

SUPREME COURT OF NIGERIA
9TH MAY 2008 SC. 111/2007
CORAM:- S. U. ONU, A. I. KATSINA-ALU, D.
MUSDAPHER, A. G. OGUNTADE, S. A. AKINTAN, JSC

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|-----------|------------------|
| ABU ISAH | APPELLANT |
| V. | |
| THE STATE | RESPONDENT |

CRIMINAL PROCEDURE - Identity of accused - Proof by recognition - Failure to promptly reveal identity - Effect of - Unless satisfactory explanation is given - Delay in mentioning names of accused - Recognized in the commission of offence - Makes identity evidence suspect (H1)

CRIMINAL PROCEDURE - Evidence - Evaluation of - Where name of accused - Was belatedly mentioned - Duty of court - In evaluating such belated identity evidence - Is to take the lateness into consideration - Or it would amount to non-direction - On material evidence (H2)

CRIMINAL PROCEDURE - Evidence - Proof - Probative value - Where circumstances make a piece of evidence suspect - As in the instant case - There is need for corroboration of such evidence - For it to sustain a conviction - Corroboration was missing in the instant case (H3)

FACTS

The Appellant was arraigned before a Kogi State high court, as the 2nd accused along with five others on a two-count charge of criminal conspiracy and armed robbery punishable under section 97(1) and 298(c) of the Penal Code respectively. The case of the prosecution is that the six accused persons committed three armed robberies in all. One was on 9th August, 2001 and two were on 11th August 2001. The two victims of the robberies are Paul Nzewi (P.W.1) and Benneth Onwugbufor (P.W.2). According to P.W.1, on 9th August 2001, at about 1.50 am, a gang of robbers had broken into

his room while he was sleeping, armed with gun, matchet and dangerous weapons. They robbed him of N42,000 before they left. Two days later, the same set of robbers returned and this time robbed him of N15,000. On neither of these occasions were the robbers masked and with the aid of the light in the room, P.W.1 was able to see and recognize some of the robbers including the Appellant right from the robbery of 9th August 2001. It was after the robbery of 11th August 2001, at the house of P.W.1 that the robbers went over to the house of P.W.2, which was in the same compound with that of P.W.1, and also robbed him. According to P.W.2, before the robbers entered his apartment, he had been awakened by gun shots and upon peeping through the window to know what was wrong, he had seen the robbers approaching. He too recognized some of them immediately, including the Appellant.

However, though both P.W.1 and P.W.2 made report to the police following each respective robbery attack on them, none of them mentioned to the police that they knew any of the robbers. Not even to any of the neighbours who came to commiserate with them after the incident did they moot that they knew any of the robbers. Some weeks later, after the police had made some random arrest, they had invited P.W.1 and P.W.2 to state C.I.D Lokoja for an identification parade. There they identified two of the accused persons, including the Appellant. After trial, the learned trial judge found each of the accused persons guilty as charged. Each of them was sentenced to seven years imprisonment on the count of robbery, and N3,000.00 fine, or one year in lieu on the count of conspiracy. Dissatisfied, Appellant had appealed against his conviction to the Court of Appeal but his appeal was dismissed. Hence he has brought this further appeal to the Supreme Court. His contention in this court as in the Court of Appeal is that there was insufficient credible evidence to link him to the robbery.

ISSUES FOR DETERMINATION

“1. Whether the Honourable Court of Appeal was right when it held that there was adequate identification evidence to arrive to an unequivocal conclusion that the appellant committed the robberies?”

2. Whether considering the circumstances of this case the Honourable Court of Appeal was right to have upheld the conviction

and sentencing of the appellant by the trial court on the evidence before it?"

HELD (Unanimously allowing the appeal per **AKINTAN JSC**)

Identity of accused - Proof by recognition

1. When they first reported the matter at the Police Station shortly after each robbery incident, none of the two men mentioned to the Police that they knew any of the robbers that raided their houses.

It was after about five days later that they mentioned the names of some of the robbers, including that of the appellant.

No reason was given for withholding such a vital information to the Police for so long. The immediate effect of withholding such information from the Police was that the Police was left in the wild. They had to embark on organizing an identification parade in which the appellant and his co-accused were identified during such identification parade.

Although it has been canvassed on behalf of the respondent that there was no law prescribing the time limit within which such information should be disclosed to the Police, but absence of such law has not prevented the court from taking an adverse stand against such an unexplained delay. The position of the law therefore is that when eyewitness omits to mention at the earliest opportunity the names of the persons he said he saw committing an offence, a court must be careful in accepting his evidence given later and implicating other persons, unless a satisfactory explanation is given as to why the names were not mentioned before or at the earliest opportunity.
(p. 2032 F)

Evidence - Evaluation of - Belated mention of name of accused

2. If a complainant or an eyewitness to a crime knew the accused persons before the commission of a crime and had omitted to mention their names to the Police when he made his complaint or written statement to the Police, as in the instance case, failure by the trial court to take that omission into consideration before deciding whether the evidence of such a complainant or witness against the accused persons was true or not would amount to a non-direction on material evidence in favour of such accused persons and such non-direc-

tion would have necessarily occasioned a miscarriage of justice.
(p. 2033 C)

Evidence - Proof - Probative value

B 3. An accused person would under such circumstance be entitled to an acquittal and discharge.

As mentioned earlier above, the appellant pleaded not guilty to the charge. He denied the allegations made against him that he took part in any armed robbery. He told the Police at the earliest opportunity that he was in his house sleeping with his wife at the material time. His wife testified as D.W.3 and confirmed her husband's alibi. The Police conducted a search of the appellant's house shortly after his arrest and found nothing incriminating the appellant during the search. The final result was that the prosecution could not produce any other evidence that linked the appellant with the commission of the crime apart from the belated identification of the appellant by the two witnesses (PW.1 and PW.2). In other words, the evidence of the two witnesses was not corroborated by any other evidence. It was clearly unsafe to entirely rely on such evidence in convicting an accused person.

E In the result, I hold that the conviction of the appellant based solely on the unreliable evidence of the two aforementioned witnesses should not be allowed to stand. There is therefore merit in the appeal and it is accordingly allowed. (p. 2033 E)

REPRESENTATION

Chukwuma-Machukwu Ume, (with him; C. U. Ekomaru, I. M. Njaka, C. I. Mbaeri and U. J. Chukwu), for the Appellant.
G Joe Abraham, Attorney-General Kogi State, (with him; A. B. Akogun, DPP Kogi State, and K. A. Sule, (Asst. Dir. Civil Lit. Kogi State), for the Respondent.

STATUTE REFERRED TO

H Penal Code Law of Northern Nigeria, ss. 97(1) and 298 (c)

LEAD JUDGMENT BY AKINTAN JSC

The appellant, Abu Isah, was arraigned before a Kogi State

High Court as 2nd accused along with five others on a two count charge of criminal conspiracy and armed robbery punishable under Sections 97(1) and 298(c) of the Penal Code respectively. The particulars of the offence are that the said appellant conspired with the other co-accused named in the charge of conspiracy to commit armed robbery and that while armed with guns, machetes and cutlasses, he along with his co-accused, attacked and robbed one Paul Nzewi of N52,000 and Benneth Onwugbufor of N68.000. B

The appellant and his co-accused persons pleaded not guilty to each count of the charge. The trial then took place at Okene High Court before Olusiyi, J. The prosecution led evidence in support of its case and each of the accused persons led evidence in their respective defence. At the conclusion of the trial, the learned trial Judge, in his reserved judgment delivered on 24th June, 2004, found each of the accused persons guilty as charged. Each of them was sentenced to seven years imprisonment on the count of robbery and N3,000.00 fine or one year in lieu on the conspiracy count. D

The appellant was dissatisfied with his conviction and his appeal to the Court of Appeal was dismissed. The present appeal is from the judgment of the Court of Appeal. The parties filed their respective Briefs of Argument in this court. The appellant formulated the following two issues as arising for determination in the appeal :- E

“1. Whether the Honourable Court of Appeal was right when it held that there was adequate identification evidence to arrive to an unequivocal conclusion that the appellant committed the robberies?” F

2. Whether considering the circumstances of this case the Honourable Court of Appeal was right to have upheld the conviction and sentencing of the appellant by the trial court on the evidence before it?” G

Two similar issues were formulated in the respondent’s Brief. I therefore do not consider it necessary to reproduce them.

The facts of the case are that the appellant and five others who were tried along with him committed three armed robberies in all. One was on 9th August, 2001 and two on 11th August, 2001. H The two victims of the robberies are Paul Nzewi (who testified as P.W.1) and Benneth Onwugbufor (who testified as P.W.2). P.W. 1 told the trial court that on 9th August, 2001, at about 1.50 a.m while

sleeping in his room in his house in Okene, he heard a knock on his door. When he did not respond, the gang of robbers forced the door open and about three men gang of robbers came inside. They were armed with gun, matchet and dangerous weapons. They struck him on the head and told him to lie down. They forced him to part with
 B N42,000 before they left. He told the court that he was able to identify one Monday, Abu Awe, a panel beater who had a workshop directly opposite riverside restaurant, Lagos Road, Okene and one Ojo Mudu of Iruvucheba, a former driver to riverside restaurant,
 C Lagos Road, Okene as the three robbers.

The same set of armed robbers again came to the house of P.W.1 on 11th August, 2001. They forced the door open and they were similarly armed with a gun, matchet and cutlass. Upon entry they forced the witness to part with N15,000.00 that was with him
 D that night. But the witness (P.W.1) told the court under cross-examination that:-

*"The accused persons were arrested after the second armed robbery incident. When I made the first report to the Police, I did not mention the names of the accused persons. The accused persons
 E were not masked when they robbed me. I knew the accused person before the incident.*

*The names I mentioned in my statement to the police were Monday, Abu and Ojo Audu in respect of the first robbery incident. In respect of the second robbery incident, I mentioned Monday and
 F Ojo Audu. The person I referred to as Ojo Audu is the 3rd accused person before the court. The person I referred to as Abu in my statement to the Police is the 2nd accused person before the court.*

*When my neighbours came to take me to the hospital, I did
 G not tell them about the identity of the robbers.*

I was invited to the State C.I.D, Lokoja where I identified the two accused persons now before the court and the other accused persons who are at large as the persons who robbed me."

There was no re-examination and as such the witness did not
 H give any reason for not disclosing the names of the robbers to the Police when he reported the incident.

Benneth Onwugbufor. (P.W. 2) was the second victim of the robberies. He was living in the same address as P.W.1. He confirmed

that the robbers visited P.W.1 on their first call on 9th August, 2001. But when they returned on 11th August, 2001 at about 2.30 am while he was sleeping in his room, he was woken up by sounds of gun shots fired by the robbers. He got up and peeped through the window in his room and he saw the robbers. He said he was able to recognize some of them. Among those he could recognize were Monday, James, Ojo, Hassan, German, an electronic repair, and Abu, the 2nd accused person who is the present appellant. B

The robbers came to his apartment upstairs in the house. They broke the door into his room and robbed him of N68.000 he had with him in the room that night before they left. He said further that it was some weeks after the incidents that P.W.1 and himself were invited to the State C.I.D, Lokoja for an identification parade. There he identified the appellant, another co-accused and one Monday as the armed robbers who robbed him. C D

It is submitted in the appellant's issue 1 that the purported recognition of the appellant was an after thought and a farce meant to get at the appellant for whatever reason. This is because of the failure of both P.W.1 and P.W. 2 to mention the names and identities of the robbers to either the Police when they made their reports or to the head of the community immediately after the incidents. That omission is said to be vital to the case for the prosecution. It is further argued that the learned trial Judge failed to advert his mind to the fact that both P.W.1 and P.W.2 had to wait until after five days after they were robbed before disclosing the identities of those who robbed them. Had the learned Judge done that, he would have rejected the evidence linking the appellant to the robberies. The court below is said to have made the same mistake. It is finally submitted that the failure or inability of the P.W.1 and P.W.2 to mention the names of the accused persons immediately after the incident created a doubt whether they actually recognized the people that robbed them. E F G

The point canvassed in the appellant's issue 2 is in respect of the evidence relied on in convicting the appellant. It is submitted that basing a conviction on the confused and doubtful evidence of recognition or identification of the appellant was erroneous and the doubt ought to have been resolved in favour of the appellant. H

It is submitted in Reply in the respondent's Brief in issue 1 that

there cannot be a better and more adequate evidence of identity of the appellant in relation to the commission of the offence than those presented at the trial against the appellant. On the delay by P.W.1 and P.W.2 in identifying the appellant, it is submitted that there are no laws stipulating the period within which identification parade must be conducted. Also on the delay in promptly reporting and disclosing to the Police the identities of the robbers, it is submitted that, that cannot defeat the evidence adduced before the trial court and no law stipulating the period within which a crime must be reported to the Police.

Reference is made to the portions of the evidence given by P.W.1 and P.W. 2 and it is submitted in the appellant's issue 2 that sufficient credible evidence was led in support of both the count of criminal conspiracy and that of armed robbery. It is further submitted that the offence of criminal conspiracy is hardly capable of any direct proof as it can only be inferred from circumstances disclosed in evidence. Sufficient evidence was led from which conspiracy could be inferred in the instant case.

The appellant was the 2nd accused person at the trial. The main evidence relied on by the trial court in arriving at the conviction came from P.W.1 and P.W.2. The two witnesses claimed that they knew the appellant very well before the incidents and that he lived in the area. They also claimed that he participated in the three armed robbery attacks on them on 9th and 11th August, 2001. But ***when they first reported the matter at the Police Station shortly after each robbery incident, none of the two men mentioned to the Police that they knew any of the robbers that raided their houses.***

It was after about five days later that they mentioned the names of some of the robbers, including that of the appellant.

No reason was given for withholding such a vital information to the Police for so long. The immediate effect of withholding such information from the Police was that the Police was left in the wild. They had to embark on organizing an identification parade in which the appellant and his co-accused were identified during such identification parade.

Although it has been canvassed on behalf of the respon-

dent that there was no law prescribing the time limit within which such information should be disclosed to the Police, but absence of such law has not prevented the court from taking an adverse stand against such an unexplained delay. The position of the law therefore is that when eyewitness omits to mention at the earliest opportunity the names of the persons he said he saw committing an offence, a court must be careful in accepting his evidence given later and implicating other persons, unless a satisfactory explanation is given as to why the names were not mentioned before or at the earliest opportunity. Thus, if a complainant or an eyewitness to a crime knew the accused persons before the commission of a crime and had omitted to mention their names to the Police when he made his complaint or written statement to the Police, as in the instance case, failure by the trial court to take that omission into consideration before deciding whether the evidence of such a complainant or witness against the accused persons was true or not would amount to a non-direction on material evidence in favour of such accused persons and such non-direction would have necessarily occasioned a miscarriage of justice. An accused person would under such circumstance be entitled to an acquittal and discharge: See *Udeh v. The State* (1999) 5 S.C. (Pt. I) 87; (1999) 7 NWLR (Pt. 609) 1 at 25, *Yekini Adeyoye v. Police* (1959) WRNLR 100 at 102, *Police v. Alao* (1959) WRNLR (Pt. 1) 39, *Eyisi v. The State* (2000) 12 S.C. (Pt. I) 24; (2000) 15 NWLR (Pt. 691) 555 at 587 and *R. v. Thurnbull* (1976) 3 All ER 549.

As mentioned earlier above, the appellant pleaded not guilty to the charge. He denied the allegations made against him that he took part in any armed robbery. He told the Police at the earliest opportunity that he was in his house sleeping with his wife at the material time. His wife testified as D.W.3 and confirmed her husband's alibi. The Police conducted a search of the appellant's house shortly after his arrest and found nothing incriminating the appellant during the search. The final result was that the prosecution could not produce any other evidence that linked the appellant with the commis-

sion of the crime apart from the belated identification of the appellant by the two witnesses (P.W.1 and P.W.2). In other words, the evidence of the two witnesses was not corroborated by any other evidence. It was clearly unsafe to entirely rely on such evidence in convicting an accused person.

B In the result, I hold that the conviction of the appellant based solely on the unreliable evidence of the two aforementioned witnesses should not be allowed to stand. There is therefore merit in the appeal and it is accordingly allowed. The conviction and sentence passed on the appellant are therefore set aside.
C In their place I hereby enter a verdict of not guilty, discharged and acquitted.

D ONU JSC

The appellant was on 24th day of June, 2004, convicted of the offence of criminal conspiracy and armed robbery contrary to Sections 97(1) and 298(c) respectively of the Penal Code Law of Northern Nigeria as applicable in Kogi State. He was then sentenced
E to seven years imprisonment and a fine of N3, 000 for each of the two counts of the charge. In default of the payment of the fine, the appellant is to serve a term of one year in prison.

Aggrieved by his conviction and sentence, on 29/7/04, he filed a Notice of Appeal with four grounds to the Honourable Court of
F Appeal. On 16th day of January, 2007, the Honourable Court of Appeal dismissed the appellant's appeal and confirmed the judgment of the trial court. The appellant dissatisfied with the decision of the Court of Appeal, has further appealed to this Honourable Court
G on a Notice of Appeal containing two grounds.

The two issues formulated by the appellant and which the respondent adopted in its lone issue are as follows:-

1. Whether the Honourable Court of Appeal was right when it held that there was adequate identification evidence that the appel-
H lant committed the robberies?

2. Whether considering the circumstances of this case the Honourable Court of Appeal was right to have upheld the conviction and sentencing of the appellant by the trial court on the evidence

before it?

Argument in support of issues for determination

Issue No. I

1. Whether the Honourable Court of Appeal was right when it held that there was adequate identification evidence to arrive at an unequivocal conclusion that the appellant committed the robberies. B
The prosecution alleged three robbery incidents in two different apartments on two different clays lumped together in the two heads of charge? See page 2 of the record.

It is evident from the record that these alleged three robbery C incidents were not committed by the same person or set of persons. The victims of the alleged robberies i.e P.W. 1 and P.W.2 belatedly and as an afterthought, mentioned the name of the appellant in their statements to the Police recorded four to six days after the alleged robbery incidents, see pages 87 - 90 of the record. D

In respect of the first robbery incidence the P.W. 1 in his statement to the Police said:-

*“On Thursday being 9th day of August, 2002, at about 1.50a.m in the night I was sleeping in my room when I heard a knock on the door parlour and I asked who was the person knocking on my door. E
There was no respond (sic) from anybody other than to forced (sic) my door opened and some group of boys numbering about three came inside to meet me where (sic) I identified one Monday, Abu Awe a panel beater who had a workshop directly opposite riverside F
restaurant Lagos Road, Okene and one Ojo Audu of Iruvucheba, a former driver to river side restaurant Lagos Road, Okene to be the three men.”*

In respect of the 3rd robbery incident the P.W.2 in his statement to the Police stated:- G

*“On 11/8/01 at about 2.10a.m, I was sleeping in my house when I heard a sound of a gun downstairs in front of our house. On hearing this sound I peeped through my window to see what was happening because the fluorescent light in front of our house was on. There I was able to see the following people whom I know very H
well. (1) Abu popularly known as A we, a panel beater at opposite riverside restaurant Iruvucheba Okene (2) Monday living in a house beside river side restaurant Okene (3) Hassan, popularly known as*

Katsina who use to stay with Abu alias Awe before.”

It was next submitted that the above statement of the P.W.1 and P.W.2 as regards the persons purported to have robbed them is an after thought.

B That this purported recognition is a farce and an after thought meant to get at the appellant for whatever reason is glaring when considering the fact that both P.W.1 and P.W.2 made report to the Police and the head of the community immediately after the alleged robbery without mentioning any names or the name of the appellant.

C At page 90 of the Record P.W.2 stated:-

“As I reported the matter to the Police, I equally reported to the community leader of Iruvucheba Okene.

In his evidence-in-chief at page 41 of the Record P.W.1 stated:-

D *“After each robbery incident I went to report to the Police.”*

Further under cross-examination P.W.1 stated:-

“When I made the first report to the Police, I did not mention the names of the accused persons. The accused persons were not masked when they robbed me.

E *“ Still under cross-examination this witness said: “When my neighbours came to take me to the hospital, I did not tell them about the identity of the armed robbers.”What a bundle of inconsistencies?*

The P.W.2 at page 43 paragraphs 15-17 in his examination-in-chief on the other hand stated: -

F *“About 9.a.m both P.W. 1 and myself went to report to the Police. We also reported to the head of the Iruvucheba community.”*

If it is true, one may ask, that the appellant robbed P.W. 1 and P.W.2 unmasked in a room well lit by electricity and the appellant is G very well known by P.W.1 and P.W.2, why did they not mention the name to (1) the neighbours who took him (P.W.1) to the clinic and (2) the Police on the day of the robbery and (3) to the head of the Iruvucheba community?

H Why should P.W.1 and P.W.2 wait till after five days before they could call a name of a person or the persons they were so sure robbed them on 9/8/01 and or 11/8/01?

I consider the treatment of issue 2 superfluous in the light of what I have said so far disclosing a conglomeration of inconsistencies.

It is for the foregoing reasons proffered by me and the more comprehensive ones set out in the leading judgment of my learned brother, Akintan, JSC., with which I am in entire agreement, that I allow the appeal and discharge and acquit the appellant.

B

MUSDAPHER JSC

I have had the preview of the judgment of my Lord, Akintan, JSC., just delivered. In the aforesaid judgment his lordship had adequately and admirably discussed the issues submitted for the determination of the appeal. I entirely agree that the identification of the appellant as one of the armed robbers that robbed P.W.1 and P.W.2 leaves much to be desired. The witnesses having known the appellant before the incident should have mentioned to the Police the name of the appellant at the first opportunity and not many days later. In my view the identification of the appellant as one of the armed robbers is an after thought. I also allow the appeal and set aside the conviction and sentences of the appellant and instead of which I enter a verdict of discharge and acquittal.

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OGUNTADE JSC

I have had the advantage of reading in draft a copy of the leading judgment by my learned brother, Akintan, JSC. I to with him that there are features in this case which incline one to hold the view that the guilt of the appellant was not established beyond reasonable doubt as required by law. I would also allow the appeal and I discharge and acquit the appellant.

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H