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**OYELEYE
& ANOR
V.
STATE**

(2013) LPELR-20693(CA)

**COURT OF APPEAL
(IBADAN JUDICIAL DIVISION)**

OLUSOLA OYELEYE & THE STATE
CITATION: (2013) LPELR-20693(CA)



In The Court of Appeal
(Ibadan Judicial Division)

On Tuesday, the 23rd day of April, 2013

Suit No: CA/I/103A/2008

Before Their Lordships

M.B. DONGBAN-MENSEM
ADAMU JAURO
O. DANIEL-KALIO

Justice, Court of Appeal
Justice, Court of Appeal
Justice, Court of Appeal

Between

1. OLUSOLA OYELEYE
2. GANIYU BUSARI

Appellants

And

THE STATE

Respondent

RATIO DECIDENDI

- 1 **WORDS AND PHRASES - "CONSPIRACY":**
Definition of "conspiracy"

"The word "Conspiracy" has been defined as an agreement of two or more persons to do an unlawful act by unlawful means." PER DONGBAN-MENSEM, J.C.A. (P.9, Para. F) - [read in context](#)

2 EVIDENCE - BURDEN OF PROOF: Burden of proof placed on the prosecution before an accused person can be convicted or acquitted

"In the case of Samodi Mustapha v. The State (2007) 12 NWLR (Pt.1049) page 639 the court in considering the burden of proof in criminal case held:- "the burden means no more than that at the conclusion of trial, for an accused to be convicted, not a single question regarding the facts which constitute the offence the accused is charged must remain unanswered. Invariably such facts which show unequivocally that the accused was the perpetrator of the offence. And this must be done by lawful and credible evidence! It follows therefore for all questions regarding the commission of the crime to be answered, any defence, indeed any suggestion of a defence must be countered by the prosecution. The court too must fully consider any such defence against the background of the totality of the evidence led by the prosecution" PER DONGBAN-MENSEM, J.C.A. (Pp. 21-22, Paras. G-D) - [read in context](#)

3 **EVIDENCE - CREDIBILITY OF EVIDENCE:**

Whether the quantity of evidence determines the success of the prosecution in establishing a case

"It is not the quantity but the quality of the evidence that determines the success of the prosecution in establishing a case. (Refer Eli v. Agid (2004) All FWLR (Pt.220) page 1347 @ 1362 & Abogede v. State (1996) 37 LRCN 674 @ 677 where it was held that:- "the credibility of evidence does not ordinarily depend on the number of witness that testify on a particular point. The question is whether the evidence of one credible witness on a particular point is believed and accepted if the answer is in the affirmative, then it is sufficient to support a conviction" PER DONGBAN-MENSEM, J.C.A. (P.25, Paras. D-F) - [read in context](#)

4 **CRIMINAL LAW AND PROCEDURE - DEFENCE OF ALIBI:** Duty of the prosecution where the defence of alibi is raised

"The law is that where the defence of alibi is raised and sufficient particulars provided, the prosecution has a duty to investigate it. See Akpan vs. State (1991) 3 NWLR part 182 page 646." PER DANIEL-KALIO, J.C.A.(P. 35, Paras. E-F) - [read in context](#)

5 CRIMINAL LAW AND PROCEDURE - OFFENCE OF ARMED ROBBERY:

Requirements of the offence of armed robbery

"For prosecution to prove the offence of armed robbery the following are the requirements. (Refer Osetola vs. State (2012) All NWLR (Pt.549) Pg.1020 @ 1023 & 1042) i. That there was in fact armed robbery ii. That the robbery was an armed robbery; and iii. That the accused person was the armed robber" PER DONGBAN-MENSEM, J.C.A. (P. 20, Paras. A-B) - [read in context](#)

6 CRIMINAL LAW AND PROCEDURE - OFFENCE OF CONSPIRACY: What constitute the offence of conspiracy

"It is also settled that the two or more persons must be found to have combined in other to ground a conviction for conspiracy. (Refer Osetola vs. State (2012) All NWLR (Pt.649) Pg.1020 @ 1023 & 1042). In the case of Salawu v. State (2011) All FWLR (Pt.594) Pg. 35 @ 56-57 it was held that: "a conspiracy consists not merely in the intention of two or more but is the agreement of two or more to do an unlawful act, or to do a lawful act, by an unlawful means, so long as a design rest in intentionally, it is not indictable. When two agree to carry it into effect, the very plot is an

act in itself, and the act each of the parties, promise against promise, actus contra actum, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. (also Patrick Njovens & Ors v. The State (1973) 5 SC 17. Daboh & Anor v. The State (1977) 5 SC 197. Erin v. State (1994) 5 NWLR (Pt.346) 522). What these authority says that for offence of conspiracy to be established, there must exist a common criminal design or agreement by two or more persons to do or omit to do an act criminally. Since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties, it is rarely capable of direct proof: it is invariably an offence that is inferentially deducted from the acts of the parties which are focus towards the realization of their common or mutual criminal purpose." PER DONGBAN-MENSEM, J.C.A. (Pp. 9-10, Paras. G-F) - [read in context](#)

7 EVIDENCE - REASONABLE DOUBT: Whether reasonable doubt means beyond all shadow of doubt

"Reasonable doubt does not mean beyond all shadow of doubt. (Refer Bagudu v. State (1996) 40/41 LRCN 1338 @ 1340 & Onyejekwe v. State (1992) 3 NWLR (Pt.230) page 444 @ 447.)" PER DONGBAN-MENSEM, J.C.A. (Pp. 25-26, Paras. G-A) - [read in](#)

M.B. DONGBAN-MENSEM, J.C.A. (Delivering the Leading Judgment):

A This is an appeal against the Judgment of the Honourable Justice J. O. Ige of the Oyo State High Court of Justice delivered on Friday, the 20th day of June, 2002. By this said judgment, four accused persons were found guilty
B of the offences of conspiracy and armed robbery contrary to section 5(b) and section 1(2) of the Armed Robbery and Firearms (Special Provision) Act, Cap, 398, volume xvii, Laws of the Federation of Nigeria. The Appellants were the 3rd and 4th
C accused persons who were convicted and sentenced by the learned trial Judge. They were each sentenced to be hanged by the neck until they are dead.

D The Appellants feeling distraught by the Judgment of the trial court filed this appeal seeking a reversal of the decision.

E The brief facts which culminated into this appeal is stated in the brief of the Appellants with some modification as follows:-

The Appellant were charged as 3rd and 4th accused persons along with other accused persons at the
F Ibadan Judicial Division of the High Court of Oyo State on a five count charge of conspiracy to commit armed robbery and armed robbery.

The counts alleged that the Appellants and others

A conspired to commit the offence on or about the 19th day of May, 1999 at Oke-Omi Olodo Area in the Ibadan Judicial Division. While armed with offensive weapons to wit: cutlass, dane gun, and other offensive weapons, they robbed the residents of Oke-Omi Olodo Area in the Ibadan of cloths valued at N7,000.00 and cash in the sums of N1,800.00, N440.00, N500.00 and N4,800.00. The prosecution called 8 witnesses while the Appellants testified for themselves and called 4 witnesses. The defence testimonies span over pages 67-81 of the records for this appeal.

D By an order of this Court, the Notices of Appeal were amended into three (3) main identical grounds each. The two appeals were also consolidated by this Court.

E The Appellants formulated three issues while the prosecution raised two issues all similar in substance. This appeal shall be determined on the issues formulated by the prosecution. Those of the Appellants are:-

F 1. Whether the prosecution has proved the offences of conspiracy and armed robbery against the 1st and 2nd Appellants beyond reasonable doubt.

G 2. Whether there was positive, direct and reliable evidence as to the identity of the 1st and 2nd Appellants as participants in the conspiracy and armed robbery.

3. Whether the judgment can be supported having regard to the evidence adduced in the case.

The three issues which were not each tied to the grounds of appeal were argued together by the

A Appellants. The Respondents however, argued their two issues seriatim and also not tied to the grounds of appeal.

Issue One

B Whether or not the Appellants were properly charged, tried and convicted of the offences of conspiracy and armed robbery."

Appellant's case

C The learned Counsel for the Appellant submits on the authority of Caleb Ojo & Anor. v. Federal Republic of Nigeria (2008) 11 NWLR (Pt.1099) 467 p.515 that proper proof of a common intention is indeed desirable in order to prove the guilt of the Appellants and ground conviction for conspiracy.

D The learned Counsel pointed to the Appellants' respective defence of alibi raised timeously, stating that they were at other places other than the scene of the crime. That the 1st Appellant gave evidence that he slept in his house with the wife and children on the said day the alleged robbery took place. The 2nd Appellant said he slept in a church on the said date of the robbery.

E Counsel cites the definition of conspiracy in Caleb's case (supra) and argued that the prosecution did not establish the existence of an agreement between the Appellants.

F DW1 gave evidence materially in favour of the alibi set up by the 3rd accused person/1st Appellant who claimed he slept in the church on the day the alleged robbery took place. DW4 also gave evidence that the 4th accused/2nd Appellant was at home with her and their children on the said date.

Respondent's case

A The learned Counsel cites the testimonies of the prosecution witnesses notably those of the PW1, PW2 two of the victims of the armed robbery and that of the PW5, the night guard of the community, each of whom positively stated that they saw and
B recognised the armed robbers when they went into the community and into their respective houses i.e the houses of PW1, PW2 as evidence of conspiracy. PW1-PW5 gave evidence that they
C identified the Appellants as members of the gang of armed robbers, who robbed their villages on 19th May, 1999.

They were all seen together at the scene of the crime at the same time. It is further the submission
D of the learned Counsel-Director Legal Drafting for the Respondent that the alibi put up by the 1st Appellant came to naught, having been debunked by the evidence of PW8, the Pastor of the Church.
E The pastor denied holding any vigil on the night of the armed robbery and he also denied the suggestion that any one spent the night in the church as he would have been informed of such an
F incident.

The word "Conspiracy" has been defined as an agreement of two or more persons to do an unlawful act by unlawful means.

G It is also settled that the two or more persons must be found to have combined in other to ground a conviction for conspiracy. (Refer Osetola vs. State (2012) All NWLR (Pt.649) Pg.1020 @ 1023 &

1042).

In the case of Salawu v. State (2011) All FWLR (Pt.594) Pg. 35 @ 56-57 it was held that:

"a conspiracy consists not merely in the intention of two or more but is the agreement of two or more to do an unlawful act, or to do a lawful act, by an unlawful means, so long as a design rest in intentionally, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act each of the parties, promise against promise, actus contra actum, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. (also Patrick Njovens & Ors v. The State (1973) 5 SC 17. Daboh & Anor v. The State (1977) 5 SC 197. Erin v. State (1994) 5 NWLR (Pt.346) 522). What these authority says that for offence of conspiracy to be established, there must exist a common criminal design or agreement by two or more persons to do or omit to do an act criminally. Since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties, it is rarely capable of direct proof: it is invariably an offence that is inferentially deducted from the acts of the parties which are focus towards the realization of their common or mutual criminal purpose.

As rightly submitted to by the learned Counsel for the Appellants, the mere fact that the 3rd accused (1st Appellant) lived in the same house with the 1st accused while the 4th accused (2nd Appellant) worked for the 1st accused, without more are not sufficient to ground conviction for conspiracy to

commit armed robbery. However, circumstances can expose conspiracy in a common intent by a resultant action. In this appeal, the Appellants who knew each other were all engaged in a common act at the same time in the same place on the same date. Such coincidence is duplicitous. The facts and circumstances of this appeal fit squarely in to the conspiracy theory of Caleb Ojo & Anor. v. Federal Republic of Nigeria (2008) 11 NWLR (Pt.1099) 467 p.515 para. D cited by the learned Counsel for the Respondent. Often, it is not possible to come up with the record of a meeting at which the conspirators agree to do an unlawful act by an unlawful means. It is often indicated by the execution of the unlawful act, as in this appeal.

The Appellants knew each other, they had at one time or the other worked for and with one another within the same community (pages 104, 105, 107,108of the record of proceedings), Only a meeting of mind as to a conspiracy to perform an unlawful act would have brought them together in the dark of the night. The learned trial judge put these facts together as follows:-

"it can't be reasonably argued that the four accused persons were in that area on that same day and time by coincidence. The meeting must certainly have been pre-arranged. Direct evidence is not indispensable to establish conspiracy. It can be proved circumstantially. In the instant case I am of the opinion that relevant piece of evidence exist for the necessary inference to be drawn".

I agree

- The problem with the case at hand is that inspite of the fact that the alleged robbers were well know and clearly identified, none of them was caught. There was evidence from some of the victims that when chased away, the robbers ran towards the house of the 1st accused person, but none of the alleged victims followed them to the said house to confront the 1st accused person. They could probably have found their assailants there. At day-break, when the victims went to the house of the 1st accused person they found him in his house claiming to have been butchered by robbers also. This evidence is however contradicted by that of pw5 the night guard who said on chasing the robbers, that they escaped through the back door. No sufficiently, compelling facts were placed before the trial Court to ground a conviction of the Appellants for conspiracy. (pg. 50 of the records; Issue Two
- "Whether or not base on the evidence on record, the 1st and 2nd Appellants are parties to the offences of conspiracy and aimed robbery they were charged for."
- It is the submission of the Appellants that the prosecution did not prove by credible and reliable evidence that the 1st and 2nd Appellants conspired with others or participated in the robbery and that it was armed robbery that was committed. The learned Counsel cites the case of Enesi Lukman Abdullahi vs. State (2008) 17 NWLR (Pt.1115) 203 as stating the essential ingredients of the offence of armed robbery. Counsel submits that none of the

accused persons were caught at the scene of the crime nor was any item allegedly stolen tendered in evidence which is fatal to the case of the prosecution.

Counsel also submits that one "Bukola" who was mentioned as the 5th suspect disappeared at the Police custody and was not charged to court with other accused persons and no reason was given about her whereabouts.

Counsel further submits that PW1-PW5 said the 1st accused person was well known because they live in the same area though denied that they have unresolved issues and that they harbour that impression that he is an armed robber but surprisingly denied knowing that the 1st accused's house was burnt down immediately after the incident. That even PW6 a Police officer denied knowing that the 1st accused's house was burnt down. Only the PW7, another police officer agreed that he found the 1st accused house was damaged without door or window, that was why he could not find out if the 1st accused's house was also burgled. The learned Counsel wonders what the PW's are all covering up that they have to lie about the burning down of the 1st accused house? That there are numerous questions raised by the scenario which raised doubt but the trial Judge failed to look at.

That the general perception of the 1st accused as an armed robber casts a pall of doubt on the evidence of the identity given by the 1st -5th P.W. It is Counsel's further submission that after the incident of 19th May, 1999 the 1st accused person,

1st and 2nd Appellants and others who work, lived with the 1st accused were raided into the net.

A That the prosecution made a heavy weather of the fact that the 1st accused admitted that a certain cutlass and hammer shown to him were his own but there is actually no evidence that the said cutlass and hammer were the ones used by the gang who robbed 1st -4th PW on that faithful day or that there was blood stains on the cutlass.

B Submits that one of the PW1 workers was matchetted and later died, his wife was robbed, beaten and taken to the hospital, she was never called as a witness, yet the learned trial Judge found the 1st and 2nd Appellants guilty of robbing the PW3 of N500 in Count 4 of the charge!

C D That the trial court did not consider the lingering doubt as none of the accused persons admitted the use of offensive weapon or robbery and failed to evaluate the evidence of PW6 & 7 "as it was a case of burglary and stealing that was initially reported"(see pages 53, 56C, 56H, 57 of the records).

E That the cases of Sunday Akinyemi v. The State (1999) 6 NWLR (Pt.607) 449 & O.Olawatobi v. The State (1985) 2 S.C. 357 referred to by the trial court which says 'that production of a subject matter of robbery is not mandatory in all cases' is not applicable as in that case the accused was caught red handed with the stolen car while in this case the Appellants were arrested days later in their various homes after the robbery. That the applicable principles to this case are the cases of

- Nwomukoro v. The State (1995) 1 NWLR (Pt.372) pg.444, Arigbola Awosika & Anor v. The State (2010) 8 NWLR (Pt.1198) pg, 49.
- A That the prosecution witnesses knew the Appellants before the alleged robbery and variously testified to the fact that the robbers were not masked while
- B carrying out the robbery. That in criminal matter the court does not speculate. See Section 149(d) of the Evidence Act,
- C Counsel also submits that the ingredients of an offence charged must be proved and the proof is beyond reasonable doubt. That the 1st-5th
- D prosecution witnesses made a scenario as a means of implicating the accused persons because they always had a notion that the 1st accused is an
- E armed robber. The learned Counsel wonder otherwise why would they use cutlass, hammer etc and unmasked in a place where they are well
- F known? For the 1st Appellant to report himself to the Police while the 2nd Appellant waits in his
- G house for the Police to come and arrest him? These postulations are evidence of loopholes in the case of the prosecution, submits the learned Counsel for the Appellants.
- Counsel also submits that the Appellants raised their defence of Alibi timeously and was not destroyed by evidence as the 1st Appellant slept in the church because of the quarrel they had with the wife of the 1st Accused, not because of vigil as the church is always open, while the 2nd Appellant slept in his house with his wife and children on that faithful day.

A That the burden placed on the prosecution to establish the guilt of the accused beyond reasonable doubt is strict, clear and unequivocal, it never shifts and was not discharged and urge this court to resolve all the issues in favour of the Appellants. (Refer Samodi Mustapher v. State (2007) 12 NWLR (Pt.1049) p9.63% Oguntola v. State (2007) 12 NWLR (Pt.1049) pg.617 Rabi v. State (2010) 10 NWLR (Pt.1201) pg.127 @ 161)

B Conversely the Respondent call attention to the testimonies of the following-following:-

C PW1-Mr. Segun Adetona (pages 40-41 of the records) which is reproduced for the ease of reference:-

D "The thieves entered and went to my wife's room she was beaten by the thieves I saw Sina 2nd accused person while beating my wife and, my wife had to say Alh. Sina and you are beating me. I saw the 2nd accused when he entered my house. The lantern was not put off and so I was able to identify the five accused persons. It was the 2nd accused person who first entered the house while the others that is, 1st, 3rd and 4th followed him. The 5th who was release at SARS was the one who held one gun, but the accused did not fire the gun. The 1st accused Olatinwo was also with them. I saw him plainly on that day. After the accused person had beaten my wife. They then carted away her clothes, money and some of the medicines stolen but they were in two or three cartons. When the accused left my wife's bedroom, they stole my clothes, money-N8,00.00, they later went out to the room of my

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apprentice adjacent to my wife's room. The thieves matched him on the head and palm his name is Godfrey. The morning Godfrey was taken to the hospital where he was treated and he was died three weeks later."

Under cross-examination, the witness stated that:-
"I was hiding behind the door during the robbery operation no one could see me but I can see people, My wife is at home, she is not witness in this case I could see properly with the lantern which was on that day"

PW1 also gave evidence to the effect that the cutlass used to inflict grievous bodily harm on the head and palm of his apprentice Godfrey, which was left on his wife's bed was shown to the 1st accused person one Mr. Kareem Latinwo who acknowledge same as his. The said accused person had earlier appealed to this Court in appeal NO: CA/1/103/2008; OLUSINA AJAYI & KAREEM IATINWO v. STATE, having been convicted of the offences jointly with the Appellants in the instant appeal. This maintains the Prosecution, goes a long way to show that the Appellants are parties to the offences of conspiracy to commit robbery and robbery with which they were charged, tried and convicted by the lower court.

It is also Counsel's submission that the PW5 PW-Dele Atanda, a night guard who was engaged by the community to oversee the security of the community gave evidence (at page 50 lines 15-25 of the record of appeal) to the effect that:

"there was moon light at the time of the incident

- and I could then see the robbers very well when I saw them 2 them I started to blow my whistle when
- A** I blow my whistle, I heard them say I should be prevented from interfering. The moonlight exposed the robbers for me to see clearly. On that day I saw 2nd, 3rd accused, 1st accused, 4th accused, Bukky
- B** who has absconded those are the ones I could recognize that day. We then chased the robbers, myself, my brothers and relations 5th from where they escaped through the back door"
- C** Under cross-examination (at page 52 lines 2-4 of the records) the witness stated thus:-
"I told the Police that I was able to identify the robbers through the moonlight that day the robbers also flashed their torch light at me"
- D** The learned Counsel for the Respondent submits that the combined effect of the above-quoted testimonies of both PW1 and PW5 which remained unchallenged, unshakable and uncontradicted
- E** throughout the trial of the case is that the Appellant are parties to the offences of conspiracy to commit robbery and robbery which they were convicted for (Refers Provost Lagos State College of
- F** Education & Ors v. Edun (2004) All FWLR (Pt.201) page 1628 @ 1642.
In addition to the uncontradicted and unchallenged evidence of PW1 & PW5 an unsuccessful attempt was made by the 1st Appellant to set up an alibi to
- G** denied being at the house of the 1st accused person-Mr. Kareem Latinwo on the night of the 18th/19th May, 1999. He claimed to have slept in the -Long life Gospel Church, Olukunle, Olodo Area,

A Ibadan founded by Rev. Abiodun Faluyi who was called as a witness by the prosecution. This Pastor was PW8; his testimony was recorded (pages 58-59 of the record). The gist of his testimony is a complete rebuttal of the defence of alibi which the 1st Appellant raised.

B By the testimonies of witnesses in this case, the above ingredients proved by the prosecution in the case? The information paper filed before the trial court at page 4 of the record of appeal evidences, the fact that the Appellants were properly charged and prosecuted but were they proved found guilty as charged?

C It is on record maintains the Respondent, that the Appellant together with their co-conspirators jointly and/or collectively carried out the robbery operation in the houses of PW1-PW4 while they were armed with various dangerous weapons such as cutlass, hammer and dane gun. That the robbery operation carried out by the Appellants and their co-conspirators is an unlawful act and this agreement by the Appellant and their co-conspirators constitutes the offences they were charged, tried and convicted for. (Refers: Buje v, State (1991) NWLR (P.1185) Pg.287 @ 289-290)
D In the case of Buje v. State (1991) NWLR (P.1185) Pg.287 @ 289-290 it was held that:

E "on liability for common intention if two or more person intentionally do a thing jointly, it is the same as if each had done it individually. Each person is not only liable for his own acts but also for the sum of the acts of his fellow conspirators in
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furtherance of the common intention."

A For prosecution to prove the offence of armed robbery the following are the requirements. (Refer Osetola vs. State (2012) All NWLR (Pt.549) Pg.1020 @ 1023 & 1042)

- B i. That there was in fact armed robbery
ii. That the robbery was an armed robbery; and
iii. That the accused person was the armed robber

C The learned trial Judge was meticulous and methodological in his approach. His lordship found as follows:-

D "each of the first five prosecution witnesses who are all residents of the village in Oke-Omi community Olodo Area, Ibadan gave an eye-witness account of how the robbery incident took place, The first prosecution witnesses are the victims of the armed robbery attack on the night of 18th/19th May, 1999, Each of them gave an account of how they were attacked in their various
E houses on the day in question. They gave details of their properties which were carted away by the robbers. The incident was reported to the Police at Iyana Offa Police station and the evidence of PWs 6
F & 7 the investigating police officers at Iyana Offa police station and at SARS confirmed the fact that there was a robbery on the night of 18th/19th May, 1999,

G As to the second ingredient there is evidence by 1st -4th PWs that the armed robbers raid their villages on the night of 18th/19th May, 1999 were armed with offensive weapons like cutlass, harmer, gun etc. As a matter of fact the 1st p.w. gave evidence

of how the robbers left behind a cutlass in his house after they have inflicted machete injuries on his apprentice one Godfrey who live in the same house with him and the man died after three weeks thereafter. There was also the evidence by pw2 of how the robbers broke into his house on that day with cutlass, harmer and gun, Pw4 Fagbure even saw one Bukola carrying a gun after he had sighted Sina the 2nd accused person. When the 7th p,w. Sgt. Justin Oke went out with the accused persons on investigation, he said one of the victims identified the 4th accused person as the person who struck him with a machete on the day.

As to who the robbers were the 1st p,w Olusegun Adetona who was the 1st victim of robbery attack told the court how the person came to his house with Sina entering first follow ,by one Bukola Ajayi who said to be holding a gun. P.W.2 Suara Yusuf also identified all the accused persons as the people who come to rob him on the night in question. Fegnbure P.W.4 also confirmed seeing all the accused persons with Sina 2nd accused person entering first follow by Bukola. This piece of evidence was corroborated by that of 5th p.w the night guard in charge of Oke-Omi area who said that when he blew his whistle to alerts the residents of the presents of the robbers, he said he saw the four accused persons together with one Buky who has since absconded"

In the case of Samodi Mustapha v. The State (2007) 12 NWLR (Pt.1049) page 639 the court in considering the burden of proof in criminal case

held:-

- A "the burden means no more than that at the conclusion of trial, for an accused to be convicted, not a single question regarding the facts which constitute the offence the accused is charged must remain unanswered.
- B Invariably such facts which show unequivocally that the accused was the perpetrator of the offence. And this must be done by lawful and credible evidence! It follows therefore for all questions regarding the
- C commission of the crime to be answered, any defence, indeed any suggestion of a defence must be countered by the prosecution. The court too must fully consider any such defence against the background of the totality of the evidence led by
- D the prosecution". The alleged robbers are not strangers to the community there is thus the possibility of a communal resentment/malice as postulated by the defence at the trial court. There
- E is however, the probability of connivance and complicity between the two Appellants, the learned trial Judge found that there was conspiracy. While the 1st and 2nd accused alleged that they too were
- F said to have been victims of a robbery some of the stolen items were alleged to have been recovered from and around their house. On the other hand, the Prosecution says the alibi of the 3rd
- G accused/1st Appellant was debunked, the pastor of the church in which he claimed he slept testified as PW8 (page 59 of the record of this appeal) and said he did not know the Appellant as a member of his church. The Pastor who also denied any suggestion

that the 1st Appellant spent the night at the church had this to say (page 59 of the record).

A "As the founder of the church whatever happens in the church must be brought to my notice, we have choir in the church. I can see the 3rd accused person; he is not a member of my choir. I have a register of members of my church. I bought the land on which I build my church from one Mr. Arije. We did not hold night vigil on the night of 18th & 19th May, 1999"

C Upon the authority of Caleb Ojo & Anor. v. FRN (2008) 11 NWLR (Pt.1099) 467 p.575, cite as creating sufficient doubt, the fact that the prosecution witnesses shielded away the fact of the differences or lingering suspicion of the 1st accused and his house as an armed robber. That shortly after the robbery incidence and his arrest, his house was raised down which facts was also conceded even by the prosecution Police Officer.

E The learned Counsel for the Appellants also purports as inconceivable, that the Appellants would carry out a robbery at a place where they are well known and their voices could easily be recognized and they were unmasked. The failure of the prosecution to produce the exhibits identified as part of the weapon used for the offence was also made a point. The learned Counsel maintains that, the whole scenario sounds strange and suspicious enough.

It sounds indeed a strange situation, the patches do not fit.

It is indeed suspect that the Appellants and their

alleged confidants in crime could have dared to rob in an area where they were well known.

- A At the trial court each of the accused persons and the witnesses know each other. The victims who testified including the Appellants lived in the same area and others worked there. The allegation of community conspiracy against the Appellants is implausible, the allegation is not made with any sense of urgency, it is made in passing like an afterthought. No wonder the learned trial Judge paid no attention to it. The 1st accused was confident and never felt threatened by the alleged hostility of the community in which he is regarded as an elder and an armed robbery kingpin. Perhaps, he did not take them seriously. It is not however the 1st accused who has appeal in this appeal, but the Appellant rely on his story.

D Yet, the staged robbery act at the house of the 1st accused person is without an iota of suspense nor credibility; sounds more like a boring drama on the television.

E The man who claimed to have been butcher by armed robbers never went to the hospital even though he was "left in a pool of blood". Before the end of the day, he went to his fish pond as though nothing had happened to him; perhaps, indeed because nothing happened to him. The villagers disbelieved his alleged attack as a cooked up story to take attention away from him as the kingpin, the arrow head of the robbers.

G The story did not simply add up. The explanations proffered are porous but sufficient to puncture the

case made out by the prosecution. The law does not place any burden on the accused person to establish their innocence.

This was a raid on a village where the peace of families was disrupted and their privacy invaded in the dark of the night allegedly by the Appellants who were locals and residents of the same community. The execution was with a fine finesse; - not one of the assailants were over-powered by the entire village!

Olayinka v. State (2007) 9 NWLR (Pt.561) @ 576 is very relevant. In this appeal, an entire community was harassed and robbed. An insistence that both husband and wife who were robbed must testify to give credence to the prosecution case is untenable.

It is not the quantity but the quality of the evidence that determines the success of the prosecution in establishing a case. (Refer Eli v. Agid (2004) All FWLR (Pt.220) page 1347 @ 1362 & Abogede v. State (1996) 37 LRCN 674 @ 677 where it was held that:-

"the credibility of evidence does not ordinarily depend on the number of witness that testify on a particular point. The question is whether the evidence of one credible witness on a particular point is believed and accepted if the answer is in the affirmative, then it is sufficient to support a conviction".

Reasonable doubt does not mean beyond all shadow of doubt. (Refer Bagudu v. State (1996) 40/41 LRCN 1338 @ 1340 & Onyejekwe v. State

447.) However, in the circumstances of this case, the wife of the pw1 who had direct contact with her unmasked assailants was a necessary witness.

There is a snag about this appeal. While it is difficult to dismiss the case of the Prosecution, affirming the conviction of the Appellants seems hollow. Often, thieves, robbers and friends of victims of a crime have something in common; "inner information" about their victims. Sometimes, crime is committed by people not too far away from the victims. Therefore, the argument that the Appellants could not have gone unmasked to a community where they are known and whose voices can easily be recognised is one of dual possibility. In a stressful situation, as under the terror of robbery, the perpetrators intimidate the victims and terrorize them with threats of death particularly as to looking at them directly. The armed robbers could have been certain they had the dare devil to take on their victims head on being people whom they know very well. Alas, the Courts do not speculate nor postulate on what could have happened. We can only pronounced on what has happened as told and believed by the trial Court. We must thus take a cursory look at the decision of the learned trial Judge.

Was there sufficient legal material placed before the Court to support the profound judgment & sentence on the Appellants?

The law is that it is better to let ten guilty men go free than to convict one innocent man. The facts

before the learned trial Judge did not quite make the Appellants out as "innocent" men so to speak.

A However, their guilt were not conclusively established. There is that element of general suspicion which was translated into the anger of the community in burning down the house of the 1s

B accused who is believed to be the kingpin of the robbers. That the Appellants had some close association with him is a pointer to some association. These aside, conviction must not be

C premised on speculation, as in this case, if they are not the ones, then who, knowing their antecedents? That is not what the law says.

The evidence of the pastor which was used to discredit the defence of alibi of the 2nd Appellant

D was not conclusive. It was open-ended to the extent that the witness admitted that the Church at that time had no doors. The Pastor did not state positively how he could know if the Appellant

E actually spent the night in the Church (See page 59 paragraph 10, of the record.)

"...the door of my church is always open, the church as at May, 1999 had no door...people can walk in and pray.;"

F No security men at the church testified to confirm that the Appellant did not sleep in the church, The doubt thus created must be resolved in favour of the Appellant. (See Aiguoreghian vs. State & Ogoala vs. State (1991) 2 NWLR (Pt. 175) pg. 50).

G There are two conflicting accounts as to the exhibits recovered at the scene of crime (see page 47 & 54 of records) whereas the alleged eye

witnesses and victims said they found the exhibits at the scene of the crime, the Police investigators said they were recovered at the house of one of the alleged robbers. No further evidence was led to conclusively link the Appellants with the said exhibits which were also not placed before the Court though recovered by the Police.

The Appellants were not arrested at the scene of crime, they made no confessional statements and the exhibits were not recovered in their possessions. In these circumstances, the case of *Nwomukoro vs. The State* (1995) 1 NWLR (part 372) page 444 provides the guide.

Kalgo, JCA held that:-

"it is wrong in a criminal trial like this where life is involved, for the learned trial Judge to arrive certain piece of evidence. Against the Appellants as he did in this appeal is without proper proof."

Both the identity of the alleged armed robbers and the exhibits recovered were shrouded in uncertainty. It was therefore unsafe to convict the Appellants upon such a wobbling case as made out by the Prosecution.

Further, on the authority of *Enesi Lukman Abdullahi vs. The State* (Supra) the 1st Appellant as 3rd accused, was added to the list of suspects as an afterthought; he was not mentioned immediately at first opportunity This gives weight to the case of the defence which alleges a community contempt at the 1st accused and all his associates.

The law is that any doubt lingering at the close of

A the case of the prosecution case must be resolved in favour of the accused person. That is not to say that the burden to proof beyond doubt is one that has to establish a water-tight case, which is the ideal situation. Where the case of prosecution leaves a wide yawning gap as in this case, the
B prosecution must take a bow and let the suspects be. In other words, where there exists lacunae, unanswered questions and circumstances do not provide the missing link, the accused must be given the benefit of the doubt.

C Refers: Samodi Mustapha vs. The State (2007) 12 NWLR (part 1049) page 539' Oguntola vs. State (2007) 12 NWLR (part 1049) page 617 and Fatai Rabi'u vs. The State (2010) 10 NWLR (part 1201) page 127 per Uwa, J.C.A at page 161 paragraphs F to G,

D In the case under consideration, both sides made startling revelations which raise questions both as to the truth of the victims' stories but which cast shadows on the response of the suspects. However, the suspects have no duty to establish their innocence. It is the Prosecution which has the duty
E to establish the guilt of the accused. The prosecution did a shabby job and the Appellants must be given the benefit of the doubt. This appeal succeeds and the conviction and sentence of the two Appellants are hereby set aside.

G The Appellants shall be released forthwith from prison custody.

ADAMU JAURO, J.C.A: I had the privilege of

A reading in advance the lead judgment just delivered by my learned brother, M.B. Dongban-Mensem, JCA. I agree entirely with the reasoning and conclusion that the appeal is meritorious and ought to be allowed. I adopt the reasoning and conclusion as mine and hereby allow the appeal.

B The appeal succeeds and the conviction and sentence imposed upon the two appellants are hereby set aside. An order of discharge and acquittal is entered in their favour.

C **OBIETONBARA DANIEL-KALIO, J.C.A.:** I have had the privilege of reading in draft the judgment just delivered by my learned brother M.B. Dongban-Mensem JCA. I agree with the conclusion reached.

D The main issue in this appeal is whether the prosecution proved the offences of conspiracy and armed robbery against the appellants beyond
E reasonable doubt. After going through the Record of Appeal, I think that there is a lot of doubt about the appellants having committed the offences for which they were charged, convicted and sentenced
F to death. The evidence on record against the appellants are in my view full of conflicts, contradictions and gaps. I will point out a few.

G PW1 said in his evidence that he saw one of the accused persons named Sina beating up his wife after the robbers entered his house. But this piece of evidence is incredible considering that the witness had earlier said that when he heard a loud noise on the door at the dead of the night he ran

out of his room out of fright, opened the door leading to the backyard and "dodged" there. I think
A it will be perverse to accept that PW1 who by his own admission had hidden at the backyard, saw someone beating up his wife in her room.- The same witness said his apprentice named Godfrey
B whose room was adjacent to his wife's room was matchetted on the head and later died of the injuries. There is no evidence by PW1 that he took the injured Godfrey to the hospital. His evidence
C was that after the robbers had left, he took the cutlass which they left behind and went to the 1st accused's house to confront him with it. I would have thought that if it was true that the apprentice was cut with a matchet on the head with such
D brutality that he later died of the injuries, the natural thing to do would have been to seek immediate medical assistance for him and not to take the offending matchet or cutlass to the house
E of the 1st accused to confront him with it. Besides there was no medical bill or record of any sort tendered to show that the apprentice was injured, much less, that he died. It is perverse in the light
F of the above to believe the evidence of PW1. PW2 also gave evidence that his own house was also attacked by the robbers who came with a gun, cutlass and hammer. This piece of evidence is
G incredible considering that according to PW1 the cutlass was left behind in his own house by the robbers. If there was more than one cutlass, no evidence was led to say so. PW2 also said that he and PW1 as well as the village night watchman

chased the robbers. But PW1 never said he chased the robbers, and the night watchman who also said that he chased the robbers never mentioned the name of PW2 as one of those who chased the robbers with him.

Under Cross-examination PW2 stated that they (the people that chased the robbers) recovered a cutlass, a hammer and a gun from the robbers. Again it is curious that such recovered items were never tendered. Could it be that no weapons were recovered?

PW3 whose house was also allegedly robbed also said that the robbers were armed with a cutlass. How credible is it that a cutlass was used in that robbery when PW1 said a cutlass was left behind in his house? PW3 said the robbers who included the 1st accused were given a chase. He said that the robbers were chased all the way to the house of the 1st accused and that the 1st accused escaped through the back door. PW3 gave evidence that the village of the 1s accused was one kilometer away.

From the judgment of the trial Judge at page 133 of the record, it was disclosed that the 1st accused was over 70 years old. Could it be possible that the robbers who included a man of over 70 years of age were chased for a distance of about a kilometer and all of them escaped? I find this unbelievable? Even if all the robbers out ran those pursuing them in all of one kilometer, surely not a man of over 70 years no matter how agile.

I think that in the face of the above, the evaluation of the evidence by the trial court left much to be

desired, was quite erroneous, and as such this court is at liberty to interfere with it. As said by the
A Supreme Court per Mukhar JSC now CJN in Abeke vs. State (2007) 9 NWLR part 1040 p.411, an appellate court will not interfere with findings based on evaluation of evidence unless it is found
B to be erroneous.

On the issue of conspiracy, conspiracy was inferred by the trial Judge from his conclusion that the accused persons committed the offence. As a legal
C term, conspiracy has to do with a clandestine agreement by two or more persons to commit an unlawful or criminal act. But it is very difficult to prove conspiracy by reason of an agreement since conspirators will rather have their secret
D agreement kept secret. More often than not therefore, conspiracy is inferred from the actus reus. As stated by Coker JSC in the case of Njovens vs. State (1973) 5 SC 12. "The overt act or
E omission which evidences conspiracy is the actus reus and the actus reus of each and every conspirator must be referreable and very often is the only proof of the criminal agreement which is
F called conspiracy".

The actus reus in this case is the commission of the armed robbery. Where as in this case the possibility of an actus reus (the armed robbery) is put in serious doubt, conspiracy cannot be inferred. The
G Latin maxim acta exteriora indicant interiora secret (external actions show internal secrets) readily comes to mind. It stands to reason following that maxim, that if there are no external actions,

internal secrets cannot be inferred. It is my humble view that since the case against the appellants was not in my humble opinion proved beyond reasonable doubt, it will be wrong to hold that conspiracy in the case was proved.

I wish to note that in this case the weapons used in the commission of the offence were not tendered. While the failure to tender a weapon is not necessarily fatal to a case of armed robbery, it could be a notable factor where the character and circumstances of the case are considered.

In *Olayinka vs. State* (2007) 9 NWLR part 1040 page 561 at p 574, the Supreme Court per Tabai JSC had this to say:

"With respect to the submission of the appellant about the failure of the prosecution to tender the weapons of the alleged robbery and its effect on the prosecution, I do not think there is any principle of law requiring the tendering of the weapons of an alleged robbery to establish the guilt of an accused person. Whether or not the prosecution needed to tender the weapons with which the appellant allegedly committed robbery depends, by and large, on the character and circumstances of the case."

In this case it is very clear from the statement of the investigating Police Officer P.C. Yakubu Madaki that what was reported at the police station was a case of burglary and stealing. (See at page 14 of the Record of Appeal) That being the case, I think if investigation revealed that it was not a case of burglary and stealing after all, but one of armed robbery, the weapons ought to have been tendered.

- This is necessary to at least remove doubts of skeptics who might think that the upgrade of the crime from the initial complaint of burglary and stealing to one of armed robbery might be due to corrupt influence and not any altruistic subsequent thorough investigation of the crime by the police.
- A That the weapons were not tendered therefore casts a heavy shadow of doubt on whether indeed an armed robbery incident occurred, more so considering the unconvincing evidence of the prosecution's witnesses at the trial.
- B Another issue is the issue of alibi. The 1st appellant said that on the day of the incident he slept at Live Gospel Church at Olukunle Village while the 2nd appellant said he was in his house with his wife at the time of the incident.
- C On the issue of alibi, the trial Judge said at page 130 of the record thus:
- D "Again I am satisfied that the defence of alibi raised by the 4th accused person was similarly investigated and effectively demolished".
- E The law is that where the defence of alibi is raised and sufficient particulars provided, the prosecution has a duty to investigate it. See Akpan vs. State (1991) 3 NWLR part 182 page 646. This is what the 1st appellant said with regard to his alibi in his Statement to the police at page 24 of the Record of Appeal.
- F "On the 19/5/99 I did not sleep at the above address but instead, I slept at Live Gospel Church Olukunle Village and Pastor Faluyi and the children can testify to it that I was at the church".
- G

PW8 was Abiodun Faluyi, the pastor referred to by the 1st appellant. He said that his church did not have a night vigil on the night of 18/19 May. He also said that as at May 1999 his church had no door.

Now, the 1st appellant never said he went to the church for a night vigil. He said that he went there to sleep. The pastor confirmed that the church had no door as at May 1999. Therefore his alibi that he went to the church to sleep is not implausible. The pastor did not say that the 1st appellant is not a member of his church, he merely said that he is not a member of his choir. The pastor did not say that he was physically present in the church that night. Placing the alibi of the 1st appellant and the evidence of PWB side by side, I think that it is perverse to say that his alibi was effectively demolished

As for the 2nd appellant his alibi was corroborated by his wife who testified as a Defence Witness. Her evidence was not shaken under cross-examination. My conclusion is that based on the evidence on record the conclusion of the learned trial Judge that the case against the appellants was proved beyond reasonable doubt was perverse. As Oputa JSC said in *Bakare vs. State* (1987) 1 NWLR part 52 page 579 at 587. "Reasonable doubt will automatically exclude unreasonable doubt, fanciful doubt, imaginative doubt and speculative doubt". I do not know how to describe the doubt in this case but I am of the firm view that the case was not proved beyond reasonable doubt.

The law is very fastidious if not jealous about protecting the innocent. It was Benjamin Franklin that said circa 1985 that "it is better 100 guilty persons should escape justice than that one innocent person should suffer". He was extending the view of William Blackstone who in his seminal work, Commentaries on the Laws of England published in the 1760's stated that:

"It is better that ten guilt persons escape than that one innocent suffer". That view of Blackstone is known as Blackstone's formulation or the Blackstone ratio. But before Benjamin Franklin or Williams Blackstone was the Holy Bible which in Genesis 18: 23-32 gave fillip to the need to protect the innocent.

While I agree with the sentiments expressed by the trial Judge in his judgment (page 133 of the record) that in this country crime rate has assumed frightening and alarming proportions, I hasten to say that the office of the Judge remains to do justice in the particular case before him. Like lady Justice, Themis, the blind fold must be firmly in place in order that the din around is banished out of sight and out of earshot so that the sword of justice can be applied undeterred by sentiments.

For the above reasons and the reasons given in the lead judgment, I will allow the appeal. The judgment of the lower court is set aside. The appellants are discharged and admitted.

Appearances

F.D. Oloruntoba holding the brief
of O.A. Owolabi

For Appellants

L.A. Ganiyu (DLAS)

**For
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LAW pavilion



POWERED BY:

