

SUPREME COURT OF NIGERIA
9TH DECEMBER, 2011. SC. 341/2010
CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH, M.
S. MUNTAKA-COOMASSIE, J. A. FABIYI, B. RHODES-
VIVOUR, JJSC

CHUKWUKA OGUDO APPELLANT
V.
THE STATE RESPONDENT

APPEALS - Issues - Determination - Courts are to restrict its deliberations to live issues - Respondent's issue no. 1 is the only relevant live issue in this case (H1)

EVIDENCE - Confession - Validity - Court must be satisfied that it is voluntary - Where it is voluntary - Accused usually pleads guilty - And a conviction based upon such would not be upset on appeal (H2)

EVIDENCE - Confession - Obtained under duress - Fate - Where accused alleges that he involuntarily made confession - Court should conduct a trial within trial - Otherwise the confession must be rejected (H3)

EVIDENCE - Confession - Inconsistency rule - Application of - Where witness makes extra judicial statement inconsistent with his testimony at trial - The testimony is to be treated as unreliable - While the statement cannot be relied upon by court (H4)

EVIDENCE - Confession - Inconsistency rule - Limitation of - It is restricted to evidence of witness who made extra judicial statement inconsistent with evidence given at trial (H5)

EVIDENCE - Confession - Conviction based on retracted confession - Propriety - Court can convict on retracted confession - But there must be other independent evidence to corroborate it (H6)

EVIDENCE - Weight - Unsigned confessional statement - Court should

exercise extreme caution in respect of such statement - And very little or no weight should be attached to it (H7)

EVIDENCE - Admission - Unsigned confessional statement - The statement should be admitted in evidence - But judge is to decide at the end of trial - The weight to be attached to it (H8)

EVIDENCE - Criminal procedure - Failure to call vital witness - Effect - It is fatal to prosecution's case - Because Evidence Act s.149 (d) raises presumption that the evidence if led - It will be unfavourable to prosecution (H9)

ARMED ROBBERY - Evidence - Burden of proof - Prosecution must prove the offence charged beyond reasonable doubt - By producing enough evidence (H10)

EVIDENCE - Evaluation - Armed robbery - Wrongful conviction - Corroboration - Retracted confession - Court is to look out for independent evidence - That corroborates the confessional statement - And not merely rely on its belief or disbelief (H11)

FACTS

Appellant and one Bright Chibuike were charged and arraigned before the High Court of Kaduna State, Kaduna on two counts of criminal conspiracy and armed robbery pursuant to Section 97 of Penal Code Laws of Kaduna State and Section 1 (a) (b) of Robbery and Firearms (Special provisions) Act Cap. 398 Laws of Federation 1990 respectively. This charge was in respect of an Armed Robbery incident that occurred on the Bukuru - Kaduna Road. Police arrested and detained appellant and one Bright Chibuike as suspects at the Birnin Gwari Police Station, Bukuru in respect of the offence. Appellant made a statement at the Bukuru Police Station, which was not produced in court at the trial. Later on, appellant and Bright Chibuike were taken to the State C.I.D. Kaduna, where appellant made a statement, exhibit 1 which according to the prosecution was his (appellant's) confessional statement. There was also alleged evidence of three victims of the armed robbery attack.

At the trial, appellant denied voluntarily making and signing

of exhibit 1. Two witnesses i.e. policemen attached to the Kaduna Police Station gave evidence for prosecution. The evidence of alleged victims was not tendered at trial and they never came to court to give evidence. Notwithstanding the paucity of evidence, the learned trial Judge found as a fact that exhibit 1 is a confessional statement and convicted appellant solely on it. He was sentenced to five years on count one and death by hanging on count two. Bright Chibuike was similarly convicted. Dissatisfied, appellant and Bright Chibuike brought an appeal before the Court of Appeal, Kaduna. The court unanimously dismissed the appeal. Dissatisfied further, appellant alone has come before this Court on a further appeal.

ISSUE FOR DETERMINATION

1. Whether the confessional statement of the appellant to the Police (Exhibit 1) was properly admitted in evidence and utilized for his trial, conviction and sentences by the trial Court (as confirmed by the Court below) notwithstanding appellant's retraction therefrom.

HELD (Unanimously allowing the appeal per **RHODES-VIVOUR JSC**)

Issues - Determination

1. The real issue or grievance of the appellant is that the trial Court was wrong to convict him on a retracted confessional statement - Exhibit 1, and the Court of Appeal was equally also wrong to confirm the sentence of the trial Court. The respondent's issue No. 1 says it all very clearly. All other issues are not live issues. They would not be considered, since Courts are not to indulge in an academic exercise. Courts are to restrict deliberations to live issues only. (p. 2384 F)

Confession - Validity

2. By virtue a section 27 (1) and (2) of the Evidence Act a confessional statement is a statement by an accused person charged with an offence stating that he committed the offence. A confession cannot be used against an accused, unless the Court is satisfied that it is voluntary. Where a confessional statement is made voluntarily by the accused person, such an accused usually enters a guilty plea and a conviction based entirely upon evidence of confession of the accused person would not be upset on appeal. (p. 2385 A)

Confession - Obtained under duress - Fate

3. A confessional Statement must be direct, positive, true and unequivocal of facts that satisfy the ingredients of the offence the accused person confesses to have committed. It is only then, can it be said that the confession is voluntary. Where the accused person contends that he did not make the statement voluntarily, that is to say the statement emanated from some threat, fear of the unexpected proceeding from a person in authority, usually a police officer, justice demands and the Court would direct that a trial within trial is held. The purpose is to test the truth of what the accused person is saying. A confession found by the Court to have been obtained by threat, inducement, etc, is no longer a voluntary confession and the Court would not rely on it. It would be rejected. On the other hand, if after a trial within trial, it is found that the confession was made voluntarily, it would be admitted in evidence and considered with other evidence led at the trial.

My lords, the position of the Law is well settled and it is that where the accused person says that he did not voluntarily make the statement credited to him, such a stand by the accused person calls for the holding of a trial within trial. (pp. 2385 D/2391 B)

Confession - Inconsistency rule - Application of

4. Retracted confessions are usually extra-judicial statements which amount to confessions which turn out to be inconsistent with testimony at the trial. The inconsistency rule deals with such situations. It is that where a witness makes an extra-judicial statement, which is inconsistent with his testimony at the trial, such testimony is to be treated as unreliable while the statement is not regarded as evidence on which the Court can act. This rule developed in the interest of justice to resolve conflict between previous statement and later evidence for the prosecution or defence. The object was to ensure that the evidence relied on by the Court is credible. The party who retracts is always afforded an opportunity while in the witness box to explain the inconsistency. (p. 2385 G)

Confession - Inconsistency rule - Limitation of

5. The inconsistency rule is restricted only to the evidence of a witness, who made an extra-judicial Statement, which was in conflict

with the evidence given at trial. The previous statements are not evidence, which the Court can act on, and the evidence given at the trial is taken by the Court as unreliable. (p. 2386 B)

Conviction based on retracted confession - Propriety

6. The inconsistency rule does not apply to an accused person. It does not cover a case where an accused person's extra-judicial statement is contrary to his testimony in Court. A Court can convict on the retracted confessional statement of an accused person, but before this is properly done, the trial Judge should evaluate the confession and testimony of the accused person and all the evidence available. This entails the trial Judge examining the new version of events presented by the accused person, which is different from his retracted confession and the Judge asking himself the following questions:

(a) Is there anything outside the confession to show that it is true?

(b) Is it corroborated?

(c) Are the relevant statements made in it of facts true as far as they can be tested?

(d) Did the accused person have the opportunity of committing the offence charged?

(e) Is the confession possible?

(f) Is the confession consistent with other facts which have been ascertained and have been proved?

Though, the Court can convict only on the extra-judicial confessional statement of the accused person, but it is desirable to find some independent evidence. That is to say, it is desirable to have outside the confession some evidence, be it slight of circumstances which make it probable that the confession was true. (p. 2386 D)

Weight - Unsigned confessional statement

7. A diligent examination of Exhibit 1 reveals that the appellant signed Exhibit 1 once and that is after the cautionary words. His signature appears as: "Chukwuka Ogudo." Nowhere else on Exhibit 1 can this signature be seen again. It is thus clear that the appellant did not sign Exhibit 1 three times as the prosecution witness would have the Court believe. When a trial Judge decides in his wisdom to sentence an accused person to death solely on a retracted confessional statement,

the statement must satisfy the basic fundamentals of a valid statement, to wit:

1. The cautionary words must be well written and signed.
 2. The body of the statement written by the accused person or by someone usually a police officer on the accused person's directives given a detailed confession which will show clearly that he committed the offence for which he is charged.
 3. The statement must be endorsed by a superior police Officer and signed by the accused person.
- C Relying on an unsigned retracted confessional statement calls for extreme caution and very little or no weight should be attached to such a statement. After all, an unsigned document is worthless.
(p. 2390 A)

D ***Admission - Unsigned confessional statement***

8. Where on the other hand, the accused person says he did not sign the statement, the statement should be admitted in evidence, thereafter, the question of what weight should be attached to such a statement becomes an issue for the Judge to decide at the end of the trial.
- E The time to object to the voluntariness of the confessional statement is at the time of tendering the statement and not when the accused person opens his defence or during that defence. Exhibit 1 was in the circumstances properly admitted in evidence by the learned trial Judge. (p. 2391 B)
- F

Criminal procedure - Failure to call vital witness - Effect

9. The appellant made a statement at Birnin Gwari Police Station, Buruku. That was the station to which he was taken after he was arrested. That statement was never tendered in Court. The prosecution is expected to tender all the statements made by the accused person to the Police whether at the time of his arrest or subsequently. In this case, the appellant made a statement at Birnin Gwari Police station (the first station he was taken to after he was arrested). The prosecution did not tender the statement at trial. To deprive the appellant standing trial for an offence which carries the death penalty the use of his statement made to the Police to my mind renders the trial unfair.

A vital witness is a witness whose evidence is fundamental, in

that it determines the case one way or the other. Failure to call a vital witness by the prosecution is fatal to the prosecution's case.

Furthermore, failure to call vital witness raises the presumption under section 149 (d) of the Evidence Act that had he been called the evidence he would have led would have been unfavourable to the prosecution. B

My lords, PW. 2 said that in the cause of their investigation he came to know that passengers in a vehicle were robbed. He gave their names as Sani Abubakar, Iliyasu Danlema and Nnamdi Celestine who all live in Buruku. Statements were obtained from them. C The prosecution failed to call any of the three victims of the robbery and also failed to tender their statements. These are vital witnesses for the prosecution and failure to call even one of these vital witnesses is fatal to the prosecution's case.

When the Police deliberately withhold vital evidence that can swing the case one way or the other, then there is more to it than meets the case. Some hidden agenda is at play. Withholding evidence in this case was deliberate but unfortunately for the Police with unexpected results. (pp. 2391 D/2393 F) D

E

ARMED ROBBERY - Burden of proof

10. To succeed in the offence of armed robbery the prosecution must establish that:

- (a) There was a robbery;
- (b) It was carried out with the use of offensive weapons; and F
- (c) The accused person participated in the robbery.

All of the above must be proved beyond reasonable doubt before a conviction can be sustained. Proof beyond reasonable doubt entails the prosecution producing enough evidence to justify the charge. G

The above ingredients were not proved in this case. (p. 2392 B)

EVIDENCE - Evaluation

11. In this case the learned trial Judge believed the contents of Exhibit 1 and disbelieved the testimony of the appellant on oath wherein he gave his own version of events. It amounts to improper evaluation of evidence for a Judge to rely on his belief or disbelief. The learned trial Judge should ask himself the six questions earlier al- H

luded to in this judgment and this includes looking for some independent evidence to corroborate or show that the confession is true. That was not obtained in this case.

Such independent evidence makes it probable that the contents of Exhibit 1 are true. It is wrong for the Courts below to be
 B satisfied with the contents of Exhibit 1 without applying the six way test.

No matter how rampant, reprehensible armed robbery is in the society, Judges who sit to hear such cases should strive to be detached and seek justice with an open mind. They are to ensure
 C that a person accused of armed robbery is given every opportunity to defend himself, and so before convicting on a retracted confessional statement such a statement must be subjected to detailed scrutiny. This is very important where the accused person says he did not
 D sign the statement and it is found to be true. The ascription of weight and total reliance on Exhibit 1 to convict the appellant was wrong and dangerous. It is this type of case that cries out for some independent evidence to corroborate Exhibit 1. Some evidence of circumstances which make it probable that the confession was true ought
 E to have been produced. The conviction cannot to my mind be sustained.

There were no facts to help as corroboration or independent evidence. It is desirable to have, outside Exhibit 1, the retracted confession some evidence of circumstances which make it probable that
 F the contents of Exhibit 1 are true. Such evidence was available if and only if:

- (a) The Police Officers who arrested the appellant and took his statement at Birnin Gwari, Buruku, Police Station were called.
- G (b) Any of the three alleged victims of the armed robbery gave evidence and their statements were tendered in Court.

Where corroborative evidence does not show beyond reasonable doubt that the accused is guilty, he should be given benefit of the doubt. In this case, there was no corroborative evidence coupled
 H with the fact that the three supposed eye witnesses never came to Court to give evidence and their statements were not produced. This amounts to grave doubts that should be resolved in favour of the appellant. (p. 2392 E)

NOTABLE POINTS OF INTEREST**MUNTAKA-COOMASSIE JSC***1. Legal practitioner is to ensure accuracy in citing cases*

Learned counsel for the appellant cited the case of Okosun v. The State (supra) and submitted that failure to take the plea of the accused after the amendment is fatal to the trial. However, I have searched through (1988) 7 SCNJ both volumes 1 and 11, I could not see where this case was reported. The same case was cited as reported in 1998 7 SCNJ 111 under the list of authorities filed, same was no where to be found in that 1998 7 SCNJ. B

This is to say the least, unethical. Counsel has the duty to properly cite the cases they seek to rely on in their briefs of arguments in order to assist the court. A situation where a counsel cites a case and put a wrong citation, the assumption is simple, the case does not exist, and such an act is condemnable. Decisions of the courts particularly decisions of this court are case laws which under the principle of stare decisis are binding on this court and all other courts below, hence in citing his case counsel have to ensure accuracy. I would hold my breath for a moment but I still hold that this kind of loose attitudes will not repeat itself. (p. 2408 G) C

2. Fresh plea must be taken upon amendment of a charge

With tremendous respect to the learned trial Judge, when there was no fact alleged constituting an offence of armed robbery against the accused, why were they convicted for armed robbery? I am not however unaware that the fact that a charge did not disclose the particulars of an offence would not result in an appeal court reversing a conviction based on such charge. F

But definitely not in a situation like this when the charge did not disclose any fact of the offence of armed robbery which the accused were convicted and sentenced. A trial Judge ought to permit the furnishing of particulars in charge in order to give the accused sufficient notice of the case against him. G

The proper procedure to take when a charge is amended is for the court to read and explain to the accused every allegation or addition to the charge and to call upon the accused to make a fresh plea and to say whether he was ready to be tried on the amended charge and/or to recall all witnesses who may have given evidence and to ask the H

prosecution and the accused if they wish to examine or cross-examine them.

Failure to follow this procedure would render the whole Proceedings a nullity. (p. 2410 B)

B REPRESENTATION

M. I. Sanni with S. M. Ngoladi, for the Appellant

A. Adeniji with O. Atanda and U. Amasike, for the Respondent

CASES REFERRED TO

- C** Kopa v. State 1971 ANLR p. 150
Cop v. Okoyen (1964) All NLR 305 at 307
Kanu & anor v. King (1952) 14 WACA p. 30
Edhigere v. State (1996) 8 NWLR (pt. 464) p. 1
D Mbenu v. State (1988) 3 NWLR (pt. 84) p. 615
Stephen V. State (1986) 5 NWLR (pt. 46) p. 978
State v. Nnolim (1994) 5 NWLR (pt. 345) p. 394
Onuoha v. State 1987 4 NWLR pt. 65 p. 331
Queen v. Ijeoma (1962) 1 All NLR 402 at 411-412
E Nsofor v. The State (2004) 18 NWLR (Pt. 905) 292
Gabriel v. The State (2001) 6 NWLR (Pt. 1190) 323
Egboghonome v. State (1993) 7 NWLR (pt. 306) p. 383
Onochie & 7 Ors v. The Republic (1966) 3 NWLR p. 307
F The Enahoro v. Queen (1966) 1 All NLR 125 at 133

STATUTES REFERRED TO

- Evidence Act, ss. 27 (1) (2), 28, 91, 149 (d)
Penal Code Laws of Kaduna State 1991, s. 97
G Robbery & Firearms (Special provisions) Act Cap. 398 LFN 1990, s. 1 (a) (b)

LEAD JUDGMENT BY RHODES-VIVOUR JSC

- The appellant was one of two accused persons charged and
H arraigned before the High Court of Kaduna State, Kaduna on two counts which read:

Count 1

That you, Bright Chibuike and Chukwuka Ogudo, on or about the 16th day of April, 2001, at Buruku Forest along, the Kaduna -

Lagos road, conspired to do an illegal act to wit, to block the road and rob passers-by of their properties and by so doing, you committed the offence of criminal conspiracy, punishable under Section 97 of the Penal Code Law, Laws of Kaduna State 1991.

Count 2

That you, Bright Chibuike and Chukwuka Ogudo, on or about the 16th day of April, 2001, at Kaduna Lagos Road, by Buruku Forest, blocked the road with woods, stones and robbed passengers in a commercial bus of their money, and by so doing, committed the offence of Armed Robbery, punishable under section 1 (a) (b) of the Robbery and Firearms (Special Provisions) Act Cap 398 LFN 1990. The appellant and Bright Chibuike entered not guilty pleas. These were the facts.

There was an Armed Robbery incident on the Bukuru, Kaduna Road, on the 16th of April, 2001. The Police arrested the appellant and Bright Chibuike, and detained them as suspects at the Birnin Gwari Police Station Bukuru. The appellant made a statement at the Bukuru Police Station, but this statement was not produced in Court at trial, thereafter, the appellant and Bright Chibuike were taken to the State C.I.D Kaduna. There, the appellant made a statement, Exhibit 1, which according to the prosecution was a confessional statement. The appellant denied making and signing Exhibit 1. Three alleged victims of the Armed Robbery made statements, to the Police, but their statements were not tendered at trial and they never came to Court to give evidence.

Notwithstanding the paucity of evidence, the learned trial Judge found as a fact that, Exhibit 1 is a confessional statement and convicted the appellant on both counts, to five years on count one and death by hanging on count two. Bright Chibuike was similarly convicted. Two witnesses, Policemen attached to the Kaduna Police Station gave evidence for the prosecution.

Their evidence had to do with recording the statements of the accused persons and visiting the scene of crime. Dissatisfied with their convictions, the appellant and Bright Chibuike brought an appeal before the Court of Appeal, Kaduna (hereinafter referred to as the Court below) and that Court in a unanimous judgment delivered on the 29th day of June, 2010, dismissed the appeal. The appellant alone has come before this Court on a further appeal.

In accordance with Rules of this Court, briefs of argument were filed and exchanged. The appellant's amended brief was deemed duly filed on the 26th of May, 2011, while the respondent's amended brief was filed on the 17th of June, 2011.

B From the appellant's grounds of appeal, two issues were distilled for determination. They are:

1. Whether having regards to the totality of the evidence adduced and the entire circumstances of this case, particularly the burden and standard of proof required in proving a criminal allegation, the lower Court was right, in affirming the decision of the trial Court; wherein the appellant was found guilty and convicted for the offence of Armed Robbery.

2. Whether the Court below complied with the requirement of the Law and thus, correctly affirmed the trial, conviction and sentence of the appellant by the trial Court; considering that it was upon a charge that was void and incompetent.

The respondent on his part formulated three issues for determination.

E 1. Whether the confessional statement of the appellant to the Police (Exhibit 1) was properly admitted in evidence and utilized for his trial, conviction and sentences by the trial Court (as confirmed by the Court below) notwithstanding appellant's retraction therefrom.

F 2. Whether the prosecution proved against the appellant the offences with which he was charged.

3. Whether the charge upon which the appellant was tried, convicted and sentenced was defective in Law and this robbed the trial Court of its requisite jurisdiction.

G ***The real issue or grievance of the appellant is that the trial Court was wrong to convict him on a retracted confessional statement - Exhibit 1, and the Court of Appeal was equally also wrong to confirm the sentence of the trial Court. The respondent's issue No. 1 says it all very clearly. All other issues are not live issues. They would not be considered, since Courts are not to indulge in an academic exercise. Courts are to restrict deliberations to live issues only.*** See *Oyeneye v. Odugbesan* 1972 4 S. C p. 244, *Nkwocha v. Gov. of Anambra State* 1984 1 SCNLR p. 634.

This appeal would be decided only on the respondents Issue

No. 1. The conviction of the appellant was based entirely upon Exhibit 1, a retracted confessional statement.

It is important, I highlight the position of the Law on confessions, voluntary and involuntary, retracted confessions.

By virtue a section 27 (1) and (2) of the Evidence Act a confessional statement is a statement by an accused person charged with an offence stating that he committed the offence. A confession cannot be used against an accused, unless the Court is satisfied that it is voluntary. Where a confessional statement is made voluntarily by the accused person, such an accused usually enters a guilty plea and a conviction based entirely upon evidence of confession of the accused person would not be upset on appeal. See R v. Sykes 1913 CAR P. 113 R V. Omokaro 1941 7 WACA P. 146 Achabua v. State 1976 NSCC P. 74 Yusufu V. State 1976 6 S. C P. 167.

A confessional Statement must be direct, positive true and unequivocal of facts that satisfy the ingredients of the offence the accused person confesses to have committed. It is only then, can it be said that the confession is voluntary. Where the accused person contends that he did not make the statement voluntarily, that is to say the statement emanated from some threat, fear of the unexpected proceeding from a person in authority, usually a police officer, justice demands and the Court would direct that a trial within trial is held. The purpose is to test the truth of what the accused person is saying. A confession found by the Court to have been obtained by threat, inducement, etc, is no longer a voluntary confession and the Court would not rely on it. It would be rejected. On the other hand, if after a trial within trial, it is found that the confession was made voluntarily, it would be admitted in evidence and considered with other evidence led in the trial. See Ikpesa v. State 1981 9 S. C p. 17.

Retracted confessions are usually extra-judicial statements which amount to confessions which turn out to be inconsistent with testimony at the trial. The inconsistency rule deals with such situations. It is that where a witness makes an extra-judicial statement, which is inconsistent with his testimony at the trial, such testimony is to be treated as unreliable

while the statement is not regarded as evidence on which the Court can act. This rule developed in the interest of justice to resolve conflict between previous statement and later evidence for the prosecution or defence. The object was to ensure that the evidence relied on by the Court is credible. The party who retracts is always afforded an opportunity, while in the witness box to explain the inconsistency. See Onubogu v. State 1974 9 SC p. 1.

The inconsistency rule is restricted only to the evidence of a witness, who made an extra-judicial Statement, which was in conflict with the evidence given at trial. The previous statements are not evidence, which the Court can act on, and the evidence given at the trial is taken by the Court as unreliable. See Egboghonome v. State 1993 7 NWLR pt. 306 p. 383.

The inconsistency rule does not apply to an accused person. It does not cover a case where an accused person's extra-judicial statement is contrary to his testimony in Court. A Court can convict on the retracted confessional statement of an accused person, but before this is properly done, the trial Judge should evaluate the confession and testimony of the accused person and all the evidence available. This entails the trial Judge examining the new version of events presented by the accused person, which is different from his retracted confession and the Judge asking himself the following questions:

- (a) Is there anything outside the confession to show that it is true?**
- (b) Is it corroborated?**
- (c) Are the relevant statements made in it of facts true as far as they can be tested?**
- (d) Did the accused person have the opportunity of committing the offence charged?**
- (e) Is the confession possible?**
- (f) Is the confession consistent with other facts which have been ascertained and have been proved?** See. Kanu & anor v. King 1952 14 WACA p. 30, Mbenu v. State 1988 3 NWLR pt. 84 p. 615, Stephen V. State 1986 5 NWLR pt. 46 p. 978.

Though, the Court can convict only on the extra-judicial

confessional statement of the accused person, but it is desirable to find some independent evidence. That is to say, it is desirable to have outside the confession some evidence, be it slight of circumstances which make it probable that the confession was true. See Queen v. Itule 1961 2 SCNLR p. 183, Onochie & 7 Ors v. The Republic 1966 NWLR p. 307, Edhigere v. State 1996 B 8 NWLR pt. 464 p. 1.

In the appellants' brief, it was argued that the retracted confessional statement (Exhibit. 1) alleged to have been made by the appellant, which the Court relied solely on to convict the appellant was not shown to have been made voluntarily by the appellant. Reference was made to Section 28 of the Evidence Act. Nwangbonwu v. State 1994 2 NWLR PT. 327 p. 380, Obidiozo v. State 1987 4 NWLR pt. 67 p. 748. C

He further argued that when as in this case the appellant retracts his confessional statement, the Court is expected to look for independent evidence to establish or prove the offence. Reference was made to - Gabriel v. State 2001 6 NWLR pt. 1190 p. 323, Nsofor v. State 2004 18 NWLR pt. 905 p. 292. D

Relying on section 149 (d) of the Evidence Act, learned Counsel observed that failure of the prosecution to tender the statement of the appellant made at Birnin Gwari Police station amounts to withholding vital piece of evidence, and that is fatal to the prosecution's case. Reference was made to PW2's testimony under cross-examination, page 36 - 37 of the Record of Appeal, where he admitted that the appellant made statement at Brinin Gwari Police Station, which was not tendered by the prosecution. E F

Finally, he observed that failure to tender the statement of the appellant made at Birnin Gwari Police Station, coupled with the denial of the appellant that Exhibit 1 was voluntarily made, and failure of the prosecution to call any other witness, not even the complainants are doubts that the trial Court should have resolved in favour of the appellant. Reference was made to State v. Azeez 2008 14 NWLR pt. 1108 p. 439. G H

He urged this Court to hold that the Courts below failed to comply with the requirement of the Law and set aside the judgment of the lower Court.

Learned Counsel for the respondent observed that it is at the

point of tendering Exhibit 1, the retracted confessional statement that the appellant should object if he did not make the statement voluntarily, but since he did not object, the statement was voluntarily made and it was properly admitted in evidence as Exhibit 1, Learned Counsel observed that the appellant's confession in Exhibit 1 was not only
 B voluntary, but was direct and positive, contending that the retraction of Exhibit 1 is no basis for its rejection in evidence and the conviction of the appellant was in order in Law. Reliance was placed on *Ikemson v. State* 1989 3 NWLR pt. 110 p. 455. He urged us to dismiss the
 C appeal as lacking in merit.

In the judgment at first instance the learned trial Judge said:

*"... In this case, nobody has come to this Court to say that he was robbed. Nobody has come to this Court to say that any of the accused person was the person, or among the persons that robbed
 D him. Nobody has come to say that any of the accused persons was armed with any firearms or offensive weapon, or that he was in company with any person so armed; and nobody has come to say that any of the accused wounded, or used personal violence to him. None
 E of the two witnesses called by the prosecution is either a victim of the alleged armed robbery, or that he witnessed the alleged armed robbery. In fact, none of the two witnesses gave evidence that any of the accused persons armed himself with any firearms or offensive weapon and robbed anybody, or wounded or used personal violence to any-
 F body. There is therefore, no direct oral evidence by or from the prosecution that establishes any of the essential elements of the offences of armed robbery punishable under Section 1 (2) (a) and (b) of the Robbery and firearms Act..."*

With the above, the learned trial Judge relied only on the re-
 G tracted confessional statement of the appellant, Exhibit 1 to convict him and sentence him to death, Relevant extracts from Exhibit 1 runs as follows:

*"On 16-4-01 at about 2200 hrs, myself, Ezu, Small, and Chibuike Bright, we left to Lagos to Kano. We joined Luxurious bus
 H together with some passengers, with intention to commit Robbery... so when we reached to Kaduna Lagos Motor Park. Ezu and small asked us, we should stop following that Luxurious bus to Kano and go back to Lagos.*

...Then on 17/4/01 at about 1830 hrs we joined open body

trailer to Lagos myself and my friend Bright. When we reached inside forest before Buruku Village, the boy of that trailer collecting N400 from each passenger. But we didn't get money to paid. So they drop us inside that bush. We decided to put Road block on Road to rob people so that we can get money to go back to Lagos. So we went inside the forest and get some big sticks and stones which we block that road....so at about 2130 hrs one small bus came, when the driver saw that Road block he stop, then we quickly came out, and rushed on them some were run inside bush and left their properties in the vehicle. And some we attacked them, but we didn't get anything from them but we get N1,440 from one person, Then We searched the other bag where we get N400 total of that money is N1,640. So at about 2330 hrs after that operation we saw some people coming towards us. Then we run inside bush, then they follow and arrested us."

The Court of Appeal found that Exhibit 1 was properly admitted by the trial Court, and affirmed the admission and action on the exhibit by the trial Court in these words:

"It would amount to a mere repetition of what the High Court said in its assessment of Exhibit 1 and 2 to set out all it said thereon by way of valuation and ascription of weight thereto. It suffices for me to state simply, that the High Court properly and correctly evaluated the evidence adduced before it by both the prosecution and the appellants, but particularly Exhibit 1 and 2 and came to the right decisions. With Exhibit 1 and 2 which are direct and positive and found by the High Court to have been made by the appellants taken along the circumstances of the tell tale stories given by the Appellants in their testimonies at the trial, I find no reason to disturb the finding by the High Court that the Exhibit 1 and 2 are true"

The Court of Appeal was satisfied with Exhibit 1 and confirmed the death sentence on the appellant. I think Exhibit 1 must be examined to see if it meets the standards expected of a statement in Law. In cross-examination PW. 1 said:

"The 2nd accused voluntarily signed the Word caution in Exhibit 1 by signing his signature. He signed the same signature at the end of the statement. The S. P. O. read Exhibit 1 to 2 accused before he endorsed it and the 2nd accused also signed again. The 2nd accused signed Exhibit 1 in three Places ..."

The 2nd accused is the appellant and on oath he said:

I see Exhibit 1, I did not sign it (sic, it). My signature is not there. It is not the one I signed... the information in Exhibit 1 was not given by me. I don't know anything about Exhibit 1...

A diligent examination of Exhibit 1 reveals that the appellant signed Exhibit 1 once and that is after the cautionary words. His signature appears as: "Chukwuka Ogudo." Nowhere else on Exhibit 1 can this signature be seen again. It is thus clear that the appellant did not sign Exhibit 1 three times as the prosecution witness would have the Court believe. When a trial Judge decides in his wisdom to sentence an accused person to death solely on a retracted confessional statement the statement must satisfy the basic fundamentals of a valid statement, to wit:

- 1. The cautionary words must be well written and signed.**
- 2. The body of the statement written by the accused person or by someone usually a police officer on the accused person's directives given a detailed confession which will show clearly that he committed the offence for which he is charged.**

- 3. The statement must be endorsed by a superior police Officer and signed by the accused person.**

Relying on an unsigned retracted confessional statement calls for extreme caution and very little or no weight should be attached to such a statement. After all an unsigned document is worthless. See section 91 of the Evidence Act.

I am firmly of the view that the Courts below were clearly in the wrong to sentence the appellant to death solely on an unsigned retracted confessional statement. If ever the need arose to find some independent evidence, outside Exhibit 1, this is the case, sadly there is no evidence other than Exhibit 1. If the law is strictly applied as it ought to in cases that carry the death penalty these facts call for caution. The adage that it is better for nine guilty persons to go free than for one innocent person to be sent to his grave holds very true to this day. I must digress a bit to examine in what circumstances Exhibit 1, was tendered and admitted in evidence, Relevant extracts from the proceedings runs as follows:

"Maisamari (the prosecutor) - I seek to tender the statement in evidence.

Ugwueruchukwu (Counsel for the 2nd accused person, the appellant). - The 2nd accused said he did not sign the statement and I know that does not stop it from being admitted.

Court - The Statement accredited to the 2nd accused person dated 27/4/2001 is admitted in evidence as Exhibit 1".

My lords, the position of the Law is well settled and it is that where the accused person says that he did not voluntarily make the statement credited to him, such a stand by the accused person calls for the holding of a trial within trial. Where on the other hand, the accused person says he did not sign the statement, the statement should be admitted in evidence, thereafter, the question of what weight should be attached to such a statement becomes an issue for the Judge to decide at the end of the trial. The time to object to the voluntariness of the confessional statement is at the time of tendering the statement and not when the accused person opens his defence or during that defence. Exhibit 1 was in the circumstances properly admitted in evidence by the learned trial Judge.

The appellant made a statement at Birnin Gwari Police Station, Buruku. That was the station to which he was taken after he was arrested. That statement was never tendered in Court. The prosecution is expected to tender all the statements made by the accused person to the Police whether at the time of his arrest or subsequently. In this case, the appellant made a statement at Birnin Gwari Police station (the first station he was taken to after he was arrested). The prosecution did not tender the statement at trial. To deprive the appellant standing trial for an offence which carries the death penalty the use of his statement made to the Police to my mind renders the trial unfair.

A vital witness is a witness whose evidence is fundamental, in that it determines the case one way or the other. Failure to call a vital witness by the prosecution is fatal to the prosecution's case. See State v. Nnolim 1994 5 NWLR pt. 345 p. 394.

Furthermore, failure to call vital witness raises the presumption under section 149 (d) of the Evidence Act that had he been called the evidence he would have led would have been unfavourable to the prosecution.

My lords, PW. 2 said that in the cause of their investigation he came to know that passengers in a vehicle were robbed. He gave their names as Sani Abubakar, Iliyasu Danlema and Nnamdi Celestine who all live in Buruku. Statements were obtained from them. The prosecution failed to call any of the three victims of the robbery and also failed to tender their statements. These are vital witnesses for the prosecution and failure to call even one of these vital witnesses is fatal to the prosecution's case.

To succeed in the offence of armed robbery the prosecution must establish that:

- (a) There was a robbery;**
- (b) It was carried out with the use of offensive weapons;**
- and**
- (c) The accused person participated in the robbery.**

All of the above must be proved beyond reasonable doubt before a conviction can be sustained. Proof beyond reasonable doubt entails the prosecution producing enough evidence to justify the charge.

The above ingredients were not proved in this case.

In this case the learned trial Judge believed the contents of Exhibit 1 and disbelieved the testimony of the appellant on oath wherein he gave his own version of events. It amounts to improper evaluation of evidence for a Judge to rely on his belief or disbelief. The learned trial Judge should ask himself the six questions earlier alluded to in this judgment and this includes looking for some independent evidence to corroborate or show that the confession is true. That was not obtained in this case. *Kopa v. State* 1971 ANLR p. 150, *Onuoha v. State* 1987 4 NWLR pt. 65 p. 331.

Such independent evidence makes it probable that the contents of Exhibit 1 are true. It is wrong for the Courts below to be satisfied with the contents of Exhibit 1 without applying the six way test.

No matter how rampant, reprehensible armed robbery is in the society, Judges who sit to hear such cases should strive to be detached and seek justice with an open mind. They are to ensure that a person accused of armed robbery is given

every opportunity to defend himself, and so before convicting on a retracted confessional statement such a statement must be subjected to detailed scrutiny. This is very important where the accused person says he did not sign the statement and it is found to be true. The ascription of weight and total reliance on Exhibit 1 to convict the appellant was wrong and dangerous. It is this type of case that cries out for some independent evidence to corroborate Exhibit 1. Some evidence of circumstances which make it probable that the confession was true ought to have been produced. The conviction cannot to my mind be sustained.

There were no facts to help as corroboration or independent evidence. It is desirable to have, outside Exhibit 1, the retracted confession some evidence of circumstances which make it probable that the contents of Exhibit 1 are true. Such evidence was available if and only if:

(a) The Police Officers who arrested the appellant and took his statement at Birnin Gwari, Buruku, Police Station were called.

(b) Any of the three alleged victims of the armed robbery gave evidence and their statements were tendered in Court.

Where corroborative evidence does not show beyond reasonable doubt that the accused is guilty, he should be given benefit of the doubt. In this case, there was no corroborative evidence coupled with the fact that the three supposed eye witnesses never came to Court to give evidence and their statements were not produced. This amounts to grave doubts that should be resolved in favour of the appellant.

When the Police deliberately withhold vital evidence that can swing the case one way or the other, then there is more to it than meets the case. Some hidden agenda is at play. Withholding evidence in this case was deliberate but unfortunately for the Police with unexpected results.

In sum, this appeal is allowed. The judgment of the trial Court and the confirmation of it by the Court of Appeal are set aside and in its place, I enter an acquittal and discharge.

MOHAMMED JSC

This appeal is against the decision of the Court of Appeal, Kaduna Division, delivered on 29th June, 2010, affirming the judgment of the Kaduna State High Court of Justice, which convicted the Appellant and one other accused person charged along with the Appellant and convicted of the offences of conspiracy and armed robbery, under section 97 of the penal code Law of Kaduna State and Section 1 (2)(a) & (b) of the Robbery and Firearms (Special Provisions) Act CAP 398 Laws of the Federation of Nigeria, 1990. The Appellant was sentenced to 5 years imprisonment for the offence of conspiracy and to death by hanging for the offence of armed robbery. The Appellant who was the 2nd Appellant at the Court of Appeal and the 2nd accused at the trial High Court, then appealed to the Court of Appeal against his conviction and sentence by the trial Court. However, that appeal was dismissed on 29th June, 2010. By his Notice and Grounds of appeal dated 4th August, 2010, the Appellant is now on a further and final appeal to this Court.

Although in both the Appellants' brief of argument and the Respondents' brief, two issues were formulated for the determination of the appeal, having regard to circumstances of this case, the real and actual issue for determination is whether having regard to the evidence on record, the Court below was right in affirming the conviction and sentence of the Appellant of the offences of conspiracy and armed robbery under Section 97 of the Penal Code Law of Kaduna State and Section 1 (2) (a) and (b) of the Robbery and Firearms (Special Provisions) Act (CAP 398, laws of the Federal Republic of Nigeria, 1990. Taking into consideration of the rather crucial findings made by the trial Court at page 36 of the record of appeal which read;

"In this case, nobody has come to this Court to say that he was robbed. Nobody has come to this Court to say that any of the accused person was the person or among the (sic) person that robbed him. Nobody has come to say that any of the accused persons was armed with any firearms or offensive weapon or that he was in company with any person so armed; and nobody has come to say that any of the accused wounded or used personal violence on him. None of the two witnesses called by the prosecution is either a victim of the alleged armed robbery or that he witnessed the alleged armed robbery."

bery. In fact, none of the two witnesses gave evidence that any of the accused persons armed himself with any firearms or offensive weapon and robbed anybody or wounded or used personal violence to anybody. There is therefore no direct oral evidence by or from the prosecution that establishes any of the essential elements of the offences of armed robbery punishable under Section 1 (2) (a) and (b) of the Robbery and Firearms Act.” ^B

The fact that the trial Court solely relied on the alleged confessional statement of the Appellant in convicting the Appellant as charged, is obvious. What requires resolution therefore is whether the alleged confessional statement of the Appellant truly confessed and established all essential ingredients or elements of the offence of armed robbery in particular? The entire contents of the alleged confessional statement of the Appellant Exhibit 1 are - ^C

On 16th April, 2001 at about 2200 hours, myself, Ezu, Small and Chubike Bright, we left to Lagos to Kano. We joined luxurious buses together with some passengers with intention to commit Robbery in that luxurious bus: when we saw there is no chance for us to operate inside that vehicle because none of us has a rifle, and we decided to keep our bags inside the luxurious bus and carry other people bags. All these we failed it. So when we reached to Kaduna Lagos Motor Park, Ezu and Small asked us we should stop following that luxurious bus to Kano and go back to Lagos. Then they asked us to carry some bags from that luxurious bus we joined. We told them that we cannot put our hands and carry those bags. Let them carry by themselves. So these being misunderstanding between us. So they asked two of us to wait for them they are coming to meet us at that Lagos motor park ... Then we decided to go back to Lagos. Then on Tuesday 17th April, 2001 at about 1830 hrs, we joined open body trailer to Lagos myself and my friend Bright. When we reached inside forest before Buruku village, the boy of that trailer collecting N400 from each passenger. But we didn't get money to paid. So they dropped us inside that bush. Then we decided to put Road block on road use to rob people so that we can get money to go back to Lagos. So we went inside forest and got some big sticks and stones which we block that road and got one big plank wood which we used to hit anybody tried to disobey with it. So at about 2130 hrs one small bus came. When the driver saw that road block, he stopped. ^D
^E
^F
^G
^H

When we quickly came out and rushed on them, some ran inside bush and left their properties in the vehicle. And some we attacked them but we did not get anything from them. But we searched one person among them where we got N1,440,00K from him. Then we searched the other bag where we got N400.00. Total of that money is N1,640.00K. So at about 2330 hrs after that operation we saw some people coming towards us. Then we ran inside bush. Then they followed us and arrested us where they took us to one Police out post. Then later we were transferred to Birnin-Gwari- that is all what happened.”

What was revealed from the above statement is that the Appellant and his co-accused person set up a road block on 17th April, 2001 on the Kaduna to Lagos Highway to commit robbery. When a small bus stopped at the road block, the passengers on seeing the Appellant and his co-accused, ran into the bush leaving their properties in the bus. The Appellant and his co-accused searched one of the passengers of the bus and removed N1,440.00 from him while the sum of N400.00 was removed from an abandoned bag in the bus. While removing the sum of money from the person of one of the passengers and the abandoned bag, the Appellant and his co-accused were not armed with any firearm or lethal weapon other than a plank of wood the size of which is not even indicated which the Appellant and his co-accused intended to use on any of their victims who tried to resist them. It is not apparent from the alleged confessional statement that any of the passengers of the bus including the victim from whose person the sum of money was removed by the Appellant and his co-accused, was threatened or hit with the plank wood with which the Appellant and his co-accused were armed. Can this alleged confessional-statement of the Appellant be regarded as direct, positive, unequivocal and conclusive of all the ingredients of the offences of conspiracy under section 97 of the Penal code Law of Kaduna state and armed robbery under section 1 (2) (a) and (b) of the Robbery and Firearms (special Provisions) Act CAP 398, Laws of the Federation of Nigeria, 1990? The answer is plainly in the negative. The quality of the evidence contained in the facts narrated in the alleged confessional statement of the Appellant, fell far below the requirements of proof of the offences with which the Appellant was convicted, beyond reasonable doubt. In fact, the reality of the situa-

tion is that the evidence in the alleged confessional statement had raised reasonable doubt which ought to have been resolved in favour of the Appellant resulting in his discharge and acquittal. This is because the prosecution of this case had been very badly or even recklessly handled at the trial court where for some reasons not apparent on the face of the record, vital evidence necessary to prove the essential elements or ingredients of the offence of armed robbery from the victims of the offence' the persons who chased and arrested the suspects in the bush who saw and could have identified the suspects to link them with the commission of the offence and the first statement of the Appellant made to the police immediately after his arrest. This levy no doubt led to the finding of the trial Court that the evidence called by the prosecution other than the alleged confessional statement had failed to establish the essential elements of the offence of armed robbery. I am afraid, the trial Court and the Court below were wrong in their decisions in finding that such necessary evidence was available in the alleged confessional statement of the Appellant, Exhibit 1. The reality of the position in this case is that the prosecution had completely failed to prove its case against the Appellant.

It is for the foregoing reasons and fuller reasons given in the leading judgment of my learned brother, Rhodes-Vivour, JSC, with which I am in total agreement, that I also allow this appeal, set aside the conviction and sentence passed and affirmed on the Appellant by the Courts below and substitute them with an order of discharge and acquittal. Accordingly, the Appellant is discharged and acquitted.

CHUKWUMA-ENEH JSC

I have read in advance, the judgment prepared by my learned brother, Rhodes-Vivour, JSC in this matter with which I agree entirely. The appeal is meritorious. I also allow it and set aside the decision of the lower Court and abide by all the orders contained in the lead judgment.

MUNTAKA-COOMASSIE JSC

The appellant with one Bright Chibuike were arraigned before

the High Court of Justice, Kaduna, on two counts charge of armed robbery as follows:-

“COUNT ONE:

That You, BRIGHT CHIBUIKE and CHUKWUKA OGUDO on or about the 16th day of April, 2001, at BURUKU FOREST along the Kaduna - Lagos Road conspired to do an illegal act, to wit, to block the road and rob passers-by of their properties and by so doing, you committed the offence of criminal conspiracy, punishable under Section 91 of the Penal Code Law, Laws of Kaduna State, 1991”.

“COUNT TWO:

That you, BRIGHT CHIBUIKE and CHUKWUKA OGUDO on or about the 16th day of April, 2001, at Kaduna - Lagos Road by Buruku Forest, blocked the road with woods, stones and robbed passengers in a commercial bus of their money, and by so doing, committed the offence of armed robbery, punishable under Section 1 (a), (b) of the Robbery and Firearms (Special Provisions) Act Cap. 398 LFN 1990.”

The prosecutor attached proof of evidence to be adduced at the trial, in which three witnesses Alhaji Sani Abubakar, Mallam Danlami and Nnamdi Celestine, were listed as witnesses. The prosecution also attached an additional proof of evidence in which two additional witnesses - Cpl. Salihu Hawa and Cpl. Musa Sumaila were listed. The first sets of witnesses were the victims of the alleged robbery, while the latter set were the Investigating Police Officers (I. P. O). At the hearing, two witnesses (P.W. 1 and P.W. 2) were called and they were the two police officers - I.P.O.

Relevant to this appeal is the evidence of the P.W. 1, who tendered the appellant’s statement in this case. When the prosecution sought to tender the statement in evidence, the appellant’s counsel did not object. The record of proceedings showed what happened as follows:-

“Mai Samari - I seek to tender the statement in evidence.

Ngweru Chukwu - The 2nd accused said he did not sign the statement and I know that, that does not stop it from being admitted.

Court: - The statement accredited to the 2nd Accused dated 27/4/2001 is admitted as exhibit 1”.

After the evidence of P.W. 2, the prosecution, unexpectedly, closed its case, while the accused persons gave evidence in their defence. The appellant, who testified as DW. 2 retracted his statement

already admitted in evidence.

In his evidence in chief the witness stated as follows:-

“They took me inside the cell. Towards evening time when it was dawn they came and called our names. We were many. They put chains on our legs and said we where (sic) going to see God that day. They said we should enter their pick-up. They took us to one place and said all of us should come down. We went down and they said myself the 1st accused and one other guy should stay aside. They took the other people aside and we were hearing gunshots.

They chained me and took me to the torturing room. About five of them began to deal with me with sticks and butt of their guns. One of them said they go out so that he could fire me. After the beating and threats they said anything they told me to do I should do it. When they said I would make a statement, I told them I was ready to die for the truth.”

The defence thereafter closed its case. It is worthy of note that the prosecution did not call any witness aside the Police Investigation officers. The trial Court in its judgment convicted the accused person and sentenced them to death by hanging for the offence of armed robbery. The judgment of the trial Court was based on the confessional statement of the accused persons. Also the trial Court before it concludes his judgment suo motu amended the charge in its judgment. It is pertinent to set out the observation of the trial Judge in his judgment on this point, thus:-

“(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 twenty-one 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 is dead or by causing such offender to suffer death by firing squad as the Governor may direct.

B “Now it should be recalled that Count 1 of this charge in this case is for conspiracy to commit an offence contrary to Section 97 of the Penal Code, while Count two of the charge alleged that the accused persons on or about the 16th day of April, 2001 at Kaduna - Lagos Road by Buruku Forest, blocked the road with woods, stones and robbed passengers in a commercial bus of their money and by so doing, committed the offence of Armed Robbery punishable under Section 1 (a) (b) of the Robbery and Firearm Special Provisions) Act Cap. 398 Law of Federation of Nigeria, 1990.” He continues:-

C I have carefully read the Act, and it is startling to observe that there is no Section 1 (a) (b) in that Act as indicated in the charge. There is however Section 1 (2) (a) and (b) -

D “1. (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 twenty-one years.

2. If - (a) any offender mentioned in Section (1) of this Section is armed with any firearms or any offensive weapon or is in company with any person so armed, or

E (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 the Act to be sentenced to death.

F 3. The sentence of death imposed under the Section may be exercised by hanging the offender by the neck till he is dead or by causing such offender to suffer death by firing squad as the Governor may direct”.

The trial Judge continues:-

G “It can be seen from the Provision of this Section that there is nothing like “Section 1 (a) (b).” Although there is Section 1 (2) (a) and (b), the charge does not indicate that it is for the offence created in Section 1 (2) (a) and (b). It is also pertinent to observe that for an offence under Section 1 (2) (a) and (b), the offender or accused person must be alleged to have been armed with any firearms or H offensive weapons or was in company with any person so armed or at or immediately before or immediately after the time of the robbery the offender wounded or used any personal violence to any person. See page 35 of the Record of Proceedings.”

The learned trial Judge being aware of the above stated facts

opined as follows:-

“... In effect the charge does not allege or suggest the commission of the offence of armed robbery, the element that constitute the offence of armed robbery under section 1 (2) (a) and (b) of the Robbery and Firearms Act Cap. 398 Law of the Federation of Nigeria, 1990, have completely and absolutely not been alleged in the charge. The charge does not therefore suggest that it is for the offence of armed robbery and the reference to “a (and) b” which presupposed reference to Section 1 (2) (a) and (b) must be a serious misconception of the charge, by its contents alleges only facts of robbery and not armed robbery.”

Notwithstanding the above finding, the trial Judge had recourse to Section 206 of the Criminal Procedure Code (C. P. C.) and held that the accused persons were not misled and proceed to convict and sentence them.

The convicts were dissatisfied with the judgment of the trial Court, unsuccessfully appealed to the Court of Appeal, Kaduna Division. The Court of Appeal now Court below unanimously dismissed the appeal of the appellant and affirmed the judgment of the trial Court. The Court below also based its judgment on the confessional statement made by the appellant.

Garba JCA, who read the lead judgment, summed up the opinion of the court below thus:-

“The accused persons in this case gave no other version of the story other than the versions in exhibit 1 and 2. I must therefore take it that exhibit 1 and 2 are the statements made by the accused person P.W. 1 and P.W. 2 ...” See 171 2nd Paragraph of the Record of Proceedings.

In accordance with the rules of Court, both parties filed and exchanged their respective briefs of argument. The appellant in his amended brief of argument filed on 1/4/2011 formulated two issues for our consideration of the appeal as follows:-

(1) Whether having regards to the totality of the evidence adduced and the entire circumstances of this case, particularly the burden and standard of proof required in proving a criminal allegation, the lower Court was right in affirming the decision of the trial Court; wherein the appellant was found guilty and convicted for the offence of armed robbery.

(2) Whether the Court below complied with the requirement of the law and thus correctly affirmed the trial, conviction and sentence of the appellant by the trial Court: considering that it was upon a charge that was void and incompetent.

B Whilst the respondent in its brief of argument dated 7th January, 2011, and filed on the same day, also formulated two issues for determination of the appeal as follows:-

C *“1. Whether the confessional statement of the appellant to the police (Exhibit 1) was properly admitted in evidence and utilized for his trial, conviction and sentences by the trial Court (as confirmed by the Court below) notwithstanding appellants retraction therefrom. (Ground 2 and 3).*

2. Whether the prosecution proved against the appellant, the offences with which he was charged. (Ground 1, 3 and 4).”

D At hearing on the 12/9/2011, the learned Counsel for the appellant, M. I. Sanni, adopted his amended brief of argument and urged this Court to allow the appeal. On its first issue for determination, learned Counsel pointed out that the appellant retracted the confessional statement during trial but the trial Court, Kurada J. went
E ahead to admit the confessional statement, he therefore submitted that the admission of that statement and the subsequent reliance on it was wrong in law. It was submitted that when an accused person retracts his confessional statement the Court is required to look for
F independent evidence outside what is contained in the statement to establish or prove the offence, counsel relies on the case of Gabriel v. The State (2001) 6 NWLR (Pt. 1190) 323 and Nsofor v. The State (2004) 18 NWLR (Pt. 905) 292

G Learned Counsel also submitted that when an accused person resiled from his statement to the police such confessional statement is subject to trial within trial. Thus the denial that the statement was made voluntarily as required by Section 28 of the Evidence Act placed a duty on the court to determine its voluntariness and in that case a trial within trial ought to be held, he cited the case of Nwagbowu v.
H The State (1994) 4 NWLR (Pt. 67) 748 at 751, he therefore submitted further that the failure to conduct trial within trial should be resolved in favour of the appellant.

Learned Counsel also pointed a contradiction in the dates regarding the confessional statement, and this contradiction should be

resolved in favour of the appellant. He again submitted that the failure of the prosecution to tender the earlier statement made by the appellant at the Birin-Gwari Police Station before it was transferred to the C.I.D, Kaduna is fatal to the prosecution, as this would have gone to prove that Exhibit 1, was not made voluntarily. He therefore urged this court to set aside the concurrent findings of the two courts as they were perverse in line with the decision in the case of Abdullahi v. The State (2008) 17 NWLR (Pt. 1115) 203. B

On issue No. 2, learned Counsel submitted that it was wrong for the lower Court to have affirmed the decision of the trial Court when the trial court amended the charge and proceeded with the trial without fresh plea from the appellant. This failure according to the learned Counsel rendered the charge incompetent and thereby denied the trial Court jurisdiction. Learned Counsel referred to the case of Okosun v. The State (1958) 7 SCNJ 118. It is further submitted that the requirement of plea is mandatory without which a criminal trial, however, well conducted is vitiated and becomes a nullity. C D

Learned counsel to the respondent, Adeniji, Esq., also adopted his brief of argument and urged this Court to dismiss the appeal. He objected to the issue No. 1 formulated by the appellant on the ground that it was not derived from any of the grounds of appeal, and urges us to strike it out. He relies on the case of Madumere v. Okafor (1996 4 SCNJ 73. E

On the issue No. 1 formulated by him, counsel submitted that it is trite that a voluntary, direct and positive statement of an accused person to the police confessing to the commission of a crime is, in criminal jurisprudence an admission of guilt, he cited Section 27(1) and (2) of the Evidence Act, 2004 and Ubierho v. The State (2005) All FWLR (Pt. 279) 3421 at 1353. F G

Learned Counsel pointed out at the Exhibit 1 tendered, without objection from the appellant. He stated that had the appellant's counsel objected to the admissibility of that document on the ground that it was not voluntary, the trial Court would have been duty bound to order a trial within trial. Learned Respondent's Counsel therefore submitted that obligation lies on the defence to raise objection timeously to a confessional statement it considers inadmissible and not to complain about admissibility of same after same had been admitted and acted upon by the trial Court. A mere denial of making a state- H

ment by the accused person does not render the statement inadmissible the case of *Shande v. The State* (2005) All FWLR (Pt. 279) 1342 was cited in support. However, where voluntariness of a statement is being challenged, the Court is duty bound to investigate the allegation in a trial within trial. But in this case the statement was not
 B challenged on the ground that it was not made voluntarily.

On the issue No. 2, Learned Counsel to the respondent submitted that the respondent had discharged the burden of proof placed on it by establishing that the appellant conspired and indeed committed an act of armed robbery as required by Section 138 of the
 C Evidence Act and Section 1(2) (a) and (b) of the robbery and firearms (Special Provisions) Act Cap. 398 LFN 1990. He referred to the Evidence of P.W. 1 and P.W. 2, and Exhibits 1 and 2 respectively. It was submitted that the strongest weapon of the prosecution in proving the guilt of the accused person beyond reasonable doubt was
 D Exhibit 1, he further submitted that the retraction of the confessional statement does not vitiate the statement from being admitted and acted upon by the trial court as the statement was voluntarily made and was direct and positive, the case of *Idowu v. The State* (2000)
 E NWLR (Pt. 16) 267 was cited. Above was the position taken by each Counsel.

Before I proceed to the main issues for determination in this appeal, I wish to quickly but steadily dispose of the objection raised
 F by the respondent on issue No. 1 formulated by the appellant. The respondent based its objection on the ground that the issue No. 1 as formulated does not relate to ground No. 1 of the Notice of appeal. However, the appellant in his amended brief of argument stated that the issue No. 1 was derived from grounds 1, 2, 3 and 4 of the Notice
 G of Appeal. The respondent's objection fails to consider grounds 2, 3 and 4 of the Notice of Appeal. It is clear that issue No. 1 relates to grounds 1, 2, 3, and 4 of the notice of appeal, thus, the respondent's objection lacks substance same is misconceived.

I am however, in agreement with the applicable law that for an
 H issue for determination to be competent, it must be related to a ground or grounds of appeal in the notice of appeal, where this is not So, such issue and argument based on it are incompetent and should be ignored. I refer to *Madumere v. Okafor* (1996) 4 SCNJ 73, *Okpala v. Beme* (1989) 2 NWLR (Pt. 102) 208; and *Adehi v. Atega* (1995) 6

SCNJ 44. I therefore have no problem in discountenancing the respondent's objection. Same is dismissed.

Issue Nos. 1 formulated by the parties are similar, and I wish to take them together. On the vexed issues of admissibility of confessional statement and when such statement is retracted after its admission, it is my view that the law on it is trite and clear as follows:-

(a) Where a statement by an accused person is tendered in evidence and objection made to it on the ground that it was not made voluntarily the Judge should first hear evidence on the point from both parties and make a ruling on the admissibility or otherwise of the document before receiving or rejecting it in evidence. See: *R. v. Onabanjo* (1936) WACA 23, *R. v. Kessi* (1939) 5 WACA 154. *Nwangbonu V. The State* (1987) 4 NWLR (Pt. 67) 745/751; and *Ikpesan v. The State* (1981) 9 SC 17.

(b) Hearing the parties on the objection that the investigation or inquiry which the Judge or Magistrate makes in order to determine the admissibility of the document is known and called trial within trial.

(c) If the question is whether the accused person made the statement or not, the Judge may receive it in evidence when properly tendered and decide at the end of the case whether the accused in fact made the statement. See *R v. Igwe* (1960) 5 FSC 55; *Ebot v. The State* (1993) 5 SCNJ 65.

(d) When a statement had been admitted as confessional statement, and the accused later retracted it in his evidence, the court when considering the weight to be attached to it must consider the following:-

(i) Is there anything outside the confession to show that it is true or real?

(ii) Is it corroborated?

(iii) Are the relevant statement made in it of facts, true as far as they can be tested?

(iv) Was the prisoner who had the opportunity of committing the offence?

(v) Is his confession possible?

(vi) Is it consistent with other facts which have been ascertained and have been proved?

My lords, if the confessional statement passes these tests, so to speak,

satisfactorily a conviction founded on it would be upheld. See: Kanu v. King (1952) 5514 WACA 30, Dawa v. The State (1980) 8-11 SC 236.

In the instant case, when Exhibit 1 was tendered for admission the learned counsel to the appellant did not object to its admissibility on the ground that the statement was made voluntarily in his words, learned counsel said:-

“The 2nd accused said he did not sign the statement and that does not stop it from being admitted.”

Learned counsel to the appellant in fact conceded to the fact that the document was admissible, and the trial court went ahead to admit it in evidence. Is this a case where a trial within trial should be ordered? In my view, the answer is in the negative. When there was no objection challenging the admissibility of a statement made by an accused person to the police on the ground that it was not made voluntarily, there is no basis to embark on a trial within trial. Notwithstanding the fact that the accused person retracted his statement in his evidence in chief, the trial court was right to have admitted the document in evidence, thus the lower court was right to have affirmed the position of the trial court. This Court in Idowu v. The State (2000) FWLR (Pt. 16) 2672 at 2703 stated it clearly, thus:-

“Mere retraction of a voluntary confessional statement by an accused person does not render it inadmissible or worthless and untrue in considering his guilt if the confessional statement is satisfactorily proved a conviction founded on it, without more, will be sustained by an appellate court.” ()

However, the question is, was Exhibit 1 satisfactorily proved before the trial court proceeded to convict him based on it? It will be necessary to reproduce the findings of the trial court on this point. The learned trial Judge found thus:-

“For the prosecution to succeed in a case of armed robbery punishable under Section 1 (2) (a) and (b) of the robbery and firearms Act Cap. 318 Laws of the Federation of Nigeria, 1990, it must prove:-

- (1) That there was a robbery*
- (2) That the accused was the robber*
- (3) That the accused was armed with any firearms or offensive weapon or was in company with any person so armed.*

(4) That at or immediately before or immediately after the robbery the accused wounded or used personal violence to any person.”

In this case, nobody has come to this court to say that he was robbed. No body has come to this court to say that any of the accused persons was the person or among the persons that robbed him. No body has come to say that any of the accused persons was armed with any firearms or offensive weapon or that he was in company with any person so armed; and no body has come to say that any of the accused wounded or used personal violence to him. None of the two witnesses called by the prosecution is either a victim of the alleged armed robbery or that he witnessed the alleged armed robbery. In fact none of the two witnesses gave evidence that any of the accused persons armed himself with any firearms or offensive weapon and robbed anybody or wounded or used personal violence to any body. There is therefore no direct oral evidence by or from the prosecution, that establishes any of the essential elements of the offences of armed Robbery punishable under Section 1(2) (a) and (b) of the Robbery and Firearms Act, Cap, 3 98 Laws of the Federation of Nigeria, 1990. The accused persons have denied that they committed the offence.

Now the prosecution virtually relies on the statements of the accused persons which, the prosecution says are confessional statements. On the other hand, the accused persons have denied having made the statements to the P.W. 1 and P.W. 2. Although they said that they made statements to the police, Exhibits 1 and 2 are not the statements they made. In fact, the P.W. 2 under cross examination admitted that the accused persons made statements at Birnin Gwari Police Division were not tendered by the prosecution. See: pages 34-37 of the Record.

The lower court on this issue held as follows:-

“The position of the law is that in above, the mere denial by an accused person of having made statement confessing to the commission of the crime he is accused of or charged with is an issue of question of fact to be decided by the trial court. It does not make the statement in-admissible in evidence but it must be considered along with the other evidence, adduced as well as the circumstance of the case for the Purpose of attaching or ascribing probative weight or

value to it in the determination of the guilt or otherwise of the accused person. The confessional statement in the circumstance is relevant and admissible under Section 21 (2) of the evidence Act.”See: page 158 of the record of proceedings of the Court of Appeal.

The lower court rightly stated the general position of the law, but the critical question is “was this statement considered along with other evidence adduced as well as the circumstance of this case before using it to convict the appellant”?

The trial court has answered the question in its finding that there is virtually no evidence before that court directly or indirectly establishing any of the ingredients of armed robbery against the appellant. Thus Exhibit 1 has not been successfully proved to have passed the tests enunciated in the principles stated above in order to justify the court attaching any weight to it. See: *Kanu v. King (supra)* and *Dawa v. The State (supra)*

The only evidence with which the court would have used in comparing whether the statement was made by the accused person or not, was the statement which P.W. 2 admitted was made at the Birnin Gwari, Division, which was not tendered before the court. There was no iota of evidence to corroborate Exhibit 1, in order to prove that it was in fact made by the appellant. It must be borne in mind that the finding of the trial court that there was no direct evidence establishing any of the ingredients of armed robbery before the court was not challenged, thus this finding is still valid and subsisting. I therefore resolve issue number 1 as formulated by both parties in favour of the appellant.

Issue No. 2 formulated by the appellant relates to the amendment of the charge, suo motu, done by the trial Judge in its judgment without calling on the parties to address him or to take fresh plea of the accused before proceeding to convict and sentence them. I have earlier reproduced the statement of the trial Judge as it related to this amendment in this judgment.

Learned counsel for the appellant cited the case of *Okosun v. The State (supra)* and submitted that failure to take the plea of the accused after the amendment is fatal to the trial. However, I have searched through (1988) 7 SCNJ both volumes 1 and 11, I could not see where this case was reported. The same case was cited as reported in 1998 7 SCNJ 111 under the list of authorities filed same

was no where to be found in that 1998 7 SCNJ.

This is, to say the least, unethical. Counsel has the duty to properly cite the cases they seek to rely on in their briefs of arguments in order to assist the court. A situation where a counsel cites a case and put a wrong citation, the assumption is simple, the case does not exist, and such an act is condemnable. Decisions of the courts particularly decisions of this court are case laws which under the principle of stare decisis are binding on this court and all other courts below, hence in citing his case counsel have to ensure accuracy. I would hold my breath for a moment but I still hold that this kind of loose attitudes will not repeat itself.

The trial court in its judgment held that the charge as preferred against the accused did not disclose any offence, and that the law under which they were brought/arraigned has nothing to do with the armed robbery. In its words the trial court stated.

"In effect the charge does not allege or suggest the commission of the offence of armed robbery. The elements that constitute the offence of armed robbery under Section 1 (2) (a) and (b) of the Robbery and Firearms Act Cap 398, Laws of the Federation of Nigeria 1990 have completely and absolutely not been alleged in the charge"

This to me the effect is simple, there was no allegation of commission of the crime of armed robbery brought before trial judge against the accused persons. Surprisingly the trial court amended the charge and inserted a proper Section in its judgment and proceeded to convict and sentence accused person to death. None of the parties was called to address the court on it and no fresh plea of the accused Person taken.

This to me is a grave infraction of the accused person's right to fair hearing. The trial court tried and attempted to take solace in Section 286 of the Criminal Procedure Code, concluded that the accused persons were not misled and neither were they taken by surprise.

My Lords, this amendment was made in trial court's final judgment, so where was the opportunity for the accused persons to express their surprise or to show that they been convicted and sentenced? This is a classical example of the sentenced? This is a classical example of the misapplication of the provisions of Section 286 of the

Criminal Procedure Code, particularly when the trial judge held that”-
 “The charge does not therefore suggest that is for the offence of armed robbery and the reference to (a) and (b) which presuppose a reference to Section 1(2) (a) and (b) must be a serious misconception. The charge by its contents alleges only facts of robbery and not armed robbery.”

With tremendous respect to the learned trial Judge, when there was no fact alleged constituting an offence of armed robbery against the accused why were they convicted for armed robbery. I am not however unaware that the fact that a charge did not disclose the particulars of an offence would not result in an appeal court reversing a conviction based on such charge. Cop v. Okoyen (1964) All NLR 305 at 307, Queen v. Ijeoma (1962) 1 All NLR 402 at 411-412. But definitely not in a situation like this when the charge did not disclose any fact of the offence of armed robbery which the accused were convicted and sentenced. A trial Judge ought to permit the furnishing of particulars in charge in order to give the accused sufficient notice of the case against him. See: The Enahoro v. Queen (1966) 1 All NLR R 125 at 133. The proper procedure to take when a charge is amended is for the court to read and explain to the accused every allegation or addition to the charge and to call upon the accused to make a fresh plea and to say whether he was ready to be tried on the amended charge and/or to recall all witnesses who may have given evidence and to ask the prosecution and the accused if they wish to examine or cross-examine them. See: Adisa v. Attorney-General (1965) 1 All NLR 412 at 416. Failure to follow this procedure would render the whole Proceedings a nullity. See: Joves v. Inspector General of Police (1960) 5 FS 38 at 43.

In view of all what I have said above, I hold that this appeal has merit. I was privileged to have seen the lead judgment prepared by my learned brother Rhodes-Vivour, JSC in draft. With this brief contribution and more elaborate judgment of my learned brother I agree entirely that this appeal is pregnant with merit and same deserved to be allowed. The concurrent decisions of the two lower courts being perverse must be set aside. The judgment of the lower court affirming the judgment of the trial court is hereby set aside. The appellant is discharged and acquitted. I abide by all consequential orders made by my lord, Rhodes-Vivour, JSC in lead judgment. Appeal allowed.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, Rhodes-Vivour, JSC. I agree with the reasons advanced therein to arrive at the conclusion that the appeal should be allowed.

At the trial court, the appellant was arraigned along with Bright Chibuike for the offences of conspiracy and armed robbery contrary to Section 97 of the Penal Code Law, Laws of Kaduna State, 1991 and section 1 (a) and (b) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 LFN 1990; respectively. The appellant pleaded not guilty to both counts when they were read to his hearing. The case of the prosecution rested on Exhibit 1 tagged confessional statement. It was not signed by the appellant. The statement which the appellant said he made at Birnin Gwari Police Station was not tendered. None of the three alleged victims of the alleged offence of arm robbery was called to testify.

The learned trial Judge essentially relied on the contents of Exhibit 1 and convicted the appellant; sentenced him to five years for the offence of conspiracy and death by hanging for armed robbery. He appealed to the Court of Appeal, Kaduna Division (“the court below” for short). Thereat, his appeal was dismissed. This is a further appeal to this court.

It has been firmly established in a line of authorities that the essential ingredients of the offence of armed robbery are as follows:-

- (a) That there was a robbery or series of robbery.
- (b) That each robbery was an armed robbery.
- (c) That the accused was one of those the robbed.

For the above stated ingredients of the offence, see *Bozin V. The State* (1955) 2 NWLR (Pt. 8) 465; *Alabi v. The State* (1993) 7 G NWLR (Pt. 307) 511 at 523; *Bello V. The State* (2007) 10 NWLR (Pt. 1043) 564. This is a peculiar case where the charge relating to armed robbery did not state any lethal weapon that was used by the appellant. The learned trial Judge, on this point found as follows:-

“In this case, no body has come to this court to say that he was robbed. No body has come to this court to say that any of the accused person was the person or among the person (sic) that robbed him. No body has come to say that any of the accused persons was armed with any firearms or offensive weapon or that he was in com-

pany with any person so armed; and nobody has come to say that any of the accused wounded or used personal violence to him."

I have taken a hard look at the so-called confessional statement - Exhibit 1 which was not signed by the appellant and cannot trace any offensive weapon mentioned therein. One is at a loss as to why the offence charged should be that which carries capital punishment. In this regard, the prosecution should have been on guard as human life is not a thing to be toyed with.

Let me move to the real point in contention. Exhibit 1 which the prosecution relied upon as a 'joker' was not signed by the appellant. Can it be said with certainty that the appellant made it? My answer is in the negative. I think not. The appellant said he made a statement at Brinin Gwari Police Station. The same was not tendered during his trial. The prosecution has a duty to tender any statement made by an accused person during the investigation of the offence with which he was charged whether or not it is in his favour. See: *Dandare v. The State* (1967) NMLR 56. This must be so in order to avoid the invocation of the provision of Section 149 (1) (d) of the Evidence Act against the prosecution which failed to tender the vital statement

The court below in respect of the un-tendered statement has this to say at page 174 of the record of appeal:-

"In the circumstances, failure to tender the statement made at Buruku Police Station, desirable as it was, would not have made any difference in the finding of the High Court."

The above view, with due diffidence, flies in the face of my views as stated above. The statement must be tendered in the first instance before one can surmise the difference it will have on the finding of the trial court. To my mind, the prosecution's case is replete with doubts. The prosecution failed to prove the case against the appellant beyond reasonable doubt. See: *Woolmington v. D. P. P.* (1935) AC. 485; *Nasiru v. The State* (1999) 2 NWLR (Pt. 589) 87.

For the above reasons and the fuller ones contained in the lead judgment, I too, feel that the appeal is meritorious and should be allowed. The appellant should be left off the hook as he is discharged and acquitted.