

THE RELEVANCE OF THE DEFENCE OF *ALIBI* IN CRIMINAL TRIALS IN NIGERIA*

Abstract

Criminal trials in Nigeria usually require that the defendant will raise a defence on his behalf. There are several of such defences the defendant can raise. The defence of alibi is one of such defence. It is pertinent to point out that the defence of alibi is a unique defence. Not only is it one which does not accept of another form of defence, it also requires the burden of proof to shift from the prosecution to the defendant. It is this unique defence that we seek to analyse in this work. The work will take a look at the definition, nature and proof of this defence and finally end with a conclusion as to the requirements of such defence.

Keywords: *Alibi, Defence of, Criminal trials, Nigeria*

1. Introduction

Anyogu while attempting a definition of alibi took a foray into the work of Saunders where Alibi was defined as, ‘ a Latin adverb meaning elsewhere or at another place and if evidence for an accused that he was not present at a place at the time an offence was committed is accepted by a jury, he is said to have established an alibi’¹ The Black’s Law Dictionary defined alibi as ‘a defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of crime at the relevant time’². So far it is obvious that almost all definitions on alibi start from the standpoint of the defendant. Indeed Jowitt defined it as ‘a prisoner or accused person is said to set up an alibi when he alleges that at the time when the offence with which he was charged was committed, he was elsewhere that is at a place so far distant from that at which it was committed that he could not have been guilty’³ According to the Supreme Court in *Eke v State*⁴ alibi means that he was not at the scene of crime. Alibi means elsewhere’. It presupposes that by fluke of nature, the defendant has no possibility of committing the offence attributed to him as he cannot be at two places at the same time. In *Attah v State*⁵, the Supreme Court per Adekeye JSC had this to say, ‘Alibi is a Latin word meaning ‘elsewhere’. Black’s Law Dictionary Eight Edition defines alibi as a defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime at the relevant time. It is the fact or state of being elsewhere when an offence was committed’. In *Ezeugo v State*⁶, Ngwuta JSC aptly defined alibi as follows, ‘Alibi in its Latin origin means ‘Elsewhere’. The defence of alibi postulates that the accused was somewhere other than the *locus criminis* at the time the offence was committed. It means he was not at the scene at the time of the commission of the crime and could therefore not have committed it or participated in its commission’ Nnamani JSC in the case of *Umani v State*⁷ defined alibi as follows, ‘An alibi means nothing more than ‘elsewhere’ i.e. that the accused person was somewhere else at the time of the crime’.

* By **B.E. EWULUM, PhD**, Lecturer in Law, Faculty of Law, Nnamdi Azikiwe University, Awka; e mail be.ewulum@unizik.edu.ng, 07038137153

¹ Z.C Anyogu, *Evidential Perspectives on the Defence of Alibi in Nigeria*, (Enugu, Okechukwu Publishers, 2006) p1, where the Learned Author referred to J.B. Saunders, *Words and Phrases Legally Defined* (2nd ed) Butterworths, 1969). He also referred to the dictum of Montague J.A in *R v Foll* (1957) 21 WWR 481 @ 491.

² B.A Garner (Ed), *Black’s Law Dictionary*, (8th Ed)(Minnesota, Thompson West Publishers 2004) pg79

³ E. Jowitt, *Dictionary of English Law* Vol 1 (London, Sweet and Maxwell 1959) pg 156

⁴ 2011 LPELR-1133(SC)

⁵ *Attah v. State* [2010] 10 NWLR (Pt. 1201) 190 S.C

⁶ (2016) LPELR-40046(SC)

⁷ *Umani v. State* [1988] 1 NWLR (Pt.70) 274

From the totality of these definitions, one thing is certain and that is that the defendant who pleads the defence of alibi has actually stated that he was never at the scene of crime for which he is being charged. Indeed in the case of *Alani v State*⁸, Ubaezuonu JCA took a more etymological step in attaching a meaning to the word alibi. The Justice stated that ‘the word alibi is of Latin derivative. It is derived from a combination of the Latin word *alius* meaning other and *ibi* or *ubi* meaning there and or where. The English usage of the combination of *alius* and *ibi* or *ubi* is elsewhere. The Shorter Oxford English Dictionary says that the plea of alibi is the plea of having been elsewhere at the time of the alleged act’ It is obvious that the defence of alibi entails being elsewhere other than at the scene of crime but one pertinent question to ask is really can this defence once raised exculpate the accused person? Is it still possible for a defendant not to be at the scene of crime and yet be guilty of an offence? This is one of the dilemmas of the defence of alibi. We shall now turn our attention albeit briefly to the possibility of being guilty even when the defendant is nowhere near the scene of crime.

2. Absence amounting to Guilt

It is imperative to state that in Nigeria Criminal Jurisprudence, the issue of who is a party in a crime revolves on the Criminal Law of the State or the area in which the offence is committed. For instance in Anambra State, parties to an offence are listed out clearly in Chapter Two of the Criminal Code Law of Anambra State⁹. In the said Chapter, Sections 4 thereof defines those who are parties to an offence. To quote verbatim et literatim it says, ‘4(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-

- (a) Every person who actually does the act or makes the omission which constitutes the offence;
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) Every person who aids another person in committing the offence;
- (d) Any person who counsels or procures any other person to commit the offence;

In the fourth case, he may be charged either with himself committing the offence or with counseling or procuring its commission’.

Parties are also contained in Section 7 of the Criminal Code¹⁰. It is worthy of note to state that the wordings of both legislations are similar and lifting same will add to the body of knowledge. Indeed Section 7 of the Criminal Code states, ‘when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with committing it, that is to say:

- (a) Every person who actually does the act or makes the omission which constitutes the offence;
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) Every person who aids another person in committing the offence;
- (d) Any person who counsels or procures any other person to commit the offence.

In the fourth case, he may be charged either with himself committing the offence or with counseling or procuring its commission’

It is apposite here to assert that even though the defendant can claim absence at the scene of crime, there is yet a possibility that his absence at the scene of crime may still not release him from the clutches of

⁸ [1993] 7 NWLR (Pt 303) 112 at 124

⁹ Cap 36 Revised Laws of Anambra State 1991

¹⁰ Cap C38 LFN, 2004

guilt. For the avoidance of doubt, both Section 7a¹¹ and Section 4(1)a¹² talk of the actual person who committed the offence. Such persons include the appellant who rained heavy stones on an ailing old woman which led to her death as was the fact in the case of *Adekunle v State*¹³. If death resulted from a blow, the party here is the hand that gave the blow. On this segment, the defendant pleading alibi may be saved. This is simply because he was not in close proximity to the scene as to be part of the *participes criminis* in the offence under review. Trouble however looms for such a defendant where any other provision of either Section 7 or Section 4(1) is invoked. For instance, Anyogu submits that Section 7 (b), (c), and (d) contemplates a situation where the *actus reus* for the offence is committed and an accused is nowhere near the *locus delictus*¹⁴. In further elucidating this assertion, the learned author sought reference to the case of *Edey v State*¹⁵ where Coker JSC held that, ‘with respect to Section 7(b), the offence postulated is that of doing or omitting to do something for the purpose of making it easier or possible for another to commit the offence; the complicity of a person not actually committing the offence himself but whose act or omission is deliberately aimed at the purpose or purposes specified in the provision.’

For ease of understanding an illustration is necessary here. Boniface a young student has always desired to have sexual intercourse with Angel a pretty law student. Unfortunately, Boniface is the shy type and cannot get Angel for himself. He then sought the services of his friend Martin who is free with Angel. On the day in question, Boniface went to Martin’s house and as per their discussion Martin put a call across to Angel asking her to come to his house. When Angel arrived, Martin locked both in the house and went away. It was later discovered that Boniface had forceful carnal knowledge of Angel, will Martin rely on the defence of Alibi to escape punishment? It is pertinent in answering this question to state that where Boniface raises the defence of alibi, it can be said that the defence is properly situated in the sense that he is the actual culprit whose presence is very effectual in the commission of the offence. On the other hand, Martin’s absence of the scene of crime has not changed anything. He has done something to aid the commission of the offence and the fact that he was far away from the scene of crime may not avail him. So his absence does not mean innocence. In fact the import of the absence of the aider, abetter, enabler or counsellor’s absence at the scene of crime despite his state of mind was captured in the case of *Idika v R*¹⁶, when the Court held that, ‘if ten men plan and encourage each member of a society to kill A on Saturday and that Plan fails, and five of them kill A on Sunday in pursuance of the original agreement to kill, it seems to me that the five who took no active part in the killing are yet responsible for the killing. They were among those who lit the fuse. Having lit it, they let it burn with the results which they desired’ These go to show that apart from the fact of his presence, a defendant may still be found guilty even where his presence is not practically possible at the *locus delictus*.

On the other side of the divide is the Penal Code position on this issue of absence yet not innocent. It is respectfully submitted that the Penal Code has provisions similar to the provisions of Section 7 of the Criminal Code. These can be found in Chapter IV and V of the Penal Code¹⁷. For the Penal Code, the issue of common intention was captured in Section 79. Section 83 defined a person who abets the doing of a thing while Section 84 defined the offence of abetment. The summary of the views expressed in

¹¹ Criminal Code Supra

¹² Criminal Code Law 1991 Anambra State

¹³ [1989] 5 NWLR (Pt 123) at 505

¹⁴ Anyogu Z.C, Evidential Perspectives, p. 7

¹⁵ [1972] 1 ANLR (Pt 1) 15at 25

¹⁶ [1959] 4 FSC 106

¹⁷ Cap 89 Laws of Northern Nigeria, 1963

the foregoing sections is that a person may yet be guilty even where he is physically not within the scene of crime. Such a person as submitted by Anyogu¹⁸ cannot be exculpated by virtue of his absence at the scene of crime. Thus it becomes a lame excuse for him to assert that he was elsewhere when the offence was committed. This is because his guilt was concluded by acts preceding and directed at abetting the offence and his punishment is the same as that for the offence.

3. What is needed for the defence of Alibi

The defence of alibi is one not bugged down by lists of ingredients. Indeed in *Mohammed v State*¹⁹, Rhodes Vivour JSC stated that the defence of Alibi means that of the time the crime was committed the accused person was not at the scene of the crime, and so it is impossible for him to be guilty of the crime. The onus of establishing alibi is on the accused person since it's a matter within his personal knowledge. The defence of alibi would succeed if of the earliest opportunity after his arrest he gives to the police sufficient particulars of where he was at the time the crime was committed, and Police investigation of his alibi turns out to be true. The defence of alibi would crumble like a pack of cards where there is stronger evidence against it'. An analysis of the above assertion therefore is that a defendant who wants to take full benefit of the defence of alibi ought to raise same timeously. In *Tunji v State*²⁰ per Owoade JCA, the Court of Appeal stated that 'a defence of alibi must be unequivocal and must be raised early during investigation of the allegation against the accused person and not during the trial. This will enable the prosecution investigate the truth of alibi, and call evidence, if necessary in rebuttal' In *Mustapha v State*²¹, Awala JCA opined that 'an accused by raising the defence of alibi is saying that he was somewhere else at the time the crime was committed, and as to where he was at the material time, was a matter specially within his knowledge, the accused ought to raise the defence at the earliest possible opportunity. In his defence, he ought to give such details and particulars of his whereabouts so that the police can investigate'. In *Natasha v State*²² per Belgore JCA, the Court summarized the position thus, 'the general principle is that the accused must present his alibi at the earliest time and once he has given full particulars of the alibi, the prosecution must investigate it to confirm it or disprove it. Failure to investigate when faced with full facts of the alibi will vitiate the prosecution²³. The alibi to be unequivocal must be complete as to the time, the place and possibly those people at the place who could help investigation.

The onus to raise alibi is on the accused the onus then shifts to the prosecution to investigate its veracity or otherwise²⁴. However this defence must be raised at the earliest possible time i.e. at the investigation stage of the case. This is normally by a suspect in answer to a charge by the police at the investigation stage to enable the truth or falsity of the allegation to be established by the Police²⁵. The summary of all we have here is that the defence of alibi is one which must be disclosed timeously. Not only will the defendant disclose same timeously, he must also give sufficient particularity to enable the prosecution discharge the onus rebutting the defence placed on them. It is therefore an essential ingredient on the part of the defendant to raise his defence of alibi at the earliest possible opportunity and at the same

¹⁸ Op cit

¹⁹ (2015) LPELR-24397(SC)

1.1.1.1.1 ²⁰ (2013) LPELR-21955(CA)

²¹ *Mustapha v. State* [2008] WRN (Vol . 2) 76 at 80, Pp. 93; lines 10 - 35 (CA)

²² [2013] LPELR-22601(CA)

²³ *Ikemson v. State* [1989] 3 NWLR (Pt.110) 455

²⁴ *Adedeji v. State* [1971] ALL NLR 75 AT 79.

²⁵ *Adio v. State* [1986] 3 NWLR (Pt 31) at 714

time to give sufficient particularity to enable the Police carry out sufficient investigation with a view to establishing or rebutting that which he had claimed.

4. How then is the defendant expected to raise this defence?

In *Bozin v State*²⁶, the Supreme Court per Karibi Whyte JSC asserted that ‘it is also well settled that the accused raises the defence of alibi, by the introduction of evidence leading to that conclusion. Once an 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. It is conceded that the prosecution does not have to investigate any offence however improbable. But where the story of the accused, if believed, is capable of providing a defence, there is in my opinion a duty to investigate such story. The failure of the prosecution to investigate the story tantamounts to an admission’.

The above assertion shows that the defendant has no duty to state that he is raising a defence of alibi. He just has to introduce evidence that leads to the fact that he was elsewhere at the time the offence was committed. Again such story is one which is capable of being believed. The existence of these requisites propels the prosecution to investigate and come up with a report either to rebut or establish the defence of alibi. Thus it has long been settled that the best time to raise the said defence is at the earliest opportunity, preferably, when the Police is still investigating the allegation against the defendant. The rationale for this strict prescription is that it is at that stage that the prosecution would have the amplitude of time and opportunity to investigate it and either endorse it or debunk it²⁷ The question one ought to ask at this time is whether the need for the defence of alibi justifies the violation of the Constitutional right of silence on the part of the suspect. It is pertinent to assert that Section 35(2) of the Constitution of Nigeria provides that, ‘any person arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice’²⁸ There are two realities to this provision. In the first instance, this right of silent though entrenched in the Constitution is non-existent. The security agents will not even listen to your plea of silence. Indeed to keep silence in any police formation in Nigeria is to invite unbearable torture and incarceration. Secondly, how will a purely innocent person keep silence in the face of obvious persecution as against prosecution? These two realities bring us to the fact that theoretically the provision exists and the next question then is if it exists, is the Defence of Alibi a violation of this right? Of course, a simple answer to this is that this Defence of Alibi does not violate this right to silence. The reason is because the suspect has a window of opportunity to consult with any person of his choice. It suffices to say that once any form of consultation is carried out then the requirement of the Constitution has been met. At this point, one wonders on who the *onus probandi* lies in a defence of alibi? In criminal trials in Nigeria, the onus of proof lies on the Prosecution and that proof must be beyond reasonable doubt. What then does this proof beyond reasonable doubt entail? In *Miller v Minister of Pensions*²⁹, Denning J said that, ‘Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible but not in the least probable’ the case is proved beyond reasonable doubt but nothing short of that will suffice’³⁰ Thus the Prosecution is expected to prove the guilt of the accused person beyond reasonable doubt. On the other hand, a defence

²⁶ [1985] 2 NWLR (Pt.8)465 See *Adedeji v. The State* [1971] 1 All NLR.75

²⁷ *Asuquo v State* (2014) LPELR-23490(CA)

²⁸ Cap C23 LFN 2004

²⁹ 1947 2 All ER 372

³⁰ See also *Bakare v State* [1987] 1 NWLR (Pt 52) at 579, *Ogidi v State* [2003] 9 NWLR (Pt 824) at 1

of alibi turns the tide against the claimant. This is because it is the responsibility of the claimant to initiate the defence and furnish adequate particularity to enable the prosecution rebut the claim or otherwise. Thus in a claim for alibi, the Prosecution still has to prove beyond reasonable doubt that the defence did not avail the claimant. This the prosecution can do through the following mechanisms viz investigation of the alibi, identification of the alibi claimant, check for contradictions in the prosecution's case, consistency in the testimony of the witnesses and then the ingredients of the offence.³¹ It is essential that the prosecution must investigate the alibi claim. Failure to do so may jeopardize the case of the Prosecution.

5. Successful Plea of Alibi

It is to be noted that where the defence of alibi is successfully pleaded, the liability of the defendant may be relieved. In *Agu v State*³², Rhodes Vivour JSC stated that 'a plea of alibi, if found to be true is a complete defence which absolves the accused person of the charge' In *Otumbere v State*,³³ the Court of Appeal Per Eko JCA had this to say "A successful plea of the defence of alibi is a good defence that completely exonerates the accused as it establishes his innocence. The essence of the defence is that at the material time the accused, incapable of omnipresence as a human being, was at a location other than the scene of crime or *locus criminis*, and that the prosecution is proceeding against a wrong person. The defence, if successfully pleaded and sustained, renders the prosecution's case incredible, as it casts serious doubt on the integrity of the prosecution's case. In other words, in that case; there has been no proof of the guilt of the accused beyond reasonable doubt. It has the same effect on the prosecution's case as it does when the prosecution's case is riddled with material contradictions. It is therefore right to conclude that a successful plea of alibi certainly implies that the defendant was never at the scene of crime and if he was never at the scene of crime then likely he is not the perpetrator of the act. Of course this conclusion will be valid where subsection (d) of Section 7 of the Criminal Code is not applicable. In a right tone, the defence of alibi succeeds where the defendant was absent at the scene of crime and the offence for which he was charged was one that requires his physical presence at the scene of crime.

6. Conclusion

This discourse has shown us that alibi is a defence in criminal trials in Nigeria. It has further shown us that it is a defence which assumes that the defendant is not at the scene of crime whereas the charge against him is one which requires his physical presence at the scene of crime. The defence further creates the certainty that it is one which shall be raised timeously that is at the earliest probable opportunity. This is to afford the prosecution the opportunity to debunk the alibi defence. It also has the requirements that the prosecution must investigate the alibi once raised. Failure by the prosecution to investigate same may turn out to be a safe haven for the defendant. It is relevant to state that no matter how stupid the alibi defence may look, the Court is bound to look at it and the prosecutor duty bound to investigate same. Alibi is a defence that must be raised at the earliest opportunity by the suspect, investigated thoroughly by the prosecution and analyzed appropriately by the Court. Where the suspect fails to raise at the earliest opportunity, such a defence may not fly. Where it is not investigated, it may succeed and where the Court fails to analyze same, it may form a ground of appeal that may set aside the decision of such court.

³¹ Anyogu op cit

³² (2017) LPELR- 41664 (SC)

³³ (2013) LPELR-22875(CA)