

SUPREME COURT OF NIGERIA
28TH MAY, 1993. SC. 249/1991
CORAM:- A. G. KARIBI-WHYTE, S. KAWU, S. M. A.
BELGORE, A. B. WALI, M. E. OGUNDARE, JJSC

HENRY OTTI APPELLANT

V.

THE STATE RESPONDENT

CRIMINAL LAW - Robbery - what amounts to threat of actual violence - robbery charge - whether proved beyond reasonable doubt.

CRIMINAL PROCEDURE - Defence of alibi - where not properly raised - whether an issue before the court.

EVIDENCE - Identification evidence - what amounts to best identification - whether identification parade is necessary at all times.

FACTS

The Appellant was charged before the Lagos High Court for robbing the sum of N6199.90 from a lady sometime in 1982. Appellant, being the driver of a taxi picked up the Complainant and thereafter two other men, his companions now at large. Instead of conveying the Complainant to her destination, appellant carried her to a lonely beach where she was robbed of her money and jewels under threat.

About one week after the incident, the Complainant saw the Appellant in the same taxi under a traffic jam. She raised an alarm and Appellant was eventually arrested by the Police. He merely denied robbing the Complainant in his voluntary statement to the Police. It was only at the witness box under oath, that Appellant remembered that his car was at the workshop for repairs on the day of the incident and that the ring he was wearing was given to him by his mother. Meanwhile, the Complainant (PW1) had earlier identified the said ring as her own and she produced a set of earrings that form

2 OTTI V. THE STATE (1993) 6 KLR 1; (1993) 4 NWLR

a set with the ring. The trial court convicted the Appellant for robbery and his Appeal to the Court of Appeal was dismissed.

On further appeal to the Supreme Court, Appellant urged the Court to determine inter alia, whether the charge of robbery against him was established beyond reasonable doubt.

HELD (unanimously dismissing the appeal)

1. Appellant's claim that his car used for the robbery was with a mechanic which arose when he was giving evidence was not an alibi. Appellant not having pursued this defence at the trial court or Court of Appeal, it cannot be an issue before the Supreme Court. (P5 L. 30).

2. Identification evidence is one tending to show that the person charged is the same person who committed the offence. Instantaneous recognition of the car that took the complainant to the scene of robbery and the recognition of the Appellant as the driver on the day of the incident is the best identification. (P5L.35).

3. Identification parade is not necessary in all cases. Where as in the present case, the complainant right in the heavy traffic several miles away from scene of crime identified the driver and the car, an identification parade is not only superfluous but totally unnecessary. (P6 L.4).

4. Threat of actual violence as required by law must include the very situation of helplessness under which the victim had no option but to comply with all commands of the assailants. Complainant's staying in the car ceased to be voluntary when against her request she was being taken off course in a state she felt kidnapped. (P6 L.24)

5. The fact of Complainant being alone against three men who were forcibly snatching her jewels and other valuable items manifest nothing but robbery, particularly where she was taken to an isolated place. (P. 6 L. 32).

REPRESENTATION

Dr. E. O. Ometan, for the Appellant
Bode Rhodes- Vivour, Director of Public Prosecutions, Ministry of Justice, Lagos State (with him, H.O. Ugbaga, Legal Officer, Ministry of Justice, Lagos State), for the Respondent

CASE REFERRED TO

Ikemson v. The State (1989) 3 NWLR (pt. 110) 455.

STATUTE

Criminal Code Law of Lagos State s. 401

LEAD JUDGMENT BY BELGORE JSC

I, on 4th day of March, 1993, dismissed this appeal and reserved the reasons for so doing to today, I hereby give the reasons.

On the 21st day of June, 1982, a lady by the name Titilayo Fatunbi went to cash a sum of N6,199.90 at a bank along Broad Street, Lagos. After collecting the money she hailed a taxi and asked to be conveyed to Apapa. She saw the driver alone in the car and was advised to take a back seat as the front door would not open. After moving a little from the front of the bank the driver stopped to pick up two men. On insisting that she was going to Apapa the driver told her that he wanted to go through Apongbon to link with the express way to Apapa. However, Instead of making a turn to climb the bridge onto the dual carriage-way to Apapa, the driver crossed into Victoria Island and thence to Apese on Lekki Peninsula. The appellant and his two friends now at large, stopped at Apese Beach and removed two strands of Titilayo Fatunbi's hair - one each from the front and the back of the head respectively. They murmured some incantations she was to repeat after them, placing the strands of her hair on her lap. They then demanded for all valuables on her with the threat that her end would come if she did not comply. They took her money she withdrew from the bank with two cheques i.e.

N6,199.90, her rings and earrings and bangles, they threw her out of the car and headed back towards Lagos. Another taxi cab arrived at the scene and P.W.1 narrated her story to the driver; he gave her free ride to Tinubu Square and gave her N5 for her bus fare.

5 On the 29th June, 1982, barely a week after she was robbed of her money and jewelry, she saw the appellant in the same taxi cab with a passenger at Ojuelegba on Lagos Mainland. There was a traffic jam and she accosted the appellant and raised an alarm which attracted passers by. The appellant was taken to the police station. The
10 P.W.1 identified a cassette containing songs by Ebenezer Obey which was played in the car to muffle her possible alarm or any cry for help at the Apese Beach as there was then a lonely photographer nearby who was oblivious of the goings on in the car. She also recognized
15 her ring, now worn by the appellant. She produced her earrings which form a set with the ring. The defense of the appellant on oath is that his mother gave him the ring; the mother, giving evidence on oath could only say the ring resembled the one she gave him. The ring is certainly a part of the set of earrings the P.W.1 produced. The
20 appellant in his voluntary statement to the police merely denied robbing the P.W. 1. In the witness box on oath he claimed his car was at the workshop for repairs on that particular day. The defense that his mother gave him the ring and that his car was on the date of the robbery with the mechanics for repairs never came up in his voluntary
25 statement to the police; it arose only when he entered the witness box to give evidence on oath.

Learned trial Judge in a well-reasoned judgment concluded
30 that the prosecution had proved its case beyond reasonable doubt and convicted the appellant as charged for robbery under S.402(1) Criminal Code Law. His appeal against this conviction was dismissed by the Court of Appeal. This appeal is against the decision of the Court of Appeal.

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Brief of Argument was filed on behalf of the appellant wherein the following issues were formulated for determination:

ISSUES FOR DETERMINATION:

1. *Whether in the circumstances of this case, the charge against*

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<i>the appellant could be said to have been proved beyond reasonable doubt?</i>			
2. <i>Or alternatively, whether in the circumstances of the case, the charge of robbery under Section 402(1) of the Lagos State Criminal Code against the appellant was established beyond reasonable doubt.</i>			5
3. <i>Whether in the circumstances of the case, a charge of robbery ought to have been preferred against the appellant.</i>			
4. <i>Whether in the circumstances of the case, it could be said that the identification of the appellant eight (8) days after the incident took place was proper when Titilayo Fatunbi, prosecution witness I could not point to any peculiar or outstanding features that could have led one into concluding that it was the appellant who committed the offence.</i>			10
5. <i>Whether the 21 year jail sentence imposed on the appellant is not excessive?"</i>			15

I shall first deal with the identification of the appellant by the complainant. The appellant's counsel submitted that there was no proper identification of the appellant. I must say that identification of an accused person is not all that magical if in the whole evidence the accused is positively identified. The appellant raised the issue that the memory of the complainant was not reliable, but looking at the whole evidence, the trial judge had reason to hold as such and the Court of Appeal rightly affirmed the findings of the trial judge. The P.W.1 i.e. the complainant positively identified the car and the driver who is the accused/appellant and gave clear evidence of the audio cassette in the glove compartment of the car and the music recorded therein. The only defense the appellant seemed to proffer on his being identified only arose when he was giving evidence on oath when he claimed, albeit, without much emphasis, that on the day in question his car now in issue was with a mechanic for repairs. It was not an alibi and he never pursued it at the trial Court and at the Court of Appeal. It is not an issue in this Court. It is therefore to be restated that identification evidence is one tending to show that the person charged with an offence is the same person who committed the offence. The best identification was the instantaneous recognition of the car that was used to take the P.W. 1 to the Apese/Lekki Beach and

the recognition of the appellant as the driver on that fateful day. There was hardly any need for lining up the appellant among others for the P.W.1 to identify. It is not in all cases that identification parade is necessary; and whereas in this case the P.W.1 right in the heavy traffic several miles away from the scene of crime identified not only
5 the driver but also the car, an identification parade is not only superfluous but completely unnecessary, [Ikemson v. The State (1989) 3 NWLR (Pt. 110) 455]. The P.W.1 had every opportunity to observe the appellant. The offence took place in broad daylight, the appellant and his companions were not masked or disguised and she was
10 able to identify the car and the content of the glove compartment. It was not a fleeting encounter, it took several minutes of driving from Marina on Lagos Island to Victoria Island and thence to Lekki Peninsula.

15 The Criminal Code Law of Lagos State in S. 401 defines robbery in this vein!

*"Any person who steals anything and, at or immediately before or immediately after the time of stealing it uses or
20 threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is said to commit robbery."*

25 Threat of actual violence as required by law must include the very situation of helplessness whereby the victim had no option but to comply with all commands of the assailants, whereas in this case, the P.W.1 was a voluntary fare paying passenger who entered the
30 car, her staying in the car was no longer voluntary when against her request she was being taken off course in a state where she felt she was kidnapped. The appellant and his two companions now at large put P.W.1 in great fear and verbal issuance of threat would be superfluous. The very fact of her being alone against three men who were
35 snatching forcibly her rings, earrings, money and other valuable items manifest nothing but robbery, the more so when she was taken to an isolated place.

 On the whole the trial Court's decision was rightly upheld by

the Court of Appeal and for the foregoing reasons I also dismissed this appeal.

KARIBI-WHYTE JSC

After argument in this appeal on the 4th March, 1993. I had no hesitation in dismissing the appeal. I indicated on that day that I will give my reasons today. 5

I have read the reasons given by my learned brother Belgore J.S.C., in his judgment. I agree entirely with him. I wish merely to make some comments on the defense of identification put forward by the appellant. The only plausible defense raised by appellant was that there was no proper identification of the appellant. He denied the offence and in his evidence on oath stated that the car in question was with a mechanic for repairs on the day in question. 10 15

Now, a plea of alibi which should have been raised at the earliest opportunity was not raised until the appellant went into the witness box to give his testimony. In the circumstance the Police had no opportunity to investigate the alibi, if the defense is to be so regarded. Again, the strongest evidence which should have been adduced by appellant in support of the alibi was that of the mechanic who repaired the car. Such evidence would have gone to show when the car was brought to him for repairs and when it was released after repairs. No such evidence was before the Court of trial. It is therefore safe to assume, as the courts below did, that an alibi was not in issue. It was a defense feebly raised which could not withstand the gale wind of available contrary evidence. 20 25 30

The evidence of PW.1 who was the complainant against who the offence was committed relating to the identity of the appellant left no doubt in the mind of the trial judge about appellant's identity. PW.1 did not only identify at first sight the car which took her to Apese/Lekki beach where the offence was committed on her, she also recognized appellant as the driver of the car. The offence took place in broad daylight and for quite sometime, PW.1 was with them. Appellant and his compatriots were not masked and the period be- 35

tween the commission of the offence and the identification of appellant was only about eight days. P.W.1 had every opportunity to observe appellant during the event which was still fresh in P.W.1's memory. The question of the recollection of the facts being dimmed by time therefore did not arise.

5 It is important to consider the corroborative facts of the accurate enumeration of the contents of the glove compartment of the car, and the coincidence of the dress ring appellant took from her and was wearing matching the earrings of P. W.1. With such a formidable army of identifying facts, it seems to me somewhat awkward
10 and unreasonable to expect the mounting of an identification parade to identify the well known culprit. I think it is ordinary good sense and consistent with the speedy administration of justice and the doing of effective justice, that where the evidence to the Police is satisfactory and the complainant or victim is not in doubt that the accused person committed the offence and could be identified, it is unnecessary to conduct an identification parade. An identification
15 parade is only relevant where the Police is confronted with the determination of whether a particular person suspected or another was the person who committed the offence. In the circumstances of this case, the identity of appellant has been established beyond doubt. It is therefore unnecessary to call for an identification parade. See Ikemson v. The State (1989) 3 NWLR (Pt. 110) 455.

25 The offence of robbery in the Criminal Code of Lagos State is defined in Section 401 as follows:

*"Any person who steals anything, and at or immediately before or immediately after the time of stealing it uses or threatens to
30 use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is said to commit robbery."*

On the facts of the case as round by the trial Judge and accepted by the Court below, P.W.1 the victim of the appellant and his
35 confederates now at large, was compelled to ride in the car in great fear for her life, or at least actual bodily injury. It was in that circumstance that she was compelled to surrender, and where she hesitated, forcibly snatched her dress ring, ear rings, money and other valuable items. This conduct comes within the meaning of robbery in section

401 of the Criminal Code. This is because the property was taken without the consent of P.W.1 by threats of violence immediately before, and it was also retained by similar threat of violence.

Above are my reasons for dismissing this appeal on the 4th March, 1993. 5

KAWU JSC

I dismissed this appeal on the 4th day of March, 1993 and reserved my reasons for doing so till today. 10

I have had the advantage of reading, in draft, the Reasons for Judgment just delivered by my learned brother, Belgore. J.S.C., I agree with him and will respectively adopt them as my reasons for dismissing the appeal. On the evidence adduced. I am satisfied the appellant was correctly identified on 29th June, 1982 at Ojuelegba by P.W.1 as one of those who committed the offence on the 21st day of June, 1982. I am also satisfied that on the totality of the evidence adduced, the conviction of the appellant was proper and that the Court of Appeal was absolutely right in affirming that conviction. 15 20

WALI JSC

On the 4th of March, 1983 after reading the record of proceedings and the briefs filed by learned counsel. I dismissed the appeal and reserved my reasons for doing so to today. I now proceed to state them. 25 30

I have been privilege to read in advance, the lead Reasons for Judgment of my learned brother Belgore, J.S.C., and I entirely agree with him. I adopt the same as mine. 35

PW. 1 the victim of the robbery had more than ample time and opportunity of observing the appellant to enable her identify him on seeing him again. She spontaneously did so when she cited

him driving the same taxi when he, in company of other two persons now at large, committed the robbery on her. She was also able to identify her ring which the appellant was wearing. There is therefore no need for any further and separate identification.

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OGUNDARE JSC

I dismissed this appeal on 4th of March, 1993 and reserved my reasons, I hereby give the reasons.

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I have had the privilege of a preview of the reasons given by my brother Belgore J.S.C. (who also dismissed the appeal) for dismissing the appeal. I agree entirely with the reasons given by him which I also adopt as mine. The victim of the crime not only had
 15 ample opportunity of seeing and observing the appellant so as to be able to identify him subsequently but also the ring found on the finger of the appellant which the learned trial Judge found to be part of the victim's set of earrings removed any doubt in the mind of any reasonable tribunal as to the proper identification of the appellant by
 20 the victim. I am also satisfied that on the totality of the evidence given at the trial and the finding of the learned trial Judge on the credible evidence before him the appellant was rightly convicted by him and the Court of Appeal equally rightly affirmed that decision. Appeal
 25 dismissed.

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