

SUPREME COURT OF NIGERIA
FRIDAY 1ST JULY, 2016. SC. 254/2013
CORAM: S. GALADIMA, M. U. PETER-ODILI, K. B.
AKA' AHS, K. M. O. KEKERE-EKUN, J. I. OKORO, JJSC

JOEL IGHALO APPELLANT
V.
THE STATE RESPONDENT

EVIDENCE - Cross examination - Failure to conduct - Where an adversary fails to cross examine a witness upon a particular matter - It is implied that he accepts the truth of that matter as led in evidence (H1)

EVIDENCE - Single witness - Weight - Evidence of a single witness can justify conviction - If such evidence proves the case alleged - And is believed by Court which received it (H2)

ALIBI - Plea of - Particulars - Accused must state his whereabouts and those present with him at the time of the incident - And duty is then shifted to prosecution to investigate and disprove same (H3)

ALIBI - Investigation - Failure to conduct - It is not a must that once investigation is not conducted - It becomes fatal to prosecution's case - As Court can still consider credibility of prosecution's evidence (H4)

ARMED ROBBERY - Proof - The offence was proved against appellant beyond reasonable doubt - By evidence of identification given by PWs3 & 4 - Which disproved the defence of alibi (H5)

FACTS

Before the High Court of Edo State Benin City, accused/appellant was arraigned on a one count charge of conspiracy to commit armed robbery and two counts of robbery while armed with offensive weapons. He pleaded not guilty to the charge. The case for prosecution/respondent is that a gang of armed robbers invaded the residence of PW3 - Musa Ighalo in Benin City. They were armed with offensive weapons. They beat up PW3, robbed him of the sum of

N25, 000. 00 and inflicted serious injuries on him and members of his family which eventually led to the death of one of the family members.

After the robbery, PW3 made a statement to the Police identifying appellant as one of the robbers that attacked his residence. This led to the arrest of appellant. In his extra judicial statement to the Police, he set up a defence of alibi. The Investigating Police Officer, Sgt. Sunday Ogodo, who testified as PW4 investigated this defence but did not visit the place appellant alleged he was at the time of the crime. At the trial, appellant and respondent each called evidence in support of their cases. At the end of the trial, the Court acquitted and discharged appellant on counts 1 and 2 but found him guilty on count 3. He was therefore convicted and sentenced to death. Aggrieved, appellant appealed to the Court of Appeal Benin Division. The appeal was dismissed and judgment of the trial Court affirmed. Still dissatisfied, appellant appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal per

AKA' AHS JSC)

EVIDENCE - Cross examination - Failure to conduct

1. It is for the trial court to decide what the effect of failure to cross-examine a witness on a particular matter has on its evidence in regard to such matter having regard to the circumstances of the case. Where an adversary fails to cross examine a witness upon a particular matter, the implication is that he accepts the truth of that matter as led in evidence. In this case the trial Judge was right in accepting the evidence of PW3 that the appellant was one of the robbers who attacked him and his household in the early hours of 2nd April, 2003.
(p. 3318 H)

EVIDENCE - Single witness - Weight

2. It is settled law that the evidence of a single witness can justify a conviction if the evidence proves the case alleged and is believed by the court which receives it.

The learned trial Judge accepted and believed the evidence of PW3 on the identification of the appellant as one of

the robbers who attacked him and his household on 2/4/2003.

The evidence proved the case alleged namely that the appellant participated in the robbery and the learned trial Judge believed PW3.

The findings made by the learned trial Judge were upheld by the Court of Appeal. They are concurrent findings of facts.

The appellant has not shown that the decisions of the two lower courts are perverse or cannot be supported having regard to the evidence adduced by the prosecution. There is no reason whatsoever to disturb the findings made by the trial court and affirmed by the court below. (p. 3320 C)

ALIBI - Plea of - Particulars

3. Whenever an accused person puts up a plea of alibi, it is his duty to furnish the prosecution with the full particulars of the alibi. He must furnish his whereabouts and those present with him at the material time of the incident. The duty is then shifted to the prosecution to investigate and disprove same.

(p. 3321 A)

ALIBI - Investigation - Failure to conduct

4. The alibi set up by the appellant was investigated. PW4 could not be expected to travel to Warri in search of Elvis since he could not locate him at the Texaco Filling Station Uselu where he was said to be working. It does not always follow that once the prosecution failed to investigate an alibi, such failure is fatal to the case for the prosecution. The trial judge has a duty, even in the absence of investigation to consider the credibility of the evidence adduced by the prosecution vis-à-vis the alibi. (p. 3322 D)

ARMED ROBBERY - Proof

5. The learned trial Judge accepted the evidence of PW3 in finding that the appellant was one of the robbers. His evidence is one of recognition of the appellant since he was well known to him. This recognition therefore dispels any shadow of doubt that he committed the offence and therefore completely knocks

out the defence of alibi.

Since the alibi set up by the appellant was disproved by the evidence of PW3 and PW4 which the learned trial Judge believed, thus proving the commission of the offence of robbery by the appellant beyond all reasonable doubt, the Court of Appeal was right in affirming the judgment of the learned trial Judge and dismissing the appeal. This court further affirms the decision of the court below. The appeal is totally lacking in merit and I accordingly dismiss it. (p. 3322 H)

REPRESENTATION

Emmanuel O. Achukwu with R. C. Hezes Esq. and N. Okongwu Esq. for the appellant

Adewale Atake Esq. with Solomon Babajide Esq., for the respondent

CASES REFERRED TO

Gonzee (Nig.) Ltd. v. NERDC (2005) 13 NWLR (pt. 943) 634

Ochiba v. State (2011) 17 NWLR (pt. 1277) 663

Igbo v. State (1975) 9 NSCC 415

E Abogede v. State (1996) 5 NWLR (pt. 448) 270

Oforlete v. State (2000) 12 NWLR (pt. 681) 415

Onafowokan v. State (1987) Vol. 18 (pt. II) NSCC 1101

Ali v. State (1988) 1 NWLR (pt. 68) 1

Abogede v. State (1996) 5 NWLR (pt. 448) 270

F Olaiya v. State (2010) 3 NWLR (pt. 1181) 423

Attah v. State (2010) 10 NWLR (pt. 1201) 1

Gachi v. State (1965) NMLR 333

Yanor v. State (1965) NMLR 337

G Odu v. State (2001) 10 NWLR (pt. 722) 668

Shehu v. State (2010) 8 NWLR (pt. 1195) 112

Umani v. State (1988) 1 NWLR (pt. 70) 274

STATUTES REFERRED TO

H Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990, s. 1(2)(a)

Evidence Act 2011, s. 135

LEAD JUDGMENT BY AKA'AH'S JSC

The appeal of the appellant is predicated on the ground that the prosecution did not prove his guilt beyond reasonable doubt and so the Court of Appeal was wrong in affirming the decision of the trial court which found him guilty of armed robbery and sentenced him to death by hanging. B

The facts of the case are as follows:

On the 1st of April, 2003 at about 2 a.m., a gang of armed robbers invaded the residence of Musa Ighalo at No. 18, Umeri Street, Upper Mosheshe, off Sakponba Road, Benin City. They were armed with guns, machetes battle axes and iron rod. They beat up the said Musa Ighalo who testified as PW3, robbed him of the sum of N25,000.00 and inflicted serious injuries on him and members of his family which eventually led to the death of Ehinome Ighalo, step-brother of the appellant who was then seventeen years old and a student of the Federal Polytechnic Auchi. C D

The appellant is the first son of PW3 but PW3 did not marry the appellant's mother. The appellant lived with his mother from birth until he was 20 years old when the appellant went to stay with PW3. At the time the robbery took place the appellant was living in PW3's house. In March 2003 the appellant visited his father's working place at the State Hospital Management Board in Benin City. There he met Frank Evokhon and Godwin Oide who were also employees of the State Hospital Management Board. They testified as PW1 and PW2 respectively. He complained about the conduct of his father towards him in not showing him respect and providing for his needs. He then informed PW1 and PW2 that he had made up his mind to teach his father a bitter lesson by joining a gang who will deal with his father. E F G

After the robbery PW3 made a statement to the Police stating that he recognized the appellant among the robbers who invaded his residence. This led to the arrest of the appellant who denied his involvement in the robbery attack on the PW3 and other members of his household. In his extra judicial statement to the Police, he set up a defense of alibi to the effect that he was in Warri from 31/3/03 to 5/5/03 having gone there with his master, a petrol tanker driver to load petrol. The Investigating Police Officer Sgt. Sunday Ogodo who testified as PW4 investigated this defence but did not visit Warri. He H

however visited the place where the appellant's master could be found as supplied by the appellant but the said master could not be traced. Subsequently the appellant was charged to court on a one count charge of Conspiracy to commit armed robbery and two counts of robbery while armed with offensive weapons. He was acquitted and
B discharged on counts 1 and 2 but found guilty on count 3 and was convicted and sentenced to death. He unsuccessfully appealed to the Court of Appeal, Benin City which was dismissed on 19/4/2013; hence the further appeal to this Court. The Notice of Appeal is dated
C 2/5/2013 and from it a sole issue was distilled for determination. The appellant filed a reply brief in response to the respondent's brief in which he alleged that two new issues were raised in the respondent's brief dealing with inconsistencies in the evidence of the appellant and DWI and the concurrent findings of fact made by the courts below.

D Learned counsel for the appellant listed the ingredients that needed to be proved to sustain the charge of armed robbery and concentrated his arguments on the identification of the appellant by PW3. He argued that because of the sour relationship which existed between the appellant and PW3, the evidence he gave about his
E recognizing the appellant in the dark from the flash of a torch should be accepted with circumspection since the robbers were said to be wearing face caps as it is common knowledge that a person in the dark on whom torchlight is flashed would ordinarily not have a clear
F vision of the objects at the source of the light so it is doubtful that PW3 could have had a clear vision to be able to identify any of the robbers as the appellant under such a condition, more so when they were all wearing face caps. He maintained that even if PW3's evidence of identification was not challenged, that does not derogate
G from the principle that such evidence must still be credible and probable before the Court can accept and act on it as was decided in *Gonzee (Nig.) Ltd v. NERDC* (2005) 13 NWLR (Pt. 943) 634. Learned counsel then referred to *Ochiba v. State* (2011) 17 NWLR (Pt. 1277) 663 on the principles that should guide the Court when dealing with
H the evidence of identification and submitted that because of the bad blood which existed at the material time between the appellant and PW3, the latter already harboured some prejudices against the appellant and so he was convinced in his mind that the appellant was among the gang that attacked him. Since PW3 did not give evidence

as to any other factors such as voice or height which assisted him in identifying the appellant, a serious doubt has been cast on the appellant's identification by PW3 and rendered same improbable. Learned counsel then dealt with the alibi the appellant raised which was not investigated and submitted that since PW4 did not exhaustively and comprehensively investigate the alibi set up by the appellant, this has led to a fundamental failure which warrants that the defence of alibi set up by the appellant should succeed. Learned counsel impressed on this court to hold that the prosecution failed to prove that the appellant participated in the robbery which is the most essential ingredient of the offence since the defence of alibi set up by the appellant was not destroyed and the evidence of identification given by PW3 is fundamentally flawed and cannot safely be relied upon in fixing the appellant to the scene of the crime. B C

The appellant filed a reply brief in which he argued that the alleged inconsistencies in the evidence of the appellant and DW1 did not amount to material contradiction which could have adverse effect on the defence of the appellant. He also addressed the issue of concurrent findings of the two lower courts and submitted that although this court would ordinarily not interfere with concurrent findings of fact by the lower courts, an appellate court can in appropriate circumstances look at the evidence on record and make an objective finding where there has been a perverse finding by the trial court which led to a miscarriage of justice as happened in the instant case on the identification of the appellant by PW3. Learned counsel for the respondent submitted that the evidence of a single witness can justify a conviction if the evidence proves the case alleged and is believed by the court which receives it and referred to *Igbo v. State* (1975) 9 NSCC 415 and *Abogede v. State* (1996) 5 NWLR (Pt. 448) 270. He argued that the evidence of PW3 was thoroughly considered and evaluated by the trial Judge in the manner required by law and the Court of Appeal was justified in confirming as it did the trial court's reliance on the evidence of PW3 to convict the appellant. Since there is concurrent findings of fact of the two courts below learned counsel argued, the burden is on the appellant to show that the decision of those courts were perverse or cannot be supported having regard to the evidence adduced by the prosecution or that a principle of law has been violated before this court can interfere with D E F G H

the decisions. On the alleged bad blood between the appellant and PW3 which could have been responsible for PW3's evidence in wanting to rope in the appellant in the commission of the offence, learned counsel contended that neither the appellant nor PW3 alluded to such motive. Learned counsel argued that there is an inconsistency
 B between the testimony of DW1 and the appellant on the issue of when they departed Benin for Warri to lift the fuel and the account of what took place on 2/4/2003 and submitted that these made the trial Judge to conclude that the defence of alibi put forward by the accused was bogus.

C The evidence given by PW3 by which he was able to recognize the appellant as one of the robbers is this:-

*"There and then the second person in the group flashed light on to my face when he did that I saw the first person and saw it was
 D the accused".*

When PW3 was being cross-examined, learned counsel rather than suggest to PW3 that his vision was blurred because of the torch-light that was flashed into his face and so could not definitively say it was the appellant he recognised, decided to ask him the type of light
 E that was flashed on his face and he answered that he did not know. In appraising this piece of evidence the learned trial Judge refused to accept the contention by counsel that the failure by PW3 to describe the flashlight allegedly beamed on him created some doubt in PW3's identification of the accused. He considered the point as tenuous. He
 F therefore believed and accepted the evidence of PW3 that the appellant was one of the invaders who invaded the house of PW3 with various offensive weapons and robbed him and members of his household. The court below considered the issue and held that the
 G identification of the appellant was not challenged under cross-examination and concluded that the trial judge painstakingly evaluated the evidence of PW3 accepted and believed the same as establishing the offence of armed robbery against the appellant beyond reasonable doubt.

H ***It is for the trial court to decide what the effect of failure to cross-examine a witness on a particular matter has on its evidence in regard to such matter having regard to the circumstances of the case. Where an adversary fails to cross examine a witness upon a particular matter, the implication is***

that he accepts the truth of that matter as led in evidence. See: Oforlete v. State (2000) 12 NWLR (Pt. 681) 415. In this case the trial Judge was right in accepting the evidence of PW3 that the appellant was one of the robbers who attacked him and his household in the early hours of 2nd April, 2003.

As to the sour relationship which existed between the appellant and PW3 which appellant now says could be the reason why PW3 roped him in the robbery, neither the appellant nor PW3 testified to this fact. When he testified in court, the appellant denied he ever threatened to deal with his father and when he was cross-examined he said:-

“My father and I are very close. My father does not hate me”.

However the evidence given by PW1 and PW2 showed that the appellant nursed a bitter resentment towards PW3 and on account of this he made up his mind to teach the father a bitter lesson. According to PW1, it was the appellant who told him about the humiliation he was suffering at the hands of his father (PW3) and his resolve to teach PW3 a bitter lesson. When PW1 asked him the bitter lesson he intended to teach his father the appellant replied that:- *“he had joined a gang and he would appeal to the gang to teach his father a bitter lesson”*

PW2 corroborated the evidence of PW1. He said he was together with PW1 when the appellant informed them he was unto a gang and that he was going to deal with his father. It was the appellant who spoke directly with PW1 and PW2 and disclosed to them the plans he had to deal with PW3. The inference which the court could draw from the evidence of PW1 and PW2 is that the appellant made good his plan to teach PW3 the bitter lesson he had disclosed to them. Any other inference to be drawn on the evidence of PW1 and PW2 in favour of the appellant would be perverse.

The Court of Appeal properly addressed the issue of the probative value of PW3's evidence on the sour relationship that existed between him and the appellant when it stated at page 128 of the record per Lokulo-Sodipe JCA as follows:-

“The existence of a “sour” relationship between the appellant and PW3 pertain to the two of them and evidence in that regard can only flow from them. The appellant never made an issue of the “sour” relationship between him and PW3 before the lower court. On the

contrary and as earlier indicated, his evidence was to the effect that the relationship between him and his father (PW3) is convivial. The appellant in my considered view cannot now be seen to raise the fact of the “sour” relationship between him and his father (PW3) as raising any doubt concerning his identification by recognition by PW3 as he never placed this fact before the lower court in any manner. In its judgment the lower court having noted that the identification of the appellant was not challenged under cross-examination not only noted that the fact that PW3 and the appellant are father and son underscores the fact that the appellant’s identification was not in doubt but also moved a step further to say that it made the identification of the appellant by PW3 much easier”.

It is settled law that the evidence of a single witness can justify a conviction if the evidence proves the case alleged and is believed by the court which receives it. See: Igbo v. State (1975) 9 NSC 415 at 418 per Obaseki JSC; Onafowokan v. State (1987) Vol. 18 (Pt. II) NSCC 1101; Ali v. State (1988) 1 NWLR (Pt. 68) 1 and Abogede v. State (1996) 5 NWLR (pt. 448) 270.

The learned trial Judge accepted and believed the evidence of PW3 on the identification of the appellant as one of the robbers who attacked him and his household on 2/4/2003.

The evidence proved the case alleged namely that the appellant participated in the robbery and the learned trial Judge believed PW3.

The findings made by the learned trial Judge were upheld by the Court of Appeal. They are concurrent findings of facts.

The appellant has not shown that the decisions of the two lower courts are perverse or cannot be supported having regard to the evidence adduced by the prosecution. There is no reason whatsoever to disturb the findings made by the trial court and affirmed by the court below. See: Olaiya v. State (‘2010) 3 NWLR (Pt. 1181) 423; Attah v. State (2010) 10 NWLR (Pt. 1201)

H 1.

The last point is the issue of alibi which the appellant said was not investigated which should avail him leading to the success of the appeal. The appellant has argued that the alibi he raised was not exhaustively and comprehensively investigated.

Whenever an accused person puts up a plea of alibi, it is his duty to furnish the prosecution with the full particulars of the alibi. He must furnish his whereabouts and those present with him at the material time of the incident. The duty is then shifted to the prosecution to investigate and disprove same.

See: Gachi v. State (1965) NMLR 333. Yanor v. State (1965) NMLR B 337. Odu v. State (2001) 10 NWLR (Pt. 722) 668 and Shehu v. State (2010) 8 NWLR (Pt. 1195) 112.

When the appellant was arrested, he made two statements. He made the first statement on 14/4/2003 and an additional statement on 12/5/2003. The two statements were received in evidence as Exhibits P1 and P2 respectively. In Exhibit P1 he stated that he left home with his master Elvis to Warri to lift fuel and did not return until 5th April, 2003. The appellant called Elvis Eghaghe who testified as DW1. He said he traveled with the appellant to Warri Refinery on 30/3/2003 and they did not return to Benin City until 5th April, 2003.

The prosecution called Sgt. Sunday Ogodo who testified as PW4. He was the one that took over the investigation of the case at the State C.I.D. after it was transferred from Ugbekun Police Division. He said that after recording the accused/appellant's statement where he alleged he was in Warri with his master, he took him to Texaco Oil Company Ltd. Uselu to look for Elvis but they did not find the said Elvis. It was there he ended his investigation as there was no need to travel to Warri in search of Elvis who was supposed to be living in Benin.

The appellant denied under cross-examination that PW4 ever requested him to take him to DW1's house.

The learned trial Judge believed the evidence of PW4 who took over the investigation of the case when it was transferred from Ugbekun Police Division to the State C. I. D. It was PW4 who recorded Exhibits P1 and P2 from the appellant and the statements of PW1 and PW2. In Exhibit P1 the appellant raised the defence of alibi and stated that on the date of the robbery he was away to Warri in the company of his master Elvis to lift fuel. In his evidence in-Chief PW4 said:-

"The accused person alleged that on the fateful day he was in Warri. However he failed to take us to the master he said he accompanied to Warri and he also failed to take me to where he said he

went to in Warri. The accused took me to Texaco Oil Coy. Ltd. Uselu which he mentioned in Exhibit P1 but there was no one called Elvis in the place”.

Under cross-examination PW4 maintained that the evidence he gave in court was from the investigation he carried out and when he was asked why he failed to visit Warri he replied-

“I did not see the need to go to Warri since the accused told me his master lives in Benin and I accompanied him to the Benin address he gave and the said master could not be traced at that address”.

The learned trial Judge in dealing with the evidence of PW4 as it related to the plea of alibi said at page 64 of the record:-

“The defence of alibi he puts forward is hollow. This is not full disclosure as alleged by the prosecution but principally because his story turned out to be brazen falsehood. For instance, PW4 told the Court and I believe him that he went to Texaco Filling Station Uselu where accused told him his so-called Master Elvis worked but that there was no trace of him there”.

The alibi set up by the appellant was investigated. PW4 could not be expected to travel to Warri in search of Elvis since he could not locate him at the Texaco Filling Station Uselu where he was said to be working. It does not always follow that once the prosecution failed to investigate an alibi, such failure is fatal to the case for the prosecution. The trial judge has a duty, even in the absence of investigation to consider the credibility of the evidence adduced by the prosecution vis-à-vis the alibi. See: Umami v. State (1988) 1 NWLR (Pt. 70) 274; Ozaki v. State (1990) 1 NWLR (pt.) 124) 92. In this case PW4 went to Texaco Filling Station Uselu where Elvis was said to be working but did not meet him.

The learned trial Judge believed PW4 and disbelieved the evidence put forward by the appellant and DW1. He was entitled to do so. The court below saw no reason to interfere and this Court cannot on the printed record say that the learned trial Judge was wrong in believing PW4.

The learned trial Judge accepted the evidence of PW3 in finding that the appellant was one of the robbers. His evidence is one of recognition of the appellant since he was well known to him. This recognition therefore dispels any shadow

of doubt that he committed the offence and therefore completely knocks out the defence of alibi. See: State v. Aigbangbee (1988) 3 NWLR (Pt. 84) 548; Walaka v. State (2010) 10 NWLR (Pt. 211) 522; Attah v. State (2010) 10 NWLR (Pt. 1201) 190.

Since the alibi set up by the appellant was disproved by the evidence of PW3 and PW4 which the learned trial Judge believed, thus proving the commission of the offence of robbery by the appellant beyond all reasonable doubt, the Court of Appeal was right in affirming the judgment of the learned trial Judge and dismissing the appeal. This court further affirms the decision of the court below. The appeal is totally lacking in merit and I accordingly dismiss it.

GALADIMA JSC

This appeal is against the judgment of the Court of Appeal Benin in Appeal No. CA/B/216c/2009 delivered on the 19th day of April 2013, in which the Court affirmed the conviction and sentence of the High Court of Edo State sitting at Benin City.

The sole issue distilled by the Appellant and which was adopted by the Respondent is:

“Whether the Court of Appeal was right in affirming the decision of the trial Court holding that the prosecution did prove the guilt of the Appellant beyond reasonable doubt.”

I have had the privilege of a preview of the judgment just delivered by my learned brother AKA'AH'S JSC. I am in entire agreement with him that this appeal lacks merit and must perforce fail. The dominant issue in this appeal as contested in the two Courts below is whether from the nature of the evidence adduced by the prosecution, the offence of armed robbery has been proved against the appellant beyond reasonable doubt.

The facts of the gruesome case have been so ably set out in the leading judgment that I do not deem it necessary to embark on any further review of them.

The evidence of PW3, the father of the appellant was thoroughly considered and evaluated by the learned trial judge; and the Court below rightly affirmed same. There is concurrent findings of fact by the two courts. Appellant has not shown that the decisions of

those courts were perverse or cannot be supported having regard to the evidence adduced by the prosecution, or the principle of law has been violated thereby leading to a miscarriage of justice.

PW3 gave evidence that he was able to recognize the appellant as one of the robbers because:

B *“There and then the second person in the group flashed light on to my face when he did that I saw it was the accused (appellant herein).”*

C The learned counsel for the appellant when cross-examining PW3 failed to suggest that his vision was blurred as a result of the torch light that was flashed directly into his face, and so could not say with certainty that it was the appellant he recognized, rather he decided to ask him to describe the type of light that was flashed on his face. PW3’s answer was that he did not know.

D That is why the learned trial judge rejected the contention of the appellant’s counsel that the failure by PW3 to describe the flash light beamed on him created some doubt in PW3’s identification. I agree with the trial judge when he held that this point raised by the counsel was extremely untenable. He rightly believed and accepted
E the evidence of PW3 that the appellant was one of the persons who invaded his house with various offensive weapons and robbed him and members of his household and fatally injured one of his sons. The court below on the other hand considered the issue and held that the identification of the appellant by PW3 was not challenged
F under cross examination. The court thus concluded that the trial judge carefully evaluated the evidence of PW3 and also concluded that the prosecution did establish the offence of armed robbery against the appellant beyond reasonable doubt.

G The Court below also properly addressed the issue of the probative value of PW3’s evidence on the sour relationship that existed between him and appellant when it stated at page 128 of the record inter alia, that:

H *“In its judgment the lower court having noted that the identification of the appellant was not challenged under cross-examination also noted that the fact that PW3 and the appellant are father and son underscores the fact that the appellant’s identification was not in doubt but also moved a step further to say that it made the identification of the appellant by PW3 much easier.”*

Also issue of alibi set up by the appellant was investigated by PW4. He was believed by the learned trial judge who disbelieved the evidence put forward by the appellant and DWI.

In view of the foregoing I, too, dismiss this appeal. It lacks merit.

B

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, Kumai Bayang Aka'ahs, JSC and to underscore my support of the reasoning, I shall make some remarks.

The Appellant was tried by the High Court of Edo State sitting in Benin City on a three count charge of Conspiracy and Armed Robbery punishable under section 1 (2) (a) of the robbery and Firearms (Special Provisions) Act, Cap 398 Laws of the Federation of Nigeria 1990. At the end of the trial, the Appellant was discharged and acquitted by the trial Judge R.T. Amaize J in Counts 1 and 2 but convicted in Count 3 and sentenced to death by hanging. The Appellant aggrieved appealed to the Court of Appeal Benin Division which affirmed the conviction and sentence of the Appellant by the High court of Edo State sitting in Benin.

C

E

Further dissatisfied with the judgment of the Court .of Appeal or court below, the Appellant has come before the Supreme Court on appeal.

On the 28th day of April, 2016 date of hearing, Emmanuel Achukwu Esq. of counsel for the Appellant adopted his Brief of Argument filed on the 16/7/2013 and in it, he formulated a single issue for determination of the appeal which is as follows:-

F

Whether the Court of Appeal was right in affirming the decision of the trial Court holding that the Prosecution did not prove the guilt of the Appellant beyond reasonable doubt.

G

Adewale Atake, learned counsel for the Respondent adopted his Brief of Argument filed on the 12/9/2013 and he adopted the sole issue crafted by the Appellant which is sufficient in the determination of this appeal.

H

SOLE ISSUE

Whether the Court of Appeal was right in affirming the decision of the Trial Court holding that the Prosecution proved the guilt of the Appellant beyond reasonable doubt.

Learned counsel for the Appellant contended that the prosecution failed to prove the guilt of the appellant beyond reasonable doubt for the following reasons:-

- i. That the Appellant was convicted solely on the evidence of PW3 who at the material time had a very sour relationship with the Appellant and harboured prejudices against the Appellant in view of the Appellant's alleged threat to deal with him and his evidence ought to have been accepted with great caution.
- ii. The identification of the Appellant by the PW3 was grossly and fundamentally flawed and could not be safely relied upon to fix the Appellant to the scene of crime.
- iii. The Police failed to comprehensively and conclusively investigate the defence of alibi duly and timeously raised by the Appellant. In effect, the Prosecution failed to debunk that defence and this lends credence to the improbability of the Appellant physically being at the scene of crime.

Learned counsel relied on the cases of: *Onafowokan v State* (1987) 3 NWLR (Pt.61) 538; Section 135 of the Evidence Act, 2011; *Ikem v State* (1985) 1 NWLR (Pt.2) 378; *Ogudo v State* (2011) 18 NWLR (Pt. 1278) 1 at 32; *Bozin State* (1985) 2 NWLR (Pt.8) 465; *Ikenta Best (Nig.). Ltd.. A. G. Rivers State* (2008) 6 NWLR (Pt.1084) 612 at 642; *Gonzee (Nig.) Ltd v NERDC* (2005) 13 NWLR (Pt.943) 634 at 650; *Ochiba v State* (2011) 17 NWLR (Pt. 1277) 663 at 694-695; *Shehu v The State* (2010) 8 NWLR (Pt. 1195) 112 at 132 - 134; *Eke v State* (2011) 3 NWLR (Pt. 1235) 589 at 606.

Mr. Adewale Atake for the Respondent countered by stating that the prosecution proved the case of armed robbery against the Appellant beyond reasonable doubt for the following reasons:-

1. The prosecution led evidence via the PW3 identifying the Appellant as one of the robbers who robbed the PW3 on the date in question thus fixing the Appellant as one of the robbers who robbed the PW3 on the date in question thus fixing the Appellant to the scene of crime.
2. The trial Court believed the evidence of PW3 in its entirety and rightly rejected the defence of alibi set up by the Appellant.
3. The identification of the Appellant by the PW3 was in order and was not shaken in any material respect by the fire of cross examination.

That the Court of trial correctly assessed this evidence and rightly relied on it. That the Court of Appeal was correct to have concurred with the trial Court on the crucial issues of identification of the Appellant by PW3 and the rejection of the alibi put forward by the Appellant and so the Supreme Court should not disturb the findings of fact as Appellant has not shown them to be either perverse, unsupported by the evidence led or a violation of any known principle of law. He cited *Jina v The State* (2010) 4 NWLR (Pt.1184) 217 at 243; *Awosika v State* (2010) 9 NWLR (Pt. 1198) 40 at 71 - 73; *Igbo v State* (1975) 9 NSCC 415 at 418; *Olaiya v State* (2010) 3 NWLR (Pt.1181) 423 at 438; *Attah v State* (2010) 10 NWLR (Pt. 1201) 190.

In reply on points of law, learned counsel for the Appellant along the line of the Reply Brief filed on 3/10/13 stated that an Appellate Court is competent to tamper with the evaluation of the evidence and/or finding of a trial Court if they are not based on a proper and dispassionate appraisal of evidence given in support of each party's case or where on the face of the record, it is clear that justice has not been done in the case. He cited *Lawal v Dawodu* (1972) 8 -9 SC 83; *Fashanu v Adekoya* (1970) 6 SC 83; *Balogun v Akanji* (1982) 1 NWLR (Pt.70) 301.

A foray into the evidence led would show that on the 1st day of April 2003 at about 2am a gang of armed robbers invaded the residence of PW3, Musa Ighalo armed with guns, machetes, bottles, axes and iron rods, beat up and robbed him of the sum of N25,000.00 and inflicted serious injuries on members of his family from which one of the sons PW3, Ehinome Ighalo aged 17 years died shortly afterwards. Coincidentally the Appellant is also a son of PW3 though from a woman not married to him. That PW3 and Appellant had a sour relationship and at an earlier date Appellant had threatened to deal with PW3 with members of his gang. This threat is in the presence of PW1 and PW2 who testified to that effect. In his testimony in Court and statement at the police station, he, PW3 said he recognised the appellant as one of the robbers and in consequence thereof the Appellant was arrested.

While Appellant took the standpoint that what was presented before the Court was below the standard required to prove the armed robbery charged beyond reasonable doubt. The Respondent opposing that view contends that what they as prosecution presented

before the trial court made out the required proof which is beyond reasonable doubt. That it is not necessary in proof of a criminal offence as in this instance to seek proof to the hilt or beyond the shadow of doubt.

Indeed the required proof is beyond reasonable doubt, shadows of doubt could be reflected in the case of the prosecution beyond what the law has prescribed. See *Onafowokan v State* (1987) 3 NWLR (Pt. 16) 538; *Ikem v State* (1985) 1 NWLR (Pt.2) 378; *Moses Jua v The State* (2010) 4 NWLR (Pt. 1184) 217 at 243.

Taking the yardstick on the expected standard of proof and juxtaposing it to the essential ingredients of the offence of armed robbery to which that standard is to be met and the stated elements of the offence are thus:-

- (1) That there was a robbery;
- (2) That the robbery was executed with the use of offensive weapon(s) and another way of saying so is that the said robbery was an armed robbery; and
- (3) That the accused person participated in it.

Those elements above have to co-exist and established beyond reasonable doubt. See *Awosika v State* (2010) 9 NWLR (Pt. 1198) 40 at 71-73.

At the Court of first instance, the reaction of the trial Court to the evidence proffered along the line of what is required of the prosecution to discharge the burden of proof laid upon it in the task it was faced with and what the Appellant in defence can do to puncture whatever arsenal the prosecution has marshaled stated as follows:

“A holistic approach to the evidence of PW3 under cross examination quite clearly reveals that the totality of his evidence is to the effect that he saw the Accused as one of the robbers... the only feeble attempt made to discredit the evidence of the witness was when he was asked to tell the Court the type of flashlight that was beamed on him and he said he could not say.”

The Court further held:

“As a matter of fact, he was not bound to know the nature of the flashlight that was beamed on him. I therefore believe and accept the evidence of PW3 that on the fateful night in which a group of persons armed with various offensive weapons invaded his abode and robbed him and members of the household as well as injuring

them, the Accused person was one of the invaders. I find that as a fact.” (See page 64 of the Records).

The Court of Appeal concurred with this finding of the trial Court at page 121 of the Record, where the Court of Appeal noted:

“The Appellant certainly did not challenge the correctness of his identification by recognition of his own father as one of the robbers that committed the robbery in question. What engaged the attention of learned counsel for the Appellant was the type of flashlight that was beamed on PW3..., had learned counsel wanted to challenge the correctness of the identification of the Appellant by recognition by PW3, one would have thought that the witness would have been questioned to show that he could not have seen the Appellant in the circumstance that he narrated. This was not”. See pages 121 - 122 of the Record.

The Court Below further stated thus:-

“I certainly do not see how the evidence of identification of the Appellant by recognition by PW3 adduced by the Respondent and the unequivocal finding of the Lower Court that the Appellant was one of the robbers that invaded the house of the PW3 at about 2a.m on 1/4/2003 can be faulted”.

At page 128 of the Record, the Court of Appeal held, regarding this issue:-

“The Appellant had equally relied on the calling of persons who were not victims or present at the scene as witnesses to testify as to the probability of his committing the offence he was charged with, as an occurrence that should have resulted in his discharge. The witnesses the Appellant is referring to in this regard are no doubt PWs 1 and 2. I however cannot but say that the stance of the Appellant in this regard is definitely not borne out by the evidence relied upon by the Lower Court... The Lower Court having duly and indeed painstakingly evaluated the evidence of the said PW3 accepted and believed the same as establishing the offence of armed robbery against the Appellant beyond reasonable doubt”.

The Appellant seems to base his dissatisfaction with what the Courts Below did solely on the fact that the Court placed reliance on the evidence of PW3 in convicting the Appellant and that it was not enough. This posture can be taken to mean one not realizing that it is not in the number of witnesses that count but that a sole witness

whose evidence meets the standard of proof is enough and nothing stops the Court utilizing that evidence that has come from the single witness to ground the conviction. This is so because credibility of evidence does not usually depend on a number of witnesses that testify on a particular point rather, it is whether the evidence of one credible witness on the particular point is believed and accepted and once the answer to the question is positive, then a conviction would stand. I place reliance on *Igbo v State* (1975) 9 NSCC 415 at 418; *Abogede v State* (1996) 5 NWLR (Pt. 449) 270 at 280.

I accept the submission of learned counsel for the Respondent that the trial Court made a calm evaluation of the evidence of PW3 which it described as the “*hub around which the Prosecutor’s case revolves*” and that Court came to the conclusion that Appellant was one of the robbers who robbed PW3 on the date and time in question. The Court of Appeal agreed with those findings of fact thus creating the concurrent findings present as in this case, the questions to ask are whether the findings of fact have been arrived at perversely or erroneously and unsupported by the evidence adduced by the prosecution or were in violation of any principle of law. When the answer comes out negative, then the appellate Court as the Supreme Court is now called upon to act, would be wise to hold back the hand of interference as it has no business disturbing such concurrent findings made without a miscarriage of justice. That is the situation as I see happened in this instant case. See *Olaiya v State* (2010) 3 NWLR (Pt. 1181) 423 at 438; *Attah v State* (2010) 10 NWLR (Pt. 1201) 190; *Olokoitinti v Salami* (2002) 13 NWLR (Pt. 784) 307 at 317.

To cover the field, one would want to get into the matter of defence of alibi raised by the Appellant. The learned trial Judge found that the Appellant had not disclosed the house address of his master where he was supposed to have been at the material time and the Court found as follows:-

“*Even more amusing are some of the un-natural events associated with the alibi raised as revealed by evidence and which events do not only demonstrate the degree of accused’s desperation to save his neck but further strengthened the position of this Court in describing the alibi as bogus. I catalogue those events as follows:-*

Firstly, according to the accused when he was informed by

one Iyere that armed robbers had attacked his father, he asked his master for money to travel to see his father, and the latter's response was that that would await completion of their exercise of fuel lifting. In any event, they did not eventually lift fuel until three days later.

Secondly, by accused's own showing after they had lifted fuel on 5/4/03, they eventually arrived Benin late on the same day with the result that they could not discharge the consignment until the following morning, 6/3/03. Thereafter, there being no evidence that he bothered to see his father, the accused again left for Warri the next day, 7/4/03.

Thirdly, according to the accused, on getting to Warri on 7/4/03, there was no fuel there, so they headed for Lagos. In this respect, both the accused person's decision to return to Warri and his master's omission to advise him on the need to see his father but rather tacitly encouraged him to embark on another journey without seeing his father are, to say the least, very unnatural. Even more troubling is the fact that before leaving for Lagos, both the accused and his master, calling to mind evidence of the accused, had become aware that the robbery incident eventually resulted in the death of one of the accused's brothers, yet he spared no thought on the need to see his father".

There were many other areas on this alibi that lent strength to the findings of the trial Court and agreed to by the Court below that the alibi was hollow and based on falsehood and could not withstand evidence of the prosecution which not only fixed the Appellant at the scene of crime at the material time but effectively dislodged the defence of alibi. See *Olaiya v State* (supra); *Michael House* (sic, Hausa) v *State* (1994) 6 NWLR (Pt. 350) 281; *Eke v State* (2011) 3 NWLR (Pt.1235) 589 at 606.

For a fact there was a lot on which the trial Court could rely and it did so effectively and made the findings it made, thereafter reaching its conclusion that the prosecution had proved its case beyond reasonable doubt and the situation the Court of Appeal could not resist going along with. There is to be said at this level that there is no room to manoeuvre to do anything to the contrary. From the foregoing and the well articulated lead judgment, I too see no merit in this appeal which I accordingly dismiss.

I abide by the consequential orders made.

KEKERE-EKUN JSC

I have had the preview of the judgment of my learned brother, KUMAI BAYANG AKA' AHS, JSC just delivered. I agree with the reasoning and conclusion that there is no iota of merit in this appeal and
 B it should be dismissed.

My comments in support of the lead judgment are in respect of the identification of the appellant as one of those who carried out the armed robbery in the home of PW3 (his father) on the 1st of April
 C 2003 around 2 a.m.

In order to secure a conviction for the offence of armed robbery, the prosecution must prove beyond reasonable doubt that there was a robbery or series of robberies, that it was an armed robbery and that the accused person was one of those who took part in the
 D armed robbery. See: *Bozin Vs The State* (1985) 2 NWLR (Pt.8) 465. It was not in dispute that there was a robbery and that it was an armed robbery. There was unchallenged evidence that PW3 and members of his household were beaten with machetes, battle axe and iron rods. The encounter unfortunately led to the death of his
 E 17 year old son. The bone of contention is whether the appellant was one of those who took part in the armed robbery.

It goes without saying that credible evidence that the accused person was one of the perpetrators of the crime is essential in the discharge of the prosecution's duty to establish its case beyond reasonable doubt. This is to ensure that there is no miscarriage of justice. The question whether an accused person is properly identified as one who participated in the commission of the offence is a question of fact to be -determined by the court based on the evidence ad-
 F duced in that regard. , See: *Ikpo Vs The State* (2016) LPELR - SC 722/2014; *Ukpabi Vs The State* (2004) 11 NWLR (Pt.884) 439.

Where the accused person is known to the witness, there would be no need to conduct an identification parade. See: *Eyisi Vs The State* (2000) 15 NWLR (Pt.691) 555; *Williams Vs The State* (1992)
 H 10 SCNJ 74.

This case is unique in that the appellant is the first son of PW3, the victim of the crime. My learned brother has summarised the background to the relationship between father and son in the lead judgment. I adopt the summary herein.

The law is settled that the evidence of a single witness can ground a conviction if it is accepted and believed by the court. See: Effiong Vs The State (1998) 8 NWLR (Pt.502) 362; Alonge Vs I.G.P. (1959) SCNLR 16; Onafowokan Vs The State (1987) 3 NWLR (Pt.61) 538 @ 552; Ohunyon Vs The State (1996) 3 NWLR (Pt.436) 264. What is important is the probative value of the evidence. See: Agbi Vs B Ogbah (2006) 11 NWLR (Pt.990) 65.

In the instant case PW3 gave credible evidence that he was able to identify the appellant (his son) when he shone a flashlight in his face during the robbery. Being his son who lived with him in the same house, there could have been no difficulty in identifying him, no matter how dim the light might have been. The circumstances of this case are very different from a situation where the robbers are strangers to the victim. C

The only issue put to PW3 under cross-examination on his D recognition of the appellant was to ask him to identify the brand of torchlight shone in his face. I find it difficult to fathom the rationale behind such line of questioning! In any event PW3 was unshaken in his identification of PW3 as one of the robbers.

The evidence of PW1 and PW2 who are co-workers of PW3 to E the effect that the appellant had come to their place of work to complain about his father, PW3 and had informed them that he was a member of a gang and would get his gang to teach PW3 a bitter lesson, gave further credence to the testimony of PW3. I agree with the concurrent findings of fact' by the two lower courts that the prosecution proved beyond reasonable doubt that the appellant was one of the robbers who attacked PW3 on the night of 1/4/2003. F

Having been fixed at the scene of crime, the appellant's *alibi* became otiose. The purported *alibi* was properly investigated by the G Police and not surprisingly found to be untrue.

The appellant has not advanced any reason in this appeal to warrant any interference with the concurrent findings of fact by the two lower courts.

For these and the more detailed reasons well articulated in the H lead judgment, I find this appeal to be devoid of merit. It is accordingly dismissed. The judgment of the lower court is affirmed.

Appeal dismissed.

OKORO JSC

This is an appeal against the judgment of the Court of Appeal, Benin Division in appeal No. CA/B/216/2009 delivered on the 19th of April, 2013 wherein the lower court affirmed the conviction and sentence of the appellant to death for armed robbery by the High B Court of Edo State, Benin Judicial Division.

The facts giving birth to this appeal are ably set out in the lead judgment of my learned brother, KUMAI BAYANG AKA'AH'S JSC, just delivered and I do not intend to repeat the exercise. Straight-away, I adopt both the reasons and conclusion reached in the lead C judgment that this appeal is devoid of merit and ought to be dismissed.

Only one issue is formulated for the determination of this appeal. It states:-

D *"Whether the Court of Appeal was right in affirming the decision of the trial court holding that the prosecution did prove 'the guilt of the Appellant beyond reasonable doubt'."*

One of the major arguments of the appellant's counsel in this appeal is that the PW3 did not properly identify the appellant as one E of the robbers who attacked him on the fateful night of the robbery incident. There is abundant evidence that the appellant is the son of the PW3, one of the victims of the attack which also led to the death of one of his sons. Both the learned trial judge and the court below took time to assess the evidence of PW3 and came to the conclusion F that the PW3 was able to recognize the appellant as one of the robbers who invaded his house as stated earlier. I shall refer to the various conclusions of the two lower courts to underscore these facts.

On pages 63 & 64 of the record, the learned trial judge said:

G *"A holistic approach to the evidence of the PW3 under cross examination quite clearly reveals that the totality of his evidence is to the effect that he saw the accused as one of the robbers... the only feeble attempt made to discredit the evidence of the witness was when he was asked to tell the court the type of flashlight that was beamed H on him and he said he could not say... As a matter of fact, he was not bound to know the nature of the flashlight that was beamed on him. I therefore believe and accept the evidence of PW3 that on the fateful night in which a group of persons armed with various offensive weapons invaded his abode and robbed him and members of his*

household as well as injuring them, the accused person was one of the invaders. I find that as a fact”.

When this matter went to the court below on appeal, the Court of Appeal concurred with the view expressed by the learned trial judge in the following words on page 121 of the record:

“The appellant certainly did not challenge the correctness of his identification by recognition of his own father as one of the robbers that committed the robbery in question. What engaged the attention of the learned counsel for the appellant was the type of flashlight that was beamed on PW3... Had learned counsel wanted to challenge the correctness of the identification of the appellant by recognition by PW3, one would have thought that the witness could have been questioned to show that he could not have seen the Appellant in the circumstance that he narrated. This ‘was not done.’”

The above concurrent findings of facts by the learned trial judge and the court of appeal are factually and legally sound and does not merit any interference by this court. Without any clear evidence of errors in law or fact leading to or occasioning miscarriage of justice, this court will not interfere with the concurrent findings. It is settled law that there must be clear proof of error either of law or of fact on the record which has occasioned miscarriage of justice before the Supreme Court can upset or reverse concurrent findings of fact. See Elizabeth Ogundiyan Vs The State (1991) 3 NWLR (Pt 181) 519, Iyaro V The State (1988) 1 NWLR (Pt 69) 256, Ogoala V The State (1991) 2 NWLR (Pt 175) 509.

In accepting the position of the two courts below as regards PW3's ability to have recognized the appellant so easily, I am buoyed by the fact that the appellant is the son of PW3 and it is elementary that recognizing the appellant by his father could have been far easier for him than if he was another person. The slightest flash of light could have aided the PW3 to recognize the appellant. I have no reason in the circumstance to disturb the concurrent findings of the two courts below on the issue of identification of the appellant.

As regards the issue of *alibi* set up by the appellant it is my view that it was his duty to furnish the necessary information from which his whereabouts at the crucial time could be checked. See Attah V State (2010) 10 NWLR (Pt 1201) 190. In the instant case, the appellant said he was with one Elvis (DW1) in Warri at the time the rob-

bery incident took place. DW1's address given by the appellant was Texaco Oil Company Ltd, Uselu. This is contained in Exhibit 1, the statement of the appellant. The police investigator PW4 took the appellant to the said address but there was nobody known as Elvis in the said address. According to PW4, since there was nobody called
 B Elvis in the address provided, there was no need to go to Warri as it would have been a waste of time. Both the learned trial judge and the court below agree with this position. I also agree. The appellant failed to provide enough and necessary information in order to assist
 C the police to investigate his alibi. It is no proof of *alibi* for an accused person merely to assert, as in this case, that he was not at the scene of crime and could not have been there because he was elsewhere. He must lead credible evidence to prove the assertion. The evidential burden of adducing evidence to support a defence of alibi is on the
 D accused person raising such defence because the facts upon which the defence of *alibi* rests are facts peculiarly within the knowledge of the accused person raising such a defence. See Mathew Obakpolor V The State (1991) 1 NWLR (Pt 165) 113, Nwabueze V The State (1988) 4 NWLR (Pt 86) 16, Ibrahim V State (1991) 4 NWLR (Pt
 E 186) 399.

Based on the above and the fuller reasons enunciated in the lead judgment of my learned brother Kumai Bayang Aka'ahs, JSC, I agree that there is no merit in this appeal. It is hereby dismissed by
 F me. The judgment of the Court of Appeal which affirmed the conviction and sentence of the appellant to death is further affirmed.

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