

SUPREME COURT OF NIGERIA
23RD APRIL, 1999. SC. 47/1997
CORAM:- A. B. WALI, I. L. KUTIGI, A. I. IGUH,
S. O. UWAIFO, E. O. AYoola, JJSC

PELE OGUNYE & 4 ORS.	APPELLANTS
V.		
THE STATE	RESPONDENT

***APPEALS** - Evaluation of evidence - Findings - That the four appellants participated in the crime - There can be no reason to interfere with such findings - Since they are fully supported by abundant evidence.*

***CRIMINAL PROCEDURE** - Arraignment - Essential requirements - That must be satisfied to make for a valid arraignment.*

***CRIMINAL PROCEDURE** - Arraignment - Interpretation of the charge - To the appellants - In the absence of contrary evidence - It will be assumed that the correct procedure was adopted - By the trial court.*

***CRIMINAL PROCEDURE** - Arraignment - Trial Court - Requirement that it be satisfied with the explanation of the charge - Before the accused persons plead thereto - The test with regard to the requirement - Is subjective and not objective.*

***CRIMINAL PROCEDURE** - Arraignment - Presumption of regularity - Under s. 150(1) of the Evidence Act - Is fully applicable in the present case - Where the arraignment was carried out in a manner - Which was substantially regular.*

***COURTS** - Official language - Of the superior courts of record throughout Nigeria - Is English - And the onus is on one who asserts a breach - Of this notorious age-long procedural practice - To prove it.*

EVIDENCE - Admissibility - Statement of an accused - Where it is challenged by the defence - On the ground that the accused did not make it at all - Such an objection does not go to the admissibility of the statement.

EVIDENCE - Evaluation of evidence - Statements of accused - Failure of the trial judge to make a finding - On the issue of whether or not the statements were made by the accused - Is erroneous.

EVIDENCE - Evaluation of evidence - Findings - That the four appellants participated in the crime - There can be no reason to interfere with such findings - Since they are fully supported by abundant evidence.

EVIDENCE - The presumption of regularity - Under s. 150(1) of the Evidence Act - Is fully applicable in the present case - Where the arraignment was carried out in a manner - Which was substantially regular.

JUDGMENTS - Conviction - Based on confessional statements - Where the trial judge failed to make a specific finding - As to whether or not the confessions were actually made by the accused - Is a gross misdirection.

JUDGMENTS - Evaluation of evidence - Findings - That the four appellants participated in the crime - There can be no reason to interfere with such findings - Since they are fully supported by abundant evidence.

FACTS

The appellants along with two others were on the 1st day of March, 1984 jointly arraigned before the High Court of Lagos, holden at Ikeja, charged in court one with the offence of conspiracy to commit armed robbery contrary to section 403A of the Criminal Code Law, Cap. 31, Laws of Lagos State, 1973 and in count two with armed robbery contrary to section 402 of the said law. Each of the accused person pleaded not guilty to the charge. The 6th accused person, Yerima Ibrahim died in the course of trial and the case against him was consequently terminated.

The substance of the case was that in the night of the 8th of September 1982, the accused persons, along with others now at large and armed with dangerous weapons invaded and violently broke into the walled premises of the complainant, Churchgate Nigeria Limited at Matori, Mushin, Lagos. They attacked and stabbed one of the security men they met on the premises and tied up two of them with ropes. Thereafter the accused persons proceeded to cart away the complainant's bales of stockfish when they were surrounded by the police. The police arrested 5 members of the gang on the spot while some of the robbers managed to escape by jumping over the wall fence of the premises. The 1st, 2nd, 3rd and 4th accused persons were among the five members of the gang that were arrested on the spot of the crime by the police. The 5th, 6th, and 7th accused persons were subsequently arrested by the police on information received. The case for the defence was a total denial of the charge. Statements, some of which were confessional in nature, were taken from them and received in evidence at their trial. Each of the accused persons totally denied the charge. They variously denied making the confessional statements credited to them and maintained that they were neither at the scene of the crime nor were they arrested in the premises of the complainant.

The learned trial judge after a careful review of the evidence found the 7th accused person not guilty of the offences charged and accordingly acquitted and discharged him. The 1st, 2nd, 3rd, 4th and 5th accused persons were, however, convicted on both counts and were accordingly sentenced to death. Dissatisfied, the appellants filed an appeal against their convictions and sentences to the Court of Appeal, Lagos Division. That court unanimously allowed the appeal of the 5th appellant on count two but his appeal in respect of count one was dismissed and the sentenced passed on him was thereupon affirmed. The appeals of the 1st, 2nd, 3rd and 4th appellants were, however, dismissed and their convictions and sentences were accordingly affirmed. The appellants have now further appealed to the Supreme Court. In their respective briefs several issues were raised for determination.

ISSUES FOR DETERMINATION

"(i) Was the Court of Appeal right to have held that the trial court's evaluation of evidence was right and as such not prejudicial to the accused persons?

(ii) Was the Court of Appeal right to have adopted the approach B of the trial court in determining the issue of armed robbery before the issue of conspiracy and rely on its findings to infer conspiracy and to convict for conspiracy to commit armed robbery?

(iii) Has the prosecution discharged the onus on it to prove the C elements of the offences charged?

(iv) Would the court have found the accused guilty of some other offence or offences other than those for which they were charged if the court had properly evaluated the evidence adduced by the parties?"

"(i) Whether the 4th and 5th appellants had a fair hearing D when the charge was not read or explained to them to the satisfaction of the court.

(ii) Whether the 4th and 5th appellants had a fair hearing when the charge was read out in a language they did not understand.

(iii) Whether it was right to have relied on exhibits A and S in E relation to which a plea of non est factum had been made and in respect of which plea the trial court made no finding."

F **HELD** (Unanimously dismissing the appeals of the 1st - 4th appellants and allowing the appeal of the 5th appellant per lead judgment of **IGUH JSC**)

Arraignment - Essential requirements

G 1. It is thus clear that for a valid arraignment of an accused person, three essential requirements must be satisfied. These consist as follows:-

(i) The accused must be placed before the court unfettered unless the court shall see cause otherwise to order;

(ii) The charge or information shall be read over and explained to H the accused to the satisfaction of the court by the Registrar or other officer of the court; and

(iii) The accused shall then be called upon to plead thereto (Unless, of course, there exists any valid reason to do otherwise such as

objection to want of service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has in fact not been duly served therewith).

I need hardly add that the above requirements of the law are mandatory and not directory and must therefore be strictly complied with in all criminal trials. I may also add that they have been specifically provided to guarantee the fair trial of an accused person and to safeguard his interest at such a trial and failure to satisfy these requirements will render the whole trial incurably defective and null and void. See Sunday Kajubo v. The State (1988) 1 N.W.L.R. (part 73) 721 at 732, Samuel Erekanure v. The State³ (1993) 5 N.W.L.R. (part 294) 385, Onuoha Kalu v. The State (1998)⁴ 13 N.W.L.R. (part 583) 531, Azeez Okoro v. The State (1998)⁵ 14 N.W.L.R. (part 584) 181 etc. (p. 796 B)

Arraignment - The presumption of regularity

2. In this connection, attention ought to be drawn to the provisions of section 150(I) of the Evidence Act which state as follows:-

"When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with".

The arraignment of the 4th and 5th appellants was both a judicial and an official act. It was also carried out in a manner which was substantially regular. In my view, the well established maxim of law, omnia prae-sumuntur rite et solemniter esse acta donec probetur in contrarium upon which ground it will be presumed that judicial and official acts have been done rightly and regularly until the contrary is proved seems to me fully applicable in the present case. See too Peter Locknan and Another v. The State (1972) 5 S. C. 22 (p. 798 G)

³ Samuel Erekanure v. The State is reported in (1993) 6 KLR 180

⁴ Onuoha Kalu v. The State is reported in (1998) 12 KLR (pt. 74) 2739

⁵ Azeez Okoro v. The State is reported in (1998) 12 KLR (pt 74) 2837

Arraignment - Trial court

3. In as much as I fully subscribe to the view that it is good practice, and indeed desirable, that a trial court specifically records that a charge was read over and explained to an accused person to its satisfaction before he pleaded thereto, my understanding of the authorities is not that unless the court so expressly records, as now urged upon us by learned counsel for the 4th and 5th appellants, such an arraignment automatically becomes invalid and null and void. Without doubt, the law enjoins a trial court to be satisfied with the explanation of the charge to the accused person before he pleads thereto. I think, however, that the test with regard to this requirement is subjective and not objective. Clearly, where a trial Judge was not satisfied with the explanation of the charge to an accused person, it seems to me that he would have directed that the same be further explained to him before his plea would be taken. Nothing of the sort happened in the present case. What happened, on the contrary, was the adjournment of the case by the trial court on two hearing dates to enable the prosecution to engage an interpreter who would explain the charge to the appellants before they would plead thereto. There is absolutely nothing on record to suggest that the learned trial Judge was not satisfied with the explanation of the charge to the appellants. In my view the presumption of regularity which is clearly applicable in the present proceedings must dislodge the conjecture upon which learned counsel's submission hangs, particularly as a court of law cannot be asked to speculate on possibilities which are wholly unsupported by evidence. See The State v. Ibong Udo Okoko and Another (1964) 1 All N. L. R. 423, Iteshi Onwe v. The State (1975) 9-11 S. C. 23 at 31- 32 etc. (p. 799 B)

Courts - Official language

4. I cannot over-emphasize the fact and it is a matter of common knowledge and notoriety of which judicial notice ought now to be taken that the lingua franca in this country is English and that this is the official language employed in all proceedings before the superior courts of record throughout Nigeria. See Damina v. The State (1995) 8 N.W.L.R. (part

415) 513 at 540. All communications between the courts, of the one part, and counsel or litigants, of the other part, are always in the official language of the court, namely, English. It is only in case where litigants do not understand English that the court communicates with them in the English language but through the medium of a Registrar of court or an interpreter who understands both the language of the litigant as well as English. Where an illiterate litigant, accused person or witness speaks to the court in vernacular through a court interpreter, the proceedings are always conducted in the English language for the benefit of the presiding Judge, all learned counsel present, the court officials and general public in court. It seems to me that the onus is on one who asserts a breach of this notorious age-long procedural practice of the superior courts of record to establish the same. (p. 800 G)

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Arraignment - Interpretation of the charge

5. There can be no doubt that the record of the learned trial Judge on the question of arraignment complained of is not as comprehensive as it ought to be. It none-the-less conveys substantially clear picture of the course he adopted by the use of the Registrar of court to read over and explain the charge to the appellants in English and the sworn interpreter to interpret in Hausa the charge read in English by the Registrar to the appellants. The appellants were all represented by learned counsel all through the trial and there is no evidence that any of them raised any objection about any alleged lack of interpretation. In my view, learned counsel for the 4th and 5th appellants have been unable to establish any irregularity on the part of the trial court, on the arraignment of the appellants. I think this court, in the absence of contrary evidence, is entitled to assume that the correct procedure was adopted by the trial court on the issue of the interpretation of the charge to the appellants. It is my candid view that any other interpretation of this part of the proceedings in issue will be to hold that even the court itself was excluded from its own proceedings together with the various learned counsel that appeared for the accused persons at the trial. I therefore find myself unable to accept the submission of learned counsel for the 4th appellant that the charge

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was never read out in English to the 4th appellant at the time of his arraignment. Issue 2 is accordingly resolved against the 4th appellant. (p. 802 F)

B *Evidence - Admissibility*

6. It is evident that the 5th appellant at the time Exhibits A and S were tendered at the trial disowned the entire statements, claiming that he never made them at all. The learned trial Judge nonetheless admitted the statement in evidence, holding that the issue of whether they were in fact made by the 5th appellants would be decided by the court at the conclusion of the proceedings. With respect, he was quite right. This is because where on the production of a confessional or any statement, it is challenged by the defence on the ground that the accused did not make it at all, such an objection does not go to the admissibility of the statement and the trial court is entitled to admit the confession in evidence as a statement the prosecution claims to have obtained from the accused person and thereafter to decide or find as a matter of fact whether or not the accused person in fact made the statement at the conclusion of the trial. See Godwin Ikpassa v. Bendel State (1981) 9 S.C. 7 at 28. The position will however be different where the admissibility of a statement is challenged on the ground that it was not made voluntarily. In the latter case it will be incumbent on the trial court to call upon the prosecution to establish the voluntariness of the statement by conducting a trial within a trial. See Joshua Adekanbi v. A.G. Western Nigeria (1966) 1 All N.L.R. 47 Paul Ashake v. The State (1968) 2 All N.L.R. 198, Ogoala v. The State (1991) 2 N.W.L.R. (part 175) 509. R. v. Omokoro 7 W.A.C.A. 146. (p. 804 E)

Evidence - Evaluation of Evidence

7. The learned trial Judge was quite right in the present case to have admitted Exhibits A and S in evidence. He was however in gross error when he failed to consider and to make a definite finding on the issue of whether or not the two statements were made by the 5th appellant. The law is that no matter how worthless the defence set up by an accused

person at his trial may be, the trial court still has a duty to consider them dispassionately before dismissing them. See Onuoha v. The State (1988) 3 N.W.L.R. (Part 83) 460, R. v. Barimah 11 W.A.C.A. 49, Agyuluwa v. Commissioner of Police (1961) All N.L.R. (Part 4) 850. (p. 805 C)

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Judgments - Conviction

8. With the greatest respect to the learned trial Judge, it was nothing short of a gross misdirection to have relied on Exhibits A and S in convicting the 5th appellant without making a specific finding as to whether or not these confessions were in fact made by him. It was equally erroneous on the part of the court below to have relied on the contents of such unproved statements in affirming the conviction of the 5th appellant. As I am in no position to say whether both courts below would have convicted the 5th appellant had they properly directed themselves on the issue here-in-before set out, it is my view that the conviction of the 5th appellant on the charge of conspiracy to commit armed robbery contrary to section 403A of the Criminal Code Law, Cap. 31, Laws of Lagos State, 1973 should not be allowed to stand. (p. 807 D)

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Appeals - Evaluation of evidence

9. The prosecution's case against the 1st, 2nd, 3rd and 4th appellants appeals straight forward and clear and may conveniently be considered together. This has already been fully set out earlier on in this judgment. It suffices to state that having appraised the totality of the evidence adduced before the court together with the confessional statements of the appellants, the learned trial Judge was satisfied that all four appellants participated in the hatching, scheming and execution of the grand design to rob Churchgate Nigeria Limited of twenty bales of stockfish valued at N8,800.00 in the night of the 8th September, 1982 at Matori, Mushin. Without doubt, the trial court found the four appellants' robbery operation to amount to nothing short of the ancient Roman Furtum manifestum as they were caught red-handed and arrested on the spot during their operation. The above findings, apart from those involving the 5th appellant, are fully supported by abundant evidence on record and were af-

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firmed by the court below. I have myself closely examined them against all the relevant evidence before the court and can find no reason to interfere with them. Issues 1-4 of the 1st - 3rd appellants' brief of argument are accordingly resolved in favour of the respondent. (pp. 807 H/810 A)

B
NOTABLE POINT OF INTEREST
IGUH JSC

1. Need to properly formulate issues for determination

In this regard, it cannot be overemphasized that issues for resolution by an appellate court ought at all times to be carefully and painstakingly worded and stated with maximum clarity with a view to projecting in a lucid and no mistaken terms, the point of law intended to be argued. In particular, the main purpose of a respondent's brief is to demonstrate, in appropriate cases, that no error was committed by the court below in the judgment and to defend, within the limits of the law, the decision appealed against. This, a respondent cannot effectively do, if the issues he has formulated are based or grounded on a misleading premise or facts which in no way bring into focus the legal principle sought to be argued. (p. 792 G)

REPRESENTATION

A. Olowoyeye Esq. for the 1st - 3rd appellants.
 A. Akinrele Esq. for the 4th - 5th appellants.
 N. N. Mofunanya (Mrs.) D.P.P. Lagos State for the respondent.

CASES REFERRED TO

Erekanure v. The state (1993) 5 N.W.L.R. (Part 294) 385
 Effiom v. The State (1995) 1 N.W.L.R. (Part 373) 507
 Ewe v. The State (1992) 6 N.W.L.R. (Part 246) 144
 Adekanbi v. A.G. Wester Nigeria (1966) 1 All N.L.R. 47
 Ashake v. The State (1968) 2 All N.L.R. 198
 Ogoala v. The State (1991) 2 N.W.L.R. (part 175) 509
 R. v. Omokoro 7 W.A.C.A. 146.
 The State v. Okoko (1964) 1 All N. L. R. 423

Onwe v. The State (1975) 9-11 S. C. 23 at 31- 32 etc.

Damina v. The State (1995) 8 N.W.L.R. (part 415) 513 at 540

STATUTES & RULES REFERRED TO

Criminal Code Law. Cap 31, Laws of Lagos State, 1973; ss. 402 and 403A B

Criminal Procedure Law of Lagos State Cap. 32; s. 215

Constitution of the Federal Republic of Nigeria, 1979; ss. 33

Evidence Act, s.150 (1)

C

LEAD JUDGMENT BY IGUH JSC

The appellants, Pele Ogunye, Ayinde Liwo, Fabian Muoka, Kamsela Kilado and Mohammed Hassan along with two others were on the 1st day of March, 1984 jointly arraigned before the High Court of Lagos State, holden at Ikeja, charged in count one with the offence of conspiracy to commit armed robbery contrary to section 403A of the Criminal Code Law, Cap. 31, Laws of Lagos State, 1973 and in count two with armed robbery contrary to section 402 of the said Law. D

The particulars of the offences charged are as follows:-

1st Count

Particulars of Offence

"1. Pele Ogunye (m) 2. Ayinde Liwo (m)

3. Fibian Muoka (m) 4. Kamsela Kilado (m)

5. Mohammed Hassan (m) 6. Yerima Ibrahim (m)

7. Rashidi Asani (m) on or about the 9th day of September, 1982 at Matori, Mushin, in the Ikeja Judicial Division, conspired together and with other persons unknown to commit armed robbery." G

2nd Count

Particulars of Offence

"1. Pele Ogunye (m) 2. Ayinde Liwo (m)

3. Fibian Muoka (m) 4. Kamsela Kilado (m)

5. Mohammed Hassan (m) 6. Yerima Ibrahim (m)

and 7. Rashidi Asani (m) on or about the 9th September, 1982 at Matori Mushin, in the Ikeja Judicial Division, being armed with of-

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fensive weapons to wit; machetes, iron rods e.t.c robbed Rabiū Jimoh of twenty bales of stockfish valued at N8,800.00 property of Churchgate Nigeria Limited."

Each of the accused persons pleaded not guilty to the charge and the prosecution called a total of 15 witnesses at the trial. The 6th accused person, Yerima Ibrahim, in the course of the trial, was reported dead on the 28th May, 1985. The case against him was thereupon terminated but the rest of the accused persons gave evidence in their own defence but called no witnesses.

The substance of the case as presented by the prosecution is clear and straight forward. This is that in the night of the 8th September, 1985, the accused person, along with others now at large and armed with dangerous weapons which included machetes and cutlasses invaded and violently broke into the walled premises of the complainant, Churchgate Nigeria Limited at Matori, Mushin, Lagos. According to P.W.2, Rabiū Jimoh, one of the security men on duty in the premises of the complainant, he heard the sound of iron being cut or sawn. This was at night in the early hours of the 9th September, 1985. He came out from the office where he was and observed that the front iron gate of their premises had been cut and forced open. He saw a group of men rushing into their premises. He suspected that they were robbers and, consequently, he raised an alarm. He was shouting "ole, ole", meaning "thief, thief" and calling for help. These men then attacked and stabbed him with a knife at his upper left arm. Members of the gang were armed with daggers, machetes, cutlasses, iron cutters and diggers. His colleague, Mumuni, who at all material times was on night guard and himself were overpowered, their hands were tied behind their backs with ropes and they were savagely beaten up by the robbers.

These men next drove the two Bedford lorries they came with into the complainant's premises and stationed a third vehicle outside the gate of the compound. Thereafter, the robbers commence to load the complainant's bales of stockfish which were stored inside the warehouse into their vehicle.

As this operation went on, the police arrived at the scene and

ordered the gang to surrender themselves or be shot dead. Apparently, one of the security men called Yakubu had on sighting the robbers escaped and ran to report the robbery to a team of policemen on duty at the nearby Ladipo police check point. Some of the robbers managed to escape by jumping over the wall fence of the premises. The police were B however able to arrest 5 members of the gang on the spot inside the premises. P.W.2 and Mumuni were subsequently rescued and untied by the police. They were taken to the hospital by the police for medical treatment. The 1st, 2nd, 3rd and 4th accused persons were among the C five members of the gang that were arrested by the police in the warehouse of Churchgate Nigeria Limited in the night of the incident. The 5th, 6th and 7th accused persons were subsequently arrested by the police on information received. All seven suspects were arraigned before the court. D

The case for the defence was a total denial of the charge. Statements, some of which were confessional in nature, were taken from them and received in evidence at their trial. Each of the accused persons denied being participes criminis in the commission of the offences or E either of them. They variously denied making the confessional statements credited to them and maintained that they were neither at the scene of crime nor were they arrested in the premises of Churchgate Nigeria Limited as testified to by the prosecution. F

The learned trial Judge, Obadina, J. after a careful and exhaustive review of the evidence on the 19th day of December, 1985 found the 7th accused person not guilty of the offences charged and accordingly acquitted and discharged him. The 1st, 2nd, 3rd, 4th and 5th G accused persons were, however, convicted on both counts of the information and were accordingly sentenced to death by hanging as prescribed by law. In his findings, the learned trial Judge accepted the evidence of the prosecution witnesses against the convicted accused persons. He was satisfied that they were not only present at the scene but that they H were participes criminis in the commission of the crime for which they were charged. He rejected their plea of alibi and dismissed their claims of non-participation in the commission of the offences in issue.

Dissatisfied with this judgment of the trial court, the appellants filed an appeal against their convictions and sentences to the Court of Appeal, Lagos Division. On the 26th July, 1995, the Court of Appeal unanimously allowed the appeal of the 5th appellant on count two but his appeal in respect of count one was dismissed and the sentence passed on him was thereupon affirmed. The appeal lodged by the 1st, 2nd, 3rd and 4th appellants were, however, dismissed and their convictions and sentences were accordingly affirmed. It is against this judgment of Court of Appeal that the 1st, 2nd, 3rd, 4th and 5th appellants, have now appealed to this court.

Both the appellants and the respondent filed and exchanged their respective written briefs of argument. In the 1st, 2nd and 3rd appellant's brief of argument, the undermentioned issues were set out for the determination of this court, namely:-

- "(i) Was the Court of Appeal right to have held that the trial court's evaluation of evidence was right and as such not prejudicial to the accused persons?
- (ii) Was the Court of Appeal right to have adopted the approach of the trial court in determining the issue of armed robbery before the issue of conspiracy and rely on its findings to infer conspiracy and to convict for conspiracy to commit armed robbery?
- (iii) Has the prosecution discharged the onus on it to prove the elements of the offences charged?
- (iv) Would the court have found the accused guilty of some other offence or offences other than those for which they were charged if the court had properly evaluated the evidence adduced by the parties?"

The 4th appellant, for his own part identified two issues in his brief of argument for resolution. These are as follows:-

" Issue I

Whether the 4th appellant had a fair hearing in view of the fact that the charge was not read or explained to him to the satisfaction of the court.

Issue II

Whether the 4th appellant had a fair hearing in view of the fact

that a portion of the trial was not held in public."

There is next the written brief of argument of the 5th appellant in which four issues were set out as germane to the resolution of this appeal. These issues are framed thus:-

"I. *Whether the 5th appellant had a fair hearing in view of the fact that the charge against him was read out in Hausa, a language he clearly did not understand.*

2. *Whether the 5th appellant had a fair hearing in view of the fact that the charge against him was not read and explained to him to the satisfaction of the court.*

3. *Whether the 5th appellant had a fair hearing in view of the fact that a portion of the trial was not held in public.*

4. *Whether it was right for the Court of Appeal to have affirmed the decision of trial court convicting the appellant for the offence of conspiracy to commit armed robbery when the trial judge relied on Exhibits "A" and "S", extra judicial statements purported to have been made by the 5th appellant in relation to which he pleaded non est factum and in respect of which plea the learned trial judge made no finding."*

The respondent, on the other hand, submitted three issues in its brief of argument in respect of the 4th and 5th appellants' appeal for the determination of this court. These issues are framed thus:-

"(i) *Whether the 4th and 5th appellants had a fair hearing when the charge was not read or explained to them to the satisfaction of the court.*

(ii) *Whether the 4th and 5th appellants had a fair hearing when the charge was read out in a language they did not understand.*

(iii) *Whether it was right to have relied on exhibits A and S in relation to which a plea of non est factum had been made and in respect of which plea the trial court made no finding."*

It is evident, from a careful study of the first two issues set out for resolution on behalf of the respondent in respect of the appeal of the 4th and 5th appellants, that not much attention was devoted in their formulation. This is because issue one as framed clearly suggests that the respondent conceded that the charge was not read and explained to the

appellants to the satisfaction of the court whereas it is plain from both the written and oral arguments of learned counsel who appeared on its behalf that the said charge was in fact read over and interpreted to both appellants in Hausa language which they understood to the satisfaction of the court. There is next issue two which, again as framed, unmistakably conveys the impression that the respondent did concede that the charge was read out to both appellants in a language they did not understand. But the written and oral submissions of learned Director of Public Prosecutions on behalf of the respondent was to the effect that the charge was indeed read out and explained to both appellants in the English language and interpreted to them in Hausa and that they fully understood the same before they pleaded thereto.

It is beyond dispute that if, indeed, there was a concession on behalf of the respondent that the charge was not read over or explained to the appellants or that although it was read over to both appellants, this was a language they did not understand before they pleaded thereto, then, obviously, there would have been a most flagrant breach of both the mandatory provisions of section 215 of the Criminal Procedure Act and section 33(6)(a) of the Constitution of the Federal Republic of Nigeria, 1979. Such breach, without doubt, would render their arraignment invalid and erroneous on point of law thus rendering their subsequent trial null and void and of no effect. See Sunday Kajubo v. The State (1988) 1 N.W.L.R. (Part 73) 721 at 731 and 737, Samuel Erekanure v. The state (1993) 5 N.W.L.R. (Part 294) 385, Edet Effiom v. The State (1995) 1 N.W.L.R. (Part 373) 507, Akpiri Ewe v. The State (1992) 6 N.W.L.R. (Part 246) 144 etc. From the arguments of learned Director of Public Prosecutions, Lagos state who appeared on behalf of the respondent in the appeal, however, it is clear that no such concessions alluded to above were intended to be made by the respondent.

In this regard, it cannot be overemphasised that issues for resolution by an appellate court ought at all times to be carefully and painstakingly worded and stated with maximum clarity with a view to projecting in a lucid and no mistaken terms, the point of law intended to be argued. In particular, the main purpose of a respondent's brief is to demonstrate,

in appropriate cases, that no error was committed by the court below in the judgment and to defend, within the limits of the law, the decision appealed against. This, a respondent cannot effectively do, if the issues he has formulated are based or grounded on a misleading premise or facts which in no way bring into focus the legal principle sought to be argued. It is however clear to me that issues raised on behalf of the 1st, 2nd and 3rd appellants, of the one part, and the 4th and 5th appellants, of the other part, in their respective briefs of argument amply cover those formulated by the respondent, as I understand them, and are, in my view, sufficient for the determination of this appeal. Accordingly I shall in this judgment confine myself to the issues raised in the briefs of argument of the 1st, 2nd and 3rd appellants, of the one part, and the 4th and 5th appellants, of the other part.

At the oral hearing of the appeal on the 28th January, 1999 learned counsel for the 1st - 3rd appellants, Mr. Olowoyeye, adopted his brief of argument and made oral submissions in amplification thereof. The thrust of his arguments, having regard to the issues raised, was that the prosecution failed to prove its case against the 1st - 3rd appellants beyond reasonable doubt, that the court below erroneously adopted the approach of the trial court by determining the substantive issue of armed robbery before considering the case of conspiracy preferred against the appellants and that a proper evaluation of the evidence would have disclosed alternative lesser offences for which the appellants ought to have been convicted instead of the more serious offence of armed robbery. Learned counsel urged the court to allow the appeals of the 1st, 2nd and 3rd appellants and acquit and discharge them accordingly.

Learned counsel for the 4th and 5th appellants, Adeomola Akinrele Esq. in his submissions relied on his brief of argument on behalf of his clients. He contended that the case against the 5th appellant was based almost entirely on his alleged confessional statements to the police, Exhibits A and S were repudiated at the trial. He pointed out that the learned trial Judge was in error when he failed to make a finding on whether or not the 5th appellant made those statements before he relied on them to convict him. He stressed that it was not clear what the view of the trial

Judge on the entire evidence against the 5th appellant would have been if he had considered the said statements, Exhibits A and S and was able to hold that they were in fact not made by him. Learned counsel pointed out that in the absence of Exhibits A and S, the only evidence which
 B connected the 5th appellant with armed robbery emanated from his co-accused, the 1st and 2nd appellants. He submitted however that it is quite clear from the judgment of the learned trial Judge that he would not have been willing in the circumstances of this case to convict the 5th
 C appellant on the incriminating evidence of his co-accused. It was his final submission that the arraignment of the 5th appellant was invalid as the charge, he claimed, was not read over and explained to him in a language he understood to the satisfaction of the court. He urged the court to allow the appeal of the 5th appellant and to acquit and discharge
 D him accordingly.

Learned counsel's arguments with regard to the 4th appellant centred mainly on the alleged invalidity of his arraignment. The submission was that the 4th appellant had no fair hearing as there was no indication that the charge was read over or explained to him to the satisfaction
 E of the court. Learned counsel buttressed his contention in this regard with the decisions in Sunday Kajubo v. The State (1988) 1 N.W.L.R. (part 73) 721 at 737, Ewe v. The State (1992) 6 N.W.L.R. (part 246) 147 at 154, Erekanure v. The State (1993) 5 N.W.L.R. (part 294) 385 and
 F Effiom v. The State (1995) 1 N.W.L.R. (part 373) 507 at 609. He conceded that although the charge was read over and explained to the 4th appellant, there was nothing to show that the trial Judge satisfied himself that the 4th appellant understood the same. He urged the court to declare
 G the whole trial null and void. He argued that the charge was never read out in English to the 4th appellant and that this, in effect, was tantamount to failure by the court to conduct the trial in public as prescribed under sections 33 (3) and 33 (1) (3) of the 1979 Constitution. In his view, the
 H 4th appellant was prevented from following the proceedings at the time the charge was read to him in Hausa. According to learned counsel, the charge, having been read to him only in Hausa without any translation in English, the proceedings at that particular stage amounted to no move

than a "secret trial" as the learned trial Judge, counsel present and all others in court who did not understand Hausa, would not know what was happening in court that moment. Learned counsel urged the court to allow the appeal of the 4th appellant and acquit and discharge him accordingly.

I think I ought to observe that the learned Director of Public Prosecutions, Lagos State at this stage applied for the leave of this court to make oral submissions in reply to the brief of argument jointly filed by the 1st, 2nd and 3rd appellants. This application was not opposed and was accordingly granted. In her subsequent submissions, learned counsel stressed that all the essential elements of the offences charged were proved before the trial court as required by law and affirmed by the Court of Appeal. She urged the court not to disturb the judgment of the court below. Learned counsel adopted the respondent's brief of argument in respect of the 4th and 5th appellants and submitted that the arraignment of the 4th and 5th appellants was in strict accordance with the provisions of section 215 of the Criminal Procedure Law, Cap. 32, Laws of Lagos State of Nigeria, 1973 and Section 33(6) (a) of the Constitution of the Federal Republic of Nigeria, 1979. She urged the court to dismiss the appeals.

I think it is convenient to dispose firstly of the issue of the validity of the arraignment of the 4th and 5th appellants as argued by Mr. Akinrele.

Section 215 of the Criminal Procedure Law of Lagos State Cap. 32 provides as follows:-

"The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order; and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith".

There is also the provision of section 33(6) (a) of the 1979 Con-

stitution which provides thus:-

"Every person who is charged with a criminal offence shall be entitled:-

*(a) to be informed promptly in the language that he understands
B and in detail of the nature of the offence"*

It is thus clear that for a valid arraignment of an accused person, three essential requirements must be satisfied. These consist as follows:-

**(i) The accused must be placed before the court unfettered
C unless the court shall see cause otherwise to order;**

(ii) The charge or information shall be read over and explained to the accused to the satisfaction of the court by the Registrar or other officer of the court; and

**(iii) The accused shall then be called upon to plead thereto
D (Unless, of course, there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and the court is satisfied
E that he has in fact not been duly served therewith).**

**I need hardly add that the above requirements of the law are mandatory and not directory and must therefore be strictly complied with in all criminal trials. I may also add that they have been
F specifically provided to guarantee the fair trial of an accused person and to safeguard his interest at such a trial and failure to satisfy these requirements will render the whole trial incurably defective and null and void. See Sunday Kajubo v. The State (1988) 1 N.W.L.R. (part 73) 721 at 732, Samuel Erekanure v. The State (1993) 5 N.W.L.R. (part 294) 385, Onuoha Kalu v. The State (1998) 13 N.W.L.R. (part 583) 531, Azeez Okoro v. The State (1998) 14 N.W.L.R. (part 584) 181 etc. I will now examine the arraignment of the 4th and 5th appellants in issue in this appeal.**

H All the accused persons were arraigned on the 1st day of March, 1984 before the trial court as follows:-

State vs. Pele Ogunye & ors.

Accused persons present.

Mrs. Olayinka (State Counsel) for the State.

Alhaji Amoda for the 1st, 2nd and 7th accused persons. Mrs. Igweonwu for 3rd and 6th accused persons. Mr. Jimmy Alara for the 4th and 5th accused persons. Court: Registrar please read and explain the charge to each of the accused persons and take their respective pleas.

Charge read and explained to all of them in Hausa-accused persons, it is interpreted by a sworn interpreter to 4th and 6th accused, they each pleaded as follows:-

COUNT 1

*1st accused - Not guilty. 2nd accused - Not guilty
3rd accused - Not guilty. 4th accused - Not guilty
5th accused - Not guilty. 6th accused - Not guilty
7th accused - Not guilty."*

It is apparent from the record of proceedings that the 4th appellant who had earlier on the 17th day of January, 1984 intimated the court that he only understood the Hausa language duly testified before the trial court in Hausa through a sworn interpreter. It is not in dispute that the charge was read over and explained and was further interpreted to him by the Registrar of court in Hausa language at his arraignment. What his learned counsel quarrelled with, if I may say with respect, is his speculation which is totally unsupported by any evidence, that the charge was not read over or explained to the 4th appellant to the satisfaction of the court. Learned counsel did however concede that the charge was read over and interpreted to the 4th appellant in Hausa language. But he contended that this was not done to the satisfaction of the court. His sole reason for arriving at this conjecture is that the learned trial Judge did not so expressly record.

He did not suggest, indeed he conceded before us, that he neither represented any of the appellants at their trial nor was he in court at the time of their arraignment.

In the case of the 5th appellant, it is apparent from the record of proceedings that he testified throughout his defence in perfect English. It is clear that the 5th appellant well understood and spoke the English language. It is against the above background that the arraignments of the

4th and 5th appellants must now be examined.

It is beyond dispute that the lingua franca of our superior courts of record, such as the High Court of Lagos State, is the English language. In the present case, when the appellants first appeared in court on the 17th January, 1984, the learned trial Judge directed the Registrar of court to

"read and explain the charge to each of the accused persons and take their respective pleas."

When the court was informed by the 4th and 6th accused persons that they only understood the Hausa language; and the 5th accused, Arabic, the court readily adjourned to enable the Registrar to secure the services of an appropriate interpreter. It was not until the 1st day of March, 1984 when an interpreter was secured that the accused persons were accordingly arraigned as aforesaid.

It is evident from the records that the charge was read over and explained to the 4th and 5th appellants in the language of the court which, without doubt, is English. Both appellants with their counsel, J. Alara Esq. were in court at the time of this arraignment. Neither of the appellants nor their learned counsel complained that they did not understand the charge read and explained to them in open court. In the case of the 4th appellant who did not understand the language of the court, the charge, as borne out from the records, was explained and interpreted to him in Hausa. In the case of the 5th appellant, he clearly understood and spoke the English language. As already observed, his testimony before the trial court throughout his defence was in good English. I may add that the need for interpretation hardly arises if an accused person, such as the 5th appellant, understands the language of the court which admittedly is English.

In this connection, attention ought to be drawn to the provisions of section 150(I) of the Evidence Act which state as follows:-

"When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with".

The arraignment of the 4th and 5th appellants was both a judicial

and an official act. It was also carried out in a manner which was substantially regular. In my view, the well established maxim of law, omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium upon which ground it will be presumed that judicial and official acts have been done rightly and regularly until the contrary is proved seems to me fully applicable in the present case. See too Peter Locknan and Another v. The State (1972) 5 S. C. 22 and James Edun and other v. I. G. of Police (1966) 1 All N. L. R. 17 at 21. In as much as I fully subscribe to the view that it is good practice, and indeed desirable, that a trial court specifically records that a charge was read over and explained to an accused person to its satisfaction before he pleaded thereto, my understanding of the authorities is not that unless the court so expressly records, as now urged upon us by learned counsel for the 4th and 5th appellants, such an arraignment automatically becomes invalid and null and void. Without doubt, the law enjoins a trial court to be satisfied with the explanation of the charge to the accused person before he pleads thereto. I think, however, that the test with regard to this requirement is subjective and not objective. Clearly, where a trial Judge was not satisfied with the explanation of the charge to an accused person, it seems to me that he would have directed that the same be further explained to him before his plea would be taken. Nothing of the sort happened in the present case. What happened, on the contrary, was the adjournment of the case by the trial court on two hearing dates to enable the prosecution to engage an interpreter who would explain the charge to the appellants before they would plead thereto. There is absolutely nothing on record to suggest that the learned trial Judge was not satisfied with the explanation of the charge to the appellants. In my view the presumption of regularity which is clearly applicable in the present proceedings must dislodge the conjecture upon which learned counsel's submission hangs, particularly as a court of law cannot be asked to speculate on possibilities which are wholly unsupported by evidence. See The State v. Ibong Udo Okoko and Another (1964) 1 All N. L. R.

423, Iteshi Onwe v. The State (1975) 9-11 S. C. 23 at 31- 32 etc.

What seems to me of importance is that a charge shall be read over and explained to the accused persons in the language they understand before they are called upon to plead thereto. This requirement was complied with in this case. I therefore hold that the arraignment of the 4th and 5th appellants was perfectly in order and valid.

The second issue, as framed, questions whether the 4th appellant had a fair hearing in view of the fact that "a portion of his trial" was said not to have been held "in public". I must, first of all, dispel the suggestion under issue 2 that any part of the 4th appellant's trial was conducted otherwise than in public. The point learned counsel appeared to be making is that although the charge was read over and explained to the 4th appellant in Hausa, there was no evidence to show that the charge was translated into English for the benefit of the trial Judge and others in court who did not understand Hausa. Learned counsel argued that to the extent that a part of the arraignment was not rendered in the language the court understood, it amounted to a "private" hearing and constituted a breach of section 33 (1)(3) of the 1979 Constitution which prescribes that proceedings of the court shall be held in public.

With profound respect to learned counsel, I find it difficult to accept his contention that the "charge was never read out in English" to the 4th appellant as he asserted under issue 2 of the respondents' brief of argument. Learned counsel, on his admission, conceded that he was not in court all through the trial of the 4th appellant. His submission in this regard was not therefore based on his personal knowledge but on yet another conjecture that the arraignment was only conducted in Hausa language but not in English. There is no iota of evidence from the records in support of this strange proposition and I find myself unable to accept the same as established.

I cannot over-emphasise the fact and it is a matter of common knowledge and notoriety of which judicial notice ought now to be taken that the lingua franca in this country is English and that this is the official language employed in all proceedings before the superior courts of record throughout Nigeria. See Damina v. The

State (1995) 8 N.W.L.R. (part 415) 513 at 540. All communications between the courts, of the one part, and counsel or litigants, of the other part, are always in the official language of the court, namely, English. It is only in case where litigants do not understand English that the court communicates with them in the English language but through the medium of a Registrar of court or an interpreter who understands both the language of the litigant as well as English. Where an illiterate litigant, accused person or witness speaks to the court in vernacular through a court interpreter, the proceedings are always conducted in the English language for the benefit of the presiding Judge, all learned counsel present, the court officials and general public in court. It seems to me that the onus is on one who asserts a breach of this notorious age-long procedural practice of the superior courts of record to establish the same.

In the present case, the trial court at the arraignment of the appellants directed the Registrar of court as follows:-

"Court: Registrar please read and explain the charge to each of the accused persons and take their respective pleas."

As I have repeatedly stressed, the language of the court is English. It is plain to me that the charge would have been read over and explained to the appellants in English language by the Registrar of court as directed. Thereafter, the same charge would be read over, explained and interpreted to the appellants in Hausa by a sworn interpreter before their respective pleas would be taken. This court procedure is a matter of common knowledge and notoriety and I conceive I am entitled to take judicial notice thereof.

A close study of the record of proceedings in the present case substantially shows that the above procedure would appear to have been adopted by the learned trial Judge. The emphasis that I desire to lay is that from the records, two officials were engaged at the arraignment of the appellants now in issue. They are the Court Registrar who was first directed to read and explain the charge, obviously in English and the sworn interpreter who did the subsequent interpretations. These two officials were specifically mentioned by the learned trial Judge in his

records above reproduced earlier on in this judgment. It seems to me that the issue under consideration is both an official and judicial act to which the protections afforded by section 150(1) of the Evidence Act and the maxim, omnia Preasumuntur rite solemniter esse acta donec probetur in contrarium are fully applicable with regard to the procedure adopted by the learned trial Judge in the absence of any proof to the contrary. See also Peter Locknan and Another v. The State (1972) 5 S.C. 22 and James Edun and others v. Inspector-General of Police (1966) 1 All N.L.R. 17 at 21. In the latter case, amendment of a charge was granted by the Chief Magistrate, Warri on the application of the prosecution. The record of court went thus:-

"Amendment granted. Amended charge read to accused persons and they plead not guilty."

The trial then proceeded and the appellants' convictions were affirmed by the High Court. One of the main issues argued on appeal to this court was that the record failed to show that each of the accused persons was called on to plead separately to the amended charge and that this irregularity was fatal to their conviction. Dismissing this submission, this court per Brett, J.S.C. stated thus:-

"We do not regard the first submission as well founded. It would have been better if the Chief Magistrate had written "each pleads not guilty" instead of "they plead not guilty", but they were represented by counsel, who took no objection to the course adopted, and as no attempt has been made to supplement the record by any further evidence of what took place, we think it may safely be assumed that the correct procedure was followed."

There can be no doubt that the record of the learned trial Judge on the question of arraignment complained of is not as comprehensive as it ought to be. It none- the-less conveys substantially clear picture of the course he adopted by the use of the Registrar of court to read over and explain the charge to the appellants in English and the sworn interpreter to interpret in Hausa the charge read in English by the Registrar to the appellants. The appellants were all represented by learned counsel all through the trial and there is no

evidence that any of them raised any objection about any alleged lack of interpretation. In my view, learned counsel for the 4th and 5th appellants have been unable to establish any irregularity on the part of the trial court, on the arraignment of the appellants. I think this court, in the absence of contrary evidence, is entitled to assume that the correct procedure was adopted by the trial court on the issue of the interpretation of the charge to the appellants. It is my candid view that any other interpretation of this part of the proceedings in issue will be to hold that even the court itself was excluded from its own proceedings together with the various learned counsel that appeared for the accused persons at the trial.

I therefore find myself unable to accept the submission of learned counsel for the 4th appellant that the charge was never read out in English to the 4th appellant at the time of his arraignment. Issue 2 is accordingly resolved against the 4th appellant.

Turning now to the 5th appellant, issues 1, 2 and 3 identified on his behalf have already been considered along with similar issues formulated on behalf have already been considered along with similar issues formulated on behalf of the 4th appellant and resolved against them. It is now left for me to consider issue 4 raised on behalf of the 5th appellant. This concerns the question whether the court below was right to have upheld the conviction of the 5th appellant on the basis of his alleged confessions in Exhibits "A" and "S" when there was no finding that those statements were infact made by him.

Exhibits A and S are alleged extra-judicial statements purportedly made by the 5th appellant to the Police in which, to some extent, it would appear he admitted his participation in the crime for which he was convicted. Both statements constituted the main evidence upon which he was convicted by the trial court, which conviction was affirmed by the court below.

Exhibits A and S were however disclaimed the 5th appellant when they were respectively tendered against him at the trial. In the case of Exhibit A, the court's record went thus:-

"..... This is the statement. Mrs. Olayinka, I seek to tender

it. Mr. Alara: I am objecting on the ground that the statement was not that of the 5th accused. The 5th accused said the signature is not his.

Court: The statement is admitted as Exhibit "A" and the issue as to whether it was made by the 5th accused would be decided by the court at the conclusion of the proceedings see R. vs. Igwe (1960) 5 F.S.C.55 and also Godwin Ikpasa vs. The State (1981) 9 S.C. 7 at 28 - 29."

In respect of Exhibit S, the record stated of follows:-

"This is the statement. Mrs. Giwa: - I seek to tender it. Mr. Alara: I am objecting because the 5th accused said he was not the person who signed the statement. The statement sought to be tendered does not belong to the 5th accused.

Court:- Since the accused denied the entire statement and the signature thereon the issue of voluntariness under which the statement can be rejected does not arise.

It is a clear retraction by the accused of the statement sought to be tendered.

In the circumstances, I hereby admit the statement under the rule in R. v. Igwe (1960) 5 F.S.C. 55 and Godwin Ikpasa vs. Bendel State (1981) 9 S.C. 7 at 28.

The statement is hereby admitted in evidence and marked Exhibit "S". "

It is evident that the 5th appellant at the time Exhibits A and S were tendered at the trial disowned the entire statements, claiming that he never made them at all. The learned trial Judge nonetheless admitted the statement in evidence, holding that the issue of whether they were in fact made by the 5th appellants would be decided by the court at the conclusion of the proceedings. With respect, he was quite right. This is because where on the production of a confessional or any statement, it is challenged by the defence on the ground that the accused did not make it at all, such an objection does not go to the admissibility of the statement and the trial court is entitled to admit the confession in evidence as a statement the prosecution claims to have obtained from the accused person and thereafter to decide or find as a matter of fact whether

or not the accused person in fact made the statement at the conclusion of the trial. See Godwin Ikpasa v. Bendel State (1981) 9 S.C. 7 at 28. The position will however be different where the admissibility of a statement is challenged on the ground that it was not made voluntarily. In the latter case it will be incumbent on the trial court to call upon the prosecution to establish the voluntariness of the statement by conducting a trial within a trial. See Joshua Adekanbi v. A.G. Wester Nigeria (1966) 1 All N.L. R. 47 Paul Ashake v. The State (1968) 2 All N.L.R. 198, Ogoala v. The State (1991) 2 N.W.L.R. (part 175) 509, R. v. Omokoro 7 W.A.C.A. 146. The learned trial Judge was quite right in the present case to have admitted Exhibits A and S in evidence. He was however in gross error when he failed to consider and to make a define finding on the issue of whether or not the two statements were made by the 5th appellant. The law is that no matter how worthless the defence set up by an accused person at his trial may be, the trial court still has a duty to consider them dispassionately before dismissing them. See Onuoha v. The State (1988) 3 N.W.L.R. (Part 83) 460, R. v. Barimah 11 W.A.C.A. 49, Agyuluwa v. Commissioner of Police (1961) All N.L.R. (Part 4) 850. If, in fact, Exhibits A and S were made by the 5th appellant, they are incriminating enough and sufficient to ground his conviction on count one of the charge. If they are not his statements, then the case against him must be considered entirely weak and being a criminal matter must be liable to fail.

The learned trial Judge seemed to appreciate the necessity and importance of considering the defence of the 5th appellant, particularly as to whether he was the maker of the confessions, Exhibits A and S attributed to him. Said he:-

"As regards the 5th accused, none of the witnesses specifically stated, that he, the 5th accused was seen at the scene of the crime. However, the 5th accused made statements to the police, Exhibits 'A' and 'S' wherein he admitted that he participated in the crime. I shall later come back to consider the 5th accused and his statements to the police with respect to his involvement in the crime."

A little later in his judgment, the learned trial Judge further observed:-

"As regards the 5th accused, he also gave evidence at the trial denying his presence at the scene of crime at the time of the crime on 9.9.82. Like the other accused persons he also made statements to the police, Exhibits 'A' and 'S'. At the trial, the learned counsel for the 5th accused objected to the tendering of Exhibits 'A' and 'S' on the ground that the two statements did not belong to the 5th accused. He did not sign any of the two statements but was forced to thumb print them, counsel added.

The two statements were therefore admitted on the authorities of R. v. Igwe (1960) 5 F.S.C. 55 and Godwin Ikpasa v. The State (1981) 9 S.C. 7 at 28, the 5th accused having retracted the two statements."

Regrettably he failed to revert to these vital statements upon which the fate of the 5th appellant almost entirely rested. This is because outside Exhibits A and S, the only evidence which vaguely connected the 5th appellant with the offence of conspiracy charged emanated from his co-accused, the 1st and 2nd appellants, which evidence the trial court rightly observed must be treated with caution.

Said the learned trial Judge:-

"Although the 1st and 2nd accused are co-accused with the 5th accused persons, their evidence is not evidence of accomplice under section 177 (2) of the Evidence Act. However, I am readily aware of the special need for caution in accepting the evidence of a co-accused which incriminated the other."

But without giving specific consideration to the defence of the 5th appellant that Exhibits A and S were not his statements and making a clear pronouncement or finding on the issue, the trial court found the evidence of the 1st and 2nd appellants as corroborative of exhibits A and S and proceeded to convict the 5th appellant. The trial court stated thus:-

"In view of the statements of the 5th accused, Exhibit 'A' and 'S' as corroborated by the evidence of the 1st and 2nd accused, I am of the view that the 5th accused was one of the armed gang that robbed the premises of the Churchgate Nig. Limited on 9.9.82."

The court below, for its own part, after placing heavy reliance on the contents of the said Exhibits A and S in respect of which the trial

court made no finding upon proceeded thus:-

"In the instant case there is much in the 5th appellant's statements Exhibits 'A' and 'S' to establish that he was part of the 'arrangement' to commit robbery at the premises of the Churchgate. He and Pele Ogunye (the 1st appellant) were hands in glove. They made the necessary contact and his statements Exhibits 'A' and 'S' are indeed very revealing. In short, there was evidence from his own statements to establish that he was part of the conspiracy to rob. The trial Judge found that the evidence of 1st and 2nd appellants corroborated his statements and after duly warning himself of the inherent danger of relying on the evidence of the co-accused, he convicted him as well on the first count of conspiracy to rob. I am unable in this respect to fault the conclusion of the learned Judge. The result is that the appeal against conviction for robbery as charged in count 2 is allowed and the conviction and sentence passed is set aside. The appeal in respect of the charge of conspiracy to commit robbery is dismissed. The conviction and sentence passed in that regard is hereby affirmed."

With the greatest respect to the learned trial Judge, it was nothing short of a gross misdirection to have relied on Exhibits A and S in convicting the 5th appellant without making a specific finding as to whether or not these confessions were in fact made by him. It was equally erroneous on the part of the court below to have relied on the contents of such unproved statements in affirming the conviction of the 5th appellant. As I am in no position to say whether both courts below would have convicted the 5th appellant had they properly directed themselves on the issue here-in-before set out, it is my view that the conviction of the 5th appellant on the charge of conspiracy to commit armed robbery contrary to section 403A of the Criminal Code Law, Cap. 31, Laws of Lagos State, 1973 should not be allowed to stand.

The prosecution's case against the 1st, 2nd, 3rd and 4th appellants appeals straight forward and clear and may conveniently be considered together. This has already been fully set out earlier on in this judgment. It suffices to state that having appraised the

totality of the evidence adduced before the court together with the confessional statements of the appellants, the learned trial Judge was satisfied that all four appellants participated in the hatching, scheming and execution of the grand design to rob Churchgate Nigeria Limited of twenty bales of stockfish valued at N8,800.00 in the night of the 8th September, 1982 at Matori, Mushin. He found that armed with dangerous weapons, the appellants acting in concert, broke into the complainants' premises, cut and forced open the iron gate of their premises, attacked and stabbed one of the security men with a dagger, assaulted and beat up the security men they met on the premises and tried up two of them with ropes. Thereafter the appellants drove in lorries they came with into the complainants' premises and were loading bales of stockfish into one of their vehicles when they were surrounded by the police and arrested in the premises during the operation. **Without doubt, the trial court found the four appellants' robbery operation to amount to nothing short of the ancient Roman Furtum manifestum as they were caught red-handed and arrested on the spot during their operation.**

Of the 1st appellant, the learned trial Judge, inter alia stated as follows:-

"Having considered the evidence of the 1st accused, his statements to the police, Exhibits 'C' and 'N' in the light of the evidence of the prosecution witnesses, I am of the view that the 1st accused was at the scene of the crime and actually participated in the commission of the crime. His defence of alibi accordingly fails."

Turning to the 2nd appellant, the trial court observed :-

"After a close examination of the statements, I am of firm belief that Exhibits 'H', 'O' and 'P' were made by the 2nd accused and were made voluntarily. With his evidence at the trial and his statements to police, especially Exhibit 'H' and in light of the evidence of the witness for the prosecution, I have no doubt of any degree that the prosecution, I have no doubt of any degree that the 2nd accused was present at the robbery on the 9.9.82, and did participate in the commission of the crime."

The learned trial Judge next considered the case of the 3rd ap-

pellant and found thus:-

"On the reading this statement Exhibit 'L' with the evidence of the 2nd, 4th, 7th, 9th and 10th P.W.s who were eye witnesses of the incident, it is my view that the 3rd accused was present at the scene of the robbery at the time of the operation and that he actually participated in the robbery. His evidence of alibi therefore fails, and is rejected." B

Of the 4th appellant, he said:-

"Exhibits 'J' and 'R' substantially and in material particulars corroborated the evidence of the 4th, 7th, 9th and 10th prosecution witnesses who arrested the accused. In the circumstances, I hold the view that the 4th accused was at the scene of the offence and actually participated in the commission of the robbery. His defence of alibi therefore fails." C

He concluded thus:-

"I do not take the view that there are contradictions or material contradictions in the evidence of the witnesses for the prosecution. It is therefore my view that the prosecution has proved its case against the 1st, 2nd, 3rd, 4th and 5th accused persons beyond all reasonable doubt in respect of the count of armed robbery and they are accordingly found guilty as charged." D

I now come back to the 1st count of the charge, namely, conspiracy to commit armed robbery. All the learned counsel for the accused persons submitted that there is no evidence of conspiracy against the accused persons. I disagree wholly with this submission. In order to appreciate the quantum of evidence of conspiracy against the accused persons one would only need to read together the statements of the 1st, 2nd, 3rd, 4th and 5th accused persons, Exhibits 'C', 'M', and 'N', 'H', and 'P', 'L' and 'Q', 'J' and 'R' and 'A' and 'S' respectively, along with the evidence of the 1st accused. From the statements of the accused persons as itemised above and the evidence of the 1st, 2nd and 3rd accused persons, it seems to me that the prosecution has led sufficient evidence of conspiracy against the accused persons. Exhibit 'N' shows clearly that the 1st accused was the brain behind the scheme which started sometime in August, 1982. The operation was earlier fixed for 8.9.82 and later shifted to 9.9.82." E
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The above findings, apart from those involving the 5th appellant, are fully supported by abundant evidence on record and were affirmed by the court below. I have myself closely examined them against all the relevant evidence before the court and can find no reason to interfere with them. Issues 1-4 of the 1st - 3rd appellants' brief of argument are accordingly resolved in favour of the respondent.

In the final result and for all the reasons that I have given above, the appeals of the 1st, 2nd, 3rd and 4th appellants fail and are hereby dismissed. Their convictions and sentences on each of the two counts charged as affirmed by the court below are hereby further confirmed. The appeal of the 5th appellant succeeds and it is hereby allowed. His conviction and sentence are set aside and it is ordered that he be acquitted and discharged.

WALI JSC

I had the privilege of reading in advance, a copy of the lead judgment of my learned brother Iguh JSC, and I agree with the reasons he gave for dismissing the appeals of the 1st, 2nd, 3rd and 4th appellants. The evidence presented before the trial court is both cogent and overwhelming against these appellants. I find no reason to interfere with the concurrent findings of the trial court and the Court of Appeal.

As for the 5th appellant, I agree with my learned brother Iguh, JSC that the trial court was in grave error to rely on Exhibits 'A' and 'S', the 5th appellant's extra-judicial statements purportedly alleged to have been made under caution, to convict him. Both Exhibits "A" and "S" were disowned by the 5th appellant. In his judgment, the learned trial judge stated as follows:-

"As regards the 5th accused none of the witnesses specifically stated, that he, the 5th accused was seen at the scene of the crime. However, the 5th accused was seen at statements to the police, Exhibits 'A' and 'S' wherein he admitted that he participated in the crime. I shall later come back to consider the 5th accused and his statements to the

police with respect to his involvement in the crime."

The learned trial judge, without making any finding on the 5th appellant's allegation that he did not make Exhibits "A" and "C" but only forced by the police to thumb-print them, proceeded to make finding against the 5th appellant as follows:

"In Exhibits 'A' and 'S' the 5th accused admitted participating in the robbery and stated the part played by him in the preparation of the scheme."

The learned trial judge went on to state that he found corroboration of Exhibits 'A' and 'S' in the evidence given in court by the 1st and 2nd appellants. He convicted the 5th appellant on the charges of armed robbery and conspiracy to commit armed robbery.

The Court of Appeal, in considering the appeal of the 5th appellant against conviction remarked and found as follows:-

"I think it must be conceded that the 5th appellant was not arrested or seen at the scene of crime when the first four appellants were arrested. The trial judge so found. It follows therefore, that there was no evidence that he actually took part in the robbery at Churchgate."

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"However, there is evidence borne out by his statement (Exhibit A) that he introduced an enquirer to some staff of Churchgate namely Mumuni Audu and Umoru Haruna and "during the process Mumuni Audu and Haruna agreed for them to come and steal in the company" He went on to say:-

"After the arrangement, I was not aware when the operation was carried out I will assist the police in arresting all the rest thieves "

What is more, he said that he took Pele (the 1st appellant) to his house. Pele also confirmed that in his evidence. In his second statement Exhibit S, the 5th appellant again stated inter alia:-

"..... Na Pele Ogunye (1st appellant) I know before Nai I say he come to me over three months ago and say he want to buy stock fish Na the house of Mumuni which no far from my house I carry Pele Ogunye whether he fit sell stock fish for am. I

come meet Umoru Haruna and Yakubu for Mumuni house. Nai Umoru Haruna and Mumuni agree that Pele should arrange with people who go rob the Churchgate and steal the stock fish. Yakubu no agree I no see Pele since that three months again no

B *Churchgate "*

The Court of Appeal then concluded:-

"In the instant case there is much in the 5th appellant's statement Exhibits 'A' and 'B' to establish that he was part of the 'arrangement' to commit robbery at the premises of the Churchgate. He and Pele
 C *Ogunye (the 1st appellant) were hands in glove. They made the necessary contract and his statements Exhibit 'A' and 'S' are indeed very revealing. In short, there was evidence from his own statements to establish that he was part of the conspiracy to rob. The trial judge found that*
 D *the evidence of 1st and 2nd appellant corroborated his statement and after duly warning himself of the inherent danger of relying on the evidence of that co-accused, he convicted him as well on the first count of*
 E *the learned judge. The result is that the appeal against conviction for robbery as charged in count 2 is allowed and the conviction and sentence passed is set aside. The appeal in respect of the charge of conspiracy to commit robbery is dismissed."*

F The appeal was therefore allowed in part by the Court of Appeal in the 5th appellant's favour. Hence the present appeal to this court.

The issue in this case as I have adverted to earlier in this judgment is the absence of finding by the learned trial judge that Exhibits 'A' and 'S' were made by the 5th appellant and that the contents were true
 G having regard to the surrounding circumstances as revealed by the other evidence in the case. This he failed to do. See Godwin Ikpassa v. Bendel State [1981] 9 SC 7 at 29. In the absence of such finding there is no evidence which the evidence of 1st and 2nd appellants could corroborate.
 H This is a serious omission on the part of the learned trial judge which appears to have been inadvertently glossed over by the Court of Appeal, resulting in failure of justice. It must be resolved in favour of the 5th appellant. I therefore allow his appeal. He is also acquitted and

discharged on the charge of conspiracy to commit armed robbery. I confirm the decision of the Court of Appeal relating to his discharge and acquittal on the substantive judge of armed robbery.

The appeals of 1st, 2nd, 3rd and 4th appellants are hereby dismissed. The convictions and sentences passed on them by the trial court, B subsequently affirmed by the Court of Appeal are hereby further confirmed.

It is for this and other reasons in the lead judgment of my learned brother Iguh, JSC that I also dismiss the appeals of the 1st, 2nd, 3rd and 4th appellants while I allow that of the 5th appellant. C

KUTIGI JSC

I read in advance the judgment just rendered by my learned D brother Iguh, J.S.C. I agree with his reasoning and conclusions. I will also dismiss the appeals of the 1st, 2nd, 3rd and 4th appellants and confirm their convictions and sentences. The appeal of the 5th appellant is however allowed. His conviction and sentence are set aside. He is dis- E charged and acquitted.

UWAIFO JSC

I read in advance the judgment of my learned brother Iguh JSC F in which he dismissed the appeal of each of the 1st, 2nd, 3rd and 4th appellants and allowed that of the 5th appellant. I am satisfied that he has thoroughly dealt with the issues involved and for the reasons he has G given I agree with the conclusions reached by him. The facts of these appeals have been fully stated in the leading judgment and I do not intend to go over them.

There is no doubt that the learned trial judge painstakingly considered the evidence, both oral and documentary, adduced before him. H The body of evidence was quite enormous. In the course of dealing with the statements contained in exhibits A and S which the prosecution tendered as having been made by the 5th appellant although he disowned

them at the time they were tendered on the ground that he made no such statements but that his thumb impression was forcibly placed on them, the learned trial judge having rightly legally admitted them at that stage ruled that the issue whether they were made by the 5th appellant would be decided at the conclusion of the proceedings. That was in compliance with the procedure laid down by this court in R v Igwe (1960) 5 FSC 55 and reiterated more elaborately in Godwin Ikpasa v The State (1981) 9 S.C. 7 at 28-29.

What the learned trial judge did, therefore, was a commitment to uphold the said procedure and then to resolve a vital issue in contention whether the 5th appellant made those statements. Without resolving that issue against the 5th appellant, their contents cannot be attributed to him. No doubt owing to some lapse, which does occasionally occur in circumstances where there has been a lot of evidence - such as in this case - requiring a finding on several relevant aspects, the learned trial judge proceeded to hold that the statements in the said exhibits A and S implicated the 5th appellant on the assumption (which can now be seen to be erroneous) that they were his statements without indeed making a finding that they were, a point upon which he had reserved a decision.

The learned trial judge relied on the said statements in making up his mind to convict the 5th appellant when he said:

"In view of the statements of the 5th accused, Exhibits 'A' and 'S' as corroborated by the evidence of the 1st and 2nd accused, I am of the view that the 5th accused was one of the armed gang that robbed the premises of the Churchgate Nig. Limited on 9.9.82."

It is obvious that the learned trial judge did not depend, in his view of the 5th appellant's guilt, upon the evidence of the co-accused persons. He depended on those statements whose authorship was in controversy yet to be resolved. He depended on them as if they were made by the 5th appellant and found corroboration of them in the evidence of the co-accused persons. That certainly produced a logical incongruity with a legal consequence of a miscarriage of justice. The lower court on the same assumption that those exhibits A and S were made by the 5th appellant proceeded to hold that "there is much in the 5th appellant's

statements Exhibits 'A' and 'S' to establish that he was part of the 'arrangement' to commit robbery at the premises of the Churchgate." The question is, were they his statements? That was never resolved. It is obvious that the 5th appellant was convicted upon evidence which was not established against him. No one can be lawfully convicted on the erroneous assumption that there is evidence against him either through alleged confession or admission or by proof. In the circumstances, his conviction cannot be allowed to stand. B

In the result, I too allow the appeal of the 5th appellant. His conviction and sentence are set aside and in their place I order his acquittal and discharge. The appeal of each of the 1st, 2nd, 3rd and 4th appellants is dismissed. C

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AYOOLA JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother, Iguh JSC. I agree entirely with his reasoning and conclusions. I, too, would dismiss the appeals of the 1st, 2nd, 3rd and 4th appellants and allow the appeal of the 5th appellant. E

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