

SUPREME COURT OF NIGERIA
FRIDAY 26TH JUNE, 2015. SC. 36/2013
**CORAM:- M. S. MUNTAKA-COOMASSIE, O. RHODES-
VIVOUR, N. S. NGWUTA, C. B. OGUNBIYI,
K. B. AKA'AH, JJSC**

ALHAJI MUSA SANI APPELLANT
V.
THE STATE RESPONDENT

ARMED ROBBERY - Proof - Prosecution failed to prove any ingredient of the offence - As there is no credible evidence to link appellant with the offence (H1)

ARMED ROBBERY - Evidence - Contradiction in - Weight - Conflict as regards date of the offence created material doubt - As to whether the incident actually occurred (H2)

ALIBI - Investigation - Failure of the police to investigate the defence - As properly raised by appellant - Created serious lapse in the conduct of prosecuting the case (H3)

FACTS

At the High Court of Katsina State, accused/appellant and one other were arraigned on a charge of armed robbery punishable under section 1(2) of the Robbery & Firearms (Special Provisions) Act Cap R11 LFN 2004. They pleaded not guilty to the charge. Prosecution/respondent alleged that appellant committed the offence on the 28th May 2008. He was arrested in connection with the crime. Appellant denied knowledge of the crime as he was at a hotel at the time when the offence was said to have been committed. However, the defence of alibi as presented by appellant was not investigated by the police.

Respondent called several witnesses and tendered statements made by appellant and the other as exhibits. The defence called two witnesses in support of their defence. None of the defence witnesses testified to the effect that appellant was not at the scene of the crime or appellant was with him/her at the time and hours appellant al-

leged that he was at the Hotel. At the end of the trial, the learned trial Judge in his judgment, convicted appellant and the other. They were thus sentenced to death. The conviction and sentence were made despite the observation by the trial Judge that respondent did not properly investigate the case. Dissatisfied, appellant appealed to the Court of Appeal. The appeal was heard and dismissed. Not yet satisfied, appellant appealed to the Supreme Court.

HELD (Unanimously allowing the appeal per **MUNTAKA-COOMASSIE JSC**)

ARMED ROBBERY - Proof

1. It is clear as stated earlier on, that the prosecution could not in law prove credible and reliable evidence to show that an armed robbery has occurred on the 28th May, 2008 at the time they stated in the role charge.

There was no evidence to link the Appellant with the incident of the robbery. The other monies stated in their evidence which was alleged to have been removed from the PW2 and PW3 were never inserted in the charge. The Appellant could not properly plead accurately to the contents of the charge.

The money said to be stolen from the PW1, the so called victim of the armed robbery, could not be ascertained. The source of the money could not be established.

It is amazing that the police did not recover anything on the Appellant immediately the robbery took place. That is something like gun, wooden knife or the money lost during the said armed robbery. There was no such armed robbery that day. The exhibits were not linked to the Appellant.

I have closely and carefully looked at the issues for determination as distilled by the parties in this appeal. I have also thought over the position of the prosecution. It is a fact that can never be altered, that the Prosecution failed woefully to establish any ingredient of the offence of armed robbery. It is clear that there is no credible evidence coming from the testimonies of the Prosecution witnesses to show that an armed

robbery has taken place on the charge put to both accused persons - Alhaji Musa Sani; and Ifenya Amah.

(pp. 2128 E/2129 F)

Evidence - Contradiction in - Weight

2. The prosecution maintained a very material contradiction as to the date the said armed robbery took place, was it on Saturday 28/5/2008 as put by the Prosecution? Or 28/5/2008 which fell on Wednesday i.e. whether it was on Wednesday which is 28/5/2008 or 28/6/2008? This is a very serious and material lapse which the respondent could not satisfactorily explain and clear.

How can report of armed robbery incident be reported to the Police before the incident occurred? The purported armed robbery is really a mystery and fake. This, without saying, has actually created material doubt as to whether that armed robbery has actually occurred. I think, I will not go astray if I resolve this doubt in favour of the Appellant.

(p. 2129 A)

ALIBI - Investigation

3. The Appellant herein put up a defence of alibi and provided the address, date and time. However the police failed woefully to investigate the truth of the Appellant's plea. Police merely did not believe the Appellant and they relied on the so called eye witnesses to dismiss the plea of alibi. While in actual fact, there is no iota of doubt that the Police refused to conduct any investigation at Lunar Hotel Katsina. This failure to conduct such investigation created serious lapses in the conduct of prosecuting this case. All the issues distilled by the Appellant and adopted by the respondents are pregnant with tremendous merits same are hereby resolved in favour of the Appellant. Appeal is therefore meritorious and is allowed.

(p. 2129 H)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

1. Alibi – Defence of

B Alibi is a defence raised by an accused person. It is a complete defence if found to be true. The defence simply means that when the offence was committed, the accused person was somewhere else, so he certainly could not have committed the offence.

C Alibi is within the personal knowledge of the accused person and so it is his duty to establish it. This is done by providing the Police with details of his Alibi (whereabouts) at the earliest opportunity after his arrest, and it is the duty of the police to investigate it.

D The standard of proof required for the defence of alibi to be sustained is one based on balance of probabilities. That is to say an alibi is established if the judge is satisfied that it is probable that the accused person was somewhere else on the date/time the offence was committed, and not that the witnesses for the prosecution are liars. Defence of alibi crumbles if there is stronger evidence against it or if after it is investigated it is found to be untrue. (p. 2130 G)

REPRESENTATION

C. I. Enweluzo with M. K. O. Akintola, for the Appellant
Hassan Yusufu A.D.PP., Ministry of Justice Katsina State, with Abu Umar, S.S.C., for the Respondent

CASES REFERRED TO

- John v. State (2011) 18 NWLR (1278) 372
 Osuagwu v. State (2009) 1 NWLR (pt. 1123) 523
 Oguntola v. State (2007) 12 NWLR (pt. 1049) 617
 G Shehu v. State (2010) All FWLR (pt. 523) 1841
 Ali v. State (2010) All FWLR (pt. 538) 812
 Posu v. State (2011) All FWLR (pt. 565) 234
 Orji v. State (2008) All FWLR (pt. 422) 1093
 State v. Azeez (2008) 14 NWLR (pt. 1108) 439
 H Josiah v. State (1985) NWLR (pt. 10) 125
 Ogunsanya v. State (2011) 12 NWLR (pt. 1261) 401
 Obiode v. State (1970) 1 All NLR 35
 Nwosisi v. State (1976) 6 SC 109

Odidika v. State (1977) 2 SC 21

Dogo v. State (2001) FWLR (pt. 39) 1388

Ntam v. State (11968) NMLR 86

Ani v. State (2009) 14 NWLR (pt. 1168) 443

Opayemi v. State (1985) 2 NWLR (pt. 5) 101

Obakpolor v. State (1991) 1 NWLR (pt. 165) 113

B

Afolabi v. State (2010) All FWLR (528) 812

Standard Engineering Co. Ltd. V. NBCI (2006) 2-3 SC 74

Orji v. State (2008) All FWLR (pt. 422) 1093

Udosen v. State (2007) All FWLR (pt. 356) 699

C

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

STATUTE REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap R11 LFN 2004, s. 1(2)

D

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The case of the prosecution is that the Appellant, Musa Sani, was said to have committed the offence of Armed Robbery and Fire Arms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria 2004. He was said to have committed the alleged offence on the 28th day of May, 2008. The Appellant has emphatically denied knowing anything about the alleged Robbery as he was at LUNAR HOTEL at about 2.30 - 3.00 a.m. when the offence was said to have been committed. In a nutshell the Accused, now Appellant put up the defence of Alibi which the prosecution did not believe.

The prosecution on the 8th day of June, 2009 charged the Appellant together with one Ifanye Amah before the Katsina High Court in a charge of Armed Robbery punishable under Section 1(2) of the said Robbery and Firearms (Special Provisions) Act Cap R11, Laws of the Federation 2004.

CHARGE:

“THAT YOU ALH. MUSA SANI Of behind Zakka house, Kofar Marusa Low cost Katsina and IFANYE AMAH of old Olympic hotel, Kofar Kaura Layout Katsina, Katsina Local Government Area of Katsina State, on or about the 28th day May 2008, committed robbery in that you did an act to wit: attacked and robbed one ABDULLAHI MOHAMMED (alias BODA) THE SUM OF Nine hun-

dred and fourty thousand naira (N940,000:00); and at the time of the robbery you were armed with offensive weapons to wit: cutlass and iron rod, with which you threatened him and thereby committed an offence punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap RII Laws of the federation 2004.”

Both accused persons pleaded not guilty to the charge.

The Prosecution, in order to establish their case against the two accused persons, called Six Prosecution Witnesses, three of which were to be eye witnesses who testified as such. The two Accused persons including the Appellant made voluntary statements to the Police which were tendered in court as Exhibits. The defence called two witnesses in their defence. None of the defence witnesses testified to the effect that the Appellant was not at the scene of the crime or the Appellant was with him or her at the time and hours the Appellant alleged that he was at Luna Hotel. The Appellant’s Counsel at the trial High Court kept mum vis-à-vis the defence of alibi.

At the end of the proceedings, in a reserved judgment, the learned trial court judge found the accused persons guilty and that they have no defence to the charge. Both Accused persons were then convicted of the offence and sentenced both to death. Even though the trial Judge Sada Abdu-Mumini J. confessed that the prosecution did not properly investigate this case. However the trial Judge nonetheless convicted the Appellant and the 2nd Accused and sentenced them to death. The trial Judge says on page 39.

“I have carefully examined all the circumstance of the case. I think the case has not been properly investigated. The two Accused persons in their respective statements Exhibit 1 and 2 have created the defence of Alibi by saying that at or about the material time of the robbery they were at Lunar Hotel Katsina. If there were proper investigation the police ought to have investigated this aspect of the statements prosecution have tendered the statement as evidence in the matter knowing very well what they contained. Proper investigation if conducted would have revealed if what the two Accused persons claimed were true or not i.e. whether they are at Lunar Hotel at the time they claimed or not”.

The 1st accused person, Musa Sani now the Appellant, unsuccessfully appealed to the Court of Appeal hereinafter called court

below.

The Appellant filed an appeal against the judgment of the trial court on the three grounds, namely:-

“Ground 1

The learned trial judge erred in law when he convicted the Appellant under section 1(2)(a) of the Robbery and Firearms Act and sentenced him to death where the prosecution failed to establish the ingredients of the offence against him.

Particulars of Error

a. No weapon or firearm was linked to the Appellant in any way in the course of the trial.

b. The Robbery and Firearms Act provides that theft with the use of weapons or actual force or ground a conviction for armed robbery which the prosecution failed woefully to do.

c. The learned trial judge admitted the fact that there was no proper investigation by the police (prosecution) but still went ahead to convict and sentenced the Appellant to death.

d. Nothing incrimination was found with or on the Appellant (accused person) by the Police to evidence theft or armed robbery.

e. Theft was not established against the Appellant”.

Ground 2

“The learned trial judge erred in law when he held that “I think the case has not been properly investigated. The two accused persons in their respective statements exhibit 1 and 2 have created the defence of alibi by saying that at or about the material time of the robbery they were at Lunar Hotel Katsina” but still convicted and sentenced the Appellant to death for armed robbery notwithstanding his clear defence of alibi”.

“Particulars of Error

a. The prosecution (police) ought to have investigated the Appellant defence of alibi which was raised by the Appellant at the earliest available opportunity, but did not.

b. The alibi of the Appellant was never challenged by the prosecution before and during trial.

c. Failure to investigate the alibi ought to have been resolved in favour of the Appellant”.

Ground 3

The learned trial judge was in error when he admitted the cut-

lass and iron rod in evidence as exhibits 3 and 4 when it is not relevant to the case nor connected to the Appellant in anyway.

a. *There was no evidence that exhibits 3 and 4 (cutlass and iron rod) were recovered from the Appellant.*

b. *PW4, PW5 and PW6 who are police officers never connected exhibits 3 and 4 which are cutlass and iron rod to the Appellant neither did they give evidence of where they were gotten from.*

c. *The Honourable trial judge in his judgment said “the iron rod exhibit 4 has not been linked with the case in any way”.*

The court below unanimously dismissed the appeal of the Appellant. Hon. Justice Orji-Abaduwa, JCA., wrote the lead judgment, and held on p. 35- 36 thus:

“Furthermore I would not hesitate to take refuge under the Supreme Court’s decisions in Nwaturuocha vs. The State in Suit No. S.C.197/2010 delivered on 11/3/11, in which it was held that where the Appellant was identified by the Prosecution witness, without any equivocation, a straight issue of credibility will arise, that is to say, where an alibi has been raised and there is visual positive identification of the accused, which is believed by the trial Court, the Appellate Court should not disturb such a finding i.e. where there is more credible evidence fixing the accused person with the commission of the crime, the defence of alibi will not avail him, per J.A. Fabiyi, J.S.C. His Lordship went further to say that proof beyond reasonable doubt is not proof beyond all iota of doubt, and it not be stretched beyond reasonable limit, otherwise it will cleave. It should be recalled that the incident was said to have taken place after about 3.00 am, and that was after the Appellant and his friends had allegedly left the Lunar Hotel at 2.30 am.

In view of the foregoing, I entirely agree with the conclusion reached by the trial Court which I believe did not allow any sentiment to overrun its reasoning. Accordingly, this appeal is hereby dismissed. I hereby affirm the conviction and sentence of the Appellant by the trial High Court”.

The Appellant still not satisfied, he again appealed to the Supreme Court and filed a Notice of Appeal containing four (4) Grounds of Appeal. They are hereunder with particulars stated.

GROUND OFS OF APPEAL:

A. *“The verdict is altogether unreasonable, unwarranted and*

cannot be supported having regard to the evidence.

B. The Learned Justices of the Court of Appeal erred in Law in upholding the Judgment of the trial Court which convicted the Appellant and sentenced him to death for the offence of Armed Robbery under Section 1(2)(a) of the Robbery and Firearms Act, Cap RII, Laws of the Federation 2004 when the prosecution failed to establish the ingredients of the offence of Armed Robbery against him”. B

PARTICULARS

“i. No weapon or firearm of any nature was linked to the Appellant in any way as that used in the commission of the offence in the course of trial. C

ii. The Robbery and Firearms Act provides that theft with the use of weapons or actual force must exist in order to ground a conviction for armed robbery which the prosecution failed woefully to do. D

iii. The learned Justices of the Court of Appeal upheld the conviction and sentence passed on the Appellant despite the record of the trial Court wherein the learned trial Judge found as a fact that there was no proper investigation by the police (nay Prosecution) but still went ahead to convict and sentenced (sic) the Appellant to death. E

iv. Nothing incrimination (sic) was found or on the Appellant by the police to evidence theft or armed robbery.

v. Theft was in no way and/or manner any case or wrong established against the Appellant” F

C. “The learned Justices of the Court of Appeal erred in law in failing to uphold the defence of alibi put forward by the Accused/Appellant and which was raised at the earliest opportunity and thereby occasioned a miscarriage of justice. G

i. Alibi was raised by the Appellant as a part of his defence.

ii. The alibi was raised at the earliest opportunity when the Appellant was making his statement to the Police.

iii. The alibi was not punctured or destroyed under cross-examination in any way whatsoever. H

iv. Yet the learned Justices of the Court of Appeal upheld the Judgment of the trial Court that the defence of alibi does not avail the appellant and that the appellant was properly fixed to the scene of crime”.

D. The Learned Justices of the Court of Appeal erred in Law by failing to hold that EXHIBIT 3 and 4 (that is cutlass and iron rod) tendered in evidence were worthless, of no evidential value and ought not to be relied upon by any reasonable Tribunal in conviction (sic) the Appellant for the offence of Armed Robbery.

B *PARTICULARS:*

i. There was no evidence that exhibits 3 and 4 (cutlass and iron rod) were recovered from the Appellant.

C *ii. PW4, PW5 and PW6 who are police officers never connected exhibits 3 and 4 (which are cutlass and iron rod) to the Appellant neither did they give evidence of where they were gotten from.*

iii. The Honourable trial Judge in his judgment made a finding of fact that: "The iron rod exhibit 4 has not been linked with the case in any way".

D *iv. The above state of fact notwithstanding, the learned Justices of the Court of Appeal upheld the conviction and the sentence passed on the Appellant by the trial Court".*

E *"2(a) any offender mentioned in Subsection (1) of this Section is armed with firearms or any offensive weapon or in company with any person so armed,*

or

F *(b) at Or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person, the offender shall be liable upon conviction under this act to be sentenced to death."*

Learned Appellants Counsel then submitted that for the Prosecution to be successful under the above Section it must prove and also establish beyond reasonable doubt the following ingredients:-

G (i) That there was robbery;

(ii) that the accused person committed the robbery and was armed with offensive weapon; and

(iii) that at or immediately before or after the robbery, the accused person wounded or used personal violence to any person.

H Learned Appellant's counsel relied heavily on the following authorities:- 1. John v. The State (2011) 18 NWLR (1278) at p.372, paras E-F 383 - 384, paragraph D-B; OSUAGWU Vs. STATE (2009) 1 NWLR (Pt.1123) 523 at 536 paras D - E; Oguntola vs. State (2007) 12 NWLR (Pt.1049) 617 at 635 paras G - H.

I intend to completely agree with the learned counsel for the Appellant for enumerating the above ingredients of the offence of Armed Robbery. The authority of *Osugu v. The State* supra, the decision of the Court of Appeal Oyo Division, although persuasive could be a clear stance of the law. Fasanmi JCA, has this to say:-

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. To succeed in a charge of armed robbery or robberies the prosecution must prove:

“i). That there was a robbery or series of robberies.

ii). That each robbery was an armed robbery.

iii). That the accused was one of those who took part in the armed robbery or robberies. He refers to the case of Boziu vs. State (1998) 1 ACLR at P1. And or Bozin v. State (1983) 2 NWLR (Pt.81) 4652”.

Also *Oguntola v. State* supra part 1049 at p. 635 per Okoro JCA as he then was. Both authorities are of persuasive authority.

The Prosecution woefully fumbled when it failed to prove the first ingredient, namely whether there was armed robbery or not.

Learned Appellant’s Counsel argued that the robbery did not take place on the said date of 28th May, 2008. He then submitted that there was nothing from the evidence adduced by the prosecution to clearly show that the alleged robbery took place on the said 28th May, 2008. The evidence of the so called victim of the robbery was full of contradictions and confusion. When such confused evidence was subjected to the powerful cross-examination, it collapsed like a pack of cards. He could not even recollect the date of incident. Another Prosecution witness, Counsel contented, testified and he said he knew nothing about the day the purported robbery took place. He only knew that the accused, now Appellant, was transferred from Sabon Gari Police Station to State C.I.D Office Katsina on 1st July, 2007 at about 13.00 hours and referred to their team for investigation. That was the shaky evidence of PW6. See page 25 of the record of Appeal. By this evidence of PW6, the Appellant and the co-Accused were transferred to them before the armed robbery took place.

On pages 22 and 23 of the Record of Appeal, there was another useless piece of evidence by the PW5, Yunusa Adamu. Learned counsel contended that the exhibit keeper had known nothing about the armed robbery. All that he knew is that a machete of about 2 feet long of wooden handle and a rod of about 1 feet long were given to

him for safe keeping. He refers to pages 22 and 23 of the Record of Appeal. Learned Appellant's Counsel submitted that in the absence of any credible evidence of the facts that the offence of armed robbery was committed together with the day same took place, the trial court cannot be right in convicting the Appellant and sentencing him to death, and also the Court of Appeal cannot conveniently uphold the conviction of the Accused/Appellant for the offence of armed robbery.

Learned Counsel contended that on whether the armed robbery really took place, there is nothing to show that PW1, i.e. the so called victim, was actually robbed of N940,000.00. This is so, counsel argued, because the purported victim failed to disclose the source of the said money. My Lords, counsel further contended that the trial court was rather left on a cross road as to speculate whether the said sum of money was actually stolen. Counsel continued to contend that in finding of fact, a court must base its decision on evidence before it as no court is permitted to speculate on evidence. He relies on the case of: OFORLETTE VS. STATE (2000) FWLR (Pt.12) 2081 at 2103 paras 15.

Counsel contended that in addition that is in the evidence in chief, the victim i.e. PW1, has stated that he was robbed of N940,000.00, one (1) computer, two (2) cameras and three (3) mobile phones. However, the charge against the Appellant only contained the sum of N940,000.00 and all other items were excluded.

Counsel refers to page 11 Lines 4-12 of the Record of Appeal. And submitted on this point that the trial court and the court below did not consider the consequences of the aforesaid inconsistencies.

As if it is not enough, Learned Appellant's counsel further contended that there was no robbery committed at all. This is because PW1, the so called victim clearly testified that robbery attack on him was on Saturday 28th May, 2008 after he came back from a naming ceremony where he performed. In his words:

"It was on Saturday in the year 2008 in the month of May we returned from naming ceremony in the house of A. Dahiru Mangal. It was in the night around 3.00 a.m. ...", See page 10 lines 17 - 20. Counsel continues and states that the date of the robbery on the charge - sheet is 28th May, 2008, which is a WEDNESDAY"

Learned Counsel then submitted that such discrepancy should

not arise in the light of the fact that (the purported victim of the robbery) claimed he reported the incidence to the Police the next day at about 10.00a.m. which should be documented. See p.11 lines 20 - 21 of the record. These doubts created by the inconsistencies on the evidence of PW1 ought to have been resolved in favour of the Appellant. See the following cases:- B

1. Shehu vs. State (2010) All FWLR (pt.523) 1841 at pp 1865 - 1866, paras H-A;
2. Afolabi Ali v. State (2010) All FWLR (pt.538) 812;
3. Posu vs. State (2011) All FWLR (pt.565) 234 at 245 paras B-E; C
4. Orji vs. State (2008) All FWLR (pt.422) 1093 at 1109, paras B - C.

Learned counsel further submitted that the only 28th day which falls on a Saturday in 2008 is in the month of June. Thus there was no armed robber on 28th May, 2008 which fell on Wednesday as against Saturday as testified by the PW1. Therefore the purported armed robbery was a mystery and created doubt as to whether it actually occurred. He then accordingly urged us to resolve this doubt in favour of the Appellant following the decision of:- State vs. Azeez (2008) 14 NWLR (Pt.1108) 439 at 483, paras B - F; 501 paras D - F. E

Curiously, Appellant's Counsel contended that none of the Prosecution witnesses beside PW1 made mention of what Abdullahi Mohammed was robbed. In fact, the Police in their investigation did not ascertain what PW1 lost to the robbery. Counsel again stated that little wonder, no mention was made of the purported sum of N940,000.00. It is accordingly, counsel added, submitted that and he urged this Court to hold that the purported carting away of N940,000.00 by the Appellant was a farce. F

It was also at page 14 lines 5 - 7 of the Record, PW2, Ibrahim G A, testified of the fact that he too lost the sum of N4,000.00 to the robbery. PW3, on the other hand, gave evidence on page 15 lines 11-13 that:

"Myself, Abdullahi Mohammed Ibrahim hands were tied. My money and handset were removed. The money taken was N3,000.00..." H

In order to prove that there was no armed robbery at all, the Appellant's counsel further argued that the evidence of loss of money by the PW2 and PW3 are mere after-thought and most irrelevant to

the arrival of a decision as to whether the purported robbery did occur. This is because the loss of the said amounts of money was neither part of the charge before the court nor in the proof of evidence based on which the Appellant was tried and convicted.

My Lords, Counsel compared the proof of evidence in Criminal Proceedings with Statement of Claim in civil matters. He submitted that a proof of evidence in criminal case is like a Statement of Claim in Civil cases, it should be explicit and should not hide anything from the other party as law is not a game of hide and seek. Thus, according to the Appellant's Counsel, all facts, evidence and exhibits should be brought to fore to enable the Appellant prepare for his defence. See: -

- a) Olowoyo v. State (2012) 17 NWLR (pt 1329 - 1346 at p.371, paras D - E.
- b) Josiah v. State (1985) NWLR (pt.10) 125.
- c) Ogunsanya vs. State (2011) 12 NWLR (pt.1261) 401.

The Respondent adopted his brief in which he accepted and adopted the issues as presented by the Appellant. The Respondent attempted to respond to the Appellant's position but failed to sincerely answer all the weaknesses highlighted by the Appellant. The submissions of the Appellant are cogent and credible.

It is clear as stated earlier on, that the prosecution could not in law prove credible and reliable evidence to show that an armed robbery has occurred on the 28th May, 2008 at the time they stated in the role charge.

There was no evidence to link the Appellant with the incident of the robbery. The other monies stated in their evidence which was alleged to have been removed from the PW2 and PW3 were never inserted in the charge. The Appellant could not properly plead accurately to the contents of the charge.

The money said to be stolen from the PW1, the so called victim of the armed robbery, could not be ascertained. The source of the money could not be established.

It is amazing that the police did not recover anything on the Appellant immediately the robbery took place. That is something like gun, wooden knife or the money lost during the said armed robbery. There was no such armed robbery that

day. The exhibits were not linked to the Appellant.

The prosecution maintained a very material contradiction as to the date the said armed robbery took place, was it on Saturday 28/5/2008 as put by the Prosecution? Or 28/5/2008 which fell on Wednesday i.e. whether it was on Wednesday which is 28/5/2008 or 28/6/2008? This is a very serious and material lapse which the respondent could not satisfactorily explain and clear. B

How can report of armed robbery incident be reported to the Police before the incident occurred? The purported armed robbery is really a mystery and fake. This, without saying, has actually created material doubt as to whether that armed robbery has actually occurred. I think, I will not go astray if I resolve this doubt in favour of the Appellant. I refer to State vs. Azeez (2008) 14 NWLR (pt.1108) 439 at 483 paras B-E D 501 paras D - F. Where at paragraph B - E Mahmud Mohammed JSC now CJN, has this to say-

“The Law is well settled that where there is doubt in a criminal trial, such doubt is resolved in favour of the accused person. This Court per Wali JSC, held in the case of Chukwu vs. State (1996) 7 E NWLR (pt.463) 686 at 701 G - H as follows:-

“Where Prosecutions evidence is found to be contradictory on a material issue, the court should give the benefit of that doubt to an accused person that stems from the non-credibility of such evidence and discharge and acquit him”. F

I have closely and carefully looked at the issues for determination as distilled by the parties in this appeal. I have also thought over the position of the prosecution. It is a fact that can never be altered, that the Prosecution failed woefully to establish any ingredient of the offence of armed robbery. It is clear that there is no credible evidence coming from the testimonies of the Prosecution witnesses to show that an armed robbery has taken place on the charge put to both accused persons - Alhaji Musa Sani; and Ifenya Amah. G H

The Appellant herein put up a defence of alibi and provided the address, date and time. However the police failed woefully to investigate the truth of the Appellant’s plea. Police merely did not believe the Appellant and they relied on

the so called eye witnesses to dismiss the plea of alibi. While in actual fact, there is no iota of doubt that the Police refused to conduct any investigation at Lunar Hotel Katsina. This failure to conduct such investigation created serious lapses in the conduct of prosecuting this case. All the issues distilled by the Appellant and adopted by the respondents are pregnant with tremendous merits same are hereby resolved in favour of the Appellant. Appeal is therefore meritorious and is allowed.

The conviction and sentence dished out on the Appellant are hereby set aside and in their place the Appellant is acquitted and discharged forthwith.

RHODES-VIVOUR JSC

I have had the benefit of reading in draft the leading judgment prepared by my learned brother Muntaka-Coomassie, JSC. I agree with his lordship that the Appellant is entitled to an acquittal as there is grave doubt as to whether the Appellant committed the offence of Armed Robbery.

The Appellant and Ifanye Amah were charged with the offence of Armed Robbery. It is alleged in the charge that they both robbed Abdullahi Mohammed of the sum of N940,000 on the 28th day of May 2008.

Nowhere in the charge is it stated where the Armed Robbery took place. According to the Appellant, at the time of the Armed Robbery he was at Luna Hotel. That is to say the Appellant raised the defence of Alibi.

Alibi is a defence raised by an accused person. It is a complete defence if found to be true. The defence simply means that when the offence was committed, the accused person was somewhere else, so he certainly could not have committed the offence.

Alibi is within the personal knowledge of the accused person and so it is his duty to establish it. This is done by providing the Police with details of his Alibi (whereabouts) at the earliest opportunity after his arrest, and it is the duty of the police to investigate it.

The standard of proof required for the defence of alibi to be sustained is one based on balance of probabilities. That is to say an

alibi is established if the judge is satisfied that it is probable that the accused person was somewhere else on the date/time the offence was committed, and not that the witnesses for the prosecution are liars. Defence of alibi crumbles if there is stronger evidence against it or if after it is investigated it is found to be untrue. See *Obiode v. The State* (1970) 1 ALL NLR p.35, *Nwosisi v. The State* (1976) 6 SC B p.109, *Odidika v. The State* (1977) 2 SC p.21.

The Appellant raised the defence of alibi in his extra judicial statement. The Police did not investigate it. He made it clear that at the time the armed robbery was alleged to have been committed he was with a friend at Luna Hotel, a fact corroborated by DW1. This, and the contradictions in the prosecution's evidence on material issues makes it probable that the Appellant was indeed at the Luna Hotel when the armed robbery took place. C

A charge must be proved beyond reasonable doubt before D there can be a conviction. In *Miller v. Minister of Pensions* (1947) 2 ALL EL p.372.

Lord Denning explained proof beyond reasonable doubt when he said that it:

“does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted of fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible but not in the least probable” the case is proved beyond reasonable doubt but nothing short of that will suffice”. F

Applying the above to the facts of this case, I am more than satisfied that the case against the Appellant has not been so proved. It is for these reasons that the conviction of the Appellant should not G stand. The judgment of the Court of Appeal is set aside. Appeal allowed. Appellant is acquitted and discharged.

NGWUTA JSC

H

I read before now the lead judgment prepared and just delivered by my learned brother, Muntaka-Coomassie, JSC and I entirely agree with the conclusion that the appeal has merit and ought to be allowed.

Appellant's counsel framed two issues for determination and learned counsel for the Respondent adopted the two issues in his brief.

I will restrict myself to issue (b) which I consider a threshold one. It is hereunder reproduced:

B *“(b) Whether the Court of Appeal was right in upholding the rejection of the defence of alibi put forward by the Appellant...”*

With respect to the plea of alibi raised by the appellant, the learned trial Judge found, inter alia that:

C *“I have carefully examined the circumstances of the case. I think the case has not been properly investigated. The two accused persons in their respective statements exhibit (sic) 1 and 2 have created the defence of alibi by saying that at or about the material time of the robbery they were at Luna Hotel, Katsina. If there were proper*
D *investigation the Police ought to have investigated this aspect of the statements prosecution tendered the statements as evidence in the matter knowing very well what they contained. Proper investigation if conducted would have revealed it what the two accused persons claimed was true or not, i.e. whether they are (sic) at Luna Hotel at*
E *the time they claimed or not. However that (sic) that the defence of Alibi does not arose (sic) where there is an eye witness...”*

The portion of the judgment of the trial Court reproduced above speaks for itself. It speaks to the absurdity of the judgment of the trial Court. Alibi is a Latin word meaning “Elsewhere”. Where an
F accused person claims he was somewhere else and could not have been at the scene of crime and could therefore not have committed the crime with which he is charged and gives particulars of his whereabouts at the material time to the Police at the earliest opportunity,
G the Police has a duty to investigate that claim no matter how unreasonable or stupid the claim or plea may seem. The burden of establishing alibi is on the accused. See *Gachi v. The State* (1965) NWLR 333 at 335; *Nwosu v. The State* (1976) 6 SC 109.

The accused need not prove the defence of alibi beyond reasonable doubt. See *Dogo v. The State* (2001) FWLR (Pt.39) 1388 at 1402, *Ntam v. The State* (11968) NMLR 86. Once the accused raises the plea that he was elsewhere and furnishes the Police with the particulars of the place and the names of the person or persons who
H was/were with him at that place, the Police has a duty to disprove the

alibi if they do not accept it. See *Ogadala v. The State* (1991) 1 NSCC 336, *Eze v. The State* (1976) 1 SC 125.

It was not enough for the trial Judge to lament as he did that the alibi raised by the appellant was not investigated. The Court ought to have dismissed the charge as the Police failed in their duty to investigate the case, leaving the Court with reasonable doubt as to the guilt of the appellant, a doubt that should have been resolved in the favour of the appellant. B

It was wrong for the trial Court to dispense with the plea of alibi to convict the appellant on the ground that the defence of alibi does not arise where there is an eye witness. That “the defence of alibi does not arise where there is an eye witness” is not a correct statement of the law. The evidence of an eye witness is not conclusive. The evidence has to be considered in the light of Police investigation of the plea of the accused as the eye witness may be mistaken in his identification of the accused. C
D

It would be a different thing if the accused was caught in the commission of the offence in which case it will be illogical to plead alibi since he cannot be in two places at the same time.

There is nothing on the record to suggest that there was an identification parade for the eye witness to identify the appellant. In convicting the appellant, the learned trial Judge appeared to have approbated and reprobated simultaneously in the same breadth. Reliance on the eye witness account in the circumstances of this case resulted in two things: a conviction of the appellant and a certainty of a reversal at the Court of Appeal. E
F

Unfortunately, the Court of Appeal fell into a serious error in attempting to rationalize the judgment of the trial court. The Court of Appeal, relying on the evidence of the defence at the trial court said: G

“The question is why is it that on the same date and about the same time the incident allegedly occurred the appellant and the 2nd accused person went to Lunar Hotel and left between 6.30pm and 2.30am were still awake, up to about 3.00am to 3.30am and up to the time they saw PW1 and his men after the robbery attack on the same vicinity...” H

With profound respect to their Lordships of the Court below, the offence was alleged to have been committed “...on or about the 28th day of May 2008...” The charge was not amended and in my

humble view, any evidence relating to the time the offence was committed, as distinct from the date of the offence, goes to no issue in the case.

It was a serious error for the Court below to rely on times in the evidence of the appellant to fill the gap in the charge which failed to allege the time the offence was committed on 28/5/2008. The appellant is entitled to be furnished with the time, date and place of the offence he is charged with. Neither the charge nor the proof of evidence made reference to the time of the commission of the alleged offence by the appellant. The Court and parties are bound by the charge laid against the appellant to which he pleaded. The Court cannot rely on any particular time of 28/5/2008 as the time the offence was committed as the charge to which the appellant pleaded contained no time of the alleged offence.

In any case, the trial Court found that the case against the appellant was not investigated in that the plea of alibi he raised was not disproved or confirmed by the police. That was a finding of fact against which there was no appeal to the Court of Appeal and, ipso facto, the same Court has no business to reopen the matter.

That finding of fact is deemed accepted by prosecution who failed to appeal against it. See *Standard Engineering Co. Ltd. V. NBCI* (2006) 2-3 SC 74.

The finding of the trial court with regard to failure to investigate the plea of alibi was not placed before the Court below and the Court should not have dealt with it. See *Oshodi v. Eyifunmi* (2000) 7 SC (Pt.11) 145. The trial court made a finding of fact that there was need to investigate the plea of alibi raised by the appellant. There was no appeal against that finding and so there was no need for the Court below to give reasons or justification for failure of the Police to investigate the alibi raised by the appellant.

It is for the above and the fuller reasons in the lead judgment that I also allow the appeal; quash the judgment of the Courts below. I acquit and discharge the appellant and he is to be released from prison custody forthwith.

OGUNBIYI JSC

The appeal is against the judgment of the Court of Appeal

(Kaduna Division) delivered on the 7th day of August, 2012 upholding the conviction and sentence passed on the appellant by the High Court of Katsina State for the offence of armed robbery punishable under Section 1(2)(a) of the Robbery and Fire Arms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria 2004.

An appeal to the court below, was dismissed on the 7th August, 2012 and thereby affirming the trial court's judgment in convicting and sentencing the appellant to death. The appellant was again dissatisfied with the outcome at the court below and has found his way now before this court based on three grounds of appeal from which two issues were formulated.

While the 1st issue relates to the standard of proof of the offence by the prosecution, the 2nd issue questions the propriety of the Lower Court in upholding the rejection of the defence of alibi put forward by the appellant.

For a defence of alibi to avail an accused person, it must be raised timeously and specifically; this is because by nature, the defence presupposes that the accused does not only claim that he never committed the offence alleged, but also that he was not at all at the scene of the crime or within the vicinity. The law is trite and well established therefore that in an offence requiring physical presence, an alibi set up by an accused person must be investigated thoroughly by the police. It must be definite as to time, place and the persons who know about the accused's whereabouts. Once it is raised by the accused, the onus rests on the prosecution to disprove it. See Yanor v. State (1965) NWLR 337 and Chukwu V. State (1996) 7 NWLR (Pt.463) 686 at 702.

The appellant herein for instance raised a defence of alibi and said that he was at Lunar Hotel in company of DW1 and DW3 when the offence for which he was being tried was allegedly committed. He also raised promptly the said defence in his statement to the police when he was arrested. At page 38 line 33 to page 39 line 12 of the record, the trial court summarized the alibi raised by the accused person in the following words:

"What can best be understood from the testimonies (sic) as the two Accused persons and that (sic) as DW1 is that at or about the time of the alleged robbery the two Accused persons at Lunar Hotel Katsina and therefore could not be possible (sic) to them (sic) com-

mit the alleged offence. In their respective statement they denied committing the offence. I have carefully examined all the circumstance of the case. I think the case has not been properly investigated. The two Accused persons in their respective statements Exhibit 1 and 2 have created the defence of Alibi by saying that at or about the material time of the robbery they were at Lunar Hotel Katsina. If there (sic) were proper investigation the police ought to have investigated this aspect of the statements (sic) prosecution have tendered the statements as evidence in the matter knowing very well what they contained. Proper investigation if conducted would have revealed it what the two Accused persons claimed were true or not i.e. whether they are at Lunar Hotel at the time they claimed or not."

It is intriguing to say that, the trial court, despite its finding that the defence of alibi was not properly investigated, (as a result of questions which are left unanswered, also being clouded with heavy doubts on whether or not the appellant did commit the offence), nevertheless, failed or refused to resolve the doubt in favour of the accused/appellant. The consequential effect is to breach the fundamental settled principle of law that where there is any doubt in the case of the prosecution, it must be resolved in favour of the accused person. This is mandatory and gives no option. See the cases of: *Shehu V State* (2010) All FWLR (Pt.523) 1844; *Afolabi v State* (2010) All FWLR (528) 812; *Posu v State* (2011) All FWLR (Pt.565) 234; *Orji V State* (2008) All FWLR (Pt.422) 1093; *Udosen V State* (2007) All FWLR (Pt.356) 699 and *Chukwu V State* (1996) 7 NWLR (Pt.463) p.686.

Also on the defence of alibi raised by the appellant, this is what the Lower Court had to say at pages 108 - 109, 111 and 112 of the record:

"A careful study of all the facts proffered by the parties particularly the Appellant and other defence witnesses give credence to the fact that issue of defence of alibi did not arise at all. Even though the charge did not specify the time of commission of the offence, the evidence of the Appellant, D.W.1 and D.W.3 categorically stated that they went to Lunar Hotel around 9p.m. on the 28th May, 2008, and they left Lunar Hotel at 2.30am for the 2nd Accused person's house. It is clear on the record that the allegation against the Appellant and the 2nd Accused person was said to have occurred after the victims had returned from a naming ceremony at about 3am. By the testi-

mony of the Appellant, it is clear that as at 3am of 28/5/08, the Appellant, the 2nd Accused person and the brother of the 2nd Accused person were no longer at Lunar Hotel, they had left the Hotel, so, there was no basis for the Investigating Police Officer to conduct any investigation at the Lunar Hotel. In fact, the Appellant and his cohorts in their evidence before the Court testified to the fact that they were outside, in front of the house of the 2nd Accused when the brother of the 2nd Accused person was urinating outside. At that time, some men passed them and enquired whether they saw some people passed, to which they said, 'No'. This was after they left Lunar Hotel.

It is clear in law that it is not every alibi raised that should be investigated. Alibi is a defence which seeks to persuade the Court that the accused could not possibly be at the scene of the crime as he was somewhere else, at a place where most probably there were people who could testify that at the time of the alleged incident or act, he was not at the scene of the crime.

In the instant appeal, and as I earlier opined, alibi does not arise because it was after the Appellant and his friends left Lunar Hotel that the alleged robbery took place.

It is on this footing I would register my displeasure with the remarks of the learned trial Judge at page 39 lines 5-23 of the record that no proper investigation was conducted by the police on the defence of alibi. The point is, no alibi existed and none was there for any investigation since it was after the Appellant and his co-accused left Lunar Hotel that the robbery attack took place.” (emphasis supplied).

With all respect to the view held by the Justices of the Lower Court, the finding which ruled out alibi in its totality, does not find a place in this case. In other words, as rightly submitted by the learned counsel for the appellant, the following conclusion reached by the Lower Court was certainly drawn in an error:- i.e. to say:-

“no alibi existed and none was there for any investigation since it was after the appellant and his co-accused left Lunar Hotel that the robbery attack took place.”

On the totality of this appeal it is obvious from the record that the defence of alibi was not investigated at all and failure to investigate was detrimental to the prosecution's case. The lacunas and doubts

that existed at the trial court were sufficient reasons why the trial court should have considered the well established principle of law, that it is better that a guilty person should go free than for an innocent person to be convicted. The appellant's plea of alibi was, no doubt, casually and totally brushed aside by the two Lower Courts.

B This has caused a dent seriously on the prosecution's case and I so hold.

My learned brother Muntaka-Coomassie, JSC has adequately dealt with the issues raised in this appeal. With the few words of mine, I hereby adopt his conclusion arrived thereat and in the same terms, C I also find merit in this appeal which is allowed by me. The conviction and sentence of the appellant is hereby set aside and in its place I hereby enter a verdict of an acquittal and a discharge of the appellant.

D _____

AKA'AH S JSC

The appellant and Ifanye Amah stood trial for the offence of robbery while armed with offensive weapons which is punishable E under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap R.11 Laws of the Federation 2004.

The charge read-

"That you Alhaji Musa Sani of behind Zakka House Kofar Marusa Low Cost Katsina and Ifanye Amah of Old Olympic Hotel, F Kofar Kaura Layout Katsina, Katsina Local Government Area of Katsina State, on or about 28th day of May, 2008 committed robbery in that you did an act to wit: attacked and robbed one Abdullahi Mohammed (alias BODA) the sum of nine hundred and forty thousand naira (N940,000.00) and at the time of the robbery you were G armed with offensive weapons to wit: cutlass and iron rod, with which you threatened him and thereby committed an offence punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap R11- Laws of the Federation 2004".

H The prosecution called six witnesses while the accused testified and called Felix Uwazie who said he was in the company of the accused from 9p.m. to 2.30a.m. at Lunar Hotel on 28/5/2008. After leaving Lunar Hotel they headed for the 2nd accused's house. When they reached the 2nd accused's house, he went to ease himself when

he overheard somebody asking the accused persons if they saw somebody in front of the house and they replied that they did not see anybody. In the morning of 29/5/2004 the accused were invited to report at the police station. At the close of the evidence by the prosecution and the defence, the learned trial Judge dispensed with address and proceeded to deliver his judgment. He reviewed the evidence adduced at the trial and found that the accused raised the defence of alibi in their extra judicial statements which were received in evidence as Exhibits 1 and 2. Despite making a finding that the case was not properly investigated and this included the alibi, the learned trial Judge proceeded to hold that the two accused jointly committed the offence as charged and thereby convicted them and sentenced them to death. The appeal to the Court of Appeal was dismissed; hence the further appeal to this Court.

My learned brother, Muntaka-Coomassie JSC in the leading judgment found that the appeal had merit and therefore allowed it. I entirely agree with him that there is merit in the appeal.

The appellant raised the defence of alibi at the earliest opportunity when he made Exhibit 1. The Police therefore had a mandatory duty to investigate and rebut the said alibi. In *Ani v. State* (2009) 14 NWLR (Pt.1168) 443 the Supreme Court held per Ogebe JSC at 457 that once an alibi has been raised the burden is on the prosecution to investigate and rebut such evidence. See *Opayemi v. State* (1985) 2 NWLR (Pt.5) 101; and *Obakpolor v State* (1991) 1 NWLR (Pt.165) 113.

The appellant and the co-accused were invited to the Police Station in the morning of 29/5/2004 on the suspicion that they were the people who carried out the robbery but none of the stolen items (which included cash of N940,000.00, computer, two video cameras and three mobile phones) was recovered. The Lower Court in dismissing the appeal stated that the coincidence of the appellant and the 2nd accused being at Lunar Hotel between 6.30p.m. and 2.30a.m. and their staying awake up to about 3.00a.m. - 3.30a.m. and up to the time they saw PW1 and his men after the robbery attack in the same vicinity was more than one could comprehend.

There is no doubt that PW1's suspicion would be aroused to find that the appellant and the 2nd accused who probably were of questionable character were awake and found in the vicinity where

the robbery took place but the suspicion, no matter how strong, would not be sufficient to find them guilty in the absence of any material evidence linking them with the offence. See: *Bozin v State* (1985) 2 NWLR (Pt.8) 465. Since they were not caught in the course of committing the offence or found with the stolen items, no conviction can stand.

It is for this and the more detailed reasons contained in the leading judgment of my Lord, Muntaka-Coomassie JSC that I find merit in the appeal and I hereby allow it. The appellant's conviction and sentence are quashed and in their place the appellant is acquitted and discharged.

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