

SUPREME COURT OF NIGERIA
FRIDAY 1ST JULY, 2016. SC. 382/2014
CORAM:- I. T. MUHAMMAD, N. S. NGWUTA,
K. B. AKA'AH, C. C. NWEZE, A. SANUSI, JJSC

BENJAMIN FRIDAY APPELLANT
V.
THE STATE RESPONDENT

ARMED ROBBERY - Proof - Presumption of guilt - The toy gun used for the robbery having been found with appellant - It is presumed that he was part of the robbery gang (H1)

CRIMINAL PROCEDURE - Conspiracy - Proof - The coming together of accused persons - And their identification at the crime scene - Is a conclusive proof of offence of conspiracy (H2)

CHARGES - Evidence - Discrepancy in - Failure to mention exhibit B in the charge is not fatal to prosecution's case - As appellant was properly identified as one of the robbers (H3)

FACTS

This matter commenced at the High Court of Ondo State Akure, wherein accused/appellant and two others were arraigned on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to sections 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap R11 vol. 14 LFN 2004. Appellant and the two others pleaded not guilty to the charge. In proof of its case, prosecution/respondent called four witnesses and tendered several Exhibits. PW1 and PW2 were victims of the robbery while PW3 and PW4 were Police Officers who investigated the case. Apart from the toy gun which was recovered during the search of appellant's premises and tendered in evidence as Exhibit B, none of the items which were taken away during the robbery operation could be seen.

Appellant explained that the toy gun and other items which were recovered inside a bag in his apartment belonged to his cousin Enete but he never called the said Enete to testify. Appellant denied

robbing PW1 and PW2. At the end of the trial, the trial Court believed the evidence adduced by respondent. Appellant and the others were therefore found guilty of conspiracy to commit robbery and armed robbery. They were sentenced to death by hanging. Dissatisfied, appellant appealed to the Court of Appeal Akure Division. The appeal was dismissed. Appellant has now appealed to the Supreme Court to challenge the dismissal of his appeal by the Court of Appeal.

ISSUES FOR DETERMINATION

(i) Whether the lower Court was right in affirming the decision of the learned trial judge that the prosecution led credible evidence of identification of the appellant as one of the armed robbers that attacked PW1 and PW2.

(ii) Whether having regard to the circumstances and from the totality of the evidence on the record the lower Court was right in upholding the decision of the trial Court that the prosecution proved the offences of conspiracy to rob and armed robbery against the appellant beyond reasonable doubt.

HELD (Unanimously dismissing the appeal per
AKA'AH'S JSC)

ARMED ROBBERY - Proof - Presumption of guilt

1. Even though the other stolen items were not seen, the recovery of the toy gun in the room occupied by the appellant and the other accused persons less than forty-eight hours after the robbery occurred gives the presumption that the appellant was in the gang that robbed PW1 and members of his family in the night of 1/2/2008 or that they received the gun knowing it to be stolen property. See Section 167 (a) Evidence Act.

Since it was 2nd accused who led the police to arrest the appellant and 3rd accused where the toy gun was recovered, the evidence placed the appellant in a position where it could be concluded he was part of the robbery gang. He failed to rebut the presumption. His identification by PW1 and PW2 became superfluous.

The concurrent findings of fact made by the two lower Courts cannot therefore be interfered with by this Court.

CRIMINAL PROCEDURE - Conspiracy - Proof

2. It is difficult to prove conspiracy by direct evidence because of the secrecy involved; hence it can only be inferred from surrounding circumstances. From the evidence adduced the learned trial Judge came to the conclusion and rightly too that the coming together of the three accused in the evening of 1st February, 2008 and their identification by the victims of the robbery at PW1's house is a conclusive proof of the offence of conspiracy. (p. 3287 A)

CHARGES - Evidence - Discrepancy in

3. The last point taken by the appellant is concerned with the evidence being at variance with the charge namely that whilst the particulars of the charge in count II on the substantive offence stated that the appellant and others were armed with "guns, cutlasses", the evidence led by the prosecution through PW1 was that the robbers used a wooden stick to hit him in the course of the robbery operation. He contended that since the evidence adduced was at variance with the charge, the prosecution failed to prove the charge beyond reasonable doubt; moreso as the toy gun was not included in the charge.

It was submitted by learned counsel for the respondent that failure to mention the toy gun in the particulars of the charge is not fatal to the case of the prosecution and the evidence led is not at variance with the charge.

It is not in doubt that the toy gun Exhibit 'B' was not mentioned in the charge as one of the items stolen from PW1's house. This does not derogate from the fact that PW1 mentioned in his statement to the Police that the toy gun belonging to his son was one of the items taken away by the robbers. He also repeated it in his oral evidence in Court. The appellant said the toy gun belonged to Enete who was living in Oshogbo. He neither called Enete to testify nor did he provide the address of Enete to enable the Police carry out any investigation.

This is not a case of PW1 wanting to settle scores with Mat-

thew Thomas who had worked for him. The appellant was properly identified as one of the robbers who carried out the robbery in PW1's house on the night of 1st February, 2008. The appeal completely lacks merit and it hereby dismissed.

(pp. 3287 B/3288 H)

B

REPRESENTATION

Ayo Asala with him, O. N. Idogun and A. E. Alagun, for the Appellant

C Tunde Babalola with him, S. A. Adegoke (DDPP, Ministry of Justice, Ondo State), for the Respondent

CASES REFERRED TO

Ochiba v. State (2012) All FWLR (pt. 608) 849

D Isah v. State (2008) All FWLR (pt. 443) 1243

Okoro v. State (1998) NWLR (pt. 584) 181

Ogudu v. State (2012) All FWLR (pt. 529) 111

Ikemson v. State (1989) 3 NWLR (Pt. 110) 455

Onyenye v. State (2012) 15 NWLR (pt. 1324) 586

E Bright v. State (2012) 8 NWLR (pt. 1302) 297

Nwokedi v. COP (1977) All NLR 77

Aruna v. State (1990) 6 NWLR (pt. 155) 125

Braimah v Abasi (1998) LPELR -801 (SC)

Oneta v. Nuna (1935) II NLR 18

F Okonkwo v. Okagbue (1994) 9 NWLR (pt. 368) 301

Enang v. Adu [1981] 11-12 SC 25

Nwadike v. Ibekwe [1987] 4 NWLR (pt. 67) 718

Igwego v. Ezeugo [1992] 6 NWLR (pt. 249) 561

G Lamai v. Orbih (1980) 5 7 SC 28

STATUTES REFERRED TO

Robbery & Firearms Act Cap R11 vol. 14 LFN 2004, ss. 1(2)(a), 6(b)

H Evidence Act, s. 167(a)

LEAD JUDGMENT BY AKA'AHs JSC

This appeal is against the judgment of the Court of Appeal, Akure Division (hereinafter called the lower Court) delivered on 16/

5/2014 affirming the judgment of the High Court of Ondo State which convicted and sentenced the Appellant to death by hanging on 16/8/2012. The offences for which he and two others were found guilty were conspiracy to commit robbery and armed robbery.

The appellant who was the 1st accused and two others were arraigned before the Ondo State High Court sitting at Akure on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to Sections 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap R11 Vol. 14 Laws of the Federal Republic of Nigeria, 2004. The Charge No. HOD/SC/2008 read as follows:-

COUNT 1

STATEMENT OF OFFENCE

CONSPIRACY to commit armed robbery, contrary to and punishable under Section 6(b) of the Robbery and Firearms (Special Provision) Act Cap. RII Vol. 14 of the Laws of the Federal Republic of Nigeria, 2004.

PARTICULARS OF OFFENCE

BENJAMIN FRIDAY, MATTHEW THOMAS and NELSON FRIDAY on or about the 1st day of February, 2008 at Ondo in the Ondo Judicial Division did conspire with one another to commit a felony, to wit, armed robbery.

COUNT II

STATEMENT OF OFFENCE

ARMED ROBBERY, contrary to and punishable under Section 1(2)(a) of the Firearms (Special Provisions) Act Cap. RII Vol. 14 the Laws of the Federal Republic of Nigeria, 2004.

PARTICULARS OF OFFENCE

BENJAMIN FRIDAY, MATTHEW THOMAS and NELSON FRIDAY on or about the 1st day of February, 2008 at Ondo in the Ondo Judicial Division robbed Hon. Justice Williams Akin Akintoroye of a sum of N14,000.00, two sets of laptop computers, a suit, a wrist-watch, a pen, a double barreled gun and jewelleryes and at the time of the robbery you were armed with offensive weapons, viz: guns, cutlasses, etc.

The appellant and the other accused persons pleaded not guilty to the charge. In proof of its case, the prosecution called four witnesses and tendered several Exhibits. PW1 and PW2 were victims of

the robbery while PW3 and PW4 were Police Officers who investigated the case. Apart from the toy gun which was recovered during the search of the appellant's premises and tendered in evidence as Exhibit B, none of the items which were taken away during the robbery operation could be seen. The appellant explained that the toy gun and other items which were recovered inside a bag in his apartment belonged to his cousin Enete but he never called the said Enete to testify. The appellant denied robbing PW1 and PW2. At the end of the trial, all the three accused persons were found guilty of conspiracy to commit robbery and also the offence of armed robbery and sentenced to death by hanging. Dissatisfied with the conviction, the appellant unsuccessfully appealed to the lower Court which dismissed the appeal. This is a further appeal from the judgment of the lower Court delivered on 16th May, 2014. The Notice of Appeal filed on 12/6/2014 contained six grounds of appeal from which the appellant's Counsel formulated the following two issues for determination namely:-

(i) Whether the lower Court was right in affirming the decision of the learned trial judge that the prosecution led credible evidence of identification of the appellant as one of the armed robbers that attacked PW1 and PW2.

(ii) Whether having regard to the circumstances and from the totality of the evidence on the record the lower Court was right in upholding the decision of the trial Court that the prosecution proved the offences of conspiracy to rob and armed robbery against the appellant beyond reasonable doubt.

The respondent adopted the two issues formulated in the appellant's brief.

Regarding the first issue learned counsel for the appellant submitted that the lower Court was wrong to affirm the decision of the learned trial Judge who held that the prosecution led credible evidence of identification of the Appellant as one of the armed robbers that attacked PW1 and PW2. He referred to the case of *Ochiba v. State* (2012) All FWLR (Pt. 608) 849 at 871 which listed the five guidelines which a Court must consider before ascribing any value to the evidence of an eye witness identification of a criminal in order to avoid cases of mistaken identity. He argued that when an eye witness omits to mention at the earliest opportunity the names of the per-

sons he saw committing an offence, a Court must be careful in accepting his evidence given later and implicating other persons, unless a satisfactory explanation is given as to why the names were not mentioned before or at least the earliest opportunity citing the case of *Isah v. State* (2008) All FWLR {pt. 443} 1243 at 1250 in support. Learned Counsel contended that the evidence led by the prosecution in the instant case could not be said to have positively identified the appellant as one of the armed robbers even though PW1 and PW2 attempted in oral evidence to link the appellant with the commission of the armed robbery incident. He said that the evidence of PW1 and PW2 fell short of the acceptable standard laid down by authorities on identification evidence *moreso* as PW1 who claimed to know the appellant before the incident neither mentioned his name nor gave a description of the appellant at the earliest opportunity when he made his statement to the police. Furthermore the appellant was not arrested at the instance of PW1. He therefore submitted that the lower Court was wrong to have affirmed the decision of the trial Court attaching weight to the evidence of recognition of the appellant by PW1. He submitted that the alleged identification by the house girl during an identification parade was inadmissible in law since she was not called to testify. *Okoro v. The State* 1998 NWLR Pt. 584 181 was cited by the learned counsel who went further to submit that the house girl is a material witness and the failure to call her is fatal to the case of the prosecution as decided in *Ogudu v. State* (2012) All FWLR (Pt. 529) 111 at 1131.

On whether the prosecution proved there was a conspiracy, learned counsel argued that the prosecution failed to establish the three elements of the offence to wit:

(a) That there was an agreement or confederacy between the convict and others to commit the offence of robbery;

(b) That in furtherance of the agreement or confederacy, the accused took part in the commission of the offence of robbery or series of robberies; and

(c) That the robberies or each of the robbery was an armed robbery. He contended that having regard to the totality of the evidence led at the trial Court, the lower Court was wrong to have affirmed the conviction of the appellant by the trial Court for the offences of conspiracy and armed robbery. He therefore submitted

that the concurrent findings of the two lower Courts are not supported by the evidence on record.

Learned counsel for the respondent contended that the lower Court was right in affirming the decision of the learned trial Judge by relying on the evidence of identification/recognition of the appellant by PW1 and PW2 to hold that the prosecution proved the charges against the appellant beyond reasonable doubt. He argued that the lower Court demolished the defence of alibi put up by the appellant and submitted that where the trial Court is faced with identification evidence, it should be satisfied that the evidence adduced proves beyond reasonable doubt that the accused before the Court was the person who actually committed the offence charged and referred to *Ikemson v. State* (1989) 3 NWLR (Pt. 110) 455. He conceded that the principles laid down in *Ochiba v. State* (2012) All FWLR (Pt. 608) 849 must be meticulously considered by a Court in ascribing any value to the evidence of an eye witness identification of a criminal in order to avoid any case of mistaken identity.

Learned counsel submitted that the identification of the appellant by PW1 was not made in a difficult condition since PW1's evidence which is incontrovertible is that the robbers were not masked and it was the 2nd accused who led the police to the house where the appellant and 3rd accused were arrested.

On whether conspiracy to rob and armed robbery was proved, learned counsel submitted that the prosecution proved all the ingredients of the offence and so the lower Court was right in affirming the conviction of the appellant.

Contrary to the submission of the Counsel to the appellant that PW1 neither mentioned the name of the appellant nor gave a description of him when he made his statement to the police, it was stated in the proof of evidence that PW1 described the appellant as light in complexion with bushy hair. PW2 and his mother who were in the house with PW1 identified the 2nd accused by name. On 2/2/2008, he was arrested and he led the police to the house where the appellant and the 3rd accused were also apprehended. A search was conducted in the house and the toy gun belonging to PW1's son which was among the items taken during the robbery was recovered in a bag kept in the appellant's room. In his oral evidence PW1 stated as follows:-

"I succeeded in arresting the 2nd accused... I handed the 2nd accused over to the two policemen before I continued my journey to Akure to treat my wife when we came back from Akure later that same afternoon, one of the two policemen called Mayowa came to my house to inform me that the 2nd accused led them {i.e. the Police) to their house where they arrested the 1st and 3rd accused persons and the police also recovered some exhibits therefrom." B

During cross-examination PW1 said:

"The environment was lit and the people were not masked. I personally identified the 1st accused as one of the armed robbers that came to my house that night. Before the incident, I had always seen the 1st accused around Funmbi Fagun. But there was no close contact between us. Nevertheless, I was able to identify him because I have seen him many times before the incident." C

The appellant admitted knowing PW1 in his statement and oral evidence. He said he was living at Road 9, Fagun Road Ondo while PW1's residence is at Road 5, Extension 2 Funmbi Fagun Crescent, Ondo. The appellant also knew PW1 to be the boss to 2nd accused. This confirms the fact that PW1 and the appellant resided in the same vicinity prior to the robbery and so PW1 was able to recognise him after the robbery had taken place. D

When Exhibit "B" was found in a bag with other items in the room where the appellant and 3rd accused were arrested, the only explanation the appellant and 2nd accused could render was that the toy gun belonged to Enete who was living in Oshogbo. They did not provide any further details such as the address where the said Enete lived in Oshogbo to enable the police carry out investigation to ascertain the veracity of their claim nor did any of them call Enete as a witness to confirm the ownership of the bag and its contents. E F

Even though the other stolen items were not seen, the recovery of the toy gun in the room occupied by the appellant and the other accused persons less than forty-eight hours after the robbery occurred gives the presumption that the appellant was in the gang that robbed PW1 and members of his family in the night of 1/2/2008 or that they received the gun knowing it to be stolen property. See Section 167 (a) Evidence Act. G H

In the judgment of the Court below on the issue of identifica-

tion, Owoade JCA agreeing with the findings made by the learned trial Judge said at page 262 of the record:-

“...the identification of the appellant by the PW1 and PW2 as found and held by the Court below, was/is positive and equivocal.”

Applying the principles set out in *Ochiba v. State* supra in ascribing value to the evidence of PW1 as an eye witness identification of the appellant in order to avoid any case of mistaken identity, it is evident the PW1 had had previous contact with the appellant and the observation which PW1 made of him was not just at a glance. Since the generator was on and there was light, the circumstances under which the PW1 saw the appellant cannot be said to be under difficult conditions as the appellant and the other robbers were not masked.

Since it was 2nd accused who led the police to arrest the appellant and 3rd accused where the toy gun was recovered, the evidence placed the appellant in a position where it could be concluded he was part of the robbery gang. He failed to rebut the presumption. His identification by PW1 and PW2 became superfluous.

The concurrent findings of fact made by the two lower Courts cannot therefore be interfered with by this Court.

The appellant sought to impugn his conviction on the ground that conspiracy was not proved and no evidence was adduced on the use of firearms as laid out in the charge.

The learned trial Judge relying on *Ikemson v. State* held that the offence of conspiracy can be committed where two or more persons have acted either by agreement or concert. He found that the three accused persons came together on the 1st February, 2008 and that their meeting was not a mere coincidence but for a purpose which translated into armed robbery operation a few hours later.

The Court below found that for the conviction on a count of conspiracy to stand the prosecution must establish the element of an agreement to do something which is unlawful or to do something which is lawful by unlawful means. It held that the offence (sic) of identification/recognition which fixed the appellant and other accused persons as participants in the armed robbery in the house of PW1 proved that the appellant and others acted in pursuance of a criminal purpose held in common between them.

It is difficult to prove conspiracy by direct evidence because of the secrecy involved; hence it can only be inferred from surrounding circumstances. See: Onyenye v. State (2012) 15 NWLR (pt. 1324) 586; Bright v. State (2012) 8 NWLR (pt. 1302) 297. From the evidence adduced the learned trial Judge came to the conclusion and rightly too that the coming together of the three accused in the evening of 1st February, 2008 and their identification by the victims of the robbery at PW1's house is a conclusive proof of the offence of conspiracy.

The last point taken by the appellant is concerned with the evidence being at variance with the charge namely that whilst the particulars of the charge in count II on the substantive offence stated that the appellant and others were armed with "guns, cutlasses", the evidence led by the prosecution through PW1 was that the robbers used a wooden stick to hit him in the course of the robbery operation. He contended that since the evidence adduced was at variance with the charge, the prosecution failed to prove the charge beyond reasonable doubt; moreso as the toy gun was not included in the charge. Learned counsel likened this case to what happened in Nwokedi v. Commissioner of Police (1977) All NLR 77 and Aruna v. State 1990 6 NWLR (Pt. 155) 125.

It was submitted by learned counsel for the respondent that failure to mention the toy gun in the particulars of the charge is not fatal to the case of the prosecution and the evidence led is not at variance with the charge.

It is not in doubt that the toy gun Exhibit 'B' was not mentioned in the charge as one of the items stolen from PW1's house. This does not derogate from the fact that PW1 mentioned in his statement to the Police that the toy gun belonging to his son was one of the items taken away by the robbers. He also repeated it in his oral evidence in Court. The appellant said the toy gun belonged to Enete who was living in Oshogbo. He neither called Enete to testify nor did he provide the address of Enete to enable the Police carry out any investigation.

As to whether the charge conflicts with the evidence, learned counsel relied heavily on Aruna v. State supra where Nnaemeka-Agu

JSC at page 135 commented as follows:-

"Secondly the information as filed alleges that the armed robbers were armed with bottles but the evidence revealed that they were armed with knives, dagger and sticks. Considering the fact that it was necessary for the prosecution to prove this element of the offence strictly it appears to me that the evidence given goes to no issue. For it is elementary that the purpose of a charge is to give to the defence (i.e. the accused persons) due notice of the case they are to meet in Court."

I had earlier reproduced the particulars of offence in Count II in the judgment.

In this case the offensive weapons which were said to have been used on the victims of the robbery were not limited to only guns and cutlasses. In the evidence of PW1, he stated that he was hit on the head with a wooden baton. He fell down and started bleeding from the head. The learned trial Judge found that the stick which was used to hit PW1 on the head was an offensive weapon by virtue of the definition of an offensive weapon under Section 13 of the Armed Robbery Act. This case can be distinguished from Aruna's case in that the offensive weapons specified in the charge were limited to broken bottles whereas the evidence revealed that a dagger was also used to injure the complainant. Also the means by which the appellants were identified as the perpetrators of the robbery was not very satisfactory. Most importantly the evidence which the prosecution witnesses gave pointed more to extortion than armed robbery since there was no strong evidence to show that theft was committed. This led Nnaemeka-Agu JSC to comment on the nature of the case as presented by the prosecution thus:

"A case of armed robbery in which the "armed robbers" will argue with the victim for about one hour only to walk away on an offer of N5.00 must be not only rare but highly improbable... the possibility of someone feigning it in order to settle old scores cannot be ruled out. This is why cases, such as these, which have manifestations of vindictive fiction should be scrutinized and, where appropriate rejected".

This is not a case of PW1 wanting to settle scores with Matthew Thomas who had worked for him. The appellant was properly identified as one of the robbers who carried out the

robbery in PW1's house on the night of 1st February, 2008. The appeal completely lacks merit and it hereby dismissed. I further affirm the judgment of the Court of appeal, Akure delivered on 16th May, 2014.

B

MUHAMMAD JSC

My learned brother Aka'ahs, JSC, permitted me to read in a draft form, in advance the judgment he has just delivered. I am in agreement with his reasoning and conclusion. The appeal lacks merit. I dismiss same. I abide by all orders made in the lead judgment.

C

NGWUTA JSC

I read in draft the lead judgment just delivered by my learned brother, K. B. Aka'ahs, JSC. I agree with the reasoning leading to the dismissal of the appeal for want of merit.

D

The facts and issues herein are the same as in SC.383/2014 in which I wrote the lead judgment dismissing the appeal for want of merit.

E

For the reasons given in the lead judgment and my judgment in SC.383/2014, I also dismiss this appeal for lack of merit.

Appeal dismissed.

F

NWEZE JSC

My lord, Aka'ahs, JSC, obliged me with the draft of the leading judgment just delivered now. I am entirely, in agreement with the reasoning and conclusion therein.

G

Although this is an appeal against the concurrent findings of two lower Courts, learned counsel for the Appellant could not advance any reason why this Court should interfere with them either on the question of the identification evidence, the proof of the offence of conspiracy or the substance offence of armed robbery. Accordingly, I endorse the conclusion that this Court should not disturb these indisputable concurrent findings.

H

It is no longer open to any debate that this Court can only disturb such findings if they are shown to be either perverse, Braimah

v Abasi and Anor (1998) LPELR -801 (SC); Oneta v. Nuna (1935) II NLR 18; Okonkwo v. Okagbue (1994) 9 NWLR (pt. 368) 301; unsupported by the evidence before the trial Court; were reached as a result of a wrong approach to the evidence or a wrong application of the principles of substantive law or procedure, Enang v Adu [1981] B 11-12 SC 25, 42; Nwadike v. Ibekwe [1987] 4 NWLR (pt. 67) 718; Igwego v. Ezeugo [1992] 6 NWLR (pt. 249) 561, 576; Lamai v. Orbih [1980] 5 7 SC 28, Woluchen v. Gudi [1981] 5 SC 297, 326; Ike v. Ugboaja (1993) 6 NWLR (pt. 301) 539, 569; Chinwendu v. Mbamali (1980) 3-4 SC 31 etc. These, the appellant, woefully, failed to demonstrate.

It is for these, and the more detailed, reasons in the leading judgment that I, too, shall dismiss this appeal. I abide by the consequential orders in the leading Judgment.

D _____

SANUSI JSC

The Judgment just rendered by my learned brother Kumai Bayang Aka'ahs JSC was made available to me before now. I am in entire agreement with the reasoning and conclusion arrived at, that this appeal lacks merit. I too, without any hesitation dismiss it and affirm the decision of the Court below which had also affirmed the conviction and sentence of the Appellant by the trial Court. I adopt the reasoning of and conclusion reached in the leading ruling as mine. F The appeal lacks merit and is dismissed by me.

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