

**SUPREME COURT OF NIGERIA**  
FRIDAY 14TH MARCH, 2014. SC. 455/2012  
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI, M. U. PETER-  
ODILI, O. ARIWOOLA, M. D. MUHAMMAD, JJSC**

THE PEOPLE OF LAGOS STATE ..... APPELLANT  
V.  
MOHAMMED UMARU ..... RESPONDENT

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CRIMINAL PROCEDURE - Proof - Burden of - Is on prosecution to prove guilt of accused beyond reasonable doubt - Failure to do so leads to discharge of accused - As the burden does not shift (H1)

ARMED ROBBERY - Ingredients - Proof - Prosecution must prove that there was robbery - Which was armed robbery - And that accused took part in the armed robbery (H2)

ARMED ROBBERY - Ingredients - Proof - Means of - Proof can be done through documentary or oral evidence - Or even through circumstantial evidence (H3)

CRIMINAL PROCEDURE - Conviction - Confession - Tendering accused statement is fundamental in grounding conviction - Otherwise the conviction is defective and can be quashed - (H4)

ARMED ROBBERY - Proof - Recent possession - Prosecution must establish identity of stolen goods - Which must be in possession of accused - And possession must be recent (H5)

ARMED ROBBERY - Proof - Identity of stolen sandal - Where unreliable - It is unsafe to base any conviction on such evidence (H6)

EVIDENCE - Withholding of - It is presumed under EA s. 149(d) - That evidence of PW1, respondent and other corroborating evidence - Are unfavourable to prosecution who withheld them (H7)

**FACTS**

Accused/respondent was charged before the High Court of

## 1280 The People of Lagos State v. Umaru (2014) 3 KLR

Lagos State on one count of armed robbery contrary to section 402(2)(a) of the Criminal Code Law Cap. 17 Vol. 12 Laws of Lagos State 2003. It was alleged by prosecution/appellant that respondent along with others (now at large) attacked and robbed PW1 (Mr. Nnosiri) with dangerous weapons. Respondent was arrested by some OPC members a short distance from the robbery scene. At the trial, PW1 claimed to have identified respondent from the sandals he was wearing. PW1 further stated that the sandals personally belonged to him (PW1) and he had left it at the entrance of his door prior to the arrival of the robbers. PW1 stated that he was sure that it was respondent that stabbed him on the chest with a dagger.

PW2 (the investigating police officer) equally testified that he recovered the dagger from respondent who confessed of having stabbed PW1. However, appellant did not tender the said respondent's confession or the dangerous weapon in evidence. In his defence, respondent denied all the allegations against him stating that he was arrested early in the morning on his way to work as a security man. At the end of the trial, the court found appellant's case proved beyond reasonable doubt. It therefore convicted and sentenced respondent to death by hanging. Aggrieved, respondent lodged appeal in the Court of Appeal Lagos Division. The court reviewed the entire case and came to the conclusion that appellant did not prove its case against respondent beyond reasonable doubt. The court having found that lapses exist in appellant's case discharged and acquitted respondent. Aggrieved, appellant appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*"1. Whether considering the circumstances of this case and the evidence presented at trial, the Court of Appeal was right in setting aside the judgment and sentence of the trial court.*

*2. Whether the refusal or failure of the appellant to tender the statement of PW1 and the dagger was fatal to the case of the prosecution.*

*3. Whether the prosecution established the ingredients in section 149(a) of the Evidence Act to ground conviction under that provision."*

# **HELD** (Unanimously dismissing the appeal per **I. T.**

**MUHAMMAD JSC)**

*CRIMINAL PROCEDURE - Proof - Burden of*

**1. Respondent's issue No. 4 is on the discharge of the burden of proof in criminal trials. This issue subsumes appellant's issue No.1. I think I should start treating this issue by re-stating the well known position of the law that in Criminal trial, the alleged offence must be proved beyond reasonable doubt. In such trials, the law places the BURDEN OF PROOF on the prosecution to prove the guilt of the accused beyond reasonable doubt. Failure to do so will automatically lead to the discharge of the accused person. The burden never shifts. Even where an accused in his statement to the Police admitted committing the offence, the prosecution is not relieved of that burden so that a wrong person will not be convicted for an offence he never committed. That is why it is always important for a trial court to determine from the outset and direct itself properly on who has the burden of proof in a trial. Where the learned trial judge fails to so direct himself, his judgment is susceptible to be set aside on appeal. (p. 1293 A)**

*ARMED ROBBERY - Ingredients - Proof*

**2. My dear Lordships, the respondent was taken to the trial court on a charge of Armed Robbery contrary to section 402 [2] [a] of the Criminal Code Law [CCL] Cap. 17, Vol. 2, Laws of Lagos State, 2003. The ingredients to be proved to sustain conviction of an accused who stands answerable to such a charge are well settled by legion of authorities. These ingredients are that:**

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

**Failure of the prosecution to prove any of these ingredients is fatal to its case. (p. 1296 B)**

*ARMED ROBBERY - Ingredients - Proof - Means of*

**3. It is in our evidence law, that proof of the above ingredients of the offence or even in civil actions, can be done either through documentary evidence, or by oral evidence or even through circumstantial evidence, as the case may be. In an attempt to prove the above ingredients of the offence of armed robbery against the respondent, the prosecution presented oral evidence through PWs 1 and 2. Mr. Nnosiri, the victim, testified as PW1. (p. 1296 F)**

*Conviction - Confession - Not tendered*

**4. There was no evidence of that sort tendered before the learned trial judge. If the tendering of other materials, objects, weapons, etc is not that vital and necessary. I think the tendering of the accused's statement made to the Police [considered to be confessional] is very vital, necessary and fundamental in grounding a conviction otherwise the conviction is defective and can be quashed and any sentence premised upon it can equally be set aside. (p. 1299 C)**

*ARMED ROBBERY - Proof - Recent possession - Conditions*

**5. Under the first leg of Section 149, that is, [a]; there is a presumption that a person found in possession of stolen property so soon after the theft, is either the thief or receiver of the property. It is under this principle that the learned trial judge mainly based her conviction of the respondent. Under this leg, several decisions were made by this or similar Courts where the defendants, convictions were affirmed. However, in R. V. Griliopoulous [1953] 20 NLR, 114, it was held that before the presumption can arise it is very necessary for the prosecution to establish the identity of the goods stolen and also the stolen goods must be found in the accused's possession. Moreso, the possession itself must be recent in relation to time or occurrence of the theft and there must be other incriminating circumstances. It is only when these conditions exist that the prosecution can ask the Court to presume that the accused was either the thief or the receiver and**

**the accused is then confronted with the task of rebutting the presumption by giving explanation as to his possession. Therefore, this presumption, in my view, does not affect the burden of proof. The burden, in such case is still on the prosecution and if the accused's explanation creates some doubt in the mind of the Court, then the prosecution has not discharged the burden on it and the accused person will be entitled to an acquittal.** (p. 1303 D) B

*ARMED ROBBERY - Proof - Stolen item - Disputed identity* C

**6. While reviewing the submissions made by the learned counsel for the respondent, I came across some vital and sensitive questions raised by the learned counsel which ought to have been answered by the learned trial judge.**

**These are the questions:** D

***“Did PW1’s sandals have a special mark of PW1 inscribed on it so as to make it easily identifiable in the public? Did PW1 report to the Police that his sandals were stolen? Did the Police ever investigate a case of stolen sandals belonging to PW1? Was the appellant ever asked to give account of his possession of the sandals he wore on the morning of 11th May, 2006, and he was unable to do so?”*** E

**The Court below concluded that those posers placed by the learned counsel for the respondent [appellant] as above been left unanswered by the learned trial judge in her judgment.** F

**I agree with the learned counsel for the respondent in his submission that it is only positive answers to these questions that can justify the conclusions reached by the learned trial judge while convicting the appellant in her judgment. Trial Judges should be cautious in dealing with cases involving disputed identities.** G

**The identity of the sandals alleged to belong to PW1 and found on respondent's foot, remains illusive and unreliable. It is certainly unsafe to base any conviction on such evidence. Identifying sandals or any other chattel/goods alleged to have been discovered in a suspicious circumstance, I think, is just like identifying a person alleged to have committed an offence** H

**where identification parade plays some role.**

(pp. 1304 H/1305 H)

*EVIDENCE - Withholding evidence*

**7. I shall now consider Section 149[d] of the evidence Act that is, on withholding of evidence. I already set out the provision of this paragraph earlier. What paragraph [d] of Section 149 of the Evidence Act stipulates is that where a party claims to have evidence that goes to show the existence of a document in proof of his case, the document should be tendered. Where such evidence could be produced but it is not produced, it is presumed to be against the interest of the party withholding it.**

**In the latter case, the Police investigated the facts of ALIBI relied on by the accused but the result of the investigation was withheld by the prosecution raising, thereby, a presumption that the evidence if produced would have been unfavourable to the prosecution.**

**From the evidence of the two prosecution witnesses, and as found by the trial Court, there were statements made to the Police by PW1 himself and the confessional statements attributed to the respondent in addition to other vital materials, which were withheld by the prosecution at the trial stage. Yet, the learned trial judge went ahead to make a finding of guilt against the respondent.**

**I am in agreement with the Court below in its decision to apply the provision of section 149 [d] of the Evidence Act. Perhaps it was because of fear of contradiction or rather, negation of what was alleged that was why the statements of PW1 and that of the respondent and other corroborating evidence, were withheld by the prosecution. It is to be noted that Courts of Law are paragons of Justice. They rely on what is produced before them as evidence cannot be given in air. In the type of case on appeal, such evidence must be given through a person and Section 149[d] of the Evidence Act can be accomplished by calling a particular witness to tender a particular object or document which if not tendered will be fatal to the prosecution's case. The objects alleged to have been recov-**

***ered and the statements of both the PW1 and the respondent ought to have been tendered by the prosecution. They were not so tendered through the relevant witnesses who testified. This, certainly, devastated the quality of the oral evidence led before the trial Court thereby laying no foundation upon which the learned trial judge would rely on to convict. I cannot but decide this issue against the appellant.*** (pp. 1306 E/1308 A) B

### **REPRESENTATION**

Dr. Muiz Banire, with P. Giwa [Mrs.], Dare Oketade, Ojochagu Ochai C  
and Aramide Babtunde, for the Appellant  
Andrew Igboekwe Esq., for the Respondent

### **CASES REFERRED TO**

Eze v. State (1985) 3 NWLR (pt. 13) 429 D  
Madagwa v. State (1988) 5 NWLR (pt. 92) 60  
Omiboju v. State (1974) 9 SC 1  
Stephen v. State (1986) 5 NWLR (pt. 46) 978  
Ikemson v. State (1989) 3 NWLR (pt. 110) 455  
Attah v. State (2009) 15 NWLR (pt. 1164) 284 E  
Garba v. State (2000) 6 NWLR (pt. 661) 378  
Olayinka v. State (2007) 4 SC (pt. 1) 210  
Attah v. State (2009) 15 NWLR (pt. 1164) 284  
Ilona v. Idakwo (2003) 11 NWLR (pt. 830) 53 F  
Akindipe v. State (2008) 15 NWLR (pt. 1111) 560  
Osudo v. State (2011) 18 NWLR (pt. 1278) 1  
Ani v State (2009) 16 NWLR (pt. 1168) 443  
Akindipe v. State (2008) 15 NWLR (pt. 1111) 560  
Ogudo v. State (2011) 18 NWLR (pt. 1278) 1 G

### **STATUTES REFERRED TO**

Criminal Code Law Cap 17 vol. 12 Laws of Lagos State 2003, s. 402[2][a]  
Evidence Act LFN 2004, s. 149(a)(d) H

### **LEAD JUDGMENT BY I. T. MUHAMMAD JSC**

From the facts contained in the printed record of the appeal, the prosecution's case against the respondent is that the respondent

along with others, were charged before the High Court of Lagos, holden at Lagos Judicial Division [the trial Court], with Armed Robbery, contrary to section 402 [2] [a] of the Criminal Code Law, Cap 17, vol. 12, Laws of Lagos State, 2003. The respondent with others at large, were alleged to have, on or about the 11th day of March, 2006, at Din Alloy Close, Oke Afa, Ilamose Estate Ejigbo, Lagos in the Ikeja Judicial Division, whilst armed with offensive weapons to wit: a dagger and a shot gun robbed and stabbed one Mr. Nnosiri on the chest. The amount robbed was (N5,000.00) five thousand naira. The respondent was arrested by some OPC members a little distance from where the robbery had taken place. Mr. Nnosiri, as PW1, identified the respondent from his sandals which had been by his door entrance before the robbers came and on a closer look, PW1 was sure the respondent was the one who stabbed him with a dagger.

After completion of hearing of the case, the learned trial judge found for the prosecution; convicted and sentenced the respondent to death by hanging.

The respondent, dissatisfied with the trial court's judgment appealed to the Court of Appeal, Lagos Division (Court below). The Court below, having reviewed the whole case, allowed the appeal set aside the trial court's judgment, discharged and acquitted the respondent. The prosecution, now as appellant, dissatisfied with the Court below's judgment appealed to this Court.

After settlement of briefs, learned counsel for the respective parties, on the hearing date, adopted and relied on the briefs filed filled and exchanged among them.

Learned counsel for the appellant set out the following issues for determination.

"1. Whether considering the circumstances of this case and the evidence presented at trial, the Court of Appeal was right in setting aside the judgment and sentence of the trial court. (Grounds 1, 2 and 4 of the Notice of Appeal)

2. Whether the refusal or failure of the appellant to tender the statement of PW1 and the dagger was fatal to the case of the prosecution. (Grounds 3, 5, and 6 of the Notice of Appeal)

3. Whether the prosecution established the ingredients in section 149(a) of the Evidence Act to ground conviction under that provision." (Grounds 7 and 8 of the Notice of Appeal)



In his submissions, the learned counsel for the appellant, Dr. Banire, argued that the Court of Appeal was wrong when it set aside the judgment and sentence of the learned trial judge convicting the respondent of the offence charged. Learned counsel set out the ingredients to be proved before conviction. He cited the case of **ABDULLAHI v. THE STATE** (2008) 17 NWLR (part 1115) 203 at page 221-222 A-C. The evidence given by PW1 establishes the fact that an armed robbery was committed. Further, the respondent made a confessional statement and that it is the best evidence which the court can rely on. The case of **NWACHUKWU v. THE STATE** (2007) 17 NWLR (part 1062) at page 70 was cited in support. The document (confessional statement) is not disputed by the respondent and it forms part of the record before the court which the court is entitled to look at **AKINDA v. VICE CHANCELLOR UNILORIN** (2004) 35 WRN 79, cited.

On the second issue, the learned counsel submitted that the failure of the appellant to tender the statement of PW1 and the dagger, as held by the Court of Appeal, is not fatal to the case of the prosecution. No cross-examination was offered by the respondent to debunk the testimonies of PW1 and the corroborating evidence of PW2. No discrepancy between the statement made to the Police and the evidence led in open Court. Further, the wound inflicted on PW1 is sufficient to obviate the need to tender the weapon used. Learned counsel argued that the identification of the accused/respondent by PW1 upon sighting him on the morning of the incident together with the sandals of PW1 to found on the accused/respondent constitutes sufficient circumstantial evidence to ground a conviction. He cited the case of **ADIEU v. THE STATE** (1980) NSCC 51 at page 63.

On the third issue, learned counsel for the appellant relies on the doctrine of recent possession to cite the provision of section 167(a) of the Evidence Act. He argued that the presumption in this case is in favour of the prosecution which the accused/respondent needed to rebut but has failed to rebut the fact that a pair of sandals stolen around 1:50am was lawfully found in his possession at 5:20am, less than four hours after the robbery.

Learned counsel urged this court to allow the appeal; set aside the judgment of the Court of Appeal and uphold the decision of the trial court.

Learned counsel for the respondent, Mr. Igboekwe, in his brief of argument did not agree with the appellant's issues as formulated by his counsel. Learned counsel opted for different issues which he claimed were from the same grounds of appeal. The issues are as follows:

B “1. *Whether from the facts and circumstances of this case, the Court of Appeal was right when it applied section 149(d) of Evidence Act 2004 in holding that the failure of the appellant to tender the statements of PW1 and the dagger allegedly used for the robbery was fatal to the case of the appellant. (Grounds 3, 5 and 6)*

C “2. *Whether from the facts and circumstances of this case, the Court of Appeal was right to hold that from the record of the court, the appellant did not establish any of the ingredients of section 149(a) of Evidence Act 2004 to warrant a conviction of the respondent under that section by the learned trial judge (Grounds 4 and 8)*

D “3. *Whether the Court of Appeal was right when, in reaching its decision, it did not rely on the alleged confessional statement of the respondent which was not tendered as an exhibit at the trial. (Grounds 4)*

E “4. *Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the appellant as the prosecution did not discharge the burden of proof placed on it by law with regard to the armed robbery charge brought against the appellant (Grounds 1 and 2)”*

F It is my observation that from the respondent's issues, ground No. 7 of the appellant's grounds of appeal seems to be abandoned as it is not covered by any issue. I would have struck it out if the respondent was the appellant. Again, two issues: 2 and 3; relate to  
G grounds 4. In the history of brief writing in appellate Courts, it is incongruous for one ground of appeal to relate to or be split into more than one issue and one of the issues is subject to being struck out. See: *MADAGWA v. STATE* (1988) 5 (part 92) 60; *AGBETOBA v. L.S.E.C.* (1991) 4 NWLR (part 188) 664. I have observed, issue  
H two (2) cannot relate to ground four (4) is on confession. The ground, shorn of its particulars, reads as follows:

“Grounds 4: *Error in Law. The Court of Appeal erred in law when it overlooked the Defendant/Respondent's CONFESSIOAL statement before setting aside the decision of the trial court*”

Thus, ground No.4 is irrelevant in this issue and all arguments premised on it in issue 2 are hereby discountenanced. Issue two, according, related only to ground of appeal No.8. Issue 3 can properly relate to ground 4 as shown in the brief.

In his submissions on issue 1, the learned counsel set out the ingredients of the offence of robbery required by law to be proved. B He stated further that in law the proof of the ingredients could be by documentary evidence and or oral evidence. He cited and relied on the case of *MARTINS v. THE STATE* (1997) 1 NWLR (part 481) 355. He argued that from the evidence of PW1, it can be seen that C PW1 made a clear, positive, direct and unambiguous confirmation that because the alleged robbery took place at midnight, there was total darkness due to power failure and he could not identify the armed robbers who were allegedly in his house on the 15th of May, 2006. The refusal of the appellant (not respondent), to tender the D statement of PW1, at the trial was to pervert the course of justice to ensure that the respondent (not appellant as referred to by learned counsel) is convicted at all costs notwithstanding the facts there was evidence with the prosecution which favoured him. Learned counsel cited Section 149(d) of the Evidence Act, 2004 and the case of E *OGUDO v. THE STATE* (2011) 18 NWLR (part 1278) 1. The statement by PW1 was made both at Ejigbo and Panti Stations 17 days after the alleged armed robbery incident as well as after PW1 had falsely identified the respondent among those that robbed him.

F Learned counsel for the respondent submitted that the evidence of PW1 was full of manifest contradictions, inconsistencies and not reliable to ground a conviction. PW1's evidence, it is further argued, is totally and manifestly unreliable as it can change at anytime. PW1's evidence, based on the findings of the Court of Appeal, ought G to be rejected in its entirety as same cannot be the basis of conviction in law as it triggered reasonable doubt in the prosecution's case which must be resolved in favour of the appellant. The case of *AKIN v. THE STATE* (2008) 15 NWLR (part 1111) 560 at page 571 B-D was cited H in support.

The evidence of PW2 on the alleged armed robbery is not admissible as he was not at the scene of the alleged armed robbery at the time it took place. Learned counsel urged the court to hold that the appellant failed to prove the 1st ingredient of armed robbery as

alleged.

On the 2nd ingredient of the offence, learned counsel submitted that the relevant evidence was that of PW2 who was the IPO who arrested and took the statement of the respondent. He visited the scene of the crime and recovered some items including a dagger. B However, PW2 failed to tender any of the items he allegedly recovered including the dagger, nor the statement allegedly made to him by the respondent. This shows the prosecution was withholding evidence that was not favourable to it which is fatal to its case. Learned C counsel referred to the case of *ATTAH v. THE STATE* (2009) 15 NWLR (part 1164) 284; *OGUDU v. THE STATE* (supra). The dagger was a material evidence to be tendered in proof of the charge against the respondent. He urged the court to hold that the appellant failed to prove the second ingredient of the offence armed robbery. D Learned counsel argued that the court below was right in upholding his submissions on Section 149(d) of the Evidence Act on withholding of evidence. He urged this Court to resolve issue 1 in favour of the respondent.

Respondent's issue No.2 is on the finding of the learned trial E judge that the sandals worn by the respondent on the day of the alleged robbery belonged to PW1 and the respondent was by that fact one of the robbers who had robbed PW1's family earlier that day the provision of Section 149(a) of the Evidence Act. Learned F counsel equated the provision of Section 149(a) referred to above to the English Law doctrine of recent possession of stolen goods. He argued further that it will be highly prejudiced to convict the respondent based on Section 149(a) of the Evidence Act when the three ingredients required in proof thereof of stolen sandals were not satisfied in whole and not in part and when the respondent was never G charged in respect of any stolen sandals. He supported his submission with the case of *EZE v. THE STATE* (1985) 3 (part 13) 429 at page 436 C-D. Learned counsel argued that Criminal proceedings, like in civil proceeding vis-a-vis pleadings, evidence can only be led on the H elements or ingredients of the offence or offences as contained in the charge sheet before the Court. Any piece of evidence established before the Court by a party which is outside the element of offences charged in the charge sheet goes to no issue. He argued further that all the pieces of evidence led by the appellant on the case of the

stolen sandals goes to no issue and therefore inadmissible. The case of **UNION BANK OF NIGERIA PLC v. AJABULE** (2011) 18 NWLR (part 1278) 152 at page 73 A-B is cited in support. Learned counsel submitted that the learned trial judge was in error when she convicted the respondent on the provision of Section 149(a) of the Evidence Act 2004, as the prosecution did not establish any ingredients of the section to warrant a conviction of the respondent. He urged that this Court should uphold the decision of the Court of Appeal as it is right in law, thereby resolving the second issue in favour of the respondent.

On his issue No. 3 the learned counsel for the respondent stated that the appellant has made heavy whether of the alleged confessional statement in its brief of argument that it ought to be taken in account in decided this appeal as the respondent can be convicted based on his alleged confessional statement alone. He posed some questions as to the effect in law of an accused's statement made to the Police who refused to tender same at the trial. He cited the case of **ANI v. THE STATE** (2009) 16 NWLR (part 11687) 443. Further, whether a Court of law can decide a criminal case before it based on the contents of such a statement. Learned counsel answered these questions in the negative and that if produced the statement would have been unfavourable to the prosecution. He supported his submissions by the case of **OGUDU v. THE STATE** (supra). Learned counsel for the respondent drew this Court's attention to the piecemeal nature of the litigation embarked upon by the appellant which the law frowns at. The case of **IJALE v. A-G LEVENTIS & CO. LIMITED** (1965) 4 NSCC 132-134 was cited. It is against respondent's constitutional right to fair hearing. The case of **TEWOGBADE v. THE AGBABOAKA** (2001) 5 NWLR (part 705) 38 referred to. Learned counsel urged this Court resolve this issue for the respondent.

Respondent's issue No.4 is on the discharge of the burden of proof by the appellant as prosecution. Learned counsel for the respondent argued that at the trial, the appellant did not prove all the essential ingredients of the offence of armed robbery by credible and admissible evidence in every material particular. The evidence of PWs 1 and 2, he submitted, are all legally inadmissible, manifestly unreliable, not credible, not to be relied upon and not safe to be the basis of a conviction offence or for any offence for that matter. The conviction

tion of the respondent by the trial court for the offence of armed robbery was an error in law which was rightly corrected by the Court of Appeal. Learned counsel cited in support the cases of *WANKEY v. THE STATE* (1993) 5 NWLR (part 295) 542 at page 549-550 - H-A, *ORJI v. THE STATE* (2008) 10 NWLR (part 1094) at page 50 A-B.

B He urged this Court to resolve issue four in favour of the respondent.

A reply brief (tagged “Reply on points of law”) was filed by the learned counsel for the appellant. In it, he replied that the evidence of PW2 is not hearsay. PW2 is the (IPO) Investigating Police Officer that carried out the investigation. His evidence on facts gathered during investigation does not and cannot fall into the realm of hearsay. He cited quoted Section 126 of the Evidence Act, 2011; *OLADEJO v. THE STATE* (1994) 6 NWLR (part 348) 101 at page 121 B-F.

D Learned counsel for the appellant replied to the submission of learned counsel for the respondent on the issue of sandals found on the respondent. That the argument of the respondent is totally misconceived. The fact that the respondent did not report a case of stolen sandals to the police and was not charged with stealing of sandals does not mean that the provision of Section 149[a] of the Evidence Act would not apply and that the respondent cannot be convicted of robbery. In fact, the fact that the respondent was found with the stolen sandals of PW1, goes to confirm that the respondent was the robber which in turn raises a rebuttable presumption that the respondent was the robber.

It is to be noted, my Lords, that the learned counsel for the respondent, having set out his brief of argument with four issues for determination as reviewed above, went ahead to proffer what he called “*response to the argument in the appellant’s*” brief of argument. But even the learned counsel for the appellant anchored his reply brief on that same respondent’s brief of four issues for determination. Then, what followed as response to appellant’s brief on pages 18 - 23 of the respondent’s brief is an unnecessary duplication of efforts and resources which should have wisely been preserved. I do not consider it desirable, anymore, to consider that part of the respondent’s repeated brief which I discountenance. I shall now consider the appeal, anon.

The issues formulated by the learned counsel for the appellant

and those of the respondent, overlap in some area. I shall relate such issues where possible in my treatment of the issues from both sides, all of which appear germane to the appeal.

**Respondent's issue No. 4 is on the discharge of the burden of proof in criminal trials. This issue subsumes appellant's issue No.1. I think I should start treating this issue by re-stating the well known position of the law that in Criminal trial, the alleged offence must be proved beyond reasonable doubt.** See: KOFI v. THE QUEEN (1952-55) 14 WACA 648; DOKA v. ZARIA NATIVE AUTHORITY (1966) NNMLR 145 at page 150; BODE v. COP (1970) NNLR 35 at page 17. **In such trials, the law places the BURDEN OF PROOF on the prosecution to prove the guilt of the accused beyond reasonable doubt. Failure to do so will automatically lead to the discharge of the accused person. The burden never shifts.** See: ALONGE v. INSPECTOR GENERAL OF POLICE (1959) 5 SCNLR 516 (1959) 4 SC 203.

**Even where an accused in his statement to the Police admitted committing the offence, the prosecution is not relieved of that burden so that a wrong person will not be convicted for an offence he never committed. That is why it is always important for a trial court to determine from the outset and direct itself properly on who has the burden of proof in a trial. Where the learned trial judge fails to so direct himself, his judgment is susceptible to be set aside on appeal.]** This general rule is traceable to the notorious case of WOOLMINGTON v. DPP (1935) AC 462.

The trial Court set out the three essential ingredients (to which I shall refer later) for the proof of the offence of armed robbery.

My lords, I think there is need for me to quote the general findings of the learned trial judge on the above ingredients. The learned trial judge found as follows:

*"On the first ingredient that there was a robbery PW2, the victim of the alleged robbery and the Investing Police officer at the Preliminary level respectively testified for the prosecution..."*

*Although PW1 admitted there was no light which the defence counsel argued would have made it impossible to identify the Defendant, I am of the view that this fact does not detract from the*

*fact PW1 was still able to identify his sandals in the actual of the Defendant. Whether or not he was the actual person who stabbed the victim is immaterial. What is material is that one of the robbers stabbed him while another pointed a gun at him threatening to shoot him if he would not bring out money.*

B *Therefore, the fact that the men were armed is incontestable and it matters not which of them was the armed man or who held which weapon among them. So apart from the fact that there was no light, the sandals identified the Defendant as one of the robbers who*  
 C *shortly before invaded the family of PW1. Section 149(a) of the Evidence Act provides that the Court may presume the existence of any fact which it thinks likely to have happed (sic happened?) regard being had to have to the common course of natural events, human conduct and public and private business, in their relation to the facts*  
 D *of the particular case and in particular the court may presume.*

*(a) that a man who is in possession of stolen goods soon after the theft is neither the thief or has received the goods knowing them to be stolen, unless he can account for his possession.*

*The truth is that the sandals found on the Defendant soon*  
 E *after the theft is such that given the contemporaneity of the time it cannot but be presumed that the he is the thief and not just the receiver thereof. There was no time to pass the sandals to someone else which consequently makes it even more probable that PW1 could*  
 F *identify the defendant as the robber who actually stabbed him with a dagger. This finds support in the oral testimony of PW2 under oath that the Defendant indeed confessed to him and his team of investigating Police Officers that he was actually the one who stabbed PW1 in the said robbery incidence. Section 149(a) Evidence Act is a codi-*  
 G *fication of the Common Law doctrine of recent possession, it state (sic) that the possessor of stolen goods is deemed either to have stolen the goods himself or received it fraudulently from the thief unless there is satisfactory and convincing explanation from him...*

*Furthermore PW2 testified that it was his team that issued a*  
 H *Police Form for PW1 to go to the hospital for treatment of the stab injury inflicted on him at the time of the robbery and that the Defendant further confessed that he was not alone in the robbery incident but that his colleagues are now at large. The foregoing has fixed the Defendant at the scene of the robbery in the house of PW1 and*



*there was indeed an armed robbery there.*

*The defendant himself admitted in court that when he was apprehended he called him 'ole, ole' or 'thief, thief' at 5:20am (barely 3 1/2 hours after the incident). It is common knowledge that by this time of the arrest of the Defendant, Lagosians are already going to their places of work and therefore it cannot be said to be so early as to have pounced on the Defendant and calling him 'ole ole' without a cause. It only goes to show that he and his colleagues were found in suspicious circumstances during which time his colleagues made good their escape. It is not so early as to have aroused suspicion to the point of arresting the defendant while the others ran away. More so as the defendant said he lived in the neighbourhood whereas PW2 said he told the Police he had no particular place of abode/ address. If it is true as claimed by the defendant that he worked for the then Commissioner of Police, Mr. John Ararume, it is a wonder that the said Commissioner of Police and the other employer he worked for barely a month earlier both in the same neighbourhood did not confirm these stories at the preliminary investigation level moreso as the whole Police unit in Lagos was under his direct supervision and control. PW2, who was the investigating Police Officer at the preliminary level said nothing about it and it is therefore the assumption that the story is an afterthought by the defendant to wriggle himself out of this case.*

*This is even more curious as the said C.O.P's house where the defendant alleged he worked in was in the neighbourhood of the first Police Station where he was taken to after his arrest and where he was detained according to his own evidence, for about one month he was transferred to Panti Police Station where he spent 26 days before the DPP's advice was issued culminating in this trial. If it is true that he actually worked for the C.O.P. and was on his way to his house as usual since he started working for him, the former would have at least showed up at the Police Station or put a call through to PW2 and his team to attest to the story of the defendant. Finally therefore I find that the prosecution has proved the offence against the defendant beyond reasonable doubt. The defendant is hereby found guilty as charged and convicted accordingly."*

The Court below, in its judgment, while reviewing the proceedings of the trial court found that the trial court maintained that

the prosecution had proved the offence against the defendant [respondent herein] beyond reasonable doubt but indeed found to the contrary from the record that there was no such proof. It finally held that all the three ingredients of the offence of armed robbery under section 1[2] of the Robbery and Fire Arms [Special Provisions] Act, Cap. R11, 2004 have not been established. The Court below allowed the appeal; set aside the judgment of the trial court, discharged and acquitted the respondent.

***My dear Lordships, the respondent was taken to the trial court on a charge of Armed Robbery contrary to section 402 [2] [a] of the Criminal Code Law [CCL] Cap. 17, Vol. 2, Laws of Lagos State, 2003. The ingredients to be proved to sustain conviction of an accused who stands answerable to such a charge are well settled by legion of authorities. These ingredients are that:***

- (a) there was a robbery or series of robberies;***
- (b) the robbery or each robbery was an armed robbery***

***and***

***(c) the accused was one of those who took part in the armed robbery.***

***Failure of the prosecution to prove any of these ingredients is fatal to its case.*** See: BOZIN v. THE STATE (1985) 7 NWLR [part 8] 465 at page 471; AMINU v. THE STATE (1990) 6 NWLR (part 155) 125 at page 135; OKOSI v. ATTORNEY-GENERAL, BENDEL STATE [1989] 1 NWLR [part 100] 642; NWACHUKWU v. THE STATE (1985) 1 NWLR (Part 1) 218; MARTINS v. THE STATE (1997) 1 NWLR (part 481) 355.

***It is in our evidence law, that proof of the above ingredients of the offence or even in civil actions, can be done either through documentary evidence, or by oral evidence or even through circumstantial evidence, as the case may be. In an attempt to prove the above ingredients of the offence of armed robbery against the respondent, the prosecution presented oral evidence through PWs 1 and 2. Mr. Nnosiri, the victim, testified as PW1. Among other things, he stated as follows:***

***"On 11th May, 2006 at 1:50am while sleeping we heard a noise on our door, when we woke up, we saw 4 men in our room and they said, 'Bring the money and twice' I said No money they***

*started beating me. My wife was shouting, one of them pressed her neck and told her to stop shouting and my wife was forced to bring out N5,000 which they said was not enough. The person I am looking used a dagger to stab me (lifted off his cloth. A wound on the left chest). Then they ran out of the house”*

He again testified that

*“They were armed. They decided to shoot me when they said I should bring the money, they pointed a gun at me that I should bring out money and my wife was forced to give them N5,000 which they said was not enough.*

*I made statements at Ejigbo and Panti Police stations.”*

While cross-examined, PW1 stated:

*“Yes I made a statement at the Police station. Yes it is true. Yes prosecution should rely on it. I told the Police what happened and they wrote it down”.*

Equally, PW2 Benjamin Dole, was the Investigating Police officer. In his evidence-in-chief, he stated that on receiving the information of the armed robbery, he arrested the defendant. The defendant made a statement to him under caution. He said he visited the scene of crime and some items such as a “dagger” was recovered. The defendant made confessional statement to him while police Form was issued for the victim to go to hospital for treatment. PW2, added further:

*“The defendant confessed that he was not alone but his colleagues are now at large and he actually confessed the [sic: he?] stabbed the victim with a dagger. My DPO interviewed and they made the same statements i.e. the Defendant victim and he told us to transfer the case to Panti for further investigation.”* [See page 58 of the record of Appeal].

My Lords, from the excerpts of the evidence of PWs 1 and 2, above and as contained in the record of appeal, some relevant questions are inevitable:

(1) What happened to the alleged statements of both PW1 and that of the defendant taken by PW2?

(2) What happened to the “dagger” recovered from the scene of the crime?

(3) What happened to the “charms and other things” recovered from the scene of the crime?

(4) What happened to the “gun” used in attacking PW1 and his family?

Neither the “dagger”, “gun” “charms and other things” recovered from the scene of the crime, nor the statement of PW1 and or, the confessional statement said to be made and endorsed by the DPO in charge of PW2’s Division/office was tendered in evidence. Not even the police Form given to PW1 to take to Hospital for treatment was tendered. That was perhaps, what made it easy for the Court below to make the following finding:

*“In the instant appeal before this Court, the failure or the refusal of the prosecution [respondent in this Court] to tender both the statement of PW1 and the dagger alleged to have been recovered from the appellant meant if either was tendered in Court it would either be adverse to it or go against it.”*

The Court below’s finding, as above, tallies with the pungent submissions made by the learned counsel for the respondent in this court, when he stated, inter alia, as follows:

*“Upon realization by the respondent that tendering this statement by PW1 at the trial will irredeemably damage its case, the respondent deliberately withheld tendering the said statement at the trial. Clearly, the refusal of the respondent to tender the statement of PW1 at the trial was to pervert the course of justice by ensuring that the appellant is convicted at all costs notwithstanding the fact that there was evidence with the prosecution which favoured him. It is trite law that the courts are enjoined to presume that that evidence which could be and is not produced, be unfavourable to the person who withholds it. See section 149(d) of the Evidence Act 2004 which is equivalent to section 167(d) of the Evidence Act 2011. See also the decision of this honourable court in OGUDU v. STATE (2011) 18 NWLR 1278 page 1”*

Although non-tendering of a weapon or weapons alleged to have been used on a victim of an armed robbery or any crime, for that matter, may not be fatal to prosecution’s case where the defendant confesses to the commission of the crime, the production of the items recovered from the scene of the crime, including the alleged dagger, along with the statements made by PW1, and more importantly, the confessional statement said to have been made by the respondent, would have gone a long way to lay some weight to the

evidence led by the prosecution. When such vital “weapons”, “charms”, or “other things” and the alleged confessional statements said to have been made by the respondent were not tendered in evidence, then one begins to wonder, upon what did the learned trial judge base her conviction? What is clear from her judgment is that she held, inter alia, as follows:

*“There was no time to pass the sandals to someone else which consequently makes it even probable that PW1 could identify the Defendant as the robber who actually stabbed him with a dagger. This finds support in the oral testimony of PW2 under oath that the Defendant indeed confessed to him and his team of investigating Police Officers that he was actually the one who stabbed PW1 in the said robbery incidence”*

***There was no evidence of that sort tendered before the learned trial judge. If the tendering of other materials, objects, weapons, etc is not that vital and necessary. I think the tendering of the accused’s statement made to the Police [considered to be confessional] is very vital, necessary and fundamental in grounding a conviction otherwise the conviction is defective and can be quashed and any sentence premised upon it can equally be set aside.***

In SAIDU v. THE STATE (1982) 4 SC 41, this Court held that a confession can support a conviction if proved to be made and that the first step in proving a confession is to properly tender it in evidence as a confession and not for identification purpose only which is of no value. In the SAIDU’S case supra, the confessional statement was only tendered for identification by the superior Police officer before whom the statement was taken for confirmation after it had been recorded. The trial judge admitted it in evidence and relied on it without calling the Policeman who recorded it. It was held that the confession was not proved as it was not in evidence before the trial Court. It was observed by this court:

*“In the instant case there is no record to show that exhibit C, the confessional statement was produced and admitted in evidence as a statement made voluntarily by the accused appellant or that the facts contained therein are true and refer to the offence with which the appellant is charged.”*

See further: REG v. CHARTWOOD (1980) 1 WRL 874;

ACHABUA v. THE STATE (1976) 12 SC 63 at page 68; YESUFU v. THE STATE (1976) 6 SC 167 at page 173.

Further observation made by this court in SAIDU'S case, which has semblance with the present appeal reads as follows:

B *"When the evidence of Cpl. Jacobs Igbinosun was admitted through PW7, the statement Exhibit 'B' was omitted not identified and was not produced by the witness and was not admitted in evidence by the learned trial judge as should have been done. The position therefore is that the issue of admissibility raised before Nnaemeka Agu, J. was side tracked by him because the accused said he did not speak pigin English and the same of admissibility when raised before Nwokedi, J; was treated as premature because in the words of his ruling "The Court has not reached the state whether the accused has made a statement or not.*

D *The learned trial judge, Nwokedi, J., surprisingly used the statement and treated it as if it had been admitted in evidence before him as a statement made by the appellant. It was the most important piece of evidence on which he convicted the appellant. This was a fatal error as a judge is not entitled to convict an accused person of a*  
E *confessional statement not proved before him to have been made by the accused person voluntarily."*

Thus, in SAIDU's case (supra), although this Court allowed the appeal, it made an order of discharge and acquittal of the appellant. SAIDU'S case, in my view, seems to be better handled by the  
F trial court than our present appeal as nothing at all was tendered in evidence by the prosecution. I resolve the appellant's 1st issue and respondent's issue No. 4 in favour of the respondent.

Respondent's issue No. 3 is on whether the Court of Appeal  
G was right to hold that the appellant did not establish any of the ingredients of Section 149(a) of the Evidence Act, LFN 2004 which is now Section 167(a) of the Evidence Act, 2011. It provides as follows:

H *"The court may presume the existence of any fact which it deems likely to have happened, regard being had to the common course of natural events, human conduct and public and private business; in their relationship to the facts of the particular case and in particular the court may presume that -*

*(a) man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be*

*stolen unless he can account for his possession;”*

The genesis of this issue is the findings and holding of the learned trial judge while reviewing the evidence of PW1, wherein she stated:

*“And because it was midnight he could not access the hospital immediately and in the morning he heard that some robbers had been apprehended nearby and he got there, he identified the Defendant as the person who actually stabbed him and by his (PW1’s) sandals stolen from his house a few hours earlier. Although PW1 admitted there was no light which the defence counsel argued would have made it impossible to identify the Defendant, I am of the view that this fact does not detract from the fact that PW1 was still able to identify his sandals on the feet of the Defendant.... So apart from the fact that there was no light, the sandals identified the Defendant as one as one of the robbers who shortly before invaded the family of PW1. Section 149(a) of the Evidence Act provides that the Court may presume the existence of any facts which it thinks like to have happened (sic) regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case and in particular the Court may presume -*

*(a) that man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to stolen, unless he can account for his possession.*

*The truth is that the sandals found on the Defendant soon after the theft in such that given the contemporaneity of the time it cannot but be presumed that he is the thief and not just the receiver thereof... Section 149(a) Evidence Act is a codification of the Common Law doctrine of recent possession, it state (sic) that the possessor of stolen goods is deemed either to have stolen the goods himself or received it fraudulently from the thief unless there is satisfactory and convincing explanation from him. See: [i] Alah v. C.O.P. 1968 NMLR, 121;*

*[ii] R. V. Isa Braimah 1943, 9 WACA, 197 [iii] State v. Aiyeola & Ors. 1969, 1 All NLR 303” (Underlining supplied for emphasis)*

In its review of the whole case and its findings, the Court below, held inter alia, as follows:

*“By the mention of his sandals which he identified as the one*

*found in the feet of the accused (appellant), the learned trial court believed him hook line and sinker. The court rushed itself into the application of the provisions of section 149(a) of the Evidence Act, and presumed that the appellant was one of the robbers who attacked the family of the PW1 on that fateful date. The learned trial judge in her judgment at page 94 of the records, quoted earlier on in this judgment said “so apart from the fact that there was no light, the scandals identified the defendant as one of the robbers who shortly before invaded the family of PW1.”*

There is no doubt the learned trial judge, rushed herself into arriving at this conclusion. I cannot but to agree with the submission of the learned counsel to the appellant in their main brief of argument, at page 7, paragraph 4, 16 wherein he stated:

“*RUSH*”, are used by the lower Court, as a verb, is to “*accelerate*”, “*expedite*”, “*hasten*”, “*quicken*”, the taking of decision on a certain matter without thinking about it carefully. [A.S. Hornby’s Oxford Advanced Learner’s Dictionary New 8th Edition, page 1299]. The word “*rush*” selected by the Court below, is indeed of an uncommon use in the whole vocabularies of the English Law. Lord Erskine, qualified the word as “*rush to judgment*” which he invented around 1800, when in practice, in the defence of a man accused of trying to assassinate King George II. He urged the Court and the Jury, that, it is fit, on that account, that there should be a solemn pause before We “*rush to judgment*” See: THOMAS ERSKINE “*speech in Defence of James Hadfield*”, in Erskine’s speeches 167 [James L. High ed; 1966 when Mark Lane, a Washington Lawyer, published *RUSH TO JUDGMENT*, a book about the assignation of President John F. Kennedy.

Section 149 of the Evidence Act 2004 [now Section 167 of the Evidence Act 2011] has five conditions. Conditions [a] and [d] are the ones directly relating to the case on hand. I already set out above the provision of Section 149 [a] which is on issue of recent possession. Section 149 [d] is on the presumption of withholding of evidence. The sub paragraph states that the Court may presume:

“*that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.*”

It behoves me to make a general observation before I come to the specific segments/conditions/elements/constituents of Section 149 of the Evidence Act. The section makes it discretionary for a



court to presume the existence of facts likely to have occurred regard being had to the course of common or natural events, human conduct and public or private business in their relation to the facts of the particular case. This is part of its reasoning process. The perception however, is confined to matters of fact alone not matters of law. See: BAMGBOYE v. UNIVERSITY OF ILORIN [1999] 70 LRCN 2146. B Again, in the case of BOZIN v. THE STATE [1985] 2 NWLR [part 8] 467, this Court, while interpreting Section 149 of the Evidence Act, held that the five matters enumerated in the section which the Court may presume are neither exhaustive nor conclusive and do not derogate from the general statement of the section that the Court may C presume the existence of a fact which it thinks likely to have happened having regard to the common course of natural event or course of human conduct.

***Under the first leg of Section 149, that is, [a]; there is D a presumption that a person found in possession of stolen property so soon after the theft, is either the thief or receiver of the property. It is under this principle that the learned trial judge mainly based her conviction of the respondent. Under this leg, several decisions were made by this or similar Courts E where the defendants, convictions were affirmed.*** See for instance: R. V. BRAIMOH (1943) 9 WACA; 197; THE STATE v. AIYEOLA & DIKE [1969] 1 ALL NLR 303; NWACHUKWU v. THE STATE [1985] 3 NWLR [part 11] 218; AREMU & ANOTHER v. THE F STATE [1991] 7 SCNJ [part II] 296; SALAMI v. THE STATE [1988] 3 NWLR [part 85] 670; ADEKOYA v. THE STATE (2012) 9 NWLR (part 1306) 536; SOWEMIMO v. THE STATE (2012) 2 NWLR [part 1284] 374; ADESINA v. THE STATE [2012] 14 NWLR [part 1321] 429. However, in R. V. Griliopoulous [1953] 20 NLR, 114, it G was held that before the presumption can arise it is very necessary for the prosecution to establish the identity of the goods stolen and also the stolen goods must be found in the accused's possession. Moreso, the possession itself must be recent in H relation to time or occurrence of the theft and there must be other incriminating circumstances. It is only when these conditions exist that the prosecution can ask the Court to presume that the accused was either the thief or the receiver and the accused is then confronted with the task of rebutting the

**presumption by giving explanation as to his possession. Therefore, this presumption, in my view, does not affect the burden of proof. The burden, in such case is still on the prosecution and if the accused's explanation creates some doubt in the mind of the Court, then the prosecution has not discharged the burden on it and the accused person will be entitled to an acquittal.**

This point was clearly stressed by Oputa, JSC in the case of EZE v. THE STATE [1985] 3 NWLR [part 13] 429 - that:

*"The above Section 148[a] [now Section 149[a] of the Evidence Law] is thus the Nigerian equivalent of the English doctrine of recent possession of stolen goods. For this doctrine to operate there ought to be evidence.*

*[1] that the accused herein the appellant was found in possession of some goods.*

*[2] that those goods were recently stolen.*

*[3] that the appellant failed to account for his possession."*

As per the scenario shown in this appeal, and as it is clear from the record and the findings of the Court below that:

*"The Court will make bold to say that the trinity ingredients for the proof of the doctrine of recent possession under Section 149[a] of the Evidence Act, must be satisfied in whole and not on part. If one or two of the ingredients are met and another is left, it would not be sufficient to ground a conviction of an accused person under that session. From the record before this court since the statements of PW1 did not report a case of stolen sandals to the Police, consequently the Police investigated whether or not the sandal found with the appellant belongs to PW1. The appellant from the record before the court was never asked to give account of his possessions of the said sandals, either by the Police or at trial, and he was unable to do so as required by section 149[a] of the Evidence Act. In short, the record before this court has not shown that any of those ingredients of Section 149[a] of the Evidence Act was established before the trial Court to ground a conviction under that provision, as done by the learned trial judge"*

**While reviewing the submissions made by the learned counsel for the respondent, I came across some vital and sensitive questions raised by the learned counsel which ought to**

**have been answered by the learned trial judge.**

**These are the questions:**

***“Did PW1’s sandals have a special mark of PW1 inscribed on it so as to make it easily identifiable in the public? Did PW1 report to the Police that his sandals were stolen? Did the Police ever investigate a case of stolen sandals belonging to PW1? Was the appellant ever asked to give account of his possession of the sandals he wore on the morning of 11th May, 2006, and he was unable to do so?”***

**The Court below concluded that those posers placed by the learned counsel for the respondent [appellant] as above been left unanswered by the learned trial judge in her judgment.**

**I agree with the learned counsel for the respondent in his submission that it is only positive answers to these questions that can justify the conclusions reached by the learned trial judge while convicting the appellant in her judgment. Trial Judges should be cautious in dealing with cases involving disputed identities.** In THE STATE v. SALISU & ORS [1974] 4 UILR 400 at page 406, AGBAJE, J. [as he then was], with whose view I agree, stated inter alia:

***“That when dealing with cases of disputed identity a judge must handle identification evidence with care and must always have presence to his mind the circumstances in which such identification was made and the weakness in it. And reference to circumstances in which such identification is made will require the judge to deal with such matters as the opportunity and the length of time that witness had of seeing who was doing what was alleged, the position he was in, his distance from the accused and the quality of light.”***

**It was the evidence of PW1 that:**

***“In the morning neighbours said they had arrested some robbers a distance away. When we got there, the Defendant was wearing my sandals he met at the door mouth and when I looked at him, I saw that he was the one that actually stabbed me.”***

**While cross-examined, PW1 answered, among others, that:**

***“There was no light at the time of the incident. It happened around 1.50 a.m.”***

**The identity of the sandals alleged to belong to PW1**

**and found on respondent's foot, remains illusive and unreliable. It is certainly unsafe to base any conviction on such evidence. Identifying sandals or any other chattel/goods alleged to have been discovered in a suspicious circumstance, I think, is just like identifying a person alleged to have committed an offence where identification parade plays some role.**

Our Courts have followed the landmark decision of Irish Supreme Court in *THE PEOPLE ATTORNEY-GENERAL v. DOMINIC CASEY* [No. 2] [1963] IR 33 at page 30-40, per KINGSMILL MOOR, J; that:

*"In our opinion it is desirable that in all cases where the verdict depends substantially on the correctness of an identification their attention should be called in general term to the fact that a number of instances, such identification has proved erroneous, the possibilities of mistake in the case before them and to the necessity of the case caution. Nor do we think that such warning should be confined to cases where the identification is that of only one witness. Experience has shown that mistakes can occur where two or more witnesses have made positive identification."*

On this issue alone, this appeal must fail woefully.

**I shall now consider Section 149[d] of the evidence Act that is, on withholding of evidence. I already set out the provision of this paragraph earlier. What paragraph [d] of Section 149 of the Evidence Act stipulates is that where a party claims to have evidence that goes to show the existence of a document in proof of his case, the document should be tendered. Where such evidence could be produced but it is not produced, it is presumed to be against the interest of the party withholding it. See: *EBOH v. PROGRESSIVE INSURANCE COMPANY LIMITED* [1987] 2 QLRN 167; *GEORGE v. THE STATE* [2009] 1 NWLR [part 1122]. In the latter case, the Police investigated the facts of *ALIBI* relied on by the accused but the result of the investigation was withheld by the prosecution raising, thereby, a presumption that the evidence if produced would have been unfavourable to the prosecution.**

See further: *AKINTOLA v. ANYIAM* [1961] ALL NLR 508; *AKINFE v. THE STATE* [1988] 7 SCNJ 236; *AREMU v. ADETORO* [2007] 16 NWLR [part 29] 471; *AWOSIKE v. SOTUNBO* [1989] 3 NWLR [part 29] 471; *ADEDERAN v. ALAO* [2001] 18 NWLR [245] 408.

**From the evidence of the two prosecution witnesses, and as found by the trial Court, there were statements made to the Police by PW1 himself and the confessional statements attributed to the respondent in addition to other vital materials, which were withheld by the prosecution at the trial stage. Yet, the learned trial judge went ahead to make a finding of guilt against the respondent.** Little wonder, therefore, that the Court below found and held as follows:

*“As regards the PW2, Corporal Benjamin Dole, who was the investigating Police Officer [IPO], who in the discharge of his duty, obtained statements from the accused [now appellant], from the PW1, one Joseph Nnosiri the victim in whose the alleged robbery occurred and recovered a dagger, obtained for the accused [now appellant] at the time of his arrest, which was also identified as weapon used by the appellant to stab the PW1. The appellant counsel in their brief of argument filed on the 27/2/12 stated that at trial of the accused [appellant], the PW2 refused to tender the dagger in evidence, which was the alleged instrument used in proof of the commission of offence. By refusing or failing to tender the dagger in evidence, it meant that either it is not true that the dagger was indeed recovered from the appellant, or there is no dagger at all anywhere. In either case the presumption in law under Section 149(d) of the Evidence Act 2004 is that the respondent withheld such evidence such that if it had been produced it would have been against the case of the respondent. Again in the same vein the prosecution or state [now respondent] in this Court refused or failed to tender in evidence the statement obtained from PW1 at the Panti Police Station on the 28th of May, 2006, and his earlier statement made at Ejigbo Police Station on the 11th of May, 2006. The learned counsel argued failing to put the statements in evidence had meant could go against respondent.*

*The respondent in their brief of argument filed on the 28th of March, 2012, did not take a reply to appellant on these facts. The provisions of Section 149[d] of the Evidence Act is as follows:...*

*In the instant appeal before this court, the failure or the refusal of the prosecution [respondent in this Court] to tender both the statement of PW1 and the dagger alleged to have been recovered from the appellant meant if either was tendered in court it would either be adverse to it, or go against it. Again, this no doubt had an*

*adverse effect on the 2 ingredients of the offence of robbery under Section 1[2] of the Robbery and Firearm [Special Provisions] Act Cap. R11, 2004.”*

**I am in agreement with the Court below in its decision to apply the provision of section 149 [d] of the Evidence Act. Perhaps it was because of fear of contradiction or rather, negation of what was alleged that was why the statements of PW1 and that of the respondent and other corroborating evidence, were withheld by the prosecution. It is to be noted that Courts of Law are paragons of Justice. They rely on what is produced before them as evidence cannot be given in air. In the type of case on appeal, such evidence must be given through a person and Section 149[d] of the Evidence Act can be accomplished by calling a particular witness to tender a particular object or document which if not tendered will be fatal to the prosecution’s case. The objects alleged to have been recovered and the statements of both the PW1 and the respondent ought to have been tendered by the prosecution. They were not so tendered through the relevant witnesses who testified. This, certainly, devastated the quality of the oral evidence led before the trial Court thereby laying no foundation upon which the learned trial judge would rely on to convict. I cannot but decide this issue against the appellant.** This issue is captured by the appellant in his issue No.2 which corresponds to respondent’s issue No.1.

Finally, on the issue of respondent’s confessional statement [if any at all], it will be futile for me to consider any argument on an exhibit that was not tendered in evidence before the trial Court.

It is certainly the duty of the prosecution to prove all the ingredients of the offence with which the respondent was charged. As found by the Court below, the prosecution did not prove before the trial Court the essential ingredients of the offence of Armed Robbery as charged, beyond reasonable doubt. This entitles the respondent to an order of discharge and acquittal as made by the Court below.

Accordingly, this appeal fails and it is hereby dismissed. The judgment of the Court below is hereby affirmed.

**FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother - I. T. Muhammad, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed. B

The respondent herein was arraigned for the offence of armed robbery contrary to section 402 (2) (a) of the Criminal Code Law, Cap 17, vol. 12, Laws of Lagos State, 2003. The Investigating Police Officer (IPO) said he took the statement of the respondent. The statement allegedly made to him was not tendered in evidence. It goes without saying that it can be presumed that the statement was not favourable to the case of the prosecution. Same is tantamount to withholding of evidence and as such, not favourable to the case of prosecution. The provision of section 149(d) of the Evidence Act is of moment. The court below was in order in the stance taken by it. See: Attah v. The State (2009) 15 NWLR (Pt. 1164) 284. C

The trial judge found that PW.2 who failed to tender the respondent's statement testified that –

*“It was his team that issued a police Form for PW.1 to go to the hospital for treatment of the stab injury inflicted on him at the time of the robbery and that the defendant further confessed that he was not alone in the robbery incident but that his colleagues are now at large.”* E

PW.2 should not have been taken seriously in respect of his viva voce evidence since he failed to tender the respondent's statement. It is not only a damning statement of an accused person that should be tendered with glee by the prosecution. A favourable statement to the accused should not be left out in a bid to secure conviction by the prosecution, at all costs. F

My learned brother said it all. I adopt the lucid reasons adumbrated in the lead judgment in dismissing this appeal.

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**PETER-ODILI JSC, CFR**

I agree totally with the judgment just delivered by my learned brother, I. T. Muhammad, JSC and to register my support, I shall make some comments. H

This is an appeal against the judgment of the Lagos Judicial Division of the Court of Appeal dated the 11th day of October, 2012 which allowed the Respondent's appeal and thereby discharged and acquitted him. The Respondent had been arraigned before the High Court of Lagos State presided over by M. A. Dada J. on a one count charge of armed robbery at the end of which trial the learned trial judge convicted and sentenced the Respondent to death by hanging on 27th day of September, 2011.

**FACTS BRIEFLY STATED:**

The prosecution put up the case that Respondent and three others in the early hours of 11th May, 2006 robbed one Joseph Nnosiri and his wife of the sum of N5,000.00 while armed with a gun and dagger with one of the robbers stabbing Mr. Nnosiri on the chest with the dagger and escaped. The respondent was arrested by the vigilante a little distance from the scene of robbery and Mr. Nnosiri (PW1) identified the respondent from his sandals which PW1 said belonged to him and which he had left at his door entrance before the arrival of the robbers.

PW2, the investigating police officer, Cpl. Dole Benjamin said he recovered the dagger from the respondent who had made a confessional statement to him, IPO admitting stabbing PW1.

The Respondent on his part and in his defence denied all the allegations against him stating that he was arrested at 5.20 am on his way to work as a security man.

At the end of the trial, the learned trial judge convicted and sentenced the Respondent to death by hanging.

Aggrieved, the Respondent appealed to the Court of Appeal which allowed the appeal and went on to discharge and acquit him. The prosecution, dissatisfied has come before this court on appeal against the discharge and acquittal of the Respondent.

On the 19th day of December, 2013 when the appeal was heard, learned counsel for the Appellant, Dr. Muiz Banire adopted the Brief of Argument of the Appellant which he had settled and filed on 16/11/12 and a Reply Brief filed on 1/2/13. He had formulated three issues for determination which are as stated hereunder:-

1. Whether considering the circumstances of this case and the evidence presented at trial, the Court of Appeal was right in setting aside the judgment and sentence of the trial court. (Grounds 1,



2 and 4 of the Notice of Appeal)

2. Whether the refusal or failure of the Appellant to tender the statement of PW1 and the dagger was fatal to the case of the prosecution, (Grounds 3, 5 and 6 of the Notice of Appeal).

3. Whether the prosecution established the ingredients in Section 149 (a) of the Evidence Act to ground conviction under that provision. (Grounds 7 and 8 of the Notice of Appeal) B

Mr. Andrew Igboekwe, learned counsel for the Respondent adopted the Brief of Argument filed on 21/1/2013 which Mr. Igboekwe settled. He distilled four issues for determination which are as follows:- C

1. Whether from the facts and circumstances of this case, the Court of Appeal was right when it applied Section 140 (d) of Evidence Act, 2004 in holding that the failure of the Appellant to tender the statement of PW1 and the dagger allegedly used for the robbery was fatal to the case of the Appellant. (Grounds 3, 5 and 6.) D

2. Whether from the facts and circumstances of this case, the Court of Appeal was right to hold that from the record of the Court, the Appellant did not establish any of the ingredients of Section 149 (a) of the Evidence Act 2004 to warrant a conviction of the Respondent under that section by the learned trial Judge. (Grounds 4 and 5). E

3. Whether the Court of Appeal was right when in reading its decision, it did not rely on the alleged confessional statement of the Respondent which was not tendered as an exhibit at the trial. (Ground 4). F

4. Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that the Appellant as prosecution did not discharge the burden of proof placed on it by law with regard to the armed robbery charge brought against the Appellant. (Grounds 1 and 2). G

The issues as drafted by the Appellant seem to me easier to utilise and I shall make use of them in the determination of this appeal. H

#### ISSUES 1, 2 & 3:

These three issues raise the question whether in the circumstances of the case the Court of Appeal was right to set aside the judgment and sentence of the trial Court. Also whether the failure of

Appellant to tender the statement of PW1 and dagger was fatal to the case of prosecution and whether the doctrine of the recent possession under Section 149 (a) Evidence Act applied. Canvassing the position of the Appellant, Dr. Banire stated that it is trite for an accused to be convicted under Section 402 (2) (a) of the Criminal Code Law, Cap. C17, Laws of Lagos State, 2003, the three ingredients must be established, to wit:

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

He cited the case of Abdullahi v. State (2008) 17 NWLR (Pt. 1115) 203 at 221 - 222.

Learned counsel said the above ingredients have been established. That the Respondent made a confessional statement of having committed the offence and stabbed PW1 in the process and it is not essential that the statement was not tendered. He referred to Nwachukwu v. State (2007) 17 NWLR (Pt. 1062) 31 at 70; Uzodinma v. Izunaso (2011) 17 NWLR (Pt. 1275) 30 at 89-90.

That the confessional statement of the Respondent is at pages 12 - 13 of the Record of Appeal and the Court ought to have looked at it irrespective of the fact that it was not tendered. He cited Akinola v. V. C. Unilorin (2004) 35 WRN 79; (2004) 11 NWLR (Pt. 855) 616 etc.

Learned counsel for the Appellant further contended that the failure of the Appellant to tender the statement of PW1 and the dagger is not fatal to the case of the prosecution since PW1 had led evidence that he made a statement at the police station. That the production and tendering of PW1's extra - judicial statement made to the police cannot be of greater importance over and above the oral evidence offered in open court when there is no allegation of discrepancy between the statement made to the police and the evidence led in open court. Also that the wound inflicted on PW1 is sufficient to obviate the need to tender the weapon used.

Further submitted for the Appellant is that the fact that PW1 immediately identified the accused person upon sighting him on the morning of the incident together with the sandals of PW1 found on the accused person constituting sufficient circumstantial evidence to

convict the accused. He relied on *Adie v. State* (1980) NSCC 51 at 63.

Dr. Banire of counsel submitted that a party has the discretion as to the quantity of evidence he wants to adduce before a court. That the fact that the dagger and the statement of PW1 were not tendered did not diminish from the case of the prosecution. He said the confessional statement of the defendant obviates the need to tender the dagger and PW1' statement, more so when the accused person did not dispute nor explain the fact that the sandals of the victim were found on him, the accused in the light of the robbery taking place at 1.50 am and the accused arrested 5.20 am of the same day.

Dr. Banire also said the failure to produce the weapon employed in the robbery was not fatal. He cited *Attah v. State* (2009) 15 NWLR (Pt. 1164) 284 at 303; *Garba v. State* (2000) 6 NWLR (Pt. 661) 378 at 388; *Olayinka v. State* (2007) 4 SC (Pt. 1) 210 at 217-218.

Learned counsel for the Respondent, Mr. Igboekwe submitted that the deliberate refusal of the prosecution to tender the statement of PW1 to the police was a clear manifestation of a hidden agenda by the prosecution to ensure the conviction of the Respondent as the said statement if tendered, would have swung the case in favour of the respondent as it would have conclusively established that PW1 wrongly identified the Respondent as one of the robbers who robbed his wife. He referred to *Ogudo v. State* (2011) 18 NWLR (Pt. 1278) 1.

That the finding and holding by the Court of Appeal that the evidence of PW1 is contradictory and unreliable should lead to the rejection of that evidence entirely. He cited *Ilona v. Idakwo* (2003) 11 NWIR (Pt. 830) 53; *Akindipe v. State* (2008) 15 NWLR (Pt. 1111) 560 at 571.

For the respondent was contended that from the facts and circumstances of the case, the Court below was right in its application of section 149 (d) of the Evidence Act, 2004 for the failure to tender the statement of PW1 and the dagger allegedly used in the course of the robbery which were materials in the possession of the Prosecution. He stated that if PW1 did not report a case of stolen sandals to the police and consequently the Police never investigated whether or

not the sandal found with the Appellant belongs to PW1. That the Appellant was never asked to give account of his possession of the said sandals and he was unable to then, the Section 149 (a) of the Evidence Act has no application to this case. He cited *Eze v. The State* (1935) 3 NWLR (Pt. 13) 429 at 436.

B For the Respondent was submitted that the failure of the Appellant to tender the alleged confessional statement of the Respondent to enable Respondent cross-examine or react to it as required by law renders the said confessional statement of no evidential value. That the court cannot rely on evidence contained in a document not rendered and admitted at the trial. He cited *Ani v State* (2009) 16 NWLR (Pt. 1168) 443.

C From the submissions of learned counsel for the Appellant would be seen that the appeal is anchored on there being sufficient D evidence linking the accused person to the robbery with which he was charged and Appellant had led credible evidence to the effect that the accused was one of the robbers who attacked PW1, Joseph Nnosiri, stabbing him and dispossessing him of the sum of N5,000.00. That PW1 was able to identify his sandals later found on the feet of E the Respondent.

The opposite of the Respondent is based on the facts that the PW1 had admitted in court that at the time the incident took place, everywhere was pitch dark as there was no light. Also that it is because PW1's testimony in court would not tally with his statement to F the police which produced the reluctance of the prosecution to bring that statement to court as it would have nailed further, the evidence of the prosecution which the Court of Appeal found to be contradictory and unreliable.

G Taking the summary of what transpired in the trial court within the context of the law, it cannot be ignored the presumption of law under section 149 (d) of the Evidence Act 2004 operative at the time of the trial which is equivalent to Section 167 (d) of Evidence Act 2011 which is, that the statement of the PW1 made to the police H which if it had been produced would have been unfavourable to the prosecution. A situation recognised by this court in the dictum of *Rhodes-Vivour, JSC in Osudo v. State* (2011) 18 NWLR (Pt. 1278) 1 and in which he said the withholding of such evidence being deliberate would have the result unexpected by the prosecution.

Furthermore, the Court below reviewing what the trial Court did, disagreed with the conclusion of that court of first instance as the Court below was able to see the contradictions in the evidence of PW1 and declared the evidence unreliable. Again was found by the Court of Appeal was that the evidence of PW2 did not enhance the position of position of the prosecution upon which a finding of guilt for armed robbery could be made against the respondent since the inconsistencies or contradictions in the prosecution's case triggered reasonable doubt in the prosecution's case which had to be resolved in favour of the Respondent. I place reliance on *Ilona v. Idakwo* (2003) 11 NWIR (Pt. 830) 53, *Akindipe v. State* (2008) 15 NWLR (Pt. 1111) 560 at 571. B  
C

Also an intriguing facet in the prosecution's case is the part played by PW2, the investigating police officer who said Appellant made a confessional statement to him and no effort made during the trial to produce the statement or even attempt to tender it. The so-called statement was not part of the evidence proffered by the prosecution. Again PW2 said he visited the scene of crime and recovered some items including the dagger. Again none of the items was brought to court not to talk of tendering them. All these lend weight to the review of the Court of Appeal and its conclusion that there were too many loose ends rendering it impossible for a finding of robbery, armed or otherwise. See *Attah v. State* (2009) 15 NWLR (Pt. 1164) 284. D  
E

On whether the Court of Appeal was right to hold that the PW1 finding his sandals on the feet of Respondent evoked the operation of section 149 (a) of the Evidence Act 2004 to pin him to either the robbery or the scene of crime at the time of incident while the trial Court found it sufficient to situate the Respondent at the crime scene at the time of incident or even as the perpetrator of the robbery and the stabbing, the Court of Appeal differed on the ground that the issue of the sandals purportedly raised more questions without answers being proffered by the trial Court. This conclusion of the Court below is supported by the fact that pW1 did not report a case of stolen sandals to the police and such was not investigated and so the applicability of section 149 (a) of the Evidence Act, 2004 did not come into play. F  
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The cases of *Attah v. State* (2009) 15 NWLR (Pt. 1164) 284 at

303; Garba v. State (2000) 6 NWLR (Pt. 661) 378 at 388, Olayinka v. State (2007) 4 SC (Pt. 1) 210 at 217 - 218 which the Appellant cited in support of the non tendering of the dagger not being fatal are in my humble view not applicable to the case in hand. In those cases the failure to tender the operating weapons was not fatal as  
B there were other strong features in the case of the prosecution upon which a conviction could be based, which is not the case here, where not even the extra-judicial statement of the Appellant allegedly confessional was not shown to Court.

C From all the above, the doctrine of recent possession as prescribed by Section 149 which is now known as Section 149 (d) of the Evidence Act cannot avail the Appellant. This, because of all the lapses earlier referred to and so the conditions for the application of the doctrine of recent possession are absent. See Eze v. The State (1985)  
D 3 NWLR (Pt. 13) 429 at 436.

I do not have any hesitation from all I have stated above in resolving the questions in issues 1, 2 and 3 against the Appellant.

From the foregoing and the fuller reasons in the lead judgment of my brother, I. T. Muhammad, JSC, I too dismiss the appeal  
E and affirm the judgment of the Court of Appeal which set aside the judgment, conviction and sentence of the trial High Court.

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**ARIWOOLA JSC**

F I had the opportunity of reading in draft the lead judgment of my learned brother I. T. Muhammad, JSC just delivered. I am in total agreement with the reasoning therein and the conclusion arrived thereat. The prosecution indeed failed totally to prove the case,  
G as prescribed, beyond reasonable doubt.

The appeal is devoid of merit and should be dismissed. Accordingly, it is dismissed by me. The judgment of the court below is affirmed.

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**M. D. MUHAMMAD JSC**

My learned brother I. T. Muhammad, JSC, obliged me a pre-view of his lead judgment just delivered. I entirely agree with his reasoning leading to the conclusion that the appeal lacks merit.

In criminal cases the law places the burden of proof squarely on the prosecution which must establish its case beyond reasonable doubt. The burden does not shift as it rests on the prosecution throughout. The existence of a doubt as to the guilt of an accused automatically entitles the accused to a discharge. See *Omiboju v. The State* (1974) 9 SC 1, *Stephen v. The State* (1986) 5 NWLR (Part 46) 978 and *Ikemson v. The State* (1989) 3 NWLR (part 110) 455 at 466. B

In the case at hand, the respondent is charged with armed robbery contrary to Section 402 (2) (a) of the Criminal Code Law Cap 17 vol. 12 Laws of Lagos State 2003. Along with others he was alleged to have, on or about the 11th March, 2006, robbed one Mr. Nnosiri at Din Alloy Close, Oke Afa Ilamose Estate, Ejigbo Lagos in the Ikeja Judicial Division. The robbers were allegedly armed with a dagger and a shot gun. It is appellant's case also that the robbers D even stabbed their victim in the course of robbing him the sum of N5,000.

In appellant's bid to discharge the burden of proving respondent's guilt, it called PW1, Mr. Nnosiri, the alleged victim of the robbery and PWII, an investigating police officer. At pages 53-54 E of the record, PW1 testified thus:-

*"On 11th May, 2006 at 1.50a.m., while sleeping, we heard a noise on our door net, when we woke up, we saw 4 men in our room and they said 'Bring the money and twice' I said 'No money they started beating me... The person I'm looking used a dagger to stab me (lifted up his clothe. A wound on the left chest). Then they ran out of the house..."* F

*So in the morning neighbours said they had arrested some robbers a distance away. When we got there, the Defendant was wearing my sandals he met at the door mouth and when I look at him, I saw that he was the one that actually stabbed me."* G

Under cross examination, PWI maintained that the robbery took place at 1.50a.m. He however concluded at page 56 of the record thus:- H

*"I made a statement at the police station. There was no light at the time of the incident."*

PWII corporal Dole Benjamin at page 58 of the record stated at the trial court that following a report of armed robbery he arrested

the respondent and recorded his statement which turned out to be confessional.

It is intriguing that neither the statement of PWI nor the confessional statement of the respondent recorded by PWII was tendered and admitted in evidence. The trial court evaluated the evidence before it thus:-

*“On the first ingredient that there was a robbery... PWI narrated how at about 1:50am of 11th May, 2006 his family was woken up from their sleep to see four men in their room demanding for money and when his wife could only come up with N5,000, they said it was too small and then the defendant stabbed him with a dagger...in the morning he heard that some robbers had been apprehended nearby and when he got there, he identified the defendant as the person who actually stabbed him and by his (PW1’s) sandals stolen from his house a few hours earlier.”*

The court found thus:-

*“Although PW1 admitted there was not light which the defence counsel argued would have made it impossible to identify the defendant, I am of the view that this fact does not detract from the fact that PW1 was still able to identify his sandals on the feet of the defendant... So apart from the fact that there was not no light the sandals identified the defendant as one of the robbers who shortly before invaded the family of PW1. Section 149(a) of the Evidence Act provides that the court...may in particular presume.*

*(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession.*

*The truth is that the sandals found on the defendant soon after the theft is such that given the contemporaneity (sic) of the time it cannot but be presumed that he is the thief and not the receiver thereof.”*

Most certainly, PWI’s identification of the respondent is suspect. He told the trial court that the robbery took place at night around 1.50 am and there was no light. He never told the court what manner of dress the respondent wore or such other features of his that allowed his being identified from other human beings. In the event, therefore, the trial court cannot be right to find other than on the basis of the presumption allowed under Section 149(a) that respon-



dent was one of the armed robbers who invaded PW1's house. The question that still has to be answered is whether on the facts Section 149(a) without more can sustain respondent's conviction for robbery.

The principle must restated that even where the prosecution benefits from the recentness of the event on the basis of which appellant's guilt can be presumed, it must further situate the appellant's possession with a criminal mind. Where the totality of the evidence and the surrounding circumstances do not support the inference that the accused was the thief or receiver of the stolen items, the court cannot justifiably draw that presumption. The possession of the stolen material by the accused on the basis of which the court invokes the presumption under Section 149 (a) (now Section 167(a) of the Evidence Act must thus be proved beyond reasonable doubt. See R. v. Obiase WACA 16 and Madagwa v. State (1988) 5 NWLR (part 92) 60.

The lower court at pages 176-177 of the record of appeal quite rightly held in that regard as follows:-

*"There is no doubt the learned trial judge rushed herself into arriving at this conclusion. I cannot but to agree with the submissions of the learned counsel to the appellant, in their main brief of argument, at page 7, paragraph 4.16, wherein he stated:*

*'Ordinarily, from the facts of this case particularly from the finding by the learned trial judge that PW1 identified the appellant as the robber that robbed his wife and stabbed him (PW1) by virtue of PW1's sandals that was allegedly worn by the appellant, before a reasonable conclusion in accordance with law can be reached there are several basic questions to be asked and answered in a situation like this. Some of these include:*

*Did PW1's sandals have a special mark of PW1 inscribed on it so as to make it easily identifiable in the public? Did PW1 report to the police that his sandals were stolen? Did the Police ever investigate a case of stolen sandals belonging to PW1? Was the appellant ever asked to give account of his possession of the sandals he wore on the morning of 11th May 2006 and he was unable to do so? It is only positive answers to these questions that can justify the conclusions reached by the learned trial judge while convicting the appellant in her judgment.'*

*No doubt those posers placed by the learned counsel to the appellant above, have been left unanswered by the learned trial judge in her judgment.”*

The lower court's foregoing postulation and its reliance on the decision of this Court in *Eze V. State* (1985) 3 NWLR (Pt 13) 429 cannot be faulted. At page 436 of the report, this Court per Oputa JSC held that for the doctrine of recent possession to operate there ought to be evidence:-

*“(1) That the accused (here the appellant) was found in possession of some goods.*

*(2) That the goods were recently stolen.*

*(3) That the fact of the possession of the stolen good is unequivocally admitted by the accused (the appellant) and*

*(4) That the appellant has failed to account for his possession of the stolen good.”*

In the case at hand PWI from the evidence on record did not report the loss of his sandals to the police. And the fact of the loss of the sandals to the robbers was never made an issue in the matter by the appellant. Respondent was never confronted before or at trial on the issue for his account to be made available to the trial court. In the circumstance, therefore, the lower court is right to have held that the presumption under Section 149(a) does not enure against the respondent and that the trial court's decision to the contrary is perverse.

It is for the foregoing and the fuller reasons outlined in the lead judgment that I also adjudge the appeal unmeritorious. I too dismiss it and abide by the consequential orders made in the lead judgment.

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