**FRANCIS YOHANA**

**V.**

**THE STATE**

IN THE COURT OF APPEAL OF NIGERIA

THE 22ND DAY OF MAY, 2017

CA/AK/68CB/2016

**LEX (2017) - CA/AK/68CB/2016**

OTHER CITATIONS

3PLR/2017/134 (CA)

(2017) LPELR-42703(CA)

**BEFORE THEIR LORDSHIPS**

UZO IFEYINWA NDUKWE-ANYANWU, J.C.A

MOHAMMED AMBI-USI DANJUMA, J.C.A

OBANDE FESTUS OGBUINYA, J.C.A

**BETWEEN**

FRANCIS YOHANA - Appellant(s)

AND

THE STATE - Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF ONDO STATE, AKURE JUDICIAL DIVISION (D. I. Kolawole, J., Presiding)

**REPRESENTATION/LAWYERS**

MICHEAL EDEKO - For Appellant

AND

A. O. ADEYEMI-TUKI (DPP, Ondo State Ministry of Justice) with TUNDE-ALARAPE E. B. and F. IDEHAI - For Respondent

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

CRIMINAL LAW AND PROCEDURE - OFFENCE OF ARMED ROBBERY:- Proof of – Burden Prosecution must discharge - Weapon used to carry out armed robbery - Whether must be tendered by the prosecution to secure a conviction.

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - CIRCUMSTANTIAL EVIDENCE:- Conditions that must be met before a conviction can be sustained by circumstantial evidence.

EVIDENCE - CONFESSIONAL STATEMENT: - Duty of the Court to test the truth of a confession - Whether an accused can be convicted on his confessional statement alone

EVIDENCE - CONFESSIONAL STATEMENT:- Duty of Court where an accused person denies making a statement – Effect of failure thereto

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant and two others were arraigned before the Ondo State High Court, Akure Judicial Division on a two count charge of Conspiracy to commit Armed Robbery and Armed Robbery. The said offences being contrary to Section 6 and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria, 2004.

Trial commenced in earnest on 24th April, 2013 with the Appellant and the two other accused persons pleading "Not Guilty" to the charges. The Prosecution fielded 5 out of the 8 witnesses listed in the proof of evidence and tendered exhibits in support of its case, while the Appellant opened his defence on 5th June, 2015 and testified as DW1. Upon the conclusion of hearing, written addresses were ordered on 18th June, 2015 and same adopted on 28th September, 2015.

In delivering its judgment, the trial Court held that the Prosecution was able to prove to the hilt the charges of Conspiracy to commit Armed Robbery and Armed Robbery and accordingly sentenced the Appellant and the other two accused persons to life imprisonment and to death by hanging respectively.

The Appellant being dissatisfied with the aforementioned decision of the Lower Court appealed to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment, convicting and sentencing the Appellant and two others to life imprisonment and to death by hanging respectively for the offences of conspiracy to commit armed robbery and armed robbery contrary to Section 6 and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria, 2004. Dissatisfied, the Appellant appealed to the Court of Appeal.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

1. Whether the learned Trial judge erred in law by convicting the Appellant for Conspiracy to commit Armed Robbery when the Prosecution failed to prove the charge against the Appellant beyond reasonable doubt as required by law.

2. Whether the learned trial judge erred in law in his evaluation of Exhibits A and B by placing more weight on the Exhibits over and above Exhibit E without adducing cogent reasons for so doing in convicting the Appellant for Conspiracy to commit armed robbery and armed robbery.

3. Whether the learned trial judge erred in law by the ascribing the quality of a Confessional Statement to Exhibit A notwithstanding the equivocal nature of the Exhibit.

4. Whether the Honourable Trial Judge erred by convicting the Appellant for Conspiracy to commit armed robbery and armed robbery when the prosecution failed to tender any evidence of whatsoever nature of the items stolen and weapons used to inflict harm during the purported robbery attack and other fundamental exhibits.

*BY RESPONDENT:*

Whether the learned trial Judge was wrong to hold that the prosecution has proved the charges of conspiracy to commit armed robbery and armed robbery beyond reasonable doubt against the three Defendants.

**MAIN JUDGMENT**

**UZO IFEYINWA NDUKWE-ANYANWU, J.C.A.** (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of the High Court of Ondo State, Akure Judicial Division delivered on the 19th November, 2015 by Hon. Justice D. I. Kolawole.

A resume of the facts culminating in this appeal is hereby made as follows: The Appellant, Francis Yohana and two others namely Usman Abubakar and Sunday James were arraigned before the Ondo State High Court, Akure Judicial Division on a two count charge of Conspiracy to commit Armed Robbery and Armed Robbery. The said offences being contrary to Section 6 and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria, 2004.

Trial commenced in earnest on 24th April, 2013 with the Appellant and the two other accused persons pleading "Not Guilty" to the charges. The Prosecution fielded 5 out of the 8 witnesses listed in the proof of evidence and tendered exhibits in support of its case, while the Appellant opened his defence on 5th June, 2015 and testified as DW1. Upon the conclusion of hearing, written addresses were ordered on 18th June, 2015 and same adopted on 28th September, 2015.

In delivering its judgment, the trial Court held that the Prosecution was able to prove to the hilt the charges of Conspiracy to commit Armed Robbery and Armed Robbery and accordingly sentenced the Appellant and the other two accused persons to life imprisonment and to death by hanging respectively.

The Appellant being dissatisfied with the aforementioned decision of the Lower Court challenged same vide a Notice of Appeal dated 3rd February, 2016 containing eight (8) grounds of appeal.

In accordance with the Rules of this Court parties have filed their respective briefs. The Appellant's brief was filed on 30th June, 2016 but deemed properly filed on the 18th January, 2017. The Appellant in his brief of argument distilled four issues for determination as follows:

1. Whether the learned Trial judge erred in law by convicting the Appellant for Conspiracy to commit Armed Robbery when the Prosecution failed to prove the charge against the Appellant beyond reasonable doubt as required by law.

2. Whether the learned trial judge erred in law in his evaluation of Exhibits A and B by placing more weight on the Exhibits over and above Exhibit E without adducing cogent reasons for so doing in convicting the Appellant for Conspiracy to commit armed robbery and armed robbery.

3. Whether the learned trial judge erred in law by the ascribing the quality of a Confessional Statement to Exhibit A notwithstanding the equivocal nature of the Exhibit.

4. Whether the Honourable Trial Judge erred by convicting the Appellant for Conspiracy to commit armed robbery and armed robbery when the prosecution failed to tender any evidence of whatsoever nature of the items stolen and weapons used to inflict harm during the purported robbery attack and other fundamental exhibits.

The Respondent on the other hand filed its brief on the 9th February, 2017. The Respondent in its brief distilled a sole issue for determination as follows:

1. Whether the learned trial Judge was wrong to hold that the prosecution has proved the charges of conspiracy to commit armed robbery and armed robbery beyond reasonable doubt against the three Defendants.

ISSUE 1

Learned counsel for the Appellant submitted that it is trite law that the burden of proving the commission of an offence lies on the prosecution and that such burden never shifts. It is the contention of counsel that in discharging the burden, the prosecution must prove every essential element of the offence charged, including the rebuttal of any defence that may be raised by the accused beyond reasonable doubt. Counsel referred to the cases of ADEKOYA V THE STATE (2012) 33 WRN 1; RASAKI V. STATE (2011) 16 NWLR (PT.1273) 251; TANKO V. THE STATE (2008) 16 NWLR (PT.1114) 597; BELLO V. THE STATE (2007) 10 NWLR (Pt.1043) 564.

He further contended that to establish an offence of Armed Robbery the prosecution must prove beyond reasonable doubt that;

1. That there was a robbery.

2. That it was an armed robbery.

3. That the accused was the robber or one of the robbers

He cited the case of ADEKOYA V THE STATE (SUPRA)

Counsel further submitted that where the evidence led by the prosecution does not establish all the above ingredients of the offence, it would mean that a reasonable doubt has been created and the accused would be entitled to an acquittal.

It is the contention of counsel that suspicion, no matter how strong it is, cannot take the place of legal proof. It is the contention of counsel that the suspicion of PW1 without any evidence from the Prosecution linking the Appellant with the offence is not sufficient to justify a conviction. He relied on UDOR V STATE (2014) LPELR 23064.

Counsel also submitted that the trial judge wrongly evaluated the evidence before it. He referred this Court to some of the evidence at the Lower Court which showed it was impossible for the Appellant to be an accomplice to the armed robbers. Some of the evidence includes;

1. The statement made by the Appellant during the robbery incident as follows "Madam, I don suffer today o" which is indicative that the Appellant was assaulted by the robbers, thus raising doubt to his culpability in the robbery incident.

2. The evidence of PW1 that the Appellant gave him his handset to enable her call for help.

It is also the contention of counsel that the findings of the Lower Court that the "1st Defendant/Appellant lied when he said in Court that he had no handset", which impacted on the decision of the trial Court to convict the Appellant is not supported by the evidence before the Court. It is the contention of counsel that the testimony of the Appellant to the effect that he didn't have a handset was never rebutted by the prosecution.

It is also the contention of counsel that another issue that raises doubt was the fact that there were material contradictions in the case of the prosecution. Counsel refers to the three statements made by the Appellant marked Exhibit A, B & E. It is the contention of counsel that while Exhibits E did not mention knowing any of the co-accused person. Exhibit A which also did not mention the co-accused. However, it stated that the Appellant had an argument with the armed robbers over his share of the loot of which he had no opportunity to do so as he was arrested on the same date and at the scene of the crime. While in Exhibit B he acknowledges knowing the co-accused and in his oral testimony he denied robbing Pw1 and knowing the co-accused persons. Thus he contended that the reliance of the trial judge on such contradictory evidence had occasioned a miscarriage of justice.

He thus urged this Court to quash the conviction of the Appellant.

Learned counsel for the Respondent on the other hand submitted that the prosecution has established beyond reasonable doubt all the elements of the offence of Conspiracy to commit Armed Robbery and Armed Robbery against the Appellant.

It is the contention of Counsel that based on the evidence led by the Respondent's witnesses (PW1-PW5) and Exhibit B (Appellant's confessional Statement), the prosecution have proved beyond all reasonable doubt the charge against the Appellant and which evidence was unchallenged at the Lower Court. Thus the Court was obliged to act on such unchallenged evidence. He relied on the cases ofUSUFU V THE STATE (2007) 3 NWLR (Pt 1020) 94: OGUNYADE V OSHUNKEYE & ANOR (2007) 15 NWLR (Pt.105) 218: IMO V STATE (2001) 1 NWLR (Pt 694) 314: AKANINWO V NSIRIM (2008) ALL FWLR (Pt 410) 610: ODUTOLA & ORS V MABOGUNJE & ORS (2013) 3 SCM 115.

RESOLUTION

The Appellant was said to have led a gang of robbers who robbed his madam with arms i.e. matchet, sticks and guns. It is in evidence that throughout the robbery, the Appellant was busy with his phone. His phone was not taken from him by the robbers whilst they took everybody's phone in the house. The robbers did not maltreat him. However, in the evidence of PW1 in Court, she said that, the fair complexioned man was originally downstairs.

The 2nd Accused spoke to the fair complexioned man in Hausa and later said in English that "the information provided by the 1st Accused (Appellant) Francis Yohama was wrong". This singular statement meant that the gang was in league with the Appellant. The Appellant was the one who provided the information that led to the robbery attack.

The Appellant was not hurt in anyway and kept on fiddling with his phone till the robbers left. PW1 even borrowed his phone to call for help as the robbers had stolen all their phones. The Appellant denied that he had phone. This shows he was a dishonest person and an unreliable witness/accused person.

The Appellant made Exhibits A, B & E. He resiled from these statements. Therefore the learned trial Judge was placed in a position to know what type of credence he can place on the statements in terms of admissibility.

It is trite law, that a free and voluntary confession, which is direct, positive and properly proved is sufficient to sustain a conviction without any corroborative evidence so long as the Court is satisfied with its truth. However, there is a duty on the Court to test the truth of a confession by examining it in the light of the other credible evidence before the Court. SOLOLA V STATE (2005) 11 NWLR (PT. 937) PG 460. NWAEZE V STATE (1996) 2 NWLR (PT.428) PG. 1. AKINMOJU V THE STATE (2000) 4 SC (PT. 1) PG. 64.

The Appellant in this case did not say that the statements, Exhibits A, B and E were involuntary. He just resiled. It is therefore the duty of the Court to know what weight to attach on it. The confessional statement cannot also be unreliable by mere denial or retraction. However, the denial or retraction is a matter to be taken into consideration to decide what weight could be attached to it. DIBIE V STATE (2007) 9 NWLR (PT.1038)

The Appellant in his statement Exhibit A stated that he opened the gate for Abdullahi, Chairman and others. He even gave the phone numbers of Abdullahi and Chairman who he claimed were his friends. If not how could he have opened the gate for them at that time without identifying who they were and confirming with his boss before allowing them in.

The Appellant also mentioned that he gave information to the gang comprising of one Seriki who he was handed over to when he came to Ondo State. He also mentioned Abubakar Usman, the 2nd Accused and Sunday James, the 3rd Accused.

The learned trial Judge in his judgment held as follows:

"I know that the statement of a Defendant is not binding on his co-Defendant but Exhibit B is before the Court. It was a statement from the 1st Defendant who was the initiator of the robbery. In Exhibit B, the 1st Defendant mentioned the name of Abubakar Usman who had been arrested as part of the robbery gang. The 2nd Defendant is Usman Abubakar."

The statement of the Appellant, Exhibits A, B and E was retracted, not that it was involuntary. The facts and details in it when compared with the evidence of PW1 and PW2 corroborated their evidence.

The Appellant and the gang of robbers were contacted by the Appellant. The Seriki he mentioned as the leader of the gang was said to have been arrested in another robbery and has since died in custody.

The details given by the Appellant are such details that only him can provide. He was the one that gave the phone numbers of Abdullahi and Chairman. This is information within his own knowledge alone.

The contradiction in the evidence of the Appellant to his extrajudicial statement is understandable. The Appellant is not a witness of truth. He said he had no handset. In his statement he said he was playing with his handset when the gang arrived his gate.

The PW1 and PW2 stated in their evidence that he kept on fiddling with his handset throughout the robbery. His own handset was not taken by the robbers. Why? It only leads to one conclusion. He was part of the robbery gang. PW1 even asked him to use his handset after the robbery.

During the robbery the Appellant was not manhandled being the only man in the house. This can only lead to one conclusion, that he was in the know of the robbery.

The Appellant mentioned that he was handed over to Seriki, when he arrived. The said Seriki was said to be a leader of one gang and has since died in custody. These are circumstantial evidence leading to no other conclusion other than that, the Appellant was a member of that gang.

The PW1 in her statement said the fair complexioned man downstairs after confirming with 2nd Accused, Usman Abubakar opined that the information given by the Appellant that the son of PW1 who just came back from overseas had come back with a lot of money.

The Appellant on this issue in his statement on oath stated that the son of PW1 came back with many bags and he thought it must be money in the bags.

Circumstantial evidence is sufficient to ground conviction only where the inference drawn from the whole history of the case points strongly to the commission of the crime by the accused. NWAEZE V STATE (1996) 2 NWLR (PT.428) PG. 1, AKINMOJU V THE STATE (2000) 4 SC (PT.1) PG. 64. DURWODE V THE STATE (2000) 12 SC (PT.1) PG. 1.

For circumstantial evidence to ground a conviction it must lead to one conclusion, namely the guilt of the accused person. UBANI V. STATE (2003) 18 NWLR (PT.851) PG.2.

In this appeal, the circumstances lead to no other conclusion other than that the Appellant was a member of the gang that robbed PW1 on that day. He also acted as their informant.

This issue is resolved against the Appellant.

ISSUE 2

Learned counsel for the Appellant submitted that the Appellant having denied the authorship of Exhibit A and B but admitted the authoring Exhibit E, the learned trial judge was wrong to have placed more reliance to Exhibit A and B than Exhibit E. He relied on the case of HASSAN V STATE (2001) 7 SC (Pt.II) 88.

It is the contention of counsel that the Appellant having shown the equivocation in Exhibit A, the curious timing and the circumstances in the making of Exhibit B and the inconsistences/contradictions in Exhibit A and B, the learned trial judge ought to have exercised caution in relying on the exhibits. He further contended that the learned trial judge ought to have placed more reliance on Exhibit E which contained direct, cogent and unequivocal statements giving a detailed chronological explanation of what the Appellant witnessed during the robbery incident than Exhibit A and B.

ISSUE 3

Learned counsel for the Appellant submitted that the learned trial judge erred in law in ascribing the quality of a confessional statement to Exhibit A. He relied on the case of OSHIM V STATE (2014) LPELR 23142: AZABADA V STATE (2014) LPELR 23017.

It is the contention of counsel that the facts in Exhibit A do not unequivocally satisfy the requirement of a confessional statement, thus the trial judge was wrong in admitting Exhibit A as the confessional statement of the Appellant and subsequently convict the Appellant based on same. He thus urged this Court to set aside the Appellant's conviction on this ground.

RESOLUTIONS OF ISSUE 2 AND 3

It is not uncommon that an accused person will at his trial retract the extrajudicial statement he made on oath. The Appellant in this case did not state that the statement was involuntary. To identify whether this statement is authentic, a free and voluntary confession of guilt whether judicial or extrajudicial, if it is direct and positive and properly established is sufficient proof of guilt and is enough to sustain a conviction, so long as the Court is satisfied with the truth of such confession. SOLOLA V. STATE (2005) 11 NWLR (PT.937) PG.460, EDHIGERE V. STATE (1996) 8 NWLR (PT.464) PG.1, IHUEBEKA V. THE STATE (2000) 4 SC (PT.II) PG.50, IDOWU V. THE STATE (2000) 7 SC (PT.1) PG.501, ALARAPE V. STATE (2001) 14 WRN PG.1.

In this case, the learned trial Judge had the duty to test the truth of the confession by examining it in the light of the other credible evidence before the Court. SOLOLA V STATE (SUPRA), NWAEZE V. STATE (1990) 2 NWLR (PT.428) PG.1, AKINMOJU V. STATE (2000) 4 SC (PT.1) PG.64).

Even though the Appellant resiled from his statement on oath, there were information that is in his own knowledge alone. He mentioned the members of his gang and their phone numbers. He also mentioned members of other gangs. It appears from the behavior of the Appellant during the robbery that he was part of them

The Appellant was neither beaten; the Appellant was also allowed the use of his phone throughout the robbery. Everybody's phone was taken except his. The fair complexioned man stated that the Appellant had given them wrong information as to the money the son of PW1 supposedly came back with from London. All these are circumstantial evidence which go to corroborate the confessional statement in Exhibit A, B and E.

The trial judge gave the Appellant's confession a serious thought. The denial or retraction of the Exhibits A and B which the trial Judge took into consideration to decide what weight could be attached to them. The learned trial Judge considered Exhibit A, B and E transposing it with the evidence of Prosecution Witnesses especially PW1 and PW2.

The Appellant was convicted for conspiracy as all the circumstantial evidence lead to no other conclusion that the Appellant was part of this robbery.

These Issues 2 and 3 are resolved against the Appellant.

ISSUE 4

Learned counsel for the Appellant submitted that the failure of the Prosecution to tender in evidence the items allegedly stolen or the weapons used in the robbery attack is fatal to the case of the Prosecution/Respondent which ought to have created sufficient doubt in the mind of the learned trial judge. Counsel relied on Section 1(2) of the Robbery and Firearms Act, 2011 and the case of THE PEOPLE OF LAGOS STATE V. UMARU (2014) LPELR 22466 (SC).

He thus urged this Court to set aside the conviction of the Appellant.

Learned counsel for the Respondent submitted that once the Prosecution proved beyond reasonable doubt that the accused person was one of the armed robbers, failure to tender the offensive weapons used in the commission of the robbery cannot result in the acquittal of the accused person. See AMINU TANKO V THE STATE (2009) 4 NWLR 430: USMAN V STATE (SUPRA).

It is the contention of counsel that in the instant case there is cogent evidence of the use of a weapon and also cogent evidence linking the Appellant with the use of the said weapon. Thus failure of the Prosecution to tender the said weapon cannot vitiate the judgment of the trial Court.

On production of the stolen items, counsel submitted that the production of stolen items is not one of the elements of the offence, thus, failure of the Prosecution to produce same cannot invalidate the judgment of the trial Court. He referred to the case of JOSEPH DANIEL UWA V. THE STATE (2013) LPELR 20329.

RESOLUTION

The offence of armed robbery is committed when at the time of the commission of the robbery the accused were proved to be armed with dangerous and offensive weapons.

The PW1 in her testimony in Court stated that Usman Abubakar matcheted her severally on the head, thighs and buttocks. She said she was bleeding from the cuts on her head.

She also saw PW2 in a pool of blood of which the PW2 stated that she was matcheted by the Appellant. The PW1 also gave in evidence that her mum had a gun to her head in her room.

The Appellant and his co-accused were armed whilst robbing PW1 and her household.

There is no principle of law which requires the prosecution to tender the weapons used in an alleged robbery in order to establish the guilt of the accused person. Whether or not the prosecution needs to tender the weapon with which an accused allegedly committed the robbery depends on the character and circumstances of the case. OLAYINKA V STATE (2007) 9 NWLR (PT.1040) PG.561.

The police might recover the stolen items in some cases but not all cases. Failure to recover the stolen item does not mean that the things were not stolen.

The prosecution was able to prove the 3 ingredients of armed robbery i.e.

(1) That there was a robbery

(2) That it was an armed robbery

(3) That the Appellant was the robber or one of the robbers.

The four (4) issues articulated by the Appellant have all been resolved against him. This appeal is unmeritorious. It is dismissed. I affirm the judgment of the trial Court convicting him of Conspiracy to commit Armed Robbery and Armed Robbery as charged.

The Appellant is sentenced to death by hanging thereby affirming the judgment of the Lower Court.

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

I read the draft of the leading judgment articulated by my Lord, Uzo I. Ndukwe Anyanwu, JCA, P.J. and the Record of Appeal in this matter and agree that the appeal be dismissed and the trial judgment be affirmed.

There was nothing to urge to the contrary.

**OBANDE FESTUS OGBUINYA, J.C.A.:**

I had the privilege to peruse, in draft, the leading judgment delivered by my learned brother: Uzo I. Ndukwe-Anyanwu, JCA. I endorse, in toto, the reasoning and conclusion in it. I, too, find the appeal bereft of merit and dismiss it in the terms decreed in the leading judgment.