

COURT OF APPEAL PORT-HARCOURT DIVISION
18TH APRIL, 2011. CA/PH/243/2007
CORAM:- A. J. ABDULKADIR, H. M. OGUNWUMIJU,
M. A. OWOADE, JJCA

IRENE NGUMA APPELLANT
(ALIAS IRENE OKOLI)
V.
ATTORNEY-GENERAL RESPONDENT
OF IMO STATE

COURTS - Evidence - Evaluation - Assessment of credibility of witness is essential function of trial court - Appellate court does not delve into such (H1)

CRIMINAL PROCEDURE - Confession - Corroboration - Material facts discovered from information given by accused - Can be used to corroborate his statement (H2)

EVIDENCE - Hearsay Rule - Exceptions - Admissions and confessions are exceptions to this rule - Because of legal presumption of their truthfulness (H3)

EVIDENCE - Hearsay - Meaning - It is testimony that depends on credibility of someone else - Other than the witness who relates it - Which is generally inadmissible (H4)

CRIMINAL PROCEDURE - Confession - Meaning - It is express acknowledgment of guilt by accused - In a criminal case (H5)

CRIMINAL PROCEDURE - Fair hearing - Confessional statement - Admissibility - Tendering of such statement - Even if resiled from by accused - Does not infringe on 1999 Constitution s. 36(11) (H6)

CRIMINAL PROCEDURE - Confession - Retraction of - Admissibility - Such statement is admissible - And the question of its validity - Is decided at the end of trial (H7)

CRIMINAL PROCEDURE - Conviction - Based on retracted confession - Validity - Prior to conviction - Extraneous evidence needs to be adduced - To make it probable that the confession is true (H8)

CRIMINAL PROCEDURE - Judgments - Obiter dictum - Effect - Statement of the judge in this case is expression of an opinion - Which cannot be a subject of an appeal (H9)

CRIMINAL PROCEDURE - Armed robbery - Conspiracy - Conviction based on confession - Is valid where confession is positively direct and unequivocal - As to admission of guilt (H10)

FACTS

Before the High Court of Imo State, Holden at Owerri, appellant and 1st accused person (who claimed to be husband and wife) were charged on a two count charge with the offence of conspiracy contrary to Section 5 (b) and Armed Robbery contrary to Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Volume 22, Laws of the Federation of Nigeria 1990. They pleaded not guilty to each charge. Prosecution called two witnesses and also tendered nine (9) exhibits among which were several of the stolen items and statements of accused persons to the police. Appellant and 1st accused testified as DW1 and DW2 respectively and called no witness. The case of prosecution is that after the robbery incident that occurred on 31st December, 1998, and the subsequent arrest of accused persons in connection thereof, several incriminating items were recovered from accused persons. Besides, prosecution also stated that accused persons voluntarily admitted the crime via their confessional statements to the police. In his defence, 1st accused denied committing the offence and also denied his statement to the police. Appellant, as 2nd Accused also denied her participation in the crime and her statement to the Police. She denied the recovery of some of the property of PW1 from her and gave evidence of torture by the Police.

The Court conducted a trial within trial in respect of the statements of both appellant and 1st accused. It disbelieved the story of torture, and admitted the statements of appellant and 1st accused as exhibits 7, 8 and 9 respectively. The court subsequently found ac-

cused persons guilty as charged and convicted them accordingly. Aggrieved, appellant has appealed to Court of Appeal, Port Harcourt Division. By a Notice of Appeal dated and filed on 10th April, 2007, appellant filed her appeal against the interlocutory ruling of 10th February, 2004 wherein appellant's confessional statement to the police was admitted in the course of trial within trial. Also, by a Notice of Appeal dated 13th March, 2007 and filed on 11th April, 2007, appellant filed her appeal against the judgment of the trial court delivered on 27th February, 2007 where she was convicted along with 1st accused for the offences of conspiracy and Armed Robbery.

ISSUES FOR DETERMINATION

INTERLOCUTORY APPEAL

“(1) Whether the learned trial Judge was right in disbelieving the evidence of appellant that she was tortured into making the said statement, Exhibit 7.

(2) Whether the learned trial Judge was right to rely on the recovery of Exhibits 1, 2, 5 and 6 to hold that the statement, Exhibit 7 was voluntary and so admissible.

(3) Whether the statement Exhibit 7, having been resiled from by the appellant is in law inadmissible.”

MAIN APPEAL

Whether upon the evidence led, the learned trial Judge was right to have convicted the Appellant of the offence charged.

HELD (Unanimously dismissing the appeal per **OWOADE JCA**) **EVIDENCE - Evaluation**

1. I do agree with the learned counsel for the respondent in this respect that credibility of witnesses is the essential function of the trial court, which saw, heard and watched the witnesses testify. And, that an appellate court does not believe or disbelieve evidence.
(p. 668 F)

CRIMINAL PROCEDURE - Confession - Corroboration

2. In deciding appellant's Issue No. 2, the learned appellant's counsel argued that the learned trial Judge relied on Exhibits 1, 2, 5 and 6 in admitting Exhibit 7. The impression one gets from that submission is that the admissibility of Exhibit 7 was absolutely dependent on the existence of Exhibits 1, 2, 5 and 6. This is not so. The learned trial

Judge merely tested the veracity of the defence witness in relation to Exhibit 7 by seeking independent and or corroborative evidence from the recovery of Exhibits 1, 2, 5 and 6. This is permissible. The fact that Exhibits 1, 2, 5 and 6 were only used to test the veracity of the defence witness in relation to Exhibit 7 is borne out by the statements
 B of the learned trial Judge at pages 45C - 45D of the record.
 The above findings by the learned trial Judge are unassailable, correctly drawn from proved facts and are not perverse. It is also correct to say that material facts discovered from information given by an
 C accused person can be used to corroborate his statement.
 (pp. 669 D/670 D)

EVIDENCE - Hearsay Rule - Exceptions

3. In deciding Appellant's Issue No. 3, the learned counsel for the
 D Appellant must be quickly reminded that admissions and confessions are recognised exceptions to the hearsay rule.

On the other hand, an hearsay exception is any of several deviations from the hearsay rule, allowing the admission of otherwise inadmissible statements because the circumstances surrounding the statements
 E provide a basis for considering the statements reliable.

Admissions and confessions fall into the above mentioned category of exception to the hearsay rule based on reliability. Admissions and confessions are generally held to be reliable because the
 F law assumes that what a man says against himself must be true. This is because, it is unusual perhaps unnatural for a man to speak against himself or to implicate himself. A statement by another becomes hearsay only when it tends to prove the truth of an assertion.

The above are the reasons why the rule of hearsay becomes irrelevant in the treatment of confessional statements in criminal trials.
 G (pp. 671 B/D/G)

EVIDENCE - Hearsay - Meaning

4. Hearsay testimony is that which is given by a witness who relates
 H not what he or she knows personally, but what others have said and is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence. (p. 671 B)

Confession - Meaning

5. A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it. In other words, a confession is an acknowledgment of guilt. (p. 671 F)

B

CRIMINAL PROCEDURE - Fair hearing - Confession

6. The admissibility of a confessional statement does not in any way infringe the provisions of Section 36 (11) of the 1999 Constitution. The Section provides thus:

C

“(ii) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.”

A confessional statement is evidence by the prosecution and not from the accused person. It is also so because the evidence is for and in favour of the prosecution since at the stage of trial it is evidence against the accused.

D

For this reason, the tendering of a confessional statement even if resiled from by the accused person cannot be held to amount to the accused “being compelled to give evidence at the trial under the provision of Section 36 (11) of the 1999 Constitution.

E

Also, the provision of Section 36 (11) of the 1999 Constitution does not prohibit a trial Judge from drawing any unfavourable inference against an accused having regard to the evidence adduced in the case. (p. 671 H)

F

CRIMINAL PROCEDURE - Confession - Retraction of

7. The correct position of the law where an accused retracted a confessional statement is that the question as to whether or not it was made at all is a matter to be decided at the conclusion of the case by the trial Judge. No account of subsequent arguments on its retraction will vitiate its admissibility as a voluntary statement and its mere denial by the accused will not be a reason for rejecting it.

G

In other words, the fact that an accused has denied making the confession does not necessarily make it inadmissible.

H

The fact that Exhibit 7 in the instant case was resiled from by the Appellant does not make it inadmissible in law neither does it make its admissibility offend against the provision of Section 36 (11) of the 1999 Constitution. (pp. 672 E/673 C)

Conviction - Based on retracted confession - Validity

8. However, before a conviction can be based upon such retracted confession, it is desirable to have some evidence outside the confession which would make it probable that the confession was true.

B (p. 673 B)

Judgments - Obiter dictum - Effect

9. The statement of the learned trial Judge at lines 23 - 26 of page 98 of the record is Obiter and cannot be a subject of an appeal.

C This is because the issue at stake before the learned trial Judge was the guilt or otherwise of the Appellant and the 1st accused for the offences charged; i.e. conspiracy and Armed Robbery. There was no time any of the parties, that is the prosecution or defence joined
D issues on whether the Appellant and the 1st accused were married or the type of marriage that they went through. In the context of a criminal trial, it is only when the prosecution and the defence have presented or answered one another's case in such a manner that they have arrived at some material point or matter of fact on one
E side and denied on the other side, that it is said that they have joined issues on the question.

In the instant case, the remark by the learned trial judge at page 98 of the record strictly was not called for as in any event his Lordship was not called upon to decide any questions of marriage between
F the prosecution and the defence. If the evidence on record had disclosed a statutory marriage between the Appellant and the 1st Accused, which was not the case, the learned trial Judge would then have been obliged even before any prompting to examine all avail-
G able defences if any associated with the definition of 'marriage' under the Criminal Code as well as the Evidence Act.

In the absence of such evidence not even from the defence by the production of a certificate of marriage, the remark of the learned trial Judge was an expression of opinion outside the confines of the
H criminal trial before his Lordship. (pp. 674 D/675 A)

Armed robbery - Conspiracy - Unequivocal confession

10. In the instant case, the content of Exhibit 7 for which the learned trial Judge found corroboration in Exhibits 1, 2, 5 and 6 adequately

revealed the role of the Appellant not only as a conspirator but indeed the initiator and principal actor in the Robbery that took place in the house of the PW1 even though the Appellant was not physically present at the scene of crime. Exhibit 7 revealed that the Appellant agreed with the 1st Accused to rob PW1, she monitored the operation without showing up at the scene and not only received some of the proceeds of the Robbery but also kept part of the ammunition used in the Robbery operation. The learned trial Judge was perfectly entitled to rely on Exhibit 7 to convict the Appellant. Exhibit 7 was not only corroborated by Exhibit 1, 2, 5 and 6 but also by the evidence of PW1 and PW2.

In *Olalekan vs. State* (2001) 18 NWLR (Pt. 746) 793 at page 824, the Supreme Court per Onu, JSC, held that where a confessional statement is direct, positive and unequivocal as to the admission of guilt by an accused person, the statement is enough to ground the conviction of the accused.

Thus, even without those corroborative acts, the Appellant in the instant case could perfectly be convicted solely on her voluntary confessional statement. (p. 677 B)

NOTABLE POINTS OF INTEREST

OWOADE JCA

1. Joinder of issues – Definition

The 8th Edition of the Black's Law Dictionary at page 854 defines "joinder of issues" as follows:

- "1. The submission of an issue jointly for decision.*
- 2. The acceptance or adoption of a disputed point as the basis of argument in a controversy. Also termed joined in issue, Similiter*
- 3. The taking up of the opposite side of a case, or of the contrary view of a question."* (p. 674 H)

2. Obiter dictum – Meaning

An 'obiter dictum' is a remark made or opinion expressed by a Judge in his decision upon a cause 'by the side' that is incidentally or collaterally and not directly upon the question before the court, or it is merely by way of illustration, argument, analogy or suggestion.

In the common speech of lawyers, all such extra judicial expressions of legal opinion are referred to as 'dicta' 'or obiter dicta'

these two terms being used interchangeably. See William M. Life et al, Brief making and the use of Law Books 304 (3rd ed. 1914). Again, the 8th Edition of the Black's Law Dictionary at page 102 says of Obiter dictum as *"A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedental....."* (p. 675 D)

REPRESENTATION

Chidi B. Nwoka, Esq., for the Appellants
K. C. Nwokorie, Esq., Assistant Chief State Counsel, Imo State, for the Respondents

CASES REFERRED TO

State vs. Ajie (2000) 7 SCNJ 1
D Yahaya vs. State (2005) NCC 120
Sommer vs. F. H. A. (1992) 1 SCNJ 73
Isibor vs. State (2002) FWLR (Pt. 98) 843
Baba vs. Civil Aviation (1991) 7 SCNJ 1
Olalekan vs. State (2002) FWLR (Pt. 91) 1605
E Okoh vs. State (2009) All FWLR (Pt. 453) 1358
Tanko vs. State (2009) All FWLR (Pt. 456) 1977
Usung vs. State (2009) All FWLR (Pt. 462) 1203
Buhari vs. I. N. E. C. (2009) All FWLR (Pt. 459) 419
Shade vs. The State (2005) 6 SCMJ 124
F Abacha vs. Fawehinmi (2000) 6 NWLR (Pt. 660) 273
Monsuru vs. The State (2005) 5 SCMJ 139
Adebayo vs. A-G Ogun State (2008) 2 SCMJ 352
Ozana Ubierho vs. The State (2005) 5 SCMJ 1

STATUTES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s. 36 (11) Criminal Code, s. 7
Robbery & Firearms (Special provision) Act Cap. 398 LFN 1990, 1
H (2) (a), s. 5 (b)

BOOKS REFERRED TO

Blacks Law Dictionary 8th edition, pp. 854, 102
Brief Making & the Use of Law Books 3rd edition 1914, p. 304

LEAD JUDGMENT BY OWOADE JCA

This is an appeal against the interlocutory Ruling and the Judgment of Chioma Nwosu - Iheme J. at the High Court of Imo State, Owerri Judicial Division sitting at Owerri.

The interlocutory Ruling on the admissibility of the confessional statement of the Appellant after a trial within trial was delivered on 10/2/2004. The Judgment of the court which convicted the Appellant (2nd Accused) and the 1st Accused of the offences of conspiracy and Armed Robbery was delivered on 22 - 2 - 2007.

The facts of the case are as follows:

The Appellant and the 1st Accused person (who claimed to be husband and wife) were charged on a two count charge with the offence of conspiracy, contrary to Section 5 (b) of the Robbery and firearms (Special Provisions) Act and Armed Robbery, contrary to Section 1 (2) (a) of the same cap. 398 Volume 22, Laws of the Federation of Nigeria 1990. Each of the Appellant and the 1st Accused pleaded not guilty to each charge.

The Prosecution called two witnesses, the victim, Augustine Chukwunyere PW1 and Inspector Atti Okon. The Prosecution also tendered nine (9) Exhibits namely: (1) A Berreta Pistol. (2) Two life Ammunitions. (3) The Application by PW1 to the Police for the release of recovered items. (4) The Bond entered into by PW1 for the release of the recovered stolen items to him. (5) One Axe. (6) A Pump Action Gun. (7) Statement of the 2nd Accused person. (8) 1st statement of the 1st Accused person. (9) 2nd statement of the 1st Accused person.

The appellant and the 1st Accused testified as DW1 and DW2 respectively, and called no witness.

The story of the Prosecution is that the PW1, Augustine Chukwunyere came back for Christmas in his Uzoagba country home, for the memorial service of his late wife. That prior to the Robbery incident, the Appellant, Irene Nguma was seen with the 1st Accused in the victim's compound and that Appellant and 1st Accused attended the Thanksgiving Ceremony, the Sunday Proceeding the 31/12/98, the day of the Robbery.

In the early hours of the said 31/12/98, three men broke into the house of PW1, the 1st Accused was one of them, he covered

lower part of his face with handkerchief and he had a Black Pistol in his hand, while the other two had Short Guns. They ordered PW1 to bring out the Dollars and out of fear he brought out his leather bag, and emptied all the money therein on the floor. 1st Accused ordered him to pack all the money into the leather bag, and he did so. The Robbers collected bundles of Naira notes totaling N330, 000.00, One Hundred and Fifty Dollars and Forty Pounds in Twenty Pound denomination. They also collected Wrist watch, Gold chains, Mobile phone and some jewelry.

The Robbers eventually matched out PW1 where other members of their gang were waiting, all armed. The night guards were tied. They also robbed the next compound, the house of PW1's cousin, Nelly Chukwunyere, and continued the shooting. PW1 recognised the 1st Accused because he had a flashlight and his own lamp was still on at the time the Robbers came. Also, he has met the 1st Accused twice. He took particular notice of the 2nd Accused because the first day he met with her, she put a ring on her nose, and wore a chain on her leg. After the Robbery, PW1 and his relations reported to the Police at Iho on 1/1/99.

At about 12 noon on the said 1/1/99, after making the report, PW1 was driving pass the market square, when he sighted the 1st Accused trying to board a vehicle. He immediately alerted policemen at the Uzoagba Police Post who arrested the 1st Accused, PW1 made a report of the Armed Robbery at the Police Headquarters, Owerri, and was given four police men. The 1st Accused took the Police from Owerri to the house of the 2nd Accused.

At the house of the 2nd Accused, the Police recovered PW1's mobile phone. The 2nd Accused brought out PW1's leather bag containing the sum of N25, 000.00 (Twenty Five Thousand Naira). Also recovered from the 2nd Accused were the Gold chain, Wedding ring, Pair of shoes, Wrist watches, the Axe and one Gun.

The 1st Accused told the Police that he gave the foreign currency to his mother-in-law. The sum of 230 Pounds Sterling was recovered from the mother-in-law. And, about Six Thousand Naira brand new Fifty Naira denominations being part of the money removed from PW1 was also recovered from the 1st Accused. The 1st Accused then took the Police to his residence at Irete, where the Police recovered one Pump Action Gun. Apart from the two Guns, all

the other items recovered were items the Robbers took from PW1.

The evidence of the defence starting from the 1st Accused Leonard Okoli was that of total denial. 1st Accused denied committing the offence and also denied his statement to the Police, Exhibits 8 and 9. The Appellant, as 2nd Accused also denied participation in the crime and her statement to the Police - Exhibit 7. She denied the recovery of some of the property of PW1 from her and gave evidence of torture by the Police. The Court conducted a trial within trial in respect of the statements of both the Appellant and the 1st Accused, disbelieved the story of torture, and admitted the statements of the Appellant and the 1st Accused as Exhibits 7, 8 and 9 respectively.

In coming to the conclusion that the statement by the Appellant to the Police was admissible in evidence the learned trial Judge held variously at pages 45 C - 45 D of the record as follows: First, at page 45C that:

“Let me start by saying that the specimen signature signed by the second accused person in open court is similar with the signature on the statement sought to be tendered, which the second accused denied signing. However, mere signing of a signature on a document is no proof of the voluntary nature of the statement.

I have therefore gone a step further on the issue of voluntariness or otherwise of the statement sought to be tendered. In doing so, Exhibits 1, 2, 5 and 6 caught my attention. There was a bag containing a Pump Action Gun, a Pistol, an Axe and an envelope containing some money, said to have been given to the Police by the second accused person. There is no evidence before this court by the defence denying that the said second accused handed same over or caused same to be handed over to the Police.

Having made available the said Exhibits to the Police, my view is that the said statement which merely mentioned the same items already said to have been surrendered to the Police by the same second accused person could not have been obtained under duress.”

And concluded the trial within trial at page 45 D as follows:

“I therefore at this stage for the purpose of the trial within trial disbelieve the evidence that the statement sought to be tendered was obtained under duress. Having said so, the said statement of the sec-

ond accused is admitted in evidence, and it is marked Exhibit No. 7.”

At the conclusion of the main trial, the learned trial Judge relied on the provisions of Section 5 (b) of the Robbery and Firearms (Special Provision) Act Cap. 398 Law of the Federation of Nigeria 1990 and the provision of Section 7 of the Criminal Code in defining the participation of the Appellant in the Robbery. At page 78, his Lordship made the following factual observations:

“The said 2nd accused is charged with Armed Robbery even though she did not physically take part in the mid-night Robbery of 1/1/99..... The prosecution narrated in very clear language the role played by the 2nd accused taking advantage of her relationship with the victim, how she supplied all the relevant information to 1st accused, and above all, immediately or so soon after the Armed Robbery, all the proceeds of the robbery were recovered in the house of the 2nd accused person.

I find as a fact that there was Robbery in the house of PW1, Augustine Chukwunyere. That the 1st and second accused persons, each participated in the robbery, and played his or her own masterly role. Also that the accused persons were never married, but just partners in crime.

That the accused persons used Firearms and other offensive weapons like Axe in order to prevent or overcome resistance to robbery of the items already enumerated.

That the Armed Robbers made away with some of the properties of the victim PW1, and that the items recovered in the house of the 2nd accused were those items removed by the robbers from PW1.

The Guns recovered by the Police Exhibits 1 and 6 were those used in the Robbery operation.”

And concluded thus:

“The prosecution has therefore proved the offence of conspiracy and Armed Robbery against the two accused persons as charged. A case of Armed Robbery and conspiracy have therefore been made out against the two accused persons, Leonard Okoli and Irene Ngumah (Alias Irene Okoli) and I find each accused person guilty as charged.”

By a Notice of Appeal dated and filed on 10/4/07, the appellant filed her appeal against the interlocutory ruling of 10/2/04 wherein

the appellant's confessional statement to the police was admitted in the course of trial within trial.

Also, by a Notice of Appeal dated 13/3/07 and filed on 11/4/07, the appellant filed her appeal against the judgment of the court delivered on 27/02/07 where she was convicted along with the 1st accused for the offences of conspiracy and Armed Robbery. B

The appellant, by an order of this court dated 16/4/08 filed an Amended Notice of Appeal containing four (4) grounds of appeal on the Ruling of 10/2/04. By the same order of 16/4/08 the appellant also filed another Amended Notice of Appeal also containing four (4) grounds of appeal on the judgment delivered on 27/2/07. C

Appellant's Brief of Argument which incorporated arguments on both appeals dated 27/5/08, filed on 30/5/08 was deemed filed on 17/11/08.

Respondent's Brief of Argument dated 9/5/09 was filed on 18/6/09. The appellant nominated three (3) issues from the four (4) grounds of appeal in the Notice of Appeal against the ruling of 10/2/04. They are: D

"(1) Whether the learned trial Judge was right in disbelieving the evidence of appellant that she was tortured into making the said statement, Exhibit 7. E

(2) Whether the learned trial Judge was right to rely on the recovery of Exhibits 1, 2, 5 and 6 to hold that the statement, Exhibit 7 was voluntary and so admissible. F

(3) Whether the statement Exhibit 7, having been resiled from by the appellant is in law inadmissible."

The respondent on the other hand formulated only one issue on the interlocutory appeal. That is:

"(1) Whether the admission of Exhibit 7 was proper and if the admission occasioned a miscarriage of justice given the evidence at the trial." G

On the first issue in the interlocutory appeal, learned counsel for the appellant recounted the events in the lower court and said that when the prosecution sought to tender the statement said to be made by the appellant - Exhibit 7, appellant through her counsel objected on the ground that the same was obtained from her by duress. A trial within trial was conducted during which the appellant gave gory details of the torture she underwent at the hands of the I. H

P. O., Atti Okon. That, she described how her gown was torn off and she was stripped naked and a bottle inserted into her vagina. That, the appellant also described the flogging she received, the bleeding she sustained and how an iron vice was used to squeeze her legs until she sustained injuries.

B Against these, said appellant's counsel, all the prosecution gave account of was a bare denial and a most conflicting and discordant story of her statement being taken to a superior police officer, A. S. P. Lawal. That, while Atti Okon as PW2 said that it was after the state-
C ment was obtained that he took appellant to the superior police officer. ASP Lawal as PW3 said he had first had appellant brought to him, heard her story then directed PW2 to take her statement.

Appellant's counsel asked rhetorically, why did the learned trial Judge reject this unchallenged account by the appellant?

D He submitted that the law is that failure to cross-examine on an issue raised or testified to by a witness may amount to admission of same. And that when evidence is unchallenged, the court ought to accept and act on it, unless the evidence is of such a quality that no reasonable tribunal should believe it. On this, counsel referred to the
E cases of Sommer vs. F. H. A. (1992) 1 S. C. N. J. 73 at 82, Baba vs. Civil Aviation (1991) 7 S. C. N. J. 1 at 22. Counsel submitted that Appellant stated during the trial that "He asked the boy to go and get a vice, the vice was like an iron rod. They put my leg on that vice and the vice got me injured on my right leg". That, this was not cross-
F examined upon.

Learned counsel for the Appellant submitted that the Appellant's right leg was right there in Court. No attempt was made by the learned trial Judge to examine the leg to see whether any scar was
G real evidence with which the Appellant's story could have been tested. But this was not done. He submitted that in the peculiar circumstances of the case, there was no basis for the trial court not to have accepted and acted upon Appellant's evidence that she was tortured in order that Exhibit 7 be obtained from her.

H In reply to the above, learned counsel for the Respondent submitted that at pages 34 to 45F of the printed record upon the objection by the Appellant of the admissibility of Exhibit 7 on grounds of duress (torture), the Court went into trial within trial, evaluated the evidence proffered by the Respondent and Appellant, disbelieved

the evidence proffered by the Appellant and accepted the evidence of the prosecution before admitting it as Exhibit 7.

The question for resolution, said respondent's counsel, is whether at this stage of appeal, the Appellant can question the evaluation or ask the Court of Appeal to re-evaluate the same evidence in order to draw a different conclusion on a document found by the trial Court to be voluntarily made based on the credibility of the witnesses called on both sides. B

In answering the above question, respondent's counsel referred to the case of Buhari vs. I. N. E. C. (2009) All FWLR (Pt. 459) 419 at 55 - 560, Bolanle vs. State (2005) 1 NCC 342 at 360 and Isibor vs. State (2002) FWLR (Pt. 98) 843 at 854, to come to the conclusion that the assessment of the credibility of a witness is a matter within the province of the trial court, a function which the appellate court must not usurp. C

In deciding Appellant's Issue No. 1 in the interlocutory appeal, it is pertinent to observe that the learned counsel for the Appellant did not correctly present the facts when he argued that the appellant's story of torture was unchallenged by the prosecution. At pages 36 - 37 of the record, Sergeant Atti Okon as PW2 in the trial within trial testified in Examination-in-chief as follows: D

"..... At the time of the incident, I was attached to the Anti Robbery Squad. I know the accused persons. It is not true that the 2nd accused made her statement under duress. I did not introduce any object into the private part of the 2nd accused. It is an after thought if she says so. I recorded her statement myself after cautioning her. She voluntarily made her statement which I recorded. The statement was made and recorded at the Anti Robbery Section of the Force C. I. D., Owerri. It was read over to her, and she signed it as being correct. I took the accused and the statement to a senior police officer, he read the statements of the 1st and 2nd accused, and then counter signed that of the 1st accused who is the husband of the second accused. I took the 2nd accused to the senior police officer first." E F G H

PW2 continued at page 37:

"The place I recorded her statement was a public place. It was impossible that she would be stake (sic) striped naked, and a stick inserted into her private part in public. The Anti Robbery Office is a

place where all men in the Anti Robbery section stay. They have their tables there, and over twenty policemen stay in that room. As the leader of the team, the 2nd accused opened up, and her statement helped us uncover a lot of things, so I decided to take the statement myself.”

B The PW3, A.S.P. Ola Lawal corroborated the evidence of PW2 in his own Evidence-in-chief at pages 38 - 39:

“After hearing from Irene the 2nd accused person, I instructed the I. P. O. to obtain statement from her. After the statement was obtained, it was shown to me and I saw it was totally the same as what she told me verbally. The statement of the 2nd accused person was used as a foundation to obtain statement from the 1st accused who was the master minder in respect of the crime. So the statement of the 2nd accused was used as a basis or foundation to interrogate the 1st accused person.

When the 1st accused person was confronted with the statement of the 2nd accused person, he confirmed and admitted all that the 2nd accused said. It was therefore the statement of the 1st accused that was endorsed by me. There was no need to endorse the statement of the 2nd accused. The two statements were obtained very voluntarily.”

The learned trial Judge considered the evidence by the prosecution and the defence in the trial within trial and disbelieved the evidence that the statement sought to be tendered was obtained under duress. ***I do agree with the learned counsel for the respondent in this respect that credibility of witnesses is the essential function of the trial court, which saw, heard and watched the witnesses testify. And, that an appellate court does not believe or disbelieve evidence.***

In circumstances that are quite similar to the instant case, Orji-Abadua, JCA, restated the position of the law in the case of Abdullahi Ibrahim vs. The State (2011) 1 NWLR (Pt. 1227) 1 at 38, thus:

“It is the law that when a trial court has performed its primary duty of assessing and evaluating the evidence before it and has made findings of fact which the evidence justifies, and particularly when such findings depend largely on the credibility accorded to the witnesses by the trial court, it is normally within the province of the trial court, which has the advantage of hearing and watching witnesses

testify to assess their credibility”

Based on the above, I have no difficulty in resolving the 1st issue in the interlocutory appeal against the appellant.

On Issue No. 2, learned counsel for the appellant submitted that the learned trial Judge was wrong on the reliance she placed on Exhibits 1, 2, 5 and 6 in holding that Exhibit 7 was voluntary. B

In reply, learned counsel for the respondent submitted that the learned trial Judge correctly evaluated Exhibits 1, 2, 5 and 6 as corroborative evidence in support of Exhibit 7 as well as applied the guide or test courts used to ascertain the veracity, weight or otherwise of a confessional statement objected to on ground of involuntariness. C
Respondent’s counsel referred to the case of Usung vs. State (2009) All FWLR (Pt. 462) 1203 at 1234 and submitted that material facts discovered from information given by an accused person in his confessional statement can be used to corroborate that statement. D

In deciding appellant’s Issue No. 2, the learned appellant’s counsel argued that the learned trial Judge relied on Exhibits 1, 2, 5 and 6 in admitting Exhibit 7. The impression one gets from that submission is that the admissibility of Exhibit 7 was absolutely dependent on the existence of Exhibits 1, 2, 5 and 6. This is not so. The learned trial Judge merely tested the veracity of the defence witness in relation to Exhibit 7 by seeking independent and or corroborative evidence from the recovery of Exhibits 1, 2, 5 and 6. This is permissible. The fact that Exhibits 1, 2, 5 and 6 was only used to test the veracity of the defence witness in relation to Exhibit 7 is borne out by the statements of the learned trial Judge at pages 45C - 45D of the record. First at page 45C that: E
F

“I have therefore gone a step further on the issue of voluntariness or otherwise of the statement sought to be tendered. In doing so, Exhibits 1, 2, 5 and 6 caught my attention. There was a bag containing a Pump Action Gun, a pistol, an axe and an envelope containing some money, said to have been given to the police by the second accused.” H

Second still at page 45C:

“There is no evidence before this court by the defence denying that the said second accused handed same over, or caused same to be handed over to the police. Having made available the said

Exhibits to the police, my view is that the said statement which merely mentioned the same items already said to have been surrendered to the police by the same second accused person could not have been obtained by duress.”

And at page 45D that:

B *“I will not at this stage go into the weight to be attached to the evidence for the time to do so is definitely not now, but considering the said exhibits, and the evidence adduced at this stage, and considering how the police recovered same, my view is that the statement sought to be tendered is not materially different from Exhibits 1, 2, 5*
C *and 6.”*

And concluded:

“I therefore at this stage for the purpose of the trial within trial disbelieve the evidence that the statement sought to be tendered was
D *obtained under duress.”*

The above findings by the learned trial Judge are unsailable, correctly drawn from proved facts and are not perverse. It is also correct to say that material facts discovered from information given by an accused person can be used to
E ***corroborate his statement.*** See Usung vs. State (supra) 1203 at 1234, R. vs. Udo Eka Ebong (1947) 12 WACA 139. Issue No. 2 is resolved against the Appellant.

On Issue No. 3 of the interlocutory appeal, learned counsel for the Appellant submitted that the Appellant having resiled from exhibit 7, the said Exhibit 7 become inadmissible in law.
F

Learned counsel for the Appellant proffered two reasons for this somewhat novel position of the law. The first is that since the said Exhibit 7 intended to establish the truth of the contents by PW2 who was not the maker of the statement, Exhibit 7 is hearsay evidence and it is accordingly inadmissible. The second is that even though Exhibit 7 was tendered by the prosecution, it is said to be the statement of the Appellant. By this, said Appellant’s counsel, the Appellant “has thereby been compelled to give evidence at that trial. And
G this is unconstitutional, being in contradiction of Section 36 (11) of the 1999 Constitution and Section 160 (a) of the Evidence Act.
H

Learned counsel for the Respondent submitted in reply that the contention by the Appellant that Exhibit 7 was hearsay evidence having been tendered by the Prosecution via PW2 and its contents

being made by another person is not correct in law, is academic and not drawn from the findings of the learned trial Judge. He also submitted that Section 36 (11) of the 1999 Constitution was not infringed upon and that neither Section 36 (11) of the 1999 Constitution nor Section 160 (a) of the Evidence Act is relevant or applicable to the instant case. B

In deciding Appellant's Issue No. 3, the learned counsel for the Appellant must be quickly reminded that admissions and confessions are recognised exceptions to the hearsay rule. Hearsay testimony is that which is given by a witness who relates not what he or she knows personally, but what others have said and is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence. C

On the other hand, an hearsay exception is any of several deviations from the hearsay rule, allowing the admission of otherwise inadmissible statements because the circumstances surrounding the statements provide a basis for considering the statements reliable. D

Admissions and confessions fall into the above mentioned category of exception to the hearsay rule based on reliability. Admissions and confessions are generally held to be reliable because the law assumes that what a man says against himself must be true. This is because, it is unusual perhaps unnatural for a man to speak against himself or to implicate himself. A statement by another becomes hearsay only when it tends to prove the truth of an assertion. A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it. In other words, a confession is an acknowledgment of guilt. E F G

The above are the reasons why the rule of hearsay becomes irrelevant in the treatment of confessional statements in criminal trials. H

Second, ***the admissibility of a confessional statement does not in any way infringe the provisions of Section 36 (11) of the 1999 Constitution. The Section provides thus:***

"(ii) No person who is tried for a criminal offence shall

be compelled to give evidence at the trial.”

Learned counsel for the Appellant himself provided an answer to his inquiry on this score when he said that “*even though Exhibit 7 was to be tendered by PW2.*”

A confessional statement is evidence by the prosecution and not from the accused person. It is also so because the evidence is for and in favour of the prosecution since at the stage of trial it is evidence against the accused. Jerry Ikuepenikan vs. The State (2011) 1 NWLR (Pt. 1229) 449 at 478.

For this reason, the tendering of a confessional statement even if resiled from by the accused person cannot be held to amount to the accused “being compelled to give evidence at the trial under the provision of Section 36 (11) of the 1999 Constitution.

Also, the provision of Section 36 (11) of the 1999 Constitution does not prohibit a trial Judge from drawing any unfavourable inference against an accused having regard to the evidence adduced in the case. See Sugh vs. State (1988) 2 NWLR (Pt. 77) 475.

The correct position of the law where an accused retracted a confessional statement is that the question as to whether or not it was made at all is a matter to be decided at the conclusion of the case by the trial Judge. No account of subsequent arguments on its retraction will vitiate its admissibility as a voluntary statement and its mere denial by the accused will not be a reason for rejecting it. Ibrahim vs. State (supra) Yahaya vs. State (2005) NCC 120 at 133 - 134, Olalekan vs. State (2002) FWLR (Pt. 91) 1605 at 1631, Usung vs. State (supra).

In other words, the fact that an accused has denied making the confession does not necessarily make it inadmissible. In R. vs. John Agarigaga Itule (1961) All N.L.R. 462 (F.S.C.), soon after the appellant was arrested for murder, he made a statement to the Police in which he admitted killing the deceased, but described circumstances which, if true, would amount to legal provocation. The next day he denied having made the statement and made a new one in which he repudiated all responsibility for the deceased’s death. His evidence at the trial was substantially in conformity with the second statement. Brett Ag. C.J.F, said (at page 465 of the Report):

“A confession does not become inadmissible merely because the accused person denies having made it and in this respect a confession contained in a statement made to the Police by a person under arrest is not to be treated differently from any other confession. The fact that the appellant took the earliest opportunity to deny having made the statement may lend weight to his denial, but it is not in itself a reason for ignoring the statement.” B

See also *R. vs. Omerewure Sapele and Another* (1957) 2 F.S.C. 24. ***However, before a conviction can be based upon such retracted confession, it is desirable to have some evidence outside the confession which would make it probable that the confession was true.*** See *Olusegun Otufale and Others vs. State* (1968) NMLR 261, *Sule Iyanda and Another vs. The State* (1971) 1 NMLR 249. ***The fact that Exhibit 7 in the instant case was resiled from by the Appellant does not make it inadmissible in law neither does it make its admissibility offend against the provision of Section 36 (11) of the 1999 Constitution.*** D
Issue No. 3 of the interlocutory appeal is also resolved against the Appellant.

Having resolved the three (3) issues in the interlocutory appeal against the Appellant, the appeal lacks merit and it is accordingly dismissed. E

The main Appeal

Learned counsel for the Appellant nominated two (2) issues for the main appeal. F

1. Whether upon the evidence led, the learned trial Judge was right to have committed the Appellant of the offence charged.

2. Whether the learned trial Judge was right in finding that Appellant and 1st accused were not married and whether that finding had not occasioned a miscarriage of justice. G

The Respondent on the other hand formulated a sole issue for determination; that is:

Whether the Appellant was properly convicted given the evidence at the trial. H

This appeal shall be decided only on the 1st issue nominated by the Appellant. The second issue nominated by the Appellant is said to have arisen from Grounds 2 and 3 of the Appellant's Amended Notice of Appeal.

The said grounds devoid of their particulars read thus:

GROUND 2

MISDIRECTION

The learned trial Judge misdirected herself when she failed to properly evaluate the evidence adduced on the issue of the marriage between Appellant and 1st Accused person, and rather held that:

"I find as fact Also that the accused persons were never married, but just partners in crime." (Lines 23 - 26 page 98 Record of Appeal).

GROUND THREE

ERROR OF LAW

The learned Trial Judge erred in law when she purported to find as a fact that: *"I find as fact... Also that the accused persons were never married, but just partners in crime."* When there is no shred of evidence supporting that finding, and thereby denied the Appellant of the defence and safeguards provided for under the Criminal Code, the Evidence Act, the African Charter on Human and Peoples Rights and the 1999 Constitution.

The statement of the learned trial Judge at lines 23 - 26 of page 98 of the record is Obiter and cannot be a subject of an appeal. See Uwaifo J.S.C in Abacha vs. Fawehinmi (2000) 6 NWLR (Pt. 660) at 273. ***This is because the issue at stake before the learned trial Judge was the guilt or otherwise of the Appellant and the 1st accused for the offences charged; i.e. conspiracy and Armed Robbery. There was no time any of the parties, that is the prosecution or defence joined issues on whether the Appellant and the 1st accused were married or the type of marriage that they went through. In the context of a criminal trial, it is only when the prosecution and the defence have presented or answered one another's case in such a manner that they have arrived at some material point or matter of fact on one side and denied on the other side, that it is said that they have joined issues on the question.*** See e.g. Albert Ebenogwu & 1 ors. Vs. O. O. Onyemaobim (2008) 3 NWLR (Pt. 1074) 396 at 427.

The 8th Edition of the Black's Law Dictionary at page 854 defines "joinder of issues" as follows:

"1. The submission of an issue jointly for decision.

2. *The acceptance or adoption of a disputed point as the basis of argument in a controversy. Also termed joined in issue, Similiter*

3. *The taking up of the opposite side of a case, or of the contrary view of a question.*”

In the instant case, the remark by the learned trial judge at page 98 of the record strictly was not called for as in any event his Lordship was not called upon to decide any questions of marriage between the prosecution and the defence. If the evidence on record had disclosed a statutory marriage between the Appellant and the 1st Accused, which was not the case, the learned trial Judge would then have been obliged even before any prompting to examine all available defences if any associated with the definition of ‘marriage’ under the Criminal Code as well as the Evidence Act.

In the absence of such evidence not even from the defence by the production of a certificate of marriage, the remark of the learned trial Judge was an expression of opinion outside the confines of the criminal trial before his Lordship.

An ‘obiter dictum’ is a remark made or opinion expressed by a Judge in his decision upon a cause ‘by the side’ that is incidentally or collaterally and not directly upon the question before the court, or it is merely by way of illustration, argument, analogy or suggestion.

In the common speech of lawyers, all such extra judicial expressions of legal opinion are referred to as ‘dicta’ ‘or obiter dicta’ these two terms being used interchangeably. See William M. Life et al, Brief making and the use of Law Books 304 (3rd ed. 1914). Again, the 8th Edition of the Black’s Law Dictionary at page 102 says of Obiter dictum as “*A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential....*”

In the instance case, Grounds two (2) and three (3) of the Appellant’s grounds of appeal are based on ‘Obiter dictum’ of the learned trial Judge. They are incompetent and are accordingly struck out. Issue No. 2 based on the same grounds is equally incompetent and it is struck out. Appellant’s Issue No. 1 would now be treated as the sole issue in this appeal. The gist of the argument of the Appellant’s counsel on this issue is that the Appellant did not physically participate in the Robbery and that nowhere was it said in evidence

that the Appellant conspired with anybody or supplied information to the 1st Accused person. Learned counsel for the Appellant submitted that by the very vires of PW2, who is the police officer that recovered the stolen items and arrested Appellant, a husband (1st Accused) gave his wife (Appellant) a brown leather travelling bag to keep for him. The husband now asked his wife to go and get the bag he gave her. The wife obediently went and brought the bag. Nothing, according to counsel, suggests that she even knew the content of the bag. Nothing suggests that she knew where her husband got the bag from. Nothing suggests that she hesitated in bringing out the bag. There is nothing at all sinister or even out of ordinary in this situation to warrant an inference of conspiracy to commit a crime, let alone aiding and abetting same. These findings of the lower court and the decision following therefrom, said counsel, are not supported by the evidence led. They are therefore perverse and the law is settled that an appellate court would interfere in such situation. He referred to the case of *State vs. Ajie* (2000) 7 SCNJ 1 at 12.

Respondent submitted that the Appellant was properly convicted by the learned trial Judge on the evidence at the trial, despite the physical non-participation of the Appellant in the crime. The testimony of PW1, PW2 Exhibits 7, 1, 2, 5 and 6 amply proved beyond reasonable doubt the commission of the offence by the Appellant. On this, Respondent's counsel referred to the case of *Adebayo vs. A. G. of Ogun State* (2008) 3 NCC P. 326. Learned counsel for the Respondent referred to paragraphs 3 to 32 of Exhibit 7 (the Appellant's confessional statement) at page 24 of the record which according to him stated directly, unequivocally the Appellant's role in the commission of the offences. He submitted, relying on the cases of *Okoh vs. State* (2009) All FWLR (Pt. 453) 1358 at 1392 and *Tanko vs. State* (2009) All FWLR (Pt. 456) 1977 at 2005 that there is no law that states that an accused cannot be convicted on his confessional statement alone once it is satisfactorily proved to be the truth and is not vitiated under Section 28 of the Evidence Act.

Counsel submitted that the learned trial Judge was right in relying on Exhibit 7 to convict the Appellant, more so, after making sure of the corroborative evidence in support of Exhibit 7 provided by Exhibits 1, 2, 5 and 6. He referred to the case of *Nwachukwu vs. State* (2002) FWLR (Pt. 123) 312 at 315 and added in respect of the

offence of conspiracy that an agreement to commit the offence as provided by Exhibit 7 itself is sufficient. On this, counsel referred to the cases of Ikemson vs. State (1998) 1 ACLR 86, Patrick Njovens vs. The State (1998) 1 ACLR 231 and Osuagwu vs. State (2009) All FWLR (Pt. 460) 700 at 716.

In the instant case, the content of Exhibit 7 for which the learned trial Judge found corroboration in Exhibits 1, 2, 5 and 6 adequately revealed the role of the Appellant not only as a conspirator but indeed the initiator and principal actor in the Robbery that took place in the house of the PW1 even though the Appellant was not physically present at the scene of crime. Exhibit 7 revealed that the Appellant agreed with the 1st Accused to rob PW1, she monitored the operation without showing up at the scene and not only received some of the proceeds of the Robbery but also kept part of the ammunition used in the Robbery operation. The learned trial Judge was perfectly entitled to rely on Exhibit 7 to convict the Appellant. Exhibit 7 was not only corroborated by Exhibit 1, 2, 5 and 6 but also by the evidence of PW1 and PW2.

In Olalekan vs. State (2001) 18 NWLR (Pt. 746) 793 at page 824, the Supreme Court per Onu, JSC, held that where a confessional statement is direct, positive and unequivocal as to the admission of guilt by an accused person, the statement is enough to ground the conviction of the accused. See also: Salawu vs. State (1971) 1 NMLR 249. Thus, even without those corroborative acts, the Appellant in the instant case could perfectly be convicted solely on her voluntary confessional statement. Also, in the case of Anthony Nwachukwu vs. The State (2007) 17 NWLR (Pt. 1062) 31 at 65 - 66, Tanko Muhammad, JSC, who delivered the opinion of the Supreme Court said:

"I am of the opinion that a positive, direct and voluntary confession by an accused person is the best evidence a criminal court can conveniently admit to convict its maker. The admission of a confessional statement which has satisfied all the requirements of the law to be "confessional" properly so called, can satisfy the burden of proof required of the prosecution to discharge in order to secure a conviction."

Finally, in the instance case the learned trial Judge was right in

having to fix the participation of the Appellant in the Robbery of 1/1/99 not only in the context of the traditional provision of Section 7 of the Criminal Code which makes the aider, the abettor, the procurer and counsellor, *participes criminis* but also in the context of the provision of Section 5 (b) of the Robbery and firearms (special provisions) Act Cap. 398 LFN 1990. It reads:

“Any person who conspires with any person to commit such an offence (i.e. Armed robbery) whether or not he is present when the offence is committed or attempted to be committed, shall be deemed to be guilty of the offence as a principal offender, and shall be liable to be proceeded against and punished accordingly under this Act.”

In the final analysis, I am satisfied that the lower court found that the prosecution discharge the onus of proof placed on it by law. The only issue in the main appeal is resolved against the Appellant. I find no merit in this appeal, it is accordingly dismissed. I affirm the conviction and sentence pronounced on the Appellant by the trial court.

E

ABDUL-KADIR JCA

I agree

F

OGUNWUMIJU JCA

I have read the judgment just delivered by my learned brother M. A. OWOADE JCA. I agree with his reasoning and conclusion that both interlocutory appeal against the ruling of the learned trial judge delivered on 10/2/04 and the appeal against the substantive judgment delivered on 22/2/07 are unmeritorious and should be dismissed. I will add a few words. The Appellant challenged the finding of fact made by the learned trial judge on the question of whether or not her statement Exh. 7 was made voluntarily.

H I must reiterate that it is the duty of the prosecution to prove beyond reasonable doubt that the statement was voluntarily made.

The Appellant seeks to question the evaluation of the evidence by the trial court and is asking this court to re-evaluate the evidence and draw a different conclusion. However, this evaluation cannot be

done by this court without assessing the credibility of the witnesses on both sides. The law is that the duty of evaluating and giving probative value to the evidence of witnesses and judging their credibility is the exclusive preserve of the trial court. The Appellate court without strong reason cannot interfere. See *OWIE v. IGHIMI* (2005) 1 SCNJ 181. I agree with the finding of the learned trial judge that the prosecution proved beyond reasonable doubt that the confessional statement of the Appellant was voluntarily made. The prosecution in my view discharged both legal and evidential burden of proof. I agree that the issue be resolved in favour of the Respondent.

The Appellant was convicted on her confessional statement and the fact that items stolen during the robbery were actually recovered from her by the police. Learned Appellant's counsel had argued that it is unconstitutional for the trial court to convict the Appellant on a confessional statement from which she had resiled. Counsel it appears refused with the greatest respect to read the lips of the law. The law is that the retraction of a confessional statement does not affect its admissibility and use in sustaining a conviction. It is sufficient without more to base a conviction. There is no legal requirement that the confessional statement be corroborated. However, the court has held that it is desirable to have corroboration of its contents outside the confession. In this case there was abundant corroboration outside the confession as money and goods stolen were recovered from the Appellant's possession. See *OZANA UBIERHO v. THE STATE* (2005) 5 SCMJ 1; *SHADE v. THE STATE* (2005) 6 SCMJ 124; *MONSURU v. THE STATE* (2005) 5 SCMJ 139; *ADEBAYO v. A.G. OGUN STATE* (2008) 2 SCMJ 352. Thus, the confessional statement of the Appellant which is direct, positive and unequivocal is sufficient to convict her. In the circumstances, the Appeal is dismissed and the conviction is affirmed.