

SUPREME COURT OF NIGERIA
FRIDAY 11TH DECEMBER, 2015. SC. 56/2013
CORAM:- I. T. MUHAMMAD,
M. S. MUNTAKA-COOMASSIE, O. RHODES-VIVOUR,
C. B. OGUNBIYI, C. C. NWEZE, JJSC

ABUBAKAR SALE APPELLANT
V.
THE STATE RESPONDENT

ARMED ROBBERY - Proof - Ingredients - Prosecution must prove that there was robbery - That the same was armed robbery - And that appellant was one of those who took part in the armed robbery (H1)

ARMED ROBBERY - Ingredients - Conspiracy - Where ingredients of armed robbery have been established - Criminal conspiracy can properly be inferred (H2)

ARMED ROBBERY - Identification parade - Failure to conduct - Absence of conducting the parade - As well as failure to report the incident to Police timeously - Cast doubts on prosecution's case (H3)

IDENTIFICATION PARADE - Necessity of - It is a must for conviction where victim did not know accused before the offence - Where victim was confronted by accused for a very short time (H4)

IDENTIFICATION PARADE - Evidence - Weight - To guard against cases of mistaken identity - Court must consider circumstances in which eye witness saw suspect - Length of time witness saw suspect (H5)

CRIMINAL PROCEDURE - Proof - Material witness - Prosecution must call all vital witnesses - Failure to so do will be fatal to its case - Which cannot be proved beyond reasonable doubt (H6)

EVIDENCE - Withholding of - Presumption - EA 2011 s. 167(d) - Evidence which could be and is not produced - Is presumed to be

unfavourable to the person who withholds it (H7)

CRIMINAL PROCEDURE - Proof - Doubt - Any doubt cast on the case of prosecution - Should be resolved in accused favour (H8)

ARMED ROBBERY - Proof - Identification parade - Appellant cannot be said to have been identified by evidence of PW2 - As the trial court did not weigh the evidence - To prevent mistaken identity (H9)

ALIBI - Defence - Conditions - For the defence to be entertained - It must be raised at earliest time - With sufficient particulars given of accused whereabouts - So as to enable police verify the claim (H10)

ALIBI - Defence - Investigation - Prosecution must not investigate every alibi - But where accused story is capable of providing a defence - There is duty on prosecution to carry out investigation (H11)

ALIBI - Defence - Failure to investigate - Failure of police to investigate the truth or otherwise of appellant's alibi - Has cast doubt on prosecution's case (H12)

FACTS

Accused/appellant and two others were arraigned before the Zamfara State High Court on a two count charge of conspiracy to rob and armed robbery under section 97 of the Penal Code and section 1(2) of the Robbery and Firearms (Special Provisions) Act, Cap R11 LFN 2004. At the trial, prosecution/respondent called three witnesses and tendered six exhibits which were admitted as exhibits A, A1, B, B1, C and C1 in support of its case. Exhibits A and A1 are the confessional statements of appellant. Appellant testified as DW2 and retracted his statements. According to testimonies of respondent's witness, appellant and the others were alleged to have entered the house of PW2 and at gun point robbed him of his money and also that of his wife. After the robbery, appellant and his cohorts escaped with their loot. PW2 testified that the robbers did not cover their faces and there was light in the room where the robbery took place.

About one month thereafter, appellant identified one of the robbers in a town and caused him to be arrested and taken to the

Police station. The arrest led to further arrest of the other gang members. Appellant was alleged to have confessed to have participated in the crime in the course of investigation. There was however no concrete identification of appellant as one of the robbers on the fateful day. At the end of the trial, the court evaluated evidence from both sides and in its judgment, found appellant guilty as charged. He was convicted and sentenced to death by hanging. Not pleased with his conviction and sentence, appellant approached the Court of Appeal Sokoto Division on an appeal. The court dismissed the appeal and affirmed the decision of the trial court. Appellant not yet satisfied, has appealed to the Supreme Court, challenging the decision of the Court of Appeal.

ISSUES FOR DETERMINATION

1) Whether it can be safely said that the identity of the appellant as one of the robbers was established beyond reasonable doubt by the evidence of Pw2 as affirmed by the lower court.

2) Whether the lower court was wrong to have affirmed the decision of the trial court that the appellant did not furnish sufficient particulars of his alibi and as such his defence of alibi failed.

HELD (Unanimously allowing the appeal per
OGUNBIYI JSC)

ARMED ROBBERY - Proof - Ingredients

1. The law is well settled in plethora of authorities that in order to succeed in a charge of armed robbery, the prosecution must prove beyond reasonable doubt, the following ingredients:-

***“i. That there was robbery or series of robbery;
ii. That each robbery was an armed robbery;
iii. That the appellant was one of those who took part in the armed robbery.”***

In reference is section 135(1) of the Evidence Act, 2011 which is in pari materia with section 138(1) of the Evidence Act, 2004 in force when the appellant’s trial was conducted.
(p. 3691 H)

ARMED ROBBERY - Ingredients - Conspiracy

2. The decision by this Court in *Bozin V. The State* (1985) 2 NWLR (Pt.8) Page 465 at 469 and *Aruna V. State* (1990) 6 NWLR (Pt.155) 125 are also trite that where ingredients of armed robbery have been established, then criminal conspiracy can properly be inferred. (p. 3692 B)

ARMED ROBBERY - Identification parade - Failure to conduct

3. It is significant to emphasize also that the witness Pw2 did not know the appellant before the robbery and the appellant was not arrested at the scene of crime. The incident happened in the night when Pw2 was woken up from sleep suddenly. In the circumstance, it is in no doubt that Pw2 must have been in a state of confusion and anxiety coupled with fear especially on sighting a gun and matchet. The absence of conducting an identification parade as well as the failure to report the incident to the police until one month thereafter are factors sufficient in casting doubts on the prosecution's case. (p. 3694 B)

IDENTIFICATION PARADE - Necessity of

4. The law is well settled that an identification parade is a sine qua non to a conviction in any of the following instances:-

a) Where the victim did not know the accused before and his first acquaintance with him was during the commission of the offence.

b) Where the victim or offender was confronted by the accused for a very short time.

c) Where the victim due to time and circumstances might not have had the full opportunity of observing the features of the accused. (p. 3694 D)

Evidence - Weight

5. This court has laid down in the case of *Ndidi v. State* (2007) NWLR (Pt.1052) 633 at 651 that, to ascribe any value to the evidence of an eye witness, in identification of a criminal, the Courts in guarding against cases of mistaken identity must meticulously consider the following issues:-

1) Circumstances in which the eye witness saw the sus-

pect or the defendant.

2) The length of time the witness saw the suspect or the defendant.

3) The lighting conditions.

4) The opportunity of close observations.

5) The previous contact between the two parties.

(p. 3694 H)

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CRIMINAL PROCEDURE - Proof - Material witness

6. The law is trite and well settled that the prosecution has a discretion in calling evidence and witnesses; however, it is also a duty on the prosecution to call all known material and vital witnesses, whether in favour of the prosecution or not. A witness becomes material in a criminal trial if there was a vital point or ingredient of an offence which can be proved by the evidence of that witness. Where the prosecution therefore fails to call such a witness, it will be fatal to its case which cannot be proved beyond reasonable doubt. The prosecution, in the case at hand held two sets of witnesses; that is to say, the two wives of Pw2 and some unnamed persons who were the alleged informants of Pw2 at Zuru that the name of the suspected robber was Abu Sholi. While Pw2 claimed that his two wives were eye witnesses to the incident, the evidence from the informants also would have confirmed the truth of the documents, exhibits A and A1, wherein the appellant denied that he was in Zuru on 18/02/2003. As rightly submitted by the counsel for the appellant therefore, the failure to call the two sets of witnesses was certainly fatal to the prosecution's case. (p. 3696 B)

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EVIDENCE - Withholding of - Presumption

7. Section 167 (d) of the Evidence Act Cap E14 2011 provides for the presumption of withholding evidence wherein it clearly states that evidence which could be and is not produced is presumed to be unfavourable to the person who withholds it. (p. 3696 F)

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CRIMINAL PROCEDURE - Proof - Doubt

8. I wish to restate clearly the position of the law that any doubt cast on the case of the prosecution should be resolved in the appellant's favour. (p. 3696 G)

B ARMED ROBBERY - Proof - Identification parade

9. As rightly submitted by the learned counsel for the appellant therefore, the failure by the two lower courts to consider as fatal the absence of evidence from the two sets of witnesses, has led to a miscarriage of justice against the appellant.

C In the circumstance of this case, I hereby endorse the submission by the counsel for the appellant that the lower court wrongly affirmed the finding by the trial court, that Pw2 sufficiently identified the accused when the trial court did not weigh such identification against the principles prescribed by this court to guard against cases of mistaken identity. In other words, it cannot be safely said that the identity of the appellant as one of the armed robbers was established beyond reasonable doubt by the evidence of Pw2 and hence issue one is hereby resolved in favour of the appellant.
(p. 3696 H)

ALIBI - Defence - Conditions

F 10. The law is well settled also that for a defence of alibi to be entertained, it must be raised at the earliest opportunity by a suspect at the investigation.

G The law is further in place that once an alibi has been raised, the burden rests on the prosecution to investigate and rebut such evidence in order to prove its case beyond reasonable doubt. For the defence of alibi to avail an accused person, it ought to be raised timeously and sufficient particulars of same must also be given to enable the police verify the claim. The defence is to show that the accused was in fact elsewhere different other than at the locus delicti and therefore it was practically impossible to connect him, accused/appellant with the offence charged in view of space, time and place. (p. 3698 F)

ALIBI - Defence - Investigation

11. Again the law is well settled that the prosecution does not have to investigate every alibi raised by an accused person. However, where the story of the accused, if believed is capable of providing a defence, there is therefore a duty upon the prosecution to investigate the alibi raised. (p. 3699 A) B

ALIBI - Defence - Failure to investigate

12. It is obvious therefore that the police was clearly aware that the appellant, who could not write his statement, was an illiterate and therefore could not be expected to know the requirements of the law as it relates to alibi. The police, who should have known better, did not also make any effort to elicit such information as they would require to investigate the alibi. It was sufficient that the appellant did introduce the defence in his own little knowledge. The failure of the police to investigate the truth or otherwise of the appellant's alibi has cast veritable doubt on the reliability of the case for the prosecution which ought to be resolved in favour of the appellant. (p. 3699 G) C
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NOTABLE POINT OF INTEREST**OGUNBIYI JSC*****1. Alibi – Definition of*** F

By definition, an alibi is a defence whereby an accused person alleges that at the time of committing the offence for which he was charged, he was elsewhere and doing something different. This is to enable the police investigate same with a view to finding out the truth or falsity of his claim. (p. 3698 E) G

REPRESENTATION

Mr. Ekemejero Ohwovoriole Esq. for the Appellant appearing with: M. Ogbeifun (Mrs.), E. Mudiaga-Odje and Mrs. C. O. Ekwu.

Dr. J. Y. Musa for the Respondent appearing with: Aliyu Abdullahi Gusau COpp MOJ Zamfara, Sirajo Abdullahi DDCL, E. S. Oluwabiyi, M. O. Onyilokwu and Eko Ejembi Eko. H

CASES REFERRED TO

- Eyisi v. State (2001) 8 WRN 1
 Ochemaje v. State (2008) 36 NSCQR (Pt. 11) 826
 Igbi v. State (2000) 2 SC 67
 Ikemson v. State (1989) 3 NWLR (Pt. 110) 455
 B Bozin v. State (1985) 2 NWLR (Pt. 8) 465
 Aruna v. State (1990) 6 NWLR (Pt. 155) 125
 Sule v. State (2009) 17 NWLR (Pt. 169) 33
 Ochiba v. State (2011) 17 NWLR 663
 C Eyisi v. State (2000) 15 NWLR (Pt. 697) 555
 Nwaturuocha v. State (2011) 6 NWLR (Pt. 1242) 170
 Ndidi v. State (2007) NWLR (Pt. 1052) 633
 Hausa v. State (1994) 6 NWLR (Pt. 350) 281
 Millar v. State (2005) 8 NWLR (Pt. 927) 236
 D Opayemi v. State (1985) 2 NWLR (Pt. 5) 101
 Ogizi v. State (1998) 4 SCNJ 226

STATUTES REFERRED TO

- Penal Code s. 97
 E Robbery & Firearms (Special Provisions) Act Cap R11 LFN 2004, s. 1(2)
 Evidence Act 2011, s. 135(1)
 Evidence Act 2004, s. 138(1)

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LEAD JUDGMENT BY OGUNBIYI JSC

- This appeal is against the judgment of the Court of Appeal, Sokoto Judicial Division, delivered on 6th December, 2012 wherein the lower court affirmed the judgment of the trial High Court Zamfara
 G which convicted and sentenced the appellant and one other to death by hanging for the offences of Conspiracy and Armed Robbery under section 97 of the Penal Code and section 1(2) of the Robbery and Firearms (Special Provisions) Act, Cap R 11, LFN 2004.

- The appellant was the 2nd accused and he was arraigned along-
 H side 1st and 3rd accused persons before the trial court on a two - count charge of conspiracy to rob and armed robbery. There was a 4th accused person named in the charge but he was not produced to stand trial.

The prosecution called three witnesses and tendered six exhib-

its which were admitted as exhibits A, A1, B, B1, C and C1. Exhibits A and A1 are the extra judicial statements of the appellant. The 1st accused person testified as Dw1 and the appellant also testified as Dw2. The 3rd accused did not enter any defence. At the end of the trial, the appellant and the 1st accused were sentenced to death by hanging while the 3rd accused was acquitted and discharged. B

The two count charge under which the appellant was found guilty and convicted read thus:-

1st Count:

“That you Moh’d Ahmed (M), Abubakar Sale (Alias Sholi) Aliyu Usman Alias Daudu and Abulrazak Danladi (M) at large on or about the 18th day of February, 2003 at Gumi town within the Gusau Judicial Division conspired to rob one Alh. Buhari Abdullahi (M) of Sabon Gari Area Gummi, and you thereby committed an offence punishable under section 97 of the Penal Code Law.” C D

2nd Count:

“That you Moh’d Ahmed (M) Abubakar Sale (Alias Sholi) Aliyu Usman Alias Gaudu and Abdulrazak Danladi (M) at large on or about the 18th day of February 2003 at about 0348 hours at Sabon Gari Area Gummi within Gusau Judicial Division attacked one Alh. Buhari Abdullahi of Sabon Gari Area Gusau, while armed with guns, cutlasses and sticks at his residence and beat one of his wives called Ubaida Buhari and robbed him of the sum of N180,000.00 and N10,000.00 from one Kulu Buhari (senior wife) of the said Alh. Buhari and you thereby committed an offence punishable under section 1(2) of the Robbery and Firearms (Special Provisions) Act Cap 398 LFN 1990.” E F

The brief facts of this case are that:- the appellant and the other accused persons were alleged to have entered the house of Pw2 and at gun point robbed him of his money and also that of his wife of the various sums stated in the count supra. G

After the robbery, the appellant and his cohorts escaped with their loot. Pw2 in narrating what transpired during the robbery that the robbers who robbed him and his wife did not cover their faces and there was light in the room where the robbery took place. H

One month or thereabout, the appellant was able to identify one of the robbers in Zuru town on a market day, and he caused him to be arrested and taken to a police station where investigations com-

menced which led to the arrest of the other co-accused; that in the course of investigation, the appellant confessed to have participated in the robbery but only to re-tract same after the commencement of trial.

The complainant, as Pw2, in his evidence in Chief before the learned trial Chief Judge testified to the effect that, on the night of 18/02/2003 he was woken up from sleep by the shouts of one of his wives. He saw the accused and the appellant holding a gun, a stick and matchet and threatened to kill him if he did not give them money which he obliged by giving them the money as stated in the 2nd count, reproduced supra. At the end of the trial, the 3rd accused was acquitted and discharged.

The learned trial Judge found the appellant and the 1st accused guilty as charged and convicted them accordingly. In its judgment, this is what the trial court said:-

“Based on the evidence adduced before this court, this court finds and holds that the prosecution has proved the charges of criminal conspiracy and armed robbery contrary to section 97 Penal Code and section 1(2) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990 against the 1st and 2nd accused persons. The 1st and 2nd accused persons Mohammed Ahmed and Abubakar Sale Alias Sholi are convicted for the offences of conspiracy and armed robbery punishable under section 97 of the Penal Code and section 1(2) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990.”

The appellant was dissatisfied with the trial court’s judgment and hence appealed to the lower court which also dismissed the appeal. In affirming the decision by the trial court, the Court of Appeal has this to say:-

“It is instructive to observe that from the evidence adduced by the prosecution, especially the evidence of Pw2 the victim of the offence, one cannot but hold the view that the prosecution has made out a case against the appellant. ..., the testimony of Pw2 has greatly demonstrated the meeting of minds of both the 1st accused and the Appellant having gone to the house of Pw2, the victim of the robbery on the 18th day of February, 2003 around 3.45 a.m and robbed him of his money and that of his wife.”

The appellant has again expressed dissatisfaction with outcome at the Court of Appeal and has filed a notice of appeal to this court on 2/1/2013 containing six grounds of Appeal.

Briefs were exchanged by parties; while that of the appellant was settled by one Ekeme Ohwovoriele Esq, the respondent's was settled by Garba Gajam Muhammad Esq, (the Hon. Attorney General, Zamfara State).

When the appeal came up for hearing on the 15th October, 2015, both counsel adumbrated on their briefs of argument. The appellant's counsel urged in favour of allowing the appeal; that the judgment of the lower court should as a consequence therefore be set aside and the appellant is to be acquitted and discharged accordingly. To the contrary however, it was submitted on behalf of the respondent that the appeal lacks merit and same should be dismissed.

The two issues formulated on behalf of the appellant are as follows:-

(1) Whether it can be safely said that the identity of the appellant as one of the robbers was established beyond reasonable doubt by the evidence of Pw2 as affirmed by the lower court.

(2) Whether the lower court was wrong to have affirmed the decision of the trial court that the appellant did not furnish sufficient particulars of his alibi and as such his defence of alibi failed.

The issues raised by the appellant were adopted by the respondent also and they will form the basis upon which this appeal will be determined.

1st issue

It is the submission by the appellant's counsel that the lower court was wrong when it affirmed the conviction and sentence of the appellant for criminal conspiracy and armed robbery on the basis of the evidence of Pw2 when the identity of the appellant as one of the armed robbers was not established beyond reasonable doubt; that a miscarriage of justice was occasioned against the appellant because there is no evidence of his identification as an armed robber prior to his arraignment; that the failure by the police to conduct an identification parade in the circumstances of this matter was fatal to the prosecution's case.

The counsel submits further that the entire scenario surrounding the robbery as narrated by Pw2 coupled with the fact that he did

not make a report of the incident to the police immediately until one month after, has raised doubts on his evidence of identification rendered in court; that the lower court wrongly affirmed the finding by the trial court that Pw2 sufficiently identified the accused. It is also the submission of counsel that the failure of the prosecution to call the
 B wives of Pw2 as well as the unnamed informants to give evidence as witnesses for the prosecution is fatal to its case; that the lower court was therefore wrong and had occasioned miscarriage of justice against the appellant when it failed to consider his defence of alibi as shown
 C on exhibits A and A1.

Finally on this issue, the learned counsel reiterates that the ingredients of armed robbery were not established by the prosecution in this case and hence the offence of criminal conspiracy cannot also be inferred against the appellant, whose conviction and sentence
 D should be quashed.

In response to the 1st issue raised, it is submitted on behalf of the respondent that the lower court was right when it affirmed the conviction and sentence of the appellant for criminal conspiracy and armed robbery on the basis of the evidence by Pw2 where the identity of the appellant as one of the armed robbers was established by
 E the prosecution beyond reasonable doubt. On the question of identification parade, the respondent's counsel submits on absence of any miscarriage of justice against the appellant and that the law is settled without equivocation that identification parade is not the only
 F method of establishing the identification of an accused person in relation to an offence charged; that where the witness has ample opportunity to identify the accused, a parade is not necessary; that recognition of an accused may be more reliable than identification. Counsel cites the case of *Eyisi V. The State* (2001) 8 WRN 1 at 9 - 10 SC; that Pw2 had all the opportunity to observe and identify the appellant whose face was not covered during the armed robbery operation; that the prosecution had adduced sufficient and acceptable evidence to fix the accused person at the scene of crime at the material
 G time: reference was made to the cases of: *Ochemaje V. State* (2008) 36 NSCQR (Pt. 11) 826 at P848; *Igbi V. State* (2000) 2 SC 67 and also the case of *Ikemson V. The State* (1989) 3 NWLR (Pt.110) 455 at 472 wherein this court held that an identification parade is only
 H essential in the following situations:-

a) Where the victim did not know the accused before and his first acquaintance with him is during commission of the offence;

b) Where the victim was confronted by the offender for a very short time; and

c) Where the victim, due to time and circumstances, might not have had the full opportunity of observing the features of the accused. B

Counsel submits therefore that contrary to the submission made on behalf of the appellant, Pw2 had identified him (appellant) sufficiently as one of the robbers who robbed him on the day of operation. In the premise, the counsel urges that the 1st issue should be resolved in favour of the respondent. C

1st Issue

In resolving this issue, I wish to reproduce a part of the judgment of the trial court Judge wherein he said thus:- D

“From the above evidence of Pw2, it is clear that two people attacked him in his house. He said they were armed with gun and stick. He also said he was able to identify them because there was light and they did not cover their faces. The prosecution has therefore proved a case of conspiracy against the 1st and 2nd accused persons and I so hold.” E

The lower court did not hesitate in endorsing the view held by the trial court and it proceeded and said as follows:-

“It is instructive to observe that from the evidence adduced by the prosecution, especially the evidence of Pw2 the victim of the offence, one cannot but hold the view that the prosecution has made out a case against the appellant.” F

The 1st issue therefore seeks to ascertain the identity of the appellant. In other words, it poses a question whether or not the two lower courts are correct in their concurrent findings that the identity of the appellant as one of the robbers was in fact established beyond reasonable doubt. It is significant to say that the evidence of identity was given by Pw2, who was the complainant of the robbery and also the prosecution's star witness. H

The law is well settled in plethora of authorities that in order to succeed in a charge of armed robbery, the prosecution must prove beyond reasonable doubt, the following ingredients:-

***“i. That there was robbery or series of robbery;
 ii. That each robbery was an armed robbery;
 iii. That the appellant was one of those who took part in the armed robbery.”***

In reference is section 135(1) of the Evidence Act, 2011 which is in pari materia with section 138(1) of the Evidence Act, 2004 in force when the appellant’s trial was conducted. The decision by this Court in Bozin V. The State (1985) 2 NWLR (Pt.8) Page 465 at 469 and Aruna V. State (1990) 6 NWLR (Pt.155) 125 are also trite that where ingredients of armed robbery have been established, then criminal conspiracy can properly be inferred; a further authority is Sule V. State (2009) 17 NWLR (Pt.169) 33 at 63.

In the instant appeal, the crucial issue is, whether there is adequate identification of the appellant as one of the armed robbers that robbed Pw2 and his wife in an operation that started at about 3.45 a.m and lasted for 30 minutes on 18th February, 2003 in Gummi town, Zamfara State.

It is the submission by the respondent’s counsel that from the evidence adduced by the prosecution, especially that of Pw2, the victim of the robbery, one cannot but hold the view that the prosecution had made out a case against the appellant. Counsel on the whole applauded the lower court in affirming the conviction and sentence of the appellant by the trial court as charged.

In his evidence at the trial court for instance, Pw2 testified that his two wives were eye witnesses to the commission of the robbery and they were also listed as witnesses in the proof of evidence on the record; that notwithstanding, the record did not disclose anywhere that the two wives or any of them testified at the trial. The prosecution relied solely on the evidence of Pw2 as the star witness.

An excerpt evidence by Pw2 and which the respondent is holding onto tenaciously is where the witness testified that on 18/02/2003, around 3.45a.m, while he was sleeping in his room together with his wife, he heard one of his wives shouting from her room; that when he was about to come out he saw a gun and a torch light on the window; that he was instructed to open the door by the robbers (accused persons), that consequent upon his opening the door, he saw the 1st accused holding a gun and a torch light while the 2nd

accused held a matchet. On the instruction of the robbers he directed them to a room where they could access some money.

It is the witness's further testimony that he was hit on his head by the 1st accused; that the robbers carted away his money in the sum of N180,000.00 plus the sum of N10,000.00 belonging to his wife; that in view of the availability of light at the time of robbery the witness was able to identify the culprits whose faces were not covered. B

It is intriguing I must say that Pw2 did not deem it necessary to report the incident to the police until one month of its happening. He did not also at anytime identify the appellant to the police as one of the robbers who robbed him and his family. C

On the totality of the communal evidence given by Pw2, it is not shown anywhere on the record that the witness did identify the appellant to the police before he was arraigned in court. In other words the first time Pw2 identified the appellant, as one of the armed robbers who robbed him and his wife, was when he (Pw2) was in the witness box. D

Pw2 in his evidence under cross examination testified that he was responsible for arresting the 1st accused person, while the appellant was, in turn arrested through the 1st accused. Earlier, in the witness's evidence in chief he restated that after the arrest of the 1st accused, the police who investigated the matter did not bother to contact him until he was summoned to court to testify against the appellant. This is what the witness had to say:- E F

"After the meeting, I saw the 1st accused person passing by. I followed him up to the road; I called a policeman who arrested him. I joined a motorcycle. I went to the police station and police followed me and arrested the 1st accused. After the police at Zuru finished their investigation, they sent to Gummi when the Gummi police finished their investigation they sent the case to State CID Gusau. Since then I have not been called again until now when I was called by court. The police went to my house, did some investigation and I explained everything to them." G H

The procedure adopted by arraigning the appellant only for the Pw2 to identify him in the dock is similar to the situation in Bozin's case wherein the suspect(s) have been singled out for the witness to identify him. With the appellant standing in the dock, it is a matter of

common knowledge that the witness, Pw2 would have no hesitation in affirming that the appellant must be one of the robbers that robbed them on the night in question. The only time the witness claimed to have seen the appellant after the robbery was when he saw him in the market place at Zuru and he went to call the police, but on return, the appellant had disappeared. In other words, he did not see the appellant to identify him to the police.

It is significant to emphasize also that the witness Pw2 did not know the appellant before the robbery and the appellant was not arrested at the scene of crime. The incident happened in the night when Pw2 was woken up from sleep suddenly. In the circumstance, it is in no doubt that Pw2 must have been in a state of confusion and anxiety coupled with fear especially on sighting a gun and matchet. The absence of conducting an identification parade as well as the failure to report the incident to the police until one month thereafter are factors sufficient in casting doubts on the prosecution's case. The law is well settled that an identification parade is a sine qua non to a conviction in any of the following instances:-

a) Where the victim did not know the accused before and his first acquaintance with him was during the commission of the offence.

b) Where the victim or offender was confronted by the accused for a very short time.

c) Where the victim due to time and circumstances might not have had the full opportunity of observing the features of the accused. See the cases of Ochiba V. State (2011) 17 NWLR 663 at 694 -695; Eyisi V. State (2000) 15 NWLR (Pt.697) 555; and Nwaturuocha V. State (2011) 6 NWLR (Pt.1242) 170 at 190.

I wish to state further that the prosecution did not deem it necessary that the persons who allegedly gave Abu Sholi's name to Pw2 should have testified. The witness Pw2 also said affirmatively in his evidence that both his wives were eye witnesses to the crime. There was no reason given and explaining why the wives were not called to testify at the trial court.

This court has laid down in the case of Ndidi v. State (2007) NWLR (Pt.1052) 633 at 651 that, to ascribe any value to the evidence of an eye witness, in identification of a crimi-

nal, the Courts in guarding against cases of mistaken identity must meticulously consider the following issues:-

1) Circumstances in which the eye witness saw the suspect or the defendant.

2) The length of time the witness saw the suspect or the defendant. B

3) The lighting conditions.

4) The opportunity of close observations.

5) The previous contact between the two parties.

In the testimony by Pw2, there was no previous contact between him and the appellant. Also on the length of time and the lighting conditions, Pw2 testified that the robbery started at about 3.45 a.m and lasted for about 30 minutes. He testified further that the robbery took place in two rooms and while there was no light in the first room, there was in the second room; that he was able to observe the features of the appellant in the second room because his face was not covered; that he was also being beaten on the head while the robbery operation was in progress. C D

He further testified under cross examination that initially he was not afraid but later said he got afraid because of the weapons being carried by the robbers. E

Again in the case of Ndidi v. State (supra) at pages 651 – 652 this court per Aderemi JSC said:-

“Whenever the case of an accused person depends wholly or substantially on the correctness of the identification of the accused or defendant which defence alleges to be mistaken, a trial judge must warn himself of the special regard for caution and should weigh such evidence with others adduced by the prosecution before convicting the accused in reliance on the correctness of the identification.” F G

The appellant’s fate in the case at hand depended wholly or substantially on the correctness of his identification by Pw2. As rightly submitted by appellant’s counsel, therefore, there is nothing on the record to show that the trial court did warn itself of the special regard for caution on mistaken identity. See also the case of Hausa v. State (1994) 6 NWLR (Pt.350) 281 at 322. H

For all intents and purposes, when regard is had to the state of mind by Pw2, who said in his testimony under cross examination that he was afraid of the weapons carried by the robbers, coupled

with the confusion at the material time, he, (Pw2) could not have been so coordinated enough to have sufficiently observed the features of the robbers within the period of 30 minutes. It will also require a lot of ingenuity to remember vividly the accurate account of the events after one month of its occurrence.

- The law is trite and well settled that the prosecution has a discretion in calling evidence and witnesses; however, it is also a duty on the prosecution to call all known material and vital witnesses, whether in favour of the prosecution or not. A witness becomes material in a criminal trial if there was a vital point or ingredient of an offence which can be proved by the evidence of that witness. Where the prosecution therefore fails to call such a witness, it will be fatal to its case which cannot be proved beyond reasonable doubt.*** See the cases of Millar V. State (2005) 8 NWLR (Pt 927) 236 at 252, also Opayemi V. State (1985) 2 NWLR (Pt 5) 101. ***The prosecution, in the case at hand held two sets of witnesses; that is to say, the two wives of Pw2 and some unnamed persons who were the alleged informants of Pw2 at Zuru that the name of the suspected robber was Abu Sholi. While Pw2 claimed that his two wives were eye witnesses to the incident, the evidence from the informants also would have confirmed the truth of the documents, exhibits A and A1, wherein the appellant denied that he was in Zuru on 18/02/2003. As rightly submitted by the counsel for the appellant therefore, the failure to call the two sets of witnesses was certainly fatal to the prosecution's case.***

- Section 167 (d) of the Evidence Act Cap E14.2011 provides for the presumption of withholding evidence wherein it clearly states that evidence which could be and is not produced is presumed to be unfavourable to the person who withholds it.*** See Ogizi v. State (1998) 4 SCNJ 226 at 253 and Okparaji & Anor. V. Ohanu & Ors. (1999) 6 SCNJ 27 at 42 - 48. ***I wish to restate clearly the position of the law that any doubt cast on the case of the prosecution should be resolved in the appellant's favour.*** See Millar V. State (supra).

As rightly submitted by the learned counsel for the appellant therefore, the failure by the two lower courts to consider as fatal the absence of evidence from the two sets of

witnesses, has led to a miscarriage of justice against the appellant. See the case of Olayinka V. State (2007) 8 NWLR (Pt 1040) 561 at 586 - 587 wherein this court said thus:-

“Failure to consider and examine a defence by the trial judge does not only raise reasonable doubt in the case of the prosecution but also amounts to a failure to perform a vital duty imposed on the trial judge and such will amount to a miscarriage of justice which must result in the decision appealed against to be set aside and the conviction quashed.”

In the circumstance of this case, I hereby endorse the submission by the counsel for the appellant that the lower court wrongly affirmed the finding by the trial court, that Pw2 sufficiently identified the accused when the trial court did not weigh such identification against the principles prescribed by this court to guard against cases of mistaken identity. See again Ndidi V. State (supra). **In otherwords, it cannot be safely said that the identity of the appellant as one of the armed robbers was established beyond reasonable doubt by the evidence of Pw2 and hence issue one is hereby resolved in favour of the appellant.**

Issue Two

Whether the lower court was wrong to have affirmed the decision of the trial court that the appellant did not furnish sufficient particulars of his alibi for the police to investigate and as such his defence of alibi failed.

It is submitted on behalf of the appellant that, contrary to the contention by the respondent's counsel, the appellant furnished the police with enough particulars to investigate the defence of alibi raised but that the police were just not interested in investigating same. The counsel, while urging this court to allow the appeal on this ground, submitted vehemently that the lower court was wrong when it affirmed the conviction and sentence of the appellant for criminal conspiracy and armed robbery on the basis of the evidence by Pw2, when the identity of the appellant as one of the armed robbers was not established beyond reasonable doubts.

The counsel submitted finally on this issue therefore that the failure of the police to investigate the truth or otherwise of the alibi pleaded by appellant has cast veritable doubt on the reliability of the

case for the prosecution which as a result ought to be resolved in favour of the appellant.

In response to the defence of alibi raised, it is submitted on behalf of the respondent that, the appellant in his statement to the police, exhibits 'A' and 'A1' did not give sufficient particulars to enable the police to investigate the alleged alibi, that he, (appellant) did not state with whom he was or what he was doing to enable the police investigate his so called alibi with a view to finding out the truth or otherwise of the claim; that the prosecution had adduced sufficient and acceptable evidence which fixed the appellant, not only at the scene of the crime but as one of the two persons who robbed Pw2 (the victim) in his house and his family on the 18/02/2003 around 3.45 a.m Counsel further argued that where there is unequivocal and consistent evidence on the part of the witness that he saw the accused person committing the offence and no other person or persons, an identification parade is most unnecessary.

In the premise, the respondent urges that the second issue should also be resolved in favour of the respondent, while the court should dismiss the appellant's appeal and affirm the decision of the lower court.

By definition, an alibi is a defence whereby an accused person alleges that at the time of committing the offence for which he was charged, he was elsewhere and doing something different. This is to enable the police investigate same with a view to finding out the truth or falsity of his claim.

The law is well settled also that for a defence of alibi to be entertained, it must be raised at the earliest opportunity by a suspect at the investigation. See the cases of Ozaki V. The State (1990) 1 NWLR - (Pt.124) P.92 and Adio V. The State (1986) 3 NWLR (Pt.31) 714.

The law is further in place that once an alibi has been raised, the burden rests on the prosecution to investigate and rebut such evidence in order to prove its case beyond reasonable doubt. For the defence of alibi to avail an accused person, it ought to be raised timeously and sufficient particulars of same must also be given to enable the police verify the claim. The defence is to show that the accused was in fact elsewhere different other than at the locus delicti and therefore it was

practically impossible to connect him, accused/appellant with the offence charged in view of space, time and place.

Again the law is well settled that the prosecution does not have to investigate every alibi raised by an accused person. However, where the story of the accused, if believed is capable of providing a defence, there is therefore a duty upon the prosecution to investigate the alibi raised. Again see Bozin V. State (supra) at page 473. B

With reference made to Exhibit A and A1, the statement of the appellant, for instance he said thus:-

“I can remember that on 18/02/2003, I did not travel to Gummi via Zamfara State. I was in my town Zongo.” C

It is the submission of the respondent’s counsel that, although the appellant stated where he was at the time the robbery was said to have been committed, that he did not however state in whose company he was or what he was doing; that this was to enable the police investigate with a view of finding out the truth or otherwise of the claim. D

The foregoing submission, in other words, questions the insufficiency of particulars for the police to investigate the alibi raised. As rightly submitted by the appellant’s counsel, it is not borne out on the record that the said alibi in question was ever investigated by the police. There is also no indication that the police did inquire more on the facts stated by the appellant in his extra-judicial statement to enable them investigate the defence raised. It is on record at page 169 that the appellant testified as Dw2 and he spoke Hausa. The Investigation Police Officer (IPO) was Pw1 who in his evidence testified that he did administer words of caution to the appellant and recorded his statement in Hausa language but translated same into English. (Exhibits A and A1). F G

It is obvious therefore that the police was clearly aware that the appellant, who could not write his statement, was an illiterate and therefore could not be expected to know the requirements of the law as it relates to alibi. The police, who should have known better, did not also make any effort to elicit such information as they would require to investigate the alibi. It was sufficient that the appellant did introduce the defence in his own little knowledge. The failure of the police to investi- H

gate the truth or otherwise of the appellant's alibi has cast veritable doubt on the reliability of the case for the prosecution which ought to be resolved in favour of the appellant.

In the result therefore, with the two issues resolved in favour of the appellant, the appeal herein succeeds and is allowed, while the
B concurrent judgments of the two lower courts are hereby set aside. Appeal is allowed and the appellant is acquitted and discharged.

MUHAMMAD JSC

C I read before now, the Judgment delivered by my learned brother, Ogunbiyi, JSC. My learned brother has dealt with all the issues satisfactorily. I need not add anything. The appeal has merit and ought to be allowed. I allow the appeal. I adopt consequential
D orders made in the lead Judgment.

MUNTAKA-COOMASSIE JSC

E This is an appeal against the judgment of the Court of Appeal delivered on 6/12/2013, herein after referred to Court below. Wherein the lower court affirmed the judgment of the High Court of Zamfara State, referred to as the trial court - which convicted and sentenced the appellant to death for the offences of criminal conspiracy under
F Section 97 of the penal Code and armed robbery under Section 1 (2) of the Robbery and Firearms (Special Provision) Act Cap, R11, LFN, 2004.

At the trial court, the appellant, Abubakar Sale was the 2nd accused person arraigned along side the two other accused persons,
G on a two count charges of conspiracy to rob and armed robbery. There was a 4th accused person named in the charge but he was not produced to face trial. (see p. 2 - 4) of the record of appeal. The three accused persons who were arraigned all pleaded not guilty to the charges.

H The prosecution called three (3) witnesses and tendered six exhibits which were admitted as Exhibits; A, AI, B, BI, C, and CI.

Pwl, a police corporal Vincent Tor attached to State CID Gusau, testified that he arrested the appellant and the 3rd accused person. He then tendered Exhibits A, AI, B and BI. He continued to testify

that it was Pw2, Buhari Abdullahi who identified the 3rd accused to him on the day he arrested the 3rd accused. However with regard to the appellant Pw1 simply stated that he arrested the appellant without stating the person who, if anyone at all, identified the appellant to him to warrant the appellant's arrest.

The second prosecution witness is Alh. Buhari Abdullahi, one of the victims named in the charge – sheet and he testified as Pw2. He stated that at about 3:45, a.m in the early hours of 18th February, 2003 armed robbers came to his house in Gummi and robbed him and his two wives named Ubaida Buhari and Kulu Buhari respectively. He further testified that the armed robbers collected the sum of N180,000.00 from him and the sum of N10,000.00 from his senior wife named Kulu Buhari, how much was collected from the 2nd wife Ubaida Buhari if I may ask?

He then further testified to the effect that the robbery started in the room where he was sleeping with his junior wife (named Ubaida Buhari); and ended in another room occupied by his senior wife, Kulu Buhari, Pw2 further stated that there was no light in the first room. He however testified that there was light in the second room and that he was able to see the faces of the armed robbers in the 2nd room. Pw2 and his two wives did not report the armed robbery incident to the police. One month after the armed robbery Pw2 said he saw the appellant on the road at Zuru and he went into the market to report to the police, that he has seen one of the robbers that robbed him. When the police and this witness came, they could not see the appellant. They were told that the appellant had entered a vehicle going to Rijau. Pw2 continued to testify that he too entered a vehicle to Rijau but when he got there the appellant was no where to be found. He went back to Zuru and reported to the police there.

Muhammad Adamu was the Pw3 and testified for the prosecution.

CHARGES

1. That you, Mohammed Ahmed (M), Abubakar Sale Alias Sholi (M), Aliyu Usman Alias Daudu (M) and Abdulrazak Danladi (M) on or about the 18th day of February, 2003 at Gummi town within the Gusau Judicial division conspired to rob one Alh. Buhari Abdullahi (M) of Sabon-Gari area, Gummi and you hereby committed an offence punishable under Section 97 of the penal code law.

2. That you, Mohammed Ahmed (M), Abubakar Sale alias Sholi (M), Aliyu Usman Alias Daudu (M) and Abdulrazak Danladi (M) (at large) on or about the 18th day of February, 2003 at about 0345 hours at Sabon-Gari area, Gummi within the Gusau Judicial Division attacked one Alh. Buhari Abdullahi of Sabon-Gari area, Gummi, while
 B armed with guns, cutlasses and sticks at his residence, and beat one of his wives called Ubaida Buhari and robbed him of the sum of N180,000.00K and N10,000.00 from one Kulu Buhari (Senior wife) of the said Alh. Buhari and you thereby committed an offence punishable under Section 1 (2) of the robbery and firearms (special provision) ACT CAP 398 LFN, 1990.
 C

All the accused persons pleaded not guilty. At the end of the trial and in a reserved judgment the trial court found the accused persons guilty and convicted for the offences of conspiracy, robbery
 D and fire arms (special Provisions) Act Cap. 398 LFN 1990. However the 3rd accused person was acquitted and discharged. The 4th accused person was not in court as he was never brought to court. Hear the trial court when it held thus:-

*"Based on the evidence adduced before this court finds and
 E hold that the prosecution has proved the charges of criminal conspiracy and armed robbery contrary to Section 97 Penal Code and Section 1 (2) of the Robbery and Firearms (special Provisions) ACT Cap 398 laws of the Federation of Nigeria 1990 against the 1st and 2nd accused persons. The 1st and 2nd accused person
 F Mohammed Ahmed and Abubakar Sale alias Sholi are convicted for the offences of conspiracy and armed robbery punishable under Section 97 of the Penal Code and Section (2) of the Robbery and firearms (special provisions) ACT Cap 398 laws of the Federation of
 G Nigeria 1990".*

The accused person being aggrieved by the decision of the trial court appealed to the Court of appeal Sokoto Division and filed a Notice of appeal containing four grounds of appeal. These grounds of appeal were copiously stated in the lead judgment. I do not have
 H to reproduce same in this judgment.

Both parties filed and exchanged their briefs. Both argued their issues in their briefs. The lower court after considering the submissions of both counsel dismissed the appellant's appeal and affirmed the judgment of the trial court. The lower court has this to say on

page 349 - 350, thus:-

“In conclusion, both the issues having been resolved in favour of the respondent, the appeal fails and same is dismissed for lacking in merit. The judgment of the lower court per Kulu Aliyu (CJ) convicting and sentencing the appellant to death by hanging is hereby affirmed”. B

Not satisfied by the above judgment of the lower court the appellant filed an appeal to the Supreme Court. Both parties filed and exchanged briefs of argument.

Although this is a concurrent judgment by the two lower courts nonetheless this court would definitely disturb same. The decisions of the lower courts are wrong and perverse. C

I have been opportune to have read in advance the all encompassing lead judgment just delivered by my learned brother Ogunbiyi JSC. I entirely agreed with the judgment just delivered that there is a lot of merit same is hereby allowed. The two concurrent judgments of the two lower courts are hereby set aside. Consequently, the appellant is hereby acquitted and discharged. D

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RHODES-VIVOIR JSC

I have had a preview of the judgment just delivered by my learned brother, Ogunbiyi, JSC. I agree that the appeal be allowed and the Appellant is entitled to an acquittal. I intend to say something on the identification of the Appellant. F

It is alleged by the prosecution that the Appellant and other persons broke into the home of PW2, armed with guns and machet, and robbed him, his wives of sums of money and then fled. PW2 reported the robbery to the Police one month after its occurrence on 18/2/2003. G

PW2 never identified the Appellant to the Police before the case was filed in court, rather he identified the Appellant in the dock when he gave evidence as a witness. The armed robbery was carried out in the night of 18/2/2003. On these facts it is clear that there are grave doubts on the identity of the Appellant as one of the robbers. H

Where there are serious doubts as to whether the Appellant was one of the armed robbers on the night of 18/2/2003, an identification parade ought to have been conducted, moreso as PW2 did

not know the Appellant before the robbery and the robbery lasted a very short time. Consequently PW2 surely did not have good opportunity of observing the features of the Appellant. See *Bozin v State* (1985) 2 NSCC (pt.i) p.1087, *Osuagwu v. State* (2015) 1- 2 SC (pt. l) p. 37, *Alolabi v. State* (2015) 6- 7 SC (pt.ii) p.1 Adesina & anor v B State (2012) 6 SC (pt.iii) p.114

The identification of the Appellant in this case fell far short of the standard required to justify concluding that the Appellant was one of the armed robbers that robbed PW2 and his wives of sums of money, while armed with guns and machet in the night of 18/2/ C 2003.

This court would rarely upset findings of fact made by the trial court and affirmed by the Court of Appeal, but would upset such findings where there has been exceptional circumstance such as -

D (a) the findings are perverse;
(b) the findings are unsupportable from the evidence before the court; or

(c) there was miscarriage of justice or violation of some principle of law or procedure. See *Haruna v A-G Federation* (2012) 3 E SC (Pt.iv) p.40, *Otukpo v John & anor* (2012) 3 SC (Pt.iv) p.95 *Alhaji Martins v COP* (2012)12 SC (pt.i) p.65, *Adeyemi v State* (1191) NWLR (Pt.170) p.679.

There are exceptional circumstances why this court should upset F concurrent findings of the two courts below which it rarely does. In this case concurrent findings of facts of the two court below that the Appellant was one of the armed robbers on the night of 18th of February, 2003 that robbed PW2 and his wives of sums of money is G perverse for the reasons earlier alluded to. Furthermore it would amount to a miscarriage of justice if the appeal is dismissed, since the identity of the Appellant as one of the armed robbers is in doubt. When there is doubt it must be resolved in favour of the accused person, as it would be better for nine guilty persons to go free than for one innocent man to be convicted.

H For this and the comprehensive reasoning of my learned brother Ogunbiyi, JSC, this appeal is allowed and the Appellant is acquitted and discharged.

NWEZE JSC

My Lord, Ogunbiyi, JSC, obliged me with the draft of the leading judgment just delivered now. I am, entirely, in agreement with His Lordship that this appeal is, wholly, meritorious.

From the facts of this case, it is not in doubt that the identification of the appellant fell far short of the standard outlined in case law, *Adesina and Anor v The State* [2012] 6 SC (pt 111) 114; *Osuagwu v State* [2013] 1 -2 SC (pt 1) 37; *Bozin v State* [1985] 2 NSCC (pt 1) 1087; *Eyisi v State* [2000] 15 NWLR (pt 697) 555; *Nwaturuocha v State* [2011] 6 NWLR (pt 1242) 170, 190. B

Thus, notwithstanding the concurrent findings and conclusions of the lower courts, his conviction cannot be allowed to stand, *Adeyemi v. State* [1991] 1 NWLR (pt 170) 679; *Martins v COP* [2012] 12 SC (pt 1) 65; *Otukpo v John and Anor* [2012] 3 SC (pt IV) 95. C

It is for these, and the more detailed, reasons in the leading Judgment that I too shall allow this appeal. Appeal allowed. I abide by the consequential orders in the leading judgment. D

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