

SUPREME COURT OF NIGERIA
FRIDAY 30TH JANUARY, 2015. SC. 364/2012
**CORAM:- M. MOHAMMED CJN, M. S. MUNTAKA-
COOMASSIE, B. RHODES-VIVOUR, N. S. NGWUTA,
J. I. OKORO, JJSC**

FATAI BUSARI APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Confession - Voluntariness - Facts in appellant's statement agree with evidence of PW1, 2 & 4 - As there is nothing to suggest otherwise than they were voluntarily made (H1)

CRIMINAL PROCEDURE - Conviction - Confession - Retraction - Court can convict on a retracted statement - But it is desirable to find external evidence that makes it probable that the confession was true (H2)

CRIMINAL PROCEDURE - Conspiracy - Meaning of - It is an agreement of two or more persons - To do an act which is an offence - Which agreement need not be physical (H3)

EVIDENCE - Crime - Evaluation - Correctness of - Evaluation of the trial Judge is unassailable as there is nothing to show perversity - Hence Supreme Court will not interfere (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 - 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 the 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 untested extra-judicial statements, and the contents of which the Appellant fully retracted.

2. Whether the court below was right in holding that the prosecution proved its case against the Appellant beyond reasonable doubt.

3. Whether to the Appellant was given fair hearing having regard to the manner he was denied access to materials required for him to properly defend himself.

HELD (Unanimously dismissing the appeal per **MUNTAKA-COOMASSIE JSC**)

CRIMINAL PROCEDURE - Confession - Voluntariness

1. The facts contained in the statement of the Appellant agree

in some material particulars with the evidence of Pw1, Pw2 and Pw4 as regards the operation at Mobil Petrol Station Challenge, Ibadan. There is nothing before the court to suggest otherwise than they were voluntarily made. The confessional statement is direct, positive and unequivocal of facts that satisfy the ingredients of offence, the offence which the appellant confesses to have committed. (p. 68 C)

CRIMINAL PROCEDURE - Conviction - Confession - Retraction

2. I confirm that it is a good law that a court can convict on the retracted confessional statement of an accused person but it is desirable to find outside the confession some evidence be it slight of circumstances which make it probable that the confession was true.

Appellant admitted participating in the alleged armed robbery in his statement to the police which was tendered and admitted in evidence as Exhibit N1 though appellant retracted same in his evidence. Once confessional statement is proved to have been made voluntarily, as in this case and it is direct, positive, unequivocal and clearly amounts to an admission of guilt, it can still ground conviction regardless of the fact that the maker resiled therefrom or retracted the same completely at the trial, as such retraction does not make it admissible or that the court should not act on it. (pp. 68 E/69 C)

CRIMINAL PROCEDURE - Conspiracy - Meaning of

3. Conspiracy is an agreement of two or more persons to do an act which is an offence to agree to. Evidence of direct plot between conspirators is hardly capable of proof. The bottom line of the offence is the meeting of the minds of the conspirators to commit an offence and meeting of the minds need not be physical. Offence of conspiracy can be inferred by what each person does or does not do in furtherance of the offence of conspiracy.

It is established on printed record from the evidence of Pw1, Pw2 and Pw4, as well as the confessional statements of the Appellant and the other co-accused persons that they were acting in concert and an inference of conspiracy can safely be

drawn. (p. 68 H)

EVIDENCE - Crime - Evaluation - Correctness of

- 4. The evaluation of the learned trial judge is unassailable which the court below rightly accepted. It is settle law that**
B the primary duty of a trial court is to evaluate and ascribe probative value to the evidence before it. A trial court had the opportunity of watching the demeanor of witnesses who testified before it is entitle to believe or disbelieve such witness.
C The evidence led before the court had been rightly evaluated as there is nothing on record to show that the evaluation of evidence done by the learned trial judge was in any way perverse. In the circumstances, this court will not disturb the finding and evaluation of the evidence carried out by the learned trial
D judge which the court below accepted. That being the case, issues 1 and 2 are thereby resolved against the appellant.
 (p. 69 H)

Fair hearing - Breach

- E 5. Moreover, if the appellant felt strongly about his alleged statement made by him at challenge Police station, which ought to be tendered by the prosecution but was concealed and/or not tendered as alleged, the onus was on the appellant to compel the prosecution to tender same during trial. He could have**
F filed the appropriate application before the trial court, for example, Notice to produce, subpoena etc. none of these applications was filed by the appellant throughout the trial of the case before the trial court. It is far too late in the day to
G now complain about those things.

In the final analysis on this issue, the prosecution adduced the evidence it felt sufficient to prove their case beyond reasonable doubt. The appellant's complaints are misguided.
 (p. 71 H)

H

EVIDENCE - Production - Crime

6. The rules of procedure provide ample method 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. (p. 72 B)

REPRESENTATION

A. A. Olatunji, Esq., for the Appellant
J. M. M. Majiyagbe, Esq., for the Respondent

CASES REFERRED TO

Idemudia v. State (1997) 7 NWLR (pt. 610) 202
Esangbedo v. State (1989) 4 NWLR (pt. 113) 57
Dawa v. State (1980) 8-11 SC 236
Lagga v. Sarhuna (2008) 16 NWLR (pt. 1114) 427
Odofin v. Mogaji (1978) N.S.C.C. 275
Mumini v. State (1975) 6 SC 79
Ejinima v. State (1991) 6 NWLR (pt. 200) 627
Akpan v. State (1992) 6 NWLR (pt. 248)
Muhammad v. State (1991) 5 NWLR (pt. 192) 438
Queen v. Itule (1961) 2 NSCC 183
Edhigere v. State (1996) 8 NWLR (pt. 464) 1
Bozin v. State (1985) 2 NWLR (pt. 8) 465
Alabi v. State (1993) 7 NWLR (pt. 307) 511
Nwosu v. State (2004) 15 NWLR (pt. 897) 466
Oduneye v. State (2001) 2 NWLR (pt. 697) 311

STATUTES REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap R11 Vol. 14 LFN
2004, s. 1(2)(a)
Criminal Procedure Law, s. 286

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The accused person, now Appellant, was arraigned before the High Court of Justice, Ibadan with 4 others for the offences of conspiracy to commit felony to wit, Armed Robbery and thereby committed an 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 Appellant and others stood charged as follows:

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 1(2)(a) of the Laws of the Federation of Nigeria, 1990.

2. On or about 18th of November, 1994 at Mobil Petrol Station, Challenge, Ibadan while armed with offensive weapons to wit: Pistol and Riffle 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 hereby committed an offence contrary to and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, 398 volume XXII, Laws of the Federation of Nigeria, 1990 as amended.

The Appellant and those co-accused persons pleaded not guilty to the charges read by the court. The prosecution called a total of 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 one made what the prosecution considered as confessional statement.

The defence made a no case submission on behalf of Fatai 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 only and accordingly discharged and acquitted him under Section 286 of the Criminal Procedure Law (CPL). The trial court, in addition, called upon the other accused persons to defend themselves.

The three (3) accused persons, namely:

1. Fatai Busari - Appellant herein;
2. Mumini Adisa; and
3. Wahab Alao defended themselves. Not called any witness.

Appellant testified as Dw1 and called no witness. Mumini Adisa testified in his defence and called no witness. The 3rd accused person, Wahab 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 statements said to be made by the accused persons. The defence, in a nutshell, stated that the confessional statements of 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, Wahab Alao was never identified during the identification parade. This submission goes further to say that the 3rd accused person 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 witness has 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 at pages 88-108, delivered its judgment in which FATAI BUSARI, MUMINI ADISA and WAHAB ALAO were found guilty of the offences charged and convicted. However, before sentence, Osuolale Tijani the 2nd accused person charged was reported dead and his name was accordingly struck out.

On page 108, the trial court, 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 WAHAB 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 soul?”

The three (3) convicted persons were not satisfied with the judgment and sentences of the trial court, 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:

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

*2. The learned trial judge erred in law in failing to properly
B convict 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) contradiction in the evidence of the prosecution witnesses.

*4. The learned trial judge erred in law in failing to hold that the
C 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
D 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 Exhibit.”

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

*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
F out in the Court of Appeal, hereinafter called lower court. They are hereby reproduced without their particulars on behalf of the Appellants herein:-*

GROUND 1:

*The learned trial judge erred in law and in fact in convicting
G the Appellant of the offence of conspiracy and armed robbery and sentencing him to death when the prosecution failed to prove the case against the Appellant.*

GROUND 2:

*The learned trial judge erred in law in failing to properly evalu-
H ate the evidence adduced at the trial before convicting the Appellant for the offences of conspiracy and armed robbery and sentencing him to death.*

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 and to commit armed robbery.

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. B

As can be seen from pages 208 to 212 of the record, the ground of appeal are hereby reproduced without their particulars:-

GROUND 1

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

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. D

GROUND 3

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

GROUND 4

That the judgments of the courts below cannot be supported by the totality of proof of evidence and the weight of evidence adduced by the prosecution so as to sustain the verdict of guilt pronounced on the Appellant. F

At the risk of repetition but for the sake of clarity, I shall reproduce the two count charges framed against the Appellant herein by the trial court thus: G

COUNT 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 there (Sic) committed an offence contrary to and punishable under Section 1(2)(a) of the Robbery and Firearms (special provisions) Act, 398 volume XXII, Laws of the Federation of Nigeria, 1990. H

COUNT 2

On or about 18th day 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 hereby committed an offence contrary to and punishable under Section B 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, 398 volume XXII, Laws of the Federation of Nigeria, 1990 (as amended).

After filling 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. C 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 untested extra-judicial statements, D and the contents of which the Appellant fully retracted. (Ground 1 of the Notice of Appeal)

2. Whether the court below was right in holding that the prosecution proved its case against the Appellant beyond reasonable doubt. (Ground 3 and 4 of the Notice of Appeal)

E *3. Whether to the Appellant was given fair hearing having regard to the manner he was denied access to materials required for him to properly defend himself. (Ground 2 of the Notice of Appeal)”*

Let me say a word or two on this appeal. This appeal is similar F in all material respects to Appeal No. SC/359/2012 in which judgment was delivered by this court on 19th December 2014. The appeal herein was based on the same grounds and issues as grounds and issues in SC/359/2012.

In our judgment in SC/359/2012, we dismissed that appeal in G a considered judgment. It is therefore, of no useful purpose to dissipate too much energy on the appeal. However, to fulfill all righteousness, let me deal with the issues again.

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 H reviewing the evidence of the witnesses and reproducing the submissions of counsel, the learned trial court in its judgment at pages 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 the

Exhibit 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 (Appellant herein) and 3rd accused person and Osuolale (now dead). B

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). C

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

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.” D

In Exhibit N1, the Appellant had stated thus:-

“I wish to state that sometime last year 1994, in the month of October, myself, Sunday Okafor, Osuolale and Wahab came from Lagos to Ibadan with a 504 Saloon car driven by one Sunday Okafor, then by 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 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 the vehicle with the money and drove away to Lagos at Sunday shop at Idumota and we share the money N75,000.00 two each.” E F

The above quoted Appellant’s confessional statement was corroborated by his co-convict Mumini Adisa in his own statements made before the police during investigation of the offences. Mr. Adisa statements were tendered into evidence as exhibits J and O. (see page 47 of the record of Appeal). G

In addition, Wahabi Alao, another co-convict also said the same thing in his statement which was tendered into evidence by PW9 (Jacob Ademuyiwa- Deputy Superintendent of Police) as Exhibit P. H

At page 16, lines 24-40 of the record of Appeal, the aforementioned Wahabi Alao stated as follows:-

“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 Express way, there is Mobil filling station to a right hand side when coming from Lagos, Sunday pointed to a man who I thought was the owner of the filling station, that he conveniently say that that’s the man 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 Sunday was on steering and the engine was on. Immediately, Fatai and Osuolale went direct to the man and later on we heard a gunshot of which at that time the man fell down. This was where Fatai and Osuolale remove the polyethylene 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 N75,000,00 was taken by myself and Mumini while the rest N75,000.00 was shared by Fatai and Osuolale respectively.”

Having seen as above the learned trial judge stated thereafter that:-

“It is pertinent to observe that the facts contained in the statements of the accused persons which I have analyzed 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.”

The Appellant (sic) 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 other accused persons, relying on Exhibit 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 confessional statement.

Learned counsel to the appellant submitted in this court as he did in the court below that it is the duty of the prosecution to prove the case against the appellant beyond reasonable doubt and that this burden does not shift until it is discharged. Reliance was placed on

the cases of IDEMUDIA VS STATE (1997) 7 NWLR Part 610 page 202 at 215 Paras F-G and ESANGBEDO VS STATE (1989) 4 N.W.L.R. Part 113 at 57.

Learned counsel seemed to suggest that the court below which just confirmed the decision of the learned trial judge merely compared the extra-judicial statement of the Appellant and the other accused persons at the trial and came to the conclusion that the facts contained in the statements of the accused persons agree substantially in some materials with the evidence of PW1, PW2 and PW4 as regards the operation at Mobil Petrol Station, challenge, Ibadan. He contended that the learned trial judge did not evaluate the evidence adduced at the trial at all before coming to the decision as he did in convicting the Appellant and sentencing him to death.

Submitted further that the apex court adopted a standard safety valve for the reliance on confession statements in the case of DAWA VS. STATE (1980) 8-11 SC. Page 236. The Supreme Court applied the test which laid down in R v. SYKES (1913) 18 C.R APP. R233 and cited with the approval in KANU VS R. 14 W.A.C.A for the verification of confessional statement before applying any evidential weight to them. The six tests are:-

1. Is there anything outside it to shows that it is true;
2. Is it corroborated
3. Are the statements made in it of facts, true as far as they can be tested;
4. Was the prisoner one who had the opportunity of committing the murder (offence);
5. Is his confession possible;
6. Is it consistent with other facts which have been ascertained and which have been proved?

Counsel argued that it was wrong for the court to have acted on the confessional statements without testing the truth thereof. He submitted that the statements contained in the alleged confessional statement cannot be true. He argued that the prosecution at the trial left very many gaping holes which create reasonable doubt as to the authenticity of the alleged confessional statement.

Learned counsel argued further that the learned trial judge failed to properly evaluate the evidence placed before him.

Reliance was placed on the case of LAGGA VS. SARHUNA

(2008) 16 NWLR Parts 1114 at 427 and ODOFIN & ORS VS. MOGAJI & ORS (1978) N.S.C.C. page 275. Submitted that the comparison made of the extra-judicial statements cannot pass proper evaluation. He urged the court of evaluate the evidence placed before the trial court as contained in the record of appeal and resolve the doubts in favour of the Appellant.

Learned counsel for the Respondent in reply submitted that the appellant made a statement before the police upon his arrested in connection with the offences of Conspiracy and Armed Robbery. Same were admitted as Exhibit N and N1 during trial. Appellant tried to deny the content that the exhibits are admissible against him and can be convicted on the basis of same, submitted that the conviction of the appellant for the offences of conspiracy and armed robbery by the learned trial judge is proper and valid in law. He referred to the cases of R. VS. KANU (1952) 14 WACA. PAGE 30. MUMINI VS STATE (1975) 6 SC. at 79, EJINIMA VS. STATE (1991) 6 NWLR. Part 200 at 627 and AKPAN VS. STATE (1992) 6 NWLR pt. 248.

Submitted further that the material contradictions in the oral testimony of the appellant with his statement made before the police on 31/1/95 which was admitted during trials as exhibit N1 and the testimony of PW4 Adewuyi Musibau Abiodun who gave an eye witness account of the conspiracy and the robbery operation point to the irresistible conclusion that the Appellant conspired with his co-conspirators to rob the Late Alhaji N. O. A. Kolawole the Director of Mobil Petrol Station at Challenge, Ibadan on 18/11/94.

He contended further that the offence of armed robbery was established through credible evidence of the witness that the appellant and his co-accused were responsible for the robbery operation carried out by them with use of gun through which substantial sum of money was carted away from the Late Alhaji N. O. A. Kolawole and was killed in the process, submitted that the prosecution has proved the offence of robbery beyond reasonable doubt through credible evidence. Reliance was placed on MUHAMMAD VS. STATE (1991) 5 NWLR Part 192 page 438.

On the evaluation of the evidence by the learned trial judge, counsel submitted that the decision of the learned trial court, which the court below confirmed, was based on findings of the trial judge which are in conformity with proper analysis of the evidence before

the court. Counsel urged the court not to disturb the findings since they are not perverse. He referred to the cases of UBANI VS. STATE (2004) FWLR. Part 191 page 1533 at 1552 paras A-B and FANNAMI VS. BUKAR (2004) ALL FWLR pt. 198, p. 1210 at 1270 paras A-E.

Submitted that the Appellant's position that the learned trial judge did not properly evaluated the evidence before him is baseless and an afterthought. He urged the court to resolve issue 1 and 3 against the Appellant. B

Section 138 (1) of the Evidence Act states that:

"If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt." C

See also the case of AIGBABON VS. STATE (2000) 7 NWLR part 666, page 686 at 704 para B where the Supreme Court opined thus: D

"in criminal trial, the onus lies throughout upon the prosecution to establish the guilt of the accused beyond reasonable doubt. Even where an accused in his statement to the Police admitted committing the offence, the prosecution is not relieved of that burden."

In the case at hand, PW1, PW2 and PW4 testified as eye witnesses to the commission of the offences of conspiracy to commit robbery and armed robbery. Appellant made exhibits N on 30/1/95 and exhibit N1 on 31/1/95. He stated materially in exhibit N1 that he came from Lagos to Ibadan in company of Sunday Okafor, Osuolale and Wahabi. They entered Mobil petrol station Challenge. Appellant and Osuolale came down from the vehicle and entered the petrol Supermarket. Osuolale was in possession of the bag containing sum of N150,000.00k while Appellant fired at the owner of the bag two times. They rushed back to the vehicle and drove to Lagos. E F G

For the avoidance of doubt, Exhibit N1 the extra judicial confessional statement of the Appellant made on 21/1/95 at page 11 of the record is reproduced as follows:

"In addition to my first statement O made to police on the 30/1/95, I wish to state that, sometime last year 1994, in 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 by reaching at Mobil petrol station, Challenge, we entered and bought fuel in the sum of N200.00 myself and Osuolale came down from H

the vehicle and entered to the petrol supermarket, while Osuolale in possession of the money in the bag containing N150,000.00k I fired at the owner of the bag, about two times I fired him twice at chest, After the firing we then rush to the vehicle with the money and drove away to Lagos at Sunday shop at Idumota, where we shared the money N75,000.00 two each, of which I gave N3,000.00 to Julius while the others settle same when I left. Then I left to my house. It's Sunday that brought us to the filling station, which he previously targeted the man who normally carried money frequently outside, the vehicle used on that day belongs to Sunday which I cannot remember the registration number but the colour is white."

The facts contained in the statement of the Appellant agree in some material particulars with the evidence of Pw1, Pw2 and Pw4 as regards the operation at Mobil Petrol Station Challenge, Ibadan. There is nothing before the court to suggest otherwise than they were voluntarily made. The confessional statement is direct, positive and unequivocal of facts that satisfy the ingredients of offence, the offence which the appellant confesses to have committed. See R VS. OMOKARO (1974) W.A.C.A. Page 146, ACHABUA VS. STATE (1976) N.S.C.C. at 74 and YUSUF VS. STATE (1976) 6 S.C. at 167 or (1988) 4 NWLR (pt. 86) at 96.

I confirm that it is a good law that a court can convict on the retracted confessional statement of an accused person but it is desirable to find outside the confession some evidence be it slight of circumstances which make it probable that the confession was true. See QUEEN VS. ITULE (1961) 2 NSCC at 183 and EDHIGERE VS STATE (1996) 8 NWLR Part 464 at page 1. The desirable evidence have been supplied by Pw1, Pw2 and Pw4. The evidence on the record showed that:

1. There was robbery;
2. It was carried out with use of offensive weapon;
3. That the Appellant participated in the robbery

See the cases of BOZIN VS. STATE (1985) 2 NWLR Part 8 page 465 at 469 and ALABI VS. STATE (1993) 7 NWLR Part 307 page 511 at 523 paras F-H.

Conspiracy is an agreement of two or more persons to do an act which is an offence to agree to. Evidence of direct

plot between conspirators is hardly capable of proof. The bottom line of the offence is the meeting of the minds of the conspirators to commit an offence and meeting of the minds need not be physical. Offence of conspiracy can be inferred by what each person does or does not do in furtherance of the offence of conspiracy. See NWOSU VS. STATE (2004) 15 NWLR B Part 897 page 466; ODUNEYE VS STATE (2001) 2 NWLR Part 697 page 311, ADEJOBI VS. STATE (2001) Part 1261 at 347.

It is established on printed record from the evidence of Pw1, Pw2 and Pw4, as well as the confessional statements of the Appellant and the other co-accused persons that they were acting in concert and an inference of conspiracy can safely be drawn. See OYAKHIRE VS. STATE (2007) ALL FWLR pt. 344 p. 1. C

Appellant admitted participating in the alleged armed robbery in his statement to the police which was tendered and admitted in evidence as Exhibit N1 though appellant retracted same in his evidence. Once confessional statement is proved to have been made voluntarily, as in this case and it is direct, positive, unequivocal and clearly amounts to an admission of guilt, it can still ground conviction regardless of the fact that the maker resiled therefrom or retracted the same completely at the trial, as such retraction does not make it admissible or that the court should not act on it. See IDOWU VS STATE (1998) 13 NWLR Part 582 page 391, OBISI VS. CHIEF OF NAVAL STAFF (2002) 2 NWLR Part 751 page 400 at 418 and SHADE VS STATE F (2005) 1 NWLR Part 218 at page 218.

I readily accept the position of the court below which confirmed the view of the learned trial judge that Exhibit 'N1' being a confessional statement as well as the evidence of Pw1, Pw2 and Pw4 as credible and probable it is also real from the evidence adduced it is clear that the appellant was one of those who took part in the armed robbery. The contradictions referred to by the learned counsel to the appellant are not material and as such has not occasioned any miscarriage of justice in view of the evidence of eye witnesses. In any case, appellant has not demonstrated how a miscarriage of justice has been occasioned. G H

The evaluation of the learned trial judge is unassailable which the court below rightly accepted. It is settle law that

the primary duty of a trial court is to evaluate and ascribe probative value to the evidence before it. A trial court had the opportunity of watching the demeanor of witnesses who testified before it is entitle to believe or disbelieve such witness.

See ADELUMOLA VS. STATE (1988) 1 NWLR Part 73 page 683

B Ratio 1. The evidence led before the court had been rightly evaluated as there is nothing on record to show that the evaluation of evidence done by the learned trial judge was in any way perverse. In the circumstances, this court will not disturb the finding and evaluation of the evidence carried out by the learned C trial judge which the court below accepted. That being the case, issues 1 and 2 are thereby resolved against the appellant.

ISSUE THREE

D Issue three (3) deals with fair hearing. Appellant took the position that he was not accorded fair hearing. In fact his position is that he was not given even a hearing, not to talk of fair hearing. Appellant's position in this regard spans about three and half pages out of which two (2) were on analysis of the concept of fair hearing. Only a page **E** was devoted to actually locating his situation.

It is not useful merely to quote principles without applying them to the peculiar facts and circumstances of the party's case.

F Be that as it may, I have decided to examine the issue, all because life is involved and not necessarily the seeming passing remark of the appellant.

The appellant's counsel hinged his argument on alleged denial of fair hearing both at the trial court and the court below on the ground that alleged non-production of the statements made at the **G** Challenge Police Station.

H Records however reveal that during the trial of the appellant and his co-convicts before the trial court, all pieces of evidence relevance to the prosecution of offences for which he and other convicts were charged were tendered by the prosecution. What evidence to tender and witness to call, to prove the charge preferred against the appellant, solely lies at the discretion of the prosecution and not the defence. The latter cannot force the prosecution to call or adduce particular witness or tender particular evidence.

However, the wrong impression being created by the appel-

lant in relation to the alleged non-production of the purported statements made by the appellant at challenge Police Station was unequivocally debunked by pw8 - Thomas Oden, during his cross-examination by the defence counsel. His testimony in this regard, which is contained at page 42-43 of the record, run thus:

"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 but the case file was transferred to state C.I.D. it was sent from Challenge Police Station to State C.I.D on 30/1/95. I know the reason why the accused were transferred to us. This is because we deal with robbery cases. I have not signed the file which was transferred to state C.I.D. Iyaganku despite all efforts made by me. I disagree with the suggestion that the 1st and 2nd accused persons were arrested at Challenge for a case of stealing originally. I disagree with the suggestion that we concocted the case of robbery against the 1st and 2nd accused persons to cover up our investigation into the 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 made confessional statements. I confirm saying we receive a signal from Abeokuta. The signal is hereby reproduced. I disagree with the suggestion that we arrested the wrong people in connection with the robbery of Mobil Petrol Station.

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 Mokola Police Station..."

It is crystal clear from the above that the alleged concealment of statements made by the appellant and his co-convicts by the prosecution is founded. It is clear that the evidence relied on by the prosecution to prove its case against the appellant emanated from a record which the Police started compiling since January, 1995.

Moreover, if the appellant felt strongly about his alleged statement made by him at challenge Police station, which ought to be tendered by the prosecution but was concealed and/or not tendered as alleged, the onus was on the appellant to compel the prosecution to tender same during trial. He could have

filed the appropriate application before the trial court, for example, Notice to produce, subpoena etc. none of these applications was filed by the appellant throughout the trial of the case before the trial court. It is far too late in the day to now complain about those things.

In the final analysis on this issue, the prosecution adduced the evidence it felt sufficient to prove their case beyond reasonable doubt. The appellant's complaints are misguided. The rules of procedure provide ample method 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.

Having dealt with all the issues in this appeal, I hold that the same are lacking in merit. The appeal is accordingly dismissed without more.

E

MOHAMMED CJN

This appeal is against the judgment of the Court of Appeal Ibadan Division delivered on 4th July, 2012 affirming the conviction and sentence of death passed on the Appellant and his co-accused persons by the trial High Court of Oyo State sitting at Ibadan in its judgment of 12th July, 2002 at page 108 of the record where the learned trial Judge concluded thus -

"I have earlier held that the accused persons made confessional statement admitting the Commission of 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."

The two counts for which the Appellant and his co-accused persons were tried and convicted are in respect of the offences of conspiracy to commit Armed Robbery and Armed Robbery itself under Sections 5(b) and 1(2)(b) respectively of Robbery and Firearms (Special Provisions) Act CAP 398 Laws of the Federation of Nigeria, 1990.

From the record of this appeal, it is quite plain that the Rob-

bery operation in which the Appellant was charged for participation and which resulted in the death of the victim of the attack, took place in broad day light at the Challenge Petrol Filling Station Ibadan. The evidence of the 3 eye witnesses to the vicious attack had pinned down the Appellant as being one of the accused persons who took part in the Armed Robbery operation. This evidence, coupled with the confessional statement of the Appellant to the Police, left the trial Court in no doubt whatsoever in finding the Appellant and his co-accused persons, guilty of the offences charged. This is because the law is well settled that a free and voluntary confession of guilt by an accused person whether judicial or extra-judicial, if it is direct and positive and properly established, is sufficient proof of guilt and is enough to sustain a conviction, so long as the trial Court is satisfied with the truth of such confession. See *Solola v. The State* (2005) 11 N.W.L.R. (Pt. 937) 460 and *Edhigere v. The State* (1996) 8 N.W.L.R. (Pt. 464) 1. D

It is for the foregoing reasons and more comprehensive reasons given in the lead judgment of my learned brother Muntaka-Coomassie, JSC, that I also find no merit in this appeal which is hereby dismissed. The conviction and sentence of death passed on the Appellant by the trial Court for the offences of conspiracy to commit Armed Robbery and Armed Robbery which were affirmed by the Court below, are hereby further affirmed. E

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment of my learned brother Muntaka-Coomassie, JSC. I agree with his lordships reasoning and conclusions that this appeal should be dismissed. F

The relevant facts are set out in the leading judgment. They need not be repeated. The appellant was convicted on his confessional statement which he retracted at trial. G

Can such a conviction be sustained?

A conviction for Armed Robbery would be sustained if the confessional statement is direct and cogent. This is the position of the law because a confession is an admission against the maker. See *State v. Isah & 2 Ors.* (2012) 7 SC (Pt.iii) P93, *Haruna v. A.G. Federation* (2012) 3 SC (Pt. iv) p.40. H

Put in another way an accused person can be convicted on his confessional statement alone provided that the judge is satisfied that the confessional statement was voluntarily made. It is desirable though for the judge to find some other evidence outside the confession which tends to show that the confession is true.

B Retracted Confessional Statement

If a confessional statement is retracted at the trial, the judge should examine evidence led to see if there are circumstances which tend to establish that the confessional statement is true. Where there is independent evidence corroborating a retracted confessional statement, the trial judge would be right to infer that the confessional statement was in fact made by the appellant and his attempt to retract the said statement at trial was a belated afterthought. When an accused person is charged with Armed Robbery or similar serious offences and the prosecution alleges that he made a confessional statement, the general impression is that the confession was beaten out of him. This general impression disappears or is no longer of any significance when as in this case three witnesses called by the prosecution easily identified the appellant and his co-gang members as the persons who shot and killed their boss in broad day light.

A conviction on a retracted confessional statement would be sustained where independent evidence makes the confessional statement appear true and reliable. Independent evidence available to the prosecution was one of the best known to criminal law, Eyewitness evidence. Three witnesses called by the prosecution repeatedly identified the appellant as one of the armed robbers. In the light of the above a retracted confessional statement is of no help whatsoever to the appellant.

G For this and the detailed reasoning in the leading judgment, the appeal is dismissed.

NGWUTA JSC

H I read in draft the lead judgment just delivered by my learned brother, Muntaka-Coomassie, JSC. I entirely agree that the appeal is devoid of merit.

The appellant who seeks to overturn the concurrent findings of facts of the two Courts below has failed to demonstrate any per-

versity in the said findings. There is no basis for this Court to disturb the decision of the trial Court as affirmed by the Court of Appeal. See *Njoku & Ors v. Eme & Ors.* (1973) 5 SC 293 at 306, *Kale v. Coker* (1982) 12 SC 252 at 271.

In addition to the eye-witness account of the incident given by PW1, PW2 and PW4 before the trial Court, there is also the ex-judicial confession of the appellant. The confessional statement was tendered, admitted in evidence and marked Exhibit N1. It is hereunder reproduced:

"In addition to my first statement I made to Police on the 30/1/95, I wish to state that sometime last year 1994, in month October, myself, Sunday Okafor, Osuolale and Wahabi came from Lagos to Ibadan with a 504 saloon car driven by one Sunday Okafor, then by reaching at Mobil Petrol Station Challenge, we entered and bought fuel in the sum of N2,000.00. Myself and Osuolale came from the vehicle and entered to the Petrol Supermarket, while Osuolale in possession of the money in the bag containing N150,000.00k. I fired at the owner of the bag almost two times. I fired him twice at chest. After the firing we then rush to the vehicle with the money and drove away to Lagos at Sunday stop at Idumota where we shared the money N75,000.00 two each to Julius while the others settle same when I left. Then I left to my home. It is Sunday that brought us to the filing station which he previously targeted the man who normally carried money frequently outside, the vehicle used on that day belongs to Sunday which I cannot remember the registration number but the colour is white."

Appellant did not claim that he was forced to make the statement. If he did there should have been a trial within trial to determine its voluntariness vel non. See *R v. Onabanjo* 3 WACA 43, *The Queen v. Itule* (1961) 1 All NLR (Pt. 3) 462, *Emeka v. The State* (2001) 88 LRCN 2343 at 2351, 2355 and 2356.

Appellant resiled from the statement. However, the retraction does not ipso facto render the statement inadmissible in evidence. See *R v. Itule* (supra), *R v. Sapele & Anor* (1957) 2 FSC 24, *Egboghonome v. State* (1993) 7 NWLR (Pt. 306) 383 at 431.

While a retraction of a confessional statement does not ipso facto water down the potency of the confession, the Court having admitted same, has a duty to examine its contents with a view to

determining the veracity vel non of the applicant's claim that he did not make the statement.

In the case at hand, while the sum stated in the statement, the type and colour of the car used and the number of the people who committed the robbery are facts which the Police can gather in their investigation, the sharing formula for the money, the owner of the vehicle and who drove it are facts within the knowledge of the appellant. They are not ordinarily available to the Police who traditionally are the ones alleged to have written the statement and forced the appellant to endorse same.

In my view, the retracted confessional statement does not appear to have been composed by someone else and forced on the appellant.

Even without the evidence of eye-witnesses, the appellant could have been rightly convicted based solely on his confessional statement. See *Kalu & Anor v. King* 14 WACA 30, *Yusuf v. The State* (1976) 6 SC 167, *Igago v. The State* (1970) 1 All NLR 150.

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

OKORO JSC

I read before now the judgment of my learned brother, Muhammed S. Muntaka-Coomassie, JSC just delivered with which I am in agreement that this appeal is devoid of merit and ought to be dismissed.

The record of appeal shows that on 18th November, 1994, while at the Mobil Petrol Station, challenge Area of Ibadan, one Alhaji N.O. Kolawole who was the dealer of the filling station was preparing to go to the bank to deposit the sum of N150,000 = (one hundred and fifty thousand naira) only being the proceeds of sale of petroleum products at the filling station, a gang of five armed robbers invaded the station in a Peugeot wagon car with inscription "First City Merchant Bank" and they disguised as if they wanted to buy petrol and milk from the station.

The facts further disclose that whilst the driver of the car was buying petrol from the attendant at the station, two other occupiers

of the vehicle alighted from the vehicle and moved to the mart of the filling station pretending to buy milk. The Dealer of the station informed them that there was no milk in the mart. The appellant herein shot the dealer with a gun in his possession. The man fell down and died. A co-convict of the appellant one Fatai Ogualale took away the polyethylene bag containing the sum of N150,000 = which fell from the deceased. The appellant and his co-travelers escaped in the vehicle they came with leaving the deceased in a Pool of his blood. B

Nemesis however, caught up with the appellant and his comrades in crime when on 30th January, 1995, they left Lagos to Ibadan for another robbery incident, this time at a chemist shop. They were all arrested. Two days after, pw1, 2, 3 and 4 who worked at the petrol station were invited by the police and they effectively identified the appellant and his co-accused as the robbers who robbed their station and killed their boss. They were charged to court for armed robbery. Appellant's no-case submission was overruled. Only the 4th accused, one Sunday Okafor was discharged. The appellant and two other accused persons entered their defence. They were found guilty and sentenced to death. C D

Dissatisfied with the judgment of the trial court, the appellant appealed to the court below which dismissed the said appeal and upheld the judgment of the trial court. The appellant has further appealed to this court. E

Learned counsel for the appellant has distilled three issues for the determination of this appeal as follows:- F

1. Whether the court below was right in affirming the trial court's decision which was based on untested extra - judicial statements and the contents of which the appellant fully retracted.
2. Whether the court below was right in holding that the prosecution proved its case against the appellant beyond reasonable doubt. G
3. Whether the appellant was given a fair hearing having regard to the manner he was denied access to materials required for him to defend himself.

In the amended brief of argument of the Respondent, two issues are however decoded from the grounds of appeal. They are:- H

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

below.

On page 10, paragraph 4, 1.4 of the appellants' brief, the learned counsel for the appellant states as follows:-

B *"It was therefore clear that the sole set of materials the trial court founded the conviction and sentence of the Appellant and the other accused persons upon were the purported confessional extra-judicial statements, i.e. Exhibits N and N1, Exhibit O and Exhibit P. In a capital offence case? Sadly the court below merely affirmed the decision without more"*

C Learned counsel argued that it was wrong for the court below to affirm the judgment of the trial court based on an alleged confessional statement of the appellant which he refracted at the trial. I agree entirely with the learned counsel for the appellant that in a criminal matter, especially one sending a man to the gallows, evidence generated must be such that which has been properly tested and evaluated to eliminate any doubt whatsoever. That was the view of this court in *Nsofor V The State* (2004) 18 NWLR (Pt 905) 292. See also *Olusoji V Attorney General* (1965) NWLR 111 at 112.

E The learned counsel for the respondent has however faulted this stance by the learned counsel for the appellant. It is his contention that the trial court did not rely on the confessional statements alone but also on the evidence of prosecution witnesses, I shall consult the record to see who is right here. On page 107 of the record, part of the judgment of the learned trial judge reads:-

F *"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. I am of the view that the statements of the accused persons are confessional statements and there is nothing before the court to suggest otherwise than that they were voluntarily made."*

H What I can gather from the above findings of the learned trial judge which the court below affirmed is that the confessional statements of the appellant and that of his co-accused persons corroborated the testimonies of pw1, pw2 and pw4 who were eye witnesses to the commission of the crimes. The witnesses stated in their evidence that the appellant and his cohorts came to the petrol station in

a Peugeot car and killed their master and stole the sum of N150,000 = from him. The confessional statements agree with the testimonies of those witnesses. I find it therefore difficult to agree with the learned counsel for appellant that the sole set of materials used by the trial court to convict appellant was the confessional statement. Even at that, it is trite that in law, a voluntary confession of 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. See *Ogoala V State* (1991) 2 NWLR (Pt 175) 509, *Philip Kanu & anor V R* (1952) 14 WACA 30. B

Moreso, it is well settled that a confessional statement as in this case, does not become inadmissible or inapplicable merely because there is a subsequent retraction of the confession by its maker. Where a court is satisfied that the statement was voluntarily made, it can still convict on it. See *Solomon Thomas Akpan V The State* (1992) 7 SCNJ 22, *Aremu V State* (1991) 7 NWLR (pt 201) 1, *Ejinima V State* (1991) 6 NWLR (pt 200) 627; *Edhighere V The State* (1996) 8 NWLR (Pt 464) 1 at 14. C

The ingredients which the prosecution must prove in an offence of armed robbery are that there was a robbery incident, that the robbers were armed with dangerous weapons and that the accused was one of the robbers or the robber. In the instant case, based on the evidence adduced by all the prosecution witnesses and the confessional statement of the appellant and his comrades in arms, there is proof beyond reasonable doubt that the offence of armed robbery was committed by the appellant with the other accused persons. He was therefore duly and properly convicted and sentenced for the offence of armed robbery. Even if he was convicted on his confessional statement alone, it will still suffice. But in this case, he was convicted based on the evidence of prosecution witnesses and also on his confessional statement. I agree with the court below that there is nothing on the record to temper with the findings and decision of the learned trial judge. D

Based on the above and the fuller reasons enunciated in the lead judgment, I agree that this appeal is devoid of merit and I hereby dismiss it. Appeal Dismissed. E