

**SUPREME COURT OF NIGERIA**  
FRIDAY 3RD JULY, 2015. SC. 300/2012  
**CORAM:- J. A. FABIYI, O. ARIWOOLA,**  
**M. D. MUHAMMAD, C. B. OGUNBIYI, C. C. NWEZE, JJSC**

IDOWU OKANLAWON ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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ARMED ROBBERY - Ingredients - Proof - Prosecution must prove that there was robbery - That the robbers were armed - And that accused was the armed robber or one of the armed robbers (H1)

CRIMINAL PROCEDURE - Identification - Proof - Whenever court is faced with evidence of identification - It must ensure and be satisfied that accused before it - Was the person who committed the offence (H2)

ARMED ROBBERY - Identification parade - Conduct of - It is essential when there is dispute as to identity of accused - But where no dispute exists - There will be no need for the parade (H3)

CRIMINAL PROCEDURE - Confession - Validity of - Exhibit K is a confessional statement - As the same was tendered and admitted without objection (H4)

CHARGES - Substantive charge and conspiracy - Proof - The approach is to deal with main charge before conspiracy - And failure to prove main charge does not make conviction for conspiracy inappropriate (H5)

CRIMINAL PROCEDURE - Proof - Means of - Guilt of accused person can be established by confessional statement - Circumstantial evidence - And evidence of an eye witness (H6)

CRIMINAL PROCEDURE - Confession - Retraction - Where accused during trial retracts from extrajudicial statement earlier made to police - It is his duty to impeach the earlier statement (H7)

CRIMINAL PROCEDURE - Confession - Test of - Once accused retracts his confession - Court is expected to inter alia examine if there is anything outside the confession - To show that it is true (H8)

CRIMINAL PROCEDURE - Conviction - Confession - Where confession is established to be positive and unequivocal - The same will suffice to ground a finding of guilt - Regardless of any retraction (H9)

CRIMINAL PROCEDURE - Proof - Number of witnesses - How many witnesses prosecution needs to prove its case - Is entirely its responsibility - But not that of the defence (H10)

FAIR HEARING - Breach - Allegation of - Bias against the trial court was uncalled for - As appellant was given adequate opportunity to be heard - And was heard in defence of the charge against him (H11)

### ***FACTS***

Before the High Court of Ogun State, accused/appellant along with three others was arraigned on a two count charge of conspiracy to commit armed robbery and armed robbery contrary to and punishable under the enabling provisions of the Robbery & Firearms Act LFN 1990. They pleaded not guilty to the charge. The case against them is that while armed with guns and offensive weapons, they conspired and robbed their victim of cash and valuables worth thousands of naira. Thereafter, 1<sup>st</sup> accused approached PW1 (an electronic repairer) to buy or dispose of stolen two handsets. PW1 became suspicious of 1<sup>st</sup> accused and in the cause of his fiddling with the handset by calling on the phone numbers on one of the handsets, PW2 answered a call and narrated the story of how he was robbed of the handsets and some amount of money.

1<sup>st</sup> accused and the others (inclusive of appellant) were consequently arrested by the police in connection with the crime. The suspects were therefore brought before the court. At the trial, appellant's statement (Exhibit K) admitting his guilt was admitted in evidence without objection. In his judgment, the learned trial Judge relied principally on the admission in Exhibit K along with other pieces of corroborative evidence to convict appellant. Appellant was thus sen-

tenced to death by hanging. Aggrieved with the judgment, appellant appealed to the Court of Appeal Ibadan Division. The appeal was heard and dismissed by the court. Not yet satisfied, appellant appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Whether the Lower Court was right when it affirmed the trial court's decision that there was no need for identification parade.

2. Whether the Lower Court was right when it affirmed that the prosecution had proved the guilt of the accused persons.

3. Whether the Lower Court was right when it affirmed that the accused person had a fair hearing when he was prosecuted and defended by the Ministry of Justice, Ogun State.

**HELD** (Unanimously dismissing the appeal per **ARIWOOLA JSC**)

*ARMED ROBBERY - Ingredients - Proof*

**1. It is already settled that to enable the prosecution to establish the charge of armed robbery, the following elements must be proved:-**

**(i) That there was a robbery or series of robberies;**

**(ii) That the robber(s) was/were armed.**

**(iii) That the accused person was the armed robber or one of the armed robbers. (p. 2451 D)**

*CRIMINAL PROCEDURE - Identification - Proof*

**2. Identification generally, is evidence tending to show that the person charged with an offence is the person who was seen committing the offence. Therefore, whenever the trial court is confronted with evidence of identification, it is expected to ensure and be satisfied that the evidence proves beyond reasonable doubt that the accused before the court was actually the person who committed the offence with which he is charged. (p. 2452 B)**

*ARMED ROBBERY - Identification parade - Conduct of*

**3. Identification parade, otherwise known as "line up", is a**

***Police Identification procedure in which criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be identified as the perpetrator of the crime.***

***B Identification parade is ordinarily not a sine qua non for identification in all cases where there has been a fleeting encounter with the victim of a crime, if there are yet other pieces of evidence leading conclusively to the identity of the perpetrator of the offence.***

***C Generally, an identification parade would become necessary only in the following situations of visual identification -***

***(i) Where the victim did not know the accused person before and his first acquaintance with him is during the commission of the offence:***

***D (ii) Where the victim was confronted by the offender for a very short time; and***

***(iii) Where the victim, due to time and circumstances, might not have had the full opportunity of observing the features of the accused.***

***E Ordinarily, in cases of armed robbery, the identity of the accused is always in issue which usually leads to the conduct of identification parade by the police. It is very essential and useful whenever there is doubt as to the ability of a victim to recognize the suspect who participated in the alleged criminal act or where the identity of the said suspect or the accused person is in dispute. But where there is no dispute as to the identity of the perpetrator of a crime, there will be no need at all for an identification parade to further identify the offender.***

***F (pp. 2452 D/2454 G)***

***CRIMINAL PROCEDURE - Confession - Validity of***

***H 4. It is interesting to note that the above statement rendered by the appellant was tendered and when there was no objection, it was admitted and marked by the trial court as Exhibit K. There is no doubt, that the above is clearly a confessional statement.***

***To satisfy the third element, that the appellant was one of the armed robbers who robbed PW2 on 18/8/2002 the Prosecu-***

**tion tendered the statement made to the Police by the appellant. And as I stated earlier, this was admitted without objection by the trial court and marked as Exhibit K. The content of the statement has been reproduced earlier in this judgment. It gave a graphic detail of the role played by the appellant. In other words, it was truly a confessional statement, made extra judicially to the Police.** (pp. 2454 F/2456 H) B

*CHARGES - Substantive charge and conspiracy - Proof*

**5. Now, as to the other arm of the issues married together, whether the court below was right in affirming that the prosecution had proved the guilt of the accused person. As shown earlier, the appellant was charged along with others with offences of conspiracy and armed robbery. It is already held that the proper approach to an indictment which contains offence of conspiracy as a charge and a substantive charge is to deal first with the main charge, and then the charge of conspiracy.** C

**Conspiracy is generally an agreement between two or more persons to do an unlawful act or doing a lawful act in an unlawful manner. Indeed, failure to prove a substantive offence does not make conviction for conspiracy inappropriate, as it is a separate and distinct offence in itself, independent of the actual offence said to have been conspired to commit.** D

(p. 2456 B) E

*CRIMINAL PROCEDURE - Proof - Means of*

**6. It is trite law that the guilt of an accused person charged with the commission of an offence can be established by any or all of the following:-** F

- (i) The confessional statement of the accused:**
- (ii) Circumstantial evidence:**
- (iii) Evidence of an eye witness.** (p. 2458 B) G

*CRIMINAL PROCEDURE - Confession - Retraction* H

**7. There is no doubt, that the above testimony in court was a retraction by the appellant from the confessional statement earlier made to the Police admitting the commission of the offence. It is settled law that where an accused person during**

**trial retracts from the extrajudicial statement he had earlier made to the police it behooves on him, and it is a duty on him to impeach the said earlier statement.**

**During the proceedings, an accused person desirous of impeaching his earlier statement is duty bound to establish that his earlier statement cannot be true or correct by showing any of the following:**

- (i) That he did not in fact make any such statement as presented; or**
- (ii) That he was not correctly recorded; or**
- (iii) That he was unsettled in mind at the time he made the statement; or**
- (iv) That he was induced to make the statement.**

**However, the way to discharge the burden of establishing any of the above by an accused at the tendering of his confessional statement is by calling evidence during a trial-within-trial. In other words, the accused must object to the admissibility of his statement immediately it is tendered. Then, where required, the trial court will order a trial-within-trial to test the veracity of the alleged confessional statement.**

(p. 2458 C)

*CRIMINAL PROCEDURE - Confession - Test of*

**8. In this case, the appellant did not object to the admissibility of his alleged confessional statement. Yet, there is no doubt that once there is retraction by the accused on the statement accredited to him, the court is expected to test its truthfulness and veracity by examining the said statement in the light of other credible available evidence. The court will do this by looking into whether -**

- (a) There is anything outside it to show that it is true;**
- (b) It is corroborated;**
- (c) The facts stated in it are true as far as can be tested;**
- (d) The accused person had the opportunity of committing the offence;**
- (e) The accused person's confession is possible;**
- (f) The confession is consistent with the other facts as contained and proved at the trial.**

(p. 2459 A)

*CRIMINAL PROCEDURE - Conviction - Confession*

**9. The law is settled, that where an extra-judicial confession has been proved and established to have been made voluntarily and it is positive and unequivocal and amounts to an admission of guilt, such confession will suffice to ground a finding of guilt, regardless of the fact that the maker resiles therefrom or retracted it altogether at the trial. (p. 2460 A)**

*CRIMINAL PROCEDURE - Proof - Number of witness*

**10. It is interesting to note the misconception by the learned appellant's counsel when he contended that the prosecution ought to have called as witness the owner of the two guns recovered from the appellant and co-accused.**

**This court has stated in plethora of cases over and over again that how many witnesses the Prosecution needs to prove its case against any accused person is entirely its responsibility but not that of the defence. The defence is not to decide for the Prosecution who to call as witness.**

**I am therefore not in the slightest doubt that the prosecution proved the case as charged against the appellant. The court below was right in affirming that the prosecution had proved the guilt of the appellant. Accordingly, the issue is resolved against the appellant. (p. 2460 C)**

*FAIR HEARING - Breach - Allegation of*

**11. In the instant case, I cannot see how the principle of fair hearing can apply or be relevant. The appellant has failed to show how his right to fair hearing was breached by the court in the way he was tried. What is more, the allegation of bias against the trial court was unfortunate and uncalled for. The appellant was given adequate required opportunity to be heard and he was heard in defence of the charge against him. Therefore, the fact that the counsel who handled the matter on appeal could have handled it differently is no basis for an attack on the integrity and competence of the other counsel who, as remarked by the trial court, did her very best in the case. In the result, this issue is resolved against the appellant as**

***there was no breach of his right to fair hearing in the way his trial was conducted at the trial court. There was no proof of any conflict of interest of the defence counsel and none of bias.*** (p. 2461 H)

## **<sup>B</sup> NOTABLE POINTS OF INTEREST**

### **ARIWOOLA JSC**

#### ***1. Robbery and armed robbery – Meaning of***

Generally, robbery is simply the illegal taking of property from the person of another or in the person’s presence by violence or intimidation. While armed robbery is robbery committed by a person carrying a dangerous weapon regardless of whether the weapon is revealed or used. (p. 2451 C)

#### **<sup>D</sup> 2. Confession – Meaning of**

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime and this includes both extra-judicial and judicial confessions. It also includes an incriminating admission made that is not direct and positive and short of a full confession. See section 28 of the Evidence Act, 2011. In the same vein, confession has also been held to be a criminal suspect’s oral or written acknowledgment of guilt, which often includes details about the crime alleged. In other words, a confession is an acknowledgment in express words by the accused person in a criminal case, of the truth of the main fact charged or of some essential part of it. (p. 2457 B)

#### ***3. Fair hearing – Principle of***

The principle of fair hearing as constitutionally guaranteed in Section 36 of the 1999 Constitution, no doubt is derived from the principle of Natural Justice with its twin pillars of “audi alterem partem” and “nemo iudex in causa sua”. This principle of fair hearing is no doubt fundamental to the administration of justice. The court is required to conduct trial or hearing of a case with all fairness to both parties to the suit and without bias or partiality in favour of or against either party. It is note worthy that complaint of breach of fair hearing is usually against the court or tribunal, whether the parties before the



court were afforded equal opportunity to fully ventilate their grievance. (p. 2461 A)

### **REPRESENTATION**

Uche Ihediwa Esq., for the Appellant  
 Funke Agbor (Mrs.) with A. A. Abdulhamed, Esq., for the Respondent B

### **CASES REFERRED TO**

- Bozin v. State (1985) 2 NWLR (pt. 8) 465 C  
 Nwachukwu v. State (1985) 1 NWLR (pt. 11) 218  
 Osuagwu v. State (2009) 1 NWLR (pt. 1123) 523  
 Bakare v. State (1987) 1 NWLR (pt. 52) 579  
 Wakala v. State (1991) 8 NWLR (pt. 211) 552  
 Okosi v. State (1989) 1 NWLR (pt. 100) 642 D  
 Ukpabi v. State (2004) 11 NWLR (pt. 884) 439  
 Ozaki v. State (1990) 1 NWLR (pt. 124) 92  
 Archibong v. State (2006) 14 NWLR (pt. 1000) 349  
 Akpan v. State (2008) 14 NWLR (pt. 1106) 72  
 Abiola v. FRN (1997) 2 NWLR (pt. 458) 449 E  
 Agboola v. State (2013) 11 NWLR (pt. 1366) 619  
 Alabi v. State (1993) 7 NWLR (pt. 307) 551  
 Olayinka v. State (2007) 9 NWLR (pt. 1040) 561  
 Osetola v. State (2012) 17 NWLR (pt. 1329) 251 F  
 Ikemson v. State [1989] 3 NWLR (Pt.110) 455  
 Ibrahim v. State [1991] 5 SCNJ 129  
 Ibe v. State [1992] 5 NWLR (Pt.244) 642  
 State v. Aibangee [1988] 3 NWLR (Pt.84) 549  
 Attah v. State [2010] 10 NWLR (pt.1201) 190 G  
 Balogun v. A-G Ogun State (2002) 6 NWLR (Pt.763) 512  
 Eyisi v. State [2001] 1 WRN 1  
 Williams v. State [1992] 10 SCNJ 74  
 Ugwumba v. State [1993] 6 SCNJ (pt.11) 217 H

### **STATUTES REFERRED TO**

Robbery & Firearms (Special Provisions) Act Cap. 398 LFN 1990,  
 ss. 5(b), 1(2)(a)  
 Evidence Act 2011, ss. 28, 29(4), 167(d)

Constitution of the Federal Republic of Nigeria 1999, s. 36

**BOOK REFERRED TO**

Black's Law Dictionary 9th ed. p. 1014

**B                    LEAD JUDGMENT BY ARIWOOLA JSC**

This is an appeal against the judgment of the Court of Appeal Ibadan Division (hereinafter referred to as “court below”) delivered on 22nd day of June, 2012.

C                    The appellant had been charged along with three others on two counts as follows:-

Count I

D                    That you, Lukman Olufeko (m) Idowu Okanlawon (m) Akeem Jimoh (m), Isikilu Olanipekun (m) and others now at large on or about the 18th day of August, 2002 at Ewi's compound Oke Efon area of Abeokuta in the Abeokuta Judicial Division conspired together to commit a felony to wit: Armed Robbery contrary to Section 5(b) and punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap. 398, Laws of the Federation of Nigeria, E 1990 as amended by the Tribunal's (Certain Consequential Amendments etc) Act, 1999.

Count II

F                    That you, Lukman Olufeko (m), Idowu Okanlawon (m), Akeem Jimoh (m), Isikilu Olanipekun (m) and others now at large on or about the 18th day of August, 2002 at Ewi's compound, Oke Efon area of Abeokuta in the Abeokuta Judicial Division while armed with firearms to wit: guns and other offensive weapons did rob one Evangelist Oluseye Ogunremi of a Nokia Mobile handset and a Sagem G mobile handset valued at N65,000.00 and a cash of N80,000.00 and thereby committed an offence contrary to Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Laws of the Federation of Nigeria, 1999 as amended by (Certain Consequential Amendments) Act, 1999.

H                    Upon arraignment, each one of them pleaded not guilty to the charge. They were tried, found guilty as charged, convicted and each sentenced to death by hanging in the judgment of the trial court delivered on Tuesday the 21st day of June, 2005 by Shoremi, J. (as he then was) in Ijebu Ode, Ogun State of Nigeria.

The appellant herein as 2nd accused was dissatisfied with the conviction by the trial court hence he appealed to the court below which court dismissed his appeal and affirmed his conviction and sentence by the trial court. That decision led to the further appeal to this court.

The facts of this case are as follows:- Sometime on the 18th day of August, 2002, the appellant and three others already mentioned in the charge above along with others still at large, armed with firearms to wit: guns and other offensive weapons conspired and robbed one Evangelist Oluseye Ogunremi of two handsets both valued at N65,000 and a cash sum of N80,000. At the trial, prosecution called nine (9) witnesses to prove its case. The appellant testified in defence but called no other witness.

PW2 was the complainant into whose house the appellant and his co-accused were alleged to have broken at about 3.30am on 18/8/2002. They were said to be armed with various dangerous weapons including firearms, cutlasses and iron rod. They demanded for money. PW2 was subsequently hit on the head with an Iron rod by one Isikilu Olanipekun, the 4th accused, tried with the appellant. The appellant was said to have searched and ransacked the house of PW2, carting away his two handsets of Nokia and Sagem with cash sum of N80, 000.00.

PW1 was one Bola Alausa. He was an Electronic repairer. He was the one whom the 1st accused approached for him to buy the two handsets or help him dispose off the sets, for the sum of N3,000.00.

PW1 became suspicious of the 1st accused and in the cause of his fiddling with the handset by calling on the phone numbers on one of the handsets, PW2 answered a call and narrated the story of how he was robbed of the handsets and some amount of money. That led to the arrest of the 1st accused, upon the matter being reported to the police. The 1st, 2nd, 3rd and 4th accused persons were later arraigned before the trial court. The appellant along with the others testified in defence. He denied that he ever robbed anyone. He was tried, found guilty, convicted and sentenced along with the others to death as prescribed. His appeal to the court below was found to be devoid of merit and was dismissed, leading to the instant appeal, upon five (5) grounds.

When the appeal came up for hearing on 7/5/2015, learned counsel for the appellant identified the appellant's brief of argument which was settled by Uche Ihediwa, Esq., and was filed on 11/12/2013. He adopted and relied on same to urge the court to allow the appeal and set aside the judgment of the court below which had earlier affirmed the conviction and sentence of the appellant by the trial court. He further urged the court to acquit the appellant and discharge him of the two count charge.

On the other hand, learned counsel for the respondent identified the respondent's brief of argument which was settled by Mrs. Funke Agbor and filed on 24/4/2013 but which was deemed as properly filed and served on 02/10/2013. She adopted and relied on same to urge the court to dismiss the appeal for lacking in merit. She urged the court to affirm the decision of the court below which had earlier affirmed the conviction and sentence of the appellant.

From the five grounds of appeal filed, the appellant distilled the following three issues for determination of the appeal:

#### Issues for Determination

1. Whether the Lower Court was right when it affirmed the trial court's decision that there was no need for identification parade. (Distilled from Ground 1)

2. Whether the Lower Court was right when it affirmed that the prosecution had proved the guilt of the accused persons. (Distilled from Grounds 2, 4 and 5)

3. Whether the Lower Court was right when it affirmed that the accused person had a fair hearing when he was prosecuted and defended by the Ministry of Justice, Ogun State. (Distilled from Ground 3)

In its own brief of argument, the respondent distilled two Issues from the five grounds of appeal filed by the appellant as follows:-

1. Whether the Court of Appeal was right in affirming the decision of the trial High Court that the prosecution proved the case against the appellant beyond reasonable doubt (Grounds 1, 2, 4 and 5)

2. Whether in the light of the facts of this case, the Court of Appeal was right when it held that appellant was not denied fair hearing at the trial High Court. (Ground 3)

In arguing the issues formulated in his brief of argument, learned appellant's counsel referred to the ingredients which the prosecution must prove in a charge of armed robbery as follows - (a) That there was robbery, or series of robberies, (b) That each robbery was an armed robbery and (c) That the appellant was one of those who took part in the robberies. He relied on several decided cases, including - *Bozin Vs. The State* (1985) 2 NWLR (Pt.8) 465; *Nwachukwu Vs The State* (1985) 1 NWLR (Pt.11) 218; *Osuagwu Vs The State* (2009) 1 NWLR (Pt.1123) 523. B

Learned counsel contended that in and by virtue of Section 135 of the Evidence Act, 2011, the burden of proof is beyond reasonable doubt. And that this burden does not shift. He relied on *Bakare Vs. The State* (1987) 1 NWLR (Pt.52) 579, *Wakala vs. The State* (1991) 8 NWLR (Pt.211) 552, among others. C

Learned counsel referred to p.98 of the record on the findings of the court below on the issue of the need for identification parade. Before proceeding further, learned counsel conceded that this court would ordinarily not interfere with the concurrent findings of fact by two Lower Courts except same is perverse or contains an error and occasioned a miscarriage of justice. And that the appellate courts would only interfere with each findings of fact where the trial court has not properly evaluated same and as long as the evidence is not evidence of credibility, the Court of Appeal is in the same position as the trial court. D

Learned counsel also conceded that the issue of identification is a question of fact to be determined by the trial Judge. E F

Learned appellant's counsel opined that the simplification of the reasoning of the Lower Court on the issue is to the effect that an identification parade was unnecessary for the following reasons: G

(a) The confessional statements of the other accused person which are harmoniously consistent with one another and give no room for doubt; and

(b) Other bits and pieces of evidence by the prosecution witnesses. H

He took the above reasoning one after the other on the warning earlier given in decided cases on the danger in mistaken identity on visual identification in criminal cases. Learned counsel contended that courts had been urged, given the danger of mistaken identity, to

be circumspect when grounding conviction on the basis of identity. He relied on *R. Vs. Turnbull* (1976) 3 WLR 445 at 447; *Bozin Vs. The State* (supra); *Okosi Vs. The State* (1989) 1 NWLR (Pt.100) 642 at 665.

B Learned counsel contended that it is due to this danger in relation to mistaken identity that the courts have equally urged that before conviction, it is necessary to look for corroboration of the evidence relating to identity or recognition.

C He contended further that the question whether an appellant was properly identified is a question of fact to be determined by the trial court.

D He referred to the testimony of PW2 when he stated that he told the police that he would recognize the accused persons if seen, and contended that this amounted to hearsay evidence and was inadmissible and ought not to have been admitted as a statement of truth.

E Learned counsel submitted that it is only the statement of PW2, Exhibit J, or an Independent testimony from a Police Officer that would be cogent, compelling and convincing relating to whether or not PW2 said he told the Police that he recognized the suspects if seen. He contended that PW7 and PW8, who testified for the prosecution, were Policemen from Abatan Police Station. They did not give evidence that PW2 told them he could identify the suspects if seen.

F Learned counsel contended that another crucial issue relating to the assertion is the timing of the said statement. In order to be credible, the description of the suspect must be given at the earliest opportunity. And that delay in giving evidence of identification and G or failure to give the evidence of identification at the earliest opportunity reduces the probative worth of such evidence.

H Learned counsel contended that in the instant case, that the armed robbery was reported to Abatan Police Station on 28/8/2002, the Policemen at Abatan were said to have investigated the matter before it was transferred to the State C.I.D on 30/8/2002. He stated that the 1st accused person was arrested on 29/8/2002 but contended that the statement of the complainant tendered as Exhibit J was not made at the earliest opportunity, as it was made after the 1st accused had been arrested and exposed to PW2. Learned counsel contended

further that assuming without conceding that the 1st accused person told the Police that he could identify the other accused persons, if seen, his answer or response under cross examination that he did not describe the accused persons at Abatan clearly showed that PW2 did not describe the accused persons at the earliest opportunity. He submitted that the failure to describe the accused persons to the Police at the earliest opportunity was fatal to the prosecution's case. B

Otherwise, there will be material contradictions in the evidence of the prosecution hence it should be rejected.

Learned counsel contended further that the conviction of the accused was significantly based on PW2's assertion that he could recognize the accused persons, if seen, hence he submitted that the answer under cross examination raises a doubt with respect to the evidence of recognition. And any weakness or doubt in the evidence of identity is usually resolved in favour of the accused person. He relied on Ukpabi Vs. The State (2004) 11 NWLR (Pt. 884) 439; Bozin Vs. The State (Supra). C D

On the description of the dresses the accused persons wore on the night of the incident as described to the Police, learned counsel contended that the generalized description of the dresses they wore does not amount to a specific recognition of those clothes. He urged the court to hold that this was a clear case where there was a very high probability of mistaken identity, hence the Police should have conducted an identification parade. He submitted that the facts of this case fall squarely into those cases where the courts had held that an identification parade is necessary. He urged the court to hold that the failure to conduct an identification parade in this case was fatal to the prosecution's case and the court below was wrong to have affirmed the decision of the trial court which convicted the appellant. E F G

On the reliance on the harmony of the confessional statements of the other co-accused, learned counsel referred to Exhibits, B, D, F and G being the alleged Statements of the other accused persons with whom the appellant were tried. He contended that none of the Statements could be used to support an identification of the appellant. He submitted that the confessional statement of an accused cannot be used to support the conviction of another accused person. He relied on Section 29(4) of the Evidence Act, 2011. Ozaki Vs. The State (1990) 1 NWLR (Pt.124) 92. H

On the reliance on other bits and pieces of evidence adduced by the prosecution in support of the evidence of identification, reference was made to the alleged confessional statement of the appellant - Exhibit K and the recovery of the Nokia handset, one of the two handsets that were alleged to have been robbed of PW2. Learned  
B counsel contended that the basis of the Lower Court to have asserted that there was no need for an identification parade was not on a firm foundation and therefore should be rejected. He submitted that the failure to conduct identification parade was fatal to the  
C prosecution's case. He urged the court to resolve the issue in favour of the appellant to allow the appeal.

Issue No.2 of the appellant is whether the Lower Court was right when it held that the prosecution had proved the guilt of the accused persons. For this, learned counsel examined the evidence  
D that led to the conviction in sub heads as follows:-

- (a) Reliance on the confessional statement, Exhibit K
- (b) Recovery and use of Evidence relating to the GSM sets.
- (c) Contradiction in evidence of Prosecution witnesses.
- (d) Recovery of Exhibits c & c1 and failure to call the owner.

On the first sub issue, learned counsel contended that the court below agreed with the trial court that Exhibit K, the confessional Statement passed the test laid down by this court in *Ubierho vs The State and Sykes Vs DPP (1913) 8 Cr App R.233*. But that in coming to the  
F conclusion, that Exhibit K met the criteria enunciated by the Supreme Court, the trial Court relied on evidence that is not borne out by the record. He gave instances of these testimonies as PW2's testimony that he recognized the appellant as one of the robbers. That, apart from saying that he could recognize the accused persons, there was  
G no other testimony on record to show that PW2 actually recognized the appellant after his arrest.

Secondly, the amount that appeared on the charge sheet as having been stolen is different from the one referred to by the trial court. That the other accused persons mentioned the name of the  
H appellant in their confessional statements. No objection to admissibility of Exhibit K. The fact that counsel did not object to the admissibility of a confessional Statement is not a basis for acting on it. He submitted that Exhibit K was not a confessional Statement so called as defined in Section 28 of the Evidence Act.



Learned counsel referred to part of the record for the charge and the Statement accredited to the appellant as his confessional statement. He compared Exhibit K with the Statements of other co-accused persons and contended that there were similarities rendering them improbable to be voluntary. He submitted that the trial court ought not to have relied on it, and the court below was wrong to have relied on same in affirming the decision of the trial court. B

On the recovery and use of evidence relating to the GSM sets, learned counsel contended that the failure to produce and tender the two handsets and cartridges allegedly recovered raises a doubt in the prosecution's case that ought to have been resolved in favour of the appellant. C

Learned counsel referred to the testimonies of PW1, PW2 and PW9 on the mobile phone handsets that were allegedly robbed by the appellant and contended that from the totality of the evidence even though reference was made to two handsets but only one handset was tendered and admitted in evidence. He submitted that failure to produce the other handset and cartridges said to have been recovered is fatal to the case of the prosecution and raises the presumption relating to withholding evidence, pursuant to Section 167(d) of the Evidence Act, 2011. He submitted further that Exhibit K, said to be a confessional statement of the appellant, cannot be the basis for sustaining the conviction of the appellant. D E

On the contradiction in evidence of a prosecution witness learned counsel submitted that where the evidence of a witness is contradictory and or contradicts the evidence of other witnesses for the prosecution, it should not be accorded any weight. He referred to the testimony of PW2 and Exhibit J, still on the issue of identity of the accused persons, also the recovery of Exhibits C and C1 and the failure to call the owner as witness. Learned counsel submitted that the failure was fatal to the case of the prosecution hence it should be resolved in favour of the appellant. He urged the court to allow the appeal on this second issue. F G

On the third issue, learned counsel contended that having been prosecuted and defended at the same time by the staff of the Ministry of Justice, Ogun State whether the appellant can be said to have had a fair hearing. He stated that in the instant case before the trial court, one officer, the Attorney General of Ogun State, prosecuted H

and at the same time he defended the same appellant. He submitted that the counsel who was assigned to defend the appellant from the Ministry of Justice should have refused the brief because of apparent conflict of interest. He submitted that in this case, the duty of counsel to his client was compromised as a result of conflict of interest, hence  
B the appellant did not enjoy fair hearing. He urged the court to so hold and allow the appeal, set aside the concurrent findings of the two Lower Courts as there was perversion.

As clearly shown in their brief of argument, the respondent  
C married issues 1 and 2 of the appellant into its issue one.

In arguing the issue, learned respondent's counsel took the identification of the appellant first. He contended that where the identity of an accused person is not in doubt, the police is not bound to conduct any identification parade. He submitted that the identity of  
D the appellant and other accused persons with whom the appellant committed the offence of armed robbery was never in doubt before the trial court. Learned counsel contended that from the record, there were no other probabilities in this case from which it could be inferred, at the very least, that there was a mistaken identity with re-  
E spect to any of the suspects.

She referred to the evidence on record and contended that it is apparent that PW2, who was the victim of the robbery incident, gave cogent and compelling evidence of the identity of the appellant as one of his assailants. She referred to the confessional statement of  
F the appellant where he clearly admitted that he partook actively in the commission of the robbery. She pointed out that the arrest of the appellant and other co-accused were effected by the police on the lead provided by the 1st accused who gave the names and identity of  
G all those who participated in the crime, including the appellant. She referred to the testimony of PW4 and PW5 on pages 20 and 21 of the record.

Learned counsel submitted that it is not in every case that an identification parade is necessary when the appellant has himself made  
H a confessional statement. She relied on *Archibong vs The State* (2006) 14 NWLR (Pt.1000) 349 at 372 and, concluded that notwithstanding the fact that the appellant recanted his statement at the trial, his identity and that of other co-accused was never in doubt, hence both the trial High Court and the Lower Court were right in the conclu-

sion that the appellant's identify was clearly established. She urged the court to so hold.

On the reliance on Exhibit K, the confessional statement of the appellant which the appellant's counsel contended was equivocal and that it was not subjected to the standard police procedure for taking confessional statements, learned counsel to the respondent referred to the testimony on record of pw6, an Assistant Superintendent of Police - (ASP) - to whom the appellant and the co-accused were referred with their confessional statements, which after they confirmed the said statements he endorsed same. Learned counsel submitted that the appellant's complaint on the procedure employed in obtaining the statement by the Police is unfounded and rather unfortunate and misleading. She urged the court to so hold. B  
C

Still on the reliance on Exhibit K by the Court in convicting the appellant, learned counsel submitted that where an accused person confesses to a crime, he can be convicted on his confession alone, once the confession is positive, direct and properly proved. She relied on Akpan Vs State (2008) 14 NWLR (pt. 1106) 72 at 92. She contended that the fact that the appellant retracted his confessional statement does not mean that a trial court cannot convict on same, as long as there are other pieces of evidence to show that it was true. Learned counsel referred to page 28 of the record of appeal to show that it is clear that the appellant admitted the followings: D  
E

- (i) That he made a statement to the Police:
- (ii) That the said statement was read to him. and
- (iii) That he thumb-printed the said statement.

Learned counsel referred to the record of appeal where the Lower Court reviewed other pieces of evidence available outside Exhibit K which confirmed the admission of guilt by the appellant and contended that this was not faulted. She submitted that the Lower Court was right in affirming the decision of the trial court in relying on Exhibit K to convict the appellant for the offence with which he was charged. She urged the court not to disturb the findings of fact in this regard. F  
G  
H

On the issue that there was contradiction in the evidence of the prosecution, learned counsel reviewed the testimony of PW2 vis-à-vis the case law on contradiction and submitted that the appellant was not able to substantiate the alleged contradictions and how they

affected the substance of the case made out by the Prosecution. She submitted further that the case of the Prosecution met the standard of proof required. She urged the court to resolve the issue against the appellant.

The second issue is whether, in the light of the facts of this case, the Court of Appeal was right when it held that appellant was not denied a fair hearing at the trial High Court. She submitted that this issue couched above as Issue 3 of the appellant is completely misguided both in law and facts. Learned counsel contended that on the record, there is nothing to show that the appellant complained about his legal representation before the trial court. She submitted that, the best person to decide on who represents him or her as counsel, in court is the party, that is the appellant in this case. She cited *Abiola vs. FRN (1997) 2 NWLR (Pt.458) 449*.

Learned counsel contended that the complaint of the appellant as stated in the brief of argument on this head is not that he did not have a counsel of his choice at the trial but that the said counsel did not ask some specific questions which his current counsel on appeal thought he would have asked.

She contended further that the choice of counsel was never made an issue before the trial court as the court clearly afforded the appellant the best opportunity to defend himself. She referred to the argument of the appellant on how the State was both the Prosecution counsel as well as the defence counsel, citing the free legal aid provided by the office of the Public Defender of Ogun State as the rationale. She submitted that where legal aid is to be provided for an accused who is unable to afford a counsel, such free legal services, in capital offence, is at the instance of the State, and in providing such free legal aid, can delegate any counsel from public service or any legal aid organization as it may deem appropriate. And that alone would not amount to the State being the Prosecution as well as the defence and such complaint can never constitute a ground to vitiate such proceedings on the ground of breach of fair hearing.

Learned counsel contended that the appellant was entitled to elect to reject the counsel assigned to represent him at the trial court as a right to reject the free legal aid. But having elected not to reject the counsel at the trial, he cannot now on appeal seek to complain about the free legal services he received at the trial. She submitted

that the appellant was not able to show from the record how his right to fair hearing was breached. She urged the court to resolve this issue against the appellant and dismiss the appeal.

As clearly shown in the charge above, the appellant along with others were charged with offences of conspiracy to commit armed robbery and armed robbery. The appellant was tried, found guilty, convicted and sentenced as prescribed by the appropriate law pursuant to which they were charged. His appeal to the court below against his conviction and sentence was dismissed leading to his further appeal to this court.

Generally, robbery is simply the illegal taking of property from the person of another or in the person's presence by violence or intimidation. While armed robbery is robbery committed by a person carrying a dangerous weapon regardless of whether the weapon is revealed or used. See; Akeem Agboola Vs The State (2013) 11 NWLR (Pt.1366) 619; (2013) 8 SCM 157; (2013) All FWLR (Pt.704) 139.

***It is already settled that to enable the prosecution to establish the charge of armed robbery, the following elements must be proved:-***

***(i) That there was a robbery or series of robberies;***

***(ii) That the robber(s) was/were armed.***

***(iii) That the accused person was the armed robber or one of the armed robbers.*** See; Bozin v. State (1985) 2 NWLR (Pt.8) 465 at 467; Alabi Vs. State (1993) 7 NWLR (Pt.307) 551; Olayinka Vs State (2007) 9 NWLR (Pt.1040) 561; (2007) 8 SCM 199; Osetola & Anor Vs The State (2012) 17 NWLR (Pt.1329) 251; (2012) 12 SCM (Pt.2) 347.

Before I proceed further, it is note worthy that at the trial court, the appellant clearly, through counsel as rightly noted by the trial Judge, conceded the first two elements required to be proved by the Prosecution. He had conceded that indeed there was a robbery incident and that the robbers were armed with dangerous weapons. Even on appeal, the appellant did not argue that there was no robbery or that the robbers were not armed. What was then seriously contested and which is now also being contested is the third element - whether or not the appellant was properly identified as one of the armed robbers who robbed PW2, hence the issue of the necessity for

an identification parade by the Police. The appellant had contended that the failure of the Police to carry out an identification parade was fatal to the prosecution's case and was enough to amount to miscarriage of justice arising from mistaken identity of the appellant.

B In dealing with this appeal I desire to take the first two Issues of the appellant together as they are interwoven. I therefore will re-couch it as - whether the court below was right in affirming the conviction and sentence of the appellant notwithstanding that there was no identification parade by the Police.

C ***Identification generally, is evidence tending to show that the person charged with an offence is the person who was seen committing the offence. Therefore, whenever the trial court is confronted with evidence of identification, it is expected to ensure and be satisfied that the evidence proves***  
D ***beyond reasonable doubt that the accused before the court was actually the person who committed the offence with which he is charged.*** See; Patrick Ikemson Vs. The State (1989) 3 NWLR (Pt.110) 455; (1981) CLRN 1 Agboola Vs. The State (supra).

E ***Identification parade, otherwise known as "line up", is a Police Identification procedure in which criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be identified as the perpetrator of the crime.*** See Black's Law Dictionary, 9th Edition page 1014; Agboola Vs State (supra).

F ***Identification parade is ordinarily not a sine qua non for identification in all cases where there has been a fleeting encounter with the victim of a crime, if there are yet other pieces of evidence leading conclusively to the identity of the perpetrator of the offence.***

G ***Generally, an identification parade would become necessary only in the following situations of visual identification -***

H ***(i) Where the victim did not know the accused person before and his first acquaintance with him is during the commission of the offence:***

***(ii) Where the victim was confronted by the offender for a very short time; and***

***(iii) Where the victim, due to time and circumstances, might not have had the full opportunity of observing the fea-***

**tures of the accused.** See R Vs. Turnbull (1976) 3 ALL ER 549 or (1977) 2B 224 at 228-231; Ikemson Vs. The State (Supra).

In this case, there is nothing on record to show that the victim knew the accused before the attack on his house. Indeed, there is no evidence that both had met earlier before the alleged commission of the offence. B

However, it is on record that the victim gave evidence that as he was reporting the incident to the Police at Abatan Police Station, he told them that he would recognize those who attacked him when he saw them as they did not wear any mask and the light in his room was on as there was supply of electricity in his house. Under cross examination, even though he told the Police that prior to the robbery incident he had never met the 1st, 2nd and 3rd accused persons before, he had given the police the description of the 1st accused before he was arrested. Still under cross examination on page 17 of the record of appeal, the complainant testified that as there was light on the night, before he opened the door for the accused persons, he switched on the light and he saw their faces and the dresses they wore. C

It is note worthy that it was the 1st accused who was caught with the two handsets of PW2 that gave up the appellant with other co-accused as members of his gang of armed robbers. Upon his arrest the appellant made a statement to the Police on 3/9/2002. I consider it appropriate to quote from the records the statement made to the Police by the appellant. It goes thus: D

*“I am a native of Ikereku, Abeokuta. I did not go to school at all. I learned barbing. I took permission for my freedom but I have not graduated. I have been in the barbing job for about two and half years. Sometime in July this year, 2002, one Ahmed introduced me to Lukman Olufeko whom I later knew as a armed robber. Lukman told me that if I follow Ahmed I will see money. That Ahmed has been a good armed robber. I know that Ahmed is an ex-convict. From that July, 2002 I joined a gang of six armed robbers namely - myself, Akeem Jimoh, Lukman Olufeko, Ahmed Isikilu and Bayo. Isikilu and Jimoh is (sic) our leaders. At times Jimoh or Ahmed will be in possession of the two guns. Isikilu and Jimoh brought the guns from one village called Ilada along Obafe road, Ogun State. Since I joined the gang, we have robbed in different locations in Abeokuta.* E

*July, we robbed at Saje area Abeokuta. I was as a security guard on that day. After the operation, I was given eight thousand Naira. That first operation we sent with is only bottle not gun. By then we have not got the guns. The second operation is (sic) at Ake, six of us went for the operation. That was that same month but not the same date.*

*B I was again given eight thousand Naira and some jeweleries, chains, rings. The jewelries were taken away by Ahmed. The third place we went for operation is (sic) Arinlese area, Itoko side. We robbed the whole tenants in each room on that day. We collected some other things like wrist watch. The fourth robbery is (sic) at Oke Arinlese*

*C Itoko Abeokuta. We robbed one woman that was about to do party, we collected big amount of money but I don't know how much. Later I was shared N6,000.00. We were fully armed with two guns recovered from Jimoh hand. The firty (sic) place is at Oke Efon where*

*D we have just been arrested. We robbed three houses that was on 18/8/2002. We went there with two guns and machetes. We collected two GSM phone and N800.00, N10, denominations. It was that that we collected N100,000 in the house of one Alhaji. All the time we go for the operation we don't go with a vehicle we have not gone with*

*E Lukman vehicle before. I know that Lukman has a vehicle but he doesn't use it for the operation. I sometimes work as a conductor for Lukman. We have never fired anybody or killed anybody. Our reason of going along with guns is that if it is been used to frighten the victims they will surrender their money to us without delay. No doubt*

*F I am an armed robber because I have joined others to rob people. My mother does not know that I am an armed robber."*

***It is interesting to note that the above statement rendered by the appellant was tendered and when there was no objection, it was admitted and marked by the trial court as Exhibit K. There is no doubt, that the above is clearly a confessional statement.***

***Ordinarily, in cases of armed robbery, the identity of the accused is always in issue which usually leads to the conduct of identification parade by the police. It is very essential and useful whenever there is doubt as to the ability of a victim to recognize the suspect who participated in the alleged criminal act or where the identity of the said suspect or the accused person is in dispute. But where there is no dispute as to***



***the identity of the perpetrator of a crime, there will be no need at all for an identification parade to further identify the offender.***

In the instant case, the appellant, having in his statement above clearly identified himself with the gang that carried out the robbery of PW2, there was no further need for the police to conduct an identification parade. As earlier noted, the appellant was first mentioned and identified as one of the gang by the 1st accused who was arrested first and who led the Police to arrest the appellant and other co-accused. On the issue of identity of the appellant when it was raised at the trial court, the court found as follows:-

*“This case does not require an identification parade. The 2nd PW right from the beginning said he could recognize each of the accused person because his light was on and under cross examination he gave detail action taken by each of the accused person and the dress worn by each of the accused person. It should not be forgotten that it was the accused persons who took the Police to where the guns were recovered and at the scene of the crime the accused persons described to the Police the strategic position taken by each one of them therefore, putting themselves to the scene and fixing themselves to the crime in question”*

When the matter was considered by the court below on the need for an identification parade to identify the appellant, the court found as follows:-

*“In the instant case PW2 recollects that the robbers wore no hood or mask just as the lights in the room were on. PW2 also told the Police that he could identify the armed robbers if he saw them. The identification of the appellant and the bits and pieces of evidence adduced by the prosecution witnesses and the confessional statements of the other accused persons are harmoniously consistent with one another and give no room for doubt that the appellant was positively identified as one of the robbers on the 18th August, 2002 in PW2’s residence. PW2 even stated under cross examination that they dressed in two jeans and only the 1st accused had cap on. There was no question of mistaken identity...”*

I am not in the slightest doubt that the above concurring findings of fact by the two courts below on the identity of the appellant and the necessity for an identification parade are unassailable. There was a misconception by the appellant’s counsel as to when the Police

would be required to conduct an identification parade. It is simply not done in all cases. Indeed, the two courts below were right to hold that there was no need for an identification parade to have been conducted in the instant case. The identity of the appellant was clearly established before the arraignment at the trial court. In the circumstance, I am also of the firm view that there was no need for an identification parade in the instant case.

***Now, as to the other arm of the issues married together, whether the court below was right in affirming that the prosecution had proved the guilt of the accused person. As shown earlier, the appellant was charged along with others with offences of conspiracy and armed robbery. It is already held that the proper approach to an indictment which contains offence of conspiracy as a charge and a substantive charge is to deal first with the main charge, and then the charge of conspiracy.***

***Conspiracy is generally an agreement between two or more persons to do an unlawful act or doing a lawful act in an unlawful manner. Indeed, failure to prove a substantive offence does not make conviction for conspiracy inappropriate, as it is a separate and distinct offence in itself, independent of the actual offence said to have been conspired to commit.*** See Segun Balogun Vs. Attorney General, Ogun State (2002) 2 SC (Pt.11) 89; (2002) 4 SCM 23; (2002) 2 SCNJ 196. Osetola & Anor Vs. State (2012) 17 NWLR (Pt.1329) 251; (2012) 12 SCM (Pt.2) 347.

As earlier stated, on the substantive charge of armed robbery it is trite law that for the prosecution to prove the offence, the following three elements must be established. That is, there must be proved that there was a robbery or series of robberies; that the robbers were armed and the suspect or accused was the robber or one of the robbers. Borne out of the available evidence, the defence counsel readily and rightly conceded the first two ingredients or elements. That there was indeed a robbery incident and the robbers were armed with dangerous weapons. What the prosecution was left with to prove was the involvement, if at all, of the appellant.

***To satisfy the third element, that the appellant was one of the armed robbers who robbed PW2 on 18/8/2002 the Prosecution tendered the statement made to the Police by the appellant. And as I stated earlier, this was admitted without ob-***

**jection by the trial court and marked as Exhibit K. The content of the statement has been reproduced earlier in this judgment. It gave a graphic detail of the role played by the appellant. In other words, it was truly a confessional statement, made extra judicially to the Police.**

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime and this includes both extra-judicial and judicial confessions. It also includes an incriminating admission made that is not direct and positive and short of a full confession. See section 28 of the Evidence Act, 2011. In the same vein, confession has also been held to be a criminal suspect's oral or written acknowledgment of guilt, which often includes details about the crime alleged. In other words, a confession is an acknowledgment in express words by the accused person in a criminal case, of the truth of the main fact charged or of some essential part of it. See; Onuoha Vs The State (1987) 4 NWLR (Pt.15) 331; Akpan Vs State (2001) 15 NWLR (Pt.737); (2001) 11 SCM 661 (2001) 7 SC (Pt.1) 124; Nwachukwu Vs The State (2002) 12 SCM 143; (2002) 7 SC (Pt.1) 124; (2007) 17 NWLR (Pt.1062) 31; Dare Jimoh Vs. The State (2014) 10 NWLR (Pt.1414) 105; (2014) ALL FWLR (Pt.733) 1855; (2014) 17 WRN 1; Alufohai Vs State (2015) 3 NWLR (Pt.1445) 172.

However, when testifying in defence it is note worthy that the appellant denied the above statement. Having been sworn on the Holy Bible the appellant stated as follows:-

*"I live at Adeyemisi Compound at Ikereku, Abeokuta. I am a Barber. I don't know why I am here but I know I am accused of robbery. I did not rob. On 3/9/2002 I was in my Shop. There was a fight in our area. When a Police Patrol came and the wife and husband were to be arrested and I was arrested with them after resisting. I was taken to Eleweran. At the Canter I was referred to as a stubborn man and the Police started to beat me. My statement to that effect was read to me. I made statement in Yoruba which I thumprinted. I don't know the 1st, 3rd & 4th accused persons. I know them 1st at the Magistrate court. I don't know the 2nd PW. I saw him in court. I did not rob or conspire with anybody."*

Under cross examination by the Prosecuting State counsel, the appellant admitted that he made statement to the Police at Aleweran

but that the Police did not state correctly what he told them.

When cross examined by the 1st accused, the appellant stated that he did not go to school at all hence he can neither read nor write English but he understands a little bit of English language. He conceded that the statement was read to him by the Police before he  
B thumb printed same.

***It is trite law that the guilt of an accused person charged with the commission of an offence can be established by any or all of the following:-***

- C (i) ***The confessional statement of the accused:***  
 (ii) ***Circumstantial evidence:***  
 (iii) ***Evidence of an eye witness.*** See Alufohai V. State (supra).

D ***There is no doubt, that the above testimony in court was a retraction by the appellant from the confessional statement earlier made to the Police admitting the commission of the offence. It is settled law that where an accused person during trial retracts from the extrajudicial statement he had earlier made to the police it behooves on him, and it is a duty on him***  
 E ***to impeach the said earlier statement.*** See; Nwachukwu Vs. State (2001) 35 WRN 175 (2001) 15 NWLR (Pt.735) 184.

F ***During the proceedings, an accused person desirous of impeaching his earlier statement is duty bound to establish that his earlier statement cannot be true or correct by showing any of the following:***

- (i) ***That he did not in fact make any such statement as presented; or***  
 (ii) ***That he was not correctly recorded; or***  
 G (iii) ***That he was unsettled in mind at the time he made the statement; or***  
 (iv) ***That he was induced to make the statement.*** See Hassan Vs. State (supra) Folorunsho Kazeem v. The State (2009) 29 WRN 43.

H ***However, the way to discharge the burden of establishing any of the above by an accused at the tendering of his confessional statement is by calling evidence during a trial-within-trial. In other words, the accused must object to the admissibility of his statement immediately it is tendered. Then, where***

**required, the trial court will order a trial-within-trial to test the veracity of the alleged confessional statement.**

**In this case, the appellant did not object to the admissibility of his alleged confessional statement. Yet, there is no doubt that once there is retraction by the accused on the statement accredited to him, the court is expected to test its truthfulness and veracity by examining the said statement in the light of other credible available evidence. The court will do this by looking into whether -**

- (a) There is anything outside it to show that it is true;**
  - (b) It is corroborated;**
  - (c) The facts stated in it are true as far as can be tested;**
  - (d) The accused person had the opportunity of committing the offence;**
  - (e) The accused person's confession is possible;**
  - (f) The confession is consistent with the other facts as contained and proved at the trial.**
- See Akpan Vs State (Supra) Kazeem v. FRN (2002) 7 SCM 73.

In considering the retracted confessional statement along with the above guidelines, the trial court on page 41 of the record, found as follows:-

*"...it was the accused persons (the appellant and 3rd accused) who took the Police to where the guns were recovered and at the scene of the crime the accused persons described to the Police the strategic position taken by each one of them therefore putting themselves to the scene and fixing themselves to the crime in question."*

Before the court below, when considering the above guidelines and applying same to the retracted statement of the appellant the court below found as follows:-

*"As regards the six tests earlier highlighted, there is a lot outside the confessional statement of the appellant to attest to its veracity as borne out by the evidence of other witnesses and the confessional statements of the other accused persons which statement are corroborative of the confessional statement of the appellant. That the appellant had the opportunity to commit the crime is not in doubt being armed and in company of his partners in crime. That the appellant's confessional statement is consistent with other facts which have been ascertained and proved is not in doubt. The other ac-*

*cused persons had fingered him as one of their own. It is in evidence that the Nokia and Sagem handsets removed from PW2's house were recovered from 1st accused who attempted to sell them to PW1."* (See pages 104-105 of the record)

***The law is settled, that where an extra-judicial confession has been proved and established to have been made voluntarily and it is positive and unequivocal and amounts to an admission of guilt, such confession will suffice to ground a finding of guilt, regardless of the fact that the maker resiles therefrom or retracted it altogether at the trial.*** See *Egboghonome v. The State* (1993) 7 NWLR (Pt.306) 383; *Osetola Vs. State* (supra).

***It is interesting to note the misconception by the learned appellant's counsel when he contended that the prosecution ought to have called as witness the owner of the two guns recovered from the appellant and co-accused.***

***This court has stated in plethora of cases over and over again that how many witnesses the Prosecution needs to prove its case against any accused person is entirely its responsibility but not that of the defence.*** See; *Ijiofor Vs. The State* (2006) 6 NSCQR (Pt.1) 209. ***The defence is not to decide for the Prosecution who to call as witness.***

***I am therefore not in the slightest doubt that the prosecution proved the case as charged against the appellant. The court below was right in affirming that the prosecution had proved the guilt of the appellant. Accordingly, the issue is resolved against the appellant.***

The next issue is whether the Lower Court was right when it affirmed that the accused person had a fair hearing when he was prosecuted and defended by the Ministry of Justice, Ogun State.

On this issue the learned appellant's counsel had argued that the counsel who defended the appellant did not handle his case diligently as much as he could have handled it for the appellant. It is on record that the counsel who defended the appellant before the trial court was a counsel in the office of Public Defender of Ogun State. There was nothing on record to show that the appellant objected to the counsel appearing for him. Indeed, there was no evidence of conflict in interest and no iota of bias against the counsel.

The principle of fair hearing as constitutionally guaranteed in Section 36 of the 1999 Constitution, no doubt is derived from the principle of Natural Justice with its twin pillars of “audi alterem partem” and “nemo iudex in causa sua”. This principle of fair hearing is no doubt fundamental to the administration of justice. The court is required to conduct trial or hearing of a case with all fairness to both parties to the suit and without bias or partiality in favour of or against either party. It is note worthy that complaint of breach of fair hearing is usually against the court or tribunal, whether the parties before the court were afforded equal opportunity to fully ventilate their grievance. See; Peters Pam & Anor Vs Mohammed & Anor (2008) 5-6 SC (Pt.1) 83; Deduwa Vs. Okorodudu (1976) NMLR 236 at 246; (1976) 9-10 SC 329.

As earlier stated, the complaint about breach of fair hearing, by the appellant is not essentially against the trial court but the defence counsel. I am of the view that the argument of the learned counsel for the appellant is, to say the least, misleading and unwarranted. In Orusbo Vs. Una (2002) 16 NWLR (Pt.792) 175, this court when considering a complaint of breach of fair hearing by an appellant stated thus:

*“It has become a fashion for litigants to resort to their right to fair hearing on appeal as if it is a magic wand to cure all inadequacies at the trial court. But it is not so and it cannot be so. The fair hearing constitutional provisions is designed for both parties in the litigation in the interest of fair play and justice. The courts must not give a burden to the provision which it cannot carry or shoulder. I see that in this appeal, fair hearing is not a cut and dry principle which parties can, in the abstract always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court. Only the facts of the case can influence and determine the application or applicability of the principle. The principle of fair hearing is helplessly or completely dead outside the facts of the case.”* See also; Major Bello Magaji Vs. The Nigerian Army (2008) 5 SCM 126; (2008) 8 NWLR (Pt.1089) 338.

***In the instant case, I cannot see how the principle of fair hearing can apply or be relevant. The appellant has failed to show how his right to fair hearing was breached by the court in the way he was tried. What is more, the allegation of bias***

**against the trial court was unfortunate and uncalled for. The appellant was given adequate required opportunity to be heard and he was heard in defence of the charge against him. Therefore, the fact that the counsel who handled the matter on appeal could have handled it differently is no basis for an attack on the integrity and competence of the other counsel who, as remarked by the trial court, did her very best in the case.**

In Okeke Vs State (2003) 15 NWLR (Pt.842) 25 where the learned senior counsel on appeal had argued that the appellant was not given a fair hearing as he was not properly, effectively and meaningfully defended, this court had had this to say:

*“The whole essence of fair hearing is that the parties must be given equal opportunity to be heard. In other words, they should be given equal opportunity to present their case. Fair hearing does not mean that the prosecution must unduly assist the defence to present its case.”*

**In the result, this issue is resolved against the appellant as there was no breach of his right to fair hearing in the way his trial was conducted at the trial court. There was no proof of any conflict of interest of the defence counsel and none of bias.**

In the final analysis, having resolved the three issues distilled by the appellant against him, I have no reason to disturb the concurring findings of fact by the court below that the prosecution proved the case beyond reasonable doubt against the appellant hence affirming the decision of the trial court.

In the circumstance, I hereby come to the conclusion that this appeal is devoid of merit and deserves to be dismissed. It is hereby dismissed. Accordingly, the decision of the Court of Appeal which affirmed the conviction and sentence of the appellant is affirmed.

### **FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother - Ariwoola, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and deserves an order of dismissal.

The facts of the matter relating to this appeal have been care-



fully set out in the lead judgment. I seek leave to rely on same. Put briefly, the appellant was arraigned along with others at the trial High court for the offences of conspiracy to rob and armed robbery. The statement of the appellant was, without objection, admitted as Exhibit K. Therein, the appellant admitted that he, along with his cohorts, robbed PW2 - the victim of his Nokia and Sagem hand-sets plus cash. The trial court relied principally on the admission in Exhibit K along with other pieces of corroborative evidence to nail the appellant. He was convicted and sentenced to death by hanging on 21st June, 2005. B

The appellant felt unhappy with the position taken by the trial court and appealed to the Court of Appeal, Ibadan Division (the court below) which heard same and dismissed it on 22nd June, 2012. The appellant has further decided to appeal to this court. C

I wish to confine my remarks to issues 1 and 2 couched on D behalf of the appellant for determination of the appeal.

They read as follows:-

*“1. Whether the Lower Court was right when it affirmed the trial court’s decision that there was no need for identification parade.*

*2. Whether the Lower Court was right when it affirmed that the prosecution had proved the guilt of the accused persons.”* E

It was seriously canvassed on behalf of the appellant that he was not properly identified. Right away, it should be stated that where the identity of the accused person is not in doubt, the police is not bound to conduct any identification parade. See: Ojukwu vs. The State (2002) 4 NWLR (Pt.746) 80; Okosi vs. The State (1989) 1 NWLR (Pt.100) 642. F

Exhibit K contains the confessional statement which was admitted in evidence without objection. Therein, without any form of equivocation, the appellant confessed when he said:- G

*“The fifth place is at Oke-Efon where we have just been arrested. We robbed three houses that was on 18/08/2002, we went there with two guns and machetes. We collected two GSM phone and N800.00, N10 denomination.”* H

The above says it all. Confession is often said to be the best evidence to nail an accused person. This is because no rational being will say something negative against his own interest; all things being equal. To make assurance doubly sure, PW2, the victim of the armed

robbery gave cogent evidence relating to the identity of the appellant as one of his assailants. He said he identified the appellant on seeing him. In my considered view, this is not a case where identification parade was necessary; in the main. See *Archibong v. The State* (2006) 14 NWLR (Pt.1000) 349 at 372.

B Let me say it further here that the point touching on contradiction in the evidence of the prosecution, thrown up on behalf of the appellant appears misplaced. One can hardly see the contradiction being complained about. The appellant had the onus to pinpoint his surmised contradiction; if he has any in his feigned imagination. He  
C failed to so do; to his chagrin.

It has often been stressed that contradiction in the evidence of the prosecution that will be fatal must be substantial. Minor contradiction which did not affect the credibility of witnesses may not be  
D fatal. Contradiction must relate to substance. Trivial contradiction should not vitiate a trial. See: *Ankwa vs. The State* (1969) 1 ALL NLR 133; *Queen vs. Iyanda* (1960) SCNLR 595; *Omisade vs. The Queen* (1964) 1 ALL NLR 233; *Sele vs. The State* (1993) 1 SCNLR 15 at 22-23, (1993) 1 NWLR (Pt.269) 276.

E Finally, there is no doubt in my mind that the prosecution proved the charge against the appellant beyond reasonable doubt. He was rightly convicted and sentenced by the trial court. The court below did a nice job in confirming same. See *Woolmington vs. DPP* (1935) AC 462; *Effiong vs. The State* (1998) 8 NWLR (Pt.562) 362;  
F *State vs. Azeez* (2008) 14 NWLR (Pt.1108) 439; *Alabi vs. The State* (1993) 7 NWLR (Pt.307) 511 at 523 and *Nasiru vs. The State* (1999) 2 NWLR (Pt.589) 87 at 98.

For the above remarks and the detailed reasons ably adum-  
G brated by my learned brother, I, too, feel that the appeal lacks merit and should be dismissed. I order accordingly and affirm the decision of the court below wherein the conviction and sentence of the appellant by the trial court was affirmed.

H

### **MUHAMMAD JSC**

I had a preview of the leading judgment of my learned brother Ariwoola, JSC, I entirely agree with his lordship that the appeal lacks merit and that its stands dismissed. I adopt all the reasons stated in

dismissing the appeal and also abide by the consequential orders made in the said judgment.

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**OGUNBIYI JSC**

I read in draft the lead judgment just delivered by my learned brother Ariwoola, JSC. I agree that the appeal is devoid of any merit and should be dismissed. The facts and genesis of this case have been well spelt out in the lead judgment. B

The Court of Appeal Ibadan Division affirmed the judgment of the trial court in convicting the appellant guilty of the Offence of Conspiracy to commit armed robbery; the appellant is therefore facing a sentence of death by hanging and hence the appeal now before us. Five grounds of appeal have been filed and challenging the judgment of the Lower Court. C

The appellant's argument centers primarily on the submission that the prosecution has fallen short of proving him guilty of the offence charged beyond reasonable doubt that the concurrent findings by the two Lower Courts were therefore perverse in view of the miscarriage of justice occasioned the appellant and which did not in the circumstance justify the sentence by hanging imposed on the appellant. The counsel therefore pleads for his acquittal and discharge in the circumstance of the case. D

The respondent's counsel in his submission sees differently from the appellant's view point and urges this court to dismiss the appeal herein, affirm the conviction and sentence of the appellant with the prosecution having proved him guilty beyond reasonable doubt. It is the contention of the respondent affirmatively that the identity of the appellant was established clearly and coupled with his statement Exhibit K which is held as confessional. E

The law is trite and affirmatively established that it is open to a court to convict an accused solely on his confessional statement provided same has passed the required standard necessary and laid down by law. In other words the statement must be proved to have been made voluntarily and be positive and not equivocal and must state an admission of guilt. The fact that the accused has retracted the confession may not however necessarily make it inadmissible. See R V. Itule (1961) ALL NLR 462 at 465. Before a conviction can be F

properly founded on such retracted confession, it is desirable to have some evidence outside the confession which would corroborate and make it probable that the confession was true. See *Sule Iyanda Salawu V. The State* (1971) NWLR 249, and *Nsofor V. State* (2005) 4 WRN 29.

B In the case of *Ozare Ubierho V. State* (2005) 7 MJSC 168 for instance, the court enumerated certain litmus tests which could corroborate accuseds' statement for purpose of conviction. The tests are:-

C 1) Is there anything outside the confessional statement to show that it is true?

2) Is it corroborated?

3) Are the relevant statements of facts made in it most likely to be true as far as they can be tested?

D 4) Is his confession possible?

5) Is it consistent with other facts which have been proved?

In his statement Exh 'K', the appellant stated that on 18/08/02 they robbed certain houses while in possession of two guns and machetes. During the course of the robbery, they collected two GSM E phones & N80,000.00. The appellant also admitted being in company of the other co-accused persons. It was in this same operation that the two mobile handsets - a Nokia and Sagem were recovered. PW2 recognized the appellant and his co-armed robbers because F they were not masked and his light was put on as he normally does while in bed. The robbers searched his house and took away the sum of N80,000.00 and two mobile handsets - a Nokia and a Sagem.

PW1 gave evidence that the two handsets Nokia and a Sagem were brought to him by the appellant for sale.

G When the various bits of evidence are put together and alongside the statement made by the appellant Exhibit K, they tell a consistent and harmonious story that the confessional statement of the appellant was indeed what happened on the 18th August, 2002 when PW2 was robbed. The tests enumerated in the *Ozare Ubierho V. State* (supra) is confirmed firmly and embedded in this case because H there is a lot outside the confessional statement of the appellant to attest to the veracity of same. That the appellant had the opportunity to commit the crime is not in doubt being armed and in the company of his partners in crime. The confessional statement is consistent with

other facts which have been ascertained and proved.

The Nokia and sagem handsets which were removed from PW2's house were recovered from the 1st accused who attempted to sell them to PW1. The evidence is overwhelming per Exhibit K and proved beyond reasonable doubt that the appellant was rightly convicted and sentenced. The question of identification parade raised by the appellant is of no relevance as it is not needful. The appellant was fixed at the locus crimini per PW2's evidence and this was confirmed by the appellant's confessional statement Exhibit K. The concurrent finding by the two Lower Courts is also affirmed by me. My learned brother Ariwoola, JSC has considered adequately the issues raised in the appeal. I also endorse his judgment as mine and dismiss this appeal as lacking in merit.

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D

**NWEZE JSC**

My Lord, Ariwoola, JSC, obliged me with the draft of the leading judgment just delivered now. I agree with the reasoning and conclusion.

As clearly shown in the illuminating leading judgment, the only contest in this appeal is the question whether an identification parade was necessary in this case. Let me state that, as a general proposition, where a trial court is confronted with the question of the identification of an accused person, it should be satisfied that the evidence of identification, which the Prosecution marshalled, establishes his guilt beyond reasonable doubt, *Ukpabi v The State* [2004] 34 WRN 133; [2004] 7 SC 189, 199 -200.

However, an identification parade is not, always, a sine qua non to conviction as in this case. At the trial court, exhibit K was admitted in evidence without any objection. In it, the appellant identified himself with the others who participated in the robbery incident. Accordingly, the trial court found that the evidence of identification was unnecessary. The Lower Court affirmed that finding. I have, painstakingly, perused the records.

I entertain no doubt that there is no justification for interfering with these concurrent findings on the issue of identification parade having regard to the ipse dixit of the appellant in the said exhibit K. I thus affirm the said concurrent findings on this issue, *Ikemson v. The*

State [1989] 3 NWLR (Pt.110) 455; [1989] 6 SCNJ 54; Ibrahim v. The State [1991] 5 SCNJ 129; [1991] 4 NWLR (Pt.186) 399; Ibe v The State [1992] 5 NWLR (Pt.244) 642; [1992] 5 SCNJ (Pt.11) 172; The State v. Aibangee [1988] 3 NWLR (Pt.84) 549; [1988] 7 SCNJ 128; [1988] 2 NSCC 192; Attah v. The State [2010] 10 NWLR B (pt.1201) 190, 225 -22, G -B; Balogun v A-G, Ogun State (2002) 6 NWLR (Pt.763) 512, 534; Eyisi v. The State [2001] 1 WRN 1; [2002] 15 NWLR (Pt.691) 555; Williams v The State [1992] 10 SCNJ 74; [1992] 1 NWLR (Pt.261) 515; Ugwumba v. The State [1993] 6 SCNJ C (pt.11) 217; [1993] 5 NWLR (Pt.296) 660.

It is for these, and the more elaborate, reasons in the leading judgment that I, too, will dismiss this appeal as unmeritorious. Appeal dismissed. I affirm the decision of the Lower Court which upheld the conviction of, and sentence on, the appellant by Shoremi J (as he D then was).

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