

SUPREME COURT OF NIGERIA

15TH JUNE, 2012. SC. 308/2010

**CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,
J. A. FABIYI, B. RHODES-VIVOUR, O. ARIWOOLA, JJSC**

1. LUKMAN OSETOLA

2. FATAI TIJANI APPELLANTS

V.

THE STATE RESPONDENT

CHARGES - Conspiracy & substantive charges - Determination - Procedure - Proper approach is to first deal with the latter - Then proceed to consider the former (H1)

CRIMINAL PROCEDURE - Conspiracy - Meaning - Conspiracy is agreement between persons to do unlawful act - And failure to prove substantive offence - Does not render conviction for conspiracy inappropriate (H2)

ARMED ROBBERY - Ingredients - Proof - Prosecution must establish that there was robbery - Which was an armed robbery - And that accused was the armed robber (H3)

CRIMINAL PROCEDURE - Confession - Retraction - Proof - Accused must show inter alia that he did not make the statement - By calling evidence to prove same at trial within trial (H4)

EVIDENCE - Retracted confession - Weight - Court is to test truthfulness of the confession - By inter alia looking for anything outside the confession - That shows it is true (H5)

CRIMINAL PROCEDURE - Confession - Voluntariness - Effect - Where confession is positive and unequivocal - It is sufficient to ground a finding of guilt - Regardless of any retraction (H6)

CRIMINAL PROCEDURE - Proof - Number of witness - Prosecution and not defence - Has duty to determine number of witness - Needed to prove a case (H7)

CRIMINAL LAW - Conspiracy - Effect - When two or more persons agree to prosecute unlawful purpose - Which leads to commission of an offence - Each of such persons is deemed to be an offender (H8)

FACTS

The case for prosecution/respondent was that accused/appellants went for an armed robbery operation at the business place of the father of PW2 located somewhere in Ogun State. The father of PW2 was shot and killed during the operation. Medical report thereafter revealed that the father died of the gunshot wound. Much later, PW4 arrested appellants. Their confessional statements were taken at a Police station. Consequently, they were arraigned before the High Court of Ogun State on a two count charge of conspiracy and attempted armed robbery punishable under sections 1(2) (a) and 2(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation 1990, respectively.

At the trial, appellants objected to the admissibility of the confessional statements. This led to a trial within trial wherein the statements were found to be voluntary. At the close of the hearing, the court found both appellants guilty as charged, convicted and sentenced each of them on count 1 to death and on count 2 to life imprisonment. Dissatisfied, both appellants appealed to the Court of Appeal, Ibadan against the ruling on the trial within trial and their eventual conviction and sentence. The court allowed the appeal in part by substituting the death sentence with sentence of life imprisonment. Aggrieved further, appellants filed appeal to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the learned Justices of the court of Appeal were right, in law, to affirm the conviction of the Appellants even though the prosecution relied upon hearsay evidence to prove the voluntariness of the confessional statements relied upon by the trial court in convicting the appellants.

2. Whether the learned Justices of the court of Appeal were right, in law, in affirming the conviction of the Appellants even though the prosecution did not prove its case against the Appellants beyond reasonable doubt.

3. Whether learned Justices of the court of Appeal were right in law to affirm the conviction of Appellants even though the trial court

wrongly evaluated the evidence with which it disbelieved that the confessions of the Appellants were involuntary

HELD

(Unanimously dismissing the appeal per **ARIWOOLA JSC**)

Conspiracy & substantive charges - Determination - Procedure

1. First and foremost, I must state that the proper approach to an indictment containing conspiracy charge and substantive charges is to deal with the latter, that is, the substantive charges first and then proceed to see how far the conspiracy count has been made out in answer to the fate of the charge of conspiracy. (p. 2414 F)

CRIMINAL PROCEDURE - Conspiracy - Meaning

2. Conspiracy is an agreement between two or more persons to do an unlawful act. Failure to prove a substantive offence does not make conviction for conspiracy inappropriate, as it is a separate and distinct offence, independent of the actual offence conspired to commit. (p. 2414 G)

ARMED ROBBERY - Ingredients - Proof

3. It is trite law that for the prosecution to establish the offence of armed robbery the following are required to be proved.

(a) That there was in fact robbery;

(b) That the robbery was an armed robbery; and

(c) That the accused person was the armed robber.

(p. 2415 A)

CRIMINAL PROCEDURE - Confession - Retraction - Proof

4. It is already settled, that where an accused person during trial retracts, denies or resists from the extra-judicial statement he had earlier made to the police immediately after the event giving rise to the charge or arraignment against him, he owes it a duty to impeach his said earlier statement. During trial, an accused person who desires to impeach his statement is duty bound to establish that his earlier confessional

statement cannot be true or correct by showing any of the following:

(i) That he did not in fact make any such statement as presented; or

(ii) That he was not correctly recorded; or

B (iii) That he was unsettled in mind at the time he made the statement, or

(iv) That he was induced to make the statement.

C Generally, the way to discharge the burden of establishing any of the above by an accused at the tendering of his confessional statement is by calling evidence during a trial within trial.
(p. 2417 B)

EVIDENCE - Retracted confession - Weight

D 5. However, on the weight to be attached to the confessional statements which has been retracted, the court is expected to test its truthfulness and veracity by examining the said statements in the light of other credible available evidence. This is done by looking into whether -

E (a) There is anything outside it to show that it is true;

(b) It is corroborated;

(c) The facts stated in it are true as far as can be tested;

(d) The accused person had the opportunity of committing the offence;

F (e) The accused person's confession is possible;

(f) The confession is consistent with the other facts ascertained and proved at the trial. (p. 2417 H)

G CRIMINAL PROCEDURE - Confession - Voluntariness - Effect

6. This court in couple of cases of similar facts and circumstances has stated that where an extra judicial confession has been proved to have been made voluntarily and it is positive and unequivocal and amounts to an admission of guilt, such
H confession will suffice to ground a finding of guilt regardless of the fact that the maker resiles therefrom or retracted it altogether at the trial. (p. 2418 E)

CRIMINAL PROCEDURE - Proof - Number of witness

7. The learned counsel to the Appellants had argued that the prosecution ought to have called some other Police Officers who investigated the case with PW4 to corroborate the purported confessional statements of the appellants. This court has stated in plethora of cases that how many witnesses the prosecution needs to prove its case against any accused person is entirely its responsibility not that of defence.

(p. 2419 C)

CRIMINAL LAW - Conspiracy - Effect

8. Furthermore, on the issue of conspiracy, when two or more persons come together as it happened in this case, and form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such common purpose an offence is committed of such a nature that is of a probable consequence of the prosecution of such purpose, each of them is in law deemed to have committed the offence. (p. 2420 A)

NOTABLE POINTS OF INTEREST

FABIYI JSC

1. Contradiction must be substantial to affect evidence of prosecution

At the trial, learned counsel for the appellants alluded to certain immaterial contradictions. To my mind, where and when the deceased who was shot died is of no moment. It is clear that the man died. The difference in the colour of the Motor cycle used for the robbery operation is inconsequential. It is basic that contradiction in the evidence of the prosecution that will be fatal must be substantial. Such must deal with the real substance of the case. Minor contradictions which did not affect the credibility of witnesses may not be fatal. Trivial contradictions like those raked up by the appellants should not vitiate the trial. (p. 2421 E)

RHODES-VIVOUR JSC

2. Proof beyond reasonable doubt – Meaning

Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The Law would fail to protect the community if it admitted to fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course
 B it is possible but not in the least probable the case is proved beyond reasonable doubt but nothing short of that will suffice. (p. 2422 G)

3. *Attempted armed robbery - Ingredients*

C When an accused person is prevented from committing the complete offence, a conviction for attempt to commit the offence may be sustained. To succeed on a charge of Attempt to commit armed robbery the prosecution must lead evidence to show the steps taken by the accused person to commit armed robbery. The last act by the
 D accused person immediately before the main act that would have resulted in the commission of armed robbery is an attempt to commit robbery provided the steps taken by the accused person are proved beyond reasonable doubt. Put in another way the last overt act of an
 E accused person, proximate to the commission of an offence in an attempt to commit the offence. Oral testimony on oath, Medical Report, identification parade result and confessional statement show beyond reasonable doubt that the 1st appellant shot the deceased in company of the 2nd appellant, but could not steal anything from the
 F deceased before they both fled for reasons best known to them. The act of shooting the deceased was the last act by the appellants' before the main act which they were unable to perform. The last act of shooting the deceased amounts to an attempt to commit armed robbery. Once credible and compelling evidence is led which shows
 G that the ingredients of the offence were established against the accused person, the charge is said to have been proved beyond reasonable doubt, and that is the situation in this suit. This appeal lacks merit. It is hereby dismissed. (p. 2424 C)

H **REPRESENTATION**

Segun Fowowe, for the Appellants
 J. O. Adesina (Mrs.) with Ameh Igbochi, Esq; and Miriam Esi (Miss),
 for the Respondent

CASES REFERRED TO

- Asariyn Vs State (1987) 4 NWLR (Pt. 613) 10
 Emeka v. The State (2001) 32 WRN 37
 The State v. Ajayi (1997) 5 NWLR (Pt. 167) 315
 Onah vs. State (1985) 3 NWLR (Pt.12) 236
 United Cinema & Films Distributing Co. v. Shell B.P Petroleum Dev. B
 Co. of Nig. (1972) NNLR 86
 Oguonzee v. The State (1998) 5 NWLR (Pt. 551) 521
 Gabriel v. State (1989) 5 NWLR (Pt. 122) 457
 Ankwa v. The State (1969) 1 ALL NLR 129
 Ahmed v. The State (1999) 7 NWLR (Pt. 612) 641 C
 Adio v. The State (1986) 3 NWLR (pt.24) 581
 Ogunbayode v. The Queen (1954) WACA 458
 Peter v. The State (1997) 12 NWLR (Pt. 531)
 Ogoha v. State (1976) 1 SC 55 D
 Akpa v. The State (2008) 14 NWLR (Pt. 1106) 72
 Odeh v. FRCN (2008) 13 NWLR (Pt. 1103) 1

STATUTES REFERRED TO

- Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990, ss. E
 1 (2) (a), 2(2)(a), 5(b)
 Evidence Act, ss. 49(d), 77

LEAD JUDGMENT BY ARIWOOLA JSC

This appeal is against the judgment of the court of Appeal, F
 Ibadan Division delivered on 17th May, 2011, whereby it affirmed
 the conviction of the Appellants for conspiracy to commit armed robbery
 and attempted armed robbery, by S.A. Oduntan, J in his judgment
 delivered on 21st May, 2004 at the Ogun State High Court. G

Sometime on the 14th March, 2000 by the complaint of the
 Attorney General of Ogun state of Nigeria, the appellants and one
 other had been charged before the state High court, Holden at
 Abeokuta, on the following counts:

Count 1

*“Lukman Osetola (m), Fatai Tijani (m), Niyi Babatunde (m)
 and others now at large, on or about the 29th day of December,
 1996 at Omida, Abeokuta, Ogun state, conspired together to commit
 the offence of armed robbery contrary to section 5 (b) and pun-*

H

ishable under section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap 398, Laws of the Federation, 1990."

Count 2

"*Lukman Osetola (m), Fatai Tijani (m), and others now at large, on or about the 29th day of December, 1996, at Omidia, Abeokuta, Ogun State, while armed with Firearms to wit: gun attempted to rob one Alhaji Sikiru Alao of his money and thereby committed an offence punishable under section 2(2) (a) of the Robbery and Firearms (Special Provisions) Act, cap 398 - Laws of the Federation of Nigeria, 1990.*"

The case proceeded to trial. The prosecution called four witnesses and tendered twelve Exhibits including the statements of the Appellants. The appellants also testified in their respective defence but did not call any other witness. The prosecution's case goes thus: that on the 29th December, 1999 at about 8pm, one Abdu Alao (PW2) was in his father's beer shop when three young men on a white Vespa Motorcycle came to the shop. The rider of the motorcycle remained on it, while the other two entered the shop in pretence of being customers who wanted to purchase carton of stout. One of the two men suddenly produced a gun from a plastic bag which he pointed at PW2 to order him to produce all the money that had been made from the day's sales. PW2 told him he did not have the keys to the safe with him, where the money was kept. The men asked for his father and he told them that his father was not around. The men then sported PW2's father who was sitting somewhere outside the shop and then called him into the shop. They introduced themselves as men of the crime Investigation Department (C.I.D.) Eleweran, Abeokuta. The gun was pointed at him with a demand for the money he had made from the day's sales' PW2's father, Alhaji Sikiru Alao requested his son (PW2), to get the money out from the safe for the men. As PW2 was going to the safe to get the money, his father - Alhaji Sikiru Alao was shot and killed. The men then fled and ran out of the shop to reunite with their partner on the Vespa motorcycle. PW2 ran after them toward the Motorcycle. One of them fell down from their get-away motorcycle while the other two escaped. PW2 struggled with the other man to get him down but he (PW2) was over powered by the man who eventually escaped too into the night. PW2 reported the incident to the Ibara Police Station. One

Sergeant Fidelis Bimi was the police officer on duty who obtained PW2's statement and followed him to the scene of the crime. The lifeless body of PW2's father was later moved to the Mortuary that same night for necessary post-mortem examination. Dr. E. A. Sobowale, a Medical Officer (PW.1) carried out the autopsy and reported that PW2's father had a gun shot wound in the chest and died of hemorrhagic shock. The medical report was tendered and admitted as Exhibit A while the statement of PW2 made to the Police officer, PW3 was admitted as Exhibit B. An expired Cartridge found at the scene of the crime was admitted as Exhibit C. Further investigation continued with PW4 Corporal Temitayo Adepelumi who on a search of the house of one Mrs. Modinatu Adekoya recovered among other items, the gun said to have been used at the crime in question. The said gun was tendered. PW4 later, between the 6th and 7th January, 1997 arrested the three accused persons including the appellants. He obtained their statements which was said to be confessional. Appellants' counsel objected to the admissibility of the statement. The objection led to the trial court conducting a trial within trial and when the counsel's objections were found to be baseless the statements were admitted and marked Exhibits I, J and K respectively. Photographs of an identification parade by the police where PW2 identified 1st Accused as the one who shot and killed his father, Alhaji Sikiru Alao were admitted as Exhibits G and G1 while the getaway Vespa motorcycle allegedly used by the fleeing armed trio on the night of the incident was admitted as Exhibit H. PW4 had been led by the 2nd Accused/Appellant to the house where the Vespa motorcycle was recovered. At the close of the prosecution's case, the defence opened and each of the appellants testified in defence, but did not call any other witness. While the 1st Accused/Appellant did not deny being at the scene of the crime on the night of the incident, his evidence was that of an innocent person who had found himself in the wrong place at the wrong time. He stated that he was at work at the Date Joint Restaurant when a man, called Saheed came in to have a drink. He tried to hurry up Saheed and another man by telling them that he needed to go to Ibara, Omida Area of Abeokuta, hence he wanted to close early. Saheed however asked him not to be in hurry as he was also going to the same area and would give him a ride. He (1st Accused/Appellant) and Saheed then came out of the

Restaurant and boarded a commercial motorcycle popularly referred to as “Okada” and when they got to the shop of Alhaji Sikiru Alao (PW2’s father) around 8p.m. on the day of the incident, he disembarked and Saheed asked him to find out the price of a carton of Stout from PW2’s father’s shop while he (Saheed) would go to the shop of his radio repairer near PW2’s shop. Saheed then came into PW2’s shop. And surprisingly he produced a gun from a nylon bag he was carrying and pointed the gun at both PW2 and himself (1st Accused). Saheed then asked PW2 to bring out money they made on the day’s sales but as PW2 began to scream, the attention of a man outside the shop was attracted and the man came into the shop, Saheed ordered him to bring out the money from the day’s sales. As the man stood steel where he was, Saheed shot him. 1st Accused/Appellant stated that he did not know Saheed or where he came from as he had only met him twice in the past, the first time being the 24th December, 1996 and on the 29th December, 1996, the day of the incident and that if he saw him he would not be able to recognize him. He denied knowing anyone connected with the incident. 2nd Accused also denied the charge and stated that he knew nothing about the offence. While admitting that he was a commercial motorcyclist who owned a Vespa motorcycle but which colour he gave as red, he denied carrying any passenger to Ibara Omida on the 29th December, 1996, the day of the incident. He admitted making a confessional statement but stated he did so under torture. At the close of the hearing in its considered judgment delivered on the 20th May, 2004 the trial court found both appellants guilty as charged, convicted and sentenced each of them on Count 1 to death and on Count 2 to life imprisonment. Dissatisfied with the judgment of the trial court, the two convicts appealed to the court below, both against the ruling on the trial within trial delivered on the 21st February, 2003 and the final judgment delivered on 21st May, 2004. The Court below allowed the appeal in part. Though the trial court was found to have rightly found the two appellants guilty of the two counts charge, the death sentence passed on the appellants was quashed by the court below in respect of count 1 and substituted for life imprisonment. The sentences were to take effect from the 24th May, 2004 when the trial court delivered its final judgment. Further dissatisfied with the decision of the court below, in affirming the conviction, each

of the appellants appealed to this court on their respective Notice of Appeal with four Grounds of Appeal each. The Joint brief of argument of the Appellants was settled by Segun Fowowe, Esq. filed on 25th October, 2010 while the Respondent's brief of argument was filed by Mrs. Adesina on 16th December, 2011 but was deemed properly filed and served on 7th March, 2012. In their joint brief of argument, the appellants distilled three (3) issues from their Grounds of Appeals for determination as follows:

"1. Whether the learned Justices of the court of Appeal were right, in law, to affirm the conviction of the Appellants even though the prosecution relied upon hearsay evidence to prove the voluntariness of the confessional statements relied upon by the trial court in convicting the appellants."

2. Whether the learned Justices of the court of Appeal were right, in law, in affirming the conviction of the Appellants even though the prosecution did not prove its case against the Appellants beyond reasonable doubt."

3. Whether learned Justices of the court of Appeal were right in law to affirm the conviction of Appellants even though the trial court wrongly evaluated the evidence with which it disbelieved that the confessions of the Appellants were involuntary"

The appellants took the issues seriatim. They submitted that the testimony of PW1, the Superior Police officer (SPO) was hearsay evidence upon which the trial court relied to convict and sentence the appellants and which conviction and sentence were affirmed by the court below. The appellants contended that many policemen were involved in their interrogation. In their joint brief of argument references were made to the testimony of the 1st Appellant during trial within trial on the treatment meted out to him to force him to make the Statement obtained a team of Policemen. The Appellants referred to the testimony of the 2nd Appellant during trial within trial also on how he was arrested and made to make the alleged confessional statement to four police officers. It was contended that the 2nd appellant was never taken before any Superior Police Officer and that the testimony of PW1 was hearsay. The two statements of the appellants were made in the absence of PW1. It was submitted that not being present when the confessional statements of the two appellants were taken, the testimony of PW1 on the fact of whether or not the

statements were made voluntarily could not be evidence of a person who “saw” or “heard” as required by Section 77 of the Evidence Act and therefore could not be direct oral evidence on the fact of whether or not the statements were voluntary. The Appellants contended that whilst it may be direct oral evidence on the fact of endorsement thereof
B by SPO, the evidence of PW1 is at best, tantamount to hearsay evidence on the particular issue of whether or not the confessional statements of the Appellants were voluntarily made and therefore the evidence was inadmissible for the purpose of proving voluntariness thereof. They relied on *Emeka Vs. The State* (2001) 32 WRN 37 at
C 47, *The State Vs. Ajayi* (1997) 5 NWLR (pt. 167) 315 at 324. The Appellants referred to part of PW1’s testimony to the effect that the case was investigated by a team of Police Officers. It was contended that the prosecution failed to call any one of those police officers who
D actually, participated in taking the two statements of the appellants to prove voluntariness thereof. The appellants contended that the evidence of PW1 who stood as a superior Police officer being a hearsay evidence and was erroneously admitted by the trial court to prove that the alleged confessional statements of the appellants were voluntarily made by them to convict therein. It was therefore submitted
E that the court below was wrong in relying on the said hearsay testimony of PW1 in affirming the conviction. They urged the court to hold that the statements were not voluntary hence the appellants were wrongly convicted and the Issue must be resolved in favour of
F the appellants. On Issue No.2, the appellants submitted that it is trite law that the onus of proof of its case beyond reasonable doubt lies always on the prosecution, and it never shifts, throughout the proceedings. In arguing that the prosecution failed to prove its case beyond reasonable doubt, the appellants relied on their argument on
G issue one above, on the wrongly admitted testimony of PW1 to establish the voluntariness of the appellants statements as truly confessional statements. The appellants contended that their alleged confessional statements were not made voluntarily as claimed and purportedly confirmed by PW1. Reliance was placed upon the case of
H *Saidu v. State* (1982) 13 NSCC 70. The appellants contended further that failure to call vital witnesses meant that the prosecution was not comfortable with their testimony. They relied upon section 149 (d) of the Evidence Act. Similarly, the appellants wondered why the

prosecution failed to tender the gun which the police recovered and remained in their custody all through. It was submitted that the presumption of law under section 149 (d) of the Evidence Act ought to have been allowed in favour of the appellants, to hold that the prosecution failed to prove its case beyond reasonable doubt. They relied on *Onah vs. State* (1985) 3 NWLR (pt.12) 236, *United Cinema & Films Distributing Co. v. Shell B.P. Petroleum Development Co. of Nig.* (1972) NNLR 86 at 94 *Oguonzee v. The State* (1998) 5 NWLR (pt.551) 521 at 571. The Appellants however conceded that the prosecution is not obliged to call a particular witness if it can otherwise establish its case, but must call at least a witness relevant and vital or necessary to prove its case. It was submitted that the prosecution never prove its case at all, let alone beyond reasonable doubt, with the evidence which they considered irrelevant and by reasons thereof inadmissible. The appellants referred to the testimony of PW2- whose father was allegedly killed in his beer shop and contended that his story of how he pursued his father's assailants who had used a gun to kill his father, with a bottle ought to have been taken as improbable and doubtful. Yet the trial court believed and relied on the testimony to convict the appellants. The appellants contended that there were discrepancies and contradictions in the testimonies of prosecution witnesses that must have rendered the prosecution's case not proved against the appellants. For instance, on the colour of the motorcycle allegedly used to commit the offence, the appellants stated that the colour conflict was not resolved. PW2 in his statement alleged it was white Vespa motorcycle while Exhibit H - the Vespa that was impounded as the Motorcycle used is red in colour, but with the same registration number. Also, on what day the 2nd Appellant who testified as DW2 signed his alleged confessional statement, he contended that he was never taken before any Superior Police Officer as against the testimony of PW1 who was the Superior Police Officer. The appellants submitted that the contradictions were not resolved. They relied on *Gabriel v. State* (1989) 5 NWLR (Pt.122) 457 at 468, *Ankwa v. The State* (1969) 1 ALL NLR 129, *Ahmed v. The State* (1999) 7 NWLR (Pt.612) 641 at 673. It was submitted that there were many inconsistencies in the prosecution's case which cast doubt on the prosecution's case to make the appellants conviction unsafe. It was further submitted that the trial court wrongly evaluated the testimony-

nies of the appellants under cross examination which led to their conviction. And the court below failed to avert its mind to the issue of wrong evaluation of evidence by trial court. The appellants submitted that the prosecution thereby failed to prove its case beyond reasonable doubt against them. They urged the court to resolve the
 B Issue in their favour, set aside the decisions of the two courts below, discharge and acquit both of them.

The Respondent's two issues which were argued together as one in its brief of argument are as follows:

C *"whether the prosecution proved its case beyond reasonable doubt to warrant the conviction of the appellants - and whether the learned Justices of the court of appeal were right when they affirmed the conviction of the appellants."*

The Respondent posed the question, how is a case proved
 D beyond reasonable doubt? It was submitted that a case can be proved by direct oral evidence. If the testimony of witnesses who saw and heard are believed, there will be proof beyond reasonable doubt. Circumstantial evidence can prove a case beyond reasonable doubt. Reliance was placed on *Adio & Anor v. The State* (1986) 3 NWLR
 E (pt.24) 581. *Joseph Ogunbayode & Ors. v. The Queen* (1954) 14 WACA 458. The Respondent contended that in proof of its case, the prosecution called four witnesses and tendered twelve Exhibits. Learned counsel to the Respondent in the brief of argument referred
 F to the testimonies of the witnesses, statements of the two appellants which she said were confessional statements. She referred also to the testimony of PW1 during trial within trial when the appellants challenged their statements, voluntariness. The trial court had held that the evidence of the only prosecution witness who was a DSP Alex
 G Agidiomo who endorsed the statements is relevant on the issue of voluntariness of Exhibits I and J. She submitted that a confessional statement becomes proof of an act when it is true, positive and direct. Cited; *Peter v. The State* (1997) 12 NWLR (pt.531); *Ogoha v. State* (1976) 1 SC 55 at 59. Learned Respondent's counsel referred
 H to the conditions for testing the veracity of a confessional statement before a court can place any evidential weight on it, and contended that there is so much outside the confessional statements to buttress the facts contained in the statements. The respondent further referred to the various Exhibits again including the confessional statements of

the Appellants and Photographs taken at the Identification parade where PW1 properly identified the 1st Appellant as one of the men who came to their shop on the night of the incident. The Learned counsel submitted that the statements of both appellants were properly admitted by the trial court as confessional statements and were rightly relied upon to convict them. Learned counsel submitted further that notwithstanding the retraction of the 2nd Appellant, that the statement was properly admitted, their conviction was properly affirmed by the court below. She cited; Akpa vs. The State (2008) 14 NWLR (pt. 1106) 72 at 98-99; Odeh Vs. FRCN (2008) 13 NWLR (Pt.1103) 1 at 27-28. Learned counsel submitted that the trial court properly evaluated the evidence adduced by both the prosecution and the appellants before coming to the conclusion as it did. There were no material contradictions that could justify any lingering doubt in the case of the prosecution. Counsel submitted that the alleged contradictions alluded to by the Appellants, if at all, are mere discrepancies which are not fundamental to the main issue in the prosecution's case. The respondent referred to the fact that the 2nd appellant led the Investigating Police Officer (IPO) to the place where the Vespa Motorcycle tendered as Exhibit was retrieved and contended that, that is what was material but not whether the colour of the Vespa was white or red. The action of 2nd appellant showed that he knew about the attempted robbery where the Vespa was used, the Respondent contended. Furthermore, the issue whether the deceased died and where he died are not material. The fact that he died shortly after he was shot is what is material but not whether he died before or after reaching the hospital. The Respondent submitted that all the supposed contradictions, if at all, mentioned by the appellants in their brief of argument, are not material enough to affect the prosecution's case. She cited; Asariyn Vs State (1987) 4 NWLR (Pt.613) 10. The Respondent finally submitted that the trial court and the court below properly evaluated the evidence adduced by both parties and the court came to a right and just conclusion by finding the appellants guilty of both counts, convicting and passing the sentences on them. She urged the court to so hold as there was no miscarriage of justice in the matter. She urged the court to resolve the issues argued together in favour of the Respondent and not to disturb the findings of the two courts below but rather dismiss the appeal for lacking in merit

and uphold the Respondent's submission that the prosecution proved its case beyond any reasonable doubt. She relied on *Ebodo v. Enarofia* (1980) 5-7 SC 42 at 56 - 57. In the consideration of this appeal I shall take the three issues distilled by the Appellants together, as they are all attacking the affirmation of the decision of the trial court by the court below when, according to them, the prosecution totally failed to prove the case against the appellants beyond reasonable doubt. As stated earlier, the appellants were both charged with two count charges of conspiracy to commit the offence of armed robbery and attempted armed robbery. The trial court having carefully considered the testimony, (oral and documentary), and all Exhibits produced and admitted by the prosecution along with the defence proffered by the appellants, the trial court found as follows:

"... I have no doubt in my mind that there was an attempt by a three-member gang to steal some money from the Late Alhaji Sikiru Alao, the father of PW2 on the night in question. I have no doubt also that at least a member of the gang was armed with firearms (a gun); or that the gang was in company with a person so armed. Again, there is no doubt that the gang used personal violence against the person of the late Alhaji Sikiru Alao. These facts without more would certainly and clearly constitute an offence of attempted armed robbery against the three member gang that visited the beer shop in question on the 29th December, 1996. Consequently, I hold that the prosecution has been able to establish a case of attempted armed robbery against the gang."

First and foremost, I must state that the proper approach to an indictment containing conspiracy charge and substantive charges is to deal with the latter, that is, the substantive charges first and then proceed to see how far the conspiracy count has been made out in answer to the fate of the charge of conspiracy. Conspiracy is an agreement between two or more persons to do an unlawful act. Failure to prove a substantive offence does not make conviction for conspiracy inappropriate, as it is a separate and distinct offence, independent of the actual offence conspired to commit. See *Segun Balogun v. Attorney General Ogun State* (2002) 2 SC (pt.11) 89, (2002) 4 SCM 23, (2002) 2 SCNJ 196. It is note-worthy that the trial court in this case did just that. The Court took the substantive count charge of

attempted armed robbery against the two appellants before dealing with the count of conspiracy which involved the appellants and yet another who was later discharged and acquitted. Now, the appellants were convicted and sentenced for the offence of attempted armed robbery. ***It is trite law that for the prosecution to establish the offence of armed robbery the following are required to be proved.*** B

(a) That there was in fact robbery;

(b) That the robbery was an armed robbery; and

(c) That the accused person was the armed robber. See C
Bozin Vs State (1985) 2 NWLR (Pt.8) 465 at 467; Alabi Vs State (1993) 7 NWLR (Pt.307) 551, Olayinka Vs State (2007) 4 SC (pt.1) 210; (2007) 9 NWLR (Pt.1040) 561; (2007) 8 SCM 193. To establish the offence of attempted robbery, the prosecution in this case relied mainly on the testimony of PW2 and PW4 and the Confes- D
sional Statements of the Appellants. PW2 is the son of the deceased victim of the crime whose property was attempted to be robbed, while PW4 was the Investigating Police Officer. The Statements of the Appellants had been tendered though objected by the defence, hence trial within trial was conducted as required, the trial court found the E
statements admissible having been made voluntarily as confessional statements, admitted them and marked the said statements as Exhibits I and J respectively. From the careful consideration of the two statements of the appellants, the trial court made the following find- F
ings:

“1. That the 2nd accused was an “Okada” rider as at 29th December, 1995. An Okada rider is a Motorcyclist who uses his Motorcycle as a public transport to carry fare paying passengers.

*2. That on that day, 29/12/96, the 2nd accused was operating G
with a white Vespa Motorcycle belonging to one Kassim when at about 6.30 p.m. he was stopped by one Saidi who told him of an assignment and to follow him*

*3. That the 2nd accused followed the said Saidi to the Date Joint Restaurant located in Sabo area of Abeokuta, where the first H
accused worked as a Manager.*

4. That at the Date Joint Restaurant, the three of them discussed the assignment brought by the said Saidi and agreed to execute it.

5. *That in furtherance of that agreement, they all left the Date Joint Restaurant for a beer shop at Ibara Omida belonging to the late Alhaji Sikiru Alao.*

6. *That at about 8p.m. on that day 29/12/96, they arrived in front of that beer shop on the Vespa Motorcycle ridden by the 2nd accused.*

7. *That the 1st accused and the said Saidi came down from the motor cycle and entered the beer shop, while the 2nd accused remained on the Motorcycle outside the beer hop.*

8. *That the 1st accused and the said Saidi met the late Alhaji Sikiru Alao in front of his shop and invited him into the shop after introducing themselves as men from the State CID, Eleweran Abeokuta.*

9. *That while inside the shop, the said Saidi brought out a gun from his bag and pointed it at the late Alhaji Sikiru Alao and ordered him to bring out his money.*

10. *That the said late Alhaji became dump founded and while still in that confused state of mind, the said Saidi shot him.*

11. *That following that shooting the said Alhaji slumped while the gunman and the 1st accused left the shop.*

12. *That both the 1st and 2nd accused succeeded in escaping from the scene on their get-away Motorcycle, leaving the said Saidi behind.”See pages 107-108 of the record.*

Based on the above findings of the trial court on the confessional statements of appellants, the trial Judge concluded as follows:-

“Clearly, the above is a direct and unequivocal admission of complicity in the killing of the late Alhaji Sikiru Alao in the attempt to steal money from him by the accused persons and their runaway accomplice Saidi.”

The court below upon review of the evidence of PW2, the son of the deceased victim of the crime came to the conclusion at the initial stage that the prosecution was able to prove that whoever the young men were, they were armed robbers. Also upon examination of Exhibits G and G1, the photographs where, at an identification parade conducted by the police, the 1st accused was duly identified by PW2. It is interesting to note that the court below in its concurring finding of facts held that the 1st Accused/Appellant did not deny the fact that he was at the scene of crime on that day and time in ques-

tion. He only denied having participated in the act of either attempting to steal from or in murdering Alhaji Sikiru Alao. He claimed that he had only gone to the shop to ask for the price of a carton of stout when he found himself in the midst of vicious people. As I stated earlier, the confessional statements of both appellants were what the trial court relied upon after warning itself on the weight to be attached to them as retracted statements. **It is already settled, that where an accused person during trial retracts, denies or resists from the extra-judicial statement he had earlier made to the police immediately after the event giving rise to the charge or arraignment against him, he owes it a duty to impeach his said earlier statement.** See Nwachukwu Vs The State (2007) 12 SCM (Pt.2) 447, (2007) 17 NWLR (Pt.1062) 31 at 69, Hassan Vs. State (2001) 11 SCM 100, (2001) 35 WRN 175, (2001) 15 NWLR (Pt.735) 184. **During trial, an accused person who desires to impeach his statement is duty bound to establish that his earlier confessional statement cannot be true or correct by showing any of the following:**

(i) **That he did not in fact make any such statement as presented; or**

(ii) **That he was not correctly recorded; or**

(iii) **That he was unsettled in mind at the time he made the statement, or**

(iv) **That he was induced to make the statement.** See; Hassan Vs The State (supra); Folorunsho Kazeem Vs. The State (2009) 29 WRN 43 at 68-59.

Generally, the way to discharge the burden of establishing any of the above by an accused at the tendering of his confessional statement is by calling evidence during a trial within trial. In the instant case, none of the two appellants called any evidence to support or buttress their retraction or establish any of the above. Not even the 2nd appellant who put forward an alibi. He failed to give the police necessary particulars of his whereabouts, to be able to investigate the defence of alibi. No wonder that defence failed him. **However, on the weight to be attached to the confessional statements which has been retracted, the court is expected to test its truthfulness and veracity by examining the said statements in the light of other credible available evidence.**

This is done by looking into whether -

- (a) There is anything outside it to show that it is true;**
- (b) It is corroborated;**
- (c) The facts stated in it are true as far as can be tested;**
- (d) The accused person had the opportunity of committing the offence;**

(e) The accused person's confession is possible;

(f) The confession is consistent with the other facts ascertained and proved at the trial. See Akpan Vs State (2001) 11 SCM 66, (2001) 53 WRN 1; (2000) 12 NWLR (Pt.682) 607 AT 628, Kareem Vs. Federal Republic of Nigeria (2002) 7 SCM 73.

In this case, the trial court considered the above test and applied it to the retracted extra-judicial statements of the appellants in the following way. *"In applying the above tests to the facts of this case, one only needs to consider the evidence of PW2 and PW4 and relate it to the statements of the 1st and 2nd Accused persons (Exhibits I and J) respectively. After a deep and sober consideration of the evidence of this case, I am of the view that the confessional statements in question are substantially and materially corroborated by the evidence of PW2 and PW4 and that the said confessions did satisfy all the tests set out above and that the accused are consequently liable to be convicted on their said statements."*

This court in couple of cases of similar facts and circumstances has stated that where an extra judicial confession has been proved to have been made voluntarily and it is positive and unequivocal and amounts to an admission of guilt, such confession will suffice to ground a finding of guilt regardless of the fact that the maker resiles therefrom or retracted it altogether at the trial. See Egboghonome Vs. The State (1993) 7 NWLR (Pt.306) 383. The court below in also applying the above tests to the instant case stated as follows:-

"There is so much outside the confessional statements that indicate the truth contained in them. The 1st accused/Appellant did not deny that he was in PW2's father's (Alhaji Sikiru Alao) Shop on the 29th December, 1996 at about 8p.m. and was witness to the incident that took place. His defence was that he did not participate in the crime. This evidence was punctured by the evidence of PW2 who identified him in the identification parade. He claimed that he

did not know the other two persons who were his partners in crime on that day but even this was found to be false. The 2nd Accused/Appellant according to PW4's evidence confessed to PW4 that he took part in the crime and that it was he who rode the others to the beer shop of late Alhaji Sikiru Alao, PW2's father on the day of the incident. After the confession, he led the PW4 to a house in Obantoko Abeokuta where the Vespa Motorcycle used for the attempted robbery operation on that day was found and recovered. The question is - how did the 2nd Accused/Appellant know about the use of the Motorcycle on the 29th December, 1996 and how did he know the location of the Motorcycle if he took no part in the dastardly crime on the night of the incident."

The learned counsel to the Appellants had argued that the prosecution ought to have called some other Police Officers who investigated the case with PW4 to corroborate the purported confessional statements of the appellants. This court has stated in plethora of cases that how many witnesses the prosecution needs to prove its case against any accused person is entirely its responsibility not that of defence. In *Ejiofor v. The State* (2006) 6 NSCQR (Pt.1) 209 at 237, per Achike, JSC (of blessed memory), this court stated thus:-

"The prosecutorial responsibility is to establish its case beyond reasonable doubt in order to secure the conviction of the Appellant. How, they get around achieving this is entirely their responsibility. Whether they field one, two or more witnesses in satisfaction of such proof will surely depend on the circumstances of each case. But under no circumstances will the accused person dictate to the prosecution regarding the person or the number of persons that they field as witnesses." Therefore, with respect to the first issue on whether the prosecution relied upon hearsay evidence to prove the voluntariness of the confessional statements of the appellants upon which the trial court relied in convicting them, it is very clear that the extra judicial statements of the appellants are materially confessional, admissible and rightly admitted and relied upon by the trial court in convicting them. There was nothing like a hearsay evidence. Similarly, from the totality of the evidence adduced by the prosecution, it is clear that the trial court rightly evaluated the evidence to believe that the confessional statements of the appellants were voluntarily made by them.

Furthermore, on the issue of conspiracy, when two or more persons come together as it happened in this case, and form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such common purpose an offence is committed of such a nature that is of a probable consequence of the prosecution of such purpose, each of them is in law deemed to have committed the offence. See *The State v. Alhaji Moshood Oladimeji* (2003) 7 SC 108 at 165, (2003) FWLR (pt. 175) 395 at 405. In the instant case, I am not in the slightest doubt that the prosecution dutifully proved its case beyond any reasonable doubt. The trial court rightly evaluated the evidence and convicted the appellants. The court below therefore correctly affirmed the conviction of the appellants. In other words, the three issues formulated by the appellants are resolved against them. In the circumstance, the appeal is lacking in merit and substance. It deserves to fail and be dismissed. The judgment of the court below was rightly arrived at and it is hereby affirmed. Accordingly, the conviction and sentence as given by the court below are affirmed. The sentences are to run from the 24th May, 2004 when the judgment of the trial court per Oduntan, J was given.

MOHAMMED JSC

My learned brother Ariwoola JSC had permitted me before today to read in draft the judgment he has just delivered in this appeal. I am completely with him in the manner he considered and resolved all the three issues submitted by the Appellants in their Appellants brief of argument for the determination of their appeal and the final conclusion arrived at in dismissing the Appellants appeal. Consequently, I adopt that judgment as mine because I do not have any useful addition to make to that judgment. Accordingly I also dismiss this appeal and affirm the conviction and sentence of the Appellants as affirmed by the Court below.

CHUKWUMA-ENEH JSC

I have read in draft the judgment of my learned brother Ariwoola JSC in this matter. I agree with his reasoning and conclu-

sion that the appeal lacks merit and should be dismissed. Accordingly I affirm the decisions given by the lower courts and I abide by the orders contained in the lead judgment.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother Ariwoola, JSC. I agree with the reasons therein contained in arriving at the conclusion that the appeal lacks merit and should be dismissed.

The facts relating to this appeal have been carefully set out in the lead judgment. The vital issue formulated on behalf of the appellants is issue (2) which reads as follows:-

“2. Whether the learned justices of the Court of Appeal were right in law in affirming the conviction of the appellants even though the prosecution did not prove its case against the appellants beyond reasonable doubt.”

On behalf of the respondent, issue (i) was couched as follows:-

“Whether the prosecution proved its case beyond reasonable doubt to warrant the conviction of the appellants.”

At the trial, learned counsel for the appellants alluded to certain immaterial contradictions. To my mind, where and when the deceased who was shot died is of no moment. It is clear that the man died. The difference in the colour of the Motor cycle used for the robbery operation is inconsequential. It is basic that contradiction in the evidence of the prosecution that will be fatal must be substantial. Such must deal with the real substance of the case. Minor contradictions which did not affect the credibility of witnesses may not be fatal. Trivial contradictions like those raked up by the appellants should not vitiate the trial. See *Ankwa v. The State* (1969) 1 All NLR 133; *Queen v. Iyanda* (1960) SCNLR 595; *Omisade v. Queen* (1964) 1 All NLR 233; *Sele v. The State* (1993) 1 SCNJ 15 at 22-23, (1993) 1 NWLR (Pt.269) 276. P.W.2, the son of the deceased related how his father was shot and he died. Both appellants admitted same in their statements. The two courts below found against them. As usual in most criminal matters, their counsel felt that the case was not proved beyond reasonable doubt. I shall continue to reiterate that the doctrine was evolved by Lord Sankey L.C. in *Woolmington v. D.P.P* (1935)

AC 485. Proof beyond reasonable doubt is ‘not proof to the hilt’. See: *Miller v. Minister of Pensions* (1947) 2 All ER 373. It is not proof beyond all iota of doubt. See: *Nasiru v. The state* (1999) 2 NWLR (Pt. 589) 87 at 98, *Edamine v. The State* (1986) 3 NWLR (Pt. 438) 530. If a case is proved through the direct evidence of a witness like B P.W.2 and buttressed by accused confessional statements and duly relied upon by the court, same is proved beyond reasonable doubt. See: *Adio & Anr v. The State* (1986) 3 NWLR (Pt.24) 581. In my considered view, where all the ingredients of an offence have been C clearly established and by the prosecution, the charge is proved reasonable doubt. See: *Alabi v. The State* (1993) 7 NWLR (Pt.307) 511 at 523. The two courts below made concurrent findings of fact in most material respects. This court will not interfere unless compelling reasons are advanced. No tenable reason has been depicted. I shall D not interfere. See: *Kale v. Coker* (1982) 2 SC; *Anaeze v. Anyaso* (1993) 5 NWLR (Pt.291) 1. For the reasons stated above and the detailed ones contained in the lead judgment, I too feel that the appeal lacks merit and should be dismissed. I order accordingly and endorse all consequential orders contained in the lead judgment. E

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment delivered by my learned brother, Ariwoola, JSC. I am in full F agreement with his lordship’s reasoning and conclusions. Section 138 (1) of the Evidence Act makes it mandatory that the standard of proof required in criminal trials by the prosecution is proof beyond reasonable doubt. Proof beyond reasonable doubt was explained in G *Miller v. Minister of Pensions* 1947 2 ALL E. R. p.372 at 373 as follows. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The Law would fail to protect the community if it admitted to fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibil- H ity in his favour which can be dismissed with the sentence of course it is possible but not in the least probable the case is proved beyond reasonable doubt but nothing short of that will suffice. See *Lori & Anor v. State* 1980 12 NSCC p.269. The appellants’ were charged for conspiracy to commit Armed Robbery and attempted Armed

Robbery. The two count charged reads:

COUNT 1

Lukman Osetola (M), Fatai Tijani (M) Niyi Babatunde (M) and others now at large, on or about the 29th day of December, 1996 at Omida, Abeokuta, Ogun State, conspired together to commit the offence of Armed Robbery contrary to section 5 (b) and punishable under section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation 1990. B

COUNT 2

Lukman Osetola (M), Fatai Tijani (M) and others now at large, on or about the 29th day of December, 1996 at Omida, Abeokuta, Ogun, while armed with firearms to wit: gun attempted to rob one Alhaji Sikiru Alao of his money and thereby committed an offence punishable under section 2 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation 1990. C

The facts are these. On the 29th day of December, 1996 at about 8p. m. Abdu Alao (PW2) was in his father's beer shop. Three men came to the shop on a motorcycle. One of them stayed back on the motorcycle while the other two went into the shop pretending to make a purchase. One of the two men suddenly brought out a gun, and at gun point demanded the day's sales from PW2. PW2 told them that the keys to the safe were with his father who at the time was sitting outside the shop. PW2 called his father. On getting to into the shop he ordered his son to get the money out of the safe because the gun was now pointed at him. While PW2 was trying to get the money out of the safe his father, was shot dead. The two men fled on the Motorcycle. Medical Report showed that PW2's father had a gunshot wound in the chest. At an identification parade conducted by the Police, PW2 identified the 1st appellant as the person who shot and killed his father. The 2nd appellant led the Police to a house where the motorcycle was recovered. Conspiracy is a separate and distinct offence and the offence of conspiracy is complete when two or more persons agree to do an unlawful act or to do a lawful act by unlawful means. Concluded agreements are mostly always inferred by what each person does or does not do in furtherance of the offence of conspiracy. At times the persons who conspire may not have met each other, but it's still a conspiracy. See *Onochie & Ors v. The Republic* 1966 Vol.4 NSCC p.72; *Ligali & Anor. v. The Queen* 1959 D E F G H

Vol. 1 NSCC; Okosun & Ors. v. A. G. Bendel State 1985 Vol. 16 NSCC pt.11 p.1327. Three men on a motorcycle went to the deceased's shop with clear intention to commit the offence of Armed Robbery. The appellants were the two men who went into the shop. The man on the Motorcycle is at large. While in the shop they shot and killed the man they wanted to rob. It is clear that the three men agreed to commit the offence of armed robbery. The offence of conspiracy against the appellants is firmly established. Attempted Robbery: Section 4 of the Criminal Code states that: When a person, intending to commit an offence, begins to put his intention into execution by means adopted to its fulfillment, and manifests his intention to such an extent as to commit the offence, he is said to attempt to commit the offence. See D. P. P. v. Stone House 1977 2 ALL E. R p.909; Orija v. Police 1957 NRNLR p. 189. When an accused person is prevented from committing the complete offence, a conviction for attempt to commit the offence may be sustained. To succeed on a charge of Attempt to commit armed robbery the prosecution must lead evidence to show the steps taken by the accused person to commit armed robbery. The last act by the accused person immediately before the main act that would have resulted in the commission of armed robbery is an attempt to commit robbery provided the steps taken by the accused person are proved beyond reasonable doubt. Put in another way the last overt act of an accused person, proximate to the commission of an offence in an attempt to commit the offence. Oral testimony on oath, Medical Report, identification parade result and confessional statement show beyond reasonable doubt that the 1st appellant shot the deceased in company of the 2nd appellant, but could not steal anything from the deceased before they both fled for reasons best known to them. The act of shooting the deceased was the last act by the appellants' before the main act which they were unable to perform. The last act of shooting the deceased amounts to an attempt to commit armed robbery. Once credible and compelling evidence is led which shows that the ingredients of the offence were established against the accused person, the charge is said to have been proved beyond reasonable doubt, and that is the situation in this suit. This appeal lacks merit. It is hereby dismissed.