

SUPREME COURT OF NIGERIA
FRIDAY 6TH MARCH, 2015. SC. 299/2012
CORAM:- M. S. MUNTAKA-COOMASSIE,
O. RHODES-VIVOUR, N. S. NGWUTA,
K. B. AKA'AH, C. C. NWEZE, JJSC

ISRAEL PIUS APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Robbery - Conviction - Even if Exhibit E was expunged from the record - There was still evidence to find guilt of robbery - Hence appellant was rightly convicted for robbery (H1)

EVIDENCE - Tainted witness - Where a witness is said to be tainted - Court must warn itself before admitting his evidence - And if he is an accomplice - His evidence requires corroboration (H2)

FACTS

Before the High Court of Ogun State, accused/appellant was charged for the offence of armed robbery. Appellant was alleged to have gone to a Health Centre where he met PW1 (Miss Ogunlana Olufunke) & 2 (Mrs. Adedola Odebode) and threatened them with a gun. He stole their mobile phones and led them to a corner of the Health Centre, where he eventually raped PW1. PW1 & 2 thereafter lodged a complaint at Erunwon Police Station. They were later referred to another police station by PW3 (Idehen Joseph). Subsequently, PW3 accosted appellant and recovered the two phones belonging to PW1 & 2.

PW3 later brought the mobile phones to the police station where PW1 & 2 identified same as theirs. Some days later PW1 & 2 were invited to the Police Station where they identified appellant amongst several suspects as the person who attacked them. During investigation PW4 (Police Constable Babatunde Ibukun) recovered a jack knife from the residence of appellant. Appellant was thus arraigned before the court. At the end of trial, the court found appellant guilty of armed robbery and sentenced him to death. Aggrieved, he appealed to the Court of Appeal, Ibadan Division. The appeal

was dismissed. However, the Court found appellant guilty of robbery without firearms on the ground that no firearm was found on him at the time of his arrest. The Court therefore reduced the sentence of death to 21 years imprisonment. Still not satisfied, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether, after expunging the evidence of use of arm or force from record, the remaining evidence of the prosecution could support appellant's conviction for robbery.

2. Whether P.W.3 and P.W.4 were tainted witnesses whose evidence required corroboration or caution, and if the answer is in the affirmative, whether the reliance on their evidence by the trial court and the Court of Appeal without corroborative evidence or caution was in grave error?

HELD (Unanimously dismissing the appeal per

AKA'AH S JSC)

Robbery - Conviction

1. The pertinent question to ask is: Did the lower court expunge the evidence of the use of arms or force? The lower court found that the respondent failed to prove with certainty the weapon used in the robbery. Although P.W.1 and P.W.2 gave evidence that the appellant pulled out a gun and threatened to shoot them if they refused to co-operate with him, no gun was found on the appellant when P.W.3 accosted him shortly after he had dispossessed them of the phones and when the appellant's residence was searched it was a jack knife that was recovered. This however does not detract from the fact that P.W.1 and P.W.2 were put in fear at the time the appellant took away their phones and when he raped P.W.1. Armed robbery is an aggravated form of robbery and the offence of robbery can be committed without the use of arms. The offence of robbery is theft or extortion by force or fear of force.

While the appellant did not use actual force, there is no doubt that he threatened to use force or violence on P.W.1 and P.W.2 at the time he dispossessed them of their phones. The appel-

lant instilled fear and intimidation on P.W. 1 and P.W.2 and this made it difficult or impossible for them to offer any resistance to the act of the appellant. Even if Exhibit E was expunged from the record, there was still evidence on which the appellant could be found guilty of the offence of robbery and the lower court rightly convicted the appellant of the lesser offence of robbery simpliciter and thus imposed a sentence of 21 years imprisonment. (p. 1058 D)

EVIDENCE - Tainted witness

2. Another category of tainted witnesses is an accomplice. Where a witness is shown to be a tainted witness the court must warn itself before admitting his evidence and if he is an accomplice, his evidence requires corroboration. The evidence did not reveal P.W.3 and P.W.4 were involved in the commission of the offence and had no interest to serve except carrying out their lawful duty as policemen. (p. 1059 E)

NOTABLE POINT OF INTEREST

NGWUTA JSC

1. Proved eye witness account of PW1 & 2 ought to have been upheld

The fact that the gun was not recovered does not in any way derogate from the truth of the evidence of PW1 and PW2. Appellant himself said that he threw a bag of Indian hemp into the bush when he was pursued by the Police. He was not caught at the scene and he had ample opportunity to get rid of the gun.

There is also the voluntary confessional Statement of the appellant admitted in evidence and marked Exhibit E. The learned trial Judge, in the last but one paragraph of his judgment held:

“From the evidence before me, including the voluntary confession of the accused (Exhibit E) I am satisfied that the prosecution has proved beyond reasonable doubt that the accused was armed with a jack knife...”

His Lordship may have been influenced by the fact that a jack knife was recovered in the room of the appellant and the charge before him alleging that the appellant was armed with a jack knife.

From the eye-witness account of the victims (PW1 and PW2) the appellant was armed with a gun and this was proved. On the other hand, there was no proof that he was armed with a jack knife.

In spite of the gravity of the offence he committed, the appellant was given a soft landing, as it were, by the prosecuting Counsel.

B Is this an error or a deliberate ploy to free the appellant? I ask this question in view of the undisputed evidence of PW1 and PW2 that the appellant was armed with a gun.

C They did not mention a jack knife or any other offensive weapon.

If there is a variation between the evidence of the key witness in Court and their accounts of the incident to the Police, the prosecutor ought to have applied to amend his charges in view of the circumstances and gravity of the offence charged. (p. 1063 E)

D

REPRESENTATION

Chinonye Obiagwe with Onyinye Oguamah (Miss) and Obinna Amorha, for the Appellant

O. O. Ojutalayo with A. A. Isiolaotan, for the Respondent

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CASES REFERRED TO

Kerenku v. Tiv N.A. (1965) All NLR 570

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

Nwokoro v. State (1995) 1 NWLR (pt. 3782) 432

F Okoro v. State (1998) 14 NWLR (pt. 589) 181

Adetola v. State (1992) 4 NWLR (pt. 235) 267

Akpan v. State (1992) 6 NWLR (pt. 248) 439

Enahoro v. R (1965) ANLR 123

G Ishola v. State (1978) 9-10 SC 81

Okupe v. Ifemechi (1974) 3 SC 97

Alagbe v. Abimbola (1978) 2 SC 39

Odulaja v. Haddad (1973) 11 SC 35

Gaji v. Paye (2003) 8 NWLR (pt. 823) 583

H Daggash v. Bulama (2004) 14 NWLR (pt. 892) 114

Olalekun v. State (2001) LPELR -2561 (SC) 29

Idahosa v. State (1978) 2 LRN 111

STATUTE REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap. 398 LFN 1990, s. 1(1)

LEAD JUDGMENT BY AKA'AHs JSC

The case put forward by the prosecution upon which the accused (now appellant) was convicted for armed robbery and sentenced to death was that on 29/9/2006 the appellant went to Ogidi Health Centre Atan in Ijebu North-East Local Government Area of Ogun State where he met P.W.1, Miss Ogunlana Olufunke Ajibola and P.W.2 Mrs. Adedoya Odebode and said he was looking for an accident victim and they directed him to another hospital. About 10 minutes later he returned to the Health Centre where he pulled a gun and ordered them to lie down and face the ground. They were frightened and complied with his order. He removed their mobile phones from where they were charging them. He then led them to the injection room and asked them to undress. They tried to put up a resistance but the accused told them that there were others with him. He then led them to a bush at the back of the Health Centre where he ordered P.W.2 to lie down and asked P.W.1 to lie on top of P.W.2 and thereafter raped P.W.1 after threatening to shoot P.W.1 if she refused to co-operate. He then asked them to run back to the Health Centre. On getting back to the Health Centre they dressed up and went to lodge a complaint at Erunwon Police Station. They met P.W.3 Idehen Joseph who directed them to Atan Police Station. It was P.W.3 who shortly after accosted the accused and recovered the two phones belonging to P.W.1 and P.W.2. When P.W.1 and P.W. 2 were making their statements at the Atan Police Station, P.W.3 brought the phones he recovered from the accused and P.W.1 and P.W.2 identified the phones as theirs. Some days later they were invited to the Police Station where they identified the accused amongst several suspects as the person who attacked them. During investigation P.W.4, Police Constable Babatunde Ibukun F/No. 359252 recovered a jack knife from the residence of the accused. Based on this evidence the accused was found guilty of armed robbery and sentenced to death.

He appealed to the Court of Appeal, Ibadan which dismissed the appeal. The lower court however found that robbery without firearms or offensive weapon was proved by the respondent against

the appellant and substituted the conviction for the lesser offence of robbery without firearms or offensive weapon under section 1(1) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Laws of the Federation of Nigeria 1990 (as amended).

The appellant felt dissatisfied and has further appealed to this Court. In the brief, appellant submitted two issues for determination, namely:-

1. Whether, after expunging the evidence of use of arm or force from record, the remaining evidence of the prosecution could support appellant's conviction for robbery.

2. Whether P.W.3 and P.W.4 were tainted witnesses whose evidence required corroboration or caution, and if the answer is in the affirmative, whether the reliance on their evidence by the trial court and the Court of Appeal without corroborative evidence or caution was in grave error?

The respondent adopted the issues framed by the appellant.

The pertinent question to ask is: Did the lower court expunge the evidence of the use of arms or force? The lower court found that the respondent failed to prove with certainty the weapon used in the robbery. Although P.W.1 and P.W.2 gave evidence that the appellant pulled out a gun and threatened to shoot them if they refused to co-operate with him, no gun was found on the appellant when P.W.3 accosted him shortly after he had dispossessed them of the phones and when the appellant's residence was searched it was a jack knife that was recovered. This however does not detract from the fact that P.W.1 and P.W.2 were put in fear at the time the appellant took away their phones and when he raped P.W.1. Armed robbery is an aggravated form of robbery and the offence of robbery can be committed without the use of arms. The offence of robbery is theft or extortion by force or fear of force. See: Kerenku v. Tiv N.A. (1965) All NLR 570 at 571. The lower court agreed with the finding of the trial Judge that P.W.1 and P.W.2 parted with their handsets Exhibits A and B under threat by the appellant. The court said at page 102 of the record:-

"The element of fear overwhelmed them at the material time, bringing the act of the appellant within the confines of the offence of mere robbery."

The court held per Ikyegh, JCA thus:

“Robbery without firearms or offensive weapon was in my considered view, proved by the respondent against the appellant beyond reasonable doubt.”

While the appellant did not use actual force, there is no doubt that he threatened to use force or violence on P.W.1 and P.W.2 at the time he dispossessed them of their phones. See: Otti v. The State (1991) 8 NWLR (Pt.207) 103 at 118. **The appellant instilled fear and intimidation on P.W. 1 and P.W.2 and this made it difficult or impossible for them to offer any resistance to the act of the appellant.** See: Nwokoro v. The State (1995) 1 NWLR (Pt.3782) 432. **Even if Exhibit E was expunged from the record, there was still evidence on which the appellant could be found guilty of the offence of robbery and the lower court rightly convicted the appellant of the lesser offence of robbery simpliciter and thus imposed a sentence of 21 years imprisonment.**

Learned counsel for the appellant has argued that P.W.3 and P.W. 4 were tainted witnesses whose evidence requires corroboration. In Okoro v. The State (1998) 14 NWLR (Pt.589) 181 at 215 - 216 a tainted witness was defined as:-

“—a witness who might have his own purpose to serve in giving evidence.”

Another category of tainted witnesses is an accomplice. Where a witness is shown to be a tainted witness the court must warn itself before admitting his evidence and if he is an accomplice, his evidence requires corroboration. See Adetola v. The State (1992) 4 NWLR (Pt.235) 267 at 273, Akpan v. The State (1992) 6 NWLR (Pt.248) 439 at 461 - 462. **The evidence did not reveal P.W.3 and P.W.4 were involved in the commission of the offence and had no interest to serve except carrying out their lawful duty as policemen.**

P.W.3 stated as follows in his evidence:-

“I had known the accused person before the date of the incident. So as the bike was taking me along the road leading to Erunwon, I saw the accused on the back of another motor bike and I asked him to stop so that I could ask him if he saw any strange faces in that neighbourhood that date, but the accused told the Okada rider not

to stop—I noticed that his trouser pockets were bulging and I asked him what he had in his pocket. He said they are market wares he wanted to sell. He brought out the items and they were three mobile phones... I collected the two phones from him... As I went to the counter to drop the two handsets, the PW.1 and PW.2 who were in the charge room saw them and immediately identified the two hand-sets.”

And PW.4 also stated in his evidence:-

“P.C. Idehen had mentioned in his statement that he recovered the handsets - exhibits A and B from the accused. On getting to the accused person’s house, we met one Adewunmi inside the accused person’s room. Immediately Adewunmi sighted us, he jumped down through the window for (sic) the storey building. We chased and arrested Adewunmi and brought him back to the room with a search warrant. We searched the room and we discovered many items including jack knife and eleven pieces of fireworks.”

Apart from the evidence of the appellant under cross-examination in which he said he knew P.W.3 as a police officer and that he used to collect money from him (appellant) when he sells Indian hemp, there is nothing to suggest that P.W.3 and P.W.4 were accomplices or had any personal interest to serve in ensuring that the appellant was convicted.

I cannot find any merit in this appeal and it is accordingly dismissed. His conviction for robbery simpliciter and sentence to 21 years imprisonment under section 1(1) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Laws of the Federation of Nigeria 1990 (as amended) by the Court of Appeal, Ibadan in CA/I/275/2008 delivered on 23rd June, 2011 is hereby affirmed. Appeal dismissed.

MUNTAKA-COOMASSIE JSC

This is an appeal against the decision of the Court of Appeal Ibadan Division now lower court, which on appeal to it dismissed the appeal of the appellant. The appellant, Israel Pius, further appealed to this court.

It is to be noted that the appellant was found guilty for Armed Robbery. He was convicted and sentenced to death by the trial court.

On appeal to the court below, that court found that there can only be robbery simpliciter. No other weapons or firearms were recovered by the prosecution. The court below substituted the conviction for the lesser offence, namely, robbery without firearms or offensive weapon under Section 1(1) of the Robbery and Firearms (special provisions) Act Cap. 398 Laws of the Federation of Nigeria 1990 (as amended). The lower court sentenced the accused/appellant to twenty one (21) years imprisonment. B

On appeal before us, my learned brother Aka'ahs JSC allowed me to have a preview of the lead judgment. I have gone through the said judgment and found myself in complete agreement with his lordship. I do not intend to add anything. I too agree that the appeal is devoid of any merit same is accordingly dismissed. I entirely agree with the sentence meted out to him by the lower court. C

D

RHODES-VIVOUR JSC

I read a draft copy of the leading judgment prepared by my learned brother Aka'ahs, JSC, and I agree with his lordship that there is no merit in the appeal. It is important I make some observations of my own on whether the 3rd and 4th prosecution witnesses are tainted witnesses. E

A tainted witness should be limited to a witness who is either an accomplice or by the evidence he gave, whether as witness for the prosecution or defence, may and could be regarded as having some purpose of his own to serve. F

Evidence of a witness categorized as tainted can only be admitted with extreme caution after the trial judge warns himself. There must be corroboration before evidence of an accomplice is admitted. See Enahoro v. R (1965) ANLR P123, Ishola v. State (1978) 9-10 SC P81, Akpan v. State (1992) 6 NWLR (Pt.248) P439. G

PW3 and PW4 are Policemen involved in the investigation of the case. PW3 knew the appellant very well before the Robbery. After the Robbery he saw the appellant on a motorcycle and stopped him for a search. Two handsets were found in the appellant's pocket, and they were the handsets stolen from the 1st and 2nd PWs. H

PW4 in the course of investigating the case he searched the appellant's room and recovered a knife. He also arrested Adewunmi

who tried to escape.

PW3 and PW4 had no purpose of their own to serve when they gave evidence, and there was no need to corroborate their evidence. Their evidence was straight to the point, moreso as the recovered stolen handsets belonged to PW1 and PW2 the two persons B robbed by the appellant.

I am satisfied that there is no merit in this appeal.

NGWUTA JSC

C I had the privilege of reading in draft the lead judgment just delivered by my learned brother, Aka'ahs, JSC.

My Lords, while I entirely agree that the appeal is completely bereft of merit, I have serious reservation on the judgment of the D Court below convicting the appellant for the lesser offence of robbery without firearms or offensive weapon under s.1(1) of the Robbery and Fire Arms (Special Provisions) Act.

The record speaks for itself. In her evidence-in-chief, the PW1, at page 13 lines 23-27, swore that, inter alia:

E *"He left but came back about 10 minutes later and pulled a gun and ordered us to lie down on the ground. We complied and the accused started to remove our mobile phones from where we were charging them."*

F At page 14 lines 3-5 of the record, the PW1 stated:
"...When I refused to corporate, the accused hit me on the head with the gun in his hand and threatened to shoot me..."

G Cross-examination of the PW1 merely elicited a confirmation of her earlier statement that the appellant was armed with a gun at the material time.

At page 15 lines 10 - 11 she, PW1, said under cross-examination:

"I confirm that the accused had a gun in his possession."

In her evidence-in-chief, the PW2 stated that:

H *"The accused pulled a gun and ordered us to surrender out (sic) handsets."* (See page 15 lines 27 - 28).

"He marched us to the injection room with the gun in his hand." (see page 16 lines 3-4);

"...but the accused threatened to waste our lives if we did not

corporate with him.” (see page 16 lines 11 - 12).

Under cross-examination, PW2 said, inter alia:

“He then returned with a gun and robbed us and rape the PW1.” (See page 17 lines 12 - 13).

The appellant had opportunity to, but did not challenge the evidence of PW1 and PW2. When evidence is unchallenged, the Court ought to accept same as proof of the issue in contest. See *Okupe v. Ifemechi* (1974) 3 SC P.97 at 103, *Alagbe v. Abimbola* (1978) 2 SC p.39 at p.40, *Odulaja v. Haddad* (1973) 11 SC 35.

Evidence elicited during cross-examination, if it relates to a fact in issue, has the same probative value, and is as valid and authentic, as evidence elicited during examination-in-chief. See *Gaji v. Paye* (2003) 8 NWLR (Pt.823) 583, *Daggash v. Bulama* (2004) 14 NWLR (Pt.892) 114.

It therefore follows that the evidence of the PW1 under cross-examination: *“I confirm that the accused had a gun in his possession”*, has as much probative value as the evidence she gave in-chief, more so as it relates to the material fact as to whether the offence was armed robbery or robbery simpliciter.

The fact that the gun was not recovered does not in any way derogate from the truth of the evidence of PW1 and PW2. Appellant himself said that he threw a bag of Indian hemp into the bush when he was pursued by the Police. He was not caught at the scene and he had ample opportunity to get rid of the gun.

There is also the voluntary confessional Statement of the appellant admitted in evidence and marked Exhibit E. The learned trial Judge, in the last but one paragraph of his judgment held:

“From the evidence before me, including the voluntary confession of the accused (Exhibit E) I am satisfied that the prosecution has proved beyond reasonable doubt that the accused was armed with a jack knife...”

His Lordship may have been influenced by the fact that a jack knife was recovered in the room of the appellant and the charge before him alleging that the appellant was armed with a jack knife. From the eye-witness account of the victims (PW1 and PW2) the appellant was armed with a gun and this was proved. On the other hand, there was no proof that he was armed with a jack knife.

In spite of the gravity of the offence he committed, the appel-

lant was given a soft landing, as it were, by the prosecuting Counsel. Is this an error or a deliberate ploy to free the appellant? I ask this question in view of the undisputed evidence of PW1 and PW2 that the appellant was armed with a gun.

B They did not mention a jack knife or any other offensive weapon.

If there is a variation between the evidence of the key witness in Court and their accounts of the incident to the Police, the prosecutor ought to have applied to amend his charges in view of the circumstances and gravity of the offence charged.

C In the circumstances, I am constrained, to my discomfort, to agree with the variation made by the Court of Appeal.

Having said this, I also will dismiss the appeal as bereft of merit and affirm the judgment of the Court of Appeal.

D Appeal dismissed.

NWEZE JSC

E My distinguished Lord, Aka'ahs JSC, obliged me with the draft of the leading judgment just delivered now. I endorse the conclusion that the appeal is unmeritorious.

The appellant's issue two was framed thus:

F Whether PW3 and PW4 were tainted witnesses whose evidence required corroboration or caution, and if the answer is in the affirmative, whether the reliance on their evidence by the trial court and the Court of Appeal without corroborative evidence or caution was in grave error?

G While PW3, Joseph Idehen, accosted the accused person and recovered the two phones belonging to the PW1 and PW2, it was PW4, Police Constable Babatunde Ibukun F/No. 359252, who, during investigation, recovered a jack knife from the residence of the accused person. It is, therefore, difficult to conceive how they could have been classified as tainted witnesses as, vigorously, contended by H the appellant's counsel, Chinonye Obiagwu, whose consistent appearances in this court for indigent accused persons, I am constrained to notice judicially.

The trial, from which this appeal arose, was conducted under the repealed Evidence Act. That Act did not define the expression "a

tainted witness.” However, Case law offered what was endorsed as its acceptable definition, *Olalekun v The State* (2001) LPELR -2561 (SC) 29, B-C. What emerges from the conspectus of the authorities on this point is that a tainted witness is a witness who may not, in the strict sense, be an accomplice but who, in giving his evidence, is established to have some purpose of his own to serve and in respect of whom it is desirable that warning, as to the corroboration of his evidence, may appropriately be given, *Idahosa v The State* (1978) 2 LRN 111; (1965) NMLR 85; *Ishola v The State* [1978] 9 - 10 SC 81; *Mailaiyi & Anor. v. The State* (1968) 1 All NLR (Pt.1) 116, 123; *Ifejirika v. The State* [1999] 3 NWLR (Pt.593) 59; *Ogunlana v The State* [1995] 5 NWLR (Pt.395) 266. B
C

This must be so for, as a result of such interest, he may harbor the tendency to cover up the true facts of the case, *Ogunye v The State* [1995] 8 NWLR (Pt.413) 333; *Oguonzee v The State* (1998) D LPELR - 2357 (SC) 4; *Effiong v The State* (1998) LPELR -1028 (SC) 8, C-D; *Akalonu v The State* (2002) LPELR -314 (SC) 7, C-D.

However, the fact that such a witness has other personal interest of his own to serve is, by itself, not sufficient to reject his evidence. All said, the effect of such interest is to place the trial court on its guard to warn itself as to the veracity of the evidence, *Oteki v The State* [1986] 2 NWLR (Pt.24) 648; *Mbenu v The State* [1988] 7 SC (Pt.111) 71, 87; [1938] 3 NWLR (Pt.84) 615; [1988] 7 SCNJ (Pt.11) 211 - 219 - 220; *Mailaiyi and Anor v The State* (supra); *Ogunlana and Ors v The State* (supra); *Onuoha v The State* (1987) 4 NWLR (Pt.65) 331, 346; *Olalekan v The State* (supra). In this case, from the pieces of evidence adduced at the trial court, there is nothing to suggest that PW3 and PW4 had any personal interests to serve in ensuring that the appellant was convicted. E
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G

It is for these, and the more detailed, reasons in the leading judgment that I, too, shall enter an order dismissing this appeal. In consequence, I hereby affirmed the judgment of the lower court which, on its part, upheld the appellant’s conviction for robbery simpliciter and sentenced him to 21 years imprisonment. H