

**SUPREME COURT OF NIGERIA**  
FRIDAY 19TH DECEMBER, 2014. SC. 359/2012  
**CORAM:- M. MOHAMMED CJN, M. S. MUNTAKA-  
COOMASSIE, B. RHODES-VIVOUR, N. S. NGWUTA,  
J. I. OKORO, JJSC**

MUMINI ADISA ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Confession - Conviction - Once court is satisfied as to the truth of a confession - It can solely rely on same to ground a conviction - Despite retraction from accused (H1)

CRIMINAL PROCEDURE - Conviction - Confession - Corroboration - Having found corroboration in evidence of PW1, 2 & 4 - CA was free to convict appellant on the strength of his confession (H2)

CRIMINAL PROCEDURE - Trial within trial - Conduct of - Where accused retracted his confession - Court should conduct the mini trial - But there may be an exception to the general rule (H3)

ARMED ROBBERY - Proof - Despite the expunging of Exhibit O - Prosecution rightly discharged the burden on it - Having proved its case beyond reasonable doubt (H4)

CRIMINAL PROCEDURE - Fair hearing - Breach - Allegation of concealment of appellant's statement is unfounded - As prosecution adduced evidence it felt sufficient to prove its case (H5)

EVIDENCE - Production - Crime - Estoppel - Methods exist to compel production of material evidence - It is only when such are employed and opponent fails to comply - That withholding of evidence arises (H6)

**FACTS**

Before the High Court of Oyo State sitting at Ibadan, accused/appellant was arraigned along with four others for the offences of

conspiracy to commit armed robbery and armed robbery contrary to sections 5(b) and 1(2)(b) of the Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990. They pleaded not guilty to the charges. The case for the prosecution/respondent is that a five man armed robbery gang had sometime in 1994, invaded a petrol station, attacked, killed the owner and finally made away with some amount of money. One month after the attack, appellant with the others were arrested while trying to rob a chemist shop in Ibadan. They were taken to Police station.

An identification parade was conducted, wherein PW1, PW2 and PW4 identified appellant and the others as the robbers who robbed the petrol station and killed the owner. The culprits made confessional statements. At the trial, respondent called nine witnesses in support of its case. Appellant and the others individually testified for themselves in defence. In the course of the trial, one of them died in custody and his name was struck out from the list. At the end of the trial, the court discharged one of them on a no case submission, while appellant and two others were convicted and sentenced to death. Aggrieved, appellant and the others appealed to the Court of Appeal Ibadan Division. After thorough consideration of the appeal, the court dismissed the appeal and affirmed the judgment of trial court. Aggrieved further, appellant appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. Whether the court below was right in affirming the trial Court’s decision which was based on extra-judicial statements, the contents of which the Appellant fully retracted.*

*2. Whether in view of the evidence adduced in this case and the expunging of Exhibit ‘O’ from the record, the prosecution proved its case against the Appellant beyond reasonable doubt.*

*3. Whether having regard to the Appellants inability to access the challenge police stations case file and the materials contained therein, he was given a fair hearing.*

**HELD** (Unanimously dismissing the appeal per**MUNTAKA-COOMASSIE JSC)***CRIMINAL PROCEDURE - Confession - Conviction*

**1. My lords, I wish to digress a little to say that the above is not and cannot be relied upon to say that where a confessional statement was retracted by the accused person then the court cannot find conviction on it. No, that cannot be the law. The law is that a court of law can out-rightly convict on his extra-judicial confessional statement which is voluntary and real/true. Consistently with the above a court of law once is satisfied as to the truth of a confessional statement, it can rely solely on it to ground conviction, despite the accused's retraction of same. (p. 3558 A)**

*Conviction - Confession - Corroboration*

**2. It is to be noted that there is absolutely nothing on record to show that Exhibit 'J' was made under duress, it was in fact tendered and admitted without objection from the Appellant. There is nothing in law preventing the court below from considering Exhibit 'J' in deciding the appeal against the appellant. This exhibit served as additional evidence to make the appellant's confession real.**

**Not only that my lords, Wahabi Alao another co-convict also in his statement Exhibit P, corroborated the guilty stance of the appellant, Mumini Adisa.**

**It is my view therefore that the appellant's counsel woefully derailed when he contended that the conviction of his client now appellant was solely based on confessional extra-judicial statements. The respondents counsel in their amended brief of argument was correct when he contended that the court below having juxtaposed the said extra-judicial statements (i.e. Exhibit 'N'. 'N1', 'J' and 'P') made before the police during investigation with the above referred testimonies of PW1, PW2 and PW4, was really right in affirming the trial court's decision. I have further digested the evidence as produced by the prosecution witnesses and I found that the com-**

**petence and credibility of those witnesses were never in doubt above all they neatly tallied with the confessional statements.**

**The court below in my view, had already found corroboration in the testimonies of PW1, PW2 and PW4. The court below was therefore absolutely free to convict the appellant on the strength of the confessional statements.**  
(pp. 3559 D/3560 C)

*CRIMINAL PROCEDURE - Trial within trial - Conduct of*

**3. In such situation, i.e. where an accused person or persons retracted his or their confessional statements usually the court should conduct a trial within trial to determine the validity and the voluntariness of the statement before the admission in evidence or otherwise as in the case of Exhibit 'O'. The trial court should have conducted a trial within trial. However it is not always the case. There may be an exception to the above general rule.** (p. 3560 G)

*ARMED ROBBERY - Proof*

**4. I am ready my lords to agree with the submissions of the appellant's counsel or any other person that the burden of proving armed robbery against the accused/appellant which duty or burden does not shift, lies on the prosecution. Consistently with the above the 2nd issue formulated by the appellant is and must be resolved in favour of the respondent. The answer to that issue 2 is that the prosecution, despite the expunging of Exhibit 'O' by the court below, proved its case against the appellant, herein, beyond reasonable doubt. Also the court below was perfectly right in affirming the conviction and sentences meted out by the trial court.** (p. 3564 B)

*Fair hearing - Breach*

**5. My lords, I agree entirely with learned respondent's counsel that from the above quoted testimony of PW8, it is clear that the alleged concealment of statements made by the appellant and his co-convicts by the prosecution is unfounded and false. It is clear in my mind therefore that the contention of the appellant's counsel that the appellant was not fairly**

**heard by both the trial court and the court below is grossly misconceived. Is it not logical for the appellant's counsel to demand that the prosecution should or even compel the prosecution to tender same during the trial? He could have filed before the trial court NOTICE TO PRODUCE. None of these were done by the appellant or his counsel. This shows that the allegation was a mere sham.** B

**In the final consideration I completely agree with the closing submission of the learned respondents counsel that "in the final analysis on this issue, the prosecution adduced the evidence they felt sufficient to prove their case beyond reasonable doubt." The appellant's complaints are misguided.** C  
(p. 3566 H)

*EVIDENCE - Production of*

**6. The rules of procedure provide ample methods by which a concerned party can compel his or her opponent to produce material evidence that he or she feels will favour him. It is only when the methods have been employed and the opponent fails to produce the evidence that withholding evidence can be mentioned. The appellant did not bother to employ those methods and should now be stopped from complaining.** D E

**Having stated as above it is my humble view that this issue lacks substance and it is hereby resolved against the appellant.** F  
(p. 3567 C)

### **REPRESENTATION**

A. A. Olatunji Esq., with Oluwafemi Adegboyega, for the Appellant  
J.M.M. Majiyagbe with M.O. Omorogbe, for the Respondents G

### **CASES REFERRED TO**

Ogida v. Oliha (1986) 1 NWLR (pt. 19) 786  
Oshatoba v. Olujitan (2000) 5 NWLR (pt. 655) 159  
Ajakaiye v. Idehai (1994) 8 NWLR (pt. 364) 504  
Opeola v. Falade (1991) 2 NWLR (pt. 173) 303  
Okpulator v. State (1990) 7 NWLR (pt. 164) 581  
Archibong v. Ita (2004) 2 NWLR (pt. 350) 281  
Akpoku v. Itombu (1998) 8 NWLR (pt. 561) 283 H

Ozaki v. State (1990) 1 NWLR (pt. 124) 92  
Edhighere v. State (1996) 8 NWLR (pt. 464) 1  
Aremu v. State (1991) 7 NWLR (pt. 201)  
Ejinma v State (1992) 1 NWLR (pt. 200) 627  
Onyejekwe v. State (1992) 3 NWLR (pt. 234) 444  
B Nwosu v. State (1998) 8 NWLR (pt. 562) 433  
Awolowo v. Shagari (1979) NSCC 89  
Kale v. Coker (1982) 12 SC 252

**STATUTES REFERRED TO**

C Robbery & Firearms (special provisions) Act Cap R11 Vol. 14 LFN 2004, s. 1(2)(a)  
Criminal Procedure Law, s. 286  
Evidence Act 2011, s. 139(1)(2)(3)

D

**LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC**

The accused person, now Appellant, was arraigned before the High Court of Justice Ibadan for the offences of conspiracy to commit felony to wit, Armed Robbery and thereby committed an  
E offence contrary to and punishable under Section 1(2)(a) of the Robbery and Firearms (special provisions) Act Cap R.11, Vol. 14 Laws of the Federation 2004.

The prosecution, on arraignment, charges were framed thus:-

F 1. On or about 18th day of November, 1994 at Mobil Petrol Station, Challenge, Ibadan, Oyo State of Nigeria conspired together to commit a felony to wit, Armed Robbery and thereby committed an offence contrary to and punishable under Section 5(2)(a) of the Laws of the Federation of Nigeria, 1990.

G 2. On or about 18th of November, 1994 at Mobil Petrol Station, Challenge, Ibadan while armed with offensive weapons to wit: pistol and rifle robbed Alhaji Nurudeen Kolawole of the sum of one hundred and fifty thousand naira (N150,000:00) and in the process of the robbery operation, killing him and thereby committed  
H an offence contrary to and punishable under Section 1(2)(b) of the Robbery and Firearms (special provisions) Act. 398 Volume XXII, Laws of the Federation of Nigeria, 1990 as amended.

All the accused persons pleaded not guilty to the charges read by the court.

The prosecution called nine (9) prosecution witnesses who testified for the prosecution. It is to be noted that four accused persons Mumini Adisa, the Appellant herein, inclusive. Each and every accused persons made what the prosecution considered as confessional statement.

The defence made a '*no case submission*' on behalf of Fatayi Busari, Mumini Adisa (the Appellant) and Wahabi Alao. The trial court however accepted the no case submission in favour of Sunday Okafor the 4th accused and accordingly discharged him under section 286 of the Criminal Procedure Law, (CPL) he in addition called upon the other accused persons to defend themselves.

The three (3) accused persons, namely;

1. Fatayi Busari
2. Mumini Adisa and
3. Wahabi Alao defended themselves.

Fatayi Busari testified as DW1 and called no witness. Mumini Adisa testified in his defence and called no witness. The 3rd accused person, Wahabi Alao, testified in his defence and called no witness.

The trial court allowed the defence counsel to address it. The defence counsel relied heavily on the confessional statement said to be made by the accused persons. The defence, in a nutshell, stated that the confessional statements of the accused were not enough to convict the accused persons in effect the accused persons retracted their statements. In addition they highlighted the fact that the "*identification parade*" conducted by the prosecution was a Sham and baseless. It was submitted that the 3rd accused person, Wahabi Alao was never identified during the identification parade. This submission goes further to say that the 3rd accused was not even identified by anybody even in court. The learned counsel for the 3rd accused person Mr. N. Dike, further submitted that none of the prosecution witnesses testified to the effect that the accused persons all of them, particularly the 3rd accused person was in Ibadan on the day of the incident i.e. 18/11/1994. He was therefore pleading alibi.

He then urged the trial court to hold that there is no evidence against the 3rd accused person, and that Exhibit P cannot be a confessional statement. All in all, the defence, through their respective counsel urged the trial court to discharge and acquit all the accused persons.

The trial court in its considered judgment on pages 88 - 108, delivered its judgment in Which FATAI BUSARI, MUMINI ADISA and WAHABI ALAO were found guilty of the offences charged and convicted. Before the sentence, Osuolale Tijjani the 2nd accused person charged was reported dead and his name was accordingly struck out.

B On page 108 the trial Judge Adeniran J finally sentenced the three accused persons to death. He has this to say:-

*"I have earlier held that the accused persons made confessional statements admitting the commission of the offence. I am convinced beyond any iota of doubt in the light of what I have said above that the three accused persons are guilty of the two counts as charged and they are accordingly convicted. In accordance with Section 1(3) of the Robbery and Firearms (special provisions) Act Cap. 398 the sentence of this court upon you, FATAI BUSARI, MUMINI ADISA and WAHABI ALAO is that each of you will be hanged by the neck or executed by firing squad until you be dead. May the Lord have mercy on your souls".*

The three (3) convicted persons were not satisfied with the judgment and sentences by the trial judge, Adeniran J., appealed to the Court of Appeal Ibadan Division, and filed a Notice of Appeal containing two (2) grounds of appeal, after the Notice of Appeal was granted in a motion. The grounds are hereby without their particulars, reproduced hereunder as follows:-

F *"1. The learned trial Judge erred in law when he convicted the 1st and 4th accused persons/appellants for the offence of conspiracy and armed robbery when the prosecution has failed to prove its case beyond reasonable doubt.*

G *2. The learned trial Judge erred in law and in fact in convicting the 1st, 3rd and 4th accused persons (Appellants) as charged.*

*3. The learned trial Judge erred in law and in fact in convicting the accused persons as charged in view of the inherent materials (Sic) contradictions in the evidence of the prosecution witnesses.*

H *4. The learned trial judge erred in law in failing to hold that the failure of the prosecution to produce the case file of the investigation of the incident of 30/1/95 of Crown Chemist by the Challenge police station occasioned a miscarriage of justice.*

*5. The judgment is un-reasonable, unwarranted having regard to the weight of evidence.*



*6. The learned trial judge erred in law when he admitted the statement of the accused persons made at the police station as Exhibits.”*

The whole purpose of the appeal by the Appellants is to set aside the conviction and death sentence and to enter an acquittal for the 1st, 2nd and 3rd appellants. B

After the ruling of Alagoa JCA (as he then was) on 23/3/2011, the grounds of appeal were reduced to two (2) to be thrashed out in the court of Appeal, hereinafter called lower court. They are hereby reproduced without their particulars on behalf of the Appellant herein:- C

*“Ground 1.*

*The learned trial Judge erred in law and in fact in convicting the Appellant of the offences of Conspiracy and Armed Robbery and sentencing him to death when the prosecution failed to prove the case against the Appellant.* D

*Ground 2.*

*The learned trial Judge erred in law in failing to properly evaluate the Evidence adduced at the trial before convicting the Appellant for the offences of Conspiracy and Armed Robbery and sentencing him to death.”* E

After thorough consideration of the appeal, in a reserved judgment the court below, in a unanimous decision, found the appeal before it lacking in merit and was therefore dismissed. In a nutshell the court below affirmed the judgment of the trial court which convicted and sentenced the Appellant to death for the offences of conspiracy to commit armed robbery and armed robbery. F

The Appellant, dissatisfied with the judgment of the court below delivered on 5th day of July, 2012 filed an appeal to the Supreme Court of Nigeria on the following grounds:- G

The grounds of appeal are hereby reproduced without their particulars:-

*“Ground 1.*

*The courts below erred in affirming the decision of the trial court convicting the Appellant based on involuntarily obtained evidence through torture without verifying the reason adduced by the defence for it's retraction.*

*Ground 2.*

*The presumption of innocence of the Appellant was a right violated to the Appellant's detriment contrary to the constitutional provision on fair hearing in judicial trial.*

*Ground 3.*

*The lower courts erred in holding that the prosecution proved  
B its case beyond reasonable doubt.*

*Ground 4.*

*That the judgments of the courts below cannot be supported  
C by the totality of proof of evidence and the weight of evidence ad-  
duced by the prosecution so as to sustain the verdict of guilt pro-  
nounced on the Appellant."*

For the sake of clarity I shall reproduce the two count-charges framed against the Appellant herein by the trial Court thus:-

*"COUNT 1*

*On or about 18th day of November, 1994 at Mobil petrol  
D station Challenge, Ibadan, Oyo State of Nigeria conspired together  
to commit a felony to wit.*

*Armed robbery and there (sic) committed an offence con-  
trary to and punishable under section 5(2)(a) of the Robbery and  
E fire arms (special provisions) Act Cap. 398 Vol. XXII Laws of the  
Federation of Nigeria 1990.*

*COUNT 2*

*On or about the 18th day of November, 1994 at Mobil petrol  
F station, Challenge, Ibadan while armed with offensive weapons to  
wit pistol and rifle robbed Alhaji Nurudeen Kolawole of the sum of  
one hundred and fifty thousand naira (N150,000:00) and hereby  
committed an offence contrary to and punishable under section  
1(2)(b) of the Robbery and firearms (special provisions) Act cap.  
G 398. Volume XXII, Laws of the Federation of Nigeria, 1990 as  
amended."*

After filing of the grounds of appeal the parties through their respective counsel filed and exchanged briefs of argument. On 25th day of September, 2014 both parties adopted their briefs before us.  
H The Appellant in its brief formulated three (3) issues for the determination of the appeal thus:-

*"1. Whether the court below was right in affirming the trial Court's decision which was based on extra-judicial statements, the contents of which the Appellant fully retracted. (Ground 1 of the*

notice of Appeal)

*2. Whether in view of the evidence adduced in this case and the expunging of Exhibit 'O' from the record, the prosecution proved its case against the Appellant beyond reasonable doubt. (Grounds 3 and 4 of the Notice of Appeal)*

*3. Whether having regard to the Appellants inability to access the challenge police stations case file and the materials contained therein, he was given a fair hearing. (Ground 2 of the Notice of Appeal)"*

On issue 1 distilled by the appellant, it was clearly stated that the issue is formulated from ground 1 of the Notice of Appeal. After reviewing the evidence of the witnesses and reproducing the submissions of counsel, the learned trial court in its judgment at page 104 - 107 of the record, proceeded to paraphrase the contents of the said statements. For the 1st accused, for example, he summarized the contents of Exhibit 'O' and did the same analysis in respect of Exhibit P for the 3rd accused person. Specifically for the Appellant, the trial court stated at page 106 of the record thus:-

*"The statement of the 2nd accused person is Exhibit O and that statement contains the following facts:*

*1. He knows the 1st and 3rd accused persons and Osuolale (now dead)*

*2. They had come to Ibadan two times on robbery operations. The first time they snatched from one man at Challenge Area a bag containing N150,000.00 at gun point and shared the money equally (four of them that is himself, 1st accused, 3rd accused and Osuolale).*

*3. On 30/11/95 they came to Ibadan again for robbery operation at Challenge Area.*

*4. They were arrested by a policeman at Chemist shop.*

*5. In the other operation at Ibadan they robbed at gun point and collected N150,000,00 which the four of them shared".*

Having held above the learned trial judge again stated thereafter that:-

*"It is pertinent to observe that the facts contained in the statements of the accused persons which I have analysed above agree in many respects. I am also of the view that those facts agree substantially in some material particulars with the evidence of PW1, PW2*

*and PW4 as regards the operation at Mobil Petrol Station, Challenge, Ibadan”.*

My lords the learned counsel to the Appellant Mr. A. A. Olatunji Esq., is of the view that the learned trial Judge relied heavily on the statements of the accused persons, which are confessional in nature, to convict and sentence the Appellant and the other accused persons, relying on Exhibits ‘O’ and ‘N’, and Exhibit ‘P’ respectively. The learned counsel added that the reference the trial court made to the evidence of PW1, PW2 and PW4 was just to find external support to corroborate the contents of the confessional statement.

On appeal the lower court disagreed with the trial court vis-à-vis the issue of confessional statements of the convicted persons. That court held that the said statement in Exhibit ‘O’ was inadmissible without conducting a trial within trial. It then expunged the Exhibit ‘O’ from the record it held thus at pages 199- 206:

*The conviction of the appellant was also based on the confession statement, Exhibit O. At pages 46 of the record of appeal the appellant’s learned counsel objected to the tendering in evidence of his client’s statement to the police on the grounds that the statement “was obtained after the accused person had been mercilessly beaten. It is also the case of the accused person that the statement was obtained under duress”,*

*Yet the court below without holding a trial-within-trial to determine the voluntariness of the statement admitted it in evidence as Exhibit O vide its ruling to that effect at page 47 of the record.*

*I agree with Mr. Agbebi for the appellant that the failure of the court below to conduct a trial-within-trial to determine the voluntariness of the statement before the admission in evidence of the said statement as Exhibit O was wrong and vitiated the statement which is hereby expunged from the record. See Eke v. The State (2011) 3 NWLR (pt. 1235) 589 at 603, Bright V. The State (2012) 8 NWLR (pt. 1302) 297, Lateef v. FRN (2010) 37 WRN 85 at 107”.*

Learned counsel for the Appellant expected the lower court to quash the conviction and sentence of the Appellant but the lower court, instead, affirmed the conviction on the ground that there is additional confessional statement which further affirmed the judgment of the trial court that additional confessional statement could be found in Exhibit ‘J’ which the Appellant challenged.

Learned Appellant's counsel then referred to pages 202 - 206 of the record. According to the Appellant the court below therefore applied the said Exhibit 'J' extensively and affirmed the conviction of the appellant wrongly. It is clear, counsel further submitted, a look at the judgment of the trial court, that it never mentioned Exhibit 'J' in its decision. He further stated that issues 2 of the Appellants brief tally with issue (iv) of the Respondent's brief - see pages 129 and 163 of the record respectively that is whether the trial court was right in relying on Exhibit 'O' to convict the Appellant. He then submitted that the court below had a duty to restrict itself to the issues raised and or argued before it and was therefore wrong in straying into a consideration of the said Exhibit 'J' let alone placing reliance on it. He relied on the decision of the Supreme Court in *Ogida v. Oliha* (1986) 1 NWLR (Pt.19) 786 at p.798 paragraphs A - D per Oputa JSC of blessed memory; *Oshatoba v. Olujitan* (2000) 5 NWLR D (Pt.655) 159 at p.170 paragraphs F- H per Igu JSC and *Ajakaiye v. Idehai* (1994) 8 NWLR (Pt.364) 504 at p.526 paragraphs B - C Per Belgore JSC (as he then was). *Opeola v. Falade* (1991) 2 NWLR (Pt.173) 303 at P.313 paragraphs C and *Okpulo v. The State* (1990) 7 NWLR (Pt.164) 581. E

Learned appellant's counsel further submitted that, since the respondent did not file a Notice seeking that the judgment of the trial court be affirmed on grounds other than the ones relied upon by the trial court. It means that the court below made a case for the respondent different from the case put before it by the parties. He concluded by saying that "It is not within the province of any court to do so". He cites *Archibong v. Ita* (2004) 2 NWLR (Pt.350) 281 at 316, where it was held per Uwais JSC (as he then was) thus:- F

*"It is not the function of court to assist any of the parties before it in presenting their case. To do so would be tantamount to the court jumping into the arena instead of being the umpire".* G

Learned Appellant's counsel again referred this court to the decision of the court below in *Akpoku v. Itombu* (1998) 8 NWLR (Pt.561) 283 at P.290 per Achike JCA, as he then was of blessed memory. The learned counsel then stated that based on the above scores, urged this court to hold that having found that Exhibit 'O', upon which the trial court relied to convict the appellant was inadmissible and having expunged the same the court below should have H

set aside the trial court's judgment and to further hold that it was not open to the court below to rely on Exhibit 'J' in the circumstances of this case.

Learned counsel for the Appellant added that how can the court below expunged a document i.e. Exhibit 'O' and later relied on the same exhibit and affirmed the conviction of the Appellant? He then argued that to do that is a grave error which fundamentally infests the entire judgment of the court below. This is so, learned counsel added because it means that the court below in affirming the conviction of the Appellant relied on an exhibit which no longer constitutes evidence by virtue of it having been expunged. He relied on *Ozaki v. The State* (1990) 1 NWLR (Pt.124) 92 at p.312 where his Lordship Obaseki JSC of blessed memory has this to say:-

*"The confessional statement having been expunged no longer constituted evidence for the purpose of the judgment of the court".*

He urged us to be bound by the above decision and to set aside the judgment of the two lower courts.

My lords I have read the arguments and the submissions of the learned appellant's counsel in his brief of argument from pages 6 - 21 under issue No1, of the Appellant's brief of argument. In his conclusion under issue 1, he submitted that the trial court and the court below which affirmed its decision were both in grave error for failing to perform the aforesaid tasks of considering the explanation made by the appellant in resiling from the purported confessional statement and for failing to subject the said statement to the six parameter/rule to determine their veracity or truth. He further submitted that if the trial court and the court below had done these, they would have arrived at a different conclusion as the purported confessional statements would have woefully failed the tests. He then urged this court to resolve this issue 1 in favour of the Appellant.

The respondents counsel, Majiyagbe Esq., drew the attention of this court of the existence of their amended respondent's brief of argument which was deemed properly filed and served on 26/2/2014.

The respondents counsel Majiyagbe Esq., contended that there are absolutely no tenable grounds for the concurrent findings of the lower court to be disturbed by the Supreme Court. He attacked the facts of the case as stated by the appellant. He however stated the facts as he understood them thus:-

*“On November 18, 1994 while at a Mobil Petrol station in the Challenge Area of Ibadan, one Alhaji Nurudeen Kolawole, the owner of the station was preparing to go to the bank to deposit the sum of N150,000.00. Suddenly, a gang of five (including the Appellant) people arrived in a Peugeot 504 Wagon with First City Merchant Bank inscribed thereon.* B

*Whilst the driver to the car was buying petrol, two of his cohorts alighted from the vehicle and entered the shop at the station ostensibly to buy milk. Alhaji Kolawole was in the shop holding the above-mentioned amount in readiness to head to the bank. He was shot and killed. The appellant’s co-accused person, one Fatayi Osuolale took the money and escaped in their car. All these happened in the presence of Messrs. Akande Akinwale (pw1) Rasaki Adesiyon PW2) and Adewuyi Musibau Abiodun (PW4).”* C

Learned respondents counsel further stated that all five men D were charged to court one of them died in prison and another was discharged and acquitted as a result of “no case submission” filed by his counsel. The appellant, herein Mumini Adisa, Fatai Busari and Wahabi Alao these were eventually tried and convicted.

The learned respondent’s counsel contended that the E appellant’s counsel relied on his numerous arguments canvassed in his brief of argument. It is the respondent’s contention however that there are absolutely no tenable grounds for the concurrent findings of the lower courts to be disturbed by the Supreme Court.

Learned respondent’s counsel submitted that the issues for F determination are as follows:-

1. Whether the court below was right to affirm the trial court’s finding that the prosecution proved its case beyond reasonable doubt.
2. Whether the appellant was given fair hearing at the court G below.

Learned respondent’s counsel contended that in order to prove the offences of conspiracy to commit felony to wit: armed robbery and armed robbery the prosecution called Nine (9) witnesses and tendered statements made by the appellant, his co-accused persons/convicts and other witnesses. H

Learned respondent’s counsel contended also that the appellant’s contention in a nutshell is that the prosecution failed to prove its case beyond reasonable doubt because all they relied upon

were extra-judicial statements i.e. the confessions of the appellant and his co-convicts. Those according to the appellant were not sufficient to warrant a finding of proof beyond reasonable doubt because same were in fact retracted eventually.

***My lords, I wish to digress a little to say that the above is not and cannot be relied upon to say that where a confessional statement was retracted by the accused person then the court cannot find conviction on it. No, that cannot be the law. The law is that a court of law can out-rightly convict on his extra-judicial confessional statement which is voluntary and real/true. Consistently with the above a court of law once is satisfied as to the truth of a confessional statement, it can rely solely on it to ground conviction, despite the accused's retraction of same.*** See Edhighere v. The State (1996) 8 NWLR (Pt.464) at P.1; Aremu v. State (1991) 7 NWLR (Pt.201) Ejinma v State (1992) 1 NWLR (Pt.200) 627 per Akpata JSC at 638; Kim v. State (1992) (Pt.233) P.17 at 33 Per Nnaemeka-Agu, JSC. Onyejekwe v. State (1992) 3 NWLR (Pt 234) at p. 444 - 447.

My lords, one of the co-convicts named Fatai Busari in his statement Exhibit 'N' Says:-

*"I wish to state that sometime last year 1994, in the month of October, myself, Sunday Okafor, Osuolale and Wahabi came from Lagos to Ibadan with a 504 saloon car driven by one Sunday Okafor, then reaching at Mobil Petrol Station, Challenge, we entered and bought fuel in the sum of N200.00 myself and Osuolale came down from the vehicle and entered in the petrol supermarket Osuolale came in possession of the money in a bag containing N150,000.00 I fired at the owner of the bag, about two times I fired twice at his chest. After firing we then rush to vehicle with the money and drove away to Lagos at Sunday shop at Idumota and we share the money N75,000.00 two each".*

The above confessional statement was effectually corroborated by another confessional statement of the present appellant in his own confessional statement i.e. Exhibit 'O', though is said to be expunged. Exhibit 'J', was also admitted and was left intact without retraction of any sort. Convict Fatai Busari has this in Exhibit 'J' the present appellant voluntarily confessed to the commission of the offences of conspiracy to commit felony to wit, robbery and armed



robbery. My lords for the avoidance of any possible doubt, Exhibit 'J' is hereunder reproduced. It reads:-

*"In addition to my first statement of January, 1995, I wish to state that sometime in the month of October, 1994 myself, Fatai Wahabi Osuolale come from Lagos to rob at one Mobil Petrol Station, Challenge, Ibadan. On reaching at the petrol station, Challenged, Ibadan. On reaching at the petrol station we bought petrol... after buying petrol Fatai and Osuolale entered into the supermarket, then Fatai used his pistol to fire ...the owner of the petrol station while Osuolale carry the money they moved into the car, we came with then Sunday drive the car to Lagos and went to his shop at Eko Lagos where we share the money and I was share the sum of N6,000.00 (six thousand naira). The second operation was at Dugbe-Iwo road, Ibadan where we rob one person sum of twenty-five thousand naira (N25,000.00) I was share the sum of five thousand naira (N5,000.00) that all I have to say".*

**It is to be noted that there is absolutely nothing on record to show that Exhibit 'J' was made under duress, it was in fact tendered and admitted without objection from the Appellant. There is nothing in law preventing the court below from considering Exhibit 'J' in deciding the appeal against the appellant. This exhibit served as additional evidence to make the appellant's confession real.**

**Not only that my lords, Wahabi Alao another co-convict also in his statement Exhibit P, corroborated the guilty stance of the appellant, Mumini Adisa.** Wahabi Alao has this to say at page 16 lines 24- 40 of the record thus:

*"On our way coming from Lagos; we came with one 504 Saloon car which was driven by Sunday. On getting to Lagos Challenge end of expressway, there at Mobil filling station at right hand side when coming from Lagos ends, Sunday pointed to a man whom I thought was the owner of the filling station, that he conveniently say that that's the man that is having money with him. It was where we parked the vehicle at the road side and then Fatai and Osuolale came down from the vehicle while myself Wahabi and Mumini stood beside the vehicle while Sunday was on steering and the engine was on.*

*Immediately, Fatai and Osuolale went directly to the man and later on we heard a gunshot of which at that very time, the man*

*fall down. This was where Fatai and Osuolale removed the polythene bag containing N150,000.00 which the victim was holding. They urgently came into the awaiting vehicle where we immediately rushed back to Lagos. It was Fatai that was in possession of the pistol on our trip from- Lagos and Back. It was the very Fatai that shot the victim of the filling station... out of this N150,000.00 the money was shared into two N75,000.00 was taken by myself and Mumini while the rest N75,000.00 was shared by Fatai and Osuolale respectively”.*

There is no doubt my lords that during the trial the Accused persons, now convicts, attempted to deny and retract their confessional statement but everything became futile when the trial judge competently and rightly too accepted it as an exhibit and correctly convicted the accused appellant.

***It is my view therefore that the appellant’s counsel woefully derailed when he contended that the conviction of his client now appellant was solely based on confessional extra-judicial statements. The respondents counsel in their amended brief of argument was correct when he contended that the court below having juxtaposed the said extra-judicial statements (i.e. Exhibit ‘N’. ‘N1’, ‘J’ and ‘P’) made before the police during investigation with the above referred testimonies of PW1. PW2 and PW4, was really right in affirming the trial court’s decision. I have further digested the evidence as produced by the prosecution witnesses and I found that the competence and credibility of those witnesses were never in doubt above all they neatly tallied with the confessional statements.***

***The court below in my view, had already found corroboration in the testimonies of PW1, PW2 and PW4. The court below was therefore absolutely free to convict the appellant on the strength of the confessional statements.***

***In such situation, i.e. where an accused person or persons retracted his or their confessional statements usually the court should conduct a trial within trial to determine the validity and the voluntariness of the statement before the admission in evidence or otherwise as in the case of Exhibit ‘O’. The trial court should have conducted a trial within trial. However it is not always the case. There may be an exception to the***

**above general rule.**

In this appeal despite the expungement of Exhibit 'O' from the record, the un-contradictory and unshakeable nature of the cogent evidence produced by the PW1, PW2 and PW4 who are eye witnesses to the commission of the crimes committed by the appellant persuaded the trial judge who had privilege of watching the demeanours of these witnesses, convinced the trial court of the guilt of the appellant and was perfectly right to have convicted and sentenced the appellant also convince myself that the court below was right in affirming the decision of the trial court. The evidence of the three prosecution witnesses, i.e. PW1, PW2 and PW4 remain unchallenged and un-contradicted throughout the trial in spite of the aggressive cross-examination by the appellant counsel to all of them.

That being the case my lords, the issue No 1 formulated by the appellant lacks merit and is hereby resolved against the appellant and in favour of the respondent.

The judgment should have ended here but for the fact that the appellants issue of lack of fair hearing has not been withdrawn. I will now briefly deal with this issue, i.e. whether the appellant was given fair hearing?

In any case, and before I embark on the issue of fair hearing I wish to consider briefly issue No. 2 which reads:

*"Whether in view of the evidence adduced in this case and the expunging of Exhibit O from the record, the prosecution proved its case against the appellant beyond reasonable doubt"*.

The appellant drew the attention of this court to their ground 3 and 4 of the Notice of Appeal. And also page 200 of the record of appeal where the learned justices unanimously held thus:

*"The piece of un-contradicted evidence of PW1 - 4 summarized above taken together proved beyond reasonable doubt that there was an armed robbery at noon on 18/11/94 at the Mobil Petrol or Service Station, Felele Ibadan, in the course of which the director of the service station, Chief Alhaji N. O. Kolawole, was killed in cold blood by gunshot wounds by the armed robbers who escaped the scene of crime with the robbed money. The first and second ingredients of stealing with violence or threatened violence which constitute the offence of armed robbery were, accordingly, proved beyond reasonable doubt by the respondent, as rightly held by the court below*

- see *Otti v. State (1991) 8 NWLR (Pt 207) 103 at 118*”.

Much later the Court of Appeal at pages 201-204 of the record went on to hold as follows:-

“*The judgment of the court below at pages 87 -108 of the record particularly at page 108 thereof and not rely solely on the identification parade where it held inter-alia that-*

*Learned counsel for the accused persons have descended heavily on the identification parade conducted at Mokola Police station describing it was as sham. The need for proper identification in accordance with laid down rules and procedure was emphasised by the Court of Appeal in Adisa v. The State (1991) 1 NWLR (pt. 168). ”*

The court below then relied on the confessional statements of the appellant and the other accused persons to convict the appellant as charged. In effect, the court below did not rely on the outcome of the identification parade to convict the appellant. Therefore all the arguments on the identification of the appellant built on the identification parade were not based on the thrust of the judgment of the court below.

It is clear that the evidence of PW1, PW2 and PW4 remained unchallenged and uncontradicted throughout the trial. The fact that the testimonies of PW1, PW2 and PW4 in this regard cannot be faulted is enough to ground a conviction as did by the court below. It is trite law that the court can convict on the evidence of a single witness. See *Mohammed v. State (1991) 5 NWLR (Pt.192) page 438 at page 442* where it held that-

“*On whether conviction can be grounded on evidence of a single witness:-*

*There is no rule of law or practice which makes a court hesitates in convicting upon the evidence of one witness if the court is satisfied with the evidence ”.*

Also, pw4 was the one that was paid to fuel the Peugeot 504 car brought to the scene of crime to rob the late Alhaji N.O.A. Kolawole. He saw for himself how they came to the station, how they were alighting from the car and how the deceased was shot. Therefore identification of appellant by Pw1, Pw2, and pw4 having regard to the circumstances of the robbery operation in question cannot be faulted.

Exhibit ‘J’ referred to the armed robbery incident at Challenge,

Ibadan, to which the pw1, pw2 and pw4 had testified. For ease of reference, Exhibit 'J' (also reproduced at page 14 of the record and referred to in the arguments at the court below) unedited reads:-

*"I Mumini Adisa having been duly charged and cautioned in English Language that I am not obliged to say anything unless I wish to do so but what was I say will be taken down in writing and will be tendered in court as evidence, I voluntarily wish to state as follows:- (Sgd) (Mumini Adisa) 30/1/95*

*I am a native of Abeokuta, Ogun State born in the 1973 to the family of Mr. Adisa Sonny of Abeokuta Ogun State, I attended primary school at Alegbata, Lagos of which I did not finished my secondary which I attended at Isaleko at Idumota Lagos in Isale-Eko Grammar School. As I drop from the school, I decided to follow my mother to shop daily where she do sell, hot drinks, at Ologbo-Idumota Lagos, know one Osu who is leaving at Oshodi Area - Lagos, he is printing in printing press, lent of now I don't know what his doing. It was Fatai Busari who introduced me to Osu. Also I knew one Wahabi 'M' who is leaving at Gboosheri area, Lagos of which I knew a friend of Fatai Busari, Wahabi 'M' do collect money from people using private toilet at Gboosheri Area, after used, he don't have any other job. Since we knew each other, we have been in Ibadan for the two times on robbery operations. The first time we snatched from one man at Challenge area the sum amount of N150,000.00 at gun point which we shared equally and since then we did not come back to Ibadan again. It was until today being the 30/1/95, we come to Ibadan again for the same robbery operation at the same Challenge area that we were got arrested by a policeman who saw us at one chemist store when we were making out normal operation that we ran to the hand of police. We do operate with a pistol that we normally do hired from one Julius leaving at Isale-Eko area, Lagos. Personally I do also contribute N1,500.00 at anytime we do go out for operation. The other operation we did at Lagos at gunpoint, I collected about N6,000.00 and given N1,500.00 Julius where Fatai gave N2,000.00, Osu N2,000.00 while Wahabi N2,000.00 all this amount given to Julius, while the other operation in Ibadan which robbed at gun point and collected N150,000.00 we shared it N35,500.00 each for four of us while the sum of N8,000.00 were contributed each of us totalling N8,000.00 the gun we do go on operations is still with*

*Julius in Lagos. But the one of today which we operated at chemist store at Challenge we did not come along with us”.*

Learned appellant’s counsel then urged this Hon. Court to set aside the findings of the two courts below that the prosecution proved that the appellant committed armed robbery or was part of the group of armed robbers who robbed at Mobil Fuel Station at Challenge Ibadan or Felele Ibadan as wrongly stated by the court below. He also urged this court in addition to hold that the prosecution failed to prove the offences charged beyond reasonable doubt.

***I am ready my lords to agree with the submissions of the appellant’s counsel or any other person that the burden of proving armed robbery against the accused/appellant which duty or burden does not shift, lies on the prosecution.*** Also I agree that the following authorities could be called to action:

- a. Section 138(1), (2) and (3) of the Evidence Act, and
  - b. Section 139(1), (2) and (3) of the Evidence Act, 2011
- and

c. Nwosu v. The State (1998) 8 NWLR (pt. 562) 433/444 paragraph B.

I have already firmly held that the prosecution made excellent efforts and was able to produce credible witnesses who gave eye witness evidence without any blemish, even by the appellant’s counsel. The said Exhibit ‘J’ was an additional evidence which helped to make the confessional statement of the appellant true and real. In fact Exhibit ‘J’. Alone can persuade the justices of the court below to hold the way they held especially with the corroboration of the evidence of the prosecution witnesses 1, 2 and 4.

***Consistently with the above the 2nd issue formulated by the appellant is and must be resolved in favour of the respondent. The answer to that issue 2 is that the prosecution, despite the expunging of Exhibit ‘O’ by the court below, proved its case against the appellant, herein, beyond reasonable doubt. Also the court below was perfectly right in affirming the conviction and sentences meted out by the trial court.***

On issue No 3 framed by the appellant which reads thus:-

*“Whether having regard to the appellant’s inability to access the challenge police station’s case file and the materials contained therein, he was given a fair hearing”.*

It goes without saying and I readily accepted that the appellant, under our criminal system, is presumed to be innocent until proved guilty and not only that, the appellant was entitled to a fair hearing. These are unequivocally stated in section 36(4) of the 1999 Federal Constitution of Nigeria as amended as follows:-

*“Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a court or tribunal provided that-*

*a. a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare or persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interest of justice;*

*b. if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a Commissioner of the Government of a state satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter”.*

I refer to Sussex peerage claim (1844) c.L & fin 85 at P.143 per TINDAL C.J. See also Awolowo v. Shagari (1979) NSCC 89/112 lines 25 - 40 per Obaseki JSC of blessed memory.

In the amended respondents brief of argument, learned counsel for the respondent Majiyagbe Esq., contended that the submissions of the appellant as regards the issue of fair hearing are misconceived. The appellant’s counsel hinged his arguments on alleged denial of fair hearing both at the trial court and the court below on the following ground. The alleged non-production of the statements made at the challenge police station. Learned counsel continues and states that, during the trial of the appellant and his co-convicts before the trial court, all pieces of evidence relevant to the prosecution of offences for which the appellant and his co-convicts were charged were tendered by the prosecution. Learned respondents counsel further submitted that the decision as to what evidence to produce and ten-

der and witnesses to call, to prove the charge preferred against the appellant, solely lies at the discretion of the prosecution and not the defence. The wrong impression being created by the appellant in relation to the alleged non-production of the purported statements made by the appellant at challenge police station was unequivocally  
 B debunked by Thomas Oden, the Pw8, during his cross-examination by the defence counsel. His testimony in this regard, which is contained at pages 42 - 43 of the record of appeal before this court reads thus:-

C *"The case was not reported to our station on 18/11/94 but it was reported at Challenge police station. The case of robbery was transferred to our station on 30/1/95. The accused persons were transferred to our station but the case file was transferred to the state C.I.D on 30/1/95. I know the reason why the accused were trans-*  
 D *ferred to us. This is because we deal with robbery cases. I have not signed the file which was transferred to the state C.I.D, Iyaganku despite all efforts made by me. I disagree with the suggestion that the 1st and 2nd accused person were arrested at Challenge for a case of stealing originally. I disagree with the suggestion that we concocted*  
 E *the case of robbery against the 1st and 2nd accused persons to cover up our investigation into death of Alhaji Kolawole - this is not true we started the compilation of the case file on 30/1/95 when the accused persons were transferred to us. The 1st and 2nd accused persons*  
 F *made confessional statements. I confirm saying we received a signal from Abeokuta. The signal is hereby produced. Tendered without objection and admitted as Exhibit L. The items were recovered by Zone 2, Abeokuta. I disagree with the suggestion that we arrested the wrong people in connection with the robbery of Mobil Petrol Station.*

G *There were about twelve men on the identification parade including the accused persons. Five accused persons were paraded pw1 identified the 1st accused person. Pw1 also identified the 2nd accused person. The identification parade was carried out in front of Makola Police station..."*

H **My lords, I agree entirely with learned respondent's counsel that from the above quoted testimony of PW8, it is clear that the alleged concealment of statements made by the appellant and his co-convicts by the prosecution is unfounded and false. It is clear in my mind therefore that the contention**



***of the appellant's counsel that the appellant was not fairly heard by both the trial court and the court below is grossly misconceived. Is it not logical for the appellant's counsel to demand that the prosecution should or even compel the prosecution to tender same during the trial? He could have filed before the trial court NOTICE TO PRODUCE. None of these were done by the appellant or his counsel. This shows that the allegation was a mere sham.*** <sup>B</sup>

***In the final consideration I completely agree with the closing submission of the learned respondents counsel that "in the final analysis on this issue, the prosecution adduced the evidence they felt sufficient to prove their case beyond reasonable doubt." The appellant's complaints are misguided.*** <sup>C</sup>

***The rules of procedure provide ample methods by which a concerned party can compel his or her opponent to produce material evidence that he or she feels will favour him. It is only when the methods have been employed and the opponent fails to produce the evidence that withholding evidence can be mentioned. The appellant did not bother to employ those methods and should now be stopped from complaining.*** <sup>D</sup> <sup>E</sup>

***Having stated as above it is my humble view that this issue lacks substance and it is hereby resolved against the appellant.***

The appellant therefore failed woefully to convince me that there is something adverse to warrant this court to disturb the concurrent findings of the two lower courts. It is really a Herculean task for the appellant to succeed in showing evidence to make the appellate court to disturb the decision of the two lower courts unless and until that decision is found to be wrong or perverse. This is not the case here in this appeal, without much-ado, is hereby dismissed. <sup>F</sup> <sup>G</sup>

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### **MOHAMMED CJN**

The Appellant was tried and convicted at the trial High Court of Oyo State for the offences of conspiracy to commit armed robbery and armed robbery, contrary to Sections 5(b) and 1(2)(b) of the Robbery and Firearms (Special Provisions) Act, CAP 398 Laws of the Federation of Nigeria 1990. The Appellant's appeal to the Court <sup>H</sup>

of Appeal was heard and dismissed for lack of merit. In his further and final appeal to this Court, the Appellant has raised three issues in the Appellant's brief of argument for the determination of the appeal. The issues are -

B “1. *Whether the Court below was right in affirming the trial Court's decision which was based on extra-judicial statements, the contents of which the Appellant fully retracted.*

C 2. *Whether in view of the Evidence adduced in this case and the expunging of Exhibit ‘O’ from the record, the prosecution proved its case against the Appellant beyond reasonable doubt.*

3. *Whether having regard to the Appellant's inability to access the challenge Police Station's case file and the materials contained therein, he was given a fair hearing.”*

D It is to be noted that having regard to the fact that the armed robbery operation at Mobil Petrol Station Challenge Ibadan in which the Appellant participated on 18th November, 1994, was carried out in broad day light to the glaring view of prosecution witnesses 1, 2 and 4 who gave evidence at the trial Court, the fact that the offences for which the Appellant was charged tried and convicted had been E proved beyond reasonable doubt, is obvious. In this respect, I completely agree with my learned brother Muntaka-Coomassie JSC, that this appeal deserves nothing but a dismissal. Accordingly, I hereby join my learned brother in his lead judgment just delivered, which I F have had the privilege of reading before today, in dismissing this appeal. The appeal is dismissed. The conviction and sentence of death passed on the Appellant by the trial Court on 12th July, 2002 and affirmed on appeal by the Court below in its judgment of 5th July, 2012, are hereby further affirmed.

G

### **RHODES-VIVOUR JSC**

H I have had the privilege of reading in draft the leading judgment of my learned brother Muntaka-Coomassie, JSC. I am in full agreement with his lordships reasoning and conclusion. There is very little I can usefully add. This is a case which is dismally devoid of merit.

Appeal dismissed.

**NGWUTA JSC**

I have read in advance the lead judgment of my learned brother, Muntaka-Coomassie, JSC. I entirely agree that the appeal is bereft of merit.

The appeal is against the concurrent findings of facts of the two Courts below. This Court will not disturb the said findings except on demonstration of perversity therein. See *Njoku & Ors v. Eme & Ors* (1973) 5 SC 293 at 306; *Kale v. Coker* (1982) 12 SC 252 at 271; *Efe v. State* (1976) 11 SC 75. There is no cogent reason for this Court to interfere.

Based on the above and the fuller reasons in the lead judgment, I also dismiss the appeal and affirm the judgment of the Court below. Appeal dismissed.

**OKORO JSC**

I read in advance the judgment of my learned brother, Coomassie, JSC just delivered and I agree with him that this appeal is devoid of merit and ought to be dismissed. A brief facts leading to this appeal shows that on 18th November, 1994, at Mobil Petrol Station in the Challenge Area of Ibadan, five armed robbers attacked the station, killed the owner of the station; one Alhaji Nurudeen Kolawole - Assistant Commissioner of Police (Rtd) and stole the sum N8,000.00 All the robbers sped away in the vehicle they came with.

About two months thereafter, exactly on 30th January, 1995, the appellant, along with other robbers were arrested while trying to rob a chemist shop in Ibadan. It is the appellant's story that on 30/1/95, he and his co-accused left Lagos for Ibadan to attend the funeral/burial ceremony of a relation of Fatai Busari - one of the robbers. On reaching Ibadan, they discovered that one of them Wahab Alao had blood-stain in his trousers which had flowed from his anus. This is what took them to the chemist shop. According to him, a misunderstanding ensued between the shop attendant and themselves which attracted the police. They were thus arrested in the chemist shop.

The police later invited the PW1, PW2 and PW4 to the police station where an identification parade was conducted and they identified the appellant and his co-travelers as the robbers who robbed their petrol station and killed their boss. The appellant and his co-

accused persons made confessional statements. All five of them were charged to court for conspiracy and armed robbery. One of the accused persons died in custody while another was discharged on a no case submission. The appellant and two other accused persons were convicted and sentenced to death.

B The appellant appealed to the Court of Appeal which affirmed the decision of the trial court. The appellant has further appealed to this court. He filed notice of appeal on 22/8/12 which contains four grounds of appeal. Three issues have been distilled by the C appellant from the four grounds of appeal. The issues are as follows:-

1. Whether the court below was right in affirming the trial court's decision which was based on extra-judicial statements, the contents of which the appellant fully retracted.

D 2. Whether in view of the evidence adduced in this case and expunging of exhibit O from the record, the prosecution proved its case against the appellant beyond reasonable doubt.

3. Whether having regard to the appellant's inability to access the Challenge Police Station's case file and the materials contained therein, he was given a fair hearing.

E The respondent however formulated two Issues as hereunder stated:

1. Whether the court below was right to affirm the trial court's finding that the prosecution proved its case beyond reasonable doubt.

F 2. Whether appellant was given fair hearing at court below.

Now, the major contention of the appellant in this appeal is that the prosecution failed to prove the charge against him beyond reasonable doubt and that having expunged exhibit O, (the extra-judicial statement of the appellant) from the evidence, there was no G more evidence upon which the appellant could have been convicted.

In this case, apart from the evidence of the PW1, PW2, PW3 and PW4 who witnessed the commission of this offence on 18/11/94 and who also identified the appellant during identification parade in January, 1995, the appellant made a confessional statement which was H admitted as exhibit O and another one which was admitted and marked exhibit J. It must be noted that, in law, a voluntary confessional statement admitting guilt, if fully consistent and probable, and is coupled with a clear proof that a crime has been committed by some persons, is usually accepted as satisfactory evidence on which

the court can convict. In other words, a confessional statement is admissible if it is direct and positive and relates to the maker's acts, knowledge or intention, stating or suggesting the inference that he committed the crime charged. See Yusuf v. State (1976) 6 SC 167. Obasi v. State (1965) NMLR 129, Akpan v. State (1992) 7 SCNJ 22, Ogoala v. State (1991) 2 NWLR (pt. 175) 509. B

The appellant herein, as I said earlier, made two confessional statements which were admitted as exhibits O and J respectively. The court below, for some inexplicable reasons, expunged exhibit O from the record and relied on exhibit J. I admit that in the judgment of the court below exhibit O was inadvertently reproduced instead of exhibit J which of course has similar contents. This is a clear mistake as the court below kept referring to exhibit J in the judgment. It is not every mistake by the court that can lead to an appellate court setting aside such judgment. It must be shown to have led to a miscarriage of justice before it can be set aside. On page 206 of the record, part of the judgment states:- C

*“Exhibit J indicated the appellant and his comrades-in-crime acted together in the criminal enterprise of armed robbery that led to the cold-blooded murder of one Chief N. O. Kolawole... In my respectful view, both the offences of conspiracy to commit armed robbery and armed robbery were established by exhibit J, the positive and voluntary confession (sic) statement of the appellant to the police, which is sufficient to anchor the conviction of the appellant for the offences of conspiracy and armed robbery.”* E  
F

The court below, after expunging exhibit O, never referred to or relied on it to uphold the conviction and sentence of the appellant. Exhibit J, as can be found on page 15 of the record states:

*“In addition to my first statement I made to the police on the 30th January, 1995, I wish to state that sometime in the month of October, 1994, myself, Fatai, Wahabi, Osuolale came from Lagos to rob at one Mobil Petrol Station, Challenge Ibadan. On reaching at the Petrol Station, we bought petrol at some amount which I did not (sic) since I was sitting inside the car, after buying the petrol, Fatai and Osuolale entered into the supermarket, then Fatai used his pistol to fire two time on the body of the owner of the petrol station while Osuolale went and collected the sum of N150,000.00 inside the bag immediately Fatai fire on the man and fall down and Osuolale carry* G  
H

*the money, they both came into the car we came with then Sunday drove the car to Lagos and went to his shop at Esale-Eko Lagos where we share the money and I was share the sum of (N6,000.00) six thousand naira. The second operation was at Dugbe-Iwo Road, Ibadan where we rob one person the sum of twenty-five thousand naira (N25,000.00) and I was share the sum of five thousand naira (N5,000.00). That all I have to say.*

*(Sgd) (Mumini Adisa) 31/1/95"*

That was exhibit J. The court below expunged exhibit O because it was admitted without conducting trial-within-trial to establish it voluntariness in view of the fact that the appellant alleged that he was forced to sign it. There was no complaint about exhibit J and I think the two lower courts were right to rely on it as part of the evidence to convict the appellant.

It often happens that accused persons after making confessional statements, resile from them during trial. It has been held by this court that if an accused person resiles from his confessional statement, it is his function to explain to the court as part of his defence the reason for the inconsistency. In such circumstances, if he is to be believed, the accused has to lead evidence to establish that his confessional statement could not be correct. That the explanation should come from him without prompting from the prosecution. (See *Onwumere V. State* (1991) 4 NWLR (Pt.186) 428; *Shittu V. State* (1970) ANLR 233.

From all I can gather from this appeal, right from the trial court to the court below, evidence clearly show that the prosecution was able to show that apart from the confessional statement of the appellant and that of his co-accused persons, the positive and direct evidence of PW1, PW2, PW4 who were at the scene of crime, who saw the accused and witnessed them were positive enough to fix the appellant and his comrades-in-crime with the offence of the armed robbery attack at Mobil Filling Station, Challenge on 18/11/94.

Based on the reasons I have given in this judgment and the fuller ones contained in the lead judgment of my learned brother, Coomassie, JSC, I agree that this appeal lacks merit. I dismiss it and affirm the decision of the two courts below. Appeal dismissed.