

SUPREME COURT OF NIGERIA
18TH APRIL 1997. SC. 76/1996
CORAM:- A R WALI, M.E. OGUNDARE, E. O. OGWUEGBU,
Y.O. ADIO, A. I. IGUH, JJSC.

MICHAEL ALOR		APPELLANT
V		
THE STATE		RESPONDENT

CRIMINAL PROCEDURE - Conviction - will only be based on proof beyond reasonable doubt - Not on suspicion.

CRIMINAL PROCEDURE - Evidence - Of a prosecution witness - whereby expunged from the record - Whether conviction of appellant can still be sustained.

EVIDENCE - Burden of proof - In criminal matters - Is on the prosecution - To prove all the essential ingredients of the offence.

EVIDENCE - Witnesses - Evidence of PW 1 about robbery in his house - Cannot establish robbery in PW2's house.

FACTS

Before the Enugu High Court, the appellant was charged, tried and convicted for the offence of armed robbery. He was alleged to have robbed the house of PW 2 (a house wife) together with other persons at large. P w 1, a student, gave evidence that appellant and his team robbed his house first before going to rob PW2's house. The trial judge convicted the appellant .as charged based on the evidence before him.

Appellant appealed to the Court of Appeal which expunged the PW 2's evidence from the record on the ground that PW2 was not cross examine and still upheld the conviction. It would seem that expunging of the said evidence was wrongful.' Appellant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether the court below was right in affirming the conviction of the appellant for the offence of armed robbery.

HELD(Unanimously allowing the appeal per lead judgment of **ADIO JSC**
Burden of proof

1. The burden of proving the charge preferred against the appellant is on the prosecution and it never shifts. See *Aruna v. The State* (1990) 6 NWLR (pt. 155) 125, at p. 137. In discharging the burden of proof, the prosecution must prove all the essential ingredients of the offence as contained in the charge. See *Aruna's case*, *Supra*. It seems like a *prima facie* case of armed robbery in the house of the p. w. 1 and of armed robbery in the house of the p.w. 2 was established against the appellant. However, a fundamental thing occurred. It was the evidence of p. w. 2 summarized above was expunged from the record of proceedings before the court below. (p. 794 B)

Evidence – Witnesses

2. In law, the evidence of the p.w. 1 about the alleged robbery which took place in his own house could not be substituted for the evidence of the p.w. 2 which related to the alleged robbery in her own house that was the subject of the charge preferred against the appellant. It does not matter that after the alleged robbery incident in the house of the p.w. 1 by the gang, members of the gang allegedly went to the house of the p.w.2. (p. 794 C)

A Conviction is to be based on proof

3. It would only be a suspicion that the appellant who was in the gang that committed the offence in the house of the p.w.1. was also in the gang that committed the offence in the house of p.w.2. . A conviction can legally be based on proof beyond reasonable doubt and not on suspicion that the accused committed the offence. (p. 794 D)

Expunged evidence of a witness _ Effect

4. In short, it could no longer be rightly or legally said that there was evidence to support whatever findings of fact made by the learned trial judge which established the guilt of the appellant as there was no other relevant evidence, an appellate court can reverse the decision of the trial court. (p. 794 E)

NOTABLE POINT OF INTEREST

ADIO JSC

1. Punishment on conviction for armed robbery

The punishment on conviction for robbery with firearms, that is, armed robbery, is sentence to death. It is immaterial whether the offender is found guilty as a principal offender or as a participant or as an aider or

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abettor or a person who has counselled or procured the commission of the offence or a conspirator who has committed the offence. If the accused was among the robbery gang that committed the offence, it does not matter that he, himself was not armed. (p. 793 H)

REPRESENTATION

Dr. M.E. Ajogwu with R. K. N. Ochi and Mrs. Ajogwu, for the Appellant
Mr. CC. Eneh (Chief Legal Officer, Enugu State) for the Respondent.

CASES REFERRED TO

Okosun v. Attorney-General of, Bendel State (1985) 11 S.C. 194
Iyaro v. The State (1988) N. W. L. R. (pt. 69) 256
Aruna v. The State (1990) 6 N. W. L. R. (pt. 155) 125, at p. 137
Abieke v. The State (1975) 9-11 SC. 97
Lengbe v. Imale (1959) W. R. N. L. R. 325
The State v. Okechukwu (1994) 9 N. W. L. R. (pt. 368) 273 at 297
R v. Lawrence 11N. L. R.
Okagbue v. Commissioner of Police (1965) N. M. L. R. 232

STATUTE REFERRED TO

Robbery and Firearms (Special Provisions) Act 1970 s. 1 (2) (a)

LEAD JUDGMENT BY ADIO JSC

When this appeal came up for hearing before this court on the 30th of January, 1997, the main issue upon which the learned counsel for the parties addressed the court was whether the court below was right in affirming the conviction of the appellant for the offence of armed robbery. The contention of the learned counsel for the appellant was that the evidence of the P.W. 2, having been expunged from the record of proceedings before the court below, the conviction of the appellant could no longer be said to be based on the evidence of his guilt and that, for that reason, the court below was wrong to have affirmed the conviction. The learned counsel for the respondent conceded that after the evidence of the P.W. 2 has been expunged from the record of proceedings before the court below, the evidence of P.W. 1 that was left in the said record could not sustain the charge or support the conviction of the appellant for the charge. In the circumstance, I allowed the appeal and reversed the judgment of the court below. I indicated that I would give the reasons for my judgment today. I now give the reasons.

The witnesses called by the prosecution in the trial of the appellant for the charge of armed robbery contrary to section 1(2)(a) of the Robbery and Fire-

arms (Special Provisions) Act, 1970, included one Joseph Ofor (P.W.1) a student and one Mrs. Theresa Okwor (P.W.2) a house-wife. The allegation against the appellant was that he, on the 13th June, 1981, at Akama Amankwo Ngwo in Enugu Judicial Division, in company with other persons armed with a firearm, to wit, a locally made pistol, robbed one Theresa Okwor of the sum of N130.00 in cash and wearing apparels valued at N700.00. What could reasonably be inferred from the evidence of the two witnesses mentioned above was that the place in which one of them was living was separate and distinct from the place where the other was living. The allegation was that on the day in question two armed robbery offences were committed and that the appellant was one of the alleged armed robbers who took part in the two separate armed robbery incidents. The P.W.1 was living in the house in which one of the armed robbery offences was committed and the P.W.2 was living in the houses in which the second armed robbery offence was committed. In order to appreciate the extent and the effect of the confusion, which eventually arose, it is necessary to give a brief summary of the evidence of the P.W. 1 and the P.W. 2.

The P.W. 1 told the learned trial Judge that on the day in question (13/6/81) three persons invaded his house. The appellant was one of them. One of the three aforesaid persons had a gun. They took his mother's matchet from under her bed and took the sum of N60.00 from her by force. With the aid of a torchlight the P.W.1 recognised the appellant who counted the money taken from his mother. One of the alleged armed robbers hit the witness with a matchet and later they went to the premises of the P.W. 2.

The evidence of the P.W. 2 was that while she was sleeping with her children in a room in her house some strange persons outside the house ordered her to open the door and threatened to kill her and her children if they themselves opened the door. As a result, she opened the door. A torch-light and a gun were pointed at her. One of them struck her with a mortar three times and she fell down. Before she became unconscious they forced open her wardrobe and the wardrobe of her husband who was away on night duty. They stole N250.00 from her husband's wardrobe and some clothes from her own wardrobe. One of them pointed a torchlight to the one who was wrapping the clothes of the witness on himself, and so the witness was able to identify the appellant who was the one who carried the clothes of the witness away. Not long after the incident, she saw some of her clothes taken away and being sold in the open market.

The punishment on conviction for robbery with firearms, that is, armed robbery, is sentence of death. It is immaterial whether the offender is found guilty as a principal offender or as a participant or as an aider or a better or a person who has

counselled or procured the commission of the offence or a conspirator who has committed the offence. See: Okosun & Ors. v. Attorney-General, Bendel State (1985) 11 SC 194; (1985) 3 NWLR (Pt.12) 283 and Iyaro v. The State (1988) 1 NWLR (Pt.69) 256. If the accused was among the robbery gang that committed the offence, it does not matter that he himself was not armed.

B The burden of proving the charge preferred against an accused is on the prosecution and it never shifts. See: Aruna v. The State (1990) 6 NWLR (Pt.155) 125, at p. 137. In discharging the burden of proof, the prosecution must prove all the essential ingredients of the offence as contained in the charge. See: Aruna's case supra. It seems that a prima facie case of armed robbery in the house of the P.W. 1 and of armed robbery in the house of the P.W. 2 was established against the appellant. However, a fundamental thing occurred. It was that the evidence of P.W. 2 summarised above was expunged from the record of proceedings before the court below. In law, the evidence of the P.W. 1 about the alleged robbery which took place in his own house could not be substituted for the evidence of the P.W.2 which related to the alleged robbery in her own house that was the subject of the charge preferred against the appellant. It does not matter that after the alleged robbery incident in the house of the P.W. 1 by the gang, members of the gang allegedly went to the house of the P.W.2. It would only be a suspicion that the appellant who was in the gang that committed the offence in the house of the P.W.1 was also in the gang that committed the offence in the house of P.W. 2. A conviction can legally be based on proof beyond reasonable doubt and not on suspicion that the accused committed the offence. See: Abieke v. The State (1975) 9- 11 SC 97. In short, it could no longer be rightly or legally said that there was evidence to support whatever findings of fact made by the learned trial Judge which established the guilt of the appellant as there was no other relevant evidence, on the print, apart from the evidence of the P.W. 1 and the P.W. 2 and the evidence of the P.W. 2 had been expunge Where findings of fact made by a trial court are not supported by evidence, an appellate court can reversed from the record. Where findings of fact made by a trial court are not supported by evidence, an appellate court can reverse the decision of the trial court. See: Lengbe v. Imale (1959) SCNLR 640; (1959) WRNLR 325.

It was because of the foregoing reasons that I allowed the appeal of the appellant on the 30th January, 1997.

H

WALI JSC

On 30th January, 1979, after hearing learned counsel on both sides in this appeal, I allowed it and reserved my reasons for doing so to today.

I have had the privilege of reading in advance the Lead Reasons For Judg-

ment of my learned brother Adio, J.S.C. with which I entirely agree and adopt as mine. It is for these same reasons that I allowed the appeal on 30th January, 1997 and entered a verdict of acquittal and discharge of the appellant.

OGUNDARE JSC

B

When this appeal came before us on 30th January, 1997 and after hearing learned counsel for the parties, I had no hesitation in allowing the appeal. I set aside the judgment of the Court below and discharged and acquitted the appellant. I indicated then that I would give fuller reasons for my judgment today.

C

I have had the advantage of a preview of the reasons given by my learned brother Adio, J.S.C. for allowing the appeal. I agree with the reasons given by him which I hereby adopt as mine. I have nothing more to add.

OGWUEGBU JSC

D

On 30/1/97, I allowed the appeal of the appellant, quashed his conviction and sentence and reserved my reasons till today.

It is clear that with the evidence of P.W. 2 expunged from the record of proceedings, what is left of the prosecution's evidence cannot sustain the charge against the appellant. It is trite law that the prosecution has the onus of proving the guilt of an accused person beyond reasonable doubt. See: *The State v. Okechukwu* (1994) 9 NWLR (Pt.368) 273 at 297, 289-290; *R. v. Lawrence* (1932) 11 NLR 6 and *Okagbue v. Commissioner of Police* (1965) NMLR 232.

In the circumstance, the charge preferred against the accused F was not proved as required by law. It was for these reasons and the fuller reasons given in the judgment of my learned brother Adio, J.S.C. that I allowed the appeal, quashed the conviction and sentence and entered a verdict of acquittal and discharge of the appellant.

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IGUH JSC

On the 30th January, 1997, this appeal was heard by this Court. After hearing the arguments of learned counsel, I allowed the appeal and H then indicated that I would give my reasons for doing so today.

I have since had the privilege of reading in advance, a copy of the leading reasons for judgment of my learned brother, Adio, J.S.C. and I agree entirely with them.

Both learned counsel for the parties appeared to be ad idem on the fact that P.W. 2, the vital prosecution witness in the case, was not cross-examined before the trial Court at the hearing. The respondent, in particular, admitted in the Court and in its brief of argument before us that there was no cross-examination of this witness before the trial court. It was on the basis of this admission that the evidence of the witness, P.W. 2, was expunged from the record of proceedings by the Court of Appeal.

It has transpired, however, that these admissions on the part of the parties are without foundation, totally erroneous on point of fact and constitute gross misconception of the issue as P.W. 2, was in fact duly cross-examined. This is borne out at pages 49 and 50 of the record of proceedings.

Outside the evidence of the said P.W. 2, there is regrettably no other evidence connecting the appellant in any manner with the offence for which he was convicted and sentenced. There is again, most unfortunately, no cross-appeal by the respondent in respect of this serious error of fact which both learned counsel only became aware of when the same was pointed out to them by this Court during the hearing of the appeal. Without doubt, the said error is, highly capable of, and might in fact have occasioned a miscarriage of justice in the case.

However, with the evidence of the said P.W.2 having been expunged from the record of proceedings, and there being no other incriminating evidence against the appellant with regard to the offences charged, the conviction and sentence of the appellant cannot be allowed to stand.

It is for the above and the more elaborate reasons contained in the leading reasons for judgment of my learned brother, Adio, J.S.C, that I, too, allowed this appeal and set aside the conviction and sentence passed on the appellant by the Court below. In substitution thereof, it was ordered that the appellant be and was thereby acquitted and discharged of the offences charged.

Appeal allowed

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