

**SUPREME COURT OF NIGERIA**  
22ND JANUARY, 2016. SC. 170/2012  
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-**  
**COOMASSIE, O. RHODES-VIVOUR,**  
**C. B. OGUNBIYI, C. C. NWEZE, JJSC**

FRIDAY SMART ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Conviction - Confession - Validity - Voluntary confession which is direct and positive - Is sufficient to warrant a conviction without any corroboration (H1)

CRIMINAL PROCEDURE - Confession - Retraction - Once confession has been proved to be made voluntarily - A conviction is held to be good - Regardless of retraction by accused in court (H2)

EVIDENCE - Vital witness - Double IPO - Where there are two IPO - But prosecution called one who knows all about the case - Not calling the other IPO is not fatal to prosecution's case (H3)

EVIDENCE - Withholding of - Evidence Act s. 167(d) - Is to the effect that when party withholds useful evidence - Presumption is that it would go against him if produced (H4)

CRIMINAL PROCEDURE - Confession - Admission - When confession is admitted without objection from the maker - The law implies that the maker agrees with everything in the statement (H5)

ALIBI - Defence - Condition - Accused must raise the defence at the earliest opportunity - To enable the police investigate it - But appellant failed to do so - Thereby making his alibi an afterthought (H6)

ARMED ROBBERY - Conspiracy - Proof - A meeting of minds of appellant and others is inferred - By their act of robbing the bank - Hence conspiracy is proved beyond reasonable doubt (H7)

ARMED ROBBERY - Ingredients - Proof - For prosecution to succeed he must prove - That there was robbery - That accused was armed - And that accused participated in the robbery (H8)

### **FACTS**

Accused/appellant was arraigned before the High Court of Ondo State, for conspiracy to commit armed robbery and armed robbery contrary to sections 5(b) and 1(2) (b) of the Armed Robbery and Firearms (Special Provisions) Act. Appellant entered a plea of not guilty to the count charge. The case as presented by prosecution/respondent is that appellant and some others (still at large) conspired to rob a commercial bank in Ifon, Ondo State. At the time of the robbery, PW1 - Bolarin Sunday Andy was about depositing some cash into an account in the bank. The armed robbers stormed the banking hall and dispossessed everybody of their cash including that of PW1. While the robbery operation was in progress, appellant acted as the lookout man. He stood at the main gate of the bank.

Police investigations commenced and within a few days appellant was arrested with a locally made pistol. He made three statements to the police - Exhibit A, Exhibit A2 and Exhibit A3. In Exhibit A - he made a comprehensive confession wherein he explained how the robbery was committed and the proceeds shared. On the strength of his confession, the State charged appellant on one count of conspiracy to commit armed robbery and two counts of armed robbery. At the trial, respondent called two witnesses, while appellant gave evidence in his defence. In his judgment, the learned trial judge found appellant guilty on all counts and sentenced him to death. Dissatisfied, appellant appealed to the Court of Appeal Akure Division. The court found no merit in the appeal and thus dismissed it. Appellant being further aggrieved has appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

#### **ISSUE 1**

Whether the Court of Appeal was right in holding that the trial court rightly attached much weight to exhibits A-A3 (the alleged confessional statements of the Appellant) and convicting the Appellant thereon.

#### **ISSUE 2**

Whether the Court of Appeal was right in holding that the

Appellant did not properly raise the defence of alibi and that the defence did not avail the Appellant.

### ISSUE 3

Whether the Court of Appeal was right in upholding the trial court's conviction of the Appellant for the offences of conspiracy to commit armed robbery and armed robbery.

## **HELD** (Unanimously dismissing the appeal per

### **RHODES-VIVOUR JSC)**

*CRIMINAL PROCEDURE - Conviction - Confession - Validity*

**1. The long held position of the law is that a free and voluntary confession which is direct and positive and properly proved is sufficient to warrant a conviction without any corroboration.**

**The well laid down rule is that a free and voluntary confession proved to the satisfaction of the court is enough proof of guilt without any corroboration. Exhibit A having been proved to be positive, direct and made voluntarily since there was no objection when it was tendered and admitted as an exhibit can sustain a conviction. Furthermore the evidence of PW1, PW2, and exhibits B - B1, a locally made gun and cartridge recovered from the Appellant are evidence outside exhibit A which clearly links the Appellant with the commission of the offences for which he was charged. Indeed exhibit A, the confessional statement of the Appellant easily passes the test spelt out in *R V Sykes* (supra). In the circumstances the Court of Appeal was right in holding that the trial court was correct to attach much weight to the Appellants confessional statements and convicting him on them.** (pp. 665 G/666 E)

*CRIMINAL PROCEDURE - Confession - Retraction*

**2. So once an extrajudicial confession as in this case has been proved to be made voluntarily, it amounts to guilt of the accused/appellant. A conviction would be held to be good regardless of the fact that the accused person resiled or retracted in his testimony in court. The retraction by the Appellant is**

**clearly an afterthought.** (p. 667 F)

*EVIDENCE - Vital witness*

**3. A vital witness is a witness whose evidence is very important, since his testimony decides the case either way. It follows that where the prosecution fails to call a vital witness the prosecution's case may crumble like a pack of cards. There were two investigating Police officers in this case, CPL Omage Stephen and PW2 Inspector Abayomi Adeleye. Both of them investigated the case and at the end of their investigation recommended that the Appellant be charged for conspiracy and armed robbery.**

**Both of them are well abreast of the facts of the case. Either of them is a vital witness for the prosecution. Both of them if called to give evidence would give similar testimony in court, consequently the prosecution's failure to call both of them to give evidence is not fatal to the prosecution case. The testimony of PW2, a vital witness is enough. It would suffice. Where there are two Investigating Police Officers, but the prosecution called one who knows all about the case, not calling the other investigating Police Officer is not fatal to the prosecution's case.** (p. 667 H)

*EVIDENCE - Withholding of*

**4. Section 167(d) of the evidence Act is to the effect that when a party withholds useful evidence the presumption in law is that it would go against the party who withheld it if produced. The presumption created is against the withholding of documentary and oral evidence. The presumption applies generally to failure to lead evidence on pleaded facts, and not failure to call a particular witness.** (p. 668 F)

*CRIMINAL PROCEDURE - Confession - Admission*

**5. When a confessional statement is admitted without objection from the maker or his counsel, the law implies that the maker of the statement agrees with everything in the statement. It also means that the maker made the statement voluntarily and it is the truth on his role in the crime. The Appellant**

**confessional statement, exhibits A - A3 is conclusive evidence that the Appellant conspired with other person at large to rob the Cooperative Bank, Ifon on 17/10/2001 and did rob the said bank while armed with offensive weapon to wit: gun, and in company of other persons also armed and still at large.** (p. 670 A) B

*ALIBI - Defence - Condition*

**6. When an accused person relies on the defence of alibi, it means that he was not at the scene of the crime when the offence for which he is charged was committed. It is the duty of the accused person at the earliest opportunity to furnish the investigating authorities with comprehensive details of his whereabouts on the day the offence was committed. Once this is done the onus is on the prosecution to investigate the alibi, and the standard of proof required to establish the defence of alibi is one based on balance of probabilities. A plea of alibi is demolished if the prosecution adduces compelling and sufficient evidence to fix the accused person at the scene of the crime at the material time. The offences for which the Appellant was charged were committed by him on 17/10/2001. He made three statements within forty-five days after committing the offences. That is on 30/10/2001 - Exhibit A. 1/11/2001 - Exhibit A2, and 30/11/2001 - Exhibit A3. The defence of alibi was not raised in any of these statements. The defence of alibi was made on 5/8/2008, seven years after he committed the crime. The defence of alibi was not raised at the earliest opportunity, it was raised too late thereby making it impossible for the police to investigate it. The courts below were correct to disregard the alibi as it was clearly worthless, an afterthought.** (p. 671 A) C  
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*ARMED ROBBERY - Conspiracy - Proof*

**7. The Appellant was charged with conspiracy to commit armed robbery and armed robbery. Now, the essence of conspiracy is an agreement between two or more persons to do an unlawful act. The agreement may be express or implied, but the offence of conspiracy is complete once the parties** H

*agree to effect an unlawful purpose. It must be noted that a conspiracy is a continuing offence, other persons may join an existing conspiracy and become parties to it. For example if X approaches Y and asks him to join him and Z in robbing a Bank, when Y agrees he becomes guilty of conspiracy to rob.*

**B** *This highlights the point that it is not necessary for all the parties to a conspiracy to be in contact with each other. What is necessary is that all the parties to the conspiracy have a common purpose communicated to at least one other person to the conspiracy. The agreement between the parties must*  
**C** *be proved beyond reasonable doubt, and an inference or circumstantial evidence of an agreement would do.*

*The Appellant and others at large agreed to rob the Co-operative bank. They finalised their plans when they were given*  
**D** *guns by Pima, a Police officer. The agreement was consummated when they stormed the bank ordering everyone to lie down while they proceeded to relieve the vaults of the bank of cash. It becomes obvious that the Appellant and others at large acted in concert. A meeting of the minds of the robbers*  
**E** *is easily inferred. They agreed to rob the bank, and carried out their agreement successfully. The offence of conspiracy is proved beyond reasonable doubt, by the confession of the Appellant. (p. 673 C/H)*

**F** *ARMED ROBBERY - Ingredients - Proof*

**8. To succeed in a case of armed robbery contrary to section 1 (2) (b) of the Robbery and Firearms (Special Provisions) Act 1990 the prosecution must prove the following beyond**  
**G** *reasonable doubt.*

- (a) that there was a Robbery**
- (b) that the accused/appellant was armed, or was in company of any person so armed.**
- (c) That the accused/appellant while armed participated**  
**H** *in the Robbery.*

*By the Appellant's own confession he was in the company of other persons who were armed when he and his gang stormed the cooperative bank Ifon, for an armed robbery operation. The ingredients of the offence of armed robbery were*

***proved beyond reasonable doubt.*** (p. 674 C)

## NOTABLE POINTS OF INTEREST

### ***RHODES-VIVOUR JSC***

#### ***1. Confessional statement – Test of***

It is well settled that an accused person can be convicted on his confessional statement alone but before a conviction can be sustained on a voluntary extra judicial confession the court must subject the statement to the test laid down in *R v Sykes* (1913) 8 Cr App p. 233. The courts have adopted that test. The test would enable the judge decide the weight to be attached to a confessional statement. That is to say the truth of a confessional statement must be established. The following must be answered to the courts satisfaction. B

1. Is there anything outside the confession which shows that it may be true. D

2. Is it corroborated?

3. Are the relevant statements of facts made in it true as far as they can be tested?

4. Was the prisoner one who had the opportunity of committing the offence? E

5. Is the confession possible?

6. Is the alleged confession consistent with other facts which have been ascertained and established.

It is desirable but not mandatory that some evidence outside the confession is available, however slight of circumstance which make it probable that the confession is true. (p. 665 H) F

#### ***2. Inconsistency rule – Application of***

My lords, the inconsistency rule applies to witnesses and not to an accused person. The witness is also given an opportunity while giving evidence on oath to explain the inconsistency. The rule is applied when the witness fails to explain the inconsistency. On the other hand the inconsistency rule does not apply to an accused person who resiles from his extra judicial statement. (p. 667 E) G

#### ***3. Confessional statement – Judge’s Rule***

My lords, since the Appellant’s statements made at Ifon Police Station were tendered as Exhibit A-A3, no useful evidence was withheld. H

Anyone of the investigating Police Officers could tender the Appellant's confessional statements. Section 167 (d) does not apply to failure to call a particular witness. Judges Rules are not Rules of law but merely Rules of administrative practice. Compliance with the Rules ensures that confessions are voluntary. The Rules lay down how confessional statements are made. An accused person who intends to make a confessional statement must be cautioned by the Police before the statement is made. After the statement is made the accused person signs or thumb impresses it. The statement and the accused person are then taken before a superior Police officer. There was strict compliance with the judges Rules in the preparation of exhibits A-A3. (p. 669 B)

#### ***4. Confession – Meaning of***

A confession is a statement made by an accused person admitting that he is guilty of a crime. It is the best evidence in a criminal trial. (p. 674 H)

#### **REPRESENTATION**

Ikenna Okoli for the appellant; with him, O. Okeke and U. Ubah (Mrs)  
G. Oyewole for the respondent; with him, G. Olowoporoku, Director, Library Services, Ondo State

#### **CASES REFERRED TO**

Edoho v. State (2004) 5 NWLR (pt. 865) 17  
Nwachukwu v. State (2004) 17 NWLR (pt. 902) 273  
Queen v. Itule (1961) 2 SCNLR 183  
Aremu v. State (1991) 7 NWLR (pt. 201) 1  
Yusufu v. State (1976) 6 SC 167  
Adekoya v. State (2012) 3 SC (pt. III) 36  
Dawa v. State (1980) 8-11 SC 236  
Kopa v. State (1971) 1 All NLR 150  
H Queen v. Ukpong (1961) 1 All NLR 25  
State v. Okoro (1974) 2 SC 73  
Ikemson v. State (1989) 3 NWLR (pt. 110) 455  
Egboghonome v. State (1993) 9 SCNJ 1  
Babuga v. State (1996) 7 NWLR (pt. 460) 279



Onwujuba v. Obieniu (1991) 4 NWLR (pt. 183) 16

A.G. Adamawa State v. Ware (2006) 4 NWLR (pt. 970) 399

### **STATUTES REFERRED TO**

Armed Robbery and Firearms (Special Provisions) Act, ss. 1(2)(b),  
5(b) B

Evidence Act 2011, ss. 135, 167(d)

### **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

This is an appeal from the judgment of the Court of Appeal, Akure Division, delivered on the 6<sup>th</sup> day of March, 2012, wherein it affirmed the death sentence pronounced by an Ondo State High Court on the appellant for conspiracy to commit Armed Robbery and Armed Robbery contrary to sections 5(b) and 1(2) (b) of the Armed Robbery and Firearms (Special Provisions) Act. C

Trial commenced before Odusola J. of an Ondo State High Court on the 13<sup>th</sup> day of May 2008. The Respondent (the State) called two witnesses while the Appellant gave evidence in his defence. He did not call anyone to give evidence in his defence. D

The following were admitted as exhibits: (a) “A - A3 statements of Appellant (b) “B” locally made pistol (c) “B1” one cartridge. E

The trial came to an end on the 15<sup>th</sup> day of October, 2008 with both counsel adopting their written addresses.

In a well considered judgment delivered on the 13<sup>th</sup> of November, 2008 the learned trial judge found the Appellant guilty on all counts, i.e. conspiracy to commit Armed Robbery and two counts of Armed Robbery. The learned trial judge had this to say: F

*“...from this statement reproduced, it is clear that the accused confessed to the commission of the crime. The statement describes in graphic details the manner and means of committing the robbery and how the proceeds were shared. I therefore do not believe the accused when he denied in open court that he never made any statement at the police station throughout the period he was under arrest. He did not deny that the information contained therein was false. It is also noted that there was no objection to the admissibility of exhibits A - A3. No single witness was called by the accused at the trial...”* G

On this reasoning the learned trial judge found the three counts proved beyond reasonable doubt and sentenced the Appellant to H

death.

The Appellant was dissatisfied with the sentence of death, and so filed an appeal. The Court of Appeal Akure Division found no merit in the Appeal and dismissed it. This appeal is against that judgment. Briefs of argument were eventually filed and exchanged by B counsel. Mr. I. Okoli filed the Appellant's brief on 19/6/12, while A.O. Adeyemi - Tuki esq., the Ondo State Director of Public Prosecutions, filed the Respondents brief deemed duly filed and served on the 10<sup>th</sup> of July, 2013. Learned counsel for the Appellant, I. Okoli C esq., identified three issues for determination of this appeal. They are:

#### ISSUE 1

Whether the Court of Appeal was right in holding that the trial court rightly attached much weight to exhibits A-A3 (the alleged confessional statements of the Appellant) and convicting the Appellant D thereon.

#### ISSUE 2

Whether the Court of Appeal was right in holding that the Appellant did not properly raise the defence of alibi and that the E defence did not avail the Appellant.

#### ISSUE 3

Whether the Court of Appeal was right in upholding the trial court's conviction of the Appellant for the offences of conspiracy to F commit armed robbery and armed robbery.

Learned counsel for the Respondent also identified three issues for determination to wit:

#### ISSUE 1

Whether the learned Justices of the Court of Appeal were right G in affirming the conviction and sentence of death imposed on the Appellant (solely on the Appellants confessional statements) in the light of evidence before the court.

#### ISSUE 2

Whether the Court of Appeal was right in holding that the H Appellant did not properly raise the defence of alibi and that the defence did not avail the Appellant.

#### ISSUE 3

Whether the learned Justices of the Court of Appeal were right in holding that the prosecution proved its case beyond reasonable

doubt at the trial court.

I have examined the issues formulated for determination of this appeal by both sides. It is clear that the issues are the same. I shall in the circumstances consider the three issues formulated by learned counsel for the Appellant. The issues are straight to the point, and highlight the real grievance of the Appellant on points of law which I think need some explanation, for example, the legal effect of a confessional statement, the defence of alibi and the standard of proof required in criminal trials and when that standard is attained by the prosecution. Once again the three issues formulated by the Appellant shall be considered.

At the hearing of the appeal on the 5<sup>th</sup> day of October 2015, learned counsel for the Appellant, Mr. I. Okoli simply adopted the Appellant's brief filed on the 19<sup>th</sup> of June, 2012 and urged this court to allow the appeal.

Learned counsel for the Respondent, Mr. G. Oyewole adopted the Respondent's brief deemed filed on the 10<sup>th</sup> of July, 2013 and urged this court to dismiss the appeal.

#### THE FACTS ARE THESE

The Appellant and other persons still at large conspired to rob the Cooperative Bank at Ifon in Ondo, State. On the 17<sup>th</sup> day of October, 2001 they were armed with guns when they arrived at the bank between the hours of 9.a.m. and 10 a.m. At that time PW1 Bolarin Sunday Andy was in the Bank, and in the process of crediting the account of Top Crown Petroleum Ltd Ifon with the sum of Sixty-six thousand, eight hundred and sixty naira (N66,860.00) when all of a sudden a man came into the bank armed with a gun, ordering everyone to lie down. Everyone complied as other members of the gang came into the Bank, collected money from Bank officials and PW1 then fled. While the robbery operation was in progress the Appellant was the lookout man. He stood at the main gate of the Bank.

Police investigations commenced thereafter and within a few days the Appellant was arrested with a locally made pistol. He made three statements to the police on 30/10/2001 - Exhibit A, 1/11/2001 - Exhibit A2 and 30/1/2001 - Exhibit A3.

In Exhibit A - he made a comprehensive confession wherein he explained how the robbery was committed and the proceeds shared. On the strength of his confession the State charged the Ap-

pellant on one count of conspiracy to commit armed robbery and two counts of armed robbery. The Appellant entered not guilty pleas to all the three counts. The counts are as follows:

COUNT 1

STATEMENT OF OFFENCE

- B Conspiracy contrary to and punishable under section 5 (b) of the Robbery and Firearms (Special Provisions) Act Cap 398. Vol. XXII Laws of the Federation of Nigeria 1990 (as amended).

PARTICULARS OF OFFENCE

- C Friday Smart 'M' and others at large on the 17th day of October, 2001 at about 9.a.m. at Cooperative Bank PLC Ifon, in the Ifon Judicial Division conspired together to commit felony to wit: armed robbery.

COUNT 2

- D STATEMENT OF OFFENCE

Armed Robbery, contrary to and punishable under section 1(2) (b) of the Robbery and Firearms (Special Provisions) Act Cap 398. Vol. XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF OFFENCE

- E Friday Smart 'M' and others at large on the 17th day of October 2001 at about 9.a.m. at Cooperative Bank PLC Ifon, in the Ifon Judicial Division, while armed with offensive weapons to wit: gun did rob cooperative Bank PLC Ifon at the Bank hall of their cash worth One million, seven hundred and Nine thousand, and one hundred F Naira (N1,709,100.00) only.

COUNT 3

STATEMENT OF OFFENCE

- G Armed Robbery, contrary to and punishable under section 1(2)(b) of the Robbery and Firearms (Special Provisions) Act 398 Vol. XXII Laws of the Federation of Nigeria, 1990.

PARTICULARS OF OFFENCE

- H Friday Smart 'M' and others at large on the 17th day of October 2001 at about 9.a.m. at Cooperative Bank PLC, Ifon, in the Ifon Judicial Division, while armed with offensive weapons, to wit: gun did rob Top Crown Petroleum Ltd Ifon at the Bank Hall of Cooperative Bank PLC of their cash worth N66,860.00 (Sixty-six thousand eight hundred and sixty Naira) only.

The trial court found the Appellant guilty on the three counts

and sentenced him to death. This judgment was affirmed by the Court of Appeal. Still dissatisfied, the Appellant appealed to the Supreme Court.

I shall now consider the issues seriatim.

#### ISSUE 1

Whether the Court of Appeal was right in holding that the trial court rightly attached much weight to exhibits A-A3 (the alleged confessional statements of the Appellant) and convicting the Appellant thereon. B

Learned counsel for the Appellant argued that since the Appellant in his testimony denied making the confessional statements the trial court ought to have exercised adequate caution in relying on the statements and should have properly evaluated the weight to be attached to the said statements. He observed that it was fatal to the Respondents case not calling the investigating Police officer who took the Appellant's confessional statement. Reliance was placed on section 167(d) of the Evidence Act, 2011. *Edoho v State* (2004) 5 NWLR (pt.865) p.17. C  
D

Concluding, he submitted that no weight should be attached to Exhibits A -A3, contending that both courts below were wrong to convict the Appellant on the said statements. E

Learned counsel for the Respondent observed that the Court of Appeal was right in affirming the conviction and sentence of the Appellant in the light of exhibits A-A3, (the confessional statement of the Appellant) which were tendered at the trial court without any objection from the defence counsel or the Appellant himself. F

He further observed that where the confessional statement is tendered and admitted without objection but later retracted by the accused person such retraction cannot vitiate the proceedings. Reliance was placed on *Nwachukwu v. State* (2004) 17 NWLR (pt.902) p.273. G

Arguing further learned counsel observed that there is evidence outside the confession which makes the confession true.

He urged this court to resolve this issue in favour of the Respondent. H

Exhibit A, the confessional statement of the Appellant runs as follows:

*"I voluntarily elect to state as follows:*

*I am a native of Sobe in Edo State. I attended Catholic Pri-*

mary School, Sobe and stopped at Primary five because of my father Smart Okutabor who died. My mother is still alive, she is at Benin. Her name is called, Aga. I am not married. I live in my father's house at Sobe. My father married up to five wives. My mother have two children namely-Patricia Ohenren 'f' and myself. That my sister is my senior and she is at Ore, a hair dresser. It is correct that I go robbed. My gang members are Ogbi, Aspa, Sonya, Segun, Odowu and Kehinde. Na only cooperative Bank at Ifon about last week which I follow them to robbed. Ohe Ugor is also our member. These one operation which for be the one I go followed them, na reserve we blocked road and I no followed them, na Segun lead the operation. I go Ore to meet one of my brothers called Sgt Godwin Age. It is almost three weeks now that Ogbi came to tell me and our members Sonya, Kehinde, Segun, Ugor Odowu and Aspa that security at Co-operative Bank, Ifon come tell him that there is money in the Bank because they wanted to bring money came to the Bank. And we come ready and we go meet Pima a Police corporal that we want to go operation for Ifon. It was Segun that meet Pima and he come signed two guns give us plus local made gun with us come make three guns. He signed two pistols give us. And we come snatched one "raining" passat which was coming from Benin at Reserve. We then used it go Ifon. We go Cooperative Bank, Ifon. It was Ogbi that drive the passat which is ashes colour. We parked the vehicle near the gate and we drived the security comot. Two policemen in the bank also run, as they see us we shot two times for up. Me stand at the main gate and three come entered the Bank while the rest stayed outside dey guard. It was soniya, Odowu and Ugor entered the Bank. And when the three comot out they hold "Ghana Must Go" bag packed money come. Na inside the bank we bring the Ghana Must Go Bag. And we then take off from the Bank with the motor wey we bring come. As we dey go towards Benin we dropped the passat motor for Agric before check point as the fuel don finished and we come snatched another motor which is Baby Banz. We come put the Ghana Must Go big inside the Baby Benz and drive to Reserve where we parked the Baby Benz and then carried the money go inside Reserve go share. My own share na N300,000.00 (three hundred thousand naira) being that na only two of us small pass the rest. After the sharing, na him everybody find his way. I go hide my own at our

*backyard for our house. I digged ground near the bush at our backyard and hide my own share there. It was about six days ago that, one policeman whom I cannot recollect his name now come to arrest me in the Reserve where I wanted to go to Benin. He arrested me that I am a suspect that, we go robbed bank. I told him that no be me and took me to Ifon Police Station. And at Ifon Police Station they asked B me about my gun and I just denied it but when Segun, my partner confessed to them that he know where we keep the gun and police come followed Segun to bring the gun where I keep it inside the farm. It was after the raiding forgo farm and keep the gun. It is the C gun we used for Ifon bank. The people who operated in the bank are myself, Segun 'M' Aspa Spniya 'MM' Oldom Igor 'M' and Kehinde 'M'. These my gang members can be at Sobe town now. It was around 9.a.m. and 10 a.m. that we go robbed the bank at Ifon."*

Section 28 of the Evidence Act 2011 states that:

*"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."*

To my mind confessions are statements which are direct acknowledgments of guilt. There is said to be a confession once a person makes a voluntary admission of his participation in a crime. A careful reading of exhibit A reveals that on the 17th day of October, 2001 the Appellant in company of named persons, still at large and armed, raided the Cooperative Bank, Ifon and made away with cash. The fact that the Appellant was in company of others still at large for the sole purpose of stealing from the Bank, and they did steal from the bank, is conclusive evidence that they conspired to steal from the Bank. The offence of conspiracy is established. Armed Robbery is stealing while armed. Exhibit A is an admission by the Appellant that he participated in conspiracy to rob and armed robbery as charged.

***The long held position of the law is that a free and voluntary confession which is direct and positive and properly proved is sufficient to warrant a conviction without any corroboration.*** See Queen v. Itule (1961) 2 SCNLR p.183, Aremu v State (1991) 7 NWLR (pt.201) p.1, Jimoh Yusufu v State (1976) 6 SC p.167, Adekoya v State (2012) 3 SC (pt. III) p. 36.

It is well settled that an accused person can be convicted on his confessional statement alone but before a conviction can be sustained

on a voluntary extra judicial confession the court must subject the statement to the test laid down in R v Sykes (1913) 8 cr App p. 233. The courts have adopted that test. See P.Kanu v R 1952 14 WACA p.30, J. Dawa v State 1980 8-11 SC p. 236 Kopa v State (1971) 1 ALL NLR p.150. The test would enable the judge decide the weight  
 B to be attached to a confessional statement. That is to say the truth of a confessional statement must be established. The following must be answered to the courts satisfaction.

1. Is there anything outside the confession which shows that it  
 C may be true.
2. Is it corroborated?
3. Are the relevant statements of facts made in it true as far as they can be tested?
4. Was the prisoner one who had the opportunity of committing the offence?  
 D
5. Is the confession possible?
6. Is the alleged confession consistent with other facts which have been ascertained and established.

It is desirable but not mandatory that some evidence outside  
 E the confession is available, however slight of circumstance which make it probable that the confession is true.

***The well laid down rule is that a free and voluntary confession proved to the satisfaction of the court is enough proof of guilt without any corroboration. Exhibit A having been proved to be positive, direct and made voluntarily since there was no objection when it was tendered and admitted as an exhibit can sustain a conviction. Furthermore the evidence of PW1, PW2, and exhibits B - B1, a locally made gun and cartridge recovered from the Appellant are evidence outside exhibit A which clearly links the Appellant with the commission of the offences for which he was charged. Indeed exhibit A, the confessional statement of the Appellant easily passes the test spelt out in R V Sykes (supra). In the circumstances the Court of Appeal was right in holding that the trial court was correct to attach much weight to the Appellants confessional statements and convicting him on them.***  
 F  
 G  
 H

The Appellants in his testimony denied making the confessional statement when he said in his testimony in court-



*"It is not correct that on 17th day of October 2001, along with others robbed the Cooperative Bank PLC Ifon..., I told the Police that I did not know anything concerning the robbery of Cooperative Bank..."*

In law what happened in court when the Appellant gave evidence was that he resiled or retracted his statement at the trial. What then is the position of the law when an accused person makes an extra judicial confession but while given testimony in court he disowns the statement or makes a u-turn? In *R. v Golder* 1960 1 WLR p. 1169. The inconsistency rule was explained by Lord Parker CJ when he said that:

*"When a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statements, whether sworn or unsworn do not constitute evidence upon which they can act."* See *Queen v. Ukpogon* (1961) 1 ALL NLR p.25; *State v Okoro* (1974) 2 SC p.73; *Ikemson v State* (1989) 3 NWLR (pt. 110) p.455; *Egboghonome v State* (1993) 9 SCNJ p.1.

My lords, the inconsistency rule applies to witnesses and not to an accused person. The witness is also given an opportunity while giving evidence on oath to explain the inconsistency. The rule is applied when the witness fails to explain the inconsistency. On the other hand the inconsistency rule does not apply to an accused person who resiles from his extra judicial statement. ***So once an extrajudicial confession as in this case has been proved to be made voluntarily, it amounts to guilt of the accused/appellant. A conviction would be held to be good regardless of the fact that the accused person resiled or retracted in his testimony in court. The retraction by the Appellant is clearly an after-thought.***

WHETHER NOT CALLING IPO A VITAL WITNESS WAS FATAL TO THE PROSECUTIONS CASE.

***A vital witness is a witness whose evidence is very important, since his testimony decides the case either way. It follows that where the prosecution fails to call a vital witness the prosecution's case may crumble like a pack of cards. There***

**were two investigating Police officers in this case, CPL Oimage Stephen and PW2 Inspector Abayomi Adeleye. Both of them investigated the case and at the end of their investigation recommended that the Appellant be charged for conspiracy and armed robbery.**

- B Both of them are well abreast of the facts of the case. Either of them is a vital witness for the prosecution. Both of them if called to give evidence would give similar testimony in court, consequently the prosecution's failure to call both of them to give evidence is not fatal to the prosecution case. The testimony of PW2, a vital witness is enough. It would suffice. Where there are two Investigating Police Officers, but the prosecution called one who knows all about the case, not calling the other investigating Police Officer is not fatal to the prosecution's case.**

Section 167 (d) of the Evidence Act, 2011 states that:

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

*(d) evidence which could be and is not produced would, if produced, be unfavourable to the person who with holds it.*

- F** Learned counsel for the Appellant relied on section 167 (d) of the Evidence Act to support his argument that not calling investigating Police Officer who took the Appellant's confessional statement was fatal to the Respondents case.

- G Section 167(d) of the evidence Act is to the effect that when a party withholds useful evidence the presumption in law is that it would go against the party who withheld it if produced. The presumption created is against the withholding of documentary and oral evidence. The presumption applies generally to failure to lead evidence on pleaded facts, and not failure to call a particular witness.** See Babuga v. State (1996) 7 NWLR (pt.460) p.279; Onwujuba & ors. v Obieniu & ors. (1991) 4 NWLR (pt.183) p.16; A.G. Adamawa State v Ware (2006) 4 NWLR (pt.970) p.399; Nigerian Airforce v. Obiosa (2003) 4 NWLR (pt.810) p.233.

In his testimony in the trial court the Appellant said:

*“...At Sobe Police Station they did not allow me to make statement. I was brought to Ifon Police Station. The investigating Police Officer who recorded my statement at Ifon Police station is from my village”.*

My lords, since the Appellant’s statements made at Ifon Police Station were tendered as Exhibit A-A3, no useful evidence was withheld. Anyone of the investigating Police Officers could tender the Appellant’s confessional statements. Section 167 (d) does not apply to failure to call a particular witness. Judges Rules are not Rules of law but merely Rules of administrative practice. Compliance with the Rules ensures that confessions are voluntary. The Rules lay down how confessional statements are made. An accused person who intends to make a confessional statement must be cautioned by the Police before the statement is made. After the statement is made the accused person signs or thumb impresses it. The statement and the accused person are then taken before a superior Police officer. There was strict compliance with the judges Rules in the preparation of exhibits A-A3.

Furthermore neither the Appellant nor his counsel objected to the admission of the said confessional statements when they were tendered and marked exhibits A-A3. The exhibits were properly made and properly admitted in evidence.

WHAT IS THE EFFECT OF THE APPELLANT’S CONFESSSIONAL STATEMENT, EXHIBITS A - A3 ADMITTED WITHOUT OBJECTION.

Little fragments from the proceedings in the trial court on the 29<sup>th</sup> day of July, 2008 runs as follows:

*“Accused in court.*

*Mr. Daniel Agbade for the State Otunba Henry Orumen for the accused PW2: Sworn on Holy Bible state in English language and give evidence as follows:*

*I am Abayomi Adeleye an inspector attached to the Nigeria Police Station Igbolako Ondo State...*

*From my findings, I discovered that accused was one of the robbers that raided the Bank. The three statements said to be made by the accused were shown to the witness which he identifies.*

*Counsel seeks to tender the statements otunba Orumen: No*

objection

*Court: The three (3) statements of the accused made at different times dated 30/10/2001, 1/11/2001 and 30/11/2001, are admitted as exhibit A - A3."*

**When a confessional statement is admitted without objection from the maker or his counsel, the law implies that the maker of the statement agrees with everything in the statement. It also means that the maker made the statement voluntarily and it is the truth on his role in the crime. The Appellant confessional statement, exhibits A - A3 is conclusive evidence that the Appellant conspired with other person at large to rob the Cooperative Bank, Ifon on 17/10/2001 and did rob the said bank while armed with offensive weapon to wit: gun, and in company of other persons also armed and still at large.**

D ISSUE 2

Whether the Court of Appeal was right in holding that the Appellant did not properly raise the defence of alibi and that the defence did not avail the Appellant.

E Learned counsel for the Appellant observed that the Appellant gave evidence of his whereabouts on the date of the alleged robbery at the earliest opportunity, and the onus was on the prosecution to disprove the alibi raised but the prosecution failed to do so. He submitted that the Court of Appeal was wrong to hold that the Appellant did not raise the defence of alibi promptly. Reliance was placed on F Ogoala v State (1992) 2 NWLR (pt.175) p.509.

Learned counsel for the Respondent observed that the Appellant did not promptly and timeously raise the defence of alibi when he was arrested or in his statement to the Police. He referred to Samson G Ebenehi & anor v State (2009) 6 NWLR (pt.1138) p.431.

He urged this court to resolve this issue in favour of the Respondent.

Affirming the decision of the trial court the Court of Appeal said:

H "...therefore, if the defence of alibi is raised for the first time during the trial of the accused, it is not competent or potent as the prosecution would have been denied the prior opportunity to investigate, verify and/or disprove such an alibi. If an alibi is raised for the first time during trial, or at the defence stage of the trial as in this case,

*it is an ambush of the prosecution by the defence and such an alibi can be validly ignored."*

***When an accused person relies on the defence of alibi, it means that he was not at the scene of the crime when the offence for which he is charged was committed. It is the duty of the accused person at the earliest opportunity to furnish the investigating authorities with comprehensive details of his whereabouts on the day the offence was committed. Once this is done the onus is on the prosecution to investigate the alibi, and the standard of proof required to establish the defence of alibi is one based on balance of probabilities. A plea of alibi is demolished if the prosecution adduces compelling and sufficient evidence to fix the accused person at the scene of the crime at the material time.*** See *Gachi v State* (1965) NMLR p.333, *Obiode v State* 1970 1 ALL NLR p. 35, *Nwosi v State* 1976 6SC p.109.

***The offences for which the Appellant was charged were committed by him on 17/10/2001. He made three statements within forty-five days after committing the offences. That is on 30/10/2001 - Exhibit A. 1/11/2001 - Exhibit A2, and 30/11/2001 - Exhibit A3. The defence of alibi was not raised in any of these statements. The defence of alibi was made on 5/8/2008, seven years after he committed the crime. The defence of alibi was not raised at the earliest opportunity, it was raised too late thereby making it impossible for the police to investigate it. The courts below were correct to disregard the alibi as it was clearly worthless, an afterthought.***

An alibi is raised by the accused person and investigated by the Police before trial and not during trial. It is wrong for the Appellant to raise the defence of alibi for the first time during trial. Such antics deny the police the opportunity to investigate it. The alibi which was raised for the first time during trial was correctly ignored, and both courts below were right in this regard.

The well laid down position of the law is that a plea of alibi is demolished if the prosecution adduces compelling and sufficient evidence to fix the Appellant at the scene of the crime at the material time. The Appellant's confessional statements, Exhibits A - A3, Exhibits B-B1 - the locally made gun and cartridge found with the Ap-

pellant and the testimonies of PW1 and PW2 show beyond doubt that the Appellant was at the scene of the crime and did participate in the crime on 17/10/2001. This overwhelming evidence makes an alibi not worth examining or considering. It becomes very clear that the Appellant did not properly raise the defence of alibi, consequently  
 B the defence of alibi does not avail the Appellant.

### ISSUE 3

Whether the learned justices of the Court of Appeal were right in holding that the prosecution proved its case beyond reasonable  
 C doubt at the trial court.

Learned counsel for the Appellant observed that the essential ingredients of the offence of conspiracy, were not proved against the Appellant to justify his conviction by the trial court, since the prosecution could not establish that there was any agreement between the  
 D Appellant and any other person. Reliance was placed on *Obiakor v State* (2002) 10 NWLR (pt.776) p.612.

He argued that the prosecution ought to have provided evidence to corroborate exhibits A-A3. He submitted that the prosecution did not prove the offence of conspiracy against the Appellant  
 E beyond reasonable doubt. On the offence of armed robbery he submitted that the evidence of PW1 and PW2 did not link the said robbery at the Cooperative Bank PLC to the Appellant. He submitted further that the prosecution failed to prove the ingredients of armed robbery beyond reasonable doubt. Reliance was placed on *Bozin v.*  
 F *State* (1985) 2 NWLR (Pt. 8) p. 465.

He urged this court to acquit and discharge the Appellant.

Learned counsel for the Respondent observed that conspiracy is often proved by circumstantial evidence and rarely by direct evidence. Reference was made to exhibit A. *Obiakor v. State* (supra)  
 G

Concluding he submitted that exhibit A proves the agreement between the Appellant and others to do an illegal act to wit: armed robbery.

On whether the prosecution proved the offence of armed robbery beyond reasonable doubt, reliance was placed on exhibit A -  
 H A3. *Egboghonome v State* (1993) 7 NWLR (pt.306) p.383

He urged the court to dismiss the appeal.

Section 135 of the Evidence Act, 2011 provides that the burden is on the prosecution to prove the guilt of the accused person

beyond reasonable doubt. Where the prosecution fails to prove its case beyond reasonable doubt the accused person is entitled to an acquittal.

In *Nwaturuocha v State* (2011) 6 NWLR (pt.1242) p.170

I explained proof beyond reasonable doubt thus:

*“Proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence. A degree of compulsion which is consistent with a high degree of probability.”*

The burden to prove a criminal offence beyond reasonable doubt is discharged when the prosecution proves the ingredients of the charge beyond reasonable doubt.

***The Appellant was charged with conspiracy to commit armed robbery and armed robbery. Now, the essence of conspiracy is an agreement between two or more persons to do an unlawful act. The agreement may be express or implied, but the offence of conspiracy is complete once the parties agree to effect an unlawful purpose. It must be noted that a conspiracy is a continuing offence, other persons may join an existing conspiracy and become parties to it. For example if X approaches Y and asks him to join him and Z in robbing a Bank, when Y agrees he becomes guilty of conspiracy to rob. This highlights the point that it is not necessary for all the parties to a conspiracy to be in contact with each other. What is necessary is that all the parties to the conspiracy have a common purpose communicated to at least one other person to the conspiracy. The agreement between the parties must be proved beyond reasonable doubt, and an inference or circumstantial evidence of an agreement would do.***

Extracts from exhibit A, reads:

*“It is almost three weeks now that Ogbi came to tell me (that) and our members, Kehinde, Segun, Ugor, Odowu and Aspa that security at Cooperative Bank, Ifon come tell him that there is money in the bank because they wanted to bring money come the bank. We come ready and we meet Pima a Police Corporal that we want go operation for Ifon.”*

***The Appellant and others at large agreed to rob the***

**Cooperative bank. They finalised their plans when they were given guns by Pima, a Police officer. The agreement was consummated when they stormed the bank ordering everyone to lie down while they proceeded to relieve the vaults of the bank of cash. It becomes obvious that the Appellant and others at large acted in concert. A meeting of the minds of the robbers is easily inferred. They agreed to rob the bank, and carried out their agreement successfully. The offence of conspiracy is proved beyond reasonable doubt, by the confession of the Appellant.**

**THE OFFENCE OF ARMED ROBBERY**

**To succeed in a case of armed robbery contrary to section 1 (2) (b) of the Robbery and Firearms (Special Provisions) Act 1990 the prosecution must prove the following beyond reasonable doubt.**

- (a) that there was a Robbery**
- (b) that the accused/appellant was armed, or was in company of any person so armed.**
- (c) That the accused/appellant while armed participated in the Robbery.**

Relevant extracts from exhibit A reads:

*“... Two Policemen in the bank also run, as they see as we shot two times for up.”*

**By the Appellant’s own confession he was in the company of other persons who were armed when he and his gang stormed the cooperative bank Ifon, for an armed robbery operation. The ingredients of the offence of armed robbery were proved beyond reasonable doubt.**

Once again I must restate the position of the law and it is that if a person makes a free and voluntary confession, that is direct and positive, and it is properly proved, the court is at liberty to convict on the confession alone without any other evidence. Queen v Itule (1961) 2 SCNLR p.183; Ejnima v State (1991) 6 NWLR (pt.200) p.627, Kim v State (1992) 4 NWLR (pt.233) p.17, Nnamdi Osuagwu v State (2013) 1- 2 SC (pt. 1) P.37.

A confession is a statement made by an accused person admitting that he is guilty of a crime. It is the best evidence in a criminal trial.



The learned trial judge in considering the confessional statements of the Appellant sought and found evidence outside the confessions to corroborate the confessions. The evidence e.g. Exhibits B-B1, and the testimonies of PW1 and PW2 were compelling and overwhelming and he was on firm ground convicting the Appellant.

This is a case of concurrent findings of fact by the two courts below. Concurrent findings of fact are rarely upset by this court, but this court would upset such findings and state the correct position if satisfied that there has been exceptional circumstances such as:

(a) the findings cannot be supported by evidence or are perverse; or

(b) there was a miscarriage of justice; or

(c) the court overlooked some principle of law or procedure.

Concurrent findings of fact by the two courts below based on the free and voluntary confession of the Appellant is that on 17/1/2001 the Appellant while armed with offensive weapon to wit: gun and in the company of others also armed but still at large robbed the Cooperative Bank, Ifon of the sums of money stated in counts 2 and 3. The Appellant has not presented before this court any reasonable argument or submission to upset these findings of fact, and no exceptional circumstance is shown either.

In the end I find no merit in this appeal. The appeal is dismissed.

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### **MUHAMMAD JSC**

I have had the opportunity of reading in draft the judgment just delivered by my learned brother, Rhodes-Vivour, JSC. I agree with him in his reasoning and conclusion. The appeal is hereby dismissed as lacking in merit.

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### **MUNTAKA-COOMASSIE JSC**

This is an appeal against the decision of the Court of Appeal, Akure Division delivered on 6/3/2012, hereinafter called lower Court. The lower court clearly affirmed the judgment of the Ondo State High Court in which the appellant was convicted and sentenced to death for conspiracy to commit Armed Robbery and Armed Rob-

bery contrary to Section 5(b) and 1(2)(b) of the Armed Robbery and firearms (special Provisions) Act. The trial court held thus:-

“...from this statement reproduced, it is clear that the accused confessed to commission of the crime. The statement describes in graphic details the manner and means of committing the robbery and how the proceeds were shared. I therefore do not believe the accused when he denied in open court that he never made any statement at the police station throughout the period he was under arrest. He did not deny that the information contained therein was false. It is also noted that there was no objection to the admissibility of Exhibits A - A3. No single witness was called by the accused at the trial...”

The appellant unsuccessfully appealed to the Court of Appeal Akure. That court unanimously agreed that the trial court was perfectly right in convicting and sentencing the appellant to death.

The appellant, nonetheless, appealed to this court and filed a notice of appeal containing grounds of appeal.

Learned counsel for the appellant Mr Okoli formulated three issues for determination as follows:-

1. Whether the Court of Appeal was right in holding that the trial court rightly attached much weight to Exhibits A - A3 (the alleged confessional statements of the appellant) and convicting the appellant thereon.

2. Whether the Court of Appeal was right in holding that the appellant did not properly raise the defence of alibi and that the defence did not avail the appellant.

3. Whether the Court of Appeal was right in upholding the trial court’s conviction of the appellant for the offences of conspiracy to commit armed robbery and armed robbery.

Learned counsel for the respondent Mr. A. O. Adeyemi Tuki Esq., settled the respondent’s brief and distilled three issues for the determination of this appeal thus:-

1. Whether the Court of Appeal was right in holding that the trial court rightly attached much weight to Exhibits A - A3 (the alleged confessional statements of the appellant) and convicting the appellant thereon.

2. Whether the Court of Appeal was right in holding that the appellant did not properly raise the defence of alibi and that the defence did not avail the appellant.

3. Whether the Court of Appeal was right in upholding the trial court's conviction of the appellant for the offence of the appellant for the offences of conspiracy to commit armed robbery and armed robbery.

My learned brother Rhodes-Vivour JSC submitted his lead judgment and I was able to go through it before now. B

I entirely agree with his reasoning and reasons leading to the dismissal of this appeal.

I have no reason to disagree. I too hold that there is no evidence coming from the appellant to warrant this court to disturb and interfere with the concurrent decisions of the two lower courts. I too therefore hold that this appeal is devoid of any merit as is hereby dismissed. The judgment of the lower court affirming the decision of the trial is upheld and affirmed by this court. The tree must lie where it falls. C D

### **OGUNBIYI JSC**

I read in draft the lead judgment of my learned brother Olabode Rhodes-Vivour, JSC. E

The facts and issues of this case are all well reproduced in clear terms in the lead judgment. I wish to state herein that the thrust and germane highlight of this appeal relates to the documents Exhibit A - A3, the confessional statement of the accused/appellant. It is pertinent to state that the best form of evidence in a criminal charge and trial is where the accused makes a confession and admitting the commission of the offence. In other words, the best person seized with the knowledge of the Act complained of cannot be any other than the actor himself. Hence premium and quality placed on such evidence is conclusive that conviction on same alone is sustainable in law. The caveat however is, for such evidence to be accredited, same must be subjected to the litmus test which must show that the confession was made voluntarily without compulsion or any external influence whatsoever and at a time when the accused was in his right state or frame of mind. The recording of the statement therefore must satisfy the condition that it should be taken before a superior police officer for purpose of endorsement by him. The absence of compliance will render the statement as inadmissible. F G H

The document Exhibit 'A' the accused's statement is very revealing and a portion which reads as follows:-

*"It is correct that I go robbed (sic). My gang members are Ogbi, Aspa, Sonya, Segun, Odowu and Kehinde. Na only cooperative Bank of Ifon about last week I follow them to robbed (sic)*

B *...It was Segun that meet Pima and he come signed two guns give us plus local made gun with us come make three guns. He signed two pistols give us. And we come snatched one raining (sic) passat which was coming from Benin at Reserve. We then used it go Ifon. We go Cooperative Bank, Ifon.*

C *...Two policemen in the bank also run, as they see us we shot two times for up. Me stand at the main gate and three come entered the bank while the rest stayed outside dey guard. It was Soniya, Odowu and Ugor entered the bank. And when the three comot out they D hold 'Ghana must go' bag packed money come...*

*My own share na N300,000.00 (Three Hundred Thousand Naira) being that and only two of us small pass the rest...*

*The people who operated in the bank are myself, Segun 'M' Aspa Spniya 'MM' Oldom Igor 'M' and Kehinde 'M'.*

E *...It was around 9a.m. and 10a.m. that we go robbed the bank at Ifon."*

A careful perusal of the document Exhibit 'A' is very much revealing and self sustaining that the accused/appellant was extremely detailed and generous with the narration of the operation of the act of robbery and his participation therein. In other words, the facts stated in the document are such that the accused must have volunteered same and they are certainly within his personal knowledge alone. No amount of force or external influence could have extracted such vivid and well calculated statements from an accused person. In my opinion, the narration gives an impression of a free flow evidence devoid of any fear, favour or compulsion.

The confirmation of Exhibit 'A' is more strengthened when recourse is had to the record of proceeding that the document was H admitted in evidence without objection from either the accused or his counsel. The documents exhibit 'A - A3' without more are conclusive evidence of the charge made out against the appellant. The following authorities are a confirmation that the court can convict an accused person on his own confessional statement- See Egboghonome

V. The State (1993) 7 NWLR (Pt.306) 385; Demo Oseni V. The State (2012) 5 NWLR (Pt.1293) 351. The law is settled that a conviction based on a confession by an accused person can be upheld so long as the court is satisfied of its truth. See Stephen V. The State (1986) 5 NWLR (Pt.46) 978 and Mohammed Yahaya V. The State (1986) 12 SC 282.

I hasten to add at this juncture also that the judgment appealed is concurrent in nature. The law is well settled on a plethora of legal pronouncements that concurrent findings of two lower courts cannot be set aside by this court as a matter of course. The burden is on the appellant to show that the decision is perverse or violated some principles of law or procedure or where such findings are shown to be patently erroneous and a miscarriage of justice will result if they are allowed to stand. See *R - Benkay Nigeria Ltd V. Cadbury Nigeria Plc* 2012 All FWLR (Pt.631) page 1450 at 1467. The court will not therefore otherwise interfere with the findings of fact made by the trial court unless it is shown that such fact does not derive from the evidence before that court or is not related thereto. See *Ogundule V. Chief Olabode* (1973) 2 SC 71 and *Balogun V. Akani* (1988) 1 NWLR (Pt.70) 301.

My learned brother Olabode Rhode-Vivour, JSC has considered exhaustively all the issues raised in this appeal; with the few words of mine and particularly the well considered reasoning and conclusion arrived thereat by my learned brother in the lead judgment, I also find no merit in this appeal and dismiss same in like terms.

### **NWEZE JSC**

My Lord, Rhodes-Vivour, JSC, obliged me with the draft of the leading judgement just delivered now. I, entirely, agree with His Lordship that this appeal is unmeritorious. In particular, I endorse my Lord's view "the inconsistency rule applies (only) to witnesses not to an accused person."

I had occasion to deal with this question in my yet unreported leading judgment in Appeal No. SC. 635/2013: *Segun Akinlolu v State* (delivered on December 11, 2015) pages 11 -20. There, I explained that the inconsistency rule traces its jurisprudential pedigree

to England. Its most eloquent formulation can be found in *R v Golder* (1960) 1 WLR 1169 where Lord Parker CJ held:

.....when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act.

Well before the decision in *R v Golder* (supra), the rule had been applied to witnesses only, *Birch v R* (1926) 1 CAR 26; also, *R v Harris* (1927) 20 CAR 144.

The first case to invoke that rule in Nigeria was *Queen v Ukpong* (1961) ALL NLR 25, 26 which approved the statement of law in *R v Golder* (supra). At its said evolution in Nigeria, therefore, the posture of the courts was that the rule was, properly, applicable to the evidence of an ordinary prosecution witness.

Subsequent decisions confirmed this posture, *Joshua v The Queen* (1964) 1 ALL NLR I, 3 - 4; *Agwu v The State* (1965) NMLR 18, 20; *The State v Okoro* (1974) 2 SC 73, 80 - 81; *Onubogu v The State* (1974) 9 SC 1; *Williams v The State* (1975) 9 - 11 SC 139; *Boy Muka v The State* (1976) 9 - 10 SC 305.

Indeed, in *Udo v The Queen*, (1964) ALL NLR 21, 24, Brett JSC resisted an attempt to extend the application of the rule to the previous confession of an accused person and his evidence.

As noted above, on its adoption in Nigeria, the rule was applicable to the evidence of an ordinary witness. Since its adoption, it has not been an inflexible rule of law or practice. In order to ensure that its operation did not eventuate to injustice, the courts had developed a safeguard. Thus, in addition to considering the totality of the evidence, the witness was given an opportunity, while in the witness box, to explain the inconsistency.

Bello CJN in *Egboghonome v The State* (1993) 9 SCNJ 1, 21 - 22, approvingly, quoted the observation of Idigbe JSC in *Jizurumba v The State* (1976) NSCC (Vol. 10) 156 on the rationale for the introduction of this safeguard:

A witness may have a good explanation for the inconsistency between his previous unsworn statement and his evidence in court, or the inconsistency may, indeed, be minor or unsubstantial ... in

which case the inconsistency may fail to discredit his entire testimony.

Thus, it was only where the witness was unable to explain the inconsistency satisfactorily that the rule was applied. The rule was limited to the statement of a witness and his inconsistent testimony. However, in 1985, the decision in *Owie v The State* 1(1985) 1 NWLR (pt. 3) 470, for the first time, extended the rule to the statement and evidence of the accused person. B

Subsequent decisions such as *Omogodo v The State* (1987) 5 - 7 SC 5; *Stephen v The State* (1986) 5 NWLR (pt 46) 98; *Oladejo v The State* (1987) 3 NWLR (pt. 61) 419; *Umani v The State* (1988) 19 NSCC (pt. 1) 137; *Mbenu v The State* (1988) 3 NWLR (pt. 84) 615 perpetuated this trend. C

Interestingly, in 1989, this Court went back to the earlier position in *Udo v The Queen* (supra) and held that the principle did not apply to an accused person and his confessional statement, *Ikemson v The State* (1989) 3 NWLR (pt. 110) 455, 473. D

Such was the uncertainty that characterised the application of the rule in Nigeria, hence, the law on the effect of the inconsistency between the sworn oral testimony and previous statements made by an accused person, was enveloped in unwarranted recondity, see, C. C. Nweze, *Contentious Issues and Responses in Contemporary Evidence Law in Nigeria* (Volume One) (Enugu: 105, University of Nigeria, 2003) 286. E

In 1991, in *Asanya v The State* 1 (1991) 3 NWLR (pt. 180) 422, this Court had another opportunity to examine the rule. The question there was whether the rule was applicable when the witness was an accused person himself. In that case, the apex court declined the invitation to overrule the line of cases in *Omogodo v The State* (supra); *Stephen v The State* (supra); *Oladejo v The State* (supra); *Umani v The State* (supra); *Mbenu v The State* (supra) which had extended the rule to the accused person himself. F

This state of affairs continued until 1993 when, in *Egboghonome v The State* (supra), this court streamlined the application of the rule. Delivering the leading judgment of the court, Bello CJN (Karibi-Whyte JSC dissenting) described the decisions in the *Saka Oladejo* and *Asanya* cases (supra) as “a departure from the long established principle laid down in *Udo v The State* (supra) and the several decisions of this court thereafter that (the) inconsistency (rule) H

*does not apply to retracted extra-judicial confession of an accused.”*

According to His Lordship, the application of the rule in *R v Golder* to retracted confessions would tantamount to overruling, by implication, all the relevant decisions of this Court from 1964 to 1992.

His Lordship was not unmindful of the sociological implication of the

B extension of the rule for he held (at page 31) that:

.....grave miscarriage of justice would also be occasioned by the extension. It may perpetuate injustice to the society as murderers would be at large simply because after a second thought, they have retracted their confessions.

C He, therefore, overruled the decisions in *Saka Oladejo* (supra) and *Asanya* (supra) and so on. Consistent with the doctrine of stare decisis, post *Egboghonome* decisions have reverted to the position in *Udo v The Queen* (supra), namely, that the inconsistency rule does  
D not apply to the previous confessions of an accused person and his evidence in court.

The cases on this point are many. Only a handful will be cited here: *Akpan v The State* (2001) 15 NWLR (pt 737) 745; *Nsofor v The State*; (2004) 18 NWLR (pt 905) 292; *Dibie and Ors v State*  
E (2007) All FWLR (pt 363) 83; *Amoshina v State* (2009) 32 WRN 47; *Seidu v State* (2009) 29 WRN 86; *Aiguoreghian v State* (2004) 1 KLR (pt 170) 129, 152; *Adeoti v State* (2009) All FWLR (pt 454) 1450,1509-1511 etc.

F It is for these, and the more detailed, reasons in the leading that I, too, shall dismiss this appeal. I abide by the consequential orders in the leading judgement.

G

H