IN THE SUPREME COURT OF NIGERIA

Suit No: SC237/2002

Petitioner: Christopher Okereke Ukpabi
And
Respondent: The State

Date Delivered: 2004-06-18

Judge(s): Salihu Modibbo Alfa Belgore, Sylvester Umaru Onu, Samson Odemwingie Uwaifo,Dahiru Musdapher, Dennis Onye

Judgment Delivered

The appellant was arrested on 11th July, 1978 along Ngwa Road, Aba and later charged for the offence of armed robbery contrary to Section l(2)(a) of the Robbery and Firearms (Special Provisions) Decree No. 47 of 1970 as amended. He was arraigned before the High Court, Aba and tried for the said offence. On 30th March, 1982, the learned trial Judge, (Nsofor, J.), found him guilty of the charge and convicted him. He was sentenced to death. His appeal to the Court of Appeal, Port Harcourt Division, was dismissed on 21st March, 2002.

The appellant has appealed to this court on two grounds of appeal. I shall state them without their particulars as follows:

\"(1) The learned Justices of the Court of Appeal erred in law in affirming the conviction and sentence of death against the appellant when the evidence upon which he was convicted depended wholly or substantially on the correctness of one or more identification of the appellant which the defence alleged to be mistaken and in the absence of a valid identification parade and warning contrary to the guidelines laid down in R v. Turnbull (1976) 3 All ER 549 as approved by the Supreme Court in the case of Zekari Abudu v. The State (1985) 1 NWLR 55, 61, 62.

(ii) The learned Justices of the Court of Appeal erred in law in affirming the conviction of the appellant of the offence of armed robbery and sentencing him to death when the guilt of the appellant was not proved beyond reasonable doubt by the prosecution.\"

As will be noticed, the first ground complains of the nature of identification of the appellant while the second ground complains of the insufficiency of the evidence. But the appellant raised only one issue for the determination of the appeal. It reads thus:

\"Whether or not the learned Justices of the Court of Appeal were right in affirming the conviction and sentence of death on the appellant when the only thing linking him to the offence of armed robbery was his alleged identification by the victim of the crime, which identification the appellant strongly disputed.\"

This issue covers only ground 1. However, the respondent relying on the two grounds of appeal, raised also a single ground which appears to cover the two grounds. The issue reads:

\"Whether the learned Justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant in the circumstances.\"

The facts of this case were clearly narrated by the two courts below. Briefly, one Samuel Sunday (P.W. 2), a petty trader, was taking his wares to the market on 11th July, 1978, along Ngwa Road, Aba, in the early hours of the morning. At about 5 a.m., he was accosted by a man whose name he later knew to be Christopher Okereke Ukpabi. He is the appellant. The said P.W. 2 was carrying a bag on his head and holding a hand bag. The appellant stopped him and ordered him to search his own person. The first instinct of the appellant was to resist. At that stage, two other persons appeared on the scene. One of them, who wore a mask, held a gun. The appellant asked P.W. 2 to choose between searching himself and death. This frightened P.W. 2 and he surrendered his wares together with N25.00 in cash to the

men. The wares were 80 dozens of headties valued at N315.00 and 50 pieces of gowns valued at N200.00. Also taken from him were his wrapper cloth, a pair of trousers, one shirt, a towel, a portfolio and some documents.

The men gave P.W. 2 a warning to continue in the direction he was going and not to look back. He did as he was directed and after some distance he hid somewhere along the said Ngwa Road. Later, he retraced his steps to go home to report his experience. It was on his way back that he recognised the appellant buying some cigarettes at a small store at the park along Ngwa Road. He gripped him and a crowd of people gathered. One of the people called in the police. The P.W. 2 said he was able to recognise the appellant from his face and the way he walked with his lame leg.

The appellant in his testimony claimed to be a beggar who had come from Arochukwu to Aba and that he did not live on Ngwa Road. He admitted that on 11th July, 1978, the P.W. 2 came round to lay hands on him and both began to fight. He said P.W. 1 was one of those who came to intervene. In the testimony of P.W. I, he confirmed that he saw P.W.2 and appellant exchange words. He said P.W.2 demanded from the appellant to return his property but the appellant asked whether P.W. 2 had come to take advantage of his deformity.

The appellant made a statement to P.W. 3, Sergeant Oto Ebere. In it, he said he was having a drink with two other boys in a hotel along Ngwa Road on 11th July, 1978, around 6 a.m. when he had an encounter with the appellant. He claimed the two boys worked and lived in that hotel. He added:

\"Then one man brought a bag and waterproof bag. He said we should guard the bags for him and he was going to bring another bag. Immediately he was going one of the workers whom I was chatting with carried the portfolio and the bag and said that he was going to keep them for upstairs.\"

He said further in the statement that he had gone out to change his dress and that it was -

\"when I came out the boy who brought me to the Police Station gripped me when I demanded whether he had collected his bags from the upstairs because I saw the boy when he carried it (sic) upstairs and said that he was going to keep it for safe.\" (sic) ;

The learned trial Judge considered the evidence carefully and made findings of fact (1) that P.W. 2 was indeed robbed of those items, as enumerated, on 11th July, 1978, along Ngwa Road; (2) that one of those who robbed him wore a mask and held a gun; (3) that the appellant was the first person who accosted P.W. 2; (4) that P.W. 2 saw his face. The learned trial Judge held that although the appellant did not himself hold a gun, he was caught by the principle of common intention and common purpose as stated in Section 7(a) of the Criminal Code [Section 8 of the Criminal Code of Western Nigeria] and as applied in Digbehin v. The Queen (1961) 1 All NLR 388 at 391 per Brett, JSC. The Court of Appeal concurred with those findings and the law as applied.

Mr. Ukiri, learned counsel for the appellant, made a spirited argument that the identification of the appellant by P.W. 2 was not free from criticism and danger. He cited R. v. Turnbull (supra) approved in Zakari Abudu v. The State (supra) by this court to support his contention to the effect that the appellant had little time to observe who accosted him. Mr. Onyeka, learned counsel for the respondent, argued that it was about 2 hours from the time P.W. 2 was accosted that he saw appellant and so his memory of the facial look of the appellant together with his peculiar features was still fresh. He drew attention to the statement (Exhibit 1) which the appellant made to the police.

I think it must be recalled from the evidence that when the P.W. 2 was confronted and was asked to search himself, he at first refused. I think it might be fair to say he did not then feel afraid but looked at the appellant straight in the face. He might have thought he could stand up to the person who so ordered him. It was when the man in mask showed up with a gun to request the appellant to choose between searching himself and death that he knew the danger he faced and so surrendered. I think he had enough time to observe the face of the appellant who was the man that first confronted him. Besides, the appellant\'s lame condition could hardly be mistaken by P.W. 2.

It is true that whenever the case against an accused person depends wholly or substantially on the correctness of the identification of the accused, and the defence alleges that the identification was mistaken, the court must closely

examine the evidence. In acting on it, it must view it with caution, so that any real weakness discovered about it must lead to giving the accused the benefit of the doubt. This is the principle laid down in R. v. Turnbull (supra). It has been approved in this country: see Abudu v. The State (1985) 1NWLR (Pt. 1) 55 at 61-62; Mbenu v. The State (1988) 1 NWLR (Pt.84) 615 at 628. In my view, the principle is more appropriate in circumstances where identification parade was considered necessary and had been conducted.

In the present case, there was no question of a formal identification parade. It was not necessary. What happened here was that RW. 2 recognised one of those who robbed him while the matter was still fresh in his mind and, incidentally, the man was still in the neighbourhood and within easy reach, as it were. As said by Lord Widgery, CJ., in R v. Turnbull (supra) at page 552:

\"Recognition may be more reliable than identification of a stranger.\" \'

Although it must be conceded that even the act of recognition is not completely immune from mistake being made sometimes, I do not think that, in the circumstances of this case, the P.W. 2 would have been mistaken when he recognised the appellant in whose hands, in the company of other two men, he had just suffered loss of his properties. It was a spontaneous recognition: see Evisi v. The State (2000) 12 S.C. (Pt.I) 24(2000) 15 NWLR (Pt.691) 555 at 595.

Mr. Ukiri had argued that the P.W. 2 could not have seen the face of the appellant because, according to him, he was backing him. I do not feel able to accept that. There is nothing in the printed record that the P.W. 2 was backing the appellant. In fact, to suggest that would fly in the face of what the appellant said his initial reaction was when the appellant ordered him to search himself. He said he refused. It is most improbable that he would have dared to defy such an order without taking a view of the person who had given it. He must have seen that the appellant was not armed and did not constitute a threat he could not meet. It was when the masked man with gun appeared that the P.W. 2 appreciated the futility and danger of resistance.

It is at this stage I ought to recall that the identification or recognition asserted by the P.W. 2 does not stand alone in this case. As shown by Mr Onyeka, the appellant implicated himself in the written statement, (Exhibit 1), he made to the police. It is true he denied that Exhibit 1 was the statement he made to the police. The two courts below disbelieved that denial. Before us, Mr. Ukiri attempted to give a different meaning to what is recorded in Exhibit 1. But I am afraid he did not quite succeed in this because the statement is not ambiguous. It shows that the appellant had attempted to concoct a story as to what happened to the P.W. 2\'s properties. The investigating police officer, Sergeant Oto Ebere, (P.W. 3), said he tried to follow up that story but that it collapsed. He gave details of that but I do not need to go over them. It is enough for me to say that there are concurrent findings based on the facts as accepted by the two courts below. The said concurrent findings of fact are not in any way perverse. This court will not in principle interfere with concurrent findings of fact unless special reasons justify such interference. That is, where there is a miscarriage of justice arising from a violation of some principles of law or procedure, or if the findings are perverse: see Ugwumba v. The State (1993)5 NWLR (Pt. 296) 660: Ogunlana v. The State (1995) 5 NWLR (Pt.395) 266; Effia v. The State (1999) 6 S.C. (Pt.1) 56 (1999) 8 NWLR (Pt. 613) 1. I cannot find any special reasons in this case to interfere with the concurrent findings of fact.

I have come to the conclusion that there is no merit in this appeal. I accordingly dismiss it and affirm the decision of the court below.

Judgement delivered by
Salihu Modibbo Alfa Belgore, J.S.C.

I agree there is no merit in this appeal and for the reasons adumbrated in the judgment of my learned brother, Uwaifo, JSC., I also dismiss it. I affirm the decision of Court of Appeal.

Judgement delivered by

Sylvester Umaru Onu, J.S.C.

Having been privileged to read in draft the judgment of my learned brother, Uwaifo, JSC., just delivered, I am in entire agreement with it that the appeal lacks substance. I have no hesitation therefore in dismissing the appeal and affirming the decision of the court below.

Judgement delivered by
Dahiru Musdapher, J.S.C.

I have had the honour to read before now, the judgment of my Lord, Uwaifo, JSC., just delivered with which I entirely agree. For the same reasons eloquently set out in the aforesaid judgment which I hereby adopt as mine, I too dismiss this appeal as unmeritorious. The law is now settled that, the question whether an accused is properly identified as the one who was a party to the commission of the criminal act is a question fact to be considered by the trial court on the evidence adduced for that purpose. In the instant case, P.W. 2 gave evidence and on the facts and the circumstances of this case, he had enough time to observe the face of the appellant who was the man who firstly aggressively confronted him. The witness also recognized the lame condition of the appellant. This, clearly is not a case where an identity parade was necessary. See Orimoloye v. The State (1984) NSCC 654 at 657. Adeyemi & Ors. v. The State (1991) 1 NWLR (Pt. 170) 679. Eyisi v. The State (2000) 12 S.C. (Pt. 1) 24(2000) 15 NWLR (Pt. 691) 555. Igbi v. The State (2000) 2 S.C. 67(2000) 3 NWLR (Pt. 648) 169. The identification of the appellant as one of those who robbed P.W. 2 was accepted as a question of fact by the two lower courts and the learned counsel for the appellant did not convince me that the finding was faulty. On the whole, the finding of the guilt of the appellant for the offence charged was based on the facts adduced at the trial and accepted both by the trial court and the Court of Appeal. These are concurrent and consistent findings of fact which were not perverse and which were supported by the evidence led and accepted. I accordingly dismiss the appeal and confirm the decisions of the court below.

Judgement delivered by
Dennis Onyejife Edozie, J.S.C.

I had a preview of the leading judgment just delivered by my learned brother, Uwaifo, JSC., and I am in agreement with the opinion expressed therein to the effect that the appeal lacks merit.

The appellant was charged with the offence of armed robbery contrary to Section 1 (2)(c) of the Robbery and Firearms (Special Provisions) Decree (now Act) No. 47 of 1970, the particulars being that he, \"on the 11th of July, 1978, at Ngwa Road in the Aba Judicial Division while in the company of two others now at large armed with fire-arms robbed Samuel Sunday of a port-folio containing 1970 tax receipts, one wrapper, a towel, a pair of trousers, a shirt and a water-proof bag containing ladies head ties and gowns valued at N515.00 and the sum of N25.00 in cash.\" Upon arraignment before the Aba High Court, the appellant denied the charge. Thereafter, the prosecution called three witnesses after which the appellant testified in his defence. At the conclusion of the trial, the learned trial Judge, Nsofor, J., as he then was, convicted the appellant as charged and sentenced him to death. His appeal to the Court of Appeal was unsuccessful hence a further appeal to this court. In the brief of argument filed by his counsel, the only issue canvassed on his behalf is \"whether or not the learned Justices of the Court of Appeal were right in affirming the conviction and sentence of death on the appellant when the only thing linking him to the offence of armed robbery was his alleged identification by the victim of the crime which identification the appellant strongly disputed.\" The pith of the submission of learned counsel for the appellant is that the P.W. 2, the victim and complainant of the incident, was mistaken on the identity of the appellant thereby rendering his conviction unsustainable. A cursory review of the evidence will throw more light on this submission.

The complainant and victim of the armed robbery incident, in his evidence as P.W. 2, stated inter alia:

\"I remember the 11th day of July, 1978. About 5 a.m. on the 11th of July, 1978, I was on my way to the market....

As I was going to the market, I was carrying a bag on the head and I was handling my portfolio in one hand. At a point

along Ngwa Road, someone stopped me and ordered me to search my person. I resisted and refused to obey. At this stage, two other persons appeared on the scene. One of them was wearing a face mask and had a gun in hand.

That first person who stopped me initially asked me to choose between searching myself and death. I then became hopelessly powerless and I surrendered to them eighty dozens (80 dozens) of head ties, valued at N315.00, fifty pieces of gowns valued at N200.00. I also surrendered to them my personal wrapper in the portfolio, a pair of trousers, one shirt, a towel and my document - house rent receipts, tax receipt and a sum of N25.00 in cash.

They ordered me to continue to the direction I was going and not to look backwards. After I had gone a distance, I took cover, and hid myself somewhere along Ngwa Road, Aba. As I went back home to report my experience to my people, I saw and recognised one of those who robbed me buying some cigarette at a small store at the park along Ngwa Road. I arrested him there. As I held him, people gathered and they went and called in the police....

I will recognise that robber I held if I see him. This is the person. He is the accused in the dock.\"

Cross-examined by Mr. Onuoha

'It was the accused who stopped me while \'I was proceeding to the market\'

Question: \'What was the remarkable thing about the accused by which you recognised him'\'
Answer: \"I recognised him by his face and by the way he walked.\"

Note: The witness demonstrates how the accused walked.

\'There was an electric light in front of the store where there was light.....
The store in front of which I was stopped has a hotel above. The light at the store was enough to enable me recognise the accused..... """..
From the spot where the robbers attacked me and took away my belongings to the small store where I later saw the accused person buying some cigarette is about a distance from where I am in the wooden box to the building on the road opposite the Court Wall\' (a distance which both counsel engaged in the trial estimate to be about 80 yards).....
\"When I held the accused person, those who gathered saw me holding him. They heard me raise the alarm that the accused and his group robbed me..... .....
I told the police also that the accused asked me to follow him upstairs to recover my belongings but I refused to follow him.\"

From the above scenario, the P.W. 2 appears to be quite firm in his recognition of the appellant at the time of the robbery. Describing the circumstances that enabled him to recognise the appellant, he said that although the incident occurred at about 5 a.m. there was electric light in front of the store at the scene of the incident. He saw the face of the appellant clearly; he had altercation with him and he noticed the familiar way by which he walked. The appellant himself had a deformed leg which, no doubt, made him walk in a peculiar manner. The P.W. 2 also saw the appellant\'s confederates in crime. One of them had a mask on the face and was in the possession of a gun. The appellant\'s defence was a total denial of the incident. He said he was a beggar and at the material time was on the roadside begging for alms when P.W. 2 apprehended him and enquired if he had seen two men who had passed by and upon his reply in the negative, he told him that some people had robbed him of his property. The P.W. 2 suspecting that he, the appellant, was one of the robbers started attacking him. The investigating police officer (P.W. 3) tendered in court a statement made by the appellant under caution. The statement was tendered without objection and marked Exhibit 1. Though the appellant denied making the statement, the trial court found as of fact that the appellant made it. There is no appeal against that finding. Such a finding remains binding. See Dahup v. Kolo (1993) 8 NWLR (Pt.317) 254 at 269.

In that statement, Exhibit 1, the appellant said:-

This morning 11/7/78 around 6 o\'clock we were drinking in an hotel along Ngwa Road named Good Hope Hotel. The

two other boys are working in that hotel and are living there. Then one man brought a bag and water-proof bag. He said we should guard the bag for him and he was going to bring another bag. Immediately he was going, one of the workers whom I was chatting with carried the portfolio and the bag and said he was going to keep them for upstairs ....
When I woke up to go and clean my dress in the washerman\'s house at the back of that Ngwa Road, when I came out, the boy who brought me to the Police Station gripped me when I demanded whether he had collected his bags from the upstairs because I saw the bag when he carried it upstairs and said that he was going to keep it for safe. When he was beating me. he claimed that his wrapper and a towel are inside the portfolio bag. Then I told him to let me show him the house of the boys who carried the bags. He say when (sic) go inside then go kill him. He refused my assistance of showing him the person who is in possession of his portfolio bag. I only saw him when he remove the bag. As they were beating me they remove my shoe. On the spot there he mention (sic) N25.00 before the policeman.\"

(underlining for emphasis)

The above statement particularly the underlined portion is very damnifying to the appellant\'s defence. In that statement made on 11/7/78, the very date of the incident, the appellant appears to be saying that he knew the house of the boys (apparently his accomplices) who carried away P.W. 2\'s bag and kept upstairs and that when he saw P.W. 2 and enquired if he had collected the bag, he, the P.W. 2, gripped him and started beating him claiming that his belongings were inside the bag. At that point, the appellant agreed to assist the P.W. 2 by showing him the house of the boys who carried his bag but the P.W. 2 declined the offer for fear of being killed. The statement underscores the fact that before the P.W. 2 held or \"arrested\" the appellant both of them had had an encounter. This fact coupled with the mentioning of bag which was part of what the P.W. 2 surrendered to the robbers clearly strengthens the identification of the appellant by the P.W. 2. It is an admission of the appellant\'s complicity in the robbery. Identification evidence is evidence tending to show that the person charged with an offence is the same as the person who was shown committing the offence. Where a trial court is faced with identification evidence, it should be satisfied that the evidence of identification established the guilt of the accused beyond reasonable doubt. Identification parade is not a sine qua non to conviction: Ikemson v. State (1989) 6 S.C. (Pt. 1) 114 (1989) 3 NWLR (Pt. 110) p.455. In the instant case, where the identification of the appellant was informal and spontaneous shortly after the robbery and having regard to the surrounding circumstances, incriminating the appellant, the contention of the appellant\'s counsel impugning the identification of the appellant is untenable. Whether P.W. 2 made a correct identification of the appellant is a question of fact. The two lower courts found as a fact that the appellant was one of those who robbed the P.W. 2. The attitude of this court is not to interfere as such with a concurrent finding if it is not perverse, but supported by the evidence and had not occasioned a miscarriage of justice. See Theoohilus v. State (1996) 1 NWLR (Pt. 423) 139 at 150, Balogun v. Labiran (1988) 3 NWLR (Pt. 80) 66.

There is no justification for interfering with the findings of the two lower courts.

In the light of the foregoing and the more detailed reasons contained in the leading judgment of my learned brother, Uwaifo, J.S.C., I agree with him that this appeal lacks substance. I, too, dismiss it and affirm the judgment of the Court of Appeal.