

SUPREME COURT OF NIGERIA
15TH JANUARY, 1993. SC.98/1991

**CORAM:- M. L. UWAIS, A. G. KARIBI-WHYTE, S. M. A.
BELGORE, O. OLATAWURA, M. E. OGUNDARE, JJSC.**

MOHAMMAT SELE APPELLANT

V.

THE STATE REPONDENT

APPEALS - When appellate Court will not interfere with trial court's findings of fact

CRIMINAL LAW - Where law under which charge was brought has been repealed - applicable law is the one valid at time of commission of crime.

EVIDENCE - Alleged contradictions in evidence of prosecution witnesses seen as mere discrepancies - contradictions will be fatal to prosecution's case when it goes to the substance.

FACTS

The Appellant was convicted by the Lagos high court for Armed robbery contrary to S. 1 (2) of the Robbery and fire arms Decree of 1970. At the time of the commission of the offence, 2nd April 1980, the Decree was still in force. However, at the time the Appellant was arraigned before the court (on 22nd January 1981) the Decree has been replaced by S 2 of criminal code amendment No. 1) law 1980 of Lagos state which came into force on 29th September, 1980. The High court found him guilty of Robbery. On appeal to the court of appeal against conviction, counsel for the appellant contended inter alia, that the appellant was tried under a

repealed and therefore non-existent law. The issue of contradictions in evidence of prosecution witnesses was also raised. The court of appeal unanimously dismissed the appeal. The appellant appealed to the Supreme Court against the decisions of the two lower courts.

HELD (unanimously disallowing the appeal)

1. The applicable law is the law in operation at the time the event in question occurred. As the law in force at the time of the commission of the offence by the appellant was the Robbery and fire arms (special provisions) Decree 1970. The appellant was rightly charged under the Decree, notwithstanding that at the time of his arraignment in court, the decree was repealed by the Criminal Code, (Amendment No. 1) Law of Lagos State 1980. (p. 29 L. 34)

2. Mere discrepancies not touching upon the substance of the offence are not contradictions. And contradictions to be fatal to the prosecution's case, must go to the substance of the case and not be of minor nature. (p. 28 L. 30)

3. The appellate court will not interfere with the findings of fact of the trial court unless such findings have been made on legally inadmissible evidence, or it is perverse or not based on any evidence before the Court. (p. 30 L. 16)

PER KARIBI - WHYTE JSC On the issue that under the new law it is the Governor and not the trial Judge who can specify the mode of execution of the death sentence

A conviction is not to be nullified merely because the wrong sentence was imposed, besides there is a clear distinction between a conviction and a sentence. (p. 35 L. 15)

PER BELGORE JSC *"Copious evidence of an attack with a dangerous weapon (dagger), infliction of injury, and pursuit thereafter by police that timeously arrived at the scene is clear evidence of the offence of robbery ..."* (p. 28 L. 32)

REPRESENTATION

Chief F. Akinyosoye, T. Olarenwaju, Adewole (Miss)
For the Appellants

S.A. Quadri - Legal Officer, Ministry of Justice, Lagos State For the Respondents

CASES REFERRED TO

1. R.V. Brissac (4 East 171)
2. Abodundu v. Queen (1959) 4 FSC. 70
3. Adamu v. The State (1991) 4 NWLR (Pt 197) 539
4. Akpan v. The State (1991) 3 NWLR (Pt 182) 646.
5. Alao v. Akano (1988) 1 NWLR (Pt 71) 431
6. Alao v. C.O.P. (1987) 4 NWLR (Pt 64) 189
7. Emelogu v. The State (1988) 2 NWLR (Pt 78) 524
8. Ikem v. The State (1985) 1 NWLR (Pt 2) 378
9. Johnson v. The State (1981) 2 SC 29
10. Nasamu v. The State (1979) 6 - 9 SC 153
11. Obada v. Military Gov. Kwara state. (1990) 6 NWLR (Pt. 157) 482
12. Obidozo v. The State (1987) 4 NWLR (Pt 67) 748
13. Ogbomo v. The State (1985) 1 NWLR (pt 2) 223
14. Ogoala v. The State (1991) 2 NWLR (pt 175) 509.
15. Okobi v. The State (1984) 7 SC 62
16. Okafor v. Onianwa (1964) 1 ALL NLR 343
17. Queen v. Ekanem (1960) 5 FSC 14
18. Kalu v. The State (1988) 4 NWLR (pt 90) 503
19. R.V. Bukar (1961) ALL NLR 673
20. R.V. Tuke. (1961) ALL NLR 270
21. Unuakhom v. The State (1985) 1 NWLR (pt 12) 364
22. Uti v. Onoyivwe (1991) 1 NWLR (Pt 166) 166.
23. Iyaro v. The State (1988) 1 NSCC. 167.

STATUTES REFERRED TO

1. Criminal Code (Amendment No. 1) Law 1 980 of Lagos State s. 2.
2. Constitution of the Federal Republic of Nig. 1979 GS. 274

(1) (a) & (b), 274 (4) (b), 33 (8), 4 (a)

3. Constitution (Certain Consequential Repeals) Decree No. 105 1979.

4. Robbery and Fire Arms (Special Provisions) Act 1970 (ie Decree No. 47 of 1970) S. 1 (2) (a)

5. Criminal Code Laws of Lagos State s. 7 (c).

6. Interpretation Act No. 1 of 1964 s. 6 (1)

LEAD JUDGMENT BY BELGORE JSC

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This appeal concerns the conviction of the appellant, Mohammad Sele for armed robbery against which he unsuccessfully appealed to Court of Appeal. On 2nd day of April, 1980, the appellant stopped a taxi cab driven by Isiaka Akano the P.W.1. It was agreed
15 the appellant would be taken in the taxi from Maza Maza Bus Stop along Badagry Express Way to around Apapa Wharf for the fare of two Naira. The appellant, according to P.W.1 was accompanied by another person. When they got to wharf area it appeared the appellant and his companion were not ready to go out and they further
20 asked to be taken to Burma Road which he complied with. At Burma Road the appellant paid the sum of N2.00 but still sat tight in the vehicle. The P.W.1 asked the two men to go out and there and then the appellant drew out a dagger at the P.W.1. A struggle ensued between appellant and P.W.1 during which the companion of the ap-
25 pellant dipped hand into P.W.1's pocket and removed N50.00 therefrom. P.W.1 was stabbed with a dagger by his side. He raised an alarm and some policemen of the Anti-Crime patrol arrived at the scene. The appellant and his companion abandoned P.W.1 and took
30 to their heels. The police caught up with the appellant when he was attempting to scale a wall fence and held him but he stabbed two of them. They held him and arrested him. His companion in the meantime had escaped. The time of this incident was around 1950 hours to 2000 hours. The policemen were carrying automatic guns and
35 when one of them was stabbed by the appellant his gun dropped. The appellant picked up the gun and as he was running away he was hotly pursued and tackled successfully at the time he attempted to jump the fence. The dagger the appellant used was also recovered but he denied it as his own. The three policemen who effected the

arrest were all in uniform. The appellant maintained that he saw the escaped passenger only in the vehicle by chance even though he used to see him around Alaba Market. He asked the police to take his brother to look for the man who has not been seen up to now.

The statement of the appellant to the police was rejected in evidence because of the objection raised that it never conformed with Judges Rules (of England). However, in his evidence on oath, he admitted riding in the P.W.1's taxi to Burma Road Apapa. But he said he protested that he was not going to Burma Road. At this, someone started pulling his bag and when he turned round he was slapped. He retaliated and a fight ensued. Then some people were shouting "Ole! Ole! Ole! which in English means "Thief! Thief! Thief!" the normal Yoruba cry for the help against thieves. At the arrival of police at the scene his assailants escaped while he was still standing at the scene where the policemen met him. They invited him to Police Station where he was locked up. The following day they brought him a paper to sign which he declined. He was finally taken to court. He denied ownership of Exhibit A, the dagger.

The trial Judge evaluated the evidence and believed the prosecution's case had been proved beyond reasonable doubt. He found the appellant guilty and convicted him under Section 1(2)(a) of Robbery and Firearms (Special Provisions) Act 1970 and sentenced him to death. The learned trial Judge considered all the evidence before him and evaluated the evidence particularly when he held as follows:-

"I have carefully considered the evidence of the prosecution witnesses, that of the accused as well as the submission of both counsel. On the facts I have no doubt whatsoever in my mind that the P.W.1 picked up the accused and the person at large as Passengers in his taxi from Maza Maza bus stop along Badagry Express Way on the day of the alleged robbery. At their destination, I accept the evidence of P.W.1 that the accused paid two naira as fare for himself and the man at large. It is blatant lie to say that the P.W.1 stopped at Mile 2 and picked the man at large. I prefer and accept the evidence of the P.W.1 that when he asked the accused and his partner at large to get out of his taxi after the accused had paid him the fare the accused drew the dagger exhibit 'A' and the P.W.1 held his hand. I believe also

that during the struggle between them the man at large picked the N50.00 in the P.W.1's breast pocket. I have no doubt that the accused and the man at large acted in concert. It is true that the accused was not charged with conspiracy, but in so far as proof goes conspiracy says Grose, J, in *R. v. Brissac* (4 East 171) "is generally a matter of inference deduced from certain criminal acts of the parties accused done in furtherance of an apparent criminal purpose in common between them". The evidence is overwhelming that the accused apart from stabbing the P.W.1 immediately before the man at large stole the N50.00, he also stabbed two of the police officers who chased him. I reject the accused's evidence that he did not know anything about exhibit 'A' as false. Exhibit 'A' in fact he longs to the accused and he had used it in stabbing first the P.W.1 and subsequently the P.W.3 and P.W.4. I concede to the learned defence counsel that there were some minor contradictions in the evidence of the P.W.2 and P.W.3 regarding who actually overpowered the accused while he was trying to jump over a fence in a bid to escape, but this was after the robbery had been committed and therefore not material to the issue of committal of the crime. As I have found earlier in this judgment the accused and the man who actually took the fifty naira from the P.W.1's pocket acted in concert. The robbery under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act 1970 was complete when the man at large stole the N50.00 from the P.W.1's pocket while the accused armed with exhibit 'A' an offensive weapon used actual violence on the P.W.1 at or immediately before the man at large stole the N50.00.

I have no hesitation in finding that the accused, who, but for the prompt action of the P.W.2, P.W.3 and P.W.4 would also have escaped was as equally accountable for the robbery as his partner in crime who escaped. In the circumstances, I have found for the robbery of P.W.1 of his fifty naira contrary to Section 1 (2)(a) of the Robbery and Firearms (Special Provisions) Act 1970 and he is found guilty accordingly. "

The appellant in Court of Appeal attempted to rely on some purported contradictions in the evidence of prosecution witnesses to submit that his conviction was not safe. Also canvassed at the Court

of Appeal is the issue of amendment of the law whereby it was contended that the appellant was tried for a non-existing offence as the law had been repealed. The Decree No.47 of 1970 i.e., Robbery and Firearms Decree, had been amended by Criminal Code (Amendment No.1) Law, 1980 of Lagos State on 29th September 1980 before the trial of the appellant. The full court unanimously dismissed the appeal and thus the appeal to this court. 5

There were three original grounds of appeal of which only to my mind the second one complaining of contradictions in evidence is of some substance. Two additional grounds were filed with leave and they are as follows: 10

ADDITIONAL GROUNDS OF APPEAL 15

(1) "That the learned trial Judge and the Court of Appeal erred in law in trying and convicting the accused under Section 1(2) of the Robbery and Firearms (Special Provisions) Decree 1970 whereas the accused committed the alleged offence on 2nd day of April, 1980 when the said Section 1 of the Robbery and Firearms (Special Provisions) Decree of 1970 had been expressly repealed and made inapplicable in Lagos State by virtue of Section 2 of the Criminal Code (Amendment No.1) Law 1980 of Lagos State. 20 25

PARTICULARS OF ERROR

1. The information upon which the appellant was arraigned before the trial court contained a single count of robbery, punishable under Section 1 (2)(a) of the Robbery and Firearms (Special Provisions) Decree 1970. 30

2. Evidence was led by the prosecution in support of the charge against the appellant brought pursuant to the said Section 1 (2) of the Decree. 35

3. *Section 1 of the Robbery and Firearms (Special Provisions) Decree 1970 upon which the appellant was tried and convicted was repealed on the 27th day of September, 1980 by Section 2 of the Criminal Code (Amendment No.1) Law 1980 of Lagos State.*

5 4. *The alleged offence for which the appellant stood trial was said to have been committed on 2nd April, 1980 and the trial commenced on January, 1981.*

10 5. *The trial court delivered the judgment against the appellant on the 18th day of May, 1981.*

15 6. *The prosecution made no amendment(s) whatsoever to the original information upon which the appellant was arraigned for trial in compliance with Section 2 of the Criminal Code (Amendment No.1) Law 1980 of Lagos State throughout the trial.*

20 7. *By virtue of the provisions of Section 2 of the Criminal Code (Amendment No.1) Law, 1980 of Lagos State, the trial court has no jurisdiction to try, convict and sentence the appellant under the provisions of Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Decree, 1970.*

25 (2) *The learned trial Judge and the Court of Appeal erred in law by their failure to hold that the contradictions in the testimony of the prosecution witnesses were fatal to the prosecution's case and that no conviction can be based on it.*

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PARTICULARS OF ERROR

35 1. *P.W.3 in his evidence in chief and during cross examination said " Along Burma Road, we saw two armed men robbing a taxi driver. As we approached the scene, the two armed men look to their heels I did see robbery taking place that night."*

P.W.2 in his own testimony said "in the course of patrol along Burma Road at about 1950 hours, I heard someone shout for help and ordered the police car to stop. At this time I saw two men running in different directions.

"It could be seen that while P.W.2, an Inspector of Police agreed that the robbery had been completed before their arrival, P.W.3, a police Constable said he actually saw the robbery taking place.

2. The learned trial Judge in his judgment did not say that he believed the evidence of P.W.2, P.W.3 and P.W.A, thereby convicting the appellant on the evidence of P.W. 1 alone."

In this brief of argument for the appellant, Chief Akinyosoye, of counsel, formulated the following issues for determination.

(i) *"Was the appellant properly tried and convicted by the Court of Appeal pursuant to the provisions of Section 1 of the Robbery and Fire Arms (Special Provisions) Decree, 1970 when the same had been expressly repealed and made inapplicable in Lagos State by virtue of Section 2 of the Criminal Code (Amendment No.1) Law 1980 of Lagos State.*

(ii) *Whether the evidence led in this case sufficiently established the armed robbery charge preferred against the accused person notwithstanding that no charge of conspiracy was preferred against the accused.*

(iii) *The contradictions in the testimony of witnesses for the respondent was fatal. The court failed to resolve the serious conflicts in the testimonies of the prosecution witnesses as to what exactly took place and that on the evidence before the court the case of armed robbery was made out."*

I shall first deal with the submission of learned counsel for the appellant on contradictions' in evidence of prosecution witnesses.

In this case, there was proof that the appellant was in the vehicle

driven by the P.W.1. There was proof that another colleague of his was with him in the vehicle. There was evidence he drew a dagger and stabbed the P.W.1 with it and his colleague took the money out of P.W.1's pocket. There was the evidence of his attempted escape on the arrival of Anti-Crime Police Patrol at the scene which led to his
5 being hotly pursued. There was further evidence that when Police caught up with him he stabbed one of them whereby the gun carried by the policeman dropped and he (appellant) picked it up. The pursuit continued nonetheless up to when he failed to scale a walled
10 fence and he was successfully tackled by the police and arrested. The trial court believed all this evidence. The minor discrepancies in sequence of occurrences are not fatal to the substance of the commission of the crime. The alleged contradictions in this case concerned the evidence of the policemen on patrol who arrived at the scene.
15 One said inter alia:

"Along Burma Road we saw two armed men robbing a taxi driver. As we approached the scene, the two armed men took to their heels I did not see robbery taking place that night."

Another one testified inter alia as follows:

20 *"In the course of our patrol along Burma Road at about 1950 hours. I heard someone shout for help and ordered the police car to stop. At this time I saw two men running in different directions."*

Learned counsel in the particulars to the ground curiously inserted:

25 *"It could be seen that while P.W.2 an Inspector agreed that robbery had been completed before their arrival, P.W.3, a police constable said he actually saw the robbery taking place"*

There are no contradictions if viewed as a whole with the
30 entire evidence before the court. At best they are mere discrepancies not touching upon the substance of the offence. Copious evidence of an attack with a dangerous weapon (dagger), infliction of injury

and pursuit thereafter by police that timeously arrived at the scene is clear evidence of the offence of robbery. The trial Judge believed the evidence.

Contradictions, to be fatal to prosecution's case, must go to substance of the case and not be of a minor nature. If every contradiction, however trivial to the overwhelming evidence before the court will vitiate a trial, human faculty to miss some minor details due to lapse of time and error in narration in order of sequence will make nearly all prosecutions fail. (See *Nasamu v. State* (1979) 6-9 SC. 153; *Queen v. Ekanem* (1960) SCNLR 39; (1960) 5 F.S.C. 14; *Kalu v. State* (1988) 4 NWLR (Pt.90) 503. 504); *Akpan v. State* (1991) 3 NWLR (Pt.182) 646; *Ogoala v. State* (1991) 2 NWLR (Pt.175) 509. Thus if the contradiction do not touch on a material point or substance of the case it will not vitiate a conviction once the evidence is clear and it is believed or preferred by the trial court. To my mind these alleged contradictions are not contradictions at all; rather the evidence being attacked concern the arrival of Police Patrol when the robbery was in operation. There was no doubt in what exactly took place that night and I find no reason to interfere with the decision of Court of Appeal not interfering with trial Judge's findings of fact.

The other issue of some importance is whether the appellant was rightly convicted in view of the law. Section 2 of Criminal Code (Amendment No.1) Law 1980 of Lagos State repealed the provisions of Section 1 Robbery and Fire arms (Special Provisions) Decree 1970. The appellant who was charged under Section 1 of 1970 was thus tried under a law no longer in existence. The repealing Law of 1980 repeated ad verbatim the offence of robbery as in the 1970 Decree but merely abolished the Special Tribunal. The counsel's reference to the case of *Adamu v. State* (1991) 4 NWLR (Pt.187) 530 is not apt as it is not on all fours with this case. This offence was committed in 1980 in the month of April, the Criminal Code (Amendment No.1) Law 1980 of Lagos State was made in September, 1980. The applicable law, it has been held in several cases in the court, is the law in operation at the time the event in question occurred. There is no indication in the complaint by this issue or by the ground of appeal

relating thereto that the appellant was prejudiced by the trial. He clearly understood the charge read to him, and pleaded to it. The wordings in the repealed statute and the new law as to definition of robbery are totally in pari materia and it is now too late to raise dust over this. The law as at the time of commission of the offence without
5 even the Law of September, 1980 remained the Robbery and Firearms (Special Provisions) Decree, 1970 subject to amendment presumed by the inconsistencies concerning trial by Special Tribunal rather than by normal Court 7 of the High Court of Lagos State. Without
10 the amendment, the Lagos High Court still had jurisdiction to try, the offence by virtue of the Constitution of the Federal Republic of Nigeria 1979.

On whether there was sufficient evidence to convict the appellant, counsel for the appellant did not advance argument to convince me that the Court of Appeal was wrong to uphold the trial court's findings of fact. On several occasions, spanning several years, this court has held that it is not right for appellate court to interfere with the trial court's findings of fact unless such findings have been made on legally inadmissible evidence, or it is perverse or not based
20 on any evidence before court. The appellant has failed to convince this court that the findings of trial court affirmed by Court of Appeal falls into any of the aforementioned exceptional categories.

25 On the whole, I find no merit in this appeal. I therefore dismiss the appeal and uphold the conviction and sentence of the trial court affirmed by the Court of Appeal.

30 **UWAIS JSC**

I have had the advantage of reading in draft the judgment read by my learned brother, Belgore, J.S.C. For the reasons stated therein I too see no merit in the appeal. I hereby dismiss it and affirm
35 the decision of the Court of Appeal.

KARIBI-WHYTE JSC

I have read, before now, the judgment of my learned brother,

Belgore, J.S.C in this appeal. I agree with him entirely that the appeal lacks merit and ought to be dismissed.

The only point deserving attention, if only to restate what has been firmly held several times over in this court, is the contention that appellant ought not have been tried and convicted for an offence in a law which at the time of the trial, had been repealed. The facts are quite simple and short. They are that appellant was on the 22nd January, 1981 charged with another now at large, before Okuribido, J. of the High Court of Lagos State that on the 2nd April, 1980 being armed with an offence, namely a dagger, they robbed P.W.I of the sum of N50; contrary to Section 1(2) of the Robbery and Firearms (Special Provisions) Decree No.47 of 1970. Thus the offence was committed on the 2nd April, 1980.

The contention of learned counsel to the appellant was that since Section.2 of the Criminal Code (Amendment No.1) Law 1980 of Lagos State amended Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Decree No.47 of 1970, appellant was tried and convicted on a non-existent law. The trial, it was submitted, was therefore a nullity. It was argued that since the amendment to the law was made before the trial of the appellant, he should have been tried under the law as amended, instead of the law as it was before the amendment. Learned counsel cited the cases of *Ogbomor v. State* (1985) 1 NWLR (Pt.2) 223, 333; *Unuakhoni v. State* (1985) 3 NWLR (Pt.12) 364; *Alao v. C.O.P.* (1987) 4 NWLR (Pt.64) 199; *Abodundu v. Queen* (1959) SCNLR 162; (1959)4 FSC 70. It was submitted that as at 29th September, 1980, the Robbery and Firearms (Special Provisions) Decree No.47 of 1970 was a State Law as declared by this court in *Emelogu v. The State* (1988) 2 NWLR (Pt.78) 524 and the Court of Appeal in *Obada v. Gov. of Kwara State* (1990) 6 NWLR (Pt.157) 482.

Citing and relying on *Johnson v. The State* (1981) 2 SC.29, learned counsel submitted that although rights which have vested are not affected by repealing of the law creating the right, unless there is a contrary intention in the repealing law, in the instant case, there is a contrary intention in Section 2 of the Criminal Code (Amend-

ment No.1) Law 1980 of Lagos State which provides that:-

"As from the commencement of this law, section 1, 2, 5, 9, 10 and 11 of the Robbery and Firearms (Special Provisions) Decree No.47 of 1970 shall no longer apply in Lagos State of Nigeria.

5 "The issue is whether appellant was charged with, tried and convicted on the relevant law applicable to the offence committed by him. My answer is clearly in the affirmative.

10 It is a cardinal principle of our concept of criminality, and which is protected by our Constitution, that a person can only be charged with and convicted for an offence recognised by the law and in existence at the time the act alleged was committed - See S.33(8) of the Constitution 1979. This is the hallowed and sacred principle of
15 legality. It is because of its importance and high public policy that the legislative jurisdiction of the legislature is also excluded from having retrospective effect in relation to any criminal offence whatsoever. See S.4 (9) Constitution 1979. There is no doubt, and this is not disputed, that the Robbery and Firearms (Special Provisions) Decree
20 No.47 of 1970 which came into force on the 27th August, 1970 applied throughout the country by virtue of S.1 of Decree No.1 of 1986 and the Decree itself. The Decree No.47 of 1970 having been promulgated, covered the entire field, and expressly repealed all pre-
25 existing laws on the subject. Hence, as from 27th August, 1970, it was the only law applicable with respect to offences of armed robbery.

The return to civilian rule on the 1st Oct. 1979 introduced
30 constitutional changes and a new structure of the exercise of legislative jurisdiction with respect to the subject matter in the Constitution. And in order to enable and facilitate a smooth change over from the Military to constitutional democracy, Decree No.105 of 1979, namely the Constitution (Certain Consequential Repeals, etc.) Decree, 1979
35 and the express provisions of the 1979 Constitution were made. Decree 105 of 1979 listed in its schedule laws to be repealed and those to be modified.

Section 274 of the Constitution provided in sub-section (1)(a)(b), as follows:-

"(1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be:-

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws."

(b) X X X X

The Constitution went further to define "existing laws" in Section 274(4) (b) as follows:-

"existing law" means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date.

Existing laws therefore are those which survived the amendments of Decree No, 105 of 1979.

Thus all subject matters in the legislative list of the Constitution within the competence of the National Assembly shall be deemed to be Acts, and those within the competence of the House of Assembly of a state shall be deemed laws.

Our constitutional policy of enumerated subject matters has left the exercise of legislative powers in respect of residual matters to the State Legislature. Accordingly the Criminal Code and the control of armed robbery fell properly within the legislative competence of the State Houses of Assembly. Hence as from Oct. 1, 1979, the Robbery and Firearms (Special Provisions) Decree No. 47 of 1970, operated, with necessary modifications, as a law of the State. See *Emelogu v. State* (1988) 2 NWLR (Pt.78) 524.

This was the position of the law on the 2nd April, 1980 till the

enactment of the Criminal Code (Amendment) Law 1980 which came into force on the 27th September, 1980. Thus the applicable law on the 2nd April, 1980 when the offence was committed was the Robbery and Firearms (Special Provisions) Decree No.47 of 1970 as amended by Section 274(1)(b) of the Constitution 1979. See *Emelogu v. State* (1988) 2 NWLR (Pt.78) 524.

Appellant was charged before the High Court on the 22nd January, 1981. Learned counsel has therefore argued that the law applicable is the law as on the 22nd January, 1981 when he was charged. On the basis of this contention the Criminal Code (Amendment) Law, 1980 of Lagos State which came into force on the 27th September, 1980 will be the applicable law.

The law is well settled that the applicable law is the law in force at the time the offence was committed- see Section 33(8) Constitution 1979, s.4(9) Constitution 1979, *Alao v. Akano* (1988) 1 NWLR (Pt.71) 431; *Utih v. Onoyiwe* (1991) 1 NWLR (Pt.166) 166, and several decided cases. As on 2nd April, 1980 when the offence was committed, the applicable law was the Robbery and Firearms (Special Provisions) Decree No.47 of 1970 as amended.

The Criminal Code (Amendment No.1) Law 1980 of Lagos State which came into force on the 29/9/80 not being retrospective cannot be the applicable law as on 2nd April 1980 as was being contended by learned counsel to the appellant. See S.6(1) of the Interpretation Act No.1 of 1964, *Johnson v. The State* (1981) 2 S.C. 29. Robbery and Firearms (Special Provisions) Decree No. 47 of 1970 falls within the legislative competence of the State House of Assembly, The appellant was therefore charged with tried and convicted for an offence under an existing law. The Criminal Code (Amendment No.1) Law 1980 of Lagos State did not have and could not have had a retrospective operation. Learned counsel was clearly in error in his contention.

I finally consider the submission that the conviction was void

because the learned Judge pronounced sentence in the words of the unamended and unmodified provision of the Robbery and Firearms (Special Provisions) Decree No.47 of 1970. It was accordingly submitted that the appellant should be acquitted and discharged.

It is conceded that after the date of 30th September, 1979 and when the Constitution of 1979 came into force. The learned trial judge had no legal right to pronounce sentence as before the 1st October, 1979. Under the new law, it is the Governor, and not the trial Judge who can specify or prescribe the mode of the execution of the death sentence - See Ikem v. State (1985) 1 NWLR (Pt.2) 378; 5 Okobi v. State (1984) 7 S.C. 62.

But that error is not sufficient to invalidate and nullify a trial properly conducted with requisite jurisdiction. Besides, there is a clear distinction between conviction and sentence. A conviction is not to be nullified merely because the wrong sentence was imposed. This court has held in Obidiozo v. State (1987) 4 NWLR (Pt.67) 748, that an error in the imposition of the wrong sentence will not "..... *ipso facto render the whole proceedings including conviction and sentence void.*" 10 15

For the reasons I have given above and the fuller reasons in the judgment of my learned brother, Belgore, J.S.C I hereby dismiss the appeal. 20

OLATAWURA JSC

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I had a preview of the judgment just delivered by my learned brother. Belgore, J.S.C. I agree with his reasoning and conclusions. In the issues raised by the appellant, it appears that there is a misconception on the part of the learned counsel about the weapon used by the appellant. In the appellant's brief the learned counsel said:- 30

"The weapon in the instant case is a 'dagger', apparently being held by the accused, the dagger must be so 'small' that the appellant concealed it in his dress that the respondent did not notice it until they were asked to disembark. It is noteworthy as well that the occupation of the appellant is carpentry and he is from Gonboro, Maiduguri where people carried 'knives' in defence of themselves or their animals but not for armed robbery. He cannot by any stretch of imagi- 35

nation be regarded as a professional armed robber who set out to rob people."

The above passage ignores completely the evidence of the prosecution witnesses that the appellant stabbed PW,1 -Isiaka Akano and the policemen. This piece of evidence was believed by the learned trial Judge. Besides, the appellant was not charged with being in possession of the dagger simpliciter. A fanner is allowed to carry his cutlass, a butcher is allowed to carry his knife, but where the cutlass or the knife is put into unlawful use e.g. stabbing with the intention to facilitate the commission of a crime, the weapon therefore becomes an offensive weapon. It is the use made of the weapon and the manner it is used that qualifies it to be an offensive weapon. The appellant's defence was a complete denial. He said he used his shoe to fight those who attacked him. The defence was rightly rejected.

The appellant's counsel also tried to distinguish between direct participation in a crime by an accused and a case where another person was alleged to have committed the offence. This distinction ignores the provision of Section 7(c) of the Criminal Code Law, Laws of Lagos State. In the assessment of the evidence before him the learned trial Judge said:-

"I prefer and accept the evidence of the PW.1 that when he asked the accused and his partner at large to get out of his taxi after the accused had paid him the fare the accused drew the dagger exhibit A and the P.W.1 held his hand. I believe also that during the struggle between them the man at large picked the N50.00 in the P.W.1's breast pocket. I have no doubt that the accused and the man at large acted in concert."

This finding is borne out by the evidence before the court. See Iyaro v. State (1988) 1 NWLR (Pt.69) 256 S.C

On the whole and for the fuller reasons given by Belgore, J.S.C. I will dismiss this appeal and affirm the conviction and sentence.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother, Belgore, J.S.C. just read. I agree with his conclusion and the reasonings leading thereto. I only need to add a few words of my own. As the law in force at the time of the commission of the offence by the appellant was the Robbery and Firearms (Special Provisions) Decree 1970, the appellant was rightly charged under the Decree notwithstanding that at the time of his arraignment in court the Decree had been repealed by the Criminal Code (Amendment No. 1) Law of Lagos State - See Section 6(1) of the Interpretation Law, Cap 57, Laws of Lagos State; *R. v. Tuke* (1961) All NLR 270, (1961) 1 SCNLR 357; *R. v. Bukar* (1961) All NLR 646; (1961) 2 SCNLR 300; *Okafor v. Onianwa* (1964) 1 All NLR 348. It is in evidence that the offence was committed on 2nd April, 1980 and the Decree was only repealed on 27th September, 1980. Since it is a matter of substantive law rather than procedural law, it is under the law in force at the time the offence was allegedly committed that an accused could be charged. At the time of arraignment it is the procedural law in force that would apply. And that is exactly what happened in this case. There is, therefore, no merit in the additional ground 1.

My learned brother has dealt with the other issues raised in the appeal. I need not go over them again. Suffice it to say that I too dismiss this appeal and affirm the conviction for robbery contrary to Section 1 (2)(a) of the Robbery and Firearms (Special Provisions) Decree, 1970 and sentence of death passed on the appellant by the trial court and affirmed by the Court of Appeal.