**MACDONALD ITA OKON**

**V.**

**THE STATE**

IN THE COURT OF APPEAL OF NIGERIA

THE 27TH DAY OF APRIL, 2017

CA/C/143C/2016

**LEX (2017) - CA/C/143C/2016**

OTHER CITATIONS

3PLR/2017/195 (CA)

(2017) LPELR-42639(CA)

**BEFORE THEIR LORDSHIPS**

CHIOMA EGONDU NWOSU-IHEME, J.C.A

STEPHEN JONAH ADAH, J.C.A

JOSEPH OLUBUNMI KAYODE OYEWOLE, J.C.A

**BETWEEN**

MACDONALD ITA OKON - Appellant(s)

AND

THE STATE - Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF CROSS RIVER STATE, CALABAR JUDICIAL DIVISION (Michael Edem J., Presiding)

**REPRESENTATION/LAWYERS**

C.O. P. EMEKA - For Appellant

AND

P.S. BISONG (DPP, CRS) with B. EGWU (SCI) and J. ONAH (SCI) - For Respondent

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

CRIMINAL LAW AND PROCEDURE - OFFENCE OF ARMED ROBBERY:- Ingredients that must exist to prove the offence of armed robbery

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF:- On whom lies the burden of proof in criminal cases - How such burden is discharged.

EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF:- On whom lies the burden of proof in criminal cases.

EVIDENCE - CONFESSIONAL STATEMENT:- Duty of Court when objection is raised to the admissibility of a confessional statement.

EVIDENCE - CONFESSIONAL STATEMENT:- Tests for determining the truth or weight to attach to a confessional statement before a court can convict on same.

EVIDENCE - WITNESS(ES):- Who is a vital witness - Effect of failure to call a vital or material witness.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant and his co-accused had been arraigned before the trial Court on one count of armed robbery pursuant to Section 1 (1) of the Robbery and Firearms (Special Provisions) Act, to which they both pleaded not guilty.

At trial only the investigating police officer testified for the prosecution tendering the extra judicial confessional statements of the Appellant and his co-accused from which they resiled at trial. Objections were taken to the voluntariness of the said statements but they were eventually admitted in evidence after trial within trial. The said witness also tendered some items recovered in the course of the investigation while a couple of the recovered items were rejected by the trial Court and so marked.

The Appellant and his co-accused testified from the witness box for themselves and were duly cross examined. Thereafter counsel for the two sides addressed the Court. In a reserved judgment the trial Court found the Appellant and his co-accused guilty as charged, convicted and sentenced them accordingly.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment, convicting the Appellant for armed robbery and sentencing him to death by hanging. Dissatisfied, the Appellant appealed to the Supreme Court.

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

*BY APPELLANT:*

1. Whether the learned trial Judge was right to convict the Appellant on the strength of Exhibit 1, his alleged confessional statement without any corroboration in the circumstance.

2. Whether the prosecution proved the charge of armed robbery brought against the Appellant beyond reasonable doubt to support his conviction.

**MAIN JUDGMENT**

JOSEPH OLUBUNMI KAYODE OYEWOLE, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of the High Court of Cross River State sitting in Calabar delivered on the 2nd December, 2014 by MICHAEL EDEM J. convicting the Appellant for armed robbery and sentencing him to death by hanging.

The Appellant and his co-accused had been arraigned before the trial Court on one count of armed robbery pursuant to Section 1 (1) of the Robbery and Firearms (Special Provisions) Act, to which they both pleaded not guilty.

At trial only the investigating police officer testified for the prosecution tendering the extra judicial confessional statements of the Appellant and his co-accused from which they resiled at trial. Objections were taken to the voluntariness of the said statements but they were eventually admitted in evidence after trial within trial. The said witness also tendered some items recovered in the course of the investigation while a couple of the recovered items were rejected by the trial Court and so marked.

The Appellant and his co-accused testified from the witness box for themselves and were duly cross examined. Thereafter counsel for the two sides addressed the Court. In a reserved judgment the trial Court found the Appellant and his co-accused guilty as charged, convicted and sentenced them accordingly.

At the hearing of the appeal, Mr. Emeka the learned counsel for the Appellant adopted the Appellant's brief filed on the 20th June, 2016 as the arguments of the Appellant in this appeal.

For the Respondent, Mr. Bisong the learned Director of Public prosecutions of Cross River State adopted the Respondent's brief filed on the 19th July, 2016 as the arguments of the Respondent in contesting this appeal.

Mr. Emeka formulated 2 issues for determination which were adopted by the Respondent as follows:

1. Whether the learned trial Judge was right to convict the Appellant on the strength of Exhibit 1, his alleged confessional statement without any corroboration in the circumstance.

2. Whether the prosecution proved the charge of armed robbery brought against the Appellant beyond reasonable doubt to support his conviction.

Arguing the first issue, Mr. Emeka submitted that it was erroneous for the learned trial Judge to have relied solely on Exhibit 1, the alleged extra judicial confession of the Appellant without corroboration and without evaluating it appropriately especially in the face of the denial and impeachment of the said confession by the Appellant in his entire evidence before the trial Court. He referred to ADEBAYO vs STATE (2014) 12 NWLR (PT 1422) 613 at 644, FRN vs IWEKA (2012) 3 NWLR (PT.1341) 288 at 316, OSUAGWU vs STATE (2009) 1 NWLR (PT.1123) 523 at 541-542, EGBOGHONOME vs STATE (1993) 7 NWLR (PT.306) 383 at 419, MUSA vs STATE (2013) 9 NWLR (PT.1359) 214 at 243 and STATE vs GWANGWAN (2015) 13 NWLR (PT.1477) 600 at 626.

On his part, Mr. Bisong submitted that a conviction could be based solely on a confession once such confession was direct and positive which in this case was settled at the trial within trial and that in the case at hand, corroboration was provided by the credible testimony of PW1 and the exhibits tendered at trial. He urged the Court to discountenance the contentions of the Appellant and refrain from interfering with the findings of the learned trial Judge. He referred to ALARAPE vs THE STATE (2011) FWLR (PT 41) 1872, ADELEKE VS STATE (2013) 16 NWLR (PT 1381) 556 at 583, MUSTAPHA MOHAMMED vs THE STATE (2007) 30 NSCQR (PT 1) 364 at 380, FCT & ORS vs NZELU & ANOR (2013) LPELR 20830 and SEMIU AFOLABI VS. STATE (2014) NCC Vol. 9 333 at 338.

The fulcrum of the judgment of the learned trial Judge convicting the Appellant was Exhibit 1, his disputed extra judicial confession. Throughout the trial, the Appellant distanced himself from this confession and at trial before the Court gave evidence that was totally at variance with the said confession. This necessarily raises the prudent need for the trial Court not to accept the said confession without subjecting it to what is now known as tests of truthfulness. This necessitates that he evaluates the said confession to determine whether there was anything outside the confession to show that it was true, whether it was corroborated, whether there were relevant statements made in it of facts true as far as they can be tested, whether the Appellant had the opportunity of committing the crime, whether the confession is in itself possible and whether the confession was consistent with other facts that had been ascertained. See ALARAPE VS THE STATE (SUPRA)

If this test was necessary in ordinary criminal trials, it is even more imperative in trials involving capital offences. Such trials involve the highest possible punishment which connotes a finality admitting of no possible errors as such would be totally beyond remedy. A possible reason several jurisdictions have abolished capital punishment.

For as long as capital punishment however remains part of our criminal jurisprudence, the sanctity of human lives dictates that every step in the trial and every part of the judgment relating thereto demonstrates the most finicky consideration and not some perfunctory exercise as was done by the learned trial Judge herein. The entire judgment did not reflect any evaluation of adduced evidence other than the confession of the Appellant.

The Respondent as prosecution called only PW1 who did not arrest the Appellant. Appellant was handed over to the said PW1 by a youth leader who never testified at trial. The victim of the said robbery never testified. The testimony of PW1 at trial substantially contained what persons who were not called as witnesses at trial told him. He in fact did nothing much by way of investigation.

Throughout the testimony of PW1 he made no mention of the use of any hammer in the robbery reported to him rendering Exhibit 3 irrelevant and he was unable to give direct testimony of any role played by Exhibit 2, the table knife in the said robbery while no forensic examination was conducted on the said Exhibit 2 to show that the Appellant had prior contact with it.

In all, I have no difficulty in resolving this issue in favour of the Appellant and against the Respondent.

The remaining issue is:

Whether the prosecution proved the charge of armed robbery brought against the Appellant beyond reasonable doubt to support his conviction.

Arguing this issue, Mr. Emeka reviewed the adduced evidence and submitted that learned trial Judge failed to find that there was indeed an armed robbery as alleged by the Respondent and that the Appellant participated in it. He referred to THE PEOPLE OF LAGOS STATE VS UMARU (2014) 7 NWLR (PT 1407) 584 at 609 and AGBOOLA vs STATE (2013) 11 NWLR (PT 1366) 619 at 641.

He submitted further that vital witnesses were not called thereby leaving a gap in the testimony of PW1 and making the case of the Respondent/defendant insufficient to support the conviction of the Appellant. He referred to Section 167(d) of the Evidence Act, 2011, OGUDO VS STATE (2011) 18 NWLR (PT 1278) 1, OCHUBA VS STATE (2011) 17 NWLR (PT 1277) 663 at 696.

He urged the Court to resolve the issue in favour of the Appellant.

On his part, Mr. Bisong outlined the ingredients of the offence of armed robbery and submitted that the Respondent/prosecution adduced sufficient evidence in support of each of the ingredients to justify the conviction of the Appellant.

He urged the Court to discountenance the submissions of the Appellant's counsel and affirm the judgment of the trial Court.

In every criminal matter, the defendant is presumed innocent and onus of proof of the criminal allegation is on the prosecution pursuant to Section 35 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which said onus is discharged on the establishment of the essential elements of the alleged offence. See ALAKE vs STATE (1991) 7 NWLR (PT 205) 567 at 591 per TOBI JCA (as he then was), and NWANKWO VS STATE (2003) 4 NWLR (PT 809) 1 at 35 per EKPE JCA, AYUB-KHAN VS STATE (1991) 1 NWLR (PT 172) 127, ADIGUN vs A.G. OYO STATE (1987) 1 NWLR (PT.53) 678 and EDE vs FRN (2001) 1 NWLR (PT 695) 502 at 515.

To succeed in establishing the offence of armed robbery, the prosecution must prove that there was a robbery or series of robberies, that each robbery was an armed robbery and that the accused took part in the said armed robbery or robberies. See BOZIN VS STATE (1985) 2 NWLR (PT 8) 465, ANI vs STATE (2003) 11 NWLR (PT.830) 142 at 161 and OKOSUN vs A.G BENDEL STATE (1985) 3 NWLR (PT.12) 283.

The evidence adduced by the Respondent at trial comprised the oral evidence of PW1, the police investigator who in actual fact did not do much by way of investigation, Exhibit 1, the extra judicial confession of the Appellant, Exhibit 2 a kitchen knife which was not tied to the alleged robbery by PW1 or any possible forensic evidence and Exhibit 3, a hammer which was not stated to have had anything to do with the alleged robbery.

Mr. Emeka submitted that the Respondent failed to call vital witnesses at trial. A witness is said to be vital when the evidence to be given by that witness is crucial to the determination of an essential part of the case one way or the other. Such a witness must be in exclusive possession of a vital fact crucial to the determination and failure to call such a witness would vitiate the case of the prosecution. See OGUDU vs STATE (2011) 48 NSCQR 377 at 411.

Two witnesses were mentioned by PW1; Joy Effiong Orok who supposedly suffered the robbery attack and Ebenezer Okene Bassey who arrested the Appellant the day after the said robbery and handed him over to the police.

While Joy Effiong Orok was said to be subsequently untraceable by PW1, Ebenezer Okene Bassey should be easily traceable as the youth leader in the community where the incident allegedly took place. Both of them were not called to testify at the trial. These witnesses had exclusive possession of crucial facts concerning the criminal allegation against the Appellant. In fact, Joy Effiong Orok apart from being the victim was also the only eye witness. The absence of these vital witnesses was not remedied by the testimony of PW1.

I agree with Mr. Emeka that these two witnesses were vital to the prosecution's case at trial. PW1 was not at the scene of the alleged crime, only Joy Effiong Orok could have given that evidence. PW1 did not personally arrest the Appellant. This was done by Ebenezer Okene Bassey. The evidence of what these two persons experienced could only be given personally by them.

The only significant step taken by PW1 apart from recording Exhibit 1, the disputed extra judicial confession of the Appellant was the recovery of Exhibit 2, the kitchen knife. Only Joy Effiong Orok could have tied the said kitchen knife to the robbery incident experienced by her.

The failure to call the two witnesses created doubts in this case which must be resolved in favour of the Appellant. See UBANI vs STATE (2003) 4 NWLR (PT 809) 51 at 64.

Exhibit 1 was resiled from by the Appellant and as earlier noted in this judgment ought to have been vigorously subjected to test of truthfulness before being accredited to convict the Appellant.

The inevitable conclusion here is that the Respondent failed to prove the criminal allegation of armed robbery alleged against the Appellant and I therefore resolve this issue as well in favour of the Appellant and against the Respondent.

In all, I find merit in this appeal and I therefore allow it.

The judgment of the trial Court convicting and sentencing the Appellant to death in charge No: HC/62c/2011 delivered on the 2nd December, 2014 by the trial Court is hereby set aside.

The Appellant is consequently discharged and acquitted.

**CHIOMA EGONDU NWOSU-IHEME, J.C.A.:**

I read before now the judgment delivered by my learned brother, J. O. K. OYEWOLE, JCA.

I adopt the facts of this criminal appeal as properly set down in the lead judgment.

I agree with the reasoning and conclusion. There is merit in this appeal and it is accordingly allowed.

The conviction and sentence of the Appellant to death in Charge No.HC/62c/2011 delivered on the 2/12/14 by Michael Edem, J, of the Cross River State High Court sitting in Calabar is hereby set aside. The Appellant is accordingly discharged and acquitted.

**STEPHEN JONAH ADAH, J.C.A.:**

I read in draft the lead judgment just delivered by my learned brother, J. O. K. Oyewole JCA. I agree in full that the appeal is meritorious and should be allowed.

In our criminal law and procedure, the onus is always on the prosecution to establish the guilt of the accused beyond reasonable doubt. The prosecution can only achieve this result by focusing on and ensuring that, all the necessary and vital ingredients of the charge against an accused person are proved beyond reasonable doubt. This is against the back drop of the fact that by Section 36(5) of the 1999 Nigerian Constitution, a person accused of any criminal offence is presumed innocent until he is proved guilty. This duty is a monothetical one and it rests squarely on the prosecution. The burden of proof in this situation never shifts. The prosecution is absolutely responsible for proving the guilt of an accused person.

In the instant case, the offence for which the Appellant was charged and ultimately convicted and sentenced by the Lower Court is for Armed Robbery. This is a capital offence and since it is this serious the law requires that the prosecution must effectively and efficiently prove the ingredients of the offence of Armed Robbery beyond reasonable doubt to secure the conviction of the accused.

In the instant case, the major evidence relied upon for the conviction of the Appellant by the Lower Court was the extra judicial confession of the Appellant. For the Court to rely wholly on an extra judicial confession of an accused person, the veracity of the statement must be tested. In the case of LAWAL vs. THE STATE (2016) 14 NWLR (PT. 1531) 69, the Supreme Court re-echoed the tests for determining the truth of a confessional statement as follows:

a. Whether there is anything outside it to show that it is true;

b. Whether it is corroborated;

c. Whether the statements made in it of fact are true as far as they can be tested;

d. Whether the accused was the one who had the opportunity of committing the offence;

e. Whether his confession is possible; and

f. Whether it is consistent with other facts which have been ascertained and which have been proved.

In the instant case, the Appellant had at the trial, retracted the statement. When the veracity test is applied to the statement in the instant case there is nothing holding out this statement as credible to assure its veracity. This statement therefore, cannot in anyway be the backbone of the case of the prosecution in this case.

For this and the further reasons advanced in the lead judgment of my learned brother. I too hold that this appeal has merit. I do allow it and set aside the conviction and sentence of the Appellant.

I also abide by the order discharging and acquitting the Appellant.