IN THE HIGH COURT OF JUSTICE
OYO STATE OF NIGERIA
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN

BEFORE THE HONOURABLE JUSTICE E. ESAN – JUDGE
THIS WEDNESDAY THE 7TH DAY OF MARCH 2012

SUIT NO. I/8A/2008

BETWEEN:

TAOFEEK OLA AREMU .... ACCUSED/APPELLANT

A N D

COMMISSIONER OF POLICE .... COMPLAINANT/ RESPONDENT

The applicant is present.
The Respondent is absent.
Leye Adepoju for the appellant with Lara Adepoju.
Mrs. O.O. Ogundele Senior Legal Officer with
Miss O.O. Adebo for the Respondent.

JUDGMENT

This is an appeal against the judgment of the Chief Magistrate's Court Iyaganku Ibadan in respect of Charge No. MI/271c/05 delivered on the 17th of July 2006.

The appellant and one other were arraigned before the Chief Magistrates Court Ibadan as 1st and 2nd accused respectively on a three count charge.

The charge was substituted with a new one in which only the appellant was the only accused person.

After the trial the appellant was convicted on two counts of stealing and fraudulent false accounting and sentenced to seven years imprisonment, on each count to run concurrently.

The appellant was aggrieved by the judgment of the Court. He therefore filed a notice of appeal containing 7 grounds of appeal before this Court as follows:

2.7. *The Grounds of Appeal, with their particulars, are as follows:*

"1. *The learned trial Chief Magistrate erred in law in neglecting and/or refusing to give the Accused/Appellant a fair trial.*

Particulars

(a) *The refusal of the learned Chief Magistrate to grant the application of the learned counsel for the Accused/Appellant, particularly on 16th and 30th June, 2006, jeopardized the proper presentation of his defence.*

2. *The learned trial Chief Magistrate erred in law and arrived at a wrong conclusion by holding that the prosecution proved its case beyond reasonable doubt.*

Particulars

(a) *The evidence before the Court on the material element of the property allegedly stolen is at variance with the charge before the Honourable Court.*

3. *The learned Chief Magistrate erred in the exercise of her discretion concerning sentencing by the stiff and*

oppressive sentences.

Particulars

(a) The Accused/Appellant is being punished for the "dishonesty" of the society and the "get rich quick" fever of his generation.

(b) The Accused/Appellant is also losing all the properties allegedly acquired through the allegations.

4. *The learned Chief Magistrate erred in law in neglecting to consider or adequately consider the case of the defence.*

Particulars

(a) The prosecution recovered many books of account including the book of record of daily sales but did not tender it.

(b) The prosecution considered the account of the complainant in only 3 (three) out of 5 (five) banks, leaving the complainant's account in each of T.I.B and Access Bank.

© The practice of collecting from and supplying goods to other branches was not considered.

(d) The habit of the Manager collecting proceeds from sales on some Fridays was not considered.

5. *The learned Chief Magistrate erred in law by admitting Exhibits 'K' to 'K4' in the ruling delivered on 20th April, 2006.*

Particulars

(a) The documents, being of secondary nature, were not

admissible by virtue of the provisions of sections 110, 97(i)(h) and 97(2)(e) of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990.

6. *The learned trial Chief Magistrate erred in law by allowing and relying on the testimony of PW1 (AYENI OLAONIPEKUN THEOPHILUS) under re-examination.*

Particulars

(a) *The evidence of PW1, while being cross-examined, had no ambiguity that could have necessitated the re-examination.*

(b) *The evidence of PW1, under the allowed re-examination, did not clear any ambiguity; rather, it raised new facts prejudicial to the Accused/Appellant.*

7. *The learned Chief Magistrate erred in law by not complying with the provisions of section 287 (i) (a) of the Criminal Procedure Law of Oyo State and thereby did not give the Appellant a fair trial.*

(a) *The learned trial Magistrate did not explain each of the 3 options provided under section 287(i) (a) of the Criminal Procedure Law of Oyo State to the Appellant so as to let the Appellant be fully aware and appreciate the implication of each of the 3 options."*

3. *ISSUES FOR DETERMINATION*

The Appellant respectfully submits that the following issues are for determination in this appeal:

(a) *Whether the admission of Exhibits "K" to "K4" and the*

testimony of PW1 under re-examination were right (Grounds 5 and 6).

(b) *Whether the provision of section 287 (1) of the Criminal Procedure Law of Oyo State, 2000 was complied with (Ground 7).*

(c) *Whether the Appellant was given a fair trial (Grounds 1 and 4).*

(d) *Whether, in view of* ***admissible*** *evidence, the prosecution proved its case beyond doubt (Ground 2).*

(e) *Whether the learned trial Chief Magistrate Court properly exercised the discretionary power of sentencing (Ground 3).*

The learned Counsel for the appellant formulated 5 issues covering the grounds of appeal for determination of the Court. They are as follows:

(a) *Whether the admission of Exhibits 'K' to 'K4' and the testimony of P.W.1 under re-examination were right (Grounds 5 and 6).*

(b) *Whether the provision of section 287 (1) of the Criminal Procedure Law of Oyo State, 2000 was complied with (Ground 7).*

(c) *Whether the Appellant was given a fair trial (Grounds 1 and 4).*

(d) *Whether, in view of* ***admissible*** *evidence, the prosecution proved its case beyond doubt (Ground 2).*

(e) *Whether the learned trial Chief Magistrate Court properly*

exercised the discretionary power of sentencing (Ground 3).

On her part, the Learned Counsel for the Respondent also formulated five issues for determination as follows:

1. *Whether the appellant was given a fair trial by the Lower Court.*
2. *Whether the provision of S. 287(1) was complied with.*
3. *Whether the prosecution proved its case beyond reasonable doubt.*
4. *Whether the Chief Magistrate properly exercised the discretionary power of sentencing.*
5. *Was the admission of Exhibits K-K4 prejudicial to the appellant's case?*

I will briefly state the facts of this case.

The appellant was a staff of D-Damak Nig. Ltd. He was in charge of selling, collecting cash and lodging same in designated bank accounts.

After the conduct of two audit exercises by the Management of D-Damak Nig. Ltd discrepancies were discovered to the effect that the Company was being short changed by the appellant. The matter was reported to the Police.

The appellant could not be found by the Police for quite sometime but he was eventually arrested and charged to Court along with one Suaib Ayete on the 28th of July 2005.

The charge was substituted on the 24th of November 2005. Only the appellant was arraigned in the new charge.

At the trial which commenced on 12/12/2005 the prosecution called 9 witnesses and tendered several exhibits.

At the close of the prosecution's case i.e. on 12/12/2005 the Court noted that the appellant's counsel had absented himself from Court without good excuse and called on the appellant to present his defence.

The Appellant was informed of his right under S.287 of the Criminal Procedure Laws of Oyo State after which the appellant elected to make a statement from the dock.

The Court delivered its judgment on the 17th of July 2006.

As I stated earlier 7 Grounds of Appeal were filed by the appellant.

Counsel for both parties formulated identical issues for determination of the Court though numbered differently.

For the purpose of this judgment I will adopt the issues formulated by both Counsel but in the order arranged by the appellant's counsel.

Issue 1 covering grounds 5 and 6 of the grounds of appeal is whether the admission of Exhibits "K" to "K4" and the testimony of P.W.1 under re-examination were right (Grounds 5 and 6).

The learned appellant's counsel submitted that the re-examination of P.W.1 was prejudicial to the Appellant because fresh pieces of evidence

were brought in without the leave of the Court. He submitted that the pieces of evidence should be expunged from the proceedings.

Counsel stated that the Court erred in admitting Exhibits 'K' to'K4' in evidence. According to him, the said exhibits were secondary evidence and they did not satisfy the conditions stipulated in S.97 (i) (h) and 97 (2) (e) of the Evidence Act 1990.

Counsel relied on the case of –

Abubaka & anor. V. Joseph & anor.

(2008) 9 SCM1 at 32

Counsel contended that without the admission of Exhibits 'K' to'K4' there would be no proof of loss of money.

In responding to this issue the learned Respondent's Counsel in her issue 5 submitted that exhibits 'K' to 'K4' do not contravene the evidence Act.

That P.W.1and P.W2 who tendered the documents were recalled for cross examination by the appellant's counsel..

That by virtue of S.227 Evidence Act 1990 the Court of Appeal is entitled to examine the evidence adduced at the trial Court and can expunge any offending evidence and if it finds that it cannot reasonably have affected the decision it will not interfere with the decision.

She referred to the case of –

Aromolaran v. Kupoluyi

(1994) 2 NWLR (Part 325) 221

I have read the printed record. Page 26 thereof shows that P.W.1 was recalled on the application of the Counsel for the accused/appellant for cross-examination with the leave of the Court.

It is recorded at Page 29, that after Re-examination P.W.1 was cross-examined again by the counsel for the accused person.

As I stated earlier, the Learned Appellant's Counsel contended that there was no ambiguity in the evidence given under the 1st cross-examination which called for re-examination.

Further more he stated that new or fresh evidence was introduced under the re-examination without the leave of the Court.

By virtue of S. 215 (3) of the Evidence Act 2011.

Re-examination shall be directed to the explanation of matters referred to in cross-examination and if a new matter is by permission of Court introduced in re-examination the adverse party may further cross-examine upon that matter.

By virtue of this law, where a new matter is introduced under re-examination further cross-examination may be allowed by the Court.

While it is not on the face of the record that leave of Court was given before the evidence under re-examination was given what is important is that the counsel for the accused/appellant was allowed to further cross-

examine P.W.1 upon the evidence given under re-examination as required by S.215(3) of the Evidence Act. There is no basis for the appellant to complain about the Re-examination and further cross-examination. On the admission of Exhibits 'K' – 'K4' by the Court.

From the printed record, Exhibits 'K'-'K4' are the copies of Zenith Bank Statements of D-Damak Nigeria Ltd tendered by P.W.2 an official of D-Damak.

By virtue of S. 89(b) Evidence Act of 2011 an entry in a bankers book belongs to certain category of Secondary evidence which are admissible in evidence subject to the observance of the conditions in S. 90(1)(e) of the Evidence Act.

But it is instructive to note in my view that even without exhibits K-K4, the decision of the Lower Court would not have been different in view of other independent evidence against the accused/appellant.

For instance I refer to the confessional statement made by the accused/appellant.

The position of the law is that a free, voluntary and direct confession is sufficient to sustain a conviction.

In the said confessional statement, the appellant stated inter-alia – this is as set out by the Learned Chief Magistrate at pages 98 of the printed record.

"The actual money I stole is Six Million Naira. I started stealing the money from year 2002. I removed the money bit by bit --- I used the money to buy Cloth, land, house, materials ------ I can bring my elders to settle on how to pay back this money --- I promise not to steal my Oga money again ---."

In my view of the above Issue No. 1 is resolved against the appellant.

Issue No. 2 is whether the provisions of S.287 (1) of the Criminal Procedure Law of Oyo State 2000 was complied with. This covers ground 7 of the grounds of appeal.

The Learned Appellant's Counsel submitted that for failing to grant the accused an adjournment the Lower Court did not exercise its discretionary power judiciously and judicially. It was further contended that S. 287(1) of the Criminal Procedure Law was not properly explained to the accused person in that under the 3rd option in that view he was not asked whether he had witnesses to examine or evidence to adduce. In her response the learned Respondent's Counsel submitted that the Lower Court after refusing an application for adjournment explained the procedure stipulated in S. 287(1) CPL to the appellant. Counsel submitted that by virtue of S. 150(1) of the Evidence Act it should be assumed that the correct procedure was adopted and followed by the trial Court until the contrary is proved. She cited the following cases –

Ogunye v. State

(1999) 5 NWLR (Part 604) Page 548.

Zarabe v. State

(2003) FWLR (Part 187) page 759 at 779

Nwachukwu v. State

(2002) FWLR (Part 123) page 312.

I have looked critically at the printed record.

At page 90 thereof, on 30/6/2006 the learned Chief Magistrate held as follows:

> *"Accused person was not represented. His Counsel wrote a letter to the Court asking for adjournment without any reference to antecedents. His application was refused after listening to the learned legal officer raise objection to it. This is because the Court saw it as a ploy to delay the hearing of the case. He was called upon to enter his defence. He was given three options in accordance with S. 287 of the Criminal Procedure Law viz either to give evidence from the witness box in which case he could be cross-examined, to make a statement from the dock in which case he would not be cross-examined or to keep mute.*
>
> *Accused person elected to make a statement from the dock."*

It is clear that the Learned Chief Magistrate explained the rights of the appellant to him under S. 287(1) of the Criminal Procedure Laws.

The option chosen by the appellant was the 1st option i.e. to make a statement from the dock. He was not cross-examined as required by law.

It must be noted that when an accused elects the 3rd option i.e. to keep mute, then in addition the Court shall ask him if he has any witnesses to examine or other evidence to adduce in his defence and the Court shall then hear the accused and his witnesses and other evidence if any. But the appellant did not chose the 3rd option of keeping mute. It is therefore my view that the learned Chief Magistrate did not do anything or omit to do anything that was prejudicial to the case of the appellant.

With due respect to the learned appellant's Counsel he made a mountain out of a mole hill. It is important to state that it is trite law that the Courts should not allow undue technically to becloud justice. In my view what counsel complained about under this issue is a technicality.

In view of the above, without much ado, I resolve issue 2 against the appellant.

Issue No. 3 is whether the appellant was given a fair trial. This issue covers grounds 1 and 4 of the grounds of appeal.

It was the contention of the learned appellant's counsel that there were a catalogue of errors and omissions in the proceedings and such a fair minded person would come to the conclusion that the Appellant was not given a fair trial.

Counsel pointed out that on 27/10/2005 the prosecution said it wanted to withdraw the charge yet the Court below struck out the name of

the 2nd accused and discharged him. He stated that there was no charge at the material time before the new charge came into existence on 24/11/2005.

Counsel pointed out that the learned Chief Magistrate had presumed the gilt of the appellant from the onset. That she refused to grant an adjournment at the instance of the appellant. That she explained S. 287 Criminal Procedure Laws to the accused person even when no witness had been called by the prosecution.

Counsel referred to S.149(a) of the Evidence Act and contended that out of 5 Banks in which D-Damak had accounts only 3 were considered and the record of daily sales recovered by the prosecution was not tendered thereby suppressing evidence presumably favourable to the Appellant.

He stated that the Lower Court ignored the defence of the appellant.

In her Reply to this issue, the learned respondent's Counsel submitted that the charge against the appellant was never withdrawn but was substituted on 24/11/2005.

Counsel stated that out of 17 appearances the appellant's Counsel absented himself 10 times. That the granting of an application for adjournment is at the Court's discretion and the appellate courts frown on the grant of unnecessary adjournments which may lead to a miscarriage of justice. She urged the Court to uphold the judgment of the Lower Court.

the learned Chief Magistrate was perfectly in order as the charge against him had been withdrawn.

It is not recorded anywhere that the charge against the appellant was withdrawn.

The charge against the appellant as 1st accused subsisted until it was substituted on 24/11/2005 with new charges.

As I had stated earlier, I am of the firm view that the Learned Chief Magistrate did not violate the provisions of S. 287 of the Criminal Procedure Law with regard to the right of the appellant.

Going by the printed record I am also satisfied that the trial was conducted in the best manner expected of an unbiased arbiter.

On the submission of appellant's Counsel that the prosecution refused to tender documents which would have been beneficial to the appellant, there is nothing in the printed record to suggest that the documents referred to would have been of any value to the prosecution in proving its case against the appellant.

The prosecution is not bound to tender all documents at their disposal.

It is my view that all that the prosecution requires are those documents/or evidence necessary to prove its case beyond reasonable doubt. See - Edem Udo v. The State

(2006) 15 NWLR (Part 1001) 179 at

The fact that the prosecution did not tender the documents referred to by Learned appellant's Counsel left no vacuum in the prosecution's case.

On the point made by counsel that the Lower Court failed to exercise its discretion judiciously and judicially to grant an adjournment at the instance of the appellant.

It is trite law that granting of an adjournment is a matter which is within the discretion of the Court and such discretion must be exercised judiciously and judicially.

Bill Construction Co. Ltd v. Imani & Sons Ltd. & 1 or.

(2006) 19 NWLR (Part 1013) 2006 11-12SC 90 at 106.

A Court is therefore not obliged to grant an adjournment merely because counsel has asked for it. The request of Counsel is a favour to be taken into account but the Court is also obliged to bear in mind the necessity of ensuring speedy justice to all.

Page 62 of the printed record shows that the learned trial Chief Magistrate considered the application for adjournment as a ploy to cause further delay having taken into account the antecedents of the case. It is on record that out of 17 sittings of the Court, the Counsel for the Appellant appeared only 7 times and was absent on 10 occasions.

In the case of - Nwadiogbu & Or. V. A.I.R.B.D.A

(2010) 44 NSCQLR 36 at 42

The Supreme Court held as follows:

"Where a judge sees no justifiable reason to adjourn a case he can refuse such adjournment and in so doing he would be exercising his discretion judicially and judiciously.
A Court should never encourage the act of holding it to ransome on flimsy excuses we must avoid the situation whereby the Courts are perpetually blamed for delays in proceedings."

In the instant case, the decision of the Lower Court to refuse the application for adjournment cannot be faulted.

Issue No. 3 is resolved against the appellant.

Issue No. 4 is whether in view of admissible evidence, the prosecution proved its case beyond reasonable doubt. This issue covers ground 2 of the grounds of appeal.

The Learned Counsel for the Appellant contended that the prosecution has the duty to prove its case beyond reasonable doubt. He said that in view of all the errors and omissions in the proceedings the irresistible conclusion should be that the case of the prosecution was not proved beyond reasonable doubt.

Counsel urged the Court to dismiss the case against the Appellant.

The Learned Respondent's Counsel in her reaction stated that the prosecution had proved the essential elements of the offences against the appellant. She stated further that the appellant admitted that he stole Six Million Naira. That the appellant stated what he used the money for. That

the confessional statement was corroborated by other pieces of evidence. That the prosecution had discharged the onus of proof on it.

The starting point in determining the issue in contention is to state that in any criminal trial, the prosecution has the duty or burden to prove the guilt of the accused person beyond reasonable doubt.

Let me state from the onset that the expression proof beyond reasonable doubt does not mean proof beyond a shadow of doubt.

See - The State v. Emine & Ors.

(1992) 7 NWLR (Part 25) 658 at 660.

Now based on the evidence adduced by the prosecution in the instant case, has the burden of proving the guilt of the appellant been discharged?

The prosecution tendered in evidence the confessional statements made by the appellant, and it was admitted in evidence without objection.

The prosecution also called 9 witnesses who adduced evidence to show that the responsibility of selling and receiving money from customers and making lodgment into banks rested solely on the appellant.

That the massive fraud which the audit team discovered was perpetuated the appellant.

It is therefore clear that apart from the confessional statement, the Learned Chief Magistrate was confronted with other independent evidence outside the confession which she relied upon in convicting the appellant.

The grouse of the appellant under this issue is misconceived.

This issue is resolved against the appellant.

Issue No. 5 is whether the learned Chief Magistrate properly exercised the discretionary power of sentencing. This issue covers ground 3 of the grounds of appeal.

The Learned Appellant's Counsel submitted that the Learned Chief Magistrate viewed the appellant with fury and this prevented her from exercising her discretion in sentencing the appellant judicially and judiciously. He contended that the appellant was not given the chance to mitigate the sentence through allocutus.

He said that points which were favourable to the appellant and which would have mitigated his sentence were not considered.

He therefore urged the Court to upturn the decision of the Lower Court.

In her Reply the learned Respondent's Counsel submitted that the trial Court sentenced the appellant to a term of imprisonment provided for by Law. She said further that allocutus is not a provision of law and that the Lower Court judiciously exercised its discretionary power to sentence the appellant.

After evaluating the evidence, the Learned Chief Magistrate convicted the appellant on the two counts and sentenced him to 7 years I.H.L. on both counts. Sentences to run concurrently.

The position of the law is that an Appeal Court will not interfere with the findings of fact of a trial court who saw and assed the witnesses unless it is demonstrated that the conclusion reached by the trial Court was wrong as a result of improper exercise of discretion.

See - Emiowe v. The State

(2000) 1 NWLR (Part 641) 408

The term of imprisonment prescribed by the Criminal Code each of the two counts is 7 years.

The learned Chief Magistrate did not exceed this limit.

The learned Chief Magistrate exercised her discretion not to impose fine or give a lighter sentence based on her findings of fact.

I have no reason to interfere with her conclusion, which culminated in the sentences imposed by her.

Apart from that I agree with the Learned Respondent's Counsel that allocutus is not a provision of law and whether or not it was utilized did not affect the validity of the proceedings of the Court.

I need not say more, Issue No. 5 is resolved against the appellant.

Having resolved the 5 issues against the appellant, this appeal is lacking in merit. Consequently it is hereby dismissed.

The judgment of the Chief Magistrates Court delivered on the 17th of July 2006 is hereby affirmed.

E. ESAN
JUDGE
7/3/2012