

SUPREME COURT OF NIGERIA
15TH FEBRUARY, 2008. SC. 186/2006
CORAM:- N. TOBI, S. A. AKINTAN, W. S. N. ONNOGHEN,
I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH, JJSC

SABURI ADEBAYO APPELLANT
V.
A-G OGUN STATE RESPONDENT

CRIMINAL PROCEDURE - Charges - Joined consideration of counts
- Miscarriage of justice - Is not caused in this case - By trial court's
joined consideration of two similar counts (H1)

JUSTICE - Miscarriage of - What amounts to it - Does not necessarily
involve a finding - That a different result would have been reached -
It is enough that justice according to law - Is not done (H2)

CRIMINAL PROCEDURE - Appeals - Discharge order - Is not se-
cured on mere technical point - Court is bound to pronounce upon
parties' valid issues - Separate pronouncement need not be made -
On an issue subsumed in another issue (H3)

FACTS

Before the High Court of Abeokuta, Ogun State, appellant was arraigned and tried on a 3 count charge. He was charged with conspiracy and actual commission of armed robbery with others still at large. Appellant pleaded not guilty to the charge. He was alleged to have robbed N100. 00 each from his two victims, together with the Suzuki Motorcycle of one of the victims while armed with cutlasses. The prosecution called six witnesses. Appellant testified on his own behalf and called no other witness.

Appellant who made a confessional statement to the police admitting the charge framed up a different evidence of denial during the trial. At the conclusion of hearing, the trial court found appellant guilty on all the 3 counts and sentenced him to death by firing squad. His appeal to the Court of Appeal was dismissed. Still aggrieved, appellant has further appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal per **MUHAMMAD JSC**)
Charges - Joinder of counts

1. In any event, what is fundamental in any criminal trial is the sustenance of justice and fair hearing. And, where the trial court is satisfied that the prosecution has proved its case beyond reasonable doubt as is required by the law, I then fail to see where the joinder of the counts on offences which are similar in nature and committed at almost the same time by the same accused person(s) can cause any miscarriage of justice. It is the decision of this court in many decided cases that in deciding upon whether there had been miscarriage of justice, the court of appeal dealing with the issue raised must be satisfied that it is substantial, not one of mere technicality, which had caused no embarrassment or prejudice to the appellant. (p. 731 B)

JUSTICE - Miscarriage of

2. Of course what amounts to a miscarriage of justice varies not only in relation to particular facts but with regard to the jurisdiction which has been involved by the proceedings in question, and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceedings said to be affected by the miscarriage. It is enough if what is done is not justice according to law. (p. 731 E)

CRIMINAL PROCEDURE - Appeals - Discharge order

3. I do not think it is that easy to secure a discharge order for the appellant merely on a technical point that the issue raised by learned counsel for the appellant before the court below was not considered. I am not unaware that a court of law is duty bound to consider and pronounce upon all the issues raised validly by the parties. Learned counsel for the respondent argued that the issue of the joint consideration of counts 1 and 2 (2 & 3) being issue 1 formulated by the appellant's counsel. It is trite law that when a party submits an issue to a court for determination, that court must make a pronouncement on the issue except where the issue is subsumed in another issue. Where that happens, there shall no longer be the necessity of making a separate pronouncement on the issue subsumed. (p. 732 E)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Appellate court will not construe a judgment parochially

In order to pick faults in a judgment of a trial Judge, an appellate court should not take paragraphs or pages in isolation or in quarantine but must take the whole judgment together as a single decision of the court. An appellate court cannot allow an appellant to read a judgment in convenient installments to underrate or run down the judgment. While an appellate court can concede to counsel the right to be partisan to the case of his client, the court will not allow him to construe a judgment parochially since the judgment is available to the court for construction. (p. 738 B)

2. Confession is the best evidence in criminal law

The appellant confessed to the commission of the offence. The confessional statement is at pages 8 and 9 of the Record. It reads in part:

"The three of us agreed to go and do the business. The three of us boarded a passenger vehicle at Lafenwan garage at about 9.30 p.m. We dropped at Wasinmi Village at about 11.30 pm they carried guns..."

Confession is the best evidence in criminal law. In it, the accused admits that he committed the offence for which he is charged. For this purpose, the accused is the figurative horse's mouth. He committed the offence and he confesses and admits the offence. There cannot be a better evidence. And so the law is that a trial Judge can admit confessional statement, if it was made voluntarily and without any inducement, threat or promise from a person in authority. (p. 738 D)

3. Fair hearing issue should not be raised any how

Learned counsel for the appellant roped in the fair hearing principle. I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the court, with a view to moving the court away from the live issues in the litigation. They make so much weather and sing the familiar song that the constitutional provision is

violated or contravened. They do not stop there. They rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the Constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision available to a party who is really denied fair hearing because he was not heard or that he was not properly heard in the case. Let litigants who have nothing useful to advocate in favour of their cases, leave the fair hearing constitutional provision alone because it is not available to them just for the asking. (p. 738 G)

D AKINTAN JSC

4. Joinder of charges is not the appellant's complaint

The main complaint raised in this court is in respect of the lower court's treatment of counts 1 and 2 together. It is not a complaint against joinder of the two counts. It is against the treatment of the issues arising together. The merits of the overwhelming case against the appellant were totally ignored. It is necessary to say that an appeal could only be allowed where, inter alia, a case has been made out show that there was fundamental breach of the applicable law or procedural law or that an essential ingredient of the charge against an appellant was not established. That was not the position in this case. (p. 739 G)

ONNOGHEN JSC

5. Law forbidding joint consideration of counts not shown to court

It should be noted that the counts 2 and 3 considered together by the learned trial judge charged the appellant with armed robbery against two persons separately and that learned counsel for the appellant has not referred this court to any provision of the Criminal Procedure Act/Law applicable which forbids such a joint consideration, particularly where the facts are very similar for the proof of each count, as in the instant case. The real question before in the trial court is simply whether there was an armed robbery committed by

the appellant together with others now at large on the day in question and on the people respectively mentioned or named in the two counts.

If from the available evidence on record, the question can be unequivocally answered in the affirmative, it becomes irrelevant to consider the issue whether the counts were considered jointly in the process leading to the resolution of the question. (p. 742 H) B

REPRESENTATION

Dr. Joseph Nwobike, for the Appellant

Mrs. A. A. Babawale, for the Respondent C

CASES REFERRED TO

Adah v. National Youth Service Corps (2004) 7 SC (Pt.11) 139 at 143 -144 D

Obi Nwanze Okonji & 4 Ors. v. George Njokanma & 2 Ors. (1991) 7 NWLR (Pt.202) 131 at 146

Balogun v. Labiran (1988) 3 NWLR (Pt.800) p.66 at page 80

Chief Okotie-Eboh v. Chief James Manager & 2 Ors. (2004) 11 - 12 SC p. 174 at 187 E

Okonji v. Njokanma (1991) 7 NWLR (Pt. 202) 131 at page 146

Igbele v. State (2006) 6 NWLR (Pt.975) 100 at page 131

Oladele v. Nigerian Army (2004) 6 NWLR (Pt. 166) at 178

Igogo v. State (1999) 14 NWLR (Pt.637) 1 at page 9

Adigun v. A. G. Oyo State (1988) 1 NWLR (Pt.53) 628 F

Okonkwo v. Udo (1997) 9 NWLR (Pt. 519) 16 at page 20

State v. Ajie (2000) 11 NWLR (Pt. 678) 434 at 448

Okonji v. Njokanma (1991) 7 NWLR (Pt. 202) 131 at page 146

Igabo v. State (1999) 14 NWLR (Pt. 637) 1 G

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999 s. 36 (1) (4)

Robbery and Firearms (Special Provisions) Act, Cap. 398, LFN 1990 ss. 1(2)(a), 5(b) H

LEAD JUDGMENT BY MUHAMMAD JSC

The appellant herein, was arraigned before the High Court of

Justice, Abeokuta, Ogun State (trial court) on the following counts:
Count one

Saburi Adebayo (M) on or about the 11th day of March, 1994 at Elekuro Village, via Ifo in Ogun State of Nigeria did conspire together with others still at large to commit a felony to wit: Armed Robbery and thereby committed an offence contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398, Laws of the Federation of Nigeria 1990.

Count two

Saburi Adebayo (M) on or about the 11th day of March, 1994 at Elekuro Village, via Ifo in Ogun State of Nigeria, while in the Company of others still at large did rob one Saliu Afolabi of the sum of N100.00k and a Suzuki Motorcycle with Reg. No OG 7842 DA and at the time of the said robbery were armed with cutlasses and thereby committed an offence contrary to and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws of the Federation of Nigeria, 1990.

Count three

Saburi Adebayo (M) on or about the 11th day of March, 1994 at Elekuro Village, via Ifo in Ogun State of Nigeria while in the Company of others still at large did rob one Oladehinde Segun of the sum of N100.00k and at the time of the said robbery were armed with cutlasses and thereby committed an offence contrary to and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provision) Act, Cap. 398 Laws of the Federation of Nigeria 1990. The appellant pleaded not guilty to each of the counts.

Trial began in earnest on the 22nd day of October, 1999. The prosecution called six witnesses. The appellant testified on his own behalf and called no other witness. The defence and the prosecution addressed the trial court respectively. Judgment was finally delivered by the learned trial judge on the 11th day of February, 2000. The appellant was found guilty on all the three counts and was accordingly sentenced to death by firing squad on each count. Sentences to run concurrently.

Dissatisfied with the trial court's judgment the accused/appellant filed an appeal to the Ibadan Division of the Court of Appeal

(court below). The court below affirmed the decision of the trial court. The appellant was aggrieved further and he came to this court on appeal. The notice of appeal contained 3 grounds of appeal pp 89 - 82 of the record).

In this court, briefs by the parties were filed and exchanged. The appellant formulated one issue which reads as follows: B

"Whether the lower court failed to consider the legal effect of joint consideration of counts 1 and 2 together and if so whether the failure occasioned injustice to the appellant."

The respondent on its part formulated the following issue for C determination:

"Whether there was any aspect of the lower court's judgment which occasioned injustice to the appellant."

The salient facts giving rise to this case as contained in the printed record of appeal are that on the night of 11th March, 1994, D at about 1:00 a.m, a gang of men armed with knives and cutlasses invaded Elekuro village near Wasinmi Railway Station. Among the houses they entered were those of PWs 1 and 2. They were demanding for money from PWs 1 and 2 who received severe beatings from the gang when they (PWs 1 and 2) said they had no money in E their houses. Eventually, PWs 1 and 2 each managed to find N100.00k (one hundred Naira) to give to the armed gang. PW 1 was wounded during the beating with attack. His Suzuki Motor Cycle with Registration No OG 7842 DA was taken away by the gang. F

When the news of the presence of the armed gang became known to some fellow villagers they came out and the robbers fled. The villagers gave a chase during which the accused/appellant was caught and arrested by PW3 who was a night guard on duty at the Universal Trust Bank which was situate in the vicinity. On arrest, the G accused was found to be carrying a cutlass and a butcher's knife which were recovered from him. He was then handed over to PW 4 who was on duty at Wasinmi Police Post, in the night in question. Handed over to PW 4 also were the cutlass and the butcher's knife recovered from the accused person. Discovered also from the scene of the crime H were the Suzuki motor cycle which was earlier in that night stolen from the house of PW 1. Two damaged wall clocks hidden in that bush were also recovered. The accused/appellant made a confes-

sional statement to PW 5 which was tendered in evidence and marked as Exhibit 'A'.

B In his submissions in the brief on the lone issue formulated, the learned counsel for the appellant stated that the first issue raised at the lower court for determination was whether the joint consideration of the two (2) offences as contained in counts 1 and 2 by the learned trial judge was justified in law.

C Learned counsel argued that the lower court in the consideration of that issue did not consider and determine the substance of the issue i.e. whether the trial judge was right and, by implication whether the appellant suffered any prejudice or miscarriage of justice in the circumstances. He argued, further that the issue was validly raised same having arisen from the grounds of appeal, ought to have been considered and pronounced upon by the lower court. The lower D court, he argued, did not consider it. The lower court's failure to consider that issue was in clear breach of the appellant's right to fair hearing as guaranteed under Section 36(1)(4) of the Constitution of the Federal Republic of Nigeria, 1999. If the issue was considered, it was further argued, it would have led to the discharge and acquittal E of the appellant.

Learned counsel for the appellant submitted further that the law is now settled that the court is bound to consider and pronounce on all the issues validly raised by the parties. He cited and relied on F the cases of *Adah v. National Youth Service Corps* (2004) 7 SC (Pt.11) 139 at 143 -144, *Obi Nwanze Okonji & 4 Ors. v. George Njokanma & 2 Ors.* (1991) 7 NWLR (Pt.202) 131 at 146; *Balogun v. Labiran* (1988) 3 NWLR (Pt.800) p.66 at page 80, *Chief Okotie-Eboh v. Chief James Manager & 2 Ors.* (2004) 11 - 12 SC p. 174 at 187.

G In the case on hand, learned counsel for the appellant stated that he raised the issue at the court below that the trial judge ought not to have jointly considered the two counts together. He contended that the evidence in support of the counts differs and that if the trial judge had not adopted that procedure, it would have been clear to H him that the charges were not proved hence the appellant would have been discharged and acquitted. There was, therefore, miscarriage of justice against the appellant by the failure of the lower court to consider the issue. On this basis alone, the appeal ought to be

allowed as the law is that, a party who was not heard in court cannot be said to be guilty of the offence charged. The case of *Alhaji Sanusi v. Oreitan Ameyogun* (1992) 4 NWLR (Pt. 237) 527 at 550 was cited. Learned counsel submitted that the issue does not relate or revolve around the style of judgment writing or evaluation of evidence by the trial judge. It was the position of the appellant that since the counts differed in terms of evidence in proof, an independent consideration of same was of utmost necessity. He finally argued that the procedure adopted by the lower court was wrong in law. He urged this court to resolve this issue in favour of the appellant by allowing the appeal.

The learned counsel for the respondent (the DPP, Ogun State, MOJ), made her submissions as follows: that the learned appellant's counsel cited some cases in support of his contention. From the outset, the cases cited by the appellant's counsel, she argued, relate to civil appeals and therefore not completely apposite in a criminal appeal. She submitted that the issue of the joint consideration of counts 1 and 2 being issue 1 formulated by the appellant's counsel in the lower court is subsumed under issue 2 formulated by the same counsel. The cardinal principle in deciding cases is that when a party submits an issue to a court for determination that court must make a pronouncement on that issue except where the issue is subsumed in another issue. She cited and relied on the case of *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131 at page 146 paragraph A - B. It is further submitted for the respondent that the cardinal principle upon which a criminal case can be sustained by the trial court is if the prosecution proves its case against the accused person beyond reasonable doubt. The cases of *Igabele v. State* (2006) 6 NWLR (Pt.975) 100 at page 131 para D, *Oladele v. Nigerian Army* (2004) 6 NWLR G (Pt. 166) at 178 para D, were cited in support. The learned DPP submitted that the trial court and the court below found the charge against the appellant to have been proved beyond reasonable doubt. At the court below, issue 2 formulated by the appellant was resolved against him. The court specifically stated that the said issue 2 was resolved in favour of the respondent. In a criminal appeal, where the court of appeal accepts that the case against the appellant was proved beyond reasonable doubt, and the said court did not find any reason

to set aside the conviction of the appellant and affirmed the sentence passed on the appellant, then the failure to consider any issue which has been subsumed under the issue which dealt with proof beyond reasonable doubt cannot be said to have occasioned any injustice to the appellant. His constitutional right was also not in any way violated. On the style adopted by the learned trial judge in his judgment, the learned counsel argued that, that was a matter within judge's discretion. She cited and relied on the case of *Igogo v. State* (1999) 14 NWLR (Pt.637) 1 at page 9, B - C. The learned DPP finally urged this court not to interfere with the concurrent findings of the two lower courts as they were not perverse and no injustice was occasioned to the appellant.

I think my spring board in commencing the determination of this appeal is what the learned trial judge said with regard to the two counts said to have been tried jointly by the judge. On page 40, lines 30 - 32 of the printed record of appeal, the learned trial judge stated:

"For convenience sake I propose to deal with the 2nd and 3rd counts of the charge first before coming back to deal with the charge of conspiracy in count 1"

The learned trial judge went ahead to treat the two counts making a finding that with regard to the 2nd and 3rd counts, the accused person was charged under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, 1990. The learned trial judge set out the provisions accordingly. I think there was a mistake from the side of learned counsel for the appellant to say that the learned trial judge considered counts 1 and 2 of the charge together. But assuming that the intention of the learned counsel for the appellant was to challenge the treatment of counts 2 and 3 of the charge together as done by the learned trial judge, I would still not have found anything wrong in that. This is because, having studied the judgment of the court below, I find that that court affirmed the style adopted by the trial court in convicting and sentencing the appellant on all the counts charged, particularly counts two and three, I quote hereunder what the court below said:

"I find the accused guilty on the 1st count of conspiracy to commit the offence of armed robbery punishable under Section 1(2) (a) of the robbery and firearms (Special Provisions) Act, 1990.

On the 2nd and 3rd counts the accused is also found guilty as charged under Section 1(2) (a) of the robbery and firearms (Special Provisions) Act 1990 respectively. I also confirm the sentence of death by firing squad in respect of the 1st, 2nd and 3rd counts."

I think the language used in that excerpt from the judgment of the court below is clear enough to show that the court was in agreement with the whole decision taken by the trial court, if there was any fault anywhere that court could have spotted it out.

In any event, what is fundamental in any criminal trial is the sustenance of justice and fair hearing. And, where the trial court is satisfied that the prosecution has proved its case beyond reasonable doubt as is required by the law, I then fail to see where the joinder of the counts on offences which are similar in nature and committed at almost the same time by the same accused person(s) can cause any miscarriage of justice. It is the decision of this court in many decided cases that in deciding upon whether there had been miscarriage of justice, the court of appeal dealing with the issue raised must be satisfied that it is substantial, not one of mere technicality, which had caused no embarrassment or prejudice to the appellant. See: Okegbau v State (1979) 12 NSCC 151 at 156;

Of course what amounts to a miscarriage of justice varies not only in relation to particular facts but with regard to the jurisdiction which has been involved by the proceedings in question, and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceedings said to be affected by the miscarriage. See: Adigun v. A. G. Oyo State (1988) 1 NWLR (Pt.53) 628. ***It is enough if what is done is not justice according to law.*** See: Okonkwo v. Udo (1997) 9 NWLR (Pt. 519) 16 at page 20; State v. Ajie (2000) 11 NWLR (Pt. 678) 434 at 448. In the appeal on hand, count two of the charge accused the appellant of robbing one Saliu Afolabi of the sum of N100.00 and a Suzuki Motor Cycle with Reg. No OG 7842 DA, while armed with cutlasses contrary to and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398, Laws of the Federation of Nigeria, 1990.

Count three of the charge accused the same appellant of robbing one Oladehinde Segun of the sum of N100.00 while armed with cutlasses, contrary to and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398. Laws of the Federation of Nigeria, 1990.

B The accused pleaded not guilty to each of the counts which were read to his understanding separately. The learned trial judge recorded accuser's pleas to the two counts separately, (see page 13 of the record of appeal). PW1 and PW2 were the victims of the offences charged under counts 2 and 3. After evaluation of evidence and making his findings, the learned trial judge, in applying the provisions of the law relating to the offences charged elected to treat counts two and three together because of their similarity. He finally pronounced the sentence in respect of each count but that all the sentences were D to run concurrently. The court below affirmed the trial court's decision. I can hardly fault these concurrent decisions. In any event the punishment meted to the appellant on the 2nd count is "death by firing squad." Equally, the punishment meted under count three is "death by firing squad." Even if there were one hundred counts and E each fetching the punishment of death, I believe there is only one death. All the sentences must, as a matter of fact, run concurrently as the convict must taste the pangs of only one death.

I do not think it is that easy to secure a discharge order for the appellant merely on a technical point that the issue raised by learned counsel for the appellant before the court below was not considered, I am not unaware that a court of law is duty bound to consider and pronounce upon all the issues raised validly by the parties. Learned counsel for the respondent argued that the issue of the joint consideration of counts 1 and 2 (2 & 3) being issue 1 formulated by the appellant's counsel. It is trite law that when a party submits an issue to a court for determination, that court must make a pronouncement on the issue except where the issue is subsumed in another issue. Where that happens, there shall no longer be the necessity of making a separate pronouncement on the issue subsumed. See: Okonji v. Njokanma (1991) 7 NWLR (Pt. 202) 131 at page 146, A-B.

This appeal is very unmeritorious. I think it was filed in order to buy more time for the condemned prisoner. That venture has failed and the appellant, who was bold enough in executing his nefarious and merciless operations, should equally be bold enough to pay the price of his deeds.

I dismiss the appeal and affirm the concurrent decisions of the two courts below.

TOBI JSC

On 11th March, 1994, at Elekuro Village, via Ifo, Ogun State, appellant with one other person armed with cutlass and knife robbed PW1, Saliu Afolabi of the sum of N100.00 and a Suzuki motor-cycle with Registration No OC 7842 DA. PW1 was sleeping in his room with his family when the robbers struck. The villagers got wind of the robbery and joined the victims to chase out the gang. The armed robbers fled. Luck ran out of or from the appellant. PW3 accosted the appellant and arrested him. Appellant was found in possession of a cutlass and a knife. Appellant made a confessional statement at the Police Station that he committed the offence.

Appellant was duly charged to court. He denied the robbery. The learned trial Judge convicted him of the three counts and sentenced him to death. An appeal to the Court of Appeal was dismissed. The appellant has come to this court.

Briefs were filed and exchanged. The appellant formulated one issue for determination. It reads:

"Whether the lower court failed to consider the legal effect of the joint consideration of Counts 1 and 2 together, and if so whether the failure occasioned injustice to the Appellant."

Respondent also formulated one issue for determination. It reads:

"Whether there was any aspect of the lower court's judgment which occasioned injustice to the appellant."

Learned counsel for the appellant, Dr. Joseph Nwobike, submitted that a court is bound to consider and pronounce on all the issues validly raised by the parties. Citing *Adah v. National Youth Service Corps* (2004) 7 SC (Pt. II) 139 and *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131, learned counsel contended that the issue as

to joint consideration of the two counts ought to have been considered and pronounced upon by the Court of Appeal as it was a material issue upon which the appeal was predicated. He submitted that failure of the court to consider the issue was in clear breach of the appellant's right to fair hearing as guaranteed in section 36(1) of the 1999 Constitution. He cited *Balogun v. Labiran* (1988) 3 NWLR (Pt. 800) 66 and *Okotie-Eboh v. Manager* (2004) 11-12 SC 174. Arguing that there was a manifest miscarriage of justice against the appellant, counsel cited the case of *Sanusi v. Ameyogun* (1992) 4 NWLR (Pt. 237) 527. He urged the court to allow the appeal.

Counsel for the respondent, Mrs. A. A. Babawale, learned Director of Public Prosecutions, submitted that the cases cited by counsel for the appellant relate to civil procedure and therefore not completely apposite in a criminal appeal. She cited the case of *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131. Counsel submitted that the issue of the joint consideration of counts 1 and 2 being Issue 1 formulated by counsel for the appellant in the Court of Appeal is subsumed under Issue 2 formulated by counsel for the appellant. She submitted that the cardinal principle upon which a criminal case can be sustained by the trial court is that the prosecution must prove its case against the accused person beyond reasonable doubt. The cases of *Igbele v. State* (2006) 6 NWLR (Pt. 975) 100 and *Oladele v. Nigerian Army* (2004) 6 NWLR 166 were cited in support of the principle of law. The affirmation of the conviction and sentence of the trial Judge by the Court goes to show that Issue 2 formulated by the appellant in the Court of Appeal was resolved against the appellant. She urged the court to dismiss the appeal.

As the complaint is on Counts 1 and 2, I should reproduce them here for ease of reference:

"Count One:

Saburi Adebayo (M) on or about the 11th day of March, 1994 at Elekuro Village, via Ifo in Ogun State of Nigeria did conspire together with others still at large to commit a felony to wit: Armed Robbery and thereby committed an offence contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398, Laws of the Federation of Nigeria, 1 990.

Count Two:

Saburi Adebayo (M) on or about the 11th day of March, 1994 at Elekuro Village, via Ifo in Ogun State of Nigeria while in the company of others still at large did rob one Saliu Afolabi of the sum of N100.00 and a Suzuki Motor-cycle with Reg. No. OG 7842 DA and at the time of the said robbery were armed with cutlasses and thereby committed an offence contrary to and punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws, of the Federation of Nigeria, 1990."

The next process to be considered is the first issue for determination in the Court of Appeal. It reads.

"Whether the joint consideration of the two (2) offences as contained in counts 1 and 2 by the learned trial judge was justified in law."

The above issue is related to the only issue formulated by appellant for determination in this court. The only difference is the twist of injustice arising from the alleged failure of the Court of Appeal to consider the legal effect of the joint consideration of counts 1 and 2 together.

An examination of the above processes will provide the answer in this appeal. As it is, the first count is on conspiracy to rob and the second count is the commission of the offence of robbery. The learned trial Judge in his judgment said at pages 48 and 49 of the Record:

"Regarding the charge of conspiracy in the 1st count, the prosecution in proving the charge against the accused generally tendered in evidence the statement of the accused to the police (Exhibit 'A'). The contents of exhibit 'A' provide sufficient evidence of the degree, nature and quality of the agreement between the accused and the other members of his gang now at large before the commission of the offences charged. With this, I am satisfied that there is sufficient evidence of conspiracy against the accused person to justify his conviction on count 1."

Assuming however for the sake of argument that exhibit 'A' does not provide sufficient direct and distinct evidence of conspiracy is not indispensable, and that it is open to the trial Court to infer conspiracy from the fact of doing things toward a common end;

Onochie v. The Republic (1966) NWLR 307 at 308.

In view of the above authority therefore, and having found the accused guilty of armed robbery under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, 1990, I am satisfied that the prosecution has also proved its case against the accused within
 B *the standard required by Section 137 of the Evidence Act, in respect of the charge of conspiracy in the 1st count. Accordingly, I find the accused guilty as charged."*

I have the impression that the first issue for consideration by the Court
 C of Appeal was on the above conclusion of the learned trial Judge. What did the Court of Appeal say? The Court of Appeal, per Udom-Azogu, JCA., said at pages 82 and 83 of the Record:

"It is my view that the evidence before the court below supports the conclusion of the trial Judge, that "On the totality of the
 D *evidence the accused's confessional statement Exhibits A and A1 and the circumstances of his arrest; I am satisfied that the prosecution has proved a case of armed robbery against the accused person beyond reasonable doubt, in consequence he found him guilty of armed robbery on 2nd and 3rd counts of the charge respectively". The 2nd*
 E *issue is resolved in favour of the respondent.*

It is manifest from the evidence that the offences of conspiracy and armed robbery were proved and accused/Appellant was rightly convicted at the court below, the retraction of the "voluntary" state-
 F *ment notwithstanding. In the final result the verdict of the trial court is affirmed. I find the accused guilty on the 1st count of conspiracy to commit the offence of armed robbery punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, 1990. On the 2nd and 3rd counts the accused is also found guilty as charged*
 G *under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act 1990 respectively. I also confirm the sentence of death by firing squad in respect of the 1st, 2nd and 3rd counts."*

I am in entire agreement with learned DPP for the respondent that the above conclusion of the Court of Appeal shows that Issue 2
 H formulated by the appellant in that court was resolved against him. At page 6 of the Respondent's Brief, learned DPP admirably further submitted:

"We further contend, that in a criminal appeal, where the Court

of Appeal accepts that the case against the Appellant was proved beyond reasonable doubt, and the said court did not find any reason to set aside the conviction of the appellant and affirmed the sentence passed on the Appellant, then the failure to consider any issue, which has been subsumed under the issue which dealt with proof beyond reasonable doubt cannot be said to have occasioned any injustice to the Appellant. His constitutional right was also not in any way violated."

I agree entirely with the above submission of the learned DPP.

While I agree with learned counsel for the appellant that there was really no clear demarcation between the conspiracy and the actual commission of the offence, in the judgment of the learned trial Judge, I am unable to agree with him that the appellant was denied fair hearing or that there was a miscarriage of justice. The offence of conspiracy to commit an offence and that of the commission of the real offence though not twin brothers have some affinity and a trial Judge cannot be censured because he did not evaluate the evidence on the two offences separately. There can hardly be any water-tight demarcation particularly in the light of the facts of this case.

I must say that the learned trial Judge tried to separate the two in his judgment. An example is at page 48 of the Record when he took the offence of conspiracy:

"Regarding the charge of conspiracy in the 1st count, the prosecution in proving the charge against the accused generally tendered in evidence the statement of the accused to the police (Exhibit A). The contents of Exhibit 'A' provide sufficient evidence of the degree, nature and quality of the agreement between the accused and the other members of his gang now at large before the commission of the offences charged. With this, I am satisfied that there is sufficient evidence of conspiracy against the accused person to justify his conviction on count 1."

Although learned counsel for the appellant submitted that the issue relates or revolves around the style of judgment writing or evaluation of evidence by the trial Judge, he clearly means the two put together. There is no need to play with words. I think learned DPP got him when she cited *Igabo v. State* (1999) 14 NWLR (Pt. 637) 1. This court said at page 19:

"It is elementary principle that the function of the evaluation of evidence is essentially that of the trial Judge. Where the trial Judge has unquestionably evaluated evidence and justifiably appraises the facts it is not the business in an appellate court to interfere, and to substitute its own views for the view of the trial court."

B In order to pick faults in a judgment of a trial Judge, an appellate court should not take paragraphs or pages in isolation or in quarantine but must take the whole judgment together as a single decision of the court. An appellate court cannot allow an appellant to read a judgment in convenient installments to underrate or run down the judgment. While an appellate court can concede to counsel the right to be partisan to the case of his client, the court will not allow him to construe a judgment parochially since the judgment is available to the court for construction.

D The appellant confessed to the commission of the offence. The confessional statement is at pages 8 and 9 of the Record. It reads in part:

E *"The three of us agreed to go and do the business. The three of us boarded a passenger vehicle at Lafenwan garage at about 9.30 p.m. We dropped at Wasinmi Village at about 11.30 pm they carried guns..."*

Confession is the best evidence in criminal law. In it, the accused admits that he committed the offence for which he is charged. For this purpose, the accused is the figurative horse's mouth. He committed the offence and he confesses and admits the offence. There cannot be a better evidence. And so the law is that a trial Judge can admit confessional statement, if it was made voluntarily and without any inducement, threat or promise from a person in authority.

G Learned counsel for the appellant roped in the fair hearing principle. I have seen in recent times that parties who have bad cases embrace and make use of the constitutional provision of fair hearing to bamboozle the adverse party and the court, with a view to moving the court away from the live issues in the litigation. They make so much weather and sing the familiar song that the constitutional provision is violated or contravened. They do not stop there. They rake the defence in most inappropriate cases because they have nothing to canvass in their favour in the case. The fair hearing provision in the

Constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in a case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision available to a party who is really denied fair hearing because he was not heard or that he was not properly heard in the case. Let litigants who have nothing useful to advocate in favour of their cases, leave the fair hearing constitutional provision alone because it is not available to them just for the asking. B

It is for the above reasons and the fuller reasons given by my learned brother, Muhammad, JSC, that I dismiss the appeal. C

AKINTAN JSC

The appellant was arraigned before an Abeokuta High Court on a one count charge of conspiracy and two counts of robbery. The first count was for conspiracy to commit robbery while the two other counts were for robbery. He pleaded not guilty to each of the counts of the charge and the prosecution led evidence in support of its case. The evidence tendered at the trial came from the victims of the robbery and the confessional statement of the appellant. The appellant was found guilty as charged by the learned trial Judge and appropriate sentences were imposed, including death sentence. E

The appellant was dissatisfied with the conviction and sentences passed on him. His appeal to the Court of Appeal was dismissed. The present appeal is from the judgment of the Court of Appeal dismissing his appeal. F

The main complaint raised in this court is in respect of the lower court's treatment of counts 1 and 2 together. It is not a complaint against joinder of the two counts. It is against the treatment of the issues arising together. The merits of the overwhelming case against the appellant were totally ignored. It is necessary to say that an appeal could only be allowed where, inter alia, a case has been made out show that there was fundamental breach of the applicable law or procedural law or that an essential ingredient of the charge against an appellant was not established. That was not the position in this H

case.

I had the privilege of reading the draft of the leading judgment written by my learned brother, I. T. Muhammad, JSC. All the issues raised in the appeal are fully set out and dismissed therein. I entirely agree with his reasoning and conclusion as set out in the said judgment. For the reasons given in the said leading judgment, I also hold that there is no merit in the appeal and I accordingly dismiss it.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, Holden at Ibadan in appeal No.CA/I/75/2002 delivered on the 11th day of July, 2006 affirming the conviction and sentence of the appellant for conspiracy to commit armed robbery, armed robbery under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, 1990.

The appellant was charged before the Ogun State Tribunal for the trial of offences under the Robbery and Firearms (Special Provisions) Act, 1990 with the following offences:-

"Count One:

Saburi Adebayo (M) on or about the 11th day of March, 1994 at Elekuro Village, via Ifo in Ogun State of Nigeria did conspire together with others still at large to commit a felony to wit: Armed Robbery and thereby committed an offence contrary to Section 5(b) and punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws of the Federation of Nigeria, 1 990.

Count Two:

Saburi Adebayo (M) on or about the 11th day of March, 1994 at Elekuro Village, via Ifo in Ogun State of Nigeria while in the company of others still at large did rob one Salu Afolabi of the sum of N100.00 and a Suzuki Motor-cycle with Reg. No. OG 7842 DA and at the time of the said robbery were armed with cutlasses and thereby committed an offence contrary to and punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap.398 Laws of the Federation of Nigeria, 1990."

Count Three:

Saburi Adekayo (M) on or about the 11th day of March, 1994 at Elekuro village, via. Ifo in Ogun State of Nigeria while in the company of others still at large did rob one Oladelinde Segun of the sum of N100.00k and at the time of the robbery were armed with cutlasses and thereby committed an offence contrary to and punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act. Cap. 398 Laws of the Federation of Nigeria, 1990". ^B

At the conclusion of the trial, appellant was convicted of the offences and sentenced to death by firing squad, He was dissatisfied with the judgment of the trial tribunal and consequently appealed to the Court of Appeal which dismissed the appeal and affirmed the conviction sentence resulting in the instant, further appeal before this court. ^C

The case of the prosecution is that on the 11th day of March, 1994 at Elekuro Village, via Ifo in Ogun State, the appellant with others now at large while armed with cutlasses and butchers knife, robbed one Salihu Afolabi of the sum of N100.00k (One Hundred Naira) and a Suzuki Motor Cycle with registration No. OG 7842 DA and also robbed one Oladehinde Segun of the sum of N100.00k (One Hundred Naira); that the accused/appellant was apprehended by PW3, Wasinmi who was a security guard in a nearby branch of Universal Trust Bank and subsequently handed over to the police. ^E

The appellant denied the charge and stated that he was on his way to Lagos to procure medicine to cure a stomach ailment but dropped from the vehicle in which he was travelling from Abeokuta, at Itori village to ease himself in a nearby bush but when he thereafter emerged from the bush onto the road so as to take another vehicle to continue with his journey, he was apprehended by PW3. ^F

Learned counsel for the appellant Dr Joseph Nwobike in the appellant's brief of argument file on the 27th day of September, 2006 and adopted in argument of the appeal on the 22nd day of November, 2007 has submitted a single issue for the determination of the appeal. The issue is as follows:- ^G

"Whether the lower court failed to consider the legal effect & of the joint consideration of counts 1 and 2 together; and if so whether the failure occasioned injustice to the Appellant"

In arguing the issue, learned counsel submitted that it is now

settled law that a court is bound to consider and pronounce on all the issues validly raised by the parties, relying on *Adah v. National Youth Service Corps* (2004) 7 SC (Pt.11) 139, at 143- 144; *Okonji v. Njokanma* (1991) 7 NWLR (Pt.202) 131 at 146; that the trial court considered counts 1 and 2 jointly but the lower court failed to pronounce upon the submission of learned counsel for the appellant that the procedure adopted by the trial court was wrong and injurious to the case of the appellant; that the matter was raised as appellant's issue 1 in the lower court and that the none consideration of that issue amounts to a breach of appellant's right to fair hearing as guaranteed under Section 36 (1) (4) of the Constitution of the Federal Republic of Nigeria, 1999 (herein after referred to as the 1999 Constitution) and urged the court to resolve the issue in favour of the appellant and allow & the appeal.

On her part, learned counsel for the respondent A. A Babawale (Mrs) formulated the following issue for determination;

"Whether there was any aspect of the lower court's judgment which occasioned injustice to the Appellant".

Learned counsel then submitted that the cases cited and relied upon by counsel for the appellant are civil cases which are not applicable to the instant ease, and cited and relied on the case of *Okonji v. Njokanma*, supra, to the effect that a Court of Appeal should not deal with issues not before it and that where an issue is submitted to the court for determination, the court must make pronouncement thereon except where the issue submitted is subsumed in another issue; that the issue of joint consideration of counts 1 and 2 as framed in issue 1 before the lower court was subsumed under issue 2 which posited thus:

"Whether the offences charged were proved by the prosecution against the Appellant beyond reasonable doubts."

that the lower court found that the charge against the appellant was proved beyond reasonable doubt and thereby resolved the issue 2 against the appellant; that the none consideration of issue 1 by the lower court in the circumstance cannot be said to have occasioned a miscarriage of justice and urged the court to resolve the issue against the appellant and dismiss the appeal.

It should be noted that the counts 2 and 3 considered together

by the learned trial judge charged the appellant with armed robbery against two persons separately and that learned counsel for the appellant has not referred this court to any provision of the Criminal Procedure Act/Law applicable which forbids such a joint consideration, particularly where the facts are very similar for the proof of each count, as in the instant case. The real question before in the trial court is simply whether there was an armed robbery committed by the appellant together with others now at large on the day in question and on the people respectively mentioned or named in the two counts. B

If from the available evidence on record, the question can be unequivocally answered in the affirmative, it becomes irrelevant to consider the issue whether the counts were considered jointly in the process leading to the resolution of the question. The end result is whether there is visible evidence on record to support the conclusion reached by the learned trial judge on the issue. From the record, I hold the view that such evidence exist and that the conclusion has not led to any miscarriage of justice, neither can the exercise be legally said to amount to a denial of the appellant's right to fair hearing as argued by learned counsel for the appellant. C D E

What is better evidence than the eye witness accounts of the victims of the robbery and the appellant's confession to the crime? In his statement to the police upon his arrest at pages 8 and 9 of the record; appellant stated, inter alia, as follows:- F

I know Wasiu and Waidi Akanji (M). Sometimes in May, 1993 Waidi (M) told me that he is a vulcanizer by profession, while I do not know the work of Wasiu. He used to meet ourselves at Oke-Ido at Gbagura where we play table tennis together. On Thursday 10/3/94 at about 7p.m., myself, Wasiu and Waidi Akanji met ourselves at Oke-Ido. As we were playing table tennis, Waidi Akanji told me and Wasiu (M) that there was one certain work that he wanted to do, I do not ask him what type of work since he is aware of my work that I am a butcher by profession. The three of us agreed to go and do the business. G H

The three of us boarded a passenger vehicle at Lafenwa garage at about 9.30p.m we dropped at Wasimu Village at about 11.30p.m. Wasiu was carrying one bag with him in his hand even the

driver whom we boarded his vehicle asked us where we were going at that lime. Waidi answered him that we were going to butcher cow somewhere when we alighted from the vehicle. We started trekking Elekuro Village we reached the village by 2 in the mid-night. All the villagers had slept. The two of them that is Waidi Akanji (M) and B Wasiu (M) opened the bag and pulled out matchets that was kept inside, one of the two men we went together later took one motor-cycle and started riding it off by this time the villagers had woken up; they carried guns and cutlasses to pursue us, I ran inside the bush and took cover. When I felt that the shouting of the villagers had died C down I entered the road leading to Wasiu village to board another vehicle to Abeokuta since I could not know the direction which the remainder two of my gang followed. I was later taken to Itori Police Station from Itori to Ifo Police before I was finally taken to Eleweran D Abeokuta. I know that what we did was bad because we went to another people village by night and we took their properties by force. I have not been given, any thing out of the properties we stole before I was caught. I plead with the government to forgive me and I promised not to commit this type of offence again.

E From the above, it is clear that the appellant admitted committing the offence while in the company of the others still at large. I therefore, do not see any merit in the instant appeal which I agree with the lead judgment of my learned brother Muhammad F JSC should be dismissed. I hereby order accordingly.

CHUKWUMA-ENEH JSC

I have read in advance the judgment of my learned brother, G Mohammad, JSC just delivered with which I agree. I adopt the same as mine. I will dismiss the appeal and abide by the orders in the lead judgment.

H