

**SUPREME COURT OF NIGERIA**  
FRIDAY 26TH FEBRUARY, 2016. SC. 346/2012  
**CORAM:- S. GALADIMA, M. U. PETER-ODILI,**  
**C. B. OGUNBIYI, C. C. NWEZE, A. SANUSI, JJSC**

GODWIN PIUS ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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IDENTIFICATION PARADE - Necessity of - It is only necessary where victim did not know accused before the crime - And was confronted for a very short time (H1)

**FACTS**

Accused/Appellant and another were brought before the High Court of Ondo State Akure Judicial Division. The offences with which they were charged are conspiracy to commit armed robbery and armed robbery contrary to sections 5 (b) and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria, 1990. Upon their arraignment, each of the accused persons pleaded not guilty to the charges.

Thereafter, the case went to trial. The case for prosecution/respondent was built on the testimonies of its two witnesses, namely, PW1 - the victim of the crime (Folabi Fayemi) and PW2 - one Corporal Michael Isichei of the Anti-Robbery Section, SCID, Akure. Appellant testified in his defence. At the end of the trial, the learned trial Judge convicted the accused persons and sentenced them to death by hanging or by firing squad *“as the Governor may direct.”* Aggrieved, appellant appealed to the Court of Appeal Akure Division, challenging the decision of the trial Court. The Court dismissed the appeal and affirmed the decision of the trial Court. Dissatisfied further, appellant appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

1. Whether the learned Justices of the Court of Appeal were in error when they held that identification parade was not necessary in the appellant’s case on the ground that the appellant did not contradict PW1 on his evidence of identity at trial?

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

**JSC**)

*IDENTIFICATION PARADE - Necessity of*

**1. Now, the Turnbull Guidelines, so-called after the eloquent formulation of Lord Widgery, CJ, in R. v Turnbull (1976) 3 All ER 549, 551- 552J do not support the proposition that an identification parade is a sine qua non in all cases where there has been a fleeting encounter with the victim even if there is other evidence leading conclusively to the identity of the perpetrators of the offence.**

**On the contrary, an identification parade is only essential where the victim did not know the accused person before and was confronted by the offender for a very short time, and in which time and circumstances he might not have had full opportunity of observing his features.**

**In such a situation, a proper identification will take into consideration the description of the accused person given to the police shortly after the commission of the offence, the opportunity the victim had of observing him, and what features of his (the accused person), which the victim noted and communicated to the police, which mark him out from other persons. (p. 1862 G)**

## **REPRESENTATION**

Chinonye Obiagwa, Esq., with Melissa Emene (Miss) Esq; for the Appellant

Gboyega Oyewole Esq with A. G. Adeyemi Tuki (Mrs.) (DPA Ondo State); A. A. Oladunmiye (PCO) Ministry of Justice Ondo State for the Respondent

## **CASES REFERRED TO**

Onibodu v. Akibu (1982) 13 NSCC 199

Okuoja v. Ishola (1982) 7 SC 314

Ejiwhomo v. Edet-Eter Mandilas Ltd. [1986] 5 -9 SC 41

Adejumo v. Ayantabe (1989) 6 SC (pt. 1) 96

Kraus Thomson Org Ltd. v. UNICAL (2004) 9 NWLR (pt. 879) 631

Awote v. Owodunmi (1986) 12 SC 294

Olarenwaju v. Governor of Oyo State (1992) 11 - 12 SCNJ 1  
 LSBPC v. Purification Tech Ltd. (2012) 52 NSCQR 274  
 Adeyemi v. Olakunmi (1999) 12 SC (pt. 11) 92  
 Queen v. Ohaka (1962) 1 All NLR 505  
 Udegbumam v. FCDA (2003) FWLR (pt. 165) 434  
 Tanko v. State (2009) 1 -2 SC (pt. 1) 198  
 Gbadamosi v. Aleshinloye (2000) 4 SCNJ 264  
 Saraki v. Kotoye (1992) 11 -12 SCNJ (pt. 1) 26  
 Ikemson v. State [1989] 6 SC (pt 5) 114

### **STATUTES REFERRED TO**

Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990, ss. 1(2)(a), 5(b), 9  
 Constitution of the Federal Republic of Nigeria 1999, s. 174

### **LEAD JUDGMENT BY NWEZE JSC**

At the High Court of Justice, Ondo State, Akure Judicial Division, the respondent herein filed information against the appellant and one Johnson Adeyemi for the offences of conspiracy to commit armed robbery and armed robbery contrary to sections 5 (b) and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria, 1990. Upon their arraignment on December 6, 2006, each of the accused persons pleaded not guilty to the charges. Thereafter, the case went to trial.

The Prosecution's case was erected on the testimonies of its two witnesses, namely, PW1, the victim of the crime, one Folabi Fayemi and PW2, one Corporal Michael Isichei of the Anti-Robbery Section, SCID, Akure. The appellant (as first accused person) testified in his defence.

In its judgement of May 21, 2008, the said High Court (hereinafter, simply, referred to as "the trial court") convicted the accused persons and sentenced them to death by hanging or by firing squad "as the Governor may direct." Aggrieved, the first accused person (appellant in this appeal) approached the Court of Appeal, Akure Division, henceforth, simply, called "the lower court") with his complaint against the said judgement of the trial court entreating it (the lower court) to allow the appeal and set aside his conviction and sentence.

The lower court, having dismissed his appeal, he further appealed to this court to set aside the concurrent findings of the lower courts and to acquit and discharge him. He formulated three Issues from his Notice and Grounds of Appeal. These issues were expressed thus:

B 1. Whether the learned Justices of the Court of Appeal were in error when they held that identification parade was not necessary in the appellant's case on the ground that the appellant did not contradict PW1 on his evidence of identity at trial?

C 2. Whether the learned Justices of the Court of Appeal were in the same error as the trial court when they affirmed the conviction of the appellant based on exhibit P5 without making any finding as to whether or not the appellant made the statement?

D 3. Whether section 9 of the Robbery and Firearms Tribunal (Special Provisions) Act conferring power of prosecution on the Attorney General of Ondo State is inconsistent with section 174 of the 1999 Constitution (as amended) which confers exclusive powers on the Attorney General of the Federation for prosecution of federal offences?

E When this appeal was heard on December 3, 2015, counsel for the appellant, Chinonye Obiagwu, who appeared with Melissa Omene, adopted the brief of argument filed on October 4, 2012. He relied on the arguments therein in urging the court to allow the appeal. On his part, counsel for the respondent, Gboyega Oyewole, F who appeared With A. O. Adeyemi-Tuki (Mrs), DPP, Ondo State and A. A. Oladunmiye, PLO, Ministry of Justice, Ondo State, adopted the brief of argument filed on February 12, 2012 in arguing that the appeal, being unmeritorious, should be dismissed.

G My Lords, for reasons that would be made obvious anon, the only live issue in this appeal is the first issue. In the first place, it is not possible to wish away the fact that the lower court made a specific finding on the crux of the complaint with regard to issue two: an issue which was, extensively, argued on pages 11 - 17 of the appellant's H brief of argument.

According to the appellant's counsel "the appellant at the trial court raised the defence of non est factum in respect of exhibit P5, i.e. exhibit P5 was not his act or that the act of signing exhibit PS was not accompany (sic) by his mind at the time of signing same because

he did not know the content,” (page 11 of the brief). He, then, proceeded to adumbrate on the nuances of the said plea of non est factum, (pages 11 -17 of the brief).

With profound respect to Chinonye Obiagwu, the altruistic counsel for the appellant, who, from his numerous appearances evident in the Law Reports, appears to be one of the most consistent advocates of causes of indigent accused persons in this court and other superior courts of record in Nigeria, seems to have underrated the findings of the lower court on this point. At page 255 of the record, the lower court, (as per the leading judgement of Adumien, JCA) agreed *“that the question of non est factum was not raised by the appellant in the trial court and I find further that it does not arise from the judgement of the lower court [that is, the trial court...”* (italics supplied) B  
C

The appellant did not challenge that finding which is, therefore, subsisting. Onibodu and Ors v Akibu and Ors (1982) 13 NSCC 199; Okuoja v Ishola (1982) 7 SC 314; Ejiwhomo v Edet-Eter Mandilas Ltd. [1986] 5 -9 SC 41, 47; Adejumo v Ayantabe (1989) 6 SC (pt 1) 96; Kraus Thomson Org Ltd. v. UNICAL (2004) 9 NWLR (pt 879) 631, 642; Awote and Ors v Owodunmi and Anor (1986) 12 SC 294, 309. D  
E

It is immaterial whether it is wrong or right, Okuoja v Ishola (supra) 349; Onibodu and Ors v Akibu and Ors (supra); Ejiwhomo v Edet-Eter Mandilas Ltd. (supra); Olarenwaju v Governor of Oyo State and Ors (1992) 11 -12 SCNJ 1; LSBPC v Purification Tech Ltd. (2012) 52 NSCQR 274, 309; Adeyemi v Olakunmi [1999] 12 SC (pt 11) 92. The net effect is that, while the appellant cannot canvass that issue before this court without more, Queen v Ohaka (1962) 1 All NLR 505, on its part, this court cannot interfere with the said finding. Udegbumam v FCDA (2003) FWLR (pt 165) 434. F  
G

That is not all! In his third Issue, the appellant posed the question:

Whether section 9 of the Robbery and Firearms (Special Provisions) Act conferring power of prosecution on the Attorney General of Ondo State is inconsistent with section 174 of the 1999 Constitution (as amended) which confers exclusive powers on the Attorney General of the Federation for prosecution of federal offences? H

In arguing this issue, learned counsel for the appellant con-

tended that the information upon which the appellant was tried for the offence created by an Act of the National Assembly was incompetent. This argument was premised on the fact that, in preferring the said information, the Attorney General of Ondo State neither sought nor obtained the fiat of the Attorney General of the Federation.

My Lords, this issue does not need to delay us here. Indeed, this sort of argument was canvassed in *Aminu Tanko v State* (2009) 1 -2 SC (pt 1) 198. The first issue in that case was the question:

Whether the Honourable Court of Appeal was right to have held that the offence of robbery created under the Robbery and Firearms (Special Provisions) Act, Cap 398, not being in the Exclusive and Concurrent Legislative List is a State offence and can be prosecuted by the Attorney General of Niger State? (page 209 of the Report)

Like the counsel for the appellant in the instant appeal, counsel for the appellant in *Aminu Tanko v State* (supra) contended that the offence of robbery, as created under the Robbery and Firearms (Special Provisions) Act (supra), is a Federal offence and, therefore, any charge of robbery under it can only be instituted and prosecuted by the ( ) Attorney - General of the Federation by virtue of section 174 of the 1999 Constitution.

This court did not have any hesitation in rejecting this submission. It held, inter alia, that:

“...not only does a State High Court have the jurisdiction to try cases relating to armed robbery, the officials of the Ministry of Justice of a State are eminently qualified to prosecute the offence of armed robbery in any High Court of a State.... it will even be incongruous to the concept of Federalism, which we practise, to contend otherwise ... (page 217, italics supplied)

It is against this background that I deride this attempt to broach this question again in this appeal as academic and, as such, will not delay us here, *Plateau State v AG Federation* (2006) 3 NWLR (pt 973) 346, 419; *Gbadamosi v Aleshinloye* (2000) 4 SCNJ 264, 294; *Global Transport Oceanic and Anor v Free Enterprise (Nig) Ltd.* (2001) 2 SCNJ 222; *Saraki v Kotoye* (1992) 11 -12 SCNJ (pt 1) 26, 44. I have no reason for departing from the position in *Aminu Tanko v State* (supra).

In all, therefore, it is only the first question that is outstanding. I, now, turn to it. The appellant posed the question:

Whether the learned Justices of the Court of Appeal were in error when they held that identification parade was not necessary in appellant's case on the ground that the appellant did not contradict PW1 on his evidence of identity at trial? B

#### ARGUMENTS ON THE SOLE ISSUE

##### APPELLANT'S CONTENTION

As noted above, when this appeal was heard on December 3, 2015, learned counsel for the appellant, Chinonye Obiagwu, adopted the appellant's brief filed on October 4, 2012. He contended that there was no credible evidence linking the appellant (as accused Person) to the commission of the offence. In his submission, the appellant was not, positively, identified as one of those who committed the offence. He pointed out that no identification parade was conducted for the witness to properly identify the appellant. C  
D

Counsel maintained that the lower court, wrongly, held that identification parade was unnecessary because the appellant did not challenge PW1's identity evidence given orally in court. He canvassed the view that the Prosecution had the burden of proving the identity of the appellant as one of those - who committed the offence. As such, it does not depend on whether or not he [the appellant] challenged the Prosecution's evidence in that respect. He, therefore, contended that the relevant question is whether the Prosecution proved the appellant's guilt beyond reasonable doubt. E  
F

He prayed in aid the decision in *Ikemson v State* [1989] 6 SC (pt 5) 114, which, approvingly, adopted the guidelines in *R v Turnbull and Ors* (1976) 3 All ER 549. The crux of his complaint here was that the PW1 did not, positively, identify the appellant when he gave his statement to the Police and that when the appellant was arrested the witness was not brought in to identify him [the appellant] in an identification parade. He, then, contended, on the authority of *Ikemson v State* (supra), that identification, parade was mandatory in the circumstance. G  
H

##### RESPONDENT'S SUBMISSIONS

On his part, Counsel for the respondent, Gboyega Oyewole, drew attention to page 18 of the record where the PW1 narrated his encounter with the appellant on the fateful day. He, equally, cited

pages 25 -26 of the record for the PW2's evidence on the events that linked the appellant with the offence and how he was arrested. He submitted that, as the above represented a direct, positive and credible identification of the appellant as one of the persons who robbed PW1, a formal identification parade was unnecessary, citing *Attah v The State* [2010] 10 NWLR (pt 1201) 190, 225-226 on situations necessitating an identification parade.

He maintained that the testimony of PW2 on how the appellant was named by the late Michael Amudipe, a member of the gang that robbed PW1; the recovery of some of the stolen items which the appellant had sold to one Alhaji Dauda Mohammed in Ibadan; the release of those items to the PW1 on bond upon his application, exhibits P3 and P4 etc rendered, further, identification parade a surplussage. He, therefore, canvassed the view that *R. v Turnbull* and *Ors*, approvingly, adopted in *Ikemson v State* (supra) was in-applicable.

#### RESOLUTION OF THE ISSUE

My Lords, what prompted the complaint in this issue was the lower court's finding that "during cross-examination of PW1, no issue was made of the identity or identification of the appellant or how PW1 was able to recognise the appellant," page 248 of the record.

As indicated earlier, the crux of the complaint of the appellant's counsel was that the PW1 did not, positively, identify the appellant when he gave his statement to the Police. With profound respect to Mr. Obiagwu, one of the most ardent advocates of the rights of convicts, this is one of those examples where defence counsel have sought to convert the Turnbull Guidelines into some sort of magical wand or adversarial mantra to enfeeble the case which the Prosecution wove against the accused persons at the court of trial. As it is often the case, this is not borne out by the facts.

***Now, the Turnbull Guidelines, so-called after the eloquent formulation of Lord Widgery, CJ, in R. v Turnbull (1976) 3 All ER 549, 551- 552J do not support the proposition that an identification parade is a sine qua non in all cases where there has been a fleeting encounter with the victim even if there is other evidence leading conclusively to the identity of the perpetrators of the offence.***

***On the contrary, an identification parade is only essen-***

***tial where the victim did not know the accused person before and was confronted by the offender for a very short time, and in which time and circumstances he might not have had full opportunity of observing his features.***

***In such a situation, a proper identification will take into consideration the description of the accused person given to the police shortly after the commission of the offence, the opportunity the victim had of observing him, and what features of his the accused person), which the victim noted and communicated to the police, which mark him out from other persons.***

This formulation in *R. v. Turnbull and Ors* (supra) has been approvingly, adopted by this court in several cases, *Ikemson v The State* (1989) 3 NWLR (pt 110) 455,472, E -G; *Mbenu v. The State* (1988) 3 NWLR (pt. 84) 615, 628; *Ukpabi v. The State* (2004) LPELR D -3346 (SC) 9, A -C; *Ndidi v The State* (2007) LPELR 1970 (SC); *Abudu v. The State* (1985) 1 NWLR (Pt. 1) 55, 61-62; *Fatai v The State* (20030 LPELR -20182 (SC) 19, A -C; *Ibrahim v The State* (1991) 5 SCNJ 129; *Ajayi v The State* (2014) LPELR -23027 (SC) 20 -21.

Thus, the rationale of the Turnbull Guidelines is that whenever the case against an accused person depends wholly or substantially on the correctness of his identification, and the defence alleges that the said identification was mistaken, the court must closely examine the evidence. In acting on it, it must view it with caution so that any real weakness discovered about it must lead to giving him the benefit of the doubt, *Ndidi v The State* (supra); *Ukpabi v The State* (supra); *Abudu v The State* (supra) 61-62; *Mbenu v The State* (supra) 615, 628.

However, identification parade would be unnecessary if there are yet other pieces of evidence leading conclusively to the identity of the perpetrator of the offence. *Agboola v The State* (supra); *Adebayo v State* (2014) LPELR - 22988 (SC) 36 -37, E -C; *Alufohai v The State* (2014) LPELR - 2415 (SC) 24-25.

WHAT WAS THE PROSECUTION'S CASE?

At page 18 of the record, PW1's testimony, with regard to the identity of the appellant (as accused person), went thus:

*"There was no light in the vicinity but our generator was on. I*

*was able to recognise the first accused person. As soon as I came out, I was leaning on the balcony of the office when I saw the first accused [person] with a bag that was taken from my office with another smaller bag that belonged to one of the girls in the office which (sic) had just arrived from a journey. The first accused looked up and told me that*  
 B *I do not go in he would come back to deal with me with his gun, At that point; one Okada arrived, the Okada took the two of them away.”*  
 (see, page 247 of the record where the lower court set out this evidence; my italics)

C Still at page 18 of the record, he gave indication as to how he concluded that he knew the appellant:

“...I came to the conclusion that the first accused was one of the persons who robbed me on that day because my generator was on and everywhere was well-lit, I am an adult I can recognise him.  
 D *He spoke to me, I did not lie down, I saw him clearly and I was able to recognise him at the Police station on the day of his arrest.”* (Italics supplied)

At page 19 of the record, he averred that:

When the first accused was arrested, the officer in charge of  
 E SARS now called me. When I got there, there were about five or six people behind the ‘counter’. As soon as I got there, the O. C. SARS asked me if I recognise one of the people there as a person who came to my shop and I pointed him. The O. C. SARS asked if Godwin (appellant) could recognise me. He said yes...” (Italics supplied)

F On his part, in exhibit P5, the appellant’s extrajudicial statement to the Police, he wrote thus:

On 3-1-2004, Michael Ajibola Amudipe brought an (sic) information that there is an handset shop at Oshinle Quarters to rob.  
 G Four of us, namely, Michael Amudipe (2) Desmond (3) Johnson and myself went for the robbery operation at about 8pm.

On the strength of this, the lower court opined that the “*confessional statement - exhibit P5 is an admission by the appellant that he was one of the persons who robbed PW1. Having regard to the*  
 H *facts and circumstances of this case no issue as to the identification of the appellant was raised to warrant an identification parade. Put - differently, an identification parade is not a sine qua non to a conviction of an accused for an alleged crime...”* (page 249 of the record, italics supplied).

These were not the only pieces of evidence on which the Prosecution hinged its case. There was, also, the testimony of the PW2, who was detailed to investigate the case. Listen to this insightful account:

*“When we started the investigation through our intelligence gathering we arrested one Michael Amudipe on 22<sup>nd</sup> January, 2004 B along (sic) Isikan Road, Akure; by our informant one Policeman. He was arrested and brought to the station. During interrogation, on the 22<sup>nd</sup> January, sorry, 23<sup>d</sup> January, 2004, A call came into his handset. I picked the handset. When I picked the handset, the first accused was the person on the line. I pretended to be. Michael Amudipe. I C told him I had an accident on 22<sup>nd</sup> January, 2004 night around 9pm and that I was admitted at General Hospital. Akure. He told me he would come there to greet me ... Before we left for the hospital, we had obtained the statement of Michael Amudipe where he mentioned D the names of the first and second accused persons and others as members of his gang...” (Italics supplied)*

The other pieces of evidence which, firmly, roped in the appellant were graphically, highlighted by the trial court, and affirmed by the lower court:

Exhibit P5 reveals that two robbers entered the shop and both carried guns. The name of Michael Amudipe featured in exhibit P5 as member of the gang of robbers that invaded the shop. Exhibit P5 shows that the first accused sold some of the stolen handsets at Ibadan, PW2 testified that in the course of investigation first accused said he F sold his share of the stolen handsets at Ibadan and that they went to Ibadan to recover them. PW1 said in his evidence-in-chief that he was robbed of handsets and money, by exhibit PS, the first accused said they stole handsets and money ... PW2 told the court that PW1 G applied for the recovered handsets and they were released to him. Exhibit P3 is the application made by PW1. Exhibit P4 is the bond to produce the exhibits. PW1 said his shop was lit because he put on his generator and therefore could identify the first accused. He was not cross examined on this fact. No contradictory evidence was adduced H by the accused. PW5 shows that Desmond and the first accused keep the two guns used for the robbery operation. Exhibits P1, P1a- P2 were recovered from the first accused. (pages 116 -117, italics supplied)

Against this background, the lower court found that in the present case, *“the identity of the appellant as one of the persons who robbed PW1 was proved beyond reasonable doubt... the evidence of the Prosecution coupled with the appellant’s confessional statement, exhibit P5, constituted convincing, cogent and compelling evidence which made an identification or identification parade irrelevant in this case,”* (pages 250 -251 of the record).

In one word, there were concurrent findings on this question. Yet the appellant did not deem it fit to show that they were not borne out of the records or that the lower courts applied the wrong principles of the law in arriving at those findings; put simply, that they were perverse. I am, therefore, unable to interfere with them. *Adeyeye v The State* (2013) LPELR -19913 (SC) 46; *Akpabo v State* (1994) 7 NWLR (pt 359) 635; *Ogbu v. State* (1992) 8 NWLR (pt. 295) 255; *Igago v State* (1999) 14 NWLR (pt. 637) 1; *Adeyemi v. The State* (1991) 1 NWLR (pt. 170) 679; *Ejikeme v Okonkwo* (1994) 8 NWLR (pt 362) 266.

In the circumstance, therefore, I endorse the above concurrent findings. This must be for, as indicated earlier, where the identity of an accused person was not in doubt (as in the instant case) there was no need to embark on identification parade; that is, identification parade was not a sine-que-non to his conviction and sentence by the trial court, as affirmed by the lower court. *Ukpabi v. The State* [2004] 34 WRN 133; *Ikemson v The State* (1959) 3 NWLR (pt. 110) 455, *Abubakar Ibrahim v The State* (supra); *Ajayi v State* (supra); *Ndukwe v State* (2009) 7 NWLR (pt 1139) 43; *Nwaturuocha v State* (2011) Vol 6 NSCC 462; *Agboola v State* (supra).

In all, therefore, I find that this appeal must fail for being unmeritorious. I, hereby, enter an order dismissing it. I affirm the trial court’s conviction of and sentence on the appellant in its judgement of May 21, 2008 affirmed in the lower court’s judgement of June 28, 2012.

H

### **GALADIMA JSC**

I have been obliged a draft copy of the judgment of my learned brother NWEZE JSC just delivered. I agree with him that the appeal is unmeritorious and ought to be dismissed.

The finding of the two courts below that the identity of the Appellant herein as one of the persons who robbed PW1 was proved beyond reasonable doubt coupled with the Appellant's confessional statement, Exhibit 5 voluntarily made, is unassailable. This constitutes convincing, cogent and compelling evidence which made identification parade unnecessary in this case.

B

For this contribution and the more details and meticulous consideration of other issues in greater detail in the lead judgment, I too dismissed the appeal and affirm the conviction and sentence of the Appellant by the trial court.

C

### **PETER-ODILI JSC**

I agree with the judgment just delivered by my learned brother, Chima Nweze JSC and in support of the reasonings upon which the decision was made, I shall make some comments.

D

This appeal is against the judgment of the Court of Appeal, Akure Division delivered on the 28<sup>th</sup> day of June, 2012 affirming the judgment of the Ondo State High Court sitting at Akure in which the Appellant was convicted and sentenced to death for the offences of conspiracy to commit armed robbery and armed robbery contrary to and punishable under sections 5 (b) and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398 of the Laws of the Federation, 1990.

E

The facts leading to this appeal are well adumbrated in the lead judgment and there is no point repeating them.

F

On the 3<sup>rd</sup> day of December, 2015 learned counsel for the Appellant adopted the Appellant's Brief of Argument filed on the 4<sup>th</sup> day of October 2012 and in which he identified three issues for determination which are follows:-

G

1. Whether the learned justices of the Court of Appeal were in error when they held that identification parade was not necessary in Appellant's case on the ground that the Appellant did not contradict PW1 on his evidence of identity at trial?

H

2. Whether the learned justices of the Court of Appeal were in the same error as the trial court when they affirmed the conviction of the Appellant based on exhibit P5 without making any finding as to whether or not the Appellant made the statement?

3. Whether Section 9 of the Robbery and Firearms Tribunal (Special Provisions) Act conferring power of prosecution on the Attorney General of Ondo State is inconsistent with Section 174 of the 1999 Constitution (as amended) which confers exclusive powers on the Attorney General of the Federation for prosecution of federal B offences?

Mr. Gboyega Oyewole of Counsel for the Respondent adopted the Brief of Argument settled by Mrs. A. O. Adeyemi-Tuki, Director of Public Prosecutions of the Ondo State Ministry of Justice and filed on the 11<sup>th</sup> day of December, 2012. She adopted to use the issues as C formulated by the Appellant.

The issues as crafted are easy to follow and utilize and so I shall use them to navigate my way in the determination of the appeal.

ISSUE NO. 1:

D Whether the learned Justices of the Court of Appeal were in error when they held that identification parade was not necessary in Appellant's case on the ground that the Appellant did not contradict PW1 on his evidence of identify at trial?

Canvassing the position of the Appellant, Mr. Obiagwu of Coun- E sel contended that there was no credible evidence linking the Appel- lant to the commission of the offence therefore making an identifica- tion parade a necessity. That the situation was not changed because the appellant had not challenged the PW1's identify evidence given orally in court. That the conditions on which an identification parade F could be dispensed with were not present. He relied on Yusuf v State (2008) All FWLR (Pt. 405) 1731; R v Turnbull & Ors (1989) 6 SC (Pt. 5) 114.

G For the Appellant was submitted that the contradictory pieces of evidence in the prosecution's case made the identification parade mandatory.

Learned counsel for the Respondent on the other hand con- tended that PW1 reported the robbery attack on him the day of incident to the police and the appellant arrested within 3 weeks of H the incident and confessed to the police that he was among the armed robbers who robbed PW1. That it was on the strength of the confes- sional statement that PW1 was invited to the police station and therein made a direct, positive and credible identification of the appellant as one of the robbers and so rendered a formal identification parade

not only superfluous but also otiose. He cited Samuel Attah v The State (2010) 10 NWLR (pt. 1201) 190 at 225-226.

On the view of the Appellant that the absence of an identification parade to place the Appellant to the crime charged would make conviction impossible. This court per Adekeye JSC had in the case of Samuel Attah v The State (2010) 10 NWLR (pt. 1201) 190 at 225-226 reiterated thus:-

*“1. An identification parade is necessary where there is clear and uncontradicted eyewitness account and identification of the person who allegedly committed the offence.*

*Ibrahim v The State (1991) 5 SCNJ page 129; (1991) 186 at 399; Balogun v A. G. Ogun State (2002) 6 NWLR (pt. 763) P. 512 at 534.*

*2. It is unnecessary where witnesses know the suspects previously. Eyisi v The State (2001) 8 WRN P.1; (2002) 15 NWLR (Pt. 691) 555; Williams v The State (1992) 10 SCNJ P. 74; (1992) 8 NWLR (Pt. 261).*

*3. Where the accused is linked to the offence by convincing, cogent and compelling evidence, an identification parade is not a relevant fact. Ugwumba v The State (1993) 6 SCNJ (Pt. 11) pg. 217; (1993) 5 NWLR (Pt. 296) 66”.*

Girded by the principles enunciated in Samuel Attah (supra) and contextualizing them with the evidence proffered by the prosecution in this case, it is clear that there was no need for an identification parade since the evidence of PW1, the complainant and that of PW2, the investigating police officer not only linked the Appellant to the offence, it left no doubt as to the identify of the Appellant as one of the offenders thereby making a parade to so identify him not only unnecessary, it would have been superfluous.

See evidence of PW1 thus:-

*“When the 1<sup>st</sup> accused was arrested, the officer in charge of SARS now called me, when I got there, there were about 5 or 6 people behind the ‘counter’. As soon as I got there, the O.C. SARS asked me if I can recognize one of the people there as a person who came to my shop and I pointed to him. The O.C. SARS asked if Godwin could recognize me. He said yes...”*

P.W.1 further gave evidence on how he was able to recognize the Appellant as follows:-

*“...I came to the conclusion that 1<sup>st</sup> accused was one of the*

*persons who robbed me on that day because my generator was on and everywhere was well lit. I am an adult I can recognize him. He spoke to me, I did not lie down, I saw him clearly and I was able to recognize him at the police station on the day he was arrested”.*

The evidence of PW2 was a recount of how the arrest of the Appellant was made and I shall quote excerpts from it below, viz:-

*“When we started the investigation through our intelligence gathering we arrested one Michael Amudipe on 22<sup>nd</sup> January 2004 among Isikan Road Akure; by our informant one policeman. He was arrested and brought to the station. During interrogation, on the 22<sup>nd</sup> January, sorry 23<sup>rd</sup> January, 2004.*

*A call came into his handset, I picked the handset. When I picked the handset, the first accused was the person on the line. I pretended to be Michael Amudipe. I told him I had an accident on 22<sup>nd</sup> January 2004 night around 9a.m and that I was admitted at General Hospital Akure, he told me he would come there to greet me.... before we left for the hospital, we had obtained the statement of Michael Amudipe where he mentioned the names of the 1<sup>st</sup> and the 2<sup>nd</sup> accused persons and others as members of his gang...”*

The linkage of the Appellant to the offence was direct, positive and stemmed from credible evidence of PW1 and PW2, sufficient to be acceptable to the Court. In fact there was nothing from the defence to shake the weight of the evidence on the identification of the Appellant and linking him to the offence. Therefore, this issue is resolved against the Appellant.

## ISSUE NO. 2:

Whether the learned Justices of the Court of Appeal were in the same error as the trial court when they affirmed the conviction of the Appellant based on Exhibit P5 without making any finding as to whether or not the Appellant made the statement.

Learned counsel for the Appellant submitted that it is trite that where the version of statement of the accused person at the police station is different from his version account at the trial, he has the burden in law to explain the reason for such discrepancy. That since Appellant made the explanation in his evidence, the trial Court had a duty to make a clear finding on the point and with the failure of the trial court to do so, the Supreme Court should disregard the weight attached to Exhibit P5 by the Lower Courts. He referred to Hassan v

State (2001) 6 NWLR (Pt.709); Aiguoreghian v State (2004) 3 NWLR (Pt. 860) 367 at 403.

Also contented for the appellant is that the prosecution failed to call its vital witnesses, namely the police informant and the buyer of the alleged stolen items, who made statements to the police during investigation and or other alleged eye witnesses of the robbery attack to corroborate evidence of PW1 and Exhibit P5. He cited *Chevron Int'l Ltd v. Egbujuonuwa* (2007) All FWLR (Pt. 395) 444. B

For the Respondent, it was contended that the contention of the Appellant is misconceived and a complete distortion of the facts in the record. That as appellant objected to the admissibility of exhibit P5 on the ground of involuntariness after which the trial judge gave a considered ruling and exhibit P5 was admitted having been found to be made voluntarily. That the fact that appellant gave a different version of his story from exhibit P5 in his evidence-in-chief does not raise a defence of non est factum. C  
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That the prosecution is at liberty to choose which witness to call and the Court's duty is to see if the prosecution had discharged the burden placed on him in that regard. That the prosecution is not bound to call every witness, rather, it is duty bound to call only material witnesses. He cited *Akpan v State* (2005) 4 ACLR 547 at 558. E

The issue made much of by the Appellant is that the Appellant having later resiled from his statement, Exhibit 5, the court should have given him the benefit of a doubt. This stance is difficult to understand since the trial judge had conducted a trial within trial to ascertain the voluntariness of the statement and being satisfied, it was voluntarily made, admitted it as Exhibit 5. It was however during his testimony in his defence that the Appellant sought to deny making that statement in the first place. The appellant posits that this later position should make that statement be taken as of no moment particularly since the accounts in the statement were different from what the Appellant was presenting in his oral evidence-in-chief. F  
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The submission of the Appellant does not persuade in that the appellant in this later version of his story and denying making Exhibit 5 would amount to is an after thought coming too late in the day and anchored on nothing. I refer to the case of *Egboghonome v State* (1993) 7 NWLR (Pt. 306) 383. H

With regard to the grouse of the Appellant on the fact that

certain witnesses ought to have been called by the prosecution including the informant referred to by PW2 and the buyer of the stolen items in Ibadan, which failure the Appellant contends was fatal to the case of the Respondent. This posture I must say is not sustainable since the prosecution is at liberty to decide which witnesses to utilize in proof of its case and where it was done so even just one witnesses, positive, credible and crucial to such an extent that the required proof beyond reasonable doubt is made, so be it. All that is necessary for the prosecution is to establish the essential ingredients of the offence on the standard of proof in a criminal trial with material witnesses or witness. The prosecution is not expected to produce every witness mentioned in the course of its investigation and when the prosecution has done its bit, it is left for the court in its own duty to see if the prosecution has discharged the burden placed on it and if the court is so satisfied and it is enough in proof thereof, then the requirement of the law is met. See *Akpan v. State* (2005) 4 ACLR 547 at 558.

Indeed what I see done by the two courts below are concurrent findings of fact which are neither perverse nor is there a material violation of some principle of law or procedure and of course there is no miscarriage of justice, therefore no interference is thereby called for. I refer to *Ogoala v State* (2009) 7 ACLR 357 at 396.

The issue herein is resolved against the Appellant.

### ISSUE NO. 3

Whether section 9 of the Robbery and Firearms Tribunal (Special Provisions) Act (as amended) conferring power of prosecution on the Attorney General of Ondo State is inconsistent with Section 174 of the 1999 Constitution (as amended) which confers exclusive powers on the Attorney General of the Federation for prosecution of federal offences?

For the Appellant, it was submitted that the information upon which the appellant was tried for an offence created by an Act of the National Assembly was incompetent because it was preferred by the Attorney General of Ondo State without the consent or fiat of the Attorney General of the Federation. He cited Section 174 of the 1999 Constitution, Section 9 of the Robbery and Firearms (Special Provisions) Act; *A. G. Kaduna State v Mallam Umaru Hassan* (1985) NWLR (Pt. 8) 483.

That in so far as Section 9 of the Act limits the exercise of

power of Attorney General of the Federation created by the Constitution, to that extent, it is inconsistent with the provisions of the Constitution and therefore null and void. He cited *Ukpo v Adede* (2001) 9 NWLR (Pt. 717) 203; *Emelogu v The State* (1998) 2 NWLR (Pt. 78) 524; *Amadi v Federal Republic of Nigeria* (2008) 7 WRN 37.

Learned counsel for the Respondent contended by stating that it is well settled by the Supreme Court that Attorney General of the States can institute a criminal charge under the Robbery and Firearms (Special Provisions) Act as the Act is deemed to be a State Law. He cited *Emelogu v The State* (1988) 2 NWLR (Pt. 78) 524.

That armed robbery as an offence is neither in the exclusive nor in the concurrent legislative list in the 1999 Constitution and so falls within the province of residual matters which only the State Assembly has competence to legislate on. That the Robbery and Firearms (Special Provisions) Act No. 5 of 1984 as amended by Decree No. 62 of 1999 is a State Law in that the decree abrogates all robbery offences. He cited *Aminu Tanko v The State* (2009 1-2SC (Pt. 1) 198.

In answer to whether the Ondo State Attorney-General can properly prosecute the offence of armed robbery on which the Appellant was charged, tried and convicted, it has to be said that the Robbery and Firearms (Special Provisions) Act No. 5 of 1984 as amended by Decree No. 62 of 1999 is a State Law since the decree abrogated all armed robbery tribunals across the country and then conferring jurisdiction on State High Court to try armed robbery offences. Therefore sections 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, 1990 LFN on which the Appellant was charged is a State Law. This position has been settled by the Supreme Court in the case of *Aminu Tanko v The State* (2009) 1-2 SC (Pt. 1) 198, a case that presented similar facets as the case in hand and this court held thus:-

*“...that not only does a State High Court have jurisdiction to try cases relating to armed robber; the officials of the Ministry of Justice of a State are eminently qualified to prosecute the offence of armed robbery in any High Court of a State....”*

The above has laid to rest such arguments as to whether there is conflict between Section 9 (2) of the Robbery and Firearms (Special Provisions) Act and the powers of the Attorney-General of the

Federation under Section 174 of the 1999 Constitution with the Supreme Court having settled that question in the *Emelogu v State* (1988) 2 NWLR (Pt. 78) 524 and *Aminu Tanko v State* (supra).

This issue is from the above resolved against the Appellant and so all issues settled against the Appellant and the better reasoning in the lead judgment of my learned brother, C. C. Nweze JSC. I too dismiss this appeal as lacking in merit.

I abide by the consequential orders made.

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### OGUNBIYI JSC

I had the privilege of reading in draft the lead judgment of my brother Chima Centus Nweze, JSC. I agree that the appeal is devoid of any merit and same is also dismissed by me.

D

The sole life issue in this appeal is the one that questions:-

*“Whether the learned justices of the Court of Appeal were in error when they held that identification parade was not necessary in appellant’s case on the ground that the appellant did not contradict PW1 on his evidence of identity at trial?”*

E

It is the contention of the appellant that there was no credible evidence linking him to the commission of the offence; that he was not positively and credibly identified as one of those who committed the offence; that no identification parade was conducted for the witness to properly identify the appellant bearing in mind that the case is

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one that requires identification parade as laid down in line of cases by this court; that without credible evidence of identification, it will be unsafe to sustain the conviction of the appellant. On the failure by the appellant to challenge PW1’s identity evidence in court, counsel

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submits that the burden to prove appellant’s identity as one of those who committed the offence rests *squarely* on the prosecution and *did* not depend on whether or not he challenges prosecution’s evidence in that respect; that the question to ask is whether the prosecution has adduced cogent and credible evidence to prove that (he)

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the appellant was guilty beyond reasonable doubt; that the contention held by the lower court and dispensing with the need for identification parade was an error therefore.

In response to the appellant, the learned counsel on behalf of the respondent submits that the contention is misconceived and mis-

placed. This he re-affirms on the evidence of PW1 (the victim) and PW2 the IPO; that with the positive and direct identification of the appellant, the call by him for a formal identification parade in this case is not only superfluous but also otiose.

It is obvious to state that the lower court in its judgment did not see the relevance in conducting an identification parade and hence did not therefore make it an issue. In its judgment at pages 248 - 249 of the record before us, the court had this to say:-

*“The cross-examination of PW1 is at pages 21 and 22 of the record. During the cross-examination of PW1, no issue was made of the identity or identification of the appellant or how PW1 was able to recognize the appellant. It was only the identity of the ‘okada’ man that was put in issue and PW1 answered that he could not recognize the ‘okada’ man. The appellant testified in the trial court in his defence as DW1 and his testimony both in-chief and under cross-examination spans pages 70 - 74 of the record and nowhere did he put his identify or non-identification in issue.*

*Having regard to the facts and circumstances of this case no issue as to the identification of the appellant was raised to warrant an identification parade. Put differently, an identification parade is not a sine qua non to a conviction of an accused for an alleged crime.”*

In the case of Samuel Attah V. The State (2010) 10 NWLR (Pt .1201) 190 at 225 - 226 for instance, this court was of the firm view wherein it dispensed with identification parade in the following situations, when it said:-

*“1. An identification parade is unnecessary where there is clear and un-contradicted eyewitness account and identification of the person who allegedly committed the offence. Ibrahim V. The State (1991) 5 SCNJ Page 129; (1991) 186 at 399; Balogun V. A-G. Ogun State (2002) 6 NWLR (Pt. 703) Page 512 at P.534.*

*2. It is unnecessary where witnesses knew the suspects previously. Eyisi V. The State (2001) 8 WRN Pg.1; (2002) 15 NWLR (Pt 691) 55; Williams V. The State (1992) 10 SCNJ Pg.74; (1992) 8 NWLR (Pt 261) 515.*

*3. Where the accused is linked to the offence by convincing cogent and compelling evidence, an identification parade is not a relevant fact; Ugwumba V. The State (1993) 6 SCNJ (Pt 11) Pg.217; (1993) 5 NWLR (Pt.296) 660.”*

The appellant raised a heavy dust and also made a heavy weather on PW1's extrajudicial statement and submits that same contradicts the witness's evidence in court. For all intents and purposes, the appellant ought to have confronted the witness on the discrepancy alleged with a view to contradicting him. The eye witness account by PW1 as to how the robbery was carried out and his recognition of the appellant as one of the persons who allegedly committed the offence were not controverted under cross-examination or otherwise. The right and appropriate forum for that objection was at the trial court when there was ample opportunity to do so. In the circumstance and in my view, it is now too late to complain at this stage; the objection is only an afterthought consideration. The evidence of the prosecution coupled with the appellant's confessional statement, exhibit 5, constitute convincing, cogent and compelling conviction rendering an identification or identification parade irrelevant in this case. Copious reference can be made to the evidence by PW1 at pages 19, 20 and also that of PW2 at pages 25 - 26 of the said record of appeal.

Furthermore, on a collective summary of the evidence by PW2, who said the appellant was named by one Michael Amudipe (who is now late and a member of the gang who robbed the PW1) coupled with the recovery of some of the stolen items sold to one Alhaji Dauda Mohammed by the appellant in Ibadan, which were released to PW1 on bond, and also the confessional statement of the appellant, Exhibit P5, it is obvious and compelling that identification parade was most unnecessary.

As rightly submitted by the respondent's counsel, the purported extrajudicial statement of PW1 to the police is not in evidence and as such cannot be capitalized and relied upon by the appellant, who had the opportunity of bringing it in at the trial court but refused to do so. The law is trite that the court cannot evaluate evidence not placed before it; the purported statement by PW1, which he seeks to bring in issue, is not before this court and cannot be looked into. See *Benson Esangbedo V. The State* (1989) 4 NWLR (Pt .113) 57. The alleged contradiction muted by the appellant has no basis in the circumstances. Therefore, the case of *Usufu V. State* (2007) 1 NWLR (Pt.1 020) 94 cited by the appellant's counsel is remarkably distinguishable from this case.

With the foregoing few words of mine and more particularly on the fuller reasoning advanced by my learned brother Chima Centus Nweze, JSC, I too dismiss this appeal as lacking in merit. The concurrent findings by the two lower courts are also confirmed by me.

Appeal is dismissed while the conviction and sentence of the appellant by the two lower courts are also affirmed. B

### **SANUSI JSC**

The judgment delivered by my learned brother Chima Centus Nweze JSC is agreeable to me. I adopt the reasons and conclusion reached therein that this appeal has want of merit and deserves to be dismissed. I too dismiss it for being devoid of merit. C

Below however, are few comments I will chip in to support the finding and conclusion reached by my learned brother in his lead judgment. The grouse of the accused/appellant was that PW1 the victim did not properly identify him when he (PW1) made his statement and therefore the prosecution should have conducted identification parade for the purpose of proper identification by the victim PW1, of his attackers. With due deference to the learned counsel for the appellant, identification parade is not the only way of establishing the identification of an accused person in relation to the offence charged. This is so because, where the witness had ample opportunity to identify the accused, a parade is not necessary. Recognition of an accused, in my humble opinion, may even be more reliable than identification. See *Eyisi v The State* (2001) 8 WRN 1 at 9/10. In this instant case the appellant's victim PW1, had this to say on page 247 of the Record:- D

*"There was no light in the vicinity but our generator was on. I was able to recognise the first accused person. As soon as I came out I was leaning in the balcony of the office when I saw the first accused person with a bag that was taken from my office with another smaller bag that belonged to one of the girls in the office which (sic) had just arrived from a journey. The first accused looked up and told me that (sic) I do no go in he would come back to deal with me with his gun. At that point, one Okada arrived, the Okada took the two of them away".* E

It is worthy of note, that the accused person now appellant, F

admitted fixed himself in the commission of the offence in his extra judicial statement Exhibit P5 as one of the robbers who robbed PW1. The law is trite, that where an accused person by his confessional statement, as in this instant case, has identified himself, there could not be any need for any further identification parade. See Archibong v State (2204) 1 NWLR (pt 855) 488. It is my candid view that a lot of pieces of evidence abound implicating the appellant to be one of the robbers who robbed PW1 and his identity is not in doubt at all. The trial court was therefore correct in convicting him of the charge. Similarly, the lower court was correct in affirming the conviction and sentence of the appellant by the trial court.

It is my view, that in the light of the two concurrent findings of the two courts below, this court has no justifiable reasons to interfere with or disturb the two findings of the two lower courts since it is not shown that the two findings are perverse or that any miscarriage of justice was occasioned against the present appellant.

In the result, with these few comments, and for the more detailed reasons advanced in the lead judgment of my learned brother Chima Centus Nweze JSC, I also see no merit in this appeal. It is hereby dismissed by me. I affirm the judgment of the lower court which had also affirmed the judgment of the trial court in convicting the accused/appellant as charged. Appeal is dismissed.

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