DEFENCE OF *ALIBI* UNDER THE NIGERIAN CRIMINAL JURISPRUDENCE: A REVIEW OF THE DUTY OF INVESTIGATING POLICE OFFICER*

Abstract

The target of criminal justice administration is to pin a crime to an exact culprit and mete out deserving punishment. The principle of audi alterem partem however requires that no person should be condemned unheard. Criminal trials in 55ivilized jurisprudence therefore require that the defendant be afforded adequate time and facility to defence himself. An accused takes leverage of a number of defences to this effect; including the defence of alibi. Alibi *is a defence based on the fact that the defendant was somewhere else and could not have practically committed the alleged crime. When alibi is raised timeously, it places heavy obligations on the police to investigate same. In Nigeria, there has been instances where Investigating Police Officers did not bother to investigate alibi or investigated same shabbily thereby causing untoward hardship to victims of crimes. In this paper therefore we adopted doctrinal research methodology to explore the law, the defence and investigation of alibi with a view to exposing the innate peculiarities and quandaries of this defence under the Nigerian law.*

Key Words: Law, Defence, *Alibi*, Investigation, Criminal Law, Jurisprudence, Nigeria.

1. Introduction

Criminal justice is an integral part of any legal system. Law, by its nature is instrument of social control which swivels on the socio-cultural milieu of a given society.[1] As an instrument of social engineering therefore, law forms the fulcrum on which social interactions and civilisation progressively leverage. A well functioning judiciary is a fundamental ingredient of any civilised society[2] as the judiciary constitutes the sole adjudicator over the political, social and economic issues arising from the day to day activities in any given nation. The Nigerian criminal justice system derives its legal basis from the constitution, especially the provisions dealing with the powers of the court,[3] fundamental human rights,[4] and various other criminal laws in force at federal or state levels.[5]

Criminal justice traverses various stages from reasonable suspicion of commission of crime by a police officer, arrest, interrogation and investigation, filling of criminal charges, arraignment, trial, conviction, sentencing, imprisonment, serving of the imprisonment term and subsequent release.[6] Apposite to criminal justice administration are criminal legislations which define duties with their corresponding rights as well as relationships within all the components of a society. Section 36[7] provides for fair hearing generally during criminal trials.[8] Section 36 (5) of the Nigerian Constitution 1999 (as amended) is to the effect that any person charged with criminal offence shall be presumed innocent until proven

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[1] T Osasona, 'Time to Reform Nigeria's Criminal Justice System' *Journal of Law & Criminal Justice* Vol. 3 No. 2 (2015)

[2] N Tobi "Delay in the Administration of Justice" in C Nweze*: Essays in Honour of Honourable Justice Eugene Ubaezona* (1997) p. 21.

[3] The Constitution of the Federal Republic of Nigeria, SS. 6, 230 – 296.

[4] That is chapter IV (SS. 33 - 46) of the CFRN 1999 as amended.

[5] Nigeria is a federalism comprising of the federal and states government. Laws operating in states may be different from that operating at the federal level, S. 4 (1), (2) and (6), (7). See however S. 4 (5). Although the Administration of Criminal Justice Act 2015 has been enacted at the federal level, most states safe Lagos state are still far behind in the laws regulating criminal justice administration in Nigeria.

[6] B Ayorinde.

[7] The Constitution of the Federal Republic of Nigeria 1999 (as amended).

[8] Particularly S. 36 (1) and (4).

guilty. Section 36(6) (c) and (d) require that such an accused be given adequate time and facilities to prepare for his defence and defend himself in person or by legal practitioners of his own choice. Defending oneself entails putting before the police or courts any or combination of available defences recognised under the law with their establishing facts and circumstances. It also entails raising facts or propositions that negate the particulars of suspicion or charges so as to be let free by the police or discharged and acquitted by the court.

William Blackstone in 1769 affirmed that 'the law holds that it is better that ten guilty persons escape, than that one innocent suffer (innocent person be convicted).'[9] This doctrine dated back to Roman law. The target of criminal law is to regulate proscribed conducts for peace, orderliness and progressive development of any given society. In its enforcement by the state or state agencies, culprits of crimes may not be properly identified thereby leading to arrest of inapposite person. Similarly, a criminal may be playing smart and therefore try to avoid criminal responsibilities. In a bid to actualise his illicit desires, he may scheme in some defences intended to exculpate him of his criminal liabilities including the defence that he was elsewhere when the crime was committed.[10]

Criminal law requires that for there to be a crime, the act amounting to crime (the *actus reus*) concurs with guilty mind, that is, the intention to commit the said crime (the *mens rea*).[11] This again, emphasises that only the man whose guilty mind propelled the action amounting to crime and no one else, should be isolated and sanctioned for the crime. A criminal therefore has to be properly identified to ensure that the criminal himself is adequately paid in his own coins. The defence of *alibi* therefore means that the person charged with crime is not even in the place of the crime at the time of the crime.[12] In essence, he was somewhere else and could not possibly have committed the said crime. This means that the identity of the person is in issue in relation to the place and time of the crime versus the place and time occupied by the body of the accused at the time of the crime. The import of the foregoing therefore is that wrong person must have been arrested and charged. The Nigerian criminal justice administration is highly rooted in the common law adversarial system of justice administration.[13] As such, the onus of identifying, isolating and bringing criminals to justice lies on the police and other agencies of crime investigation. The determination of the guilt or otherwise of the accused however lies within the ambit of the court's duties.

Alibi as a defence must be raised at the earliest opportunity for it to avail the accused.[14] That is, at the point of interrogation by the police. Some problems have however trailed the defence of *alibi*, making same to fail the defendant even where the defendant has a good cause and does not plead *alibi malafide*. For one, the police may be overzealous to pin the alleged crime to the suspect for sundry reasons ranging from hatred, personal misunderstanding, bribery and corruption or mere zeal to get applauded for doing a good job. Secondly, there is high level of illiteracy in Nigeria such that majority of citizens quizzed by the police narrate their stories in local dialects. Most times, the police, who may not be well versed in the local dialects, record the accused's statement in English language. Even where the Investigating Police Officer understands the dialects, there is usually the baffle strife of recording the statements in English language since most police officers do not usually possess a good command of the English language, most of them being employed with Senior School Level Certificates. Similarly, intimidation and torture has become ready tools for interrogation by the Nigerian police. This, most times, creates

[9]Vidar Halvorsen, 'Criminal Justice Ethics' Vol. 23 Iss.2 (2004), 3-13. Benjamin Franklin (1706–90) was attributed with similar saying "[T]hat it is better 100 guilty Persons should escape than that one innocent Person should suffer" See Benjamin Franklin, "Letter to Benjamin Vaughan, March 14, 1785" in Albert H. Smyth, (ed.), *The Writings of Benjamin Franklin,* Vol. 9 (1906), 293

[10]YDU Hambali, 118 - 119

[11] CO Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria* (Ibadan: Spectrum Books Ltd, 2003), 45 -53.

[12] Y DU Hambali, *Practice and Procedure of Criminal Litigations in Nigeria* (Lagos: Feat Print & Publish Ltd, 2012), 118.

[13] AO Sanni, (ed), *Introduction to Nigerian Legal Method* (2nd edn, Ile-Ife: OAU Press, 2012), 139-145.

[14] YDU Hambali, no. 11, 118

problem for the accused, who may have raised the defence of *alibi* during interrogation but was muzzled whimsically or inadvertently by the Investigating Police Officer.

Finally, unlike most other defences which are defined in positive law with the nitty-gritty of the procedure necessary to get advantages of them, *alibi* as a defence is not contained in any positive law rather has remained nourished under case law. Judicial precedent may be waned by lack of independence and overbearing executive influence on the judiciary. The implication of the foregoing is that the defence of *alibi* may one day be messed up by an overzealous judicial officer seeking to satisfy the political or personal aggrandizement of his pay master. It is against this backdrop that this paper seeks to appraise the defence of *alibi* under the Nigerian criminal justice system especially given that this defence, though, recognised by the courts has not received the attention of the positive law over the years.

2. Literature Review

2.1 Conceptual Framework

2.1.1 Crime

A comprehensive, universal and satisfactory conceptualisation of 'crime' is thorny especially given the dearth of consensus among scholars. For instance, scholars and draftsmen use the word crime and offence interchangeably.[15] In general usage, offence is conceived in terms of wrong whether moral, religious, social or legal; prohibited by individual, group or community and which may attract disapproval in any form. A crime is a wrong prohibited by an organised society or state for which there exists a legal instrument duly enacted by the state containing punishment for breach.[16] It is common to identify a crime as activities that involve breaking the law, an illegal act or activity that can be punished by law.[17] It is a social harm that 'the law renders punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding.'[18] As a concept however, 'Crime' may be seen as an act or omission centering on the breach of duty recognised or created by the law of a particular society. Since legal norms are obligatory in nature, it follows that a sanction is a *sine-qua-non* to the enforcement of criminal laws in the public interest.[19] Howbeit defined, the fact remains that a crime is an act or omission proscribed by the state and to which punishment attaches for its breach.

Under the Nigerian legal system, the two principal operational codes[20] used in criminal proceedings made references to the word 'offence' instead of crime. They however, had no problem with the use of the word 'criminal.' Section 2 of the Criminal Code defines offence as 'an act or omission which renders the person doing the act or making the omission liable to punishment under this code or under any Act or law…' Also Section 3 (1) of the Penal Code defines an offence as 'every act or omission contrary to the provisions thereof which he shall be guilty within northern Nigeria.' By virtue of Section 24 of the Criminal Code, an offence is a willed Act. According to Okonkwo, an offence is an act or omission which is rendered punishable by some legislative enactment.[21] It is also an act or omission done or omitted to be done in a particular state of mind.[22] In totality, a crime is a wrong done by one member of the state/society against another which is punishable under the criminal law of the country. It can as well be defined as those breaches of the law resulting in special accusatorial procedure controlled by the state and renders the offender upon conviction liable to sanction. A crime is proscribed by the state

[15] This is typical of the Criminal Code Act Cap C 38 and the Penal Code Act Cap P 3 LFN 2010 respectively.
[16] That is to say, while all crimes constitute offences, not all offences are crimes.
[17] Oxford Advanced Learner's Dictionary 6th Edn p. 276,
[18] BA Garner, (ed.) *Black's Law Dictionary*, 9th Edn (St. Paul MN: Thompson Reuters, 2009) p. 427,
[19] EO Fakayode, "The Concept of Crime" in E. O. Fakayode (ed.) The *Criminal Code Companion* (Ethiope Pub Co., 1977) p. 12,
[20] The Criminal Code Act Cap C 38 and the Penal Code Act Cap P 3 LFN 2010.
[21] CO Okonkwo, Okonkwo and Naish: *Criminal Law in Nigeria* (Lagos; Spectrum Book Ltd, 2012) p. 43.
[22] Ibid.

via laws which clearly define such offences and prescribe punishment thereof. The state enforces criminal laws through instrumentality of the law enforcement agents.[23]

To qualify as crime, most legal systems recognise that the elements of action/act (the *actus reus*) and intention (the *mens rea*) must correspond in some cases only. The cases which require both action and intention to match represent the traditional notion of constituent elements of a crime. In this regard, Okonkwo wrote:

> But if the definition of any particular offence is examined carefully, it will be seen that it nearly always consists of two sorts of elements - physical and mental… For example, in the offence in section 394 of the Criminal Code, the physical element is the killing of an animal capable of being stolen; the mental element is the intent to steal the skin or carcass. In English law, the two terms which stand for the physical and mental elements of an offence are, respectively *actus reus* (latin for "guilty act") and *mens rea* ("guilty mind").[24]

Furthermore, there are cases or instances where the mental element - *mens rea* is not required such as in strict liability or absolute liability offences/crimes. These crimes represents such offences in which the mental element or *mens rea* is immaterial, examples of these offences includes possession of hard drugs such as cocaine; over speeding which results to the death of another; and offences of negligent act, etc. For the purpose of punishment, crimes are classified into felonies, misdemeanors and simple offences.[25] On the other hand, for the purpose of trial, we have indictable and summary offences under the Criminal Code Act. A felony is an offence which is declared by law to be a felony or is punishable, without proof of previous conviction, with imprisonment for three years or more. A misdemeanour is any offence which is declared by law to be a misdemeanor, or is punishable by imprisonment for not less than six months, but less than three years. All other offences other than felonies and misdemeanours are simple offences. According to section 2 of the Criminal Procedure Act the term "indictable offences" means any offence, which on conviction, may be punished by a term of imprisonment exceeding two years, or which on conviction may be punished by imposition of a fine exceeding two hundred pounds or which is not declared by be written law creating the offence to be punishable on summary conviction. A summary conviction offence means any offence punishable by a magistrate's court on summary conviction and includes any matter in respect of which magistrate's can make an order in the exercise of its summary jurisdiction. "Summary trial" means any trial by a magistrate and a trial by a Judge in which the accused has not been committed for trial after a preliminary inquiry.[26]

The Nigerian legal system requires that for an act or omission to qualify as a crime it must be contained in a written law and must have a punishment stated for it. This is the purport of Section 36 (12) of the Constitution of Federal Republic of Nigeria 1999[27] to the effect that '… a person cannot be convicted of a criminal offence unless that offence is defined and a penalty therefore is prescribed in written law…' This means that acts and omissions which under the unwritten customary laws and p rior to this enactment/amendment were or amounted to criminal acts can no longer be regarded as such as far as the Nigerian legal system is concerned.[28] It also means that for any statutory prohibited act or omission there must always be a prescribed punishment for its commission and where this is not done such violation falls short of a crime as it concerns the legal system in Nigeria.[29]

[23] That is, the Police.
[24] CO Okonkwo, no.13.
[25] Criminal Code Act, Section 2.
[26] Criminal Procedure Act, 2004; Section 2 (1)
[27] As amended 2011
[28] *Aoko v. Fagbemi* (1961)1 All NLR 400; B. Osamor, *Fundamentals of Criminal Procedure Law in Nigeria* (Ojodu: De-Sage Nigeria Ltd,
2004) pp. 258 – 259.
[29] *Aoko v. Fagbemi*, supra.

Conclusively, crime as a social issue has been in the air and has occupied the minds of thinkers for centuries. The trend has always been to discuss what constitutes crime procedurally and not its substance. Brett[30] has offered that the reverse should be the case and it is in this light that Okonkwo opined:

> The real difficulty about trying to discover some substantive, as opposed to procedural, hallmark of crime, is that the criminal law is so variable in content a variability due to the fact that any human conduct, however noble or outrageous, can be categorised as criminal simply by being forbidden on pain of punishment by the legislative power in any particular community.[31]

According to Black's Dictionary, an accused is therefore a person who has been blamed for wrongdoing especially a person who has been arrested and brought before a magistrate or who has been formally charged with a crime (as by indictment or information), or person whom legal proceeding have been initiated against.[32]

2.1.2 Justice

The concept 'justice' has posed a lot of difficulty for scholars to define. Justice, however, has generally being conceived in terms of legal equality of human beings. Justice is an outward manifestation of equality of all citizens before the law and in social and distributive justice.[33] Aristotle in attempt to define justice, stated: 'unjust means both unlawful and unfair; therefore 'just' means lawful and fair (equitable).'[34] Nnabue however noted that:

> Justice like law derives from the pre Socratic Greek cosmology and its picture of a morally ordered universe in which everything has its assigned place or natural role. Hence, justice is considered as consisting of everything staying in that assigned place and not usurping the place of another. Developing this concept Plato sees social justice as existing when every person performs the function for which he or she is best fitted by nature and does not infringe upon the natural role of another…[35]

The word 'justice' according to *Rawls*[36] **"**is the first virtue of social institution as truth is of thought" He noted that in … justice as fairness, the original position of equality corresponds to the state of nature, the traditional theory, social contract" to understand how the criminal Justice System works, it is necessary to grasp the working relationships of all its agencies: the use, functions and decision making process of the police: the structures of the court system and judges reach decisions, and the intricacies of penal institutions.

Two principles of Justice were accordingly expounded by Rawls: "first, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second, social and economic inequalities are to arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all…"[37] Criminal justice agencies are the main actors in the fight against crime and apprehending people who violate the criminal law. The courts decide the guilt or innocence, and sentence those who are convicted or those who plead guilty; and the prisons or correctional institutions carry out the sentence of the court and rehabilitate criminals. Justice has also been conceived in terms of fairness, reasonableness, impartiality, correctness, purity and righteousness.

[30] CO Okonkwo no.13 p. 21
[31] Ibid.
[32] BA Garner, no. 20, p.25
[33] F Adaramola, *Jurisprudence, 4th edn* (Durban: LexisNexis Butterworth's, 2008) p. 197.
[34] RWM, Dias, Jurisprudence, 5th edn (London: Butterworth's & Co (Publishers) Ltd, 2009) p. 66.
[35] USF Nnabue, *Law and Legal Process,* Revd. edn (Owerri: Global Press Ltd, 2004) p. 27.
[36] J Rawls, *A Theory of Justice* (Cambridge: Cambridge University Press, 1971) p. 211.
[37] J Rawls, no. 18, p. 213

2.1.3 Criminal Justice Administration

Criminal Justice Administration may be defined in terms of a system or as a process. As a system, it is concerned with the method, the process and the institutions for dealing with crimes and criminals in any given society. It is made of three sub-system or components: the police, the court and corrections responsible for law enforcement. Iwaremua-Jaja[38] defined the criminal justice system as a process whereby the different components co-ordinate their independent functions by processing the criminal/suspect from one stage to the other. Criminal justice process basically involves arrest, booking, trial and confinement. Once a crime is reported to the police, an investigation begins; witnesses are interviewed or interrogated, sufficient information obtained leads to the arrest of a suspect who may be detained or placed in police custody, or even be released on bail, where there seems to be no threat. Police discretion could be exercised at this stage, either to charge or discharge the suspect. Criminal justice can be defined either as a legal process or as an academic discipline. As a legal process, it involves the procedure of processing the person accused of committing crime from arrest to the final disposal of the case. According to Clare and Kramer:[39]

It is possible to view criminal justice as a consequence of decision making stages. Through this system offender are either passed on to next stage or diverted out of this system. This diversion may be due to any number of reasons such as lack of evidence or a desire to reduce the load on the system. Each subsequent stage of the process is dependent upon the previous stage for its elements; it is the dependence that exemplifies the "system" nature of criminal justice. As an academic discipline, criminal justice studies provide a thorough understanding of the criminal justice system in relation to the society.

2.1.4 Imperative of Identity of the Criminal in Jurisprudence

Sometimes, police are greatly assisted by the identification of the suspect of crime either by the victim of such crime or by the eye witness to the commission of the crime. In circumstances such as this, the police do not have to go on a wide voyage to know the perpetrator of the crime complained of or that is being investigated. Evidence identification of an accused person is admissible at his trial as evidence relevant to the fact in issue, that is, whether the person arraigned is the true perpetrator of the crime charged. In *Archibong v. State;*[40] the Supreme Court defined identification as:

> a whole series of facts and circumstances for which a witness or witnesses associate an accused person with the commission of the offences charged. It may consist of or include evidence in the form of finger prints, handwriting, voice, identification parade, photographs identity or the recollection of the feature of the culprit by a witness who saw him in the act of commission of a crime or a combination of two or more of these.

Also in the same case, Ogbuagu JSC added quickly that it is also settled that there may be sufficient identification of a person by his voice.[41] Hence, identification can take several forms including dock identification, spontaneous identification, identification parade, visual identification by means of photographs, voice identification, finger print identification, etc.

2.1.5 *Alibi*

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'[42] The Black's Law Dictionary defined alibi as 'a defence based on the physical

[38] Iwaremua-Jaja, Defining Criminal Justice Administration (2003) cited in A. M. Adebayo, Administration *of Criminal Justice System in Nigeria* (Lagos: Princeton Publishing Company, 2012) p.136

[39] PK. Clare and JH Kramer, *Introduction to American Correction* (Boston: Holbrook Press, 1976) p. 47

[40] (2006) 4 NWLR (Pt. 100) 349

[41] *Ndidi v State* (2007) 13 NWLR (Pt.1052) 633

[42] ZC Anyogu, Evidential Perspectives on the Defence of Alibi in Nigeria, (Enugu, Okechukwu Publishers, 2006), 1 citing J. B. Saunders,

impossibility of a defendant's guilt by placing the defendant in a location other than the scene of crime at the relevant time'.[43] 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'[44] According to the Supreme Court in *Eke v State*[45] 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*,[46] 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*,[47] 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*[48] 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'.

From the totality of these definitions, one thing is certain, that is, the defendant who pleads *alibi* has actually stated that he was never at the scene of crime for which he is charged or prosecuted. Indeed, in the case of *Alani v State*,[49] Ubaezuonu JCA took a more etymological voyage in attaching a meaning to the word *alibi*. His Lordship stated that 'the word *alibi* is of Latin derivative 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 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 it is pertinent to pry into the potency of this defence to exculpate the accused person, once raised. Is it still possible for a defendant not to be at the scene of crime and yet be guilty of the said crime? This is one of the dilemmas of the defence of *alibi*.

2.2 Theoretical Framework

2.2.1 Punishment in Criminal Jurisprudence

Punishment, according to the dictionary, involves the infliction of pain or forfeiture; it is the infliction of a penalty, chastisement or castigation by the judicial arm of the State. But if the sole purpose of punishment is to cause physical pain to the wrong-doer, it serves little purpose. However, if punishment is such as makes the offender realize the gravity of the offence committed by him, and to repent and atone for it (thus neutralizing the effect of his wrongful act), it may be said to have achieved its desired effect. A person is said to be "punished" when some pain or detriment is inflicted on him. This may range from the death penalty to a token fine. Thus, punishment involves the infliction of pain or forfeiture; it is a judicial visitation with a penalty, chastisement or castigation. In this book entitled "Criminal Behaviour", Walter Reckless[50] describes punishment as "the redress that the commonwealth

Words and Phrases Legally Defined (2nd edn), Butterworths, 1969) and the dictum of Montague J. A in R v. Foll (1957) 21 WWR 481 @ 491.

[43] BA Garner (Ed), Black's Law Dictionary, (8th Ed) (Minnesota, Thompson West Publishers 2004), 79.

[44] E Jowitt, Dictionary of English Law Vol 1 (London, Sweet and Maxwell 1959),156.

[45](2011) LPELR-1133 (SC)

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

[47] (2016) LPELR-40046 (SC)

[48][1988] 1 NWLR (Pt.70) 274

[49] [1993] 7 NWLR (Pt 303) 112 at 124

[50] WC Reckless, *Criminal Behaviour* (New York: McGraw-Hill, 1940) cited in Priya Sepaha, "Theories of Punishment" *soOLEGAL*

takes against an offending member." In the words of Westermarck, punishment is "Such suffering as is inflicted upon the offender in a definite way by, or in the name of the society of which he is permanent or temporary member."[51]

The philosophy of criminal justice is deterrent, preventive, reformative, retributive and compensatory in nature. Theories of punishment effectively hinge on this philosophy and seriatim, we shall explore them in this work:

a. Deterrent Theory of Punishment

Punishment is primarily deterrent when its object is to show the futility of crime, and thereby teach a lesson to others. Deterrence acts on the motives of the offenders, whether actual or potential. Offences are committed, in most cases, as a result of a conflict between the so-called interests of the wrong-doer and those of society at large. The object of punishment, according to this theory, is to show that, in the final analysis, crime is never profitable to the offender, and as Locke observed, to make crime "an ill-bargain to the offender." By making it an ill-bargain to the offender, the world at large would learn that crime is a costly way of achieving an end. The idea behind deterrent punishment is that of preventing crime, by the infliction of an exemplary sentence on the offender. By this, the State seeks to create fear in its members, and thus deter them from committing crime through fear psychology. The rigour of penal discipline is made a terror and a warning to the offender and others.

According to the exponents of this theory, punishment is meant to prevent the person concerned and other persons from committing, similar offences. The advocates for the retention of capital punishment rely on this theory in support of their contention. They argue that capital punishment, by its very nature, cannot have either a reformative value or be a retributive necessity. Its only value, if at all, is by way of deterrence. However, the theory of deterrent punishment fails to achieve its goal. A hardened criminal becomes accustomed to the severity of the punishment, and deterrence does not always prevent him from committing a crime. On the other hand, it also fails to affect an ordinary criminal, as very often, a crime is committed in a moment of excitement. If the crime is pre-mediated, the offender commits the crime, knowing full well, the consequences arising from his act and performs the act because he cannot help but do it. In the Indian case of *Phul Singh v. State of Haryana*[52], a young philanderer aged 22, overpowered by excess sex stress, raped a twenty-four year old girl next door in broad day-light. The Sessions Court convicted him to four years' rigorous imprisonment, and the High Court confirmed the sentence on appeal. When the matter was further appealed to the Supreme Court, the sentence was reduced to two years' rigorous imprisonment, as the accused was not a habitual offender, and had no vicious antecedents. The Supreme Court observed: 'The incriminating company of lifers and others for long may be counter-productive, and in this perspective, we blend deterrence with correction, and reduce the sentence to rigorous imprisonment for two years.'

b. Preventive Theory of Punishment

If the deterrent theory tries to put an end to the crime by causing fear of the punishment in the mind of the possible crime-doer, the preventive theory aims at preventing crime by disabling the criminal, for example, by inflicting the death penalty on the criminal, or by confining him in prison, or by suspending his driving license, as the case may be. Thus, the extreme penalty, the death sentence, ensures that, once and for all, the offender will be prevented from repeating the heinous act. In the past, maiming was considered an effective method of preventing the wrong-doer from committing the same crime in the future, by dismembering the offending part of the body. Thus, a thief's hand would be cut off, or a sexual organ cut off.

In the ultimate analysis, the preventive mode of punishment works in three ways, viza)

i. by inspiring all prospective wrong-doers with the fear of punishment;
ii. by disabling the wrong-doer from immediately committing any crime; and

available at: https://www.soolegal.com/roar/theories-of-punishment; last accessed on 4th April, 2019.

[51] Ibid.

[52] (1980) Cri. L. J. 8

iii. by transforming the offender, by a process of reformation and re-education, so that he would not commit crime again.

In this connection, the following extract from Rule 58 of the International Standard Minimum Rules is illuminative:

> The purpose and justification of a sentence of imprisonment or a similar measure derivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society, the offender is not only willing, but also able, to lead a law –abiding and self-supporting life."

An important difference between the deterrent and the preventive theories of punishment deserves to be carefully noted. The deterrent theory aims at giving a warning to society at large that crime does not pay, whereas the preventive theory aims at disabling the criminal from doing further harm.
As mentioned above, the purpose of the deterrent theory is to set a lesson unto others and show that crime does not pay. This theory of punishment seeks to show to the offender, and the rest of the world, that ultimately punishment will be inflicted on the criminal, and therefore, crimes are to be shunned. But under the preventive theory of punishment, the main object of the punishment is to disable the wrong-doer himself from repeating the crime. This theory does not act so much on the motive of the wrong-doer, but it disables his physical power to commit the offence.

c. Reformative Theory of Punishment

According to the reformative theory, a crime is committed as a result of the conflict between the character and the motive of the criminal. One may commit a crime either because the temptation of the motive is stronger or because the restraint imposed by character is weaker. The deterrent theory, by showing that crime never pays, seeks to act on the motive of the person, while the reformative theory aims at strengthening the character of the main, so that he may not become an easy victim to his own temptation. This theory would consider punishment to be curative or to perform the function of a medicine. According to this theory, crime is like a disease and "you cannot cure by killing".

The exponents of the reformative theory believe that a wrong-doers stay in prison should serve to re-educate him and to re-shape his personality in a new mould. They believe that though punishment may be severe, it should never be degrading. To the followers of this theory, execution, solitary confinement and maiming are relics of the past and enemies of reformation. Thus, the ultimate aim of the reformists is to try to bring about a change in the personality and character of the offender, so as to make him a useful member of society.

The reformists argue that if criminals are to be sent to prison in order to be transformed into law-abiding citizens, prisons must be turned into comfortable, dwelling houses. This argument is, however, limited in its application, and it must be remembered that in a country like India, where millions live below the poverty line, it may even act as an encouragement to the commission of crimes. Lamenting on the conditions prevailing in jails in India, Justice Krishna lyer opens his judgment in *Rakesh Kaushik v. Superintendent, Central Jail,*[53] with the following poignant question: "Is a prison term in Tihar Jail a post-graduate course in crime?"

In *Sunil Batra (II) v. Delhi Administration,*[54] the Supreme Court regarded a simple letter from a co-prisoner as sufficient to invoke proceedings by way of habeas corpus. The judgment deals at length with the shocking conditions prevailing in Indian prisons and suggests a series of prison reforms. Lamenting on the atrocities prevailing in Delhi's Tihar Jail, Justice Krishna lyer, in the course of his learned judgment, observes a follows.

[53] (1980) Supp. S.C.C. 183
[54] (1980) 3 S.C.C. 488

> The rule of law meets with its Waterloo when the State's minions become law-breakers, and so the Court as a sentinel of justice and the voice of the Constitution, runs down the violators with its writ, and serves compliance with human rights even behind iron bars and by prison wardens.

True, it is that the reformative element had long been neglected in the past. However, the present tendency to lay heavy stress on this aspect seems to be only a reaction against the older tendency to neglect it altogether, and has therefore, the danger of leaning to the other extreme. Whereas reformation is an important element of punishment, it cannot be made, the sole end in itself. It must not be overlooked, but at the same time, it must not be allowed to assume undue importance. In the case of young offenders and first offenders, the chances of long-lasting reformation are greater than in the case of habitual offenders. Again, some crimes, such as sexual offences, are more amenable to reformative treatment than others. Further, reformative treatment is more likely to succeed in educated and orderly societies than in turbulent or under-developed communities.

Though the deterrent and the reformative theories coincide to some extent, there is also some element of conflict between the two. The deterrent theory would impose the punishment of imprisonment, fine, or even whipping and death-penalty, but according to the formative theory, all modes of punishment other than imprisonment are barbaric. Imprisonment and probation are the only instruments available for the purpose of a purely reformative system.

The next question to be answered, in view of this conflict between the deterrent and reformative theories of punishment, is whether it is possible to have a penal system having the reformative element as the sole standard of punishment. Salmond, in his treatise on Jurisprudence, points out that there are in the world, men who are incurably bad. With them, crime is not so much of a bad habit as an ineradicable instinct. The reformative theory might be quite helpless in the case of such persons. Therefore, according to him, the perfect system of criminal justice is based neither the reformative, nor the deterrent principle exclusively, but is the result of a compromise between them. In this compromise, it is the deterrent principle which wields the predominant influence.[55]

Salmond further adds that the present-day acceptance of the reformative theory is, in a large measure, a reaction to the conservative approach to the question of punishment. The extreme inclination towards the reformative theory may be as dangerous as the complete acceptance of the old code of punishment. It is true that in the olden days, too much attention was paid to the crime, and very little to the criminal. It is also true that criminals are not generally ordinary human beings. They are often mentally diseased abnormal human beings; but, if all murderers are considered as innocent and given a lenient treatment, is it not possible that even ordinary sane people might be tempted to commit that crime, in view of the lenient attitude of law towards crime? Thus, in course of time, this theory would crumble down. The theory may be effective in the case of very young and the completely insane offenders, but in other cases, some deterrent element in the punishment must be present.[56]

3. Defence and Investigation of *Alibi*

3.1 Nature of *Alibi*

We have noted earlier in this work that in the process of a custodial interrogation, an accused person may deny his presence at the scene of the crime which is being investigated. He may state in his written statement or orally to the officer interrogating him that he was somewhere other than the scene of the crime at the time the crime was committed. Hence, "*alibi*" has been defined by the Black's Law Dictionary as: "a defence base 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." In *Aliyu v. The State*,[57] it

[55] Priya Sepaha,.
[56] Ibid.
[57] (2007) All FWLR (pt.388)1123 at 1141 paras. D-E (CA), see also the cases of *Adebiyi vs State* (2016) 1-2 S.C (pt iv) 95; *Ayuba v. State* (2021) LPELR-55745(CA)

was held that, "alibi means, when a person charged with an offence says, 'I was not at the scene at the time the alleged offence was committed. I was somewhere else; therefore, I was not the one who committed the offence.'[58] *Alibi* is a Latin word which means nothing other than "elsewhere."[59] Where an accused person claims he was somewhere else and could not have been at the scene of crime and could therefore not have committed the crime with which he is charged and gives particulars of his whereabouts at the material time to the Police at the earliest opportunity, the Police has a duty to investigate that claim no matter how unreasonable or stupid the claim or plea may seem..

3.2 Time to Raise the Defence of *Alibi*

Defence of *alibi* must be raised at the earliest opportunity to enable the prosecution to investigate the truth of the defence. In other words, it must be raised during the police or the relevant agency's pre-trial investigation. This assertion received judicial confirmation in the case of *Egberetamu v. The State,*[60] where per Ogunwumiju, JCA, which held that:

> For the defence to exculpate the accused, it must be raised in accordance with certain rules. For the defence of alibi to be properly raised, it must be raised at the earliest opportunity when an accused person is confronted by the police with the commission of an offence so that the police will be in a position to check the alibi.[61]

In *Kareem v. State*,[62] it was stamped that a defence of *alibi* must be unequivocal and must be raised by an accused at the earliest opportunity during investigation of the allegation against the accused person and not during trial. This will enable the prosecution investigate the truth of the *alibi*. However, failure of a defence of *alibi* does not mean the guilt of the accused. In the present case, the defence of alibi was raised during trial by the appellant. The prosecution whose duty it is to disprove the alibi where properly raised, did not have the time or opportunity to investigate the *alibi* or to adduce evidence in rebuttal of the defence. An accused person must therefore raise his *alibi* at the earliest opportunity, preferably in his extra-judicial statement. He must not be allowed to use *alibi* as trump card to scuttle prosecution. This is to offer the Police an opportunity either to confirm or confute its availability to the accused person. The accused seeking to benefit from such defence of *alibi* must open up and provide substantial details as to particulars. The defence of *alibi* would be unavailing where the accused person raised it during the trial.

The foregoing must not be construed to mean that an accused person cannot raise the defence of *alibi* before the trail court for the first time. Of course, he can, the implication however, is that it may, as a general rule be of little or no assistance to him at that stage. Also, his failure to raise it during investigation to give the police the earliest opportunity of investigating its veracity place the burden on him to now lead convincing evidence to proof of the defence. Since the law is that every defence put up by an accused person at his trail must be considered by the trial court before coming to a conclusion. In the case of *Ibrahim v. The State*,[63] the Supreme Court held that where an accused person raised a defence of his being elsewhere at the time the offence was committed for the first time before a trail judge, he has made an assertion which he must prove his whereabouts that is

a. Where he was at the time of the crime;
b. Who he was with;
c. Who saw him if he was not with anyone in particular;
d. What he was doing at the other place that he was at the time of the crime; and
e. Any other evidence that is likely to give credit to his defence.

[58] *Okosi v. The State* (1989)1 CLRN 29." Per Ariwoola, JCA.
[59] *Alhaji Musa Sani v. The State* (2015) Legalpedia (SC) 51133**.**
[60] *(2014) LPELR-22615(CA)*
[61] *Bashaya v. The State, Afolalu v. The State.*
[62] (2021) 17 NWLR (Pt. 1806) 503
[63] (1991)4 NWLR (pt. 186), 399.

3.3 The Place of Corroboration in the Defence of *Alibi*

Although, defence of *alibi* does not require corroboration, but in a situation where the accused raises the defence for the first time at his trial, the evidential burden of proof placed on him will not be discharged without calling a witness or witnesses, persons he was with at the place other than the scene of the crime for the witnesses to be cross-examined by the prosecution.

In *Ndidi v. The State*,[64] the appellant was tried and convicted of armed robbery. The prosecution gave an eyewitness account through the PW1, who was one of the victims of the armed robbery. PW1 testified that she identified the Appellant at the time of the robbery. The Appellant testified but did not call any other witness. In his testimony, he raised the defence of *alibi* for the first time at the trial court but alleged that he had earlier raised alibi during interrogation but the Police refused to record it. He however signed his statement in the Police. His alibi was that he was ill on that fateful day and had to be at home with his mother. He went to where he was being treated and came back to house at about 7pm. He heard the news of an armed robbery from his sister. The trial court accepted the evidence of PW1, rejected the Appellant's evidence and convicted him. The Court of Appeal dismissed the Appellant's appeal and he further appealed to the Supreme Court. The Supreme Court set aside the conviction and sentence and discharged and acquitted the Appellant on the ground that the evidence of PW1 was not credible. Niki Tobi dissenting however pointed out that though the defence of *alibi* does not need corroboration in law, the Appellant would have been useful to himself by calling in evidence, the person who treated him or at least his mother. Tobi JSC also held that raising the defence of *alibi* for the first time in the trial court offers little or no help to the accused because it may predispose the judge to treat such defence as an afterthought.

1.1 3.4 Defence of Alibi *and Police Duty to Investigate*

When an accused person raises *alibi* early enough during investigation, he must furnish the police with every material facts thereto as to the identity of the place where he was at that material time, the person or persons he was with, or the person or persons who saw him at that time and what he was doing at that material time. When he furnishes the police with all this information, the police has the duty to investigate the veracity or otherwise of the *alibi*. Where an Alibi is properly set before the police during investigation, failure to investigate same by the police is fatal to the case of the prosecution unless a credible eyewitness account is called to discredit or destroy the *alibi*. In *Onyegbu v. State*,[65] the Appellant was charged and convicted for murder by stabbing the deceased severally for refusing to have illicit sexual intercourse with him in the bush. During police interrogation, he raised *Alibi* but could not give details of who saw him or who he was with on that fateful day. The police did not investigate the *alibi*. At trial, the police called the younger son of the deceased who was with her when the incident occurred, who gave an eyewitness account of the incident. The Appellant however reaffirmed his *alibi* and mentioned the place he was on that fateful day. The trial court however convicted him as charged. His appeal to the Court of Appeal was dismissed. The Supreme Court also dismissed his appeal and held as follow:

a. That the defence of alibi ought to be set at the earliest possible time with all the material particulars of where and with whom the accused was at that particular time. This is necessary to avoid detailing police to the worthless exercise of investigating a bottomless defence;
b. That if the Appellant evidence in court had been what he stated in his statement to the police, the failure of the police to investigate and check the credibility of the alibi would have been fatal to the case of the prosecution and the conviction would have been quashed;
c. That it is not always that failure to investigate alibi destroys the prosecution's case. The trial judge has a duty, even in the absence of the investigation, to consider the credibility of evidence adduced by the prosecution via-a-vis the *alibi*.

An alibi must be very detailed on the exact whereabouts of the accused person. He could refer to persons that the Police can contact to show that his alibi is true. The onus is thus on the accused person to rely on evidence to support his alibi, and the standard of proof required to establish an alibi is on balance of

[64] (2007)13 NWLR (pt. 1052), 633
[65] (1995)4 SCNJ 275; Peter v, State (1997)3 SCNJ 48.

probabilities. Once an accused person raises the defence of alibi, it is the duty of the Police to investigate it to see if it is true. There would be no need to investigate an alibi if there is overwhelming evidence against the accused person.[66]

In State v. Ifeanyi[67] however, the Appellant was charged, tried and convicted of murder. He raised alibi during interrogation in the police and gave all material particulars of his whereabouts at the material time, to wit; that he was with his mother and sister; that one cotenant named Iya Ibeji woke him up and asked him to switch off his radio and he gave his clear address to the police. The police searched the Appellant house but got nothing incriminating. They also investigated the *alibi* but during evidence said he did not record those mentioned by the Appellant and could not recollect the facts of their statements. Evidence of the prosecution was contradictory. The trial court yet convicted and sentenced the Appellant to death by hanging. The Court of Appeal dismissed his appeal. The supreme court however allowed his appeal and setting aside his conviction, held:

a. That alibi should not be treated lightly because the onus is the prosecution to disprove it;
b. If the prosecution faced with the defence of alibi investigated what the accused supplied in evidence, the court may believe or disbelieve either side depending on the strength of their evidence;
c. That the plea of *alibi* when set up, sends the prosecution on a very important assignment, the police must investigate the *alibi*.[68]

3.5 Consequences of not Investigating an *Alibi* by the Prosecution

It is a trite law that where an accused person raises a defence of *alibi* during investigation, he must also furnish the police with every material particulars of his *alibi* failing which the police will not be under the obligation to investigate his *alibi*. An *alibi* properly set up during investigation but not investigated by the police is of fatal consequences to the case of the prosecution unless a credible eye-witness account is called to disprove the *alibi*. The Supreme Court held in the case of *Onafowokan v. The State* that, failure by the police to investigate and check the reliability of *alibi* would raise reasonable doubt in the mind of the tribunal and lead to the quashing of the conviction imposed in the disregard of this requirement…" Worthy of note and for emphasis, is the rule that *alibi* must be investigated is therefore inapplicable in the face of credible evidence of witnesses who are able to fix the accused person with the scene of the crime.

3.6 Onus (Burden) of Proof of *Alibi*

It is a settled principle in the criminal justice system of Nigeria, that in all criminal trial, the burden of proof lies solely on the prosecution, which he must prove beyond reasonable doubt. Once a defence of *alibi* has been promptly and properly put up, the burden is on the prosecution to investigate it and rebut such evidence in order to prove the case against the accused beyond reasonable doubt.[69] In the case of *Bozin v. The State* (supra) the court has this to say: 'The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove the alibi beyond that of introducing the evidence of alibi.'

The accused person only has what is referred to as evidential burden which means the duty of adducing evidence or raising the defence of *alibi*. This was well presented in the celebrated case of *Okpotu Obiode & Ors v. The State* that, 'the standard of proof required to establish an alibi is much, much lower than proof beyond reasonable doubt expected of the prosecution. That standard is merely the favourable balance of possibilities which in this case is more on the side of the Appellant.' A successful plea of *alibi* results in the acquittal of the defendant. *Alibi* is a radical, sweeping and far-reaching defence which, where proved, serves to completely exculpate the defendant from the offence charged.[70]

[66] Osu v. State (2013) 1-2 SC, 37; Ajayi v. State (2013) 2-3 SC (Pt. 1), 143; Aliyu v. State (2013) 6-7 SC (Pt. iv), 1; Ozaki v. State (1990) 1 SC, 109 - Per Ebiowei Tobi, JCA
[67] (1996)9-10 SCNJ 18.
[68] *State v. Azeez* (2008) 4 SC 188.
[69] *Adedeji v. The State (1971)1 All NLR p. 75.*
[70] *Kareem* v. *State* (2021) 17 NWLR (Pt. 1806) 503 – Supreme Court

However an alibi raised by the defence may be demolished by the prosecution. The Supreme Court has affirmed this in *Ochemaje v. The State* in the following dictum:[71]

> There is nothing extraordinary or esoteric in a plea of alibi. Such a plea postulates that the accused person could not have been at the scene of crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disprove the alibi or attempt to do so, there is inflexible and/or invariable way of doing this. If the prosecution adduces sufficient and acceptable evidence to fix the accused person at the scene of the crime at the material time, surely his alibi is thereby logically and physically demolished…

A careful look at the above statement will reveal that, to demolish a defence of *alibi*, the prosecution must furnish evidence proving that the accused was at the scene of the crime.

3.7 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 State. Section 4(1), reproduced verbatim says: 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 Code.[72] 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 guilt. For the avoidance of doubt, both Section 7(a)[73] and Section 4(1) (a)[74] 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*.[75] 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 *participis 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

[71] Supra.
[72] Cap C38 LFN, 2004
[73] Criminal Code.
[74] Criminal Code Law 1991 Anambra State.
[75] [1989] 5 NWLR (Pt 123) at 505.

offence is committed and an accused is nowhere near the *locus delictus*.[76] In further elucidating this assertion, the learned author sought reference to the case of *Ededey v State,*[77] 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, abettor, enabler or counselor's absence at the scene of crime despite his state of mind was captured in the case of *Idika v R*[78] 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 Code.[79] 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 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 Anyogu[80] 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.

3.8 Ingredients Necessary for Sustaining the Defence of *Alibi*

The defence of *alibi* is one not bugged down by lists of ingredients. Indeed in *Mohammed v State,*[81] 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*

[76] Z. C. Anyogu, 7.
[77] [1972] 1 ANLR (Pt 1) 15at 25.
[78] 16 [1959] 4 FSC 10.
[79] Cap 89 Laws of Northern Nigeria, 1963.
[80] ZC Anyaogu.
[81] (2015) LPELR-24397(SC).

v State[82] 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*,[83] 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*[84] 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 prosecution.[85] 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 otherwise.[86.] However, this defence must be raised at the earliest possible time, that is, 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 Police.[87] 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 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.

3.9 How the Defendant Expected to Raise this Defence

In *Bozin v State*,[88] 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 amounts 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 it.[89] 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'[90] There are two realities to this provision.

[82] (2013) LPELR-21955(CA).
[83] Mustapha v. State [2008] WRN (Vol. 2) 76 at 80, Pp. 93; lines 10 - 35 (CA).
[84] [2013] LPELR-22601(CA).
[85] Ikemson v. State [1989] 3 NWLR (Pt.110) 455.
[86] Adedeji v. State [1971] ALL NLR 75 AT 79.
[87] Adio v. State [1986] 3 NWLR (Pt 31) at 714.
[88] [1985] 2 NWLR (Pt.8)465 See Adedeji v. The State [1971] 1 All NLR.75.
[89] Asuquo v State (2014) LPELR-23490(CA).
[90] Cap C23 LFN 2004.

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*,[91] 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'[92] Thus the Prosecution is expected to prove the guilt of the accused person beyond reasonable doubt. On the other hand, a defence 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.[93] It is essential that the prosecution must investigate the *alibi* claim. Failure to do so may jeopardize the case of the Prosecution.

3.10 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*,[94] 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*,[95] 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.

4. Conclusions

This study 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

[91] 1947 2 All ER 372.
[92] Bakare v State [1987] 1 NWLR (Pt 52) at 579
[93] Anyogu.
[94] (2017) LPELR- 41664 (SC).
[95] (2013) LPELR-22875(CA).

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.

Alibi is raised by an accused person, which must be done at the earliest opportunity by furnishing the police or the relevant agency in charge of the investigation with necessary material particulars of his whereabouts. When this is properly established, it is incumbent on the prosecution to investigate the *alibi* to find out if it is true the accused person was not at the scene of the crime when the crime was being committed; or to rebut the *alibi* if it was false. The standard of proof must be beyond reasonable doubt. And also worthy of repeating is that the onus (burden) of proof does not in any point in time shift to the accused person. All that is required of the accused person is an evidential burden which is base on mere favourable balance of possibilities. It is given our findings above that we are convinced that the following recommendations are imperative in this study:

a. Independence of the Judiciary

The Nigerian judiciary has to be repositioned for independence. This will strengthen the development and advancement of judicial precedent;

b. Legislative Action

The legislature should rise up to the challenges of updating our criminal laws. Such amendment will including inculcating the defence of alibi into the positive law which will define all the requirement of proof and thus harmoise judges opinions for positive and progressive development in this area of the Nigeria criminal justice;

c. Stepping up Qualifications for Recruitment into the Nigeria Police

The current system where qualification for recruitment into the Nigeria Police includes Ordinary Level Certificates of Senior School Certificate Examination is laughable. Nigeria has grown past the stage where the ordinary citizen out there will be far more educated than an average police officer. Lack of good quality education hampers effectiveness in the police work. We therefore recommend that the least qualification for recruitment into the police should Ordinary National Diploma (OND) and its equivalents.

d. Training and Retraining of Police Officers

Police officers should be given on-the-job training and retraining regularly. Training is required especially in the area of crime investigation. This will help reduce shabby investigations that usually offer loopholes for the criminals to go free;

e. Objective War against Corruption

Corruption has ground every sector of the Nigerian Public Administrative System to a halt and needs to be tackled headlong. Most times, effective investigation is not carried out in a pending case because the victims of crimes did not meet the financial demands of the police. Crime prevention, detection and prosecution are duties of the state. Nigeria state should rise up to responsibility by providing the needed fund and monitor and audit how such fund was utilized. Corrupt public officers should be brought to book. It is only then that others should sit up and do their duties effectively.