

SUPREME COURT OF NIGERIA
FRIDAY 14TH JUNE, 2013. SC. 397/2011
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC**

WALE BANJO APPELLANT
V.
THE STATE RESPONDENT

ROBBERY - Stolen item - Recent possession - Where accused cannot explain how a robbed item got to his possession - It is presumed that he was one of the robbers - Or that he participated in the robbery (H1)

CRIMINAL PROCEDURE - Robbery - Evidence - Police - Failure to call policeman who recovered the items is of no moment - As PW2 stated that the item was recovered from appellant in his presence (H2)

FACTS

Accused/appellant was arraigned before the High Court of Ogun State by prosecution/respondent on the charge that he conspired with two others (now at large) to commit armed robbery contrary to sections 5(6) and 1(2)(C) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990. At the trial, respondent called five witnesses in support of his case against appellant, while appellant gave evidence for himself denying involvement in the robbery.

At the close of trial, the trial court was of the opinion that the essential elements of the offence of armed robbery have been proved by respondent against appellant. The court consequently, convicted and sentenced appellant to death. Dissatisfied, appellant appealed to the Court of Appeal, Ibadan Division. The court allowed the appeal in part by reducing the sentence of death to that of life imprisonment, on the ground that there was no evidence to show that appellant was armed during the robbery operation. Still dissatisfied, appellant filed appeal at Supreme Court against the decision of the

Court of Appeal.

ISSUE FOR DETERMINATION

“Whether the prosecution proved a case of robbery at trial against the appellant to warrant his conviction for robbery and sentence to 21 years imprisonment by the lower court”.

HELD (Unanimously dismissing the appeal per **MUNTAKA-COOMASSIE JSC**)

ROBBERY - Stolen item - Recent possession

1. My lords, I have painstakingly gone through the evidence of the appellant and I could not see where he made any explanation as to how the robbed items got to his possession. In view of the evidence I reproduced above I have no doubt that the findings of the lower court was based on the evidence contained in the record. Where an accused person is found with a robbed item and he could not explain how the goods got to him, there is a presumption that he was one of the robbers or that he participated in the robbery. In that case, there would be no need to conduct any identification Parade. Being in possession of a stolen items or robbed items is a prima facie evidence that the accused participated in the robbery. That being the case, the onus is on him to give satisfactory account/evidence as to how the good or goods got to his possession, failing which the court would be right to convict him for the offence of robbery or theft (stealing).

Applying this principle of law to this case, I have no doubt that the lower court validly made the presumption that the appellant participated in the commission of the offence of robbery. (pp. 2690 D/2691 C)

Robbery - Evidence - Police

2. The argument of the appellant that the police man who recovered the items was not called as a witness and as a result there is a vacuum does not hold water. With tremendous respect, this argument is of no moment, whatever vacuum that may allegedly be created by the failure to call the police man

has been filled by the pw2 who said that the audio cassette was recovered from the appellant in his presence. (p.2691 D)

REPRESENTATION

Olusola Idowu Esq., for the Appellant

J. K. Omotosho PDPP (M.O.J) Ogun State, for the Respondent

CASES REFERRED TO

Ogunsi v. State (1994) 1 NWLR (pt. 322) 583

Agbi v. Ogbah (2006) 11 NWLR (pt. 900) 65/125

Otti v. State (1991) 8 NWLR (pt. 207) 103

Youho v. COP (1990) 5 NWLR (pt. 148) 103

Aremu v. State (1991) 17 NWLR (pt. 201) 1

Ukorah v. State (1977) 4 SC 167

Madagwa v. State (1988) NSCC (pt. 3) Vol. 19

Kolade v. COP (1971) NMLR 20

Salami v. State (1988) 5 NWLR (pt. 85) 570

Ibodo v Enarofia (1980) 5-7 SC 42

Chikwendo v. Mbamali (1980) 3-4 SC 31

Okafor v. Idigo (1984) 1 SCNLR 481

Kponuglo v. Kodadja (1932) 2 WACA 24

Alkalezi v. State (1993) 2 NWLR (pt. 273) 1

STATUTES REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990, ss. 1(1)(2)(C), 5(6)

Evidence Act, s. 149(d)

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The Appellant, Wale Banjo, together with two others were charged with conspiracy to commit armed robbery and armed robbery contrary to section 5(6) and 1(2)(C) of the Robbery and Firearms (special provisions) Act Cap 398 Laws of the Federation of Nigeria 1990 as amended by the Tribunal (certain consequential amendments etc.) Act 1999.

At the trial the prosecution called five (5) witnesses while the appellant gave evidence on his behalf. At the conclusion of hearing the trial court found the Appellant guilty as charged and sentenced

him to death. The trial court in its conclusion held thus:-

“The totality of the evidence before the court reveals that the accused persons and others now at large participated in the robbery of 15/2/2000. All the ingredients of the offences charged have been proved, to wit:-

- B *(1) That the accused person and others at large did agree to the PW2 and the PW3 15/2/2000 which was an unlawful purpose;*
- (2) That the robbery alleged to have taken place on 15/2/2000 at Anyegbani quarters. Ago-Iwoye, did In fact take place.*
- C *(3) That at the time of the robbery the robbers were armed with dangerous weapons.*
- (4) That the accused persons participated in the said robbery.*

The persecution has therefore proved the case against the D 1st and 2nd accused persons beyond reasonable doubt. The defence put forward by the accused persons are well crafted lies, fabrications and after thoughts”. Page 98 of the record.

The appellant was aggrieved with the decision of the trial court and as a result appealed to the Court of Appeal, Ibadan Division, hereinafter referred to as the lower court. The lower court heard the appeal and allowed it in part by substituting the death sentence with twenty-one (21) years imprisonment. The lower court held as follows:-

- F *“The appeal is allowed in part. The conviction and sentence of the appellant are altered from armed robbery under section 1 (2) of the Robbery and Firearms (Special Provisions) Act cap 598 Laws of the Federation of Nigeria (1990 edition) as amended for the lesser offence of robbery without firearms or offensive weapons under Section 1 (1) of the same Act - See John Nwachukwu v. The State (1980) G 2 NWLR (pt.251) 765 as there was no clear cut evidence showing appellant was armed or was in company of any armed person at the time of the commission of the robberies. The appellant is sentenced to twenty one (21) years imprisonment mandatorily fixed by section H 1 (1) of the said Act, the sentence is backdated to 15-01-2000 when the appellant lost his liberty on account of this case”. Per J. S. Ikyegh JCA at pages 160 - 161 of the record-*

Further aggrieved by the above judgment of the lower court, the appellant has appealed to this court. Both parties filed and ex-

changed their respective briefs of argument. The appellant distilled only one issue for determination as follows:-

“Whether the prosecution proved a case of robbery at trial against the appellant to warrant his conviction for robbery and sentence to 21 years imprisonment by the lower court”.

The respondent also in its brief of argument formulated one single issue for determination thus:-

“Whether the lower court was right in holding that the prosecution has proved the offence of robbery against the appellant beyond reasonable doubt”.

Both parties adopted their respective briefs of argument at the hearing of this appeal before us on 21/3/13.

In arguing the appeal, learned counsel to the appellant Olusola Idowu Esq., urged this court to allow the appeal. The gist of the submission of the learned counsel in his brief of argument is to the effect that the lower court was wrong to have held that the appellant is guilty of robbery on the fact that the goods stolen were found in his possession. It was his contention that the Pw2 and Pw3 were not present when the property was removed from his possession and neither was the Policeman who recovered it from the possession of the appellant called as a witness. He therefore submitted that section 149 (d) of the Evidence Act was mis-applied by the lower court.

Learned counsel further submitted that the failure of the prosecution to call the policeman that arrested the appellant and who in fact recovered the goods from his possession created a vacuum in the case of the prosecution and this is fatal to the prosecution's case. The case of *Ogunsi v. The State* (1994) 1 NWLR (Pt.322) 583 at 592 was cited. He pointed out that the appellant denied this fact and it is therefore important for the prosecution to call the policeman who arrested the appellant. Hence the only inference is that the policeman, if called, his evidence will not be favourable to the prosecution, he cites section 149(d) of the Evidence Act *Agbi v. Ogbeh* (2006) 11 NWLR (Pt.322) 65/125; *Ogwuro v. C. BEN Ltd* (1994) 8 NWLR (pt. 365) 683. He also referred to the evidence of Pw3 which was based on suspicion, and contended that cannot be sufficient to find the appellant guilty.

In his turn, learned counsel to the respondent, J. K. Omotosho Esq., urged this court to dismiss the appeal. In his submis-

sion on the sole issue framed, the learned counsel contended that the only onus on the respondent is to prove the ingredients of the offence of robbery beyond reasonable doubt and not beyond a shadow of doubt, cites *Henry Otti v. The State* (1991) 8 NWLR (pt. 207) 103 at 118. He referred to the evidence of Pw1 and Pw3 who were robbed in the early hours of 15/2/2000 of various personal effect, and in the morning the appellant was arrested near the place where the robbery took place and at the time of his arrest the audio cassette belonging to Pw2 which was among the articles stolen from him was found in the back pocket. He also pointed out that when the Pw3 went to the Police station to report the robbery, the Police came to the station with one of the robbers who attacked them and the robber was the appellant.

On the issue of suspicion, learned counsel pointed out that the Pw3 only said he suspected the appellant because the native dress that was stolen from him was found on the appellant. He therefore contended that the provisions of section 149 (d) now section 167 (a) of the Evidence Act applies as there is evidence that the appellant was found in possession of some of the robbed items so soon after they were robbed. He therefore submitted that the appellant is presumed to be the robber and the lower court was justified in holding that the appellant was one of the robbers, learned counsel cites the following cases:- a. *Youho v. COP* (1990) 5 NWLR (Pt.322) 103 at 116-117, b. *Aremu v. The State* (99117 NWLR (pt. 201) 1 and C. *Ukorah v. The State* (1977) 4 SC 167.

Learned counsel also referred to the evidence of Pw5 which corroborated the evidence of Pw2 and Pw3 as to how and where the stolen items were recovered. He particularly referred to the evidence of Pw2 who was present when the appellant was searched and the items recovered from him, thus making him the best person to give evidence as to how he saw the appellant with the robbed items. Also the evidence of Pw3 in this respect.

The appellant's complaint arose from the judgment of the lower court where it held as follows:-

"The Pw2 and the Pw3 discovered some of the robbed items with the appellant after his arrest few hours after the robberies and both of them laid open claim of the ownership of the items in the presence and to the hearing of the appellant at the earliest opportu-

nity. In the case of PW2 it was robbed audio cassette that was discovered in the back pocket of the appellant, while Pw3's robbed Native attire and some food items, sardines and salami Noddles were found with the appellant a few hours after the robbery incident. The appellant did not challenge the assertion of ownership of the above mentioned items by the Pw2 and Pw3. He did not also allege the items were planted on him to incriminate him. He made a bare denial of the discovery of the items on him. No satisfactory explanation on the civil balance of probability was proffered by the appellant to justify his possession of the goods in question and displaces the respondent's case that they were recently robbed from the Pw2 and the pw3 students of Olabisi Onabanjo University, Ago Iwoye, Ogun State. Objection was raised on whether the audio cassette found with the appellant was the one Pw2 had stated was robbed from him. I do not think, with respect, that there was doubt on the robbed articles. It was an audio cassette all the same, and Pw2 had openly laid claim of ownership on it without a scrap of protest from the appellant'."

At pages 160, the lower court concluded thus:

"Having successfully proved beyond reasonable doubt that the appellant was presumed to be one of the robbers under section 149 (a) of the Evidence Act, identification parade was no longer necessary, as the recently robbed goods found in his possession without his accounting for them on the balance of probability provided the nexus between the appellant and the robberies and gave him out as one of the robbers, in my view".

The appellant has strongly contended that these findings were not supported by the evidence contained in the record. Thus making the examination of the evidence to be inevitable. On this point, PW2 stated in his evidence as follows:

"In the morning while we were searching for the robbers, we were told that the police arrested some of them. We went to the police where the arrest was effected. Fortunately I arrived at the time a search was being conducted on them and my audio cassette was found in the back pocket of the short one, that is the 1st accused. At the same time police also showed us some other recovered items including the rechargeable lamp and locally made pistol but my own was not among..."

Under cross examination, he said my audio cassette was re-

covered from the back pocket of the 1st accused person in my presence.

Pw3 also testified as follows:

“While still there the police came to the station with one of the robbers. I discovered that one of clothes stolen from me was in his Possession so I confirmed that he was one of the robbers who attacked us. The robbers brought to the station that morning was the 1st accused person. Apart from the clothes recovered from him other items found in possession of the 1st accused were food items, namely Salami noodles and Sardine’.

Under cross-examination, the witness stated that “I suspected the 1st accused person to be among the robbers because the Native dress and salami Noodles and Sardine were found on him. As the 1st accused person was alighting from the police vehicle which conveyed him to the station I saw the items stolen from me and instantly identified him”.

My lords, I have painstakingly gone through the evidence of the appellant and I could not see where he made any explanation as to how the robbed items got to his possession. In view of the evidence I reproduced above I have no doubt that the findings of the lower court was based on the evidence contained in the record. Where an accused person is found with a robbed item and he could not explain how the goods got to him, there is a presumption that he was one of the robbers or that he participated in the robbery. In that case there would be no need to conduct any identification Parade. Being in possession of a stolen items or robbed items is a prima facie evidence that the accused participated in the robbery. That being the case, the onus is on him to give satisfactory account/evidence as to how the good or goods got to his possession, failing which the court would be right to convict him for the offence of robbery or theft (stealing).

This court in the case of Madagwa v. The State (1988) NSCC (Pt.3) Vol. 19 at 160 stated the legal position as follows:-

“However, when the matter got to the court of appeal the court observed, as it was entitled to do, that the facts of the case raised a presumption of guilt against the accused, that is, that the appellant was in possession of a stolen car, a few hours after it was

stolen and could be presumed to have been the thief. That is a presumption of law, it is an inference which section 148 of the Evidence Act allows the court to make and in the instant case I am satisfied that the presumption could validly be made. Indeed that some type of the presumption has been made in similar cases in R v. Kwashie (1950) 13 W.A.C.A. 864 was held that an accused who was found in possession of property stolen some 90 minutes earlier would be presumed to be the thief". Per Craig JSC. See also R. v. Sunday (1960) LCR 192, R. v. Michael Opara (1961) WNLR 127, Kolade v. COP (1971) NMLR 20 and Salami v. The State (1988) 5 NWLR (pt. 85) 570.

Applying this principle of law to this case I have no doubt that the lower court validly made the presumption that the appellant participated in the commission of the offence of robbery.

The argument of the appellant that the police man who recovered the items was not called as a witness and as a result there is a vacuum does not hold water. With tremendous respect, this argument is of no moment, whatever vacuum that may allegedly be created by the failure to call the police man has been filled by the pw2 who said that the audio cassette was recovered from the appellant in his presence.

Finally my lords, I hold that this appeal is devoid of any merit and it is accordingly dismissed. The judgment of the lower court is both humane and legal, considering the facts and evidence adduced. The conviction and sentence of 21 years imprisonment passed on the appellant is absolutely correct and same is hereby affirmed.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother MUNTAKA-COOMASSIE, JSC just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed and therefore order accordingly. Appeal dismissed.

NGWUTA JSC

I have had the privilege of reading in draft the lead Judgment

delivered just now by my Lord Muntaka-Coomassie, JSC and I entirely agree with the reasoning and conclusion therein.

I wish to say a word or two on the proceeds of robbery which were allegedly found in possession of the appellant after the robbery.

PW2 and PW3 each gave evidence that some proceeds of the robbery were recovered by the police from the appellant in their presence. The appellant denied ever being in possession of any such items.

The trial Judge saw and heard the witnesses testify in Court. He made proper use of the opportunity of seeing and hearing the witnesses in Court. He found as a fact that the evidence of the witnesses is credible and accepted same while he rejected the evidence of the appellant as unreliable.

This finding of fact was affirmed by the Court below. It is a concurrent findings of facts with which this Court cannot interfere as there is no showing by the appellant that the findings are perverse. See *Ibodo v Enarofia* (1980) 5-7 SC 42, *Chikwendo v. Mbamali* (1980) 3-4 SC 31, *Okafor v. Idigo* (1984) 1 SCNLR 481, *Kponuglo v. Kodadja* (1932) 2 WACA 24. Based on the above and more especially the fuller reasons in the lead Judgment, I also dismiss the appeal as devoid of merit.

ARIWOOLA JSC

The appellant together with two others were charged with the offences of conspiracy to commit armed robbery and armed robbery, contrary to Sections 5(6) and 1(2) (c) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria, 1990 (as amended).

After the trial, the court found the appellant guilty as charged, convicted and sentenced him to death. Upon appeal to the court below, the appeal was allowed in part. The conviction and sentence were reduced from armed robbery and death to lesser offence of robbery without firearms and 21 years imprisonment.

The appellant was further dissatisfied with the decision of the court below hence appealed to this court. The sole issue distilled for determination of the appeal was “*whether the prosecution proved a case of robbery beyond reasonable doubt at the trial against the ap-*

pellant to warrant his conviction for robbery and sentence to 21 years imprisonment by the lower court.”

It is instructive to note that at the time the appellant was arrested by the police near the scene of the alleged robbery, he was found in possession of part of the items dispossessed of his victim of the robbery. He failed to explain away how he came about the said item- audio cassette which belonged to PW2. Indeed, the appellant was identified at the police station few hours after the robbery took place and was wearing one of PW3's native dresses stolen by the appellant.

There is no doubt, the testimony of PW2 and PW3 who were victims was convincing enough to meet the ingredients of the offence of robbery. And it is trite law that the requirement that prosecution is expected to prove any criminal offence beyond reasonable doubt is not and does not require absolute proof beyond reasonable doubt or proof beyond all shadows of doubt. See *Stephen John & Anor Vs The State* (2011) 18 NWLR (pt.1278) 353; (2011) LPELR - SC.269/2010. *Alkalezi Vs State* (1993) 2 NWLR (Pt.273) 1, *Oreoluwa Onakoya Vs FRC* (2002) 11 NWLR (pt. 779) 895.

In the instant case the prosecution, without any iota of doubt proved the offence of robbery against the appellant and he was properly found guilty and convicted by the trial court. The court below was however right to have allowed the appeal in part, having found that a lesser offence was indeed proved and reduced also the sentence. See *John Nwachukwu Vs The State* (1986) 2 NWLR (Pt.25) 765, (1986) All NLR 496, *The Queens v. Nwangoagwu* (1962) 1 All NLR 294.

In the light of the above and having read in draft the lead judgment of my learned brother, Muntaka-Coomassie, JSC I am in total agreement with the reasoning in the said lead judgment and the conclusion arrived thereat that this appeal is unmeritorious. It is liable to dismissal and is hereby accordingly dismissed.