

SUPREME COURT OF NIGERIA
FRIDAY 20TH MAY, 2016. SC. 331/2012
CORAM:- S. GALADIMA, O. RHODES-VIVOUR,
N. S. NGWUTA, M. U. PETER-ODILI,
M. D. MUHAMMAD, JJSC

TUNDE ASIMI APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Conviction - Confession - Court may convict accused on his confessional statement alone - Once the confession is free and voluntary (H1)

CRIMINAL PROCEDURE - Inconsistency Rule - Application - It is applied where a witness is unable to explain the inconsistency - Arising from his previous statement and evidence in court (H2)

CRIMINAL PROCEDURE - Conviction - Retracted confession - Court can convict on such confession - Which accused not only resiled from - But also contradicted in his testimony before court (H3)

CRIMINAL LAW - Conspiracy - Criminal liability - Where several persons are involved in criminal act - In furtherance of a common intention of all of them - Each of them is liable for that act (H4)

CRIMINAL PROCEDURE - Evidence of co accused - Weight - Where evidence incriminating accused was from a co-accused - Court can rely on it provided accused persons were jointly tried (H5)

FACTS

Accused/appellant and one other were arraigned before the High Court of Kogi State for the offences of conspiracy and armed robbery contrary to section 97 (1) and 298 (c) of the Penal Code Law of Kogi State. They pleaded not guilty to the charge. Allegation against appellant is that between the months of July and October of 2007, while in company of the co-accused and some others (at large), carried out a series of robberies at residential premises in Ajaokuta,

Kogi state. They were armed with guns, sticks when they successfully robbed and disposed residents of their cars and personal effects. Appellant and his co-accused were later on arrested. Appellant made confessional statement to the Police which he retracted at trial.

A trial within trial was conducted at the end of which the appellant's statement was admitted as Exhibit 4. At the trial, prosecution/respondent called three witnesses in support of its case against appellant. Four documents were admitted as exhibits. Appellant gave evidence in his defence and called no witness in support. At the end of the trial, the learned Chief Judge Ajanah, CJ found appellant guilty as charged. He was therefore convicted of the offences of criminal conspiracy and armed robbery for which he was sentenced to two years and five years respectively. Appellant being dissatisfied appealed to the Abuja Division of the Court of Appeal which in turn affirmed the conviction and sentences handed on appellant by the trial Court. Appellant in his further quest for justice, has approached the Supreme Court on appeal against the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in relying on Exhibit "4" to conclude that the conviction of the Appellant on the facts and circumstances of the case by the trial Court is right.

2. Whether the lower Court was right in affirming the conviction of the Appellant by the trial Court even though there was no credible evidence to sustain it.

HELD (Unanimously dismissing the appeal per

RHODES-VIVOUR JSC)

CRIMINAL PROCEDURE - Conviction - Confession

1. 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. A confessional statement is thus the best evidence that the accused person committed the offence for which he is charged. A direct acknowledgment of guilt should be regarded as a confession. Exhibit 4 is the confessional statement of the Appellant. Therein he admitted to taking part in robbery operations with Okey Omonoseh and others at large.

It is long settled that the Court may convict an accused person on his confessional statement alone once the Court is satisfied that it is a free and voluntary confession of his guilt.

There can be no doubt after reading Exhibit 4 that it is a confessional statement made by the Appellant. It is a direct acknowledgment of guilt by the Appellant that he participated in a series of armed robberies with Okey Omonoseh and others at large. The Court of Appeal was right to affirm the judgment of the trial Court to rely on Exhibit 4. (p. 2583 B)

CRIMINAL PROCEDURE - Inconsistency Rule - Application

2. The long settled position of the law is that the inconsistency rule does not apply to an accused person.

The rule is applied when the witness is unable to explain the inconsistency arising from his previous statement and his evidence in Court. The rule does not apply to cases where an accused person confessional statement runs contrary to his testimony on oath in Court. (p. 2584 B/D)

CRIMINAL PROCEDURE - Conviction - Retracted confession

3. A trial Court can convict on the extra-judicial statement of the appellant which the appellant not only resiled from but also contradicted in his testimony on oath before the trial Court. Put in another way, a Court may convict an accused person (appellant) on his extra-judicial confession which is voluntary and true but inconsistent with his evidence.

A Court can convict on the retracted confessional statement of an accused person. The ends of justice would be met if there is general corroboration of the important incidents and not that a retracted confession should be corroborated in each material particular.

Once, an extra-judicial confession has been proved as in this case to have been made voluntarily and it is positive and unequivocal, amounting to an admission of guilt (such as the appellant's confessional statement, Exhibit 4) a Court can convict on it even if the appellant retracted or resiled from it at trial. Such an afterthought does not make the confession inadmissible. It is desirable but not mandatory that there is

general corroboration of the important incidents and not that a retracted confession should be corroborated in each material particular. (pp. 2584 B/E/2585 D)

CRIMINAL PROCEDURE - Conspiracy - Criminal liability

B 4. In view of the provisions of 79 supra, when several persons are involved in a criminal act in furtherance of a common intention of all of them, each of them is liable for that act as if it were done by him alone. All the three elements in Section 79 of the Penal Code are present, and they are:

C (a) There was common intention of the Appellant and his co-accused person to commit armed robbery;

(b) In furtherance of the armed robbery properties of the victims were stolen at gun point.

D (c) The robbery, stealing with violence satisfies the law and in the circumstances the prosecution proved its case beyond reasonable ground.

The evidence adduced by Okey Omonoseh, one of the Appellant's co-accused persons showed that they all had a

E common intention to commit armed robbery. It must be made clear under Section 79 supra that when the Court is satisfied that two or more persons had a common intention to prosecute an unlawful purpose and in furtherance of that unlawful purpose an offence is committed which was a probable consequence of the unlawful purpose each of them is deemed to

F have committed the offence. Evidence available, accepted by the learned trial judge and affirmed by the Court of Appeal reveals that the appellant, Okey Omonoseh and others at large

G while armed with offensive weapons within the months of July to October 2007 decided to commit a series of armed robberies and in the process of achieving their aim, the appellant and his co-conspirators still at large committed armed robbery. Both Courts below agreed on this finding of fact. By the

H clear provisions of Section 79 of the Penal Code, the appellant, Okey Omonoseh and those still at large participated in a series of armed robbery in Ajaokuta. To my mind, all the ingredients of the offence were proved beyond reasonable doubt.

(p. 2586 B/E)

CRIMINAL PROCEDURE - Evidence of co accused - Weight

5. Where evidence incriminating an accused person was from a co-accused the Court is at liberty to rely on it provided the accused person who gave the said evidence was tried with the other accused person. (p. 2586 E) B

NOTABLE POINT OF INTEREST

NGWUTA JSC

1. Appeal is not direct from High Court to Supreme Court C

On ground one of his notice of appeal to this Court, appellant questions the lower Court's opinion on the trial within trial by the trial Court. In my humble view, this is a direct appeal against the ruling of the trial Court.

The Supreme Court has no direct link with the High Court in the judicial process. The Court lacks jurisdiction to make an order that will have the effect of ignoring or by-passing the constitutional role of the Court of Appeal in the hierarchy of Court under the Constitution. (p. 2589 F) D

REPRESENTATION

J. A. Akubo with him, M.T. Audu, G.O. Omagbogu, Miss M. Abolo, D. I. Ugbede, Olaronke Famuyiwa and Miss Ngozi Okoh, for the Appellant

Mrs. R. A. Alfa, (DPP Kogi State) with her, H.E. Yusufu (DDPP Kogi State) and I. Idama (CLO), for the Respondent F

CASES REFERRED TO

Mohammed v. State (2001) 11 NWLR (pt. 1045) 303 G

Ogudo v. State (2011) 18 NWLR (pt. 1278) 1

Sule v. State (2009) 17 NWLR (pt. 1169) 33

Michael v. State (2008) 13 NWLR (pt. 1101) 383

Queen v. Itule (1961) 2 SCNLR 183

Akpan v. State (1992) 6 NWLR (pt. 248) 439 H

State v. Isali (2012) 7 SC (pt. iii) 93

Agwu v. State (1965) NMLR 18

Queen v. Ukpong (1961) 1 ANLR 25

Onubogu v. State (1974) 9 SC 1

Ikemson v. State (1989) 3 NWLR (pt. 110) 455

Asanya v. State (1991) 3 NWLR (pt. 180) 422

Egboghonome v. State (1993) 9 SCNJ 1

Aremu v. State (1984) 6 SC 85

Akinfe v. State (1988) 3 NWLR (pt. 85) 729

B

STATUTES REFERRED TO

Penal Code, ss. 79, 97(1), 298(c)

Evidence Act 2004, s. 27(5)

C Supreme Court Act Cap 515 LFN 2004, s. 2

LEAD JUDGMENT BY RHODES-VIVOURE JSC

Okey Omonoseh and Tunde Asimi were arraigned on an eight count charge which reads:

D COUNT 1

That you, Okey Omonoseh and Tunde Asimi, on or about 31st July 2007 at Maggi Restaurant, Ajaokuta steel Company in Ajaokuta Local Government Area within the Kogi State Judicial Division committed the offence of criminal conspiracy by doing an act to wit: you agreed to rob Mr. Aiyedun Kunle of his Sky blue coloured V Boot Mercedes Benz 300E with Registration No. AL 578 LND which is an illegal act and thereby committed an offence punishable under Section 97(1) of the Penal Code.

E

COUNT 2

That you, Okey Omonoseh and Tunde Asimi, on or about 24 July, 2007 at No 35 E Portakagi Bt.B Ajaokuta in Ajaokuta Local Government Area within the Kogi State Judicial Division committed the offence of criminal conspiracy by doing an act to wit: you agreed to rob Mr. Alabi Akeem's wife of vehicle documents, Nokia handset, digital Sony Camera, Sony video CD with remote control, a cutlery set, cloths and his room key which is an illegal act and thereby committed an offence punishable under Section 97 (1) of the Penal Code.

F

G

COUNT 3

That you, Okey Omonoseh and Tunde Asimi on or about 5 July, 2007 at 26 Kaduna Estate Ajaokuta Local Government Area within the Kogi State Judicial Division committed the offence of criminal conspiracy by doing an act to wit: you agreed to rob Mrs. Abigail Ibrahim of a DVD player with two speakers, Nokia Camera handsets,

H

Samsung Camera Handset, Panasonic Handset, six thousand naira cash and her OX-blood coloured Toyota Carina E, registration No. EJ 808 ABC Abuja which is an illegal act and thereby committed an offence punishable under Section 97 (1) of the Penal Code.

COUNT 4

That you, Okey Omonoseh and Tunde Asimi, on or about 31 B July, 2007 at Maggi Restaurant Ajaokuta Steel Company in Ajaokuta Local Government Area within the Kogi State Judicial Division committed the offence of Armed Robbery by doing an act to wit you robbed Mr. Aiyedun Kunle at gun point of his Sky blue coloured V- C Boot Mercedes Benz 300E with registration No. AL 578 LND and thereby committed an offence punishable under Section 298(c) of the Penal Code.

COUNT 5

That you, Okey Omonoseh and Tunde Asimi, on or about 24 D July, 2007 at No 35e, Portakagi Bt.B, Ajaokuta in Ajaokuta Local Government within the Kogi State Judicial Division committed the offence of armed robbery by doing an act to wit: you robbed Mr. Alabi's sister of vehicle documents, Nokia handset, digital sony camera, sony video CD with remote control, a cutlery set, cloths and his E room key and thereby committed an offence punishable under Section 298 (c) of the Penal Code.

COUNT 6

That you, Okey Omonoseh and Tunde Asimi, on or about 5 F July, 2007 at 268 Kaduna Estate, Ajaokuta in Ajaokuta Local Government Area within the Kogi State Judicial Division committed the offence of armed robbery by doing an act to wit: you agreed to rob Mrs. Abigail Ibrahim at gun point of a DVD player with two speakers, Nokia Camera handsets, Samsung Camera Handset, Panasonic G Handset, six thousand naira cash and her Ox-blood coloured Toyota Carina E, registration No. EJ 808 ABC Abuja and thereby committed an offence punishable under Section 298 (c) of the Penal Code.

COUNT 7

That you, Okey Omonoseh and Tunde Asimi, on or about 9 H October 2007 at RD E12 Flat 9A Kaduna Estate Township, Ajaokuta Local Government Area within the Kogi State Judicial Division committed the offence of criminal conspiracy by doing an act to wit: you agreed to rob Hajia H.O. Umar at gun point of a Saisho rechargeable

lantern, designer perfume (Guess), two packets of Knorr Maggi, three tins of lion curry, Nokia handsets (Nokia 70, Nokia 6060, Nokia 1100) Radio, Akai CD/DVD player and other items which is an illegal act and thereby committed an offence punishable under Section 97 (1) of the Penal Code.

B COUNT 8

That you, Okey Omonoseh and Tunde Asimi, on or about 9 October, 2007 at RD E21 Flat 9A. Kaduna Estate Township, Ajaokuta in Ajaokuta Local Government Area within the Kogi State judicial Division committed the offence of armed robbery by doing an act to wit: you robbed Hajia H.O. Umar at gun point of a saisho rechargeable lantern, designer perfume (Guess), two packets of Knorr Maggi, three tins of lion curry, Nokia handsets (Nokia 70, Nokia 6060, Nokia 1100) Radio, Akai CD/DVD player and other items and thereby committed an offence punishable under Sec. 298 (c) of the Penal Code.

Trial commenced on 9 February, 2009 with both accused persons entering not guilty pleas to the original charge sheet which contained six counts. The charge was subsequently amended with the addition of counts seven and eight. Again both accused persons pleaded not guilty to them. The state called three witnesses and closed its case. Four documents were admitted as exhibits. Both accused persons gave evidence in their defence, but did not call any witness.

In a Judgment delivered on 19 February, 2010 Ajanah CJ Kogi State in the concluding part of his judgment said:

F *“On the whole the two accused are hereby convicted of the offence of conspiracy and armed robbery under Section 97 (1) and 2988 (c) of the Penal Code as alleged against them in counts 1, 4, 7 and 8 of the amended charges while the 1st accused is found guilty of the offence of conspiracy and armed robbery as alleged against him under counts 3 and 6 of the head of charges and he is accordingly convicted.”*

H The Appellant, Tunde Asimi was the 2nd accused person at the trial Court. He was convicted on counts 1, 4, 7 and 8 of the amended charges. Dissatisfied with the judgment against him, he filed an appeal that was heard by the Court of Appeal Abuja Division.

The judgment of the trial Court was affirmed by the Court of Appeal when it reasoned that:

“In the instant case the learned trial judge tested the veracity of

the Appellants retracted confessional statement and the evidence adduced by prosecution witnesses and rightly concluded that the Appellant committed the robberies as alleged.”

On the above reasoning the Court of Appeal concluded its judgment as follows;

“The conviction of the Appellant on the facts and circumstances of the case by the trial Court is right and I find no reason to disturb same. The appeal is without merit, it is hereby dismissed.”

This appeal is against that judgment. In accordance with Rules of this Court briefs of argument were filed and exchanged. The Appellant’s brief filed on 2 July, 2013 was deemed duly filed and served on 12 March 2014, while the Respondent’s brief filed on 16 January, 2014 was deemed duly filed and served on 25 February, 2016.

Learned counsel for the Appellant J.A. Akubo Esq., formulated two issues for determination.

1. Whether the Court of Appeal was right in relying on Exhibit “4” to conclude that the conviction of the Appellant on the facts and circumstances of the case by the trial Court is right.

2. Whether the lower Court was right in affirming the conviction of the Appellant by the trial Court even though there was no credible evidence to sustain it.

On the other side of the fence learned counsel for the Respondent formulated a sole issue for determination. It is

1. Whether the lower Court was right in affirming the conviction of the Appellant by the trial Court.

After examining the issues formulated by both sides I am satisfied with the Appellants issues. They cover the sole issue of the Respondent. In view of this observation, the appeal would be decided on the Appellants issues which shall be taken together.

Briefs of argument were adopted by counsel when the appeal came up for hearing on 25 February, 2016.

The facts are

Between the months of July and October, 2007 the Appellant in the company of Okey Omonoseh and others still at large carried out a series of robberies at residential premises in Ajaokuta, Kogi state. They were armed with guns, sticks when they successfully robbed and disposed residents of their cars and personal effects.

The Appellant made confessional statement to the Police which he retracted at trial. A trial within trial was conducted at the end of which the Appellants statement was admitted as Exhibit 4.

The Appellant was convicted on his confessional statement. His conviction was affirmed by the Court of Appeal.

B Learned counsel for the Appellant observed that an accused person can be convicted only on his confessional statement once it is made voluntarily. Reliance was placed on S. 27 (5) of the Evidence Act 2004, Mohammed v State (2001) 11 NWLR (Pt. 1045) p. 303.

C He submitted that when a confessional statement is retracted as in the instant case the statement should be subjected to six tests to ascertain the truthfulness of it. He further submitted that for the conviction of the Appellant to be valid in law, Exhibit 4, the Appellants confessional statement must be tested or corroborated with evidence D of witnesses outside the confession, no matter how slight to make the confession probable that it is true. Reliance was placed on Ogudo v State (2011) 18 NWLR (Pt. 1278) p.1.

E Concluding learned counsel submitted that the judgment of the Court of Appeal ought to be set aside and the Appellant acquitted and discharged since the evidence led by the prosecution witnesses did not corroborate Exhibit 4.

F Learned counsel for the Respondent observed that the Court could convict on the Appellant's confessional statement, (Exhibit 4) even if the Appellant resiled from it. Reliance was placed on Sule v State (2009) 17 NWLR (Pt. 1169) p.33 Michael v State (2008) 13 NWLR (Pt. 1101) p. 383. He further observed that Exhibit 4 was clearly linked to the evidence adduced by PW1 and PW4 and the evidence of PW2 showed that some of the stolen property were re- G covered from the Appellant.

He urged this Court to dismiss the appeal and affirm the judgment of the Court of Appeal.

H I earlier on in this judgment said that in the trial Court Okey Omonoseh was the 1st accused person while the Appellant was the 2nd accused person. During trial both of them objected to the admissibility of their statements being admitted in evidence on the ground that their statements were not voluntarily made. After a hearing the learned trial judge admitted the 1st accused person's statement as exhibit 3 and the Appellants statement as Exhibit 4. There is no ap-

peal from the trial within trial in which the confessional statement of the Appellant was admitted as Exhibit 4. In the absence of an appeal the Ruling on the trial within trial is inviolate until set aside and in this case that Ruling would never be set aside since there is no appeal. In the circumstances the Ruling on the trial within trial is correct. The confessional statement of the Appellant was properly and correctly admitted in evidence as exhibit 4. B

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. A confessional statement is thus the best evidence that the accused person committed the offence for which he is charged. A direct acknowledgment of guilt should be regarded as a confession. Exhibit 4 is the confessional statement of the Appellant. Therein he admitted to taking part in robbery operations with Okey Omonoseh and others at large. C
D

It is long settled that the Court may convict an accused person on his confessional statement alone once the Court is satisfied that it is a free and voluntary confession of his guilt. See Queen v Itule (1961) 2 SCNLR p. 183, Akpan v State (1992) 6 NWLR (Pt. 248) p. 439, State v Isali & ors (2012) 7 SC (Pt. iii) p. 93. E

There can be no doubt after reading Exhibit 4 that it is a confessional statement made by the Appellant. It is a direct acknowledgment of guilt by the Appellant that he participated in a series of armed robberies with Okey Omonoseh and others at large. The Court of Appeal was right to affirm the judgment of the trial Court to rely on Exhibit 4. F

RETRACTED CONFESSIONAL STATEMENT EXHIBIT 4

On oath the Appellant said: G

“...I do not know anything about this case...”

That is to say the Appellant retracted or resiled from his confessional statement.

In Ogudo v. State (2011) 18 NWLR (Pt. 1278) p.1, I explained the application of the inconsistency rule when I said that: H

“A retracted confession is an extra-judicial statement which amounts to a confession but turns out to be inconsistent with testimony at the trial. The inconsistency rule deals with such a situation. It is that where a witness makes an extra-judicial statement which is

inconsistent with his testimony at the trial, such testimony is to be treated as unreliable while the statement is not regarded as evidence on which the Court can act. The rule developed in the interest of justice to resolve conflict between previous statement and later evidence for the prosecution or defence. The object is to ensure that the evidence relied on by the Court is credible. The party who retracts is always afforded an opportunity while in the witness box to explain the inconsistency...”

The long settled position of the law is that the inconsistency rule does not apply to an accused person. A trial Court can convict on the extra-judicial statement of the appellant which the appellant not only resiled from but also contradicted in his testimony on oath before the trial Court. Put in another way, a Court may convict an accused person (appellant) on his extra-judicial confession which is voluntary and true but inconsistent with his evidence. See *Agwu v. State* (1965) NMLR p. 18, *Queen v Ukpung* (1961) 1 ANLR p. 25 *Onubogu v. State* (1974) 9 SC p.1.

The rule is applied when the witness is unable to explain the inconsistency arising from his previous statement and his evidence in Court. The rule does not apply to cases where an accused person confessional statement runs contrary to his testimony on oath in Court.

A Court can convict on the retracted confessional statement of an accused person. The ends of justice would be met if there is general corroboration of the important incidents and not that a retracted confession should be corroborated in each material particular. See *Ikemson v State* (1989) 3 NWLR (Pt. 110) p. 455 *Asanya v State* (1991) 3 NWLR (Pt. 180) p. 422, *Egboghonome v State* (1993) 9 SCNJ p.1.

The Court of Appeal endorsed the findings of the trial Court as unassailable. The findings of the trial Court runs as follows:

“In the instant case, there is no doubt that robbery was committed in the houses of the PW3, PW4 and PW5 while the PW1 was robbed at a place in Ajaokuta called Maggi Restaurant. The PW1 has alleged and given vivid evidence on how his Mercedes 300 E was taken from him at gun point. The PW2 gave further evidence about the investigation carried out and how the statement of the 1st ac-

cused led to the recovery of the said vehicle which was later handed over to the PW1. The 1st accused in his statement gave a vivid description of how the robbery was committed and the role he played in it. The 2nd accused also gave a vivid description how of the robbery was committed on PW1 and the part he played, the said statements which were independently made corroborated each other; I am therefore convinced that with regards to conspiracy as alleged in charges 1 and 7 that the prosecution has proved those charges beyond reasonable doubt. Similarly, the same evidence shows that in pursuance of the said conspiracy act of armed robbery was committed by the 2 accused persons on the PW1 and PW4. In a case of robbery, the prosecution is required to prove that there was robbery or series of robbery and that each of the robbery was armed robbery and that the accused committed the said act. All these elements are present in the confessional statement of the two accused persons with regards to the robberies committed on the PW1 and PW4..."

Once, an extra-judicial confession has been proved as in this case to have been made voluntarily and it is positive and unequivocal, amounting to an admission of guilt (such as the appellant's confessional statement, Exhibit 4) a Court can convict on it even if the appellant retracted or resiled from it at trial. Such an afterthought does not make the confession inadmissible. It is desirable but not mandatory that there is general corroboration of the important incidents and not that a retracted confession should be corroborated in each material particular. See *Egboghonome v State* (1993) 7 NWLR (Pt. 306) p. 383, *Aremu v State* (1984) 6 SC p. 85, *Akinfe v State* (1988) 3 NWLR (Pt. 85) p. 729, *Ikemson v State* (1989) 3 NWLR (Pt. 110) p. 455, *Asanya v State* (1991) 3 NWLR (Pt. 180) p. 422.

The confessional statement of the appellant, Exhibit 4 is a free and voluntary confession by the appellant in view of the fact that a trial within trial was conducted in which it was admitted as an Exhibit and there was no appeal from that decision. A trial Court is at liberty to convict solely on Exhibit 4. The fact that the appellant resiled or retracted from Exhibit 4 at trial makes no difference. A trial Court can convict on a retracted confessional statement.

The fact that a stolen item to wit: Mercedes Benz 300E was recovered is good corroboration that Exhibit 4 is true. Both Courts

below were correct in convicting the appellant as one of the armed robbers. Section 79 of the Penal Code states that:

“When a criminal act is done by several persons in furtherance of a common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

B In view of the provisions of 79 supra, when several persons are involved in a criminal act in furtherance of a common intention of all of them, each of them is liable for that act as if it were done by him alone. All the three elements in Section 79 of the Penal Code are present, and they are:

C (a) There was common intention of the Appellant and his co-accused person to commit armed robbery;

(b) In furtherance of the armed robbery properties of the victims were stolen at gun point.

D (c) The robbery, stealing with violence satisfies the law and in the circumstances the prosecution proved its case beyond reasonable ground. See *Fulani v Bornu N.A* (1966) 2 SCNLR p. 274 *Michael v State* (2008) 13 NWLR (Pt. 1104) p. 361, *Atanyi v Queen* (1955) 15 WACA 34, *Idahosa v Queen* (1965) NMLR 85.

E Where evidence incriminating an accused person was from a co-accused the Court is at liberty to rely on it provided the accused person who gave the said evidence was tried with the other accused person. The evidence adduced by Okey Omonoseh, one of the Appellant’s co-accused persons showed

F that they all had a common intention to commit armed robbery. It must be made clear under Section 79 supra that when the Court is satisfied that two or more persons had a common intention to prosecute an unlawful purpose and in furtherance

G of that unlawful purpose an offence is committed which was a probable consequence of the unlawful purpose each of them is deemed to have committed the offence. Evidence available, accepted by the learned trial judge and affirmed by the Court of Appeal reveals that the appellant, Okey Omonoseh and

H others at large while armed with offensive weapons within the months of July to October 2007 decided to commit a series of armed robberies and in the process of achieving their aim, the appellant and his co-conspirators still at large committed armed robbery. Both Courts below agreed on this finding of

fact. By the clear provisions of Section 79 of the Penal Code, the appellant, Okey Omonoseh and those still at large participated in a series of armed robbery in Ajaokuta. To my mind, all the ingredients of the offence were proved beyond reasonable doubt.

In conclusion, the fact that there is credible evidence outside the appellants confessional statement (Exhibit 4) of the circumstances of this case which make it probable that the confession is indeed true, and that the facts of this case fall conveniently within the provisions of Section 79 of the Penal Code, clearly shows the appeal to have no redeeming features. In the end the appeal is dismissed.

GALADIMA JSC

I have been obliged a copy of the lead judgment of my learned brother OLABODE RHODES-VIVOUR, J.S.C. just delivered. I am in entire agreement with all the reasoning leading to the conclusion that this appeal is lacking in merit and ought to be dismissed.

The Appellant and one other person were arraigned on an eight counts charge, tried, convicted and sentenced to death for the offence of conspiracy and armed robbery under Section 97 (1) and 298 (c) of the Penal Code Law of Kogi State. The judgment of the Learned State Chief Judge was affirmed by the Court of Appeal. The Court found as follows:-

“In the instant case the learned trial Judge tested the veracity of the Appellant’s retracted confessional statement and the evidence adduced by prosecution witnesses and rightly concluded that the Appellant committed the robberies as alleged.”

Hence the Court below further concluded thus:-

“The conviction of the Appellant on the facts and circumstances of the case by the trial Court is right and I find no reason to disturb same. The Appeal is without merit, it is hereby dismissed.”

Indeed, I cannot disturb the concurrent findings of the two Courts below. The conviction of the Appellant herein was firmly grounded on the facts and circumstances of the case at the trial Court.

The Appellant and one Okey Omonoseh and others at large were armed with guns, sticks when they robbed some residents in Ajaokuta, town of Kogi State and dispossessed them of their cars and

personal effects. The Appellant volunteered a statement to the police which he later retracted at the trial. However, when a trial within trial was conducted the learned trial Chief Judge admitted the statement as Exhibit 4. It is instructive to note that the Appellant was convicted based on his confessional statement.

B Once the trial Court has duly tested the veracity of the Appellant's retracted confessional statement, he can be convicted on it because his confession is an admission suggesting that he committed the crime. See Section 27 (5) Evidence Act 2004 and *STATE v ISALI & ORS* (2012) 7 SC (PT. III) P. 93; *SULE v THE STATE* (2009) 17 NWLR (PT. 1169) P. 33; *MICHAEL v STATE* (2008) 13 NWLR (PT. 1101) P. 383; *QUEEN v ITULE* (1961) 2 SCNLR P. 183.

C Exhibit 4 is a direct admission of guilt by the Appellant herein, that he and others committed the crime. He could be convicted even D if he resiles from making the confessional statement.

Furthermore, Exhibit 4 was closely linked to the evidence ad-
duced by PW1, PW2 and PW4. Evidence of PW2 showed clearly
that some of the items carted away during the robbery were recov-
ered from the Appellant.

E Testimonies of the prosecution witnesses serve as sufficient cor-
roboration. Their statements which were made independently cor-
roborate each other: *ASANYA v STATE* (1991) 3 NWLR (Pt. 780)
422; *IKEMSON v STATE* (1989) 3 NWLR (Pt. 110) 455.

F In sum, there is credible evidence outside the confessional state-
ment of the Appellant, which makes it probable that he truly admit-
ted his guilt.

The findings of the two lower Courts are unassailable, they
cannot be disturbed. In view of the forgoing, I too dismiss this appeal
G as lacking in merit.

NGWUTA JSC

H I have read in its draft form the lead judgment just delivered
by my learned brother Olabode Rhodes Vivour, JSC. I agree with,
and adopt, the lucid reasoning leading to the conclusion that the
appeal lacks merit and liable to be dismissed.

I wish to comment on a trial Court's decision/ruling in a trial
within trial to determine the voluntariness vel non of a statement

allegedly made to the Police by an accused.

The end result of a trial within trial is the decision or order to admit or reject the statement. Section 2 of the Supreme Court Act Cap 515 LFN 2004 defines judgment to include decision or order. It follows that the end product of a trial within trial is a judgment in terms of Section 2 of the Act. It is appealable. It is an interlocutory decision and appeal against same may be included the appeal against the trial Court's decision in the matter. See *Oke v. Nwaogbuinyinya* (2001) 1 SC (Pt.1) 22. B

Did the appellant appeal against the decision of the trial Court, in the trial within trial that the statement, Exhibit 4, was voluntarily made by the appellant? In the appellant's three grounds of appeal to the Court below, the only reference to Exhibit 4 is made in ground three which is reproduced here below: C

"GROUND THREE:

The lower Court erred in law in admitting the extrajudicial statement of the appellant (i.e. Exhibit 4) to the Police as a confessional statement hence occasioned a miscarriage of justice." D

In the particulars No.2 it was stated that:

"The lower Court said in its ruling on trial within trial that Exhibit 4 was voluntarily made by the appellant." E

The above particular, based on the trial Court's finding that Exhibit 4 was voluntarily made by the appellant is at variance with the ground of appeal which is a complaint that the said Exhibit 4 was admitted as a confessional statement. It therefore follows that the appellant did not appeal against the, trial Court's ruling in the trial within trial that he made Exhibit 4 voluntarily. F

On ground one of his notice of appeal to this Court, appellant questions the lower Court's opinion on the trial within trial by the trial Court. In my humble view, this is a direct appeal against the ruling of the trial Court.

The Supreme Court has no direct link with the High Court in the judicial process. The Court lacks jurisdiction to make an order that will have the effect of ignoring or by-passing the constitutional role of the Court of Appeal in the hierarchy of Court under the Constitution. See *Akinpelu v. Adegboye* (2008) 4-5 SC (Pt. 11) 75. H

For the above and the fuller reasons in the lead judgment I also dismiss the appeal for lack of merit.

PETER-ODILI JSC

I am in total agreement with the judgment just delivered by my learned brother, Olabode Rhodes-Vivour and in support of the reasoning I shall make some comments.

B The appellant with one other were arraigned at the High Court of Kogi State per Nasiru Ajanah C.J. The appellant was convicted of the offences of criminal conspiracy and armed robbery for which he was sentenced to two years and five years respectively. The appellant being dissatisfied appealed to the Abuja Division of the Court of Appeal which in turn affirmed the conviction and sentences, thus eliciting a further grievance of the appellant who has come before this Court on appeal.

D The background facts are well set out in the lead judgment and so there is no need to have them repeated.

On the 25th March, 2016 J. A. Akubo, Esq. of counsel adopted the Brief of Argument of the appellant filed on the 2/7/2013 and deemed filed on 12/3/14. He framed two issues for determination which are as follows:

E 1. Whether the Court of Appeal was right in relying on Exhibit “4” to conclude that the conviction of the appellant on the facts and circumstances of the case by the trial Court is right, (Grounds 2 and 3 of the Amended Notice of Appeal).

F 2. Whether the Lower Court was right in affirming the conviction of the appellant by the trial Court even though there was no credible evidence to sustain it. (Ground one of the Amended Notice of Appeal).

G The learned DPP of Kogi State, Mrs. R. A, Alfa adopted the Brief of Argument of the respondent filed on the 16/1/2012 and deemed filed on 25/2/2016 and which Brief had been settled by Iye A, Idana (Miss) Chief Legal Officer of the Ministry of Justice, Kogi State.

She crafted a single issue for determination, viz:

H Whether the Lower Court was right in affirming the conviction of the appellant by the trial Court, (Grounds 1, 2 and 3)

This sole issue as drafted by the respondent seems to me complete to be utilized in answer to the questions that have arisen in this appeal and so I shall make use of it. That is if the Court of Appeal was

correct in its affirmation of the conviction and sentences meted out by the trial Court.

Mr. Akubo of counsel for the appellant contended that the decision of the lower Court was not supported by the record as none of the victims of the robberies could identify the appellant as one of the robbers and so all the Court was left with was the confessional statement of the appellant which was retracted by him, and the statement not meeting the six way test could not be used to ground the conviction. Also that the confessional statement had nothing corroborating it. That this is one of the exceptional circumstances in which this Court should interfere with concurrent findings of the two lower Courts. He cited *Action Congress of Nigeria v Sule Lamido & Ors* (2012) 8 NWLR (Pt. 1303) 560 at 594; *Olatinwo Nurudeen Bright v The State* (2012) 8 NWLR (Pt. 1302) 297 at 323 - 324 etc.

For the appellant was further submitted that the failure of the trial Court to evaluate Exhibit "4", the extra-judicial statement of the appellant with other evidence of the prosecution witnesses is a clear violation of the principles of law on the need for corroboration, Also that Exhibit "4" alone in the face of the peculiar circumstances of this case particularly the evidence of PW1 - PW5 showed a lack of linkage between the appellant and the commission of the offences of conspiracy and armed robbery. Again to be said is that Exhibit 3, confessional statement of co-accused was not read and adopted by the appellant, none of the exhibits were recovered from the appellant and so it was unsafe to convict the appellant on it without caution.

Learned counsel stated on for the appellant that it was wrong to convict the appellant without credible evidence proving the essential elements of the offences of criminal conspiracy and armed robbery under Section 97(1) and 298 (c) the Penal Code respectively. That there was no credible and adequate evidence to prove that there was agreement between two or more persons to do an illegal act or a legal act by legal means. He referred to *Enesi Lukman Adbullahi v The State* (2008) 17 NWLR (Pt. 1115) 203 at 221; *Usman Kaza v The State* (2008) 7 NWLR (pt. 1085) 125 at 154.

That the prosecution failed to prove the essential ingredients of the offence beyond reasonable doubt. The learned counsel cited *Bosin v The State* (2005) 2 NWLR (Pt. 998) 465 at 469; *Adeniyi Adekoya v The State* (2012) 9 NWLR (Pt. 1306) 539 at 566; Section

138 (1) of the Evidence Act, 2004 LFN now Section 135 (1) of the Evidence Act 2011 as amended.

Learned counsel for the respondent, Mrs. Alfa submitted that the findings of the lower Court are supported by evidence and there is no miscarriage of justice and the case against the appellant was proved beyond reasonable doubt. That the trial Court was correct to have relied on Exhibits “4” and “3”, the confessional statements of the appellant and co-accused respectively. That the statements became part of the evidence of the prosecution upon the Ruling after a trial within trial on the voluntariness of the statements and they were such as on their own alone a conviction could be secured. She cited *Sule v The State* (2009) 17 NWLR (Pt. 1169) 33 at 60; *Michael v The State* (2008) 13 NWLR (Pt. 1104) 383.

That in spite of the strength of the confessional statement the trial Court found and stated some pieces of evidence linking Exhibit 4 to appellant’s commission of the offences.

The long and short of the grouse of the appellant is that it is unsafe in law to convict the appellant solely on exhibit. ‘4”, the confessional statement of the appellant without any evidence from the prosecution witnesses to corroborate it in view of the particular circumstances in this case and that the case of the prosecution against the appellant was not proved beyond reasonable doubt as required by law.

Respondent counters the above assertion of the appellant contending that there was no miscarriage of justice and the case against the appellant was proved beyond reasonable doubt.

In the said confessional statement of the appellant, Exhibit 4, he described in detail the activities of his co-accused and what roles each played. Also that the other two accused carried guns while he had a stick in the course of the robbery operation, in such a way that there was synergy between what the accused person did and the testimonies thereof by the PW1 and PW4 at the trial Court thus it can be seen that there was a linkage, The evidence of PW2 showed that some of the robbed properties including some electronics were recovered from the appellant.

The appellant also took exception to the utilization of Exhibit 3, the confessional statement of the co-accused which contents were corroborated by the evidence of PW5 who confirmed that the Toyota

Carina E was stolen from his house and the PW2 stated how they recovered the said Toyota based on the information of the 1st accused who made Exhibit 3.

Of note is that both the 1st accused and the 2nd accused/now appellant contested the voluntariness of these two extra-judicial statements, Exhibit 3 and 4 respectively and the trial after a trial within trial had difficulty in dispatching the objection of the accused persons to the voluntariness of the statements holding that the confessions were indeed voluntarily made by two accused and proceeded to admit them in evidence as Exhibits 3 and 4 respectively since the provisions of Section 28 of the Evidence Act, 2011 were complied with. The concerns of the appellant over the use of Exhibit 3 by the trial Court and its affirmation by the Court below should be rested since the accused persons were tried together and their activities in the course of the transactions were linked and so formed part of the evidence of the prosecution. Indeed there was strength embedded in the confessional statement of the appellant on which the Court of first instance could found a conviction alone in spite of the later retraction of that statement by the accused/appellant. I rely on *Sule v State* (2009) 17 NWLR (Pt. 1169) 33 at 69; *Michael v State* (2008) 13 NWLR (Pt. 1104) 383.

It needs be stated that though the confessional statement, Exhibit 4 on its very one alone could be used to ground a conviction but there was a surfeit of evidence like the recovered properties and the evidence of PW1, PW2 and P4 from which corroborative evidence would be derived and so one cannot but go along what the lower Courts found as those findings are unassailable and there is no basis to depart from them or upset them.

From the foregoing and the well considered reasoning in the lead judgment I find this appeal unmeritorious and I dismiss it. I abide by the consequential orders as made.

MUHAMMAD JSC

I read in draft the lead judgment of my learned brother Olabode Rhodes-Vivour J.S.C. just delivered. I entirely agree with the reasoning leading to the conclusion the lead judgment that the appeal is bereft of any merit. I imbibe the reasons contained in the lead judg-

H

ment some of which, purely for the sake of emphasis, I shall restate herein under, dismissing the appeal.

The appellant and one other, Okay Omonoseh were tried and convicted for four out of the eight count charge of conspiracy and robbery by the trial Kogi State High Court presided by Ajanah C.J.

B The judgment of the trial Court was delivered on 19th February 2010. The dismissal of the appellant's appeal by the Court of Appeal informs his instant appeal to this Court. It is argued in the appellant's brief that the lower Court is wrong to have relied on Exhibit "4" in affirming the trial Court's conviction of the appellant. It is instructive

C to note that learned appellant/s counsel realized that an accused person can be convicted on his voluntary confessional statement. The confessional statement, it is argued, must, however, be tested against the background of other facts to show that the statement probable.

D Relying inter-alia on Mohammed V. State (2001) 11 NWLR (Pt 1045) 303 and Ogudo V. State (2011) 18 NWLR (Pt 1278) 1, learned appellant's counsel urges that their lone issue for the determination of the appeal contained in the appellant's brief of argument be resolved against the respondent and the appeal allowed.

E Learned respondent's counsel insists that notwithstanding that an accused person had resiled from his confessional statement, once the statement shown to be voluntary, he still can be convicted on the extra judicial statement. Outside Exhibit "4", appellant's voluntary

F confessional statement, it is further submitted, the evidence of PW1 establishing the recovery of some of the items carted away by the appellant and his gang from their victims settles whatever quarrel the appellant's lodges against the use of Exhibit "4". Learned respondent's counsel cites and commends the decisions in Sule v. State (2009) 17

G NWLR (Pt 1169) 33 and Michael V. State (2008) 13 NWLR (Pt 1101) 383. He seeks the dismissal of the unmeritorious appeal.

One cannot agree more with learned respondent's counsel. It has long been settled that a trial Court's conviction of an accused solely on the latter's voluntary confessional statement that is clear,

H direct and positive will be sustained on appeal. The appellant's retraction from the said statement constitutes no threat to a conviction founded on the clear, direct and positive confessional statement. The uncontroverted evidence of PW1, PW2 and PW4, in the case at hand, which shows the recovery of some of the items the appellant and his

co-travelers in crime robbed their victims takes the bottom off the appellant as to the unreliability of his extra-judicial statements Exhibit “4”.

Exhibit 4, it must be noted, was admitted in evidence after the conduct of a trial-within-trial. On perusal, it clearly suggests that the appellant, its maker, had in fact participated in the series of robberies he along with others were convicted for which conviction the lower Court affirmed. Both Courts below, see Ikemson V. State (1989) 3 NWLR (Pt 110) 455 and Egboghonome V. State (1993) 9 SCNJ 1, have rightly relied on Exhibit 4 as further enhanced by the evidence of PW1, PW2 and PW4 in accepting the guilt of the appellant’s as established beyond reasonable doubt. The appellant, having failed to establish that the concurrent decisions of the two Courts are perverse, accordingly fails.

It is for the foregoing and more so the fuller reasons stated in the lead judgment of my learned brother Rhodes-Vivour J.S.C. that I also dismiss the appeal. The decision of the trial Court convicting the appellant for counts 1, 4, 7 and 8 of the eight count amended charge is hereby accordingly further affirmed.

E

F

G

H