

**SUPREME COURT OF NIGERIA**  
14TH JANUARY, 2011. SC. 39/2009  
**CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN,**  
**F. F. TABAI, I. T. MUHAMMAD,**  
**S. MUNTAKA-COOMASSIE, JJSC**

MICHAEL EBEINWE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Evidence - Contradictions - Effect - The alleged contradictions in the prosecution's case - Are not such as would have affected the substance of its case (H1)

EVIDENCE - Crime - Contradictions - Warranting reversal of judgment - Nature of - To succeed in upturning a decision - The contradiction must be relevant and of great magnitude - That would cause a miscarriage of justice (H2)

ARMED ROBBERY - Proof - Failure to tender the robbed motorcycle - Does not destroy the conclusive evidence led - As its description and whereabouts were consistently explained in court (H3)

CRIMINAL PROCEDURE - Evidence - Proof beyond reasonable doubt - Meaning - It does not mean proof beyond shadow of doubt - It is attained where the evidence leave a remote possibility in favour of accused person (H4)

***FACTS***

The appellant was arraigned and tried before the High Court of Ogun State holden in Ijebu-Ode on a charge of armed robbery. The case of the prosecution was that appellant had on 23rd October, 2000, engaged a cyclist, one Mr. Paul Umoke to take him to his house at Itele in Ijebu-Ode judicial division. Upon getting to a point around his destination, appellant, who had a machete with him, cut the cyclist severally with the machete, left him in a pool of blood and made away with the Suzuki Motorcycle FR 50 belonging to the cy-

clist. Following a report by the cyclist, appellant was subsequently arrested by the police. While in custody, appellant made a confessional statement, took the police to the place where he hid the motorcycle and it was recovered. He also took the police to the scene of the robbery where the machete was recovered among other items.

However, during the trial, appellant denied that his confessional statement to the police was made voluntarily. Moreover, the details of the victim's narration in oral testimony varied in some respects from his extrajudicial statement to the police. Also, the motorcycle was not tendered in evidence, as same had since been released on exhibit bond to the owner. The trial judge found appellant guilty as charged and sentenced him accordingly. Aggrieved, appellant appealed to the Court of Appeal which appeal was dismissed. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court. It is his contention that the discrepancies in the evidence and failure to tender the motorcycle, were fatal to the case of the prosecution.

### **ISSUE FOR DETERMINATION**

Whether the prosecution failed to prove the guilt of the appellant.

**HELD** (Unanimously dismissing the appeal per **MUKHTAR JSC**)  
**CRIMINAL PROCEDURE - Evidence - Contradictions - Effect**

1. The only discrepancy I can perceive in these pieces of evidence is that of the scene of the crime for which P. W 1 added, 'Atoye along the express at Ijebu-Ife'. As for his earlier evidence that the incident occurred when they got to the destination, it was consistent with the evidence in cross examination in which he said they had reached the destination. The fact that PW1 said, the scene of crime was along the express road does not detract from the fact that he was robbed or cut with a cutlass by the appellant. The destination or the house may well be on the express road.

The inconsistencies/contradictions alleged by the learned counsel for the appellant are not such that would have affected the substance of the prosecution's case, and the finding of the learned trial judge is to that effect. (p. 130 D)

**Contradictions - Warranting reversal of judgment - Nature of**

2. In this respect, I cannot see that there was any material contradic-

tion in the evidence of PW1 to warrant the reversal of the judgments of the lower courts. If at all there is, it is a discrepancy and a minor one for that matter, for it is trite law that, is not every discrepancy, contradiction and or inconsistency that will affect the substance of a criminal case, that has been proved with credible and unchallenged evidence that will upset the judgment of the trial court. To succeed in upturning a decision, the contradiction must be relevant and of great magnitude that, it would cause miscarriage of justice. (p. 131 B)

### ***Robbery - Proof - Failure to tender the motorcycle - Effect***

3. Indeed, there were several pieces of evidence that nailed the coffin and confirmed the appellant as the person who robbed PW1 of his motorcycle after inflicting injuries on him. Those pieces of evidence unequivocally reinforced the guilt of the appellant, and led to the conclusion that the prosecution did prove its case beyond reasonable doubt, as required by section 138 of the Evidence Act, Cap. 112 1990, Laws of the Federation of Nigeria.

The cutlass and the other exhibits given to PW3 were tendered in evidence. It is however, a fact that the motorcycle was not tendered in evidence, but I believe that PW2 and PW3 gave ample evidence on the motorcycle, its description and its whereabouts to the court. That it was the appellant who led PW2 to the recovery of the motorcycle speaks a volume. There was also consistency in the description of the motorcycle. (p. 132 H/133 H)

### ***Evidence - Proof beyond reasonable doubt - Meaning***

4. This proposition of the law is well enunciated by Lord Denning in the case of *Miller v. Minister of Pensions* 1947 2 All E. R. page 372, and it reads thus:-

*“Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”*

I am fortified by the above and apply it to the case in hand. The presence of minor discrepancies and minor lapses which the

appellant's counsel has capitalized on are not strong enough, and are of no moment to justify the interference of this court. (p. 135 C)

### **STATUTES & RULES REFERRED TO**

- B Robbery and Firearms (Special Provisions) Act, Cap. 398 LFN, 1990,  
s. 1  
Tribunals (Certain Consequential Amendments Etc.) Decree, 1999  
Evidence Act, Cap. 112, LFN, 1990, ss. 138 and 149 (d)

### **REPRESENTATION**

- C Mr. O. U. Inneh for the Appellant.  
Mr. Kemi Balogun with him M. K. Ogidiagba for the Respondent.

### **CASES REFERRED TO**

- D Ogidi v. The State 2005 All WLR part 251 page 202  
Ogbu v. The State 1992 8 NWLR part 259 page 255  
Okereke v. The State 1998 3 NWLR part 540 page 75  
Ogoala v. The State 1991 2 NWLR part 175 page 509  
Wankey v. The State 1993 5 NWLR part 295 page 542  
E Okpulor v. The State 1996 7 NWLR part 164 page 581  
Ayo Gabriel v. The State 1989 5 NWLR part 122 page 457

### **LEAD JUDGMENT BY MUKHTAR JSC**

- F The charge for which the appellant was arraigned before the  
Ogun State High Court, holden in Ijebu-Ode reads as follows:-  
“That you Michael Ebeinwe on or bouat (sic) the 23rd day of  
October, 2000 at Itele in the Ijebu-Ode Judicial Division robbed one  
G Paul Umoke of a Suzuki Motorcycle FR 50 valued at N 100,000.00  
and at the time of the said robbery was armed with an offensive  
weapon to wit cutlass and thereby committed an offence contrary to  
Section 1 (2) (a) of the Robbery and Firearms (Special Provisions)  
Act Cap. 398 Laws of the Federation of Nigeria, 1990 as amended  
H by the Tribunals (certain consequential Amendments etc.), Decree  
1999.”

The accused pleaded not guilty to the charge. The case of the prosecution is that the appellant inflicted injuries on one Paul Umoke, a motorcycle operator whom he hired to carry him to his house with

a matchet, when they got to the destination. The appellant and took the victim's motorcycle to an unknown place. The incident took place at Atoyo Village along Lagos-Benin Expressway Ijebu-Ife. The prosecution called three witnesses who testified and tendered the confessional statement of the accused/appellant.

The appellant defended himself and denied that he made the confessional statement voluntarily, but that he was tortured by the police. B

The learned trial judge at the end of the case for the prosecution and the defence found the prosecution case proved beyond reasonable doubt, and convicted him as charged. Aggrieved by the conviction the accused appealed to the Court of Appeal. The Court of Appeal found no merit in the appeal and so dismissed it, and affirmed the decision of the court of trial. C

Dissatisfied with the judgment, he has again appealed to this court on four grounds of appeal. Learned counsel exchanged briefs of argument which were adopted at the hearing of the appeal. In his brief of argument, the learned counsel formulated only one issue for determination, and the issue is, whether the prosecution failed to prove the guilt of the appellant. Two issues for determination were however raised in the respondent's brief of argument. The issues are:- E

1. Whether the prosecution proved the guilt of the appellant as required under section 138 of the Evidence Act.

2. Whether the learned Justices of the Court of Appeal were right to have affirmed the judgment of the trial court. F

In arguing their sole issue, the learned counsel for the appellant submitted that the evidence of the victim of the crime, (PW1) was riddled with contradictions, and so it diminished the evidence put forward by the prosecution. He cited the cases of Ogoala v. The State 1991 2 NWLR part 175 page 509, Ayo Gabriel v. The State 1989 5 NWLR part 122 page 457, Okereke v. The State 1998 3 NWLR part 540 page 75, Ogbu v. The State 1992 8 NWLR part 259 page 255, and Wankey v. The State 1993 5 NWLR part 295 page 542. Learned counsel further submitted that the contradictions in the evidence put forward by the prosecution were substantial and material contradictions or conflicts especially that of P.W.1, which should warrant the reversal of the judgments of the court below. G  
H

The learned counsel for the respondent contended that there were no contradictions in the evidence of PW1, and if at all there were they would amount to mere discrepancies. He placed reliance on the cases of Gabriel v. State supra, Musa v. State 2009 15 NWLR part 1165 page 467, and Asriyu v. The State 1987 4 NWLR part 67 page 709. The evidence the appellant's counsel is hammering on are as follows:-

*"As we got to the destination, I asked for my money saying that I could not carry him any further as the day was far spent and it was getting late. He then started to matchet me with cutlass....."*

*The incident happened at Atoye along the Express at Ijebu-Ife." In the course of cross examination PW1 testified thus:-*

*"On getting to the house of the accused (the destination) he told me he was going inside to bring money with which to pay my fee but he came out with a cutlass and started to attack me."*

***The only discrepancy I can perceive in these pieces of evidence is that of the scene of the crime for which P W 1 added, 'Atoye along the Express at Ijebu-Ife'. As for his earlier evidence that the incident occurred when they got to the destination, it was consistent with the evidence in cross examination in which he said they had reached the destination. The fact that PW1 said the scene of crime was along the Express road does not detract from the fact that he was robbed or cut with a cutlass by the appellant. The destination or the house may well be on the Express Road.*** When one reads the evidence against the backdrop of the confession of the accused in his caution statement, one will see that the accused/appellant corroborated the evidence of PW1. In Exhibit 'J' his confessional statement can be found in the following:-

*"On the 22/10/2000, I saw one motorcyclist at Ijebu-Ife and asked him to carry me to Ajegunle area of Itele where I reside with my friend to collect some money and a matchet."*

***The inconsistencies/contradictions alleged by the learned counsel for the appellant are not such that would have affected the substance of the prosecution's case, and the finding of the learned trial judge is to that effect.*** This was equally affirmed by the court below when Fasanmi JCA, who wrote the lead

judgment posited inter alia thus:-

*“I have perused this evidence several times and I have seen no material not to talk of any contradiction in the evidence of PW1 as to the scene of crime. For a statement to be contradictory, it should be direct opposite of what was earlier stated or spoken.”*

The evidence of PW2 lends credence to the view I expressed above on the scene of accident, for in the course of being cross-examined he said inter alia:-

*“The scene of crime was Atoye area under Itele.”*

***In this respect, I cannot see that there was any material contradiction in the evidence of P. W. 1 to warrant the reversal of the judgments of the lower courts. If at all there is, it is a discrepancy and a minor one for that matter for it is trite law, that is not every discrepancy, contradiction or inconsistency that will affect the substance of a criminal case, that has been proved with credible and unchallenged evidence that will upset the judgment of the trial court. To succeed in upturning a decision, the contradiction must be relevant and of great magnitude that it would cause miscarriage of justice.*** See *Omisade v. Queen* 1964 1 All L. R. 233, *Queen v. Ekanem* 1960 SC 14, and *Queen v. Iyanda* 1960 5 F. S. C. 264.

In fact what is described as contradiction in this case is a mere discrepancy, and even for that, to have a negative effect, it must be sufficient to affect the credibility of the evidence. I find solace in the decision of this court in the case of *Abogede v. State* 1996 5 NWLR part 448 page 270, where Adio JSC stated inter alia thus:-

*“It is not every discrepancy between what one witness says at one time and what he says at another that is sufficient to destroy the credibility of the witness altogether. However, where the discrepancy is at least enough to call for a mention by the judge, it should appear on the record that he averted his mind to it and the reason for believing the witness in spite of the discrepancy should also be stated. That will enable the Appellate Court to determine if the learned trial judge overlooked the discrepancy or whether he averted his mind to it and consider it but find the witness credible nevertheless.”*

I am fortified by the above excerpt of the judgment of the *Abogede*’s case. Another grouse of the appellant is that the description of the motorcycle by PW1 is not consistent with the description

on the charge, and that the prosecution should have produced the motorcycle allegedly stolen to prove its case. These anomalies, according to learned counsel, has not assisted the prosecution to discharge its duty of proof beyond reasonable doubt. He relied on the cases of Obiakor v. The State 2002 FWLR part 113 page 299, <sup>B</sup> Agbachoni v. The State 1970 1 All WLR 69, Okpulor v. The State 1996 7 NWLR part 164 page 581, and Ogidi v. The State 2005 All WLR part 251 page 202. Learned counsel further submitted that the prosecution's failure to produce the actual motorcycle raises justification for this court to invoke the provisions of section 149 (d) of the <sup>C</sup> Evidence Act, and he referred to Asoruyu v. The State 1987 4 NWLR part 67 page 709.

It was also submitted that the reliance on Exhibits A and J by the lower court to affirm the conviction and sentence of the Appellant by the trial court is unjustified, and that the other facts outside <sup>D</sup> Exhibits A and J relied upon by the courts below to convict and sentence the appellant were disputed facts, which dispute relates to the inconsistencies in the evidence produced by the prosecution. He placed reliance on the cases of State v. Gwonto 2000 FWLR part 30 <sup>E</sup> page 2583, and Debbie v. The State 2007 All FWLR part 363 page 83.

The learned counsel for the respondent in reply, submitted in its brief of argument that by the tendering of Exhibit H (application for release of motorcycle) which was not challenged and same <sup>F</sup> was admitted in evidence, the provisions of section 149 (d) of the Evidence Act is not relevant to the issue as the production of the motorcycle is optional and superfluous because it is not one of the envisaged ingredients required to prove the offence of armed robbery. <sup>G</sup> According to learned counsel the prosecution adduced ample evidence to prove its case. The recovery of the motorcycle vide the lead of the appellant, photographs of the victim at the hospital when he was receiving treatment for injuries he sustained from the appellant's act of armed robbery, the appellants caution statement <sup>H</sup> Exhibits A and J, were also supportive of the prosecution's case. Reliance was placed on the case of Okpulor v. State 1990 7 NWLR part 164 page.

***Indeed, there were several pieces of evidence that nailed the coffin and confirmed the appellant as the person who***



**robbed PW1 of his motorcycle after inflicting injuries on him. Those pieces of evidence unequivocally reinforced the guilt of the appellant, and led to the conclusion that the prosecution did prove its case beyond reasonable doubt, as required by section 138 of the Evidence Act, Cap. 112, 1990, Laws of the Federation of Nigeria.** Such vital and pertinent evidence are:- B

*“PW1..... He then started to matchet me with cutlass. The time was about 6.00 p.m. I was soaked in my own blood which covered my face. As I was lying on the ground, Michael rode away my machine (the motorcycle). I did not know where he carried the machine.....”* C

The above evidence was not successfully Challenged. Corporal Olowu who investigated the case gave evidence on the motorcycle and the cutlass thus:-

*“After I had obtained the statement the accused took me to a D location after Eridi Camp along Ogbera Road where he said he kept the motorcycle - Suzuki FR50 model-unregistered, from the bush. I took same to the police station. The accused person also took me to the scene of Crime at Atoyo Area, near Itele, where I recovered one cutlass, long-sleeve shirt,..... I visited the victim, the PW1 at the hospital (Olu Ola Hospital, Ijebu-Ode), where he was receiving treatment.”* E

Again this evidence was not challenged by the appellant in the course of cross-examination. The position of law is that evidence that is neither challenged nor debunked remains good and credible evidence which should be relied upon by a trial judge, who would in turn ascribe probative value to it. See *Okike v. L.P.D.C.* 2005 15 NWLR part 949 page 471. F

Then P. W. 3, another police corporal to whom P.W. 2 handed G over all the exhibit's when he transferred the case to Abeokuta gave the following testimony:-

*“The exhibits transferred along with the case file to Abeokuta included one Suzuki FR50 motorcycle, one cutlass; the key to the motorcycle.....the motorcycle and its key were released to the complainant at the state C. I. D. but the other exhibits are in court.”* H

**The cutlass and the other exhibits given to P. W. 3 were tendered in evidence. It is however, a fact that the motorcycle**

**was not tendered in evidence, but I believe P. W. 2 and P. W. 3 gave ample evidence on the motorcycle, its description and its whereabouts to the court. That it was the appellant who led PW 2 to the recovery of the motorcycle speaks a volume.**

**There was also consistency in the description of the motorcycle.** That the learned counsel for the appellant should make heavy weather of the non production of the motorcycle to the extent of wanting this court to invoke the provision of section 149 (d) of the Evidence Act supra, baffles me Perhaps I should reproduce this provision for a clear understanding of my bewilderment. It stipulates:-

*“149. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of national events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume-*

*(d) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;”*

How could it, if I may ask have been unfavourable to the prosecution if the motorcycle had been produced in court. A chain of how the motorcycle was recovered and its identity and ownership had been established, and this chain did not at any stage snap, so what difference would it have made if it was physically brought to court. It is obvious that the appellant’s counsel is clutching a straw to exonerate the appellant from the hideous crime he has committed, and I will invoke the saying that the wicked cannot go free or unpunished here. The court below adequately dealt with the issue in its judgment, as is encapsulated below:-

*“The learned trial Judge held that there was no doubt as to the object of the robbery and that the Appellant was never in any way misled or prejudiced by the fact that the robbed motorcycle was not tendered. See lines 21 - 25 on page 61 of the Record of Proceeding. I agree with the learned trial judge for the right finding of fact that the Appellant was not misled by the non production of the motorcycle. The prosecution accounted for the whereabouts of the robbed motorcycle vide the content of Exhibit ‘H’ it tendered during the trial.”*

There is also the confessions of the appellant in Exhibits A and J. I Consequently endorse the above finding.

By virtue of the provision of section 138 of the Evidence Act supra, for a crime to result in a conviction, the prosecution must prove its case beyond reasonable doubt. Section 138(1) stipulates thus:-

*“138. (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.”*<sup>B</sup>

This of course does not require or infer that such proof must be stretched to a ridiculous height, of requiring proof beyond the shadow of doubt. This principle of law has been amply invoked and applied by this court in a plethora of authorities. ***This proposition of the law is well enunciated by Lord Denning in the case of Miller v. Minister of Pensions 1947 2 All E. R. page 372, and it reads thus:-***<sup>C</sup>

***“Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”***<sup>D</sup><sup>E</sup>

***I am fortified by the above and apply it to the case in hand.*** See also Obiakor v. State 2002 10 NWLR part 776 page 612, Odili v. State 1977 4 SC. 1, and Sadau v. State 1968 1 All W.L.R. 124. ***The presence of minor discrepancies and minor lapses which the appellant’s counsel has capitalized on are not strong enough, and are of no moment to justify the interference of this court.*** It is trite law that an appellate court will not ordinarily disturb the findings of a trial court unless the findings are perverse not supported by credible evidence and have occasioned miscarriage of justice. This is an appeal against concurrent findings of two courts which this court will not interfere with, in the circumstances of this case. See Efee v. State 1976 11 SC, Michael Omisade v. State 1976 11 SC 75 and, Egwe v. State 1982 9 SC. 174,<sup>F</sup><sup>G</sup><sup>H</sup>

All the issues raised, for determination by learned counsel in their briefs of argument are resolved in favour of the respondent, and so the grounds of appeal from which they were distilled fail, and

they are hereby dismissed. The end result is that the appeal fails in its entirety and it is hereby dismissed. The conviction and sentence of the learned trial court are affirmed.

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**B ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother MUKHTAR, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is devoid of merit and should be dismissed.

My learned brother has dealt exhaustively with the relevant issues for determination which renders any addition unnecessary. I therefore have nothing useful to add.

I too dismiss the appeal and abide by the consequential orders made in the said lead judgment.

Appeal dismissed.

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**E MUHAMMAD JSC**

I am privileged by my learned brother, Mukhtar, JSC, to read in advance the judgment just delivered. Permit me, my Lords, to say that the appellant's lone issue is premised primarily on proof of the offence of robbery as provided by the Robbery and Fire Arms [special Provisions] Act as contained in Cap. 398 of the Laws of the Federation of Nigeria, 1990 [and now contained in Cap. R11, Volume 14 of the Laws of the Federation of Nigeria, 2004]. Section 16 of the former enactment and now section 11 of the 2004 Laws, defines robbery to mean:

*“Stealing anything and, at or immediately before or after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.”*

The word “stealing” itself has been defined by the Act to connote the act of taking or converting to one's use or the use of any other person anything other than immovable property with any of the following intents:-

a) an intent permanently to deprive the owner of the thing

of it;

b) an intent permanently to deprive any person who has any special property in the thing of such property, the term “special property” here including any charge or lien upon the thing in question and any right arising from or dependent upon holding possession of the thing in question, whether by the person entitled to such right or by some other person for his benefit; B

c) an intent to use the thing as a pledge or security;

d) an intent to part with the thing on a condition as to its return which the person taking or converting it may be unable to perform; C

e) an intent to deal with the thing in such a manner that it cannot be returned in the condition in which it was at the time of taking or conversion;

f) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner. D

An X-ray of the case law reveals that the Supreme Court at different occasions, had interpreted the provisions of section 9 of the Robbery and Firearms (Special Provisions) Decree No. 47 (Act) of 1970 to define robbery as, stealing anything and at or immediately before or after the time of the stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. See: The State v. Yamusissiaka (1974) 6 SC 53 at 62; Okabi v. The State. (1984) 6 SC 47 at 57 Robbery is theft or extortion by force or inducing of fear by coercion. See: Kerenku v. Tiv. N. A. (1955) 2 ANLR 141 at 142. It is the same definition that is given to robbery by the Criminal Code Law of Ogun State as contained in Cap. 29 of the Laws of Ogun State of Nigeria, vol. II, 1978. Therefore, theft, in all its ramification is robbery if, in order to commit the theft or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender/accused for that end, voluntarily causes or attempts to cause any person's death or hurt or wrongful restraint or fear of instant death or hurt or instant hurt or of instant wrongful restraint. See: The State v. Yamusissiaka (supra). E  
F  
G  
H

Thus, from the provisions of section 16, now section 11 (as

revised) of the Act, and the general case law, it is my understanding that for the prosecution to secure conviction on the offence of robbery (armed robbery), it has the onus of proving beyond reasonable doubt that:

- B i. robbery has taken place;
- ii. the robbery was an armed robbery;
- iii. the accused person participated in the robbery.

It is immaterial in whichever form stealing/theft of anything was executed by an accused person, once the act involved extortion by force or infusing fear of instant death or hurt, it would amount to robbery. See: *Kerenku v. Tiv N. A.* (1965) ALNR 141 at p. 142. There are findings of fact made by the trial court and affirmed by the court below that:

a) what took place between the PW1 and the accused on 23/10/2000 was an armed robbery (p. 60 of the record).

b) the recovery of exhibit B - the cutlass used by the accused to attack PW1 (p. 62 of the record)

c) exhibits B, C, D, E and F (the cutlass and personal effects of the accused) recovered from the scene of the crime, established the guilt of the accused beyond reasonable doubt (p. 62 of the record). Under the Act in reference, the punishment for robbery has been provided as follows:-

1. Any person who commits the offence of robbery shall upon trial and conviction under this Act, be sentenced to imprisonment for not less than 21 years

2. If-

a) any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any person so armed; or

b) at or immediately before or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person, the offender shall be liable upon conviction under this Act to be sentenced to death

3. The sentence of death imposed under this section may be executed by hanging the offender by the neck till he be dead or by causing such offender to suffer death by firing squad as the Governor may direct. (*Words/phrases underlined are for emphasis*)

The court below, per Fasanmi, JCA, concluded its appraisal of the

trial court's proceedings in the following words:

*"The confessional statements of the Accused/appellant Exhibits A and J which were subjected to trial within trial before they were admitted in evidence are sufficient to link the accused/appellant with the commission of the offence.*

*The trial court has determined the issue as to whether or not the case against the accused person was made out or established beyond reasonable doubt by considering the totality of the evidence before the court.....*

*Setting aside findings of fact of a trial court is a very serious appellate function which an appellate court cannot exercise for the fun of it, but rather for valid legal reason or reasons. An appellate court cannot fault the findings of fact of a trial court when the appellate court does not find or see any fault."*

It is my finding that, the two courts below are concurrent that the offence of armed robbery has been sufficiently established beyond reasonable doubt against the appellant. This court does not normally interfere with such a concurrent decision unless where perversity is shown to exist. See: Adimora v. Ajufu & Ors. (1988) 3 NWLR (Pt. 80) 1 at 16; Fawehinmi v. Akilu (1994) 6 NWLR (Pt. 351) 387 at p. 467-468.

I fail to find any perversity in this appeal. The appeal lacks merit. I hereby, in concurrence with my learned brother, Mukhtar, JSC, dismiss the appeal and affirm the judgment of the court below.

### **MUNTAKA-COOMASSIE JSC**

I have been opportuned to read in draft the lead judgment of my learned Lord Mukhtar JSC, I agree with the conclusions reached thereat. Since all the issues raised were resolved in favour of the respondent, the appeal as a whole failed same is accordingly dismissed. I have looked into the record, the evidence and the submissions of the Appellant's counsel but could not lay my hand on any mitigating circumstances to resolve same in favour of the Appellant. That being the case, the conviction and sentence meted out by the trial court and affirmed by the court below are further confirmed by me.