

SUPREME COURT OF NIGERIA
11TH MAY, 2001. SC. 199/2000
CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI,
U. MOHAMMED, O. ACHIKE, E. O. AYOOLA, JJSC.

1. MONDAY ODU APPELLANTS
2. IKPONMWOSA ERHUMWENSE
V.
STATE RESPONDENT

***APPEALS** - Issue - Which does not relate to any of the grounds of appeal - Such issue cannot be argued and is incompetent (H 5)*

***CRIMINAL PROCEDURE** - Alibi - Failure to investigate - Consequence - Where there is positive evidence which cancels the alibi - Failure to investigate the alibi - Would not be fatal to conviction (H 1)*

***CRIMINAL PROCEDURE** - Alibi - Onus - Of establishing the defence - Is on the accused - Even if the police has failed to investigate the assertion (H 2)*

***CRIMINAL PROCEDURE** - Proof beyond reasonable doubt - Where the evidence against each of the accused persons is overwhelming - And there is no special ground which would establish any doubt as to their guilt - Prosecution has proved its case beyond reasonable doubt (H 4)*

***MURDER** - Self Defence - In a hand to hand fight - Where the accused used a knife and stabbed the other who later died - Self defence is negatived (H 3)*

FACTS

In the High Court of Edo State, the appellants were charged for the offences of conspiracy and murder of one Gregory Iyoman. There are two versions of events leading to the death of the deceased. The prosecution described what happened during the encounter through the

testimonies of PW1 and PW4 as follows: The 1st and 2nd appellants had seized the cap and wrist watch of the deceased. Whilst PW1 and the brother of the deceased (PW4) were playing football on Ivbitor Primary School ground their attention was drawn to an incident where the deceased was trying to retrieve his cap and wrist watch from the 2nd appellant. The 2nd appellant was at that time wearing the cap on his head. The 1st appellant and the 3rd accused (who was discharged at the High Court) were present at the scene. The 3rd accused kicked and slapped the deceased. He also used his stick and kicked the deceased with it. The 1st appellant brought out a dagger and gave it to the 2nd appellant who then stabbed the deceased with it. The deceased fell down. P.W. 4 confronted the 2nd appellant. The 2nd appellant used the same knife and stabbed him (PW4) on the back. P.W. 1 tried to stop the 2nd appellant from inflicting further injuries on P.W. 4. He too was cut on the right thumb. The 1st appellant and the 3rd accused thereafter ran away from the scene. The 2nd appellant threw away the dagger and ran. PW1 and PW4 ran after him and held him.

The 1st appellant in his own defence denied the charge. He claimed to have travelled to Kaduna at the time of the incident to see his father a serving soldier at Kaduna Military Cantonment. When he eventually returned to Benin he reported himself to the police when he learnt the police was looking for him. He was not present during the fighting and did not take part in the fight. He did not carry any knife or dagger used in killing the deceased. The 2nd appellant in his own defence alleged that he was attacked by a group of boys which included PW4 and the deceased. He alleged that PW4 cut off his wrist watch with a knife and slapped him. The other boys present in the group joined in beating him while the deceased hit him on the head with a piece of plank and blood came out.

At the end of trial and in a considered judgment the learned trial judge found each of the appellants guilty and convicted them for the offences of conspiracy and murder. Their appeal to the Court of Appeal Benin Division was dismissed. They have further appealed to the Supreme Court. The 1st appellant raised two issues while the 2nd appellant

raised three issues. The respondent raised issues similar to the issues raised by the appellants. On the whole, the appeal was decided on three issues.

ISSUES FOR DETERMINATION

“(1) Whether having regard to the evidence before the court, the Learned Justices of the Court of Appeal were right in holding that the defence of alibi put up by the 1st Appellant had been dislodged by the prosecution

(2) Whether having regard to the evidence the prosecution proved its case beyond reasonable doubt

(3) Whether having regard to the circumstances of the case, the Court of Appeal was right to have held that the defence of provocation, self-defence and accident did not avail the 2nd appellant (from Ground 1 and 2).

HELD (Unanimously dismissing the appeal summarily for reasons for judgment by **MOHAMMED JSC**)

Alibi - Failure to investigate

1. Although, there are occasions on which failure to check an alibi may cast doubt on the reliability of the case for the prosecution, yet where there is positive evidence which cancels the alibi, the failure to investigate the alibi would not be fatal to conviction. (p. 1557 H)

Alibi - Onus

2. The onus of establishing alibi, being a matter within the personal knowledge of an accused lies on him. It is not enough for the accused to say to the court that I was at a particular place away from the scene of the crime he has to prove his assertion. Even if the police have failed to investigate such assertion, the accused has the onus of adducing evidence on which he relies for his defence of alibi. (p. 1558 A)

Murder - Self defence

3. In a hand to hand fight where the accused used a knife and stabbed the other who later died, self defence is negatived. I do not see any

apprehension of death or grievous hurt in this incident for the 2nd appellant to use a dagger and stab the deceased in the ribs. The 2nd appellant received no injuries and was unable to show the trial court any on his person. In these circumstances the assault (if any) from the deceased on B the appellant was not such as to cause reasonable apprehension of death or grievous harm. *Bassey V. The Queen* (1963) 1 All NLR 280. (p. 1559 A)

C ***Proof beyond reasonable doubt***

4. Both appellants raised issues of proof beyond reasonable doubt. It is trite law in a criminal prosecution that the case must be proved beyond reasonable doubt. I agree with both the trial High Court and the Court of Appeal that PW1 and PW4 were witnesses of truth and the fact that they D arrested the 2nd appellant at the scene of the crime is enough to rely on their testimonies. Learned respective counsel for the appellants have not succeeded in identifying any special ground which would establish any doubt as to the guilt of the appellants. The evidence against each of them E is overwhelming. (p. 1559 C)

Appeals - Issue

5. Where an issue formulated for the determination of appeal does not F relate to any of the grounds of appeal such issue is unarguable and incompetent. (p. 1559 F)

REPRESENTATION

G E. Imadegbelo; J.O. Bamidele, with him, for the 1st Appellant.
M.O. Sagay, for the 2nd Appellant.
Respondent not represented.

CASES REFERRED TO

H Ozaki v. The State (1990) 1 NWLR (Pt.24) 92
Esangbedo v. The State (1989) 4 NWLR (Part 113) 57 at 70
Patrick Njovens & Ors. v. The State (1973) 5 S.C. 17
Akpan v. The State (1994) 9 NWLR (pt. 368) 347

Mohammed Garba v. The State (2000) 77 L.R.C.N. 1126

LEAD REASONS FOR JUDGMENT BY MOHAMMED JSC

On 15th February 2001, this court heard the 1st and 2nd appellants' appeal from the judgment of the Court of Appeal, Benin Division, dismissing their appeals from the decision of the High Court, Edo State. After reading the respective briefs of counsel for the appellants and the respondent and listening to the oral arguments in elaboration of points made in those briefs this, court dismissed the appeals of the appellants and announced that reasons would be given later. The following are my reasons:

Before I go into the details of this judgment it is pertinent to set down, rather briefly, the facts of this case. The 1st and 2nd appellants had seized the cap and wrist watch of Gregory Iyonmane, the deceased. On the 12th of June, 1994, whilst PW1 and the brother of the deceased (PW4) were playing football on Ivbitor Primary School ground their attention was drawn to an incident where the deceased was trying to retrieve his cap and wrist watch from the 2nd appellant. The 2nd appellant was at that time wearing the cap on his head. The 1st appellant and the 3rd accused (who was discharged at the High Court) were present at the scene. The 3rd accused kicked and slapped the deceased. He also used his stick and hit the deceased with it.

The 1st appellant brought out a dagger and gave it to the 2nd appellant who then stabbed the deceased with it. The deceased fell down. PW4 confronted the 2nd appellant. The 2nd appellant used the same knife and stabbed him (PW4) on the back. PW1 tried to stop the 2nd appellant from inflicting further injuries to PW4. He too was cut on the right thumb. The 1st appellant and the 3rd accused thereafter ran away from the scene. The 2nd appellant threw away the dagger and ran. PW1 and PW4 ran after him and held him.

The trial opened on 18th September, 1996. The prosecution called seven witness to prove their case against the five accused persons. At the close of the prosecution's case a no case submission was made in respect of the 4th and 5th accused persons. The court in its ruling

sustained the submission and discharged them. The 1st, 2nd and 3rd accused were called upon to open their respective defences. At the end of the trial and in a considered judgment the learned trial judge concluded as follows:

B *“I therefore find the 1st accused person guilty of conspiracy in Count 1 of the charge and he is convicted. I find the 2nd accused person guilty of conspiracy in Count 1 and he is convicted. I find the 1st accused guilty in Count 2 of the murder of Gregory Iyomane and he is convicted. C The charge in both counts, has not been proved sufficiently against the 3rd accused person. In accordance with Section 246 of the Criminal Procedure Law, the 3rd accused person is discharged and acquitted”.*

D Dissatisfied with the judgment the appellants appealed to the Court of Appeal. The court below considered all the issues raised in the appeal and dismissed it. The appellants have finally come before this court contesting the dismissal of their appeal by the Court of Appeal.

Learned counsel for the 1st appellant identified the following two issues for the determination of 1st appellant’s appeal.

E *“(1) Whether having regard to the evidence before the court, the Learned Justices of the Court of Appeal were right in holding that the defence of alibi put up by the 1st Appellant had been dislodged by the prosecution.*

F *(2) Whether having regard to the evidence the prosecution proved its case beyond reasonable doubt against the 1st appellant”.*

The issues formulated by the learned counsel for the 2nd appellant read as follows:

G *“1. Whether the upholding by the Court of Appeal of the sentence passed on the 2nd appellant by the trial High Court when the prosecution failed to prove its case beyond reasonable doubt did not occasion miscarriage of justice (from Grounds 2).*

H *2. Whether having regard to the circumstances of the case, the Court of Appeal was right to have held that the defence of provocation, self-defence and accident did not avail the 2nd appellant (from Ground 1 and 2).*

3. Whether the sentence passed on the 2nd appellant by the trial

High Court was not void having regard to the fact that the 2nd appellant was not convicted by the High Court of the offence of murder”.

The respondent’s counsel identified issues similar to the issues raised by the appellants.

I will start with the issue of alibi. The 1st appellant in his statement B to the police, Exhibit G, stated as follows:

“...I remember that on 13/6/94, I travelled to Kaduna to see my father, Odu Peter, a serving soldier at Kaduna Military Cantonment. I returned to Benin on 23/2/95 and when people told me that the police was (sic) looking for me, I reported myself to the police. I did not take part in any fight between Ikponwosa or any other person or persons on 14/6/94. I did not carry any knife or dagger used in killing Gregory Iyonmane. I was not present during the fighting...”. C

In his testimony the 1st appellant repeated the same story that he D was in Kaduna from 13/6/94 to 23/2/95. Learned counsel for the 1st appellant argued that this evidence of alibi was not investigated by the police. Counsel submitted that the police are duty bound to investigate the defence of alibi once promptly and properly raised. He referred to **Ozaki V. The State** (1990) 1 NWLR (Pt. 24) 92; **Esangbedo V. The State** E (1989) 4 NWLR (Part 113) 57 at 70.

Learned trial judge considered the issue of alibi in her judgment and agreed with the defence that although the 1st appellant raised the issue F of alibi in his cautioned statement the police did not investigate it. The learned trial judge however, stated that failure to investigate the defence of alibi notwithstanding there was direct evidence, which she believed, that the 1st appellant was present at the scene of the crime as was averred by both PW1 and PW4. The Court of Appeal agreed with the learned trial G judge and held that similar situation had arisen in the case of **Patrick Njovens & Ors. V. The State**. (1973) 5 S.C. 17 where it was held that if the prosecution adduced sufficient and accepted evidence to fix the person at the scene of crime at the material time his alibi is thereby logically H and physically demolished.

Although, there are occasions on which failure to check an alibi may cast doubt on the reliability of the case for the prosecution,

yet where there is positive evidence which cancels the alibi, the failure to investigate the alibi would not be fatal to conviction. I do not have to repeat what this court had said in several decisions, but the onus of establishing alibi, being a matter within the personal knowledge of an accused lies on him. It is not enough for the accused to say to the court that I was at a particular place away from the scene of the crime he has to prove his assertion. Even if the police have failed to investigate such assertion, the accused has the onus of adducing evidence on which he relies for his defence of alibi. The issue of the defence of alibi has failed.

Learned Counsel for the 2nd appellant raised the issue of provocation, self defence and accident and submitted that such defences availed the 2nd appellant. Counsel referred to the testimony of the 2nd appellant wherein he said;

“I remember the 14th of June, 1994. I was attending lectures off Dumez road at Alohan Street and after my first subject Agric. Science, left the room and sat with the woman selling cakes. Then I saw a group of boys coming towards me. I now know their names to be June, one Macdonald, one Arthur and one Greg and others that I do not know their names and also Ehigie Ikponmwosa. Arthur is the 4th P.W. as we all stood face to face, the one called Arthur pulled out a knife and cut off my wrist watch and it fell down. As I was about to pick up the wrist watch, Arthur slapped me. All the others present in the group that I named also joined in beating me. Then they dragged me to Alohan Street. Gregory Ayonmano hit me on the head with a piece of plank and blood came out”.

Learned Counsel submitted that PW1 told the trial court that PW4 gripped the 2nd appellant during the encounter. In such circumstances the teenager was in reasonable apprehension of losing his life. Under such circumstances the 2nd appellant was justified to defend himself.

There are two versions of events leading to the death of the deceased. The prosecution described what happened, during the encounter, through the testimonies of PW1 and PW4. The 2nd appellant gave a contrary picture of the events. The learned trial judge preferred the version as told by the prosecution. From such evidence the defences of

provocation, self defence or accident cannot avail the 2nd appellant. **In a hand to hand fight where the accused used a knife and stabbed the other who later died, self defence is negated. I do not see any apprehension of death or grievous hurt in this incident for the 2nd appellant to use a dagger and stab the deceased in the ribs. The 2nd appellant received no injuries and was unable to show the trial court any on his person. In these circumstances the assault (if any) from the deceased on the appellant was not such as to cause reasonable apprehension of death or grievous harm. Bassey V. The Queen (1963) 1 All NLR 280.**

Both appellants raised issues of proof beyond reasonable doubt. It is trite law in a criminal prosecution that the case must be proved beyond reasonable doubt. I agree with both the trial High Court and the Court of Appeal that PW1 and PW4 were witnesses of truth and the fact that they arrested the 2nd appellant at the scene of the crime is enough to rely on their testimonies. Learned respective counsel for the appellants have not succeeded in identifying any special ground which would establish any doubt as to the guilt of the appellants. The evidence against each of them is overwhelming. This issue has also failed.

I agree with the respondent's counsel that the 3rd issue formulated by the 2nd appellant, in this appeal, does not relate to or arise from the grounds of appeal he filed for the prosecution of this appeal. **Where an issue formulated for the determination of appeal does not relate to any of the grounds of appeal such issue is unarguable and incompetent see Akpan V. The State (1994) 9 NWLR (Pt. 368) 347; Mohammed Garba V. The State (2000) 77 L.R.C.N. 1126.**

It is for the foregoing reasons that I find no merit in this appeal by the two appellants. I therefore dismiss it and uphold the decision of the Court of Appeal which affirmed the conviction and sentence of the High Court on the appellants.

KARIBI-WHYTEJSC

On the 15th February, 2001, after hearing learned Counsel we

summarily dismissed the appeal of the appellants against their conviction by the Court of Appeal, Benin Division for the offences of conspiracy and murder. We affirmed the conviction and stated that we shall give our reasons today.

B I have read the reasons given by my learned brother Uthman Mohammed, JSC in this appeal. I regard his reasons as adequately covering the issues argued before us and in support of our decision. I adopt the reasons so lucidly stated.

C —————
KUTIGI JSC

We dismissed the appeals brought by the Appellants to this court on 15/2/2001 and said that we shall give our reasons for doing so today.

D I read before now the Reasons for Judgment just delivered by my learned brother Mohammed, JSC. I agree with him. The appeal lack merit and deserved to be dismissed. The convictions and sentences are hereby further confirmed.

E —————
ACHIKE JSC

On the 15th February, 2001, after hearing learned counsel we summarily dismissed the appellants' appeal from the decision of the Court of Appeal, Benin Division and stated that reasons would be given today.

F I have had the privilege of reading in draft the reasons given by my learned brother, Uthman Mohammed, JSC in the appeal. I agree with his reasons which I regard to be in support of our decision and I respectfully adopt them as mine.

G —————
AYOOLA JSC

H On 15th Febuary 2001 this Court dismissed the 1st and 2nd appellants` appeal from the decision of the Court of Appeal with reasons to be given later. I have had the privilege of reading in draft the reasons for judgement delivered by my learned brother, Uthman Mohammed, JSC. I agrree with the reasons he gives and adopt them as mine. I do not wish to add anything further.