

Alibi as a Defence in Criminal Liability

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Alibi simply means elsewhere. It is a defence of having been at a place other than the scene of the crime. It may equally connote that I was not present at the place where the offence was committed.

For a plea of alibi to succeed, an accused is expected to raise the plea immediately after his arrest by the police, that is, he must tell or inform the investigating police officer at the first contact, that he was not present at the scene of the crime or that he was at a particular place different from the place where the crime was committed. That is, when a person is charged with an offence he is entitled to say that he was in some particular place or places other than the scene of the crime at the time of the commission of the crime. The accused must give the particulars of his alibi at the earliest opportunity.

By virtue of section 11 of the English Criminal Justice Act 1967, a defendant charged with an indictable offence must give seven days notice of the particulars of alibi if he wants to adduce evidence of it at his trial. If the accused did not properly set up his defence of alibi during the trial, he will not be allowed to do so on appeal except if the appeal court is satisfied that the trial was rushed or that the defendant had no fair chance of putting his defence of alibi across during his trial.¹

The investigating police officer in order to rebut the plea of alibi, must carry out the investigation to ascertain the claim of the accused, that is, the investigating police officer must endeavour to visit the place which the accused claimed he was at the particular time the offence was committed. The officer must equally find out the particulars of whoever the accused must have mentioned in his statement as the person or persons with whom he was staying or stayed at that particular time. The police officer must find out from those people whether it was true the accused or suspect was with the person or persons at that material time.

Failure on the part of the investigating police officer to carry out this duty is fatal to the success of the case against the accused. Once alibi is raised, the onus shifts on the prosecution to disprove it, it is not for the accused to prove it.

It should be noted that the standard of defence regarded to establish an

alibi is much lower than the proof beyond reasonable doubt expected of the prosecution. The burden of establishing the defence of alibi which lies on the accused is like that which lies on a defendant in civil case, it is discharged by the balance of probability and not by proof beyond reasonable doubt.

If an accused fails or neglects to inform the investigating police officer during the course of investigation and now raises the defence or makes the plea for the first time in court, the accused will not succeed because the opportunity for the police or investigating officer or prosecutor to investigate the defence might have been foreclosed. Although the prosecution can anticipate the defence of alibi and forestall it but if it cannot reasonably be foreseen and it is set up for the first time after the close of prosecution case, then the prosecution must be allowed to call rebutting evidence if they so wish.² This article or paper seeks to examine some fundamental issues.

If an accused who really participated in a crime but denied same during investigation by raising the plea of alibi but for reason which was beyond the control of the investigating officer, he could not conduct the required investigation to find out the authenticity of the accused claim, what would then be the stand or the position of the court? Will the court rely on circumstantial evidence to convict the accused or the court will because of this technical defect, acquit the accused?

This proposition could be examined by considering the following cases:

- (a) In the case of *Onuoha v. The State*³ the Supreme Court in holding⁴ had this to say "the setting up of the defence of alibi is not a sufficient reason for a trial judge to call witnesses *proprio motu* as there is nothing ex-improviso about the defence. It is the commonest of defences and it does not require any particular ingenuity but ordinary common sense on the part of the prosecution to conceive that a person accused may come to court and say that he did not do it, he was not at the scene of the crime."
- (b) In *Hausa v. The State*⁴ Where the Supreme court while dismissing the appeal by a majority decision held that "although there are occasions in which failure to check or investigate alibi may cast doubt on the reliability of the case of the prosecution, where there is positive evidence which cancels the alibi or where the prosecution adduces sufficient and accepted evidence which fixed the accused person at the scene of crime at the material time, the alibi raised is logically demolished or fizzles into thin air and thus doomed."

The facts of the case are as follows:

The appellant in that case was charged at the Bendel State High Court holden at Orerokpe with the murder of Samuel Ariokoko contrary to section 319 (1) of the Criminal Code cap 49 vol. 4 Law of Bendel State of

Nigeria 1976. He, however, pleaded not guilty. The prosecution's case was that on 25th January, 1987 the appellant murdered one Samuel Ariokoko at Okpara Inland in Bendel (Now Delta) state by shooting him with a gun. PW2, the wife of the deceased and PW3, the brother of the deceased testified to the effect that he saw the appellant at the scene of the crime in the light cast by security light, when the appellant shot the deceased with a gun in the night of 25th January, 1987.

The appellant denied the charge and his statement to the police (Exhibit 8) recorded some six months after the offence was committed and consequent upon his being apprehended raised the issue of alibi.

The appellant both in his statement and in oral testimony before the trial court said that he was not at the scene of the crime but rather at Umuru in Ondo State. The prosecution did not investigate the alibi raised by the appellant. The High court rejected the plea of alibi and proceeded to convict the accused. The court of appeal dismissed the appellant appeal to it. In his appeal to the Supreme Court, he contended mainly on the issue that the defence of alibi raised by him was not investigated by the prosecution and was not properly considered by the two lower courts.

The Supreme court held that:

1. Once alibi has been raised, the burden is on the prosecution to investigate and rebut such evidence in order to prove its case beyond reasonable doubt. The only burden on the accused raising alibi is to adduce some evidence tending to show that he was elsewhere other than at the scene of the crime (which is a matter, peculiarly within his knowledge).

Once that is done, it is the duty of the prosecution through the agency of police investigation to check on the alibi.

*It is trite law that where there is a duty on the prosecution to investigate alibi, failure on the part of the prosecution to do so tantamount to an admission of the alibi.

*Although there are occasions in which failure to check or investigate alibi may cast doubt on the reliability of the case of the prosecution, where there is positive evidence which cancels the alibi, or where the prosecution adduces sufficient and accepted evidence which fixed the accused person at the scene of crime at the material time, the alibi raised is logically demolished or fizzles into thin air and thus doomed.

In such a situation, the failure of the prosecution to investigate the alibi would not be fatal.

*It is settled law that the prosecution does not have to investigate every alibi raised by the accused person, however, improbable.

However, where the story of the accused if believed is capable of proving a defence, there is a duty upon the prosecution to investigate the story.

In the case of *Oriori Yanoe & Myina Andiar v. The State*⁵ the court held as follows: "On the defence of alibi, the law is that the jury should be directed that they should not disregard evidence of alibi unless there is a strong evidence against it."

It further held that "Therefore while the onus is on the prosecution to prove the charge against an accused person, the latter has, however the duty of bringing the evidence on which he relies for his defence of alibi, when such evidence has been adduced, the court should consider it in the light of the evidence adduced by the prosecution in support of the charge against the accused and if in the end, the court is unable to reach a decision on the question whether the evidence in support of the case for the prosecution is stronger than that produced in support of the alibi, the accused must be acquitted." From my experience as a prosecuting state counsel, most of these criminals especially the hardened or notorious ones may be as a result of the lapses or negligence on the part of the investigating authority. In *Agbany v. State*⁶, the appellant was arraigned before Benue High Court sitting at Katsina-Ala charged with the offence of mischief by fire, contrary to section 337 of the Penal Code.

The facts of the case are that PW1, Suaga Aade, a farmer from Mbaabega Shitile alleged that the appellant on 1st March 1989 set ablaze his two dwelling houses at Mbaabega Shitile, the appellant denied setting the houses ablaze. He pleaded alibi saying that he was working behind his house with one Agbidye Aba and two others when PW1 came to him to level allegations against him.

PW3, the investigating police officer did not investigate the appellant claim that he was elsewhere with other people at the time of the burning of PW1's house.

The High Court rejected the plea of alibi because it did not contradict or contradict the evidence of the prosecution. The accused person appealed to the Court of Appeal, the Court of Appeal unanimously allowed the appeal. It held that the onus of proof on an accused person who pleaded an alibi is the evidential burden. There is no onus on such accused person to prove his innocence or to discredit or contradict the evidence of the prosecution.

The only burden or onus on the accused person setting up a plea of alibi is merely to contradict and forward evidence in support thereof. Accordingly, the onus is not on him to prove such a defence but on the prosecution to disprove it.

It is settled law that an accused person whose defence is an alibi has the onus to adduce evidence on the alibi which if considered with care for the prosecution, creates a reasonable doubt in the mind of the judges so as to entitle the accused person to an acquittal. And this burden on the accused to adduce evidence in support of his alibi is far less than that in civil cases. Once an accused person raises a plea of alibi the burden is on the

prosecution to investigate and rebut such plea in order to prove the case against the accused beyond reasonable doubt. Failure by the prosecution to investigate the plea of alibi which has been promptly and properly raised, may cast doubt on the probability of the prosecution's case.

The courts are advised to ensure that mere technicalities are not allowed to over ride the course of justice. The court should endeavour to weigh other evidence proffered in the case especially by the prosecution so as to arrive at a just and convincing decision such as the evidence of identification of the accused person with the crime (even by one prosecution witness), if it is a very clear and strong evidence. If there are discrepancies in the story of prosecution witnesses about the identity of the accused, the court must resolve such discrepancies before rejecting or accepting the defence of alibi.⁷

Conclusion, the plea of alibi should not be allowed to be turned to a shield by the accused person in order to get away from the desired punishment for the offence committed. Mere technicalities should not be allowed to defeat the doing of substantial justice as held by the Supreme Court in the case of *State v. Gwonto*.⁸ It is submitted that in rejecting the defence of alibi the court must carefully weigh the evidence of the prosecution especially identification with regard to the following matters: Time of day, Weather, Locus, Distance of view, Means of identification, Duration and Familiarity.

NOTES

1. Hon. Justice E. O. Fakayode, *The Nigerian Criminal Code Companion*, Ethiope Publishing Corp., Benin City Nig. 1977 p. 232
2. Ibid — Justice E. O. Fakayode (Rtd), Pg. 232
3. (1989) 1 NSCC 411
4. (1994) 6 NWLR Part 350
5. (1965) All NLR 193
6. (1995) 2 NWLR 193, Part 328.
7. Justice E. O. Fakayode Op. cit. Pg. 233
8. (1983) 1 SCNLR 142