IN THE COURT OF APPEAL
ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN

ON THURSDAY, THE 28TH DAY OF FEBRUARY, 2013

BEFORE THEIR LORDSHIPS

PAUL ADAMU GALINJE (PJ)	**JUSTICE, COURT OF APPEAL**
HUSSEIN MUKHTAR	**JUSTICE, COURT OF APPEAL**
TIJJANI ABUBAKAR	**JUSTICE, COURT OF APPEAL**

APPEAL NO. CA/IL/C.32/2011

BETWEEN

AHMED SALIHU ..... APPELLANT

V.

THE STATE ..... RESPONDENT

JUDGEMENT

DELIVERED BY PAUL ADAMU GALINJE, JCA

The Appellant herein and three other persons were arraigned before the High Court of Kwara State charged with the offence of conspiracy to commit armed robbery and rape, robbery and rape under section 97 of the Penal Code, Section 1(2) of the Robbery and Firearms (Special Provisions) Act 2004 and Section 283 of the Penal Code respectively. The Appellant pleaded not guilty to the charges. The prosecution called nine witnesses in proof of its case. The Appellant testified in person and called no further witness.

At the end of the prosecution's case and that of the defence, the learned trial Judge in a reserved and considered judgment found the Appellant guilty of a lesser offence of being in possession of property suspected to have been stolen under Section 319A of the Kwara State Penal Code and sentenced him to two years imprisonment without an option of fine.

The Appellant is dissatisfied with the decision of the lower Court and has therefore brought this appeal. His notice of appeal dated and filed on the 21st of February 2011 contains three grounds of appeal which I reproduce hereunder without their particulars as follows:

"1. **The learned trial Judge erred in law when he held that the Appellant committed criminal conspiracy, rape and armed robbery contrary to section 23 and 97 of the Penal Code and Section 1(2) of Armed Robbery and Firearms (Special Provisions) act all against the Appellant.**

2. **The learned trial Judge erred in law which he convicted the Appellant of conspiracy, rape and Armed Robbery based on the evidence of the Complainant/Respondent.**

3. **`The Judgment is unreasonable, unwarranted and cannot be supported having regards to the evidence adduced at the trial.**"

The notice of appeal is at pages 86 – 87 of the record of appeal. There is another notice of appeal dated 21st of February 2011 at page 88 of the record of appeal which bears no evidence of filing. It contains one Omnibus ground of appeal. Since it was not filed and the only ground of appeal on that notice is covered by ground three of the notice of appeal I have earlier mentioned, the 2nd notice of appeal is hereby discountenanced.

Parties filed and exchanged briefs of argument.

For the Appellant, the following two issues were formulated for determination of this appeal:

"1. **Whether the learned Trial Judge was right when he convicted the Appellant/2nd Accused person when the prosecution refused to investigate the claim of the Appellant/2nd accused person to the effect that he bought the alleged stolen property from a third party.**

2. **Whether it was right for the learned Trial Judge to have invoked and applied the provisions of Section 218 and Section 319A of the Criminal Procedure Code and the Penal Code law respectively when the particulars of the lesser offence were neither proved nor established in evidence.."**

For the Respondent, the two issues formulated by the Appellant were adopted.

In arguing the appeal on the first issue for determination, Mr. Ahmed Raji, learned Counsel for the Appellant submitted that the prosecution's failure to investigate the Appellant's claim that he purchased the handset, Exhibit N1 from unidentified Hausa man for N4,000 was in breach of Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and that the trial Judge was wrong in convicting the Appellant when there was no proper investigation conducted by the police. In support of the argument herein learned Counsel cited **Onwubuariri V. Igboasoiyi (2011) 3 NWLR (Pt. 1234) 381 paragraphs G – H, AL Hassam V.**

State (2011) 3 NWLR (Pt. 1234) 280. Finally learned Counsel urged this Court to allow the appeal.

In answer to the submission of the learned Counsel for the Appellant, Mr. Kamaldeen Ajibade, learned Attorney General of Kwara State, submitted that the burden of investigation of a defence raised by an accused can only shift to the police where the accused has supplied all the necessary particulars necessary for such investigation. According to the learned Attorney General, the Appellant in the instant case in one breath said he bought the handset Exhibit N1 from one Hausa man whose name he did not know and in another breath, he said that he obtained Exhibit N1 from the 1st accused person, one Mohammed Bello. With this contradictory story, the police had no basis to investigate, the learned Attorney General concluded.

Finally on this issue, the learned Attorney General submitted that the learned trial Judge who had the opportunity of seeing and hearing the witnesses rightly came to conclusion that the Appellant was unable to offer proper explanation on how he came about Exhibit N1, as such he was therefore right to have convicted the Appellant pursuant to Section 149(a) of the Evidence Act.

Learned Attorney General urged this Court to dismiss the appeal on this issue.

The Appellant's second issue for determination of this appeal is said to arise from grounds 2 and 3 of the grounds of appeal. It follows therefore that the 1st issue is formulated from ground one, since there are only three grounds of appeal. A close perusal of the

1st ground of appeal, it will appear that it does not arise from the judgment against which this appeal lies. I have read through the judgment at pages 70 – 85 of the record of appeal and I have failed to come across where the learned trial Judge held that the Appellant committed criminal conspiracy, rape and armed robbery contrary to Sections 23 and 97 of the Penal Code and Section 1(2) of the Armed Robbery and Firearms (Special Provision) Act. At page 83 of the record of this appeal, towards the end of the first paragraph, the learned trial Judge said:

> **"The conclusions I have therefore come to is that the prosecution has failed to establish that it was the accused that perpetrated the armed robbery. The finding on the identity of the accused also afflicts the Court (sic) of rape. I therefore hold that the prosecution has failed to prove the offence of armed robbery.**
>
> **With regard to the count alleging rape, I also adopt the finding in paragraph 20 of this judgment to the effect that it has not been established beyond reasonable doubt that it was the 1st and 2nd accused that raped PW5 and PW6 .....**
>
> **The conclusion I have therefore come to is that the prosecution has** not **proved the count alleging rape beyond reasonable doubt. With regard to the count alleging conspiracy, I have considered the evidence of the prosecution and I do not find the circumstantial**

evidence relied upon by the prosecution as strong enough to warrant the conviction of the accused for criminal conspiracy."

Clearly the first ground of appeal is at variance with the decision of the Court as reflected from the passage of the judgement I have reproduced above. The law is settled in a long chain of decisions that a ground of appeal against a decision of a Court must relate to that decision and should be a challenge to the ratio of the decision appealed against. Thus where a ground of appeal is not related to the judgement against which the appeal lies, such ground appeal is incompetent and it is liable to be struck out.

See Newbreed Press Ltd V. Jaiyesein (2000)6 NWLR (Pt. 662)561, Saraki V. Kotoye (1992) 9 NWLR (Pt. 264)207, Adesanya V. President of Nigeria (1981)2 NCLR 358, Egbe V. Alhaji (1990) 1 NWLR (Pt. 128) 546.'

Even at the risk of repetition, the Appellant's first ground of appeal reads thus:-

"The Learned Trial Judge erred in law when he held that the Appellant committed criminal conspiracy, rape and armed robbery contrary to Section 23 and 97 of the Penal Code and Section 1(2) of Armed Robbery and Firearms (Special Provision) act all against the Appellant.

Particulars of Error:

1. **The first accused person denied beaten (sic) of the Respondent and denied the rape allegation.**
2. **The accused person denied taken (sic) the GSM of the Respondent."**

The Respondent herein is the State. The particulars to the first ground of appeal talks of beating of the respondent and taking GSM of the respondent. Clearly there is nothing in the judgement that accused the appellant of beating the State and taking GSM out of its possession. The learned Counsel for the appellant failed to pay attention to the appeal process that was filed on behalf of the appellant. This is so sad. A Counsel that elects to defend a party convicted of a criminal offence must exercise utmost care in the appeal process filed on behalf of his client, even if the appeal is gratuitous. The competence or otherwise of the process will be a reflection of the learned Counsel's professional standing.

I find the first ground of appeal incompetent and it is hereby struck out. The first issue for determination of this appeal as formulated by the appellant is also incompetent since it is formulated from incompetent ground of appeal. Same and all the argument founded on the issue are hereby struck out.

However, because this is a criminal case, and perhaps I may be wrong in my decision, I wish to consider the argument in respect of the first issue for determination on its merit.

The initial charges against the Appellant are as stated at the beginning of this judgement. At the end of the trial, the learned trial Judge found the Appellant guilty of the offence of being in possession of stolen property contrary to Section 319A of the Penal Code. I wish to state clearly that the Section under which the Appellant was convicted is exceptional in that the prosecution is only required to show that it is reasonably suspected that something in the possession of the accused is stolen property for the burden of proof to shift to the defence to show that he came by the thing honestly. The prosecution is not required to prove that the property was stolen or unlawfully acquired.

PW2, the owner of the house that was attacked and the occupants robbed, testified that he was able to identify the handset Exhibit N1 because of the numbers he stored in and the messages and pictures he saved therein. Clearly the suspicion that Exhibit

N1 was stolen property was reasonable. The Appellant therefore had the burden to prove that he came by the handset lawfully. In attempt to do that he gave in evidence that he bought the handset from one Hausa man. He neither mentioned the Hausa man's name and address nor did he call him to confirm that he gave Exhibit N1 to the Appellant.

There was therefore no basis for police investigation. The learned Trial Judge was therefore right when he convicted the Appellant for being in possession of Exhibit N1, property suspected of having been stolen. For the reason stated herein, the first issue is resolved against the Appellant and the ground upon which it is distilled is hereby dismissed.

On the second issue, the contention of the learned Counsel for the Appellant is that the learned Trial Judge misapplied the provision of Section 218 of the Criminal Procedure Code and his decision was therefore reached per incuriam. It is also the learned Counsel's contention that for an application of the provision of Section 218 of the Criminal Procedure Code, it must be in evidence that facts have been proved which reduce the substantive offence to a lesser offence. According to the learned Counsel, the learned Trial Judge did not observe the provision of Section 218(2) of the Criminal Procedure Code in convicting the Appellant. Finally, learned Counsel urged the Court to allow the appeal.

Mr. Kamaldeen Ajibade, learned Attorney General, who appeared for the State, submitted that the learned Trial Judge was right in convicting the Appellant pursuant to the provisions of Section 218 of the Criminal Procedure Code and in accordance with the provision of Section 319A of the Penal Code.

Section 218 of the Criminal Procedure Code provides as follows:

> "(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete lesser offence and such combination is proved, but the remaining particulars

are not proved, he may be convicted of the lesser offence though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence though he is not charged with it."

From the evidence available in this case, PW 2 and his household were robbed when their compound was broken into by persons unknown. Among the items stolen from the compound and which were identified by PW 2, PW 5 and PW6 are Exhibits N, N1 and 5. Exhibit N1 a thing reasonably suspected of having been stolen was recovered from the Appellant, who could not properly explain how he came by the property. The only explanation he offered was that he bought Exhibit N1 from one Hausa man whose address and name he did not know. He could also not produce any receipt evidencing the purchase. There was therefore sufficient evidence that proved that the Appellant was guilty of the offence of being in possession of property suspected of having been stolen contrary to Section 319A of the Penal Code, a lesser offence than those offences for which the Appellant was charged. The offence under Section 319A has a direct connection to the offence of robbery for which the Appellant was charged, since Exhibit N1 which was found in possession of the Appellant is a product of the said robbery. In Ezeja V. State (2008) 10 NWLR (Pt.1096) 513 at 529 – 530 paragraphs H – B the Supreme Court per Onnoghen JSC said:

"**It is settled law that the Courts including this Court have the power under Section 218 of the Criminal Procedure Code to convict an accused/appellant of lesser or an offence for which he was neither charged nor pleaded to. The Appellant in this case, was charged with causing grievous hurt to Cyprian Okpala by shooting**

and wounding him with his service pistol, but the evidence at the trial disclosed a lesser offence of causing hurt without provocation hence the conviction of the Appellant by the trial Court under Section 246 of the Penal Code. I hold the view that the lower Court was right in affirming the said conviction and in correcting the error made by the trial Judge in referring to Section 218 of the Penal Code instead of Section 218 of the Criminal Procedure Code as his authority for substituting a conviction for a lesser offences (sic) for the offence charged."

See Adava V. The State (2006) 9 NWLR (Pt. 984) 152 at 169. In the instant case, the prosecution is not required to prove that the property, Exhibit N1 was stolen or unlawfully acquired. Its duty is to create in the mind of the learned trial Judge that Exhibit N1 was reasonably suspected to have been stolen. This, the prosecution did by leading sufficient evidence towards that direction and succeeded in shifting the burden of proof to the Appellant. I am therefore convinced that the learned trial Judge properly applied the provision of Section 218 of the Criminal Procedure Code in the determination of this case. I find no merit in the Appellant's argument on the 2nd issue for determination of this appeal which I resolve against the Appellant.

Having resolved the two issues in this appeal against the Appellant, this appeal shall be, and it is hereby dismissed.

PAUL ADAMU GALINJE,
JUSTICE, COURT OF APPEAL.

Mr. Abiola Olagunju with S. Ali Musa for the Appellant.

Mr. Kamaldeen Ajibade (A.G. Kwara State) with Mrs. A. O. Akinpelu (S.G), A. O. Oyeyipo (SSC) and O. S. Balogun (S.C) for the Respondent.

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HUSSEIN MUKHTAR (J.C.A)

I have been privileged to read before now the leading judgment just rendered by my lord **Galinje, JCA**. My learned brother has meticulously appraised the two issues raised for determination in this appeal and I fully agree with the reasons therein and the conclusion that the appeal is bereft of substance and ought to be dismissed.

I adopt the same reasons and conclusion as mine and do hereby dismiss the appeal for lacking in merit. I subscribe to the consequential orders made in the judgment.

DR. HUSSEIN MUKHTAR

JUSTICE, COURT OF APPEAL.

TIJJANI ABUBAKAR JCA, I had the privilege of reading in draft the lead judgment just delivered by my brother Paul Galinje JCA, His lordship conducted meticulous analysis of the issues in this appeal, I agree entirely with the reasoning and conclusion reached by him, I also adopt them as mine.

Just by way of contribution, appellants issue for determination number two as adopted by the Respondent reads.

> "Whether it was right for the trial judge to have invoked and applied the provisions of section 218 and 319A of criminal procedure code, and the penal code respectively when the particulars of the lesser offence were neither proved or established in evidence".

Learned counsel for the Appellant said the learned trial judge misapplied the provisions of section 218 of the criminal procedure code Mr. Raji said the trial judge did not observe the provision of section 218(2) of the criminal procedure code in convicting the appellant.

Learned Attorney General Kwara State, Mr. Ajibade for the Respondent said the learned trial judge was right in convicting the Appellant pursuant to the provisions of section 218 of the Criminal procedure code.
Section 218(2) of the criminal procedure code is as follows:

> "218(2)
>
> When a person is charged with an offence, and facts are proved which reduce it to a lesser offence he may be convicted of the lesser offence though he is not charged with it".

The charge against the Appellant is at page 3 of the record of appeal. The charge relates to conspiracy, robbery and rape. The prosecution called PW2 who testified at the trial. Part of his evidence in chief is reproduced as follows:

> "..... I am a businessman, I know all the accused persons I also remember 14/7/09. I returned from South Africa at around 11pm in the night while asleep I heard a gun shot at 11.45, and so I woke up. I later heard the sound of somebody trying to break the door which was not successful because the door was bullet proof. A similar noise and attempt to enter and break the kitchen door was made. The wall was broken, which enabled them to open the kitchen door from behind. Now the first and second accused entered my room after gaining access to the house.

Myself and my wife were asked to lie down on the floor. My customized gold plated wrist watch worth N108,000 was taken from me by first accused. We were being beaten as the items were taken from us. N350,000. Was also collected from us 6 GSM hand sets while I was being forced to hand over money.

My wife was taken out of the house and raped by the 1st accused, jewelleries and car key was also taken by them.
Exhibit 5 (red armlet) was also collected from me by the 2nd accused. Two of my sisters in-law were also raped. The robbers eventually left around 1.am... On 24/8/09 I received a call from the Police that one of my hand sets is in their possession, so I should come and identify it. I identified a nokia hand set exhibit N as my hand set. I then identified the 1st accused as one of the people who came to my house to attack us....."

The learned trial judge at page 85 of the record of appeal said

"..... I do not believe his explanation of how he came to the possession of the exhibits. I therefore invoke section 149(a) of the Evidence Act, to hold that the three accused persons were in possession of the properties of the complainant particulars exhibit N, N1, Exhibit 5 knowing them to be stolen. Consequently I hereby find the first accused guilty of being in possession of Nokia hand set Exhibit N1 knowing same to have been stolen contrary to section 319A of penal code law".

The cry by the Appellant that the trial judge misapplied section 218 of the criminal procedure code is an attempt to cry wolf where none exists.

The Supreme court of Nigeria answered this question in TUNDE ADAVA & ANOTHER VS STATE (2006) 9 NWLR PART 984 page 152.
Kutigi JSC as he then was said.

"..... The appellants were not charged with this offence, but can they be convicted of it?. The answer is in the affirmative. By section 218 of the criminal procedure code cap 30 laws of Northern Nigeria 1963 applicable to Kogi State, an accused person can be convicted of a lesser offence, if proved even though he is not charged with it...."

The prosecution by the evidence of PW 2 alone, led credible evidence sufficient to justify the application of section 218 of the criminal procedure code by the learned trial judge.

I also as my learned brother find no merit in this appeal, appellant has nothing useful to urge this court, the appeal is therefore dismissed.

TIJJANI ABUBAKAR
JUSTICE COURT OF APPEAL.