**AKINBOLADE DELE**

**V.**

**THE STATE**

THE COURT OF APPEAL OF NIGERIA

THE 6TH DAY OF FEBRUARY, 2015

CA/AK/128C/2013

**LEX (2015) - CA/AK/128C/2013**

OTHER CITATIONS

2PLR/2015/8 (CA)

(2015) LPELR-24296(CA)

**BEFORE THEIR LORDSHIPS**

MOJEED ADEKUNLE, JCA

MOHAMMED AMBI-USI DANJUMA, JCA

JAMES SHEHU ABIRIYI

**BETWEEN**

AKINBOLADE DELE - Appellant

AND

THE STATE – Respondent

**ORIGINATING STATE**

ONDO STATE HIGH COURT

**REPRESENTATION**

ISIAKA ABIOLA OLAGUNJU Esq. - For Appellant

AND

A. O. ADEYEMI-TUKI, D.P.P. Ministry Of Justice, Ondo State - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW AND PROCEDURE - STATEMENT OF A CO-ACCUSED:-Settled law that a statement of a co-accused is different and distinguishable from his evidence in court – Settled law that a statement made by an accused person remains his statement and not his evidence and it is binding on him only - Where the prosecution intends to use the statement against the co-accused – Necessity of making a copy of the incriminating statement available to the co-accused – Effect of failure thereto

CRIMINAL LAW AND PROCEDURE – EVIDENCE - CONFESSIONAL STATEMENT OF AN ACCUSED PERSON:- Confessional statement of an accused person - Whether can solely provide the basis for his conviction

CRIMINAL LAW AND PROCEDURE – EVIDENCE - PROOF OF ARMED ROBBERY:- Essential ingredients – What prosecution must prove to secure a conviction for armed robbery

CONSTITUTIONAL LAW – FAIR HEARING - RIGHT TO AN INTERPRETER: Rules guiding the requirement of the law that an accused person receive adequate interpretation of trial proceedings conducted in a language he does not understand

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - CIRCUMSTANTIAL EVIDENCE: Securing conviction on the basis of circumstantial evidence - Relevant considerations thereto

**MAIN JUDGMENT**

JAMES SHEHU ABIRIYI, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This appeal is against the judgment of the Ondo State High Court sitting at Ondo delivered on the 15th May, 2012. The Appellant and three others were charged with robbery and conspiracy to commit robbery contrary to section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap 11 R 11 Vol. 14 Laws of the Federation of Nigeria, 2004 and Section 5(b) of the Same Law.

The case of the Respondent as can be gathered from the evidence of six witnesses who testified for the prosecution is quite simple. According to Yaya Suberu (PW1), at about 2:00am on the 6th January, 2005 he heard the voice of one of his boys who slept in the passage that leads to his room.

When he asked who was in the house at that hour somebody responded by saying that the boy should keep quiet otherwise he would shoot.

While the Pw1 was walking with his torchlight in hand towards the boy, he saw somebody in the passage run down the stair-case. Pw1 shouted "thief, thief" and two other people opened the door to the house. All the three people wore masks. They asked for money. They ransacked the whole house looking for money. They took all the money in the house. They took two handsets and jewelleries.

Apart from the guns they carried, the people had an axe, knife and a torchlight.

In the morning the Pw1 reported to the police but that because the three people were masked he could not identify any of them. He also did not suspect anyone.

On 13th January, 2005 based on information received, the Appellant and the others were arrested.

When Pw1 went to the police station, he saw the Appellant with his wife's jewelleries that were stolen.

The Appellant in two statements he had made to the police (Exhibits H and H1) talked of different operations carried out by them. But in his defence in court, the Appellant denied committing the offence. He once worked for the Pw1 he said but could not continue due to ill-health. Nothing belonging to the Pw1, he said was recovered from him.

After hearing the evidence led by the Respondent, one of the accused persons was discharged on a no case submission. The Appellant and two others were convicted and sentenced to death for armed robbery after a full blown trial. It is the conviction and sentence to death that have led the Appellant here. He filed a Notice of Appeal on 14th June, 2012 containing one Ground of Appeal. Pursuant to an order of this court made on 19th March, 2014, the Appellant filed an amended Notice of Appeal containing four grounds of appeal from which he presented the following issues for determination:

1) Having regards to the circumstances of this case, whether or not the procedure adopted by the Lower Court has not breached the Appellant's right to fair hearing, (Ground 1 and 2)

2) Whether or not the prosecution proved its case beyond reasonable doubt against the Appellant to warrant the conviction.

The Respondent adopted the two issues formulated by the Appellant.

On issue 1, it was contended that the record of appeal page 75 shows that the Appellant opted to be tried in Yoruba language. That the Appellant's plea was taken in Yoruba language and he also gave his evidence in Yoruba language. That the Pw2 - Pw6 gave their evidence in English language inspite of the fact that the Appellant does not understand English language and no provision was made for an interpreter. This it was submitted was a violation of the Appellant's right to an interpreter. We were referred to *Section 36 (6)(e) of the 1999 Constitution FRN (as amended) and Madu v State (1997) 1 NWLR (Pt 482) 386 at 408 D.*

It was submitted that the Appellant's Constitutional right to an interpreter is a right which is sacrosanct and cannot be waived by counsel.

It was submitted that should the court find that the constitutional right of the Appellant was not breached the court should find that the Appellant denied making the extra judicial statement and not that it was involuntarily made. Therefore the trial within trial was inappropriate.

It was further submitted that the statements of the Appellant Exhibits H and H1 were not subjected to any statutory tests before the Lower Court relied on them.

On issue 2, it was submitted that the prosecution failed to adduce credible evidence to show that there was a robbery or series of robberies. The Pw1, it was submitted did not identify any of the exhibits as his stolen items. We were referred to *Afolalu v. State (2010) 16 NWLR (Pt 1220) 584 at 612 G-H.* Also none of the weapons allegedly recovered from the accused persons was tendered at the trial. Worse still, was evidence of Pw2 that Pw1 reported a case of robbery.

It was submitted that the prosecution failed to lead evidence connecting the Appellant to the alleged offence. Exhibits H and H1, it was submitted were not properly evaluated to the extent that the Appellant's right to fair trial has been breached. We were referred to the judgment of the court at pages 246 - 247. It was further submitted that even if exhibits H and H1 were considered, they were not confessional because nowhere in those statements did the Appellant confess to robbing the house of the Pw1 or robbing the Pw1 in person.

It was submitted that the failure of the Pw1 to identify the voice of any of the accused persons who had worked for him before cast doubt on the guilt of the Appellant or any of the other accused persons.

It was submitted that none of the stolen items was found with the Appellant. Most of the stolen items were found with the late Dele Akinbola.

It was submitted that on the available evidence the prosecution failed to prove all the ingredients of the offence beyond reasonable doubt.

On issue 1, learned counsel for the Respondent submitted that electing to speak in Yoruba language by the Appellant did not mean that the Appellant did not understand English language at all. The court was referred to the record of appeal at page 189 where the Appellant under cross-examination stated thus:

"I am a Senior Secondary School graduate. I left Saint Francis in 2003. I passed WASCE examination"

The Appellant, it was submitted, could not have passed WASCE examination if he did not understand English language. If the Appellant did not understand English language how did he object to the admissibility of the extra judicial statements, asked counsel for the Respondent.

It was submitted that there is a presumption that the Appellant understood the proceedings held in English language. We were referred to Uwachukwu v. The State (2008) 6 ACLR 336 at 354.

It was further submitted that the Appellant was represented by a counsel, Femi Kuteyi Esq. throughout the court proceedings and neither the Appellant nor the counsel representing him complained to the trial court that the appellant did not understand the proceedings. We were referred to Uwachukwu v. State (supra).

The burden, it was submitted was on the Appellant to show that the irregularity complained of in the proceeding led to a failure of justice. The Appellant, it was submitted, failed to show that he was misled in any way which resulted in a miscarriage of justice.

On the argument that the Lower Court ought not to have conducted a trial within trial, it was submitted that the Appellant objected to the statement being admitted in evidence on the ground that it was not voluntarily made. We were referred topage 87 lines 8-13 of the record of appeal and Oguno v. State (2011) 7 NWLR (Pt 1246) 314 at 328.

It was submitted that the trial court did not rely solely on the confessional statement of the Appellant to convict him but also on circumstantial evidence.

On issue 2, it was submitted that the prosecution proved its case beyond reasonable doubt.

It was submitted that the confessional statement of the Appellant and those of the other accused persons formed part of the case for the prosecution. It was submitted that the combined and cumulative confessional statements (Exhibits H and H1, M and J and J1) and circumstantial evidence before the trial court laid credence to the fact that the Appellant participated in the armed robbery operation that took place in the house of Pw1 on 6th January, 2005.

It was submitted that the failure of Pw1 to identify Exhibit A will not negate the fact that Pw1 was robbed by armed men on 6th January, 2005. Also that the failure to tender the weapon allegedly used by the armed robbers is not fatal to the case of the prosecution. We were referred to Olayinka v. The State (2008) 6 ACCR 194 at 208.

It was submitted that the argument that the Appellant did not specifically state that he robbed the house of the Pw1 was misplaced because the Appellant referred to a series of operations and the other accused persons made confessional statements. Learned counsel for the Respondent proceeded to show portions of Exhibits M and J which threw light on the confessional statement of the Appellant.

It was finally submitted that the argument that Pw1 ought to have identified the voice of at least one of the robbers who once worked for him is not a requirement of law and that in any case the Pw1 stated that there was no light and that he was confused and terribly afraid.

The law requires that there shall be adequate interpretation to an accused person of anything said in the course of trial or proceedings in a language which he does not understand. Where an accused person is represented by counsel and no objection is raised at the trial court for failure to provide an interpreter, this will not result in vitiating the trial or the judgment of the trial court. It will be a different thing where there is no counsel representing the accused person and where such failure had led to a miscarriage of justice, and prejudiced the accused person as a result. The interpretation is intended to assist the accused person to have knowledge of the case against him and to defend himself, by being able to put before the court his version of the events. See Udosen v. State (2007) 4 NWLR (Pt.1023) 125 and Kamasinki case (1989) EC & HR Judgment, 19 December.

The Appellant in this case was represented from the commencement of the trial on 7th June, 2007 to the date the Lower Court reserved judgment on the 17th February, 2012. There is nothing either in the record of proceedings of the Lower Court or Appellant's brief to suggest that either the Appellant himself or the learned counsel representing him objected to the conduct of the proceedings in the English language. The Appellant has also not shown that he was prejudiced by the failure to interpret the proceedings to him and/or that this led to a miscarriage of justice. Inspite of the fact that the proceedings were in English language, the Appellant nevertheless vigorously defended himself and called his father as a witness. He will therefore not be allowed to flash section 36(6)(e) of the 1999 Constitution FRN on the face of this court.

When the statement of the (1st accused) Appellant was to be tendered in court the following reaction followed:

"Femi Kuteyi Esq.: We are opposing the admissibility of that statement. The statement was not made by the 1st accused person, neither did he sign it as the maker. The statement was not made voluntarily. A gun was pointed at the 1st accused persons (sic). I urge the court to reject the statement."

The above reaction of the learned counsel for the Appellant was a two-in-one complaint. The Appellant in one fell swoop denied making the statements and at the same time alleged that the statements were not voluntarily made. Faced with this type of objection what was the Lower Court expected to do? Whether or not the Appellant made the statements was to be determined later by the court. Whether the statements were not voluntarily made had to be determined instantly in a trial within trial. This the Lower Court did. In my view the Lower Court properly conducted the trial within trial. If it did not that certainly would have been a complaint in this court. The Lower Court therefore successfully avoided the trap by conducting the trial within trial.

From what I have stated above it appears to me that issue 1 should be resolved in favour of the Respondent.

I accordingly resolve the said issue in favour of the Respondent.

To secure a conviction for armed robbery the prosecution must prove the following: (a) that there was an armed robbery; (b) that the accused was armed; and (c) that the accused while with the arm or arms participated in the robbery. Once the prosecution proves the above ingredients beyond reasonable doubt failure to tender the offensive weapon cannot result in the acquittal of the accused person because of the possibility of the accused person doing away with the offensive weapon after the commission of the offence in order to exculpate himself from criminal liability or responsibility. See Olayinka v. State (2007) 9 NWLR (Pt.1040) 561 and Okosi v. A.G. Bendel State (1989) 1 NWLR (Pt.100) 642.

Worthy of note is the fact that the alleged armed robbers were masked. Pw1, one of the alleged victims of the armed robbery said that for this reason he did not identify any of the robbers. He did not suspect any particular person either. Pw2 one of the police witnesses said what was reported was a case of robbery. He did not say it was a case of armed robbery that was reported. The alleged armed robbery report was further diluted by the Pw3 another police officer under cross-examination when he stated thus:

"Pw1 came to report a case of stealing at the station."

By this evidence extracted under cross - examination, the charge for armed robbery was in my view demolished.

Furthermore it is surprising that although the Pw3 said the case reported was that of stealing, he claimed that house breaking instruments were recovered from the house of the Appellant, a toy gun, face mask and knock-outs even though none of these was reported stolen. But the Pw6 said that what was recovered in the house of the Appellant was a mattress, curtain, ring and some valuable items. The Pw3 and Pw6 therefore violently contracted themselves as to what was found in the house of the Appellant. What is more none of these things was reported stolen by Pw1.

Pw1 claimed that he found the Appellant at the police station with his wife's jewelry/jewelries. This claim was baseless. Neither Pw3 nor Pw6 said any jewelries were found in the house of the Appellant.

Although the PW3, claimed that house breaking instruments, a toy gun and face masks were found in the house of the Appellant none of these items was tendered by the prosecution. The case of Olayinka v. State (supra) is not applicable here where the alleged weapons were purportedly recovered but none tendered in evidence. Failure to tender any of the purported items recovered was fatal to the case of the Respondent who offered no explanation for the failure to tender any of those items. Moreso that Appellant Pw3 said that what was reported was a case of stealing.

Instead of tendering the items which might have given the incident a semblance of the armed robbery alleged, that is, the house breaking instruments, toy gun, masks and knock outs, the Respondents only tendered a Nokia handset, ear-rings, necklace, chain and wrist chain. None of these items - Exhibits A - G point to the offence of armed robbery.

Inspite of the above, the Lower Court still found the Appellant guilty of armed robbery on the Appellant's confessional statement and on circumstantial evidence.

There is no evidence stronger than a person's own admission or confession. Such a confession is admissible in evidence. Although an accused person can be convicted solely on his own confessional statement, it is desirable to have some evidence outside the confession which would make it probable that the confession was true. See Dibie v. State (2007) 9 NWLR (Pt.1038) 30 and Nwaebonyi v. State (1994) 5 NWLR (Pt.343) 130.

Apart from the fact that there was nothing outside the extra-judicial statements linking the Appellant to any offence of robbery the Lower Court appeared not to have perused the extra-judicial statements properly. If it had it would have found that in none of them did the Appellant admit the commission of any robbery for which he was charged, tried and convicted. In the said statements the Appellant referred to a third operation. It is not indicated when and where the operation took place and the type of operation. The sum of N85,000 referred to is not the same with the N50,000 Pw1 alleged was taken by force from his house.

Learned counsel for the Respondents confronted with the inadequacy of Exhibits H and H1 as admission or confession of the alleged offence submitted that the statements of other accused persons shed light on Exhibits H and H1.

With due respect to learned counsel for the Respondent the statements of the other accused persons were not capable of shedding light on Exhibits H and H1 unless the Appellant had been given copies of those statements and he adopted them. It is the law that a statement of a co-accused is different and distinguishable from his evidence in court. A statement made by an accused person remains his statement and not his evidence and it is binding on him only. Where the prosecution intends to use the statement against the co-accused, a copy of the incriminating statement must be made available to him. See Suberu v. State (2010) 8 NWLR (Pt.1192) 586.

It is clear from the submission of Respondent's counsel that Exhibits H and H1 did not amount to admission or confession of the offence alleged.

The Lower Court was therefore wrong to rely on it to convict the Appellant.

Circumstantial evidence is sufficient to ground a conviction only where the inferences drawn from the whole history of the case point strongly to the commission of the crime by the accused. The circumstances relied upon should point unequivocally, positively and irresistibly to the fact that the offence was committed and that the accused committed it. Before circumstantial evidence can form the basis for conviction, the circumstances must clearly and forcibly suggest that the accused was the person who committed the offence and that no one else could have been the offender. See Adepetu v. State (1998) 9 NWLR (Pt.568) 185, Yongo v. COP (1992) NWLR (Pt.257) 36, Nwaeze v. State (1996) 3 NWLR (Pt.428) 1, Akinmoju v. State (2000) 4 SC (Pt.1) 64 and Durwode v. State (2000) 12 SC (Pt.1) 1.

At page 247 of the record of appeal the Lower Court made the following finding:

"there is something that strikes my imagination in this case. It is the fact that these three accused persons had at one time or the other, worked for Pw1 in his bakery where the armed robbers came to attack him. The cumulative effect of all these pieces of evidence is what Olorunfemi Esq. relies upon as circumstantial evidence in this case."

Learned counsel for the Respondent submitted that the Appellant and the other accused persons were friends and had worked with the Pw1 at one time or the other. With due respect there was no evidence before the Lower Court that the Appellant and the others were friends. The Lower Court made no such finding. Even if it was established that the Appellant and the other accused persons were friends that would not in the least lead to an inference that they committed the offence for which the Appellant and the others were convicted and sentenced to death.

Although there was evidence that the Appellant and the others at one time or the other worked for the Pw1 who was allegedly robbed it cannot be inferred from this alone that the Appellant and the others committed the offence of armed robbery for which they were tried, convicted and sentenced to death. There was no other circumstantial evidence on the evidence before the Lower Court on which the Appellant could have been convicted.

The Lower Court also wrongly relied on circumstantial evidence to convict the Appellant.

The standard of proof in a criminal trial is proof beyond reasonable doubt. This means that it is not enough for the prosecution to suspect a person of having committed a criminal offence. There must be evidence which identified the person accused with the offence and that it was his act which caused the offence. The burden of proof lies throughout, upon the prosecution to establish the guilt of the accused person and it never shifts. Even where an accused in his statement to the police admitted committing the offence, the prosecution is not relieved of the burden. Failure to discharge this burden renders the benefit of doubt in favour of the accused. See Aigbadion v. State (2000) 4 SC (Pt.1) 1 and Igabele v. State (2006) 6 NWLR (Pt 975) 100.

In the instant appeal, the prosecution woefully failed to prove the commission of the offence by the Appellant. The Lower Court relied on the statements made by the Appellant and circumstantial evidence. The statements were not confessional and there was no circumstantial evidence pointing to the guilt of the Appellant.

Issue 2 should therefore be resolved in favour of the Appellant. It is accordingly resolved in his favour.

The said issue having been resolved in favour of the Appellant, the appeal is allowed. The conviction and sentence of the Appellant are hereby quashed.

The Appellant is discharged and acquitted.

**MOJEED ADEKUNLE OWOADE, J.C.A.:**

I read in draft the Judgment Delivered by my learned brother James Shehu Abiriyi, JCA**.**

I agree with the conclusion and I also abide with the consequential orders.

**MOHAMMED AMBI-USI DANJUMA, J.C.A.:**

My Lord, Abiriyi, JCA had made available to me before now, a draft copy of the Judgment in this appeal just rendered by him.

From the specific facts and evidence available and relied upon for the conviction and sentence of the Appellant at the trial court, I am in agreement with my learned brother J. S. Abiriyi, JCA that the conviction and sentence were unfounded.

There was no proof of the offence of Armed Robbery against the Appellant herein, as an accused, at the trial court.

In deference to his liberty and presumption of innocence, I concur with my Lord in allowing this appeal and in abiding with the consequential order of discharge and acquittal as entered.