

IN THE SUPREME COURT OF NIGERIA

Suit No: SC128/2005

Petitioner: Sunday Ndidi

And

Respondent: The State

Date Delivered: 2007-05-11

Judge(s): Aloysius Iyorgyer Katsina-Alu, Niki Tobi, Francis Fedode Tabai, Ibrahim Tanko Muhammad, Pius Olayiwola Aderemi

Judgment Delivered

The appeal here is against the judgment of the Court of Appeal, Benin Judicial Division delivered on the 4th of March 2005 upholding the conviction and sentence of death passed by the High Court of Delta State, Agbor Judicial Division on the 28th of November 2001. The appellant had been charged before the High Court sitting at Agbor with a three-count charge of conspiracy and armed robbery under Sections 1 (2) (a) and 4 (b) of the Robbery and Firearms (Special Provisions) Decree 1984 as Amended. And the third count is the second charge of armed robbery committed against one Helen Onyeije. To establish their case, the prosecution called five witnesses while the appellant personally gave evidence but called no witness. PW1, PW2 and PW3 were eye-witnesses called by the prosecution. In its judgment delivered on the 4th of March 2005 aforesaid, the High Court discharged and acquitted the appellant on count 3 but pronounced him as guilty on counts 1 and 2 and accordingly sentenced him to death by hanging. Being dissatisfied with the judgment, the appellant appealed to the court below (Court of Appeal) after hearing the appeal, the court below, in a considered judgment delivered on the 4th of March 2005, dismissed the said appeal and affirmed the judgment of the court of trial. Again, being dissatisfied with the judgment of the court below, the appellant appealed to this court via a Notice of Appeal dated 7th April 2005 with three grounds of appeal incorporated into it. Distilled from the said three grounds of appeal and set out in the appellant's brief of argument is only one issue which is in the following terms:- "Whether the Court of Appeal was right in affirming the conviction and sentence of the appellant on the basis of the evidence PW1 only in the circumstances of this matter." The respondent identified two issues for determination and as set out in their brief of argument, they are as follows: -

(1) Whether from the totality of the evidence on record, the lower court was right in affirming the conviction and sentence passed on the appellant for the offences of conspiracy to rob and armed robbery.

(2) Whether the appellant was properly identified as the person involved in the armed robbery committed against Mrs. Comfort Apokueze, PW1. When this appeal came to us for argument on the 15th of February 2007, Mr. Alegeh, learned counsel for the appellant referred to and adopted his client's brief of argument dated 26th October 2005 and while urging that we should allow the appeal, he submitted that PW1's testimony is not credible to warrant conviction. Mr. Ogbogu, Assistant Director, Ministry of Justice, Delta State for the respondent, also referred to and adopted his Client's brief deemed to have been properly filed on 15th February 2006 and urged that the appeal be dismissed. I have carefully read the issues formulated by the parties; issue No 1 on the appellant's is materially similar to issue No 2 on the respondent's brief; while issue No 1 on the respondent's brief dovetails into the other two issues afore-mentioned. I shall therefore take all of them together.

In his brief of argument, the appellant submitted that the conviction and sentence handed down to him were based solely on the evidence of PW1 - Comfort Apokueze - but went ahead to submit that there was no physical evidence linking him with the crime. The evidence of PW1, it was further argued, was not credible, cogent, compelling nor did it irresistibly point to his guilt. Evidence of identification is of no value as, according to him, it did not meet the required conditionalities laid down by the law; pieces of evidence adduced by PW1 were reviewed to buttress the argument while reliance was placed on the decision in *Abudu v. State* (1985) 1 NWLR (pt.1) 55; *Mbenu v. State* (1988) 3 NWLR (pt.84) 615; *Abodundu v. The Queen* (1959) SCNLR 162 and *Onubogu v. State* (1974) 9 S.C.I. It was also his argument that there being an eye witness to the commission of the crime in this case, question of alibi does not arise; it was conceded

while the decision in *Ntam v. State* (1967) NSCC (Vol.5) 1 was cited. Though the trial judge reviewed the evidence in support of alibi as presented by the appellant and rejected same, it was submitted that the rejection of same would not make the evidence of PW1 credible. Referring to the evidence of PW1 that she used a small lantern and that the alleged armed robbers made use of torchlight to pack her things points conclusively to the fact that there was no light at Abavo at that time of the night - 1 a.m.; judicial notice of the fact that it is always dark at that hour ought to have been taken; he further argued this, it was. finally argued on this point that doubt as to the credibility of the evidence of identification ought to have been created in the mind of the trial judge; the court below, it was again argued, fell into that serious error in not appreciating the incalculable damage to justice which the evaluation of this crucial piece of evidence had done to the case. It was finally urged that this Appeal be set aside while the conviction and sentence of the appellant be quashed. On issue No 1 in the respondent's brief, it was submitted that the case against the appellant which was that he committed the offence of armed robbery against PW1 on the 4th of January 2000 was proved beyond reasonable doubt. It was further argued that the findings of the trial judge that at about 1 a.m. on 4th January 2000, armed robbers assaulted and robbed PW1 in her house were not appealed against; adding that the grounds of appeal were limited to the identification of the appellant by PW1 as one off the armed robbers. These findings can only be set aside by this court if there was an appeal against it; it was further argued while relying on the decision in *Oshodi v. Eyifunmi* (2000) 13 NWLR (pt.684) 298. It was again contended that credible evidence to sustain the appellant's conviction was laid before the trial judge; the trial court and the court below made concurrent findings of fact that there were ample and favourable circumstances from which PW1 could identify the appellant as one of the armed robbers who robbed her on the night of 4/1/2000; arguing further, the respondent submitted that the identification of the appellant by PW1 was at the earliest opportunity, the trial court was therefore right, in law, in believing the testimony of PW1 on the issue of identification citing in support the decision in *Abudu v. the State* (1985) 1 NWLR (pt.1) 55. The defence of alibi raised by the appellant, it was argued, would not avail him here in that it was not raised promptly and properly prior to the trial, indeed, it was during the trial that the appellant raised it for the first time; the decision in *Balogun v. A-G Ogun State* (2002) 6 NWLR (pt.763) 512 was relied upon for this submission. It was finally urged that this appeal be dismissed. A reading of the judgment of the trial court and the court below leaves me in no doubt that the two courts below held the view that the conviction and the sentence of the appellant was predicated on the evidence of PW1 - Comfort Apokueze. The trial court had on the issue of identification held: -"Now, having dealt with these issues, as between the credibility of the PW1 and the accused, the court believes the evidence of PW1 and disbelieves that of the accused person. There was ample opportunity and favourable circumstance from which she could identify the accused person as one of those, who while armed, robbed her on the night of 4/1/00. The court accepts as satisfactory her identification of the accused and the circumstances under which she could identify him. The court-therefore finds Count 11 of the charge proved beyond reasonable doubt." The court below, in its judgment, held in an unequivocal word, that the above findings of the trial court justified the conviction of the appellant solely on the evidence of PW 1. The findings of the two courts are, therefore, concurrent. This court (the Supreme Court) can only interfere with the concurrent findings if the findings can be shown to be perverse or illegal or that they are product of improper use of the opportunity of the trial court having heard and watched the witnesses testify. See (1) *Sobakin v. The State* (1981) 5 S.C. 75; (2) *Oladiran v. The State* (1986) 10 S.C. 165 and (3) *Mbenu v. The State* (1988) 3 NWLR (pt.84) 615. I pause to say that I have read the testimonies of PW2 and PW3 both of whom in addition to PW1 gave evidence of identification of the appellant. I am in agreement with the two courts below that the testimonies of these two witnesses (PW2 and PW3) are of no value but I shall examine their testimonies and test them against the testimony of PW1. I shall now reproduce the salient portions of PW1 upon which the conviction was founded. PW1 - Comfort Apokueze said inter alia under examination-in-chief: -"I know the accused person. I know Charles and Helen Onyeije. They are my neighbours. I recall 4-1-00. I was sleeping and around 1 a.m., I heard, voices shouting, 'open, open' my protector was broken and the door too, and some people entered my house. The first person I saw was the accused. He entered my house holding a gun, 3 others followed him..... The accused and I should see he is armed (sic). He asked me to bring out money. He said he would shoot me if I refused. I gave them N4, 900 the other ones carried all my clothes the accused said they were going to the next house and that if I made any noise he would come hack and shoot meAt day break I raised alarm and our Community Member came around, he reported the matter to the Police. I told the Police that I saw the accused person."

Under cross-examination she said: -"I made two statements, one at Abavo and the other one at Agbor.I knew accused before this incident occurred. It is not true that there was no light in Abavo on the night in question. I told the Police there was light. It is true I told the Police I carried a small lantern. The robbers told

me to put the small lamp down and quench it. They used torchlight to pack the things It is not true that I hate the accused person. It is true that the accused person and I had a quarrel earlier."In his statement made on the 27th of January 2000 to the Police as a complainant and which written statement was tendered as Exhibit A, she said inter-alia: -"I raised my lantern and saw Sunday Ndidi carrying a gun. They ordered me to bring lamp down and asked me whether I knew them. I told them that I did not know them. Sunday Ndidi told me to give him money or he would shoot me. I ran to my room and brought N4,900.00 and handed over the money to him because he was following me with gun Three years ago, the same Sunday Ndidi who brought the other armed robbers came to my house and stole my fowls. The case was reported to the Police at Abavo."PW2 - Charles Onyeije in his evidence-in-chief said: -"I know the accused. I recall 4.1.00. On that day the accused came with his gang to rob me in my house. They came at about 2 a.m. When I asked who it was, they just shouted 'open, open' and forced my door open. The accused was the first to enter my house.He was armed (sic) with a gun. When I saw him, I forced myself outside the house.....I was in the bush till daybreak when I went to the house. We raised alarm and people gathered. We narrated our experience and told them the accused was one of the robbers They abandoned an axe in my house I reported the matter to the Police Station and made a statement. I learnt later that the accused was taken to the Police station by his mother. I know Helen Onyeije. She is my wife."Under cross-examination, he said: -"It is not true that there was no electricity on the night in question. I made a statement on 5.1.00. It is not true that I made a statement on 27.1.00. I have seen the document shown to me. I have seen my signature. The statement is dated 27.1.00. It is the 2nd statement. The first one was made on 5.1.00."PW3 - Helen Onyeije, the wife of PW2 said in her evidence; -"I know the accused person very well. I remember 4.1.00. at about 2 a.m. on that day some armed robbers came and were making noise at the window. I saw the 1st accused through the window. They broke the door and came into the house. I saw the 1st accused among them. They asked us to lie face down on the floor, which we did. I was later asked to stand up and show them where we kept money. The 1st accused was armedIt was when the accused asked me to bring out money that I recognised him as Sunday,"PW2 made two statements to the Police, the first on 5.1.2000 tendered as Exhibit C and the second on 27.1.00 tendered as Exhibit B. In Exhibit B -the statement made to the Police PW2 said inter alia: -"By the time the first person entered my house, he pointed his gun at me. I tried to know (sic) him and later recognised him to be one Sunday Ndidi and I recognised him; he hit me on the head; with his gun. It was Sunday Ndidi that brought other armed robbers to our house on 4.1.2000."In Exhibit C - the statement she made on 5.1.2000, she said the armed robbers came to attack her at 2300 hours when she was sleeping - they were three in number and she claimed to recognise one of them as Sunday Ndidi -the appellant.In holding that the evidence of PW2 and PW3 was not credible, the trial court said of PW2's evidence: -"..... in view of his answers to other question (sic) regarding whether or not the accused was masked or wearing a cap, can it be said that he has sufficiently identified the accused person as one of the robbers who attacked him and his wife at their home on the date and time material to this charge' I think not. If the accused was wearing a mask, how could the witness have identified him. If he was not, how could the witness fail to observe this. In view of this, the court holds that the evidence of identification of the accused by the PW2 is unreliable."On the evidence of PW3, particularly on the issue of identification, the trial court, after reviewing same, held:-"It is a well known or notorious fact that it is always pitch dark at 2 a.m. in the morning, unless there is a moon. This witness has not told this court that there was a moon from which light he could identify the accused, even when they were outside his (sic) window or that there was a security light by which light he (sic) could have seen the accused in a group outside the window. He has not told the court that he had a light inside his room by whose light he could identify the accused person at that time of the night. Since she does not know whether the accused was wearing a cap on the day of the incident, coupled with the above circumstances which would make identification of the accused difficult, the court is of the view that the identification of the accused by this witness as one of the robbers who invaded her house on the night in question is unsatisfactory. Having found that the circumstances under which the accused was identified and that the evidence of identification is weak, the court is of the view that the prosecution has not proved Count III of the charge against the accused beyond reasonable doubt. In the result, he is entitled to a discharge and acquittal on that count and so I hold."I cannot fault the above findings of the trial court sequel to the review of the testimonies of PW2 and PW3. as I have said and it is commonly agreed by all the parties that the conviction and sentence of the appellant are founded on the evidence of identification proffered by PW1. The appellant has in his brief" of argument, attacked the two judgments of the two courts below on the ground that the evidence of identification as given by PW1 was not credible and could therefore not sustain the conviction and sentence handed down on the appellant. Generally in criminal cases, the crucial issue is not ordinarily whether or not the offence was committed. More often than not, the controversy always rages over the identification of the person or persons alleged as the actual perpetrators of the offence charged. It follows therefore that identification evidence is that evidence which tends to show

that the person charged is the same as the person who was seen committing the offence. To ascribe any value to the evidence of an eye-witness re identification of a criminal, the courts in guarding against cases of mistaken identity must meticulously consider the following issues: -

- (1) circumstances in which the eye-witness saw the suspect or defendant.
- (2) the length of time the witness saw the subject or defendant.
- (3) The lighting conditions
- (4) The opportunity of close observation.
- (5) The previous contacts between the two parties.

Whenever the case of an accused person depends wholly (as in the instant case) or substantially on the correctness of the identification of the accused or defendant which defence alleges to be mistaken, a trial judge I must warn himself of the special regard for caution and should weigh such evidence with others adduced by the prosecution before convicting the accused in reliance on the correctness of the identification; the locus classicus on the issue of identification is the English case of R v. Turnbull & Ors (1976) 3 A.E.R 549 - a decision of the Court of Appeal (England) Criminal Division presided over by Lord Widgery C.J. and written by him. Suffice it to say that our courts have cited it with approval. The Supreme Court in Ikemson v. The State (1989) 6 S.C. (pt.5) 1 14 gave approval to the decision of Lord Widgery C.J. in Turnbull supra when at page 126 it was said: -"It seems to me that counsel to the appellants was under the impression that identification parade is a sine qua non in all cases where there has been fleeting encounter with the victim even if there is other evidence leading conclusively to the identity of the perpetrators of the offence. I do not think so. I agree with the submission of counsel to the respondent that an identification parade is only essential in the situations enunciated in R. v Turnbull & Ors. (1976) 3 A.E.R. 549 at 551. These are cases where the victim did not know the accused before and was confronted by the offender for a very short time, and in which time and circumstances he might not have had full opportunity of observing the features of the accused. In such a situation, a proper identification will take into consideration the description of the accused given to the police shortly after the commission of the offence, the opportunity the victim had for observing the accused, and what features of the accused noted by the victim and communicated to the Police marks him out from other persons."In the case at hand, PW1 in her oral testimony said she had known the accused before this incident occurred. It seems to me that the guidelines laid down in R.v.Turnbull (supra) will not apply hook, line and sinker in this case. Her (PW1) evidence, as it relates to the appellant, must\ be examined in the light of her saying that she recognised the appellant in the early hours of that day. Her evidence must clearly demonstrate acquaintance with the appellant that is, admitting acquaintance with the appellant by certain signs and/or factors. This is because she said she had seen him before the date of the incident. Whereas if her testimony is examined in the light of identification, all one would be doing is to see whether the testimony of PW1 is credible enough to convince the trial judge that the appellant now standing trial is the same person PW1 saw for the first time on the day of the incident Recognition therefore presupposes prior knowledge of the appellant before 4.1.00. But identification connotes knowledge of the person of the appellant acquired by PW 1 for the first time on the day of the incident; that is 4.1.00. I must be quick in saying that "recognition" (which translates to evidence of visual observation) is regarded as one of the guidelines laid down in R. v. Turnbull (supra). In Archbold Criminal Pleading, Evidence and Practice (1993) Volume 1 Paragraph 14 - 4 which is a confirmation of what I have said, reads:- "The following guidelines which are to be observed by trial judges when \identity\ is an issue, were laid down by the Court of Appeal (England a five-judge court) in R. v. Turnbull & Ors 63 CR. APP. P.132 at 137 - 140. (The paragraph, letters and numbers have been added for ease of reference)

- A.
- B.

C. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and

friends are sometimes made.\"These guidelines constitute what the judge must sum up for the jury in England where jury trial still obtains. Jury trial is no longer in vogue in Nigeria. When it was, it was only limited to Lagos territory. Therefore a trial judge in Nigerian must not only warn himself but must meticulously examine the evidence proffered to see whether there are any weaknesses capable of endangering or rendering worthless any contention that the suspect was sufficiently recognised by the witness. PW1 said the time they came was 1 a.m. The trial judge, it must be remembered, took a judicial notice that it was always dark at that very early hour of the morning. So visibility would normally be blurred at that time. Under cross-examination, she said it was not true that there was no light in Abavo at that time in question. She claimed she told the Police that there was light and that she also told the Police that she carried a small lantern at that material time. According to her, the robbers ordered her to put the small lantern she was carrying down and to quench it. It was her further evidence that at that time and place, the robbers used their own torchlight to pack her belongings. These pieces of evidence by PW1 go to support the findings of the trial judge; that it was dark at that material time. Visibility was blurred. There was definitely a need for the provision of lighting aid to make everything around to be visible. Also waking up by force at that time of the night, one would not immediately gain consciousness and as such one's ability to be able to recognise things around one would be considerably reduced. There is no evidence as to the time she woke up from her sleep and the time the appellant appeared to her. It is a great surprise that the trial court did not avert its mind to the above crucial issues and neither were any findings made thereon. Tragically, the court below fell into that grave mistake. The quality of evidence proffered in support of the prosecution's case that PW1 actually saw the appellant at that material time is very poor; it is not reliable. And the poorer the quality of such pieces of evidence, the greater the danger in convicting on them. Indeed, the quality of evidence at the end of the prosecution's case on the issue of identity or even recognition of the appellant by PW1 was very low and poor that no reasonable tribunal could be heard to convict on it. I am not unmindful that what is now before us is a concurrent findings of facts by the two courts below and being an appellate court, the apex court for that matter; it is none of our business to ordinarily disturb the findings of facts made by a trial court and affirmed by the intermediate appellate court except in exceptional; circumstances (as in the instant case) where the inferences from established facts are clearly wrong or where the findings just do not flow or follow from the evidence led. There has been no proper appraisal of the oral testimony of PW1 and of course, there was serious error on the ascription of probative values of the said evidence.. The result, in my humble view, is that the evidence of PW1 cannot sustain the conviction and sentence of the appellant. Consequently, the only issue formulated by the appellant is answered in the negative. By the same token, issue No 2 is answered in the negative. For all I have been saying, the totality of the tenuous evidence led by the prosecution which I have reviewed above cannot ground the conviction and sentence of the appellant, therefore issue No 1 on the respondent's brief is answered in the negative. In the final analysis, it is my judgment that this appeal is meritorious. It is hereby allowed. The judgments of the two courts below are hereby set aside. The conviction and sentence passed on the appellant by the High Court of Delta State sitting at Agbor on the 28th of November 2001 are) hereby set aside. The appellant is hereby discharged and acquitted.

Judgement delivered by
Katsina-Alu. J.S.C.

I have read in draft the judgment of my learned brother Aderemi J.S.C in this appeal. I agree with his reasoning and conclusion. I too allow the appeal and set aside the conviction and sentence passed on the appellant. He is accordingly acquitted and discharged.

Dissenting Judgement delivered by
Niki Tobi, J.S.C.

The appellant, a farmer and a native of Abavo, had previously been accused of various criminal acts in the village of Abavo. On 4th January, 2000, there was an armed robbery incident in the village. PW1, PW2 and PW3 were alleged to be victims of the armed robbery. A native doctor had earlier said that the appellant was the armed robber. Following this, the appellant was taken to the palace of the Chief. He claimed that he was beaten up and taken to the hospital for treatment. Police obtained statement from him in the hospital. Appellant was charged with conspiracy and armed robbery under section 1(2)(a) and 4(b) of the Robbery and Firearms (Special Provisions) Decree 1984. The High Court discharged and acquitted the appellant on one count of armed robbery but convicted him of conspiracy and one count of

armed robbery. The appellant was accordingly sentenced to death by hanging. His appeal to the Court of Appeal was dismissed. He has appealed to this court. The issue for determination formulated by the appellant is whether the Court of Appeal was right in affirming the conviction and sentence of the appellant on the basis of the evidence of PW1 only in the circumstances of the case. The respondent formulated two issues. They are:

(1) Whether from the totality of evidence on record the lower court was right in affirming the conviction and sentence passed on the appellant for the offences of conspiracy to rob and armed robbery.

(2) Whether the appellant was properly identified as the person involved in the armed robbery committed against Mrs. Comfort Akpokueze, PW1. Learned counsel for the appellant, Mr. Alegeh, submitted that the courts were wrong in basing their conviction on the evidence of PW1 only and that the trial court failed to make findings of crucial issue. He faulted the identification of the appellant. Learned counsel for the respondent, Mr. N. W. Ogbogu, Assistant Director, Ministry of Justice, Asaba, submitted that the evidence of PW1 which was an eye witness account of the robbery incident was sufficient, credible, cogent, compelling, and irresistible to sustain the conviction of the appellant for the offence of armed robbery. What was the evidence of PW1, the victim of the robbery? In her evidence in-chief, PW1 said at page 6 of the Record: "I was sleeping and around 1 a.m., I heard voices shouting open, open, my protector was broken and the two and some people entered my house. The first person I saw was the accused. He entered my house holding a gun. 3 others followed him. They too were armed. 2 other people came with them, making a total of 6. One was at the front of the house while the other one stood at the entrance. The accused and I should see (sic) he is armed. He asked me to bring out money. He said he would shoot me if I refused. I gave them N4.900 the other ones carried all my clothes, shoes and my whole collection of stainless plates... At day break, I raised alarm and our community member came around. He reported the matter to the police. I told the police that I saw the accused person. I made a statement to the police at Asaba." Under cross examination, witness said at pages 7 and 8 of the Record: "I know the accused before this incident occurred. It is not true that there was no light in Abavo on the night in question. I told the police there was light. It is true I told the police I carried small lantern. The robbers told me to put the small lamp down and quench it. They used torchlight to pack the things... It is true that the accused and I had a quarrel earlier. We have settled... The accused was not wearing a cap. He did not cover his face. He was wearing a pair of trousers and a short sleeve shirt. I do not know the colour but it is not white. He was wearing a pair of black trousers." That is the evidence that the High Court and the Court of Appeal believed. Is learned counsel for the appellant correct in law in submitting that the court ought not to convict on the evidence of a single witness? What type of law is that? I do not know it. The one I know is that a court of law cannot convict on the single or sole evidence of a witness in an offence or charge that statutory requires corroboration. I do not think armed robbery is one such offence. Learned counsel for the appellant cited *Abudu v. State* (1985) 1 NWLR (Pt. 1) 55 in apparent support of his submission that before a court can convict on the evidence of a single witness, the court must carefully consider the evidence and all relevant circumstances to ensure that the evidence is credible, cogent, compelling and shows irresistibly that the accused was the person involved in the criminal act. In *Abudu* this court doubted the credibility of the evidence of the star witness. The court held that where an eye witness omits to mention at the earliest opportunity the name or names of the person or persons seen committing an offence, a court must be careful in accepting his evidence given later and implicating the person or persons charged, unless a satisfactory explanation is given. This is because such delay makes the evidence of identity suspicious and reduces the truth content of the evidence below acceptable probative level. With respect, *Abudu* is not helpful to the case of the appellant. In *Abudu*, the witness did not identify the accused person "at the earliest opportunity". That is not the situation here. In this case, PW1 raised an alarm immediately following the robbery and in her words "our community member came around." Let me repeat what the witness said, for purposes of emphasis: "I reported the matter to the police. I told the police that I saw the accused person. I made a statement to the police." The difference between *Abudu* and this case is that no time was lost between when the offence was committed and when PW1 raised an alarm. There was a clear instinctive spontaneity on the part of PW1 as she acted quickly to a situation of harm and grief. Learned counsel also cited *Mbenu v. State* (1988) 3 NWLR (Pt. 84) 615 on the issue of identification. This court held that in a case of identification, the Judge should examine closely the circumstances in which the identification by each witness came to be made. Some questions arose in *Mbenu*. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a pass of people? How often? If only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the Police. The above questions, though relevant in the case of *Mbenu*, do not readily apply in this case. It is in evidence that PW1 knew the appellant before that

day of robbery. It is human for a person who knows another to identify him quickly and this is on the moment of a glance. In such a situation, the memory of recollection sends a signal to the eyes and that follows the identification. While identification could be a more difficult thing with a person being identified is seen for the first time with the identifier, it is a lot simpler to identify a person he knows. That is what happened in this case. I go to the issue of darkness, lantern and all that. PW1, under cross examination said, at page 7, and I repeat this at the expense of prolixity: "It is not true that there was no light in Abavo on the night in question. I told the police there was light. It is true that I told the police I carried a small lantern. The robbers told me to put the small lamp down and quench it. They used a torchlight to pack the things." The learned trial Judge said at page 40 of the Record: "The accused and others are alleged to have robbed one Comfort Akpokueze, who testified as the PW1 in this case. During her evidence-in-chief, she told the court that after her door was broken open, the first person to enter her house (was) the accused who was armed with a gun. She also testified that the accused spoke to her, showing her the gun he was holding." The learned trial Judge referred to the following evidence by PW1 in his judgment on identification at page 41 of the Record: "The accused was wearing a cap. He did not cover his face. He was wearing a pair of trousers and a short sleeve shirt. I do not know the colour but it is not white. It is not true that I mentioned him to the police because of our previous quarrel." In evaluating the evidence, the learned trial Judge said at pages 41 and 42 of the Record: "Now having dealt with these issues as between the credibility of the PW1 and the accused, the court believes the evidence of the PW1 and disbelieves that of the accused person. There was ample opportunity and favourable circumstances from which she could identify the accused person as one of those, who while armed, robbed her on the night of 4/1/2000. The court accepts as satisfactory, the identification of the accused and the circumstances under which she could identify him. The court therefore finds Count II of the charge proved beyond reasonable doubt." The Court of Appeal accepted the above conclusion. In her contribution, Augie, J.C.A, said at page 106 of the Record: "It is true that the assessment of credibility of a witness is a matter within the province of the trial court as it is only that court that has the advantage of seeing, watching and observing the witness in the witness box. It has the liberty and privilege of believing him and accepting his evidence either as a whole or in part in preference to the evidence adduced by the evidence... What is more, before a trial court can convict in a criminal trial, it does not have to call a whole host of witnesses upon the same point... In this case, the trial court accepted as satisfactory PW1's identification of the accused and the circumstances under which she could identify him, and this court will not interfere with his findings." The above is good law and I endorse it. After all, an appellate court cannot overturn the findings of fact of a trial Judge unless such findings are perverse. This is not such a case. I realise that so much storm is made out by the appellant on the issue of light or no light during the robbery. In an effort to contradict PW1, counsel quoted the following evidence of the witness: "It is not true that there was no light in Abavo on the night in question. I told the police there was light.., It is true I told the police I carried a small lantern. The robbers told me to put the small lamp down and quench it. They used a torch light to pack the things." Learned counsel for the appellant submitted that the foregoing evidence elicited from PW1 under cross-examination raised serious doubt on the identification evidence and the credibility of PW1. He contended that either there was light in Abavo or there was no light in the night in question. If there was light, PW1 would not have required a small lantern and the armed robbers would not have required a torch light to pack the things. If there was light then why would PW1 need a small lantern and the armed robbers a torch light, learned counsel asked rhetorically. With respect, this is unnecessary hair splitting and does not address the real point. Learned counsel for the respondent submitted that the issue of whether there was light or not in Abavo and whether a finding was made thereto does not render unjustifiable the finding of the learned trial Judge on the identification of the appellant by PW1. In my view, for purposes of identification, the issue is whether there was enough light for PW1 to identify the appellant. Whether the light was generated by electricity or by lantern is, with respect, neither here nor there. What is in evidence is that there was enough light (whether electricity or lantern) to enable PW1 to identify the appellant. The rest of the evidence, I repeat, is unnecessary hair splitting. It should have been different if PW1 gave evidence that there was darkness when the robbery took place. In such a situation, issue of identification should have been difficult. But that was not the issue. Whether it is electricity or lantern, there was light. In most villages, people use lantern and it cannot be said that lantern cannot be used to identify person or persons. And that takes me to the minutest details of the identification by PW1. The appellant was wearing a pair of trousers and a short sleeve shirt; he was not wearing a cap. He did not cover his face. Can PW1 be fabricating the above merely because she wanted to score old animosity or take vengeance or vendetta? I think not. It is much more than that. I am convinced that the real thing is the evidence of PW1. That of the appellant is a deliberate falsehood; a fabrication. His evidence does not surprise me. After all, who wants to be hanged? Learned counsel for the appellant submitted that the learned trial Judge was wrong in convicting on the only evidence of PW1. I do not know of any law which foists on the prosecution to call a village or community of witnesses in a criminal case. All I know is that an accused person cannot be

convicted on the evidence of a single witness where the offence requires corroboration. The one in this appeal is not one of them. I realise that I am repeating myself. Repetition is at times good for emphasis. I must say that the best evidence is one given by an eye witness. PW1 was not only an eye witness; she suffered it all as a victim. In my humble view, her evidence did not require corroboration. The appellant raised alibi. Let us listen to his story of alibi which he told at pages 21 and 22 of the Record: "I was at home with my mother on that day. I was at Udomi because I was ill and came home for treatment. I was farming at Uronigbe in Edo State. On 3.1.01 my mother and I went to the place where I was receiving treatment. I was suffering from hernia. We returned at about 7 p.m., the treatment is for morning and evening. When we came back, I tied a wrapper as I could not wear trousers because of the nature of my ailment. I went to bed thereafter... I was lying down when my younger sister came to our mother's house. I heard her saying some people were robbed." Although defence of alibi does not need corroboration in law, the appellant could have been more useful to himself if he called the person who treated him or his dear mother. What did the appellant say about the alibi? He said that the police refused to record it. What did he do thereafter? Did he refuse to sign the statement, even on pain of police brutality or torture? There is no such evidence. Raising the defence of alibi at the trial is of little or no help to an accused person. It is the law that alibi as a defence should be raised at the earliest opportunity and that opportunity is in the interrogation room. This will enable the police to investigate the alibi. The police cannot investigate an alibi raised at the trial or during the trial. It is too late. In the circumstances, I agree with learned counsel for the respondent that the defence of alibi is an afterthought. And what is more, Exhibit D, the voluntary statement of the appellant told a different story, contrary to the defence of alibi. Appellant's mother was actively involved in the arrest of the appellant. Counsel for the respondent correctly said so. Part of Exhibit D reads: "It is true that I was arrested by my blood brothers in my village on 5/1/2000. In the process of arresting me, my brothers namely Ugoh Ndidi, Aboy Ndidi, Agility Ndidi and my mother Mrs. Josephine Ndidi." Although the second sentence seems not complete the complete first sentence will provide meaning to the second sentence and it is that the mother too assisted in the arrest. It is curious that the blood relations of the appellant, including the mother were involved in the arrest of the appellant. Although that cannot be basis for determining the criminality of the appellant, it reveals a story that may not be that favourable to the appellant. One can raise some eyebrow to the effect that the blood relations may not have been involved in the arrest of the appellant if he was totally innocent of committing the crime. This is quite a slippery aspect and I will not pursue it beyond this tangent. But an aspect of it which is not that slippery is in respect of the evidence of the appellant that he slept in his mother's house that night. Can this be true? Will the mother assist in the arrest of the son who to her knowledge did not commit an offence? That looks to me like one more fabrication. Learned counsel for the appellant submitted that there were contradictions in the evidence of some of the witnesses, particularly the evidence of PW1, PW4 and PW5. It is trite law that contradictions can only be of use to an accused person if they are material or substantial. In other words, contradictions can only be of use to an accused person if they affect the live issues in the matter. Contradictions which are merely peripheral or not affecting the substance of the case will not exculpate an accused from criminal responsibility. In the circumstances, where the report of the crime was made is not relevant to the issue of robbery. So too when appellant made the statement to PW4. And so the contradictions cannot be of help to the appellant. They all look to me like making a storm out of a tea cup. This is a case of concurrent findings on the part of the High Court and the Court of Appeal. This court cannot tamper with such concurrent findings because they are clearly borne out from the evidence before the court. I do not see any perversity in the findings. I have looked at this matter from all angles and I do not see my way clear in disturbing the concurrent findings of the two courts below. They are right. I accordingly dismiss the appeal. After all, lantern exudes light; though not as much as electricity light to identify a person. The appeal is dismissed.

Judgment delivered by
Francis Fedode Tabai, J.S.C

The Appellant was charged on a three count charge at the Agbor Division of the High Court of Delta State. The trial involved the testimony; of five witnesses for the prosecution and the Appellant only testified in self defence. In his judgment on the 28/11/2001 the learned trial judge found the Appellant guilty of the offence of armed robbery. He was accordingly convicted and sentenced to death. Not satisfied he went on appeal to the Court of Appeal Benin Division. The appeal was dismissed. This was in its judgment on the 4/3/2005. Still aggrieved he has come on appeal to this Court. The facts are detailed in the leading judgment of my learned brother Aderemi J.S.C and I think I should avoid restating the same facts. Out of the five witnesses for the prosecution three claimed to be eye witnesses. They were the PW1, PW2 and PW3. All the three of them claimed to be eye witnesses. Both of them claimed to have identified the

Appellant. Learned trial judge rejected the evidence of the PW2 and PW3, There was circumstantial evidence linking the Appellant to the offence, he did not admit the offence in the two statements which he made to the Police on the 12/1/2000 and. 1/2/2000 respectively. In the Appellant's Brief Mr. A.O. Alegeh submitted that the learned trial judge did not properly evaluate the evidence of the prosecution before proceeding to that of the Appellant. It was his submission that the evidence of identification on which none the learned trial judge relied to convict the Appellant was not strong enough to sustain the conviction. Prof. Utuama SAN the learned Attorney-General of Delta State referred to the consistency in the statement of the PW1 in Exhibit 'A' and her testimony in court and submitted that the findings of the learned trial judge were supported by the evidence. He submitted again that the issue pertained to that of credibility of the witnesses on area peculiarly within the exclusive province of the trial court which alone sees hears, matches and believes and not that of the Appellate Court. He cited *Ugo v Inoamaowei* (1999) 13 NWLR (Part 633). In the first place, I agree with the learned A.G. of Delta State that the assessment of the credibility of witnesses is the exclusive preserve of the trial court. It is an area in respect of which an appellate court does not normally exert any interference. Every case however has to be examined on its own merit. In this case there were a number of oppressive circumstances: besetting the Appellant. Firstly before the night of the alleged robbery on the 4/1/2000 he had been generally acknowledged in his community as a common criminal. He even admitted that much in his statement to the police in Exh. "D". Flowing from this fact it was the brothers and mother that handed him over as the suspect when the allegation was made at "daybreak". Secondly the robbery allegedly took place between 1 a.m. and 2 a.m. No alarm was raised until some four to five hours later. Thirdly the PW 1 and the Appellant had had a previous quarrel. Fourthly nothing incriminating was recovered from the Appellant when his premises was searched. The appellant alleged in Exh. D, and I am inclined believe him that he was severally beaten up. Despite these oppressive circumstances he maintained his denial of the offence throughout. As it stands therefore it is the evidence of the PW1 against that of the Appellant. Even the two police witnesses PW4 Sgt. Francis Aredeinghan and PW5 Inspector Erasmus Okoh tendered no incriminating evidence against the Appellant. It was a situation of oath against oath. The learned trial judge believed the evidence of the PW1 and disbelieved that of the Appellant. He did not proffer any reason why he preferred the evidence of the PW1 to that of the appellant. The Appellant was not recorded to have shaken under cross-examination. In the absence of any reason why he preferred the evidence of the PW1 to that of the Appellant the mere expression of 'I believe' would not suffice. I find myself unable to support any finding that the guilt of the Appellant was proved beyond reasonable doubt. There is no single corroborative evidence from any other source. Again while the Appellant remained consistent and unshaken under cross-examination, there is some demonstrable weakness in the evidence of the PW1. While she said there was light in the night, she still had to carry a lantern and her story about lantern came only under cross-examination. Even in a civil matter where the evidence presents a situation as exists here the court has a duty to locate in whose favour the balance of probability tilts. In view of the foregoing considerations and the oppressive circumstances against the Appellant, I am unable to go to the conclusion that the appellant's guilt was established beyond reasonable doubt. He is entitled to the benefit of that doubt no matter how slight. For the foregoing reasons and the fuller reasons in the judgment of Aderemi J.S.C, I will allow the appeal. I set aside the judgment of the two courts below and substituted therewith a verdict of discharge and acquitted for the appellant.

Judgement delivered by
Ibrahim Tanko Muhammad. J.S.C

My Learned brother Aderemi, J.S.C graciously permitted me to read in draft form his leading Judgment just delivered, I am in agreement with his conclusion that there is merit in this appeal and it must be allowed This is a criminal appeal in which the appellant was sentence to death by hanging or by firing squad. Although the offence with which the appellants was charged was a serious one i.e. Robbery which now becomes a cankerworm in the Nigerian society and which of course requires drastic, urgent and effective solution to curb it, we should not forget that; in criminal trials, particularly in Capital offences the trial court must arrive at its decision through a process of reasoning which is analytical and commands confidence. A judgment which sends a man to the gallows and awaits the hang man to execute him at any single minute must be punctuated by logical thinking based on cogent and admissible evidence in which the facts leading to his conviction are clearly found and legal interference carefully drawn. It can hardly be allowed to stand if founded on scraggy reasoning or a perfunctory performance. See *Aniagolu, J.S.C's dictum in the case of Nwosu v. State* (1986)4 NWLR (pt.35)348 at 359. Now, as it is clear from the record of appeal, the appellant was convicted and sentenced to death mainly on the strength of evidence of PW1 who was a victim of the alleged robbery incidence. Learned counsel for the appellant attacked the veracity of that evidence of identification by PW1 and submitted that the evidence could not sustain the conviction and sentence. I have myself carefully gone through the gamut of the evidence

led before the trial court. I hold the same view as my brother Aderemi, J.S.C; that whenever the case of an accused person depends on the correctness of the identification of the accused which the defence alleges to be mistaken, a trial judge must warn himself of the need to weigh such evidence with others adduced by the prosecution before conviction. Again, it is to be noted that PW1 denied that she hated the appellant, yet she admitted in cross-examination that she had a quarrel between her and the accused. Although some grouse or settling scores on some personal interest between an accused and a witness does not generally affect the validity of evidence by that witness, the effect of such grouse or personal interests is to place the trial Judge at his guard to warn himself as veracity of the evidence. See *Ogulana & Ors v. the State* (1995) 5SCNJ 189; *Theophilus v. the State* (1996) 1 SCNJ; 79. In her statement to the Police which was rendered and marked Exh. A, PW1 stated no features to identify the appellant except by calling out his name Sunday Ndidi. PW1 made an allegation in that statement that Sunday Ndidi some three years ago brought other armed robbers to her house and stole her fowls. In this kind of situation, I think proper identification through the accused's features was necessary, It was held by Karibi Whyte, in *Ikemson v. the State* (1989) 2 NSCC as follows: "In such a situation a proper identification will take into consideration the description of the accused given to the police shortly after the commission of the offence, the opportunity the Victim had for observing the accused, and what features of the accused noted by the victim and communicated to the Police marked him out from other persons. In the instant case PW1 described the special features of the 1st appellant, as fair in complexion and wearing a beard. He was quite close to him during the encounter." Such kind of description as in the case of *Ikemson* (Supra) were missing in the present appeal. Further, doubt was seriously created whether there was light in Abovo Village or not. All these in a criminal trial, would have been resolved in favour of the appellant. The cardinal principle of trial in criminal cases is that the trial court must not be seen to appear to look for excuse to shore up the case of the prosecution to get a conviction any how, such an attitude of ignoble practice only portrays the court as anything but impartial arbiter. It is reprehensible for any court to portray any attitude that shows tendency to get conviction at all cost for the prosecution that case the court would have now turned itself into a prosecutor and a persecutor. A court of law or reasonable tribunal should be wary of such practice. For the detailed reasons given by My Learned brother, Aderemi J.S.C; I too: allow the appeal; set aside the Judgments of the two lower courts wherein the appellant was convicted and sentenced to death. The appellant is accordingly discharged and acquitted hereby.

Counsel

A.O.Alegeh

with him

L.J.A. Inebuyen

Cyril Attamu For the Appellant.

N.W. Ogbogu For the Respondent