**JIMOH ISHOLA (ALIAS EJIGBADERO)**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

26TH OCTOBER, 1978.

SUIT NO. SC 8/1977

**LEX (1978) - SC 8/1977**

**OTHER CITATIONS**

3PLR/1978/37 (SC)

(1978) 9-10 S.C. (REPRINT) 59

**BEFORE THEIR LORDSHIPS**

DAMLEY ARTHUR ALEXANDER, C.J.N.

ATANDA FATAI-WILLIAMS, J.S.C.

AYO GABRIEL IRIKEFE, J.S.C.

MUHAMME BELLO, J.S.C.

CHUKWUNWIKE IDIGBE, J.S.C.

**ORIGINATING COURT**

1. FEDERAL COURT OF APPEAL

2. HIGH COURT OF LAGOS STATE

**REPRESENTATION**

SOBO SOWEMIMO, R. I. CLARKE and G. P. ALATISHE for the Appellant.

S. O. ILORI Esq, D.P.P. Lagos State), B. O. OLOWU Esq, S.C. Lagos State) Miss C. UWEIA, S.C. Lagos State) for the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW:- Murder – Proof of – Conspiracy to murder –

CRIMINAL LAW AND PROCEDURE - EVIDENCE:- Proof of murder – Evidence of accomplices - Classes of accomplices – Admissibility of the testimony of an accomplice - section 7 and section 10 of the Criminal Code

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Accomplices - The common feature of all classes of accomplices – “Not only do they wish the offence to be committed, they also play a part towards its commission” – Whether extends to a silent listener or spectator to the planning of a crime –

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Witness to a crime – Whether mere failure of a witness to report to the police a person who designs to commit an offence ipso facto make him unworthy of credit should he testify at a subsequent trial of the offender for the contemplated offence – Whether makes him an accomplice were he to testify on behalf of the prosecution in such a trial

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Murder - Proof of motive on the part of an accused on a charge of murder – Whether not a sine qua non to his conviction for the offence – Whether evidence of motive where available is not only a relevant fact but also admissible under section 9 of The Evidence Act

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Similar facts evidence – When considered a valid exception to general rule in criminal as well as in civil cases that the evidence must be confined to the point in issue – Need for the evidence to so closely and inextricably mixed up with the history of the criminal act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case without the evidence being thereby rendered unintelligible

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Criminal proceedings and forms of caution/directions regarding evidence – Distinction between Jury trial and judge sitting as both trial-judge and jury - Whether it must be presumed that a learned Judge, sitting as both Judge-Jury, has directed himself aright in matters of law unless the contrary appears from the judgment

CHILDREN AND WOMEN LAW:- *Widows and Justice Administration* – Eye-witness evidence of woman whose spouse was shot dead beside her due to refusal to give up his claim on a disputed land – *Widowhood and Security* – Loss of a spouse due to poor policing/law enforcement practices

HEALTHCARE AND LAW:- Emergency medical services – Absence of – Death of a villager shot by a gun while being taken to the hospital

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE**:–** Evidence of similar facts evidence in civil or criminal proceedings **–** When admissible – Need for caution and mode of – Tainted Witness

INTERPRETATION OF STATUTE:- Section 7 and section 10 of the Criminal Code - Section 40 of the Criminal Code

**MAIN JUDGMENT**

**IDIGBE, J.S.C.** (Delivering the Judgment of the Court):

At this point in these proceedings there are for determination of this court inter alia the following principal questions;

(1) Whether the eighteenth witness for the prosecution (P.W.18 - Kehinde Yekini) is an accomplice whose testimony in so far as it tends to implicate the appellant required corroboration from an independent witness?

(2) Whether the court of first instance did not, in the circumstances of this case, err in law in admitting evidence of “similar facts”, whose prejudicial character far outweighed their probative value?

(3) Whether, in the circumstances of this case, the evidence of visual Identification of the appellant at the alleged time and venue of the murder of the deceased as given by the first, second, third and sixth prosecution witnesses based on a fleeting glance of the appellant at night and the failure” of the learned trial Judge to warn himself of the need for other independent evidence corroborating the same did not amount to error in law?

(4) Whether, in the light of the foregoing, the failure of the learned trial Judge in the High Court of Lagos State (Oluwa, J.) to warn himself;

(a) on the need for independent evidence corroborating in material particulars the evidence of the accomplice, Kehinde Yekini (P.W.18); and (b) on the need for independent evidence corroborating the “fleeting” visual identification of the appellant “at the alleged time and venue of murder” by P.W. 1, P.W.2, P.W.3 and P.W.6; and

(c) the admission by the learned trial Judge of the evidence referred to in the third question above has not, in the circumstances of this case, occasioned such miscarriage as to warrant the acquittal of the appellant by the High Court of Lagos State and finally,

(d) whether the Federal Court of Appeal was not in error of law in failing to allow the appeal from the said decision of the High Court of Lagos State?

For the reasons we now give, we answered each of the foregoing questions in the negative on the 22nd September, 1978, when we dismissed this appeal.

The questions which we set out in the preceding paragraph came about in this way. The appellant was, tried in the High Court of Lagos State on a two count in-formation for the offences of conspiracy and murder and we set out hereunder the charges as framed in the two counts; they read:-

“Statement of Offence - 1st Count Conspiracy to commit a felony to wit: murder, contrary to section 519 of the Criminal Code Law.

Particulars of Offence

Jimoh Ishola (alias Ejigbadero) on or about the 22nd day of August, 1975, at Alimosho Village... conspired together with other person or persons unknown to commit a felony, to wit: Murder.

Statement of Offence - 2nd Count

Murder, contrary to section 319(1) of the Criminal Code Law.

Particulars of Offence

Jimoh Ishola (alias Ejigbadero) (m) on or about the 22nd day of August, 1975, at Alimosho Village.......... murdered one Raji Oba.”

The case for the prosecution may be summarised thus: The appellant (known also as Ejigbadero) who claimed to have purchased a vast area of land in the area of Alimosho Village, in or about 1970, proceeded sometime in 1975 to clear a large area of the same of the various crops and economic trees thereon in an attempt to develop the same. In the process he was challenged by a number of villagers In Alimosho (of whom the deceased was one) who not only claimed that their crops on the land had been wantonly damaged without reference to them but also that the land being their own the appellant was, in effect, a trespasser. In the event a number of unpleasant incidents occurred between the appellant and the villagers. Complaints to the Police at Agege of assault and malicious damage to crop and property were freely made by either side. Investigations of these complaints by the police appeared, in respect of every one of them to be rather slow and in the meantime, the appellant who frequently come to Alimosho Village with a number of people - who according to the appellant were his workmen but according to the villagers were his (the appellant’s) thugs - threatened and beat up violently a number of the villagers. In particular, he gave special attention to the deceased, who according to the prosecution witnesses he once stabbed near the eye-brow with a dagger or knife, and on several other occasions was heard to say the he would kill “one day.”

On the 22nd day of August, 1975, Sabitu Raji Oba, the wife of the deceased who testified as P.W.(1) returned to the village in the night from the market. She and the husband sat outside their building at about 8 p.m, she had just warned her husband of the presence of the appellant and some of “his thugs” in the village. She had seen them on her way back to the house; it was a moonlit night. As she was giving the husband (the deceased) this warning there was an explosion from a gun. The deceased groaned and fell down from the chair he sat on; he had been fired at and he sustained injury in the region of the head from where blood was seen to ooze. PW(1) immediately turned to the direction of the sound of the explosion from which the smoke of gun powder was seen to emerge and she saw six people running away towards a nearby bush; she recognised distinctly the appellant who, holding a gun, was in the rear. Although she saw the back of the appellant she was able to recognise him; in particular, apart from the gun held by the appellant, she recognised that the appellant at time and venue “wore English dress a short-sleeved dress ... over long trousers.” Another witness, Nimota Kelani P.W.(2), a neighbour, on hearing the alarm raised that night by P.W.(1) to the effect that Ejigbadero had killed the deceased came outside. She also saw the appellant running away towards the bush. She was able to do so by the aid of the moonlight. She also called on the appellant telling him that she had seen him and reminded him that he had kept his “promise” to kill the deceased. Another witness, Sumbo Kelani P.W.(3) in her testimony claimed that following the sound of a gun-shot in the village about 8 p.m. that night and the alarm raised by P.W.(1) to the effect that the appellant (Gbadero or Ejigbadero) had killed her husband, she also came outside. She saw the deceased “lying on the ground... and blood oozing from his head.” According to this witness, the night was moon-lit and the moon so bright that it was possible to pick a needle if it fell down...” The fourth witness for the prosecution, Mann Elson Ofongo helped in conveying the deceased that night to the hospital at about 8.30 p.m. Deceased died on the way to the hospital. P.W.(6) Rafiu Latifu in his testimony claimed that as he was returning to the village (Alimosho) on the night of the 22nd August, 1975, he saw a white Peugeot 504 station wagon parked by the side of a Mosque a distance within “two minutes run” from the house of the deceased. He also saw the appellant and six other persons (one of whom was a woman) run out of a nearby bush towards the waiting or parked Peugeot 504 station wagon; the time was, according to the witness, “about 9 p.m.” Witness, however, did not observe the registration number of the vehicle. On arrival at the premises of the deceased he met people who said the appellant had killed the deceased, who was still lying on the ground and bleeding from the head. Witness immediately told the people present that he had just seen the appellant and six other persons run out of the bush but did not know at the time that he had already killed the deceased.

We think that at this stage reference should be made to the testimony of Kehinde Yekini P. W 18). This witness was employed by the appellant as “a guard” (i.e. a security officer) in his (the appellant’s) business premises (actually, a factory), on a salary of N60 per mensem. According to P.W. (18) early one morning - about three weeks after his employment -the appellant, in company of four others (one of whom was a woman, Modina) had told him that he intended to kill the deceased. Deceased had been difficult, and had refused to give up his land to the appellant. In the circumstances, he thought the deceased should be killed. Thereafter, he told the witness and the four others present, at the time - that is, Modina (f), Osadebey (m), Isiaka (m), Bakare (m) and Wahab Oduntan (m) - that they should assemble again at the business premises (i.e. the factory) later that day in the evening the appellant re-appeared with the four other persons already mentioned. The appellant then told P.W. (18) that the deceased must be killed that night. According to P.W. (18) the appellant said: “Kehinde we shall carry out the operation, I told you before” (i.e. we are going to kill the deceased).

The witness immediately replied: “I could not go”; but the appellant told him that he (witness) would not be involved in the killing and that he was only required to guard the appellant’s car where it would be parked. Witness declined this invitation; he told the court, “I refused to go”. The appellant then asked him to go and call another security officer - one Lukman - from his post and requested him to “take over the gate” until they returned from the “operation.” Witness then called Lukman who went away with the group. Continuing his testimony witness said: ‘they left at 8 p.m. In the office there was a time piece. I looked at after they left”. The group left the factory premises for “the operation” in a “white Peugeot 504 family car; the one called station wagon”.

The group later returned to meet the witness still at the factory. The time of their return was “a little bit after 9 p.m.” On their return the appellant told the witness (as he, the appellant, drew out a gun from underneath his trousers) that he (the appellant) had now killed the person he (witness) had refused to kill. Thereafter, the appellant said they should all enter the car to go to a party at his (appellant’s) house, and they did. Asked under cross-examination why he did not immediately go to the police to report what transpired, witness said: “I did not report to the police because I have seen so many of the acts of the accused. There was a day a fight took place in the farm instead of police arresting the thugs brought by the accused the police arrested the villagers. And the Police at Agege belong to the accused... later I read from the newspapers that the accused had been arrested. I went to the Panti C.I.D. and made a statement”. We will have cause to refer once again to this aspect of the cross-examination of this witness, later in this judgment. Further, in his testimony P.W. 18 said that when the appellant left for the “operation” (i.e. the killing of the deceased) that night he was dressed in a “French suit” (i.e. a pair of trousers and jacket), and that later the appellant went to his (appellant’s) party that night still dressed in the “French suit..

It is noteworthy to observe at this stage, that there was evidence from other prosecution witnesses (among them P.W.7) that the appellant went to Police Station that night from his (appellant’s) party - a party which the appellant claimed to have organised in celebration of the “naming” of his infant child; and that at his arrival at the Panti C.I.D. he was still dressed in “French suit” (see the evidence of P.W. (24) Inspector of Police, Benjamin Olu). Earlier about 7 p.m. that same day P.W. 24 had seen the appellant in from of his house, as the party was about to start, dressed in “French suit”. The evidence of P.W. 24 also showed that by one of the three possible routes, the appellant’s house was within 10 - 20 (ten to twenty) minutes ride (by a car) to the deceased’s house at Allmosho Village.

In his defence the appellant denied that he was at Alimosho Village that night. He set up an alibi by maintaining that he was at his party (that of naming of his infant child) throughout that night (i.e. the night of the 22nd day of August, 1975) and in particular that he did not leave the party between the hours of 8 and 9.30 p.m. In the view of the learned trial Judge the witnesses he called to support his plea of alibi - D.W. (2) Police Sergeant Bashiru Ajape, D.W. (3) Jacob Gbadegesin Oyelakin a Sales Manager of the Leventis Motors Ltd. and D.W. (4) Emmanuel Olayinka George a legal practitioner - were each miserably untruthful in the evidence each gave and we think that even on the printed evidence, the learned trial Judge justifiably rejected their evidence. In the event, the appellant’s pleas of alibi failed.

In a well considered judgment the learned trial Judge, after a very careful review of the evidence before him, accepted the testimony of the principal witnesses for the prosecution P.W. (1),P.W.(2), P.W.(3), P.W.(6), P.W. (18) and P.W. (24) who each impressed him very much.

He accepted, in particular the testimony relating to the appellant’s unsuccessful attempt to persuade P.W. 18 to join in the “operation” in which the deceased was killed and his (the appellant’s) departure in the company of his group from and return to the factory that night (22/8/75) at about the hours of 8 p.m. and 9 p.m. respectively. Accordingly, he found the appellant guilty, as charged. In the indictment, of the offences of (a) conspiracy to murder and (b) Murderer of Raji Oba.

On appeal from the said judgment of the learned trial Judge, the Federal Court Appeal Mamman Nasir P. Adetunji Ogunkeye and Ijoma Aseme JJ.A7 allowed the appeal in respect of the count of Conspiracy to murder, affirmed the conviction on the second count (dealing with the charge of murder) and dismissed the appeal.

This appeal is from the said judgment of the Federal Court of Appeal.

We will deal first with ground of appeal relating to the first question posed in the first paragraph of this judgment and it reads:

‘The Federal Court of Appeal misdirected itself in law when it held that the 18th prosecution witness was not an accomplice contrary to the finding of the learned trial Judge who found and held that 18th prosecution witness was every inch a conspirator on the face of the evidence before the trial court.” (Italics supplied).

In support of this ground of appeal learned counsel for the appellant submitted that on the authority of the dissenting judgment of Mbanefo Ag. J.S.C. (as he then was) in Omisade v. The Queen (1964) N.M.L.R. 67 at 99, P.W.(18) should be treated as an accomplice or, at least, a “tainted witness”. According to him, the learned trial Judge in fact treated P.W. (18) as such but failed to advert to the need to warn himself that it would be unsafe and dangerous to convict (the appellant) in the absence of corroboration by independent witnesses of those aspects of the evidence of P.W. (18) which tend to implicate the appellant with the offences with which he was charged. He further submitted that since the learned trial Judge had failed to advert to the need to warn himself (as stated above) his conviction of the appellant was in error of law; and an Appellate Court, in those circumstances, even if it should find that there was in fact, evidence tending to corroborate that of P.W. (18) in material particulars would have no option but to acquit the appellant. We were then referred to the following decided cases in support of the above sub-missions: (1)D.P.P. v. kilbourne (1973) A.C. 729 at 740, (2) R v. Prater (1959) 44 C.A.R. 83 (3) R v. Russel (1968) 52 C.A.R. 147 (4) R v. Ezechi (1962) 1 All N.L.R. 113 (5) Davies v. D.P.P. (1954) A. C. 378 and finally Ukut v. The State (1965) N.M.L.R. 18.

Now, in the course of his judgment the learned trial Judge observed as follows:-

“I appreciate that the 18th prosecution witness though a witness for the prosecution is every inch a conspirator with the others and the accused person. I equally appreciate always finds it necessary to use such evidence against others. The gist of the offence of conspiracy is the meeting of the mind of the conspirators’. The offence is complete when there is agreement to do the unlawful act - see Njovens v. The State (1973) 5 S.C. 17 at 68. I believe the evidence of prosecution witness 18, Yekini as true...

With all respect to the learned trial Judge if, and we think he is justified on the evidence, he believed that evidence of P.W. (18) as true then that witness is not a “conspirator’ and unless he is a “conspirator’ he cannot be regarded as an a accomplice. Even if he were to be regarded as an accomplice he could only be an accomplice to the offence of conspiracy to murder and - on the available evidence which the learned Judge accepted as true - certainly not an accomplice to the crime of murder. The question whether or not a witness is an accomplice is one of law not of fact and ff, as here, the learned trial Judge erred in regarding P.W. (18) as an accomplice (to the crime of conspiracy) it is certainly open to an Appellate Court (and in this instance, the Federal Court of Appeal) to reverse the erroneous view of the learned trial Judge.

There are three classes of accomplices (a) participes criminis in respect of the actual crime charged, (b)Receivers vis-à-vis the thieves from whom they receive the goods on a trial of the latter for stealing, (c)Witnesses for the prosecution who, on previous occasions, were parties to crimes identical to that committed by an accused on trial, but evidence of which crimes is being offered, in the course of the trial of the accused, to prove a system and intent and to negative accident on the part of the accused. Although this third category of witnesses are not accomplices strictu senso their evidence should not be left to the jury (before whom the accused is being tried) without a warning that it is dangerous and/or unsafe to accept it without corroboration - see Enahoro v. The Queen (1965) 1 All N.L.R 125 at 142 adopting Lord Simonds L.C. in Michael John Davies g. Director of Public Prosecutions (1954) A.C. 378 at 400. The issue whether P.W. (18) is an accomplice is concerned with the first class of accomplices, viz:- participes criminis. These persons (i.e. associates or participants in the crime or offence) fall within the category of offenders set out in section 7 and section 10 of the Criminal Code.

According to section 7

“(a) Every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids another person in committing the offence;

(d) every person who counsels or procures any other person to commit the of-fence”................ Is guilty of the offence.

Everyone, therefore, who fall within any of the categories (a) - (d) is a participant in the actual offence, that is, an accomplice. The party who falls within (a) is the perpetrator of the offence; the one who falls within (b) prepares the way for, or facilitates, the crime; the one who falls within (c) assists in the preparation of the crime and, the one who falls within (d) foments or incites its commission. Unless one is intent on doing violence to language can it be seriously contended that P.W.(18) falls into any of the categories of offenders in section 7 of the Criminal Code? Clearly the common feature to all the persons described in categories (b), (c) and (d) is that, not only do they wish the offence to be committed, they also play a part towards its commission. The evidence here is that P.W. (18) was a silent listener at the meeting in the morning; at best he was a spectator. In the evening, however, he was no longer a silent listener, he definitely rejected the proposal: “I refused to go”, he said. This Court also decided in Enahoro v. The Queen (Supra) at P.144 that a spectator is not an accomplice and in doing so it rejected the minority judgment Mbanefo Ag. J.S.C. (as he then was) in Michael Adedapo Omisade AND others v. The Queen (1984) 1 All N.L.R 233 at 293-294. Section 10 of the Criminal Code deals with another category of participes criminis and it reads:-

“A person who receives or assists another who is to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.”

The question in Omisade (Supra) was whether Dr. Onabamiro, a witness for the prosecution was, a particeps criminis and as such, an accomplice. According to the evidence, he was present with three other persons when one of them put up the proposal of capturing by force or seizing power from the Federal Government of Nigeria and assigned tasks to that effect; remaining silent he neither affirmed or rejected the proposal. Later he bought and studied books on revolution; but on the evidence he certainty did nothing towards carrying out the task assigned to him. Later he tumbled into a meeting of the others present when the proposal for seizure of Government and assignment of tasks therefore was made, and he advised them that their plan was not feasible although on that occasion he offered to take an oath of secrecy. The majority of the Court (a Court of five Judges) thought he was certainly not an accomplice; the fifth Mbanefo Ag. J.S.C. - as he then was held the view that he was or, at least, a “tainted witness” in the light of section 40 of the Criminal Code. If we take a look at section 40 of the Criminal Code we find that the offence described in (1) differ from the offence in (2). The offence in (1) consists in failure to do something in order to prevent the treason (i.e. negative attitude on the part of the offender is sufficient). Section 40 aforesaid reads:-

“Any person who:-

(1) becomes an accessory after the fact to treason; or

(2) knowing that any person intends to commit treason, does not give information thereof ... to the Governor-General ... or use other reasonable endeavours to prevent the commission of the offence; is guilty of a felony, and is liable to imprisonment for life.”

Unquestionably, an offender within sub-section (1) of section 40 is an accomplice. There is no doubt that an offender within sub-section 2 of section 40 is not an accomplice and it is for that reason that the sub-section (i.e. 40(2)) is added in the Code to provide punishment. In the appeal in hand it was urged by the learned counsel for the appellant, Chief Sobo Sowemimo, that under section 515 of the Criminal Code Cap. 42 Laws of the Federation P.W. (18) must be regarded as an accomplice or, at least a ‘taintedwitness”. Section 515 aforesaid which although not specifically considered was by implication examined under consideration of section 40 of the Criminal Code in Omisade (Supra) and Enahoro (Supra) reads:-

“Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour and is liable to imprisonment for two years.”

Clearly, an offender under this section does not come under any of the three categories of accomplice recognised in Davies v. D.P.P. (Supra) and adopted by this Court in Omisade (Supra) and Enahoro (Supra); and in Davies (Supra), Lord Simonds L.C. in the concluding portions of this aspect of his speech (i.e. relating to accomplices) in the House of Lords said:

... In both (2) and (3) [i.e. categories 2 and 3 of accomplices which we earlier on set out in this judgment] a person who is not a party or not necessarily a party to the substantive crime charged was an accomplice for the purpose of the requirement of the warning ... The primary meaning of the term ‘accomplice’ then has been extended to embrace these two anomalous cases. In each case there are special circumstances to justify or at least to excuse the extension...

My Lords, these extensions of the terms are imbedded in our case law and it would be inconvenient for any authority other than the Legislature to disturb them. Neither of them affects this case [nor the facts in the appeal in hand]... I CAN SEE NO REASON FOR ANY FURTHER EXTENSION OF THE TERM ‘ACCOMPLICE’.”

[Bracket, Italics and capitals supplied and added by this court] - See Michael John Davies v. Director of Public Prosecutions (1954) 1 All E.R. 507 at 513-514.

We draw particular attention to the part of the above quotation in capitals; and as in Omisade (Supra) and Enahoro (Supra) we see no reason for further extension of the term ‘accomplice’. However, we think that section 515 aforesaid under certain circumstances can have some relevance on the question whether any particular witness (whether for the prosecution or defence) in a criminal trial could be worthy of credit.

But the mere failure of a witness to report to the police a person who designs to commit an offence does not ipso facto make him unworthy of credit should he testify at a subsequent trial of the offender for the contemplated offence nor does it make him an accomplice were he to testify on behalf of the prosecution in such a trial. Such a witness may have very good reasons for failing to make any such report. In the case of P.W.(18) he gave good reason under cross- examination why he failed to report the appellant to the police; he had seen other persons against whom the appellant had committed an offence arrested instead of the appellant being arrested. Part of the testimony of P.W.(18) under cross- examination which learned trail Judge believed reads:-

“I did not report to the police because I have seen so many acts of the accused. There was a day a fight took place in the farm instead of the police arresting the thugs brought by the accused the police arrested the villagers. And the police at Agege belong to the accused person...

The accused is usually called by his hooligans ..... ‘Lion the father of Moradewun’. We call him also ’Baba’.”

The balance of this part of the testimony of the witness (P.W. 18) clearly shows that appellant was regarded by him as a terror and in virtue of his special position with the Police Authorities in the vicinity of Alimosho Village he would not readily be disposed to make a report against him (the appellant). When P.W. (18) thought it was reasonably safe to make a report (i.e. as soon as he learnt of the arrest of the appellant, four days after the murder) he made a statement to the Police on the events of 22nd August, 1975, and gave the details of the plot by the appellant and his group to kill the deceased. Under similar circumstances, the West African Court of Appeal rejected the contention of learned counsel that a prosecution witness who failed to report at the earliest opportunity an offence committed by the accused was not only unworthy of credit but also an ‘accomplice’. In that case Blackhall Robserved:

‘The defence (as here) was alibi so the answer to the question whether Kofi Mensah was an accomplice has to be gathered from his own evidence. Mr. Opolu Acheampon submits that he was because he was present at the scene of the crime. But mere presence is not enough. A person must be purposely facilitating or aiding the commission of a crime by his presence before he can be regarded as an accomplice. But there was no evidence to that effect.

Counsel further argued that because Kofi Mensah did not run away he should be regarded as an accomplice. But the first appellant... had threatened Kofi’s companion that if he tried to run away they would kill him, and both appellants had guns... It was further contended that the fact that he did not report the matter to the police until they interviewed him indicates complicity. But it is common knowledge that in this country witnesses often refrain from coming forward in case they might get into some sort of trouble. In this case the apprehension was much more definite because if Kofi’s evidence was accepted he was dealing with two desperados who would stop at nothing ..:’

[Brackets and Italics supplied by the court] See Yaw Azumah and Kwame Kehedo v. The King 13 WACA 87 at 87-88.

We adopt the view of the West African Court of Appeal in Yaw Azumah (Supra) and are satisfied that failure by P.W. (18) to report to the police at the earliest opportunity the offence contemplated by the appellant on 22nd August., 1975, did not necessarily detract from his credit and, on the view we have taken, earlier on, in his judgment, he does not qualify under category (1) (Participes Criminis) as an accomplice. The only other section under which a person may be considered a particeps criminis is section 8 of the inapplicable to the facts relating to P.W.(18) and the appellant.

We cannot close the issue under consideration in the first question posed in the first paragraph of this judgment without considering the other submission of Chief Sowemimo that P.W. (18) must be regarded as a “tainted witness”. As we observed in Garba Mailayi AND Usman Sokoto Vs The State (1968) 1 All N.L.R. 116 at 123:

“Recently there has been a tendency among criminal layers to create a category of ‘tainted witness’ .................. we however observe that the expression ‘tainted’ is very loose and If its application is not kept within proper bounds a great deal of confusion will be unleashed into an area of evidence which even now is fraught with difficulties............:’

We think it is proper to confine this category of witness, (i.e. ‘tainted’) to one who is either an ‘accomplice’ or, by the evidence he gives, (whether as witness for the prosecution or defence) may and could be regarded as “having some purpose of his own to serve.” Viewed in this way there is less likelihood to bringing unnecessary confusion into this area of evidence; and this is the only logical way of looking at the observations of the courts, on this subject in most of the cases cited to us, which include (1) Prater 1960 44 C.A.R. 83 at 86; (2) Frederick Valentine Russell (1968) 52 C.A.R. 147 at 150 and (3) Idahosa AND Anors Vs The Queen (1965) N.M.L.R. 85 at 87-88. We see nothing in the evidence of P.W.(18) upon which he could possibly be regarded as having some purpose of his own to serve, whether in regard to (a) the charge of conspiracy in respect of which the appellant was discharged and acquitted by the Court of Appeal or the charge of murder. There was, therefore, in our view no substance in the arguments adduced in support of ground (1). The second ground of appeal raises the second question posed in the first paragraph of this judgment and it reads:-

‘The Federal Court of Appeal misdirected itself in law when it held that the reception of the highly prejudicial evidence by the trial Judge did not affect his mind in his evaluation of the evidence and that the Judge only relied on such evidence for the purpose of identification.

Particulars of misdirection

(i) The mere reception of highly prejudicial evidence perse is fatal to any conviction whether or not the learned trial Judge expressly referred to such prejudicial evidence for whatsoever purpose in his judgment.

(ii) The reception of prejudicial evidence per se constitutes miscarriage of justice.”

The sum of the argument of learned counsel for the appellant, Chief Sobo Sowemimo, in respect of this ground is that the court of trial erred in law in admitting evidence (1) that the appellant had been in the village (Alimosho) on various occasions prior to 22nd August, 1975 and “had engaged, as alleged by the prosecution”, in the destruction of economic crops belonging to the village and as a result was himself, and quite often in the company of other people (variously described by the prosecution witnesses as his “thugs” or “labourers” or “workmen”), involved in various incidents of assault on the villagers; (2) that he had in the course of one of these assaults stabbed the deceased near the eyebrow; (3) that he had on various occasions in the past threatened to kill the deceased unless he surrendered his claim to a portion of land to which both the deceased and appellant had laid claims of exclusive ownership. All this evidence which learned counsel described as “evidence of similar facts” were, in his view, highly prejudicial to the appellant and on the authority of Makin v. Attorney- General for New South Wales (1894) A.C. 57 inadmissible. He further submitted that, in any event, since the prejudicial character of the evidence far outweighed its probative value, it ought not to have been admitted and the Court of Appeal in the circumstances “misdirected itself’ when it held that the evidence did not improperly affect the mind of the learned trial Judge in his evaluation of the entire evidence before him. We felt quite unable to accede to the submission of learned counsel. The decision of the Privy Council in Makin v. Attorney-General for New South Wales (Supra) is that while undoubtedly it is not competent for the prosecution in a criminal case to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct, propensity, and/or character to have committed the offence for which he is being tried, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the Jury, and it may be so relevant to rebut a defence which would otherwise be open to the accused. In the case under appeal the defence of the appellant, apart from his alibi, includes one of improper or insufficient identification. His contention in the court of trial was that the evidence of P.W.(1), P.W.(2), P.W.(3) and P.W.(16) that they saw him in the vicinity of the murder incident at about 8 p.m. on the night of the 22nd day of August, 1975, must be one of mistaken identity. Even if there was moonlight, that, his counsel submitted, made little difference since the witnesses had only a ’fleeting glance” of him and P.W. (1) only saw “the back’ of the appellant. In dealing with that aspect of the defence the learned trial Judge reviewed at length much of the evidence which is the subject of complaint in this ground of appeal. He considered inter alia the evidence which was offered to show (a) that over a year or two immediately preceding the murder of the deceased there had been violent disagreements between the appellant and the villagers at Alimosho in the course of which it was alleged that the appellant and his workmen or “thugs” attacked the villagers; (b) that the appellant on one occasion took some of the villagers to the Police Station at Agege for attacking and injuring a P.W.D. road workman; (c) that on another occasion the appellant had ordered one Wahabi Oduntan ‘to hold the deceased at gun point” while the appellant went to bring a number of policemen who on his instructions took the deceased and some other villagers away to the Agege Police Station on an alleged offence. At the end of his review of this evidence, the learned trial Judge observed.

“I infer from these details of unhappy contacts between the accused and the villagers at Alimosho that the accused must be a well known person to the villagers and especially to the deceased and members of his household ..:’

Thereafter the learned trial Judge once again reviewed in detail the evidence of identification of the appellant on the night of 22nd August, 1975, by RK(t), P.W.(2), P.W.(3) and P.W.(6) and was satisfied that there was no mistake by any of these witnesses as to the Identity of the person they each recognised, by the moonlight, holding a gun and running (1) towards a nearby bush [according to the evidence of the women P.W.(1) and P.W.(2) and P.W.(3)] and (2) towards a waiting white Peugeot 504 station wagon [according to the evidence of P.W.(6)], soon after the deceased received his gun-shot injuries. We would like, also, to add that although proof of motive on the part of an accused on a charge of murder is not a sine qua non to his conviction for the offence yet if evidence of motive is available it is not only a relevant fact but also admissible under section 9 of The Evidence Act (also section 9 Cap. 30 Laws of Lagos State Vol. 2 1973 Edition). Surely, the general rule in criminal as well as in civil cases that the evidence must be confined to the point in issue cannot be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the charge. Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the criminal act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case without the evidence being thereby rendered unintelligible. Thus, in cases of murder, evidence is admissible to show prior assaults by the accused upon the murdered person or menaces uttered to him by the accused, or to show conversely the irritation behaviour by the deceased to the accused. Again, the relations of the murdered man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the person charged with the crime, can be admitted to prove as integral parts of the history of the alleged crime for which the accused is on his trial. (See R. v. Bond (1906) 2 K.B. 389 as per Kennedy J. at pp.400 and 401).

While still on this point, we think the following observation of Lord Atkinson in R. v. Ball (1911) A.C. 47 (H.L.) at page 68, with which we agree, is particularly relevant-

“Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to show he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased’s life.

Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his ‘malice aforethought’ in as much as it is more probable that men are killed by those who have some motive for killing them than by those who have not.”

In the circumstances of this case much of the evidence which form the subject-matter of the complaint in respect of the second ground of appeal is, indeed, relevant and admissible both under the Evidence Act (or Evidence Law, Lagos State) and within the principle of law stated in Makin v. Attorney-General for New South Wales (Supra). In the event, the second ground of appeal fails.

The next ground of appeal argued on behalf of the appellant relates to the third question posed in the first paragraph of the judgment; that ground reads:-

,,(i) The Federal Court of Appeal misdirected itself in law and on the facts when it held that there was sufficient circumstantial evidence of identification of the accused at the time of the murder incident when as contended by the appellant the only evidence adduced at the trial was unsafe and unsatisfactory;

(ii) the trial judge did not warn himself about the danger of relying on circumstantial evidence of identification in convicting an accused; and the Federal Court of Appeal failed to consider the submission of appellant that the trial judge did not judicially evaluate (sic) the evidence of circumstantial evidence of Identification.

Particulars of Misdirection

(1) The evidence of identification is of poor quality being a fleeting glance of the back of the accused at night in circumstances which could impair visibility ...

(ii) The other evidence proffered to support the evidence of identification was highly prejudicial and of little probative value deepening suspicion of the accused/appellant.

(iii) The Federal Court of Appeal failed to consider the effect of the failure of the trial Judge in not warning himself about the danger of convicting an accused on circumstantial evidence of identification.

(iv) The 1st Prosecution witness gave evidence that she saw accused at 8.00 p.m. on the day of the incident but could not identify the colour of the dress the accused was wearing even though there was moonlight which enabled her to see the accused after 9.00 p.m. running away with a gun; (sic). The dress worn by the accused and tendered as Exhibit A AND Al was white in colour”.

Much of the argument in support of this ground of appeal is covered by the argument in support of the second ground of appeal already considered. However, the sum of the argument of learned counsel for the appellant in respect of this ground of appeal is as stated in the “particulars of misdirection” quoted above; and it is to the effect that the relevant prosecution witnesses [P.W.(1), P.W.(2), P.W.(3) and P.W.(6)] had only “fleeting glances” of the appellant and could be mistaken as to his identity. In the circumstances learned counsel contended that the learned trial Judge should have “warned himself of the special need for caution” in considering the weight to be attached to the evidence of these witnesses. This Court was then referred to the cases of Idahosa v. R. (1965) N.M.L.R. 85 and R. v. Turnbull and another (1976) 3 W.L.R. 445, 447- 449, 454 and 457. As already stated when we considered the second ground of appeal the learned trial Judge was satisfied after careful review of the evidence given by the prosecution witnesses (2), (3), (4) and (6) that they recognised the appellant who was well-known to each of the witnesses and not a stranger to any of them. It was also clear from the record of proceedings that the learned trial Judge was very cautious in his examination of the evidence of the witnesses concerned (i.e. P.W.(2), P.W.(3), P.W.(4) and P.W.(6). Turnbull (Supra) was a jury-trial and of course it is desirable that in matters of this nature the jury have to be directed. It is quite another thing when a judge sits both as trial-judge and jury. In this connection we draw attention, with approval, to the observations of the West African Court of Appeal in R. v. Adebanjo AND Others (1935) 2 W.A.C.A. 315:

“...We think it (is) going altogether too far to demand that a judge, sitting as both judge and jury, should commence his judgment by directing himself as to the burden of proof, the doctrine of reasonable doubt, and the elements which constitute the offences with which the accused is, or are, charged. To our minds it must be presumed that a learned Judge, sitting as both Judge-Jury, has directed himself aright in matters of law unless the contrary appears from the judgment ...”

- See (1935) 2 W.A.C.A. at p.321 per Aitken, J.

Again, in the case of Commissioner of Police v. Tsalikis (1943) 9 W.A.C.A. 211 at 217 the West African Court of Appeal observed:-

“It is true that nowhere in the record is there any sign that the Magistrate warned himself that Uwakara was an accomplice but the fact was sufficiently obvious and the court will not do the Magistrate the injustice of assuming that he did not realise this fact.

Apart from that, the court finds that there was evidence tending to corroborate the evidence of Uwakara on material matters....”

The record of proceedings show that not only was the learned trial Judge sufficiently aware that there was need to treat with caution the evidence of the relevant witnesses already mentioned, he in fact adopted that attitude in his examination of their evidence. The case Idahosa (Supra) cited to us by counsel does not, in the circumstances of this case, avail his submission as is clear from the observations of Hewart L.C.J. in R. v. John Phillips 18 C.A.R. 151 and 152 (adopted by this court) at p.88 of (1965) N.M.L.R.:-

“It Is not of course to be said that a person is not to be convicted on the testimony of one witness identifying him but where the circumstances are those of the present case (as was the case with the third appellant in Idahosa - where the identifying witness is a stranger to the defendant and the physical references are those to which reference has been made (as in Idahosa, where the identifying witness merely described the appellant, a complete stranger to the witness as “a man with fat belly’) - it is right that the attention of the jury should be directed to the weakness of the evidence. If, after such direction the jury think it right to convict, that is one thing, it is another thing where, as here, there is no reference in the summing-up at all to the fact that there is only one witness to identify...”

We were satisfied that for the foregoing reasons the third ground of appeal was absolutely without merit.

It was also argued on behalf of the appellant that there were a number of in-consistencies in the evidence of the prosecution witnesses. Much reliance was placed on the alleged inconsistencies in their evidence as to:

(1) the time when the appellant was seen by them in the vicinity of the murder incident at Alimosho Village;

(2) on the location of the appellant’s house (i.e. whether it was at Oshodi or Mushin);

(3) as to the day of the week on which the murder of the deceased took place (i.e. whether it was a Friday or a Saturday); and

(4) finally as to discrepancies between the testimony of some of the witnesses and their unsworn statements (i.e. statements to the police).

In the end it was submitted to us by learned counsel for the appellant that in the circumstances the court of trial should have come to the conclusion that there was reasonable doubt as to the guilt of the appellant. We considered carefully the argument of learned counsel and were satisfied that that inconsistencies referred to were in our view not material inconsistencies. We were also satisfied that the learned trial Judge, in his very careful review of the evidence of the prosecution witnesses, was not unmindful of these inconsistencies which in our view he justisfiably, also considered to be insignificant or de minimis. However, we were quite satisfied that in spite of these inconsistencies there was ample evidence on which a jury or a judge sitting as both judge and jury could come to the conclusion that the appellant was guilty; and, above all, we were satisfied that the learned trial Judge after a careful review of the overall evidence before him was satisfied be-yond any shadow of doubt that it was the appellant who killed the deceased. In this connection attention may be drawn to the observations of the West African Court of Appeal which we consider germane to the facts in the appeal in hand:-

“...As to this, although as has already been mentioned, there were serious discrepancies in the evidence of the two principal witnesses for the prosecution Degbeh and Jawan there was ample evidence upon which the jury could come to the conclusion which they did, and the conflict of evidence was not such as to preclude them from believing the evidence of the girl Degbeh that it was the appellant who had had (carnal) connection with her ....” (Italics and brackets supplied by the court) - See R. v. Jonathan Cole (1942) 8 W.A.C.A. 121 at 122.

It has to be mentioned that in the course of his argument on the last ground of appeal learned counsel for the appellant contended that the evidence of P.W.(1) whom he considered to be the principal witness for the prosecution ought not to have been given credit because, (1) she failed to mention in her evidence that the second prosecution witness P.W.(2), Nimota Kelani, was the person who arrived on the scene (i.e. of the murder) immediately after she raised an alarm following the gun-shot injury received; (2) she mentioned that it was one Jinadu who arrived at the scene. He further contended that it was the duty of the prosecution to call Jinadu to testify; and that since the prosecution failed to discharge their duty (i.e. of calling the witness Jinadu), then on the authority of R. v. Kuree (1941) 7 W.A.C.A. 175 this court should quash the conviction of the appellant. After a careful examination of the original record of proceedings (i.e. the manuscript in which the evidence of the witnesses at the trial was recorded by the learned trial Judge) we were satisfied that P.W.(1) did not mention the name “Jinadu” in her evidence. She consistently referred to “Nimota” in her evidence. With respect to the latter contention of learned counsel for the appellant and for which he relied on the authority of George Kuree (Supra) we are in no doubt that learned counsel completely misunderstood the ratio decidendi of that case judgment of the court in Kuree (Supra):-

“it is well established that it is the duty of the prosecution to place before the court all available relevant evidence. This does not mean, of course that a whole host of witnesses must be called upon the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called. The trial Judge also has a discretion himself to call a witness in the interest of justice and we conceive it to be his duty to exercise this discretion where by doing so the real truth can be ascertained. In this case there was one person whose evidence, we think, was of vital importance and it was not before the court. We refer to the woman Amamki...“

(Capitals and italics supplied by this court) - See R. v. George Kuree (1941) 7 W.A.C.A. at 177.

As already stated P.W.(1) never mentioned Jinadu as one of the persons who, came on the scene soon after the deceased was shot and, consequently, should have seen the appellant and his confederates running into the bush. She mentioned Nimota who, in fact, gave evidence as P.W.(2) corroborating her [P.W.(1)’s] story on this material point. Nothing important really turns on this argument since P.W.(1) is not the only witness who testified on this “vital issue”; others did, and they include P.W.(2), P.W.(3) and P.W.(6). Consequently the decision in George Kuree (Supra) does not avail the submission of learned counsel, which again we considered to be devoid of any merit.

In the event, we had no difficulty in answering the penultimate question, arising on the grounds of appeal in the instant case and posed on the fifth question in the first paragraph of this judgment, in the negative. Whereupon this appeal was, at the end of the arguments and submissions both written and oral of learned counsel for the appellant - this court not having found it necessary to call upon learned counsel for the respondent - dismissed on the 22nd day of September, 1978.

Appeal dismissed.