IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN

The State
Vs.
Unisa Swarray & Harold Zizer

BEFORE THE HONOURABLE JUSTICE MIATTA M. SAMBA, J
DATED THE 6TH DAY OF NOVEMBER 2015

Counsel:
AJM Bockarie Esq for the State
Al Sesay Esq for the Accused

Judgment:

Both accused persons stand charged on a two counts Indictment dated 29th day June 2015 with the offences of conspiracy contrary to law and robbery contrary to Section 23(2) of the Larceny Act 1916 as repealed and replaced by Section 2 of the Imperial Statutes (Criminal Law) Adoption Amendment Act No. 16 of 1971. The Prosecution alleges that on diverse days between the 15th and 19th day of October 2015, at Freetown in the Western Area of the Republic of Sierra Leone, both accused persons conspired with other persons unknown to commit robbery and that on the 19th day of October 2014, at Freetown in the Western Area of the republic of Sierra Leone, both accused persons robbed Augustine Joko Dumbaya of one X2 Mobile Phone valued at three hundred thousand Leones. I thank the Prosecutor, A.J.M Bockarie Esq and the A. I Sesay of the Legal Aid Board for your professional prosecution, fierce defence and submission of final addresses.

Burden and standard of proof

It is an established rule that in all criminal cases, it is the duty of the Prosecution to prove its case beyond all reasonable doubt. This proposition as expressed in the case of *Woolmington Vs. DPP* has been adopted in our jurisdiction in all criminal cases.[1] There are common law exceptions for example, insanity under the M'naagten Rules. There are also statutory exceptions which provides that where a defence is based on any exception, proviso or qualification, the accused will have the burden of proof in proving that the exception applies. See R Vs. Edwards (1975) QB 27. In *Miller Vs Minister of Pensions (1947) 2 AER 372*, Lord Denning stated as follows:

'It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not however mean proof beyond the shadow of a doubt. The law will fail to protect the community if it allowed fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility n his favour, which can be dismissed with the sentence, 'of

[1] *The State Vs. Francis Mohamed Fofana Komeh & John Mans (unreported).*

course its possible but not in the least probable' the case is proved beyond reasonable doubt but nothing short of that will suffice'.

I will discountenance the defence counsel, A. I Sesay's line of reasoning in respect of the dates, ie. 19th October 2015 in Count 1 because in my capacity as trial Judge, the law allows me to make amendments which are trivial and not prejudicial to the case of the accused, as necessary. One can tell from all the evidence led so far that the year 2015 will not affect the evidence so far led and that insertion of that date, i.e 2015 must have been a genuine mistake. Section 148(1) of the CPA 1965, Act No. 32 of 1965 provides as follows:

'Where, before trial or at any stage of such trial, it appears to the court that the indictment is defective, the court shall make such orders as the court thinks necessary to meet the circumstances of the case, unless having regard to the merit of the case the required amendments cannot be made without injustice'.

The key ingredients for consideration by the court in an application for amendment pursuant to Section 148(1) of the CPA 1965 are:

1. The indictment can be amended at anytime of the trial;
2. That injustice will not be caused by the amendment within the context of the circumstances of the case.

In the case of *Collison*[2] an amendment was accepted even after the jury had gone into retirement and were considering their verdict for over three hours. The Court of Appeal in England in *R Vs. Pople* (1951) 1KB p 54 confirmed the extent of the power to amend. The Criminal Court of Appeal was referring to the provisions of Section 5 of the Indictment Act 1915 in England which is repeated *ipsissima verba* in Section 148(1) of the CPA.

Count 1, Particulars of Offence of the indictment herein is therefore amended to read 19th October of 2015.

I am mindful of the fact that though both accused persons are jointly tried, the case against each of them have to be treated separately. I am not entitled to treat evidence which is only applicable to or which inculpates only one accused person, against the other accused person. It is trite law that each accused is entitled to an acquittal if there is no evidence direct or circumstantial, establishing his guilt independent of the evidence against his co-accused. I have also cautioned myself that all doubts must be resolved in favour of an accused person. I shall now proceed to evaluate the evidence and law before me.

The Law-Conspiracy

The offence of conspiracy is committed when a person agrees with one or more persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intention, will necessarily amount to or involve the commission of any offence or offences by one or more of them and

[2] (1980) 71 Cr App R 249 at page 253.

such agreement has been held to be sufficient to found a conviction for conspiracy.[3] I disagree with Counsel for the defence that there must be proven an agreement on a charge of conspiracy. The agreement can be inferred; it needs not be specifically proven.[4] Also, it is settled law that a conspiracy may be sufficiently proved where the circumstances are such that the overt acts which are proved against some defendants may be looked at as against all of them, to show the nature and the objects of the conspiracy. So the evidence needs not include evidence of some tacit agreement on their part to commit any crime. It is enough that it can be safely inferred that the role of each of the accused persons show that they were part of a larger scheme which resulted in the commission of the offence.

Mens rea is important in conspiracy as it is in any crime. However, with conspiracy, proof of *mens rea* is found in the accused' willingness to perform his own part of the plot. The accused may know full well that the entire enterprise would involve the commission of offence(s) by one or more of the conspirators. Older authorities have suggested that the Prosecution need not prove that the party to the conspiracy had knowledge of the illegality of the acts to be done.[5] However, where proof is available, it is submitted that it is sufficient that the accused knew that there was going to be the commission of some offence.[6] I shall look into the substantive offence charged of robbery before looking into the evidence led, if any, on the charge of conspiracy.

The law-Robbery

Section 23(2) of the Larceny Act 1916 as repealed and replaced by Section 2 of the Imperial Statutes (Criminal Law) Adoption Amendment Act No. 16 of 1971 creates the offence and penalty for the offence of robbery.

The Section provides that:

Every person who robs any person shall be guilty of a felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years.

As defined, robbery is actually an aggravated form of stealing and if there is no stealing, there can be no robbery. The offence of robbery is complete when the theft is complete. In respect of robbery, the appropriation must normally be by taking and assuming control of the property appropriated, which said control he ought not to have done unless authorized by the owner.

The offence must be committed against any other person, normally, the owner of the property appropriated. In some cases it might not be clear to whom the property appropriated belong or whether in fact it belongs to any one at all.

[3] *O'Connell v R* 1844 5 St. Tr.(NS).
[4] *R v Brisac* (1803) 4 East 164.
[5] See para. 4075 of Archbold, 36th Edn.
[6] *R v Siracusa* 90 Cr. App. R. 340 cited favorably in Archbold 2001 Edn p 2641.

It has been said that robbery is an aggravated form of stealing. According to the definition section, Sec. 1(1) of the Larceny Act 1916, a person steals if without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent, at the time of such taking, permanently to deprive the owner thereof.

The *actus reus* of stealing consists in the taking and carrying away of property belonging to another person. Taking and carrying away in the context of the Larceny Act 1916 is some dealing in the property, which shows that the Defendant has assumed the rights of an owner. Section 1(2)(ii) of the Larceny Act 1916 defines 'carrying away' to include any removal of anything from the place which it occupies ...' it is my view that the term 'carrying' as appears in Section 1(2)(ii) of the Larceny Act 1916, requires active conduct on the part of the accused. In the instant case, the allegation and testimony of PW1 against both accused persons is that they attacked, took and carried away an X2 mobile phone from the complainant herein, it being the property of PW1 and treated same as theirs. The assertion is that the act of both accused amount to an assumption of the rights of the owner, in this instance, an X2 mobile phone. See *Rogers Vs. Arnatt (1960) 2QB 244; (1960) 2AER 417.*

Every person: the section relates to any person; any human being, young or old, male or female, employed or unemployed.

The property stolen must have been taken without the consent of the owner. In other words, it must be property belonging to another person. Ordinarily, property is stolen from one who both owns and possesses it by one who has no interest in the property whatever. Section 1(2)(iii) of the Larceny Act 1916 defines who the 'owner' of property could be as 'any part owner of person having possession or control of, or a special property in, anything capable of being stolen'. Property is regarded as belonging to any person having possession or control of it or having in it any proprietary right or interest. Viscount Dilhorne in *Lawrence Vs Metropolitan Police Commissioner (1972) AC. 626, HL* said that the words 'belonging to another' simply means that at the time of appropriation, the property appropriated belonged to another person. It is my considered opinion that the basis of larceny is founded on 'possession in fact' that is, interference of another's property.

Pursuant to Sec. 1(3) everything which has value and is the property of any person, and if adhering to the reality, then after severance therefrom, shall be capable of being stolen. By value, I mean economic value no matter how little and I reiterate, the property must belong to or be under the control of another person. For the purposes of this matter herein and pursuant to Section 23(2), the property stolen must be tangible; it must be a physical substance, however slightly tangible. In the instant case, we are referring to an X2 Mobile phone.

Robbery requires at least an intention to steal. It must be proven that the accused used or threatened to use force to secure a conviction on a charge of robbery. A timorous witness as in this case PW1 to a grab raid as he presented to

this court might well fear that the thieves, in this case, both accused persons will turn on him.

The Prosecution led two witnesses in chief to prove its case against the accused both accused persons on the 31st day of August 2015. The Prosecution closed its case on 7th October 2015 and tendered the committal certificates of both accused persons, Unisa Swarray and Harold Zizer. Both accused persons were on the same day put to their election in compliance with Section 192 of the CPA No. 32 of 1965. On 14th October 2015, guided by Defence Counsel Al Sesay Esq, C. Blake and O.C Spencer-Coker, both accused persons chose to rely on their statements made to the police.

Evidence analysis-Conspiracy and Robbery

PW 1 was the complainant himself, Augustine Joko Dumbuya of 13 Bass Street, a student of the Prince of Wales Secondary School. He testified on oath to the effect that on the night of 19th October 2014, he was home during the night hours watching movie; that he felt hungry and stepped out between the hours of 10.00pm and 11.00pm to buy himself some food. PW1 said his friend called him on his phone between these hours but because he saw a large crowd of people and heard the words 'thief thief' shouted, he did not receive his friend's call but rather rejected his friend's call. He said he saw both accused persons both of whom held on to a bottle each; that A2 rushed at him and demanded his X2 mobile phone and that because he refused handing over his phone, A1 also rushed at him and stabbed him twice at the back of his neck and cut him with a razor on his right hand. He then let go of his X2 mobile phone which A2 took away and ran off. He said he use to see A1 around Bass Street, Brookfields and that he did not know A2 before the incident of 19th October 2014. PW1 says his friend Papa met him at the crime scene at Bass Street and advised that he makes a report at the New England Ville Police Station which he did. He said he was given a medical request form at the police station which he took with him for examination and treatment at the Connaught Hospital on 20th October 2014 which said form he returned endorsed to the police. PW1 did not get his said friend Papa to testify as to that piece of evidence on his behalf.

PW1 said in cross-examination that what he said to the police was that he was attacked by a group of people who took his X2 phone from him. My understanding of this piece of evidence is that assuming that PW1 was attacked on Bass Street, he was not attacked specifically by A1 or A2 alone, if at all. He denied attending a birthday party on 19th October 2014. According to PW1, his friend who tried to reach him on his phone earlier referred is one Senessie Luseni. Luseni too was not called in to confirm PW1's testimony to that effect. PW1 said he handed in his blood stained clothes to the police as exhibit.

PW 2 was the Investigating Officer, Abdulai Mustapha Nyalay attached to the CID New England Ville Police Station. He testified on oath to the effect that PW1 made complaint of robbery to him at the New England Police Station on 19th October 2014 against the two accused persons. Together with the complainant, Augustine Joko Dumbuya and other police officers, PW2 visited the scene of crime. PW2 confirms PW1 had a wound on his neck so he gave him a medical

request form for examination and treatment which said form PW1 returned endorsed. The said medical form was produced for identification as Exhibit Z.

PW2 said together with his colleague DPC 11606 Jusu A.F, on 20th October 2014, he obtained voluntary statements separately from both accused persons; that he cautioned and questioned the accused persons in Krio separately and that they each made their statements in Krio which was recorded in English by PW 2 witnessed by the said DPC Jusu. He stated that each of the statement was read to each accused persons in Krio to which each accused admitted to be true and correct by affixing their right hand thumb print each to the said statement. Both voluntary statements were tendered as Exhibits A1-5 and B1-5 respectively.

PW2 said that on 26th October 2014, both accused persons were cautioned separately in respect of a charge statement, by DPC 11606 in Krio and each accused made his statement in Krio which was recorded in English by PW2 and witnessed by the said DPC Jusu; that at the conclusion of the interview, both accused persons separately had their charge statement read over and explained to them in Krio which they admitted to be true and correct by affixing their right hand thumb print; he then charged both accused persons jointly with the offences of conspiracy and robbery. Both charge statements were tendered in evidence as Exhibits C1-2 and D1-2. I note that no blood stained clothes referred to by PW1 was referred to nor tendered by PW2 or any other prosecution witness.

In cross-examination, PW2 said, (just as PW1 had said in his cross-examination), that he was informed by PW1 that he was assaulted by a group of people, 12 in number. PW2 said that PW1 told him that he attended a birthday party at Dougan Street on 19th October 2014, from whence the whole incident began and that A1 told him that he was best friends with PW1 which according to PW2, PW1 confirmed. He said it was PW1 who showed him Dougan Street where the party was celebrated and that he was informed by PW1 that he was assaulted on his way home from the said birthday party. PW2 said his investigation had only to do with wounding and not robbery. This piece of evidence leaves me wondering why and how PW2 could have charged both accused persons jointly as in Exhibits C1-2 and D1-2 with the second count of robbery if his investigation had nothing to do with robbery.

In re-examination, PW2 said that it was the complainant who accompanied him to Dougan Street where the party of 19th October 2014 was celebrated.

I have read the voluntary caution and charge statements of both accused persons. Both accused persons live at Nos. 1 and 79 Bass Street respectively and they both in their statements claim to know and in fact were good friends with PW1. I believe them and do not believe PW1 when he said that he only use to see A1 at Bass Street in the Brookfields community and that he only got to know A2 in respect of this incident herein. I also believe the PW2 when he said that it was the PW1 who led him to Dougan Street where a birthday party was celebrated.

A1's statement is a complete denial of any involvement in a fight between PW1 and any other person or persons. A2 admits to have had a fight with PW1 and he stated in his statement that A1 had nothing to do with their fight. I shall not go into the fight because the case against the accused persons have nothing to do with a fight or wounding. I believe the investigating officer and both accused persons when they said that PW1 was at a party on 19th October 2014 at Dougan Street and do not believe PW1, Augustine Joko Dumbuya when he said on the said night, he was at home and did not attend the birthday party. How and why then did he lead the investigating officer to the scene of crime, ie. Dougan Street? I perused PW1's testimony at the court of first instant where he said he was talking on his mobile phone on his return home in search of food when he heard voices shouting 'thief thief'. In his testimony to this court, PW1 said in chief that a friend called him on his phone but he did not pick up the call because of the voices he heard 'thief thief'. He even used the word 'flash' and we all know what that means in respect of use of cell phones. That piece of evidence in his statement is inconsistent with what he said on oath.

Verdict

The offences for which both accused persons were charged and have been tried are:

1. Conspiracy to commit robbery;
2. Robbery.

The complainant's statement to the police does not form part of the evidence before this court but I would think that if part of his complaint was that his cell phone was robbed, same ought to form part of the questions put to the accused persons separately. That is what is required in respect of fair trial. The accused persons were never questioned in respect of robbery by the investigating officer even though they were charged with the said offence. As said above, PW2 confirms that investigating robbery was not part of his investigation. The voluntary caution statement and charge statements of both accused persons dealt only with wounding, not robbery. Here lies the importance of State Counsel seeing and anyalysing proofs of evidence before preferring an indictment. I do believe that had the State Counsel received Exhibits A1-5 and B1-5, the charge Both accused persons have chosen to rely on their statements to the police and rightly so because the evidential burden is one borne by the prosecution to prove the elements of the offence of robbery as charged in Count 2 of the indictment, which has not been proven and I so hold.

I also hold that the Prosecution failed to prove the elements of the charge of conspiracy to commit a crime as charged in Count 1 of the indictment. I find both accused persons not guilty for the offences of conspiracy and robbery as charged in the indictment dated 29th June 2014.

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Hon. Ist. Miatta M. Samba J.