NWABUEZE AND OTHERS

V.

THE STATE

IN THE SUPREME COURT OF NIGERIA

8TH DAY OF JULY, 1987

SUIT NO. SC 57/1987

LEX (1987) - SC 57/1987

# OTHER CITATIONS

2PLR/1988/60 (SC)

(1988) NWLR (Pt.86)

**BEFORE THEIR LORDSHIPS**

KAYODE ESO, J.S.C.

SAIDU KAWU, J.S.C.

CHUKWUDIFU AKUNNE OPUTA, J.S.C.

PHILIP NNAEMEKA-AGU, J.S.C.

EBENZER BABASANYA CRAIG, J.S.C.

BETWEEN

NWABUEZE AND OTHERS – Appellants

AND

THE STATE – Respondent

ORIGINATING COURT(S)

HIGH COURT OF IMO STATE, ORLU JUDICIAL DIVISION

REPRESENTATION

J.H.C. OKOLO - for 1st and 3rd Appellants

J.C. OKONKWO - for 2nd Appellant

A.I. EZENAGU, Deputy Director of Public Prosecutions, Imo State - for Respondent

ISSUES FROM THE CAUSE(S) OF ACTION

CRIMINAL LAW AND PROCEDURE: - Armed robbery - Identification of accused persons

CHILDREN AND WOMEN LAW: Women in Crime - Female member of armed robbery gang - Armed robbery in hotel

PRACTICE AND PROCEDURE ISSUES

EVIDENCE:- Variation in confessional statement and statement on oath -When an alibi can avail the accused person

**MAIN JUDGMENT**

KAWU, J.S.C (DELIVERING THE LEAD JUDGMENT):

The appellants, together with a fourth accused person were arraigned before the High Court of Imo State, Orlu Judicial Division and jointly charged with the offence of armed robbery contrary to section 1(2)(a) of the Robbery and Fire-arms (Special Provisions) Act, 1970. They all pleaded not guilty to the charge.

At the trial before Johnson, J., seven witnesses gave evidence for the prosecution while each accused person tested on his or her behalf but called no witness. At the conclusion of the hearing, after evaluating all the evidence adduced, the learned trial judge convicted the appellants and sentenced them to death. The fourth accused was, however, acquitted and discharged. The appellants appealed to the Court of Appeal, Enugu Judicial Division, which court, on 30th day of January, 1987 dismissed their appeal. They have now appealed to this Court. I will deal with the appeal of the 1st and 3rd appellants first before considering that of the 2nd appellant.

The 1st and 3rd appellants filed two grounds of appeal each which are very similar and which without the particulars are as follows:

“(1) The learned Justices of the Appeal Court erred in law in affirming the conviction and sentence of the appellant, when on the evidence disclosed his defence of alibi was not satisfactorily disproved by the prosecution.

(2) The Justices of the Appeal Court erred in law in affirming the said conviction and sentence when the identity of the appellant in the offence alleged was not conclusively or satisfactorily established.”

In the brief of argument filed on behalf of 1st and 3rd appellants’ two issues were formulated for determination in this appeal and they are as follows:

“(I) Was the Court of Appeal right in upholding the findings and conclusion of the trial court, having regard to the defences of alibi raised by the appellants, none of which was either effectively challenged or disproved by the prosecution?

(ii) Was the identity of the appellants in the offence alleged established beyond reasonable doubt as will render them liable to the confirmation of their conviction and sentence?.”

In his own brief, counsel for the respondent formulated three issues for determination as follows:

“Having regard to the nature of evidence before the trial court,

(i) was the finding of facts by the trial court justified as to warrant the Court of Appeal upholding it.

(ii) whether the substance of the alibi set up by the appellants was sufficiently defined to warrant police investigation and therefore avail the appellant’s as a defence, and

(iii) whether the identification of the appellants justified the findings of the trial court which the Court of Appeal subsequently upheld, thereby confirming the conviction and sentence of the appellants.”

It is obvious that the two crucial issues which will determine this appeal are the issues of identification of the 1st and 3rd appellants and their defences of alibi which both of them put up at the trial.

However, before going into the arguments of counsel regarding these two matters, I think it is necessary to state, briefly, the background facts of this case. They are as follows:

In the early hours of 9th November, 1981, the “Friends Hotel”, Amaifeke, Orlu, was besieged by a gang of armed robbers. At the time of their arrival at the Hotel, p.w.2 - Vitalis Akubuo was sleeping in one of the Hotel rooms with one Innocent and one Rose Duru (p.w.3). They were all employees of the Friends Hotel. The robbers broke into their room and at gun point ordered them to lie down facing the ground. They all promptly complied with the order, but while doing so, p.w.2 raised his head up slightly to enable him have a good look at the intruders. He testified that one of the robbers (3rd appellant) ordered p.w.3 to produce her money or be shot. P. W.3 promptly surrendered her handbag from which 3rd appellant took the sum of N60.00. The evidence of p.w.2, was confirmed by that of p.w.3. According to the evidence of p.w.2, amongst the robbers was the 1st appellant who at the time of the robbery was at the door of the room holding a gun. The 2nd appellant was also identified as a member of the gang. She was said to be wearing a skirt and a blouse. Both p.w.2 and p.w.3 heard when the 2nd appellant said in Igbo “gbagbuo Oliver” meaning “shoot Oliver dead”. Oliver (p.w.7) who was also an employee of the Hotel and was in another room with one Josephine Njezi (p.w.5) at the time of the robbery, heard the 2nd appellant giving orders to the other robbers to shoot him dead. After they had robbed p.w.3 of her money the robbers moved into Oliver’s room where they stole N65.00. At the end of their nefarious activities, they all jumped into their vehicle and drove off.

Now in this appeal, there are only two points that have been raised on behalf of the 1st and 3rd appellants. The first was whether the evidence adduced by the prosecution sufficiently and unequivocally identified the 1st and 3rd appellants as members of the gang that committed the robbery on that day, and the second was whether their defences of alibi were adequately considered.

On the issue of the identification of the 1st and 3rd appellants it was submitted that the evidence adduced by the prosecution in this regard was inconclusive. It was contended that of all the seven prosecution witnesses only p.w.2 and p.w.3 gave evidence implicating the 1st and 3rd appellants. The evidence of those two witnesses, it was submitted, could not be said to be reliable evidence on which to convict, because their evidence was in conflict with some previous statements which they had made to the Police. In respect of p.w. 3 reference was made to Exh. ‘A’ which is the statement she made to the police on the very day of the incident. With regard to p.w.2 reference was made to Exh. ‘C’ and ‘D’ which are the statements made by the witness on 11/11/81 and 12/11/81 respectively.

Now, in her evidence at the trial, p.w.3 - Rose Duru said clearly the 1st and 3rd appellants were amongst the robbers that invaded the Friends Hotel on the day of the incident. She was positive as to the identity of each robber and described in some considerable detail the part played in the robbery by each robber. Her evidence was believed by the learned trial judge. But contrary to her evidence at the trial, in the statement which she made to the police on the very day of the incident, she said that she did not know the names of any of the robbers. That statement is Exh. A and it reads as follows:

“I Rose Duru voluntarily elect to state as follows: I am a Sales lady in the above Hotel, and I live in it. Today Monday the 9th November, 1981, at about 0400hrs. I was sleeping in my room. All of a sudden I heard my door being broken with foot. I woke up. I saw two men with torch light on my eyes. Then they ordered me to lie on my belly facing the ground. One with knife and the other with gun. The gun was shot. The man with gun pointed to me the gun so also the one with knife and ordered me to bring all the money I had. I brought my bag containing N60.00 and gave it to the man with gun. He told me to bring more that the money was not finished. He demanded the key to my cupboard that if I fail he would shoot me. Then I gave him the key and he opened the Cupboard and removed the sum of N150.00 from the Cupboard. During the time they were in my room one girl with them was telling them to move to the room of one Rose Okaneme whom she said has money. The voice is the voice of one girl living with me before at Akuma Mother-land Hotel. Though she was in Ramblers to Akuma and then to Friends Hotel. This girl is called Ngozi and I know her very well so also her voice. I also heard from her when she told those robbers to shoot one man in the Hotel by name Oliver Ikekwe but the thieves replied that they were after money but not to kill. She told them to do quick as time was against them. Then they broke into the room, ... stole all her properties and ran away. The robbers came with a vehicle though I did not know how many they were. I don’t know any of them.

Yesterday at about afternoon this Ngozi with some boys came to the Hotel and drank about six bottles of Beer. They were four boys and this Ngozi. Before when these boys enter the Hotel they would finish about two or three cartons in the Hotel. The names are Idea, Rapheal, Goody and Surugede with deformed hand. I know this Idea to be a thief and he is always in possession of small gun. I can’t tell if they were the boys who came to our Hotel to steal there. But before Ngozi was barred to come to this hotel because of her keeping company with these boys. The proprietor of the hotel can confirm this. When Ngozi came to our hotel yesterday, we were all afraid to see her with those bad boys in our hotel. This is all that happened.”

In her cross-examination at the trial, when she was asked if it was true that in her statement to the police she had said that she did not know any of the robbers, she denied saying so. But when she was confronted with Exh. A, she was recorded to have said, at p.48 of the record as follows:

“There are two girls in the Hotel who go by the name ‘Rose’ the other Rose denied knowing the accused but I said I saw the 3rd accused while 2nd ordered Oliver to be shot. The contents of Exh. A is partly my statement and partly wrong.”

The issue of conflict between the testimony of these two witnesses and their previous statements to the Police was raised at the trial, and in his judgment at p.113114 the learned trial judge dealt with the matter as follows:

‘There are some salient legal issues raised by defence Counsel in their addresses: Firstly it is discovered that two statements were credited to P.W.3, one of which is Exh. A. The significance of Exh. A is that P.W. 3 was alleged to have said in it that she recognised the voice of 2nd accused when she said “Gbagbuo Oliver and apart from that, she did not know the robbers. This issue was raised particularly in favour of 3rd accused. In her explanation, P.W.3 denied ever saying so to the Police. She said there were two girls called Rose in the Hotel at the time of the incident and both made statements to police in respect of this case. That while the other Rose denied knowing the robbers, she (p.w.3) did not say so. The second untendered statement of Rose Duru did not state that she did not know the robbers ... I watched the demeanor of P.W.3, her answers to questions in cross-examination and her evidence generally and was greatly impressed. I believe her as a witness of truth. Her story is consistent with the facts of the case, as supported by the evidence of other witnesses.”

Again the matter cropped up in the Court of Appeal, and that Court as per the lead judgment of Nasir, President of the Court of Appeal, at p.231 of the record disposed of the matter as follows:

“In respect of the evidence of Rose Duru (p.w.3) there is no doubt that her evidence on oath was in serious conflict with her statement (Exhibit A) in that in Court she said that she knew all the appellants before the robbery while in her statement she said she did not know if they were the robbers. She identified 2nd appellant. The learned trial Judge believed Rose Duru that she knew the appellant well before the robbery and he agreed with her that the statement attributed to her must have been a mistake.”

Now the learned trial judge made reference to another statement which was said to have been made by p.w.3 but which was not tendered as an exhibit; but there is nothing in the record to show that p.w.3 made such a statement. In any case if she did and it was not tendered, it would not be evidence on which the trial judge could make a finding. A judge can only make findings on the evidence properly adduced at the trial.

Again in their judgment the Court of Appeal held that the trial court was right in agreeing with p.w.3 that the statement attributed to her must have been a mistake.” I cannot find anywhere in the record where p.w.3 said anything of the sort. Throughout her evidence she spoke of only one statement which is Exhibit’A’.

There is no doubt that in this case the testimony of p.w.3 was inconsistent with Exhibit’A’, the statement she made to Police on the very day of the incident. While in that statement she said she did not know any of the robbers, in her evidence in court she said she had known all the appellants before the day of the robbery. I believe the law is that where a witness has made a previous statement, which is inconsistent with his oral testimony, the previous statement, whether sworn or unsworn does not constitute evidence upon which the court can act. See R. vs. Golder AND OTHERS(1960) W.L.R. 1169. In Christopher Onubogu AND ANOTHER vs. The State (1974) 9 S.C. 1, Fatayi- Williams, J.S.C. (as he then was) delivering the judgment of the Court at p.17 of the report, stated as follows:

‘We thought that the submissions of learned counsel for the appellants are well founded. In our view, where a witness, such as the complainant (p.w.4) in the case in hand, has made a statement before trial which is inconsistent with the evidence he gives in court, the court, provided that no cogent reasons are given for the inconsistency, should regard his evidence as unreliable”.

Also see Queen v. Ukpong (1961) 1 All N.L.R. 25; Jizurumba vs. The State (1976) 3 S.C. 89 and Williams v. The State (1975) 9111 S.C. 139. In this case p.w.3 was unable to advance any cogent and satisfactory reason for the inconsistency, on a very material point, in her testimony and her previous statement. In that case her evidence should not have been relied upon. The onus was on her to offer an explanation. It was not the function of the trial court to embark on the task of finding one as the trial court wrongly attempted to do in this case.

The same point was raised regarding the evidence of p.w.2 who also claimed to have witnessed the robbery. He made two statements to the Police - Exhibits ‘C’ and V a couple of days after the incident. He also gave evidence at the trial. In Exhibit ‘C’ and ‘D’ he named the appellants amongst the robbers who invaded the Friends Hotel that morning. But in his evidence in court he said that he did not know their names. The learned trial judge said nothing in his judgment about this obvious inconsistency in the evidence of this witness, and yet it was upon the evidence of this witness and that of the p.w.3 that he based the conviction of the 1st and 3rd appellants as he has so stated clearly at p.116 of the record.

Now in our system of criminal adjudication the onus is on the prosecution throughout to establish the guilt of the accused person beyond all reasonable doubt, though not beyond any shadow of doubt. See Stephen Oteki v. Attorney-General of Bendel State (1986) 2 N.W.L.R. pt.24, 648. Also see Woolmington v. Director of Public Prosecution and Minister of Pensions and Miller (1947) 3 All E. R. 372 at 374. The question is: In this case, can it be said, with any degree of certainty, that the prosecution has discharged its onus of proving the case against the 1st and 3rd appellants beyond all reasonable doubt? My answer is firmly in the negative. I am of the view that if the learned trial judge had given proper consideration to the inconsistency in the evidence of p.w.2 and p.w.3 and their previous statements, he would have come to the conclusion that it would have been unsafe to convict them on such evidence. Where, as in this case there are inconsistencies in the prosecution’s evidence such as to cast reasonable doubt on the guilt of the accused person, such accused persons should be given the benefit of the doubt. See Onubogu v. Queen (Supra). In my judgment the 1st and 3rd appellants should not have been convicted on the evidence before the court. Their appeal therefore succeeds and it is hereby allowed. I hereby set aside the judgments of both the High Court and the Court of Appeal and enter in respect of the 1st and 3rd appellants, a verdict of acquittal and discharge. In the circumstances I find it unnecessary to consider the issue of alibi raised in the appellants grounds of appeal.

I now come to the appeal of the 2nd appellant. In the brief of learned counsel for the 2nd appellant, three issues were formulated for determination but having considered the grounds of appeal filed, and learned counsel’s arguments in support of those grounds it is my view that the only two points which need to be considered are (1) whether on the totality of the evidence adduced, the conviction of the 2nd appellant was justified and (2) whether adequate consideration was given to her defence of alibi.

With regard to the defence of alibi, 2nd appellant in her statement to the police (Exh.’F) said that she went to her boy friend’s house - one Samuel Ohaka at about 5.30 p.m. on Sunday, 8th November, 1981 and remained there until about 9 a.m. on Monday 9th November, 1981. But in her evidence in court she said that she was with her boyfriend. Samuel Ohakafrom 6thNovember, 1981to9thNovember, 1981. There was evidence before the court that the 2nd appellant’s defence of alibi was in fact investigated and found to be false. This is the evidence of p.w. 4 who in his cross-examination said:

“I did investigate 2nd accused’s story and found it to be a lie because she went to the place after the robbery. The person 2nd accused went to was also arrested but later released by Police.”

That evidence was believed by the learned trial court. There is therefore, in my view no substance in the complaint that her defence of alibi was not adequately considered. As to who should call Samuel Ohaka to testify, I think the position has been clarified in a portion of the judgment of this Court delivered by Brett, J.S.C. in Gachi AND OTHERS v. The State (1965) N.M.LR. 333 at 335 where he said:

‘The word “alibi” means elsewhere and since it is a matter peculiarly within the knowledge of an accused person if he was at some particular place other than that where the prosecution says he was at any material time, what has been called the “evidential burden” that is, the burden of adducing or eliciting some evidence tending to show this rests on him.”

In this case the appellant had faded to discharge the evidential burden on her in her defence of alibi because her statement that she was with Samuel Ohaka at the time of the robbery was found to be false. In my view, in the circumstances the prosecution were not obliged to call Samuel Ohaka as a witness. In my case there was the evidence of eye witnesses who had known the 2nd appellant before the incident and who testified that she took part in the robbery. This brings me to the second point as to whether there was sufficient evidence on which the trial court based her conviction.

In this regard the first thing to bear in mind is that the 2nd appellant was not a stranger to the staff of the “Friends Hotel” This was made clear in her evidence when she said:-

“It is true somebody said he identified me in the night of 9/11/81 at the Friends hotel but that person is not speaking the truth. Police arrested me in the house of Samuel Ohaka. I was arrested on 9/11/81. I was sleeping before I was arrested. I have lived at Friends hotel previously. I know all the workers at Friends Hotel, and they know me too. It is true witnesses said they picked my photograph at the premises of the hotel the night of the incident. It was during my stay at the Friends Hotel that I gave out my picture to one Josephine Njezie. It is true I was identified during Police identification parade. I know the two people who identified me. Some of the girls who attended the identification parade were known to me and they are my friends.”

At the trial p.w.5 -Josephine Njezie testified that she recognised 2nd appellant’s voice that morning when she shouted “gbagbuo Oliver’. It was a voice she was familiar with having known her before the day of the incident. There was also the evidence of p.w.7 - Oliver Ikekwe who also identified the appellant’s voice when she ordered the other robbers to shoot him (Oliver) dead. He also identified 2nd appellant’s voice at the Identification parade conducted by the Police. There was also Exh. ‘B’, her photograph which was found at the spot where the robbers parked their vehicle that morning. She tried to explain that Exh. ‘B’ had been previously given to p.w.5 as a gift but the learned trial judge rightly rejected that explanation as p.w.5 was never cross-examined on the point when she gave evidence. On the whole the evidence adduced by the prosecution against the 2nd appellant was overwhelming, and in her case any other verdict would have been perverse. I am satisfied the 2nd appellant was properly convicted by the trial court and the Court of Appeal was right in upholding that decision. The appeal of the 2nd appellant fails and it is hereby dismissed. Her conviction and the sentence of death passed on her are hereby affirmed.

**ESO, J.S.C**.

I have had a preview of the judgment just delivered by my learned brother Kawu, J.S.C. I am in complete agreement that the appeal of the 1st and 3rd Appellants should be allowed. The reason is clear and this is conceded by the learned Director of Public Prosecution that the main evidence against these two, that is the evidence of P.W.2 and P.W.3 were in conflict with their previous statements to the Police. They were tendered in court and found to be so. The statements and evidence could not both be true. One must be false and it would be unsafe to convict on such evidence. See Asuquo Williams v. the State (1975) 9-11 S.C. 139.

The second appellant put up an alibi in the trial Court which she never substantiated. She had no burden to prove this defence of alibi beyond all reasonable doubt. The onus on her is lighter. But she must adduce some evidence. In other words she should have fed some evidence into the imaginary scale before the Prosecution could be saddled with onus to feed the other scale.

In this case she failed. In her evidence, she said she was with her boy friend for the period of three days including the fateful day. That if true could have been a perfect alibi. But in her earlier statement, she only said she visited him on Sunday. She could visit and still perpetrate the crime and so the defence of alibi does not avail her.

For these reasons and the fuller reasons given in the judgment of my learned brother Kawu, J.S.C. I will allow the appeal of the 1st and 3rd appellants and dismiss the appeal of the 2nd appellant.

**OPUTA, J.S.C.:**

I have had the privilege of a preview in draft of the lead judgment just delivered by my learned brother Kawu, J.S.C. and I agree completely with his reasoning and conclusions.

The appellants were along with one other charged with the offence of Armed Robbery contrary to Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act 1970. The trial Judge Johnson, J. of the Imo State High Court convicted the 3 appellants and sentenced them to death. The robbery took place in the early hours of the morning -to be precise - 4 a.m. of the 9th day of November, 1981. The robbers drove to the hotel in a vehicle. The evidence was that it was the noise of their vehicle that roused Vitalis Akubuo called as P.W.2 and Rose Duru called as P.W.3 from their sleep. The appellants were all convicted on the evidence of P.W.2 an P.W.3. They were the witnesses who identified the appellants as those who robbed them. The appeals of the Appellants to the Court of Appeal were all dismissed.

The appellants have now appealed to this Court. Mr. Okolo, learned counsel for the 1st and 3rd appellants attacked (both in his Brief and oral arguments before us) the identification of the Appellants by the prosecution witnesses as “full of equivocations”. He submitted that there were very substantial contradictions between the statement of these witnesses to the Police and their oral evidence in Court. In view of these conflicts, no one could really be sure of the identity of the actual robbers or be sure that the 1st and 3rd appellants were among those who robbed the “Friends Hotel” Amaffeke, Orlu, on the 9/11/81. Learned Deputy Director of Public Prosecutions Mr. Ezenagu, in keeping with the best traditions of the profession, readily conceded that the identification of the 1st and 3rd appellants left much to be desired.

Identification evidence has to be very carefully considered since it is usually a question of reconstruction, especially where a witness tries to identify someone he had never seen or met before the day of the incident. There are many possibilities of mistake arising either from error of observation or error of recollection. There is however a difference between a witness saying -”I knew the accused before the date of this incident. It was he that I saw on that material night’ and a witness saying - “I saw someone that night for the first time. I can identity him if I see him again”. Now where a witness testifies that he knew the accused before, it will be natural to expect him to give the name of such accused person to the Police at the earliest opportunity, when he makes his statement to them during police investigation into the offence charged. The witnesses who identified the 1st and 3rd appellants were P. W.2 and P.W.3. Let me now compare their statements to the Police and their evidence in Court.

Now P.W.2, Vitalis Akubuo, in his statement to the Police Exh. D mentioned 1st and 3rd Appellants by name but in his oral testimony at p.36 lines 2 to 3 of the record he said inter alia:

“I can recognise them easily whenever I see them. I do not know their names.”

The P.W.3, Rose Duru, in her statement to the Police Exh. A, at p.122 of the record gave the names of the 1st and 3rd Appellants. She knew them before. In Exh. A, P.W.3 added:

“I can’t tell if they were the boys who came to our hotel to steal there”.

This statement was made on 9/11/81 the very day of the robbery charged. Then in her evidence in Court given on the 4th November, 1982, one year and five days after the robbery she then gave evidence implicating the 1st and 3rd Appellants.

The question now is - How would a Court treat the evidence of P.W.2 and P.W.3, evidence that is at variance with their previous statements to the Police? The character of a witness for habitual veracity is an essential element to be considered If his credibility is in issue. If it appears (as it does in this case on appeal) that a witness had previously said or written something contrary to what he has deposed to on oath in Court then his evidence should not have much weight. The effect of the conflict between the evidence of P.W.2 and P.W.3 and their Statements Exh. D and Exh. A respectively is to render their sworn evidence negligible. The case has thus to be established by other witnesses - R. v. Leonard Harris (1927) 20 CR. App. R. 144 at p.147; R. v. Francis Fraser & Robert Warren (1956) 40 CR. App. R. 160; R. v. Atkinson (1934) 24 CR. App. R. 123; Onubogu AND ANOTHER v. The State (1974) 9 S. C. 1; Queen v. Ukpong (1961) 1 All N.L.R. 25. In this case if one discounts the evidence of P.W.2 and P.W.3 (as they ought to be discounted, there will be nothing left to connect the 1st and 3rd Appellants with this robbery. Their appeals therefore have merit and ought to be allowed. I hereby allow same, reverse the appeal decision of the Court of Appeal and quash the conviction and sentence of the trial court with regard to them 1st and 3rd Appellants.

The case of the 2nd Appellant is slightly different. The 2nd P.W. and the 3rd P.W. mentioned her in their statements Exh. D and Exh. A. They also mentioned her in their oral evidence in the Court. These witnesses were believed. The defence of the 2nd Appellant was an alibi. To succeed, she had only the evidential burden of adducing such evidence that will enable the trial Court finding the issue of alibi in her favour. this burden differs from the primary onus of proof which rests on the prosecution and never shifts. If the trial Court is left in doubt as a result of her evidence of alibi, it will discharge her for it will then mean that the prosecution has failed to establish its case beyond reasonable doubt. In that event the 2nd Appellant wins -See R. v. Lobell (1950) 41 CR. App. 100 at p.104. This means that the onus of disproving the alibi set up by the 2nd Appellant is still on the prosecution. All the 2nd Appellant had to do was to set up an alibi -Onafowokan v. The State (1987) 3 N. W.L.R. 538; Akile Gachi v. The State (1965) N.M.L.R. 333 at 335; Ortese Yanor AND ANOTHER v. The State (1965) N.M.L.R. 337. In this case the learned trial judge disbelieved the alibi set up by the 2nd Appellant. Her conviction has therefore not been faulted. The Court of Appeal was right in dismissing her appeal and this Court cannot interfere.

In the final result and for the reasons given above and for the fuller reasons in the lead judgment of my learned brother Kawu, J.S.C. which I now adopt as mine, I will allow the appeals of the 1st and 3rd Appellants. I will dismiss the appeal of the 2nd Appellant and same is hereby dismissed. I abide by the other consequential orders in the lead judgment.

**NNAEMEKA-AGU, J.S.C.:**

I have had a preview of the judgment of my learned brother, Kawu, J.S.C., just delivered. I agree with him that the appeals of the 1st and 3rd appellants have merit and that the appeal of the 2nd Appellant is unmeritorious.

There can be no doubt that the evidence of the two star witnesses, Vitalis Akubuo (P.W.2) and Rose Duru (P.W.3) in court conflicted with their earlier statements in writing to the police which were tendered as Exh. A, for P.W.3, and Exhs. C and D, for P.W.2. Exhs. A, C and D were tendered under cross-examination to confront these witnesses with the inconsistencies between these statements and their respective testimonies in court. It is now perfectly settled that when it is shown that a witness called by the prosecution made a previous statement in writing which is inconsistent with his evidence in court, the evidence should be treated as unreliable, and that the previous statements are no evidence upon which the court could act. See on this -The Queen v. Joshua (1964) 1 All N.L.R. 1 at p.3; Onubogu v. The State (1974) 9 S. C. 1, p.20; Asuquo Williams v. The State (1975) 9-11 S. C. 139. That they were inconsistent was, indeed, conceded by the learned D.P.P. for the State. It is remarkable that P.W.2 freely mentioned the names of the 1st and 3rd Appellants in his statements, Exhs. C and D, as the culprits thereby giving the clear impression that he knew them very well. But, in his testimony in court, he said he did not know them. As the main evidence against the 1st and 3rd appellants is that of P.W.2 and P.W.3, I agree that they are entitled to acquittal.

The case against the 2nd Appellant is a different kettle of fish. Her main defence is alibi. There are two good reasons why that defence is bound to fail. In the first place, It must be noted that the Latin word alibi means “elsewhere”. A defence of alibi is one which postulates that the accused person was somewhere else other than the locus of the offence charged at the time of commission of the offence. For a proper plea of alibi there is an evidential burden on the accused to bring evidence, with all necessary particulars, in support of the alibi, that is some evidence tending to show that by reason of the presence of the accused person at a particular place other than the locus of the commission of the offence charged at the time it was committed, he could not have committed the offence. Once he has properly raised his defence of alibi, the onus is on the prosecution to investigate and disprove the alibi by evidence. Until the defence of alibi is properly raised with all the necessary particulars to enable the prosecution investigate it and rebut it, if they can, there is nothing for the prosecution to disprove. Commenting on the 2nd Appellant’s defence of alibi the learned trial judge stated:

“In her statement Exh. F she said she went to her boyfriend Samuel Ohaka’s house at 5.30 p.m. on Sunday 8/11/81, and on Monday 9/11/81 she cooked rice and ate; whereas in her oral testimony she said she was with Samuel from 6/11/81 to 9/11/81. Exh. F did not spell it out that way. The two statements do not mean the same. Exh. F simply stated that she visited, not that she remained with Ohaka.”

If this statement of the facts was correctly made, what it comes to is that the 2nd Appellant did not even discharge the evidential burden on her in her defence of alibi. Until she did that the duty of the prosecution to disprove the alibi did not even arise. This is because as the facts upon which the defence of alibi rest are facts peculiarly within the knowledge of the 2nd Appellant, she had the evidential burden of eliciting some evidence tending to show she was elsewhere at the time the crime was committed. She had the duty to thus successfully raise the defence but did not have to prove it beyond reasonable doubt. See Akile Gachi AND OTHERS v. The State (1965) N.M.L.R. 333, at p.335. If she quibbled in discharging this evidential burden, that was the end of the matter.

But even if I consider it on the basis that she successfully raised a defence of alibi, I must have to hold that it did not avail her, for two reasons. In the first place according to P.W.4, Christian Nwagwu, Sergeant No. 46799 who investigated the case under cross-examination:

“I investigated the alibi and found it to be a lie because she went to the place after the robbery. The person 2nd accused went to was also arrested but later released by Police.”

He was not asked how he came to the conclusion that it was false. There can be no question about the power of a police officer giving evidence about what he found as a result of his investigation. It follows, therefore, that the contention that the alibi was not investigated cannot be sustained. But the second and stronger reason why I believe that the 2nd Appellant was rightly convicted is that there were other two sets of accepted evidence which clearly link her with the commission of the offence. In the first place, even if the evidence of P.W.2 and P.W.3 were disregarded, the evidence of P.W.5 and P.W.7 show clearly that she was identified by her voice when shewas shouting “Gbagbuo Oliver’, which means “shoot Oliver dead” when the robbery was going on. Also her photograph, Exh. B, found after the robbery at the place where the escape vehicle was parked links her unto the commission of the crime. It follows from all these that even if she successfully raised a defence of alibi, there was strong evidence called by the prosecution in support of the case against her. The law on this type of situation is as stated by the Supreme Court in Christian Nwosisi v. The State (1976) 6 S.C. 109, at p.113 thus:

“In Yanor AND ANOTHER v. The State (1965) N.M.LR. 337 this Court held that on the defence of alibi, the law is that evidence of alibi should not be disregarded by a trial court unless there is stronger evidence against it and that, while the onus is on the prosecution to prove the charge against an accused person, the latter has the duty of bringing the evidence on which he relies for his defence of alibi. Having regard to the overwhelming evidence which was accepted by the trial court, of the two eye witnesses, P.W.3 and P.W.9 of the Appellant’s presence at the scene and of his actual commission of the offence, the defence of alibi was, in our view rightly rejected, as also the wild suggestion, unsupported by any evidence whatever, that the murder was committed by another lover of P.W.3.”

It is well to remember that since the decision of this Court in Gachi AND OTHERS v. The State (supra) and Yanor AND ANOTHER v. The State (1965) N.M.L.R. 337 which were followed in the case of Nwosisi (supra) and several other decisions, the defence of alibi has ceased to be the type of cheap panacea that it used to be in the hands of criminals. Now, not only has the accused an evidential burden of eliciting some evidence, with all necessary particulars which can be checked, to show that she was somewhere else at the time the offence charged was committed at the locus of the crime but also, if the prosecution investigates the alibi and calls some evidence in disproof of it, the Judge, not disregarding the defence of alibi, is yet entitled to consider it from the background of other stronger evidence, if any, linking the accused person with the crime charged. In the instant case, there is such strong evidence connecting the 2nd Appellant with the offence charged that I am of the view that the learned President of the Court of Appeal was right when he held:

“From the above evidence it is not difficult to see why the scale on which the prosecution’s evidence and the defence evidence were weighed tilted fully against the Appellants. The learned trial Judge was justified to reject the defence of alibi put up by each of the Appellants.”

It appears to me too that when the learned President said that the scale “tilted fully against the Appellants” he was, in effect, saying that it far outweighed the standard sufficient to satisfy a court in a civil case. It was beyond reasonable doubt. In civil cases, all that is required is for the scale to be tilted beyond a balance of probability.

For all I have said above, and for the fuller reasons given by my learned brother Kawu, J.S.C., I allow the appeal of the 1st and 3rd appellants but dismiss the appeal of the 2nd Appellant.

**CRAIG, J.S.C**.:

I have had the privilege of the preview of the judgment of my learned brother Kawu, J.S.C. and I am in total agreement with the views expressed therein, The central point in this appeal concerns the defence of alibi set up by the Appellants. The alibi of the 2nd Appellant was investigated and found to be false. Apart from this, there was evidence from other witnesses which implicated the Appellant in the commission of the offence. For instance, persons with whom she had lived and who were familiar with her voice, heard her say on the night of the robbery “Gbagbuo Oliver’ - meaning “shoot Oliver dead”. The learned trial judge believed these witnesses and convicted the Appellant of the offence. The lower court confirmed that conviction and Counsel has not been able to show that that conviction was wrong. In those circumstances, I am of the view that the 2nd Appellant’s appeal should be dismissed.

In the case of the island 3rd Appellants, they also set up a defence of alibi which the trial judge disbelieved. However, apart from this, the evidence of witnesses who identified them as being at the scene of the crime, was shown to be full of such inconsistencies as were capable of casting doubt on the case of the Prosecution.

These inconsistencies have been adequately highlighted in the lead judgment and for the lucid reasons given by my learned brother Kawu, J.S.C., I agree that these two Appellants ought to have been given the benefit of the doubt and acquitted of the charge against them.

Accordingly, I hold that the appeal of the 1st and 3rd Appellants succeed and it is allowed, whilst that of the 2nd Appellant fails and it is dismissed.

I make the same consequential orders as are contained in the lead judgment. Appeal of 1st and 3rd appellants allowed.

Appeal of 2nd appellant dismissed.