

**SUPREME COURT OF NIGERIA**  
FRIDAY 20TH DECEMBER, 2013. SC. 169/2012  
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-  
COOMASSIE, S. GALADIMA, N. S. NGWUTA,  
K. M. O. KEKERE-EKUN, JJSC**

1. KAYODE BABARINDE  
2. AKEEM HARUNA ..... APPELLANTS  
3. YUSUF NURUDEEN  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Judicial bias - Comments made by the trial Judge in his ruling on voluntariness of appellants' statements - Did not show a likelihood of bias against appellants - In respect of the substantive trial (H1)

CRIMINAL PROCEDURE - Trial within trial - Purpose - It is mini trial conducted to determine - Whether or not confessional statement of accused was made voluntarily (H2)

IDENTIFICATION PARADE - When not necessary - The parade is not necessary where suspect is caught at crime scene - Where accused identified himself by his confession - Or where there is circumstantial evidence showing his involvement in the offence (H3)

CRIMINAL PROCEDURE - Proof - Number of witness - Evidence of single witness can ground a conviction - Where the evidence is credible and cogent - Provided that corroboration is not required (H4)

ARMED ROBBERY - Ingredients - Proof - Prosecution must prove that there was robbery - That the robbery was armed robbery - And that accused took part in the armed robbery (H5)

CRIMINAL PROCEDURE - Conviction - Offensive weapon - Where such weapon was used in commission of offence - It is not essential to tender it to secure conviction - Provided there is cogent eye witness or circumstantial evidence - That points to guilt of accused (H6)

CRIMINAL PROCEDURE - Contradictions - Effect - It is only contradictions that are substantial and fundamental to main issue - That would be fatal to prosecution's case (H7)

### **FACTS**

Accused/appellants were charged before the High Court of Kwara State, Ilorin Division on a two-count charge of conspiracy to commit armed robbery and armed robbery contrary to section 97 of the Penal Code and section 1(2) of the Robbery & Firearms (Special Provisions) Act Cap. R11 LFN 2004, respectively. Appellants were alleged to have robbed one Mrs. Ruth Alabi (PW3) of the sum of N50,000 while armed with a locally made pistol at a place in Jebba, Kwara State. Appellants were arrested shortly after the commission of the crime. Appellants made confessional statements – Exhibits 4, 5 & 6 in respect of the crime. At the trial, appellants separately pleaded not guilty to each count of the charge.

Prosecution/respondent called three witnesses and tendered the exhibits. The issue of the voluntariness of appellants' confessional statements arose. This necessitated the conduct of a trial within trial, after which the learned trial Judge ruled that appellants made the statements voluntarily. The matter therefore went to main trial. At the conclusion of the substantive trial, the court found each appellant guilty as charged on each of the counts. They were sentenced to two years imprisonment on the count of conspiracy and death by hanging on the count of armed robbery. Aggrieved, appellants lodged appeal in the Court of Appeal, Ilorin Division, contending inter alia that the comments by the learned trial showed likelihood of bias. Although the court expunged Exhibits 4, 5 & 6, yet after hearing the appeal, it dismissed same and affirmed the judgment of the trial court. Dissatisfied, appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Whether the alleged bias against the appellants by the learned trial Judge in the course of the trial within trial ought to have vitiated the entire trial?

2. Whether the appellants ought to have been discharged and acquitted upon the finding of the Court of Appeal that Exhibits 4, 5 and 6 were wrongly admitted in evidence.

3. Whether the offences of conspiracy and armed robbery were proved against the appellants beyond reasonable doubt?

**HELD** (Unanimously dismissing the appeal per **KEKERE-EKUN JSC**)

*CRIMINAL PROCEDURE - Judicial bias*

**1. The effect of these decisions is that where the conduct of a trial Judge is impugned, a court looking into the matter would be guided by the inference that could be drawn by an ordinary bystander observing the proceedings.**

**An examination of the entire ruling shows that the learned trial Judge, after according the evidence led the necessary scrutiny, found that the appellants were not witnesses of truth and for this reason concluded that the statements attributed to them were made voluntarily. While the choice of language in the instant case leaves much to be desired, I am unable to agree with learned counsel for the appellants that the comments showed a likelihood of bias against the appellants in respect of the substantive trial. This issue is therefore resolved against the appellants. (pp. 4007 H/4008 E)**

*CRIMINAL PROCEDURE - Trial within trial - Purpose*

**2. Applying the principles to the circumstances of this case, it is necessary to reiterate the fact that a trial within trial is a complete process in itself within the substantive trial. The trial court halts the main trial to conduct a mini trial specifically to determine whether or not a confessional statement allegedly made by an accused person was made voluntarily.**

**As submitted by learned counsel for the respondents, the witnesses in a trial within trial are re-sworn. They testify, call additional witnesses if necessary, and tender exhibits; the witnesses are subjected to cross-examination and at the conclusion of the trial, counsel to the parties address the court. The court delivers a considered ruling on the voluntariness or otherwise of the statements sought to be tendered. In the course of delivering that ruling the court which had the opportunity of listening to and observing the witnesses for both sides, is**

***obliged to give reasons for the conclusion reached. This will include the court opinion on the credibility of the witnesses.***  
(p. 4008 A)

*IDENTIFICATION PARADE - When not necessary*

- B **3. It is not in every case that an identification parade must be held to determine the identity of the persons (s) who commit a, crime. For instance where a suspect is caught at the scene of crime or at a place closely connected with the scene of crime, it would not be necessary to conduct an identification parade. It would also not be necessary where by his confession, an accused person identified himself or where there is circumstantial evidence showing his involvement in the commission of the offence.**
- C
- D **From the facts of the instant case, the appellants were arrested shortly after the commission of the offence, at a time when PW3's memory was still fresh. Furthermore she had the opportunity of seeing them clearly when they pointed a gun at her since the unchallenged evidence is that her house was illuminated at the time.** (p. 4018 C)
- E

*CRIMINAL PROCEDURE - Proof - Number of witness*

- 4. It is trite that the evidence of single witness could be sufficient to ground a conviction where the evidence is credible, cogent and of high quality so long as the evidence is not required to be corroborated.**
- F
- In any event the law is quite well settled that it is not every available witness that must be called to testify in a case so long as those who do testify are able to discharge the burden of proof in the case being made out by a party. In other words, the evidence of the witness or witnesses in a criminal trial must be sufficient to prove the case beyond reasonable doubt.**  
(pp. 4018 G/4021 F)
- G

H *ARMED ROBBERY - Ingredients - Proof*

**5. With respect to the charge of armed robbery, the law is settled that in order to secure a conviction the prosecution must prove the following beyond reasonable doubt:**

- a. That there was a robbery or series of robberies.
- b. That each of the robberies was an armed robbery.
- c. That the accused person was one of those who took part in the armed robbery.

The fact that there was a robbery on 18/8/2007 at Jebba in Moro Local Government Area of Kwara State is not in dispute, which satisfies the first ingredient above. Learned counsel for the respective appellants however contend that the prosecution failed to prove the other two ingredients of the offence beyond reasonable doubt. As to whether or not the robbery was an armed robbery learned counsel for the appellants have laboured to assert that this ingredient of the offence could only be established by linking the gun, Exhibit 2, to any of the appellants. In order to secure a conviction for armed robbery, the prosecution must prove that the accused person was armed with an offensive weapon. The weapon may be a gun or any other object likely to induce fear of bodily harm in the victim such as a cutlass or machete. (p. 4019 B)

*CRIMINAL PROCEDURE - Conviction - Offensive weapon*

6. Where a gun or other offensive weapon is used in the commission of an offence, it is not essential to tender the weapon to secure a conviction, provided there is cogent eye witness evidence or in the absence of eye witness evidence, there is enough unequivocal circumstantial evidence that points to the guilt of the accused. (p. 4019 H)

*CRIMINAL PROCEDURE - Contradictions - Effect*

7. The law is that it is only material contradictions in the case of the prosecution that will raise a doubt, the benefit of which ought to be resolved in favour of the accused. It is only contradictions that are substantial and fundamental to the main issue in question that would be fatal to the prosecution's case. For a contradiction to be material it must not only relate to a material fact, it must in addition lead to a miscarriage of justice. (p. 4023 B)

## NOTABLE POINT OF INTEREST

### **KEKERE-EKUN JSC**

#### ***1. Judicial bias – Definition of***

In *Womiloju v. Anibire* (2010) 10 NWLR (Pt. 1203) 545 @ 571 G - H, His Lordship, Adekeye, JSC considered the terms judicial bias” and “bias” as defined in Black’s Law Dictionary 8th edition thus:

Black’s Law Dictionary defines judicial bias as -

*“A Judge’s bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or refusal, the judge’s bias usually must be personal or based on some extrajudicial reason. In the case *Kenon v. Tekam* (2001) 14 NWLR (Pt. 732) 12 bias is defined as -*

*“An opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the court so influenced will be unable to hold an even scale.”* (p. 4007 C)

### **REPRESENTATION**

J. M. M. Ajiyagbe Esq., for the 1st Appellant  
E Olumuyiwa Akinboro Esq. - 2nd and 3rd Appellants with Onaiya Otokunrin Esq., for the Appellants  
Kamaldeen Ajibade Esq. (A.G. Kwara State) with J. A. Mumini Esq., (D.P.P), M. A. I. Akande (ACSC) and O. S. Balogun Esq. (SSC), for  
F the Respondent

### **CASES REFERRED TO**

*Azuokwu v. Nwakanma* (2005) 11 NWLR (pt. 937) 537  
*Yakubu v. State* (2007) 9 NWLR (pt. 1038) 1  
G *Yakubu v. State* (2007) 9 NWLR (1038) 1  
*Mohammed v. Kano* (1968) 5 NSCC 325  
*Ijeoma v. State* (1990) 6 NWLR (pt. 158) 567  
*Nwosu v. State* (1986) 4 NWLR (pt. 35) 348  
*Garba v. The University of Maiduguri* (1986) 2 SC 128  
H *Womiloju v. Anibire* (2010) 10 NWLR (pt. 1203) 545  
*Lateef v. F.R.N.* (2010) 37 WRN 85  
*Attah v. State* (2010) 10 NWLR (pt. 1201) 190  
*Mohammed v. State* (1991) 5 NWLR (pt. 192) 438  
*Igbo v. State* (1975) 9 - 11 SC 129

Akalezi v. State (1993) 2 NWLR (pt. 273) 1

Bakare v. State (1987) 1 NWLR (pt. 52) 579

Usufu v. State (2007) 1 NWLR (pt. 1020) 94

**STATUTES REFERRED TO**

Penal Code, ss. 96, 97

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

Constitution of the Federal Republic of Nigeria 1999, s. 36(4)(5)

Evidence Act 2011, s. 37(a)

**BOOK REFERRED TO**

Blacks Law Dictionary 8<sup>th</sup> Ed.

**LEAD JUDGMENT BY KEKERE-EKUN JSC**

The appellants were charged before the High Court of Kwara State, Ilorin Division on a two-count charge of conspiracy to commit armed robbery and armed robbery contrary to Section 97 of the Penal Code and Section 1 (2) of the Robbery and Firearms (Special Provisions) Act Cap. R 11 Laws of the Federation of Nigeria (LFN) 2004 respectively. They were alleged to have robbed one Mrs. Ruth Alabi of the sum of N50,000 while armed with a locally made pistol on 18/8/2007 at Baba Oloya Street, Jebba, within the jurisdiction of the court. Each of the accused persons pleaded not guilty to each count of the charge. The prosecution called three witnesses and tendered exhibits while the appellants each testified on their own behalf and called no other witness. At the conclusion of the trial, the High Court on 26/9/09 found each of the accused persons guilty as charged on each of the counts. They were sentenced to two years imprisonment on the count of conspiracy and death by hanging on the count of armed robbery.

Being dissatisfied with their conviction and sentence they appealed to the Court of Appeal, Ilorin Division by their notice of appeal dated 12/5/2010. The Court of Appeal dismissed the appeal on 23/2/2012 and upheld the conviction and sentence passed on them by the trial court. They appealed to this court vide their original notice of appeal dated 23/3/2012. Subsequently they sought and obtained leave to file their Amended Notice of Appeal dated 26/7/

2012, which was deemed filed on 4/7/2013.

The 1st appellant's brief was settled by M. J. ONIGBANJO, ESQ. It was filed on 27/7/2012. The following two issues were formulated for the determination of this appeal:

B 1. Whether the bias demonstrated by the trial court against the 1st Appellant and his co-accused persons ought to have vitiated the entire trial? (Grounds 1 & 2)

C 2. Whether the offences of criminal conspiracy and armed robbery were proved beyond reasonable doubt before the trial court? (Grounds 3, 4 and 5)

The 2nd and 3rd appellants' brief of argument was settled by OLUMUYIWA AKINBORO ESQ. In the said brief filed on 30/10/2012 four issues were formulated thus:

D 1. Whether the statement of the learned trial Judge during the entire proceedings against the 2nd and 3rd appellants did not conclusively present the state of mind of the learned trial Judge towards the accused and thereby exhibiting bias against them and amounting to denial of fair hearing, which ought to have persuaded the learned Justices of the Court of Appeal as vitiating the entire trial.  
E (Grounds 1 & 2)

F 2. Whether the learned Justices of the Court of Appeal having found that Exhibits 4, 5 and 6 the confessional statements were wrongly admitted and that it was wrong for the trial court to have convicted the accused persons based on them ought not to have discharged and acquitted the 2nd and 3rd appellants. (Ground 3)

3. Whether the evidence of PW3 was not hearsay evidence on the issue of Exhibit 2. (Ground 5)

G 4. Whether the offences of criminal conspiracy and armed robbery against the 2nd and 3rd appellants were proved beyond reasonable doubt before the trial court. (Ground 6)

H The respondent's brief filed on 21/11/13 but deemed filed on 4/7/2013 was settled by KAMALDEEN AJIBADE ESQ., the Attorney General of Kwara state. He formulated two issues for determination to wit:

1. Whether the inadmissibility of Exhibits 4, 5 and 6 (Confessional statements of the appellants) was enough to vitiate the whole trial. (Grounds 1, 2 and 3)

2. Whether the Court of Appeal was right to have held that the

prosecution proved the offences of Criminal Conspiracy and Armed Robbery against the appellants beyond reasonable doubt. (Grounds 4, 5 and 6)

At the hearing of the appeal on 3/10/2013 learned counsel for the parties adopted and relied on their respective briefs of argument. Learned counsel for the appellants urged the court to resolve the appeal in their clients' favour, while learned counsel for the respondent urged the court to dismiss it. B

Having carefully examined all the issues formulated by the parties I am of the view that the following three issues are the issues that call for resolution in this appeal: C

1. Whether the alleged bias against the appellants by the learned trial Judge in the course of the trial within trial ought to have vitiated the entire trial? (1st appellant's and 2nd & 3rd appellants' Issue 1). D

2. Whether the appellants ought to have been discharged and acquitted upon the finding of the Court of Appeal that Exhibits 4, 5 and 6 were wrongly admitted in evidence. (2nd & 3rd appellants' issue 2 and respondent's issue 1).

3. Whether the offences of conspiracy and armed robbery were proved against the appellants beyond reasonable doubt? (1st appellant's issue 2, 2nd & 3rd appellants' issues 3 & 4 and Respondent's issue 2). E

The appeal shall be determined on these three issues. F

Issue 1

Whether the alleged bias against the appellants by the learned trial Judge in the course of the trial within trial ought to have vitiated the entire trial?

In support of this issue, learned counsel for the 1st appellant referred to page 70 of the record where in the course of ruling on the trial within trial to ascertain the voluntariness or otherwise of the alleged confessional statements of the accused persons the learned trial Judge made the following remarks:

*"The accused persons in their tutored (sic) position of wandering around their adhered style of telling lies in a desultory fashion..."* H

*"What could be observed on the 3rd accused (DW2) is an improved style of telling lies to block some loop holes created by his*

*comrade in crime*”.

He submitted that the reference to the appellants as “comrades in crime” and “liars” was highly prejudicial to the 1st appellant and demonstrated that he had little or no chance of enjoying the benefit of the doubt that he would otherwise have been entitled to.

B He submitted that a real likelihood of bias existed. He submitted that in such situations the likelihood of bias taints the entire proceedings and that contrary to the conclusion reached by the Court of Appeal it does not matter whether the proceedings were decided on the merit or not. He referred to: Pavex International Co. Ltd. v. I.B.W.A. C (1994) 5 NWLR (Pt. 347) 685 @ 701 G. He disagreed with the view of the learned Justices of the Court of Appeal that since that court had expunged the wrongly admitted statements from the record the utterances of the learned trial Judge became empty or hollow and at D best could be construed as merely obiter dicta.

He submitted that in determining whether or not an allegation of bias is made out, the important consideration is the impression created in the minds of right thinking members of the society. He relied on: Azuokwu v. Nwakanma (2005) 11 NWLR (Pt. 937) E 537 @ 551 E - F; Yakubu v. The State (2007) 9 NWLR (Pt. 1038) 1 @ 24 C - D.

He contended that having uttered the prejudicial statements in the course of the trial within trial it would be highly improbable that the learned trial Judge would have purged himself of the bias exhibited earlier by the time he returned to the substantive trial. He argued that the likelihood of bias could not be removed post trial with the expunging of the confessional statements by the Court of Appeal, the learned trial Judge having already heard and determined G the entire case with the alleged bias operating in his mind. He submitted further that it is of no consequence if the remarks of the learned trial Judge were made obiter or constitute the ratio decidendi in the case. He referred to the case of Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon (1969) QB 527 @ 599 wherein Lord Denning, MR. H stated inter alia that in considering whether there is a real likelihood of bias the court does not look at the mind of the justice himself but at the impression that would be given to other right-minded people observing the proceedings. He submitted that no matter how well the proceedings are conducted, once bias is established, any decision

reached therein is vitiated.

Learned counsel for the 2nd and 3rd appellants submitted that the learned Justices of the lower court erred in holding that the utterances of the learned trial Judge were mere obiter dicta and confined to the trial within trial proceedings. He contended that the state of mind of the learned trial Judge did not abate with the trial within trial proceedings but lasted throughout the trial and therefore denied the appellants their fundamental right of the presumption of innocence as provided for in Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (hereinafter referred to as the 1999 Constitution). He argued that by referring to the appellants as “comrades in crime” the learned trial Judge had already formed an opinion as to their guilt. He referred to: *Yakubu v. The State* (2007) 9 NWLR (1038) 1 @ 18 G, 19 E & 24 C - D. On the appellants’ right to fair hearing he referred to Section 36 (4) of the 1999 Constitution and cited the case of: *Mohammed v. Kano* (1968) 5 NSCC 325 @ 326 - 327; *Obadara & Ors. v. The President, Ibadan West District Council Grade B Customary Court* (1965) NMLR 39 @ 44.

Learned counsel submitted that the issue of bias cannot be compartmentalized to an aspect of the trial and that once it is established that there is a real likelihood of bias an appellate court would intervene. He referred to: *Azuokwu v. Nwakanma* (2005) 11 NWLR (Pt. 937) 537 @ 551 E also cited earlier by learned counsel for the 1st appellant. He submitted that the duty on the court to intervene is even greater in a capital offence where the life of the accused is at stake. He relied on: *Ijeoma v. The State* (1990) 6 NWLR (Pt. 158) 567 @ 586; *Nwosu v. State* (1986) 4 NWLR (Pt. 35) 348 @ 359.

In reply to the above submissions, the learned Attorney General reproduced in extenso the finding of the court below on this issue. He submitted that the allegation of bias was made in respect of the ruling of the learned trial Judge in the trial within trial on the voluntariness of Exhibits 4, 5 and 6. He submitted that the lower court expunged these documents from the record before affirming the judgment of the trial court based on the overwhelming evidence adduced by the prosecution.

He submitted that evidence of bias on the part of a trial Judge or tribunal other than on the basis of pecuniary interest, as in the instant case, must be clear, direct, positive and unequivocal from which

a real likelihood of bias could be inferred and not mere suspicion. He referred to: Hon. Justice Ayebe v. Hon. Justice Adesiyuba & Ors. (1997) 5 NWLR (Pt. 505) 403; Akoh v. Abuh (1988) 3 NWLR (Pt.85) 696. He submitted that there is no clear, positive, direct or unequivocal evidence upon which the allegation is premised other than the passing statement of the learned trial Judge. He conceded that the court is concerned not with the mind of the judge but with the impression created in the mind of a prudent, reasonable and right minded person in the circumstances of the case. He relied on: Onigbede v. Balogun (2002) 6 NWLR (Pt. 762) 1 @ 22 - 23. He asserted that the impression of any right minded person who had the opportunity of viewing and listening to the evidence led by the prosecution and defence would be no different from that of the learned trial Judge. He argued that this is why, in spite' of expunging Exhibits 4, 5 and 6, the lower court reached the same conclusion as the trial court.

Learned counsel submitted further that a trial within trial is independent and distinct from the substantive trial in criminal proceedings and therefore observations, conclusions and findings made therein ought not to be viewed within the context of the main trial. He referred to the dictum of Oputa, JSC in Garba & Ors. v. The University of Maiduguri (1986) 2 S.C. 128 @ 268. He noted that in a trial within trial oaths are taken afresh, witnesses are called and counsel address the court before a ruling is delivered. He submitted that the trial Judge is expected to examine the conduct of the witnesses before making his findings. He contended that whatever comments the learned trial Judge made in the trial within trial in relation to the confessional statements went with the decision of the lower court to expunge them.

From paragraphs 2.20 to 2.27 of his brief, learned counsel addressed the issues raised under issue no. 2, which was dealt with separately by the appellants. I shall consider these submissions when dealing with issue 2.

In considering this issue it must be stated at the outset that all the parties are ad idem as to the position of decided authorities on what amounts to bias or likelihood of bias.

In a case where the learned trial Judge is accused of bias either during the course of proceedings or after the delivery of judgment, the court considering the issue would be guided by the deci-

sion in cases such as *The Secretary Iwo Central LG v. Adio* (2000) 8 NWLR (Pt. 667) 115 where Ogundare, JSC at 133 F - G cited with approval the view of Lord Denning M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (1969) 1 QB 577 @ 599, as follows:

*“There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did in fact favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased’.”*

In *Womiloju v. Anibire* (2010) 10 NWLR (Pt. 1203) 545 @ 571 G - H, His Lordship, Adekeye, JSC considered the terms judicial bias” and “bias” as defined in Black’s Law Dictionary 8th edition thus: D

Black’s Law Dictionary defines judicial bias as -

*“A Judge’s bias towards one or more of the parties to a case over which the judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or refusal, the judge’s bias usually must be personal or based on some extrajudicial reason. In the case Kenon v. Tekam (2001) 14 NWLR (Pt. 732) 12 bias is defined as -*

*“An opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the court so influenced will be unable to hold an even scale.”* (Emphasis supplied) F

His Lordship went on to consider the test for determining the real likelihood of bias by referring, inter alia to the case of *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* (supra). Also in *Womiloju’s* (supra), I. T. Muhammad, JSC stated at page 566 G: G

*“The question [whether there is a real likelihood of bias is always answered by inference drawn from the circumstances of the case. The reason for this attitude of the court is that it would be unseemly for the court to purport to pry into the state of mind of any judicial officer. See Abiola v. Federal Republic of Nigeria (1995) 7 NWLR (405) 1.”* H

**The effect of these decisions is that where the conduct of a trial Judge is impugned, a court looking into the matter would be guided by the inference that could be drawn by an**

**ordinary bystander observing the proceedings. Applying the principles to the circumstances of this case, it is necessary to reiterate the fact that a trial within trial is a complete process in itself within the substantive trial. The trial court halts the main trial to conduct a mini trial specifically to determine whether or not a confessional statement allegedly made by an accused person was made voluntarily.** See *Adelarin Lateef & Ors. v. F.R.N.* (2010) 37 WRN 85 @ 107 lines 25 - 45; *Jimoh & Anor. v. The State* (2011) LPELR 4357 (CA) 1 @ 19 - 20 F - D. **As submitted by learned counsel for the respondents, the witnesses in a trial within trial are re-sworn. They testify, call additional witnesses if necessary, and tender exhibits; the witnesses are subjected to cross-examination and at the conclusion of the trial, counsel to the parties address the court. The court delivers a considered ruling on the voluntariness or otherwise of the statements sought to be tendered. In the course of delivering that ruling the court which had the opportunity of listening to and observing the witnesses for both sides, is obliged to give reasons for the conclusion reached. This will include the court opinion on the credibility of the witnesses.**

**An examination of the entire ruling shows that the learned trial Judge, after according the evidence led the necessary scrutiny, found that the appellants were not witnesses of truth and for this reason concluded that the statements attributed to them were made voluntarily. While the choice of language in the instant case leaves much to be desired, I am unable to agree with learned counsel for the appellants that the comments showed a likelihood of bias against the appellants in respect of the substantive trial. This issue is therefore resolved against the appellants.**

Issues 2 & 3

**Whether the appellants ought to have been discharged and acquitted upon the finding of the Court of Appeal that Exhibits 4, 5 and 6 were wrongly admitted in evidence?**

**Whether the offences of conspiracy and armed robbery were proved against the appellants beyond reasonable doubt?**

**These issues shall be considered together, as they are intertwined.**

Mr. Onigbanjo, learned counsel for the 1st appellant submitted that in affirming the appellants' convictions and sentences and holding that the offence of conspiracy was proved, the lower court relied on the evidence of PW3 to the effect that the 1st accused was arrested first and that he was the one who mentioned the names of the other accused persons. He submitted that having regard to the facts and circumstances of the case, PW3's evidence on how the appellants were arrested amounted to hearsay. On what amounts to hearsay, he referred to Section 37(a) of the Evidence Act 2011. He also relied on: FRN v. Mohammed Usman (alias Yaro Yaro) & Anor. (2012) LPELR SC. 28/2011 @ 17. He submitted further that since the fact of the 1st appellant's arrest and his subsequent implication of the other appellants in the commission of the offence was contained in the rejected confessional statements, the main plank upon which the lower court based its finding on "agreement of minds" between the appellants has been destroyed. He submitted that the lower court ought to have discharged and acquitted the appellants on the count of conspiracy.

On the charge of armed robbery, relying on the case of Attah v. The State (2010) 10 NWLR (Pt. 1201) 190, learned counsel submitted that in order to secure a conviction the prosecution must prove beyond reasonable doubt that there was a robbery; that the robbery was an armed robbery and that the accused took part or was one of those who took part in the armed robbery. He submitted that the prosecution failed to prove the charge against the 1st appellant beyond reasonable doubt. He submitted that the Court of Appeal erred in relying on testimony based on confessional statements, which it had expunged from the record. He referred to the evidence of PW2 at page 251 of the record.

He also referred to alleged inconsistencies in the evidence of PW3 (the complainant) regarding, among other things, the number of guns used in the commission of the offence; the exact amount of money stolen from her; the description of the clothes worn by the appellants; and where and how the appellants were arrested. He disagreed with the position of the lower court that the said contradictions were not material enough to warrant the setting aside of the decision of the trial court. He submitted further that the evidence of PW3 regarding the recovery of the gun (Exhibit 2) was hearsay while

the evidence of PW2 in respect of the same issue was based on the 1st appellant's alleged confessional statement, which had since been expunged by the lower court. He submitted that in the absence of any evidence linking the 1st appellant with possession or ownership of Exhibit 2, a crucial ingredient of the offence (i.e. that the robbery  
B was an armed robbery) was missing and therefore the prosecution had failed to establish its case against the 1st appellant beyond reasonable doubt.

It was argued on behalf of the 2nd and 3rd appellants that  
C once the confessional statements, Exhibits 4, 5, and 6 were expunged from the record there was no surviving evidence upon which to base their conviction. Learned counsel, Mr. Akinboro, observed that PW1 (the exhibit keeper) only testified in respect of the exhibits in his custody and admitted under cross-examination that he was not present  
D when the appellants were arrested. He contended further that the evidence of PW2 (the investigating police officer) was essentially to corroborate the contents of Exhibits 4, 5 and 6 and that once the lower court had expunged those exhibits his evidence ceased to have any value. He referred to aspects of PW2's evidence that indicated  
E that he did not conduct a proper investigation once the 1st accused person allegedly confessed that he shot the gun.

He argued that if this court agrees that the evidence of PW1 and PW2 was lacking in substance, the only evidence upon which  
F the conviction of the appellants could be upheld or quashed is the sole, uncorroborated evidence of PW3 (the complainant). While conceding that the court could safely base a conviction upon the evidence of a single witness, he submitted that such evidence must be of sufficient probative value. He referred to: Mohammed v. State (1991)  
G 5 NWLR (Pt. 192) 438 @ 451; Igbo v. State (1975) 9 - 11 SC 129. He submitted further that such evidence must be of such quality that it could only lead to a conclusion of the accused person's guilt.

On the quality of evidence required to prove a charge beyond reasonable doubt he referred to: Akalezi v. The state (1993) 2 NWLR  
H (pt.273) 1; Bakare v. The State (1987) 1 NWLR (Pt. 52) 579 @ 595. He contended that the evidence of PW3 is full of contradictions and that the court cannot rely on it to convict the appellants in the absence of corroboration. He referred to various aspects of PW3's evidence, which in his view, demonstrated inconsistency and lack of

credibility, some of which were highlighted earlier by learned counsel for the 1st appellant. He urged the court to discountenance her evidence and discharge and acquit the appellants. He contended that the learned Justices of the lower court erred in law when, having rejected and overturned the decision of the trial court on the admissibility of the confessional statements, it proceeded to rely on the testimony of one of the witnesses, founded on the rejected statements, to uphold the conviction. B

He made similar submissions as those made by learned counsel for the 1st appellant on the issue of alleged hearsay evidence given by PW3 regarding the circumstances of the arrest of the 1st appellant and the recovery of Exhibit 2. On the need for a witness to testify in respect of matters within his personal knowledge and what amounts to hearsay evidence, he cited the cases of: *Utteh v. The State* (1992) 2 NWLR (Pt. 223) 257 @ 273; *Judicial Service Commission v. Omo* (1990) 6 NWLR (Pt. 157) 407; *Adekea v. Vattia* (1987) 1 NWLR (Pt. 48) 134; *Jolayemi v. Alaoye* (2004) 12 NWLR (Pt. 887) 322 @ 341; *James v. Nigerian Air Force* (2000) 13 NWLR (Pt. 684) 406 @ 422. C D

He observed that PW3'S son who allegedly saw the gun (Exhibit 2) drop from 1st appellant and apprehended him was not called to testify and therefore the evidence of PW3 regarding the recovery of the gun amounted to hearsay and was inadmissible. He submitted further that PW3's son was a material witness and that failure to call him to testify in proof of the fact that the robbery was an armed robbery was fatal to the prosecution's case. He relied on: *Usufu v. The State* (2007) 1 NWLR (Pt. 1020) 94 @ 118 C - D. On the failure of the prosecution to call PW3's son to testify, learned counsel urged us to invoke the provision of Section 167 (d) of the Evidence Act G 2011 against it and to presume that his evidence would have been unfavourable. He contended that having failed to prove the charge of armed robbery against the appellants the best that they could be convicted of is the offence of robbery. He submitted that in the circumstances the death sentence imposed on them ought to be commuted to 21 years imprisonment. H

On proof of the offence of conspiracy, learned counsel referred to Section 96 of the Penal code, which defines "conspiracy" as follows:

*“When two or more persons agree to do or cause to be done:  
a. an illegal act; or  
b. an act which is not illegal by illegal means.  
Such an agreement is called conspiracy.”*

B He conceded that proof of the offence of armed robbery  
against the appellants beyond reasonable doubt would sustain a con-  
viction for the offence of conspiracy to commit the offence on the  
ground that proof of the offence charged is proof of confederacy by  
the accused persons to commit the said offence. He however con-  
C tended that the essential ingredients of the offence were not proved  
beyond reasonable doubt. He maintained his earlier submission that  
once Exhibits 4, 5 and 6 were expunged from the record there was  
no evidence left upon which to base the conviction of the appellants  
for armed robbery. He submitted that the numerous doubts created  
D in the mind of the court by the evidence of PW3 ought to be re-  
solved in the appellants’ favour.

He relied on: Opara v. The State (2006) 9 NWLR (pt. 986)  
508 @ 527; Obiosa v. Nigeria Air Force (2000) 12 NWLR (Pt. 680)  
112; Abdullahi v. The State (2008) 17 NWLR (Pt. 1115) 203 @ 221  
E - 222; Attah v. The State (supra). He submitted that in the circum-  
stances the conviction and sentences of the appellants are liable to be  
set aside and they are entitled to be discharged and acquitted. He  
referred to: Egbe v. King (1950) 13 WACA 105; Alonge v. IGP (1956)  
F SCNLR 516.

As noted earlier learned counsel for the respondent addressed  
the issue of the fate of the prosecution’s case upon Exhibits 4, 5 and  
6 being expunged in paragraphs 2.20 - 2.27 of his brief under issue  
1. He submitted that having regard to the “irresistible” evidence led  
G by the prosecution coupled with the fact that the appellants merely  
asserted that they did not commit the crime without specifically de-  
nying any of the direct evidence led against them, the learned trial  
Judge had no alternative than to find the appellants guilty as charged  
and convict them accordingly. He submitted that, contrary to the  
H submission of learned counsel for the appellant, the evidence of PW1  
and PW2 was not based on the expunged statements but on their  
respective actions and findings in the course of the investigation. He  
submitted that their evidence was admissible and corroborated the  
evidence of PW3. He submitted that the appellants neither denied

nor rebutted the evidence of PW2 as to what he saw and observed at the scene of crime, He referred to several authorities and submitted that in the circumstances the learned trial Judge was entitled to rely on the evidence.

I now return to learned counsel's arguments in opposition to the submissions of learned counsel for the appellants in respect of issues 2 and 3, which are being considered together. On proof of conspiracy learned counsel referred to the judgment of the lower court at pages 247 - 248 of the record wherein the learned Justices reviewed the evidence on the point and concluded that the offence of conspiracy had been proved beyond reasonable doubt. He also referred to the finding of the learned trial Judge at pages 120 - 122 of the record. He urged this court not to disturb the two concurrent findings of fact on the issue.

He submitted that the prosecution need not prove that the conspirators met before carrying out their illegal act, as long as evidence is led from which the court could draw the inference of certain criminal acts done in pursuance of an apparent criminal purpose in common between them. He cited a recent decision of this court in support of his submission: *Onyenye v. The State* (2012) ALL FWLR (Pt. 643) 1810 @ 1832 - 1833. He also referred to: *Iwuneye v. State* (2000) 5 NWLR (Pt. 658) 550 @ 560 - 561; *Osondu v. FRN* (2000) 12 (Pt. 682) 483 @ 501 - 502. He submitted further that from the evidence of PW3 facts and circumstances surrounding the incident demonstrate all the necessary ingredients of conspiracy. He urged us to uphold the finding of the lower court that the offence of conspiracy was proved beyond reasonable doubt.

In reaction to the contention of learned counsel for the appellants that the evidence of PW3 was hearsay, learned counsel referred to her testimony at page 97 of the record. He submitted that having been confronted by the appellants before they ran away she was able to identify them owing to the light in front of her house, which was on at the time. He submitted that PW3's identification of Exhibit 2 could also not amount to hearsay because from her evidence it was the weapon used to attack her and deprive her of her possessions. He submitted that her evidence in response to questions put to her during cross-examination revealed that the gun was pointed directly at her.

On the contention that the prosecution failed to prove that the robbery was an armed robbery he referred to the concurrent findings of fact of the two lower courts as contained at pages 114 - 120 and 251 - 256 of the record and urged this court not to disturb the findings. He submitted further that proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. He submitted that the requirement of Section 138 (1) of the Evidence Act is that the prosecution must prove that an offence has been committed and that no other person other than the accused committed the offence. He submitted that the absence of reasonable doubt does not mean certainty of truth but a high degree of probability that the accused committed the offence. He cited the case of: *Miller v. Minister of Pension* (1947) 2 ALL ER 371 @ 373 per H. Denning, J. (as he then was), and adopted by this Court in *Ilori v. State* (1980) 8 - 11 SC 81 @ 99; *Akalezi v. State* (1993) 2 NWLR (Pt. 273)1@ 13 C - D.

He submitted that the cogent and compelling direct evidence against the appellants, particularly the evidence of PW3, met the required standard of proof beyond reasonable doubt. He submitted that in the circumstances although there was no duty on the appellants to prove their innocence, the facts required some explanation from them. He referred to: *Adepetu v. The State* (1998) 9 NWLR (Pt. 565) 185 @ 207. He noted that each of the appellants merely testified that he did not commit the offence without more. He was of the view that failure to react to the damning evidence against them left the trial court with no alternative than to convict them as it did. In reaction to the contention of learned counsel for the 1st appellant that the lower court relied on the expunged statements in making its findings, learned counsel referred to page 251 of the record and submitted that the lower court based its findings on the testimony of PW2 as to his observations in the course of the investigation and not on the contents of the expunged statements.

On the contention that there were discrepancies in certain aspects of the prosecution's case learned counsel submitted that for such discrepancies or alleged contradictions to be fatal to the prosecution's case they must be substantial. He referred to: *Shurumo v. The State* (2010) 16 NWLR (pt. 1218) 65 @ 81; *Abogede v. The State* (1996) 5 NWLR (Pt. 448) 270; *Nasiru v. The State* (1999) 2 NWLR (Pt. 589) 87. He submitted that the alleged discrepancies are

characteristic of a true story as opposed to a rehearsed tale. On the distinction between contradiction and discrepancies in the evidence of witnesses he referred us to the case of: Jerry Ikuepenikan v. The State (2011) 1 NWLR (Pt. 1229) 449 @ 454. He urged us to discountenance the submissions of the respective learned counsel in this regard and to resolve the appeal in favour of this respondent. B

It is the contention of learned counsel for the appellants that having expunged the confessional statements, Exhibits 4, 5 and 6, there was no credible evidence left upon which the lower court could have based its decision to uphold the convictions and sentences passed on the appellants by the trial court. It is therefore necessary to consider the findings of the lower court vis-à-vis the evidence on the record before the trial court. C

Section 96 of the Penal Code, which defines “criminal conspiracy”, has been reproduced earlier in this judgment. It is trite that conspiracy is seldom proved by direct evidence. In Obiakor v. State (2002) 6 SC (part II) 33 @ 39 - 40 this court held, per Kalgo, JSC: D

*“Conspiracy as an offence is the agreement by two or more persons to do or cause to be done an illegal act or legal act by illegal means. The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed. Because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved acts.”* (Emphasis mine) E

On the nature of proof required to establish criminal conspiracy, Achike, JSC had this to say in Oduneye v. The State (2001) 1 SC (Part I) 1 @ 6 - 7: F

*“A conviction for conspiracy is not without its inherent difficulties. ...a successful conviction for conspiracy is one of those offences predicated on circumstantial evidence which is “evidence not of the fact in issue but of other facts from which the fact in issue can be inferred. ...Evidence in this connection must be of such quality that irresistibly compels the court to make an inference as to the guilt of the accused.”* (Emphasis mine). See also: Patrick Njovens v. The State (1973) 5 S.C. 17; Dabo & Anor. v. The State (1977) 5 SC 22; Kaza v. The State (2008) 1 - 2 SC 151 @ 164 - 165; Onyenye v. The State (2012) ALL FWLR (Pt. 643) 1810. G H

In challenging the judgment of the lower court on proof of

conspiracy, learned counsel for the 1st appellant referred to a portion of the judgment from page 247 line 22 to page 248 line 2 of the record, wherein the court quoted the evidence of PW3 regarding the arrest of the appellants, and submitted that the said evidence was hearsay and therefore inadmissible. The portion of the judgment referred to reads thus:

*“Under cross-examination she answered: ‘It was the 1st accused who was first arrested before he mentioned the names of the other accused persons’.”*

It is noteworthy that the portion of the judgment complained of is not a reflection of the entire finding of the court on the issue. Before considering the evidence of PW3 given under cross-examination, the lower court reproduced part of her evidence in chief, starting from page 247 line 14 as follows:

*“On 18/8/07 at about 9.30 pm I was coming from my shop to my house when I took a motor bike home being ridden by a motor cyclist. As I came down on the motor cycle, I moved 2 (two) steps on the stair case and I saw the attackers with gun pointed at me. They asked if I will surrender my bag with money or my life. The people who attacked me are the accused persons standing trial. They snatched the bag from me and I started shouting as I ran to the door...”*

Having reviewed the evidence of PW3 the lower court held at page 248 lines 3 - 22 of the record:

*“It can be gleaned from these pieces of evidence, particularly the underlined portions, that the appellants had an agreement or confederacy, overt or covert, to attack or rob the victim, PW2 (sic). This is demonstrable from the meteoric manner they swooped on the victim contemporaneously with their lethal club or weapon to dispossess her of her bag. Their joint or communal attack on their prey, the victim indicated that they were consensus ad idem prior to the onslaught on her. Their concurrent close in for the PW3 was not spontaneous or a fluke. Moreover the bald fact, based on the evidence, that the first appellant, mentioned the names of the other appellants shows that they had a previous unlawful pact over the attack on PW3 otherwise he (sic) would not have mentioned their names. Although they are not direct evidence of conspiracy they are impregnable and point irresistibly to the guilt of the appellants vis-à-vis the crime of conspiracy. To give greater verve to these pieces of*

*evidence they are both unchallenged and uncontroverted viva voce testimony.*”(Emphasis mine)

It is evident from the reasoning of the court reproduced above that the lower court did not rely solely on PW3’s evidence that the 1st appellant was arrested first and that it was he who gave the names of the other appellants. The court took into consideration the fact that PW3’s evidence as to how she was attacked by three persons at gun point, raised the inference that there must have been a meeting of the minds between them and that the attack was neither spontaneous nor a fluke. It was on this basis that the lower court upheld the finding of the trial court that the offence of conspiracy had been made out by the prosecution. Thus even if it were conceded that the evidence elicited from PW3 under cross-examination was hearsay and therefore inadmissible, her evidence in chief ‘stating how she was robbed and her vivid account of the incident was sufficient proof of the offence of conspiracy.

Furthermore, I do not agree with the contention that PW3’s evidence regarding the 1st appellant’s arrest amounts to hearsay. The lower court at page 253 of the record referred to her evidence under cross-examination where she stated inter alia:

*“I was already at the police station before the accused persons were arrested. It was the 1st accused who was first arrested before he mentioned the names of the other persons.”*

The evidence indicates clearly that although PW3 was not present when the appellants were arrested she was already at the police station when the 1st appellant was brought in. Her testimony that he was arrested first before the other two appellants is therefore direct evidence of what she personally observed. That evidence has not been rebutted. She identified the appellants as the persons who acted in concert and attacked her on the fateful day. It was contended by learned counsel for the 2nd and 3rd appellants that PW3 was only able to identify the appellants because they were pointed out to her by the police, as she had admitted under cross-examination that she did not know them before the incident. This issue was raised at the court below. In resolving it the lower court held at page 255 of the record:

*“From the evidence, PW3 saw the appellants who pointed gun at her and snatched her bag at Baba Olaya, Jebba, the locus criminis.*

*She identified them because the locus criminis was lit or illuminated by the electric light in her house and her surrounding milieu, which made her recognize them at the Jebba Police Station. There is evidence that the first appellant was arrested and handed over to the Police Divisional Headquarters, Jebba and he acted as a pointer to the apprehension of the second and third appellants. That confirmed that the appellants were associates-in-the-crime regarding the armed robbery. She was never shaken in her evidence that she was robbed with a gun on 18/8/2007. Her evidence further unveiled the colour of the dresses two of them wore on that fateful day - one wore white while the other was clad in red colour attire, short sleeve. PW1 gave unchallenged evidence of how the second appellant took them to where he kept the bag they collected from PW3."*

***It is not in every case that an identification parade must be held to determine the identity of the persons (s) who commit a, crime. For instance where a suspect is caught at the scene of crime or at a place closely connected with the scene of crime, it would not be necessary to conduct an identification parade. It would also not be necessary where by his confession, an accused person identified himself or where there is circumstantial evidence showing his involvement in the commission of the offence. See: Ikemson v. The State (1989) 3 NWLR (Pt. 110) 455; Ebenehi v. The State (2008) 10 NWLR (Pt. 1096) 596 at 607 G - H. From the facts of the instant case, the appellants were arrested shortly after the commission of the offence, at a time when PW3's memory was still fresh. Furthermore she had the opportunity of seeing them clearly when they pointed a gun at her since the unchallenged evidence is that her house was illuminated at the time.***

***It is trite that the evidence of single witness could be sufficient to ground a conviction where the evidence is credible, cogent and of high quality so long as the evidence is not required to be corroborated. See: Oguonzee v. The State (1998) 5 NWLR (Pt. 551) 521; (1998) 4 SC 110; Effiong v. The State (1998) 8 NWLR (Pt. 562) 362; (1998) 5 S.C. 136. In the instant case, notwithstanding the expunging of Exhibits 4, 5 and 6, there was sufficient cogent and credible evidence before the trial court to establish the offence of conspiracy against each of the appellants. Where there***

are concurrent findings of fact by two lower courts, this court would not interfere unless the appellants can show that the findings are perverse, not supported by the evidence, that there is a wrongful application of the law or that there has been a miscarriage of justice. See: Igwego v. Ezeugo (1992) 6 NWLR (Pt. 249) 561; (1992) 7 SCNJ 284; Okoye v. Obiaso (2010) 8 NWLR (Pt.1195) 145; Cameroon Airlines v. Otutuizu (2011) 1 - 2 SC (Pt. III) 200. The appellants herein have failed to show that any of the named circumstances exist to warrant interference by this court.

***With respect to the charge of armed robbery, the law is settled that in order to secure a conviction the prosecution must prove the following beyond reasonable doubt:***

- a. That there was a robbery or series of robberies.***
- b. That each of the robberies was an armed robbery.***
- c. That the accused person was one of those who took part in the armed robbery.***

See: Bozin v. The State (1985) 2 NWLR (8) 455; Afolalu v. The State (2010) 15 NWLR (Pt.1220) 584; Eke v. The State (2011) 3 NWLR (Pt. 1235) 589; Bello v. The State (2007) 10 NWLR (Pt. 1043) 564.

***The fact that there was a robbery on 18/8/2007 at Jebba in Moro Local Government Area of Kwara State is not in dispute, which satisfies the first ingredient above. Learned counsel for the respective appellants however contend that the prosecution failed to prove the other two ingredients of the offence beyond reasonable doubt. As to whether or not the robbery was an armed robbery learned counsel for the appellants have laboured to assert that this ingredient of the offence could only be established by linking the gun, Exhibit 2, to any of the appellants. In order to secure a conviction for armed robbery, the prosecution must prove that the accused person was armed with an offensive weapon. The weapon may be a gun or any other object likely to induce fear of bodily harm in the victim such as a cutlass or machete.***

***Where a gun or other offensive weapon is used in the commission of an offence, it is not essential to tender the weapon to secure a conviction, provided there is cogent eye witness evidence or in the absence of eye witness evidence,***

***there is enough unequivocal circumstantial evidence that points to the guilt of the accused.*** See: Alor v. the State (1996) 4

NWLR (Pt. 445) 726 @ 742-743 H - A. In the case of Dibie v. The State (2004) 14 NWLR (Pt. 893) 257 @ 280 - 281 H - A, it was held that whether it was a real pistol or something that looked like a pistol that was pointed at the witness was immaterial. What was material was that either an actual pistol or what looked like a pistol was used to threaten the witness and induced fear in her. See also: Sele v. State (1993) 1 NWLR (Pt. 269) 276.

In the instant case the lower court reviewed the evidence of PW3 both in chief and under cross-examination to the effect that a gun was pointed at her during the robbery and the threat of the robbers to kill her if she failed to comply with their demands. Also considered was her evidence that after being threatened at gun point they snatched her bag and left. With regard to the evidence of PW2, the court, at page 251 of the record, reproduced the following excerpt of his testimony:

*"I visited the scene of crime with both complainant (and) accused persons. At the scene of crime I discovered that the house of the 3rd accused is very close to the house of the complainant corroborating the evidence of the statement of the 1st accused that the 3rd accused withdrew to avoid recognition. The 2nd accused took us to where he abandoned the bag he collected from the victim when he was running away. My investigation revealed that the 3rd accused persons did rob the complainant on gun point."* (Emphasis mine)

The lower court found as follows at page 254 of the record:

*"Flowing from the above excerpts of the evidence of PW2 and PW3, it is crystal clear that the PW3, a food vendor, was robbed by the appellants on 18/8/2007 around 9.30 pm in front of her house at Baba Oloya, Jebba and dispossessed of her bag containing some money. There is no better evidence of robbery than the ones offered by the respondent."*

*Furthermore the testimonies show case that the robbery or larceny was armed robbery in the sense that the theft on the PW3, the victim, was actuated by the use of a locally made pistol, received in evidence as Exhibit 2. ... The pointing of the locally made pistol on PW3 by the appellants, from his evidence, rattled and instilled fear of losing her life in her. Hence PW3, who was a stranger to the likes of*

*Exhibit 2, since her birth, was scared and obeyed the appellants in order to preserve her precious and priceless life. ...From the evidence, PW3 saw the appellants who pointed gun at her and snatched her bag at Baba Olaya, Jebba, the locus criminis."*

The salient point here is that the evidence of PW3 that a gun was pointed at her during the robbery incident, which made her relinquish her handbag containing some amount of money was not controverted and remained unshaken under cross-examination. She testified that upon hearing her shout, her husband and son came out and pursued the robbers and that it was while her son, Sunday, was pursuing the 1st appellant that he (1st appellant) dropped the gun. Since she did not join in the pursuit of the robbers, it is correct, as contended by learned counsel for the 2nd and 3rd appellants that she could not have been present when the gun was recovered. Her evidence regarding the circumstances in which the gun was recovered is indeed hearsay and inadmissible. However, from her testimony she was able to describe and identify Exhibit 2 because she saw it at close range. Both the trial court and the court below found her evidence in this regard to be cogent and convincing. I see no reason to disturb their finding in this regard.

Learned counsel for the 2nd and 3rd appellants has argued that failure to call Sunday as a witness was fatal to the prosecution's case and urged us to invoke Section 167(d) of the Evidence Act 2011 against the prosecution and hold that his evidence would have been unfavourable. It must be noted here that Section 167 (1) of the Evidence Act 2011 deals with withholding evidence and not the failure to call a particular witness.

***In any event the law is quite well settled that it is not every available witness that must be called to testify in a case so long as those who do testify are able to discharge the burden of proof in the case being made out by a party. In other words, the evidence of the witness or witnesses in a criminal trial must be sufficient to prove the case beyond reasonable doubt.*** See: Aliyu v. The State (2013) LPELR-SC.104/2011 @ 18 B - G; Akalonu v The State (2002) 6 SC (Pt. II) 107 @ 112 - 113; Alonge v. I.G.P. (1959) 4 F.S.C. 203. In the instant case the lower court was right when it held that Sunday's evidence was not vital in establishing whether the robbery was an armed robbery or not, par-

particularly as he did not witness the robbery but only gave chase after he heard his mother's shout.

A lot of dust has been raised regarding the reliance by the lower court on the evidence of PW2 wherein he stated that upon investigation he discovered that the 3rd appellant's house was close to PW3's house, and that his discovery corroborated certain statements made in the alleged confessional statement of the 1st appellant, already expunged by that court. It is important to note that the lower court considered the entirety of the evidence before the trial court and did not rely solely on this aspect of PW2's testimony. PW2 stated categorically that the 2nd appellant took the team to the place where he abandoned the bag he collected from the victim when he was running away.

This evidence when considered alongside the evidence of PW3 as to how her bag was snatched from her after being threatened at gun point, leaves one in no doubt that the robbery was an armed robbery. The appellants have failed to show that the findings of the two lower courts in this regard are perverse. Therefore the fact that Exhibits 4, 5 and 6 were expunged did not prevent the lower court from considering the case on its merits and making appropriate findings. As observed earlier there was sufficient evidence outside the confessional statements upon which the lower court could base its findings.

The third ingredient of the offence of armed robbery is whether the appellants were those who robbed PW3 or were among those who committed the offence. Both learned counsel for the respective appellants argued that there were many contradictions in the evidence of the prosecution witnesses, material enough to warrant the setting aside of their convictions and sentences. Some of the alleged contradictions are as follows:

1. That whereas in her evidence in chief PW3 stated that a gun was pointed at her, under cross-examination she stated that the robbers pointed two guns at her from both sides.
2. That while she stated in her evidence in chief and in her statements to the police (Exhibits 7 and 7A) that the robbers collected N50,000 from her, under cross-examination she stated that the amount was N40,000.
3. That she was unable to state the colour of the clothes worn

by her attackers

4. That having stated that she was 40 years old, her testimony that her first son was 30 years old could not be true.

5. That PW2 and PW3 contradicted each other regarding the location where the 1st appellant was arrested.

6. That the prosecution failed to link Exhibit 2 to the 1st appellant having regard to the fact that PW2 relied on the 1st appellant's alleged confession and the said statement had been expunged.

***The law is that it is only material contradictions in the case of the prosecution that will raise a doubt, the benefit of which ought to be resolved in favour of the accused. It is only contradictions that are substantial and fundamental to the main issue in question that would be fatal to the prosecution's case. For a contradiction to be material it must not only relate to a material fact, it must in addition lead to a miscarriage of justice.*** See: Dibia v. The State (2004) 14 NWLR (Pt. 893) 257 at 280 A - D; Ikemson v. The State (1989) 2 NSCC (Vol. 20) 471; Onubogu v. The State (1974) 1 All NLR (Part II) 5; Okonji v. The State (1987) 1 NWLR (Pt. 52) 659; Shurumo v. The State (2010) 10 NWLR (Pt.1218) 65 @ 81.

The lower court reviewed the alleged contradictions referred to above at pages 256 - 261 of the record and held, rightly in my view, that they are not material and do not detract from the facts established by the prosecution beyond reasonable doubt, to wit: that there was a robbery on 18/8/2007, that the robbers were armed with an offensive weapon, that in the course of the robbery some money was stolen from PW3 and that the appellants were the ones who carried out the armed robbery.

In concluding its judgment the lower court held at pages 267 - 268 of the record:

*"When those improperly received exhibits (Exhibits 4, 5 and 6) are excluded from the case, the unchallenged, uncontroverted and credible eye witness evidence of PW3 clearly demonstrated and fixed the appellants as the perpetrators of the heinous and rampant offences of criminal conspiracy and armed robbery leveled against them. Put starkly, the absence of Exhibits 4, 5 and 6 does not exculpate the appellants when the direct testimonies of PW3 establish be-*

*yond reasonable doubt their culpability for those offences of criminal conspiracy and armed robbery that are menaces to the fragile Nigerian society. In the circumstance I would be loath to upset the judgment of the lower court since the expunction of those exhibits has left it, the judgment, unscathed."*

B In consequence thereof the lower court dismissed the appeal and affirmed the convictions and sentences of all the appellants. I find no reason to disturb the said finding and conclusion. Issues 2 and 3 are accordingly resolved against the appellants. In effect the appeal lacks merit and is hereby dismissed. The judgment of the Court of Appeal, Ilorin Division delivered on 23/2/2012 upholding the convictions and sentences of the appellants for conspiracy and armed robbery is hereby affirmed.

D

### **ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead judgment of my learned brother KEKERE-EKUN, JSC just delivered.

E I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

F The inadmissibility of exhibits 4, 5 and 6 which were the confessional statements of the appellants herein, is not enough or sufficient to vitiate the conviction and sentence of the appellants for the offences charged as there are sufficient independent evidence on record to sustain the conviction. Where a conviction of an accused person is not based solely on an inadmissible or expunged confessional statement, but also on independent pieces of evidence which, in effect, corroborate the expunged confessional statement(s) as in the instant case, the conviction and sentence can be, and is in effect, sustained by the independent evidence on record.

G It is only where the conviction is based solely on the expunged confessional statement that the conviction and sentence is vitiated as there will be no evidence to support the charge.

H It is for the above and the detailed reasons contained in the said lead judgment of my learned brother that I too dismiss the appeal. Appeal dismissed.

**NGWUTA JSC**

I have read in draft the lead judgment of my learned brother, Kekere-Ekun, JSC. I adopt the lucid and exhaustive reasoning and conclusion reached and based on same; I also dismiss the appeal for want of merit.

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