

SUPREME COURT OF NIGERIA
FRIDAY 24TH JUNE, 2016. SC. 441/2011
CORAM:- M. MOHAMMED CJN, S. GALADIMA, C. B.
OGUNBIYI, K. M. O. KEKERE-EKUN, J. I. OKORO, JJSC

CHARLES KINGSLEY JOE ISONG APPELLANT
V.
THE STATE RESPONDENT

EVIDENCE - Confession - Validity - Once accused makes statement under caution - Admitting commission of the offence charged - The statement becomes confessional (H1)

CRIMINAL PROCEDURE - Trial within trial - Conduct of - It is conducted where accused objects to voluntariness of confession - And not where he denies making statement (H2)

EVIDENCE - Confession - Contradiction - Where accused gives evidence contrary to his earlier statement to police - Such evidence should be disregarded as unreliable (H3)

ARMED ROBBERY - Identity of accused - Where there is positive identification of accused at the crime scene - Which is believed by trial court - Appellate court should not interfere (H4)

FACTS

Prosecution/respondent filed a three count charge of armed robbery against accused/appellant and three others, at the High Court of Akwa-Ibom State Eket. Respondent's case is that on or about the 22nd day of June 2001, appellant and his gang, armed with offensive weapons robbed the residents of the premises situate at No.1 Bassey Ekanem Street, Eket, Akwa Ibom State and dispossessed the residents therein of the various properties and sums of money. At the trial, five witnesses testified for respondent, while appellant and his co-accused testified in their defence.

Appellant denied being involved in the armed robbery. He stated that he was not at the scene of the robbery let alone committed the offence alleged. He equally denied making any voluntary

confessional statement to the police. He rather stated that his purported statement was obtained after he was tortured, mercilessly beaten and shot on his legs. At the end of the trial, the court convicted and sentenced appellant to death. Dissatisfied, appellant appealed to the Court of Appeal Calabar Division. The Court in a majority decision of 2 - 1, dismissed the appeal and affirmed the conviction and death sentence imposed by the trial Court. Not yet satisfied, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(a) Whether the Justices of the Court of Appeal were right in law to have relied on the confessional statement of the Appellant in affirming his conviction and sentence by the trial Court when same was never admitted to test as required by law?”

(b) Whether the Justices of the Court of Appeal were right in law in affirming the conviction and sentence of the Appellant by the trial Court in spite of the material discrepancies that trailed the identity of the Appellant and the identification parade conducted by the police?”

HELD (Unanimously dismissing the appeal per GALADIMA JSC)

EVIDENCE - Confession - Validity

1. On the issue of admissibility of the statements of the Appellant the learned trial Judge ruled that there was no substance in the objection and accordingly admitted the statements. Again, the Court below in considering the voluntariness of the Exhibits concluded that they were freely and voluntarily made. That the statements were direct and positive enough to sustain a finding of guilt, regardless of the fact that the Appellant sought to resile or retract them altogether. I cannot fault this finding. Once an accused person makes a statement under caution, saying or admitting the charge or creating the impression that he committed the offence charged, the statement becomes confessional.

Nobody will dispute the wisdom behind the “Judge’s Rules” made by the English judges for the guidance of English Police officer to ensure that confessional statements are vol-

untary. It should not be stretched too far. Confirmation before a superior police officer of a statement made by the accused that he was the one who committed the crime may be dispensed with and the confessional statement may be admitted if there is no suspicion of such statement not being voluntary. (p. 2836 D)

CRIMINAL PROCEDURE - Trial within trial - Conduct of

2. Citing the cases of Richard Igago v. State (Supra) and David Madjemu v. State (Supra) 349, in the Appellant's brief, learned counsel submitted that the trial judge ought to have conducted a trial within trial to determine whether the Appellant's statements Exhibits 2 and 10 were made voluntarily, since he had denied making them. I agree with the learned counsel for the Respondent that the Appellant's counsel had really misunderstood the fundamental requirement in criminal trial. A trial within trial is required in law where the objection to admissibility of a statement is based on the ground that it was not made voluntarily. In that case there has to be a trial within trial to determine the question of voluntariness. It is only where this is proved by the prosecution that the statement is admitted in evidence.

Indeed, it is settled law that where a confession is objected to not as in the instant case where no objection was raised as to the voluntariness of these extra judicial statements - a judge sitting alone must hear and determine its admissibility. Where, however, an accused is merely disputing the correctness of the contents of the written statement or that he made no statement at all, it is not necessary to have a trial-within trial. (p. 2837 A)

EVIDENCE - Confession - Contradiction

3. Learned Counsel for the Appellant has also contended that the Appellant's evidence on oath before the trial Court was at variance with his extra judicial statements (Exhibits 2 and 10) made at the police station. Indeed, it is settled law that where an accused person gives evidence that is inconsistent with the earlier statement made by him to the police, such evidence

should be and ought to be taken with a pinch of salt if not disregarded as unreliable. Appellant's contention here is not that, there were such inconsistencies in his statement which created some doubt in the mind of the trial Court. Having not shown such inconsistencies the Appellant is not entitled to
B benefit there from. (p. 2837 H)

ARMED ROBBERY - Identity of accused

4. What is clear in this case is that the identity of the Appellant as given by the PW1, PW3 and PW4 in their evidence at the trial Court was never in doubt. They clearly identified the Appellant as the one who was a party to the commission of the armed robbery.

Where there is visual and positive identification of the accused at the scene of the crime which is believed by the trial judge, the Appellate Court should not disturb such finding. Indeed, that is the law. I cannot disturb concurrent findings of the two Courts below on this issue. (pp. 2839 F/2840 E)

E REPRESENTATION

Adedoyin Rhodes-Vivour (Mrs.) with him, Olusegun Idowu Esq., for Appellant

Essien E. Udom Esq. with him, Naomi Bassey (Miss), for Respondent

F CASES REFERRED TO

R. v. Skyes (1913) CAR 233

Dawa v. State (1980) 8-10 SC 236

Ghian v. State (2005) 1 NCC 458

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

State v. Emine (1992) 7 NWLR (pt. 256) 658

Igago v. State (1999) 14 NWLR (pt. 637) 1

Madjemu v. State (2001) 9 NWLR (pt. 718) 34

Sule v. State (2009) 17 NWLR (pt. 1169) 60

H Kasa v. State (1994) 6 SCNJ

Akinfe v. State (1988) 7 SC (pt. II) 131

Ehot v. State (1993) 5 SCNJ 76

Nwagbomu v. State (1994) 2 SCNJ 2

Akpa v. State (2008) 4 - 5. SC (pt. II) 1

Evbuomvan v. C.O.P. (1961) WNLR 257

Ozaki v. State (1990) 1 NWLR (pt. 124) 92

STATUTES REFERRED TO

Robbery & Fire Arms (Special Provisions) Act Cap. 398 vol. 22 LFN 1990, s. 1 (2)(a) B

Evidence Act Cap 112 LFN 2004, s. 27(3)

LEAD JUDGMENT BY GALADIMA JSC

This appeal is against the judgment of the Court of Appeal Calabar Division, delivered on Thursday, the 25th day of August, 2011. The Court affirmed the conviction and sentence of the Appellant herein, who was arraigned along with three other persons by the Akwa Ibom State High Court sitting at Eket, on 3 count charge of armed robbery, on the 27th day of July, 2006. C

The background facts which give rise to this appeal can be summarized as follows: The Appellant was arraigned and charged along with three others, namely Victor Essien Victor, Ukeme Sunday Usen and Monday Akpan Sunday, before the Akwa Ibom State High Court on three-count charge of armed robbery contrary to Section 1 (2) (a) of the Robbery and Fire Arms (Special Provisions) Act Cap.398, Vol.22, Laws of the Federation of Nigeria, 1990. D

The case for the prosecution was that on or about the 22nd day of June 2001, the Appellant herein and his gang, armed with offensive weapons robbed the residents of the premises situate at No.1 Bassey Ekanem Street, Eket, Akwa Ibom State and dispossessed the residents therein of the various properties and sums of money. The prosecution in proof of its case called five witnesses, while the Appellant and his co-accused testified in their own defence. E

The case for the Appellant, who denied the three-count charge, was that he was neither at the scene of the robbery let alone committed the offence alleged. He was dissatisfied with the testimony of PW3 who never stated in his two statements to the police that he identified him (the Appellant) but came with the evidence for the Respondent at the trial. The Appellant also denied making any voluntary confessional statement, as it was obtained after he was tortured, mercilessly beaten, and shot on his legs. F

However at the conclusion of the trial the learned trial judge in G

his judgment delivered on 27th day of July, 2006 held that the prosecutor had proved its case beyond reasonable doubt and there after convicted and sentenced the Appellant and the 1st accused person, but acquitted the 3rd and 4th accused persons.

Dissatisfied with the judgment of the trial Court, the Appellant B appealed to the Court of Appeal. The Court in a majority decision of 2 - 1, delivered on the 25th day of August, 2011 dismissed the appeal of the Appellant and affirmed his conviction and sentence by the trial Court.

Aggrieved by the decision of the Court below, Appellant has C further appealed to this Court filing his notice of appeal on the 23rd day of January, 2012 which contained three grounds of appeal.

From the grounds of appeal A. A. ADEDEJI of Counsel who settled the brief on behalf of the Appellant formulated two issues for D determination as follows:

“(a) Whether the Justices of the Court of Appeal were right in law to have relied on the confessional statement of the Appellant in affirming his conviction and sentence by the trial Court when same was never admitted to test as required by law? Ground one.

E *(b) Whether the Justices of the Court of Appeal were right in law in affirming the conviction and sentence of the Appellant by the trial Court in spite of the material discrepancies that trailed the identity of the Appellant and the identification parade conducted by the police? Ground Two”*

F In the Respondent’s brief of argument settled by its counsel, ESSIEN E. UDOM Esq., and filed on 22/3/2012, the two issues formulated by the Appellant were adopted.

G On the 7th day of April 2016, this Appeal was heard. Learned counsel for the Appellant, ADEDOYIN RHODES-VIVOUR (MRS.), leading Olusegun Idowu Esq., identified, adopted and relied on the brief of argument of the Appellant. She urged us to allow this appeal whilst, the learned counsel for the Respondent, ESSIEN E. UDOM leading Naomi Bassey (Miss) having identified the Respondent’s brief H of argument, adopted and relied on same. He urged this Court to dismiss the appeal.

ISSUE ONE:

Arguing the appeal on the first issue, learned counsel for the Appeal, contended that the issue questions the rationale and legality

of the reliance on the Appellant's confessional statements Exhibits 2 and 10, by the Court below, without more in affirming the conviction and sentence of the Appellant by the trial Court. That there was nowhere in the record where it was established or shown that the trial Court admitted the Appellant's extra judicial statements in compliance with the tests laid down in *R v. SKYES* (1913) CAR 233 and as approved in a plethora of cases of this Court, particularly in *JONADAWA & ANOR v. THE STATE* (1980) 8-10 SC 236 at 257. He further contended that the Appellant's evidence on oath before his trial was at variance with his extra judicial statements earlier made at the police station. This was in spite of the fact that it was retracted at the trial by the Appellant. Learned Counsel, submitted therefore that if the learned trial judge had subjected the Appellant's confessional statements to test, as required by law, he would have found, as a fact, that the Appellant's oral testimony in Court was inconsistent with his extra judicial statements made to the police. It is urged, in the circumstance, relying on the authority of *AIGUO BARUE GHIAN v. THE STATE* (2005) 1 NCC 458 at 472, that the oral evidence made at the trial should be disregarded as unreliable and the extra judicial statements should also be ignored.

Learned Counsel for Appellant has also contended that since Appellant has stated that he did not make Exhibits 2 and 10 voluntarily, the trial Court had a duty to conduct a trial within trial. This not having been done the admission and reliance on the said Exhibits to convict Appellant has occasioned a miscarriage of justice. Reliance was placed on the cases of *ASANYA v. STATE* (1991) 3 NWLR (Pt.180) 422. *STATE v. EMINE* (1992) 7 NWLR (Pt.256) 658.

On this issue, learned counsel for the Respondent, Essien E, Udom Esq., submitted in his brief that the argument of the Appellant that the Court below had relied exclusively on the Appellant's confessional statements, Exhibits 2 and 10, in affirming the conviction and sentence of the Appellant, was predicated on erroneous assumptions. That the Court below had painstakingly considered the totality of evidence, and findings of the trial Court before affirming the conviction and sentence of the Appellant.

Making references to some passages in the lead judgment of the Lower Court particularly pages, 175, 176 of the record, learned counsel submitted that court did not merely rely on the confessional

statements of the Appellant statements of the Appellants (Exhibits 2 and 10) to affirm his conviction and sentence, but had reviewed the totality of the findings of the trial Court. It is further contended that the summary of the findings of the trial Court which formed the basis of the conviction and sentence of Appellant can be found at pp.109
 B and 112 of the record of appeal. That the weight of overwhelming evidence adduced against the Appellant by the prosecution witnesses and the fact that the confessional statements of the Appellants were admitted in evidence and considered, the two Courts below were
 C right in arriving at their conclusion that the Appellant was an active participant in the armed robbery that took place.

Learned Counsel has further submitted, that the Appellant has missed the point by relying on the authorities of *IGAGO v. STATE* (1999) 14 NWLR (Pt.637) 1 and *DANIEL MADJEMU v. STATE*
 D (2001) 9 NWLR (Pt.718) 34, to submit that the trial court should have conducted a trial within trial to determine whether the Appellant's statements were made voluntarily. He has contended that there was no need to hold a trial within trial where an accused is merely disputing the correctness of the contents of the written statement or that he
 E made no statement at all.

On the issue of contradiction between the extra judicial statements of the Appellant and his oral testimony at the trial, learned counsel, relying on the case of *SULE v. STATE* (2009) 17 NWLR
 F (Pt.1169) 60, submitted that a confessional statement does not become inadmissible merely because an accused person denies having made it. In this respect a confession contained in a statement made to the police by a person under arrest is not to be treated differently from any other confession.

On this issue, I must say that the learned counsel for the Appellant has taken a stand that has no basis in law and circumstances of this case. The Court below did not rely exclusively on Exhibits 2 and 10, the confessional statements of the Appellant, in confirming his conviction and sentence. The Court had painstakingly considered
 G the totality of evidence, findings of fact and conclusions thereof made by the trial judge before affirming the conviction and sentence of the Appellant. In his lead judgment Hon. Justice M. A. Oredola JCA at pages 176-177 of the record of appeal, concluded thus:

"To my mind and in this case, the findings of fact and holdings

made by the learned trial judge are based on facts with probative and evidential values, which he duly accepted. The findings are not perverse. This Court in principle does not make a habit of interfering with findings of facts which are not in any way pervasive. The recognized basis for intervention will include a situation, where justice arising from a violation of some principles of law or procedure. See Ugwumba v. The State (1993) 5 NWLR (Pt.296) 660; Ogunlana v. The State (1995) 5 NWLR (Pt.395) 266; Effia v. The State (1999) 8 NWLR (Pt.613) 1.”

Learned Counsel for the Respondent has referred to the summary, the findings of the trial Court, which form the basis of the conviction and sentence of the Appellant, at page 109 of the record of appeal. These are stated thus:

“I find from the case of the prosecution that the following facts are established in the evidence of common to the pw1, pw3, and pw4.

(1) They were robbed on the night of the early hours of 22nd June, 2001.

(2) Two people entered their rooms to rob.

(3) The two people were unmasked

(4) They saw with the aid of electricity light.

(5) The two robbers were armed with shot guns.

(6) The arm robbery took place at about 2:30am to 3:30 am.

(7) They threatened the prosecution witnesses with the gun.

(8) They robbed them of their property.”

The learned trial judge found the evidence of PW1, particularly, overwhelming against the Appellant. Hence he made his findings at page 112 of the record thus:

“I have before me overwhelming evidence of pw1 1st and 2nd accused persons were in his room to steal - The 2nd accused took the money he had hidden in his room and handed it to the 1st accused. Pressed by the accused persons, he gave the 2nd accused N3,500:00. The 2nd accused also took his Luggage bag and his walkman Radio and Adaptor. He further stated that the 1st and 2nd accused were armed with guns at the relevant time which was at night, more particularly the early hours of the 22nd day of June, 2001.”

Also from the record PW3 testified and gave graphic evidence

of the role played by the Appellant. How the Appellant stole his pair of black cover shoes after searching his room in vain for some money in the presence of 1st accused (Victor Essien Victor) whom he had known before the incident. PW3's further evidence was that the Appellant had pointed a gun at him immediately he entered his room.

B PW4 equally testified that both the 1st accused (Victor Essien Victor) and the Appellant searched his room and stole N500.00. Both of them were armed with guns which they pointed at him (PW4). These witnesses were not cross examined on these weighty and overwhelming evidence against them. As for the Appellant herein he merely denied the charge against him to the effect that he did not make the statements in Exhibits 2 and 10, not on the grounds of having not been made voluntarily or that they were obtained under torture or other unlawful means.

D The grounds of objection were rather that the Appellant did not endorse the statement and that the witness failed to state the rank of the Divisional Police officer who affirmed the statement.

On the issue of admissibility of the statements of the Appellant the learned trial Judge ruled that there was no substance in the objection and accordingly admitted the statements. Again, the Court below in considering the voluntariness of the Exhibits concluded that they were freely and voluntarily made. That the statements were direct and positive enough to sustain a finding of guilt, regardless of the fact that the Appellant sought to resile or retract them altogether. I cannot fault this finding. Once an accused person makes a statement under caution, saying or admitting the charge or creating the impression that he committed the offence charged, the statement becomes confessional.

Nobody will dispute the wisdom behind the "Judge's Rules" made by the English judges for the guidance of English Police officer to ensure that confessional statements are voluntary. It should not be stretched too far. Confirmation before a superior police officer of a statement made by the accused that he was the one who committed the crime may be dispensed with and the confessional statement may be admitted if there is no suspicion of such statement not being voluntary. See MUSA KASA v. THE STATE (1994) 6 SCNJ.

In view of the foregoing concurrent findings of the two Courts below this Court has no reason to interfere with such findings as they have not been shown to contain procedural error or in any way perverse.

Citing the cases of Richard Igago v. State (Supra) and David Madjemu v. State (Supra) 349, in the Appellant's brief, learned counsel submitted that the trial judge ought to have conducted a trial within trial to determine whether the Appellant's statements Exhibits 2 and 10 were made voluntarily, since he had denied making them. I agree with the learned counsel for the Respondent that the Appellant's counsel had really misunderstood the fundamental requirement in criminal trial. A trial within trial is required in law where the objection to admissibility of a statement is based on the ground that it was not made voluntarily. In that case there has to be a trial within trial to determine the question of voluntariness. It is only where this is proved by the prosecution that the statement is admitted in evidence. AKINFE v. THE STATE (1988) 7 SC (Pt.II) 131, EHOT v. THE STATE (1993) 5 SCNJ 76, AUGUSTINE NWAGBOMU v. THE STATE (1994) 2 SCNJ 2 BASIL AKPA v. THE STATE (2008) 4 - 5 SC (Pt.II) 1. The point was very lucidly made by this Court per ONU JSC in IGAGO v. THE STATE (Supra) as follows:

Indeed, it is settled law that where a confession is objected to not as in the instant case where no objection was raised as to the voluntariness of these extra judicial statements - a judge sitting alone must hear and determine its admissibility. See R. V. Onabanjo (1936) 3 WACA 43 and R. v. Kassi (1939) 5 WACA 154. ***Where, however, an accused is merely disputing the correctness of the contents of the written statement or that he made no statement at all, it is not necessary to have a trial-within trial.***

As I have earlier observed, the Appellant's objection to admissibility of Exhibits 2 and 10 was not on the ground that those statements were not made voluntarily, and as such there was no need for the trial judge to conduct a trial within a trial. AUGUSTINE v. NWAGBOMU (Supra).

Learned Counsel for the Appellant has also contended that the Appellant's evidence on oath before the trial Court

was at variance with his extra judicial statements (Exhibits 2 and 10) made at the police station. Indeed, it is settled law that where an accused person gives evidence that is inconsistent with the earlier statement made by him to the police, such evidence should be and ought to be taken with a pinch of salt if not disregarded as unreliable. Appellant's contention here is not that, there were such inconsistencies in his statement which created some doubt in the mind of the trial Court. Having not shown such inconsistencies the Appellant is not entitled to benefit there from. SULE AHMED (alias EZA) v. THE STATE (2002) 1 SCM 37, OLAYINKA AFOLALU v. THE STATE (2010) 5-7. SC (Pt.II) 93.

In view of the foregoing, I have resolved this issue in favour of the Respondent.

D ISSUE TWO:

On this issue it is the contention of the Appellant that the Court below erred in law when it confirmed the conviction of the Appellant by the trial Court without properly considering the material discrepancies that trailed his initial identity and subsequent parade conducted by the police.

Referring to the relevant portions of the statements made by the 1st accused (Victor Essien Victor) on 22/6/2001 and 4/7/2001, learned counsel submitted that it was not very certain who was arraigned tried, convicted and sentenced in this case: Was it ISONG who slept with Glory or Joe who slept with Esther? It is submitted that the identity of the Appellant was never at all resolved either by the police during their investigation into the matter or by the trial court during the trial. Learned counsel has submitted that it is clear that the Appellant was linked to the commission of the offence of armed robbery in the extra judicial statements made to the police by the 1st accused person. It is contended that if that was the case, the 1st accused's statements is no evidence against an Appellant who was a co-accused. Appellant reinforced his contention with Section 27(3) of the Evidence Act Cap 112, Laws of the Federation 2004, and R v. AJANI & ORS. (1936) 3 WACA 3, EVBUOMWAN v. COMMISSIONER OF POLICE (1961) WNLR 257, DANLAMI OZAKI & ANOR v. STATE (1990) 1 NWLR (Pt.124) 92.

It is also the contention of the Appellant that there has not

been a proper identification of him as the parade conducted by the police was nothing but a charade. That whilst, PW3 denied he ever stated in his statement to the police that he recognized the Appellant, neither did any other witnesses say so in their statements. That PW2 while being examined in chief lied under oath before the trial Court that he conducted three separate identification parades. The same witness under cross-examination contradicted himself that he only conducted the identification parade once only. It is submitted that this contradiction in PW2's evidence is sufficient enough to create some doubts in the mind of the trial judge thereby destroying the inference that the Appellant was properly identified by the prosecution witnesses as the person who committed the offence with which he was charged. It is urged that this doubt must be resolved in favour of the Appellant and therefore resolved this issues in favour of the Appellant.

Responding, learned counsel for the Respondent submitted that the evidence adduced by PW1, PW3 and PW4 summarized by the learned trial judge contained no discrepancy whatsoever as to the identity of the Appellant. That the witnesses clearly identified the Appellant as an active participant in the robbery as each was brutally attacked and that these findings are contained in the judgment of learned trial judge at pages 112 to 113 of the record of appeal which findings the Court below also confirmed. It is urged that these concurrent findings of both Courts ought not to be interfered with as they are not in any way perverse.

What is clear in this case is that the identity of the Appellant as given by the PW1, PW3 and PW4 in their evidence at the trial Court was never in doubt. They clearly identified the Appellant as the one who was a party to the commission of the armed robbery. At pages 112 and 113 of the record the evidence of these witnesses were carefully summarized by the trial Court thus:

"I have before me overwhelming evidence of pw1 that the 1st and 2nd accused persons were in his room to steal - The 2nd accused took the money he had hidden in his room and handed it to the 1st accused. Pressed by the accused persons, he gave the 2nd accused N3,500.00. The 2nd accused also took his luggage bag and his walk-man Radio and Adaptor.

He further stated that both 1st and 2nd accused were armed with guns at the relevant time which was at night, more particularly the early hours of the 22nd day of June, 2001.

Pw3 gave graphic evidence of how the 2nd accused stole his pair of black cover shoe after searching his room in vain for money.

The 1st accused, whom he had known before then was present. His further evidence was that the 2nd accused had pointed a gun at him upon entry into his room.

Pw4 testified that both 1st and 2nd accused searched his room and stole N500.00 both accused persons were armed with guns and they pointed guns at him.

The evidence of the prosecution witnesses was not dislodged under the search-lights of cross Examination. ”

The findings of the trial Court that the Appellant had been properly identified by the PW1, PW3 and PW4 was affirmed by the Court below at page 176 of the record as follows:

“To my mind and in this case, the findings of fact and holdings made by the learned trial judge are based on facts with probative and evidential values, which he duly accepted. The findings are not perverse. This Court in principle does not make a habit of interfering with the finding of facts which are not in any way perverse.”

Where there is visual and positive identification of the accused at the scene of the crime which is believed by the trial judge, the Appellate Court should not disturb such finding.
 F SAMUEL ATTA v. THE STATE (2010) 3 - 5 (Pt.1) 1. **Indeed, that is the law. I cannot disturb concurrent findings of the two Courts below on this issue.**

On the whole, having resolved the two issues presented for determination of this appeal in favour of the Respondent, I have come to inevitable conclusion that this Appeal is lacking in merit and ought to be dismissed. It is accordingly dismissed. I affirm the decision of the Court below which earlier on affirmed the decision of the trial Court. Appeal dismissed.

H

MOHAMMED CJN

I have had a preview of the lead Judgment of my learned brother Galadima, JSC, which has just been delivered. For the rea-

sons that have been ably put in the judgment which I entirely agree with and adopt as my own, I also find no merit in this appeal. In addition to the reasons set out in the lead judgment, I will add that taking into consideration of the evidence of prosecution witnesses 1, 3 and 4 and the confessionals statement of the Appellant, I am of the firm view that the case against the Appellant for the offence he was B
 tried and convicted by the trial Court had been clearly proved beyond reasonable doubt as found by the trial Court and affirmed by the Court below. See OLAYINKA VS. THE STATE (2007) 9 NWLR (Pt.1040) 561 and OKOSI VS. ATTORNEY-GENERAL BENDEL C
 STATE (1989) 1 NWLR (Pt.100) 642.

For the foregoing reasons and more comprehensive reasons given in the lead judgment, I also find no substance in this appeal which is hereby dismissed by me. The conviction and death sentence passed on the Appellant for the offence of armed robbery by the trial D
 High Court and affirmed on appeal by the Court of Appeal, are hereby further affirmed.

OGUNBIYI JSC

I have had the privilege of reading in draft the lead judgment of my learned brother Galadima, J.S.C. I agree that the appeal is devoid of any merit and should be dismissed. E

This is an appeal against the judgment of the Court of Appeal sitting at Calabar Judicial Division, delivered on the 25th day of August, 2011. The Lower Court affirmed the judgment of the Akwa Ibom State High Court sitting at Eket, delivered on the 27th of July, 2006, convicting the appellant on a three count charge of armed robbery contrary to Section 1(2)(a) of the Robbery and firearms F
 (Special Provisions) Cap 398, Vol. 22 Laws of the Federation of Nigeria, 1990. G

The death sentence passed on the appellant by the trial Court was also affirmed at the Court of Appeal by a majority decision of two to one, while his Lordship Aka'ahs, JSC, ruled that the sentence H
 of death passed on the appellant should be committed to life imprisonment.

Two issues are formulated by the appellant in his appeal herein against the conviction and sentence, My learned brother Galadima,

JSC has exhaustively considered the issues raised and I will adopt his judgment as mine. However, I seek to chip in a few words of mine on the first issue raised by the appellant. The issue is:-

“Whether the justices of the Court of Appeal were right in law to have relied on the confessional statements of the appellant in affirming his conviction and sentence by the trial Court when same was never admitted to test as required by law.”

It is the submission of counsel on behalf of the appellant that the learned justices of the Court of Appeal erroneously relied on Exhibits 2 and 10, the confessional statements of the appellant in affirming his conviction and sentence.

It is the appellant’s objection that the said exhibits were not endorsed by him; that the witness failed to state the rank of the Division Police Officer who affirmed the statement. In stating further, the appellant herein did not deny on the ground that the statements were not made voluntarily or that they were extracted by torture or unlawful means. In other words, the voluntariness of the Exhibits 2 and 10 was not put to question at the trial Court, it was rather a mere denial of same. At page 176 of the record of appeal for instance, the Lower Court had this to say:-

“The denial is a matter to be considered in deciding the weight to be attached to the confession. See Bature v. The State (1994) 1 NWLR (PT.320) 267.

Again the law is firmly settled that where the extra judicial statement made by an accused person is properly proved to have been freely and voluntarily made, direct and positive, it is adequate to warrant and sustain a finding of guilt, regardless of the fact that the maker resiled there from or retracted it altogether at the trial. See Bature v. The State (supra). However, it is incumbent on the Court to test the truth and possibility thereof and in doing this, it must look for any other independent, external evidence, however slight which will lend credence to the truthfulness and probability of the confession before it can be used and relied upon. See Alarape v. The State (2001) 5 NWLR (Pt.205) 79; (2001) 2 SCNJ 162; Nwaeze v. The State (1996) 2 NWLR (Pt.428); Bature v. The State (supra) and Akpan v. The State (1992) NWLR (Pt.248) 439.”

In the earlier findings by the learned trial judge, the evidence adduced by the prosecution witnesses PW1, PW3 and PW4 against

the appellant was held as overwhelming; the following was the summary by the Court of pages 112 - 113 of the record:-

"I have before me the overwhelming evidence of PW1 that the 1st and 2nd accused persons were in his room to steal - the 2nd accused took the money he had hidden in his room and handed it to the 1st accused. Pressed by the accused persons, he gave the 2nd accused N3,500.00. The 2nd accused also took his luggage bag and his walk - man Radio and adaptor.

He further stated that both 1st and 2nd accused were armed with guns at the relevant time which was at night, more particularly the early hours of the 22nd day of June, 2001.

PW3 gave graphic evidence of how the 2nd accused stole his pair of block cover shoe after searching his room in vain for money, the 1st accused, whom he had known before then was present. His further evidence was that the 2nd accused had pointed a gun at him upon entry into his room.

PW4 testified that both 1st and 2nd accused searched his room and stole N500.00. Both accused persons were armed with guns and they pointed at him.

The evidence of the prosecution witnesses were not dislodged under the search-lights of cross Examination."

It is no wonder therefore that the Lower Court held as it did again at page 176 of the record wherein it said thus:-

"To my mind and in this case, the findings of fact and holdings made by the learned trial judge are based on facts with probative and evidential values, which he duly accepted. The findings are not perverse. This Court in principle does not make a habit of interfering with findings of facts which are not in any way pervasive."

Contrary to the submission by the appellant's counsel therefore, the Lower Court had carefully considered the totality of evidence, findings and holdings of the trial Court in affirming the conviction and sentence of the appellant.

With the foregoing few words of mine and more particularly for the further reasoning and conclusion arrived at in the lead judgment of my brother, I also dismiss this appeal in terms of orders made therein.

KEKERE-EKUN JSC

I have read before now the judgment of my learned brother, SULEIMAN GALADIMA, JSC just delivered. I am in full agreement with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

B The appellant herein was charged along with three others with armed robbery contrary to Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap. 38 Vol. 2 Laws of the Federation of Nigeria, 1990. It was alleged that the appellant and his gang stormed the premises situate at No. 1 Bassey Ekanem Street, Eket, Akwa Ibom State on 22/6/2001 and robbed the residents of sums of money and other valuables. He was found guilty and sentenced to death. His appeal to the Court below was unsuccessful, hence the instant appeal.

D The two issues for determination this appeal are:

1. Whether the Justices of the Court of Appeal were right in law to have relied on the confessional statements of the appellants in affirming his conviction and Sentence when same were never admitted to test as required by law.

E 2. Whether the Justices of the Court of Appeal were right in law in affirming the conviction and sentence of the appellant by the trial Court in spite of the material discrepancies that trailed the identity of the appellant and the identification parade conducted by the police.

F My learned brother has considered both issues exhaustively in the lead judgment. My brief comments are in support of the judgment and for emphasis.

G It is contended on behalf of the appellant that he denied making Exhibits 2 and 10 (his confessional statements) and that the trial Court ought to have conducted a trial within trial before admitting them in evidence. It is contended further that having admitted the statements in evidence, the trial Court failed to subject them to the test in *R. Vs Sykes* (1913) C.A.R. 233 to determine whether the H confessions were true. It was also argued that the said statements were retracted at the trial and ought not to have been relied upon.

When a trial Court is confronted with a statement made by an accused person which is confessional, there are two situations that may arise. The accused person may object to the admissibility of the

statement on the ground that it was not voluntarily made; that it was procured by means of torture, inducement or fear. In such circumstances, it is the duty of the court to conduct what is commonly referred to as a “trial within trial” to determine if indeed the statement was voluntarily made, Where the accused person denied making the statement at all, a trial within trial is unnecessary. The Court would be at liberty to admit the statement in evidence and at the conclusion of the case determine the probative value to attach to it. See: *Madjemu Vs The State* (2001) 9 NWLR (Pt.718) 349; *Ojegele Vs The State* (1988) 1 NWLR (Pt.71) 414; *State v. Isah* (2012) 10 NWLR (Pt.1327) 613 @ 633 - 634 H - C.

It is also trite that the stage at which to challenge the voluntariness of a confessional statement is at the point when the prosecution applies to tender it in evidence.

When Exhibit 2 was sought to be admitted in evidence, there was no objection to its voluntariness. The objection raised was that it was not endorsed before a superior Police Officer. The Court was therefore correct in admitting it in evidence.

Exhibit 10 was produced and tendered in evidence at the instance of learned counsel for the appellant. The appellant retracted both statements at the trial. The law is that the Court can convict on a retracted confessional statement if it is satisfied that it was made voluntarily. In order to determine if it was made voluntarily, the Court will consider other evidence outside the confession that would make it probable that the confession is true. See: *State vs. Isah* (supra) @ 629 - 630 G - A & 633 F - G; *Akpan Vs The State* (1992) 6 NWLR (Pt.248) 439; *Itule Vs Queen* (1961) 2 SCNLR 183; *Alarape Vs State* (2001) 5 NWLR (Pt.705) 79.

A careful perusal of the judgment of the trial court shows that the learned trial Judge considered credible evidence outside Exhibits 2 & 10, particularly the positive identification of the appellant by PW1, PW3 and PW4, which corroborated the appellant’s confession before concluding that the prosecution had established its case against him beyond reasonable doubt. The judgment was not shown to be perverse and the Court below rightly affirmed it. I am at one with my learned brother, GALADIMA JSC that this appeal is unmeritorious. I accordingly dismiss it and affirm the judgment of the Court below. Appeal dismissed.

OKORO JSC

The appellant, along with three others were arraigned before the High Court of Akwa Ibom State sitting at Eket on a three count charge of armed robbery contrary to Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act Cap.398, Vol. 22 Laws of the Federation of Nigeria, 1990. Based on the testimonies of the PW1, PW3 and PW4 who were victims of the robbery and that of PW2 who investigated the crime, and also having regard to the confessional statement of the appellant, the learned trial judge convicted the appellant of the offence of armed robbery and sentenced him to death. The appellant's appeal to the Court of Appeal was dismissed. He has further appealed to this Court.

My learned brother, Suleiman Galadima, JSC availed me before now a copy of his lead judgment which he has just delivered. I am in total agreement with the reasons advanced and conclusion reached that this appeal is devoid of merit and deserves an order of dismissal. I adopt both his reasoning and conclusion as mine. That notwithstanding, I shall chip in a few words of mine in support of the judgment.

The first complaint of the appellant in this appeal is captured in the first issue for determination which states:

"whether the Justices of the Court of Appeal were right in law to have relied on the confessional statement of the appellant in affirming his conviction and sentence by the trial Court when same was never admitted to test as required by law."

I have read the arguments of both the learned counsel for the appellant and that of the respondent for and against the above issue. They are well summarized in the lead judgment. I do not intend to repeat the exercise. The truth in this case is that the learned trial judge did not convict the appellant based on his confessional statement alone. This much was stated by the court below in its judgment. Listen to the learned trial judge on page 109 of the record:

"I find from the case of the prosecution that the following facts are established in the evidence common to the PW1, PW3 and PW4:

(1) They were robbed on the night of the early hours of 22nd June, 2001.

(2) Two people entered their rooms to rob.

- (3) *The two people were unmasked*
- (4) *They saw with the aid of electricity light.*
- (5) *The two robbers were armed with shot guns.*
- (6) *The arm robbery took place at about 2:30am to 3:30 am.*
- (7) *They threatened the prosecution witnesses with the gun.*
- (8) *They robbed them of their property.”* B

The Court below stated clearly that apart from the statement of the appellant to the police, the evidence of PW1, PW3 and PW4 were cogent enough to convict him. Against the weight of overwhelming evidence adduced against him by the prosecution witnesses, the appellant merely denied the charge against him and in his defence, denied making the statements in Exhibits 2 and 10. The learned counsel for the appellant that trial within trial ought to have been conducted. This is not true. The rule with respect to conducting a trial within a trial operates only in cases of questioning the voluntariness or otherwise of confessions. It does not operate where an accused person denies making the statement or retracts. See *Owie v. State* (1985) NWLR (Pt.3) 470 (1985) 4 SC (Pt.2) 1. C

Let me state clearly that it is settled law that the fact that an accused has retracted a confessional statement does not mean that the Court cannot act upon it. More often than not, it is very usual for an accused person to retract, deny or resile during his trial in the Court from the extra-judicial statement he had earlier made to the police immediately after the event giving rise to the charge or arraignment against him. In such a situation, it behooves the accused to impeach his earlier statement and the Court is to test the veracity of that statement with other facts and circumstances outside the statement in order to see whether they support, confirm or correspond with the said statement. See *Hassan v. State* (2001) 15 NWLR (Pt.735) 184, *Onwumere v. State* (1991) 4 NWLR (Pt.186) 428, *Ubierho v. State* (2005) 5 NWLR (Pt.919) 644. D

In the instant case, as I said earlier, there was no reason to conduct a trial within a trial as the appellant did not challenge the voluntariness or otherwise of the statement. Secondly, the learned trial judge took time and brought out the facts evinced from PW1, PW3 and PW4 which confirmed the confessional statement of the appellant to the police. E

The PW1, PW3 and PW4 clearly identified the appellant as F

one of the robbers and I am satisfied that the Court below was on a strong wicket to affirm the conviction and sentence of the appellant for the offence of armed robbery.

It is on the above reasons of mine and the fuller ones in the lead judgment of my learned brother, Galadima, JSC that I agree
B that there is no merit in this appeal. It is accordingly dismissed by me. I affirm the judgment of the Court of Appeal which had upheld the judgment of the trial Court. Appeal Dismissed.

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