

SUPREME COURT OF NIGERIA
14TH DECEMBER, 2001. SC. 278/2000
CORAM:- I. L. KUTIGI, U. MOHAMMED,
A. I. KATSINA-ALU, U. A. KALGO, E. O. AYOOLA, JJSC.

JIMOH AWOPEJO & 6 OTHERS APPLICANTS
V.
STATE RESPONDENT

***APPEAL** -Issues not before the court - Any finding made by the court on such issues - Is irrelevant*

***CRIMINAL PROCEDURE** - Alibi - Defence of- Was rightly rejected by court - Because of the credible witnesses that identified the appellants at the scene of crime - And the roles they played at the scene*

***Criminal PROCEDURE** - Charges - Criminal Procedure Rules 1970 - Abridgment of the provision of the Rules - Did not amount to a denial of right to fair hearing*

***CRIMINAL PROCEDURE** - Charges - Discrepancies between charge and evidence - The discrepancies did not mislead the appellants in any way - And was therefore not fatal*

***CRIMINAL PROCEDURE** - Contradictions in evidence - For the contradiction to affect the decision of court - It must be material and fundamental in the determination of guilt*

***CRIMINAL PROCEDURE** - Murder -Identification of the deceased - Where the identity of the deceased can be inferred from the circumstances of the case - There is no need to call the person who identified the corpse (11 the doctor - As witness*

***EVIDENCE** - Evaluation of evidence - Once the trial judge has*

properly considered the evidence - Style used in evaluating such evidence is not a matter to impugn

FACTS

A chieftaincy dispute over the stool of Bale of Oke-oyi town in Kwara State led to the death of one Alhaji Isaa Atanda. The government of Kwara State had made two conflicting announcements in September 1993 concerning the successor to the stool. This therefore polarized the community into two, each faction supporting one of the candidates announced by the government. An irate crowd visited the house of the father of the deceased and threw stones into the premises. When they came back the next day they were armed with guns and lethal weapons. On seeing them armed, the father of the deceased ran towards the house of his son Alhaji Isaa Atanda. He was pursued by the mob who came into the house and attacked Alhaji Isaa Atanda in the presence of his father and his wife. Alhaji Isaa Atanda collapsed and died in the room and his body was dragged out and stoned by the mob.

The father identified seven members of the mob who killed his son. They were therefore arrested and arraigned before the court for the offence of culpable homicide punishable with death. The High court found them guilty and sentenced each of the appellants to death. The appellants appealed to the Court of Appeal. The court dismissed the appeal and the appellants have therefore further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court below was right to have endorsed the trial court’s holding that the failure of the prosecution to elicit any evidence on the identification of the corpse of the deceased to the doctor that performed the postmortem examination was not fatal in the circumstances of this case.

2. Whether the Court below was right to have agreed with the trial court that the abridgment and failure of the prosecution to observe strictly the mandatory provisions of sub-rule 3(2) (b) of the Criminal Procedure (Application for Leave to prefer A charge in the High Court) Rules 1970 was not fatal to the trial of the appellants and whether the difference between the charge and the

evidence led was not fundamental to have vitiated the trial.

3. *Whether the Court below was correct to have agreed with the way and manner the trial court first reviewed, considered and accepted the case of the prosecution even before considering at all the defences of the appellants which led to a failure of justice and truncation of the appellants right to a fair hearing.*

4. *Whether the Court below acted properly in agreeing with the trial court that there were no material unexplained contradictions in the case of the prosecution, and by picking and choosing between the evidence of the prosecution witnesses.*

5. *Whether the Court below was right to have confirmed the decision of the trial court on the rejection of the alibi of the appellants which in effect put a higher burden of proof on the appellants.*

6. *Whether the Court below was right to have agreed with the trial court that the prosecution proved its case as enjoined by law inspite of all the errors highlighted in the prosecution s case."*

HELD:(Unanimously dismissing the appeal per lead judgment of **MOHAMMED JSC**)

Murder - Identification of deceased

1. In this submission Yusuf Ali, SAN is saying that the failure ofPW3 to state that he was the person who identified the corpse of the deceased to the Medical Officer is fatal to the prosecution's case. I do not think so. The facts of this case show that the identity of the deceased was not in doubt. The death occurred in a small community where all parties involved are known and could easily be identified. The deceased was a well-known personality in the community. (p. 3588 B)

Appeals - Issues not before the court

2. Coming back to the case in hand, this issue about the failure of the prosecution to elicit any evidence on identification of the corpse of the deceased to the doctor was not raised as an issue before the court below. Therefore any finding made by the learned Justice of

the Court of Appeal on that issue is irrelevant. (p. 3588 G)

Charges - Criminal Procedure Rules 1970

3. I do not see where such abridgment of the provisions of the Rules could amount to a breach of the appellants' right to fair hearing. The appellants raised no objection to the abridgment and as the learned counsel for the respondent, quite rightly pointed out, the abridgment had not occasioned any miscarriage of justice. Again, the respondent's counsel gave a convincing clarification on the so-called discrepancies in the evidence and the charge sheet on the date the deceased died. (p. 3589 D)

Charges - Discrepancies

4. I have read the charge and, in my respectful view, it was clear to all the appellants from the wordings of the charge that they stood charged for the offence of causing the death of Alhaji Issa Atanda. They all pleaded not guilty to the charge. They all knew Alhaji Issa Atanda and lived in the same village with him. I agree that none of them was misled in anyway by minor discrepancies in the charge on the date of the deceased death and the place his body was found after the heinous crime. The second issue is also resolved in favour of the respondent. (p. 3590 A)

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Evidence - Evaluation of evidence

5. The style used by learned trial judge in evaluating such direct evidence is not a matter to impugn. The essential aspect of the trial is that all evidence adduced much be considered before a judge concludes his judgment. In Adamu V. The State (1991) 6 SCNJ 33 at 40 this court per Belgore J.S.C, held:

"Trial judge has a duty to consider all the evidence before him the moreso in a criminal case where the guilt of the accused must be proved beyond reasonable doubt. S. 138 (1) Evidence Act Cap 112, Laws of the Federation of Nigeria 1990. The justice of a case and statutory requirements will not be met if the trial Court considers one side of the case only. Adequate consideration must

be given to both sides. In discharging this duty the judge must evaluate all the evidence. It is not the justice of a case if the judge without evaluating the evidence just holds that he believes one side and disbelieves the other, only evaluation will logically lead to his reasons for believing or disbelieving. Judges, being rational and objective persons, must differ in style. Some evaluate the evidence witness by witness; others issue by issue with the link of each witness with the issues, and then arrive at the conclusion. Which-ever style a judge is used to or adopts, the essential thing is that he considers all the evidence before him by evaluation before arriving at his conclusion which is the finding. The mere fact that he first evaluated the evidence of the prosecution before advertng to that of the defence is not evidence of bias or wrong evaluation. All the trial judge did in this case was to evaluate all the evidence before him; to my mind that is precisely what the law requires. “

My learned brother in the above extract from the judgment of Adamu v. The State (supra) has made a detailed legal exposition which answers the submissions of counsel in respect of both issues 3 and 4. (p 3590 D)

Criminal procedure - Contradictions in evidence

6. The court below, in my view, is quite correct in accepting, despite the minor contradictions and inconsistencies in the evidence of the prosecution, that the offence the appellants were charged with had been proved beyond any reasonable doubt. It is trite law that for a contradiction to be essential and affect the decision of a trial court such contradictions must be material and fundamental in the determination of the guilt of the accused. The contradictions must create doubt in the mind of the court to such a degree that the court believes that the doubt must be resolved in favour of the accused. (p. 3591 C)

Criminal procedure - Alihi - Defence of

7. It is quite clear that the trial court considered the plea of each appellant on the defence of alibi and quite correctly rejected it. The trial court had no problem in doing so because it believed the testimonies of

PW2, PW.3 and PW4. in which each of the appellants was identified at the scene of the crime and the role each played in attacking the deceased. The testimonies of those witnesses are convincing enough to help the court in reaching a conclusion that the defence of alibi was unsubstantiated. I affirm the decision of the court below in accepting that the trial court was right in rejecting the defence of alibi put up by each appellant. (p. 3591 F)

C NOTABLE POINT OF INTEREST

MOHAMMEDJSC

1. Medical evidence is not always essential to prove death

Our law reports are replete with authorities showing that medical evidence is not always essential to prove death. Where the victim dies in circumstances in which there is abundant evidence of the manner of death, medical evidence can be dispensed with. (p. 3588 C)

REPRESENTATION

Yusuf Ali SAN, with him are K. K. Eleja and A. M. Kayode for the Appellants.

Titus Olasupo Ashaolu, A/G Kwara State, with him, J. A. Mumuni, Principal State Counsel for the Respondent.

F CASES REFERRED TO

The V. The State (1992)5 NWLR (Pt. 224) 642 at 649

Adetola V. The State (1992) 4 NWLR (Pt. 235) 267 at 269 Umani

V. The State (1988) 1 NWLR (Pt. 70) 274

G Tonara Bakur v. The State (1965) N.M.L.R. 163

Bwashi V. The state (1972) 5 S.C. 93

Idemudia V. The State (1999) 7. N.W.L.R (Part 610) 202 at 216

Okoro v. The State (1988) 5 NWLR (Part 94) 255

Enewoh V. The state (1990) 4 NWLR (Part 145) 469

H Aruna v. State (1990) 6 NWLR (Pt. 155) 125 at 136

Adamu v The State (1991) 6 SCNJ 33 at 40

Rex v. Eronini 14 W.A.C.A. 366

Ayo Gabriel V. The State (1989) 5 NWLR (Pt. 122) 457 at 468 -469
Ogoala v. The State (1991) 2 NWLR (Pt. 175) 509 at 525

LEAD JUDGMENT BY MOHAMMED JSC

At the conclusion of the trial conducted by Olagunju J (as he then was), each of the appellants was convicted of the offence of culpable homicide punishable with death, contrary to section 221(a) of the Penal Code. The learned trial Judge thereafter sentenced each of the appellants to death.

Dissatisfied with the decision, the appellants appealed to the Court of Appeal. After reviewing the facts and the evidence and in a considered judgment, the Court of Appeal dismissed the appeal of each of the appellants.

The appellants have now come before this court appealing against the decision of the Court of Appeal in which it affirmed the conviction and sentence passed on each of them by the High Court.

The facts of the case are undisputed. A chieftaincy dispute over the succession to the stool of Bale of Oke-Oyi town led to the death of one Alhaji Issa Atanda. The Kwara State Government made two conflicting announcements on 28/9/93 and 29/9/93 concerning the successor to the stool. The Government carelessly announced two different persons for the same stool. The announcement polarized the small community into two, each faction supporting one of the candidates announced by the Government. Tension was high in the village. An irate crowd singing war songs visited the house of the father of the deceased and threw stones into the premises. They dispersed when it began to rain heavily. They came back the following day. This time they were armed with guns and lethal weapons. On seeing them armed, PW2, who was the father of the deceased, came out of his house and ran towards the house of his son, Alhaji Issa Atanda. The mob pursued him. He entered the house and met Alhaji Issa Atanda and his wife standing outside their room. The mob came into the house and attacked Alhaji Issa Atanda. Alhaji Issa Atanda, his father (PW2) and his wife (PW4) entered a room and locked the door. The mob broke the door, entered the room and savagely attacked Alhaji Issa Atanda in

the presence of his wife and father. Alhaji Issa Atanda collapsed and died in the room. The body was dragged out of the room and the irate mob threw stones on the corpse.

The father of the deceased identified seven members of the mob who entered the room and killed his son. They were arrested and arraigned before the court for the offence of culpable homicide punishable with death. As I mentioned earlier, in this judgment, the trial High Court found them guilty as charged and sentenced each of them to death. The convictions and sentences were affirmed by the Court of Appeal.

Learned counsel for the appellants, Yusuf Ali, SAN, identified six issues for the determination of this appeal. The issues are as follows:

“1. Whether the court below was right to have endorsed the trial court’s holding that the failure of the prosecution to elicit any evidence on the identification of the corpse of the deceased to the doctor that performed the postmortem examination was not fatal in the circumstances of this case.

2. Whether the court below was right to have agreed with the trial court that the abridgment and failure of the prosecution to observe strictly the mandatory provisions of sub-rule 3(2)(b) of the Criminal Procedure (Application for leave to prefer a charge in the High Court) Rules 1970 was not fatal to the trial of the appellants and whether the difference between the charge and the evidence led was not fundamental to have vitiated the trial.

3. Whether the court below was correct to have agreed with the way and manner the trial court first reviewed, considered and accepted the case of the prosecution ever before considering at all the defences of the appellants which led to a failure of justice and truncation of the appellants’ right to fair hearing.

4. Whether the court below acted properly in agreeing with the trial court that there were no material unexplained contradictions in the case of the prosecution, and by picking and choosing between the evidence of the prosecution witnesses.

5. Whether the court below was right to have confirmed the decision of the trial court on the rejection of the alibi of the

appellants which in effect put a higher burden of proof on the appellants.

6. *Whether the court below was right to have agreed with the trial court that the prosecution proved its case as enjoined by law inspite of all the errors highlighted in the prosecution's case".* B

The Solicitor-General of Kwara State who settled the respondents' brief, adopted the issues formulated by the appellants' counsel.

Learned counsel for the appellants opened his submission on the issue of identification of the corpse of the deceased to the doctor who performed an autopsy on the body of the deceased and referred C to the following observation made by Amaizu J.C.A. in his judgment:

"Exhibit 10 is a medical report which was issued by the doctor that performed the autopsy on the body of the deceased. The doctor did not give evidence in the Court below. He is dead. PW3 who was stated in the report to have identified the corpse to the doctor did not give evidence of the identification. There is therefore no nexus between the corpse of the deceased and Exhibit 10. D

It is to be appreciated however that the real purpose of identification of a corpse is to ensure that there is no miscarriage of justice. The identification is therefore necessary in order to avoid a situation where an accused may be convicted for the murder of a person who is alive. It has to be remembered that both parties agreed that Alhaji Issa Atanda is dead. Exhibit 8, 8A, 6, 9 & 9A the negative and print of the photographs of the deceased body confirm this. It is in evidence that he died F on the spot after he was attacked. It seems to me therefore that in the light of the evidence, which the learned trial Judge believed even if Exhibit 10 is expunged, it is not fatal to the prosecution's case. This is because the evidence of the prosecution from which the court decided the cause of death of the deceased showed unequivocally G the nexus between the death of the deceased and the unlawful acts of the appellants."

Yusuf Ali, SAN, argued that it is clear from the observation of the learned trial Judge that the doctor who wrote the medical report H Exhibit 10, did not give evidence before the trial court. PW3 who was stated in the exhibit to have identified the corpse to the doctor did not say a word on the point in his evidence. Learned counsel further stated

that there is no nexus between the corpse of the deceased and Exhibit 10. Yusuf Ali, SAN submitted that there must be certainty of the identification of the corpse of a deceased to the medical officer who performed the postmortem examination. He argued that it is the nominal requirement of the law to avoid miscarriage of justice.

In this submission Yusuf Ali, SAN is saying that the failure of PW3 to state that he was the person who identified the corpse of the deceased to the medical officer is fatal to the prosecution's case. I do not think so. The facts of this case show that the identity of the deceased was not in doubt. The death occurred in a small community where all parties involved are known and could easily be identified. The deceased was a well-known personality in the community. Our Law reports are replete with authorities showing that medical evidence is not always essential to prove death. Where the victim dies in circumstances in which there is abundant evidence of the manner of death, medical evidence can be dispensed with. *Tonara Bakuri v. The State* (1965) NMLR 163; *Bwashi v. The State* (1972) 6 SC 93. In a recent case decided by this court, *Idemudia v. The State* (1999) 7 NWLR (Pt.610) 202 at 216 Katsina-Alu JSC, held that the desirability to call as a witness in a murder trial the person who identified the victim's dead body to the doctor who performed the autopsy, is only in circumstances where the identity of the body examined by the doctor is shrouded in doubt. Where the identity of the deceased can be inferred from the circumstances of the case, then such direct evidence is not essential. - see *Okoro v. The State* (1988) 5 NWLR (Pt.94) 255 and *Enewoh v. The State* (1990) 4 NWLR (Pt.145) 469.

Coming back to the case in hand, this issue about the failure of the prosecution to elicit any evidence on identification of the corpse of the deceased to the doctor was not raised as an issue before the court below. Therefore any finding made by the learned Justice of the Court of Appeal on that issue is irrelevant.

The second issue questioned the failure of the trial court to comply fully with the requirement of section 3(2)(b) of the Criminal Procedure (Application for leave to prefer a charge in the High Court)

Rules, 1970. The prosecution abridged the provision of the rule by exclusion of the phrase “that the application shall include a statement that the evidence shown in the proofs will be evidence available at the trial and that the case disclosed by the proofs will be evidence available at the trial and that the case disclosed by the proofs is to the best of the knowledge, information and belief of the applicant, a true case”. The court below, referring to the above-alleged breach of the provision of the rule by the prosecution held:

“It does seem to me that it is too late for the appellants to raise this point. From the record, the appellants were not prejudiced in the trial by the abridgement of the provision by the prosecution in the charge. From the record also the trial Judge applied his mind to the omission in the charge and gave adequate consideration to the evidence of the prosecution and the defence.”

I do not see where such abridgment of the provisions of the rules could amount to a breach of the appellants’ right to fair hearing. The appellants raised no objection to the abridgement and as the learned counsel for the respondent, quite rightly pointed out, the abridgment had not occasioned any miscarriage of justice. Again, the respondent’s counsel gave a convincing clarification on the so called discrepancies in the evidence and the charge sheet on the date the deceased died. The evidence shows that the event which culminated in the murder of the deceased, started on 29th September and reached its climax on 30th September 1993 when the deceased was murdered. The respondent’s counsel referred to the case of Rex v. Eronini 14 WACA 366 and submitted that it is not compulsory for the prosecution to prove the precise date an offence was committed. It is sufficient to give a date without substantial variance with the real date.

The appellants’ counsel further argued that the discrepancies highlighted between the charge and the evidence led by the prosecution witnesses are weighty and serious enough to render the trial void. He further submitted that the framing of an accurate and precise charge is the basic desideratum of a valid criminal charge. See Aruna v. State

(1990) 6 NWLR (Pt.155) 125 at 136.

I have read the charge and, in my respectful view, it was clear to all the appellants from the wordings of the charge that they stood charged for the offence of causing the death of Alhaji Issa Atanda. They all pleaded not guilty to the charge. They all knew Alhaji Issa Atanda and lived in the same village with him. I agree that none of them was misled in anyway by minor discrepancies in the charge on the date of the deceased death and the place his body was found after the heinous crime. The second issue is also resolved in favour of the respondent.

In considering the submissions of learned counsel for the appellants on issue 3, I must refer to the overwhelming evidence against the appellants. The trial court relied on the evidence, particularly of PW2 and PW4, the father and wife respectively of the deceased. They were present together with the deceased in a room when he was attacked and killed by the appellants. PW2 identified each of them with their names and nicknames and described how his son met his death. **The style used by learned trial Judge in evaluating such direct evidence is not a matter to impugn. The essential aspect of the trial is that all evidence adduced must be considered before a Judge concludes his judgment. In Adamu v. The State (1991) 4 NWLR (Pt.187) 530; (1991) 6 SCNJ 33 at 40 this court per Belgore, J.S.C. held:**

“Trial Judge has a duty to consider all the evidence before him, the moreso in a criminal case where the guilt of the accused must be proved beyond reasonable doubt. S. 138 (1) Evidence Act Cap. 112, Laws of the Federation of Nigeria 1990. The justice of a case and statutory requirements will not be met if the trial court considers one side of the case only. Adequate consideration must be given to both sides. In discharging this duty the Judge must evaluate all the evidence. It is not the justice of a case if the Judge without evaluating the evidence just holds that he believes one side and disbelieves the other, only evaluation will logically lead to his reasons for believing or disbelieving. Judges, being rational and objective persons, must differ in style. Some evaluate the evidence witness by witness; others issue by issue with the link

*of each witness with the issues, and then arrive at the conclusion. Whichever style a Judge is used to or adopts, the essential thing is that he considers all the evidence before him by evaluation before arriving at his conclusion which is the finding. The mere fact that he first evaluated the evidence of the prosecution before advert- B
ing to that of the defence is not evidence of bias or wrong evaluation. All the trial Judge did in this case was to evaluate all the evidence before him; to my mind that is precisely what the law requires."*

My learned brother in the above extract from the judg- C
ment of Adamu v. The State (supra) has made a detailed legal exposition which answers the submissions of counsel in respect of both issues 3 and 4. The court below, in my view, is quite correct in accepting, despite the minor contradictions and in- D
consistencies in the evidence of the prosecution, that the of- fence the appellants were charged with had been proved be- yond any reasonable doubt. It is trite law that for a contradiction to be essential and affect the decision of a trial court such con- E
tradictions must be material and fundamental in the determina- tion of the guilt of the accused. The contradictions must create doubt in the mind of the court to such a degree that the court believes that the doubt must be resolved in favour of the ac- cused.

The submission of counsel on issue 5 dealt with the defence of F
alibi raised before the trial court. Learned counsel for the appellants submitted that the defence of alibi was not properly treated and that the lower court was in error to have upheld the decision of the trial court. It is quite clear that the trial court considered the plea of G
each appellant on the defence of alibi and quite correctly re- jected it. The trial court had no problem in doing so because it believed the testimonies of PW2, PW3 and PW4 in which each of the appellants was identified at the scene of the crime and the role each played in attacking the deceased. The testimo- H
nies of those witnesses are convincing enough to help the court in reaching a conclusion that the defence of alibi was unsub- stantiated. I affirm the decision of the court below in accepting that the trial court was right in rejecting the defence of alibi put

up by each appellant.

B The last issue is a repetition of the arguments made by the learned counsel for the appellants in issue 1 where he questioned the non-compliance with Criminal Procedure (Application for Leave to prefer a charge in the High Court Rules, 1970). It also dealt with the way and manner the trial court analysed the contradictions in the evidence adduced by the prosecution. He argued that the court below was wrong to affirm such decisions. This is a repetition of what I have considered earlier in my judgment and as nothing new has been added C to the earlier submission I will not repeat what I considered above.

D In sum, these appeals have failed and they are dismissed. The decision of the Court of Appeal affirming the convictions and sentences passed by the trial court on each appellant is hereby further confirmed.

KUTIGI JSC

E I have had a preview of the judgment just read by my learned brother Mohammed, J.S.C. I agree with his reasoning and conclusions. I find no merit in the appeals lodged by the appellants herein. I dismiss each and everyone of them and confirm the decisions of both the trial High Court and the Court of Appeal.

F

KATSINA-ALU JSC

G I have had the advantage of reading in draft the judgment delivered by my learned brother Uthman Mohammed JSC in this appeal. I agree with it, and for the reasons he gives, I too would dismiss the appeal and affirm the decision of the Court of Appeal.

KALGO JSC

H I have had a preview of the judgment just delivered by my learned brother Mohammed JSC in this appeal and I entirely agree with the reasoning and conclusions reached therein.

The main issues raised by the appellants' counsel for the determination of this court touched on identification of the corpse of the victim of the offence, discrepancies in the evidence of the prosecution and alibi raised by the appellants in their defences. My learned brother has in my respectful view, painstakingly considered these issues in the light of the evidence available on the record and resolved them in favour of the prosecution (respondent). I have also looked at the whole evidence adduced at the trial and found, in the circumstances of this case, that the deceased was properly identified as the victim of the offence and the few discrepancies in the evidence of the prosecution were not material as to affect the conviction of the appellants or raise any doubt in the mind of the court in relation thereto. See *Ayo Gabriel v. The State* (1989) 5 NWLR (Pt.122) 457 at 468-469, *Ogoala v. The State* (1991) 2 NWLR (Pt.175) 509 at 525.

On the issue of alibi raised by the appellants, I have no doubt in my mind that the credible evidence of PW2 and PW4 accepted and believed by the learned trial Judge identifying the appellants who hitherto were very well known to these witnesses, fixed the appellants at the scene of the crime at the material time and completely destroyed the defence of alibi. See *Ibe v. The State* (1992) 5 NWLR (Pt.244) 642 at 649; *Adetola v. The State* (1992) 4 NWLR (Pt.235) 267 at 269; *Umani v. The State* (1988) 1 NWLR (Pt.70) 274.

For the above and the more detailed reasons given in the leading judgment of my learned brother Mohammed JSC, I also find no merit in this appeal. I accordingly dismiss it and affirm the decision of the Court of Appeal and the conviction and sentence passed on the appellants.

AYOOLA JSC

I have had the privilege of reading in advance the judgment delivered by my learned brother, Mohammed, J.S.C. For the reasons he gives, I too would dismiss the appeal.