

SUPREME COURT OF NIGERIA
6TH MARCH, 2009. SC. 220/2008
CORAM:- D. MUSDAPHER, G. A. OGUNTADE, W. S. N.
ONNOGHEN, I. F. OGBUAGU, J. O. OGEBE, JJSC

1. SAMPSON EBENEHI APPELLANTS
2. OMEHI WADA
V.
THE STATE RESPONDENT

EVIDENCE - Circumstantial evidence - Quality of - One test which such evidence must satisfy is that it should lead to the guilt of the accused - Leaving no possibility that other persons could have committed the offence (H1)

CRIMINAL PROCEDURE - Alibi - Manner of raising - Propriety of - It must be raised at the earliest opportunity - When accused is confronted by the police - So that police may check it out (H2)

EVIDENCE - Armed robbery - Proof - Circumstantial evidence - Sufficiency of - Evidence of PW 2 sufficiently linked 2nd appellant - As being in the armed robbery gang (H3)

APPEALS - Grounds - Propriety of - It is not a proper ground of appeal in criminal cases - To say that the verdict is against the weight of evidence (H4)

FACTS

The appellants were arraigned and tried before the High Court of Kogi State for the offences of conspiracy, mischief and robbery. The case of the prosecution was that following a robbery of PW 3 and PW4 on the night of 16th August, 2001, 1st appellant was arrested the following morning by the villagers of a nearby village with car keys belonging to PW 3 and PW4, which keys were taken from the victims during the robbery.

In the course of investigation, 1st appellant confessed to the robbery though he subsequently denied it at the trial, belatedly setting up a plea of alibi. In his extra-judicial confession, 1st appellant had named the 2nd appellant as one of those who participated in

the robbery. 2nd appellant also confessed on his arrest. After hearing, the trial court found them guilty as charged and sentenced them accordingly. Dissatisfied, the appellants appealed to the Court of Appeal which rejected the confessional statements of the appellants, but nevertheless dismissed their appeal. Appellants have brought this further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

1ST SET

“1. Can it be said that from the evidence on record there are sufficient circumstantial evidence to pin the 1st appellant to the incident and the scene of crime.

2. Was the Defence of Alibi raised by the 1st appellant properly considered?”

2ND SET

“(1) Whether the learned Justices of the Lower Court were right in upholding the decision of the trial Judge in rejecting the defence of alibi raised by the 2nd appellant.

(2) Whether the learned Justices of the Lower Court were right in holding that there was circumstantial evidence linking the 2nd appellant to the commission of the crime.

(3) Having regard to the totality of evidence of PW2, PW3 and PW4 and having expunged the confessional statement of the 2nd appellant, whether the learned Justices of the Lower Court were right in upholding the conviction of the 2nd appellant.”

HELD (Unanimously dismissing the appeal per **OGEBE JSC**)

Circumstantial evidence - Quality of

1. This Court in the case of Chime Ejiofor V The State (2001) 9 NWLR (Pt. 718) 371 at P. 385 has this to say on circumstantial evidence:

Each case depends on its own facts but the one test which such evidence must satisfy is that it should lead to the guilt of the accused person and leave no degree to possibility or chance that other persons could have been responsible for the commission of the offence”.

The 1st appellant could not explain how he came about the keys belonging to the victims of the robbery within hours of the robbery. He was caught with the keys by villagers of the neighbouring village who had no information of the robbery. The circumstantial

evidence before the trial court which was also evaluated by the lower court irresistibly pointed to the guilt of the 1st appellant.
(p. 581 C/E/H)

Alibi - Manner of raising

2. The learned counsel for the 1st appellant submitted that the alibi of the 1st appellant was not properly considered by the lower court. I do not agree with this submission. It is trite law that for the defence of alibi to be properly raised it must be raised at the earliest opportunity when an accused person is confronted by the Police with the commission of an offence so that the Police will be in a position to check the alibi. In this case the 1st appellant raised the defence of the alibi for the first time in the trial court. There was therefore no proper plea of the alibi by the 1st appellant to require any consideration by the trial court. (p. 582 A)

EVIDENCE - Armed robbery - Proof

3. The learned counsel for the 2nd appellant submitted that with the rejection of 2nd appellant's confessional statement there was no sufficient circumstantial evidence to link him with the commission of the offence.

It is my view that the evidence of PW2 Alabi Attah which linked him with the hiring of his vehicle to carry him and the 1st appellant and 3 other boys to a destination where he claimed his vehicle had broken down and no such vehicle was found there in the very night of the robbery clearly showed that the 2nd appellant was in the gang that committed the robbery that night. He arranged their transportation. (p. 582 E)

APPEALS - Grounds - Propriety of

4. I also observe from the identical grounds of appeal filed by the two appellants that the 4th ground which reads:

"That the verdict of the lower court is unreasonable and cannot be supported having regard to the weight of evidence", is not a proper ground of appeal in a criminal appeal. Such a ground is meant for a civil appeal. See the case of *Ibrahim V. The State* (1991) 4 NWLR Pt. 186, 399 at P. 424 where the Supreme Court held as follows:

"In criminal cases, the issue of preponderance of evidence

does not really arise. The question is whether there is evidence of such a quality on every material ingredient or issue in the case that it ought to be believed. If there is and it is believed by the trial Judge, that is the end of the matter; provided, of course that it is manifest that he has given due consideration to the evidence by or on behalf of the defence. He needs not weigh them on a balance.” (p. 582 H/583 B)

NOTABLE POINT OF INTEREST

OGBUAGU JSC

1. A judge may infer from facts proved
It need be stressed and this is also settled, that a Judge, is permitted, to infer from the facts proved and other facts necessary, to complete the element of guilt or establish innocence. Such evidence, must however, be closely examined. It is also necessary that before drawing inference of the accused persons’ guilt from circumstantial evidence, the Judge has to be certain that there are no other co-existing circumstances, which may weaken or destroy the said inference.
(p. 585 E)

REPRESENTATION

P. O. Okolo for the 1st Appellant.
Mr. R. O. Atabo with L.M. Anenga and E.I. Ejiga for the 2nd Appellant.
Mr. J. Abrahams, Attorney-General Kogi with Mr. A. B. Akogu D.PP for the Respondent.

CASES REFERRED TO

Chime Ejiofor V The State (2001) 9 NWLR Pt. 718 371
Ibrahim V. The State (1991) 4 NWLR Pt. 186, 399 at P. 424
Obosi v. The State (1965) NMLR 129
Ukorah v. The State (1977) 4 S.C. 167 @ 174
Lori & anor. v. The State (1980) 8-11 S.C. 81 @ 86
Ona v. The State (1985) 3 NWLR (Pt.12) 236 @ 241
R v. Taylor. Weaver & Donovan 21 Cr. App R. 20 @ 21
Nasiru v. The State (1999) 1 SCNJ. 83 @ 101
Akpunya v. The State (1976) 11 S.C. 269 @ 276
Igwe v. The State (1982) 9 S.C. 174

Princent & anor. v. The State (2002) 12 SCNJ. 280

LEAD JUDGMENT BY OGEBE JSC

The High Court of Justice Anyigba in Kogi State tried the two appellants for the offences of conspiracy, mischief and robbery under the relevant sections of the Penal Code and convicted them on the 4th of June 2004. They were sentenced to various terms of imprisonment and fines. They were dissatisfied with the judgment of the trial court and appealed to the Court of Appeal Abuja Division and their appeals were dismissed. This is a further appeal to the Supreme Court.

The learned counsel for the 1st appellant filed a brief on his behalf and distilled two issues for determination as follows:

"1. Can it be said that from the evidence on record there are sufficient circumstantial evidence to pin the 1st appellant to the incident and the scene of crime.

2. Was the Defence of Alibi raised by the 1st appellant properly considered?"

The learned Attorney-General of Kogi State filed a brief on behalf of the respondent in answer to the 1st appellant's brief. He formulated three issues for determination as follows:

"(1) Whether the Lower Court properly rejected Exhibit P5 the confessional statement of the 1st appellant.

(2) Whether the defence of alibi raised by the 1st appellant was properly dismissed by the Lower Court.

(3) Whether the Prosecution has proved the charges against the 1st appellant beyond reasonable doubt to warrant his conviction and sentence being affirmed by the Lower Court."

A brief was also filed on behalf of the 2nd appellant raising the following three issues:

"(1) Whether the learned Justices of the Lower Court were right in upholding the decision of the trial Judge in rejecting the defence of alibi raised by the 2nd appellant.

(2) Whether the learned Justices of the Lower Court were right in holding that there was circumstantial evidence linking the 2nd appellant to the commission of the crime.

(3) Having regard to the totality of evidence of PW2, PW3 and PW4 and having expunged the confessional statement of the

2nd appellant, whether the learned Justices of the Lower Court were right in upholding the conviction of the 2nd appellant."

The learned Attorney-General of Kogi State Joe Abraham Esq. filed a brief on behalf of the respondent in answer to the 2nd appellant's brief and raised the following three issues:

B *"(1) Whether the Court of Appeal properly rejected Exhibit PG and the 2nd appellant's confessional statement to the police.*

(2) Whether 2nd appellant's defence of alibi was properly dismissed by the Lower Court.

C *(3) Whether the Prosecution has proved the charges against the 2nd appellant beyond reasonable doubt to warrant his conviction and sentence being affirmed by the Lower Court."*

The first issues formulated by the Hon. Attorney-General in his two briefs questioning whether the lower court properly rejected D the confessional statements of the appellants, namely Exhibit "P5" and Exhibit "P6" did not arise from any of the Grounds of appeal. If he had wanted to challenge the rejection of the confessional statements by the lower court, he should have cross-appealed. Since he did not do so, the first issue he raised in respect of each appellant is E incompetent and the 2 issues are hereby struck out.

The learned counsel for the 1st appellant in arguing the first issue submitted that since the victims of the robbery did not recognize their assailants there was no direct evidence to link the 1st appellant with the robbery. The lower court relied on circumstantial evidence which was not sufficient to prove the offences charged against F the 1st appellant. He submitted that for circumstantial evidence to support conviction there must be a complete and unbroken chain of evidence to justify a trial court coming to the irresistible conclusion G that the accused person and no one else committed the offence alleged. He relied on the case of Chime Ejiofor V The State (2001) 9 NWLR Pt. 718 371.

In reply to this issue the learned Attorney-General submitted that the lower court was perfectly right to have held that the prosecution proved the charges against the 1st appellant beyond reasonable H doubt especially as the 1st appellant was caught a few hours after the robbery with the keys of the two vehicles belonging to the victims of the robbery and the door keys of the house.

The facts of the case are that in the night of 16th August 2001

between 11 pm and 2 a.m PW3 Ibrahim Okolo, PW4 Dupe Joel, and PW5 David Abimaje were attacked in their houses in Ojiapata village in Odekina Local Government Area of Kogi State by armed assailants who robbed them of their money and took away the keys of their vehicles and the keys of the door of the main house. At about 5.a.m. on the 17th of August 2001, just a few hours after the robbery the 1st appellant was arrested by the villagers of Odolu-Efu a nearby village with a bag containing a hammer, car keys belonging to PW3 and PW4 and the keys to PW3's house. The 1st appellant in his confessional statement named the 2nd appellant as one of those who took part in the robbery. Since the confessional statement has been rejected by the lower court rightly or wrongly and there is no cross-appeal to challenge it, I shall say no more about it.

This Court in the case of Chime Ejiofor V The State (2001) 9 NWLR Pt. 718 371 at P. 385 has this to say on circumstantial evidence:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of Mathematics. It is no derogation of evidence to say that it is circumstantial. It may also be noted that there is no yardstick by which any circumstantial evidence can be measured before a conviction can be entered against an accused person charged with the offence for which the circumstantial evidence is the only one available. Each case depends on its own facts but the one test which such evidence must satisfy is that it should lead to the guilt of the accused person and leave no degree to possibility or chance that other persons could have been responsible for the commission of the offence".

The 1st appellant could not explain how he came about the keys belonging to the victims of the robbery within hours of the robbery. He was caught with the keys by villagers of the neighbouring village who had no information of the robbery. All that his lawyer is arguing before this court is that the keys were not properly identified by the owners. There was evidence before the trial court that the PW6 the Police witness showed the keys to the owners and they identified them as theirs. ***The circumstantial evidence before the trial court which was also evaluated by the***

lower court irresistibly pointed to the guilt of the 1st appellant.

On the 2nd issue ***the learned counsel for the 1st appellant submitted that the alibi of the 1st appellant was not properly considered by the lower court. I do not agree with this submission. It is trite law that for the defence of alibi to be properly raised it must be raised at the earliest opportunity when an accused person is confronted by the Police with the commission of an offence so that the Police will be in a position to check the alibi. In this case the 1st appellant raised the defence of the alibi for the first time in the trial court. There was therefore no proper plea of the alibi by the 1st appellant to require any consideration by the trial court.***

The learned counsel for the 2nd appellant submitted that the lower court was wrong in upholding the decision of the trial court in rejecting the defence of the alibi raised by the 2nd appellant.

I do not agree with this submission because the 2nd appellant was raising that defence for the first time before the trial court. He did not raise it at the earliest opportunity to the police.

On the 2nd issue as to whether there was sufficient circumstantial evidence linking the 2nd appellant to the commission of the offence ***the learned counsel for the 2nd appellant submitted that with the rejection of 2nd appellant's confessional statement there was no sufficient circumstantial evidence to link him with the commission of the offence.***

It is my view that the evidence of PW2 Alabi Attah which linked him with the hiring of his vehicle to carry him and the 1st appellant and 3 other boys to a destination where he claimed his vehicle had broken down and no such vehicle was found there in the very night of the robbery clearly showed that the 2nd appellant was in the gang that committed the robbery that night. He arranged their transportation.

It should be noted that the two lower courts have made current findings of fact which this Court will not disturb unless they are shown to be perverse. ***I also observe from the identical grounds of appeal filed by the two appellants that the 4th ground which reads:***

"That the verdict of the lower court is unreasonable and can-

not be supported having regard to the weight of evidence”, is not a proper ground of appeal in a criminal appeal. Such a ground is meant for a civil appeal. See the case of Ibrahim V. The State (1991) 4 NWLR Pt. 186, 399 at P. 424 where the Supreme Court held as follows:

“In civil cases, the question is as to weight of evidence. The inquiry is which of the two sets of evidence on an issue out-weighs the other. To ascertain this, they are put on an imaginary scale and weighed together to find out which of them preponderates. But ***in criminal cases, the issue of preponderance of evidence does not really arise. The question is whether there is evidence of such a quality on every material ingredient or issue in the case that it ought to be believed. If there is and it is believed by the trial Judge, that is the end of the matter, provided, of course that it is manifest that he has given due consideration to the evidence by or on behalf of the defence. He needs not weigh this on a balance.***”

For all I have said in this judgment I see no merit in the appeals of the 1st and 2nd appellants and I hereby dismiss the appeals and affirm their convictions and sentences by the lower courts .

MUSDAPHER JSC

I have read before now the judgment of my Lord Ogebe, JSC just delivered in this matter with which I entirely agree. For the same reasons contained in the judgment which I adopt as mine, I too, find the appeal of the appellants unmeritorious and I accordingly dismiss same. I affirm the convictions of the appellants.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Ogebe, JSC. I agree with his reasoning and conclusion. I would also dismiss this appeal as unmeritorious. I affirm the judgment of the court below.

ONNOGHEN JSC

I have had the advantage of reading in draft, the lead judgment of my learned brother, OGEBE, JSC just delivered.

B I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. He has effectively and completely dealt with the relevant issues for consideration in the appeal. I have nothing useful to add. The evidence against the appellants is overwhelming and pin them to the scene of crime thereby rendering their purported and belated defence of alibi clearly an afterthought.

C The appeal is dismissed and I abide by the consequential orders made by OGEBE, JSC in the said lead judgment.

Appeal dismissed.

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OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Abuja Division (hereinafter called “the court below”) delivered on 7th January, 2008, affirming the conviction and sentence of the Appellants by the High Court of Kogi State sitting at Anyigba on 4th June, 2004.

Dissatisfied with the said decision, each of the Appellants, appealed to this Court on four Grounds of Appeal which are identical.

F The facts briefly stated, are that on the date of incident at about 2 a.m., the four victims of the armed robbery, were sleeping in their respective room in their respective house at their village at Ojiapata in Dekina Local Government Area of Kogi State, when a group of dangerously armed persons with short guns and hammers, broke
G into their houses and robbed them of their money, damaged the windscreen of a Mercedes Benz car and other valuable items including a video player, television set, tape recorder and a box. The 1st Appellant about 5.30 a.m. of that same day, of the same date, was arrested by some youths of Odolu-Efu Village. They recovered from
H the 1st Appellant’s bag, four expended cartridges, a torch light, three bunch of keys, a hammer and some money. The 1st Appellant, was later handed over to the Police together with the said items recovered from him by PW1 who is the Gago of Odolu-Efu village. The Appellants, made confessional statements - Exhibits P5 and P6 re-

spectively. PW2, is the Driver and owner of the vehicle with which he conveyed the Appellants and three other persons with his said vehicle and dropped them at Ojuwo Aneru village at the instance of the 2nd Appellant. The Appellants at the trial, raised the defence of Alibi. The learned trial Judge, convicted the Appellants while he discharged and acquitted the 3rd accused person. B

I will deal very briefly with circumstantial evidence raised in Issue 1 of the 1st Appellant. From the Records, the evidence, is that the 1st Appellant, was caught few hours after the robbery by villagers or youths, who did not in fact know about the robbery. Bunch of keys of the doors of one or some of their victims, were recovered from him. The evidence of the PW2 who drove him - the 2nd Appellant and three others, point irresistibly, to the guilt of the Appellants. It has been held that circumstantial evidence, is the best evidence particularly, where it is overwhelming (as in the instant case leading to this appeal) and lead to no other conclusion, than the guilt of the accused persons. See the Cases of Obosi v. The State (1965) NMLR 129; Ukorah v. The State (1977) 4 S.C. 167 @ 174; Lori & anor. v. The State (1980) 8-11 S.C. 81 @ 86; Ona v. The State (1985) 3 NWLR (Pt.12) 236 @ 241; R v. Taylor. Weaver & Donovan 21 Cr. App R. 20 @ 21 and Nasiru v. The State (1999) 1 SCNJ. 83 @ 101 just to mention but a few. C D E

It need be stressed and this is also settled, that a Judge, is permitted, to infer from the facts proved and other facts necessary, to complete the element of guilt or establish innocence. Such evidence, must however, be closely examined. It is also necessary that before drawing inference of the accused persons' guilt from circumstantial evidence, the Judge has to be certain that there are no other co-existing circumstances, which may weaken or destroy the said inference. See the cases of Teper v. R/Queen (1952) A.C. 480 @,489; Anekwe v. The State (1976) 9-10 S.C. 255. 264; Nasiru v. The State (supra) and Ijioffor v. The State (2001) 9 NWLR (Pt. 718) 371 @ 384. 390 - 391; (2001) 4 SCNJ. 230. F G

It is also trite that in a criminal case, a conviction based on circumstantial evidence, can be obtained by the prosecution. However, to do so, the evidence, must be positive, unequivocal and lead irresistibly, to the conclusion that it is the accused person, that committed the offence charged. See the case of Aigbedion v. The State H

(2000) 4 SCNJ. 1 @ 11 - per Uwais, CJN. This was the position or case in respect of the 1st Appellant. My answer to the said Issue 1 of the Appellants, is in the Affirmative.

In respect of Issue 2 of the Appellants and the Respondent respectively, I note that the defence of Alibi, was raised by the Appellants during their evidence at the trial and not in their respective Statement to the Police. It is now settled that an accused person, must set up the defence, at the first opportunity to enable the Police investigate the same, otherwise, it may be disregarded. See the cases of R v. Littleboy (1934) 24 CAR 192; Gachi & ors. v. The State (1965) NMLR 337; and Ntam & anor v. The State (1968) NMLR 86 just to mention but a few.

However, having found as a fact by me that the evidence of the prosecution, positively, unequivocally and irresistibly point to the guilt of the Appellants, the defence of Alibi becomes of no moment. I so hold. The foregoing, takes care of the two issues of the 1st Appellant. I note that Issue 2 of the 1st Appellant, issue 3 of the 2nd Appellant, and that of the Respondent, are stated to be distilled from Ground 4 of the Grounds of Appeal of the Appellants. That ground, reads as follows:

“That the verdict of the lower court is unreasonable and cannot be supported having regard to the weight of evidence”.

Such a ground it is said to be defective and incompetent. See the case of Ndike v. The State (1994) 9 SCNJ. 46.

In the case of Aladesuru v. The Queen (1956) A.C 49 it was held that in a criminal appeal, the point is not the preponderance of evidence on the one side which outweighs the evidence on the other side. However, it has been held that in an effort to do substantial justice, an amendment may be allowed in an additional ground.

In fact, in the case of Iboko & ors. v. Police (1965) NMLR 384, it was held per incuriam, that it is a pardonable mistake and that High Court Judges, might delete the words “weight of and invite counsel, to argue an appeal from conviction on the facts with the right approach as laid down in the case of Queen v. Omisade & ors. (1964) NMLR 62 @ 78. See also the case of Enilari & 2 ors. v. The State (1986) 3 NWLR 604 S.C; From the arguments in the Briefs of the parties, I will ignore the word “weight of evidence” in the interest of justice.

Having said this, I take it that the complaint on this issue 3, is perhaps, on the evaluation of the evidence by the two lower courts. First of all, evaluation of evidence, is principally, that of the trial court who saw and heard the witnesses. However, it is now settled that where a trial court has erred in evaluating the facts found by it, an Appellate Court, can re-examine the whole facts and come to an independent decision as the court of trial. See the cases of Fatoyinbo v. Williams 1 FSC 87 and Benmax v. Austin Motor Co. Ltd. (1955) A.C. 370; (1955) 1 AER 326. From the Records, I cannot fault the evaluation by the trial court of the overwhelming evidence against the Appellants. The court below, rightly in my respectful view, was right in affirming the conviction and sentence of the Appellants.

I note that there are concurrent findings of fact by the two lower courts which are not perverse in my respectful view. See the cases of Akpuenya v. The State (1976) 11 S.C. 269 @ 276; Igwe v. The State (1982) 9 S.C. 174 and Princent & anor. v. The State (2002) 12 SCNJ. 280 and many others. This Court, cannot therefore, disturb or interfere with the same.

I had the advantage of reading before now, the lead Judgment of my learned brother, Ogebe, JSC just delivered. I agree with him that this appeal should be dismissed as unmeritorious, I too dismiss it and affirm the decision of the court below affirming the Judgment of the trial court.

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