

IN THE FEDERAL COURT OF APPEAL  
IN THE BENIN JUDICIAL DIVISION  
7TH NOVEMBER, 1978. FCA/B/83/77

CORAM:- J. O. EBOH, S. J. ETE, M. L. UWAIS, JJCA.

OSHIOVBIE OLAGHERE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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**CRIMINAL LAW** - Burglary - Mere identification of the sacks found in appellant's possession - Is no proof that it was appellant who broke into the house.

**CRIMINAL LAW** - Stealing - Of two bags of garri - Where appellant was not found in possession of the garri - But two bags containing pork- There was no evidence to support the stealing charge.

**CRIMINAL LAW** - Stealing - Standard of proof required - Was complied with in respect of theft of a pig, count 3.

**CRIMINAL PROCEDURE** - Proof beyond reasonable doubt - There is no confusion in the evidence - To suggest lack of proof.

**CRIMINAL PROCEDURE** - Defence of appellant - That the pigs he killed were his - Was properly considered by the trial court.

**EVIDENCE** - Burglary - Presumption of theft or receiving stolen property - Does not extend to a presumption of burglary.

**FACTS**

\_\_\_\_\_The appellant was charged before the Auchi High Court on 3 counts of Burglary and stealing of 2 bags of garri and pigs. He denied all the counts and sought to establish that the pork and sack found in his possession were not stolen.

The trial Court found the appellant guilty as charged. The appellant then appealed to the Court of Appeal against his conviction.

**ISSUE FOR DETERMINATION**

*Whether the conviction of the appellant on all the Counts were proper.*

**HELD** (Unanimously allowing the appeal in part per judgment of the court delivered by **UWAIS JCA**)

***Burglary - Mere identification of the sacks***

1. It is clear from this testimony that P.W.7 did not know who broke into her house, because the breaking and entering took place in her absence. The fact that she identified the sacks found in possession of the appellant is no proof that it was the appellant who broke into her house R v Iyakwe, 10 W.A.C.A. 180. We therefore agree with the submission of Mr. Sadoh, that there was no proof to sustain the first count against the appellant. (p. 546 C)

***Stealing - Of two bags of garri***

2. On the question of the appellant stealing the two bags of garri, there was no evidence that he was found in possession of the garri. What was found with him were two bags containing pork and not garri. P.W. 7 identified only one bag when she went to the police station to report theft and burglary. She said that she identified the bags because there was a hole in it. We are not for ourselves certain that a sack could be properly identified, with the degree of certainty required in a criminal case, by merely identifying a hole which appears on it. (p. 546 E)

***Burglary - Presumption of theft***

3. We have already stated that there was no evidence which established conclusively that it was the appellant who broke and entered the house of P.W.3. Section 148 (a) of the Evidence Act which allows for the presumption of theft or receiving stolen property when a person is found to be in recent possession of stolen property does not extend to a presumption of burglary. In our view therefore it is non-sequitur for the learned trial judge to conclude as quoted above that the appellant was the burglar. It

follows that the submissions of the learned counsel for the appellant on counts 1 and 2 succeed. (p. 547 A)

***Stealing - Standard of proof required***

4. With regard to count 3 Mr. Sadoh merely submitted that although the count referred to the theft of a pig, P.W.1 was only able to identify the head of a pig and that this does not amount to the proof of the theft of a pig but its head. We think there is no substance in this submission. The evidence of P.W.1 taken as a whole proved that one of her pig was stolen and that although the pigs was not found, she was able to identify its head. We are satisfied that this evidence together with the other evidence, which the learned trial judge believed, proved count 3 to the standard of proof required. (p. 547 C)

***Proof beyond reasonable doubt***

5. In his final submission on the 2nd ground of appeal Mr. Sadoh said that the prosecution did not prove their case beyond reasonable doubt with regard to count 4 because there was confusion as to the exact number of pig's heads identified at the trial and that the marking of the heads was muddled. He further said that while three heads were said to have been tendered for identification only two heads were admitted as exhibits F & F1. Furthermore the policeman who gave evidence as P.W.5 made reference to 2 heads of pig while P.W.2 mentioned 3 heads. He then cited the case of Michael Okogbue v Commissioner of Police 1965 N.M.L.R. 232 in support of his submission. From the testimony of P.W.2 and P.W.5 there was no such confusion as alleged by Mr. Sadoh. (p.548A)

***Defence of appellant***

6. In arguing ground 3 it was submitted by counsel for the appellant that the prosecution failed to investigate the defence of the appellant that the pigs he killed were his and that he killed them on the order of the chiefs of his village. It was further submitted that the learned trial judge failed to consider the defence of the appellant. These submissions have no substance in our view. In considering the appellant's defence the learned

trial judge said:-

*"I disbelieve the case for the first accused which I regard as tissue of lies. .... the story put forth by the accused that 3rd P.W. is his enemy is untrue ..... I find as a fact that the accused did not own the pigs. .... His account of how he came by them is unsatisfactory and I have so rejected it. -- A bona fide belief by an accused that he has a legal claim to property is a good defence to charge of stealing. It is my view that his belief was not bona fide."*

The third ground of appeal therefore fails. (p. 549 B)

### **REPRESENTATION**

J. O. Sadoh for appellant

A. Okpewono, Senior State Counsel, for respondent

### **CASES REFERRED TO**

Rv. Iyakwe 10 W.A.C.A 180

Okogbue v. Commissioner of Police 1965 N.M.L.R. 232

### **JUDGMENT DELIVERED BY UWAIS JCA**

The appellant was charged and convicted in the Bendel State High Court, holden at Auchi, (Omosun, J.) of the following counts:

#### **Count 1**

Oshiovbie Olaghere (m) on or about the 29th day of May, 1974, at Uzebba in the Auchi Judicial Division, broke and entered the dwelling house of one Aidevo Aigholosumuan (f) with intent to commit felony therein to wit stealing.

#### **Count 2**

Oshiovbie Olaghere (m) on or about the 29th day of May, 1974, at Uzebba, in the Auchi Judicial Division stole from the dwelling house of Aidevo Aigholosumuan (f) two bags of garri valued at N24.00 property of the said Aidevo Aigholosumuan (f).

#### **Count 3**

Oshiovbie Olaghere (m), Ekpenga Odihiri (m), Sunday Ojeaga (m), and Edokhagbe Odihiri (m), on or about the 31st day of May, 1974 at Uzebba, in the Auchi Judicial Division stole one female pig valued N20.00

property of one Okhen William (f) Oshiovbie Olaghere (m) Ekpenga Odihiri (m), Sunday Ojeage (m) and Edokhagba Ohihiri (m) on or about the 31st day of May, 1974, at Uzebba in the Auchi Judicial Division, stole two female pigs valued N22.00 property of one Omohiehie Omoleh (f).

All the counts were denied by the appellant at the trial. He put up a defence that he was rearing five pigs when he received a report that the pigs were straying into other people's farms and causing havoc. He therefore decided to slaughter them and sell the pork and this he accomplished. He said that he borrowed a sack from Aidevo Aigholosumuan, P.W.7, to put in the pork. In other words the pork and sack found in his possession which were the subject of his being charged were not stolen. The defence was rejected by the learned trial judge, as he was entitled to do.

Only one ground of appeal was filed with the appellant's notice of appeal. This is the omnibus grounds of appeal. These grounds read as follows:-

*"1. The learned trial judge erred in law in convicting the appellant when the ingredients and or particulars averred in the charge were not proved.*

*"2. The learned trial judge erred in law in convicting the appellant when the defence of the appellant with respect to counts 3 and 4 were never investigated and the facts which emerged were neither considered nor answered by the learned trial judge."*

The additional grounds 1 and 2 were renumbered 2 and 3 respectively. The learned counsel for the appellant, Mr. Sadoh argued ground 2 first. He submitted with regard to count 1 that there was no evidence that the appellant broke and entered into the house of P.W. 7. In respect of count 2 he submitted that there was no evidence on which the appellant could have been convicted of stealing the bags of garri. We think there is substance in these submissions. The only evidence adduced of breaking and entering is that given by P.W.7 which is as follows:-

*"Sometime in May, 1974 I went to Okiye to go and buy some garri. I locked the doors and windows before I left. I held the key to the front door. I returned on 3rd day. I found that the door was forced*

*open. Two bags of garri were missing from the lot. The thieves gained entrance through the window at the front. I went to report to the police. I met one of the sacks for my garri. I told the police that this is one of the sacks I used to pack my garri. I know the bag. These are the 2 bags shown to me. (witness identifies exhibits "A", "A1" as her bags). I put a hole where I used to hold it. I made a statement to the police. I took police to my house to look at it. I did not give the bags to first accused to use. The two bags cost me N24."* (underlining and brackets ours).

**It is clear from this testimony that P.W.7 did not know who broke into her house, because the breaking and entering took place in her absence. The fact that she identified the sacks found in possession of the appellant is no proof that it was the appellant who broke into her house R v Iyakwe, 10 W.A.C.A. 180. We therefore agree with the submission of Mr. Sadoh, that there was no proof to sustain the first count against the appellant.**

**On the question of the appellant stealing the two bags of garri, there was no evidence that he was found in possession of the garri. What was found with him were two bags containing pork and not garri. P.W. 7 identified only one bag when she went to the police station to report theft and burglary. She said that she identified the bags because there was a hole in it. We are not for ourselves certain that a sack could be properly identified, with the degree of certainty required in a criminal case, by merely identifying a hole which appears on it.**

Another curious point is that P.W.7 said she travelled sometime in May, 1974. She did not mention the exact date. The appellant was found in possession of the bags without garri on 31st may 1974. The learned trial judge concluded from those facts as follows:-

*"It is my view that the accused is either the thief - burglar or receiver. Having regard to the proximity of time of the breaking and when he was found with the meat, I am of the view that he was the burglar."* (Underlining ours).

**We have already stated that there was no evidence which established conclusively that it was the appellant who broke and en-**

tered the house of P.W.3. Section 148 (a) of the Evidence Act which allows for the presumption of theft or receiving stolen property when a person is found to be in recent possession of stolen property does not extend to a presumption of burglary. In our view therefore it is non-sequitur for the learned trial judge to conclude as quoted above B that the appellant was the burglar. It follows that the submissions of the learned counsel for the appellant on counts 1 and 2 succeed.

With regard to count 3 Mr. Sadoh merely submitted that although the count referred to the theft of a pig, P.W.1 was only able to C identify the head of a pig and that this does not amount to the proof of the theft of a pig but its head. We think there is no substance in this submission. The evidence of P.W.1 taken as a whole proved that one of her pig was stolen and that although the pigs was not found, she was able to identify its head. The relevant part of her evidence reads: D

*"On 31st May, 1974 I woke up. I went to the pen to release the pigs. To my surprise I discovered that the pen was broken. I had thirteen pigs in all. This morning they were 12. I know the pigs well. I put some marks to identify them. I instructed my boy to feed it whenever it comes. I E returned from farm about 4 p.m. my child told me the pig had not returned I search for it around the area. I received some information that dead pigs were at the Police station. I went to the Police Station. I only met the head of a pig. The pig had been slaughtered. I shouted and told police F that the slaughtered pig is mine. I sliced the pig at the tip of the left ear and while the right ear is sliced in two places. By this head I was able to recognise it as mine. This is the head shown to me. (Prosecutor seeks to tender it for identification - identification 1). I showed the marks to the G police and said it was my own."*

We are satisfied that this evidence together with the other evidence, which the learned trial judge believed, proved count 3 to the standard of proof required.

In his final submission on the 2nd ground of appeal Mr. H Sadoh said that the prosecution did not prove their case beyond reasonable doubt with regard to count 4 because there was confusion as to the exact number of pig's heads identified at the trial and that

the marking of the heads was muddled. He further said that while three heads were said to have been tendered for identification only two heads were admitted as exhibits F & F1. Furthermore the policeman who gave evidence as P.W.5 made reference to 2 heads of pig while P.W.2 mentioned 3 heads. He then cited the case of Michael Okogbue v Commissioner of Police 1965 N.M.L.R. 232 in support of his submission.

From the testimony of P.W.2 and P.W.5 there was no such confusion as alleged by Mr. Sadoh. To make this clear we shall quote, as relevant, the evidence of both witnesses. P.W.2 said:

*"I remember 30/5/74. My two pigs returned to sleep in the kitchen. Next morning I could not find them. I raised an alarm. I searched for them. I received information that there were some pigs at the police station. I went to the police station Uzebba. I identified two dead pigs as mine. They had been roasted and butchered. I saw the head of the smaller pig. I did not see the head of the bigger one. This is the head shown to me (Tendered for identification identification 2). The bigger one limped as he previously had a burn on one of the legs. I recognised it by that. The left ear was cut on the smaller one. (Tendered for identification identification 3). I know my pigs well. I recognise these two as mine.*

While P.W.5 said:

*"As the pork was decomposing I sought court order to dispose of the pork but retained two heads of pigs. These are the two heads shown to me. (Prosecution seeks to tender them. Alegbe had no objection. Tendered and marked Exhibits "F" and "F1").*

From the foregoing P.W.2 clearly identified the head of the small pig which was marked -"identification 2". "Identification 3" is capable of referring to either the burnt leg of the big pig or the cut in the left ear of the head of the small pig which had already been marked "identification 2". In whichever way one interprets "identification 3" it is obvious that it does not refer to a third head. Counts 3 and 4 considered together refer to three different pigs. P.W.1 had in her evidence identified the head of her pig which was marked "Identification 1". P.W.2 also identified only one head, that is "Identification 2". So that only two heads were produced

for identification before the learned trial judge and these were properly put in evidence by P.W.5 as exhibits "F" and "F1".

**In arguing ground 3 it was submitted by counsel for the appellant that the prosecution failed to investigate the defence of the appellant that the pigs he killed were his and that he killed them on the order of the chiefs of his village. It was further submitted that the learned trial judge failed to consider the defence of the appellant. These submissions have no substance in our view. In considering the appellant's defence the learned trial judge said:-**

*"I disbelieve the case for the first accused which I regard as tissue of lies. .... the story put forth by the accused that 3rd P.W. is his enemy is untrue ..... I find as a fact that the accused did not own the pigs. .... His account of how he came by them is unsatisfactory and I have so rejected it. -- A bona fide belief by an accused that he has a legal claim to property is a good defence to charge of stealing. It is my view that his belief was not bona fide."*

**The third ground of appeal therefore fails.**

On the first and general ground the contention is that there was no evidence to show the part played by the appellant in the commission of the offence or that exhibits "F" and "F1" relate to counts 3 and 4. This submission lacks merit. There is ample evidence about how the appellant was found in possession of the pork and the evidence of P.W.1, P.W.2 and P.W.5 clearly connect exhibit "F" & "F1" with the charges under counts 3 and 4.

On the whole the appeal succeeds in part. We allow the appeal against convictions under counts 1 and 2. We accordingly set aside the convictions and sentences in that respect. With regard to the appeal against convictions on count 3 and 4 the appeal is devoid of merit and it is hereby dismissed. We affirm the convictions and sentences of 2 years imprisonment I.H.L. and 1 year imprisonment I.H.L. respectively which are to run concurrently.

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