

SUPREME COURT OF NIGERIA
FRIDAY 14TH FEBRUARY, 2014. SC. 319/2011
CORAM:- J. A. FABIYI, B. RHODES-VIVOUR, M. U. PETER
ODILI, M. D. MUHAMMAD, J. I. OKORO, JJSC

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

EVIDENCE - Evaluation - It is within the powers of trial court to assess credibility of witnesses - And where its evaluation is borne out from evidence on record - Appellate court cannot interfere - Even if it concludes that trial court should have acted differently (H1)

APPEALS - Evidence - Re evaluation - Where trial court failed to properly evaluate evidence - Appellate court is competent to re evaluate - In order to obviate miscarriage of justice (H2)

CRIMINAL PROCEDURE - Conviction - Confession - Validity - Once it is satisfied about truth therein - Court can safely and without corroboration - Convict on voluntary confession which is direct and positive (H3)

COURTS - Obiter dictum - Definition - It is by the side remark made by Judge in his decision upon a case - Which remark is incidental and not directly upon the question before the court (H4)

APPEALS - Court - Erroneous finding - CA finding that appellant's ground of appeal and issues therefrom - Which query trial court's non consideration of appellant's defence of marriage are incompetent - Is an error to appellant (H5)

CRIMINAL PROCEDURE - Defence - Consideration of - Court has duty to fairly consider defence raised by accused - However stupid or conflicting the defence is (H6)

APPEALS - Judgment - Errors in - Effect - Not all errors result in

setting aside judgment - As it is only those errors that caused miscarriage of justice - That entitle appellant to success in the appeal (H7)

FACTS

Accused/appellant along with 1st accused (in the trial court) was arraigned before the High Court of Imo State on a two count charge of Conspiracy and Armed Robbery contrary to sections 5(b) and 1(2) of the Robbery & Firearms (Special Provisions) Act Cap. 398 LFN 1990, respectively. They pleaded not guilty to each count charge. Prosecution/respondent's case is that three armed men including 1st accused, attacked the residence of PW1 who arrived Nigeria from United States of America for the Christmas and memorial service of his late wife. Prior to the memorial service, appellant and 1st accused (appellant's alleged husband) visited and were seen at PW1's compound by PW1. During the armed robbery operation and due to the fact that the compound was well illuminated, PW1 was able to identify the person of appellant whom he had met twice before the robbery incidence. The armed men successful robbed PW1's residence and made away with their loot. Subsequently, PW1 sighted 1st accused at a market square while trying to board a vehicle. The police was alerted and 1st accused was promptly arrested. After his arrest, he took the police to the house of appellant from who PW1's personal items were recovered. PW1 equally identified appellant, having met her in the past. Guns and other dangerous weapons were also recovered from the various residence of appellant and 1st accused. Their confessional statements were accordingly taken by the police.

At the trial, appellant and 1st accused who claimed to be married each gave evidence and called no witness. Appellant denied committing the crime and disputed the recovery of PW1's property from her. 1st accused also denied involvement in the crime. Both of them alleged that the police had tortured them while recording their statements. Appellant and 1st accused in effect challenged the voluntariness of their confessions i.e. Exhibits 7, 8 and 9. The court conducted a trial within trial to ascertain the voluntary nature of the confessions. The confessions were admitted in evidence at the end of the mini trial. At the end of the full trial, the court disbelieved the alleged marriage between appellant and 1st accused and held that

they were partners in crime. Appellant and 1st accused were thus found guilty as charged. They were accordingly convicted and sentenced to death. Dissatisfied, appellant appealed to the Court of Appeal Owerri Division against both the interlocutory ruling admitting her confession and the final decision convicting and sentencing her of the offences charged. The court heard and dismissed the appeal. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

3.01. Whether the lower court was right in deciding that despite the provisions of Section 36(11) of the 1999 Constitution and Section 160(a) of the Evidence Act, the confessional extra-judicial statement said to be made by the Appellant which she resiled from, was still admissible in law.

3.02. Whether the lower court's decision in striking out the issues before it relating to the marriage between Appellant and 1st Accused Person, on the ground that the trial court's pronouncement on same was obiter, is correct.

3.03. Whether the lower court was right in its decision that Exhibits 1, 2, 5 and 6 properly corroborated Exhibit 7 and together proved the guilt of the Appellant of the offence charged. (Derived from Ground Four of the Grounds of Appeal.)

HELD (Unanimously dismissing the appeal per MUHAMMAD JSC)

EVIDENCE - Evaluation

1. Firstly, the decision on the voluntariness or otherwise of appellant's confessional statement, Exhibit "7", unarguably requires the trial court's assessment of the credibility of the witnesses who testified on the matter. The principle has not changed from what the lower court in its foregoing finding holds it to be.

It was the trial court that saw the witnesses during trial and heard their testimonies. This afforded the trial court the opportunity of observing the demeanour and idiosyncrasies of the witnesses. In evaluating the evidence of the witnesses, the trial court is expected to make full use of the opportunity

it had of seeing and observing the witnesses in the course of their testimonies and having regard to applicable law and common sense arrive at the conclusions a reasonable tribunal in that circumstance will arrive at.

It remains within the purview and competence of the trial court, therefore, for obvious reasons, to first evaluate evidence of witnesses. The trial court does not share this jurisdiction with the appellate court and where its evaluation is borne out from the evidence on record, an appellate court cannot interfere in such a circumstance even if the appellate court concludes that the trial court should have evaluated the evidence of the witnesses differently.

In the instant case, as rightly held by the lower court, the trial court's decision that the extra judicial statement of the appellant, Exhibit "7" is voluntary, having been borne out of the evidence on record remains unassailable. It is the principle that neither the lower court nor this court can interfere with same.
(pp. 969 E/970 C)

Evidence - Re evaluation

2. Where, however, the trial court failed to use the opportunity afforded it to properly evaluate the evidence adduced at a trial, the appellate court is competent to re-evaluate the evidence on record in order to obviate miscarriage of justice.
(p. 970 B)

Conviction - Confession - Validity

3. Again, it must outrightly be stated that a free and voluntary confession which is direct, positive and properly proved is sufficient to sustain a conviction. Though desirable, corroborative evidence is not necessary. Once the court is satisfied with its truth, it can safely convict on the basis of the confessional statement of an accused alone. (p. 971 D)

COURTS - Obiter dictum - Definition

4. As rightly defined by the court, "an obiter dictum is a by the side remark made or expressed by a judge in his decision upon a case which remark or opinion is incidental or collateral and

not directly upon the question before the court. (p. 974 C)

Court - Erroneous finding

5. In the case at hand the finding of the trial court on whether or not the appellant is married to the 1st accused cannot be easily ignored as one “that is unnecessary to the decision in the case” before that court. Excerpts of the evidence of DW1 and DW2 earlier reproduced in this judgment clearly allude to the fact of their being married. It is on that note that one agrees with learned appellant counsel that the lower court has erred in its finding that neither the appellant nor the respondent had led evidence on the marriage between them. Learned counsel is also right in his further submission that, the lower court’s inference that the trial court’s finding on the marriage between the appellant and the 1st accused is an obiter is equally erroneous.

In the instant case it is evident from the record that the appellant and the 1st accused had asserted the fact of their being married. The trial court’s inference that the two were never married but partners in crime is, beyond a mere swipe, a profound finding borne by the evidence on record on the issue.

The court’s disbelief in the evidence of the appellant and the 1st accused in proof of the marriage they asserted between them led to the devastating finding. If the appellant is entitled to any defence under the Criminal Code or the 1999 Constitution by the fact of the existence of a statutory marriage, evidence must abound on the record that they are indeed married in the first place. Marriage of any kind, the trial court has held, does not, from the evidence on record, exist.

The lower court’s finding that appellant’s ground of appeal as well as the issue distilled from the ground, which query the trial court’s non consideration of the defence due to the appellant by virtue of the fact of her being married to 1st accused, are incompetent, it must be conceded to the appellant, is an error. Appellant’s second issue for the determination of the appeal is accordingly resolved in favour of the appellant. (pp. 974 F/975 C)

CRIMINAL PROCEDURE - Defence - Consideration of

6. It must be restated here that although a judge or court is not obliged to fish for defences not borne out by the evidence on record, it has long been settled that the court has the duty to fairly and impartially consider any defence raised by a person charged with crime however weak, foolish, unfounded or conflicting the defence is. Any defence to which an accused is, on the evidence entitled to, should be considered however stupid, unreasonable or for whatever it is worth. (p. 975 A)

Judgment - Errors in - Effect

7. Not all errors in a judgment appealed against, however, result in the setting aside of the judgment and allowing the appeal. Only those errors that have caused miscarriage of justice entitle the appellant to real success in the appeal.

In the instant case, where the trial court's finding that the marriage between the appellant and 1st accused does not exist draws from the evidence on record and the finding has not been shown by the appellant to be perverse, the resolution of her 2nd issue in this appeal in her favour does not enhance appellant's fortunes in any way. Her victory is indeed pyrrhic. The appeal which all the same lacks merit is hereby dismissed. The lower court's judgment is resultantly affirmed. (p. 975 H)

REPRESENTATION

Chidi B. Nworka Esq., for the Appellant
C. C. Dimkpa (Director Estates & Trusts, Ministry of Justice) and K. A. Leweanya (Assistant Chief State Counsel, Ministry of Justice Owerri), for the Respondent

CASES REFERRED TO

INEC v. Musa (2003) 1 SCNJ 1
Ekulo Farmers Ltd v. UBN Plc (2006) ALL FWLR (pt. 319) 895
Adeleke v. Oyo State House of Assembly (2007) ALL FWLR (pt. 345) 211
FRN v. Osahon (2006) All FWLR (pt. 312) 1975
Ushae v. C.O.P Cross River State Command (2006) All FWLR (pt. 313) 86

Amobi v. Nzegwu (2006) All FWLR (pt. 297) 1087

Agogo v. State (1999) 73 LRCN 3505

Alarape v. State (2001) FWLR (pt. 41) 1872

Eghogbanome v. State (1993) 7 NWLR (pt. 305) 383

Sule v. State (2009) 17 LRCN 1

Ogunbayo v. State (2007) 146 LRCN 696

B

Iwuoha v. Nipost (2003) 8 NWLR (pt. 822) 308

Adeye v. Adesanya (2001) 6 NWLR (pt. 708) 1

Iragunima v. R.S.H.P.D.A (2003) 12 NWLR (pt. 834) 427

Abasi v. The State (1992) 10 SCNJ 113

C

STATUTES REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990, ss. 5(b), 1(2)

Constitution of the Federal Republic of Nigeria 1999, ss. 36(11), D 42(1)(a)

Evidence Act, ss. 27-32, 160(a)

Criminal Code, ss. 10, 34

LEAD JUDGMENT BY MUHAMMAD JSC

E

This is an appeal against the decision of the Owerri Division of the Court of Appeal (hereinafter referred to as the court below) delivered on 18th April, 2011 affirming the decision of the Imo State High Court, (hereinafter referred to as the trial court) convicting the appellant for the offences of conspiracy and Armed Robbery in charge HOW/51C/99 and sentencing her to death.

F

A brief summary of the facts of the case that brought about the appeal is rendered immediately.

The appellant and the 1st accused person were tried on a two count Charge of Conspiracy and Armed Robbery contrary to Sections 5(b) and 1(2) of the Robbery and Firearms (Special Provisions) Act CAP 398 Laws of the Federation 1990 respectively. Each of the two, who claimed to be husband and wife, pleaded not guilty to each head of charge. Augustine Chukwunyere, PW1, and Inspector Atti Okon, PW2, testified for the respondent. Nine Exhibits including a Berreta Pistol, two life ammunitions, an axe, a pump action gun, PW1's application for and the bond for the release to him of recovered items as well as the statements of the appellant and 1st

H

accused were tendered by the respondent through the two witnesses. The appellant and 1st accused testified as DW1 and DW2 respectively.

Respondent's case is that PW1 had come back to Nigeria from the United States for the Christmas and memorial service of his late wife. He was staying at his Uzoagba country home. Prior to the memorial service which took place on 31st December, 1998, the appellant and her alleged husband had visited and were seen at PW1's compound. PW1 is the victim of the robbery for which the appellant and her alleged husband, the 1st accused, were tried, convicted and sentenced.

In the early hours of 31st December, 1998, three men, including the 1st accused broke into PW1's country home. The 1st accused, the lower part of whose face was covered with a handkerchief, had a gun in his hand. The other two men had shot guns. Having been ordered by the three men, PW1, out of fear, brought out his leather bag and emptied all the money in it on the floor. In compliance with 1st accused person's subsequent order, PW1 packed all the money back into the leather bag. The three men carted away from PW1's house the sum of N330, 000.00k in Naira notes, one hundred and fifty Dollars, forty pounds in twenty pound denomination, a wrist watch, some Jewelry and their victim's mobile phone. The robbers who, before gaining entry into PW1' compound had overpowered and tied the night guards, also robbed the next house which belonged to PW1's cousin Nelly Chuwunyere. PW1 recognized the 1st accused whom he had met twice before the robbery incidence because at the time of the robbery the lamp in the compound was lit and in addition, 1st accused had a flash light. PW1 particularly noticed that on the first day he met the appellant she had a ring on her nose and chain around one of her legs.

1st accused was arrested at about 12 noon on 1st January, 1999 after the robbery incident had been reported to the police by PW1 and his relations. Upon sighting the 1st accused, PW1 alerted the police at their Uzoagba post. 1st accused was at the market square trying to board a vehicle. After his arrest, he took the police to the house of the appellant from whom PW1's mobile phone, leather bag containing the sum of N25,000.00k, gold chain, wedding ring, pair of shoes and wrist watches were recovered. An axe and a gun were

also retrieved from the premises. At 1st accused's Irete residence, one pump action gun was also recovered.

The appellant's defence is a total denial of committing the offences. In Exhibit "7", her statement to the police, the appellant not only denied her participation in the crime she also disputed the recovery of PW1's property from her. The appellant and 1st accused alleged that the police had tortured them while recording their statements. Her statement, Exhibit 7 and 1st accused's statements, Exhibits "8" and "9", were admitted in evidence after a trial within a trial. At the end of trial, the trial court found the appellant and the 1st accused guilty as charged, convicted and sentenced them accordingly. The lower court's affirmation of the trial court's decision brought about this appeal.

At the hearing of the appeal, parties identified, adopted and relied on their respective briefs they had before then filed and exchanged as their arguments for and against the appeal. The three issues the appellant distilled at pages 3-4 of her brief read:-

3.01. Whether the lower court was right in deciding that despite the provisions of Section 36(11) of the 1999 Constitution and Section 160(a) of the Evidence Act, the confessional extra-judicial statement said to be made by the Appellant which she resiled from, was still admissible in law. (Derived from Ground One of the Grounds of Appeal)

3.02. Whether the lower court's decision in striking out the issues before it relating to the marriage between Appellant and 1st Accused Person, on the ground that the trial court's pronouncement on same was obiter, is correct. (Derived from Grounds Two and Three of the Grounds of Appeal)

3.03. Whether the lower court was right in its decision that Exhibits 1, 2, 5 and 6 properly corroborated Exhibit 7 and together proved the guilt of the Appellant of the offence charged. (Derived from Ground Four of the Grounds of Appeal.)"

The respondent also distilled three issues as having arisen for the determination of the appeal thus:-

"(a) Whether on extra-judicial statement of an accused person is rendered inadmissible by reason that the accused person resiled thereon.

(b) Whether the lower court was not right in striking out the

trial court's pronouncement on the alleged marriage between the appellant and the 1st accused as obiter.

(c) *Whether the lower court was not right in upholding the decision of the trial court that Exhibits 1, 2, 5 and 6 properly corroborated Exhibit 7 and together proved the guilt of the appellant of the offence charged.*”

On appellant's 1st issue, it is contended that the trial-within-a-trial procedure resorted to by the trial court which decision the lower court affirmed offends Section 160(a) of the Evidence Act and Section 36(II) of the 1999 Constitution. Sections 27-32 of the Evidence Act which the two lower courts held to have provided for the trial-within-a-trial procedure, argues learned appellant counsel, cannot, in the face of Section 1(1) and 3 of the 1999 Constitution override the Constitution. Furthermore, it is illegal under Section 36(II) of the 1999 Constitution and Section 160 (a) of the Evidence Act to compel an accused to give evidence. It goes contrary to the two provisions, argues learned appellant counsel, to make the recorded statement of the appellant, who cannot be compelled to enter the witness box and give evidence, admissible. It is all the more so because appellant's statement was recorded after he had been tortured. Relying on *INEC v. Musa* (2003) 1 SCNJ 1 at 32, *Ekulo Farmers Ltd v. UBN Plc* (2006) ALL FWLR (part 319) 895 at 918, *Adeleke v. Oyo State House of Assembly* (2007) ALL FWLR (part 345) 211 at 251-258, learned counsel urges that the issue be resolved in appellant's favour and in consequence Exhibit “7”, her statement expunged which concession leaves the lower court without any evidence to affirm appellant's conviction by the trial court.

On appellant's 2nd issue, learned appellant's counsel contends that the two prosecution witnesses at pages 30, 33-33, 50 and 52 of the record of appeal gave evidence to the effect that the appellant was married to the 1st accused. DW1 and DW2, the 1st accused and the appellant respectively, similarly testified at pages 52, 53 and 54 of the record on their marriage. Contrary to the evidence on record, submits learned counsel, the trial court held that the appellant and the 1st accused were not married but partners in crime. The lower court's finding that appellant's issue which hangs on the trial court's wrong finding on her marriage to the 1st accused is obiter, submits appellant's counsel, is perverse.

Further arguing the issue, learned counsel submits that under Section 10 and 34 of the Criminal Code, the appellant can neither be an accessory after the fact to an offence for which her husband is guilty nor held liable for facilitating her husband's escape from punishment. The appellant who is married to the 1st accused under the Igbo customary law, by virtue of Section 42(1)(a) of the 1999 Constitution, is discriminated against if denied the defence she is otherwise entitled to under Section 10 and 34 of the Criminal Code. Relying on *FRN v. OSAHON* (2006) ALL FWLR (part 312) 1975 at 2002, *Ushae v. C.O.P Cross River State Command* (2006) ALL FWLR (pt. 313) 86 at 104, learned counsel urges that on resolving the issue against the respondent, we set aside the lower court's affirmation of the trial court's perverse finding on the marriage between the appellant and the 1st accused, and invoke Section 22 of the Supreme Court Act to ensure that the appellant enjoys the defences Sections 10 and 34 of the Criminal Code, Section 42(1)(a) of the 1999 Constitution as well as Articles 2, 3(2) and 17(3) of the African Charter entitle her to.

On the 3rd issue for the determination of the appeal, learned appellant counsel contends that the lower court is wrong firstly to have affirmed the trial court's finding that Exhibit "7", the statement of the appellant is confessional and that, secondly, Exhibits "1", "2", "5" and "6" corroborate the content of the said Exhibit "7". It is contended that not all the Exhibits which the trial court held corroborate Exhibit "7" were recovered from the appellant. The bag which contained Exhibits "1" and "2" in particular, the Berrata pistol and the two live ammunition, was never tendered in evidence. Exhibits "5" and "6" the axe and pump action gun were recovered from the Irete residence of appellant's husband. Evidence is lacking, contends learned counsel, which established that the appellant was aware of the content of the bag her co-accused gave to her to keep. The factual base of the charge against the appellant having collapsed, submits learned counsel the lower court's affirmation of the trial court's findings in that regard is therefore, perverse. The act of recording appellant's statement after the recovery of the various Exhibits, concludes learned appellant counsel, disentitle the prosecution from tendering them and the trial court, by virtue of section 29 of the Evidence Act, from relying on the statement to convict the appellant.

Section 29 of the Evidence Act, learned counsel insists, allows the use of statements of accused persons that led to the recovery of the Exhibits which courts hold corroborate those statements. Statements recorded after the recovering of the Exhibits, it is submitted, lack the necessary probative value to sustain a conviction. On the basis of the decision in *Amobi v. Nzegwu* (2006) ALL FWLR (part 297) 1087 at 1101 learned counsel urges the resolution of the issue in appellant's favour and allowing the appeal.

Arguing the appeal under respondent's 1st issue, it is submitted that appellant's retraction from her confessional statement does not make the statement inadmissible. In the case at hand, learned respondent's counsel further submits, following appellant's objection when the statement was tendered, the trial court proceeded to conduct a trial-within-a-trial and having been convinced on the evidence of both sides that appellant was not tortured, admitted the statement in evidence. Learned appellant's counsel's submission on Sections 27-31 of the Evidence Act, is absurd, contends the respondent. Given Section 27 of the Evidence Act, once proved to be voluntary, appellant's confessional statement is admissible against her. Whether or not the statement constitutes conclusive proof of what is admitted, learned respondent's counsel concedes, is a question of fact. Once the statement is shown to be voluntary, direct and unequivocal as to the guilt of its maker, the statement is relevant, admissible and sufficient to ground a conviction. Learned counsel supports his argument with the decisions in *Agogo v. State* (1999) 73 LRCN 3505, *Alarape v. The State* (2001) FWLR (part 41) 1872 at 1893 and *Eghogbanome v. The State* (1993) 7 NWLR (part 305) 383.

Again, learned respondent's counsel submits, no law precludes the use of appellant's voluntary extra judicial statement. Neither Section 35(11) of the 1999 Constitution nor Section 160 of the Evidence Act does. From the evidence on record, the appellant was neither compelled to make Exhibit "7", her statement, nor the evidence in her defence at her trial. Both Exhibit "7" and appellant's evidence in her defence having passed the test the law provide on them are admissible. The distinction must always be made between the respondent's burden of adding evidence to prove its case and the competence of the appellant to defend herself. Further relying on the decision in *Sule v. The State* (2009) 17 LRCN 1 at 29 and 30,

learned respondent's counsel urges that the issue be resolved in respondent's favour.

Under their 2nd issue, learned respondent's counsel supports the lower court's pronouncement that the trial court's comment on the marriage between the appellant and the 1st accused is an orbiter. Learned counsel submits that the live issue before the trial judge is one of Conspiracy and Armed Robbery with PW1 being the victim. The respondent by Exhibit "7" and the Evidence of PW1 and PW2 led credible evidence which the trial court believed in convicting the appellant. Section 34 of the Criminal Code, concedes learned counsel, shields the appellant from liability for conspiracy once there is evidence of a Christian marriage between her and the 1st accused. The fact remains though that there is no evidence of any type of marriage between the two to entitle the appellant to the defence she seeks now to assert. Relying on *Adegboye v. The State* 1 SCJN 207 the respondent contends that the appellant must also fail on this issue.

On respondent's 3rd issue, learned counsel relies on the definition of the word "corroboration" in *Ogunbayo v. The State* (2007) 146 LRCN 696 at 703 and submits that appellant's counsel is simply wrong in contending that the lower court has erred in affirming the trial court's finding that Exhibits other than Exhibit "7" corroborate the latter. Exhibits 1, 2, 5 and 6, submits learned respondent's counsel, clearly show the appellant to be an active participant in the commission of the offences. The Exhibits corroborate not only the testimonies of PW1 and PW2 but appellant's extra judicial statement in Exhibit "7" as well. The 3rd issue, submits learned counsel, be resolved against the appellant. He urges that the appeal be dismissed.

It is glaring that while respondent's 1st and 3rd issues for the determination of the appeal correspond with appellant's 1st and 3rd issues, its 2nd issue raises the same questions as does appellant's 2nd as well. I shall be guided by the issues distilled by the appellant if not for any other reason than the fact that she initiated the appeal which grounds and issues distilled therefrom constitute the plank and reasons that should inform the appeal's success or failure.

Appellant's overriding contention is that the fact of her being tortured in the course of recording Exhibit "7" has rendered the statement inadmissible. The two courts contrary decision being reverse

must to be set-aside. It is argued by learned appellant counsel that the trial-within-a trial-procedure the lower court held has lawfully informed the trial court's finding that appellant's statement, Exhibit "7", is confessional, stands in breach of Section 36(II) of the 1999 Constitution as well as Section 160 of the Evidence Act. The appellant by the two provisions cannot be compelled to give evidence be it as contained in Exhibit "7" or as a witness in the course of her trial. Sections 27-31 of the Evidence Act which allows for the conduct of a trial-with in-a-trial in facilitating the admittance and use of Exhibit "7" cannot, given the combined effect of Section 1(1) and (3), Section 36(II) and Section 315 of the Constitution subsist.

Learned counsel in reply insists and, correctly too, that the two courts are right in their concurrent findings that Exhibit "7" being the voluntary statement of the appellant is admissible. Learned respondent counsel is also on a firm terrain in his submission that Exhibit "T" cannot be precluded on the basis of appellant's further contention that the mini trial procedure facilitated by Sections 27-32 of the Evidence Act constitutes a breach of Section 160 of the evidence Act as well as Section 36(11) of the 1999 Constitution.

It must be recalled that at the trial court the appellant, at the point her statement was being tendered by the respondent, objected to its being admitted in evidence. At the end of the trial-within-the trial the court conducted to ascertain the voluntariness of the statement the court concluded its ruling at page 45D of the record of appeal thus:-

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

Having said so, the said statement of the second accused is admitted in evidence and it is marked as Exhibit No. 7".

The appellant urged the lower court in one of the three issues she presented for the determination of her appeal to answer the question whether in its foregoing finding the trial court was right. The lower court after satisfying itself that the trial court before admitting Exhibit "7" had considered the evidence by the prosecution and the defence in the trial-with-in-the trial proceedings, answered the question the appellant raised on the issue at page 284 of the record per Owoade JCA as follows:-

"I do agree with the learned counsel for the respondent in this respect that credibility of witnesses is the essential function of the trial court, which said, heard and watch the witnesses testify. And, that an appellate court does not believe of disbelieve evidence..."

On appellant's further query that Exhibit "7", contrary to the decision of the trial court, is precluded by the operation of Section 160 of the Evidence Act and Section 36(11) of the 1999 Constitution, the lower court, again per Owoade JCA who read the lead judgment, held at page 20 of the record:-

"...The admissibility of a confessional statement does not in any way infringe the provisions of Section 36 (II) of the 1999 constitution. The Section provided thus:-

'(II) No person who is tried for a criminal offence shall be compelled to give evidence at the trial'

Learned counsel for the appellant himself provided an answer to his inquiry on this score when he said that Exhibit "7" was tendered by PW2. From confessional statement is evidence by the prosecution and not from the accused person. It is also so because the evidence is for and in favour of the prosecution since at the stage of trial it is evidence against the accused."

On its foregoing postulations I cannot agree more with the lower court.

Firstly, the decision on the voluntariness or otherwise of appellant's confessional statement, Exhibit "7", unarguably requires the trial court's assessment of the credibility of the witnesses who testified on the matter. The principle has not changed from what the lower court in its foregoing finding holds it to be.

It was the trial court that saw the witnesses during trial and heard their testimonies. This afforded the trial court the opportunity of observing the demeanour and idiosyncrasies of the witnesses. In evaluating the evidence of the witnesses, the trial court is expected to make full use of the opportunity it had of seeing and observing the witnesses in the course of their testimonies and having regard to applicable law and common sense arrive at the conclusions a reasonable tribunal in that circumstance will arrive at.

It remains within the purview and competence of the

trial court, therefore, for obvious reasons, to first evaluate evidence of witnesses. The trial court does not share this jurisdiction with the appellate court and where its evaluation is borne out from the evidence on record, an appellate court cannot interfere in such a circumstance even if the appellate court concludes that the trial court should have evaluated the evidence of the witnesses differently. Where, however, the trial court failed to use the opportunity afforded it to properly evaluate the evidence adduced at a trial, the appellate court is competent to re-evaluate the evidence on record in order to obviate miscarriage of justice. See *Iwuoha v. Nipost* (2003) 8 NWLR (pt 822) 308 343-344, *Adeye v. Adesanya* (2001) 6 NWLR (Pt 708) 1 and *Iragunima v. R.S.H.P.D.A* (2003) 12 NWLR (Pt 834) 427.

In the instant case, as rightly held by the lower court, the trial court's decision that the extra judicial statement of the appellant, Exhibit "7" is voluntary, having been borne out of the evidence on record remains unassailable. It is the principle that neither the lower court nor this court can interfere with same.

It must be stressed that even though Exhibit "7" is appellant's confessional statement, it is still respondent's evidence. The testimony of PW2 sustains this fact. The distinction between Exhibit "7", appellant's confessional statement, and her evidence at trial in defence cannot be ignored. In *Olawole Arogundare v. The State* (2009) 6 NWLR (Pt 1136) 165 at 178 my Lord Tobi JSC in his concurring judgment distinguished the two thus:-

"A confessional statement is different from evidence given by a witness in court. While a confessional statement is a pre-trial matter made by an accused person, mostly in pre-trial custody, evidence given by a witness in court is before the face of the trial court one cannot be substituted by the other. The mere fact that the contents by way of facts of both are similar or the same, do not in law make them the same as the legal incidents of acceptability or otherwise of the two are quite different. In confessional statements, the test is its voluntary nature. In evidence in court, the test is relevance, veracity or authenticity."

Sections 27-31, of the Evidence Act provide for Exhibit "7" being a confessional statement. Sections 36(11) of the 1999 Consti-

tution and 160(a) of the Evidence Act both provide, on the other hand, for the evidence of witnesses in the face of the court at trial. The latter Sections rule appellant's evidence as DW2 in defence. I agree with learned respondent counsel that appellant's contention that Exhibit "7" is precluded by the operation of Section 36(11) of the 1999 Constitution and Section 160(a) of the Evidence Act is B misconceived.

The concurrent findings of the two courts below that Exhibit "7" being appellant's voluntary confessional statement as envisaged under Sections 27-31, admissible cannot, be interfered with. See C Okoro Abasi v. The State (1992) 10 SCNJ 113.

Lastly, on appellant 3rd issue, it has also been contended that Exhibit "7" cannot, by itself, sustain appellant's conviction by the trial court as affirmed by the court below. It is further contended that the lower court has erred in its affirmation of the trial court's decision D that Exhibit "1", "2", "3", "5" and "6" corroborate Exhibit "7".

Again, it must outrightly be stated that a free and voluntary confession which is direct, positive and properly proved is sufficient to sustain a conviction. Though desirable, corroborative evidence is not necessary. Once the court is satisfied with its truth, it can safely convict on the basis of the confessional statement of an accused alone. See Mustapha Mohammed and another v. State (2007) 4 SCNJ 117 and Okon Osung v. The State (2012) 18 NWLR (pt 1332) 256. E

On this issue, the lower court at pages 213-214, of the record F held:-

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

In spite of the foregoing impeccable findings of the lower court, the court at page 214 of the record concluded as follows:-

B *“In Olalekan vs. State (2001) 18 NWLR (Pt. 746) 793 at page 824, the Supreme Court per Onu, JSC, held that where a confessional statement is direct, positive and unequivocal as to the admission of guilt by an accused person, the statement is enough to ground the conviction of the accused. See also: Salawu v. State (1971) 1 NMLR 249. Thus, even without those corroborative acts, the Appellant in the instant case could perfectly be convicted solely on her*
C *voluntary confessional statement.”* (Underlining mine for emphasis).

In endorsing the foregoing conclusion of the lower court which cannot be faulted, I resolve appellant’s 1st and 3rd issues against her.

D To fully grasp the import of the submissions of learned appellant counsel under appellant’s 2nd issue, the last to be considered, it helps to reproduce aspects of the testimonies of the appellant and the 1st accused relevant to the point being canvassed by virtue of the issue.

E The 1st accused person testified at page 52 of the record of appeal inter-alia as follows:-

F *“My names are Leonard Okoli... The second accused is my wife... On the said 28-1-98, I was coming from Ukpò to Uzoagba to see my wife. As I was about to enter a commercial motorcycle (sic), a man pointed at me as the in-law to Armstrong my father in law. There were some policemen there at Uzoagba, they held me and took me to the police station... I was taken to the House of my father-in-law. The policemen then arrested my wife and I, put us in the*
G *vehicle and drove off. I was kept at the Iho Police Station... My wife was taken to the Female section of the cell.”*

Under cross examination, the witness testified at page 53 of the record in part thus:

H *“...I was told that PW1 is related to the 2nd accused. It is not true that on the 27-12-98, the 2nd accused introduced me as her husband to PW1. I did not visit Kingsley Jones with my wife on 27-12-98... I did not give the 2nd accused those Exhibits tendered by the police I started marrying the 2nd accused from 1996. I cannot remember the year I married her, it is a long time now. We were still*

planning to wed in church before this incident. I married her traditionally but cannot remember when."

At pages 54-55 of the record of appeal DW2, the appellant, testified in chief inter-alia thus:-

"My names are Irene Okoli... I know the 1st accused person. He is my husband. We got married in 1997. The marriage was under native law and custom.... I am aware that the 1st accused person and I are being charged with conspiracy and armed robbery."

In relation to the foregoing evidence of the two accused persons vis-a-vis the evidence the respondent led through PW1 and PW2, the trial court at page 98 of the record of appeal made a profound finding thus:-

"I find as a fact that there was robbery in the house of PW1 Augustine Chukwunyerere; that the 1st and 2nd accused persons each participated in the robbery and played his or her mastery role. Also that the accused persons were never married but partners in crime."

The 2nd issue the appellant distilled and urged the lower court to consider in determining her main appeal reads:-

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

The 3rd ground in the appellant's notice of appeal from which the issue was distilled is herein under reproduced, devoid of its particulars, for ease of reference:

"GROUND THREE

ERROR OF LAW

The learned trial judge misdirected herself when she purported to find as a fact that:

'I find as a fact Also that the accused persons were never married, but just partners in crime.'

When there is no shred of evidence to support that finding and thereby denied the appellant of the defence and safeguards provided for under the Criminal Code, the Evidence Act, the African Charter on Human and People Rights and the 1999 Constitution."

The lower court's decision on appellant's issue that was distilled from the foregoing ground of appeal is to be found at 211-212 of the record of appeal and reads in part thus:-

"The statement of the trial judge at lines 23-26 of page 98 of

the record is obiter and cannot be subject of an appealhis lordship was not called upon to decide any questions of marriage between the prosecution and the defence. If the evidence on record had disclosed a statutory marriage between the Appellant and the 1st Accused, which was not the case, the learned trial judge would then
 B *have been obliged even before any prompting to examine all available defences if any associated with the definition of marriage under the Criminal Code as well as the Evidence Act. In the absence of such evidence not even from the defence by production of a certificate of*
 C *marriage, the remark of the learned trial judge was on expression of opinion outside the confines of criminal trial before his lordship."*

With due deference, I am unable to agree with the lower court's foregoing conclusion. **As rightly defined by the court, "an obiter dictum is a by the side remark made or expressed by a**
 D **judge in his decision upon a case which remark or opinion is incidental or collateral and not directly upon the question before the court.**

In Prince (DR.) B.A. Onafowokan & 2 ors v. Wema Bank Plc & 2 ors (2011) 5 SC (Pt 11) 1, this court opined as follows:-
 E *"Obiter dicta reflect, inter alia, the opinion of the judge which does embody the resolution of the court. The expression of judgment must be taken with reference to the facts of the case which he is deciding the issues calling for decision and answers to those issues."*
 F See also Bamigboye v. University of Ilorin (1999) 6 SCNJ 324, National Democratic Party (NDP) v. Independent National Electoral Commission (2012) 12 SC (Pt iv) 24 and Abacha v. Fawehinmi (2001) 6 NWLR (Pt. 660) 273.

In the case at hand the finding of the trial court on
 G **whether or not the appellant is married to the 1st accused cannot be easily ignored as one "that is unnecessary to the decision in the case" before that court. Excerpts of the evidence of DW1 and DW2 earlier reproduced in this judgment clearly allude to the fact of their being married. It is on that**
 H **note that one agrees with learned appellant counsel that the lower court has erred in its finding that neither the appellant nor the respondent had led evidence on the marriage between them. Learned counsel is also right in his further submission that, the lower court's inference that the trial court's finding**

on the marriage between the appellant and the 1st accused is an obiter is equally erroneous.

It must be restated here that although a judge or court is not obliged to fish for defences not borne out by the evidence on record, it has long been settled that the court has the duty to fairly and impartially consider any defence raised by a person charged with crime however weak, foolish, unfounded or conflicting the defence is. Any defence to which an accused is, on the evidence entitled to, should be considered however stupid, unreasonable or for whatever it is worth. See Elijah Ukoh v. The State (1972) 5 and 6 SC 89 Nwarga Nwuzoke v. The State (1988) 2 SC (Pt 11) 272 and Fatai Olayinka v. The State (2007) 4 SCNJ 53.

In the instant case it is evident from the record that the appellant and the 1st accused had asserted the fact of their being married. The trial court's inference that the two were never married but partners in crime is, beyond a mere swipe, a profound finding borne by the evidence on record on the issue.

The court's disbelief in the evidence of the appellant and the 1st accused in proof of the marriage they asserted between them led to the devastating finding. If the appellant is entitled to any defence under the Criminal Code or the 1999 Constitution by the fact of the existence of a statutory marriage, evidence must abound on the record that they are indeed married in the first place. Marriage of any kind, the trial court has held, does not, from the evidence on record, exist.

The lower court's finding that appellant's ground of appeal as well as the issue distilled from the ground, which query the trial court's non consideration of the defence due to the appellant by virtue of the fact of her being married to 1st accused, are incompetent, it must be conceded to the appellant, is an error. Appellant's second issue for the determination of the appeal is accordingly resolved in favour of the appellant.

Not all errors in a judgment appealed against, however, result in the setting aside of the judgment and allowing the appeal. Only those errors that have caused miscarriage of

justice entitle the appellant to real success in the appeal. See Soleh Boneh Overseas Nig. Ltd. V. Agboola Ayodele & Anor (1989) 2 SC (Pt. 1) 108; Anthony Odiba V. Tule Azege (1998) 7 SCNJ 119) and CSS Bookshops Ltd V. The Registered Trustees of Muslim Community in Rivers State & Ors. (2006) 4 SCNJ 310.

B ***In the instant case, where the trial court's finding that the marriage between the appellant and 1st accused does not exist draws from the evidence on record and the finding has not been shown by the appellant to be perverse, the resolution of her 2nd issue in this appeal in her favour does not enhance appellant's fortunes in any way. Her victory is indeed pyrrhic. The appeal which all the same lacks merit is hereby dismissed. The lower court's judgment is resultantly affirmed.***

D

FABIYI JSC

I had a preview of the judgment just delivered by my learned brother - M. D. Muhammad, JSC. I agree that this appeal lacks merit and should be dismissed.

E The appellant and the 1st accused person were tried on a two count charge of conspiracy and Armed Robbery contrary to Sections 5(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation 1990, respectively.

F As extant in the Record of Appeal, the appellant organised the operation. She took the 1st accused whom she described as her husband to the scene - P.W.1's house on 27/12/1998. P.W.1 identified her as she had a ring on her nose and chain on one of her legs. On 31/12/98, she monitored the operation from behind. And after
G the illegal act was carried out by the 1st accused and others at large, the items of P.W.1's good stolen during the operation were handed over to her by the 1st accused. The police recovered same from her. She made a clean breath admission in Exhibit 7 in respect of how the 1st accused and herself planned the operation and carried same out
H with utmost precision.

Conspiracy has been defined as a combination or confederacy between two or more persons, formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the

concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful. (Blacks Law Dictionary Sixth Edition, page 309).

It should be noted here that conspiracy is often hatched in utmost secrecy. The circumstance of the matter must be properly considered. In the case of Patrick Njovens v. The State (1973) 1 NMLR 331, GBA Coker, JSC (of blessed memory) pronounced with force as follows:-

“When it is proposed to give evidence of happenings inside hell it is only a matter of common sense to call one of the inmates of that place or one whose business is carried out in reasonable propinquity to hell and it must be surprising indeed to find even a lone angel fit and qualified for the assignment. Indeed, it would be preposterous to look for such evidence in other directions.”

The mode of hatching the armed robbery operation carried out by the 1st accused and his cohorts on 31/12/98 can be found in Exhibit 7 - the appellant’s confessional statement which was admitted by the learned trial judge after a properly conducted trial-within-trial. Learned counsel for the appellant had an axe to grind with the procedure relating to trial-within-trial in his bid to obliterate the vital Exhibit 7. He vehemently maintained that the long established procedure touching on trial-within-trial is precluded by the combined operation of Section 36(11) of the 1999 Constitution of the Federal Republic of Nigeria and Section 160(a) of the Evidence Act, 2004.

The learned trial judge performed a Yeoman’s job in the trial-within-trial. He heard both sides before coming to the decision that there was no duress on the appellant before admitting the confessional statement as Exhibit 7. The court below affirmed the stance of the trial court that Exhibit 7, being appellant’s voluntary confessional statement, as envisaged under sections 27-31 of the Evidence Act is admissible. The concurrent findings by the two lower courts cannot be interfered with. See: Abasi v. The State (1992) 10 SCNJ 113.

It is clear that the appellant’s contention that Exhibit 7 is precluded by the operation of Section 36(11) of the 1999 Constitution and Section 160(a) of the Evidence Act is, no doubt, misconceived. In another clime, he would be advised ‘to go and say it to the Marines’.

The appellant attempted to cling tenaciously to her ‘purported’

marriage to the 1st accused. I say purported since there was no Act Marriage established at the trial court which might have entitled her to some form of defence. I cannot fathom how any form of customary marriage was proved to exist either. To my mind, this peripheral issue touched upon by her counsel is akin to clinging to a straw in the middle of a turbulent river. This issue failed to hit the target; in the main.

There is no doubt that the two offences for which the appellant was tried with another person have been proved beyond reasonable doubt. All the ingredients of the two offences were clearly established. The trial court so found. The court below affirmed same. I cannot see my way clear in exculpating the appellant. See *Akalezi v. The State* (1993) 2 NWLR (pt. 273) 1 at page 13.

For the above reasons and the detailed ones ably adumbrated in the lead judgment, I too feel that the appeal lacks merit and should be dismissed. I accordingly dismiss the appeal and affirm the judgment of the court below.

E **RHODES-VIVOUR JSC**

I have had the advantage of reading in draft the judgment of my learned brother, M. D. Muhammad, JSC. There is very little I can usefully add, as this appeal is dismally devoid of merit. I shall add a few words of my own.

The appellant and the 1st accused person were charged and convicted for Conspiracy and Armed Robbery contrary to Sections 5(b) and 1(2) of the Robbery and Firearms (Special Provisions) Act, Cap 398 Laws of the Federation. Both of them were sentenced to death. This is the 2nd accused persons appeal. Affirming the judgment of the trial court the Court of Appeal said:

“...In the instant case, the content of exhibit 7 for which the learned trial judge found corroboration in exhibits “1”, “2”, “5” and “6” adequately revealed the role of the appellant not only as a conspirator but indeed the initiator and principal actor in the Robbery that took place in the house of PW1 even though the appellant was out physically present at the scene of crime. Exhibit “7” revealed that the appellant agreed with the 1st accused to rob PW1, she monitored the operation without showing up at the scene and not only

received some of the proceeds of the Robbery but also kept part of the ammunition used in the Robbery operation. The learned trial judge was perfectly entitled to rely on exhibit 7 to convict the appellant. Exhibit "7" was not only corroborated by exhibit "1", "2", "5" and "6" but also by the evidence of PW1 and PW2."

The above sums up of the role played by the appellant in the armed robbery in the house of PW1 on the 27th day of December, 1998. The appellant planned the armed robbery with the 1st accused person but was not physically present at the house of PW1 where the 1st accused person and his gang robbed PW1 of his property. She monitored the Robbery operation from the safe comfort of her home. At the end of the Robbery operation the 1st accused person gave her items stolen from the house of PW1 for safe keeping. The appellant made a confessional statement, exhibit 7. It was corroborated by exhibits 1, 2, 5 and 6. Both courts below were satisfied. This court is also satisfied with the quality of evidence which I found unassailable.

It has been said in a plethora of cases that in a charge of conspiracy all that is required is evidence of agreement of the parties express or implied before there can be conviction. The offence is complete when there is established an agreement to do an unlawful thing and not in doing the thing. Reasonable inferences from the acts of the parties would suffice. See Adejobi & anor. v. State 2011 6-7 SC (pt. iii) p.65, State v. Olashehu Salami 2011 12 SC (pt. iv) p.191 and Bright v. State v. State 2012 1 SC (pt. ii) p.47

There is conclusive evidence that there was an agreement between the appellant and the 1st accused person to rob PW1 of his property at his house on the 27th day of December, 1998.

I must comment on the fact that the appellant was not physically present at the scene of the Armed Robbery on the 27th day of December, 1998.

My lords, the position of the law is that it is immaterial whether the offender is guilty as a principal offender, or participated as aider, abettor. All those who accompany armed robbers to rob, who aid, procure the commission of the offence and those who conspire with others to commit the offence are guilty of the offence and punishable with death. There is/was compelling evidence that the appellant was in conspiracy with the 1st accused person (who she claimed is her

husband) to rob PW1. The appellant was in the circumstances properly tried and convicted notwithstanding the fact that she was not physically present at the scene of the armed robbery.

The fact that the appellant conspired with the 1st accused person to rob PW1 in his house on the 27th day of December 1998 was established beyond reasonable doubt by the trial court. This finding was affirmed by the Court of Appeal. This in law amounts to two concurrent finding of facts of the courts below on the issue of the complicity of the appellant in the armed robbery at the home of PW1. The Supreme Court is slow to review such evidence unless there is proof of miscarriage of justice, or violation of some principle of law or procedure, or the finding is perverse. See *Cameroon Airlines v. Otutuizu* 2011 1-2 SC (pt.iii) p.200 *Onwubuariri & 3 ors. v. Igboasoiji & 4 ors.* 2011 1-2 SC (pt.iii) p.109

Arowolo v. Olowookere & 2 ors. 2011 11-12 SC (pt. ii) p. 98

The conviction of the appellant was supported by very good evidence and so there is no justification for this court to interfere with the judgment of the Court of Appeal.

I agree that the appeal should be dismissed. The judgment of the Court of Appeal is affirmed.

PETER-ODILI JSC

I agree totally with the judgment, just delivered by Musa Dattijo Muhammad JSC and to show my support for the reasoning I shall make my comments.

This is an appeal against the decision of the Court of Appeal, Owerri Judicial Division in its judgment delivered on the 18th day of April, 2011 in which that court affirmed the decision of the trial High Court of Imo State convicting the appellant for the offence of armed robbery and sentencing her to death.

FACTS BRIEFLY STATED

On the 31st December 1998 at about 2 am in the morning, three armed men barged into the room of Augustine Chukwunyere, PW1 under gun point carted away all PW1's Nigeria Money Fifteen Thousand naira in fifty naira denomination all brand new and four thousand naira in ten naira, fifty naira and hundred naira denominations. Also stolen were some of his personal effects.

Before the armed robbery attack, on 27th December 1998 PW1 had a thanksgiving ceremony in honour of his late wife, he noticed the appellant in company of the 1st accused. He took particular notice of the appellant because she had a ring in her nose and a chain on her leg. On the 31/12/98 the night of the armed robbery incident, though the 1st accused tied a white handkerchief on the lower part of his face, PW1 was able to recognise him because he had seen him twice earlier on 27/12/98. The 1st accused had a black pistol in his hand. B

About 12 noon on 1st January 1999, PW1 saw the 1st accused in the market square trying to board a bus and recognized him as one of the armed robbers that robbed him the previous night. He raised alarm and 1st accused was apprehended and taken to the police station. 1st accused took PW1 and the policemen to the house of the appellant and the following items belonging to PW1 were recovered from the appellant. C D

- (a) PW1's mobile phone
 - (b) PW1's leather travelling bag and inside it were the following items stolen from PW1 during the armed robbery attack. E
 - (i) PW1's gold chain
 - (ii) PW1's wedding ring
 - (iii) PW1's pair of shoes
 - (iv) PW1's wrist watch
 - (v) PW1's cash sum of about twenty five thousand naira F
- Also in the leather bag were:
- (i) Exhibit 5 - the axe
 - (ii) Exhibit 1 - Beret pistol
 - (iii) Exhibit 2 - two life cartridges used during the attack.

The 1st accused and appellant each gave evidence and called G no witness. 1st accused and appellant denied the charge. 1st accused stated that on the 28/12/98 he was in his father's house at Ukpo, Anambra State. On the said date he was coming from Ukpo to Uzoagba to see the appellant, his wife and was about entering a commercial motorcycle when a man pointed at him as the in-law to H Armstrong and some policemen arrested him.

Appellant in evidence stated that she was married to the 1st accused under native law and custom in 1997. That on 28/12/1998 she was in her house and 1st accused told her he would come but

did not. That she went to Anambra on the 30th and was told that he left on 28/12/98 and had not been seen. That she got back on the 31/12/98 and arrested on 1/11/99.

B Appellant made a confessional statement which she resiled during trial but was admitted in evidence as Exhibit 7 after a trial within trial was conducted by the trial court during which appellant gave details of the torture she suffered at the hands of the Investigating police Officer, Inspector Ati Okon. The trial court disbelieved her story and admitted her said statement as Exhibits 8 & 9. The trial court equally disbelieved the couple's claim that they were married, C held that they were only partners in crime and not a married couple, convicted them of the offences charged and sentenced both of them to death.

D Appellant appealed against both the trial court's interlocutory ruling admitting the statements, and the final decision convicting her for the offences charged and sentencing her to death. The Court of Appeal, Owerri Judicial Division, dismissed her appeal and affirmed the decision of the trial court, hence this appeal to the Supreme Court.

E The hearing of the appeal was made on 21/11/13 at which learned counsel for the appellant, Mr. Chidi B. Nworka adopted the Brief of Argument he had settled and filed on 26/9/11. He distilled three issues for determination viz:

F 1. Whether the lower court was right in deciding that despite the provisions of Section 3 (ii) of the 199 Constitution and Section 160(a) of the Evidence Act, the confessional extra-judicial statement said to be made by the appellant which she resiled from, was still admissible in law (Derived from Ground One of the Grounds of Appeal).

G 2. Whether the lower court's decision in striking out the issues before it relating to the marriage between appellant and 1st accused person, on the ground that the trial court's pronouncement on same was obiter, is correct (Derived from Grounds Two and Three of the Grounds of Appeal.)

H 3. Whether the lower court was right in its decision that Exhibits 1, 2, 5 and 6 properly corroborated Exhibit 7 and together proved the guilty of the appellant of the offence charged (Derived from Grounds Four of the Grounds of Appeal.)

Mrs. C. C. Dimkpa, learned counsel for the respondent

adopted the Brief of Argument which she had settled and filed on 22/11/11. She formulated three issues for determination which are as follows

1. Whether an extra-judicial statement of an accused person is rendered inadmissible by reason that the accused person resiled thereon. B

2. Whether the lower court was not right in striking out the trial court's pronouncement on the alleged marriage between the appellant and the 1st accused as obiter.

3. Whether the lower court was not right in upholding the decision of the trial court that Exhibits 1, 2, 5, and 6 properly corroborated Exhibit 7 and together proved the guilt of the appellant of the offence charged. C

The issues as couched by the learned counsel on either side in effect raised same questions and it really does not matter which style is adopted for the determination of this appeal. Therefore for an easy flow I shall use those crafted by the appellant even though Issues 1 & 3 would be taken together being related.

ISSUES ONE & THREE

These question the admissibility of the confessional extra-judicial statement of the appellant from which she resiled from. Also whether Exhibits 1, 2, 5, and 6 properly corroborated Exhibits 7 and together proved the guilt of the appellant. E

Arguing learned counsel for the appellant, Mr. Nworka contended that the practice of conducting a trial within trial whenever an accused person resiles from a confessional statement said to be made by him, in so far as such procedure has the potential of getting that statement admitted in evidence as the truth of what it contains, is both unlawful and unconstitutional. That the moment an extra-judicial confessional statement of an accused person is resiled from at the point when it is tendered, it becomes totally inadmissible in law. He referred to Sections 27-31 of the Evidence Act 2004 and also Section 6 & 160 of the same Act. F

For the appellant was further submitted that admitting and utilizing an extra-judicial statement an accused had resiled from is contrary to Section 36(ii) of the 1999 Constitution as it is akin to compelling the accused person to testify against himself. That where the constitution has set the conditions for doing anything, no legisla- H

tion can alter those conditions in any way directly or indirectly unless the constitution itself has so provided. He cited *INEC v Musa* (2003) 1 SCNJ 1 at 32.

B Learned counsel for the appellant stated on that conducting a trial within trial to determine whether a statement is voluntarily made undermines the provisions of Section 160 (a) of the Evidence Act and Section 36(ii) of the Constitutional on *Ekulo Farmers Ltd v. UBN Plc* (2006) ALL FWLR (Pt. 319) 395 at 918, *Adeleke v Oyo State House of Assembly* (2007) ALL FWLR (Pt. 345) 211 at 251 - C 258: *Adinuso v. Omeire* (2006) ALL FWLR (Pt.310) 1759 at 1769 - 1770.

Mr. Nworka of counsel stated that the trial court was wrong to have relied on Exhibits 1, 2, 5, and 6 to hold that they corroborated Exhibit 7, the confessional statement. He referred to Exhibit 1, D the Beretta Pistol taken from a handbag which 1st accused gave to appellant to keep. Also Exhibit 2, the two bullets also from the same bag while Exhibit 5 and Exhibit 6 a pump action gun got at 1st accused's house at Irete, Owerri. That it cannot then be said that all the exhibits were recovered from the appellant. He said these claims E of the prosecution which were found to be false but utilized by the trial court and affirmed by the appellate court should not be allowed to stand. He relied on *Amobi v Nzegwu* (2006) ALL FWLR (Pt.297) page 1087 at 1101.

F It was submitted that the Exhibits 1, 2, 5, and 6 cannot corroborate Exhibit 7 (statement) since they were obtained before the statement was made. That the conviction based on the wrong reliance on those exhibits is perverse, wrong, void and occasioned a miscarriage of justice.

G Mrs. Dimkpa responding stated that the retraction or resiling from an extra-judicial confessional statement or denial by an accused person of having made such a statement does not render it inadmissible. He cited *Alarape v The State* (2001) FWLR (Pt.41) 1872 at 1893; *Egboghanome v The State* (1993) 7 NWLR (Pt. 306) 383.

H That where a confessional statement is objected to as to voluntariness of the statement a judge at trial must determine its admissibility by way of a trial within trial which is what the learned trial judge did in this instance. He cited *Igago v The State* (1999) 73 LRCN 3505.

For the respondent was submitted that Exhibits 1, 2, 5 and, 6 properly corroborated Exhibit 7. He cited *Ogunbayo v The State* (2007) 146 LRCN page 9. That Exhibits 1, 2, 5, and 6 were direct evidence that the appellant was an active party to the offence in line with Section 7 of the Criminal Code and Section 5 (b) of the Robbery and Firearms (Special provisions) Act Cap. 398 Laws of the Federation 1990 but also the amount to confirmation of the accounts given by PW1 and PW2. That they also corroborated Exhibit 7, the extra-judicial statement of the appellant. He cited *Ogunbayo v The State* (supra) 703.

The issues thrown up here have to do with the confessional statement, Exhibit 7 which the prosecution stated was made by the appellant as accused and which accused/appellant denies making voluntarily. In fact appellant contended that the confessional statement was made under duress in the course of extreme torture by the police. The appellant through counsel sought to disprove the voluntariness of the statement hence the order by the trial court and the learned trial judge getting the proceedings through a trial within trial, at the end of which she ruled that the statement was voluntarily made and so admitted it as Exhibit 7. In this wise, the provisions Section 27(1) & (2) of the Evidence Act are applicable and it is thus provided:

“(1) Confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the offence.

(2) Confessions if voluntary are deemed to be relevant facts as against the person who made them only”.

The provision of Section 27 of the Evidence Act above restated stipulates that where the voluntariness of the statement is challenged by an accused, everything in the trial would stop and the voluntariness or otherwise of that statement ascertained and that in a trial within trial.

That was what the learned trial judge did and in strict compliance with the procedure in that specialized process of a trial that takes place in the course of the trial of an accused. In that process, the accused does not start the tendering of evidence on the voluntariness of the statement. rather it is the prosecution who begins and later the accused reacts with his own version of what transpired so that the

trial judge would strike the necessary balance in deciding whether indeed there was involuntariness on the part of the accused at the time of the alleged confession or not. It is a missing of the point for the learned counsel for the appellant to contend that in so testifying the accused/appellant was forced by the prosecution to make a defence and thereby an infraction of Section 160(a) of the Evidence Act.

The provision of that Section of the Evidence is captured hereunder, viz:

SECTION 160

“Every person charged with an offence shall be a competent witness for the defence at every stage of the proceeding whether the person so charged is charged solely or jointly with other person provided that:

(a) A person so charged shall not be called as a witness in pursuance of this section upon his own application”.

The point raised by learned counsel for the appellant is not on target since the sub-trial if I may call a trial within trial as such, is a separate process which is not part of the main trial of the accused as it is an ascertainment of the voluntariness of the statement and no more and cannot be seen as an infringement of the right of an accused to say nothing if he so desired in his own defence in the main trial. A line must be drawn between the main trial and a trial within trial. Therefore there was no infringement of the rights of an accused within Section 36(ii) of the 1999 Constitution of the Federal Republic of Nigeria or Section 160(a) & (b) of the Evidence act. As an addition would need be asked, how the evidence proffered by the prosecution or those who obtained the statement from the accused would be challenged effectively if when they put forward their side of the story of everything regularly done to obtain the confession without undue influence, force or duress and the accused says nothing in rebuttal since counsel for the accused is not equipped to effectively debunk what the prosecution witnesses in the trial within trial had asserted merely by address. The incongruity of the situation is best imagined and the fall out is that the accused’s right to state the various stages of the torture or force or undue influence would be lost.

It seems to me that the mind set of the appellant’s counsel is that once the confessional statement has its voluntariness put to ques-

tion, it becomes automatically inadmissible. That in my humble opinion is not the law or the judicial guides at play. See *Alarape v The State* (2001) FWLR (Pt. 41) 1872, *Egboghanome v The State* (1993) 7 NWLR (Pt.306) 383; *Sule v The State* (2009) 17 LRCN 1 at 29.

The question that later arose is whether or not Exhibits 1, 2, 5 and 6 corroborated the confessional statement, Exhibit 7. Some conditions must play out for any evidence to be taken as corroborative of the other especially a confessional statement as in this instance. For such evidence it must be an independent testimony, direct or circumstantial, which confirms in some material particular not only that an offence has been committed. The other way to define corroborative evidence is to say that it is that evidence which tend to confirm, support and strengthen other evidence sought to be corroborated. It is not expected that it would be tantamount to a confirmation of the whole evidence given by a witness, rather it must be such as corroborates some material aspects of the charge. I refer to *Ogunbayo v The State* (2007) 146 LRCN 696.

In this case in hand Exhibits 1, 2, & 5 being the black berate pistol, two life cartridges, the axe respectively were recovered from the appellant and when situated alongside the confessional statement, Exhibits 7 it would be seen that the items Exhibits 1, 2 and 5 are corroborative of the contents of Exhibit 7, the extra-judicial confessional statement. The statement itself gives graphic details of the planning, execution and the after-math of the robbery with some exhibits in tow.

For effect I shall quote the confessional statement hereunder

“...Then on 27 12- 98, I was escorting my husband to the park to Uzoagba where he will enter motor to Owerri. Along the road to Uzoagba Park, I saw Uncle George who was standing beside his car. There this same Uncle George tell him they came for the thanksgiving of his brother that return from Overseas. This very Uncle George is a brother to the victim of the robbery. As I left Uncle George to my husband who was waiting for me, he asked me what Uncle George told me and related all to him. He my husband said he will like to rob that Uncle George from Overseas which I also agree with him. Beside I show him the house of this Uncle George to my husband. Then on 29/12/98, my husband told me that he is waiting for his friends and when they come they will be going to the said Uncle

George brother's house for the armed robbery operation. The it was Wednesday 30/12/98 that my husband told me that he has seen the persons he has been looking for and that on that Wednesday 30/12/98 night the will carry out the armed robbery operation the said house of Uncle George brother from Overseas... it was on the 31/12/98 being Thursday in the morning hours, I saw my husband again when he told me the successfulness of the armed robbery operation in the house of Uncle George brother he my husband on his visit to me at Uzoagba after the operation show me a bag when I opened it I saw some pounds sterling and there new N50,00 notes together with perfumes as the items he robbed from the said Uncle George's brother. I have handed over the items to the police. My husband handed over the foreign currencies to me to keep for him... I know my husband have guns the long one and the pistol recovered from him in our house... I saw the two guns that the long gun and the short pistol with my husband by November 1998..."

From the statement can be seen that the appellant though not at the scene of the robbery was fully an active participant, having provided the needed information of the robbery site and given all the assistance at her disposal. In fact without her role in the act, the possibility of the success of the robbery would not have been guaranteed. Therefore, the provisions of Section 7 of the Criminal Code and Section 5(b) of the Robbery and Firearms (Special provisions) Act, Cap 308 Laws of the Federation Nigeria 1990 have pinned her firmly as one of the robbers whose absence at the time of the crime in the scene thereof would not exculpate her from the full blame.

These issues 1 and 3 are hereby for the above resolved against the appellant.

G ISSUE NO 2

This raises the question whether the Court of Appeal was right to strike out the issues relating to the marriage between appellant and 1st accused person on the ground that the trial court's pronouncement on the same was obiter.

H Learned counsel for the appellant referred to the two witnesses for the prosecution who gave evidence on the marital status of the appellant and 1st accused. Also DW1 testified that appellant was his wife and he was cross-examined on that matter and so it cannot be said that the trial judge's remarks or comment on the status of two

accused persons was obiter and cannot be the subject of an appeal. He said the court below was correct to say what was before the trial court or the culpability or otherwise of the accused persons. That being the case, he said in determining that guilt every defence open to any or all the accused persons as revealed by the evidence is also in issue since the court is bound to consider every defence open to the accused as raised in evidence. He relied on Section 233(2) (d) of the 1999 Constitution; *Oyakhire v State* (2007) ALL FWLR (pt. 344) 1 at 10; *Edibo v State* (2007) 5 SCNJ 325 at 331. B

Mr. Nwoka of counsel for the appellant urged the court to invoke Section 22 of the Supreme Court Act and set aside that striking out of the Court of Appeal and rather resolve the matter of the marriage between appellant and 1st accused in favour of the appellant. That in this regard the finding of the trial court was perverse and a miscarriage of justice which should be resolved for the appellant as the evidence adduced would have afforded a viable defence for the appellant. He cited *state v Ajie* (2000) 7 SCNJ 1 at 12; *Joe Golday v Co-operative Bank* (2003) 2 SCNJ 1 at 19, Sections 10 and 34 of the Criminal Code Act applicable in Imo State. C D

For the appellant was further stated that the fact that the marriage between appellant and 1st accused was the customary marriage did not change anything since the constitution or the African charter does not allow any person to discriminated against on account of certain unique circumstances applying to the person. E

In response, Mrs. Dimkpa for the respondent stated that the mere fact that appellant stated that 1st accused was her husband and a marriage contracted under native law and custom is nor enough to prove the fact of marriage to him as proof of the assertion was necessary. He cited *Adegboye v The State* 1 SCNJ 207. F

That in absence of any evidence in proof of the alleged marriage, the pronouncement of the learned trial judge on the issue is an obiter dictum. G

The grouse of the appellant is that the pronouncement of the learned trial judge that the appellant and the 1st accused were not married as known to law, was prejudicial to the appellant in that it debarred from all the defences open to her that would have seen to a different verdict being made available to her and this ran counter to Section 233(2) (d) of the 1999 Constitution which has provided H

that in criminal cases the courts including the appellate ones are duty bound to avail an accused of any defence open to him from the totality of that evidence whether or not he has expressly asked for it. This principle given effect to in the cases of *Oyakhire v State* (2007) ALL FWLR (Pt.344) 1 at 10; *Edibo v State* (2007) 5 SCNJ 325 at B 331.

The above principle is indeed the law, which can only apply if the facts in this case render it applicable. The respondent counsel's view is that the pronouncement was merely an obiter dictum which had no part to play in the consideration of the evidence before the court. That is that the remark was an incidental opinion which would not directly impact upon the question before the court.

Ogbuagu JSC in *Ogunbayo v State* (2007) 146 LRCN 696 at 713 described a similar comment to be:

D *"at worst the said comment is a comment and at best is an obiter dictum i.e. a comment which just by the way, a casual and passing expression, an observation of the learned trial judge which has nothing relevant to do with the live issue before him"*

E That was akin to the position taken by this court in *Onagoruwa v The State* (1993) 7 NWLR (pt. 303) 49 at 9 - 10.

The stance of the appellant is anchored on Section 34 of the Criminal Code which stipulates that there is no offence of conspiracy between a husband and wife and that relationship being a marriage under the Marriage Act. It is true that one of the charges for which F the appellant and 1st accused stood trial is conspiracy but evidence of the nature of the marriage must be raised before the defence under Section 34 of the Criminal Code can be available to any of them and in this instance the appellant. Also the appellant would not be termed G an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him to attempt to escape punishment. This is in consonance to Section 10 of the Criminal Code.

H The mere fact that the appellant and the 1st accused had each referred the other as husband or wife respectively had not established the status by evidence for which the comment or observation of the learned trial judge would not be taken as an obiter dictum. A statement that they were partners in- crime and never married, the trial judge made merely in embellishment or to underscore her finding that there was a robbery in the house of PW1, Augustine

Chukwunyere and the appellant and 1st accused each fully participated in the robbery and each playing his or her mastery role.

It is in the light of that the Court of Appeal finding the comment to be an obiter dictum rightly struck out the issue raised thereby.

I find the Issue 2 resolved against the appellant.

All three issues having been resolved against the appellant and the fuller reasoning in the lead judgment, that I too dismiss the appeal.

I abide by the consequential orders made.

C

OKORO JSC

I was obliged in advance a copy of the judgment of my learned brother, Musa Dattijo Muhammad, JSC, just delivered and I agree with the reasons therein advanced to arrive at the conclusion that this appeal has no merit and ought to be dismissed. The appeal herein is in respect of an armed robbery matter. It is against the judgment of the Court of Appeal, Owerri Division delivered on 8th April, 2011 whereby the said court dismissed the Appellant's appeal against the judgment of the Imo State High Court which convicted the Appellant of conspiracy and armed robbery in Charge No. HOW/51C/99 and sentenced her to death.

The facts of the case are exhaustively set out in the lead judgment of my learned brother Muhammad JSC, which I do not propose to repeat here in extenso except to delve straight into the consideration of one of the issues distilled by both parties for the determination of this appeal. It is the first issue. The Appellant puts it this way:

"1. Whether the lower court was right in deciding that despite the provisions of Section 36 (ii) of the 1999 Constitution and Section 160 (a) of the Evidence Act, the confessional extra-judicial statement said to be made the Appellant which she resiled from was still admissible in law."

On the same issue, the Respondent couched it differently as follows:-

"(a) Whether an extra-judicial statement of an accused person is rendered inadmissible by reason that the accused person resiled therefrom."

H

Both Counsel have elaborately made submissions in support of their opposing positions.

Section 27 (1) & (2) of the Evidence Act state as follows:-

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

(2) *Confessions if voluntary are deemed to be relevant facts as against the person who made them only.*”

C Thus, a confessional statement, if it is true, positive and direct becomes proof of an act. Also, where it is voluntarily made stating or suggesting the inference that an accused committed an offence for which he is charged, it is relevant and admissible against him provided the statement was not made as a result of any threat, promise or inducement from a person in authority. It has to be noted that any D voluntary information given by the accused at any time during investigation which leads to the discovery of any fact material to the charge against him is equally admissible. See PETER V. STATE (1997) 12 NWLR (pt. 531) I at 22, FATILEWA V. THE STATE (2008) 12 NWLR (pt. 1101) 518, (2008) 4 - 5 SC (pt. 1) 191.

E There is no doubt any longer and it is well settled that a court can convict an accused person on the confessional statement made by him provided it is direct positive and unequivocal about his committal of the crime. See NWACHUKWU V. STATE (2007) 7 SC 1, (2007) 17 NWLR (pt. 1062) 31, YUSUFU V. THE STATE (1976) 6 F SC 167 at 173, KIM V. THE STATE (1992) 4 SCNJ 81 @ 110.

G In the instant case, the defence objected to the prosecution tendering the confessional statement of the Appellant on the ground that the said statement was not voluntarily made and asked for a trial within a trial to determine its voluntariness. At the end of the exercise, the learned trial judge held that the statement was voluntarily made. This was upheld by the court below. It is trite that if the accused person resiles from his confessional statement, it is his duty to explain to the court as part of his evidence, the reason for the inconsistency but the Appellant in this case could not convince the trial H court that his confessional statement was not voluntarily made. See KAREEM V. FEDERAL REPUBLIC OF NIGERIA (No. 2) (2002) 4 SC (pt. 11) 42, (2002) 8 NWLR (pt.770) 664. The reason is that in most cases it is usual for an accused person to retract deny or resile

during his trial in court from the extra-judicial statement he had earlier made to the police immediately after the event giving rise to the charge against him. That is why such a resiled statement is not rendered inadmissible by the mere denial or retraction by the accused person.

The area of argument by the learned counsel for the Appellant did not impress me at all as it did not pave the way for the freedom of his client. All those arguments regarding Section 36 (II) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and Section 160 (a) & (b) of the Evidence Act are mere academic exercise in view of the hard facts of this case coupled with the confessional statement of the Appellant. There is no evidence that the Appellant was forced to give evidence as the confessional statement is to support the case of the prosecution and not that of the defence.

Based on the above and the more detailed reasons encapsulated in the lead judgment of my learned brother, Muhammad, JSC, I agree that this appeal has no merit at all. I accordingly join in dismissing it.

B

E

F

G

H