

**SUPREME COURT OF NIGERIA**  
FRIDAY 3RD JULY, 2015. SC. 202/2012  
**CORAM:- J. A. FABIYI, O. ARIWOOLA,**  
**M. D. MUHAMMAD, C. B. OGUNBIYI, C. C. NWEZE, JJSC**

HAPPY KINGSLEY IDEMUDIA ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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EVIDENCE - Crime - Identification - Witness fixing accused at crime scene - Must mention name of accused at earliest opportunity time to police - Otherwise court will be cautious in accepting his evidence (H1)

ALIBI - Investigation of - Alibi must be definite as to time and whereabouts of accused - And once timeously raised - It must be thoroughly investigated by the police (H2)

ARMED ROBBERY - Proof - PW2 having failed to identify appellant as to fix him at the crime scene - Cannot be accorded the status of a credible witness - To sustain the proof required of prosecution (H3)

ALIBI - Proof - Accused is not obliged to prove his alibi - As it is enough if he supplies material facts - Sufficient for police to investigate the defence raised (H4)

ARMED ROBBERY - Conspiracy - Conviction - Based solely on testimony of PW2 cannot stand - As testimony of the witness is unreliable - Since he failed to identify appellant at earliest time (H5)

**FACTS**

Accused/appellant was brought before the High Court of Delta State Isiokolo Judicial Division, on a two count charge of conspiracy to commit armed robbery and attempted armed robbery punishable under sections 1(2)(a) and 2(2) of the Robbery & Firearms (Special Provisions) Act Cap. 398 Vol. 221, LFN 1990. Appellant pleaded not guilty to both counts. Appellant was confronted with the crime several months after the occurrence. It was PW2 (one Samuel

Odurume) who identified appellant to the police as one of the robbers. Appellant raised the defense of alibi, which was not investigated by the police.

Allegation against appellant was that while in company of two others (now at large), he attempted to rob PW2 of his money while armed with a gun at Sanubi (a location within the judicial division of the court). To prove its case, prosecution/respondent called two witnesses. Appellant testified in his defence and called no witness. At the conclusion of addresses by the learned counsel for the parties, the court delivered its judgment. Appellant was convicted of the two count charge and was sentenced to 14 years imprisonment. Appellant was not pleased with the judgment. He therefore lodged appeal at the Court of Appeal, Benin Division. The appeal was dismissed and judgment of the trial court affirmed. Hence, appellant has further appealed to the Supreme Court.

### **ISSUE FOR DETERMINATION**

Whether from the totality of the evidence on record, especially the evidence of P. W. 2 and the alibi raised by the appellant, the lower court was right in affirming the conviction of the appellant by the trial court for the offences of conspiracy to rob and attempted armed robbery?

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

*EVIDENCE - Crime - Identification*

**1. As rightly submitted by the appellant's counsel, the credibility of P. W. 2's evidence on the identification of the appellant has to do with whether the witness identified the appellant to the police at the earliest opportunity and not dependant on the question of his demeanour from the witness box as erroneously held by the trial judge. It is pertinent to restate that P. W. 2's identification of the appellant was a period of over a year of the alleged offence and it was in the course of a different case from the one now on appeal.**

**The principle of law as laid down and which must guide a court faced with the evidence of a witness fixing an accused**

*person at the scene of crime is settled that, such a witness must have mentioned the name of the accused person or given a description to the police at the earliest opportunity time, especially where the witness claims to have known the accused person prior to the occurrence of the incident. In other words, where an eye witness omits to mention at the earliest opportunity the name or names of the person or persons seen committing an offence, a court must be cautious in accepting his evidence later and implicating the person or persons charged, unless a satisfactory explanation is given. The reason is obvious because such delay is likely to expose to question the evidence of identity and thereby raising uncertainty as to its acceptability and probative value.*

*It is trite law that one of the major factors that a court must take into consideration in a trial of this nature where the evidence against the accused person is based primarily on recognition by one of the victims who claimed to have known the accused person is, whether the victim mentioned the name of the accused person to the police at the earliest opportunity.* (pp. 2381 C/2382 H)

*ALIBI - Investigation of*

**2.** *The law is trite and well established that in an offence requiring physical presence, an alibi set up by the accused person must be investigated thoroughly by the police. The alibi must be definite as to time, place and the persons who know about the accused's whereabouts. Once an alibi is timeously raised, it must not be treated lightly because the onus is on the prosecution to disprove it.*

*From P.W.1's evidence supra, there was no effort made by the police to investigate further the alibi raised by the appellant. His brother who was at the station did confirm that the accused was with him in Warri on the day of incident. If the prosecution doubted the elder brother's confirmation of alibi, it is its responsibility to have gone on to investigate. In a criminal trial, any doubt on the prosecution's case ought to be resolved in favour of the accused/appellant. It is sufficient that the elder brother confirmed the alibi raised and which must be in*

***favour of the appellant.***

***Finally, from the record, the complaint and the offence in respect of which the police carried out investigation is different from the complaint and the offence for which the appellant was arraigned, tried and convicted. In other words, the police did not investigate the offence in respect of which the appellant was tried and convicted. The appellant timeously raised and led evidence in support of his defence of alibi which (he) the appellant is entitled to in answer to the charge against him. The lower court was obviously wrong in affirming the trial court when it rejected the defence put up by the appellant.***  
(pp. 2384 B/H/2387 H)

***ARMED ROBBERY - Proof***

***3. In the light of the foregoing authorities read together with the case of Abudu V. State (supra) the prosecution has not in my view demolished the plea of alibi raised by the appellant. This I say because from the events on the record the only sole witness (i.e.) P.W.2 cannot be accorded the status of a credible witness to sustain the proof required of the prosecution. In other words, P.W. 2 in his evidence did not identify the appellant sufficient enough or at all so as to fix him at the scene of crime conclusively.*** (p. 2386 A)

***ALIBI - Proof***

***4. The next point for consideration is whether or not the appellant ought to have called the elder brother to give evidence in his defence as held out by the lower court. The position of the law is again well settled that the appellant is not obliged to prove his alibi. It is enough if he supplies material facts sufficient for the police to investigate the defence raised. In order to establish the defence, all that the accused needs do is merely to put forward evidence accordingly; the onus is not on him to prove such defence but on the prosecution to disprove it.*** (p. 2386 C)

***ARMED ROBBERY - Conspiracy - Conviction***

***5. As rightly submitted by the learned counsel for the appel-***

**lant, the lower court was in error when it affirmed the decision of the trial court which wrongly relied on the belated and unreliable evidence of P.W. 2 in convicting the appellant for conspiracy. It is elementary to say that the conviction of the appellant for the substantive offence based on the testimony of P.W. 2 solely is obviously unwarranted and totally out of sound reasoning. It follows also therefore that the same evidence cannot serve to sustain a conviction for the offence of conspiracy. Proof for the two counts is fused in P.W. 2 whose evidence is found to be unreliable and un-creditable. This I say because the evidence of P.W. 2 that he recognised the appellant as one of the armed robbers which formed the basis of his conviction is very much unfounded because the appellant was not identified to the police at the earliest opportunity despite the evidence of P.W.2 that he knew the appellant prior to the incident.** (p. 2387 D)

## NOTABLE POINT OF INTEREST

### **OGUNBIYI JSC**

#### ***1. Alibi – Definition of***

On the question as to whether or not the defence of alibi avails the appellant, recourse must be had to the totality of evidence adduced and available before the court. Alibi as a defence presupposes that the accused does not only claim that he never committed the offence alleged, but that he was not at all at the locus delict. The Black's Law Dictionary Ninth Edition by Bryan A. Garner at page 84 defines alibi, a Latin word "elsewhere" in the following terms:-

*"A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time ...The fact or state of having been elsewhere when an offense was committed."* (p. 2383 F)

### **REPRESENTATION**

Mr. Ayo Asala, for the Appellant

O. F. Enenmo (D.D.PP) Delta State's (MOJ), for the Respondent

**CASES REFERRED TO**

- Undoebere v. State (2001) FWLR (pt. 159) 1244
- Balogun v. A. G. Ogun State (2001) 94 LRCN 260
- Onuchukwu v. State (1998) 58 LRCN 3393
- Sowomimo v. State (2005) 1 FWLR 246
- B Esangbe v. State (1998) ACLR 109
- Oduneye v. State (2001) 83 LRCN 1
- Abudu v. State (1995) 1 NWLR 55
- Abdullahi v. State (2008) All FWLR (pt. 432) 1047
- C Bozin v. State (1998) A.C.L.R 1
- Yanor v. State (1965) NMLR 337
- Chukwu v. State (1996) 7 NWLR (pt. 463) 686
- Ozaki v. State (1990) 1 W.B.R.N 55
- Ikemson v. State (1989) 3 NWLR (pt. 110) 455
- D Balogun v. A.G Ogun State (2002) 94 L.R.C.N 2060
- Esangbedo v. State (1998) A.C.L.R. 109
- Onagoruwa v. State (1993) 7 NWLR (pt 303) 49
- Joshua v. State (2000) 5 NWLR (pt 658) 591
- Sanusi v. Ameyogun (1992) 4 NWLR (pt 237) 527
- E Pam v. Mohammed (2008) LPELR - 2895 (SC) 74 B-E
- Larmie v DPM and S Ltd (2005) LPELR -1756 (SC) 24-25 G-B

**STATUTES REFERRED TO**

- F Robbery & Fire Arms (Special Provisions) Act Cap. 398 Vol. 221
- LFN 1990, ss. 1(2)(a), 2(2)

**BOOK REFERRED TO**

- Black's Law Dictionary 9<sup>th</sup> ed. p. 84
- G

**LEAD JUDGMENT BY OGUNBIYI JSC**

- This is an appeal against the judgment of the Court of Appeal, Benin Judicial Division (herein called the lower court) delivered on the 19th day of January, 2011, affirming the judgment of the High Court, Delta State, Isiokolo Judicial Division, delivered on 19th day of June, 2008 in which the appellant was convicted of conspiracy to commit armed robbery and attempted armed robbery.
- H

The brief facts of the case are that, the appellant was arraigned before the trial court upon a two (2) count charge of conspiracy to

commit armed robbery and attempted armed robbery punishable under Section 1(2)(a) and Section 2(2) of the Robbery and Fire Arms (Special Provisions) Act Cap. 398 Vol. 221, LFN 1990.

The appellant pleaded not guilty to both counts. The case of the prosecution was that on or about the 21st day of February, 2006, the appellant in company of two others now at large, at Sanubi in the Isiokolo Judicial Division attempted to rob one Samuel Odorume (P.W. 2) of his money while armed with a gun. B

In proof of its case, the prosecution called two witnesses while the appellant testified in his defence and called no witness. At the end of address by both counsels, appellant was found guilty on the two count charge and sentenced to 14 years imprisonment. C

The appellant was dissatisfied with the judgment of the trial court and unsuccessfully appealed to the lower court, which dismissed his appeal and affirmed the decision of the trial court. D

The appellant was again unhappy with the judgment of the lower court and is now before this court vide a notice of appeal filed on 3/6/2013 pursuant to the leave of this court granted on 24/4/2013. The notice contains two grounds of appeal. In accordance with the rules of court, briefs were exchanged between the parties. E The appellant's brief of argument was settled by one Ayo Asala, Esq. of counsel and that of the respondent was by O. F. Enenmo, Deputy Director Public Prosecutions Delta State (MOJ) filed on the 12th August, 2013 and 7th November, 2013 respectively. F

On the 16th April, 2015 when the appeal came up for hearing, both learned counsel adopted their respective briefs of arguments. While the counsel Mr. Asala urged that the appeal be allowed, Mr. Enenmo submitted on behalf of the respondent that same be dismissed as it lacks merit. The lone issue formulated by the appellant G for determination reads as follows:-

Whether from the totality of the evidence on record, especially the evidence of P. W. 2 and the alibi raised by the appellant, the lower court was right in affirming the conviction of the appellant by the trial court for the offences of conspiracy to rob and attempted armed robbery? H

The respondent's issue is in all respect a reproduction of the appellant's.

In his submission to substantiate the issue raised, the counsel

Mr. Asala, representing the appellant enumerated in detail the facts which are not in dispute or contention between the parties. It is the submission of counsel that both the concurrent findings of the trial court and the lower court are perverse and should be set aside; that it is wrong for the lower court to have affirmed the decision of the trial court in attaching credibility to the evidence of P.W.2 which identified the appellant as one of the persons that attacked him on 21/2/2006.

It is the submission of counsel further that where an eye witness omits to mention at the earliest opportunity the name or names of the person or persons seen committing an offence, a court must be careful in accepting his evidence given later and implicating the person or persons charged, unless a satisfactory explanation is given; that such delay makes the evidence of identity suspicious and reduces the true content of the evidence below acceptability and probative level.

In re-iterating his submission, the learned counsel submits also that a reading of the record will reveal very clearly that the offence that was investigated by the police in this case is different from that which the appellant was arraigned, tried and convicted. The counsel referred to the police investigation report prepared by P.W.1, the investigation police officer as contained at pages 14 to 17 of the record, especially the findings made by the police; that from the said findings, the complainant is one Solomon Erharhedjeke, while the offence that was investigated by (P.W.1) was house breaking and stealing.

Counsel submits that the lower court was in error when it held that the appellant's alibi did not explain where he was at the specific time when the offence against P.W.2 was committed. It is a submission of counsel further, that the appellant, who was never confronted with the allegation of P.W.2 should not be expected to respond to the unknown; that despite the evidence of P.W. 2 that his wife was an eye witness to the incident, the prosecution did not deem it necessary to call the wife as a witness; that the court should in the circumstance apply caution therefore in relying on evidence of a single witness on identification. Counsel submits that the testimony of P.W.2 linking the appellant with the offence of conspiracy and attempted armed robbery is unreliable, lacks credibility and ought not to have been relied

upon by the trial court also lower court in convicting the appellant.

It is the submission by the appellant's counsel also that his client did raise promptly the defence of alibi when he was confronted with the allegation that he was involved in the incident that occurred on 21/2/2006 at Sanubi. It is to be noted counsel argued, that the appellant was confronted with the allegation relating to the charge of attempted robbery for the first time on 22/3/2007. On the findings made by the lower court at page 101 of the record, the counsel submits that same is not borne out of evidence and is also erroneous in law. This is because the three reasons enlisted by the lower court in upholding the rejection of the alibi raised by the appellant are not tenable; that is to say the fixing of the appellant at the scene of crime, secondly that the appellant did not give explanation as to where he was at the time the offence was committed and thirdly, that the failure of the appellant to call his elder brother to give evidence was detrimental to his (appellant's) case. The counsel submits in no mincing words that the alibi raised by the appellant as contained in exhibit 'A' was made on 15/3/2007 before the testimony of P.W. 2 which was recorded on 8/11/2007; that it is not the duty of the appellant to prove his alibi.

Submitting on the conviction of the appellant for the offence of conspiracy, the counsel argued that the lower court fell into a greater error in upholding the conclusion arrived at by the trial court, which relied on the belated and unreliable evidence of P.W.2, in convicting the appellant for conspiracy.

The counsel on the totality urged before us that the appeal should be allowed, and the decision of the lower court in upholding that of the trial court is to be set aside, while the appellant herein should enjoy the liberty of an acquittal and a discharge.

Submitting also on behalf of the respondent, the learned counsel Mr. Enenmo Deputy Director of Public Prosecutions (DDPP) applauded the trial court's finding which he argued was based on the available facts before it; that the direct and positive evidence of P.W.2 fixes the accused person at the locus criminis and the fact in support of the appellant's alibi falls short of the legal requirement for his discharge and acquittal; that for a defence of alibi to avail an accused person, the courts have laid down the following principles which must apply:-

(i) The accused raising the alibi must be definite as to where he was at the particular time the crime was committed.

(ii) He should be able to mention by name the people that were with him at the particular point in time.

(iii) He must raise the issue at the first opportunity in most cases in his extrajudicial statement to the police.

(iv) Where the prosecution adduces evidence to fix him at the scene of crime, he must lead evidence by calling as witness the person that were with him on that day. See the cases of:- *Undoebere V. The State* (2001) FWLR Pt. 159 p. 1244 at 1259, *Balogun V. A. G. Ogun State* (2001) 94 LRCN 260 at 274; *Onuchukwu V. State* (1998) 58 LRCN 3393 at 3409; *Sowomimo V. State* (2005) 1 FWLR 246 at 610 and *Esangbe V. State* (1998) ACLR 109 at 129.

It is quite evident from the facts stated, counsel argues, that the accused alibi is vague. In otherwords, that the accused/appellant did not state in his evidence in court and his extrajudicial statement where he was at the particular time the attempted robbery took place; that he (appellant) did not lead evidence and calling his brother Gabriel to testify also for him during the trial of this case; that having led evidence and fixing the appellant to the time and date of crime at the scene, the evidential burden of leading evidence on the alibi, for purpose of raising doubt in the mind of the trial judge, was on the appellant; that although the appellant gave evidence that he was with his elder brother in Warri on the date, nothing was said of the time; his said brother was not also called to testify.

On the offence of conspiracy to commit armed robbery, the respondent's counsel submits that the lower court was right when it affirmed the conviction of the accused person on that account. Counsel further adopts the definition of conspiracy as propounded by this court in the case of *Dr. Oduneye V. State* (2001) 83 LRCN page 1 where it was held that it does not consist only in the intention of two or more persons but merely in their agreement to do an unlawful act or do a lawful act by unlawful means. The learned trial judge, counsel argues, evaluated and believed the evidence of P.W.2, which was held as unshaken under cross examination.

On whether the appellant was convicted for an offence different from what was reported at the police station, counsel submits that although the P.W.2's statement was recorded one year after the

incident took place, there is evidence on record to show that the said witness testified in a related matter that happened on the same date. The counsel in the result urges that the court should uphold the conviction of the appellant and dismiss this appeal for the following reasons:-

(1) The conviction of the appellant was based on facts available to court and laid down principles of law. B

(2) The appellant failed to discharge the evidential burden of proof of the alibi raised in his extrajudicial statement to the police.

Furthermore that the prosecution on its part had successfully proved its case on the 2 count charge against the appellant beyond reasonable doubt by:- C

(a) Proof of the ingredients of the offence of the two count charge against the appellant.

(b) Fixing the appellant at the scene of crime. D

The lone issue raised in this appeal is hinged conclusively on the evidence of P. W. 2 being the main principal witness on whose testimony the two lower courts upheld the conviction of the appellant. It is instructive to state from the onset also that on the basis of the trial court's findings which accorded credibility to the evidence of P. W. 2 and affirmed by the lower court, the alibi raised by the appellant was rejected by both the two lower courts. The basis upon which the foregoing conclusion is anchored is found in the pronouncements of the trial court in the course of its judgment at page 51 of the record of appeal which states:- E  
F

*"Apart from the fact that I could not be impressed by the alibi of the accused person in view of the direct and positive evidence of the P. W. 2 which firmly fixes the accused person at the 'locus criminis,' the P. W. 2 struck court as a truthful witness. I watched his calm demeanor as he testified before me and cross examination did not succeed in shaking his resolve."*

The finding by the trial court was adopted affirmatively by the lower court when it held at page 101 of the record and said:-

*"The evidence of the victim P. W. 2 was detailed and direct on these two essential aspects of the case. P. W. 2 also stated that he knows the appellant before the date of the incident and identified him at the police station when he saw him... Having led the foregoing evidence fixing the appellant with the time and date of the crime* H

*at the scene, the evidential burden of leading evidence on the alibi on these points at least sufficient to cast doubt in the mind of the trial judge was on the appellant. But in contrast, although the appellant gave evidence that he was with his elder brother in Warri on the date, nothing was said of the time and his said brother was not called."*

B Also on the issue of the credibility of P.W.2's evidence, the two lower courts were concurrent in accrediting the witness in his recognizing the appellant as one of the armed robbers; the lower court at page 102 of the record for instance had this to say:-

C *"In the instant case, on the level of evidence adduced by both sides, there was a direct and straight issue of credibility and the learned trial judge was entitled to weigh both sides and reach a conclusion on which side he believed. He did so extensively in relation to both counts on the information at pages 8 - 10 of the judgment and particularly*  
D *in relation to the defence of alibi...*

*The above is a clear and succinct finding of fact which this court has no reason to distort or reverse."*

E While the appellant's counsel challenges principally the findings above (supra) as perverse, the respondent's counsel questions against interference with such concurrent findings.

It is pertinent to recount at this stage that on the communal reading of the record of Appeal, the following basic facts are not in dispute:-

F i) The offence for which the appellant was arraigned and convicted occurred on 21/2/2006.

G ii) The complainant who reported a case of house breaking and stealing on 21/2/2006 was one Solomon Erharhajeke. This was the evidence of Cpl. Sunday Lawrence (P.W.1) at page 25 of the record of appeal.

iii) It is not borne out on the record that Mr. Solomon Erharhajeke was called by the prosecution to give evidence.

H iv) Mr. Samuel Odorume who testified as P.W.2 at page 28 of the record was not the complainant to the police on 21/2/2006. He was however the victim of robbery, but did not report the incident or make a statement to the police immediately after the incident leading to the charge against the appellant. P. W. 2 did not also identify the appellant to the police at the earliest opportunity.

v) It was on 22/3/2007, a period of over one year, that P. W. 2

identified the appellant at the police station where the appellant was detained in respect of a different offence of stealing GSM handset which was investigated and have nothing to do with the case in issue.

vi) The appellant denied his involvement in the offence for which he was charged both in his extra judicial statement and oral evidence and did raise the defence of alibi. B

vii) The police recorded statement from the elder brother to the appellant who confirmed the alibi raised by the appellant.

viii) The incident for which the appellant was arraigned, tried and convicted was not reported to the police until over one year when P.W.2, saw the appellant at the police station for an unrelated offence and pointed at him to the police. C

***As rightly submitted by the appellant's counsel, the credibility of P. W. 2's evidence on the identification of the appellant has to do with whether the witness identified the appellant to the police at the earliest opportunity and not dependent on the question of his demeanour from the witness box as erroneously held by the trial judge. It is pertinent to restate that P. W. 2's identification of the appellant was a period of over a year of the alleged offence and it was in the course of a different case from the one now on appeal.*** D E

***The principle of law as laid down and which must guide a court faced with the evidence of a witness fixing an accused person at the scene of crime is settled that, such a witness must have mentioned the name of the accused person or given a description to the police at the earliest opportunity time, especially where the witness claims to have known the accused person prior to the occurrence of the incident. In other words, where an eye witness omits to mention at the earliest opportunity the name or names of the person or persons seen committing an offence, a court must be cautious in accepting his evidence later and implicating the person or persons charged, unless a satisfactory explanation is given. The reason is obvious because such delay is likely to expose to question the evidence of identity and thereby raising uncertainty as to its acceptability and probative value.*** See the cases of Abudu V. State (1995) 1 NWLR page 55, also Abdullahi V. State (2008) All FWLR (Pt. 432) p.1047 at 1057. F G H

In the instant case, it is on record that P. W. 2 testified in his evidence that he knew the appellant very well prior to the date of incident. It is surprising therefore that the same witness did not deem it expedient to either report the happening of the event or make a statement to the police in respect thereof immediately thereafter and to mention the name of the appellant or give a description of him to the police. It is not shown on the record that the prosecution gave the reason for this failure. I have mentioned earlier in the course of this judgment that one Solomon Erharhajeke who reported a case of burglary and stealing to the police on 21/2/2006, was not called to give evidence by the prosecution. His statement was not tendered also or contained in the record. This I hold is again detrimental to the prosecution's case. As a reference is the evidence of P. W. 1 at pages 25 to 27 of the record.

The police investigation report was prepared by P. W. 1 and contained at pages 14 to 17 of the record, and from the report of the findings at pages 16 - 17 specifically, the offence that was investigated is house breaking and stealing. Interestingly and from the evidence of P. W. 1 also it is revealed that PW.2, the victim of the robbery was able to identify the appellant to the police after one year of the commission of the offence. The identification was at the police station where the appellant was detained by the police in respect of a different offence of stealing. The evidence of P. W. 1 at page 25 of the record is in point wherein he said thus:-

*"On the 21/2/2006, there was a case of house breaking and stealing reported by the said Solomon Erharhajeke at the Abraka Police Station. The case was referred for my investigation and I recorded statement from the complainant. I then booked to visit Salubi Town along with other four other officers. On getting to Salubi I recovered a damaged Padlock at the scene and a length of iron rod.*

*Later, on the 22/3/2007, I was in the police station when the two complainants, Solomon and Samuel (PW. 2) in the matter at Salubi came to the station where they identified the accused person as one of the culprits in the matter involving the house breaking/ robbery matter sent to the state C.I.D. By me."* (Emphasis supplied).

**It is trite law that one of the major factors that a court must take into consideration in a trial of this nature where the evidence against the accused person is based primarily on**

**recognition by one of the victims who claimed to have known the accused person is, whether the victim mentioned the name of the accused person to the police at the earliest opportunity.** See the case of *Bozin V. State* (1998) A.C.L.R page 1 at page 18 where Aniagolu, JSC said:-

*"If the appellant whom those witnesses knew very well before the incident took part in the robbery of those witnesses that night, would the witnesses not have mentioned him by name, or by description, immediately the police came in a van that night in answer to their telephone call? Would the course of human conduct not impel the witnesses to tell the police that night of the involvement of the appellant, who was said to be unmasked, in the robbery? I am firmly of the view that the failure of those witnesses to mention the appellant to the police that night at the first opportunity, cast a grave doubt on their evidence that they saw the appellant that night in the act of robbery".*

The same principle was also adopted in the later case of *Ani V. State* (2009) All FWLR (Pt. 482) 1044 at 1062 - 1063.

The only evidence of recognition of the appellant was by P.W. 2 with no other independent evidence of identification. It is the testimony of P.W.2 under cross-examination at page 30 for instance that *"my wife is the only person that saw what happened to me that night apart from myself"*; it is unfortunate that the prosecution did not in the circumstance call P.W.2's wife to testify in corroboration of his evidence. The case of *Abudu V. State* (supra) is again in point wherein the court should exercise great caution in accepting such single witness without corroboration.

On the question as to whether or not the defence of alibi avails the appellant, recourse must be had to the totality of evidence adduced and available before the court. Alibi as a defence presupposes that the accused does not only claim that he never committed the offence alleged, but that he was not at all at the locus delict. The Black's Law Dictionary Ninth Edition by Bryan A. Garner at page 84 defines alibi, a Latin word "elsewhere" in the following terms:-

*"A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time ...The fact or state of having been elsewhere when an offense was committed."*

It is argued on behalf of the respondent that the appellant's alibi was vague because he failed to state in his evidence, also his extra judicial statement, where he was at the particular time the attempted robbery took place; that the appellant did not also call his brother at the trial.

***The law is trite and well established that in an offence requiring physical presence, an alibi set up by the accused person must be investigated thoroughly by the police. The alibi must be definite as to time, place and the persons who know about the accused's whereabouts. Once an alibi is timeously raised, it must not be treated lightly because the onus is on the prosecution to disprove it.*** See Yanor V. State (1965) NMLR 337 and Chukwu V. State (1996) 7 NWLR (Pt.463) 686 at 702. From the evidence of P.W.1 at page 25 (reproduced supra), the appellant was first confronted with the allegation relating to the charge of attempted robbery on 22/3/2007. The appellant's statement to the police on the 15/3/2007 was exhibit 'A' at pages 60 to 51 of the record wherein he said:-

*"I don't known (sic) Stanley, on the 21st February, 2006, I was in Warri, I just went to Warri to pay a visit to my elder brother, I came back from Warri on the 27th of February, 2005 to Abraka where I am living, I did not go to Sanubi to robber (sic) Solomon in his house, I am not a member of any armed robbery gang in Abraka, I don't known (sic) those people you are mention (sic) to me, I did not rape any woman in Sanubi on 21st Feb, 2006, and made away with her N50,000.00.*

*This is all I know about this matter."*

On the defence of alibi raised by the appellant that he was with his elder brother on the day the crime was committed, P.W.1 the police investigator in his evidence at page 27 said:-

*"The accused person told me that on the said 21/2/2006 he was not in Sanubi but in Warri. He told me he went to see his senior brother in Warri. I did not visit his senior brother to find out whether it was true accused person visited Warri or not but his senior brother came to the station to meet him. His senior brother confirmed that the accused person was in Warri with him on that day."* (Emphasis supplied)

***From P.W.1's evidence supra, there was no effort made***

**by the police to investigate further the alibi raised by the appellant. His brother who was at the station did confirm that the accused was with him in Warri on the day of incident. If the prosecution doubted the elder brother's confirmation of alibi, it is its responsibility to have gone on to investigate. In a criminal trial, any doubt on the prosecution's case ought to be resolved in favour of the accused/appellant. It is sufficient that the elder brother confirmed the alibi raised and which must be in favour of the appellant.** Also at page 32 lines 11 - 14 of the record, the appellant in confirming his alibi had this to say:-

*"In February, specifically on the 21st, I was in Warri - Delta State to see my elder brother by name Gabriel. I told the police this and my elder brother was contacted in respect of this information."*

The lower court agreed with the trial court and upheld the rejection of the alibi raised by the appellant and at page 101 of the record it predicated its conclusion on the following three reasons: - i.e. to say that P.W. 2 gave credible evidence by fixing the appellant at the scene of crime; that the appellant did not give explanation as to where he was at the time the offence was committed and lastly that the appellant failed to call his elder brother to give evidence.

On the totality and analysis of the entire case at hand, it is on record that the appellant promptly raised the defence of alibi in his statement to the police per exhibit 'A'. The alibi was duly investigated by (P.W.1) who testified that he did contact the appellant's elder brother, and he confirmed that the appellant was with him on the day of the incident. On the significance of specific time, the evidence from the appellant as confirmed by P.W.1., through the elder brother was that the appellant was with him (elder brother) in Warri on the day of the incident (21/2/2006) and was therefore not in Sanubi, the locus criminis - a different Local Government area from Warri. The appellant also said that he did not leave Warri until 27/2/2006. Contrary to the conclusion arrived at by the lower court in affirming the trial court, the appellant could not have been in two different places at one and same time. In a further authority of the case of Onuchukwu V. State (1998) 58 LRCN 3393 at 3409 which was cited by the respondent's counsel, it was held that:-

*"A plea of alibi is demolished if the prosecution adduces sufficient evidence to fix the accused person at the scene of crime at the*

*material time.*” See also the cases of *Ozaki V. The State* (1990) 1 W.B.R.N 55, *Ikemson v. The State* (1989) 3 NWLR (Pt. 110) 455, *Balogun V. A.G Ogun State* (2002) 94 L.R.C.N 2060 and also *Esangbedo V. State* (1998) A.C.L.R. 109.

***In the light of the foregoing authorities read together with the case of Abudu V. State (supra) the prosecution has not in my view demolished the plea of alibi raised by the appellant. This I say because from the events on the record the only sole witness (i.e.) P.W.2 cannot be accorded the status of a credible witness to sustain the proof required of the prosecution. In other words, P.W. 2 in his evidence did not identify the appellant sufficient enough or at all so as to fix him at the scene of crime conclusively.***

***The next point for consideration is whether or not the appellant ought to have called the elder brother to give evidence in his defence as held out by the lower court. The position of the law is again well settled that the appellant is not obliged to prove his alibi. It is enough if he supplies material facts sufficient for the police to investigate the defence raised. In order to establish the defence, all that the accused needs do is merely to put forward evidence accordingly; the onus is not on him to prove such defence but on the prosecution to disprove it.***

Again see *Abudu V. State (supra)* at 59 where this court in a similar situation found the evidence against the appellant equally unreliable and unsafe; it was held therefore that the case against him was not proved beyond all reasonable doubt, and he was therefore entitled to that benefit. Coker, JSC in delivering the lead judgment had this to say at page 59 of the report:-

***“I agree with this statement of the law. He also stated the law as regards alibi, citing amongst other cases, Yanor & Anor. V. The State (1965) NMLR 337 and Christian Nwosisi V. The State (1976) 6 SC. 109, Akpan V. The State (1973) 5 SC 231. He concluded by stating***

***“From the foregoing, it is clear that the person who puts forward an alibi as his answer to a charge does not undertake upon himself any burden of proving that answer, and it is a misstatement of the law or in fact a misdirection to refer to any burden of proof***

resting on an accused in such a case. See *R. V. Anthony Hugh Johnson* (1962) 46 C.A.R. 45.”

*I also agree that, that is correct statement of the law.”*

In *Ikono V. State* (2007) 5 ACLR 319 this court held also that when the sole defence is an alibi, identification by a single witness must be conducted with great care. B

In upholding the conviction of the appellant for the offence of conspiracy to commit armed robbery as stated in count (1), the lower court held as follows at pages 102 to 103:-

*“In the same manner, the trial court made impeccable finding on the matter of conspiracy when after reviewing and evaluating the evidence at page 8 that there was enough circumstantial evidence to ground a charge of conspiracy to commit the offence of armed robbery.”* C

***As rightly submitted by the learned counsel for the appellant, the lower court was in error when it affirmed the decision of the trial court which wrongly relied on the belated and unreliable evidence of P.W. 2 in convicting the appellant for conspiracy. It is elementary to say that the conviction of the appellant for the substantive offence based on the testimony of P.W. 2 solely is obviously unwarranted and totally out of sound reasoning. It follows also therefore that the same evidence cannot serve to sustain a conviction for the offence of conspiracy. Proof for the two counts is fused in P.W. 2 whose evidence is found to be unreliable and un-credible. This I say because the evidence of P.W. 2 that he recognised the appellant as one of the armed robbers which formed the basis of his conviction is very much unfounded because the appellant was not identified to the police at the earliest opportunity despite the evidence of P.W.2 that he knew the appellant prior to the incident.*** D E F G

It is well pronounced also that the incident for which the appellant was arraigned, tried and convicted was not reported to the police until over a year when P.W.2, who saw the appellant at the police station, pointed him to the police. H

***Finally, from the record, the complaint and the offence in respect of which the police carried out investigation is different from the complaint and the offence for which the appel-***

**lant was arraigned, tried and convicted. In other words, the police did not investigate the offence in respect of which the appellant was tried and convicted. The appellant timeously raised and led evidence in support of his defence of alibi which (he) the appellant is entitled to in answer to the charge against him. The lower court was obviously wrong in affirming the trial court when it rejected the defence put up by the appellant.**

The lone issue raised is, in the circumstance resolved in favour of the appellant. The appeal is allowed while the conviction and sentence of the appellant by the lower court in upholding the trial court is hereby set aside. The appellant is acquitted and discharged accordingly.

D

### **FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother, Ogunbiyi, JSC. I agree with the reasons therein adumbrated to arrive at the conclusion that the appeal is, no doubt, meritorious and should be allowed without much ado.

The appellant was arraigned before the trial court based on a two (2) count charge of conspiracy to commit armed robbery and attempted armed robbery punishable under Section 1(2) (a) and Section 2(2) of the Robbery and Fire Arms (Special Provisions) Act Cap. 398 Vol. 221, LFN 1990, respectively.

PW2 (the victim of the attack) said he knew the appellant before the incident. He did not mention his name to the police or describe him at all until after over one year. As well, the appellant, at the earliest opportunity in his statement to the police put up a plea of alibi. PW1, the Investigating Police Officer (IPO) confirmed that the appellant's brother maintained that the appellant was in Warri with him at the material time; not at Sonubi town, the alleged scene of incident.

The appellant was found culpable by the trial court and sentenced to 14 years in prison. He appealed to the Court of Appeal, Benin Division (the court below) which heard the appeal and dismissed it on 19th January, 2011. The appellant has decided to appeal to this court.

The lone issue couched on behalf of the appellant for a due

determination of the appeal reads as follows:-

*“Whether from the totality of the evidence on record, especially the evidence of PW2 and the alibi raised by the appellant, the lower court was right in affirming the conviction of the appellant by the trial court for the offences of conspiracy to rob and attempted armed robbery.”* B

As extant in the record of appeal, PW2, the victim, said immediately after the incident, some police men came to the scene at Sonubi town. He did not mention the name of the appellant whom he claimed to know very well or identify him by description to the police. In a situation like this, this court in *Bozin v. The State* (1998) ACLR 1 at page 18 held that such failure on the part of PW2 raises a very strong doubt which should be resolved in favour of the appellant. This court, per Aniagolu, JSC pronounced eloquently as follows:- C

*“If the appellant whom the witnesses know very well before the incident took part in the robbery of those witnesses that night, would the witnesses not have mentioned him by name, or by description immediately the police came in a van that night in answer to their telephone call? Would the course of human conduct not impel the witnesses to tell the police that night of the involvement of the appellant, who was said to be unmasked, in the robbery? I am firmly of the view that the failure of those witnesses to mention the appellant to the police that night at the first opportunity, cast a grave doubt on their evidence that they saw the appellant that night in the act of robbery.”* D E F

The decision of the court in the case of *Ani vs. The State* (2009) All FWLR (pt. 452) 1044 at 1062, in a similar situation, is also in point. To say the least, the position taken by the trial court which was affirmed by the court below cannot be supported by this court. Failure on the part of PW2 to mention the name of the appellant to the police at the earliest opportunity and waiting until over one year before so doing raised a very serious doubt which should have been resolved in favour of the appellant. The two lower courts goofed in material particulars and same engendered miscarriage of justice to the appellant. G H

The above is still not the end of the matter. The appellant, at the earliest opportunity in his statement to the police, made a plea of alibi. He maintained that he was at Warri with his elder brother at the

material time of incident, not at Sanubi - scene of the incident.

Alibi means elsewhere. It is the duty of the prosecution to investigate same. It is the duty of the accused to furnish particulars of the alibi. He must furnish his whereabouts and those present with him at the material time of the incident. It is left for the prosecution to  
B disprove same. Failure to investigate will lead to acquittal. See *Yanor vs. The State* (1965) NMLR 337; *Gachi vs. The State* (1973) 1 NMLR 331; *Odu & Anr. v. The State* (2001) 5 SCNJ 115 at 120; (2001) 10 NWLR (pt. 772) 668.

C As extant in the record of appeal, PW1 (IPO) said in his bid to investigate the appellant's plea of alibi, he invited his elder brother who came from Warri to confirm that the appellant was with him at Warri at the material time of incident, and not at Sanubi as alleged by PW2. To one's consternation, the trial court in an inverse fashion, still  
D maintained that the appellant failed to call his elder brother from Warri to support him. With due diffidence to the court below, it ought not to have affirmed such a warped finding. It should have been found that the plea of alibi was made out by the appellant, as same was confirmed by PW1 (the IPO).

E In sum, PW2's evidence of recognition of the appellant is unreliable as the appellant was not identified to the police at the earliest opportunity despite the fact that PW2 knew the appellant before the incident. The appellant raised his plea of alibi timeously and same  
F was confirmed by PW1 (IPO). The two lower courts found to the contrary against the current of evidence adduced at the trial court. This is clearly a case where the concurrent findings of the two lower courts should be interfered with. I so do, on ground of perversity. The findings have not been made in consonance with the evidence  
G on record. They are not in compliance with known principles of law as above discussed and have, in the main, occasioned injustice. See *Afolalu vs. The State* (2010) 5-7 SC (pt. 11) 93 and *Osuagwu vs. The State* (2013) 1-2 SC (pt. 1) 37.

H It is basic, that it is the duty of the prosecution to prove the charge against the appellant beyond reasonable doubt. See *Woolmington v. DPP* (1935) AC 462, *Akalezi vs. The State* (1993) 2 NWLR (pt. 273) 1 at 13; *Nasiru vs. The State* (1999) 2 NWLR (pt. 589) 87 at 98. It has been clearly depicted that this matter is rooted in shred of doubts here and there.

For the above reasons and of course the detailed ones carefully set out in the lead judgment, I too, feel that the appeal is meritorious and should be allowed. I order accordingly and hereby set aside the conviction and sentence of the appellant by the trial court which was upheld by the court below. The appellant is hereby acquitted and discharged forthwith.

B

### **ARIWOOLA JSC**

I had the opportunity of reading in draft the lead judgment just delivered by my learned brother, Clara Ogunbiyi, JSC and I am in total agreement with the reasoning therein and the conclusion arrived thereat.

C

The sole issue which was identified by the appellant for the determination of the appeal and which materially was adopted by the respondent goes thus:

D

*“Whether from the totality of the evidence on record, especially the evidence of PW2 and the alibi raised by the appellant, the lower court was right in affirming the conviction of the appellant by the trial court for the offences of conspiracy to rob, and attempted armed robbery”*

E

The facts of this case have been eloquently stated in the lead judgment that I need not repeat same except where necessary for the purpose of emphasis.

F

What touches me mostly in the way the matter was treated is the way the courts handled the defence of alibi which was raised by the appellant. The appellant had been charged with two counts, that sometime on or about 21/2/2006, the appellant in company of two others at large, at Sanubi in the Isiokolo Judicial Division attempted to rob one Samuel Odorume (PW2) of his money while armed with gun.

G

The prosecution called two witnesses in proof of its case while the appellant only testified in defence but called no other witness.

The main evidence of the prosecution was that of an eye witness (PW2) who was the alleged complainant while the defence of the appellant was an alibi. It is interesting to note that the alleged crime was not reported to the police until after one year. Yet, it is on record that the complainant (PW2) claimed to have known the ap-

H

pellant before the day he was allegedly attacked.

What then does the defence of alibi raised by the appellant mean? It simply means “elsewhere.” That is, a defence based on the physical impossibility of a defendant’s guilt by placing him in a location other than the scene of the crime at the relevant time. It is the fact or state of having been elsewhere when an offence was committed. See: Kareem Olatinwo V. The State (2013) 8 NWLR (Pt.1355) 126 at 149; (2013) 4 SCM 178 at 194; (2013) 2 SCNJ (Pt. 1) 345 at 373. In other words, alibi means - when a person charged with an offence says - *“I was not at the scene at the time the alleged offence was committed. Indeed I was somewhere else, therefore, I was not the person who committed the alleged offence.”* See Christopher Okosi & Ors V. The State (1989) CLRN 29 at 48; Agboola Vs. The State (2013) 11 NWLR (pt.1366) 619; (2013) 8 SCM 157, (2013) All FWLR (pt. 704) 139.

It is already settled law, that the accused raises the defence of alibi when he introduces evidence leading to that conclusion. Therefore, once an alibi is raised by an accused, the burden is on the prosecution to investigate and come up with a rebuttal of such evidence in order to prove the case, as required, beyond reasonable doubt. See Adedeji v. The State (1971) 1 All NLR 75. However, it is the duty of the accused person who is relying on defence of alibi to give details of the alibi he sets up to enable the prosecution carry out investigation of his said whereabouts. His said duty involves letting the police know at the earliest opportunity where and with whom he was at the material time. See; Udo Akpan V. The State (1986) 3 NWLR (Pt.27) 258 relied on in Mathew Obakpolor Vs. The State (1991) 1 NWLR (pt. 165) 113; (1991) 1 SCNJ 91; (1991) 1 SC (pt. 1) 35.

It is on record clearly in the instant case that the alleged attempted robbery took place on 21/2/2006 at Sanubi but the appellant was only confronted with the allegation on 22/3/2001. However, in his statement to the police on 15/3/2007 which was admitted as Exhibit A, the appellant had stated that he was not at Sanubi on the 21st February, 2006 but in Warri to visit his elder brother. He stated inter alia, as follows:

*“I don’t know (sic) Stanley, on the 21st February, 2006; I was in Warri, I just went to Warri to pay visit to my elder brother. I came back from Warri on the 27th of February, 2006 to Abraka where I*

*am living. I did not go to Sanubi to robber (sic) Solomon in his house. I am not a member of any armed robbery gang in Abraka. I don't known (sic) those people you are mention (sic) to me. I did not rape any woman in Sanubi on 21st February, 2006 and made away with her N50, 000.00. This is all I know about this matter."*

To the above extrajudicial statement rendered to the Police by the appellant upon being confronted with the allegation of robbery and rape, the Policeman who investigated the case in his oral testimony during trial had this to say, inter alia:-

*"The accused person told me that on the said 21/2/2006 he was not in Sanubi but in Warri. He told me he went to see his senior brother in Warri. I did not visit his senior brother to find out whether it was true accused person visited Warri or not but his senior brother came to the Station to meet him. His Senior brother confirmed that the accused person was in Warri with him on that day."*

As earlier stated, it is already established that once an accused person discharges the evidential burden on him of adducing evidence of his being somewhere else on the particular time of the commission of an alleged crime, the onus is on the prosecution to disprove it. It is however equally true and established that there is a duty on the trial Judge to test the alibi raised by the accused in defence against the evidence adduced by the prosecution. See; Sunday Okoduwa V. The State (1988) NWLR (Pt. 76) 333.

Ordinarily and this has long been settled that the Police are not expected to go on a wild goose chase, in order to investigate an alibi. It behooves on the accused person setting up alibi as a defence to give to the Police at the earliest opportunity some tangible and useful information relating to the place and the person with whom he was. But failure of the Prosecution to investigate an alibi set up by the accused is tantamount to an admission of the story. See; Yanor Vs. The State (1965) NMLR 387; Ozulonye Vs. State (1981) 1 NCR 381, Bozin Vs State (1985) 2 NWLR (Pt.8) 465.

There is no doubt that in this case, the appellant raised in his extrajudicial statement to the Police, his defence of alibi at the earliest opportunity and this was clearly admitted by the Policeman that investigated the case (PW1) in his testimony in court. This is a clear case of where the accused discharged his own duty of disclosing his whereabouts as against the scene of the alleged crime but the prosecution

failed admittedly, to investigate the alibi. Yet, the person with whom the appellant claimed he was with came to the Police Station without an invitation by the Police and admitted that the appellant was indeed in Warri with him on the very day the crime was allegedly committed. I am therefore of the firm view that the Police ought to have gone further to investigate the claim. Otherwise, they are presumed to have admitted and believed the story of the appellant. In which case the appellant was entitled to a discharge. In other words, the trial court was also in error when it had the situation as stated above before it, yet went ahead to convict the appellant. Justice of this case demanded that the trial Judge would have compared the story of the appellant on his defence of alibi with the evidence adduced by the prosecution. The trial court was therefore simply in error to have notwithstanding the failure of the prosecution to investigate the alibi, convicted and sentenced the appellant. In the result, the court below was also in error in affirming the decision of the trial court.

For the above reason and the fuller and more detailed reasoning of my learned brother in the lead judgment, I also hold that the appeal is meritorious and deserve to succeed. It is allowed by me. The decision of the court below which affirmed that of the trial court is set aside. The appellant is entitled to acquittal and discharge. Accordingly, he is acquitted and discharged.

F

### **MUHAMMAD JSC**

I had a preview of the very thorough lead judgment of my learned brother Ogunbiyi JSC, just delivered. I entirely agree with the reasoning and conclusion therein, that this appeal has merit. For all the reasons in the lead judgment which I take the liberty to emphasizing hereinafter, too allow the appeal.

Appellant was arraigned, tried and convicted for conspiracy to commit armed robbery punishable under Section 1(2) a and 2(2) of the Robbery and Fire Arms (Special Provision) Act CAP 398 Vol. 221 Laws of the Federation of Nigeria 1990.

It is on record that appellant had, from the onset, asserted that on the relevant date and time he was not at Sanubi where the offences took place. It is his case that he was in Warri with his brother. This is a clear plea of Alibi.

On the authorities, see Yanor & anor V. The State (1965) NMLR 337, Christian Nwosisi V. The State (1976) 6 SC 109 and Ikono V. The State (2007), the respondent herein has the duty, in the circumstance, of proving that appellant's plea of Alibi is false. It is theirs to fix him at the scene of crime and the time the crime took place. This essential evidence has not been made available to the trial court which decision the court below affirmed. B

The testimonies of PW1 and PW2, the supposedly vital witnesses whose evidence, the two courts below relied upon to convict the appellant, are rather unhelpful to the respondent's case. Beyond C not fixing the appellant at the scene of crime, PW1 in his evidence devastatingly establish the fact that appellant's brother had vindicated the appellant in his stance that on the date and time the offences the appellant is convicted for were committed, the appellant was in Warri with him. Even more devastating is PW2's evidence which, in spite of D the fact that the appellant was known to him, never made mention of the appellant to PW1, a police officer, in the course of latter's investigation into the case.

Given these facts, the appellant has asked us to determine his appeal on the basis of the very apt issue he distilled from the grounds E in his Notice of appeal. The issue Reads:-

*"Whether from the totality of the evidence on record, especially the evidence of PW2 and the Alibi raised by the appellant, the lower court is right in affirming the conviction of the appellant by the trial court for the offences of conspiracy to rob and attempted robbery."* F

The issue must be resolved against the respondent. The failure of PW1 to disclose, at first opportunity, the fact that appellant was among those who attempted to rob him, even though he had all G along known the appellant, raises serious doubt as to whether the appellant was one of those who committed the very offences for which he has been convicted. Respondent's further failure to disprove appellant's plea of alibi by fixing him at the scene through witnesses other than PW2, the victim of the offence, makes H respondent's case all the more hopeless. The lower court's affirmation of the decision of the trial court which does not draw from available evidence cannot, for the foregoing and more so the detailed reasons contained in the lead judgment, persist. This explains why I

allow the appeal too and abide by the consequential orders made in the lead judgment.

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**NWEZE JSC**

B My Lord, Ogunbiyi, JSC, obliged me with the draft of the leading judgment just delivered now. I agree with the reasoning and conclusion.

C As the leading judgment insightfully pointed out, the complaint relating to the offence which the Police duly investigated had no nexus of any sort with the offence for which the appellant, unjustly, went through the rigours of trial and the unwarranted obloquy of a conviction.

D Although, he raised the defence of alibi at the earliest possible time in exhibit “A” the police did not investigate it as the Investigating Police Officer [IPO] confirmed in his evidence in court. Curiously, the trial court still proceeded to convict him.

Surprisingly, the lower court affirmed that unfortunate verdict of the trial court.

E Against this background, I take the humble view that his said trial and conviction epitomize the failure of justice or the misapplication of justice; in a word, the trial court’s verdict, affirmed by the lower court, amounted to a miscarriage of justice as it was, wholly, prejudicial to the appellant’s substantive right, *Onagoruwa v. The State* (1993) 7 NWLR (pt 303) 49; *Joshua v. The State* (2000) 5 NWLR (pt 658) 591; *Sanusi v. Ameyogun* (1992) 4 NWLR (pt 237) 527; *Pam and Anor v. Mohammed and Anor* (2008) LPELR - 2895 (SC) 74, B-E; *Larmie v DPM and S Ltd* (2005) LPELR -1756 (SC) 24-25, G G-B.

H Having raised the said defence of alibi at the earliest opportunity, *Hassan v. The State* (2001) 6 NWLR (pt 709) 286 in exhibit “A,” he had availed the prosecution of the opportunity either to confirm or confute its availability to him, *Ibrahim v. The State* (1991) 4 NWLR (pt 186) 399; *Nwabueze v. The State* [1988] 3 NWLR (pt. 86); *Ikemson v. The State* [1989] 3 NWLR (pt 110) 455. In other words, he cast a burden on the Prosecution to investigate it, *Eyisi v. State* [2000] 4 NSCQR 60 and to disprove same, *Eke v The State* (2011) LPELR - 1133 (SC) 16.

As confirmed by the IPO, the said defence was not investigated. In the circumstance, he was entitled to an acquittal, Yanor v The State (1965) ANLR (Reprint) 199; Bello v. Police [1956] SCNLR 113; Odu and Anor v. The State (2001) 5 SCNJ 115, 120; [2001] 10 NWLR (pt. 772) 668 and not the conviction which the trial court slammed against him. B

By its failure to investigate the appellant's defence of alibi, the Prosecution must be deemed to have admitted his story that he was elsewhere when the said offence was committed, Bozin v. The State [1985] 2 NWLR (pt 8) 465; Ozulonye v. The State (1981) 1 NCR 387; Yanor v. The State (supra). He was, therefore, entitled to an acquittal, Gachi v. The State (1973) 1 NMLR 331; Odu and Anor v. The State (supra). After all, the defence of alibi rests on the jurisprudential postulate of the physical impossibility of an accused person's involvement in a crime when he was elsewhere, other than the scene of the crime, at the relevant time, that is, when the alleged offence took place, Attah v. The State (2010) LPELR - 597 (SC) 33 A-C. C D

As noted above, the trial court's verdict, affirmed by the lower court, amounted to a miscarriage of justice. It must, therefore, not be allowed to stand. Accordingly, like the leading judgment, I, equally, find that there is considerable merit in this appeal. I hereby set aside the conviction of, and sentence on, the appellant by the trial court, as affirmed by the lower court. I abide by the order discharging and acquitting him. E F

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