IN THE SUPREME COURT OF NIGERIA

Suit No: SC188/2005

Petitioner: Benjamin Oyakhire
And
Respondent: The State

Date Delivered: 2006-07-14

Judge(s): Sylvester Umaru Onu , Umaru Atu Kalgo , Ignatius Chukwudi Pats Acholonu ,Aloma Mariam Mukhtar , Francis Fe

Judgment Delivered

The Appellant, Benjamin Oyakhire, and two others, Jimoh Michael and Gerson Soba, were Police constables attached to the Mobile Unit of Nigeria Police Lokoja in Kogi State. The four count charge preferred against them was that on or about the 17th of February 2001 they committed

(i) Culpable Homicide when they caused the death of one Mamodu Abdullahi Ajawu by inflicting gun shot wound on him and the deaths of Rafiu, John Ogara, Thomas Onah and Alfa by setting their vehicle Registration No. Oshun XB104 SGB on fire and burning them to ashes punishable under sections 221 and 79 of Penal Code.

(ii) Armed Robbery when armed with their service rifles, they robbed Saka Jimoh, Abdullahi Ajawu, Suleiman Badmus and other passengers in the vehicle punishable under section 298 of the Penal Code.

(iii) Mischief by fire by setting the vehicle Registration No. Osun XB 104 SBG on fire and burning same to ashes punishable under section 336 of the Penal Code.

(iv) Criminal conspiracy to commit culpable homicide, armed robbery and mischief by fire contrary to and punishable under section 97 of the Penal Code.

At the end of the trial which involved the testimony of six prosecution witnesses and each of the accused persons, the trial Chief Judge, Hon. Justice A.U. Eri convicted each of them and sentenced each to various sentences of death, life imprisonment and 7 years. Dissatisfied, the Appellant appealed to the Court of Appeal. The appeal was dismissed.

He has now come on further appeal to this Court. The Notice of Appeal dated the 7th of July 2005 contains six grounds of appeal. The Appellant\'s Brief of Argument was prepared by Ocholi James. While the Respondent\'s Brief was prepared by Mr. Arome Benson Akogu, Director of Public Prosecutions, Kogi State.

In the Appellant\'s Brief of Argument Mr. Ocholi James formulated the following four issues for determination:-

Issue One.

Whether the charges against the Appellant were proved beyond reasonable doubt to warrant a conviction and its affirmation by the lower court.

Issue Two.

Whether the lower court treated the evidence of the co-accused correctly before affirming the conviction of the Appellant by the lower court.

Issue Three.

Whether there was in existence before the trial court a competent amended 2nd head of charge before it embarked on the trial and conviction which the lower court affirmed.

Issue Four.

Whether the lower court was right in affirming the conviction of the Appellant for all the offences charged without considering nor making a finding on the main defence raised by him to the effect that he changed his mind on the commission of the crime and set out to return the bus and the passengers to the police station when he heard the explosion that burnt the bus and the passengers therein

I shall now commence my deliberation of the appeal by first considering the third issue and the preliminary objection in respect thereto. The issue is whether there was a competent second head of charge before the trial court upon which the Appellant was tried and convicted. Counsel for the Appellant, at page 33 of the Appellant\'s brief sought the leave of this Court to raise and argue the issue. Mr. Arome Benson Akogu learned Director of Public Prosecutions took advantage of the leave sought to argue by way of preliminary objection, that the validity of the amended second head of charge was never canvassed at the Court below and being a fresh issue cannot be raised and argued before this Court without leave. He relied on Ali Pinder Kwajaffa & Ors v.Bank of the North Ltd (2004) 5 SCNJ 121 at 133-134; (2004) 13 NWLR (part 889) 146; Lebile v. Reg. Trustees of Cherubim and Seraphim Church of Zion of Nigeria Ugbonla & Ors (2003) 1 SCNJ 463 at 477; (2003) 2 NWLR (part 804) 399 and Yiola Maskala v Dimbriwe Silli (2002) 6 SCNJ 351 at 357-358; (2002) 13 NWLR (Part 784) 216.

The three authorities above cited by the learned Director of Public Prosecutions, no doubt, restated the general principle that leave is necessary to raise, on appeal before this Court, an issue not raised at the courts below. But where however appeal as of right is conferred on an appellant under the Constitution, he need not obtain the leave of court. These are provided for in section 233(2) of the 1999 Constitution. Section 233(2)(a) and (d) which are the relevant provisions to the issue under consideration Section 233(2) Provide :

An appeal shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in cases:

(a) where the ground of appeal involves questions of law alone, decisions in any civil or criminal proceeding before the Court of Appeal;

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court.

Ground 5 from which the third issue was distilled says:-

\"The lower court erred in law when it affirmed the conviction of the Appellant on second count of charge when there was no valid amended second head of charge before the trial court before it took the plea of the Appellant, thus proceeding on an incompetent charge.\"

The particulars of error are at page 229 of the record. It is clear from the ground that it involves only a question of its competence which is an issue of law alone. And the Appellant who was sentenced to death by the High Court had his sentence confirmed by the Court of Appeal, He has thus derived his right of appeal as of right from both subsections 233(2)(a) and (d) of the 1999 Constitution. It is my firm view that where, as in this case, an appellant\'s right to appeal as of right on any issue is founded on the Constitution, he does not need leave of court to raise it. Besides, the issue of incompetence of the second head of charge is one of jurisdiction in respect of that charge and it has been held in many cases that issue of jurisdiction can be raised and argued for the first time in this Court without leave so to do. See Chief Iyhejee Elugbe v Chief Emimigbe Omokhafe & Ors (2004) 18 NWLR (part 905) 319 at 334; Benson Obiakor & Anor v. The State (2002) 10 NWLR (part 776) 612 at 626 and 627; Isaac Gaji & Anor v. Emmanuel D. Paye (2003) 8 NWLR (Part 823) 583. I am also of the view that section 233(2)(d) of the Constitution only amplifies the long established principle of criminal justice that the courts, including the appellate courts, have a duty to avail an accused person of any defence open to him from the totality of the evidence whether or not he has expressly asked for it. See Rasulu

Oladipupo v. The State (1993) 6 NWLR (part 298) 131 at 140. ;

From all accounts, I do not see any basis for the leave sought by learned counsel for the Appellant to raise the issue of the competence of the second head of charge. A fortiori, there was no basis for the objection raised by the learned D.P.P.

Now what is the merit of the complaint in ground five of the grounds of appeal from which the third issue is derived' The contention of the Appellant is that at the time the purported amended second head of charge was read and explained to the accused persons and to which each pleaded, there was, in law, no amended second head of charge and that the trial and conviction based thereon were therefore null and void. The learned D.P.P. proffered no argument on this issue apart from the preliminary objection.

On the 12/3/2001 the D.P.P. drew the attention of the trial Chief Judge to the fact that the amount of N400,00.00 stated in the second head of charge was a typographical error and that the correct amount of which the victims were robbed was N1,400.000.00 and made an oral application to amend same. Mr. Aliwo for the accused persons said he had no objection to the amendment sought. The learned trial Chief Judge however directed that a formal motion on notice for the amendment sought be made, and the matter was adjourned to the following day, the 13/3/2001. On that same 12/3/2001 the motion was filed. Attached to the affidavit in support of the motion as Exhibit \"A\" was the Amended second head of charge. Before the commencement of the proceedings on the 13/3/2001 each of the accused persons and their counsel Mr. W. Aliwo, had been served with a copy of the amended charge. At the proceedings, the charge was read and explained to each of the accused persons. The learned trial Chief Judge then at page 22, lines 16-18 of the record said:

\"Amended second head of charge read and explained to each of the three accused persons, after leave of the court was granted accordingly.\"

The record at the rest of page 22 from lines 20-30 shows that each of the accused persons said he understood the charge as amended and pleaded thereto. Immediately thereafter the actual trial started with the testimony of the PW1 Police Sergeant Isaac Egwuma.

The totality of the entries at pages 19-23 of the record shows that the motion for leave to amend the charge was filed on the 12/3/2001 and on the 13/3/2001 the leave sought was granted and the charge accordingly amended. The amended charge was read and explained to each of the accused persons who said he understood it and pleaded thereto. I agree that there is nothing in the record to show that the learned D.P.P. moved the motion before the leave sought therein was granted. But I would like to presume that he moved and counsel for the accused persons indicated no objection before the court granted the leave to amend. I am inclined to so presume because even on the 12/3/2001 when the learned D.P.P. made oral application to amend the charge, Mr. Aliwo for the accused persons indicated that he would not oppose the amendment. Section 150(1) of the Evidence Act provides:-

\"When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.\"

I think, I can safely make recourse to this provision and hold that before the court gave the positive indication of having granted the leave to amend the charge, the formal requisites of moving the motion were complied with. The result is that I consider the trial court\'s incomplete recording about the motion a mere irregularity as to form and which did not affect the substance as to the trial and conviction of the Appellant on that charge. The amended charge was read and explained to each of the accused persons and each said he understood the charge and pleaded thereto. The defects in the trial court\'s recording about the motion would only have been fatal to the trial and conviction of the Appellant if it had led to a miscarriage of justice. See Michael Okaroh v The State (1990)1 NWLR (Part 125) 128; Okegbu v The State (1979)11 SC 1; Orosunlemi v The State (1967) NMLR 278. There is no complaint of any miscarriage of justice and none apparent from the record. It was the Appellant himself who led a team of policemen to the house of his girl friend Lami Mohammed in Karaworo area of Lokoja and recovered the sum of N223,210.00 which, he admitted, was his share of the booty from the criminal exploit. It is clear therefore that there is no substance in the complaint in ground five of the

grounds of appeal. Accordingly the third issue is resolved against the Appellant.

Issues one and two relate to the question of whether the prosecution proved the charges against the Appellant beyond reasonable doubt to warrant his conviction by the trial court and the affirmation by the Court of Appeal. Mr. James Ocholi meticulously went through the evidence of the prosecution witnesses, that of the Appellant including exhibit 1 and portions of the judgment of the trial court and pointed out that none of the witnesses knew the particular accused whose gun shot killed Mamodu Abdullahi Ajawu and who set the bus ablaze and killed four persons therein. He submitted therefore that the lower court erred in law in affirming the conviction of the trial court.

At page 99 of the record of proceedings, the learned trial Chief Judge quoted a statement of this Court in Asimiyu Alarape & Ors v The State then unreported but now reported in (2001) 5 NWLR (Part 705) 79.

At pages 102-103 this Court per Iguh JSC said :-

\"The point that needs to be emphasised in this sort of cases is that once it is firmly established that two or more persons formed the necessary common intention to prosecute an unlawful purpose and in the prosecution of such purpose, an offence of such nature that its commission was probable consequence of the prosecution of such purpose is committed, each of them is deemed to have committed the offence. In such circumstances, the courts, once the execution of the common intention or design is established, would be right in asserting that it did not matter on such facts which of the accused persons did what. That is for the simple reason that under such circumstances a fatal blow, though given by one of the accused persons involved, is deemed in the eye of the law to have been given by the rest of his co-accused persons. The person actually delivering the blow is said to be no more than the hand by which the others all strike.\"

The trial court followed the principle and held that the Appellant and the two other accused persons went out on the 17/2/2001 to prosecute an unlawful purpose of armed robbery in the course of which they committed the offence not only of the armed robbery which they set out to execute, but also culpable homicide of five human beings. The court held that, although it was not clear who of the Appellant and the two other accused persons shot and killed Mamodu Abdullahi Ajawo, each of them was deemed to have shot and killed him. The court went to the same conclusion with respect to the gun shot into the vehicle which caused the fire and death of the four victims in it. The Court of Appeal invoked the provisions of section 79 of the Penal Code and the principle in Dabo Fulani & Njobi Fulani v. Bornu N.A. (1968) 1 All NLR 55 and many other cases and affirmed the decision of the trial court.

I do not fancy any conceivable reason to disturb the concurrent decisions of the two courts below. The uncontroverted evidence before the court is that the Appellant and the two other convicts, each armed with the rifle officially assigned to him for his official duties as a police officer agreed to go and rob the victims of their money. In the course of their criminal adventure and in an apparent bid to overcome resistance or prevent escape one of them shot and killed one of the victims of the robbery, Mamodu Abdullahi Ajawo. In the same escapade and for the purpose of achieving their self same common end, one of them shot into the vehicle. The shot hit a jerry can of petrol and ignited a fire which burnt down the vehicle and four persons in it to death. Can it be argued, in these circumstances that no criminal liability attaches to the Appellant because he was not identified in the evidence as the very accused whose gun shot killed the victims' I answer this question in the negative. The argument is untenable in law in view of the numerous authorities some of which were relied upon by the courts below. Equally untenable is the Appellant\'s contention that because their mission was armed robbery he was not criminally responsible for the homicide for which there was no previous agreement between himself and the co-accused persons.

My view is that if, in the course of the accused persons\' execution of their unlawful common purpose of armed robbery and while jointly and severally employing their arms to overcome the victims\' resistance or facilitate their own escape, the gun shot of one of them kills any of the victims, each of the accused persons is deemed, in the eyes of the law, to have fired the fatal gun shot and criminally liable for the armed robbery as well as the culpable homicide. See the case of Okosi v. The State (1989) 1 NWLR (part 100) 642 at 658. Similarly the gun shot of one of the accused persons into the vehicle that caused the fire which burnt the vehicle and the four persons in it to death is to the same effect. In the circumstances of this case, it is enough proof of the criminal liability of all the three accused persons to establish that the gun shot of one of them caused the death of the victims. It is immaterial to prove what each of the accused persons did

in the actualisation of their pre-conceived common purpose. See also Ikemson v The State (1989) 3 NELR (part 110) 455 and Ezekiel Adekunle v The State (1989) 5 NWLR (part 123) 505 at 518 and Offor v Queen 15 WACA 3 at 4.

The next is the Appellant\'s complaint about the trial court\'s purported use of the evidence of the co-accused persons to convict him. Although at page 97 of the record the trial court believed the evidence of the 3rd accused that it was the Appellant who fired his gun directly into the bus which shot sparked off the fire and the resultant deaths, that finding did not alter the ultimate finding. And the ultimate finding is that the Appellant and the two co-accused persons killed the five victims in the course of their pre'conceived armed robbery expedition. And this finding is amply supported by the totality of evidence including the statements of the accused persons in Exhibits 1, 8 and 9 and their testimonies in court. It is this finding that is crucial to the Appellant\'s conviction and not the trial court\'s belief of the evidence of the 3rd accused person. It. is therefore misleading to argue that the Appellant\'s conviction was founded on the evidence of the co-accused persons.

It is, at this juncture, necessary to restate the legal principles with respect to a statement to the police and evidence of an accused person against a co accused. The settled principle is that a statement made by an accused person to the police may amount to an admission of the offence for which he is charged and such a statement and the facts admitted therein are admissible only against the maker of the statement and not against a co-accused. But where the accused goes into the witness box and repeats, on oath, the contents of his statement to the police, they become evidence for all purposes, admissible in law and can be acted upon by the court against a co-accused. These principles were re-echoed in Akanbi Enitan & Ors v. The State (1986) 3 NWLR (part 30) 604 at 611; R v. Akinpelu Ajani & Ors (1936) 5 WACA 3 at 4; Hamuzat Badmos v Commissioner of Police (1948) 12 WACA 432; Rex Augustine Umeh & 2 Others Re Vincent Egejuru (1942) 8 WACA 123. The above is the purport of the provisions of section 178(2) of the Evidence Act Cap 112 Laws of the Federation of Nigeria 1990. While the court is expected to regard such evidence of an accused against a co-accused with circumspection, the law does not impose a duty on it to warn itself before convicting on it. The requirement of warning applies only to the evidence of an accomplice within the provision of section 178(1) of the Evidence Act. See Danlami Ozakl & Anor v. The State (1990) 1 NWLR (Part 124) 92 at 117. Thus even if the trial court had convicted the Appellant on the evidence of the co-accused persons, (which was not) it was entitled so to do without warning itself.

The last issue concerns the Appellant\'s claim of his change of mind about the commission of the offences for which they were charged. This is another patently frivolous line of defence adopted by the Appellant. In the first place his claim to a purported change of mind was not contained in his statement to the Police Exh. 1. Again his claimed change of mind, according to him, took place before the gun shot that burnt the bus and four victims to death. Yet after his alleged change of mind he had this to say in his Exhibit 1:-

\"We later came to slaughtering house within Okene town. It was there myself, PC Michael Jimoh and PC Gerson Soba Shared the money from there we board another vehicle to Lokoja\"

And in the concluding part of the said statement he said :-

\"After sharing the money I took my own share to my house at Karaworo area Lokoja. Immediately I reached home I handed over the money to my girl friend Lami Mohammed and instructed her not to open the nylon bag named Ghana must go. I did not tell Lami Mohammed the contents of the nylon bag handed over to her to keep for me.\"

He later led a team of police men to his house where the money was recovered from the aforesaid Lami Mohammed. At the trial he admitted Exhibit 1 as his voluntary statement.

In my view, the above quoted portions of his statement completely negatived his claimed change of mind about the commission of the offences. I hold that the claim to his change of mind as a defence has no basis both in law and in fact.

This case represents the height of man\'s inhumanity to man. The Appellant and his co-accused police constables employed by the nation to protect the lives and properties of its citizenry embarked on this unlawful mission and in their brazen brutality terminated the lives of these five innocent and defenceless victims, with unimaginable damages to their

loved ones and families back at their various homes. The case demonstrates the regrettable reality that the numerous police check points along our highways only give the citizenry a false sense of security.

In conclusion, I hold that the appeal has no merit and is accordingly dismissed. The conviction and sentences of the Appellant by the courts below are also hereby affirmed.

Judgement delivered by
Sylvester Umaru Onu, J.S.C

I have had the opportunity of reading before now the judgment just delivered by my learned brother, Tabai JSC. I am in complete agreement with him that the appeal lacks substance and therefore fail.

The acts of the appellant in perpetrating the crimes charged are heartless and dastardly in both design and execution. The act of setting ablaze the four deceased persons in a vehicle to facilitate their being burnt to ashes was not only inhuman but wicked in the extreme.

I find no redeeming features in the defence put forward by the Appellant and I have no hesitation in dismissing this appeal.

Judgement delivered by
Umaru Atu Kalgo, J.S.C

I had the opportunity of reading in draft the judgment just delivered by my learned brother Tabai JSC in this appeal. I entirely agree with it and have nothing useful to add. I also dismiss the appeal and affirm the conviction and sentence passed on the appellant and confirmed by the Court of Appeal.

Ignatius Chukwudi Pats Acholonu. J.S.C.

died before this judgment was delivered.

Judgement delivered by
Aloma Mariam Mukhtar, J.S.C

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Tabai J.S.C. I am in full agreement with the reasoning and conclusion reached in the lead judgment. Indeed, my learned brother aptly described the whole wicked act as man's inhumanity to man.