

SUPREME COURT OF NIGERIA
FRIDAY 28TH FEBRUARY, 2014. SC. 196/2011
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, K. B. AKA'AH, K. M. O. KEKERE-EKUN,
J. I. OKORO, JJSC**

SGT. MONDAY YAKUBU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Conspiracy - Proof - Prosecution must inter alia prove agreement between two or more persons to do illegal act - And specifically that each of accused persons individually participated in the conspiracy (H1)

CONVICTION - Circumstantial evidence - Weight - For such evidence to lead to conviction - It must be cogent and unequivocal as to point to no other direction - But the guilt of accused (H2)

CRIMINAL PROCEDURE - Proof - Facts within accused knowledge - Although prosecution is to prove beyond reasonable doubt - And accused has no duty to prove innocence - But accused must adduce evidence in support of facts strictly within his knowledge (H3)

CRIMINAL PROCEDURE - Defence - Fair hearing - Appellant was not denied fair hearing as he was represented by counsel throughout trial - And there was sufficient compliance with the law in the case (H4)

FACTS

Before the High Court of Kogi State Egbe, accused/appellant along with four others was arraigned on three counts of criminal conspiracy, culpable homicide and armed robbery punishable under section 97(1), 221(a) and 298(b) of the Penal Code. They pleaded not guilty to the charges. The case for prosecution/respondent is that appellant drove an Army truck in company of the four others to a Sawmill. While appellant waited in the truck at the entrance of the Sawmill, the other four persons went inside, killed a security guard

and stole a sewage machine. PW1 who witnessed the incident was able to run away from the scene to inform a manager at the Sawmill of the ugly incident.

The police were alerted and when they arrived, they arrested appellant who was still waiting in the truck. The other four persons were subsequently arrested in connection with the crime. At the trial, respondent called 9 witnesses and tendered 29 Exhibits in evidence. Appellant and the others did not testify or call any witness in defence. In its judgment, the court found appellant guilty of criminal conspiracy only. He was convicted and sentenced to 10 years imprisonment without an option of fine. Not happy with the judgment of the court, appellant appealed to the Court of Appeal Abuja Division. The court dismissed the appeal and affirmed the conviction and sentence passed on appellant. Aggrieved, appellant lodged appeal in Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the learned Justices of the court below were right to hold that the prosecution had proved a case of criminal conspiracy against the appellant beyond reasonable doubt?

2. Whether the learned Justices of the court below were right in holding that the failure of the learned trial Judge to fully comply with the provisions of Sections 191 and 235 of the Criminal Procedure Code has not rendered the entire trial a nullity?

HELD (Unanimously dismissing the appeal per

KEKERE-EKUN JSC)

CRIMINAL PROCEDURE - Conspiracy - Proof

1. To prove conspiracy, the prosecution must prove the following:-

i. an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means.

ii. where the agreement is other than an agreement to commit an offence, that some act besides the agreement was done by one or more of the parties in furtherance of the agreement.

iii. Specifically that each of the accused persons indi-

vidually participated in the conspiracy.

It is well settled that conspiracy is seldom proved by direct evidence. (p. 738 E)

CONVICTION - Circumstantial evidence - Weight

2. In order for the circumstantial evidence to lead to a conviction it must be so cogent and unequivocal as to point to no other direction but the guilt of the accused. The quality of the evidence must be such as to leave no reasonable grounds for speculation that some other person other than the accused committed the offence. (p. 739 E)

CRIMINAL PROCEDURE - Proof - Facts within accused knowledge

3. One glaring fact in this case is the fact that the appellant, a driver with the Defence Headquarters Lagos, unofficially and illegally accepted a fee for the hire of one of the army TATA truck belonging to his employer, the Nigerian Army. Not only that, he agreed to drive the truck in the company of others all the way from Lagos to Kogi State in the dead of night for a rendezvous at the Ise Oluwa Sawmill at Egbe. These facts alone suggest the inference that there was an agreement between the appellant and those who accompanied him on that journey to do an illegal act. He claimed he believed he was hired to collect an engine belonging to one Mr. Kehinde. The said Mr. Kehinde was never invited to testify to corroborate the appellant story. This was evidence of a fact within the appellant's knowledge. Although the prosecution has the burden of establishing its case against the accused person beyond reasonable doubt, and the accused has no duty to prove his innocence, he nonetheless has a duty to adduce evidence in support of facts that are strictly within his knowledge. (p. 739 G)

CRIMINAL PROCEDURE - Defence - Fair hearing

4. It is noteworthy that the appellant and the other accused persons were represented by counsel throughout the trial and in particular on 12/5/2004. Learned counsel did not raise any objection when the court read out its record nor did he apply

to call the appellant or any other witness in his defence. Indeed in the course of addressing the court, he asserted that the appellant and the other accused persons were not bound to say even a word in their defence.

I agree with the lower court that there was sufficient compliance with the provisions of the law in the circumstances of this case, particularly as the appellant was represented by counsel.

If, as argued by learned counsel for the appellant, the learned trial Judge went over his head and put the wrong options to the appellant directly, he owed it as a duty to his client to raise an objection, which he failed to do. The contention that the appellant was denied a fair hearing, thereby rendering the trial a nullity is misconceived. (p. 741 H)

NOTABLE POINT OF INTEREST

KEKERE-EKUN JSC

1. Criminal conspiracy – Definition of

Section 96 of the Penal Code defines “criminal conspiracy” as follows:

“When two or more persons agree to do or cause to be done:

a. an illegal act; or

b. an act which is not illegal by illegal means’

F such an agreement is called conspiracy” (p. 738 D)

REPRESENTATION

Aliyu Saiki Esq., with Afolabi Omotosho Esq., Ibrahim T. Hassan Esq., and Edet Ekoli Esq., for the Appellant

G Joe Abraham, SAN, A.G. Kogi State with R. A. Alfa (Mrs.) D. P. P. Kogi State, for the Respondent

CASES REFERRED TO

- H Usufu v. State (2007) 3 NWLR (pt. 1020) 94
- Oyakhire v. State (2006) 15 NWLR (pt. 1001) 157
- Alarape v. State (2001) 5 NWLR (pt. 705) 79
- Obiakor v. State (2002) 6 SC (Part II) 33
- Njovens v. State (1973) 5 SC 17

Dabo v. State (1977) 5 SC 22
 Kaza v. State (2008) 1 - 2 SC 151
 Onyenye v. State (2012) ALL FWLR (pt. 643) 1810
 Akinmoju v. State (2000) 6 NWLR (pt. 662) 608
 State v. Otu (1964) NMLR 113
 D.P.P. v. Akanji (1968) ALL NLR 484
 Dangari v. State (1968) ALL NLR 246
 Usufu v. State (2007) 3 NWLR (pt. 1020) 94
 Tanko v. State (2008) 16 NWLR (pt. 1114) 597
 State v. Aibangbee (1988) 7 SC (pt. 1) 96

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STATUTES REFERRED TO

Penal Code, ss. 96, 97(1), 221(a), 298(b)
 Criminal Procedure Code, ss. 191, 235
 Evidence Act 2011 (as amended), ss. 139, 140
 Indian Hemp Decree 1966, s. 2(1)

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LEAD JUDGMENT BY KEKERE-EKUN JSC

This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 14/4/2011 affirming the conviction and sentence of the appellant by the High Court of Kogi State sitting at Egbe delivered on 11/5/2005.

The appellant along with four others was arraigned before the High Court of Kogi State, sitting at Egbe, on three counts of criminal conspiracy, culpable homicide and armed robbery punishable under Section 97(1), 221 (a) and 298 (b) of the Penal Code. The appellant was the 1st accused at the trial court. All the accused persons pleaded not guilty to each of the three counts. The prosecution called 9 witnesses and tendered 29 Exhibits, while the accused persons declined to testify on their behalf or call any witnesses.

The brief facts of the case are that on or about the 6th day of May, 2001 at Egbe in Yagba West Local Government Area of Kogi State, around 12.45am the Appellant drove a TATA Green Army Truck with Reg. No. DHQ 154 to Ise Oluwa Sawmill. The other four accused persons accompanied him in the vehicle to the sawmill. A security guard, Joseph Folatayo (PW1), sighted the other four accused persons coming towards him and another security guard (Baba Muri) with a halogen lamp and a gun. PW1 was able to run and

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inform PW2, Ojo Ayodeji, a manager at the sawmill of what was going on. Unfortunately Baba Muri, the security guard, was killed by the assailants and was later found in a pool of his own blood with his hands and legs tied with rope and his head battered. A blood stained piece of wood was found near his corpse. It was discovered that one of the machine wheels had been loosened and rolled towards the army vehicle, while a sewage machine worth N25,000 had been stolen. A box of tools was also found among other things. The police apprehended the appellant who was in the truck at the entrance to the sawmill. The truck was searched and later taken away to the police station. The police later arrested the four other accused persons.

In a considered judgment delivered on 11/5/2005, the appellant was found guilty of criminal conspiracy only. He was convicted and sentenced to 10 years imprisonment without an option of fine. He was dissatisfied with the judgment and appealed to the Court of Appeal, Abuja Division (the lower court). His appeal was dismissed and his conviction and sentence were affirmed. Still dissatisfied he has appealed to this court vide his notice of appeal filed on 13/5/2011 containing ten grounds of appeal.

The appellant formulated two issues for determination.

They are:

1. Whether the learned Justices of the court below were right to hold that the prosecution had proved a case of criminal conspiracy against the appellant beyond reasonable doubt? (Grounds 1, 2, 4, 5 and 6)

2. Whether the learned Justices of the court below were right in holding that the failure of the learned trial Judge to fully comply with the provisions of Sections 191 and 235 of the Criminal Procedure Code has not rendered the entire trial a nullity? (Ground 9)

The respondent on its part formulated four issues for determination.

They are:

1. Whether the learned Justices of the court below were right to hold that the prosecution had proved the case of criminal conspiracy against the appellant beyond reasonable doubt? (Grounds 1, 3, 6, 7, 8 and 9)

2. Whether the learned Justices of the court below were right

in holding that there was substantial compliance with the provisions of Sections 191 and 235 of the Criminal Procedure Code by the trial Judge? (Grounds 2 and 4)

3. Whether the learned Justices of the court below were right in affirming the sentence passed on the appellant? (Ground 5)

4. Whether the learned Justices of the court below were right in holding that the appellant had a fair trial? (Ground 10) B

The appeal shall be determined on the issues formulated by the appellant.

In respect of Issue 1, it is pertinent to note that in his extra judicial statements to the Police, which were tendered in evidence and admitted as Exhibits 19 and 25, the appellant stated that he is a driver at the Defence Headquarters (DHQ) in Lagos and that the TATA army truck that he drove on the day of the incident belonged to the DHQ. He also stated that he was paid a fee of N20,000.00 by one Kehinde to bring the truck to Kwara State to collect an engine that allegedly belonged to him from the sawmill. He also stated that the said Kehinde detailed about seven boys to accompany him and that the other accused persons were among them. He claimed that he was not aware that the other accused persons were going to carry out a robbery at the sawmill as he believed the engine they went to collect belonged to the said Kehinde. He also admitted that the journey was unauthorized by his employer. C

It was contended on the appellant's behalf that to succeed in proving the offence of criminal conspiracy, the prosecution must prove both the actus reus and the mens rea elements of the offence. Learned counsel who settled the appellant's brief, ABDULLAH M. ALIYU ESQ., submitted that the charge was not made out against him because the prosecution failed to prove that he voluntarily and intentionally agreed to commit the offence with another. He argued that the appellant was merely Kehinde's employee and that from his statement it was evident that he was not aware that they were going to Kogi State to steal. To further buttress his assertion that the appellant was not aware that they were there to steal, he noted that he remained in the truck and did not join the others in dismantling the engine and also did not flee upon sighting the Police. D

Learned Senior Counsel for the respondent, JOE ABRAHAM, SAN, the Hon. Attorney General for Kogi state, submitted that from E

the appellant's extra-judicial statements and other evidence before the court, it was clear that he agreed with the other accused persons to embark on the illegal journey from Lagos to Egbe and also agreed to the objective of unlawfully removing the machines and engine from the sawmill. He submitted that their intent could be inferred from their actions. Relying on the cases of *Usufu Vs The State* (2007) 3 NWLR (Pt.1020) 94; *Oyakhire Vs The State* (2006) 15 NWLR (Pt.1001) 157; *Alarape Vs The State* (2001) 5 NWLR (pt. 705) 79, he submitted that the proof of conspiracy is usually a matter of plausible inference deduced from certain criminal action of the accused persons done in pursuance of an apparent criminal purpose in common between them. He submitted further that proof of an actual agreement between the accused persons is uncommon. He contended that the prosecution proved its case against the appellant beyond reasonable doubt and that the lower court was right to affirm the decision of the trial court.

Section 96 of the Penal Code defines "criminal conspiracy" as follows:

"When two or more persons agree to do or cause to be done:
a. an illegal act; or
b. an act which is not illegal by illegal means'
such an agreement is called conspiracy"

To prove conspiracy, the prosecution must prove the following:-

i. an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means.

ii. where the agreement is other than an agreement to commit an offence, that some act besides the agreement was done by one or more of the parties in furtherance of the agreement.

iii. Specifically that each of the accused persons individually participated in the conspiracy.

It is well settled that conspiracy is seldom proved by direct evidence. In *Obiakor Vs The State* (2002) 6 SC (Part II) 33 @ 39 - 40 this court held, per Kalgo, JSC held:

"Conspiracy as an offence is the agreement by two or more persons to do or cause to be done an illegal act or legal act by illegal

means. The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed. Because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved acts.” (Emphasis mine)

On the nature of proof required to establish criminal conspiracy, Achike, JSC had this to say in *Oduneye Vs The State* (2001) 1 SC (part I) 1 @ 6 - 7:

“A conviction for conspiracy is not without its inherent difficulties. ...a successful conviction for conspiracy is one of those offences predicated on circumstantial evidence which is “evidence not of the fact in issue but of other facts from which the fact in issue can be inferred. ...Evidence in this connection must be of such quality that irresistibly compels the court to make an inference as to the guilt of the accused.”

See also: *Patrick Njovens v. The State* (1973) 5 SC 17; *Dabo & Anor v. The State* (1977) 5 SC 22; *Kaza v. The State* (2008) 1 - 2 SC 151 @ 164 - 165; *Onyenye v. The State* (2012) ALL FWLR (Pt.643) 1810.

In order for the circumstantial evidence to lead to a conviction it must be so cogent and unequivocal as to point to no other direction but the guilt of the accused. The quality of the evidence must be such as to leave no reasonable grounds for speculation that some other person other than the accused committed the offence. See *Akinmoju v. The State* (2000) 6 NWLR (Pt.662) 608 @ 626 D - E.

In the instant case, as conceded by learned counsel for the appellant at page 4 paragraph 4.01 of his brief, the facts adduced by the prosecution through PW1 - PW4 are in the main not in dispute. The issue is whether those facts as established, are sufficient to warrant the inference of guilt against the appellant.

One glaring fact in this case is the fact that the appellant, a driver with the Defence Headquarters Lagos, unofficially and illegally accepted a fee for the hire of one of the army TATA truck belonging to his employer, the Nigerian Army. Not only that, he agreed to drive the truck in the company of others all the way from Lagos to Kogi State in the dead of night for a rendezvous at the Ise Oluwa Sawmill at Egbe. These

facts alone suggest the inference that there was an agreement between the appellant and those who accompanied him on that journey to do an illegal act. He claimed he believed he was hired to collect an engine belonging to one Mr. Kehinde. The said Mr. Kehinde was never invited to testify to corroborate the appellant story. This was evidence of a fact within the appellant's knowledge. Although the prosecution has the burden of establishing its case against the accused person beyond reasonable doubt, and the accused has no duty to prove his innocence, he nonetheless has a duty to adduce evidence in support of facts that are strictly within his knowledge. See Section 140 of the Evidence Act 2011 (as amended).

The appellant did not raise a defence of alibi. It was therefore not the duty of the prosecution, as argued by learned counsel for the appellant, to search for and produce the said Kehinde or Sgt. Peter who allegedly introduced the appellant to Kehinde.

It is also interesting to note that when the police, who were invited to the scene, approached the vehicle and demanded to know who was inside, the appellant identified himself as "a soldier man" (See Exhibit 19 at page 31 of the record), This explains why the appellant did not flee when he saw the police approaching. He had assumed that he would not be arrested once he identified himself as a soldier. The evidence further revealed that the appellant remained in the vehicle while the other accused persons went into the sawmill to remove the machines and engine, and in the process killed the security guard. After a careful review of the evidence, the lower court at pages 268 - 269 of the record held thus:

"It could be inferred that the role of the appellant was to receive the machines or engines which the other accused persons have removed from the sawmill and then facilitate their joint escape as the driver to the Army truck.

...It is also striking and disturbing that the activities of the appellant and the other co-accused were carried out around 02.45an in the midnight and this showed that their actions were questionable and illegal since it could not be carried out during the day time.

Furthermore the appellant mentioned Sergeant Peter and one Kehinde in his statement to the police i.e. Exhibits 19 and 25 but did not call them to confirm his statement.

On the whole, it is my view that the prosecution has proved the case of criminal conspiracy against the appellant beyond reasonable doubt."

It is my humble view that the above findings are fully borne out by the record and are not perverse. The appellant has not advanced any reason to warrant interference by this court. B

With regard to issue 2, it is the appellant's contention that the learned trial Judge failed to comply with the provisions of Sections 191 and 235 of the Criminal Procedure Code (CPC), which failure occasioned a miscarriage of justice. Section 191 of the CPC enjoins the court, at the close of the prosecution's case to enquire from the accused person whether he intends to testify on his own behalf or call any witnesses other than witnesses as to character. While Section 235 empowers the court, where it deems it necessary after the prosecution has closed its case and before he is called upon for his defence, D to put questions to the accused person to enable him explain any circumstances appearing in the evidence against him. At the close of the prosecution's case on 12/5/2004, the following ensued:

"Court to the accused persons: Do you want to give evidence or do you want to rely on all that the prosecution has stated. Note: John Owoleke, Court Secretary interpretes from English to Yoruba and vice versa. E

Yinusa Saliu Driver, interprets from English to Hausa and vice versa. F

1st accused: I have no additional statement to make to what I have already stated in the trial within trial.

Court: The 5 accused persons when asked if they had understood all that had been said against them all agreed that the (sic) understood same. The were equally asked if they wanted to testify on their own behalf tender any document or call additional witness and they all said that they would be resting their case on all they had stated at the trial within trial and as such would not be adducing any evidence." (See page 113 lines 1 - 21 of the record) G

It is noteworthy that the appellant and the other accused persons were represented by counsel throughout the trial and in particular on 12/5/2004. Learned counsel did not raise any objection when the court read out its record nor did he apply to call the appellant or any other witness in his defence. In- H

deed in the course of addressing the court, he asserted that the appellant and the other accused persons were not bound to say even a word in their defence. (See page 121 lines 9 - 12 of the record). **I agree with the lower court that there was sufficient compliance with the provisions of the law in the circumstances of this case, particularly as the appellant was represented by counsel.**

If, as argued by learned counsel for the appellant, the learned trial Judge went over his head and put the wrong options to the appellant directly, he owed it as a duty to his client to raise an objection, which he failed to do. The contention that the appellant was denied a fair hearing, thereby rendering the trial a nullity is misconceived.

In conclusion, I hold that the appeal lacks merit. It is hereby dismissed. The judgment of the lower court delivered on 14/4/2011 affirming the conviction and sentence of the appellant by the trial court is hereby affirmed.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead Judgment of my learned brother KEKERE-EKUN JSC just delivered.

I agree with his reasoning and conclusion that the appeal is without merit and should consequently be dismissed.

I therefore order accordingly. Appeal dismissed.

MUNTAKA-COOMASSIE JSC

This is an appeal against the decision of the Court of Appeal, Abuja Division hereinafter referred to as Lower Court. This judgment was delivered on the 14th of April 2011.

The Appellant, SGT. Monday Yakubu, was the 1st accused person at the trial court. He was charged along with 4 other accused persons with criminal conspiracy, Armed Robbery and Culpable Homicide contrary to Sec. 97, 292(b) and 221 (a) of the Penal Code.

“That you, SGT. Monday Yakubu Rasak Olarenwaju, Akeem Abiodun, Yakubu Ali and Rasheed Ayinde at Egbe in Yagba West Local Government within the Kogi State Judicial division committed

Armed Robbery by doing an act to wit. While being armed with guns and other dangerous weapons, you robbed the premises of Ise-Oluwa Sawmill, Egbe of one sawing machine valued N25,000.00k belonging to one Ojo Adedeji and you thereby committed an offence punishable under Section 298 (c) of the Penal Code”

Nine (9) witnesses testified for the prosecution. The appellant herein failed to testify and called anybody to give evidence on his behalf. However his extra-judicial statement to the Police was tendered and admitted in evidence as exhibits 19 and 25. It is to be noted that in those exhibits the appellant totally denied any knowledge that he was going to Egbe for stealing expedition. He stated in those exhibits that he was engaged by one Kayode (who claimed to own the equipment) to convey them for him, for a fee from Egbe to Lagos. That he carried out the acts which he did without the knowledge or intention that a crime was to be committed. At the end of the trial and addresses, the appellant was convicted only for the offence of criminal conspiracy and sentenced to a term of 10 years imprisonment with no option of fine. It is clear from the ruling on trial within trial the statement of the accused now Appellant was admitted and that the trial court Medupin J. handed down the conviction and sentenced him to 10 years, see pages 129 - 165 of the record of proceedings, especially page 165 thereof.

The accused person was not happy with the conviction and sentence, unsuccessfully appealed to the Court of Appeal Abuja Division herein called lower court. It was the unanimous decision of the lower court that the accused, now appellant, was rightly convicted and sentenced by the trial court and therefore dismissed the appeal. See pages 257 to 277 of the record of proceeding.

The accused/Appellant not satisfied with the judgment of the court below and further appealed to the Supreme Court on a Notice of Appeal containing ten (10) grounds of appeal thus.

1. It is the duty of the prosecution to prove beyond reasonable doubt that the appellant conspired with others to commit the offence.

2. The learned justices of the Court of Appeal misdirected themselves in law when they held that:

“the learned counsel for the respondent submitted that the circumstances envisaged by the sections of the criminal procedure

code referred to above and cases cited by the learned counsel for the appellant are those in which accused/persons (sic) are not represented by the legal practitioner, so as not to put them at a disadvantage. I agree with her on this point.

In this appeal under consideration, the appellant and his other co-accused were represented by counsel throughout the trial until judgment was delivered. And a careful examination of the appellant's statement to the court on page 33 lines 1 - 14 would reveal that the appellant had no intention of giving evidence or calling witness. Even if there were irregularities it must be shown to be substantial before a court can look into it.

3. The learned justices of the Court of Appeal erred in law when it affirmed the finding of the trial court that the prosecution has proved the offence of conspiracy beyond reasonable doubt.

4. The learned Justices of the Court of Appeal erred in law when they held that the learned trial judge had complied substantially with the provision of Section 191 and 194 (1) of the criminal procedure code.

5. The learned Justices of the Court of Appeal erred in law when they refused to interfere with the sentence passed on the appellant when there was no legal basis for it.

6. The learned Justices of the Court of Appeal erred in law when they held that the trial judge properly made use of Exhibits 19 and 25 in convicting the appellant.

7. The learned Justices of the lower Court misdirected themselves in law when they drew inference for conspiracy when there was no basis for that.

8. The learned Justices of the Court of Appeal erred in law when they held that the learned trial judge rightly relied on the alleged extra-judicial statements of the appellant's co-accused in convicting the appellant when it was not shown that he adopted them.

9. The learned justices of the Court of Appeal erred in law when they held that:-

"The statements of the other co-accused persons in Exhibits 26A, 26B, 27, 28A, 28B, and 29 buttressed the fact that they all had a common intention to commit crime".

10. The learned Justices of the lower court erred in law when it held that the appellant had a fair trial at trial court.

The entire incident that led to the trial of the accused/appellant took place at Ise-Oluwa Saw Mill in a town called Egbe, Kogi State. The vehicle was parked at the entrance of the Saw Mill. He then woke the deceased and informed him that they have come. The PW1 continued to testify that he saw two (2) of the occupants of the vehicle approaching the Saw Mill with Halogen lamp and a gun he ran to inform the PW3, on being informed the Pw3, went to alert his neighbour (Pw5) who was the officer in-charge of the Egbe Police station. All the Pw5 together with Pw3 went with, three police men to the saw mill where they saw the truck. On getting to the said truck which blocked the entrance they then changed direction, put off their light and approached the truck. On getting to the truck, they shot at the tires and deflated it. The Pw5, evidence continued, shouted “who was there?” The appellant emerged from the vehicle and said “spirit de corps”. When the vehicle was ultimately searched, the police discovered shirts, slippers and torch light wrappers. The Appellant was immediately arrested and taken to the police station. B C D

It was in the following morning that the police discovered at the saw mill that one of the machines was loosened and moved towards the vehicle while a sawing machine, worth, N25,000.00 had been stolen. Another discovery was that the police discovered that one of the security guards on duty at the saw mill had been killed. His two hands had been tied to his legs and he had a fracture on his head. A blood stained plank was equally found near the corpse of the security guard. E F

It was on the basis of the above facts that the present appellant was charged along with others for the offences of conspiracy to commit Armed Robbery, Armed Robbery and Culpable Homicide Punishable under Sections 97, 222 and 298 (1) of the Penal Code respectively. G

In the course of the trial the prosecution amended the 2nd and 3rd counts on the charge sheet to Culpable Homicide and Armed Robbery punishable under Section 221 (a) and 298 (b) of the Penal Code respectively. H

I was privileged to have read in draft the lead judgment rendered by Kekere-Ekun JSC, I entirely agree with the decision reached thereat. I too hold that the appeal is devoid of merit same is deserved to be dismissed. I dismiss it.

AKA'AH'S JSC

I was privileged to read in draft the judgment delivered by my learned brother, Kekere - Ekun JSC I entirely agree with the reasoning and conclusion reached in the leading judgment.

B It is rather unfortunate that the appellant who is a symbol of security of the Nigerian State and who should be in the vanguard of protecting lives and property of innocent hard working Nigerians should engage himself in such nefarious activity leading to the loss of a precious life.

C The appellant was charged along with four others with Criminal Conspiracy, Armed Robbery and Culpable Homicide contrary to sections 97, 297(b) and 221(a) of the Penal Code. He was convicted of the offence of Criminal Conspiracy and sentenced to 10 (ten) years D imprisonment without option of a fine.

His appeal to the Court of Appeal was dismissed. This is a further appeal. The Notice contained ten grounds of appeal from which two issues were formulated for determination. The issues read thus -

E (i) Whether the learned Justices of the Court below were right to hold that the prosecution had proved a case of Criminal Conspiracy against the Appellant beyond reasonable doubt (Grounds 1, 2, 4, 5 and 6 of the Notice and Grounds of Appeal)

F (ii) Whether the learned Justices of the court below were right in holding that the failure of learned trial Judge to fully comply with the provisions of section 191 and 235 of the Criminal Procedure Code has not rendered the entire trial a nullity? (Ground 9 of the Notice and Grounds of Appeal). Since no issues were formulated G from grounds 3, 7, 8 and 10 in the Notice they are deemed as abandoned and struck out.

Learned counsel for the appellant conceded the fact that the evidence given by PW1, PW2, PW3 and PW4 showed that thieves invaded the premises of Ise Oluwa Saw Mill in Egbe on the night of H 6th May, 2001. The appellant drove the thieves from Lagos to Egbe in an army truck for a fee. In the course of the theft the thieves killed the security man who was guarding the premises of the saw mill.

Learned counsel argued however that the appellant at the earliest opportunity told the police in his extra - judicial statement it

was one Kehinde who through the intervention of Sgt. Peter begged him to drive him to some place in Kwara State to carry an engine and he bargained with Kehinde who paid him N20,000.00 (Twenty Thousand Naira) before he left for the journey and so did not know that the purpose of the journey was to go and steal. He submitted that the appellant cannot be guilty of criminal conspiracy since he did not form the intention with anybody to commit the offence and relied on *The State vs Otu & Ors* (1964) NMLR 113 at 114. He contended that the learned trial Judge in finding the appellant guilty of the offence of criminal conspiracy completely ignored the defence of lack of knowledge as raised by the appellant. He said the Court of Appeal was wrong in holding that the appellant ought to have called Sgt.

Peter and Kehinde to testify since the burden of proof of an accused person who raises the defence of being an innocent agent does not rest on the appellant but on the prosecution to disprove the assertion made by the accused and if they fail to do so the accused must be discharged. He relied on *D. P. P vs Akanji* (1968) ALL NLR 484 at 487 for this submission. He further submitted that once an accused sets up an exculpatory explanation of his role in the crime, the burden shifts to the prosecution to negative the explanation citing *Dangari vs The State* (1968) ALL NLR 246 at 251 -252 to buttress the argument and contended that since he gave the address of Sgt. Peter who introduced Kehinde to him, this was enough to put the police on the trail of Kehinde to ascertain if the appellant was aware of the real purpose of the trip to Egbe.

In a charge of conspiracy, proof of actual agreement is not always easy to come by. See: *Usufu vs State* (2007) 3 NWLR (part 1020) 94. The Court can infer conspiracy and convict on it if it is satisfied that the accused persons pursued, by their acts, the same object, one performing one part of the act and the other performing the other part of the same act so as to complete their unlawful design. See: *Tanko vs The State* (2008) 16 NWLR (Part 1114) 597 at 637 - 638.

The facts of the case which the appellant is not disputing are:-

1. The appellant conveyed the thieves from Lagos to the Ise Oluwa saw mill in Egbe where the security guard was killed and the engine was removed.

2. He was arrested within the vicinity of the saw mill

3. The journey took place in the night.

His main defence is that he is an innocent agent. The question to ask is:

Was the conduct of the accused consistent with his innocence?

The appellant did not obtain permission to embark on the journey.

B The fact that the journey took place in the night casts a lot of suspicion on the innocence of the appellant. If the journey had been undertaken in the daytime and he was operating a commercial transport service, there will be credence in his claim to being an innocent agent. In *D.P.P. vs Akanji* supra the accused was charged with the offence of knowingly cultivating Indian Hemp contrary to section 2(1) of the Indian Hemp Decree 1966.

The evidence at the trial showed that one Pa Emmanuel of Iroko gave to the accused some Indian Hemp seeds to plant for him. D He assured the accused that he had a licence to plant them. He further told the accused that he had arranged with one Salami who would come to cut the plants when they were ripe for cutting. When Salami came for the first harvest he was caught by the police. The Prosecution did not call Pa Emmanuel as a witness. In discharging the E accused the court held that for a charge under section 2(1) of the Indian Hemp Decree 1966 to succeed the prosecution must prove beyond reasonable doubt that the accused “knowingly” planted the Indian Hemp i.e. that he knowingly planted it, knowing it to be Indian Hemp. Knowledge may be proved by inference from all the F evidence; but the inference must be irresistible. In this case, the accused although he planted the plants did not do so knowingly. Pa Emmanuel made use of him as an innocent agent. Consequently the prosecution had failed to prove the charge against him beyond reasonable doubt. G

In the instant case, there is an irresistible inference to be drawn that the appellant in undertaking the journey from Lagos to Egbe in the cover of darkness had a sinister motive in doing so. The only person who could have been called to testify to the appellant’s innocence was Kehinde but the appellant did not give any clue where the said Kehinde could be found. The prosecution could not be expected to go on a wild goose chase in search of Kehinde whose address was not known. Sgt. Peter in the circumstances of this case is of no value to the prosecution’s case since the appellant did not claim to have H

undertaken a lawful journey on the orders of Sgt. Peter.

Another inference that can be drawn from this case is that the appellant undertook the trip in the night using the Army vehicle to facilitate the joint escape of the thieves and himself from arrest.

The learned trial Judge was right in finding the accused guilty of conspiracy and the court below did well to affirm the decision of the trial court. B

The second issue raised by the appellant is of no moment since he was represented by counsel and opted not to testify or call any witness.

The appeal lacks merit and it is accordingly dismissed. The conviction and sentence passed on the appellant is further affirmed by this Court. Appeal is dismissed. C

OKORO JSC

I read before now the lead judgment of my learned brother, Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC just delivered with which I agree that this appeal lacks merit and I join to dismiss same. I propose to say a few words in support of the judgment. E

The Appellant herein was charged along with four others with criminal conspiracy, Armed Robbery and culpable Homicide contrary to Sections 97, 297(b) and 221 (a) of the Penal Code. The entire incident which led to the trial of the Appellant took place at Ise Oluwa Saw Mill in a town called Egbe, Kogi State. The PW1 and the deceased were security guards at the said saw mill. On 6th June, 2001, at about midnight, the PW1 noticed a vehicle approaching the saw mill. The vehicle was parked at the entrance of the saw mill. The PW1 then saw two of the occupants of the vehicle stooping and approaching the saw mill with a gun and a halogen lamp. He signaled the deceased and ran to inform the PW3 who went to invite the officer in charge of Egbe Police Station - the PW5. F

It was the prosecution's evidence that the PW5 mobilized some policemen and went along with the PW3 to the sawmill. They saw a truck blocking the entrance of the sawmill. On getting to the truck, they shot at the tyres and deflated it. The PW5 demanded to know the identity of those present at the saw mill. The Appellant emerged from the vehicle and said "esprit de corps". When the vehicle was G H

searched, the police discovered shirts, slippers, torch light and wrappers. The Appellant was arrested and taken to the police station.

In the morning, the police discovered at the saw mill that one of the machines was loosened and moved towards the vehicle while a sewage machine worth N25,000.00 had been stolen. The police
B equally discovered that one of the security guards on duty at the saw mill had been killed. His hands were tied to his legs and he had a fracture on his head. A blood stained plank was equally recovered near the corpse of the security guard. It was for this reason that the
C Appellant was charged along with the others for the offences aforesaid.

Although the Appellant did not give evidence at the trial, his extra-judicial statement to the police was tendered and admitted in evidence as exhibits 19 and 25. The Appellant had, in those statements, denied any knowledge that he was going to Egbe for a stealing expedition. He stated that he was engaged by one Kayode (who claimed to own the equipment) to convey them for him, for a fee, from Egbe to Lagos. The appellant's contention therefore, at the trial, was that he was an innocent agent engaged by Kayode to convey the machines to Lagos for a fee. That he carried out the acts
E which he did without the knowledge or intention that a crime was to be committed.

At the end of the trial, the Appellant was convicted only of the offence of Criminal Conspiracy and sentenced to a term of 10
F years imprisonment without the option of a fine. The Appellant was dissatisfied with the judgment of the trial Court and appealed to the Court of Appeal. That Court in a considered judgment dismissed the appeal and affirmed the judgment of the trial Court. The Appellant is
G once again, dissatisfied with the judgment of the Court of Appeal, hence, the present appeal to this Court.

From the ten (10) grounds of appeal contained in the Notice of Appeal, the learned counsel for the Appellant has decoded two issues for the determination of this appeal. The two issues are:-

H Whether the learned Justices of the court below were right to hold that the prosecution had proved a case of criminal conspiracy against the Appellant beyond reasonable doubt.

1. Whether the learned Justices of the court below were right in holding that the failure of the learned trial judge to duly comply

with the provisions of sections 191 and 235 of the Criminal Procedure Code has not rendered the entire trial a nullity. The Respondent has distilled four issues as reproduced hereunder:

1. Whether the learned justices of the Court below were right to hold that the prosecution had proved the case of criminal conspiracy against the Appellant beyond reasonable doubt? B

2. Whether the learned Justices of the Court below were right in holding that there was substantial compliance with the provisions of sections 191 and 235 of the Criminal Procedure Code by the trial Judge. C

3. Whether the learned Justices of the Court below were right in affirming the sentence passed on the Appellant.

4. Whether the learned Justices of the Court below were right in holding that the Appellant had a fair trial.

I shall make my comments based on the two issues submitted by the Appellant, after all this is his appeal. D

By section 139 of the Evidence Act, 2011, in all criminal prosecutions, it is the duty of the prosecution to prove its case beyond reasonable doubt. This however does not mean prove beyond any shadow of doubt but the ingredients of the offence charged must be proved as required by Law to the satisfaction of the Court. See Obiakor v. The State (2002) 6 SCNJ 193, State v. Aibangbee (1988) 7 SC (Pt. 1) 96. E

On issue of conspiracy which relates to the 1st issue by the appellant, I wish to state that conspiracy is the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. There must be two or more persons as one person cannot conspire with himself. The two or more persons must be found to have combined in order to ground a conviction for conspiracy. It has to be noted that for the offence of conspiracy to be in existence, there must be consent of two or more persons. There must be an agreement which is an advancement of an intention conceived in the mind of each person secretly. The secret intention must have been translated into an overt act or omission or mutual consultation or agreement. See Tanko v. The State (2008) 16 NWLR (Pt. 1114) 597. It is trite that the Court can infer conspiracy from the evidence or facts of the case. In Tanko v. The State (supra) at 638, this court held that: F G H

“The court can infer conspiracy and convict on it if it is satisfied from the evidence that the accused persons pursued, by their acts, the same object, one performing one part of the act and the other performing the other part of the same act so as to complete their unlawful design.”

B In the instant case, the evidence discloses that the act of the appellant using the army truck to convey the robbers to the scene of crime was illegal. PW4 clearly told the trial court that during investigation, they notified the office of the appellant to tell them that their vehicle was involved in a robbery and was being detained by the police. The response of the army authorities was that the movement of the Appellant with the truck was unauthorized as they were about declaring him wanted before the police message was received. Quite apart from the unlawfulness of the act of the appellant, the act was carried out in the night. In fact evidence shows that they arrived the scene at about 2.45am. From what has happened in this case, it can be inferred, and I think the court below was right to agree with the trial court that the role of the Appellant was to receive the machines or engines which the other accused persons had gone to remove and steal from the saw mill and then with the help of the army truck, facilitate an easy passage and escape since he was the driver of the army truck. I have no doubt in my mind that the court below was right to uphold the conviction of the Appellant for conspiracy.

F On the other issue, the learned counsel for the appellant contended that the trial judge ought to have complied strictly with the Provisions of Sections 191 and 235 of the Criminal Procedure Code. He argued that the trial Judge ought to have read out the options contained in Section 191 of the Criminal Procedure Code and explained them to the appellant. He relied on the case of State V Josiah (1985) 1 NWLR (Pt.1) 125.

The learned trial Judge on page 113 lines 15 - 21 of the Record of Appeal states:

H *“The 5 accused persons when asked if they understood all that had been said against them all agreed that the (sic) understood same. They were equally asked if they wanted to testify on their own behalf, tender document or call any additional witness and they all said that they would rest their case on all they had stated at the trial within trial and as such would not be adducing any evidence.”*

For me, I am satisfied that from what transpired at the trial, the learned trial Judge sufficiently complied with the provisions of sections 191 and 235 of the Criminal Procedure Code especially as he was represented by counsel. The contention by the Appellant in this issue is of no moment as the argument has failed to fly.

On the whole, based on the above comments of mine and the fuller considerations made in the lead judgment, I agree absolutely that this appeal is devoid of any scintilla of merit and is hereby dismissed by me.

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