

**SUPREME COURT OF NIGERIA**  
18TH DECEMBER, 2009. SC. 167/2004  
**CORAM:- G. A. OGUNTADE, M. MOHAMMED,**  
**W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,**  
**M. S. MUNTAKA-COOMASSIE, JJSC**

MORUFU BOLANLE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Conviction of co-accused - And discharge of one - Propriety - Though where evidence is same against two accused persons - In all material respect - Discharge for one should be discharge for both - Evidence herein is not the same (H1)

EVIDENCE - Burden of proof - Beyond reasonable doubt - Discharge - If trial court is left with no doubt - That the offence was committed by the accused person - The burden is discharged (H2)

***FACTS***

Before the Ibadan high court, appellant and another accused were arraigned and tried on one count information for armed robbery. It was the case of prosecution that the accused persons were among a group of armed robbers that robbed the victims around 2.30 am on the fateful day. The robbers forced open the residence of the victims and appellant in particular assaulted everybody with iron rod and a broken bottle and even raped one of the victims. Following a tip-off after the robbery, appellant was arrested. As the victims claimed they could identify the robbers due to the electricity light that was on, that night and the fact that the robbers spent time with them. An identification parade was carried out nine days after the robbery from which the victims identified appellant and his co-accused.

After trial, the learned trial judge reasoned that in view of the fact that the victims all gave detailed account of appellant's activities during the robbery, but said little or nothing of the co-accused, it was doubtful the co-accused participated in the robbery. Accordingly, he

resolved the doubt in favour of the co-accused but convicted appellant. Aggrieved, appellant appealed to the Court of Appeal which dismissed his appeal. This is a further and final appeal to Supreme Court by appellant. It is his contention that his discharge ought to follow from the discharge of his co-accused as the evidence against both of them were the same.

**ISSUES FOR DETERMINATION**

*"(i.) Whether the conviction of the Appellant can stand notwithstanding the discharge and acquittal of his co-accused.*

*(ii.) Whether on the accepted evidence, the prosecution can be said to have proved its case beyond reasonable doubt."*

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

***Conviction of co-accused - And discharge of one - Propriety***

1. The state of the law is quite correct as stated by the learned Counsel to the Appellant that -

*"Where the evidence against two accused persons in a criminal case is same and a doubt is resolved by the trial Judge in favour of one of the accused persons, the same doubt should also be resolved in favour of the other. Consequently if one is discharged and acquitted, the other should also be discharged and acquitted."*

The question in the present case is whether or not the evidence as found by the learned trial Judge was in all material respect the same against the Appellant and the co-accused. The answer of course is in the negative. (p. 2216 C)

***Burden of proof - Beyond reasonable doubt - Discharge***

2. By virtue of the provisions of Section 138 of the Evidence Act, CAP 112 of the Laws of the Federation 1990 applicable at the time of the trial of the Appellant, the commission of crime by a person must be proved beyond reasonable doubt. However, it is also the law that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. If on the entire evidence, the trial Court is left with no doubt that the offence was committed by the accused person, that burden of proof beyond reasonable doubt is discharged and the conviction of the accused person will be upheld even on the credible evidence of a single witness. (p. 2217 E)

**REPRESENTATION**

R. A. Adesanmi for the Appellant

Adewale Adesokan for the Respondent

**CASES REFERRED TO**

Ogidi v. State (2003) 9 N.W.L.R. (Pt. 824)

Ebiri v. The State (2004) 5 S.C. (Pt. 11) 29 at 35

State v. Danjuma (1997) 5 N.W.L.R. (Pt. 506) 512

Kalu v. The State (1988) 10 - 11 S.C. 19; (1988) 4 N.W.L.R. (Pt. 90) 503

Chief Frank Ebba V. Chef Egode (1984) 4 S.C. 84; (1984) 1 S.C.N.L.R. 372

**STATUTES REFERRED TO**

Evidence Act, Cap 112, L. F. N. 1990, s. 138

Robbery and Fire Arms (Special Provisions) Act, 1990, s. 1 (2) (a)

**LEAD JUDGMENT BY MOHAMMED JSC**

This is an appeal against the judgment of the Court of Appeal Ibadan delivered on 19<sup>th</sup> April, 2004 affirming, the conviction and sentence, of death on the Appellant by the Oyo State High Court sitting at Ibadan of the offence of armed robbery.

The Appellant and another co-accused person were arraigned and tried by the trial High Court on one count information for armed robbery. In the course of the trial, the prosecution called five witnesses in support of the charge while the Appellant testified in support of his own defence. In his judgment which was delivered on 23<sup>rd</sup> January, 2002, after appraising the evidence adduced by the prosecution and the defence put up by the Appellant and his co-accused, the learned trial Judge found the Appellant guilty of the offence of armed robbery and convicted him. He was sentenced to death in accordance with the law while the co-accused of the Appellant was discharged and acquitted.

The Appellant who was aggrieved by his conviction and sentence, appealed to the Court of Appeal Ibadan Division on five grounds of appeal. After hearing the parties on their respective briefs of argument, the Court of Appeal in its judgment handed down on

19<sup>th</sup> April, 2004, the Appellant's appeal was dismissed and his conviction and sentence of death were affirmed. Still not satisfied with this decision the Appellant is now on a further and final appeal to this Court.

The facts of this case as revealed in the evidence led by the prosecution was that around 2.30 a.m on the night of October, 22 1996, a group of armed robbers stormed the residences of victims along Olorunsogo Street, Oke-Itunu Area of Ibadan.. The robbers forced opened the residence of the victims and the Appellant in particular assaulted everybody with iron rod and a broken bottle. His attempt to rape PW2, Ruth Fatundimu did not materialize because the Appellant found she was in her menstrual period. However, the Appellant raped the 4th prosecution witness, Bolatito Ayilara while her mother Bosede Ayilara died of the wounds sustained by being hit with a broken bottle by the Appellant. The evidence Shows that the robbers took away money and valuables belonging to the witnesses. The Appellant was on a tip-off arrested. As the victim of the robbery, had claimed that they could identify the robbers due to the electricity light that was on that night and the fact that the robbers had spent sometime with, them, an identification parade was carried out by the Police nine days after the robbery. The Appellant and the co-accused were identified by some of the witnesses but the photographs of the identification parade was not tendered by the prosecution in the course of the trial. During the trial however, PW1, PW2 and PW3 had identified the Appellant as one of the armed robbers. The defence of the Appellant was that he did not take part in the robbery and that he was mistakenly identified by the victims.

At the end of the trial, the learned trial Judge in his judgment found the Appellant guilty as charged, convicted and sentenced him to death accordingly. Part of this judgment at page 105 reads -

*"From the cross-examination, the defence failed to expose any error in the observation, recognition and identification of the accused by the prosecution witnesses."*

However, at' page 107 of the same record, the learned trial Judge observed on the co-accused and the Appellant as follows - .

*"Looking at this case as it relates to the 2nd accused, I have a doubt in my mind that he has anything to do with this case. While the eye-witnesses gave detailed activities of the 1<sup>st</sup> accused as regards the*

*robbery operation, no evidence was led on any role of the 2nd accused respecting the robbery. Having resolved the doubt I have in this case in favour of the 2nd accused, I hold that the prosecution have not proved any case against the 2nd accused. Accordingly, the 2nd accused is discharged and acquitted in the case.*

*The prosecution have established their case against the 1<sup>st</sup> accused. Consequently, he is found guilty and convicted of the offence of armed-robbery, committed against Emmanuel Fatundimu on the 22nd of October, 1996 at Olorunsogo (otherwise called Kalejaiye) Street, Oke-Itunu, Ibadan contrary to and punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act 1990 as amended. He is accordingly sentenced to death.”*

These findings of the learned trial Judge were affirmed on appeal by the Court of Appeal. In the Appellants appeal to this Court against the decision of that Court, two issues for determination were identified by his learned Counsel in the Appellants brief. They are -

“(i.) *Whether the conviction of the Appellant can stand notwithstanding the discharge and acquittal of his co-accused.*

(ii.) *“Whether on the accepted evidence, the prosecution can he said to have proved its case beyond reasonable doubt.”*

Similar issues although differently worded were formulated by the Respondent in the Respondent’s brief of argument.

On the first issue, it was argued for the Appellant that since at the trial both PW1 and PW3 had testified that, both the Appellant and the co-accused were members of the robbery gang, the acquittal of the co-accused on this same evidence ought to have served as a ground” for acquitting the Appellant. This is because according to learned Counsel, that where two or more persons are charged with the commission of an offence and the evidence against all the accused persons is the same or similar, to the extent that the evidence is extricably woven around all the accused persons, the discharge of one must as a matter of law, affect the discharge of the others. The cases of *Kalu v. The State* (1988) 10 - 11 S.C. 19; (1988) 4 N.W.L.R. (Pt. 90) 503 and *Ebiri v. The State* (2004) 5 S.C. Pt. 11 29 at 35 were relied upon in support this argument of the learned Counsel who urged the Court to allow the appeal.

For the Respondent however, the learned Counsel while agreeing with the state of the law in *Kalu v. The State* (supra) and *Ebiri v.*

The State (supra), explained that the situation on the state of evidence in the present case is entirely different from the type of evidence stated in the cases referred. While the co-accused gave evidence to the satisfaction of the trial Court having regard to the evidence of the prosecution witnesses in support of his defence of alibi, the same cannot be said in respect of the Appellant. Relying on the cases of Peterside v. Oligakwe 11 N.L.R. 41; Woluchem & Ors. v. Chef Gudi & Ors. (1981) 5 S.C. 291 and Chief Frank Ebba V. Chief Egode (1984) 4 S.C. 84; (1984) 1 S.C.N.L.R. 372, learned Respondent's Counsel urged this Court not to interfere with the findings of trial Court on' credibility of witnesses which is an essential functions of the trial Court.

***The state of the law is quite correct as stated by the learned Counsel to the Appellant that***

***"Where the evidence against two accused persons in a criminal case is same and a doubt is resolved by the trial Judge in favour of one of the accused persons, the same doubt should also be resolved in favour of the other. Consequently if one is discharged and acquitted, the other should also be discharged and acquitted."***

***The question in the present case is whether or not the evidence as found by the learned trial Judge was in all material respect the same against the Appellant and the co-accused. The answer of course is in the negative.*** The learned trial Judge who saw and heard the witnesses testified before him, was clearly satisfied that the Appellant was plainly identified by the victims of the robbery whom he not only robbed of their belongings, but also attempted to rape some of them, raped some of them and smashed a broken bottle on the head of one of the victims leading to her death. Certainly, the victims who the Appellant raped or' attempted to rape for the fact that the victim was in her menstrual period, could not have failed to recognise and identify the Appellant. The fact that the conduct and violent actions of the Appellant also resulted in the death of one of the victims of the armed robbery, was also accepted by the learned trial Judge in finding the Appellant guilty of the offence, convicted and sentenced him to death accordingly. Obviously, it is not the function of this Court to re-appraise this evidence and come to a different conclusion based on the leading au-

thority on this subject namely the case of Woluchem and Others v. Chief Gudi and Others (1981) 5 S.C. 291.

As for the co-accused to the Appellant while the learned trial Judge on the evidence was satisfied that -he was not properly identified as one of the participants of the armed robbery; there was also no specific role or action alleged to have been committed by the co-accused by any of the prosecution witnesses. The learned trial Judge was therefore right in finding that there was indeed doubt in the co-accused having participated in the armed robbery and consequently in discharging and acquitting him.

The second issue as identified in the Appellant's brief of argument is whether on the accepted evidence, the prosecution can be said to have proved its case beyond reasonable doubt. The complaint of the Appellant in this issue is that he was not properly identified by the prosecution witnesses and that his defence of alibi was not investigated at all by the Police in the course of their investigation."

In response on this issue, the learned Counsel to the Respondent contended that there was overwhelming evidence upon which the trial Court rightly found the Appellant guilty beyond reasonable doubt.

***By virtue of the provisions of Section 138 of the Evidence Act CAP 112 of the Laws of the Federation 1990 applicable at the time of the trial of the Appellant, the commission of crime by a person must be proved beyond reasonable doubt. However, it is also the law that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. If on the entire evidence, the trial Court is left with no doubt that the offence was committed by the accused person, that burden of proof beyond reasonable doubt is discharged and the conviction of the accused person will be upheld even on the credible evidence of a single witness.*** If on the other hand, on the totality of the evidence, a reasonable doubt is created, the prosecution would have failed to discharge the burden of proof which the law vests up on it thereby entitling the accused person to discharge and acquittal. See *Alonge v. Inspector General of Police* (1959) S.C.N.L.R. 576; *Fotoyimbo v. Attorney General Western Nigeria* (1966) W.N.L.R. 4 and *State v. Danjuma* (1997) 5 N.W.L.R. (Pt. 506) 512. Thus, on the evidence adduced by the prosecution wit-

nesses and accepted by the learned trial Judge, the offence of armed robbery punishable under Section 1 (2) (a) of the Robbery and Fire Arms' Special Provisions Act 1990 as amended had been clearly proved beyond reasonable doubt against the Appellant to justify his conviction ;and sentence to death. See *Ogidi v. State* (2003) 9 N.W.L.R. B (Pt. 824).

In the result, as the two issues raised by the Appellant for the determination of this appeal have failed having been resolved against him, the appeal itself must fail. Accordingly the Appellant's appeal is hereby dismissed and his Conviction and sentence of death by the C Oyo State High Court, Ibadan and affirmed by-the Ibadan Division of the Court of Appeal, are hereby further affirmed.

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D **OGUNTADE JSC**

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Mohammed J.S.C. I am in agreement with him that this appeal has no merit I would also come to the conclusion that the appeal be dismissed. E

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**ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother, MOHAMMED, JSC just delivered. F

I agree with his reasoning and conclusion that the appeal has no merit and ought to be dismissed.

The argument of learned counsel for the appellant is that since there is evidence accepted by the trial court that appellant and his co-accused -were members of a robbery gang but a co-accused of the appellant was acquitted and discharged of the offence charged on the same evidence, appellant ought, also, to have been acquitted, relying on the case-of *Kalu vs The State* (1988) 10-11 S.C 19; (1988) 4 NWLR (pt 90) 503; *Ebiri vs The State* (2004) 5 S.C (pt. 11) 29 at H 35. I hold the considered view that the above principle does not apply to the facts of this case, and consequently irrelevant. In the instant case, the learned trial judge found that the appellant was clearly identified by the victims of the robbery and the roles he played at the scene recounted with clarity.

On the other hand, the co-accused was found by the learned trial judge not to have been properly identified as a participant in the robbery incident and he was not alleged nor proved to have performed any specific role in the operation by any of the witnesses. In such a case, it cannot be said that the evidence against the two accused persons is in all material respect the same so as to result in the application of the principle that a resolution of any doubt in favour of a co-accused must equally be applicable to the other accused which would, of necessity, result in the discharge and acquittal of both accused persons. B

In the circumstance I, too, dismiss the appeal as lacking in merit. C  
Appeal dismissed.

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**CHUKWUMA-ENEH JSC**

I have had the advantage of reading in advance in draft the judgment of my learned brother Mohammed JSC just delivered. I entirely agree with his reasoning and conclusion that the appeal is unmeritorious and should be dismissed. I dismiss it and abide by the orders containing in the lead judgment. D E

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**MUNTAKA-COOMASSIE JSC**

I have the advantage of a preview of the judgment just delivered by my learned brother Mahmud JSC I entirely agree with the reasoning and conclusions that the appeal lacks merit and I too dismiss the appeal. The conviction and sentence are further affirmed by me. F

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