

SUPREME COURT OF NIGERIA
FRIDAY 3RD JUNE, 2016. SC. 598/2014
CORAM:- I. T. MUHAMMAD, M. U. PETER-ODILI,
K. B. AKA'AH, J. I. OKORO, A. SANUSI, JJSC

GABRIEL OGOGOVIE APPELLANT
V.
THE STATE RESPONDENT

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

ARMED ROBBERY - Proof - Means of - The offence can be established by evidence of eye witness - Confessional statements - Circumstantial evidence - And admission by conduct of accused (H2)

ARMED ROBBERY - Stolen item - Presumption of guilt - Contained in Evidence Act s. 167(a) is applicable - As appellant failed to give good explanations as to how he came into possession of the items (H3)

ALIBI - Defence - Conditions - Accused must raise the defense timely - Stating his whereabouts and those with him - So as to enable police conduct investigation (H4)

CRIMINAL PROCEDURE - Conspiracy - Proof - Conspiracy being agreement by persons to do unlawful act - Is usually proved by inferences drawn from acts of the parties (H5)

FACTS

At the High Court of Delta State Warri Judicial Division, accused/appellant and some others were arraigned on a three count charge of conspiracy to commit armed robbery and armed robbery. Appellant pleaded not guilty to the charge. Allegation brought by prosecution/respondent is that appellant and others while armed with guns robbed one Ogbama Simon (PW2) and one Godwin Inieke Esen sometime in 2008 along the Ughelli/Patani Express Road and

thereby committed an offence contrary to section 6(b) and punishable under section 1(2) (a) of the Robbery and Firearms (Special Provision) Act Cap R11 Vol. 14, LFN 2004. An arrest was made and appellant made extra-judicial statements (Exhibits A & B) to the police, wherein he denied involvement in the crime. At the trial, two witnesses (PW 1 & 2) were called by respondent to prove its case against appellant. Appellant testified in his defence and called two witnesses.

In line with his extra-judicial statements, appellant maintained that he was never at the crime, but was rather at his residence at the material time. Appellant gave evidence and called witnesses whose evidence remained un-contradicted under cross examination that appellant visited the scene of the crime in the morning. Appellant stated in his written and oral evidence that it was when he went with his co-drivers at the crime scene the next morning that he picked a cloth and ATM card (Exhibits C and D) at the crime scene. In his judgment, the learned trial Judge relied on the fact that Exhibits C and D were found with appellant in holding that respondent proved its case beyond reasonable doubt. Appellant was therefore convicted and sentenced to death. Not happy with the judgment, appellant appealed to the Court of Appeal, Benin Division. The court dismissed the appeal and affirmed the judgment of the trial court. Aggrieved further, appellant appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether having regard to the circumstances of this case and the totality of the evidence on record, the Lower Court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy and armed robbery against the appellant beyond reasonable doubt.

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

ARMED ROBBERY - Ingredients - Proof

1. At the risk of repetition of what has become trite, to succeed in a charge of armed robbery the prosecution had the duty to prove beyond reasonable doubt the essential ingredi-

ents of armed robbery which are well stated in the cases of *Ikemson v The State* (1998) Vol. 1 ACLR 80 at 103; *Bozin v State* (1998) Vol. ACLR 1 at 11 to be thus:

- (a) That there was a robbery or series of robberies.**
- (b) That each robbery was an armed robbery.**
- (c) That the accused person or appellant was one of those who took part in the armed robbery. (p. 2896 H)**

ARMED ROBBERY - Proof - Means of

2. To carry out this onus of proof there are four ways to prove the commission of the crime which are as follows;

- (i) By evidence of eye witness**
- (ii) By confessional statements**
- (iii) By circumstantial evidence where direct or confessional statements are lacking.**
- (iv) Admission by conduct of the accused person/appellant. (p. 2897 B)**

ARMED ROBBERY - Stolen item - Presumption of guilt

3. It is to be said that neither of DW1 nor DW2 testified seeing the appellant pick any of items from the scene or seeing the items scattered on the ground and so the concurrent findings of the two Courts below rejecting the appellant's explanations as to how he came into possession of the said stolen items in the course of an armed robbery that took two human lives on the basis that the explanations were contradictory. Therefore, leaving the trial Court and as affirmed by the Court of Appeal with the only option that the presumption under Section 148(d) Evidence Act now Section 167(a) Evidence Act 2011 is applicable. (p. 2901 H)

ALIBI - Defence - Conditions

4. On the defence of alibi raised by the appellant, it has to be reiterated that for that defence to be taken seriously, the accused had to raise it at the earliest opportunity with the accompanying materials with sufficient particulars of where he was and with whom to enable the police investigate to support the alibi or debunk it as the case may be. The reason for

this guide is that the police should not embark or be involved in a wild goose chase or looking for a needle in a haystack as to unraveling the whereabouts of an accused person at the time the crime was committed. It behooves the accused to provide specific particulars of where he was at the material time to enable the police move straight to the place to carry out the inquiry expected by the law. (p. 2902 D)

CRIMINAL PROCEDURE - Conspiracy - Proof

5. Those concurrent findings as displayed in the summation of the Court below, the appellant had a grouse against stating that there was no peg on which to hang the offence of conspiracy. I am however in agreement with the contention of learned counsel for the respondent in his submission that the two Courts below rightly applied the law of conspiracy. Conspiracy in its definition is an agreement by two or more persons to do an unlawful act or to do a lawful act by illegal means and so to establish the offence there must exist a common design or agreement by two or more persons to do or omit to do an act criminally. Since the implication is that one cannot conspire with himself but two or more person must be involved for the issue of conspiracy to evolve. That is to say that the ingredient of conspiracy is the agreement between parties to do an unlawful act by unlawful means. However one is mindful that the secrecy with which criminals perpetrate their crimes or even have the meeting of minds has tended to create difficulties for the prosecution in many cases of no eye-witnesses and so confession in such situations alone without corroboration may suffice to support a conviction as long as the Court is satisfied of the truth of such a confession. The other area of solution can be by the deduction from inferences from the acts of the parties and in such instances the proof of conspiracy will naturally be recognized. It is to be stated therefore that in the matter of inference of conspiracy from the acts of the participants in the armed robbery incident as witnessed by PW2 was what enabled the trial Court to arrive at the inescapable finding that conspiracy existed among the appellant and the other participants, a conclusion which the invocation and

application of the doctrine of recent possession supplied.
(p. 2903 G)

REPRESENTATION

Ayo Asala, Esq. with him, E. M. Odje, Esq., for the Appellant
Peter Mrakpor (Attorney- General of Delta State) with him, O. F. B
Enenmo (DCSU/Appeal MOJ), Martins A. Omakor (Dep. Director,
MOJ Delta State), for the Respondent

CASES REFERRED TO

Usufu v. State (2005) All FWLR (pt. 405) 1631 C
Omopupa v. State (2008) All FWLR (pt. 445) 1648
Yongo v. C.O.P. (1992) 8 NWLR (pt. 237) 75
The People of Lagos State v. Umaru (2014) 7 NWLR (pt. 1407) 541
Oguonzee v. State (1998) 5 NWLR (pt. 551) 521 D
Aruna v. State (1990) 6 NWLR (pt. 155) 125
Bozein v. State (1998) Vol. ACLR 1
Ikemson v. State (1998) Vol. 1 ACLR 80
Moses v. State (2003) FWLR (pt. 141) 1969
Gira v. State (1996) 4 SCNJ 95 E
Udo v. R (1964) 1 All NLR 21
Utteh v. State (1992) 2 NWLR (pt. 223) 257
Salami v. State (1988) 3 NWLR (pt. 85) 670
Madaguwa v. State (1988) 5 NWLR (pt. 92) 60
Ibe v. State (1992) LPELR (1386) 1 F

STATUTES REFERRED TO

Robbery & Firearms (Special Provision) Act Cap R II Vol. 14 LFN
2004, s. 1(2)(a) G
Evidence Act 2011, s. 167(a)

LEAD JUDGMENT BY PETER-ODILI JSC

This is an appeal against the judgment of the Court of Appeal,
Benin Judicial Division (hereafter called the Lower Court), delivered
on the 9th day of July, 2014, affirming the judgment of the High
Court of Delta State, Warri Judicial Division delivered on 10th day of
October 2012 convicting and sentencing the appellant to death by
hanging, having been found guilty and convicted for the offence of

conspiracy to commit armed robbery and armed robbery.

BACKGROUND FACTS

From the Record of Appeal are garnered the following facts for an easier understanding of the journey from the trial Court to this Appeal at the Supreme Court.

B On the 1st day of April, 2009, the appellant was arraigned before the trial Court on a three (3) count charge of conspiracy to commit armed robbery and armed robbery. It was alleged that the appellant and others while armed with guns robbed one Ogbama Simon (PW2) and one Godwin Inieke Esen on 25th day of May, C 2008, and thereby committed an offence contrary to Section 6(b) and punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provision) Act, Cap R II Vol. 14, Laws of the Federation of Nigeria (LFN) 2004. See page 2 of the Record.

D The appellant pleaded not guilty to the three count charge and the case proceeded to hearing. To prove the three count charge against the appellant. The prosecution called two witnesses and tendered various exhibits. PW1 is the police investigating officer while PW2 is one of the victims of the armed robbery incident that took E place at Evwreni junction at Ughelli/Patani Road within the Ughelli judicial division. The following exhibits were tendered by the prosecution;

- (i) Statement of appellant Exhibit A
- (ii) Second statement of the appellant Exhibit B
- F (iii) Shirt Exhibit C
- (iv) 2 ATM Cards Exhibit D
- (v) Search Warrant Exhibit E

At the close of the prosecution's case, the appellant testified in G his defence and called two witnesses. In line with his extra judicial statements to the police (Exhibits A and B), the appellant in his oral evidence denied his involvement in the armed robbery incident. He maintained that he was never at the scene of the armed robbery incident which occurred late in the night on 24/05/2008 till the early H hours of the morning of 25/05/2008, but that he was at his residence at No. 19 Uduophori Street, Otovwodo, Ughelli at the material time.

In defence, the appellant gave evidence and called witnesses whose evidence remained un-contradicted under cross examination that the appellant visited the scene of the crime in the morning. That

is 25/05/2008 when they went to recover the vehicle of his co-drivers who was a victim of the armed robbery incident. The appellant stated both in his extra judicial statements and oral evidence that it was when he went with his co-drivers to recover the vehicle that he picked the cloth and the ATM card which he found at the scene of the armed robbery. Despite the explanation given by the appellant as to how he came about Exhibits “C and D”, the learned trial judge in his Judgment relied on the fact that Exhibits C and D were found with the appellant in holding that the prosecution proved beyond reasonable doubt the two count charge of conspiracy and armed robbery against the appellant and convicted him accordingly. The learned trial judge consequently sentenced the appellant to death by hanging. The learned trial judge, however, discharged and acquitted the appellant in respect of third count for failure of the prosecution to adduce evidence in support of the particulars of the charge.

APPEAL

Dissatisfied with the judgment of the trial Court, the appellant unsuccessfully appealed to the Lower Court. On 9/07/2014, the Lower Court dismissed the appellants appeal and affirmed the decision of the trial Court. Aggrieved by the decision of the Lower Court, the appellant appealed to this Court vide a notice of appeal filed on 5/8/2014. The notice of appeal contained three grounds of appeal. See the notice of appeal at pages 184 to 186 of the Record.

On the 10th day of March, 2016 date of hearing learned counsel for the appellant, Ayo Asala Esq. adopted his Brief of Argument filed on the 19/11/14 in which he raised a sole issue viz:

Whether having regard to the circumstances of this case and the totality of the evidence on record, the Lower Court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy and armed robbery against the appellant beyond reasonable doubt.

For the respondent, learned counsel, Peter Mrakpor Esq., the Attorney General of Delta State adopted the Brief of Argument of the respondent settled by Martins A. Omakor, Assistant Director of Public Prosecutions of Delta State, filed on 30/1/2015 and in which was crafted a single issue also which is as follows:

Whether the Lower Court was right in affirming the judgment of the learned trial judge that the prosecution proved the cases of

conspiracy and armed robbery against the appellant beyond reasonable doubt.

The path taken in crafting the issue on either side though different came to the same question and so whichever is utilized does not matter and so I shall use that as framed by the appellant.

B **SOLE ISSUE**

Whether having regard to the circumstances of this case and the totality of the evidence on record, the Lower Court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy and armed robbery against the appellant beyond reasonable doubt.

Learned counsel for the appellant contended that prosecution failed to establish any of the ingredients against the appellant as required by law. That Exhibits C and D found in possession of the appellant are not conclusive proof that appellant participated in the armed robbery despite his explanation as to how he came in possession of Exhibits C and “D”, He cited *Usufu v State* (2005) ALL FWLR (Pt.405) 1631; Section 148 (a) now 167 (a) of the Evidence Act 2011; *Omopupa v State* (2008) ALL FWLR (Pt.445) 1648.

That the appellant gave sufficient explanation as to how he came about Exhibits C and D. He relied on *Yongo v. C.O.P.* (1992) 8 NWLR (Pt.237) at 75. *The People of Lagos State v. Umaru* (2014) 7 NWLR (Pt.1407) 541.

That it is wrong for the Lower Court to rely on the evidence of the prosecution witnesses to discredit the explanation offered by the appellant in keeping with Section 167(a) of the Evidence Act 2011.

For the appellant is contended that there are grounds upon which the concurrent findings of the two Courts below should be set aside.

On the issue of alibi, learned counsel, Ayo Asala Esq. submitted that the defence of alibi raised by the appellant was not properly investigated and so doubts arose which should be resolved in favour of the appellant. That this Court should therefore interfere with the concurrent findings on that defence of alibi put forward by the appellant. He cited *Oguonzee v State* (1998) 5 NWLR (Pt.551) 521; *Aruna v State* (1990) 6 NWLR (Pt.155) 125 etc. That there was no independent evidence from the prosecution linking the appellant with the commission of the offence charged and so appellant is entitled to

be discharged and acquitted.

The Honourable Attorney General Delta State, Peter Mrakpor Esq. for the respondent contended that to succeed in a charge of armed robbery the prosecution has the onus to prove beyond reasonable doubt the ingredients of armed robbery which ingredients are thus: B

- (a) That there was a robbery or series of robberies.
- (b) That each robbery was an armed robbery.
- (c) That the accused person or - appellant was one of those who took part in the armed robbery. C

He cited *Bozein v State* (1998) Vol. ACLR 1 at II; *Ikemson v The State* (1998) Vol. 1 ACLR 80 at 103.

He stated on that in discharging the onus of proof, there are three ways to prove the commission of crime which are:

- (i) By evidence of eye witness D
- (ii) By confessional statements
- (iii) By circumstantial evidence where direct confessional statements are lacking.

He relied on *Moses v. The State* (2003) FWLR (Pt.141) 1969 at 1986. E

Learned counsel contended that there is now a further method of discharging the burden of proof which is admission by conduct of the accused person/appellant. In this he cited *Dapara Gira v The State* (1996) 4 SCNJ 95 at 106; *Udo v. R* (1964) 1 ALL NLR 21 at 23; *Utteh v. The State* (1992) 2 NWLR (Pt.223) 257. F

For the respondent was canvassed that the possession of Exhibits “C” and “D” by the appellant so soon after the robbery brought into operation the presumption of either being the robber or one of them or had received the goods knowing them to have been stolen pursuant to Section 148(d) Evidence Act now Section 167 of the Evidence Act 2011. That the trial Court before invoking the presumption examined the essential ingredients which must co-exist and found the explanations of the appellant on how he came in possession of the items inconsistent and unacceptable. He cited *Salami v. The State* (1988) 3 NWLR (Pt.85) 670 at 672; *Madaguwa v. State* (1988) 5 NWLR (Pt.92) 60. G

That the Court below was right to have made similar findings thus making the concurrent findings of the two Courts well supported H

by the records. He referred to *Ibe v. The State* (1992) LPELR (1386) 1 at 10; *Igbi v The State* (2000) LPELR (1444) 1 at 13 - 14.

On the alibi raised by the appellant, the learned Attorney General stated that the Lower Court correctly applied the law on Alibi when it stated that the defence of Alibi had to be raised at the earliest opportunity preferable in the extra judicial statement of the accused person to the police wherein he must give sufficient particulars of where he was and those with him at the material time which were absent in this case. He cited *Omotosho v. The State* (2009) LPELR 2663 1; *Ochemaje v. The State* (2008) 15 NWLR (Pt.1109) 57 at 90.

In respect to the offence of conspiracy learned counsel for the respondent said the Lower Court was correct to affirm the finding of the trial Court which had inferred the conspiracy from the commission of the substantive offence. He cited *Lawson v. The State* (1975) 4 SC 115 at 123; *Atono v A. G. Bendel State* (1988) 2 NWLR (Pt.201) 232; *Amachree v Nigerian Army* (2003) 3 NWLR (Pt.807) 256 at 281 etc.

That there is no basis for the Supreme Court to interfere with the concurrent findings thereof.

The position of the appellant upon which he seeks this Court to allow the appeal stem from the fact that appellant states he gave sufficient explanation as to how he came about the Exhibits “C” and “D”; the stolen items. Also that the prosecution failed to properly investigate the defence of alibi promptly raised by the appellant upon his arrest that he was in his matrimonial home at the material time when the offence was committed. Also that there was no independent evidence from the prosecution linking the appellant with the commission of the offence charged.

The opposite stance of the respondent is that the appellant failed to show that a miscarriage of justice was occasioned by the judgment of the Lower Court and nothing to support any perversity in the concurrent findings of the two Courts below. That there was adequate consideration of the alibi raised by the appellant which defence fell short of what would be termed an alibi. Also that the doctrine of recent possession under Section 167 (a) of the Evidence Act, 2011 was properly invoked in the circumstances of this case.

At the risk of repetition of what has become trite, to

succeed in a charge of armed robbery the prosecution had the duty to prove beyond reasonable doubt the essential ingredients of armed robbery which are well stated in the cases of Ikemson v The State (1998) Vol. 1 ACLR 80 at 103; Bozein v State (1998) Vol. ACLR 1 at 11 to be thus:

- (a) That there was a robbery or series of robberies.** B
- (b) That each robbery was an armed robbery.**
- (c) That the accused person or appellant was one of those who took part in the armed robbery.**

To carry out this onus of proof there are four ways to prove the commission of the crime which are as follows; C

- (i) By evidence of eye witness**
- (ii) By confessional statements**
- (iii) By circumstantial evidence where direct or confessional statements are lacking.** D

(iv) Admission by conduct of the accused person/appellant. See Moses v The State (2003) FWLR (Pt.141) 1969 at 1986; Emeka v The State (2001) FWLR (Pt.66); Dapara Gira v The State (1996) 4 SCNJ 95 at 106.

In the case at hand, the prosecution made use of the evidence E of PW1 and PW2, the recovery of Exhibits “C” and “D” which invoked the doctrine of recent possession under Section 148(d) now Section 167(a) of the Evidence Act 2011 which the trial Court placed reliance to convict the appellant which findings and decision the Court F below affirmed.

A brief recast of the facts would be that PW2, Ogbame Simon was traveling between Lagos and Yenagoa on the 25th day of May, 2008 when they were attacked by armed robbers along the Ughelli/ Port Harcourt Highway and his bag containing clothes among other G items was stolen. Then on the 17th June, 2008 the said PW2 was traveling between Yenagoa and Lagos when upon arrival in Ughelli he saw the appellant wearing his jersey shirt, one of the clothes in the bag stolen by the robbers during the robbery incident of 25th May 2008. PW2 alerted the police and the appellant was arrested and H upon a search warrant being executed at appellant’s resident an ATM Card belonging to the PW2 was recovered.

The appellant’s defence was that he picked the jersey shirt at the scene of crime. The Jersey shirt and Oceanic Bank ATM card

were admitted as Exhibits C and D.

With regard to the stolen items, Exhibits “C” and “D” the Jersey shirt belonging to the complainant and also the Oceanic Bank ATM Card of the same ownership, the provisions of Section 148(d) now Section 167 (a) of the Evidence Act 2011 is relevant and it stipulates thus:

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

(a) A man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen/ unless he can account for his possession.

The learned trial judge held thus at page 83 of the record thus:

“The accused in his evidence in Court testified how he accompanied several persons to the scene of the robbery to retrieve Akpos Cars, Accused testified he left for the scene in the company of some policemen, one Macaulay, Obazee, Ojo and some other drivers. He testified how he picked Exhibits “C” and “D” to Akpos and told Akpos, he would use Exhibit C for “training”. White still at the box, the accused realized the story he was building up was stranger than fiction. The accused obviously knew nobody not even Akpos could corroborate the outrageous story. So the accused quickly changed his story and went in another direction. This time, the story of the accused was that he picked Exhibits “C” and D from the ground at the scene of the robbery before entering Akpos vehicle. Am afraid the accused only convinced me he was a skillful and seasoned liar. His evidence that “various properties were scattered on the road” was not corroborated by D.W.1 and D.W.2 whom he called as witnesses. The D.W.1 and D.W.2 could not also corroborate the evidence of the accused that accused picked Exhibits “C” and “D” from the scene of the robbery. On my part, from the totality of the evidence as demonstrated and tested together with the demeanor of the witnesses, I do not believe robbed properties such as Exhibits “C” and (sic) “D” were lying on the ground at the scene of the robbery as at the time the accused accompanied D.W.1 and D.W.2 to the scene if at all accused followed them to the scene after the robbery.”

The Court of Appeal stated at page 174 of the Record per Ogakwu JCA thus:

“The Lower Court found the account presented by the appellant as outrageous consequence of which he described the appellant as a skillful and seasoned liar. The Lower Court disbelieved the appellant’s story after considering the “totality of the evidence as demonstrated and tested together with demeanour of the witnesses” (See pages 82 of the record). Consequently, the Lower Court held that the appellant’s explanation of how he came into possession of Exhibits “C and D were not consistent with innocence, Where a finding made in a particular case is supported by the evidence believed by the trial judge, an appellate Court will be loath to interfere with such finding unless it is evidently perverse. Igbi v State (supra) having duly considered the record, I am of the firm conviction that the Lower Court rightly invoked the doctrine of recent possession as at the indices for the application of the doctrine were in place and the appellant as rightly found by the Lower Court did not give an explanation which was consistent with innocence.”

Learned counsel for the appellant had put forward his stand that the explanation given for the possession of the stolen items, Exhibits C and D were sufficient to demolish the presumption of either being one of the robbers or received the items knowing them to have been stolen in keeping with the presumption under Section 148 (d) of the Evidence Act. A foray into the proceedings would show that the appellant had made his first extra judicial statement, Exhibit A, he made no mention of picking the ATM Card at the scene of the robbery the same time he picked the Jersey shirt.

In Court the appellant testified in his own defence and at pages 67 to 68 stated as follows:

“My name is Gabriel Ogogovie. I lived at Otovwodo Opposite the palace Ughelli, I am a driver by profession. On 24/5/2008 I was at the motor part opposite Kubi Motel in Ughelli when a fellow driver named Akpos who has earlier left for Bayelsa returned to the motor part late without his vehicle. He informed us that robbers had blocked the Ughelli/Patani highway with a Trailer and he had run into the trailer and damaged his own vehicle. Apart from myself there were other members of our Union in the motor park at the material time. The vice chairman of the motor park was present at the material

time. The vice chairman Mr. Ubogu asked him if he had reported the matter to the police and he replied that the matter was reported at Ewweni the previous day.

The driver left and later returned with some policemen amongst them were one Macaulay Obazee and one Ojo. Myself and some other drivers then accompanied Akpos and the policemen to the scene of robbery. At the scene of the robbery various properties were scattered on the road. As we were about to tow Akpos vehicle back to Ughelli, I entered the front seat of Akpos vehicle. As we were coming towards Ughelli, I saw a jersey shirt in Akpos vehicle. I also saw a card, I picked them and showed them to Akpos and he said I should put them on the dash board. We towed the vehicle to a panel beater's workshop along Samaco Road Ughelli where we left the vehicle. At the workshop I told Akpos I would take the shirt. He asked me what I would use the shirt for and I replied I will use it for training. I also took the card which I had seen inside the vehicle. I now say that I picked the shirt and the card from the ground at the scene of the robbery before I entered Akpos vehicle. I took the shirt and the card to my house. I kept the card at the top of my shelf while I washed the shirt. I had used the jersey for a while until 17/6/2008. On 17/6/2008 while I was at the motor park three vehicles suddenly drove into the park. The armed policemen in the vehicles arrested me to the police station Ughelli. The police asked me how I came about the jersey I was putting on and I told the police how I came by the jersey. The PW2 and some policemen thereafter accompanied me to my house. The police searched my house and recovered the card and when I was asked how I came by the card I told the police I picked the card at the scene of the robbery, I did not participate in the robbery. I was arrested because of the shirt and the ATM card I took from the scene of the robbery."

Ese Ekpeni, DW1 testified that he is a driver at the Otovwodo Motor park and stated that on the day of incident he drove into the robbery scene and the wind shield of his vehicle was destroyed when the robbers fired at him and so he ran into the bush and only came out after the police arrived the scene. That on the 25/5/2008 while going to recover his vehicle, the accused/appellant and some other drivers accompanied him and others to the robbery scene.

DW2, Akpos Unuosefe stated that he went on the 25/5/2008

to the motor park when he was informed of a robbery which involved his vehicle and that one Charles had accompanied him to the scene of the robbery.

Of note is that the two witnesses called by the appellant stated that they did not see him picking the jersey shirt and the ATM card from the scene of crime. They had no knowledge of the two items. While the appellant in Exhibit A, his first statement mentioned picking the jersey shirt at the scene of crime, he made no mention of the ATM card. Thereafter on the conclusion of the search in his room in which the ATM Card was found that in his subsequent statement Exhibit B he stated that he collected the ATM card Exhibit D from the scene of robbery thus displaying what the trial Court termed a “deceptive conduct in taking the police to another person’s room when they came to search and the actual owner of the said room re-directed them to the proper room of the appellant.

These accounts shown in the extra-judicial statements Exhibits A and B did not tally with appellant’s testimony in Court. Also his account in Court contradicted the versions put forward by his witnesses DW1 and DW2 and I shall quote appellant’s answers in cross-examination thus:

“Akpos and a policeman called Macaulay saw me when I picked up the shirt and ATM Card at the scene. I made statements to the police. It is not correct as suggested that I did not tell the police in my extra judicial statements that Akpos and Macaulay saw me when I took the shirt and the ATM Card at the scene of the robbery. Macaulay saw me when I picked the shirt and ATM Card but I did not tell him I was going to take both items to my house. I deny the suggestion that Akpos and Macaulay never saw me pick the shirt and ATM Card. Akpos and Macaulay are alive. It is correct I did not to the police about the ATM card until after my house was searched and the card discovered inside my house.

It is not correct as suggested that when PW2 confronted me about the shirt Exhibit C I told him I bought the shirt, it is not correct as suggested that I told the police that I bought the shirt at the initial stage of my arrest. It is not correct as suggested that I pointed out another apartment to the police when I was told to take the police and PW2 to my house.” See page 68 of the Record.

It is to be said that neither of DW1 nor DW2 testified

seeing the appellant pick any of items from the scene or seeing the items scattered on the ground and so the concurrent findings of the two Courts below rejecting the appellant's explanations as to how he came into possession of the said stolen items in the course of an armed robbery that took two human lives on the basis that the explanations were contradictory. Therefore, leaving the trial Court and as affirmed by the Court of Appeal with the only option that the presumption under Section 148(d) Evidence Act now Section 167(a) Evidence Act 2011 is applicable. See the cases of Ibe v. The State (1992) LPELR (1386) 1 at 10; Igbi v The State (2000) LPELR (1444) pg. 1 at 13 - 14.

The situation is all the more poignant when seen in the light of the evidence of the appellant materially contradicting his earlier statements to the police, Exhibits A and B and no explanation proffered to reasonably explain those discrepancies. See the English case of R v Golden (1960) 1 WLR page 1169; Onubogu v. The State (1974) 9 SC 1; Nwankwoala v. State (2006) LPELR (2112) 1 at 16 - 17.

On the defence of alibi raised by the appellant, it has to be reiterated that for that defence to be taken seriously, the accused had to raise it at the earliest opportunity with the accompanying materials with sufficient particulars of where he was and with whom to enable the police investigate to support the alibi or debunk it as the case may be. The reason for this guide is that the police should not embark or be involved in a wild goose chase or looking for a needle in a haystack as to unraveling the whereabouts of an accused person at the time the crime was committed. It behooves the accused to provide specific particulars of where he was at the material time to enable the police move straight to the place to carry out the inquiry expected by the law. I rely on Omotola v. The State (2009) LPELR (2663) 1; Ochemaje v. The State (2008) 15 NWLR (Pt.1109) 57 at 90.

It is therefore in furtherance of the guideline on the defence of alibi and what should be done before it can fly as a defence that I find it difficult to fault what the two lower Courts found that the appellant did not mention the names of persons who lived in the same house with him or even give the name of his wife. Even then the co-tenants

in the course of the police investigation could not remember seeing the appellant at home at the material time. Therefore in the light of the appellant merely stating being at home during the relevant hours is neither here nor there and apart from the police having no tools to work out whether indeed the alibi stood or not, there was much linkage upon which the alibi can be said to have been scuttled and the appellant firmly pinned to the scene of crime at the material time. The cases of Chukwu v. State (1996) 7 NWLR (pt.463) 686 at 697; Aigbadion v. State (2000) 4 SCNJ page 1 at 13 which the appellant called in aid have not been helpful to him rather they support the stance of the respondent and what the two Courts below did.

In respect to the issue of conspiracy, the Court of Appeal stated thus at pages 164 to 164 per Ogakwu JCA as follows:

“The Lower Court clearly took cognizance of these principles when it not only stated the counts in the information will be conveniently taken together; it duly considered the live issue on the count of armed robbery, id est, whether the appellant was one of the robbers before applying the doctrine of recent possession under Section 167(a) of the Evidence Act 2011 and then drew the inference that the appellant was culpable on the count of conspiracy. The general principle of law is that a charge of conspiracy is proved either by leading direct evidence in proof of the common criminal design or it can be proved by inference derived from the commission of the substantive offence. See Lawson v. State (1975) 4 SC 115 at 123, Akano v. A - G Bendel State (1988) 2 NWLR (pt. 201) 232, Amachree v. Nigerian Army (2003) 3 NWLR (Pt.807) 256 at 281; D - E and Nwose v. State (2004) 15 NWLR (pt. 497) 466. The Lower Court inferred proof of the offence of conspiracy from the conviction of the appellant for the substantive offence of armed robbery. The implication is that if the appellant succeeds in his appeal against his conviction for armed robbery, then by parity of reasoning, the conviction for conspiracy will not stand.”

Those concurrent findings as displayed in the summation of the Court below, the appellant had a grouse against stating that there was no peg on which to hang the offence of conspiracy. I am however in agreement with the contention of learned counsel for the respondent in his submission that the two Courts below rightly applied the law of conspiracy. Con-

spiracy in its definition is an agreement by two or more persons to do an unlawful act or to do a lawful act by illegal means and so to establish the offence there must exist a common design or agreement by two or more persons to do or omit to do an act criminally. Since the implication is that one cannot
conspire with himself but two or more person must be involved for the issue of conspiracy to evolve. That is to say that the ingredient of conspiracy is the agreement between parties to do an unlawful act by unlawful means. However one is mindful
that the secrecy with which criminals perpetrate their crimes or even have the meeting of minds has tended to create difficulties for the prosecution in many cases of no eye-witnesses and so confession in such situations alone without corroboration may suffice to support a conviction as long as the Court
is satisfied of the truth of such a confession. The other area of solution can be by the deduction from inferences from the acts of the parties and in such instances the proof of conspiracy will naturally be recognized. It is to be stated therefore that in the matter of inference of conspiracy from the acts of the participants in the armed robbery incident as witnessed by PW2
was what enabled the trial Court to arrive at the inescapable finding that conspiracy existed among the appellant and the other participants, a conclusion which the invocation and application of the doctrine of recent possession supplied. See
 the cases of *Achabua v. State* (1979) 12 SC 63 at 68; *Igago v. The State* (2011) 2 ACLR 104 at 126; *Segun Odineye v. The State* (2001) FWLR (Pt. 38) 1203 at 1213; *Atano v. A. G. Bendel State* (1988) 2 NWLR (Pt.201) 232.

Indeed the route taken by the Court below is right that the commission of the substantive offence was proved and the trial Court was right to have inferred the common criminal design necessary to convict for conspiracy from the proven commission of the substantive offence since conspiracy is seldom proved by direct evidence. Therefore these concurrent findings, I cannot see myself interfering with as I see no perversity in the application of the law or a violation of some principles of law or procedure which has occasioned a miscarriage of justice. I am therefore loathe to deviate from what the two Courts below found and its being settled that when the situation such

as the present occur in concurrent findings there is no basis to upset what the trial Court and the Court below did. See *Oguonze v. The State* (1998) 5 NWLR (Pt.551) 521; *Aruna v. State* (1990) 6 NWLR (Pt. 155) 125; *Sele v. The State* (1993) 6 NWLR (pt. 269) 276; *Igbi v. The State* (2000) FWLR (pt. 3) 358 at 369; *Eze v. The State* (1985) 3 NWLR (Pt.13) 429.

In conclusion, I am satisfied that the Court of Appeal was right in affirming the judgment of the learned trial judge that the prosecution proved the cases of conspiracy and armed robbery against the appellant beyond reasonable doubt. The appeal is lacking in merit I hereby dismiss it. I affirm the decision of the Court below in its affirmation of the conviction and sentence of the appellant by the trial High Court when it sentenced the appellant to death by hanging.

MUHAMMAD JSC

I read before now, the judgment just delivered by my learned brother Peter-Odili JSC. I am in agreement with my Lord that the appeal lacks merits. I dismiss the appeal. I abide by consequential orders made in the lead Judgment

AKA'AHJ JSC

I had a preview of the judgment of my learned brother, Mary Peter-Odili JSC dismissing the appeal. I agree with the conclusion that the appeal is lacking in merit and ought to be dismissed.

The issue formulated in the appellant's brief is:-

"Whether having regard to the circumstances of this case and the totality of the evidence on record, the Lower Court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy and armed robbery against the appellant beyond reasonable doubt."

In my view the issue in this appeal is whether the learned trial judge properly invoked the doctrine of recent possession of Exhibits "C" and "D" in coming to the conclusion that the appellant was one of the robbers who attacked PW2 and others on 25th May, 2008? The invocation of the doctrine of recent possession is encapsulated in Section 167 (formerly Section 148) Evidence Act. Specifically Sec-

tion 167(a) provides as follows:-

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

(a) a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession".

To appreciate how the learned trial Judge came to the conclusion that the accused/appellant was one of the robbers who attacked PW2 on 25th May, 2008 and consequently was guilty of the offence of robbery for which he was convicted and sentenced to death, it is necessary to give a brief account of the facts which are as follows:-

On 25th May, 2008 Ogbame Simon who testified as PW2 was traveling from Lagos through Ughelli to Yenagoa in Bayelsa State where he resides. On reaching Ughelli he chartered a vehicle at Otovwodo in order to continue the journey to Yenagoa but ran into a road block mounted by armed robbers at the Ewureni Junction and all his belongings were taken away from him. Among the items which he lost to the robbers was a bag containing his clothes and his Oceanic Bank ATM Debit Card. During the robbery operation which lasted for several hours other vehicles were attacked leading to the death of a Naval Officer and a Police man. The Police came to the rescue but no arrests were made. Solomon Oborekahwo, Police Constable No. 440907 who testified as PW1 was the IPO and he recorded statements from the victims of the robbery. He recovered the corpses of the victims as well as Mitsubishi Bus and a Nissan Sunny car. The corpses were deposited at the General Hospital Ughelli while the vehicles were taken to the Police Station. Some damaged vehicles were left at the scene of the robbery. According to PW1, he did not see anything on the ground at the scene apart from the corpses and the vehicles. None of the victims who made statements could identify any of the robbers. Although no one was caught at the scene of the robbery, on 17th June 2008 which was three weeks after the robbery PW2 was on his way to Lagos from Bayelsa State. He stopped at Ughelli to change vehicle that would take him to Lagos. As he was about to board the vehicle for Lagos he saw the accused/ appellant

wearing a jersey shirt on which was written 'Mitore' in the front. He recognised the shirt as his own which was one of the clothes he was carrying inside the bag that was stolen by the robbers. He immediately went to the Police and made a report and some Policemen were detailed to accompany him to where he saw the accused/appellant. On reaching the place the police arrested the accused and when he was asked how he came about the shirt, he first told the Police that he bought it and when they demanded that he should take them to the place where the shirt was sold to him he changed the story to say that he picked the shirt at the scene of the robbery which occurred the previous month. When the appellant was taken for a search to be conducted in his residence, he tried to deceive the police by pointing to a store which was locked and the police were attempting to break it open until the landlord came out to show them where the accused lived. During the search the Oceanic Bank ATM Debit Card belonging to PW2 was recovered. The shirt and debit card were tendered in evidence as Exhibits "C" and "D".

The accused/appellant made two Statements on 17/6/2008 and 1/7/2008 which were admitted in evidence as Exhibits "A" and "B" respectively. In Exhibit "A" he stated that he picked the jersey shirt at the scene of the robbery but did not mention anything about the Oceanic Bank Debit Card. It was after his residence had been searched that he made Exhibit B also claiming that he picked both the Jersey shirt and the Oceanic Bank ATM Debit Card at the scene of the robbery.

During his testimony in Court, he said that various properties were scattered on the road and as they were about to tow Akpos vehicle, he entered the front seat of the vehicle and it was there he saw the jersey shirt and ATM Card inside the vehicle which he showed to Akpos who told him to keep them on the dash board. When they reached the workshop he told Akpos he was taking the shirt and Akpos wanted to know what he intended to do with the shirt and he told him he was going to use it for training. He however changed the story to say that he picked the shirt and the card on the ground at the scene of the robbery.

Answering questions under cross-examination, accused/appellant stated that Akpos and a police man called Macaulay saw him when he picked up the shirt and card at the scene.

None of the witnesses he called ever mentioned the fact that they saw him pick anything at all from the scene of the robbery.

Before finally deciding to disbelieve the accused/appellant on the story that he picked Exhibits “C” and “D” at the scene of the robbery and thereby holding that his explanation is not consistent with innocence the learned trial Judge pointed to the fact that the defence did not challenge the prosecution’s evidence on the conduct of the accused in misrepresenting his room before his correct room was searched leading to the recovery of Exhibit “D”. Right from start when PW2 saw him with the shirt and lodged the report to the Police, he could not provide any straight forward answers regarding how he came about the shirt. Since he could not take the Police to the place where he bought the shirt, he came up with the concoction that he picked the shirt and the card on the ground where the robbery occurred. Unfortunately for him his story did not fly as Akpos whom he claimed asked him what he intended to do with the shirt said nothing about that encounter.

The point needs to be made that the accused/appellant was not expected to prove his innocence beyond reasonable doubt but to rebut the presumption of having taken part in the robbery or receiving the goods with the knowledge they were stolen items.

The Court below addressed this issue in its consideration of Section 167(a) Evidence Act when Ogakwu JCA stated at pages 167-168 of the records:

“The above stipulation which enacts the doctrine of recent possession is a rebuttable presumption of fact. By the provision the presumption that the person in possession of stolen goods soon after the theft is either the thief or the receiver of the stolen goods, is rebutted where the person can account for his possession of the goods...”

Where there is enough explanation as to how the person came by the property, the presumption will not apply. In *State v. Nnolim* (1994) 6 SCNJ 48; (1994) 5 NWLR (Pt 345) 394 at 410. Adio JSC stated as follows:-

“An explanation by the accused person of the way in which a stolen property came into his possession which might be reasonably true and which is consistent with innocence, although the Court may not be convinced of its truth would displace the presumption.”

The Court below found from the record that the appellant’s

explanation or account of how he came to have possession of Exhibits “C” and “D” include:-

1. That he picked them by the Carina vehicle which was robbed.
2. That he picked them inside Akpos’ vehicle.
3. That he picked them from the ground at the scene of the robbery before he entered Akpos’ vehicle. B

Commenting on this evidence the Court below found as follows on Page 173 -

“The account seems to be contradictory as the Court is left to wonder, if it was inside Akpos’ vehicle, beside the Carina vehicle, or on the ground at the scene of the robbery. Without a doubt, where and how the appellant came into possession of Exhibits “C” and “D” is maternal in consideration of whether he had explained on the balance of probability his possession of the stolen goods and any contradiction is fatal. See: Ibe v. State (1992) LPELR (1386) 1 at 10.” C

As explained by Ayoola JSC in Igbi v. State (2000) 3 NWLR (Pt.648) 169 at 188:-

“Whether contradiction in the evidence of a witness affects the quality of the evidence is primarily for the trial Court to determine having regard, no doubt, to the rest of the evidence of the witness and the fact or facts in respect of which such contradictory evidence has been given.” E

Learned counsel for the appellant while agreeing there were inconsistencies in the accounts of the appellant, submitted that the explanation by the appellant that he picked Exhibits “C” and “D” from the scene need not as a matter of law, be corroborated and that it is enough that the appellant offered the explanation which is consistent with the innocence of the accused. F

From what the learned trial Judge said, it is clear that the explanation given by the appellant was not consistent with his innocence and this necessitated some positive evidence from DW2 that indeed he saw the appellant picking Exhibits “C” and “D” when they went to retrieve his (DW2’s) vehicle at the scene of the robbery. It was not until the search warrant was executed and Exhibit “D” recovered that the appellant made the additional statement, Exhibit B stating that he picked Exhibits “C” and “D” from the scene of the robbery. Earlier before the room was searched the appellant had G

misdirected them to another room. This certainly was not consistent with his innocence. The trial Court was right to disbelief the explanation given by the appellant as to how he came possession of Exhibits “C” and D before proceeding to invoke Section 167(a) Evidence Act to find that the appellant was the robber who robbed PW2 on 25th May, 2008 and to infer that the appellant conspired with others to carry out the robbery. As the conviction of the appellant was based on the surrounding circumstances relating to his being found in possession of Exhibits “C” and “D” the Court below was right in affirming the judgment of the trial Court. This Court cannot interfere since the evidence upon which the appellant was convicted was based on credibility of witnesses which the trial Court duly considered. This is a case where nemesis caught up with the appellant. I find no merit whatsoever in the appeal.

D It is for these reasons and the ones contained in the lead judgment of my learned brother, Mary Peter-Odili JSC that too will dismiss the appeal.

Appeal dismissed.

E

OKORO JSC

I read in draft the lead judgment of my learned brother Mary Ukaego Peter-Odili, JSC just delivered which I agree with both the reasoning and conclusion that the appeal lacks merit and deserves an order of dismissal. I shall make a few comments in support.

A synopsis of the facts leading to this appeal shows that the Pw2, Ogbame Simon was traveling between Lagos and Yenagoa on 25th, May, 2008 when he was attacked by armed robbers along Ughelli/Port Harcourt Highway. His bag containing clothes among other items was stolen. Subsequently, on 17th, June, 2008, the Pw2 was again traveling between Yenagoa and Lagos when upon arrival in Ughelli, he saw the Appellant wearing his jersey shirt which was one of the clothes in the bag stolen by the robbers during the robbery incident of 25th May, 2008. He alerted the police and the appellant was arrested. A search warrant was later executed at the residence of the appellant and an ATM card belonging to the Pw2 was recovered thereat.

On the other hand, the case of the appellant who says he is a

driver at the Otovwodo Motor Park, Ughelli is that one of the drivers at the Motor Park, the Dw1, was also a victim of the robbery incident of 25th May, 2008 and that he was one of the drivers who went to the scene of the robbery the following day. It is also his case that it was at the scene that he picked the jersey shirt and ATM card and took them away. The jersey and ATM card were admitted in evidence at the trial as Exhibits C and D. B

The record shows that the learned trial judge preferred the evidence of the prosecution and convicted the appellant for the offence of conspiracy to commit armed robbery and armed robbery. He was sentenced to death. The conviction and sentence of the appellant were affirmed by the Court of Appeal. C

On a further appeal to this Court, one issue has been nominated for the determination of this appeal. It states:-

“Whether having regard to the circumstances of this case and the totality of the evidence on record, the Lower Court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy and armed robbery against the appellant beyond reasonable doubt.” D

Both counsel addressed the Court on the above issue. As can be seen from the facts above, the appellant was not arrested at the time the offence was committed, neither is there any evidence that he was found at the scene when the offence was committed. The appellant was however found with the stolen properties of the Pw2 about three weeks after the robbery incident. Appellant has given explanation on how he came about the jersey (shirt) and ATM card. F

May I state here that our laws on circumstantial evidence are well settled. This Court held in *Sebastian S. Yongo & anor v. Commissioner of Police* (1992) 4 SCNJ 113, that the circumstances relied upon should point unequivocally, positively, unmistakably and irresistibly to the fact that the offence was committed and that the accused committed the offence. See also *Abioke v. The State* (1975) 9 - 11 SC 97, (1995) 1 All NLR 57, *Adepotu V. State* (1998) 9 NWLR (Pt 565.) 185. H

Now, considering the evidence adduced by the prosecution and the defence put up by the appellant, I am of a well considered opinion that the Court below was on a strong wicket when it affirmed the proper invocation of the doctrine of recent possession under Sec-

tion 167 (a) of the Evidence Act, 2011 which the learned trial judge relied upon to convict the appellant. The said Section 167

(a) of the Evidence Act 2011 states:

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

(a) a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.”

There is no doubt that both the shirt and the ATM card were recovered from the appellant. Was he able to account for his possession? The two Courts below held that the numerous explanations of the appellant on how he came into possession of Exhibits C and D were inconsistent with innocence.

In the instant case, the appellant had more than one explanation to make. He said he picked Exhibits C and D by the Carina Vehicle which was robbed. Secondly, that he picked them inside Akpo's car. Thirdly, that he picked them on the ground before he entered Akpo's car. Yet again, he told Pw2 that he bought the jersey, his denial notwithstanding. It is trite that where a witness (here the accused person) makes a statement which is inconsistent with his earlier statement, such should be treated as unreliable. See *Umani v. The State* (1988) 1 NWLR (Pt. 70) 274, *Oladejo v. The State* (1987) 3 NWLR (pt. 61) 364, *William v. The State* (1975) 9-11 SC (Reprint) 87, (1975) LPELR-3482 (SC).

I agree with the submission of the learned counsel for the respondent that in both the pre trial statements of the appellant in Exhibit A and B coupled with his testimony in Court, the appellant failed to give the faintest or slightest explanation of the inconsistencies in his account of how he came in possession of Exhibits C and D.

From the foregoing thoughts of mine, I am at one with the two Courts below that Section 167 [a] of the Evidence Act was properly invoked and applied to the facts of this case. I agree entirely that from the facts of this case, the appellant was indeed one of the robbers who attacked the pw2 and others on 25th day of May, 2008 while armed with a gun. I affirm the conviction and sentence of death

passed on the appellant by the learned trial judge as upheld by the Court below. Accordingly, there is no merit in this appeal and is accordingly dismissed.

SANUSI JSC

My noble lord Hon. Justice Mary Ukaego Peter-Odili, JSC made available to me her draft judgment in this appeal. Having perused same, I am in entire agreement of the reasoning and conclusion arrived at therein, that this appeal is devoid of merit and deserves to be dismissed. I accordingly dismiss the appeal and affirm the judgment of the Court below which affirmed the decision of the trial High Court which convicted and sentenced the appellant to death as charged. I however wish to chip in few comments of mine in support of the leading judgment.

The appellant herein, was arraigned before the Delta State High Court sitting in Warri Judicial division on two Court charge of conspiracy, to commit armed robbery contrary to Section 6 (b) punishable under Section 1 (2)(a) of the Robbery and Firearms (Special Provisions) Act Cap RII Vol. 14 Laws of the Federation of Nigeria 2004, hereinafter as referred (“the Act”) and of armed robbery, contrary to Section 1 (2) (a) of the same Act punishable under Section 1(2)(a) of the Act.

The facts of the case giving rise to the arrest, trial conviction and sentence of the appellant as could be gathered from the record of proceedings are summarized as below. On 25th May, 2008, the victim one Ogbame Simon for a journey to Yenagoa and on reaching Ewvreni junction along Ughelli/Patani road, he ran into a road block mounted by armed robbers. The robbers robbed him of his bag containing assorted clothes, a sum of fifty thousand Naira, an ATM card of Oceanic Bank, two mobile phones and text book. Two persons were killed during the robbery operation. Then on 17th day of June, 2008, the victim set for another journey from Ughelli to Lagos and he saw the appellant wearing one of his shirts which was among the items robbed from him during the robbery operation of 25/5/2008. He thereupon reported the matter to the police and the appellant was thereupon arrested by the police. In the course of investigation, the police went to the appellant’s house to conduct search

and when the police arrived at the appellant's compound, the latter showed them a room which he claimed to be this. Immediately he pointed at the room which he claimed to be his, a co-tenant of his appeared and told the police men that room he showed them was his (co-tenant) room and not that of the accused/appellant. The co-tenant then showed the police the appellant's actual room. The team of police men then conducted search in the appellant's room, wherefrom the victims Oceanic ATM Card was recovered from the appellant's room.

On the other hand, the case of the appellant was that he was at Ughelli motor park when one driver by name Akpos came to inform him that robbers had blocked the Ughelli/Patani high way and that his (Akpos) vehicle had been damaged in the blockage. Akpos later left and returned with some police men and himself, the appellant and others left to the scene of the robbery along with the police men. The appellant said on reaching there, they noticed that properties were scattered at the scene and as he was about to enter Akpo's vehicle which was about to be towed, he discovered a jersey shirt and an ATM Card which he said he saw inside Akpos car. And in another breath, the appellant stated that he picked both the ATM Card and the shirt from the ground at the robbery scene before he entered Akpos car.

During the appellant's trial, the prosecution, (now respondent,) called two witnesses to prove the allegations against the accused/appellant and tendered the under listed exhibits

1. Statement of appellant.
2. Second statement of the appellant.
3. Shirt.
4. ATM Card
5. A search warrant

In presenting his defence, the accused/appellant also called two witnesses and also testified for his own defence. At the conclusion of the trial, the Court having found the accused/appellant guilty of counts 1 and 2, convicted and sentenced him to death. Aggrieved by the judgment of the trial Court, the appellant appealed to the Court of Appeal (hereinafter to be referred to as the Court below) which dismissed his appeal and affirmed the decision of the trial Court convicting him and sentencing him to death. Further aggrieved by the judg-

ment of the Court below, he again appealed to this Court against the judgment of the Court below, vide a notice of appeal containing three grounds of appeal. In keeping with the practice and Rules of this Court, parties took time to file and exchange their briefs of argument. The appellant who had his brief settled by one Ayo Asala, Esq. filed same on 19th November, 2014. In the said brief of argument, the appellant simply proposed a lone issue for the determination of the appeal which reads thus:-

“Whether having regard to the circumstances of the case and the totality of the evidence on record, the Lower Court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy and armed robbery against appellant beyond reasonable doubt.”

As regards the respondent, a Respondent’s Brief of Argument settled on its behalf was filed on 31/11/2015. The learned counsel for the respondent also decoded lone issue for the determination of the appeal as reproduced hereunder:-

“Whether the Lower Court was right in affirming the judgment of the learned trial judge, that the prosecution proved the cases of conspiracy and armed robbery against the appellant beyond reasonable doubt”.

Proffering arguments on the sole issue for determination he proposed which merely differs with the one raised by the learned respondent’s counsel in the way it was couched, the learned counsel for the appellant listed the ingredients of the offence of armed robbery which the prosecution must prove beyond reasonable doubt in order to obtain conviction and he stated that the respondent in this case proved. See *Usufu v. State* (2008) ALL FWLR (Pt. 405) 1231. He contended that Exhibits C and D i.e. the shirt and ATM Card found in accused/appellant’s possession were not enough evidence to prove his guilt or that he took part in the robbery. He stated the trial Judge was wrong in relying on the evidence of recent possession of the exhibits under Section 148(d) of the old Evidence Act now Section 167 (a) of the new Evidence Act of 2011 (as amended).

Consequently, said the learned appellant’s counsel, the Court below was also wrong to have affirmed the decision of the trial Court in that regard. In a further submission, the learned appellant’s counsel argued that before Court can make a presumption under Section

167(a) of the Evidence Act or old Section 148(a) of the old Evidence Act, four essential elements must exist, namely,

- (i) That the goods were stolen
- (ii) That the accused must be in possession of same.
- (iii) That it must be soon after the theft, and

B (iv) That the accused was unable to offer reasonably account of his possession.

Although learned counsel conceded that evidence was adduced by the prosecution to establish items (i), (ii) and (iii) above. He said
C they failed to establish item (iv) above in view of the explanation by accused/appellant's on how he came in possession of the exhibits. He opined it is not necessary that the trial Judge must be convinced by the accused person's explanation. See - State v. Nrolion (1994) 5 NWLR (Pt.345) 394 at 410. He contended that even the inconsis-
D tent statement of the accused on how he came in possession alone could not lead to conviction of the accused on the ground of pre-
sumption of recent possession.

On the defence of alibi raised by the accused/appellant at the trial Court, the appellant's counsel contended that the defence of
E alibi was not properly investigated by the police even though the trial Court stated on pages 175/176 that it was investigated, but it did not say that the defence of alibi was "properly investigated" as the law requires. He said the Court below, for that reason, should have set
F aside the trial Court's judgment failing which, this Court do same.

Then on the offence of conspiracy to commit robbery, he argued that the trial Court was wrong to have treated it together with the substantive of armed robbery, especially where it stated at page 79 follows:-

G *"From the foregoing, the remaining two Courts in the information can conveniently be dealt with together".*

Learned counsel also referred to a portion in trial Court's Judgment where it held that it was "satisfied that the prosecution proved the first and second counts against the accused" and went ahead to
H convict and sentence the accused on each of the two counts. He then urged to resolve the sole issue in his favour and allow this appeal.

In his reaction, the learned counsel for the respondent conceded to the ingredients of the offence of robbery listed in the appellant's brief which be proved beyond reasonable doubt in alle-

gation of armed robbery as listed in the appellant's brief argument which include:-

- (a) That there was a robbery or series of robbery
- (b) That one or all the robbers was/were armed at or during robbery.
- (c) That the accused was one of the robbers who took part at the robbery. See- *Moses v. The State* (2003) FWLR (Pt. 141) 1969 at 1986. B

He said the trial Court was correct in relying on the evidence of PW1, PW2 and Exhibits C and D as irresistible circumstantial evidence, coupled with Doctrine of possession under Section 148 of old Evidence Act, now Section 167 (a) of the new or current Evidence Act of 2011 (as amended) to convict the appellant. Learned respondent's counsel referred to the evidence of PW1 at pages 61 to 64, PW2 at pages 65-66 and that of the Appellant, DW1 and DW2, submitting that the two of the elements of armed robbery were proved and that the inconsistent statement of the accused/appellant exposed him as a skilful and seasoned liar. He added that the Court below was correct in affirming the judgment of the trial Court. C

Then on conspiracy count, learned respondent's counsel submitted that both trial and Lower Courts were right in applying the law of conspiracy to find the accused guilty. He said it was right for the trial Court to draw inferences of conspiracy from the acts of participants as it properly did in arriving at the conclusion that the offence of conspiracy was complete. He said that the offence of conspiracy can be proved by inference and Court can convict on such inference or inferences or even from the conviction of the main offence of armed robbery. See the case of *Lawson v. The State* (1975) 4 SC 115 at 123, *Nwosu v. The State* (2004) 15 NWLR (Pt.897) 466. He then urged this Court not to interfere with the concurrent findings of the two Courts below. E

Both learned counsel to the parties are ad idem on the ingredients of the offence of armed robbery which the prosecution must establish in order to obtain conviction. F

Even at the expense of being repetitive I shall reproduce such ingredients below:-

- (a) That a robbery took place
- (b) That during the robbery the accused person or any of the H

accused persons was in possession of arms, and

(c) That the accused person was one of the robbers or had taken part in the robbery.

See *Bozin v. State* (1998) ACLRI at II; *Ikemson v. State* (1998) 1 ACLR 809 at 103. The law has also established mode of proving the offence of armed robbery or any offence for that matter, to include any of the followings:-

(i) By evidence of eye witness or witnesses.

(ii) By confessional statement of the accused person, or

(iii) By circumstantial evidence where any of the two methods above are lacking.

There is no gainsaying and in fact it is common ground of the parties learned counsel, that a robbery had actually taken place and the complaint i.e. PW1 was among the victims. Admittedly, only the PW1 who is a victim was the eye witness called by the prosecution. The trial Court however convicted the accused/appellant based on the Doctrine of recent possession of some of the items the complaint (PW1), (the victim) was robbed of, particularly Exhibits C and D, namely the shirt and ATM Card respectively which were recovered from the accused person now appellant soon after the robbery incidence. The trial Court based its findings largely on the evidence of recent possession of those two items which it held that the accused failed to give reasonable account or explanation of how he came into possession of those items. The provisions on which the trial Court relied in convicting the accused for being found in possession of recently stolen/robbed property is Section 148 (a) of the old Evidence Act which has now been replaced by Section 167(a) of the Evidence Act 2011 (as amended), which has same wordings with Section 148(a) of the former Act. The said new provisions are reproduced hereunder for ease of reference.

Section 167 reads:-

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

(a) A man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be

stolen unless he can account for his possession”.

The learned counsel for the appellant in his brief of argument, rightly in my view, listed the ingredient of the above provisions for a trial Court to be guided in applying those provisions, to include the namely:

- (a) That the goods are stolen B
- (b) That the accused must be in possession of the goods.
- (c) The goods must be found in his possession soon after the theft, and
- (d) That the accused was unable to account for his possession of the goods recently stolen. The learned appellant’s counsel conceded that the prosecution now respondent, had led credible evidence to establish items (a), (b) and (c) above, but had failed to prove item (d) above. I will come to that later, but suffice it say, that this interpreted the above provisions in some of its decided authorities few of which I shall highlight below. In interpreting the meaning of “soon after the theft or recently stolen goods” this Court, in *State v. Aiyoola* (1969) 6 NSCC 287 Fatai Williams, JSC (as he then was) of blessed memory had this to say C

*“...with regard to the theft of the certificate,
we are of the view, bearing in mind the testimony relating to its disappearance from the lands registry which the learned trial judge accepted and the appellant’s explanation as to how he came into possession of it which the Court categorically, rejected, that the circumstance surrounding the disappearance on or about 7th May, 1968, and its appearance on 12th June, 1968, in the hands of the appellant left no room for any conclusion other than it had been stolen from the lands registry on or about the 7th May 1968.* D

As for the contention that the possession of the certificate was not recent enough, it seems to us, and we are in agreement with the learned Director of public prosecutions in this respect, that in considering the question whether or not possession is ‘recent’ regard is to be taken of the nature of the property stolen as well as the course of human conduct in its relation to the facts of the particular case. E

In the instant case, not only was the appellant found with the stolen certificate just over a month after it had been stolen there can be no doubt that the learned trial Judge was right in invoking the provision of Section 148(a) of the Evidence Act and in presuming F

that the appellant, by virtue of being found in possession of it within a month of the theft, was the person who stole the certificate (exh. A). Having failed to secure the Court's acceptance of the explanation which he gave as to how he came to be in possession of the certificate, we do not see how the appellant could have escaped the conviction which followed."

Similarly, in *Eze v. State* (1985) 3 MZR (Pt. 13) 429 this Court held that the presumption created by this provision is merely an inference which a trial Court is always at liberty to draw and not that it must draw from all the facts and circumstances of each particular case. I will add here, that the possession envisaged in the provisions, is physical possession in respect of thing which are capable of being stolen as in this instant case.

Again, in *Adekoya v. State* (2012) 9 MWLR (Pt. 1306) 539, His Lordship Mary Peter-Odili, JSC had this to say at page 590.

"Bearing that statutory provision in mind the account given by the appellant on his being in possession of the two side mirrors from the stolen motorcycle 24 hours after the robbery did not flow with the reality of the total evidence available. That fact lent credence to the position of the respondent rather than... the exculpation from blame of the appellant and (his) partners. Taken alongside the tested confessional statement, Exhibit 'E', the identification of the appellant and tallied with that of the accused/appellant and the report of the investigation of the police witnesses. Indeed there is just more than enough upon which it can safely be said the proof of the offences has been made beyond all reasonable doubt."

Thus, from what can be deduced from the interpretation of the provisions of the Evidence Act under reference supra, one can without any hesitation say, that the trial Court was correct when it considered the contradictory, inconsistent stories on how he came in possession of Exhibits C and D that he failed to give sufficient and convincing account of his possession. The trial Court therefore had the discretion to so hold and to convict him of the offence of robbery based on recent possession of Exhibits C and D as it rightly did. The Court below as well, was also right in affirming the trial Court's decision convicting the accused/appellant as charged. It needs to be emphasized however, that the said exhibits were recovered from the appellant in June while the robbery was committed on 25th of May

2008 that is to say in less than one month after the robbery took place even less than the period as in the case of State v. Aiyeola (supra).

On the defence of Alibi raised by the appellant that he was at home with his wife at the time or on the day of the robbery, I make bold to say, that such defence could not avail him, as rightly held by the trial Court and affirmed by the Lower Court. The word “Alibi” simply means elsewhere. It is the duty of the accused who intends to rely on it as a defence, to furnish the police with sufficient particulars of same. He must state his whereabouts and those persons with him at the material time. It is then, that it is left for the prosecution to disprove same as failure to investigate the Alibi may lead to the acquittal of the accused. See Yanor v. The State (1965) ATMLR 337; Queen v. Turner (1957) WRNLR 34; Bello v. Police (1956) SCNLR 113; Gachi v. State (1973) 1 NLR 331; and Odu & Anor v. The State (2001) 5 SCNJ 115 at 120 or (2001) 10 NWLR (Pt. 772) 668.

In Patrick Njovens & Ors v. The State, Coker, JSC (of blessed memory) stated as follows on page 401.

“...There is nothing extra ordinary or esoteric in a plea of alibi. Such a plea postulates that the accused person could not have been at the scene of the crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disprove the alibi or attempts to do so, there is no inflexible and/or invariable way of doing this if the prosecution adduces sufficient and accepted evidence of crime at the material time surely his alibi is thereby logically and physically demolished.”

I must reiterate here, that although failure on the part of prosecution to check or investigate an alibi raised by an accused person may cast doubt on the reliability of the case of the prosecution and may even lead to the acquittal of an accused, however in a situation where there is evidence direct or circumstantial fixing the accused at the scene of the crime, then the prosecution’s failure to check the alibi will not be fatal. It is worthy of note, that in this instant case where the accused/appellant merely stated that he was with his wife at home at the material time, he failed or refused to call the wife or anybody, for that matter, to confirm that he slept in his house on that day. The trial Court was therefore right in rejecting the alibi defence

posed by the accused/appellant and the Court below is also faultless in affirming the trial Court's findings in that regard.

Then on the offence of criminal conspiracy, I must emphasize that the offence of conspiracy is normally inferred from the attitude of the accused person, facts and circumstances of each given case. It
B needs not be proved through direct evidence, as it is often difficult or impossible to get such direct evidence. Therefore, where is no direct evidence as in this instant case, such offence can rightly be inferred, as done by the trial Court and later endorsed on appeal the Court
C below. The pieces of evidence adduced by the prosecution at the trial, the attitude of the appellant during the investigation process, as well as the evidence of recent possession went a long way to put the accused/appellant neck-deep into the participation or commission of the offence of robbery and the commission of the offence of criminal
D conspiracy to commit robbery as rightly inferred by the trial Court. Therefore, the two Courts below are correct in their concurring findings, that the appellant was guilty of committing the two count charges and was therefore rightly convicted and sentenced. Since the findings of the two Court's below are not perverse. This Court loath with
E the power to disturb or interfere with such concurring findings of the two Courts below.

Thus, in summation, I am at one with the detailed reasoning and conclusion arrived at by my learned brother Mary Ukaego Peter-Odili, JSC, that this appeal is devoid of merit and ought to be
F dismissed. I too accordingly dismiss the appeal and affirm the judgment of the Court below which also affirmed the conviction of the two counts and the sentence of death passed on him. Appeal is hereby dismissed by me.

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