

SUPREME COURT OF NIGERIA
8TH JUNE, 2012. SC. 297/2004
CORAM:- A. M. MUKHTAR, F. F. TABAI,
M. S. MUNTAKA-COOMASSIE, S. GALADIMA,
O. ARIWOOLA, JJSC

OKON DAN OSUNG APPELLANT
V.
THE STATE RESPONDENT

EVIDENCE - Confession - Tendered without objection - Fate - Such confession is deemed voluntary - And court need not inquire into - Whether or not same was made voluntarily (H1)

EVIDENCE - Contradiction - Effect - Contradiction must relate to material fact - Before it can affect judgment of court (H2)

CHARGES - Arraignment - Validity - Appellant was properly arraigned and tried - Since his fresh plea was taken - After amendment of the charge (H3)

APPEALS - Determination - Duty of appellant - Appellant must place before appellate court - All document that is relevant - For determination of his appeal (H4)

FACTS

Accused/appellant and others were alleged by prosecution/respondent to have (while being armed) attacked and robbed PW1 and PW2 of a sum of money. Appellants were subsequently arrested and their confessional statements obtained as well. They were later arraigned before the High Court of Cross River State for the offence of Armed Robbery contrary to section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap R11 Laws of Federation of Nigeria 2004. The original charge was against only two accused. It was later amended to include four others with appellant as 6th accused person. Each of the six pleaded not guilty to the offence. The charge was again amended when three of the accused were reported to have died in prison. A fresh plea was again taken from remaining

three accused following the amendment.

At the hearing, respondent called four witnesses while appellant testified on his own behalf and called no witness. Confessional statements of appellants were tendered without objection. At the end of trial, the court held that respondent proved its case beyond reasonable doubt. It therefore found appellants guilty of the offence charged and sentenced them to death. Appellant was dissatisfied. He thus appealed to the Court of Appeal Calabar Division. The court affirmed the decision of the trial court. Appellant was again dissatisfied and he filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in holding that the chairman of the robbery and firearms special tribunal adequately tested the truth of the alleged confessional statement of the appellant before relying solely on it to convict and sentence the appellant to death.

2. Whether the Court of Appeal was right in holding that there were no inconsistencies and contradictions in the evidence of the prosecution witnesses in respect of the identity of the appellant as one of the robbers who carried out the robbery operation of 17th June, 1993.

3. Whether the Court of Appeal was right in holding that the robbery incidence of 17th June, 1993, was an armed robbery incident.

4. 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 information 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

MUNTAKA-COOMASSIE JSC)

EVIDENCE - Confession - Tendered without objection - Fate

1. It is also to be noted that the appellant's confessional statements were tendered without any objection, which there-

fore relieved the trial Tribunal from conducting an enquiry into whether it was made voluntarily or not. The statement I dare say was made voluntarily by the appellant and will require no further corroboration. It is clear from the above that a voluntary confessional statement of an accused does not need any further corroboration particularly where it was tendered without any objection. The court would only need further corroboration where there is any doubt about the voluntariness or the opportunity of making such statement. In the instant case, the appellant's confessional statement was tendered without objection. This coupled with the fact that the appellant admitted under cross-examination that he made the statement at Oron Police Station, and Police Headquarters, Ikot Akpan Abu Uyo. I have no doubt in my mind that the lower court was right when it upheld the decision of the trial Tribunal, which relied on the confessional statement of the appellant to convict him. I therefore resolve this issue in favour of the respondent herein. (pp. 2436 G/2437 E)

EVIDENCE - Contradiction - Effect

2. *The issue of identity raised by the appellant's counsel is of no moment here. The appellant himself admitted committing the crime and showed the court what he bought with his own share of the proceeds of the robbery. Hence the issue of identity does not arise. It was never an issue as the culprits were known. However, it must be pointed out even if there was any contradiction as alleged, that contradiction or inconsistency must relate to a material fact before it can affect the judgment of the lower court. It must be capable of casting reasonable doubt upon the guilt of the accused person. It must be of such magnitude as to warrant interference by an appeal court. This is not the position in this case.* (p. 2438 G)

CHARGES - Arraignment - Validity

3. *On the last issue formulated by the parties, which deals with the alleged absence of the charge sheet/information in the record of proceedings, the appellant's counsel had contended that charge sheet absence means that he was not tried*

on any offence and as such the proceedings and the judgment of the lower court should be set aside. As can be seen in the record on 20/6/1994 charge No. RFT/1/94 was preferred against two persons, Etim Edet Oboho and Effiong Etim Sunday, for the offence of armed robbery and on 21/6/94 the Trial Tribunal ordered that other three accused persons be joined and as a result of this order on 28/6/94 four other accused persons were joined in the charge which was read to them and all of them pleaded not guilty. The appellant was the 6th accused person. The charge was further amended on 6/7/94, as a result of the death of three accused persons in prison, and a fresh plea was again taken. These facts were never denied by the appellant, and neither was this issue of missing of charge sheet/information raised at the trial court, when all these steps were taken till judgment. I therefore have no any shred of doubt that the appellant was properly arraigned and tried at the trial Tribunal. (p. 2439 B)

APPEALS - Determination - Duty of appellant

4. It must also be noted that it was the appellant who applied for a departure from the rules and prayed the lower court to use the bundle of documents as the record to hear the appeal. Thus, he was the person who selected the documents upon which his appeal should be determined. Thus, if the charge sheet/information was important for the determination of the appeal why leaving it out? Or he wants to foist upon the court a situation of hopelessness, in order to set free a guilty appellant who actually committed an offence of armed robbery. I would not like to say that this is a deliberate act by the learned counsel to the appellant. It is the duty of the appellant to place before the Court of Appeal all relevant document necessary to determine the appeal. I think it is true that an appellant who desires to have its appeal heard and determined timeously must place before the court, either through the Registry of the trial court or by himself, when the Registry fails to transmit the record, all such documents that would assist the timeous and judicious determination of the appeal. Where necessary documents are not in the record, such an appeal is likely or liable to be struck

out. It is for these reasons that I also resolved the 4th issue in favour of the respondent. (p. 2439 G)

REPRESENTATION

A. O. Mabadeje (Miss); for the Appellant

U. Udom Esq, for the Respondent

B

CASES REFERRED TO

Yesufu v. The State (1976) 6 SC 167

Nwachukwu V. The State (2007) 1 NWLR (Pt. 1062) 31

Odeh v. FRN (2008) 13 NWLR (Pt.1103) 44

Ikpo v. The State (1995) 9 NWLR (Pt. 421) 540

Bozin v. The State (1985) 2 NWLR (Pt. 8) 467

Alabi v. The State (1993) 7 NWLR (Pt. 307) 311

Idahosa v. The Queen (1966) NMLR 85

COP V. Alao (1959) WRNLR 39

Micahel v. The State (2002) 1 NWLR (Pt. 749)

The State v. Godfrey Aje (Pt. 678) 434

Mohammed v. The State (2007) 11 NWLR (Pt. 1045) 303

Yahaya v. The State (2005) 1 NCC 120

Akpa v. The State (2008) 4 - 5 SC (Pt. 11) 1

Milla v. The State (1985) 3 NWLR (Pt. 11) 190

Alhabuwa v. The State (1976) 12 SC 41

C

D

E

STATUTES REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap R11 LFN 2004, s. 1(2)(a)

Criminal Procedure Act, ss. 77, 164 and 215

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G

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The appellant was charged with the offence of Armed Robbery contrary to Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Decree No 5 of 1994, now Section 1(2)(a) of the robbery and firearms (Special Provisions) Act Cap. R11 Laws of Federation of Nigeria 2004. The original charge in the case was against only two accused persons, which charge was amended to include four other accused persons with the appellant as the 6th accused person. All the six accused persons pleas were taken and they all

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pleaded not guilty.

On the 19/11/1996, when the matter came up for hearing, three (3) of the accused persons were reported to have died in prison, and upon the presentation of their death certificates, their names were struck out, leaving only three (3) accused persons on the charge sheet. The three accused persons pleas were also taken and again they pleaded not guilty.

At the hearing the prosecution called four witnesses while the appellant herein testified on his own behalf and called no witness. The confessional statements of the appellants, which were tendered without objection, were admitted as Exhibits 9, 10 and 11, respectively.

At the conclusion of hearing, the trial Tribunal held that the prosecution has proved its case beyond reasonable doubt found the appellant guilty of the offence charged and after conviction sentenced him to death. In arriving at its conclusion, the trial Tribunal found as follows:-

“In view of Exhibits 4, 7 and 9, I find that the denial of this offence by DW1, DW3 and DW5 in this Tribunal is of no consequence. The question is, was the operation carried 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 went unchallenged I accept and believe it notwithstanding the evidence to the contrary by Dw1 in Exhibit 4 that “none of them was armed”. I find that the Operation whereby Pw1 and Pw2 were attacked and dispossessed of their money at Oron Road, Oron on 17/6/93 was armed robbery. On the basis of the evidence adduced by the prosecution in this case which evidence is largely unchallenged coupled with the confession made by the accused persons as contained in Exhibits 4, 7 and 9, I find that the prosecution has proved its case beyond reasonable doubt and I so find each of the accused persons guilty as charged”.

The appellant herein was dissatisfied with the decision of the trial Tribunal and thus appealed to the Court of Appeal Calabar Division herein after called the lower court. As can be gleaned from the

briefs of argument filed by the parties, the lower court affirmed the decision of the trial Tribunal and dismissed the appeal. However, by a majority of 2 -1, the order of sentence to death was affirmed while the minority judgment of Justice Akaahs, JCA, commuted the death sentence to 21 years imprisonment. The appellant was again dissatisfied with the judgment of the lower court and has appealed to this court. In accordance with the rules of the Supreme Court both parties filed and exchanged their respective briefs of argument. The appellant in his second amended brief of argument formulated four issues for determination as follows:-

“1. Whether the Court of Appeal was right in holding that the chairman of the robbery and firearms special tribunal adequately tested the truth of the alleged confessional statement of the appellant before relying solely on it to convict and sentence the appellant to death.

2. Whether the Court of Appeal was right in holding that there were no inconsistencies and contradictions in the evidence of the prosecution witnesses in respect of the identity of the appellant as one of the robbers who carried out the robbery operation of 17th June, 1993.

3. Whether the Court of Appeal was right in holding that the robbery incidence of 17th June, 1993, was an armed robbery incident.

4. 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 information 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.”

The respondent adopted these issues as formulated by the appellant in its brief of argument. At the hearing the learned counsel to the appellant adopted the brief of argument and urged this court to allow the appeal. The gist of the appellant’s submission on its issue 1 is that the charge or information upon which the appellant was tried and convicted was not contained in the record of proceedings and as such the appellant was not tried on any charge which renders the conviction and sentence a nullity. Furthermore, since the trial

tribunal has ordered that all documentary Exhibits used in the trial be destroyed there is no basis to order a retrial. And any order of the retrial if made would amount to a double jeopardy and unjust, the appellant having been standing trial for 18 years after the arrest.

On the 2nd issue. Learned counsel submitted that the trial Tribunal did not test the correctness of the confessional statement of the appellant before relying on it to convict him. It was the submission of the learned counsel that the trial Tribunal ought to have tested the confessional statement with other evidence to test whether the contents were true or not. Hence the lower court was therefore wrong to have upheld the judgment of the Trial Tribunal based on the confessional statement. The learned counsel further submitted that although a confessional statement alone is sufficient to ground a conviction once the court is satisfied with the truth of the confession and the court normally requires some evidence in addition to the confessional statement which make it more probable, the following cases were cited thus:- *Yesufu v. The State* (1976) 6 SC 167, *Nwachukwu V. The State* (2007) 1 NWLR (Pt 1062) 31 at 64, *Odeh V. Federal Republic of Nigeria* (2008) 13 NWLR (Pt.1103) 44. The learned counsel therefore submitted therefore that the failure of the trial tribunal to test the veracity of Exhibit 9 as decided in *Ikpo V. The State* (1995) 9 NWLR (Pt. 421) 540 before relying on it to convict and sentence the appellant is an error in law which ought to be resolved in appellant's favour.

Arguing issues 3 and 4 together learned counsel pointed out that there were material contradictions and inconsistencies in the evidence of the prosecution witnesses particularly the evidence of PW1 and PW2 who were the victims of the robbery no respect of the appellant's identity as one of the robbers who participated in the robbery incident; and further contended that there was no proof beyond reasonable doubt that the alleged robbery incident of 17th June, 1993 was indeed an armed robbery. Learned counsel referred to Section 1 of the Robbery and Firearms (special Provisions) Decree No 5 of 1994 and submitted that for the prosecution to succeed there must be proof beyond reasonable doubt that:-

- (a) There was a robbery or series of robberies.
- (b) Each robbery was an armed robbery; and
- (c) The accused was one of those who took part in the rob-

bery.

He relied on the following authorities. (i) *Bozin V. The State* (1985) 2 NWLR (Pt.8) 467 and (ii) *Alabi V. The State* (1993) 7 NWLR (Pt.307) 311. That since Pw1 and Pw2 could not correctly identify the appellant, the trial court was wrong to have relied on his confessional statement Exhibit 9 to hold that having confessed to have participated in the robbery he has been linked to the offence, It was the submission of the learned counsel that it is important that an eye witness who saw a person committing an offence must act timeously by using the earliest opportunity to identify and mention the name of the person he saw committing the offence, the cases of *Idahosa v. The Queen* (1966) NMLR 85 COP V. *Alao* (1959) WRNLR 39, and *Micahel v. The State* (2002) 1 NWLR (Pt. 749) 500 were cited. Therefore, since the evidence of PW1 and PW2 were contradictory on the issue of the identity of the appellant, the Trial Tribunal was wrong to have convicted and sentence him. Also the evidence of the PW1 and PW2 were contradictory on whether the appellant was around when the alleged robbery was committed. This has created very serious doubt which ought to be resolved in favour of the appellant, counsel cited the cases of:- *Augustine Onuchukwu V. The State* (supra), *The State V. Collin Ojo Aibanubee* (supra) at 545 and *The State V. Godfrey Aje* (Pt.678) 434/445.

The respondent also at the hearing adopted his amended brief of argument deemed filed on 24/7/10 and urged this court to dismiss the appeal. It was the contention of the respondent that though the appellant made three confessional statements i.e. exhibits 9, 10 and 11, the Trial Tribunal did not rely solely on Exhibit 9 to convict and sentence him for the offence charged. That the prosecution depended on the testimonies of PW1 and PW2 (the victims of the robbery) and their Police Statements Exhibits 1, 2, 9, 10, 11 and exhibit 12, the motorcycle Reg. No. RV887BA which he confessed to have been purchased by him from his share of the proceeds of the offence of robbery. Learned counsel pointed out that the confessional statements were tendered and admitted without any objection from the defence counsel. Thus a voluntary statement tendered without objection and admitted in evidence is a good evidence and no amount of subsequent arguments against it or a retraction will vitiate its admissibility and potency, and a free and voluntary confession alone is

sufficient without further corroboration to warrant and sustain a conviction, the following cases were cited in support:- Mustapha Mohammed V. The State (2007) 11 NWLR (Pt. 1045) 303 at 318, Yahaya V. The State (2005) 1 NCC 120. The respondent pointed out that the appellant as DW5 admitted that he made statements to the police at Oron Police Station and Police Headquarters, Ikot Akpan Aba, Uyo Akwa-Ibom State. It was also pointed out that the trial Tribunal compared the evidence of PW1 and PW2 side by side with the confessional statements of the appellant and found that there was nothing to show that they were not made voluntarily. Learned counsel then posited that the trial tribunal adequately tested the truth of the said statement in exhibit 9 before acting on it. It looked outside the statement for some corroborative evidence of circumstances which made it probable that the facts stated therein were true. In this case at hand there was evidence given by the prosecution witnesses outside the confessional statement in Exhibit 9 to sustain the charge against the appellant by PW1, PW2, PW3 and PW4.

On the issue of whether the appellant was armed or not, and ought to have been sentenced to death as contended by the appellant's counsel, the learned counsel to the respondent referred to the provisions of Section 1(2)(a) of the Armed Robbery and Firearms (special provisions) Decree No. 5 of 1994 and submitted that the offender need not to use or arms or offensive weapons provided at or immediately after the robbery, the offender wounds or used any personal violence to any person. In other words, where the offender is armed with firearms or any other offensive weapons or is in company of any person armed or he wounds or uses any personal violence to any person, whether or not he or those in his company are armed with firearms or other offensive weapons, he is guilty of armed robbery and liable to be sentenced to death upon trial and conviction, he cites the case of Adeyemi V. The State (1991) 2 NWLR (Pt. 170) 18. In this case the appellant never challenged the fact that he or any person in his company on the occasion of the robbery was armed with any offensive weapon by cross examining the prosecution witnesses or even denying this fact in his testimony. It was further submitted that contrary to the submission of the appellant's counsel that the fact that the appellant was not arrested at the scene of the robbery the prosecution has to prove his identity beyond reasonable

doubt, the law remains that even in the absence of an eye witness account, where an accused person confessed to a crime, he can be convicted on his positive, direct and properly proven confession alone and the confession in this case is positive, direct and properly proved, see the cases of:- a. Akpa V. The State (2008) 4 - 5 SC (Pt. 11) 1 at 14, b. Milla V. The State (1985) 3 NWLR (Pt. 11) 190, c. Alhabuwa V. The State (1976) 12 SC 41, amongst others. On the issue of Contradiction in the evidence of PW1 and PW2 raised by the appellant's counsel, it was the respondent's submission that there was no contradiction. It was pointed out that both the Trial Tribunal and the lower Court found that PW2 in particular identified the appellant as one of the robbers and by his confessional statement he sufficiently linked himself to the offence, by identifying himself as one of the robbers learned counsel then posited that it is not in every case that identification parade is conducted particularly when the accused has clearly identified himself as one of the offenders, and where the prosecution witnesses were not cross examined on the issue of identification. He cited the case of Oguntola v. The State (2007) (Pt.1049) 617 at 633, Ibrahim Vs the State (1991) 4 NWLR (Pt.186) 399, Okosi V. The State (1989) NWLR (Pt.100) 642, and Ikemson V. The State (1989) 3 NWLR (Pt.110) 455.

On the issue of the omission to include the charge sheet in the record, the respondent's counsel noted that at pages 6 and 7 of the record it is shown that on 20/6/1994 charge No. RFT/,1/94 was preferred against two accused persons, Etim Edet Oboho and Effiong Etim Sunday for the offence of armed robbery before the trial Tribunal, and on 21/6/1994 the trial Tribunal ordered the other three accused persons who were being tried at the Magistrate Court be joined in the charge. On the 28/6/1994 four (4) other accused persons were joined in the charge, which was read to them and all of them, pleaded not guilty. On the 6/7/1994, the charge was further amended by substituting new charge and fresh pleas were taken and all the accused persons also pleaded not guilty and the old charge filed on 13/5/1994 was struck out.

Learned counsel further pointed out that throughout the processes of the arraignment, amendment, pleas, trial and conviction the appellant never raised the issue of the charge or information not being before the Trial Tribunal. He therefore submits that the appel-

lant was properly arraigned under a proper charge that he pleaded and the procedure adopted at the trial complied with the provision of section 215 of the criminal procedure law of Akwa-Ibom State as stated in *Ajile v. The State* (1999) 9 NWLR (Pt. 619) 503 at 505. It was further contended that there is presumption of regularity, that is, B presumption in favour of the availability of the charge or information pursuant to which the appellant took his plea, unless the appellant proves otherwise which he has not done. Learned counsel pointed out that the record of proceedings was compiled by the appellant C with leave of court, therefore having initiated the process of departure from the rules and having selected the documents upon which he felt his appeal could be determined, the appellant is bound by them especially as it is not mandatory for all documents to be included in the record, hence the appellant cannot now be heard to D complain that the record is incomplete. He relied on *FIRST BANK OF NIGERIA LTD V. T.S.A. IND. LTD* (2007) ALL FWLR (Pt.352) 1719 at 1750. It was further contended that it was the duty of the appellant to place before the court of appeal relevant documents for the appeal, the case of *Nwana V. FCDA*, (2007) 11 NWLR (Pt.1044) E 59 at 79 was cited in Support. The appellant cannot therefore turn round to seek the reversal of the decision of the Court below on the basis of the record he compiled and on documents he selected without answering the question: What is the effect of the omitted charge sheet or information on the Justice of the appeal? He therefore F contended that there is no miscarriage of Justice and the appellant cannot seek to escape from Justice by his own commission.

On the first issue for determination raised by the parties, it is apparent from the record that apart from the confessional statement G of the appellant, there are some other evidence which the trial Tribunal relied on. The evidence of PW1 and PW2 (the victims of the robbery) and Exhibit 12, the motorcycle with Reg. No. RVB87 RA which he confessed he bought with the proceeds of the robbery. ***It is also to be noted that the appellant's confessional statements H were tendered without any objection, which therefore relieved the trial Tribunal from conducting an enquiry into whether it was made voluntarily or not. The statement I dare say was made voluntarily by the appellant and will require no further corroboration.*** I am fortified by the decision in the case of *Mustapha*

Mohammed V. The State (2007) 11 NWLR (Pt.1045) 303 at 310 - 321 where my learned brother Niki Tobi JSC has this to say:-

“Where an accused person confesses to a crime in the absence of an eye witness of killing, he can be convicted on his confession alone if the confession is positive, direct and properly proved. See Milla V. The State (1985) 3 NWLR (Pt. 11) 190; Achabua V. The State (1996) 12 SC 63; and UBOSI V. The State (1965) 1 NMLR 129”. A free and voluntary confession alone is sufficient without further corroboration to warrant conviction. See Obosi v. The State (supra) and Ayaluyi V. The Queen 15 WACA 34. A conviction for murder can be based on the confessional statement of the accused. See Stephen V. COP (1986) 2 NWLR (Pt.25) 673; and Queen V. Mboho (1964) NMLR 49 at 52. It is important to say that when the confessional statements of the appellant were tendered there was no objection and so there was no trial within trial. In the absence of objection, the court can come to the conclusion that the statements were made voluntarily by the appellants. This court held in Adio V. The State (1986) 2 NWLR (PT. 24) 581 that a free and voluntary confession of a guilt by an accused person, if it is direct, positive and satisfactorily proves occupies the highest place of authenticity when it comes to proving beyond reasonable doubt”.

It is clear from the above that a voluntary confessional statement of an accused does not need any further corroboration particularly where it was tendered without any objection. The court would only need further corroboration where there is any doubt about the voluntariness or the opportunity of making such statement. In the instant case, the appellant’s confessional statement was tendered without objection. This coupled with the fact that the appellant admitted under cross-examination that he made the statement at Oron Police Station, and Police Headquarters, Ikot Akpan Abu Uyo. I have no doubt in my mind that the lower court was right when it upheld the decision of the trial Tribunal, which relied on the confessional statement of the appellant to convict him. I therefore resolve this issue in favour of the respondent herein.

On the second and 3rd issues for determination which were argued together the learned counsel pointed out that there were material contradictions and inconsistencies in the evidence of PW1

and PW2 in respect of the appellant's identity as one of the robbers who participated in the robbery, and that there was evidence that the robbery incident of 17/6/93 was indeed an armed robbery. On these issues, the Trial Tribunal found as follows:-

"In view of Exhibits 4, 7 and 9 I found that the denial of this offence by DW1 and DW3 and DW6 in this Tribunal is of no consequence, the question is was the operation carried 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 went unchallenged "I accept and believe it notwithstanding the evidence to the contrary by DW1 in Exhibit 4 that none of them was armed". I find that the operation whereby the PW1 and PW2 were attacked and dispossessed of their money at Oron Road, Oron on 17/6/93 was armed robbery".

The finding of the Trial Tribunal was upheld by the lower court. It is trite that the court will not interfere in the concurrent findings of the two lower courts except where the appellant could show cogent reason why it should do so, such as if the findings were perverse or not related to the evidence adduced before the trial court. See Ebba V. Ogodo (1984) 1 SCNLR 292. I have patiently and carefully perused the evidence adduced in this matter and the exhibits tendered particularly Exhibits 9 and 12 i.e. the appellant's confessional statement and the motorcycle he purchased with his own share of the proceeds of the robbery couple with the unchallenged evidence of PW1 and PW2 on this point and I find that the findings of the trial court which was upheld by the lower court was based on the adduced evidence before it, and as such I have no basis to disturb the concurrent findings of the two lower courts which, in my view, were correct. This issue is therefore resolved against the appellant.

The issue of identity raised by the appellant's counsel is of no moment here. The appellant himself admitted committing the crime and showed the court what he bought with his own share of the proceeds of the robbery. Hence the issue of identity does not arise. It was never an issue as the culprits were known. However, it must be pointed out even if there

was any contradiction as alleged, that contradiction or inconsistency must relate to a material fact before it can affect the judgment of the lower court. It must be capable of casting reasonable doubt upon the guilt of the accused person. It must be of such magnitude as to warrant interference by an appeal court. This is not the position in this case. See 1. Onubogu V. Queen (1974) 9 SC 1 at 23-24, 2. Queen V. Iyanda (1960) FSC 263/265 and 3. Omisade V. Queen (1964) 1 All NLR 233. I therefore resolve these two issues in favour of the respondent.

On the last issue formulated by the parties, which deals with the alleged absence of the charge sheet/information in the record of proceedings, the appellant's counsel had contended that charge sheet absence means that he was not tried on any offence and as such the proceedings and the judgment of the lower court should be set aside. As can be seen in the record on 20/6/1994 charge No. RFT/1/94 was preferred against two persons, Etim Edet Oboho and Effiong Etim Sunday, for the offence of armed robbery and on 21/6/94 the Trial Tribunal ordered that other three accused persons be joined and as a result of this order on 28/6/94 four other accused persons were joined in the charge which was read to them and all of them pleaded not guilty. The appellant was the 6th accused person. The charge was further amended on 6/7/94, as a result of the death of three accused persons in prison, and a fresh plea was again taken. These facts were never denied by the appellant, and neither was this issue of missing of charge sheet/information raised at the trial court, when all these steps were taken till judgment. I therefore have no any shred of doubt that the appellant was properly arraigned and tried at the trial Tribunal.

It must also be noted that it was the appellant who applied for a departure from the rules and prayed the lower court to use the bundle of documents as the record to hear the appeal. Thus, he was the person who selected the documents upon which his appeal should be determined. Thus, if the charge sheet/information was important for the determination of the appeal why leaving it out? Or he wants to foist upon the court a situation of hopelessness, in order to set free a guilty appel-

lant who actually committed an offence of armed robbery. I would not like to say that this is a deliberate act by the learned counsel to the appellant. It is the duty of the appellant to place before the Court of Appeal all relevant document necessary to determine the appeal. See Nwana V. FCDA (2007) 11 NWLR
 B (Pt.1044) 59 at 70. **I think it is true that an appellant who desires to have its appeal heard and determined timeously must place before the court, either through the Registry of the trial court or by himself, when the Registry fails to transmit the
 C record, all such documents that would assist the timeous and judicious determination of the appeal. Where necessary documents are not in the record, such an appeal is likely or liable to be struck out. It is for these reasons that I also resolved the 4th issue in favour of the respondent.**

D Having resolved all the issues in favour of the respondent, my lords the appeal has nothing to stand upon. Therefore I hold that this appeal lacks merit and it is accordingly dismissed. The majority decisions of the lower court are hereby restored and affirmed.

E

MUKHTAR JSC

The Court of Appeal, Calabar Division affirmed the conviction and sentence of the appellant for the offence of armed robbery. The learned trial judge had evaluated the evidence before him and found
 F the prosecution case proved, as follows:-

*“On the basis of the evidence adduced by the prosecution in this case, which evidence is largely unchallenged, coupled with the confession made by the accused persons as contained in Exhibits 4, 7
 G and 9. I find that the prosecution has proved its case beyond all reasonable doubt and so I find each of the accused persons guilty as charged”.*

In the appeal before this court, the appellant in his brief of argument raised four issues for determination of the appeal. The is-
 H sues are:-

“i. 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 information 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.

ii. *Whether the Court of Appeal was right in holding that the Chairman of the Robbery and Firearms Special Tribunal adequately tested the truth of the alleged confessional Statement of the Appellant before relying solely on it to convict and sentence the Appellant to death.*

iii. *Whether the Court of Appeal was right in holding that there were no inconsistencies and contradiction in the evidence of the prosecution witnesses in respect of the identity of the Appellant as one of the robbers who carried out the robbery operation of 17th June, 1993; and*

iv. *Whether the Court of Appeal was right in holding that the robbery incident of 17th June, 1993 was an armed robbery incident?"*

The above issues were adopted by the respondent in its brief of argument. As can be seen from the first page of the trial court's judgment, the particulars of the first count of the charge in as far as the appellant is concerned is:-

"... and 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"

The offence for which the learned trial judge found the appellant guilty of corresponds with the above count, for in his judgment he found as follows:-

"I find that the operation whereby PW1 and PW2 were attacked and dispossessed of their money at Oron Road, Oron on 17/6/93 was an armed robbery."

It is very clear that the appellant and others were found guilty and convicted on the two count charge they were arraigned i.e armed robbery. It is on record that the original charge that had only two accused persons was amended to accommodate more accused person which included the appellant. The relevant record reads as follows:-

"Mr. Ekong applies to amend the charge to bring into the charge as 3rd, 4th, 5th and 6th accused in the persons of Joseph Edet Ekpo,

Etim Asuquo Enubiak, Edet Asuquo and Okon Dan Osung respectively.

No counsel has objected to the application.

TRIBUNAL: Application granted and leave given for the charge to be amended to include the 3rd, 4th, 5th and 6th accused persons.

B *Mr. Ekong asks for an adjournment to enable him determine whether or not to proceed against the accused persons on the charge as amended.*

Case adjourned to 6/7/94 for plea and trial if possible."

C Then on the said 6/7/94 the following was recorded:-

"Mr. Ekong applies to amend the charge by way of substitution. He says he brings the application under Section 163 of the Criminal Procedure Law and gives reasons for the amendment.

Messrs Eneyo and Edem do not oppose the application.

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. Clerk of court reads and explains the charge to the accused persons.

E *Plea:..."*

The accused pleaded not guilty to the charge. As I have stated above, the new charge was read and explained to the accused persons as is reflected in the judgment of the learned trial court and on page 10 of the record of proceedings. Then on 19/11/96 the following was recorded:-

F *"Mr. Uruzian: In view of the fact that the 1st, 2nd and 3rd accused persons are dead, the surviving accused persons should take a fresh plea.*

G *Mr. Uruzian therefore applies that the names of the 1st, 2nd and 4th accused persons who are dead and whose death certificate have been obtained and are in the file of this case to be struck out.*

H *COURT: On presentation of the death certificate of the 1st, 2nd and 4th accused persons thus proving that they are dead, the names of the 1st, 2nd and 4th accused are hereby struck out from the charge.*

Charge read and explained to the 3rd, 5th and 6th accused persons and each of the 3rd, 5th and 6th accused persons pleads not guilty to each of the two counts."

The grouse of the appellant under this issue is that the amended charges, in particular the latter one is not contained in the record of proceedings, and there was nothing to show that sections 77, 164, and 215 of the Criminal Procedure Act were complied with. I do not know that the absence of the amended charges in the record of appear construes non-compliance with the provisions of the criminal procedure Act supra, for the provisions require that the accused person knows and understands the reason why he is on trial, and a plea be taken by the court on the offence/offences he is charged with. I have already said the latter charge upon which the appellant was convicted was read and explained to the appellant by the learned trial judge as is recorded in the record of proceedings. The appellant and his co-accused were recorded as having understood the charge, and their plea taken and recorded. The most important factor is that their pleas were taken, to wit they pleaded not guilty. If they had pleaded guilty it may have been justifiable for the appellant to make heavy weather of the absence of other material particulars that may likely influence the learned judge in the determination of the guilt of the appellant. My impression is that the, offences on the charges, original and amended are the same, otherwise the learned trial judge wouldn't have recorded what he recorded in his judgment in connection with the charges and the arraignment.

On the complaint on the contents of the appellant's confessional statement and the treatment of them by the learned trial judge, I will first of all reproduce the recorded proceeding that led to their admission in court. Sergeant Mbuk Edet who tendered the appellant's caution statement gave evidence and the following was recorded:-

"I recorded two statements from the 3rd accused Okon Dan Osung, witness shown a statement and he identifies it as the first statement he recorded from the 3rd accused. The statement is dated 2/11/93.

Mr. Uruzian: I seek to tender this statement as an exhibit.

Mr. Uwah: No objection.

Tribunal: The statement of the 3rd accused dated 2/11/93 rendered and admitted as exhibit 9...

Witness shown the second statement he recorded from the 3rd accused and he identifies it.

Mr. Uruzian: I seek to tender this statement dated 28/11/92 as

an exhibit.

Mr. Uwah: No objection.

Tribunal: The second statement of the 3rd accused dated 28/11/93 tendered and admitted Exhibit 10.”

It is instructive to note that the appellant did not object to the admission of the statements when they were about to be admitted, which in essence means that he conceded that he made the statements and agreed that the contents were what he told the recorder of the statements. In the absence of the objection, the learned trial judge was at liberty to consider and rely on the contents of the statements for the just determination of the case. If the appellant was apprehensive of the contents of the statements, the correct thing to do was for his counsel to object to their admissibility and give his reasons, the objection of which may have led to a trial within a trial. In the circumstances the learned trial judge was not in error to have used the confessional statements to which he ascribed probative value, in addition to the other prosecution evidence to convict the appellant. In this vein, I endorse the finding of the lower court, which reads as follows:-

“Once a confessional statement is admitted in evidence it becomes part of the case for the prosecution which the court is bound to consider for its probative value. See *Akpan v. State* 2001 15 NWLR Part 737 p. 745. It must also admit the essential elements of the offence. It should be such that when tested against proven facts it will show that the Appellant committed the offence. See *Odua vs. Federal Republic of Nigeria* (2002) 5 NWLR Part 761 p.615. It is also the law that where a confessional statement has been tendered and admitted without objections, its later retraction cannot vitiate the proceedings. See *Nwachukwu vs. State* (2004) 17 NWLR Part 902 p.262 where it was stated that the Appellant had the opportunity of challenging Exhibit A to make its admission impossible, but the Appellant failed to do so till the statement was admitted in evidence. It was held to be too late in the day to deny the statement on appeal.”

I believe the later retraction of the confessional statement was an after thought and it does not lie in the mouth of the appellant to now disown it most particularly the following excerpt of exhibit ‘9’ which reads thus:-

“After sometime the man left us for spring road junction by

Oron Rd. Oron. While Edet Asuquo Bassey, Joseph Edet Ekpo, Etim Enubial and I remained at Mount Zion Rd. by Oron Rd. Oron...

My three co-suspects pounced on the occupants of the vehicle and collected their bags and ran back to meet me and the man at the Spring Rd. Junction...

The money was taken in the bags and we all ran (sic) away^B (sic) the money was taken in the bags and we run (sic) away, the money was later shared that night..."

In exhibit '8' is the following:-

"I did not follow the thieves (sic) operate that day' I do not know any of them apart from Edet Asuquo Bassey. He was the one who led the police to my house to arrest me."^C

At least there is a connection between the appellant and Edet Asuquo Bassey whose name also featured in exhibit 9 as a co-accused, and it was he who facilitated the arrest of the appellant. It is also instructive to note that the other accused persons in their statements also roped in the appellant as their partner in crime i.e. they confirmed his involvement in the commission of the crime. Again, there is the evidence of P.W.1 and P.W. 2 who were at the scene of crime, one of them being the victim. By virtue of the provision of section (1) of the Robbery and Firearms (Special Provisions) Act 2004.^E

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

(2) If...

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

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

By the above provision, it is not necessary that the person charged under the above provision be armed with any firearm or any offensive weapon himself. Once he is in the company of any person who is so armed, when the offence was committed, it will suffice to find him guilty of the offence of armed robbery. Evidence abound in the record of proceedings that some of the accused were^H

armed with offensive weapons. The following pieces of evidence illustrate this fact. PW.1 in his evidence testified, inter alia thus:-

“The 5th accused brought out a machete from his back and showed me. On seeing the machete, I released the bag to them. The boy who gave me a machete cut and ran away with the bag is not in this tribunal. The 3rd and 6th accused then went to the front of the car and held my brother Okafor Ndukwe. By holding my brother I mean they robbed my brother of money.”

The witness was not cross examined on the machete, so evidence that the 5th accused was armed with a machete was not challenged. Hence the evidence was reliable and credible and was correctly relied upon by the learned trial judge to sustain the charge. It is settled law that evidence that is neither challenged nor discredited, and which is relevant to the issue in controversy, becomes good and credible evidence which a judge is at liberty to rely upon for the just determination of the case before him. See *Chime v. Chime* 2001 3 NWLR Part 701 page 527, and *Nwabuoku v. Ottih* 1961 1 All NLR page 487.

Then PW.2 in his evidence gave the following testimony:-

“I saw all accused persons but one holding machete while one of them held a pen knife. One of them used the machete on the chin of Uche Emele. They lifted him up and dropped him down.”

Again offensive weapons features in the evidence. Although, the witness was cross examined on the evidence on the machete, vis-a-vis his earlier statement to the police, this is neither here nor there. The above pieces of evidence have brought to fore and confirmed the fact that offensive weapons were involved in the act of committing the offence. It is also of assistance to note the provision of the act supra under which the appellant and his cohorts were charged, particularly that part that any of them may be armed with the offensive weapon i.e. not necessarily all of them. The fact that they are in company of one who is armed with the said weapon will suffice. Having established that an offensive weapon featured in the commission of the crime, the ingredients of the offence have been proved, and the learned trial judge found so in his judgment, and the finding was affirmed by the lower court, which rightly posited the following in its judgment.

“What the learned trial Judge, the Chairman of the Tribunal,

had to decide was whether the Appellant was armed or whether he was in the company of those who were armed. The learned trial chairman decided, quite rightly in my view, that the robbers were armed based on the evidence of P.W.1 who was even given a machete cut on his face on that fateful day, the fact that the offensive weapons were not recovered from them notwithstanding.” B

The totality of the evidence is definitely weighty enough to support and sustain the charge of robbery against the appellant. I am of the view that the conviction of the appellant by the court of trial and its affirmation by the Court of Appeal are warranted, and there is no reason to interfere with the decisions of these courts. I am satisfied that the prosecution proved its case beyond reasonable doubt in accordance with the provision of section 138 of the Evidence Act Volume 6 Cap E14 of the Laws of the Federation of favour of the appellant. The concept of beyond reasonable doubt has been described as not being tantamount to proof beyond any shadow of doubt. See *Miller v. Minister of Pensions* 1947 2 All E.R. page 372. This is an appeal against concurrent findings of two lower courts, which the law enjoins this court not to disturb, unless the findings are not supported by credible evidence, in which case miscarriage of justice has been occasioned. See *Aseimo v. Abraham* 2001 16 NWLR Part 738 Page 20, *Ibode v. Enarofia* 1980 5 - 7 SC. 42, and *Odonigi v. Oyeleke* 2001 6 NWLR Part 708 Page 12. C D E

In the present case no such shortcomings exist. I have had the advantage of reading in advance the lead judgment delivered by my learned brother Muntaka-Coommassie JSC, and I agree completely with his reasoning and conclusion that the appeal has no merit and substance. It therefore deserves to fail, and I hereby dismiss it. F

G

GALADIMA JSC

I have read the draft of the judgment just delivered by my Learned Brother COOMASSIE, JSC. I agree with his reasoning leading to the dismissal of the Appeal. H

The Learned trial Judge had evaluated the evidence before him and found the prosecution case equally proved. The Court of Appeal Calabar Division affirmed the conviction and sentence of the Appellant. Dissatisfied, the Appellant appealed to this Court and raised

4 issues for determination as follows:

- i. 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 information 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.*
- ii. Whether the court of Appeal was right in holding that the Chairman of the Robbery and Firearms Special Tribunal adequately tested the truth of the alleged Confessional Statement of the Appellant before relying solely on it to convict and sentence the Appellant to death.*
- iii. Whether the Court of Appeal was right in holding that there were no inconsistencies and contradictions in the evidence of the prosecution witnesses in respect of the identity of the Appellant as one of the robbers who carried out the robbery operation of 17th June, 1993; and*
- iv. Whether the Court of Appeal was right in holding that the robbery incident of 17th June, 1993 was an armed robbery incident?"*

The Respondent in its briefs has adopted the above issues formulated by the Appellant. When this appeal came up for hearing learned counsel for the Appellant adopted the brief of argument and urged this Court to allow the appeal. The Respondent also adopted his amended brief of argument deemed filed on 24/7/2010 and urged this Court to dismiss the appeal.

The complaint of the Appellant on the first issue is that the amended charges, particularly the latter, is not contained in the record of proceedings, and that there was nothing to show that sections 77, 164 and 215 of the criminal procedure Act were complied with.

The Appellant was found guilty as charged. The particulars of the first count of the charge is as follows:

"...and Okon Dan Osung on or about the 17th day of June, 1993 along Oron Road Judicial Division while armed with offensive weapons, to wit, machete, daggers and pen knives robbed Okafor Ndukwe Anya of the sum of N79,995.00 property of one Sunday Ikema".

Let it be noted that the offence for which the trial judge found

the appellant guilty of, corresponds with the above count. Hence the court in that judgment found as follows:

“I find that the operation whereby PW1 and PW2 were attacked and disposed of their money at Oron Road, Oron on 17/6/93 was an armed robbery.”

It is on record that the original charge that had only two accused persons was amended to accommodate more accused person which included the appellant. The accused persons pleaded not guilty to the charge. As stated earlier, the new charge was read and explained to the accused persons. This clearly reflected in the judgment of the learned trial judge and on page 11 of the Record. The proceedings of 19/11/96 are as follows:

“3rd, 5th and 6th accused persons present, the 1st, 2nd and 4th accused persons reported dead. Mr. Gladstone Uruzian for the State, Mr. Tony Uwah for the accused persons Mr. Uruzian; in view of the fact that 1st, 2nd and 3rd accused persons are dead; the surviving accused persons should take a fresh plea.

Mr. Uruzian therefore applies that the names of the 1st, 2nd and 4th accused persons who are dead, and whose death certificate have been obtained and are in the file of this case, be struck out. Court. On presentation of the death certificate of the 1st, 2nd and 4th accused persons thus proving that they are dead, the names of the 1st, 2nd and 4th accused are hereby struck out from the charge.

Charge read and explained to the 3rd, 5th and 6th accused persons and each of the 3rd, 5th and 6th accused persons and each of the 3rd, 5th and accused persons pleads not guilty each of e two Counts.”

The important consideration in the complaint of the appellant is that the latter charge upon which the appellant was convicted was read and explained to him by the learned trial judge. The Appellant and his co-accused persons were recorded as having understood the charge and their plea taken and recorded. It is clear that the offences on the charges original and amended are the same.

The second issue is all about the confessional statement of the Appellant, The complaint of the Appellant is on the contents of the confessional statement and the reliance on same by the learned trial judge. It is the contention of the Appellant that although he made three confessional statements Exhibits 1, 10 and 11, the Tribunal

relied solely on Exhibit 9 (his confessional statement of 2/11/83) to convict and sentence him for the offence charged without first and foremost testing the truth or otherwise of Exhibit 9 visa-a-vis Exhibits 10 and 11. The Appellant has hinged this contention on his allegation of glaring discrepancies between all his three confessional statements which reveal the improbability of Exhibit 9, his having same, notwithstanding. The Appellant nested this point by further contending that the EF11 version of Exhibit 11 dated 21/10/93, which was translated into English and admitted during the trial was not produced by the prosecution during trial in which the Appellant denied any involvement in the robbery of 17/6/93. This seems a plausible argument but it must, be noted that the case of the prosecution at the Tribunal as it concerns the Appellant depended on the testimonies of PW1 and PW2 (the victims of the robbery attack) and the police statements, Exhibits 1 and 2 the Appellants confessional statements Exhibits 9, 10 and 11 Exhibits 12, the motorcycle No. RV887 B.A. (which the Appellant confessed to have been purchased by him from his share of the proceeds of the robbery.

It is noted that the Appellant did not object to the admission of his statements. It means that he had conceded that he made the statements and agreed with the contents of the said statements. It is trite law that a valid voluntary statement tendered without objection and admitted in evidence, is good evidence and no amount of subsequent arguments against it or a retraction will vitiate its admissibility and potency as a voluntary statement; and the mere denial by the accused, will not be a good reason for rejecting it. It is only desirable to have some evidence of circumstances which make it probable that the confession was truly confessional, although a free and voluntary confession alone is sufficient without further corroboration to warrant and sustain a conviction.

Therefore, once a confessional statement is in evidence it becomes part of the case for the prosecution and the court is bound to consider, provided that it admits of the essential elements of the offence charged and such that when tested against proven facts will show that the accused committed the offence. See *AKPAN v. THE STATE* (2001) 15 NWLR (Pt.737) 745. The Appellant in this case at hand had all the opportunity of challenging the exhibits now sought to be impugned but failed to do so at the stage or trial. It is too late

now, to claim irreconcilability of the statement with other police statements of the appellant on.

As evident from the records, of this appeal, the learned chairman of the Tribunal adequately tested the truth of the said statement in Exhibit of before acting on it. In the circumstances, the Tribunal rightly came to a conclusion that by virtue of exhibit 9 even with or without corroboration, the Appellant could rightly be convicted and sentenced without more. See *ODEH v. FEDERAL REPUBLIC OF NIGERIA* (2008) 13 NWLR (Pt. 1103) 1 at P.37. B

On the basis of the foregoing, the prosecution has proved the guilt of the Appellant beyond reasonable doubt in accordance with the provision of Section 138 of the Evidence Act. Accordingly, the concurrent findings of the two lower courts supported by credible evidence cannot be disturbed, as no miscarriage of justice has occasioned. This Appeal is lacking in merit and it is dismissed. C D

ARIWOOLA JSC

I was privileged to have read the draft of the leading judgment just delivered by my learned brother, Coomassie, JSC and I am in entire agreement that the prosecution proved the case before the trial court beyond reasonable doubt, and the conviction and sentence of the appellant by the trial court were rightly affirmed by the court below. This court has no reason to depart from the concurrent findings of facts of the two courts below. E F

In the circumstance I also hold that this appeal lacks merit and substance. It deserves to be dismissed. Accordingly, I hereby dismiss same. G

H