nexus between the offence charged and the conviction?

ARGUMENTS ON THE SOLE ISSUE

APPELLANT'S CONTENTION

When this appeal came up for hearing on November 27, 2014, V. Uche Obi, appearing with O. S. Toki; A. M. Sanusi and S. R. Akinriade, for the appellant, adopted the appellant's brief of argument filed on September 10, 2012. He, equally, adopted the reply brief filed on December 22, 2014. He urged the court to allow the appeal. He invited the court to strike out the totality of his submissions on pages 19 (1); (2) and (3) of the appellant's brief. Since the application was unopposed, order was granted as prayed and the said paragraphs were struck out.

He drew attention to pages 6-15 of the brief where it was contended that the Prosecution did not establish the venue of the offence. He observed that while the charge against the appellant alleged that, at Igouil Petrol Station, Boluwaji, Ibadan, he robbed one Mrs. Lara Adebimpe of cash and other valuables, the evidence which the witnesses proffered showed that the victim, Mrs. Lara Adebimpe, was, allegedly, robbed at her private dwelling place situate at Nos 1 and 3 Bode Adebimpe Close, Boluwaji Atagba Road, Boluwaji Area, Ibadan.

At his instance, the appeal was adjourned to enable him file better processes. On the adjourned date, February 5, 2015, following this court's order deeming his reply brief as properly filed and served, he adopted it and urged the court to allow the appeal.

In the main brief, it was contended that in all criminal trials, an accused person would not be convicted unless the Prosecution proves the offence charged beyond reasonable doubt, citing section 138 of the Evidence Act [then applicable] and *Oteki v. AG Bendel State* [1986] 2 NWLR (pt 24) 648. Against this background, he maintained that the Prosecution has a duty to establish every particular of the offence charged, failing which a favourable verdict would be entered for the accused person, *Oyebade v Tiv Native Authority* (1967) N. N. L. R. 71; *Amadi v The State* [1993] 8 NWLR (pt 314) 644, 664.

Counsel outlined the ingredients of the offences of conspiracy and armed robbery. He canvassed the view that the Prosecution's inability to establish any of the said ingredients would yield a favourable judgment for the accused person. He pointed out that, in such a

situation, the only other option available to the Prosecution was the amendment of the charges to align them with the evidence on record. In the instant case, he averred, this option was not explored, hence, the appellant's conviction and sentence cannot be allowed to stand, *Queen v Zakwakwa of Yorro* [1960] NSCC 8.

B He drew attention to the fact that the appellant [as accused person] was charged for the offences of armed robbery and conspiracy to rob someone at a place, a petrol station, and the Prosecution specified the location with definite particularity as the Igouil Petrol Station. He pointed out that, in its attempt to prove the offences, the C Prosecution called five literate witnesses, [PW1; PW2; PW3; PW4 and PW5], who, however, did not, in their respective testimonies, refer to any robbery at any petrol station, much less, any robbery at Igouil Petrol Station. He observed that the alleged victim, PW2 [Mrs. D Omolara Adebimpe]; PW3, her son and PW1, the block seller, all testified, and were cross examined, about a robbery incident involving the PW2 at her private dwelling house situate at NOs 1 and 3, Bode Adebimpe Close, Boluwaji, Atagba Road-Boluwaji Area, Ibadan.

On their part, PW4 and PW5, of the Sanyo Police Station and E the Criminal Investigation Department of the Oyo State Police Command Iyaganku, Ibadan, respectively, who investigated the case of the alleged robbery, equally, in their testimonies in chief and cross examination, described the roles they played in relation to the robbery incident which occurred at a private dwelling house situate at F Nos 1 and 3, Bode Adebimpe Close, Boluwaji Atagba Road, Boluwaji Area, Ibadan, citing pages 49 and 56 of the record. Just like PW1; PW2 and PW3, PW4 and PW5 did not testify about any robbery incident at any petrol station, much less, any robbery incident at Igouil G Petrol Station.

He expressed the view that the sharp discrepancy between the location of the alleged crime [as described in the Charge Sheet] and the location [established in the evidence led before the trial court] could not have eventuated from a clerical error or the illiteracy of the H witnesses, *Queen v Zakwakwa of Yorro* (supra) at page 9. He volunteered two reasons in support of his above categorical claim. In the first place, he averred that there was no similarity between a petrol station [which was stated on the Charge Sheet] and a private dwelling house [as led in evidence]. He pointed out that, even then, there

was no evidence before the trial court which either tended to show or even suggest that there was a petrol station contiguous to Nos 1 and 3, Adebimpe Close, Boluwaji Atagba Road, Boluwaji Area, Ibadan.

He drew attention to the fact that a specific, precise and distinct petrol station, Igouil Petrol Station, was clearly and unambiguously stated as the locus criminis. In his view, that was a clear demonstration that the person who drafted the said charge did not entertain any doubt as to the venue of the alleged offence. Having regard to the circumstances described above, he urged the court to reverse the verdict of the trial court, as affirmed by the lower court. In its place, he implored the court to find and hold that the charge of conspiracy and armed robbery against the appellant, as far as they related to the incident that, allegedly, took place at one Igouil Petrol Station, was not proved. In consequence, he maintained, the appellant is entitled to this court's order discharging and acquitting him.

RESPONDENT'S SUBMISSIONS

On his part, M. O. Adebayo, Attorney General of Oyo for the State, appearing with S. A. Aborisade, adopted the respondent's brief filed on October 17, 2013, although, deemed properly filed and served on February 5, 2015. In the said brief, reference was made to sections 166, 167 and 168 of the Criminal Procedure Law on the effect of errors or defects in charges. He cited several authorities on what an accused person should do if he has any objection to any error, omission or defect in a charge [paragraphs 3.1 -3.9, pages 2-6, of the respondent's brief],

He conceded that for the Prosecution to succeed in a charge of robbery, the three ingredients, consistently, highlighted in case law must be proved beyond reasonable doubt. He pointed out that, in proof of the allegations against the appellant, the Prosecution called five witnesses, citing pages 35-36 of the record. Although he acknowledged that the trial court had a duty to consider all the defences that availed the accused person, he maintained that proof beyond reasonable doubt imposes a duty on the Prosecution to prove the main ingredients of the offence charged which, in his submission, the Prosecution did at the trial court. He pointed out that, being an appeal against concurrent findings, the appellant must show that the judgment was perverse or cannot be supported having regard to the evidence adduced, *Ibukunle v The State* [2007] All FWLR (pt 354)

209, 238; *Oaiya v State* (2010) 2 SCM 163, 175. He urged the court to dismiss the appeal.

APPELLANT'S REPLY

At the resumed hearing of the appeal on February 5, 2015, counsel for the appellant adopted the reply filed on December 22, 2014 but deemed properly filed on February 5, 2015. In rebuttal of the respondent's submissions, he canvassed arguments on paragraphs 2.1- 2.24 of the said reply brief.

Expectedly, he dismantled the respondent's claim that the appellant did not complain or challenge the so-called defect in the charge. Accordingly, he contended that sections 166; 167 and 168 of Oyo State, similarly worded like sections 166; 167 and 168 of the CPA, do not avail the respondent. He re-iterated his earlier submission that what happened at the trial court was that one incident or robbery was alleged in a particular location but the witnesses for the Prosecution adduced evidence of another incident, totally, different from the one charged. Put differently, he averred that the offence charged was at variance with the evidence tendered in proof, *Raymond Nwokedi v. Commissioner of Police* (1977) All NLR 11.

He maintained that the Prosecution could not be said to have discharged its burden of proving the offence charged unless it, successfully proves all the essential ingredients of the offence as stated in the charge, *Aruna v State* (1990) 6 NWLR (pt 155) 125. He contended that establishing the locus of an offence [as laid in the charge] is so crucial to its proof that an accused person would earn his acquittal where such proof is not forthcoming, *AG Federation v Chanri and Anor* (1965) All NLR 338. In his submission, sections 166-168 (supra) cannot cure any material disparity between the location [as laid in the charge] and the location as established in evidence, *Alor v State* (1974) 4 NWLR (pt 501) 511, 517. He urged the court to upset the concurrent findings of the courts below as the circumstance of this case so warrants such an interference, *Ibukunle v The State* [2007] 2 NWLR (pt 1019) 546, 564- 565; 579-580. In all, he entreated the court to allow the appeal; set aside the decision of the lower court and discharge and acquit the appellant.

RESOLUTION OF THE ISSUE

As indicated above, the respondent's counsel devoted paragraphs 3.1 -3.9, [pages 2-6, of the brief] to what the appellant ought

to have done if he had any objection to any error, omission or defect in the charge at the trial court.

With profound respect, it would appear that the Honourable Attorney General of Oyo State, who appeared for the respondent, totally misconceived the substance of the appellant's contention. He placed undue reliance on sections 166, 167 and 168 of the Criminal Procedure Law of Oyo State. Indeed, he dissipated so much energy in the above pages of the brief on the settled position on the above provisions of the Criminal Procedure Law which deal with the effect of errors, defects or omissions in charges at the trial court, *Okewu v FRN* [2012] 1 NWLR (pt 1305) 237, 369; *John Agbo v State* [2006] 1 SCNJ 332, 335-337; *Uwaekweghinya v State* (2005) 3 SCNJ 32, 42. Contrary to the above submission, the gist of the appellant's argument was that none of the essential ingredients of the offence of armed robbery on March 7, 2005 at Igouil Petrol Station, Boluwaji, Ibadan, was proved.

Thus, in order to accentuate the irrelevance of the said submissions [pages 2-6 of the respondent's brief], it has become necessary to adumbrate on the import of those sections of the Criminal Procedure Law of Oyo State. ***By virtue of section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), every person who is charged with any offence shall be entitled to be informed promptly in the language he understands and in detail, of the nature of the offence.*** *Amala v State* [2004] 12 NWLR (pt 888) 520; *Ezeze v State* [2004] 14 NWLR Pt 894) 491; *Okeke v The State* [2003] 15 NWLR (pt 842) 25; *Madu v The State* (2012) LPELR -7867 (SC); *Solala v The State* [2005] 11 NWLR (pt 937) 460. ***Ostensibly, therefore, the statutory prescription that every charge shall state the offence for which the accused person is standing trial stems from this constitutional mandate.***

Occasionally, however, charges so drafted may contravene any of the rules of drafting charges, such as the rules against ambiguity; duplicity; misjoinder of offenders and misjoinder of offences. See generally, Bob Osamor, *Fundamentals of Criminal Procedure Law in Nigeria* (Ojodu, Lagos: Dee-Sage Nigeria Limited, 2004) 188; O. Doherty, *Criminal Procedure in Nigeria Law and Practice* (London; Blackstone Press Limited, 1999) 227; O.

Onadeco, The Criminal trial Procedure (Lagos: Lannon Nigeria Ltd, 1998). This is the context in which sections 166, 167 and 168 (supra) have to be viewed.

On its part, section 166 (supra) is designed to salvage charges which exhibit non-material errors in stating the offence or the particulars which ought to be stated and the omission to state the offence unless the accused person was, in fact, misled by such error or omission. C.O.P. v. Okoye (1964) 1 All NLR 305; Okeke v. State [2000] 10 NWLR (pt. 675) 423; Ogbomor v The State [1985] 2 SC 289. **To be misled the defect must be fundamental and misleading.** Timothy v FRN (2012) LPELR -9346 (SC) 17.

By section 167 (supra), on the other hand, any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge had been read over to the accused and not later. Put differently, an accused person is under obligation to raise any objection to any formal defect to a charge before he takes his plea. Where he fails to do so, he is presumed to have understood the charge preferred against him. Ogunye v The State [1999] 5 FWLR (pt.604) 545; Adeniji v The State [2001] 13 NWLR (pt. 730) 375; Okeke v The State (2003) 5 SCM 131, 185-186; Solola and Anor v The State (2005) 6 SCM 137, 147; Okewu v FRN (2012) 1 NWLR (pt 1305) 327, 369. In effect, the above provisions, which the learned Honourable Attorney General relied on, cannot be considered outside their context, namely, as logical corollaries to the rules dealing with drafting of charges, O. Doherty, Criminal Procedure in Nigeria Law and Practice (London; Blackstone Press Limited, 1999) 227.

As shown above, the scenario here is, entirely, different from what transpired at the trial court [as affirmed by the lower court]. In the said court, the Prosecution meticulously outlined the particulars of the offence charged. In fact, it was specific as to place, [the locus criminis], the Igouil petrol station and date, March 7, 2005. Thus, having charged the appellant [as accused person] with the said offence, the Prosecution had a duty to prove it beyond reasonable doubt.

Now, ever since the evolution of the offence of armed robbery as a specie of capital offence in our adversarial crimi-

nal justice system, our appellate courts have sagaciously enunciated the specific ingredients of this offence which must be proved to warrant a conclusion that the prosecution has discharged the burden of proving its commission beyond reasonable doubt. The cases are many, too many indeed, that only a handful of them would be cited here, *Suberu v The State* [2010] 8 NWLR (pt 1197) 586; *Nwachukwu v The State* [1985] 1 NWLR (pt 110) 218; *Alabi v The State* [1993] 7 NWLR (pt 307) 511; *Olayinka v The v State* [2007] 9 NWLR (pt 1040) 561; *Bozin v State* (1985) 2 NWLR (pt 8) 465, 467; *Okosun v AG, Bendel State* (1985) 3 NWLR (pt 12) 283; *Ikemson v State* (1989) 3 NWLR (pt 1100) 455; *Adeosun v State* (2007) 46 WRN 1. B
C

These cases are unanimous on the point that the three-fold ingredients which the prosecution must prove in order to secure a conviction for the said offence are: (a) the factual reality of a robbery; (b) the participation of the accused person in the said robbery operation and (c) that, at the material time when the offence was being committed, he was either armed with firearms or an offensive weapon or that he was in the company of a person who was so armed. D
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The pertinent question now is: how did the Prosecution fare at the trial court? As already indicated above, the Prosecution called five literate witnesses, [PW1, PW2, PW3, PW4 and PW5]. Unfortunately, in their respective testimonies, none of them referred to any robbery at any petrol station, much less, any robbery at Igouil Petrol Station on March 7, 2005. The alleged victim testified as PW2. Her son was the PW3. The PW1 was a block seller. Three of them testified and were cross examined, about a robbery incident involving the PW2 at her private dwelling house situate at Nos. 1 and 3, Bode Adebimpe Close, Boluwaji, Atagba Road, Boluwaji Area, Ibadan. F
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Even PW4 and PW5, of the Sanyo Police Station and the Criminal Investigation Department of the Oyo State Police Command, Iyaganku, Ibadan, respectively, who investigated the case of the alleged robbery, equally, in their testimonies in chief and cross examination, described the roles they played in relation to the robbery incident which occurred at a private dwelling house situate at Nos 1 and 3, Bode Adebimpe Close, Boluwaji Atagba Road, Boluwaji Area, Ibadan, pages 49 and 56 of the record. Just like PW1; PW2 and H

PW3; PW4 and PW5 did not testify about any robbery incident at any petrol station, much less, any robbery incident at Igouil Petrol Station.

By PW3's testimony at page 42 of the record, the appellant was their [that is, PW2 and PW3's] house boy. In other words, the witness knew the appellant very well. Most curiously, however, it was only during his testimony at the trial court that he, for the first time, raised the issue of his [appellant's] involvement in the robbery incident in their private residence. This prompted the submission of the appellant's counsel that this witness's failure to mention the appellant's name at the earliest opportunity was fatal to the Prosecution's case.

I entirely agree with this submission. The trial court did not allude to this aspect of the PW3's testimony yet the lower court affirmed its verdict. That was a wrong approach. The trial court's said omission was a non-direction on a point in favour of the appellant which occasioned a miscarriage of justice, Onuoha and Ors. v State [1989] 2 SC (pt 11) 115, 135. If indeed he [PW3], who knew the appellant, their former house boy, very well had seen him [the appellant] in the course of the alleged robbery in their residence, that was the first thing he would have mentioned to the police.

Thus the only explanation for his failure to mention the appellant's name was that he did not see him [the appellant] during the robbery incident (if indeed there was any such incident in their residence). See Onuoha & Ors v. The State (supra) at page 121; Kalu v The State [1988] 10-11 SCNJ 1, 9; Adeyoye v C O. P. (1959) 100, 102; Ishola v The State [2008] 18 NWLR (pt 1119) 285, 294-295.

Against this background, the appellant's counsel urged the court to reverse the concurrent findings of the lower courts to the effect that the appellant was linked with the said offence. Onuoha and Ors v State (supra); Kalu v The State (supra); Ishola v The State (supra) etc are decisions of this court on the effect of a trial court's non-direction on a point in favour of the appellant which occasioned a miscarriage of justice. ***In the instant case, there was a non-direction by the trial court on the effect of PW3's failure to mention the appellant's name at the earliest opportunity. Yet the lower court endorsed its [the trial court's approach]. It is in this context that I hold the view that the sub-***

mission of the appellant's counsel on this point is as forceful as it is unanswerable. As I had noted above, the trial court's said omission was a non-direction which occasioned a miscarriage of justice. Onuoha and Ors v State (supra); Kalu v The State (supra); Ishola v The State (supra).

Thus, notwithstanding the lower court's concurrent findings, this court is justified in interfering with them, Omoregbe v. Edo (1971) 1 All NLR 282, 289; Fashanu v. Adekoya [1974] 6 SC 83; (1974) 1 All NLR 35, 41; Okolo v. Uzoka [1978] 4 SC 77,86; Ivienagbor v. Bazuaye [1999] 9 NWLR (pt. 620) 552, 559. Surely, this court will, readily, upset concurrent findings of lower courts where there are exceptional circumstances, such as, where the findings are perverse; where there was a miscarriage of justice or where a principle of Law or procedure was not followed, Ogbu v. State [1992] 8 NWLR (pt. 295) 255; Igago v State [1999] 14 NWLR (pt. 637) 1; Adeyemi v D The State [1991] 1 NWLR (pt. 170) 679; Adeyeye v The State (2013) LPELR -19913 (SC) 46; Akpabo v State [1994] 7 NWLR (pt 359) 635; Ejikeme v Okonkwo [1994] 8 NWLR (pt 362) 266.

In the instant case, it has been, demonstrably, shown that the trial court's non-direction on a point in favour of the appellant occasioned a miscarriage of justice, Onuoha and Ors v State (supra); Kalu v The State (supra); Ishola v The State (supra).

The net effect is that there is nothing in the testimonies of the five witnesses linking the appellant with the commission of the said offence. Even PW2's sister, who, according to PW2 and PW3, witnessed the robbery incident and received threats of ravishment from the said hoodlums, was not summoned to testify. It is true that the prosecution only has a duty to call witnesses to establish its case beyond reasonable doubt. The State v Azeez [2008] 4 SC 188, 209; [2008] 4 SCNJ 325, 343-344; (2008) LPELR -3215 (SC) 20; Oluwatoba v The State [1985] 1 NSCC 306; Adamu v. State [1991] 6 SC 17; [1991] 4 NWLR (pt 187) 530; Amuneke v State (1992) 6 NWLR (pt. 2170) 338.

It however has an obligation to place all available relevant evidence before the trial court. The State v Azeez (supra). Thus, where there is a vital point in issue [as in the instant case where the identity of the appellant was put in issue

by the evidence of the PW3] and there is one witness [again, as in the instant case where the sister of the PW2 was alleged to have seen the robbers and even received threats of ravishment from them] whose evidence would settle it one way or the other, that witness ought to be called. The State v Azeez B (supra), approvingly, citing R v Kuree (1941) 7 WACA 175; INR v Harris (1927) 2 KB 587; Okonkwo v. Police (1953) 20 NLR 165.

It was against this background that Obi, of counsel for the appellant, contended that in all criminal trials, an accused person would not be convicted unless the Prosecution proves the offence charged beyond reasonable doubt, citing section 138 of the Evidence Act [then applicable]; that is, establishes every particular of the offence charged, failing which a favourable verdict would be entered for the accused person. C
D **There is considerable force in this submission.**

As I had observed elsewhere, in our system of criminal justice, proof is not analogous to the requirement of proof in the Science of numbers, otherwise known as Mathematics. Unlike mathematics, where proof is attained through inflexible formulae and answers are arrived at with inviolable certitude, proof in criminal trials is attained against the background of the burden codified in section 138 (1) of the Evidence Act. [supra], Ebeinwe v The State (2011) LPELR -985 (SC) 14-15; Jua v The State (2010) LPELR -1637 (SC); Alabi v The State [1993] 7 NWLR (pt 307) 511, 523; Otukpo v John and Anor F (2012) LPELR -20619 (SC).

The law, therefore, does not impose a duty on the accused person to purge himself of guilt. Onachukwu v The State [1998] 4 SCNJ 36, 49; Obiode and Ors v The State (1970) 1 All G NLR 35; Olatinwo v The State (2013) LPELR -19979 (SC); Ume v The State [1973] 25 SC 9; Saidu v State [1982] 4 SC 41; Oduneye v The State [2001] 5 NSCQR 1, 41; Obue v The State [1976] 2 SC 141. **Rather, it imposes an obligation on the prosecution to prove his [the accused person's] guilt beyond reasonable doubt.** H

This is an offshoot of the impregnable canon ordained in section 36 (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). This section guarantees the right to the presumption of innocence. This court has interpreted

the section [section 36 (5)] as imposing the burden of proving the guilt of an accused person on the prosecution. Posu and Anor v The State (2011) LPELR -1969 (SC) 17-18; The State v Azeez and Ors (2008) LPELR -3215 (SC) 17; Okoro v The State (1988) LPELR -2494 (SC) 11; Ozaki and Anor v The State [1990] 1 NWLR (pt 124) 92, 125; Aruna and Anor v. The State (1990) LPELR B -568 (SC) 18; Obiakor v. State (2002) 10 NWLR (pt. 776) 612. The duty thus imposed on the prosecution is to prove the case beyond reasonable doubt. This is axiomatic. It is indeed well-settled under Nigerian criminal jurisprudence, Bello v. State (2007) 10 NWLR (pt. 1043) 564, 585, Oladele v. Nigerian Army (2004) 6 NWLR (pt. 868) C 166.

This is so because our criminal justice is accusatorial in nature. In our system, trials are initiated and sustained by accusation rather than by inquisition. *Usu v. COP* (1972) ANLR 825, Elias CJN. Hence, D where the ingredients are ascertainable, the prosecution must prove beyond reasonable doubt that the accused person or persons envisaged by the law creating the offence and their acts are within the ambience of the ingredients of the offence. *Oladele v. Nigerian Army* E (supra).

Although, it is not essential to prove the case with absolute certainty, the ingredients of the offence charged must however be proved as required by law and to the satisfaction of the court. *Obiakor v. State* (2002) 10 NWLR (pt. 776) 612, 627, *Nwokedi v. COP* (1977) F 3 SC 35, 40, *Ameh v. The State* (1973) 7 SC 27, *Kalu v. The State* (1988) 4 NWLR (pt. 90) 503, *Aruna v. The State* (1990) 6 NWLR (pt. 155) 125.

These authorities constitute a contemporary judicial affirmation of the maxim which was very popular in the Latin days of the law, *judicis est judicare secundum allegata et probate*, which simply G means that it is the duty of a Judge to decide according to facts alleged and proved.

From an examination of the prosecution's allegation as evidenced in the charge against the appellant before the trial court and my meticulous consideration of the totality of the evidence in proof H thereof, as per the testimonies of PW1, PW2, PW3, PW4 and PW5. I harbour grave and genuine doubts about the lame story of the prosecution. Having failed to lead any scintilla of evidence in proof of the

ingredients of the offences which the appellant, allegedly, committed on March 7, 2005, at Igouil Petrol Station, Boluwaji, Ibadan, I hold the strong view that the Prosecution failed in its duty to discharge the burden of proof which the law vests upon it.

It cannot be gainsaid that the Prosecution, equally, failed to
 B prove the separate and distinct offence of conspiracy, *Balogun v. Attorney General of Ogun State* [2002] 2 SCNJ 196, 209; *Gbadamosi v. State* [1991] 6 NWLR (pt.196) 182; *Majekodunmi v. Queen* 14 WACA 64; *Daboh v. State* [1977] 5 S C 167; *Onochie v. The Republic* (1966) 1 All NLR 86; *Nwankwo v. FRN* [2003] 4 NWLR (pt. 809)
 C 1; *Abacha v The State* [2002] 11 NWLR (Pt. 779) 437.

The appellant [as accused person] is, therefore, entitled to the benefit of the doubt thus created. *Ikhane v C. O. P.* [1977] 6 SC 119; *The State v Aibangbee and Anor* [1988] 7 SCNJ 128; *Onuoha and*
 D *Ors v The State* [1989] 2 NWLR (pt 101) 23, 38; (1989) LPELR - 2704 (SC) 21- 22; *Onafowokan v The State* [1987] 3 NWLR (pt 61) 381; *Ekpe v The State* [1994] 12 SCNJ 131; *Namsoh v The State* [1993] 6 SCNJ (pt 1) 55, 69.

The only verdict, in the circumstance, is that of his discharge
 E and acquittal, *Posu and Anor v The State* (2011) LPELR -1969 (SC) 17-18; *Afolabi v The State* [2010] All FWLR (pt 538) 812, 828; *Alonge v. IGP* (1959) SCNLR 516; *The State v Danjuma* [1997] 5 NWLR (pt.506) 512. The lower court failed in its duty in this regard.
 F This court, on its part, will not brook the subsistence of such a parody of justice. In consequence of all I have said above, I find that I have to and I hereby allow this appeal. I therefore, enter an order setting aside the judgment of the lower court which affirmed the trial court's conviction and sentence on the appellant. In its place, I order the
 G discharge and acquittal of the appellant and his release from the custody of the Prison authorities forthwith. Appeal allowed.

MUNTAKA-COOMASSIE JSC

H The appellant herein was the accused person before the High Court of Justice Ibadan Oyo State. He was charged with conspiracy to commit armed robbery and armed robbery contrary to Sections 6 (b) and 1 (12) (a) of the robbery and firearms (special provisions) Act, Cap R. 11, Vol.14 Laws of the Federation of Nigeria, 2004. The

accused person, now appellant, pleaded not guilty to the charges.

The prosecution, In order to establish their allegations against the appellant and other at large called five (5) witnesses who testified in favour of the prosecution. Some eighteen (18) exhibits were tendered and admitted. The accused person, now appellant testified in his defence and called no witness. B

After considering the evidence the High Court Ibadan, herein after called the trial court entered judgment convicting the accused person and sentenced him to death by hanging.

“Even though the rest of the accused persons are now at large having established beyond reasonable doubt that the accused person acted in consent with other armed robbers who are now at large, he will come within, the purview of Section 7 of the Criminal Code to be equally as liable as the other suspects who are now at large even though there is no evidence before the court that the accused person carried any arm or weapon personally on the fateful night. C

I therefore find the accused person guilty of the first count of conspiracy to commit a felony to wit armed robbery under Section 5 of the Armed Robbery and firearms (S. P) Act, Cap 398 LFN (1990).

Furthermore, having held in the course of this judgment, that the accused acted in concert with the other armed robbers who are now at large on the fateful night of 7th March 2005 to violently attack the Pw2 in her home while armed with cutlasses and other dangerous weapons dispossessing her unlawfully of her money and other valuables, I find[(sic) Editor: error here may be published in a subsequent KLR pt. if correction is secured from the SC] D

The accused person being aggrieved appealed to the Court of Appeal Ibadan Division. The Court of Appeal, now court below for short, dismissed the appeal in the following words: E

“I wish to note that section 24 of the Criminal Code Cap 24 of 1958 is a replica of section 24 of the Criminal Code Law Cap 38 vol. 11 Laws of Oyo State 2000. I agree with the submission of respondent’s counsel that the defense of accident is not available to the appellant. The decisions of this court in the cases of Umoru v. State (supra) are instructive. See Okosi v. State (1989) 1 NWLR (pt. 99) 642 at 672 – 674. The conduct of the appellant has sufficiently implicated him as such the defence of accident cannot avail him. It is in evidence that appellant locked up the guard dogs, prior to and F

during the course of the armed robbery operation and appellant also served as a pointer to the other armed robbers on what item they should steal. The appellant also advised them to use PW2's vehicle to cart away their loot. The learned trial Judge rightly in my view rejected the defence on the ground that appellant denied committing the offences for which he was charged. This is in line with the decision of this court in *Okeke v. State* cited (*supra*) by respondent's counsel in the brief of argument.

I will similarly resolve issue 2 against the appellant.

The learned trial Judge had unquestionably evaluated the evidence and justifiably appraised the facts. As such it is not the business of this court to interfere. See *Igabo v. State (1999) 14 NWLR (pt. 637) 1*.

In the final result this appeal fails. It is hereby dismissed. I affirmed the conviction and sentence passed by the lower court on 27th February 2009 in charge No. 1/53c/2006".

The appellant again appealed to the Supreme Court. The appeal before us therefore is against the decision of the court below. The appellant and the prosecution i.e. respondent have adopted their respective briefs of argument on 5/2/2015.

My learned brother produced a draft of his lead judgment in which he found that the appeal is pregnant with merit. He then relied on his reasons and conclusion to allow the appeal.

I have painstakingly analysed the reasons, the issues before us, and the conclusion of my learned brother Nweze JSC and I agree that there is a lot of merit in this appeal same I think deserved to be allowed. I too for the same reasons hold that appeal shall be allowed. The appellant is hereby acquitted and discharged.

RHODES-VIVOUR JSC

The appellant was charged with the offences of conspiracy and armed robbery contrary to section 6(b) and 1 (2), (a) of the Robbery and Firearms (Special Provisions) Act. In the charge it was stated that the robbery was committed on 7/3/05 at Igouil Petrol Station, Boluwaji Ibadan. The prosecution called 5 witnesses which included the person robbed, and the Police investigation officers. All of them led evidence that the Robbery occurred at No 1 and 3 Bode Adebimpe

Close, Boluwaji Road Ibadan. The trial court found the appellant guilty of the offence. This finding was affirmed by the court of appeal.

Two issues call for urgent determination.

(a) Whether an accused person can be convicted when there is no nexus between the offence and evidence led. B

(b) When would the Supreme Court interfere with concurrent findings of the two courts below?

The place where the offence was committed must be stated with sufficient precision. Where this is not done the prosecution is at liberty to amend the charge, or the court may alter the charge but this must be done at any time before judgment is given and all alterations or additions shall be read and explained to the accused/appellant. See sections 162, 163, 164, of the Criminal Procedure Act. Since the appellant was accused of committing the offence of armed robbery at Igouil Petrol Station Boluwaji Ibadan and the evidence led was for a robbery committed somewhere else, at (No. 1 and 3 Bode Adebimpe Close, Boluwaji Road Ibadan) and there was no amendment of the charge by the prosecution or the court the appellant would be entitled to an acquittal, in view of the fact that no evidence was led to show that he committed the offence of armed robbery at Igouil Petrol Station Boluwaji Ibadan. C
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It is only when all the vital ingredients of the offence have been clearly established that the charge is said to have been proved beyond reasonable doubt. See *Alabi v. State* (1993) 7 NWLR (pt. 307) p. 511. F

In view of the fact that there is no evidence to even remotely suggest that any offence was committed at Igouil Petrol Station Boluwaji, Ibadan, the venue of the offence in the charge the case has not been proved beyond reasonable doubt. G

Finally, the long held position of the law is that where the two courts below make concurrent findings of fact, this court would very rarely interfere. The reason is simple. Such findings are only arrived at after cross-examination, the judge observing the witnesses, their reactions to questions and demeanour. But this court would readily interfere and upset findings of fact by the two courts below in exceptional circumstances, such as the findings are perverse or are against evidence led or occasioned miscarriage of justice, or in breach of H

some principle of law or procedure whose application will have the same effect. See *Ogbu v. State* (1992) 8 NWLR (pt.259) p.255; *Igago v. State* (1999) 14 NWLR (pt.637) p.1; *R-Benkay Nig Ltd v. Cadbury Nig PLC* (2012) 3 SC (pt. iii) p.169; *ACN v. Lamido & 4 ors.* (2012) 2 SC (pt. ii) p.163

B The finding of the trial court that appellant robbed PW2 at No.1 and 3 Bode Adebimpe Close Boluwaji Road Ibadan when he was charged for robbery at Igouil Petrol Station and there was no evidence to support the charge renders the finding perverse. The judgment of the Court of Appeal is hereby set aside, and the appeal allowed.

C For the above and the comprehensive reasoning in the leading judgment of my learned brother, Nweze, JSC I agree with his lordship conclusions. The appellant is hereby acquitted and discharged.

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NGWUTA JSC

I read in draft the lead judgment just delivered by my learned brother Nweze, JSC and I entirely agree with His Lordship's reasoning and conclusion that the appeal be allowed.

The facts of this case clearly demonstrate a variation between the charge and evidence proffered in proof of same. This appears to have been mistaken by the Respondent for a challenge to the competence of the charge itself.

F Section 258 of the Evidence Act, 2011 defines fact in issue or principal fact. In a criminal trial the locus criminis is a fact in issue and ought to be proved, along with other facts in issue, beyond reasonable doubt to secure a conviction. This is in conformity with the presumption of innocence in s.36 (5) of the 1999 Constitution of the Federation, as amended. See *Woolmington v. DPP* (1935) AC 462 at 481 to which the presumption of innocence appears traceable. See also *Nwodo v. State* (1991) 4 NWLR (Pt. 185) 341; *Muka v. State* (1976) 9-10 SC 305.

H The facts of this case create the impression that the prosecuting Counsel at the trial Court deliberately scuttled his own case to let the appellant walk. And the two Courts below did not appear to have given a thought to the fact that evidence of the place the offence was committed varied with the place alleged in the charge as the place

the offence was committed.

I agree that the appeal be allowed and I allow it and set aside the judgment of the Court below which affirmed the judgment of the trial Court. Consequently, the appellant is acquitted and charged.

B

AKA'AH'S JSC

I read the draft of the judgment prepared by learned brother Nweze JSC. I agree with his reasoning and conclusion that the appeal has merit despite the concurrent findings made by the two lower courts.

C

The charge for which the accused/appellant was found guilty and sentenced to death was that he committed armed robbery at Igouil Petrol Station, Boluwaji, Ibadan. However the evidence adduced by the Prosecution witnesses and especially PW2 (Mrs. Omolara Adebimpe) the victim of the robbery which linked the appellant with the robbery was based on suspicion. In her evidence PW2 stated that before she went to bed on the night of the robbery, she saw the appellant sleeping inside her car and before she retired to bed she released the dogs from their cage but when she came out by 1:00 a.m. on 7th March, 2005 she noticed that the dogs were caged and suspected that the only person who could have locked them up was the appellant. She then instructed him to release them. At a point, the dogs continued to bark and so she suspected the appellant was harbouring a stranger in his room and this accounted for the barking of the dogs.

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PW3, Olabode Adebimpe, who is the son of PW2 stated that he first heard the voice of the appellant speaking to one of the robbers telling him to carry the electronics. He later saw the appellant's face when the torchlight was flashed. He said it was the appellant who showed his (PW2) wrist watch which he kept on the refrigerator to the robber and that it was the appellant who discussed with one of the robbers about using PW2's car to carry the electronics.

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The evidence given by PW2 and PW3 is that the robbery took place at Nos 1 and 3 Bode Adebimpe Close, Atagba Road, Boluwaji Area, Ibadan. No evidence was led to show the proximity of Igouil petrol station to the private residence of PW2 at Nos 1 and 3 Bode Adebimpe Close, Atagba Road, Boluwaji Area, Ibadan. There is there-

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fore a discrepancy between the location of the alleged crime (locus criminis) and the evidence led. In spite of this discrepancy, the prosecution did not apply to amend the charge to align the evidence adduced to the charge. The law is that where the charge laid is at variance with the evidence tendered, the conviction of the appellant will not stand. See *Raymond Nwokedi vs Commissioner of Police* (1977) ALL NLR 11.

There is material contradiction between the evidence of PW2 and PW3 on the role played by the appellant in the removal of the electronic items which the robbers took away from PW2's house. While PW3 said he overheard the appellant discussing that the robbers should use PW2's car to carry the electronics, PW2 in answer to a question under cross - examination stated that she is still having the car. There is also evidence that the robbers scaled through the fence when they made their escape. Although the learned trial Judge disbelieved the evidence of the appellant that the robbers threatened him with a gun and this was why he could not do anything when he heard the robbers beating up PW2, the Judge found that there was ample evidence from the testimonies of PW2 and PW3 as well as that of the appellant that the robbers were armed. PW2 also testified that the robbers threatened to take away the appellant and sell him in order to realise the amount they were looking for to deliver to their boss but she pleaded with them not to carry out their threat because his people might think she was the one that used him for ritual killing. With this evidence coming from PW2, it was not safe to convict the appellant of armed robbery and proceed to sentence him to death.

The entire evidence by the prosecution no doubt cast suspicion on the appellant's role in the robbery saga and it was unsafe to convict him on such evidence.

It is on account of this and the more detailed reasons contained in the judgment of my learned brother, Nweze JSC that I too find merit in the appeal and set aside the conviction and sentence of death by hanging for armed robbery which was passed on the appellant by the Oyo State High Court, Ibadan and affirmed by the Court of Appeal Ibadan on 27th March, 2012. In its place the appellant is acquitted and discharged.

Appeal allowed.