

1. DAVID OMOTOLA
2. TIMOTHY BENSON
3. AYODELE AYINDE
4. AKEEM ADEBAYO
5. ADEMOLA APANISIL V.

V.

THE STATE

SUPREME: COURT OF NIGERIA

SC.69/2008

DAHIRU MUSDAPHER. J.S.C. (*Presided*)
GEORGE ADESOLA OGUNTADE. J.S.C. (*Read the Leading Judgment*)-
WALTER SAMUEL NKANU ONNOGHEN. J.S.C.
IKECHI FRANCIS OGBUAGU, J.S.C.
JAMES OGENYI OGEBE. J.S.C.

FRIDAY. 6TH MARCH, 2009

APPEAL - Concurrent findings of facts by lower courts-Attitude of the Supreme Court thereto - When it will interfere therewith.

COURT - Judgment of court - How written – Constituents of a good judgment.

CRIMINAL LAW AND PROCEDURE - Conspiracy,-charge of-When tried with substantive charge - Duty on court as to consideration of evidence relevant to conspiracy.

CRIMINAL LAW AND PROCEDURE –Defences-Alibi-Where raised by accused - When will be rejected.

*CRIMINAL LAW AND PROCEDURE - Defences - Alibi - Where raised by accused - Burden of proof of - Whether lies on accused
Duty on prosecution - How discharged.*

CRIMINAL LAW AND PROCEDURE - Identification of accused -identification parade - When not necessary.

*CRIMINAL LAW AND PROCEDURE- offences - charge of - conspiracy to murder and murder -Whether accused must first be
found guilty of conspiracy before being found guilty of murder.*

CRIMINAL LAW AND PROCEDURE - Offences Conspiracy Meaning and ingredient of - How established.

*CRIMINAL LAW AND PROCEDURE - Proof of crime -Circumstantial evidence - Meaning and nature of- When court may act
upon - Nature of required to ground conviction.*

*CRIMINAL LAW AND PROCEDURE- Proof of crime - Witnesses -Child witness - Where called to testify in a criminal case
-Examination of as to whether he understands the nature of an oath - When not necessary*

*CRIMINAL LAW AND PROCEDURE-Proof of crime - witnesses – Relation of victim of crime - Competence of to testify for the prosecution -
Evidence of - How treated.*

*EVIDENCE: Defences - Alibi - Where raised by accused - Burden of proof of Whether lies on accused - Duty on prosecution -How
discharged.*

EVIDENCE: Proof- Piece of evidence - Where rejected - Evidential value of.

*EVIDENCE: - Proof of crime - Circumstantial evidence - Meaning and nature of - When court may act upon - Nature of required to
ground conviction.*

*EVIDENCE: - Proof of crime – conspiracy- Charge of - When tried with substantive charge -duty on court as
to consideration of evidence relevant to conspiracy*

*EVIDENCE - Proof of crime - Witnesses – child witness- Where called to testify in a criminal case – Examination as of to whether he
understands the nature of an oath – When not necessary.*

EVIDENCE - Proof of crime – Witnesses - Relation of victim of crime- Competence of to testify for the prosecution - Evidence of – How treated.

EVIDENCE - Proof of crime - Witnesses – Tainted Witness – Who is - Children of deceased- Where called as prosecution witnesses- Whether tainted witnesses - Evidence of– How treated.

JUDGMENT AND ORDER - Judgment of Court – How written- Constituents of a good judgment.

PRACTICE AND PROCEDURE - Appeal – Concurrent findings of facts by lower courts - Attitude of the Supreme Court thereto - When it will interfere therewith.

PRACTICE AND PROCEDURE - Judgment of court – How written- Constituents of a good judgment.

WORDS AND PHRASES - "Circumstantial evidence" – Meaning and nature of.

WORDS AND PHRASES - Tainted witness - Who is.

Issues:

- 1 Whether the Court of Appeal was not in pronouncing upon the remote and immediate causes of the murder of the deceased before considering the issues submitted for its determination and approach of the Court of Appeal had not occasioned miscarriage of justice on the 1st, 2nd and 4th appellants.
- 2 Whether the Court of Appeal was not in error in the defense of alibi raised by the 1st, 2nd and 4th appellants.
- 3 Whether the Court of Appeal was not in error in affirming the conviction of the 1st, 2nd and 4th appellants thereby failing to apply to the appellant's benefit favourable available evidence on record and in placing reliance on the evidence of tainted witnesses called by the prosecution.
- 4 Whether the Court of Appeal was right in affirming the conviction of the 1st, 2nd and 4th appellants on weak circumstantial and contradictory evidence adduced by the prosecution.
- 5 Whether the Court of Appeal was right in affirming the conviction of the appellants when their guilt was not proved beyond reasonable doubt and the issue of their identification was riddled with so many irregularities.
- 6 Having regard to the fact that no mandatory tests were conducted on P.W. 10 as a minor before admitting his evidence,

- whether the conviction for murder of the 3rd appellant was based on legally admissible evidence whatsoever before the court.
7. Having regard to the fact that the case against the 3rd appellant depended on the propriety and exactitude or otherwise of a minor (P.W. 10) whether the Court of Appeal was right in affirming the conviction of the 3rd appellant.
 8. Whether the 3rd appellant received a fair hearing at the Court of Appeal and whether the Court of Appeal did not misunderstand his case when it proceeded to affirm his conviction for murder on the assumption that he was convicted for conspiracy to murder by the trial court and could not therefore escape conviction.
 9. Whether the Court of Appeal was right to hold that the prosecution proved beyond reasonable doubt the offence of conspiracy against the 15th appellant.

Facts:

The appeal arose from the murder of one Chief Olajide Esan.

The deceased and nearly all the accused persons (including the appellants) were residents of Ikoro-Ekiti or who had something to *do* with the town. Both the 1st appellant and the deceased were known personalities in the town and it would seem that each had a respectable followership in relation to two distinct issues which caused a schism between them. One of the causes of disagreement was the Obaship of Ikoro-Ekili town. The Oba of Ikoro-Ekiti died and there was the need to appoint a successor. The 1st appellant and the deceased supported rival candidates. This led to a civil suit instituted by the deceased against the 1^M appellant for libel. The deceased, a lawyer, had judgment in his favour and was awarded the sum of N55,000.00 as damages for libel.

Another cause of disagreement arose out of the desire of the deceased to set up a road transport union with the object of reducing the transport fares payable by the commuters in Ikoro – Ekiti who regularly travelled to adjoining towns. The 1st appellant was the head of another union which had regulated transportation fares in Ikoro-Ekiti which fares the deceased considered excessive and exploitative. The deceased got some people around himself to lunch the union on 14-6-1999. It was given in evidence that the 1st appellant and his group resisted the attempt by the deceased to set up what was considered a rival union. Bonfires were lit on the highway leading to the township. The launching fixed for 14-6-1999 was in the process aborted. A new date was fixed for 18/6/1999. There was evidence before the trial court that the 1st appellant's group openly said that the deceased would not live to take part in the lunching fixed for 18/6/1999.

It turned out that the deceased was murdered in the night of 17th- 18th June, 1999 only a few hours before the schedule launching.

Consequently, thirteen accused persons including the five appellants were arraigned before the High Court, Ado- Ekiti for conspiracy and murder of the late Chief Olajide Esan on 18th June, 1999 at Ikoro-Ekiti in Ekiti State of Nigeria. Before \ commenced, two of the accused persons died.

At the trial, the prosecution called 24 witnesses in all. some of the accused persons testified in their own defence and called witnesses. On 12-01-05, the trial court delivered its judgment. The 2nd, 3rd, 5th, 8th, 9th and 11th, accused persons were discharged and acquitted. The 1st, 6th, 7th and 10th. Accused persons were found guilty of the offences of conspiracy to murder and murder of Chief Olajide Esan on 18/6/1999. Each was sentenced to death. The 4th accused was found guilty on the first count of conspiracy to murder but not of murder and sentenced to 14 years imprisonment.

Each of the accused persons who was found guilty including accused were dissatisfied with the judgment of the trial court and appealed to the Court of Appeal which dismissed the appellants' appeals.

The appellants were still aggrieved and they appealed to the Supreme Court. The 1st and 2nd appellants jointly retained one counsel failed a brief for them while each of the 3rd, 4th and 5th appellants retained a separate counsel.

Held (*Unanimously dismissing the appeal*):

1. *On Meaning and ingredients of conspiracy -*

Conspiracy as an offence is the agreement by two or more persons to do or cause to be done an illegal act or a legal act by illegal means. The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed. Because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved acts. In order to get conviction on a count of conspiracy, the prosecution must establish the element of agreement to do something which is unlawful or to do something which is lawful by unlawful means. Circumstantial evidence is often used to point to the fact that the conspirators had agreed on the plan to commit the crime. There must be an overt act from which to infer the conspiracy. For circumstantial evidence to ground conviction, it must lead to one and only one conclusion i.e. the guilt of the accused. The facts to be relied upon for conviction must be consistent, cogent and must irresistibly lead to the guilt of the accused. Also, where persons are charged with conspiracy and with offence committed in pursuance of it as in the instant case, care must be taken in considering the conspiracy and to keep the several issues clear.

[Obiakor v. State (2002) 10 NWLR (Pt. 774) referred to.] (Pp. 191-192, paras. B - A) Per OGUNTADE, J.S.C. at page 193., paras. A-H: "In the instant appeal, the evidence of the prosecution shows that there was a meeting at which the plan to murder Chief Olajide Esan was hatched and that the 5th appellant was present. As was to be expected, there was no evidence before the trial court of the proceedings at the said meeting. One could not say with certainty whether or not the 5th appellant had agreed with the plan. Perhaps more sensibly, he should have alerted the law enforcement agencies of the plan in

order to show that he was not privy to the plan. But he was not seen at the scene of crime. The learned authors Archbold - Criminal pleading, Evidence and Practice, 38th Edition para.4076 at page 1540 wrote:

"It must be proved that the alleged conspirators were acting in pursuance of a criminal purpose held in common between them and that each conspirator knew that there was in existence a scheme which went beyond the illegal act which he agreed to do *R v. Griffiths* (1966) 1 Q. B. 589;49 CrApp. R 279."

In this case, not much time intervened between the meeting at which the conspiracy was hatched and its execution. This imposed the necessity on the 5th appellant to repudiate plan to kill the deceased if he was not party to the plan. He had enough time to warn the deceased of the catastrophe soon to befall him.

The evidence clearly shows that he knew of something that would prevent the lunching of the RTEAN union on 18/6/99. out that Chief Esan was killed that morning. it seems to me that the circumstantial evidence available against the 5th appellant was strong enough to warrant his conviction for the offence of conspiracy. There was no evidence that 5th appellant at the time between the holding of the meeting and the actual murder of the deceased countermanded the decision taken at the meeting of 17/6/99. That he revealed the decision to P.W. 3 did not amount in law to a renunciation of the agreement. That would not convey much than that he possessed a leaky mouth. I am therefore satisfied that the trial court was right to convict the appellant on the offence of conspiracy and the court below to affirm the said conviction."

2. *On Whether person charged with conspiracy to murder and murder must first be found guilty of conspiracy before being found guilty of murder* -It is not the requirement of the law that a person charged with the offences of conspiracy to murder and murder must first be found guilty of conspiracy before he can be found guilty of the offence of murder. (*P. 183, paras. F-G*)

On Meaning and nature of circumstantial evidence court may act on -

Circumstantial evidence is as good as, and sometimes better than, any other sort of evidence, and what is meant by it is that there is a number of circumstances which are accepted so as to make a complete and unbroken chain of evidence. If that is established to the satisfaction of the court, it may well and properly act upon such circumstantial evidence. In a case in which there is no direct evidence against the accused but only the kind of evidence that is called circumstantial, the court has a two-fold task; that is.

(a) It must first make up its mind as to what portions of the circumstantial evidence have been established;

(b) and it must ask itself: is this sufficient proof ?

it is not sufficient to say: if the accused is not murdered, I know of no one who is, There is some evidence against him, and none against anyone else.

Therefore, I will found him guilty." Such a line of reasoning as this is

unsound, for experience shows that crimes are often committed by persons unknown who have succeeded in wholly covering their tracks. In the instant case, the evidence against the 1st and 2nd appellant was quite substantial. It was more than circumstantial.

[Ukorah v. State (1977) 4 SC 11; Adei v. state (1980) 1-2SC 116; Obiakor v. state (2002). 10 NWLR (It. 774) 612 referred to.](Pp. 177-178, paras .H-G; 191, para. H)

4. *On Who is a tainted witness and how his evidence is treated -*

A tainted witness has been described as a witness who is either an accomplice or who by the evidence he gives may and could be regarded as having some purpose of his own to serve. The evidence of such a witness should be treated with considerable caution and be examined with a tooth comb. The fact that the witnesses for the prosecution are relations of the deceased and friends or children of the deceased does not mean that they are not competent witnesses for the prosecution. But that fact can only make a court to be circumspect in the reception of their evidence. In the instant case, the fact that P.W.s 7,10 and 11 were the children of the deceased did not make them tainted witnesses. *[Adetola v. State (1992) 4 NWLR (Pt.235) 267; Aivria v. State (1982) 4SC 78; Onafowokan, v. state (1986) 2 NWLR (It. 23) 496; Ishola v. State (1978) 7-10 SC 81; Mnebu v. state (1988) 3 NWLR (Pt.84) 515; Ogunlabi v. state (1995)5NWLR (It.395)266; Mailayi v. State (1968) 1 ANLR 116; Akalonu v. State, (2002)2 NWLR (Pt. 643) 165 referred to.]* (Pp. 177, paras C-D; 195, paras. F-H)

Per OGUNTADE, J.S. C. at page 177, paras. E-H:

“it was undisputed that P.W.s.7, 10 and 11 are the children of the deceased. But did that fact alone make them tainted witnesses? I do not think so. Every citizen has the duty to come forward and offer assistance in the diligent detection and prosecution of crime. Their blood relationship with the victim of crime may constitute an additional incentive to come forward to testify in a court case. But that in my view cannot be regarded as a basis to describe their evidence as untrue, biased or tainted. I am unable to accept the submission that the evidence of I.VV.s 7, 10 and 11 was lacking in the requisite quality and objectivity just for the reason that they were the children of the deceased. It would have served the-interests of the appellants better if counsel concentrated in showing that they did not observe what they claimed to have witnessed or that their evidence in some way was incredible. Asking that their evidence be rejected as tainted witnesses just because they were the children of the deceased is in my view unhelpful.”

*On Treatment of evidence of relations of victim of crime-*A case is not lost on the ground that those who are witnesses are members of the same family or community. What is important is their credibility and that they are not tainted witnesses. This is because the prosecution should not be encouraged to call hired witnesses especially in murder cases or capital offences. Justice will be defeated if the prosecution of any accused person can only commence when and only when the witnesses are neither related to the accused nor are non-members of the same family. Thus, the evidence of a relation can be

accepted if cogent enough to rule out the Probability of deliberate falsehood and bias. [Chukwu v. state (1991) 1 NWLR (Pt. 217) 255; v. Mgbudon (1981) 1 MSLR 285 referred to.](Pp.195-196, paras. paras. H-D)

6. *On Competence of blood relations of victim of crime to testify for the prosecution -*

There is no law which prohibits blood relations from testifying for the prosecution where such a relation is the victim of the crime committed. [Adelumola v. State (1988) 1 NWLR (Pt. 73) 683; Hausa v. state (1994) 6 NWLR (Pt. 350) 281 referred to. paras. D-E)

7. *On When not necessary to examine a child called to testify in a criminal case whether he understands the nature of an oath -*

It is necessary to carry out the requisite investigation in court to satisfy itself that a child called to testify in a criminal case understands the nature of an oath. Under the Criminal Procedure Act, a child means any person who has not attained the age of fourteen years. In the instant case, the evidence given by P.W.10 as to his age which was not challenged by the defence clearly showed that he was 17 years old when he testified on 11-03-03. On the evidence available before the trial court, this was not a case in which the trial court needed to conduct an examination in the open court to ascertain whether or not P.W.10 understood the nature of an oath. Consequently, the submission of the appellant's counsel as to the *age* of P.W. 10 and the necessity to orally examine him in court as to his understanding of the nature of an oath was not well premised. [Sambo v. State (1993) 6 NWLR (Pt. 300); Mbale v. State (1990) 4 NWLR (Pt. 145) 484 referred to.] (Pp. 179-181, paras. H-G)

8. *On When identification parade not necessary –*

In as much as there was evidence which the trial court accepted that P.W. 10 knew the appellant very well before the date of the murder, it was not necessary for a formal identification parade. (Pp.182-183, paras. H-A)

9. *On on whom lies burden of proof of defence of alibi –*

If an accused person wishes to put forward an *alibi*, it is for him to offer evidence accordingly but if he does put forward evidence, the onus is not on him to satisfy the court that the *alibi* on such evidence is established but for the prosecution to disprove the *alibi*. In other words, there is no onus on the accused to satisfy the court on the *alibi* once he has put forward evidence which might establish it. One of the ways by which the prosecution may disprove an *alibi* is to call evidence against it which is cogent, substantial and credible. The fact that an accused has raised an *alibi* by his evidence or that of his witnesses does not imply that the *alibi* must be accepted by a court. If the evidence called by the prosecution is credible, strong and compelling, the court may reject the defence of *alibi*. In the instant case, the defence of *alibi* raised by the 1st appellant was rejected by the court, the court having rejected as incredible the evidence called by the 1st appellant in support of the defence of *alibi*.

[Azabamen v. State (1972) 4 SC 30; Fatoyinbo v. A.-G., Western Nigeria (1966) WNLR 4 referred to.] (Pp. 171-173, paras. E-A)

10. *On when defence of alibi will be rejected —*

When the evidence called in support of the defence of *alibi* is rejected as being incredible and the evidence of the prosecution witnesses fixing the accused at the scene of crime is accepted, the defence of *alibi* collapses. While it is desirable that an *alibi*, be raised timeously to enable the prosecution investigate it, it is still capable of being displaced by credible and substantial evidence from the prosecution. Where in spite of the evidence of *alibi*, the evidence of the prosecution is shown to be stronger than the *alibi* proffered by the accused as a defence, and such evidence still fixes the accused at the scene of the crime then the *alibi* can be appropriated rejected. In the instant case, from the totality of the evidence elicited by the prosecution and the appellant, the court accepted the testimonies of the witnesses for the prosecution as having fixed the 2nd appellant at the scene of crime on those days in of the incident of the murder of chief Olajide Esan Thus, the evidence of *alibi* called by the 2nd appellant was properly rejected by the court. [*Adetola v. state* (1992) 4 NWLR (Pt. 233) 267 referred to.] paras. B-D; 175, paras. G-H)

11 *On Treatment of rejected piece evidence -*

When a court has rejected a piece of evidence as incredible, it has no evidential value of any kind. In the instant case, the trial court, having rejected as incredible the evidence called by the 1st appellant support of the defence of *alibi* which he raised, it was no longer open to the defence counsel to argue in support of the defence. (P. 174, paras. B – D)

12 *On Constituents of a good judgment –*

The manner in which a judgment is to be written cannot be made universal to judges. Each judge has his own style and each case often calls for an approach considered most useful to make the particular judgment good enough for the occasion. The important thing is that all the known elements in a good judgment must be incorporated. Some of constituent parts of a good judgment of a trial court include:

- (a) the issues or questions to be decided in the case;
- (b) the essential facts of the case of each party and the evidence led in support;
- (c) the resolution of the issues of fact and law raised in the case;

- (d) the conclusion or general inference drawn from the facts and the law as resolved; and
- (e) the verdict and orders made by the court.

It is a good approach to preface the consideration of issues with an explanation of the matters which led to the occurrence or dispute over which the court is called upon to adjudicate. This enables a reader of the judgment to understand the issues as discussed later in the judgment. A judgment may appear abstract and unintelligible to a reader who had not previously known the antecedents of a matter being considered. An exposition of the background facts leading to a dispute ought not to harm the case of any of the parties unless the court in such exposition demonstrates an acceptance or rejection of the defence or the prosecution's case. In the instant case, a perusal of the lead judgment of Agube, J.C.A. at the Court of Appeal shows that the learned justice first reviewed the nature of the rancorous situation that existed between the 1st appellant and the deceased before considering the issues for determination in the appeal. The approach was not wrong. [*Ogba v. Onnowitzo* (2005) 14 NWLR (Pt. 945) 331 referred to.] (Pp. 167-168, paras. B-E)

13 *On Attitude of the Supreme Court to concurrent findings of facts by two lower courts -*

The Supreme Court does not make a practice of interfering with concurrent findings of facts except under special circumstances which include where the findings are perverse or not backed by the facts on record, etc. In other words, where the Supreme Court finds that the concurrent findings of facts by the two lower courts are not perverse by any stretch of imagination, the attitude of the court is not to disturb or interfere with such findings, [*Namsoh r. Suite* (1993) NWLR (Pt. 28) 123; *Dogo r. State* (2001) 3 NWLR (Pt. 699) 192; *Ubani v. State* (2003) 18 NWLR (Pt. 851) 224 referred to.] (Pp. 194, paras. F-G 197, paras. B-C)

A.-G., Kaduna state v. Hassan (1985) 2 NWLR (Pt. 8) 483

Adelumola r. v. state (1988) 1 NWLR (Pt. 73) 683

Adetola v. state (1992) 4 NWLR (Pt. 235) 267

Adie v. State (1980) 1-2 SC 116

Agenu v. State (1992) 7 NWLR (Pt. 256) 749

Akalomi v. State (2000) 2 NWLR (Pt. 643) 165

Arebamen v. State (1972) 4 SC 35

Awopejo v. state (2000) 6 NWLR (Pt. 659) 1
Balogun v. A.-G., Ogun State (2002) 6 NWLR (Pt. 763) 512
Chukwu v. State (1992) 1 NWLR (Pt. 217) 255
Dogo v. State (2001) 3 NWLR (Pt. 699) 192
Ebre v. State (2001) 12 NWLR (Pt. 728) 617
Faloyinbo v. A.-G., Western Nigeria (1966) 1 SCNLR 101
Haruna v State (1994) 6 NWLR (Pt. 350) 281
Ishola v. State (1978) 9-10 SC 81
Mailayi v. State (1968) 1 All NLR 1 16
Mbale v. State (1990) 4 NWLR (Pt. 145) 484
Mbenu v.State (1988) 3 NWLR (Pt. 84) 615
Namsoh v. State (1993) 5 NWLR (Pt. 292) 129
Obiakorv. State (2002) 10 NWLR (Pt. 776) 612
Ogba v. Onwnzo (2005) 14 NWLR (Pt. 945) 331
Okosi v. State (1989) 1 NWLR (Pt. 100) 642
Olalekan v. Slate (2001) 18 NWLR (Pt. 746) 793
Onafowokan v. Slate (1986) 2 NWLR (Pt. 23) 496
Sambo r. State (1993) 6 NWLR (Pi. 300) 399
Slate r. Mgbudon (1981) 1 MSLR 285

Ubani r. Stale (2003) 18 NWLR (Pt. 851) 224

Ukorah r. Stale (1977) 4 SC 167

Yanorv State (1965) N MLR 337

Foreign Case Referred to in the Judgment:

R v. Simmonds (1969) 1 Q.B. 685

Nigerian Statute Referred to in the Judgment:

Evidence Act. Cap. 112. Laws of the Federation of Ni 1990, S. 183(1) (2) (3) & (4)

Books Referred to in the Judgment:

Arch bold - Criminal Pleading. Evidence and Practice Edition, para. 4076 page 1540

Holy Bible, Genesis Chapter 9v 5-6, Exodus Chapter 20 v 13, Deuteronomy Chapter 5 v 17

Appeal:

These were appeals against the judgment of the Court of Appeal affirming the conviction and sentence of death by the High Court of the appellants for murder. The Supreme Court, in a unanimous decision, dismissed the appeals.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Dahiru

Musdapher, J.S.C. (*Presided*); George AdcsolaOgunlade,

J.S.C. (*Read the Leading Judgment*)', Walter Samuel Nkanu

Onnoghen, J.S.C.; Ikechi Francis Ogbuagu, J.S.C.; James

OgenyiOgebe, J.S.C.

Appeal No.: SC/69/2008

Date of Judgment: Friday, 6th March, 2009

Names of Counsel: K. K. Eleja, Esq. (with him, Messrs.

S. A. Oke and A. S. Ishola) -for the 1st and 2nd Appellants

C. F. Agubu, Esq. (with him, Messrs. A. S. Oyinloye, K.

E. Akanbi, O. A. Owolabi and Owoseni Ajayi) -for the 4th Appellant

Bamidele Omoto, Esq. (with him, Messrs. O. Olowolafe,

Rotimi Adabembe and Adedayo Adewunmi) -for the 5th Appellant

Gboyega Oyewole, Esq. Hon. Attorney-General of Ekiti State (with him, A. A. Morakinyo, Esq. D.P.P. Ekiti State) —for the Respondent

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Court of Appeal, Ilorin Names of Justices that sat on the appeal: Hellen Moronkeji Ogunwumiju, J.C.A. (presided): Jummai Hannutu Sankey, J.C.A.: Ignatius Igwe Agube. J.C.A. (Read Ilie Leading Judgment)

Appeal No: CA/IL/C.60/2006

Date of judgment : Monday 10th December, 2007

Name of counsel: k. k. Eleja, Esq. (with him, Ahmed Tarfar, Esq., S. Saad. Esq. and Ukadike, Esq.) – for the 1st – 4th Appellants and also holding; the brief of Dele Omotosho -for the 5th Appellant A. A. Morakinyo, Deputy Director of li. r. Ministry of Justice, Ekiti State - for the respondent

High Court:

Name of High Court: High Court of Ekiti State, Ado Ekiti

Name of the Judge: Kowe, J

Charge No: HIT/3C/2001

Date of Judgment: Wednesday, 12th January, 2005

Names of Counsel: Mr. A. O. Familoni, Director of Civil Litigation Ministry of Justice, Ekiti State (with him, Mr. A. A. Morakinyo) -for the Prosecution

Mrs. P.M. Fwd-fartlie 1st, 2nd, 3rd, 5th, 7th and, 9th Accused Persons

Apostle P. K. Ogunkile -for the 4th & 6th Accused persons

Counsel:

K. K. Eleja, Esq. (with him, Messrs. S. A. Oke and A.S. Ishola) -far the 1st and 2nd Appellants

C. F. Agubu, Esq. (with him, Messrs. A. S. Oyinloye, K. E. Akanbi, O. A. Owolahi and Owoseni Ajayi) – for the 4th Appellant

Bamidele Omoto, Esq. (with him, Messrs. O. Olowolafe, Rotimi Adahcmhe and Adedayo Adewunmi) –for the 5th Appellant

Gboyega Oyewole, Esq. Hon. Attomey-Gencia State (with him, A. A. Morakinyo, Esq. D. P. P. Ekiti State)-for the Respondent

OGUNTADE, J.S.C. (Delivering the Leading Judgment):

Thirteen accused persons including the five appellants were arraigned before the High Court, Ado-Ekiti for conspiracy and murder of one

Chief Olajide Esan on 18th Junc, 1999 at Ikoro-Ekiti in Ekiti State of Nigeria. Before the trial commenced, two of the accused persons had died.

The accused persons were tried by Kowe, J. The prosecution called 24 witnesses in all. Some of the accused persons testified in their defence and called witnesses. On 12-01-05, the trial Judge delivered judgment. The 2nd, 3rd, 5th, 8th, 9th and 11th accused persons discharged and acquitted. The 1st, 6th, 7th and 10th accused persons found guilty of the offences of conspiracy to murder and murder of Hef Olajide Esan on 18/6/99. Each was sentenced to death. The 4th accused was found guilty on the first count of conspiracy to murder but not guilty of murder and sentenced to 14 years imprisonment.

Each of the accused persons who were found guilty including the 4th accused was dissatisfied with the judgment of the trial court, each brought an appeal before the Court of Appeal, Ilorin (hereinafter referred to as 'the court below'). On 10-12-07, the court below in its judgment dismissed the appeal of each of the appellants and affirmed Conviction and sentence imposed by the trial Judge. The appellants have come on a final appeal before this court. The 1st and 2nd appellants jointly retained one counsel who filed a brief for them while each of the 3rd, 4th and 5th appellants retained a separate counsel. This has imposed the necessity to consider serially each of the appellant's brief filed by the different counsel.

In the appellants' brief filed by counsel for the 1st and 2nd appellants (who were respectively the 1st and 6th accused persons pre the trial court), the issues for determination in the appeal were stated to be the following:

- “1. Whether the Court of Appeal was not in error in pronouncing upon the remote and immediate causes of the murder of the deceased before considering the issues submitted for its determination and whether the approach of the Court of Appeal has not occasioned miscarriage of justice on the appellants.
 2. Whether the Court of Appeal was not in error in dismissing the defence of *alibi* raised by the appellants.
 3. Whether the Court of Appeal was not in error in affirming the conviction of the appellants thereby failing to apply to the appellants' benefit favourable available evidence on record and in placing reliance on the evidence of tainted witnesses called by the prosecution.
 4. Whether the Court of Appeal was right in affirming the Conviction of the appellants on weak circumstantial and contradictory evidence adduced by the prosecution
 5. whether the court of Appeal was right in affirming the conviction of the appellants when their guilt was not proved beyond reasonable doubt and the issues of their identification was riddled with so much irregularities.”
- The respondent's counsel in his brief adopted the five issues for determination as formulated by the appellant's counsels. It is desirable, for an appreciation of the facts as discussed in this judgment to expose fully the nature of the events or history leading to the murder of the deceased Chic Olajide Esan. Necessarily, the preamble as discussed relates

to all the appellants in this appeal and not just the 1st and 2nd. The case of the prosecution was that nearly all the accused persons in the case were residents of a town called Ikoro-Ekiti or who had something to do with the said town. Both the 1st appellant and the deceased were well-known personalities in the town and it would seem that respectable and it would seem that each had a following in relation to two distinct issues which caused a schism between them. The Oba of Ikoro-Ekiti died. There was the need to appoint a successor. The 1st appellant and the deceased supported rival candidates. This also led to a civil suit instituted by the deceased against the 1st appellant for libel. The deceased, a lawyer, had judgment in his favour for N55,000.00 as damages for libel against the 1st appellant. Another cause of disagreement the desire of the deceased to set up a road transport union with the object of reducing the transport fares payable by the commuters in Ikoro-Ekiti who regularly travelled to adjoining towns. The 1st appellant was the head of another union which had regulated transportation fares in Ikoro-Ekiti which fares the deceased considered excessive and exploitative. The deceased got some people around himself to launch the union on 14-6-1999. It was given in evidence that the 1st appellant and his group resisted the attempt by deceased to set up what was considered a rival union. Bonfires were lit on the highway leading to the township. A new lunching fixed for 14-06-1999 was in the process aborted. A new date was fixed for 18/6/1999. There was evidence before the trial court that the 1st appellant's group openly said that the deceased would not live to take part in the launching fixed for 18/6/1999. It turned out that indeed, the deceased was murdered in the night of 17th-18th June, 1999 only a few hours before the scheduled lunching.

Now, to the first of the issues raised by counsel. Was the court below in error to have first broadly stated the background facts on the nature of the case against the appellants before considering the issues for determination in the appeal before it? The appellants' counsel has argued that the court below had virtually pre-accepted the facts relied upon by the prosecution at the trial court before considering the case of the appellants in the appeal. It was submitted that this approach results in a miscarriage of justice.

A perusal of the lead judgment of Agube, J.C.A. at the court below shows that the learned Justice first reviewed the nature of the rancorous situation that existed between the 1st appellant and the deceased before considering the issues for determination in the appeal. I do not think that this was a wrong approach in the writing of a judgment. It is in my humble view a good approach to preface the consideration of issues with an explanation of the matters which led to the occurrence or dispute over which the court is called upon to adjudicate. This enables a reader of the judgment to understand the issues as discussed later in the judgment. A judgment may appear abstract and unintelligible to a reader who had not previously known the antecedents of a matter being considered. An exposition of the background facts leading to a dispute ought not to harm the case of any of the parties unless the court in such exposition demonstrates an acceptance or rejection of the defence or the prosecution's case. The Court below in this case had opened its judgment by stating

Thus:

"Before delving into arguments of counsel and the resolution of the issues formulated, it is only pertinent to give a resume of the facts of the case. As *can be gleaned from the evidence which the trial court accepted in relation to the five appellants in the appeal*, the deceased, a seventy-six years old legal practitioner of forty-two years post-call was before he met his gruesome death and at all times material to this case, the Chief Sakoro or head of Kingmakers in Ikoro-Ekiti and second only in rank to the Olukoro of Ikoro (otherwise the Oba of Ikoro)".

(Italics mine)

As made clear in the above passage of the judgment of the court. below, the learned Justice of the court below who wrote the lead only opened its judgment by highlighting or restating the facts which the trial court as accepted. I do not see how the statement could be considered as injurious to the interest of the appellants as would make it amount to a miscarriage of justice. It seems to me that the manner in which a judgment is to be writing can not be made universal to judges. Each Judge has his own style and each case often called for an approach considered most useful to make the particular judgment good enough for the occasion. The important thing is that all the known elements in a good judgment must be incorporated. In this connection, I gratefully adopted the observation of Akintan, J.S.C. in *Ogba v. Onwuzo* (2005)14 NWLR (Pt. 945)331 at 345 where he said:

"Judgment writing is an art by itself in which every individual has his own peculiar style and method. All that a good judgment requires is that it most contain some well-known constituent parts. Thus some of the constituent parts which a good judgment must contain in case of a trial court include; (1) the issues or questions to be decided in the case; (2) the essential facts of the case of each party and the evidence led in support; (3) the resolution of the issues of fact and law raised in the case; (4) the conclusion resolved; and (5) the verdict and orders made by the court. See *Oro v. Falade*(1995)5 NWLR (Pt.396) 385 at 407-408; *Mogaji v. Odofin* (1978) 4 SC 9; *Ojogbue v. Nnubia* (1972) 1 All NLR (Pt. 2) 226 and *Olomosola v. Oloriawo* (2002)2 NWLR (Pt.750) 113 at 125."

The result of the above is that issue 1 must be and is decided, against the 1st and 2nd appellants.

The 2nd issue is a complaint by the 1st and 2nd appellants that the defence of *alibi* raised by them was wrongly rejected by the two courts below. The record of court clearly reveals that the appellants raised the defence of alibi. Appellants' counsel has argued that the court below erred by failing to hold that the appellants' defence of alibi ought to have succeeded having regard to the fact that there was evidence before the trial court to sustain the defence.

In his statement to the police, exhibit 'L' on 21-6-99, the first appellant had said:

"On the night of 17\6\99, I was in my house at Ikoro- Ekili but none of the following (1) Hakeem Adebayo (m) and (2) Ayodele Ayinde (M)(3) Akoo Benson (m)came to me in my house for any meeting."

In his evidence in court under oath, the 1st appellant said that us in his house from 7 p.m. on 17\6\99 to 6.00 a.m. on 18\9\99. The first appellant's wife and son testified respectively as D.W. 3 and D. W.4 .Each gave evidence in support of the *alibi* raised by the 1st appellant. The trial court in its judgment at page 387-388 of the record said concerning the defence of alibi:

"The plea of *alibi* put up by the 1st accused person will not avail him. He merely stated in his statement to the police that he was in his house at Ikoro Ekiti on the night of 17/6/99 without giving the details of his whereabouts. He was not definite as to the time, place and persons who knew about his whereabouts. It was when he was giving evidence that he said that he was in his house between 7 p.m. on 17/6/99 and 6 a.m. on 18/6/99 with members of his family.

The defence of *alibi* is not readily conceded with levity to an accused person because when properly established it has the far-reaching finality of exculpating the accused from complete criminal responsibility. To take advantage of this defence, the 1st accused must give a detailed particularization of his whereabouts on the day the crime was committed. This will include not just the specific place where he was but additionally the people in whose company he was and what, if any, transpired at the said time and place. Such comprehensive information furnished by the accused must, unquestionably, be capable of investigation by the police. Such defence must be timeously brought to the attention of the police preferably in the statement of the accused in order to afford the police an ample time to carry out investigation. For the 1st accused person to raise the defence while testifying at his trial is to deliberately deny the police its right and duty to investigate the defence. See *Njiokwitemeni v. The State* (2001) 14 WRN 96 at 103; *Yanor v. The State* (1965) NMLR 337 at 341-342; *Isong Akpan Udo Kbre v. The State* (2001) 6 NSCQR (Pt. 11) 755 at & 66-767; (2001) 12 NWLR (Pt. 728) 617.

The appeal of *alibi* by the 1st accused in his statement to the police (exhibit L) that on the night of 17/6/99 he was in his house at Ikoro Ekiti without more is porous and vague. What is the police expected to investigate in that plea of the 1st accused? He did not mention the location of his house. It is trite that the police are not expected to go on wild goose chase in order to investigate an *alibi* put forward by an accused person. It is my believe (sic) that the first accused did not discharge the evidential burden that is imposed on him. His defence of *alibi* cannot avail him. See *Balogun v. Attorney-General of Ogun State* (2002) 2, SCNJ 196 at

202, (2002) 6 NWLR (Pt.763)512; Okosi v. The State (1989) 1 NWLR (Pt. 100) 642.' Awopejo & Ors. v. The State (2000) 4 WRN 57 at 70, (2000)6 NWLR (Pt.659) 1."

At pages 635-636 of the record, the court below in its reaction to the defence of alibi raised by the 1st appellant raised by the first appellant said:

"From the foregoing and taking into particular consideration the averments in exhibit L the extra-judicial statement of the appellant, can we say that he discharged the evidential burden placed on him so as to sustain the defence of *alibi* raised by him? Outrightly, the 1st appellant merely said that he was in his house on the night of the 17th of June, 1999. He did not state sufficient particulars as to his whereabouts at the time of the commission of the offence, the name(s) of the person(s) who were with him and could testify to his being there as the crime was allegedly committed and even the time they were together. The non-particularization of the *alibi* fell short of the requirement of the law as laid down in the long line of cases decided by the Supreme Court that it is not enough to raise the defence of *alibi* at large but that the accused must go further to furnish adequate particulars which would assist the police to make meaningful investigation of the alibi.

In the instance case, the 1st appellant never gave a lead as to the specific address(es) of the place(s) or person to contact and the relevant period he was away from the scene of crime. This he should have done at the earliest opportunity when the facts of the case were still very fresh in his memory. Surely, it was not enough for him to simply say he was in his house at Ikoro-Ekiti on the night of 17th June, 1999. See the dictum of Uwaifo, J.S.C. in *Balogun v. A.-G., Ogun State* (2002) 4 M.J.S.C. 45 at 59, (2002) 6 NWLR (763) 512. As at the time he gave evidence in court along with the DW3 and DW4 where the deficiency in his alibi was to be remedied, it became too late for the police to have investigated the alibi. As Uwaifo, J.S.C. in *Balogun v. A.-G., Ogun State* (supra) succinctly put it"

It seems to me that the police would not be allowed to go on a wild goose chase' at Ikoro-Ekiti to ferret out particulars of the whereabouts of the 1st appellant, the persons who were with him and the time he was wherever he purported to have been during the commission of the offence. See *Njoven's case* (supra) and *Obiode v. The State* (1970) 1 All NLR 35."

It seems to me that the two courts below were in error in the peremptory manner they dismissed the defence of *alibi* put up by the 1st appellant. Certainly, the 1st appellant gave sufficient information as to his whereabouts at the time the deceased was murdered. It was one thing for the trial court to reject the evidence piled in support of the *alibi* raised as

unbelievable and quite another to say that the 1st appellant did not give the details of his movements.

The 1st appellant had not been told the specific time the deceased was killed in the night of 17/6/99, he could not have been any more specific than state that he was in his house in the night of 17/6/99.

The reasoning of the trial court that the 1st appellant did not state his address is incorrect. The 1st appellant's did not state his address was clearly on exhibit

'L' as No. 88, Mogaile Street. Ikoro-Ukiti.

The law on the defence of *alibi* has been stated by the court in a number of cases. One of them is *Arebamen v. the State* (1972) 4

SC 35 where Lewis. J.S.C. said:

"In our view, as we have said, though we agree the *onus* is on the prosecution to disprove the *alibi*, as the learned Judge rightly stated, since we said *Adedeji v. The State* SC. 324/70 (unreported) of the 19th February, 1971: we think that what he was intending to say, though he may perhaps more happily phrased it, his that if an accused person wishes to put forward an *alibi*, it is for him to offer evidence accordingly but if he does put forward evidence, then the *onus* is not on him to satisfy the jury that the *alibi* on such evidence is established but for the prosecution to disprove. We must emphasize that there is no *onus* on the accused to satisfy the jury on the *alibi* once he has put forward evidence which might establish it. (cf. *R v. Johnson* (1961) 1 WLR 14789 and *Yanor v. The State* (1965) N.M.L.R. 337"

One of the ways by which the prosecution may disprove an *alibi* is to call evidence against it which is cogent, substantial and credible. The fact that an accused has raised an *alibi* by his evidence or that of his witnesses does not imply that the *alibi* must be accepted by a court. If the evidence called by the prosecution is credible, strong and compelling, the court may reject the defence of *alibi*. In *Fatoyinbo v. Attorney-General, Western Nigeria* (1966) W.N.L.R. 4; (1966) 1 SCNLR 101 this court by Coker, J.S.C. observed.:

Where a defence of *alibi* is suggested or is put forward by an accused person, the *onus* resting on the prosecution is no more than that of adducing evidence as, if accepted, would demolish the suggestion or inference that the accused person was not available " at the scene of crime at the material time and satisfy the court or jury of the contrary. Admittedly, where such a " defence is put forward in such a manner and at such a time as to enjoin on the prosecution the duty of

investigating it, a failure to do so may cast some doubts upon the probability of the case for the prosecution. But that does not warrant nor justify the suggestion that the prosecution specifically has to rebut in a particular way the defence of *alibi*. In the present case, the evidence of the third prosecution witness fixes appellant at the scene where the deceased was murdered. That evidence was accepted by the learned trial Judge and although his statement to the police was prod the appellant himself gave no evidence in support or it or otherwise and called no witnesses. It is cleared that on the totality of the evidence before the court and accepted by it, the prosecution as established that the suggestion in the statement of the appellant (exhibit D) that he was incredible: In this case, the trial judge at page 388 of the record in his judgment said:

"I do not believe the evidence of the 1st accused and his witnesses that he was in his house from the evening of 17/6/99 till the morning of 18/6/99. The *alibi* of 1st accused will not avail him.

I believe the evidence of P.W. 7 that he heard the 1st accused talking about the launching of Road Transport Employees Association of Nigeria. He said that he was conversant and close with the 1st accused who spoke at the scene of crime. P.W. 7 evidence was not challenged nor contradicted by the defence. There is therefore no reason to doubt his evidence.

There is evidence that the 1st accused person held a meeting with some people in April, 1999 where he boasted that the deceased would be no more within the next six months vide the evidence of P.W. 2. He made that statement in April 1999 when P.W. 2 and others went to appeal to him to desist from fomenting trouble on the issue of Olukoro chieftaincy. P.W. 3 testified that on 17/6/99 at about 8.30 p.m. he saw the 4th and 7th accused persons coming out of the house of the 1st accused and that the 4th accused told him that the launching of a rival drivers Union (Road Transport Employers Association of Nigeria) slated for 18/6/99 would not take place because something would happened between the night of 17/6/99 and morning of 18/8/99 that would prevent the launching. P.W. 3 added that that was why the 1st accused was at Ikoro-Ekiti that day. The 4th P.W. said that he was with the deceased in the evening of 17/6/99 when P.W. 3 narrated to the deceased what the 4th accused told him about the pi.in of the 1st accused to prevent the launching of the rival drivers union by overt acts between the night of 17/6/99 and Morning of 18/6/99. P.W.3 and P.W 5 said that they saw the 1st accused and other accused persons at the spot where members of the national national union of road transport workers blockaded and made bonfire on the road leading to ikoro township on 14/6/99. P.W.13 said that ikoro youth movement were holding meeting in the house of 1st accused to discuss olukoro chieftaincy matter regularly.

When a court has rejected a piece of evidence as incredible, it has no evidential value of any kind. It seems to me that the Court having rejected as incredible the evidence called by the appellant in support of the defence of *alibi* which he raised, it is no longer open to defence counsel to argue that there was evidence in support of the defence. It is my view that the defence of alibi raised by the 1st appellant was properly rejected by the courts below the evidence called in support of it having been found incredible.

The 2nd appellant also raised the defence of alibi. The trial court, however, rejected it in these words at pages 393-394 of the record: "The 6th accused person pleaded *alibi* which was investigated by the police. P.W. 20 and P.W.21 who investigated the *alibi* testified that they visited area H Ogudu/Ojota Police Station, Lagos and confirmed that the 6th accused was there and left 12 noon on. But the 6th accused and his wife (D.W.9) testified that they returned to the police station at 5 p.m. on 17/6/99 and left the place at 8 p.m. same day for their house No. 35 Alhaja Abass Ogudu Lagos where they slept till the morning of 18/6/99. I do not believe the evidence of the 6th accused and his wife that they went back to Area Ogudu/Ojota police station at 5 p.m. on 17/6/99 and returned home at 8 p.m. that day. If it were so, the police at Area II. Ogudu/Ojota police station would have told P.W. 20 and P.W. 21 who investigated the *alibi* that the accused left the police station at 8 p.m. on 17/6/99 believe the evidence of P.W. 20 and P.W. 21 that the 6th accused left the Area II Ogudu/Ojota police station at 12 noon on 17/6/99. I believe the evidence of P.W. 7 that he saw the 6th accused at the scene of crime and identified him at the identification parade concluded at the police station Ado-Ekiti later. I believe the evidence of P.W. 11 that the deceased shouted the appellation of the 6th accused 'Akoo' when he was being attached (sic) by the murderers. P.W. 7 also testified that he saw the 6th accused at an identification parade. He was able to recognize the 6th accused person because the 19th accused person lit a chargeable lamp which illuminated the scene. There is no dispute on the identity and identification of the 6th accused ever been pointed to by the 7th P.W. at parade. There was no objection or evidence of the 6th accused ever been pointed to by the 7th P.W. at the parade. It was his counsel who, in his submission was trying to impute what was not brought up in evidence. P.W. 7 did not testify that when she wanted The to point to another person police disallowed her. What she said was that she identified the 6th accused person amongst a group of people lined up for identification parade. There was no dispute about the identity and identification of the 6th accused by P.W. 7. Her evidence is enough corroboration of the evidence of P.W 20 and P.W 21 that the 6th accused left Area H Ogudu/Ojota Police Station at 12 noon on 17/6/99. See *Okosi v. State* (1989) 1 NWLR (Pt. 100) 642 at 644. It is possible for the 6th accused to travel to Ikoro after he left Ogudu/Ojota police station at 12 noon on 17/6/99."

The reason why the trial court rejected the 2nd appellant's evidence in support of the *alibi* he raised is quite manifest in the passage from the judgment reproduced above. I think that the court below was right to affirm the finding of fact made before the trial court. At pages 627-628 of the record, the court below held:

"However, in spite of the evidence of *alibi* the evidence of the prosecution is shown to be stronger than the *alibi* proffered by the accused as a defence, and such evidence still fixes the accused at the scene of crime then the *alibi* can be appropriately rejected. See *Atletola & Ors. v. The State* (1992) 4 NWLR (Pt.233) 267 at 274 paras D-E where Omo. J.S.C held:

'As against this plea (of *alibi*) is the visual identification evidence of the P.W.1 and P.W.3 which the court believed, and which therefore effectively destroyed 1st appellant's attempt at pleading an *alibi*, vide *Njovens v. The State* (1973) 5 SC 17; *Madagawa, v. State* (1988) 5 NWLR (Pt. 92) 60 at 74. In *Ukwunnenyi & Anor. v. The State* (1989) 3 N.S.C.C 44 at held 7, (1989) 4 NWLR (Pt. 114) 131; and also *Mathew Agu v. The State* (1985) 2 N.S.C. it was held that 'when the prosecution produced evidence which the court accepts, fixing and accused. With presence at the scene of crime that effectively destroys the *alibi*.'

From the totality of the evidence elicited prosecution and the accused/appellant the court accepted the testimonies of the witnesses for the prosecution as having fixed the 2nd appellant at the scene of crime that day of the incident of the murder of Chief Olajide Esan.

Following the dictum of Nnaemeka – Agu, J.S.C .1 in *Esangbedo's case* (supra) and Omo, J. S. C. in *Adelola's case* the trial Judge considered the *alibi* whatever it was worth and found out rightly in my that it was possible for the 6th accused to have left I.1 to Ikoro after leaving Area H Ogudu/Ojola Police Station at 12.00 noon having believed the strong evidence of the prosecution witnesses. Accordingly *alibi* was rightly dismissed."

It is my view that the evidence of *alibi* called by the 2nd appellant was properly rejected by both courts below.

I intend to consider together issues 3, 4 and 5 raised by the 1st and 2nd appellants' counsel. Under these issues, appellants' counsel contends that the evidence called by the prosecution when viewed as to its quality and quantity was not sufficient to establish the guilt of the 1st and 2nd appellants beyond reasonable doubt. Counsel also contends that the evidence given by D.W. 2 clearly shows that the evidence given by P.W.s 7, 10 and 11 was influenced or teleguided by some persons who had a score to settle with the appellants. It was further submitted that the circumstantial evidence upon which the trial court and the court below relied did not irresistibly point to the guilt of the appellants. It was finally submitted that the two courts did not take into account the evidence that some night marauders or armed robbers have invaded Ikoro Ekiti town in the night of 17/18/June, 1999.

Appellant's counsel made a great play of the fact that P.W.s 7, 10 and 11 were tainted witnesses whose evidence for the prosecution ought to have been approached with circumspection. Were they tainted witnesses? I think not. In *Adetola v. The State* (1992) 4 NWLR (Pt. 235) 267 at 273, the court per Omo, J.S.C. considered the issue when a witness may be regarded as a tainted one. He said:

"A "tainted" witness has been described as a witness who is either an accomplice or who by the evidence he gives may and could be regarded as 'having some purpose of his own to serve' (1) *The State v. Dominic Okolo & Ors.* (1974) 2 S.C. 73, 82; (1974) 1 All N.L.R. 466, 474; (2) *Ishola v. The State* (1978) 9-10 S.C. 81, 100; (3) *Mbcnu v. The State* (1988) 3 NWLR (Pt.84) 615. The Supreme Court has held that the evidence of such a witness should be treated with considerable caution and be examined with a tooth comb"

It was undisputed that P.W.s 7, 10 and 11 are the children of the deceased. But did that fact alone make them tainted witnesses? I do not think so. Every citizen has the duty to come forward and offer assistance in the diligent detection and prosecution of crime. Their blood relationship with the victim of crime may constitute an additional incentive to come forward to testify in a court case. But that in my view cannot be regarded as a basis to describe their evidence as untrue, biased or tainted. I am unable to accept the Submission that the evidence of P.W.s. 7, 10 and 11 was lacking in [the requisite quality and objectivity just for the reason that they were [children of the deceased. It would have served the interests of the appellants better if counsel concentrated in showing that they did not observe what they claimed to have witnessed or that their evidence in some way was incredible. Asking that their evidence be rejected as tainted witnesses just because they were the children of the deceased is in my view unhelpful.

The appellants' counsel also submitted that the circumstantial evidence available did not lead irresistibly to the inference that the appellants committed the offence brought against them. The nature of circumstantial evidence and its reliability in criminal cases have been considered by this court on several occasions. In *Ukorah v. State* (1977) 4 S.C. 167 at 174 – 175, this court per Idigbe, J.S.C. observed:

"Circumstantial evidence is as good as, sometimes better than, any other sort of evidence, and what is meant by it is that there is a number of circumstances which are accepted so as to make a complete and unbroken chain of evidence. If that is established to the satisfaction of the jury they may well properly act upon such circumstantial evidence'

(Hunpherey, J., Rex v. Chung V. Miao, cited in Wills on Circumstantial Evidence, Seventh Edition (1936) p. 324).

And, again, the learned author of *Wills on Circumstantial Evidence* on the same page makes reference to a direction of the court (and in which we think, we should draw attention, with approval) in the case of *Emperor v. Browning 39 I.C. 322* where it was stated:

In a case in which there is no direct evidence against the prisoner but only the kind of evidence that is called circumstantial, you have a two-fold task; you must first make up our minds as to what established *portions* of the circumstantial evidence have been established, and then when you have got that quite clear, you must ask yourselves, is this sufficient proof? It is not *sufficient to say, if the accused is not the murderer, I know of no one who is. There is some evidence against him, and none again one else. Therefore, I will find him guilty.*'

Such a line of reasoning as this is unsound, for experience shows that crimes are often committed by persons unknown who have succeeded in wholly covering their tracks..."

See also *Adie v. State* (1980) 1 -2 SC. 116.

The evidence against the 1st and 2nd appellants is quite substantial. It is more than circumstantial. A group of assailants in the night of 17th/18th June, 1999 went to the house of the deceased. They attacked and killed him. The 1st and 2nd appellants were in group. They were later physically identified at an identification parade as being in the group. It seems to me that the attempt by the appellants' counsel to trivialize the presence of the appellants at the scene of crime in the dead of the night, which said presence was never explained, only serves to strengthen the prosecution's case against the appellants. I am unable

to accept the submission of the counsel for the 1st and 2nd appellants that their guilt was not established on the standard required by law.

It is my view that the two courts below were right in finding them guilty on the charges brought against them.

Now to the 3rd appellant who was the 7th accused person before the court below. In the appellant's brief filed by his counsel, the Uses for determination in the appeal were identified as the following:

- "1. Having regard to the fact, that no mandatory tests were conducted on P.W. 10 as a minor before admitting his evidence, whether the conviction for murder of the 3rd appellant was based on legally admissible evidence whatsoever before the court.
2. Having regard to the fact that the case against the 3rd appellant depended on the propriety and exactitude or otherwise of a minor (P.W. 10) whether the court below was right in affirming the conviction of the 3rd appellant.
3. Whether the 3rd appellant received a fair hearing at the court below and whether the court below did not misunderstand his case when it proceeded to affirm his conviction for murder on a very wrong assumption that he was convicted for conspiracy to murder by the trial court and could not therefore escape conviction?"

I intend to consider together issues 1 and 2 above and separately issue 3. The argument of counsel under these two issues is that P.W. 10 was a minor at the time he testified for the prosecution and that it was an error on the part of the trial court not to have conducted in court a mandatory test on P.W. 10 to determine whether or not understood the nature of an oath. Counsel relied on *Sambo v. State* (1993) 6 NWLR (Pt.300) 399 at 413-414; *Mbele v. State* (1990) 4 (1993) 6 NWLR (Pt.145) 484; *Agenu v. State* (1992) 7 NWLR (Pt.256) 749 at 766. In *Sambo v. State* (supra) Olafawura, J.S.C. at page 422

Observed:

"In this case on appeal, it is not dispute that at the time

the offence was committed the prosecutrix was only ten years old and therefore she was a child. She cannot in law give her consent to sexual intercourse.

Consequently her evidence must be corroborated. The record shows that her evidence was not in conformity with section 182(1) of the Evidence nothing to show how she was examined merely shows a conclusion of what happened; it ought to have stated how the learned trial conclusion that she 'knows the nature of an oath does not know the consequence of telling a lie.'

Similarly in *Mbele v. State* (supra), this court stressed the necessity to carry out the requisite investigation in court to satisfy itself a child called to testify in a criminal case understands the nature of an oath.

Now the Criminal Procedure Act defines a child to mean- "any person who has not attained the age of fourteen years." Section 183 of the Evidence Act Cap. 112 provides.

- "(1) In any proceeding for any offence, the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understand the nature of an oath may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
- (2) If the court is of opinion as stated in subsection (1) of this section, the deposition of a child may be taken though not on oath and shall be admissible in evidence in all proceedings where such deposition if made by an adult would be admissible.

- (3) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support therefore implicating the accused.
- (4.) If any child whose evidence is received as aforesaid wilfully gives false evidence in such circumstances that he would if the evidence had been given on oath have guilty of perjury, he shall be guilty of an offence against section 191 of the Criminal Code and, on conviction shall be dealt with accordingly."

At page 8 of the 3rd appellant's brief, the appellant's counsel writes :

"Instructive, P.W.10 on whose evidence the 3rd appellant was convicted and sentence to death is a minor. From the address of the 3rd appellant (7th accused's) counsel which can be found at page 307 of the record of appeal, he submitted to the court that P.W.10 was 12 (twelve) years old at the time he gave the evidence at the High Court. This submission was neither countered by the prosecution at the High Court nor was it addressed by the High Court Judge in his judgment."

It is manifest that the appellant's counsel relies solely on the submission of appellants' counsel before the court below as the proof of the age of P.W. 10. But the evidence given by P.W. 10 as to his age which was not challenged by the defence clearly shows that he was 17 years old when he testified on 11-03-03. At page 197 of the record P.W. 10 said:

"My names are Oyedele Esan. i am seventeen years old. I am a student. I am here to testify about the murder of my father on 17"/18th June, 1999."

Under cross-examination by Mr. Ajayi, of counsel for the Reliant, P.W. 10 said:

"I was 14 years old when the incident happened... I am familiar with the 7th accused. He used to come to our house and we play table tennis together. I mentioned his name to the police in my statement. I told the police all that I am telling the court in my evidence."

On the evidence available before the trial court, this was not a case in which the trial court needed to conduct an examination in the open court to ascertain whether or not P.W. 10 understood the nature of an oath. I think that the submission of the appellant's counsel is to the age of P.W. 10 and the necessity to orally examine him in Court as to his understanding of the nature of an oath is not well premised. I reject it.

I must give thought to the contention of counsel that the evidence against the 3rd appellant, was that of a minor and that the court below was in error to have affirmed his conviction; I can only make reference to the findings of the court below at page 395 of the record:

“As to the 7th accused person Mr Ayodele Ayinde there is evidence linking him with the murder of the late Chief Olajicle Esan. P.W. 10 Olajide Esan one of the children of the deceased who was at the scene of the crime at the time the deceased was killed testified that he saw the 7th accused at the scene of crime on the night of 17/6/99 early morning of 18/6/99. He described the 7th accused as light in complexion, not too tall and with K leg. He added that the 7th accused *was a* revenue-collector in the motor park. Under cross-examination, P.W. 10 said that he was familiar with the who used to come to the house of the deceased to play table tennis with the children of the deceased. The statement of P.W. 10 is not different from the evidence. In his statement made on 18/6/99 when the matter was still fresh. P. W. 10 described the 7th accused as light in complexion, with K leg and tax collector accused because the murderers lit their torches. At a later date, P.W.10 was able to identify the 7th accused person at an identification parade conducted at the Nigeria Police Station, Ado- Ekiti. Under cross-examination witness denied that the murderers masked. He said that he was familiar with the 7th accused thereby erasing the question of mistaking identity. I observe that the description of 7th accused by P.W. 10 is correct. Failure to mention the name of the 7th accused to the police is not fatal to the case of the prosecution in as much as the 10th P.W. had vividly described him to the police. His description of the 7th accused was not faulted under cross-examination and by evidence. He later identified him at the identification parade at Ado-Ekiti police station thereby confirming to the police.”

I do not accept that the court below was in error to have affirmed the findings of the court below. As for the complaint of the appellant’s counsel as to the propriety of the identification parade at which P.W.10 identified the 3rd appellant as one of those who attacked the deceased on 17th/18th June. 1999, I need only say that in as much as there was evidence which the trial court accepted that P.W. 10 knew the appellant very well before the date of the murder, it was not necessary for a formal identification parade.

P.W.10 testified that the 3rd appellant regularly came to play table tennis in the house of the deceased. P.W. 10 even knew him to be fair complexioned tax collector with K leg, which description fitted the 3rd appellant. I think that the case against the 3rd appellant was established as required by the law.

The 3rd issues is a complaint against the observation of the court below at page 671 of the record thus:

"From their conduct before and after the murder of the late Chief, especially the incident of 14-6-99, their utterances, attempts at his life and threats either by words or letter and the fact that all of them were fixed at the scene and had attended meetings in the house of the 1st appellant prior to the dastardly act, more so when alter murdering him a N10.00 note was placed on his palm, circumstantial evidence which sufficiently proved conspiracy against all the accused persons were elicited to warrant their conviction by the lower court."

The contention of the appellant's counsel is that the 3rd appellant was not convicted of the offence of conspiracy by the trial court as implied by the court below. It is correct that the 3rd appellant was not convicted by the trial court on the offence of conspiracy brought against him. Indeed at page 397 of the record, the trial court said:

"The 7th accused is found guilty of the murder of the Chief Olajide Esan and I so convict him. He is however not found guilty of conspiracy to murder and he is discharged and acquitted on count 1."

The thrust of the argument of appellants' counsel is that the trial court not having convicted the 3rd appellant on conspiracy but on murder, it was wrong of the court below to affirm the conviction of the appellant for murder. I do not see any logic in the submission of counsel since it is not the requirement of the law that a person charged on the offences of conspiracy to murder and murder must first be found guilty of

conspiracy before he could be guilty on the offence of murder. The mistake of the court below is innocuous and ought to be forgiven. I elect to overlook it. On the whole, I am satisfied that the 3rd appellant was properly convicted of the offence of murder.

The 4th appellant was the 10th accused before the trial court.

His counsel has raised five issues for determination in the appeal.

The issues are:

- "1. Whether the Court of Appeal was not in error in pronouncing upon the remote and immediate causes of the murder of the deceased before considering the issues submitted for its determination and whether the approach of the Court of Appeal has not occasioned miscarriage of justice on the appellant.
2. Whether the Court of Appeal was not in dismissing the defense of *alibi* raised by the appellant's.
3. Whether the Court of Appeal was not in error in affirming the conviction of the appellant thereby failing to apply to the appellant (sic) benefit favourable evidence available on record and in placing reliance on the evidence to tainted witnesses called by the prosecution.
4. Whether the Court of Appeal was right in affirming the conviction of the appellant on weak circumstantial and contradictory evidence adduced by the prosecution.
5. Whether the Court of Appeal was right in affirming conviction of the appellant when his guilt was not proved beyond reasonable doubt and the issue of his identification was riddled with so many irregularities.

The issues formulated by the 4th appellant's counsel reproduced above are in some ways similar to the 1st and 2nd appellants' issues.

I have in the consideration of the 1st and 2nd appellants' issues dealt with 4th appellant's issue 1 above. I do not have anything to say that add save to say that issue 1 is resolved against the 4th appellant.

Issue 2 is a complaint that the defence of *alibi* raised by the appellant was not properly considered by the court below. The 4th appellant at page 292 in his defence before the trial court raised the defence of *alibi* for the first time. He said:

"I know nothing about the murder of Chief Olajide Es.n. I was in my house on 14/6/99 till 2 p.m. when I was arrested by the police on a report lodged by one Jimoh Famuyiwa (alias Ojaye) against me. I was locked up and I made statement to the police. I was in the police cell at Ijero from 14th June to 17th June, 1999. I was released at 6 p. m. on 17th June, 1999. I went to in house to sleep because I was I did not wake up until 6 a.m on 18/6/99 when my wife came in the town because Chief Esan Sakoro already worn out. has been murdered."

The trial Judge very painstakingly considered the defence *alibi* d by the 4th appellant. At pages 397 to 398, the trial Judge said:

"As to the 10th" accused person, Mr. Akeem Adebayo, there is evidence that he was seen at the scene of crime. P.W. 7 testified that he saw the 10th accused at the scene of crime. He saw him clearly because the 10th accused held and lit a chargeable lamp which illuminated the scene of crime. Under cross-examination, P.W. 7 said that he knew the 10th accused very well and saw him clearly because the chargeable lamp which illuminated the area he was. P.W. 11 also testified that he saw the 10th accused at the scene of crime on the night of 17/6/99 morning of 18/6/99. He said that at that material time he saw the 10th accused, the 10th accused wore a dress with red lining. He added that at the scene the 10th accused looked at him and other children of the deceased and pushed them aside saying 'these are his children we have nothing to do with them.' He identified the 10th accused at an identification parade conducted by the police at Ado-Ekiti police station as the person he saw at the scene of crime during the time the deceased was murdered. Under cross-examination, witness said that he has been seeing the 10th accused

before that night. He denied that there was armed robbery at Ikoro-Ekiti that night.

The 10th accused denied participating in the murder of Chief Olajide Esan. He said that he slept in his house on the night of 17/6/99 to the morning of 18/6/99. The 10th accused did not raise his defence of *alibi* timeously. He put up that defence for the first time in the witness box. For the 10th accused to successfully put up the defence of *alibi*, he must raise the plea timeously giving the particulars of his whereabouts those with whom he was, the time and place he was at the time the crime was committed. See *Udo Ebre v. The State* (supra) at P.P. 766-767. Since the 10th accused did not raise the alibi timeously he had denied the prosecution its right and duty to investigate that defence. The 10th accused's defence of *alibi* for the first time in the witness box will not avail him. See *Yanor v. the State* (supra); *Balogun v. A.-G. Of Ogun State* (supra) at 202-203.

The 1th P.W. identified the 10th accused identification parade as the person he saw at the scene Of crime. There was no dispute as to the identity of the accused. The 11th P.W. said that he knew him and described the dress the accused wore when he was at the scene of crime.

Under cross-examination, P.W. 11 said he had been seeing the accused before that night. In evidence in-chief he said he was able to see the accused clearly because the chargeable lamp he held and lit illuminated the area. The 10th accused did not dispute the description of the dress P.W. 10 said he wore that night. The accused confirmed that P.W. 11 knew him very well. He only complained about his identification at the identification parade. I do not believe his evidence and that of his witnesses on his defence of *alibi*. There is contradiction in their evidence. The contradiction is fatal to the case of the accused. While the 10th accused said that he slept in his house at Mogadi Street, Ikoro on the day of the incident, D.W. 12 said that the 10th accused, his mother and sister and herself slept in the house of their mother at Orin street, Ikoro that night. I prefer the evidence of P.W. 7 and P.W. 11 to that of the 10th accused and his witness. There is no question of mistaken identify because there is evidence that P.W. 11 knew the 10th accused

very well. P.W 11 described the dress worn by the 10th accused during the time he saw him at the scene of crime on the night of 17/6/99 morning of 18/6/99 as lined with red. There is evidence that the accused held and it lit chargeable lamp at that material time and that the scene of the crime on the was illuminated. Those pieces of evidence were not controverted nor challenged. There was no suggestion that P.W. 7 and P.W. 11 were either lying or mistaken. P.W. 24 witnessed the identification parade including the accused (vide exhibit U²).since there was no dispute about the identify of the accused and his alibi was dislodged by the prosecution there will be no reason while the evidence of P.W.7 and P.W.11 which I believe, cannot ground and sustain the conviction of the 10th accused person. See *Joshua Alonge v. Inspector general of police* (1959). **4 FSC 203**, (1959) **SCNLR 516**; *Onafowokan v. The State* (1987) 3 NWLR (Pt.61) 538 at 552." The court below correctly affirmed the findings of fact made by he trial Judge. I do not have any reason to fault the reasoning of the court below. The evidence against the 4th appellant was so overwhelming such as not to give the two courts any other choice than reject the defence of *alibi* raised. As I said earlier in this judgment, when the evidence called in support of the defence of *alibi* is rejected as being incredible and the evidence of prpseculion witnesses fixing the accused at the scene of crime is accepted, the defence of *alibi* collapses. While it is desirable that an *alibi* be raised timeously to enable the prosecution investigate it, it is still capable of being displaced by credible and substantial evidence from the prosecution. I decided issue 2 against the 4th appellant.

I now lake together issues 3, 4 and 5. These raise the question about the nature of the prosecution's evidence against the appellant. Did the evidence establish the guilt of the appellant beyond reasonable doubt? Was the alleged circumstantial evidence called by the prosecution such as could not lead to the inference that the appellant participated in the murder of the deceased? And finally was there any evidence favourable to the appellant which the two courts below did not take into consideration? I do not understand what the appellant's counsel had in mind by his argument that there was evidence favourable to the appellant which was not taken into account. The evidence given by P.W. 7 and P.W. 11 was to the effect that the appellant

was at the scene of crime holding a rechargeable lamp which enabled P.W. 7 and P.W. 11 to see him clearly. The appellant was subsequently identified and he agreed that P.W. 7 and P.W.11 knew him well before the murder of the deceased. On the accepted evidence, the onus was on the appellant to explain what he was doing in the night of 17/6/99 in the midst of persons who came to murder the deceased. The evidence against the appellant is more than circumstantial and there is certainly no basis to describe the evidence available against the appellant as merely circumstantial when the appellant did not explain how he found himself in the midst of the murderers of the deceased. I am unable to see any evidence favourably to the appellant which was not taken into account. My view is that the evidence against the 4th appellant is overwhelming and damning leaving me with the satisfaction that the guilt of the 4th appellant was established on the standard prescribed by law.

I now come to the 5th appellant's appeal. He was the 4th accused before the trial court. His counsel has formulated one issue for determination thus:

"Whether the Court of Appeal was right to hold that the prosecution had proved beyond reasonable doubt the offence of conspiracy against the appellant."

The trial court found the 5th appellant guilty on the offence of conspiracy to murder the deceased. The argument of the appellant's counsel is that the evidence available against the appellant on the offence of conspiracy is insufficient and could not have established the guilt of the appellant beyond reasonable doubt. There is no doubt that the evidence against the 5th appellant on the count of conspiracy is rather brief. At page 173 of the record, P.W. 3 said concerning the 5th appellant:

"On 17/6/99 at about 8.30 p.m., I saw 4th, 7th accused persons and one Mr. Micheal Ayo coming out of the house of the 1st accused. The 4th accused ran to us and greeted us. I was with Mr. Yusuf Bola. The 4th accused ran to us and told me and Yusuf Bola that the launching of the RTEAN slated for 18th June, 1999 would not be launched. I asked why. He said that that was why the 1st accused was in the town. He emphasized that what would happen the night of 17/6/99 morning of 18/6/99

would happen in the night of the 17/6/99 morning of 18/6/99 would prevent launching of the rival driver union. I reported the 4th accused told me to the late Olajide Esan.'

In his evidence, the 5th appellant denied that he had conspired with anyone to murder the deceased. The trial Judge in his judgment at page 392 of the record in pronouncing the 5th appellant guilty of the offence of conspiracy observed:

"As to the 4th accused, the evidence against him is that of P.W.3 and P.W.9. P.W.3 testified that about 8.30 p.m. on 17/6/99 he saw the 4th and 7th accused persons emerging from the hose of the 1st accused and the 4th accused ran to him and told him that the launching of the road Transport Employees Association of Nigeria scheduled for 18/6/99 that would not take place because something would happen in the night of 17/6/99 that would prevent the launching and that the first accused was in Ikoro for that assignment. P.W.4 said that he was with the deceased when P.W.3 narrated to the deceased that the 4th accused said that the launching would not take place on 18/6/99. P.W.9 who is a cousin of the 4th accused testified that the 4th accused told him at about 10 p.m. on 17/6/99 that the launching of the road Transport Employees Association of Nigeria slated for 18/6/99 would not take place because somebody would die. Though there is no evidence that the first accused was seen at the scene of crime, conspiracy can be inferred from the evidence of P.W.3, P.W.4 and P.W.9.

Those pieces of evidence are strong circumstantial evidence which are cogent, complete, compelling and point to the irresistible conclusion that the 4th accused knew of the existence of the plan and hatched the plan to murder late Chief Olajide Esan. See *Ogba v. The State* (1992) 2 NWLR (Pt.222) 164; *Lori v. The State* (1980) 8 - 11 S.C. 81; *Oyediran v. The Republic* (1967) NMLR 122; *Ikwuiwe v. The State* (2000) 5 NWLR (Pt.658) 550 at 560. It holds that the prosecution has proved

the offence of conspiracy to murder the late Chief Olajide Esan against the 4th accused beyond reasonable doubt. However, there is no evidence that he participated in the killing of the deceased. He is found guilty of conspiracy to murder Chief Olajide Esan and I so convict him. He is not guilty of the murder of the deceased. He is discharged and acquitted on count II."

The court below in affirming the finding of the trial court said at pages 683-684 of the record:

In the instant case, the evidence of the P.W. 3 that the 5th appellant informed him of what would likely happen to frustrate the launching of RTEAN Chief Esan on the 18/6/99 has been corroborated by the P.W.4. Notwithstanding the version of the P.W.9 that the appellant told him that somebody would die; there is no doubt that the P.W. 3 saw the appellant coming out from a meeting which was held in the 1st appellant's house on the eve of the proposed launching of the RTEAN for the 18/6/99. On the long run, the launching was frustrated and somebody who was the protagonist of that exercise Chief Olajide Esan was actually murdered. That is the essence of circumstances which by undersigned coincidence is capable of proving a proposition with mathematical exactitude.

The appellant has not been able to tell the court below or this court whether any other person apart from Chief Esan died in Ikoro-Ekiti in the early hours of 18/ 6/99 or whether any other person was to launch a rival drivers union to the N.U.R.T.W. in that community which would have been disrupted by whatever event that happened that day as predicted by the appellant. I am of the considered view that there are sufficient circumstantial evidence to rope in the appellant on this charge of conspiracy to kill Chief Esan.

One could have commended him if he simply infiltrated the ranks of the 1st accused and others 11 to build up incriminating evidence against them in which case his information to the P.W. 3 which eventually got to the deceased, would have been

altruistic more so as he was able to reveal this same fact to his uncle (the P.W. 9) on the night of the incident at 10.00 p.m

The late Chief may have thought that the in of 14/6/99 where the incident of 14/6/99 where the first accused/appellant and his confederates disrupted the launching with thugs would have repeated itself in which case the assailants would have been contained by the police to whom he was about reporting the following morning but alas? The assailants had more sinister plans to outsmart him.

That the 5th appellant knew and partook in the hatching of the dastardly act is amply demonstrated in his outright denial in open court that he neither saw nor passed such information to the P.W.3 on the 17th of June 1999. However this extra-judicial statement sold the conspirator in him out when he admitted at the earliest opportunity in that statement that it was rather the P.W.3 whom when they met told the idea of the launching of the next day to him but he told the said P.W.3 that he was not a driver so as to be interested in the launching.”

"Now in *Obiakor r. State* (2002) 10 NWLR (Pt. 776) 612 at 628-629. This court per Kalgo. J.S.C discussed the nature of the offence of Conspiracy thus:

"Conspiracy as an offence is the agreement by two or more persons to do or cause to be done an illegal act or legal act by illegal means. The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed. Because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved acts. But where persons are charged with conspiracy and with offence committed in pursuance of it as in the instant case, care must be taken in considering the evidence relevant to conspiracy and keep the several issues clear. See *Onochie Ors. v. The Republic* (1966) NMLR 307; (1966) 1 SCNLR204.

In this case, there is no direct evidence of any witness or any admission or confession of the offence of conspiracy by the appellants. Therefore the evidence against them must of necessity be circumstantial if their conviction is to be sustained. And for circumstantial evidence to ground conviction, it must lead to one and only one conclusion i. e. The guilt of accused. See *Popoola v. Commissioner of Police* (1964) NMLR 1; *R v. Roberts* (1913) 9 CAR 189; *Raphael Ariche v. Slate* (1993) 6 NWLR (Pt.302) 752; *Atano's case* (supra) at page 225. The facts to be relied upon for conviction must be consistent, cogent and must irresistibly lead to guilt of the accused. It is also well settled that circumstantial evidence is as good and sometimes better than direct evidence. It is sometimes referred to as the best evidence capable of proving a proposition with the accuracy of mathematics. See *Onah v. State* (1985) 3 NWLR (PL 12) 236-, (1985) 12 SC. 59 at 64; *Lori v. the State* (1980) 8-11 SC. 81 also cited by learned counsel for respondent.”

Another very helpful case which illuminates in many respects the nature of the offence of conspiracy is *R v. Simmonds* (1969) Q.B. 685 where Fenton-Atkinson, J. observed:

"This argument is based on a complete fallacy as to the nature of conspiracy. Of course, if two men agree on a particular day to embark on a course of criminal conduct over a period of months, the offence of conspiracy is committed at the moment of agreement. But they remain conspirators and their conspiracy continues until either the criminal purpose has been achieved or their agreement has been brought to an end.

The offence of conspiracy has clearly over the centuries been committed by being a member of what in the old books is referred to as a "confederacy"-that is to say, being one of two or more person acting or planning to act in concert under some agreement-be it express or implied- in pursuit of a criminal design.

Furthermore, it is well-established law that if A and B conspire together to carry on, for example, a course of fraudulent trading, C may join in (in the older phraseology 'adhere to' the conspiracy at a later date and then A may drop out and be replaced by D. But it all remains a single conspiracy as long as all of them are for the period of

then participation acting in combination to achieve the same criminal objective. This view of the law finds statutory recognition in the form of conspiracy count laid down in Schedule 1 to the indictments Act. 1915, as amended by the Indictment Rules, 1916 (see Archbold's Criminal Pleading; practice and Evidence. 36th ed. (1966). para. 4072).”

In order to get conviction on a count of conspiracy prosecution must establish the element of agreement to do something which is unlawful or to do something which is lawful by unlawful means. Conspiracy is an offence which is difficult to prove because it is often hatched in secrecy. Circumstantial evidence is often used to point to the fact that the confederates had agreed on the plan to five appellants. I would accordingly dismiss their appeals and affirm their conviction by the two courts below. Appeals are dismissed.

MUSDAPHER, J.S.C.: I have read before now, the judgment of my Lord, Oguntade. J.S.C. just delivered with which I entirely agree. His lordship has meticulously dealt with all the issues submitted for the determination of the appeal. I adopt his reasoning as mine and accordingly find no merit in the appeal and I dismiss the same and affirm the concurrent decisions of the two lower courts.

ONNOGHKN, J.S.C.: I have had the opportunity of reading in draft, the lead judgment of my learned brother. Oguntade, J.S.C. just delivered. The appellants, together with others who were later discharged and acquitted by the trial court, were charged before the court with the offence of murder and convicted and sentenced to death accordingly. Their appeal to the Court of Appeal, to this court.

My learned brother, Oguntade, J.S.C. has exhaustively dealt with the relevant issues raised for determination in the appellants and the laws applicable thereto before coming to the final conclusion that the appeals are without merit and consequently dismissed same.

The appeals are on concurrent findings of facts by the lower courts and the appellants have not satisfied this court why the findings ought to be interfered with as it is the law that this court does make a practice of interfering with concurrent findings of facts only under special circumstances which include the findings are perverse or not backed by the facts on record etc, etc.

I therefore completely agree with his reasoning and conclusion that the appeals are without merit and should be dismissed.

I order accordingly.

Appeal dismissed.

OGBUAGU, J.S.C.: I have had the advantage of reading before now, the lead judgment of my learned brother, Oguntade, J.S.C. just delivered. I agree with his reasoning and conclusion that there is no merit in the appeals of the five (5) appellants. I too dismiss each of the appeals or then appeals and I accordingly, affirm the judgment of the court below affirming the convictions and sentence of the appellants by the trial court. However, the above, is subject to my finding as a fact and holding, that the court below, erred in convicting the 3rd appellant (who was the 7th accused person) of *conspiracy* when the trial court, only found him guilty of murder and sentenced him to death. He was not convicted of conspiracy this fact was conceded by Oyewole, Esq.- learned Attorney General of the Ekiti State and counsel for the respondent on 11th December, 2008 when this appeal came up for hearing in his oral address. The learned trial judge at page 397 of the records, stated inter alia, as follows:

'The 7th accused, is found guilty of the murder of chief Olajide Esan and I so convict him. He is, however, not found guilty of conspiracy to murder and is discharged and acquitted on count 1.

Not that the said conviction for conspiracy by the court below, matters or makes any difference to me, having regard to the fact that the 3rd appellant had been sentenced to death and was/is to be hanged by the neck. But this is a matter of law and the law, must

be respected and upheld. In the circumstance, I hereby set aside the decision of the court below only in that respect.

By way of my brief contribution, I note that heavy weather or fuss, has been made about some of the prosecution witnesses, being the children of the deceased and therefore, branded as "*tainted witnesses*." With respect to the learned counsel for the 1st and 2nd appellants, this is of no moment. This is because, it has been firmly settled firstly, that that fact, does not mean that they are not competent witnesses for the prosecution. See the case of *Arehia & Anor v. The State* (1982) 4 S.C. 78 @ 92. In other words, the fact that the witnesses for the prosecution, had been relations of the deceased and a friend [or children of the deceased, does not make their evidence, inadmissible. But that fact, can only make a court or tribunal, to be circumspect in the reception of their evidence and to treat such evidence, with caution. See the case of *Onafowokan & Anor v. The Staff* (1986) 2 NWLR (Pt. 23) 456.

Secondly, a case is not lost on the ground that those who are witnesses are members of the same family or community. What is important, is their credibility (as in the instant case leading to these appeals) and that they are not tainted witness. This is because, the prosecution should not be encouraged to call hired witnesses especially in murder case or capital offences. Justice it is said, will be defeated, if the prosecution of any accused person, can only commence, when and only when, the witnesses are neither related to the accused nor are non-members of the same family. See the case of *Chukwu v. The State* (1992) 1 NWLR (Pt. 217) 255 @ 263; (1992) 1 SCNJ. 52 @ 61. Where Belgore, J.S.C. (as he then was), reproduced the pronouncement of Olatawura, J.C.A. (as he then was and of blessed memory) in his judgment in the same case at the Court of Appeal.

Thirdly, the evidence of a relation can be accepted is enough to rule out the probability of deliberate falsehood < See the case of *The State v. Mglmdon* (1981) 1 MSLR 285@290 - per Aguta, J. (as he then was).

Fourthly, there is no law, which prohibits *blood relation*, from testifying for the prosecution where such a relation, is the victim of crime committed. See the cases of

Adelumola v. The State NWLR (Pt. 73) 683; (1988) 1 SCNJ. 68 and *Hausa v. The state* (1994) 7-8 SCNJ. (Pt. 1) 144@ 161, (1994) 6 NWLR (Pt. 350)281.

A *tainted witness*, it is now settled, is a witness who though not an accomplice, is a witness, who *may* have his or her own purpose to serve. See the cases of *Ishola r. The State* (1978) NSCC (vol. 2) 479; (1978) 9-10 SC 81 @ 100; - per Idigbc, J.S.C; *Mbenu & Ors v. The State* (1988) 3 NWLR (Pi.84) 615; (1988) 7 SCNJ. (Pt.11)211@ 219-220; (1988) 7 S.C. (Pt.III) 71 @ 80; *Adetola & 2 Ors.v. state* (1992) 4 NWLR (Pt.235) 267 @ 273; (1992) 4 SCNJ. 199@ 204; *Ognnlana & 3 Ors. v. The Stale* (1995) 5 SCNJ. 189; (1995)5 NWLR (Pt. 395) 266 citing the cases of (*Iarha Mailayi & Anor. The State* (1968) 1 All NLR 116. 117 (Pt. 123 - per Coker,J.S.C; *Olalekan v. The state* (2001) 12 SCNJ 94 @ 111, (2001) 18 NWLR (Pt.746) 793 – per Ogundare, J.S.C and @115 - per Karibi-Whyte, J.S.C citing some other cases; and *Akalonn v. The state* (2002)6 SCNJ. 332 *dp* 336, 337, (2002) 2 NWLR (Pt. 643) 165.

In *Mailayi & Anor.* (Supra), it was/is stated *inter alia*:-

"Rccently there has been a tendency among criminal lawyers to *create* a category of '*tainted witness*'-we however observed that the expression '*tainted is* very loose and if it's not kept within proper bounds a great deals of confusion will be unleashed into an area of evidence which even is fraught with difficulties....."

I am satisfied that the evidence against; the appellants are not only damning, but are overwhelming. There are again, the concurrent findings *of fads* by the two lower courts. Since I find as a fact and hold that they are not perverse by any stretch of imagination, the attitude of this court as appears in a line of decided authorities, is hi to disturb or interfere with such findings. See the eases of *Namsoh v.The State* (1993) 5 NWLR (Pt.292) 129 ;(1993)6SCNJ.(Pt.1)55 *Dogo &4 Ors. v. The state* (Pt.(2001)3 NWLR (Pt.699)192; (2001)1SCNJ. 315 and *Ubani & 2 Ors. v. The state* (2003)12 SCNJ.111@ 127 128, (2003) 18 NWLR (Pt.851)224 just to mention but a few.

The appellants deserve to die. Their sentence to death is supported *theologically* or in the Holy Bible. See *Genesis Chapter 9 verse 5*. In verse 6. it is stated that,

"Whoso sheddeth man's blood by man *shall* his blood be shed: for in the image of God made he man"

In *Exodus Chapter 20 verse 13 and Deuteronomy Chapter 5 arse 17*, there is the injunction or prohibition which says:

"Thou *shall not kill*"

See also the observation of Oputa, J.S.C. in the case of *Attorney-Gieneral of Kadnna State v. Mallam Hassan* (1985) 2 4WLR (Pt.8) 484@ 524.

In conclusion, from the records, I am obliged to *commend*, the earned trial Judge - Kowe. J. for his industry. In my humble and respectful view, he admirably, painstakingly, meticulously and thoroughly, dealt with the case leading to the instant appeal. His judgment, spans from pages 340 to 399 of the records. I am not concerned with the length of the said judgment, but with its *quality* evidencing a *sound knowledge* of the law. I am therefore, not at all surprised that the court below - per Agube, J.C.A. who wrote the lead judgment spanning from pages 601 to 685 of the records and the concurring contributions of his learned brother/sister -I Ogunwumiji. J.C.A. and Sankcy. J.C.A. had no difficulty at all or qualms, in affirming the said judgment of the learned trial Judge.

My learned brother, Oguntade. J.S.C.. in my profound humility and respect, has *exhaustively* and in greater details, dealt with these appeal of the appellants. It is said that Justice is the honourable gift from God to man that they are honourable who do justice.

OGEBE, J.S.C.: I read in advance the lead judgment of my learned brother, Oguntade, J.S.C and I agree with his reasoning and conclusion. He has He has resolved all the issues raised in the appeals thoroughness and for the reasons given, I also dismiss the of all the appellants and affirm the judgment of the lower courts sentencing them to death.

Appeals dismissed.