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DEFENCE OF *ALIBI*-A LESSER EVIDENTIAL BURDEN ON DEFENDANT?

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Abubakar Sale v State [2016] 3 NWLR (pt. 1499) 392 Examined.

ABSTRACT

*A defendant that raises a defence of Alibi has the evidential burden to prove where he was at the time of the crime which is the subject matter of the charge or information. It is critical that the defendant at the earliest opportunity gives particulars of the Alibi to the police so that they can investigate. To what extent is the suspect/defendant required to supply particulars? What constitutes particulars? Are there circumstances when the requirement for particulars will be said to be complied with even though the suspect in his extra judicial statement did not apparently make a 'full disclosure'? The nature and extent of particulars to be given by the suspect/defendant is examined in view of several decisions of courts and the recent decision of the Supreme Court on the evidential burden on the defendant who raises a defence of Alibi. This is the subject of the decision of the Supreme Court in the case of *Abubakar Sale v State* [2016] 3 NWLR (pt. 1499) 392 under review.*

1.0 INTRODUCTION

A defence open to a defendant in the course of a criminal trial is *Alibi*.² Before a defendant can properly rely on this defence, it must be raised at the earliest opportunity when the defendant is confronted with the commission of the offence so that the police can investigate the *alibi*. This may be at the time of making the extra judicial statement to the police. The suspect must provide sufficient

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² *Alibi* means that the defendant is somewhere other than where the prosecution says he was at the time of the commission of the offence making it impossible for him to have committed or participated in the commission of the offence for which he is charged. See *Umani v State* [1988] 1 NWLR (pt.70) 274, *Attah v State* [2010] 10 NWLR (pt.1201) 190, *Okosi v State* (1989) 1 NWLR (pt. 100) 642

particulars: of the place he was at the time of commission of the offence, those he was with and other material facts. This is an evidential burden on the defendant. It is not sufficient to merely state that he was not at the scene of the crime alleged. He must go further to give the names of persons who can testify that he was elsewhere other than the *locus delicti*,³ and therefore it was practically impossible to connect him with the offence charged in view of space, time and place. This is because by its nature, a defence of *alibi* is a combined defence of lack of *actus reus* and *mens rea*.⁴ It is only where the defendant has given the particulars will the burden shift to the prosecution to investigate the *alibi*.⁵ If the story of the defendant is conflicting, there is no such burden.⁶

A successful defence of *alibi* will result in the acquittal of the defendant.⁷ Hence the prosecution must not lightly disregard the defence especially where the defendant has provided necessary particulars and discharged its evidential burden of proof.⁸

What is the nature of the particulars to be supplied by a suspect to warrant investigation of the *alibi* by the police or prosecution? In other words, to what extent will the defendant be required to discharge the evidential burden of proof? What are sufficient particulars to be furnished by the defendant? Are there circumstances when the defendant fails to provide particulars, he will still be able to raise the defence of *alibi*? This is the crux of the decision of the Supreme Court in *Abubakar Sale v State*.⁹ It will be shown that in a few exceptional cases, the evidential burden may be discharged by the defendant with minimal evidence in his extra judicial statement. In that case, the burden is on the prosecution to go further in its inquiry. Otherwise, the defendant may be given the benefit of the doubt.

2.0 FACTS OF THE CASE OF *ABUBAKAR SALE V STATE*:

The material facts for the purpose of this review were that, the appellant and two others were arraigned at the High Court on a two- count charge of Conspiracy to Rob and Armed Robbery. The appellant and the other accused persons were alleged to have entered the house of PW2 and at gun point, robbed him of his

money and that of his wives. The robbers escaped but were later arrested. The extra judicial statements of the appellants were tendered in evidence during the trial and admitted as Exhibits A and A1. At the end of the trial, the 3rd accused was discharged and acquitted while the appellant and the 1st accused were convicted and sentenced to death.

The appellant appealed to the Court of Appeal which dismissed the appeal and affirmed the judgment of the trial court. He further appealed to the Supreme Court.

One of the issues formulated for determination by the appellant was: whether the lower court was wrong to have affirmed the decision of the trial court that the appellant did not furnish sufficient particulars of his *alibi* and as such his defence of *alibi* failed. Appellant's counsel submitted on this issue that the appellant furnished the police with enough particulars to investigate the defence of *alibi* raised but the police were not interested in investigating same. In response to the defence of *alibi* raised, counsel for the respondent argued that the appellant in his extra judicial statement Exhibits A and A1 did not give sufficient particulars to enable the police investigate the alleged *alibi*, that he did not state with whom he was or what he was doing to enable the police investigate his so called *alibi* with a view to finding out the truth or otherwise of the claim. In the said statement, (Exhibits A and A1) appellant said: 'I can remember that on 18/02/2003, I did not travel to Gunmi via Zamfara State. I was in my town Zongo'. Counsel urged the court to hold that the prosecution had adduced sufficient and acceptable evidence which fixed the appellant not only at the scene of the crime, but as one of the two persons who robbed PW2 and his family.¹⁰

3.0 DECISION OF SUPREME COURT:

The Court in allowing the appeal on this issue held that there was nothing on record to show that the *alibi* was investigated. The appellant was an illiterate and therefore could not be expected to know the requirements of the law as it relates to *alibi*. The police that took his statement should have made effort to elicit more information to enable them investigate the *alibi*. In the circumstance of the appellant being an illiterate, he had discharged the evidential burden of proof on him to introduce the defence. The failure to ask further questions and investigate,

³ See *State v Azeez* (2005) 8 NWLR (pt. 927) 312, *Ozaki v State* (1990) 1 NWLR (pt. 124) 92
⁴ *Ukwinnanyi v State* (1989) 4 NWLR (pt. 114) 131 @ 144E-F per Karibi-Whyte, JSC
⁵ *State v Odomo* (2018) LPELR 46339
⁶ *Okosi v State* (1989) 1 NWLR (pt.100) pp 642 - 660
⁷ *Ukwinnanyi v State* (1989) NWLR (pt.114) 131, (1989) LPELR 3353
⁸ *Ifeanyi Chukwu v State* (1996) 7 NWLR (pt. 463) 686, *Yanor v State* (1965) NMLR 337
⁹ (2006) 3 NWLR (pt. 1499) 392

¹⁰ Ibid pp. 416-417.

cast doubt on the prosecution's case. The appeal was allowed and the appellant discharged and acquitted.¹¹

Ogunbiyi, JSC in the leading judgment stated as follows:¹²

The foregoing submission, in other words, questions the insufficiency of particulars for the police to investigate the *alibi* raised. As rightly submitted by the appellant's counsel, it is not borne out on the record that the said *alibi* in question was ever investigated by the police. There is also no indication that the police did inquire more on the facts stated by the appellant in his extra judicial statement to enable them investigate the defence raised. It is on record at page 169 that the appellant testified as DW2 and he spoke Hausa. The Investigating Police Officer (IPO) was PW1 who in his evidence testified that he did administer words of caution to the appellant and recorded his statement in Hausa language but translated same into English. (Exhibits A and A1).

It is obvious therefore that the police was clearly aware that the appellant, who could not write his statement was an illiterate and therefore could not be expected to know the requirements of the law as it relates to *alibi*. The police, who should have known better, did not also make any effort to elicit such information as they would require to investigate the *alibi*. It was sufficient that the appellant did introduce the defence in his own little knowledge. The failure of the police to investigate the truth or otherwise of the appellant's *alibi* has cast veritable doubt on the reliability of the case for the prosecution which ought to be resolved in favour of the appellant. (Underlining mine for emphasis)

4.0 REVIEW

The evidential burden of proof is on the defendant who raises the defence of *alibi*.¹³ This is because where he was at the material time is a matter within his knowledge. He is required to furnish details and particulars of his whereabouts

that the police can investigate.¹⁴ Once the defendant discharges the evidential burden of proof, the onus shifts on the prosecution to disprove it.¹⁵

To what extent has this authority expanded the frontiers on the evidential burden of proof on the defendant? In other words, what is the significance of this authority? It is our deduction from this case that where an illiterate in making an extra judicial statement merely states that he was not at the *locus delicti*, the police officer taking the statement has a duty to ask for further particulars-where he was at the time, and whom he was with. Unlike previous authorities considered in this article, where the general position is that the suspect must give full particulars, that burden is less in cases of illiterate suspects. The moment he mentions that he was elsewhere other than the scene of the crime, he has discharged the evidential burden. According to Honourable Justice Ogunbiyi, as an illiterate he is not expected to know the requirements of the law as it relates to *alibi*.¹⁶

It is our opinion that this 'lesser' evidential burden should not only be applicable to illiterate suspects. A literate suspect should also benefit from it. After all, how many suspects 'know the requirements of the law as it relates to *alibi*'? It is argued that as soon as a suspect raises the defence of *alibi* in his extra judicial statement whether literate or illiterate, and fails to provide particulars, the investigating police officer should prompt him to furnish the particulars even if he has to make a further statement. Where after being asked to furnish the particulars he defaults, the police would have discharged its responsibility with no further obligation to carry out any investigation. The protection afforded an illiterate should also be afforded all suspects. The scale of justice should be even.

5.0 CONCLUSION

The case of *Abubakar Sale v State* is a refreshing departure from the legion of authorities which places an evidential burden of proof on defendant raising a defence of *alibi* without considering the peculiarities and circumstances of the defendant. This authority has taken into consideration the fact that a suspect may be illiterate. This principle should be extended to all suspects.¹⁷ Courts should

¹¹ Ibid p.418

¹² Ibid p.418C-G

¹³ By the combined reading of sections 137, 139 (1), and 140, Evidence Act 2011, the evidential burden will be discharge on a balance of probability. Once the defendant has successfully raised the defence the burden shifts to the prosecution to disprove the *alibi*. This is in contrast with the general burden of proof on the prosecution which never shifts under section 135 (3). See *Agim Sunday v State* (2014) LPELR 24251

¹⁴ *Agim Sunday v State* (2014) LPELR 24251

¹⁵ See *Gabriel Daudu v State* (2018) LPELR 43637

¹⁶ *Sale v State* p. 418F

¹⁷ This is not to say that ignorance of the law is an excuse. What is argued is that the suspect must be guided to comply with requirements of particulars to meet the law on *alibi*. See *EFCC v Fayose* (2018) LPELR 44132

apply this authority in appropriate cases.¹⁸ Counsel for defendants should also take advantage of this authority. The police should be guided accordingly.

¹⁸ This is a binding precedent for lower courts based on the doctrine of *stare decisis*. See *Equitorial Trust Bank Ltd v Agada* (2016) LPELR 40792, *Bogoro Local Government Council v Kyauta* (2017) LPELR 43296, *FRN v Saraki* (2017) LPELR 43392, *Umar v APC* (2018) 18 NWLR (pt. 1650) 139