

**SUPREME COURT OF NIGERIA**

20TH APRIL, 2012. SC. 298/2008

**CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,  
M. S. MUNTAKA-COOMASSIE, J. A. FABIYI,  
B. RHODES-VIVOUR, JJSC**

EDET ASUQUO BASSEY ..... APPELLANT

V.

THE STATE ..... RESPONDENTS

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CRIMINAL PROCEDURE - Confession - Relevance of - Confession is relevant if it proves beyond reasonable doubt - Ingredients of crime for which accused is charged - As well as his identity (H1)

ARMED ROBBERY - Meaning of - Armed robbery means stealing with violence - While robbery is stealing without violence - And person that aids in commission of the offence - Is guilty of armed robbery (H2)

CRIMINAL PROCEDURE - Conviction - Upon retracted confession - Validity - Before accused is convicted on such confession - Court must look for extraneous evidence - Which makes the confession probable (H3)

CRIMINAL PROCEDURE - Robbery - Confession - Failure to retract - Where accused did not object to admission of his confession in evidence - There would be no need for extraneous evidence (H4)

CRIMINAL PROCEDURE - Proof - Beyond reasonable doubt - Meaning - It means prosecution establishing guilt of accused - With compelling evidence which is conclusive (H5)

CRIMINAL PROCEDURE - Arraignment - Principles - CPA s. 215 - Accused must be unfettered - And charge shall be read and explained to him - He shall then be called upon to plead (H6)

CRIMINAL PROCEDURE - Charge - Amendment - Need for fresh plea - CPA s. 164 - Amended charge must be read to accused - And

fresh plea taken - Otherwise the proceedings will become a nullity (H7)

APPEALS - Record of appeal - Presumption of regularity - Record prepared by counsel is presumed correct - More so where counsel that prepared it did not challenged same (H8)

EVIDENCE - Inconsistency - Contradiction - Meaning - Evidence contradicts one another - When they are inconsistent on material facts (H9)

### **FACTS**

Sunday Ikema – PW 3 sent PW1 and PW2 to Port Harcourt, Rivers State to purchase some items. He gave them some amount of money. They arrived Port Harcourt but could not buy the items because of inadequate funds. Thus they decided to go back to their base in Oron, Akwa-Ibom State. On their way, their vehicle was attacked by seven men (inclusive of accused/appellant) who made away with their cash. Thereafter, appellant was originally arraigned as 5<sup>th</sup> accused along with five others before the Robbery and Firearms Special Tribunal, Ikot-Ekpene for armed robbery contrary to section 1(2)(a) of Robbery & Firearms (Special Provision) Decree No. 5 of 1984.

Later on, the tribunal was informed that 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused were dead. Consequently, their names were struck out from the charge. The charge was thus amended and fresh pleas taken thereto. At the trial, prosecution called four witnesses while appellant gave evidence and called one witness. There were material contradictions in the testimonies of PW1 and PW2 on how the robbery incident took place. At the end of trial, the court convicted appellant and thus sentenced him to death. Appellant was dissatisfied and appealed to the Court of Appeal, Calabar. The court dismissed the appeal but reduced the death sentence to 21 years imprisonment having found that appellant was not armed during the robbery. Aggrieved further, appellant filed appeal at Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Whether the learned justices of the Court of Appeal were right in holding that exhibit 7, the appellants alleged confessional

statement was direct and voluntary, and therefore sufficient to warrant a conviction without any corroborative evidence.

2. Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the appellant and sentencing him to 21 years imprisonment notwithstanding the fact that there were material contradictions in the evidence of the prosecution witnesses regarding the appellants identity as to whether the robbers were armed or not.

3. Whether the trial at the Robbery and Firearms Tribunal and the subsequent appeal at the Court of Appeal, Calabar in this case are a nullity considering the fact that the appellant/applicant was not tried on any charge as the record of appeal at the Court of Appeal, Calabar does not disclose any information or charge or statement of offence and particulars thereof against the appellant.

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

***CRIMINAL PROCEDURE - Confession - Relevance of***

1. Section 27(1) of the Evidence Act States that:

*“27(1) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.”*

A confession is relevant if it proves beyond reasonable doubt the ingredients of the crime for which the accused person is charged, and the identity of the accused person. (p. 1505 D)

***ARMED ROBBERY - Meaning of***

2. Armed Robbery simply means stealing plus violence used or threatened. While robbery is stealing without violence. Before there is a robbery the suspect must steal something capable of being stolen. Any person in company of a person armed, or aiding or abetting in the commission of the offence is also guilty of armed robbery.

Exhibit 7 reproduced above reveals that there was a robbery on the 17<sup>th</sup> of June 1993, planned and executed by one Archibong, the appellant and his co-accused. Sums of money were stolen and the identity of the appellant as one of the robbers is firmly established. (p. 1506 E)

***Conviction - Upon retracted confession - Validity***

3. When an accused person confesses to a crime in his extrajudicial statement but in court he retracts or resiles from his confession, prudence and the well laid down practice is that before such an accused person is convicted on the said confessional statement the court looks  
B for some evidence outside the confession which would make the confession probable.

Where the confession is found by the court to have been made voluntarily and it is true but inconsistent with the accused persons evidence in court it is safe to convict. (p. 1506 H)  
C

***Robbery - Confession - Failure to retract***

4. Where on the other hand the accused person confesses to robbery in his extra judicial statement and had no objection to the statement being tendered and admitted in evidence, and did not resile in his testimony in court there would be no need to look for evidence outside the confession any more. After all, the accused person is in the best position to say if he committed the offence. Exhibit 7 was admitted with no objection from Mr. Uwah counsel for the appellant.  
E See pages 24 and 25 of the record of appeal. The appellant never denied making statements to the police (see evidence-in- chief of the appellant on page 29 of the record of appeal). My lords, the fact that exhibit 7, the appellants confessional statement was tendered without objection means that the appellant was in full agreement with  
F everything in the statement. In the absence of a denial or retraction there is no need to look for independent evidence to corroborate the statement. I am satisfied that exhibit 7 is clear and unequivocal, and anyone reading it would easily conclude that the appellant was one of robbers who robbed PW1 and PW2 on the 17<sup>th</sup> of June 1993.  
G I agree with both courts below that exhibit 7, the confessional statement of the appellant was direct and voluntary and the identity of the appellant was clearly established. (p. 1507 C)

***H Proof - Beyond reasonable doubt - Meaning***

***5. Proof Beyond Reasonable Doubt***

Section 138(1) of the Evidence Act States that:

*“If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved*

*beyond reasonable doubt.*”

Proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It means the prosecution establishing the guilt of the accused person with compelling evidence which is conclusive. It means a degree of compulsion which is consistent with a high degree of probability. Proof beyond reasonable doubt is not achieved by the prosecution calling several witnesses to testify, rather the court is only interested in the testimony of a quality witness. If the court convicts on the extra judicial confessional statement of an accused person, proof beyond reasonable doubt would be achieved if and only if the statement was made voluntary and the accused person did not retract from his confessional statement when he gave evidence in court on oath. Exhibit 7 the appellant’s confessional statement was tendered and admitted in evidence without any objection whatsoever from the appellant’s counsel. The appellant did not retract from his confessional statement when he gave evidence on oath in court. Accordingly there was proof beyond reasonable doubt for the offence of Robbery. (p. 1507 H)

### ***CRIMINAL PROCEDURE - Arraignment - Principles***

6. The well laid down position of the law is that an accused person is arraigned under section 187(1) of the Criminal Procedure Code (applicable in the North) and section 215 of the Criminal Procedure Act (applicable in the South). Both legislation stipulate that:

1. The accused person shall be brought before the court unfettered unless the judge otherwise directs (e.g. if the accused person becomes violent the judge may direct that he be brought before the court fettered).

2. The charge shall be read and explained to the accused person in the language he understands

3. The accused person shall then be called upon to plead instantly.

Failure to comply with any of the above renders the entire proceedings no matter how well conducted a nullity. (p. 1508 H)

### ***Charge - Amendment - Need for fresh plea***

7. Once the charge is amended, section 164 of the Criminal Procedure Act stipulates, that the amended charge must be read to the

accused person and a plea must be entered to the amended charge. Section 164 of the Criminal Procedure Act is mandatory and failure of the accused person to plead to the amended charge renders the proceedings a nullity. (p. 1509 D)

**B Record of appeal - Presumption of regularity**

8. It was learned counsel for the appellant who compiled the record of appeal after obtaining an order from the court for departure from the rules to prepare the said process. There is a presumption that the record of appeal compiled by counsel is correct and that presumption becomes irrebuttable when counsel who prepared the record never challenged it. It is desirable and to be expected that the amended charge is in the record of appeal but there has been no miscarriage of justice because the amended charge was read and explained to the appellant before he entered a not guilty plea. (p. 1510 F)

**EVIDENCE - Inconsistency - Contradiction - Meaning**

9. I am in complete agreement with the above reasoning. Evidence contradicts another evidence when it says the opposite of what the other evidence has stated, and not when there is just a minor discrepancy between them. Two pieces of evidence contradicts one another when they are themselves inconsistent on material facts. PW1 and PW2 were robbed on the 17<sup>th</sup> day of June 1993. They were the only eye witnesses to the robbery. Their evidence is thus vital in determining the role played by the appellant. PW1 and PW2 both say that they were attacked by seven men and their bags containing their money taken away by them. PW1 stated that the seven men were armed with machetes and daggers, while PW2 said *"I did not see any machete or pen knife on them."* This is a contradiction on a material fact and it must be resolved in favour of the appellant. That explains why the sentence of death was reduced to 21 years imprisonment. There is no evidence better than eye witness evidence, and when such evidence is inconsistent on material facts as in this case the benefit of the doubt must be given to the appellant. In the light of the above the Court of Appeal was correct to reduce the sentence to 21 years imprisonment. (p. 1512 A)

## **REPRESENTATION**

Olufunke Aboyade (Ms) with A. O. Mabadeje (Ms) for the appellant  
Uko Udom for the trespasser

## **CASES REFERRED TO**

- |  |   |
|--|---|
| Ikpo v. State (1995) 9 NWLR (Pt. 421) 540              | B |
| Shande v. State (2005) 12 NWLR (Pt. 393) 301           |   |
| Azeez & 5 Ors v. State (2005) 8 NWLR (Pt. 927) 312     |   |
| Nwachukwu v. State (2004) 17 NWLR (Pt. 902) 262        |   |
| Odeh v. FRN (2008) 13 NWLR (Pt. 1103) 1                | C |
| Igbinoia v. State (1981) 2 SC 5                        |   |
| Okosun v. A.G. Bendel State (1985) 3 NWLR (Pt. 12) 283 |   |
| Nwachukwu v. State (1985) 3 NWLR (Pt. 11) 218          |   |
| Kopa v. State (1971) 1 All NLR 150                     |   |
| Paul Onochie & 7 Ors v. The Republic (1966) NMLR 307   | D |
| R. v. Kanu (1952) 14 WACA 30                           |   |
| R. v. Walter Sykes (1931) 8 CAR P. 233                 |   |
| Queen v. Obiasa (1962) 2 SCNLR 402                     |   |
| Mumuni v. State (1975) 6 SC 79                         |   |
| Akpan v. State (1992) 6 NWLR (Pt. 248) 439             | E |

## **STATUTES REFERRED TO**

- |  |   |
|--|---|
| Robbery and Firearms (Special Provisions) Decree No. 5 of 1984 |   |
| Cap. R 11 LFN 2004, s. 1 (2) (a)                               | F |
| Evidence Act, ss. 27(1), 138(1)                                |   |
| Criminal Procedure Code, s. 187(1)                             |   |
| Criminal Procedure Act, ss. 164, 215                           |   |

## **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

The appellant and five persons were arraigned before the Robbery and Firearms Special Tribunal which held at Ikot-Ekpene, Akwa Ibom State, on a two count charge which reads:

### *1. Statement of Offence*

Armed Robbery Contrary to section 1(2)(a) of the Robbery and Firearms (Special Provisions) Decree No. 5 of 1984.

### *Particulars of Offence*

Etim Edet Oboho, Effiong Etim Sunday, Joseph Edet Ekpo, Etim Asuquo Enobiak, Edet Asuquo Bassey, Okon Dan Osung on or about

the 17th day of June, 1993 along Oron Road in Oron judicial division while armed with offensive weapons, to wit, machetes, daggers and pen knives robbed Okafor Ndukwe Anya of the sum of N79,995.00 property of one Sunday Ikema.

*2. Statement of Offence*

**B** Armed Robbery Contrary to section l(2)(a) of the Robbery and Firearms (Special Provisions) Decree No. 5 of 1984

*Particulars of Offence*

**C** Etim Edet Oboho, Effiong Etim Sunday, Joseph Edet Ekpo, Etim Asuquo Enobiak, Edet Asuquo Bassey, Okon Dan Osung on or about the 17th day of June, 1993 along Oron Road in Oron Judicial Division while armed with offensive weapons, to wit, machetes, daggers and pen knives robbed Uche Emde Uba of the sum of N140,289.00 property of one Sunday Ikema.

**D** On the 17<sup>th</sup> of June 1993 PW3, Sunday Ikema sent PW1 and PW2 to Port Harcourt to buy out board engine and crank shaft. He gave PW1 N140.289 and PW2 N29,995. Both of them left Oron and arrived in Port Harcourt, but were unable to purchase the items, because the money on them was not enough. They decided to return to Oron. They entered a car in which there were three ladies already seated. On arriving at Oron near an Apostolic Church, the ladies disembarked. Before they could continue the journey they were surrounded by about seven men. The appellant was one of them. Their bags containing the money were taken from them. The Robbery occurred in the early evening of the 17<sup>th</sup> day of June, 1993, and while the robbery was ongoing the driver of the vehicle looked on impassively. On the 19th day of November, 1996 the Tribunal was informed that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused persons had died. Their names were struck out from the charge. The surviving accused persons were Sunday Joseph Edet, the appellant and Okon Dan Osung. A fresh plea was taken and not guilty pleas were entered.

**H** Four witnesses testified for the prosecution and confessional statements were admitted as exhibits. The appellant testified along with his father - DW 4. In a considered judgment delivered on the 26<sup>th</sup> day of May, 1999 the learned trial judge found that the prosecution proved its case beyond reasonable doubt and sentenced both accused persons to death.

Edet Asuquo Bassey lodged an appeal. It was heard by the



Court of Appeal, Calabar. In a well considered judgment delivered on the 2<sup>nd</sup> day of July, 2008 that court per Akaahs, Omokri JJ.C.A. affirmed the judgment of the Robbery and Firearms Special Tribunal, but reduced the sentence to 21 years imprisonment. Orji-Abadua, J.C.A. dissented on the ground that the death sentence should be affirmed and restored. This appeal is against the judgment of the Court of Appeal. B

Notice of appeal filed on the 28<sup>th</sup> day of July 2008 subsequently amended contains four grounds of appeal from which the following three issues were formulated for determination of the appeal in the appellants amended brief filed on the 7<sup>th</sup> day of October, 2010. C

1. Whether the learned justices of the Court of Appeal were right in holding that exhibit 7, the appellants alleged confessional statement was direct and voluntary, and therefore sufficient to warrant a conviction without any corroborative evidence. D

2. Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the appellant and sentencing him to 21 years imprisonment notwithstanding the fact that there were material contradictions in the evidence of the prosecution witnesses regarding the appellants identity as to whether the robbers were armed or not. E

3. Whether the trial at the Robbery and Firearms Tribunal and the subsequent appeal at the Court of Appeal, Calabar in this case are a nullity considering the fact that the appellant/applicant was not tried on any charge as the record of appeal at the Court of Appeal, Calabar does not disclose any information or charge or statement of offence and particulars thereof against the appellant. F

Learned counsel for the respondent adopted the issues formulated by the appellant in its respondent's amended brief filed on the 24<sup>th</sup> day of February 2010 but deemed duly filed on the 11<sup>th</sup> day of March, 2010. G

At the hearing of the appeal on the 9<sup>th</sup> day of February, 2012 learned counsel for the appellant, Ms. O. Aboyade adopted her brief filed on the 7<sup>th</sup> day of October 2010 and in amplification observed that there was no charge in the Record of Appeal. Further observing that there are irreconcilable inconsistencies which ought to be resolved in favour of the appellant. She urged this court to set aside the judgment of the Court of Appeal and acquit and discharge the ap- H

pellant.

Mr. U. Udom, learned counsel for the respondent adopted the respondent's amended brief filed on the 24<sup>th</sup> of February, 2010. On the charge he observed that it was the appellant's counsel who prepared the Record of Appeal, contending that this is the first time they  
B are complaining of the charge. He submitted that there is a presumption that there was indeed a charge sheet. He urged this court to dismiss the appeal and confirm the conviction and sentence of the Court of Appeal.

C Issues 1 and 2 would be taken together. They ask the question whether exhibit 7, the appellant's confessional statement was direct and voluntary, and whether the identity of the appellant as one of the robbers was not in doubt.

Learned counsel for the appellant observed that the tribunal  
D relied on exhibit 7 to convict and sentence the appellant for the offence charged without first testing the truth or otherwise of the alleged confessional statement, further observing that it was signed and not thumb printed as stated by the appellant. He observed that there is nothing outside exhibit 7 to show that exhibit 7 is true. Reliance  
E was placed on *Ikpo v. State* (1995) 9 NWLR (Pt. 421) p. 540. Learned counsel submitted that, notwithstanding the admission of the confessional statement the prosecution still has the duty of proving its case beyond reasonable doubt contending that the prosecution failed in that regard. Reliance was placed on *Shande v. State* (2005) 12 NWLR  
F (Pt. 393) p. 301. Learned counsel observed that the testimonies of the prosecution witnesses are full of contradictions which led to the failure of PW1 and PW2 to identify the appellant as one of the robbers, contending that once there is doubt as in this case such doubt  
G should be resolved in favour of the appellant by the court returning a verdict of acquittal and discharge. Reliance was placed on *Azeez & 5 Ors v. State* (2005) 8 NWLR (Pt. 927) p. 312. Finally, learned counsel submitted that the prosecution failed to prove all the ingredients of armed robbery or robbery beyond reasonable doubt. She urged the  
H court to set aside the conviction and the 21 years imprisonment awarded by the Court of Appeal.

Learned counsel for the respondent observed that exhibit 7 was tendered without objection, contending that it is on appeal that he makes a futile and belated effort to resile from the said statement.

He submitted that the appellant had all the opportunity of challenging exhibit 7 now sought to be impugned but failed to do so at the stage of trial. Further submitting that later retraction of the statement cannot vitiate the proceedings. Reliance was placed on *Nwachukwu v. State* (2004) 17 NWLR (Pt. 902) 262. He submitted that there was no need to have exhibit 7 corroborated by other evidence outside the confession since exhibit 7 was direct and positive as to the guilt of the appellant. Reliance was placed on *Odeh v. FRN* (2008) 13 NWLR (Pt. 1103) 1. Learned counsel observed that the prosecution, by evidence of PW1, PW2 and exhibit 7 proved the case of armed robbery against the appellant beyond reasonable doubt as required by Law. On the identity of the appellant as one of the robbers learned counsel observed that the appellant identified himself as one of the robbers in exhibit 7. Finally learned counsel submitted that the appellant was rightly convicted and sentenced to 21 years imprisonment based on exhibit 7, his confessional statement.

**Section 27(1) of the Evidence Act States that:**

***“27(1) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.”***

***A confession is relevant if it proves beyond reasonable doubt the ingredients of the crime for which the accused person is charged, and the identity of the accused person. See Igbinoia v. State (1981) 2 SC p. 5.***

It is now apposite to reproduce exhibit 7 to see if it is a confessional statement. It reads:

*“... In addition to my statement which I made to the police on 26/11/93 I am now saying that I took part in the armed robbery incident that happened at Oron on 17/6/93 at about 5 pm. I was at Aba Street, Oron, when one man whom I later know his name to be Mr. Archibong Okon invited me to his house at No. 113 Oron. He started telling me that there is a business which he wants me to carry out with my friends. I went and invited Joseph Ekpo, Victor, surname unknown and it was victor who invited Okon Dan Osung given the number four persons, we all went to Archibong’s house. As we reach he brought another hot drink for us to drink. From there he started telling us that there was a 504 saloon that stop with customs at Ikot Umoessin check point. From there heself (sic), Archibong, my self,*

*Edet Asuquo Bassey, Joseph Ekpo, Etim Enubuak and Okon Dan Osung we all went to Anwanessin Junction and wait for the vehicle. We were waiting for the vehicle when the vehicle arrived. Archibong directed us to go to the front of the vehicle that any bag we saw there that we should snatch it, it contains money. It was Joseph Ekpo who*  
 B *snatch the bag that contain money, we all ran away through spring Road, Oron to Archibong house while Archibong join Oron Road. In Archibong's house, we handed the bag to him after entering bedroom and he came out and told us that the money was N150,000.00*  
 C *(one hundred and fifty thousand Naira). He then gave four of us N50,000.00 (fifty thousand Naira) Okon Dan Osung collected the money we went to Convent Primary School Oron and shared the money as follows: Myself received N10,000.00 Joseph Ekpo N15,000.00, Okon Dan Osung N15,000.00 while Etim Enubak re-*  
 D *ceived N10,000.00. I used my own N10,000.00 to obtain a shade (sic) at Ibaka Town to trade second handed cloth. I opened the shade (sic) on 24/6/93. The name of my Landlord was one Patrick Akansor. It was on 7<sup>th</sup> of July fire entered into my shade and destroyed all my goods. That is all."*

E **Armed Robbery simply means stealing plus violence used or threatened. While robbery is stealing without violence. Before there is a robbery the suspect must steal something capable of being stolen. Any person in company of a person armed, or aiding or abetting in the commission of the offence**  
 F **is also guilty of armed robbery.** See *Okosun v. A.G. Bendel/State* (1985) 3 NWLR (Pt. 12) p. 283; *Nwachukwu v. State* (1985) 3 NWLR (Pt. 11) 218. **Exhibit 7 reproduced above reveals that there was a robbery on the 17<sup>th</sup> of June 1993, planned and executed**  
 G **by one Archibong, the appellant and his co-accused. Sums of money were stolen and the identity of the appellant as one of the robbers is firmly established.** The Court of Appeal quite rightly in my view held that exhibit 7 is a confessional statement in which the appellant admitted to have participated in the robbery. It is clear that  
 H exhibit 7 is a confessional statement made by the appellant and it is clear that the appellant took part in the robbery. Now, in law can the appellant be convicted - on exhibit 7 alone?

**When an accused person confesses to a crime in his extrajudicial statement but in court he retracts or resiles from**

**his confession, prudence and the well laid down practice is that before such an accused person is convicted on the said confessional statement the court looks for some evidence outside the confession which would make the confession probable.** See *Kopa v. State* (1971) 1 All NLR p. 150; *Paul Onochie & 7 Ors v. The Republic* (1966) NMLR P. 307, (1966) 1 SCNLR 204; *R. v. Kanu* (1952) 14 WACA p. 30. **Where the confession is found by the court to have been made voluntarily and it is true but inconsistent with the accused persons evidence in court it is safe to convict.** See *R. v. Walter Sykes* (1931) 8 CARP 233; *Queen v. Obiasa* (1962) 2 SCNLR p. 402; *Mumuni v. State* (1975) 6 SC p. 79; *Akpan v. State* (1992) 6 NWLR (Pt. 248) p. 439

**Where on the other hand the accused person confesses to robbery in his extra judicial statement and had no objection to the statement being tendered and admitted in evidence, and did not resile in his testimony in court there would be no need to look for evidence outside the confession any more. After all, the accused person is in the best position to say if he committed the offence. Exhibit 7 was admitted with no objection from Mr. Uwah counsel for the appellant. See pages 24 and 25 of the record of appeal. The appellant never denied making statements to the police (see evidence-in-chief of the appellant on page 29 of the record of appeal). My lords, the fact that exhibit 7, the appellants confessional statement was tendered without objection means that the appellant was in full agreement with everything in the statement. In the absence of a denial or retraction there is no need to look for independent evidence to corroborate the statement. I am satisfied that exhibit 7 is clear and unequivocal, and anyone reading it would easily conclude that the appellant was one of robbers who robbed PW1 and PW2 on the 17<sup>th</sup> of June 1993.**

**I agree with both courts below that exhibit 7, the confessional statement of the appellant was direct and voluntary and the identity of the appellant was clearly established.**

***Proof Beyond Reasonable Doubt***

**Section 138(1) of the Evidence Act States that:**

***“If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it***

***must be proved beyond reasonable doubt.***”

***Proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It means the prosecution establishing the guilt of the accused person with compelling evidence which is conclusive. It means a degree of compulsion which is consistent with a high degree of probability. Proof beyond reasonable doubt is not achieved by the prosecution calling several witnesses to testify, rather the court is only interested in the testimony of a quality witness. If the court convicts on the extra judicial confessional statement of an accused person, proof beyond reasonable doubt would be achieved if and only if the statement was made voluntary and the accused person did not retract from his confessional statement when he gave evidence in court on oath. Exhibit 7 the appellant’s confessional statement was tendered and admitted in evidence without any objection whatsoever from the appellant’s counsel. The appellant did not retract from his confessional statement when he gave evidence on oath in court. Accordingly there was proof beyond reasonable doubt for the offence of Robbery.***

### *Issue 3*

Learned counsel for the appellant observed that the charge upon which the appellant and two others were tried, convicted and sentenced to death is not in the record of appeal. He submitted that since this was the case the entire proceeding at the trial court and the Court of Appeal are nullities since the appellant was not tried on any charge or information. Reliance was placed on *Macfoy v. UAC* (1962) AC p. 152; *Joseph Edet Ekpo v. The State* appeal No. CA/C/113/G 2007 judgment delivered on 30/6/08.

Learned counsel for the respondent observed that throughout the process of arraignment, amendment, pleas, trial and conviction, the appellant never raised the issue of the charge or information not being before the trial tribunal, contending that the appellant was properly arraigned under a proper charge that he pleaded to. He urged this court to dismiss the appeal and affirm the conviction and sentence of the appellant to 21 years imprisonment. The live issue is whether the appellant was tried on a charge. ***The well laid down position of the law is that an accused person is arraigned un-***

**der section 187(1) of the Criminal Procedure Code (applicable in the North) and section 215 of the Criminal Procedure Act (applicable in the South). Both legislation stipulate that:**

**1. The accused person shall be brought before the court unfettered unless the judge otherwise directs (e.g. if the accused person becomes violent the judge may direct that he be brought before the court fettered).** B

**2. The charge shall be read and explained to the accused person in the language he understands**

**3. The accused person shall then be called upon to plead instantly.** C

**Failure to comply with any of the above renders the entire proceedings no matter how well conducted a nullity.** See *Kajubo v. State* (1988) 1 NWLR (Pt. 73) p. 721; *Eyorokoromo v. State* (1979) 6-9 SC p. 3. D

**Once the charge is amended, section 164 of the Criminal Procedure Act stipulates, that the amended charge must be read to the accused person and a plea must be entered to the amended charge. Section 164 of the Criminal Procedure Act is mandatory and failure of the accused person to plead to the amended charge renders the proceedings a nullity.** See *R. v. Eronini* (1953) 14 WACA p. 366, *Princent v. State* (2002) 12 SC (Pt. 1) p. 137, (2002) 18 NWLR (Pt. 798) 49. E

Relevant extracts from the record of appeal must be examined and reproduced if necessary to see if there was compliance with section 164 and 215 of the Criminal Procedure Act. On page 6 of the Record of Appeal is a one count charge of: Armed Robbery contrary to section 1(2)(a) of the Robbery and Firearms (Special Provisions) Decree No. 5 of 1984. Those charged were Etim Edet Oboho and Effiong Etim Sunday. On the 20<sup>th</sup> of June 1994 the clerk of the court read and explained the charge to both of them. They both entered not guilty pleas. (See page 7 of the record of appeal. On the 21<sup>st</sup> of June 1994 the Tribunal was informed that there are three other accused persons who were being tried before the Oron Magistrates court. The tribunal ordered that they should be brought before the tribunal to face trial. On the 28<sup>th</sup> of June 1994, Mr. I. J. Ekong for the State applied to amend the charge to bring in, as he put it 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> F

G

H

and 6<sup>th</sup> accused persons. There was no objection by the appellant or any one. The tribunal granted the application. The accused persons before the tribunal now were the following:

1. Etim Edet Oboho
2. Effiong Etim Sunday
3. Joseph Edet Ekpo
4. Etim Asuquo Enobiak
5. Edet Asuquo Bassey
6. Okon Dan Osung

B

C

Records of the tribunal on page 10 (i.e. 6/7/94) of the records of appeal runs as follow:

D

Tribunal: Application to amend the charge by substituting a new charge granted and accordingly the charge filed on 13/5/94 is hereby substituted with the new charge filed on 5/7/94. The old charge filed on 13/5/94 is hereby struck out.

E

Clerk of court reads and explains the charge to the accused person. The accused person one after the other pleaded not guilty. On the 19<sup>th</sup> of November, 1996 the tribunal was informed that 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> accused persons had died. The proceedings for that day relevant to this issue reads:

F

Court: On the presentation of the death certificate of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused persons thus proving that they are dead, the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused are hereby struck out from the charge. Charge read and explained to the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons and each of the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons pleads not guilty to each of the two counts.

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***It was learned counsel for the appellant who compiled the record of appeal after obtaining an order from the court for departure from the rules to prepare the said process. There is a presumption that the record of appeal compiled by counsel is correct and that presumption becomes irrebutable when counsel who prepared the record never challenged it. It is desirable and to be expected that the amended charge is in the record of appeal but there has been no miscarriage of justice because the amended charge was read and explained to the appellant before he entered a not guilty plea.*** (See page 12 of the record of appeal). Relevant extracts from the record of appeal show that the amended charge was read and explained to the



appellant. This satisfied the requirement of sections 164 and 215 of the Criminal Procedure Act. The proceedings in the trial court and Court of Appeal were very much notwithstanding the fact that the charge/s the appellant pleaded not guilty to cannot be found in the record of appeal.

Finally on the issue of whether there was a charge, learned counsel for the appellant said in paragraph 4.77 on page 27 of the appellant's amended brief:

*"The charge was read to the 3<sup>d</sup>, 5<sup>th</sup> (appellant) and 6<sup>th</sup> accused persons who pleaded not guilty to the two count charge, pursuant to which the trial of the appellant and the other two surviving accused persons (Joseph Edet Ekpo and Okon Dan Osung) commenced on 19<sup>th</sup> November, 1996"*

By learned counsel for the appellant's own admission above there was a charge, and it was read to the appellant and he pleaded not guilty. This once again lays to rest the fact that there was complete compliance with sections 164 and 215 of the Criminal Procedure Act. The Court of Appeal reduced the sentence of death passed on the appellant to 21 years imprisonment. PW1 is Uche Enule Uba, PW2 is Okafor Ndukwe Anya. PW1 was robbed of the sum of N140,289. See count No. 2 while PW2 was robbed of the sum of N79,995. See count No. 1. PW1 said in his statement recorded on 26/10/93, exhibit 1 that 7 men emerged from both sides of the road with machetes and daggers in their hands and ordered myself and my brother, Okafor to surrender everything that was in our hands. On the other hand PW2's statement was recorded on 4/11/93. Relevant extracts from his statement runs as follows:

*"When the driver stopped the vehicle, Uche's bag was inside the booth. I asked him to go and carry the bag out of the booth for the women not to mistakenly carry it away. As Uche Uba went it was the time these seven men came and started struggling with Uche and his bag, they throw him on the ground and snatched away his bag. Three men among the same griped (sic) me and snatched my own bag, all ran away, as they snatched the two bags. I did not see any machete or pen knife on them."*

This is what the Court of Appeal said:

*"... I find that there is a material contraction between PW2's statement and his testimony on the crucial point on whether the rub-*

*bers were armed or not. No explanation has been given on this clear contradiction which must be resolved in favour of the appellant ... it cannot be said with any degree of certainty that the accused were armed with any offensive weapons. The robbery was therefore a simple robbery and not an aggravated robbery."*

**B *I am in complete agreement with the above reasoning. Evidence contradicts another evidence when it says the opposite of what the other evidence has stated, and not when there is just a minor discrepancy between them. See Gabriel v. State (1989) 5 NWLR (Pt. 122) p. 457. Two pieces of evidence contradicts one another when they are themselves inconsistent on material facts. PW1 and PW2 were robbed on the 17<sup>th</sup> day of June 1993. They were the only eye witnesses to the robbery. Their evidence is thus vital in determining the role played by the appellant. PW1 and PW2 both say that they were attacked by seven men and their bags containing their money taken away by them. PW1 stated that the seven men were armed with machetes and daggers, while PW2 said "I did not see any machete or pen knife on them." This is a contradiction on a material fact and it must be resolved in favour of the appellant. That explains why the sentence of death was reduced to 21 years imprisonment. There is no evidence better than eye witness evidence, and when such evidence is inconsistent on material facts as in this case the benefit of the doubt must be given to the appellant. In the light of the above the Court of Appeal was correct to reduce the sentence to 21 years imprisonment.***

**G** The conviction of the appellant was based on exhibit 7, a confessional statement. The appellant also made exhibit 6 and 8. Reading these exhibits it becomes clear that the appellant was very aware, and took part in the robbery for which he was charged and convicted.

**H** Appeal dismissed. Judgment of the Court of Appeal is confirmed.

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**MOHAMMED JSC**

The judgment just delivered by my learned brother Rhodes-

Vivour J.S.C. was read by me in draft before today. I completely agree with him that this appeal is devoid of any merit and therefore should be dismissed.

The appeal arose from the judgment of the Court of Appeal Calabar division delivered on 2/7/2008, in which by a majority of 2-1, the appellant's appeal against his conviction for the offence of armed robbery which earned him with other co-accused persons a sentence of death by the Robbery and Firearms Special Tribunal sitting at Ikot Ekpene, Akwa Ibom State in its judgment of 26/5/1999. The appeal was allowed and his sentence of death was substituted with 21 years of imprisonment. Reasons for allowing the appellant's appeal by the Court of Appeal resulting in the substitution of sentence are contained in the lead judgment of Akaahs, J.C.A. at pages 119 - 120 of the record of appeal where the learned justice after very carefully considering the evidence on record against the complaint of the appellant of the alleged contradictions in the evidence adduced by the prosecution at the trial Robbery and Firearms Special Tribunal, came to the conclusion thus:

*"I find that there is a material contradiction between the PW2's statement and his testimony on the crucial point on whether the robbers were armed or not. No explanation has been given on this clear contradiction which must be resolved in favour of the appellant. While the robbery took place on 17/6/93, it can not be said with any degree of certainty that the accused were armed with any offensive weapons. The robbery therefore was a simple robbery and not an aggravated robbery."*

I entirely agree with him and ultimately with my learned brother Rhodes-Vivour, J.S.C., in his lead judgment that there is no reason to disturb the judgment of the court below. Accordingly, I also dismiss the appeal and affirm the conviction and reduced sentence passed on the appellant by the court below.

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### CHUKWUMA-ENEH JSC

This matter from both the accepted facts and the applicable law has been exhaustively dealt with by the lower court. The lower court cannot be faulted in its reasoning and conclusions although they have been challenged in this appeal in this court, and it is base-

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less. There is therefore no doubt in my mind that the accused person has been rightly convicted as charged. However, as regards the issue of some element of doubt as to whether the robbery in this matter, which took place on 17/6/93 has been carried out armed with dangerous weapon that question rightly has been resolved in favour of the accused person even as the prosecution has established beyond reasonable doubt that there has been a robbery. See *Okeke v. State* (1995) 4 NWLR (Pt. 392) 676 hence the reduced sentence to 21 years imprisonment as per the majority judgment. See *Okeke v. State* (1995) 4 NWLR (Pt. 392) 676. In law it is settled that where there is some element of doubt in a criminal proceeding the doubt inevitably has to be resolved in the accused favour. This is more so as in cases as in the instant matter where the inconsistencies in the testimonies of the prosecution eye witnesses have reached a stage of leaving inconclusive an important requirement/ingredient of the said crime that is, that the instant crime of robbery was carried out with dangerous weapons contrary to the provisions of section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act; R II Laws of the Federation of Nigeria 2004. In the light of this principle I subscribe to commuting the death penalty passed on the accused person to a sentence of 21 years as rightly so in my view. See *Chukwu v. State* (1996) 7 NWLR (Pt. 463) 686; *Abogede v. State* (1996) 5 NWLR (Pt. 448) 270. It is prudent on the facts of this matter to err on the part of caution.

For all I have said above and upon the apt reasoning and conclusions reached in the lead judgment of my learned brother Rhodes-Vivour, JSC, I agree with him that the appeal is unmeritorious and should be dismissed and I dismiss it and affirm the conviction and the reduced sentence passed on the appellant by the lower court. Appeal dismissed.

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### **MUNTAKA-COOMASSIE JSC**

The Appellant was charged with the offence of Armed Robbery contrary to section 1(2)(a) of the Armed Robbery and Firearms (Special Provisions) Decree No. 5 of 1984. Now section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. R 11, Laws of the Federation of Nigeria (2004).

The appellant was originally arraigned as the 5<sup>th</sup> accused per-

son along with five other accused persons. All the accused persons pleaded not guilty. On the 19/11/96 the trial tribunal was informed that the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> accused persons were dead. Consequently their names were struck off from the charge sheet. The charge was then amended and fresh plea of the accused persons taken and they once more pleaded not guilty. At the hearing the prosecution called four (4) witnesses while the appellant gave evidence and called one witness. At the conclusion of the hearing and after listening to the counsel addresses the appellant was convicted of the offence charged and sentenced to death. On page 39 of the record the tribunal Chairman Idong J. held thus:

*“In view of exhibits 4, 7 and 9 I find that the denial of this offence by DW1, DW3 and DW9 in this Tribunal is of no consequence. The question is, was the operation earned out by DW1, DW3 and DW5 along Oron Road, Oron, Opposite the Apostolic Church, Oron on 17/6/93 an armed robbery? The evidence that when the robbers surrounded the vehicle which Stopped at that point to enable the ladies in the vehicle disembark they were armed with machetes, daggers and knives was not contradicted. Since this piece of evidence was unchallenged, I accept and believe it notwithstanding the evidence to the contrary by DW1 in exhibit 4 that “none of us was armed” I find that the operation whereby PW1 and PW2 was attacked and dispossessed of their money at Oron Road, Oron on 17/6/93 was an armed robbery”.*

The appellant was reasonably dissatisfied with this judgment and then unsuccessfully appealed to the Court of Appeal, Calabar division, hereinafter called the lower court in its majority judgment the lower court dismissed the appeal but reduced the death sentence to 21 years imprisonment. It was the finding of the lower court that the appellant was not armed when robbery was committed, the lower court stated thus:

*“Certainly the event that took place on 17/6/93 was fresher in his memory when he gave his statement on 4/11/93 than on 19/11/96 (three years after) when he testified. I find that there is a material contradiction between PW2’s statement and his testimony on the crucial point on whether the robbers were armed or not. No explanation has been given on this clear contradiction which must be resolved in favour of the appellant. While the robbery took place on*

*17/6/93, it cannot be said with any degree of certainty that the accused were armed with any offensive weapons. The robbery therefore was a simple robbery and not aggravated robbery. Certainly the accused did not carry any firearms. The sentence of death passed on the appellant therefore cannot stand”.*

B It was against this decision of the lower court that the appellant further appealed to this court. Briefs of argument were filed and exchanged by the parties. The appellant, through his counsel, formulated three issues for determination as follows:

C *“1. Whether the learned justices of the Court of Appeal were right in holding that exhibit 7, the appellant’s alleged confessional statement was direct and voluntary, and therefore sufficient to warrant a conviction without any corroborative evidence.*

D *2. Whether the learned justices of the Court of Appeal were right in affirming the conviction of the appellant and sentencing him to 21 years imprisonment, notwithstanding the fact that there were material contradictions in the evidence of the prosecution witnesses regarding the appellant’s identity and as to whether the robbers were armed or not.*

E *3. Whether the trial at the robbery and firearms tribunal and the subsequent appeal at the Court of Appeal, Calabar in this case are a nullity considering the fact that the appellant/applicant was not tried on any charge or statement of offence and particulars thereof against the appellant.”*

F These issues for determination were also adopted by the respondent. However it is my view that the crucial issues to determine is:

G *“Whether the concurrent findings that the robbery took place on 17/4 /93 and that the appellant participated in the robbery was not supported by the evidence, if the answer is in the negative, has it occasioned any miscarriage of justice on the appellant.”*

The trial tribunal in its judgment found as follows:

H *“The question is, was the operation carried out by the DW1, DW3 and DW5 along Oron Road, Oron opposite the Apostolic Church, Oron on 17/6/93 an armed robbery? The evidence that when the robbers B surrounded the vehicle which stopped at that point to enable the ladies in the vehicle disembark they were armed with machetes, daggers and knives was not contradicted; since the*

*piece of evidence went unchallenged I accept and believe it notwithstanding the evidence to the contrary by DW1 In exhibit 4 that none of us was armed”.*

The lower court in affirming this finding held as follows:

*“From all the surrounding circumstances, the tribunal was right to hold that the accused denial of the D offences was of no consequence. And the fact that the appellant’s confession was direct and voluntary was sufficient to warrant conviction without any corroborative evidence. I see no reason to disturb the conviction”.*

The argument of the learned counsel to the appellant that there was no evidence on the record to support the confessional statement could not be supported by the record. In Exhibit 7 the appellant stated that he used the N10,000.00 shared to him to pay for a stall at Ibaka Town. His father who testified as DW4 confirmed that the appellant was trading in second hand clothes at Ibaka Town. His comrade in the robbery used His own share to buy motor cycle which was recovered during investigation.

Once a confessional statement is in evidence, it becomes part of the case of the Prosecution which the court is bound to consider provided that it admits all the essential elements of the offence charged and when tested against proven facts will show that the accused person or persons committed the offence. I rely on *Akpan v. The State* (2001) 15 NWLR (Pt. 737) 745.

I have earlier stated in this judgment that the concurrent findings of the two lower courts is to the effect that robbery took place on 17/4/93 at Oron Road and that the accused/ appellant participated in the robbery. My Lord the question that arises is that has the appellant showed that the said findings were incorrect and perverse and that it had led to a miscarriage of justice? The answer is in the negative. This court will not disturb concurrent findings of fact of the courts below unless there is a substantial error apparent on the record of proceedings. See *Ibodo v. Enarofia* (1980) 5-7 SC 42 at 56; *Evans v. Adit* (1981) 11-12 SC 25 at 41; *Igwe v. The State* (1982) 9 SC 174 at 176; *Kale v. Coker* (1982) 12 SC 252 at 272. Having failed to show that the concurrent findings of the two lower courts were perverse or that there exists a substantial error apparent on the record of proceedings I will not disturb the concurrent findings of the two lower courts. I therefore resolve this issue in favour of the respondent.

On the last issue raised by the appellant that the proceedings were a nullity on the ground that the charge or information was not contained in the record of proceedings, it is my view, with all sense of responsibility, that the said allegation holds no water. At pages 6 and 7 of the record, charge No-RFT/1/94 was preferred against two accused persons, and in 28/6/1994 four accused persons were added to the initial two accused persons, including the appellant, the charge was then amended to include the four (4) new accused persons. This charge was further amended on 6<sup>th</sup> July, 1994 and Plea of the accused persons taken. On the 19/11/94 the Tribunal was informed of the death of the 1st 2nd and 4th accused persons, the tribunal then took a fresh plea of the remaining three accused persons including the appellant herein, and the trial tribunal proceeded with the hearing. It is therefore not correct to say that the charge or information was not contained in the record of proceedings.

I was privileged to have read the lead judgment rendered by my learned brother Bode Rhodes-Vivour, JSC with which I entirely agree. For the above little but humble contribution and more elaborate decisions of my learned brother in the lead judgment, I also hold that the appeal lacks merit and same is hereby dismissed. The judgment of the lower court is hereby affirmed.

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### ***FABIYI JSC***

At the trial tribunal, the appellant was arraigned along with two other accused persons for the offence of armed robbery. The tribunal garnered evidence and after applying the relevant laws, it found the appellant culpable. It convicted and sentenced him to die by hanging. The appellant appealed to the Court of Appeal, Calabar division which found the conviction to be in order but reduced the sentence to 21 years in its majority judgment. The appellant has decided to further appeal to this court.

As can be gathered from the record of appeal, the evidence of machetes and daggers being employed by the appellant and his cohorts during the operation is not certain. While PW1 said he saw the accused persons with machetes during the operation, PW2 said he did not see them with machetes. Contradiction has been defined as a lack of agreement between facts related by two persons. It is clear to



me that there is lack of agreement between the facts related by PW1 and PW2. It is not a minor contradiction which can be given a wave of the back hand. It is not trivial at all as it relates to a crucial determinant point. See *Ankwa v. The State* (1969) 1 All NLR 133, (1969) 1 SCNLR 197; *Omisade v. Queen* (1964) 1 All NLR 233. Akaahs, J.C.A. got it right when he found that the evidence established robbery simpliciter and not armed robbery after resolving the contradiction in favour of the appellant. I am of the firm view that the appellant was rightly sentenced to 21 years imprisonment.

The appellant in exhibit 7, his confessional statement which was not retracted during trial, related how they carried out the operation and shared the booty and he used his own share of N10,000.00 to secure a shed for trading which later got burnt. On behalf of the appellant, it was still submitted that the case was not proved beyond reasonable doubt as dictated by section 138 of the Evidence Act which is often unnecessarily employed by defence counsel. Proof beyond reasonable doubt is not proof to the hilt. See: *Miller v. Minister of Pension* (1947) 3 All ER 373. In this matter, all the ingredients of the offence were clearly established. The prosecution proved the case beyond reasonable doubt. See *Alabi v. The State* (1993) 7 NWLR (Pt. 307) 511 at 523.

For the above reasons and the fuller reasons ably set out in the lead judgment of my learned brother Rhodes-Vivour, J.S.C. I too agree that the appeal should be dismissed. I order accordingly and affirm the majority judgment of the Court of Appeal.

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