

SUPREME COURT OF NIGERIA

25TH JUNE, 1993. SC.16/1992

**CORAM:- M. L. UWAI, A. B. WALI, O. OLATAWURA, U. OMO,
E. O. OGWUEGBU, JJSC**

GODSPOWER ASAKITIKPI APPELLANT
V.
THE STATE RESPONDENT

APPEALS - *Concurrent findings of two lower courts -
regarding identity of accused - whether perverse*

*CRIMINAL
PROCEDURE* - *Armed robbery - commencement of trial - when
is a trial deemed to be commenced - alleged
delay during trial - whether fair hearing is denied*

*CRIMINAL
PROCEDURE* - *Serious omission by trial court - to indicate that
accused was present in court - on the day of
judgment - whether trial will be vitiated thereby*

EVIDENCE - *Armed robbery-identification-variation in the
victims account-whether identification is poorly made*

FACTS

The Appellant in the High Court, Sapele, was charged on two counts of armed robbery. Appellant together with another person at large robbed a driver and his assistant of the sum of N45.00 in denominations adequately attested to by the two victims. Whilst Appellant was attempting to rob a woman at the same scene, he was arrested by the police on being identified and his colleague escaped. The trial of the Appellant was adjourned for about 19 times within the period of 20 (twenty) months before the charge was read to him and he pleaded not guilty and raising an alibi. After plea, the trial was conducted within 3 (three) weeks and the Appellant was sentenced to death upon his being found guilty as charged.

Appellant's appeal to the Court of Appeal was dismissed. On further appeal to the Supreme Court, his counsel submitted that Appellant was not given a fair trial within a reasonable time as provided under the Constitution. The Supreme Court also had to determine whether the Appellant was poorly identified in view of variation in the account of two prosecution witnesses that were victims of the armed robbery. Whilst one said he could not identify the Appellant because it was dark and rain was

falling, the other said he could because the Appellant's face was spotted.

HELD (unanimously dismissing the appeal)

1. Trial in a criminal charge is commenced with arraignment which consists of the charging of the accused or reading over the charge to the accused and taking his plea. (P158 L 28)
2. Although Appellant has been taken to the court 19 times, his trial did not commence until the day plea was taken. (P159 L 6)
3. For the constitutional provision that requires fair hearing within a reasonable time to apply, regard must be had to the commencement of a trial as provided under the criminal procedure law (ie reading over charge and taking the plea of the accused). (P159 L 9)
4. The delay for the period of twenty months before the commencement of trial in this case, though most unfortunate is not the delay envisaged under s. 33 (4) of the 1979 Constitution. And since the trial of the Appellant lasted for 3 (three) weeks only, that is, from the date plea was taken to the date of judgment it cannot be said that the trial was not conducted within a reasonable time. (P159 L 13)
5. Where the Appellant on being arrested was found with a pistol and naira notes in denomination that tallied with the account of 2 prosecution witnesses on details of the robbery, coupled with an undiscredited evidence by one prosecution witness that said he identified the Appellant because he had spots on his face, it can not be said that the concurrent findings made by two lower courts were perverse to warrant an interference. (P163 L 13)
6. There could not have been the pronouncement of sentence on the accused with a record of his allocutus if he was not in court at the time judgment was delivered. Omitting to note that the Appellant was in court was a slip made by the learned trial Judge (P164 L 16)
7. The Omission to indicate that the Appellant was present in Court is in contravention of the Criminal procedure Law provisions. Though this omission is serious, trial will not be vitiated because it has not been shown that the Appellant has suffered any miscarriage of justice thereby. (P164 L 25)

REPRESENTATION

Oluwatoyin Doherty (Mrs.), for the Appellant

Respondent not represented, for the Respondent

CASES REFERRED TO

1. Mohammed v. Kano N.A. (1968) 1 All NLR 424
2. Oyediron & 5 Ors. v. The Republic (1967) NMLR 122
3. R. v. Turnbull (1976) 3 All ELR 549
4. Adaje v. The State (1979) 6-9 SC 18
5. Ali v. The State (1988) 1 SCNJ 17
6. Obade & Ors. v. The State (1991) 6 NWLR (pt. 198) 435
7. Lawrence v. R. (1933) AC 699
8. Adio & Anor. v. The State (1986) 2 NWLR (pt. 24) 281

STATUTES

1. Firearms (Special Provision) Act No. 47 1970 s. 1 (2) (a)
2. Constitution of the Federal Republic of Nigeria 1979 s. 33 (4)
3. Criminal Procedure Law Cap. 49 Laws of Bendel State 1976 ss. 215, 210, 100, 223
4. Evidence Act s. 208
5. Supreme Court Act 1960 s. (26(1))

LEAD JUDGMENT BY UWAIS JSC

The appellant was charged in the High Court of erstwhile Bendel State sitting at Sapele with two counts of armed robbery contrary to section 1 subsection (2) (a) of the Firearms (Special Provisions) Act, No. 47 of 1970. He was convicted of both counts and was sentenced to death. The appellant brought an appeal to the court of appeal against the conviction. The appeal was unsuccessful. He, therefore, appealed further to this court, formulating three issues for our determination, namely -

"1. Whether the appellant was denied a fair trial because of the inordinate delay in commencing the trial of his case.

2. Whether the concurrent findings of the lower courts were reasonable having regard to the evidence of identification before the (trial) court and the effluxion of time (or time-lag) between the alleged commission of the offence and the trial of the accused.

5 *3. Whether the failure of the (trial) court to state specifically in the record that the accused was present at the time of delivering judgment is fatal to the trial and conviction."*

Although the Attorney-General of Delta State was represented in
10 this court on the 28th day of January, 1993 when the appeal was adjourned to the 1st day of April, 1993 for hearing, the respondent is presently neither represented nor was a brief filed on its behalf even though the appellant's brief was served on the Attorney-General on the 28th day of January, 1993. In exercise of our inherent powers and in view of the provisions of Order 6 rule 9 of the Supreme Court Rules, 1985, we decided to
15 hear the appeal in the absence of representation for the respondent by counsel.

The facts of the case are as follows: On the 6th day of July, 1981, Balonwu Dike (P.W.1) a trailer driver, and Peter Okafor (P.W.2) who was his
20 assistant, were asleep inside their trailer at Okirigwe junction. P.W.2 was sleeping inside on the seat in the driver's cabin while P.W.1 was sleeping inside the trailer when, at about 1.00 a.m. two persons armed with a pistol and a knife respectively woke up P.W.1 whom they asked to open the cabin's door. P.W.2 did as they asked. The person holding a knife entered the
25 driver's cabin and asked P.W.2 for money. P.W.2 said that he had no money but took the persons to the trailer and woke up his master (P.W.1), who saw the appellant holding a pistol. The appellant threatened that P.W.1 should open the door of the trailer or otherwise he would be shot. P.W.1 complied and the person holding a knife then demanded of him (P.W.1) to surrender
30 the vehicle or face death. P.W.1 surrendered N40.00 in 2 notes of N20.00 denomination to the person holding knife who in turn handed over the money to the appellant. The person with a knife then took from P.W.2 a N5.00 note which he handed over to the appellant.

After the incident P.W.1 and P.W.2 decided to return to Warri as
35 they had no money to continue with the journey to Maiduguri. When they came to a police check-point at Amukpe junction, P.W.1 reported the incident to the policemen at the spot. P.W.1 was asked by the policemen whether he could identify the culprits and he answered in the affirmative. As a result, the policemen stopped a taxi carrying passengers and instructed the

taxi driver to take P.W.1 together with two policemen to the scene of the incident. The taxi driver did as he was requested. At the scene of the incident, the appellant and the person that held a knife during the incident were seen by P.W.1 and the two policemen attempting to rob a woman. The appellant was arrested while the person that held a knife escaped. When searched on the spot, the appellant was found to be in possession of a pistol (exhibit C) four live cartridges (exhibit D1-D4) and the sum of N45.00 in two N20.00 notes and one N5.00 note, which were tendered in evidence as exhibit E. 5

The appellant was taken to the police station at Sapele where he volunteered a statement to the police under caution. He denied committing robbery and set up an alibi. The statement was put in evidence at the trial and was admitted as exhibit B. 10

Three witnesses including P.W.1 and P.W.2 were called by the prosecution at the trial and the appellant, who was the only accused person before the trial court, (the other suspect being at large) testified on his behalf. He denied committing the offence charged and set up the defense of alibi. He denied the content of exhibit B that the pistol and cartridges found on him (exhibits C and D1-D4) were dropped on him by his friend called Lucky who fled from the scene where the appellant was arrested. No witness was called by the appellant. 15 20

The learned trial Judge believed the case for the prosecution and the appellant was convicted on the two counts for armed robbery and was sentenced to death.

Arguing the first issue for determination, learned counsel, for the appellant, Mrs. Oluwatoyin Doherty referred, in the appellant's brief, to the provisions of section 33 subsection (4) of the constitution of the Federal Republic of Nigeria, 1979, which states thus- 25

"(4) Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a court or tribunal." 30

and submitted that in the circumstances of the present case, the appellant did not have a fair trial. The ground for the submission is that-

"The accused was charged to court on the 17th of January, 1982, (Sic). Thereafter the case was adjourned eighteen times and most of these adjournments were because the court was not sitting and prosecuting counsel and witnesses were not in court. The case was adjourned at the instant of the accused or his counsel on only two occasions. The trial of the accused commenced on the 10th of March, 1983, fourteen months after the charge was preferred

against him. The trial Judge had earlier warned on the 18th of November, 1982, that the charge would be dismissed, if the case is (sic) not prosecuted."

From the evidence adduced at the trial in the High Court the appellant was arrested on the 6th day of July, 1981. The record of proceedings shows that the Attorney-General of Bendel State filed an application dated the 19th day of October, 1981 in the High Court, Sapele, seeking the consent of the court "to prefer and file information upon the proofs of evidence filed in the High court Registry, Sapele against the above mentioned accused person namely GODSPOWER OSERETI ASAKITIKPI and that the copies of information and proofs of evidence be served on the accused person." The application was considered in chambers by Obi. J. On the 26th day of November, 1981 and the consent was granted by him.

The appellant was brought to the High Court on the 8th day of February, 1982 and he appeared before K.S.Y. Momoh, J. No charge was read to the appellant. From that date the case was mentioned in the High Court for not less than 18 times between the 18th day of February, 1982 and the 8th day of February, 1983. Again no charge was read to the appellant on all those occasions. However, on the 10th day of March, 1983, the appellant was taken before Dugbo. J. and the charge as preferred by the Attorney-General of Bendel State was read and explained to the appellant and his plea was taken. Judgment was delivered on the 31st day of March, 1983, that is barely 3 weeks after the charge was read to the appellant.

The question that arises from the argument canvassed by learned counsel for the appellant is whether the appellant had a fair hearing within a reasonable time.

A fair hearing means a fair trial- see *Isiaku Mohammed v. Kano NA* (1968) 1 All N.L.R.424. Trial in a criminal case is said to commence with arraignment which in turn consists of the charging of the accused or reading over the charge to the accused and taking his plea thereon - see *Oyediran & 5 Ors. v. The Republic* (1967) NMLR 122 at P. 125 and section 215 of the Criminal Procedure Law, Cap. 49 of the Laws of Bendel State of Nigeria 1976, which is the law applicable. The section provides -

"215. *The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court,*

and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has been duly served therewith."

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It follows from the foregoing that although the appellant in the present case was taken to the High Court 19 times, his trial did not commence until the 10th day of March, 1983, since the procedure under section 215 of the Criminal Procedure Law, Cap. 49 did not previously take place. It follows also that for the provisions of section 33 subsection (4) of the constitution 10 to apply, it must be read in conjunction with the commencement of a trial and in the present case in conjunction with the provisions of section 215 of the Criminal Procedure Law Cap 49. I am, therefore, of the view that the delay from the 6th day of July, 1981 to the 10th day of March, 1983, though most unfortunate and deprecable, is not the delay in trial which 15 section 33 subsection (4) of the constitution envisages. We put this to learned counsel to the appellant in the course of her oral argument and she conceded the point. What remains to be said therefore is that since the trial of the appellant lasted about 3 weeks only, that is the taking of his plea and evidence as well as the delivery of the judgment, it cannot rightly be argued 20 that the trial was not conducted within a reasonable time. Happily, this is not the point advanced on behalf of the appellant.

With regard to the second issue for determination it has been conceded in the appellant's brief of argument that there are concurrent findings of fact by the lower courts that the appellant was one of the two persons 25 that robbed P.W.1 and P.W.2.

It is, however, being argued, on the basis that the concurrent findings were perverse, that the identification of the appellant by P.W.1 raises some doubt in view of the fact that P.W.2 who was first approached by the robbers and who took them to P.W.1 from the driver's cabin to the trailer 30 said, unequivocally under cross examination, that he could not recognize the robbers as it was dark and raining at the time of the incident. The actual words uttered by P.W.2 under the cross examination are as follows -

"The robber with a pistol did not beat my master, he in fact did not gain entrance into the apartment where my master was lying down. 35 If it was day time I should have been ask (sic) to recognize the person who held the pistol. If there was light (sic) I should have been able to recognize the robbers. There was rain and the weather (sic) was dark."

It was submitted that if PW.2, who had ample opportunity to see and observe the robbers, could not recognize them then it must have been difficult, if not impossible, for PW.1 to recognize them. In support of the submission, the case of R. V. Turnbull, (1976) 3 All E.L.R. 549 was cited in particular at P. 553 where Lord Widgery, CJ stated thus -

5 *"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless*
10 *there is other evidence which goes to support the correctness of the identification,"* (Italics mine)

Other cases cited in support of the submission are Adaje v. The State. (1979) 6-9 S.C. 18; Ali v. The State. (1988) 1 S.C.N.J. 17; Obade & Ors. v. The State (1991) 6 NWLR (Pt. 198) 435 at P. 451 per Salami,
15 J.C.A.

It is true that PW.2 was categorical, even in his evidence-in-chief, that he "could not recognize any of the robbers because it was night". However, this piece of evidence needs to be contrasted with that of PW.1 who said in his evidence-in-chief that when he met the policemen at Amukpe
20 junction -

"..... They asked me whether if I see the people who robbed me I could recognize them and I told them that I could."

The statement made by PW.1 to the police on the 7th day of July, 1981 was put in evidence as exhibit during cross-examination. In the ex-
25 hibit, P. W.1 stated as follows-

"..... At Eku Road block, I reported the incident to the sgt. (sic) in charge duty. The sgt. (sic) asked me if I could know the people if I see them and I told him yes."

Again under cross-examination PW.1 said -

30 *"I have never known the accused before the date of the incident. The Accused face (sic) was spotted hence I easily recognized him. I know very well that the accused now in court was one of those who robbed me on the 6th July, 1981".*

Now, in his address to the High Court, counsel for the appellant
35 referred to the last sentence in exhibit A, where PW.1 said - "I cannot recognize the one now at large as it was night at the time of the robbery."

That is that PW.1 could not recognize the second person that was holding knife at the time of the incident. It is not clear why exhibit A was tendered in evidence by the appellant's counsel in the High Court. By sec-

tion 208 of the Evidence Act-

"A witness may be cross-examined as to previous statements made by him in writing relative to the subject-matter of the trial without such writing being shown to him, but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him:

Provided always that it shall be competent for the court at any time during the trial, to require the production of the writing for its inspection, and the court may thereupon make use of it for the purposes of the trial, as it shall think fit."

The record of proceedings does not show the reason why counsel for the appellant tendered the statement of PW.1 (exhibit A) in evidence. If the intention was to discredit PW.1, his attention was not drawn to the contradictory aspect of the statement as laid down by section 208 of the Evidence Act. In effect, exhibit A shows PW.1 as being in the main consistent about the identity of the appellant despite his statement therein that he could not recognize the missing culprit because the incident happened at night. To strengthen this, it is perhaps necessary to reproduce from the record of proceedings the cross-examination which PW.1 went through at the trial and which the statement added credit to as well as his evidence-in-chief. It runs thus -

"XXM J. Y. ODEBALA.

While I was making my statement to the police the accused was present and stood by me. The accused was searched after I had made my statement alleging that they robbed me of N45.00. It was my statement that led to the search of the accused resulting in recovery of the N45.00 which I said they robbed me of. I did not make any further statement after recovery of the N45.00. I did not tell the police that the sum of N45.00 was recovered from the accused in my statement. J. Y. Odebala seeks to tender the statement of the accused. Chief A. Okpewunor for the state do (sic) not object. The statement of the 1st P.W. dated 7/7/81 is admitted and marked Exhibit "A". All I told the Police in Exhibit A is that the accused held a pistol.

I told the Police that the man who held the gun ordered me to surrender my money or I be dead. All I told the police is that a c c u s e d held a pistol at the scene of crime. I have never known the accused before the date of the incident. The accused (sic) face was spotted hence I easily recognized him. I know very well that the accused now in court was one of those who robbed me on the 6th July, 1981.

My boy Peter Okafor did not follow me to the police station. It was the Police, who requested me to bring my boy Peter Okafor sometimes in August, 1981." (Italics mine).

In his judgment, the learned trial Judge found that there was no mistaken identity on the part of P.W.1 when he said he recognized the
5 appellant and he gave the following as his reasons for so finding-

*Learned counsel for the accused Mr. J. Y. Odebala did not put to the 1st prosecution witness how he was able to recognise the accused person at the time of the incident this witness has consistently asserted that he recognized the accused in fact the police from the check point had to stop
10 a taxi to chase the accused because the 1st P.W. told them that he was in a position to identify the robbers if found. Thus, the evidence of identity by the 1st P. W. remains unchallenged. Learned counsel preferred to confront the P.W.2. who in fact, said he could not recognize the robbers because it was night the evidence of the P.W.2 could not be substituted for that of the
15 P.W.1 who was available for cross examination by counsel.*

The 2nd P.W. did not in fact follow the police and the 1st P.W. to locate the robbers.

*There was no dispute as to the scene of crime, the accused himself admitted the scene of crime which is the same as alleged by the 1st P.W.
20 and when they all visited the scene, the I.P.O. who is the 3rd P.W. in this case confirmed same in his evidence. There is therefore consistency in the evidence of the 1st P.W."*

In dealing with the same issue, the court of Appeal, per Mustapha, J.C.A held as follows -

*"I have myself read the record and I respectively agree that the evidence of P.W.1 with regards to the identity of the Appellant remains un-
25 challenged. He was consistent. It was when he reported the robbery at the police check point and had told the policeman on duty there that he could recognize the robber, that himself and the police stopped a taxi and chased
30 the robbers, and the Appellant as recognized at the scene the robbery by P. W.1 holding a gun. This is a finding of fact by the learned trial Judge who saw and heard both P.W.1 and the Appellant while testifying the learned trial Judge disbelieve the appellant and accepted the evidence of P.W.1 that he recognized the appellant as one of the robbers that robbed him. For an
35 Appeal Court to interfere with such finding, it must be shown that such a finding is perverse and cannot be supported having regards to the evidence led and accepted.*

In my view, this point is sufficient to cover this ground of appeal which is clearly complaint on a finding of fact. I do not therefore deem it

necessary to go into the other points raised. Suffice it for me just to say, ground of appeal which complains against a finding of fact by the learned trial Judge is misconceived."

In the case of R. V. Turnbull (supra) Lord Widgery remarked that when the quality of identification is poor; the accused should be acquitted unless there is other evidence that supports the correctness of the identification. It is significant to observe that soon after the appellant was arrested by the police, he was found to be in possession of a pistol and the sum of N45.00 in the denominations of two N20.00 notes and one N5.00 notes. This tallies with the account given by oath P.W.1 and P.W.2 on the details about the perpetration of the robbery. In addition, P.W.1 said under cross-examination that he identified the appellant because he has spots on his face and that piece of evidence had not been discredited by showing that the appellant had no such spots.

It has not been shown that the concurrent findings made by the lower courts regarding the identity of the appellant have been perverse, consequently, there is not any special circumstance shown by the appellant on ground of which we can interfere with the findings.

Finally, the third issue for determination contends that the record of proceedings in the High Court has not shown that the appellant was present in the court at the time its judgment was delivered. Reference has been made to the provisions of section 210 of the Criminal Procedure Law Cap. 49 of the Laws of Bendel State of Nigeria, 1976, and the case of BR. Lawrence V. R. (1933) A.C. 699, to submit that the failure to state in the record that the appellant was present in court was fatal to the whole of the trial.

Section 210 of the Criminal Procedure Law provides -

"210. Every accused person shall, subject to the provisions of section 100 and of subsection (2) of section 223, be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable."

Section 100 and 223 of the Criminal Procedure Law, Cap. 49 deal with dispensing with the presence of accused at trial and the procedure when an accused is suspected to be of unsound mind, respectively. Therefore, the provisions of both sections do not apply to the present case. It is correct that looking at the record of proceedings in the High Court with respect to the proceedings on the 31st day of March, 1983, the minutes do not show that the appellant was present in court when, the judgment was to be delivered although the record shows that his counsel Mr. J.Y. Odebala

was present. The record also shows at the tail-end of the judgment the following -

"ALLOCUTUS: The accused begs for Leniency

*SENTENCE: The sentence of the court upon you is that you
be hanged by the neck until you be dead and
may the lord (sic) have mercy on your soul."*

Surely there could not have been an allocutus by the appellant, as the record has shown, if the appellant was not in court when the judgment was delivered, as alleged in the appellant's brief of argument and as submitted by learned counsel, Mrs. Doherty. Similarly, there could not have been the pronouncement of sentence as was done by the learned trial Judge if the appellant were not present in Court at the time the sentence was passed. In view of this, I am disposed to thinking that there was a slip made by the learned trial Judge in omitting to note in the record of proceedings that the appellant was present in court.

That notwithstanding, I will hold that the omission to indicate in the record that the appellant was present in court contravenes the provisions of section 210 of the Criminal Procedure Law. Cap. 49. However, the omission though curious does not appear to me to vitiate the trial because it has not been shown that the appellant had suffered any miscarriage of justice by its reason. There is no affidavit sworn to by Mr. J.Y. Odebala or the appellant showing that the judgment was delivered in the absence of the appellant. It is, indeed, doubtful if the mere failure of a trial judge to note that the appellant was present in court when judgment was to be delivered could lead to the whole proceedings being vitiated by this court in view of the provisions of the proviso to section 26 subsection (1) of the Supreme Court Act. 1960, which provides

*"26- (1) The supreme Court on any appeal against conviction
under this part shall allow the appeal if it thinks that the
verdict should be set aside on the ground that it is unrea-
sonable or cannot be supported having regard to the evi-
dence, or that the judgment of the court before which the
appellant was convicted should be set aside on ground of
a wrong decision on any question of law or that on any
ground there was a miscarriage of justice and in any other
case, subject to the provisions of subsection (3) of this -
section and section 27 dismiss the appeal:*

*Provided that the court may, notwithstanding that
it is of the opinion that the point raised in the appeal*

might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

With respect, I do not find the case of *BR. Lawrence v. The King* (supra) cited by the appellant to be on all fours with the point raised to the third issue for determination. For in that case, the accused was present 5 when the judgment was read and he was convicted and sentenced. However, at a later date the trial Judge in chambers, in the presence of the prosecution but in the absence of the accused altered, at the instance of the prosecution, the sentence passed. This evoked the following remarks by the Privy Counsel, Per Lord Atkin at P. 708-

"It is an essential principle of our criminal law that the trial for an indictable offence has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended 15 to make trial impossible renders it lawful to continue in his absence. The result is that the sentence passed for felony in the absence of the accused is totally invalid.

.....Their Lordships cannot agree with the appellate court that it (the new sentence) was merely an elaboration of a previous 20 sentence. It was a new and different sentence passed in circumstances in which the Judge had no possible jurisdiction to pass any sentence even if, which is doubtful, in point of time his power to pass sentence at all still continued."

On the whole this appeal has failed and it is hereby dismissed. The decision of the Court of Appeal confirming that of Dugbo J. is hereby affirmed.

WALI JSC

I have read in advance, a copy of the lead judgment of my learned brother, Uwais J.S.C. I entirely agree with his reasoning and conclusion that the appeal lacks merit and has to be dismissed.

There was nothing, in the evidence to cast any doubt on the identification of the appellant by PW.1, who was one of the victims of the appellant's criminal act. PW.1 spontaneously identified the appellant by the spots on his face. He was consistent in his evidence from the investigation of the case to its final conclusion at the trial.

The concurrent findings of fact on the evidence as regards the

identification and the participation of the appellant in the commission of the crime by both the trial court and the Court of Appeal are unimpeachable.

For the more reasons given in detail in the lead judgment of my learned brother, Uwais, J.S.C. which I hereby adopt as mine, I also dismiss this appeal, and confirm the conviction and sentence passed on the appellant by the trial court and the Court of Appeal.

OLATAWURA JSC

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I had a preview of the judgment just delivered by my learned brother, Uwais, J.S.C. I agree with his reasoning and conclusion.

My learned brother has dealt in details with the provision of section 33 (4) of the Constitution of the Federal Republic of Nigeria, 1979 and has in the course of his judgment set out in sequence the details of the arraignment and subsequent trial. I only wish to add that what section 33 (4) of the 1979 constitution provides for is the trial up to judgment after the accused has been charged with an offence, hence the provision "whenever any person is charged with a criminal offence". There is anxiety on the part of counsel when interpreting this section of the constitution to substitute arrest of an accused person for a charge before the court.

There is a clear difference between an arrest of a suspect and arraignment and charge in the court. The intendment of that section is to ensure speedy trial of those charged to court. Any suspected person is sometimes invited to make a statement so as to afford the police to investigate and come to a decision as to whether such a suspect should be charged. The rush to charge a suspect has sometimes led to a miscarriage of justice; hasty investigation as a result of which vital witnesses were not called at the trial and also omission to lead evidence to connect the suspect subsequently charged with the ingredients of the offence. While investigation may even take quite sometime, trial must be within a reasonable time after the accused has been charged. As carefully analyzed in the lead judgment of my learned brother, the trial took just about 3 weeks.

It is on record however that when these details of the trial were pointed out to Mrs. Doherty, the learned counsel for the appellant, she readily conceded that there was no denial of fair trial. It is the hallmark of good advocacy.

On the issue of identity of the appellant, it should be appreciated the degree of perception of events even in time of danger varies with

individual's ability, memory and presence of mind. While some at the mere shout of an armed robber will lose their nerves, there are others who are gallant enough to observe details of the armed robber's movement and his appearance. It is here that the observation of the trial judge during the evidence of a witness is material and should not easily be disregarded by the appellate court. The finding of the trial court to the effect that there was no mistake identity of the appellant by the P.W.1 has not been effectively challenged before us. I agree with Musdaphar, J.C.A. in the lead judgment when he said:

"I have myself read the record and I respectfully agree that the evidence of P.W.1 with regards to the identity of the appellant remains unchallenged. He was consistent".

It is for these reasons and the fuller reasons in the lead judgment of my learned brother, Uwais, J.S.C, that I will also dismiss the appeal for lack of merit.

OMO JSC

The three issues for determination in this appeal as stated in appellant's brief are as follows:-

1. *Whether the appellant was denied a fair trial because of the inordinate delay in commencing the trial of his case.*
2. *Whether the concurrent findings of the lower courts were reasonable having regard to the evidence of identification before the (trial) court and the effluxion of time (or time-lag) between the alleged commission of the offence and the trial of the accused.*
3. *Whether the failure of the (trial) court to state specifically in the record that the accused was present at the time of delivering judgment is fatal to the trial and conviction."*

With regards to the 1st issue, the facts of this case, which have been succinctly set out in the lead judgment of my learned brother, UWAIS, J.S.C., shows that even though there was a time lag of fourteen months between the date the appellant was charged in court and the date the trial commenced, there was only a short period of less than three weeks from the date of trial to the date judgment was delivered. Such a trial cannot be

described as not having been conducted within a reasonable time. What is material here is the period of the trial itself and not the length of time before or delay in commencing the trial. The answer to the 1st issue for determination is therefore in the negative.

5 The second issue for determination had been fully considered by my learned brother, UWAIS, J.S.C. in his lead judgment. For the reason he has given in his judgment, which I adopt as mine, I agree with him that the concurrent findings of the trial High Court and the court below identifying the appellant as one of the two persons who robbed PW.1 and PW.2., should not be disturbed. They are reasonable and certainly not perverse,
10 and the answer to issue 2 must therefore be in the affirmative.

The failure referred to in the third issue canvassed is certainly not one of substance. As demonstrated in the lead judgment there was conclusive evidence to show that in fact the appellant was present in court to receive judgment, hence he was able to plead in allocutus. The failure to
15 record his presence has therefore, in my view, not occasioned a miscarriage of justice.

For the above reasons and the more detailed ones in the lead judgment, which I have already adopted as mine, I also dismiss this appeal.
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OGWUEGBU JSC

I had a preview of the judgment which has just been delivered by my learned brother, Uwais, J.S.C. and I agree with the reasons and conclusion.
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I abide by the orders made in the said judgment of my brother. Uwais, J.S.C. Appeal Dismissed.

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