

SUPREME COURT OF NIGERIA
FRIDAY 1ST JULY, 2016. SC. 501/2012
CORAM:- S. GALADIMA, M. U. PETER-ODILI, K. B. AKA'AH, S.
K. M. O. KEKERE-EKUN, J. I. OKORO, JJSC

FREEBORN OKIEMUTE APPELLANT
V.
THE STATE RESPONDENT

EVIDENCE - Conviction - Credibility of witness - Conviction of appellant based on evidence of PW3 was proper - As the witness positively identified him as perpetrator of the crime (H1)

EVIDENCE - Inconsistency - Weight - PW3 having properly identified appellant - Minor contradictions in her evidence on oath and Exhibit C - Cannot render the evidence unreliable (H2)

CRIMINAL PROCEDURE - Conspiracy - Proof - Evidence of conspiracy is by inference from criminal acts or omissions of accused - Done in pursuance of criminal purpose common to them (H3)

ALIBI - Defence - From evidence on circumstances of appellant's arrest - And his failure to raise the defence promptly - Appellant cannot be availed by the defence of alibi (H4)

CHARGES - Validity - From evidence adduced and circumstances of the case - Charging of appellant with conspiracy along with the substantive charge - Does not render the charge bad in law (H5)

FACTS

Before the High Court of Delta State sitting at Ozoro, accused/appellant and others (at large) were arraigned on six counts charge of conspiracy to commit armed robbery and armed robbery. Appellant pleaded not guilty to each of the counts. At the commencement of the trial, prosecution/respondent called six witnesses to prove its case against appellant. PW3 in her evidence on oath identified appellant as one of the perpetrators of the crime. In his defence, appellant did not call any witness, but rather testified for himself.

At the conclusion of the trial, the Court discharged and acquitted appellant in respect of the counts II, III, IV and VI but convicted him in respect of counts I and V relating to the robbery committed against PW3 and held that based on the proper identification of appellant by PW3 and evidence adduced in the case, respondent proved its case beyond reasonable doubt. Aggrieved, appellant appealed to the Court of Appeal Benin Division. The Court heard and dismissed the appeal for want of merit and upheld the decision of the trial Court. Aggrieved further, appellant has appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the lower Court was right in upholding the finding of the trial Court that the PW3 gave positive evidence of identification/recognition of the appellant as one of the armed robbers that robbed PW3.

(ii) Whether from the totality of the evidence on the record, the lower Court was right in affirming the conviction of the appellant by the trial Court for the offences of conspiracy to rob and armed robbery.”

HELD (Unanimously dismissing the appeal per GALAD-IMA JSC)

EVIDENCE - Conviction - Credibility of witness

1. In the instant case, the facts relied on by the learned trial Judge in convicting the Appellant on the two-count offences of conspiracy to commit armed robbery are credible. The evidence of PW3 at the trial during cross-examination, where she clearly identified the Appellant was not challenged. Let it be noted that the only issue raised by the Appellant at the Court below which the trial Judge duly considered in his judgment is that the police did not conduct any identification parade. I agree with the learned counsel for the Respondent that the Appellant did not make the findings of the trial Court on the issue of identification parade an issue in the appeal before the Court below. In this case, one of the abiding principles of law regarding the identification parade is applicable. That an identification parade is not necessary when the witness claims that the perpetrator of a crime is a familiar or definite person by name or his abode who can be pos-

itively identified if the victim is given the opportunity to do so. The victims in this case, testified as eyewitnesses, and mentioned specific names of people previously known to them, thus clearly excluding the necessity of an identification parade.

I am of the firm opinion that the credibility of PW3 was properly evaluated to warrant the Court coming to the conclusion that the conviction of the Appellant based on the evidence of PW3 was proper. (p. 3413 B)

EVIDENCE - Inconsistency - Weight

2. Learned counsel for the Appellant has urged this Court to apply the consistency rule to the evidence of PW3 simply to discountenance both Exhibit ‘C’, the extra judicial statement made to the police by him and the evidence made on oath at the trial on the basis of irreconcilable inconsistencies and contradiction in both statements from which this Court cannot pick and choose. What are the main inconsistencies, the Appellant is agitating? One of these is PW3 had stated in Exhibit ‘C’ that she was informed that the Appellant was the leader of the armed robbery gang but on oath she said she identified the Appellant while the robbery was taking place. If the purpose of tendering Exhibit ‘C’ is to show inconsistency of PW3’s evidence that purpose is not served, in the circumstance of this case. Inconsistency rule does not apply to render the evidence of PW3 incredible and unreliable and to be discountenanced. Particularly when such inconsistency is of a minor nature that does not affect the live issue.

I do not find both aforementioned statements inconsistent, capable of affecting her credibility.

I agree with the Court below that there was no significant inconsistency in the evidence of PW3 and Exhibit C which she made about a month after the incident as to render the evidence unreliable. The Appellant was recognised by PW3 as one of those who committed the armed robbery. I must say that it is preposterous for the learned counsel for the Appellant to urge the Court to totally discountenance the evidence of PW3 on oath vis-a-vis Exhibit “C”. To do this is to lose sight of the fact that she had made an earlier statement to the police in which she claimed to have identified the Appellant and mentioned his name. (pp. 3413 H/3415 C)

CRIMINAL PROCEDURE - Conspiracy - Proof

3. Indeed the correct legal principles on evidence of criminal conspiracy is well considered and summed up by the two Courts below. The conspiracy is either by direct evidence of how the conspiracy came about or by inference from certain criminal acts or omissions of the parties concerned, done in pursuance of an apparent criminal purpose common to them. (p. 3417 C)

ALIBI - Defence

4. I have quoted the evidence of PW3 extensively. Her evidence fixed the Appellant at the scene of the crime. He is to proffer credible alibi and not his defence that he was arrested for a different offence.

When the Appellant was first arrested on 16th January, 2007 and he made Exhibit F he did not mention that he was arrested for assault. He came up with the story of how he was arrested in his statement on oath on 30th January, 2007. At pages 62-64 of the record he claimed that he fought with one James who reported him for assault for which he was arrested. That the statements of PW1 and PW3 were made on 16th January, 2006 but backdated to 19th November, 2006 in order to implicate him in the robbery. What an incredible tell-tale! Who really wanted to implicate him; PW1 or PW3 if I may ask? I agree with the learned counsel for the Respondent that **“it would have taken a lot of collaboration to get the PW1 and PW3 to the station at the time when the Appellant was accused in order to set about implicating him in the dastardly manner suggested by the Appellant.”**

Learned counsel put up a valid argument in his brief. Indeed, if the Appellant had not been identified by PW3 as one of the armed robbers and was accurately described in her statement to the police after the event, and the Appellant had promptly and properly raised the defence of alibi, the police would have been obliged to carry out the investigation of his claim. Having believed the evidence of IPO on oath as to the circumstances of the Appellant's arrest, I do not think that the defence set up by the Appellant will avail him. (p. 3418 C)

CHARGES - Validity

5. However, in the present appeal, I am in no doubt that the evidence,

as clearly pointed out earlier, support the count of conspiracy to commit armed robbery as well as the count for actually carrying it out. The circumstances of this case when considered, then the charging of Appellant with conspiracy along with the substantive charge does not render the information inherently bad in law. (p. 3419 G)

NOTABLE POINTS OF INTEREST

GALADIMA JSC

1. Identification parade – Conduct of

It must always be borne in mind that an identification parade is not necessary in all cases. It is however, necessary in the following circumstances; where:-

(a) The victim did not know the accused before and his first acquaintance with him was during the commission of the offence:

(b) The victim or witness was confronted by the offender for a very short time; or

(c) The victim, due to time and circumstances, might not have had the opportunity of observing the features of the accused.

However, the instances, where identification parade is not necessary are as follows: where

(a) there is a clear and un-contradicted eye witness account and identification of the person who allegedly committed the crime;

(b) witness knew the accused previously;

(c) the defendant is linked to the offences by convincing, cogent and compelling evidence; and

(d) the accused in his confessional statement identified himself with the crime. (p. 3412 F)

2. Identification parade – Not mandatory for a conviction

It must be noted, however that an identification parade is not a sine qua non to a conviction. It has to be established or proved that the accused is guilty of the offence he is being charged with, beyond reasonable doubt. (p. 3413 A)

3. Joinder of Charges – Need to avoid

This Court has deprecated the practice of including a count of conspiracy to commit an offence in information as well as a count for actually committing it, where the evidence to support the two counts

are the same. The reason is obvious. This is because:

(i) evidence which otherwise would be inadmissible on the substantive charges against the accused becomes admissible, and

(ii) such a joinder of charges adds to the length and complexity of the case so that the trial may easily be well near unworkable and impose a quite intolerable strain on the Court.

This proposition is good if there will be clogging of otherwise simple trial with a count of complicated conspiracy, especially when there is no independent evidence of conspiracy. This is the merit of this proposition of the law. It should not be over-stressed or stretched to a ridiculous elasticity. (p. 3419 B)

REPRESENTATION

Ayo Asala, Esq. with him, Charles Uzoka, Esq., for the Appellant P. Mrakpor (Hon. Attorney-General Delta State, Ministry of Justice) with him, B. O. Odigwe, Esq. (DPP, Delta State Ministry of Justice) O. F. Enenmo (Director, Civil Service and Appeals) and C. O. Agbawu, Esq., for the Respondent

CASES REFERRED TO

Ikemson v. State (1989) 6 SC (pt. 5)
Adamu v. State (1991) 4 NWLR (pt. 187) 530
Alabi v. State (1993) 7 NWLR (pt. 307) 24
Isibor v. State (2002) 3 NWLR (pt. 754)
Ndidi v. State (2007) All FWLR (pt. 381) 1617
Basil v. State (2008) 4 SCNJ 250
Gabriel v. State (1989) 5 NWLR (pt. 122) 457
Idemudia v. State (2015) 24 LRCN 1
Wakala v. State (1991) 8 NWLR (pt. 211) 552
Ozaki v. State (1990) 1 SC 109
Onyenye v. State (2012) 15 NWLR (pt. 1324) 586
Njovens v. State (1973) 5 SC 7
Balogun v. A-G Ogun State (1992) 2 NWLR (pt. 763) 512
Sule v. State (2009) 17 NWLR (pt. 1169) 33
Arwa v State NWLR (1990) 6 NWLR (pt. 155) 125

STATUTES REFERRED TO

Robbery & Firearms Act LFN 2004, s. 1(2)(a)

Evidence Act 2011, s. 135

LEAD JUDGMENT BY GALADIMA JSC

This Appeal is against the judgment of the Court of Appeal, Benin Division, delivered on the 15th day of November, 2012 which affirmed the judgment of the High Court of Ozoro, (Delta State). Delivering its judgment on 14th July, 2010, the trial High Court convicted the Appellant of the offence of conspiracy to commit armed robbery and robbery.

The Appellant was arraigned on the 22nd day of January, 2009 before the trial Court upon information containing six counts stated as follows:

“STATEMENT OF OFFENCE: COUNT I

Conspiracy to commit armed robbery punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, Laws of the Federation of Nigeria, 2004.

PARTICULARS OF OFFENCE:

Freeborn Okienute (M) and others now at large on or about the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division conspired to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II

Armed robbery punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Law of the Federation 2004.

PARTICULAR OF OFFENCE:

Freeborn Okiemute (M) and others now at large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division, robbed one Okonedono Bight of his Sagen handset while armed with gun.

STATEMENT OF OFFENCE: COUNT III

Armed robbery punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Laws of the Federation 2004.

PARTICULAR OF OFFENCE:

Freeborn Okiemute (M) and others now at large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division robbed one Beauty Egbamuno of her handset while armed with gun.

STATEMENT OF OFFENCE: COUNT IV

Armed robbery punishable under Section 1 (2)(a) of the Robbery and Firearms (Special Provisions) Act, Laws of the Federation 2004.

PARTICULARS OF OFFENCE:

B Freeborn Okiemute (M) and others now at Large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division robbed one Ajiri Egbamuno of her Samsung handset while armed with gun.

STATEMENT OF OFFENCE: COUNT V

C Armed robbery punishable under Section 1??(2) (a) of the Robbery and Firearms (Special Provisions) Act, Laws of the Federation 1990.

PARTICULARS OF OFFENCE:

D Freebom Okiemute (M) and others now at large on the 17th day of November, 2006 at Ozoru in the Ozoro Judicial Division robbed one Matilda Egbanu (F) of N500,000.00 cash, jewelry, wrappers and other personal belonging while armed with gun.

STATEMENT OF OFFENCE: COUNT VI

E Armed robbery punishable under Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, laws of the Federation 1990.

PARTICULARS OF OFFENCE:

F Freeborn Okienute (M) and others now at large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division robbed one Marvelous Okomedono (M) of his Siemens handsets while armed with gun.”

The Appellant pleaded not guilty to the six counts charge. The trial proceeded. The prosecution called six witnesses, while the Appellant testified for himself. At the conclusion of the trial, the trial Court discharged and acquitted the Appellant in respect of the counts II, III, IV and VI but convicted him in respect of counts I and V relating to the robbery committed against PW3 and held that the prosecution proved its case beyond reasonable doubt.

Dissatisfied with the judgment of the trial Court, the Appellant appealed to the Court below which dismissed the appeal and affirmed the decision of the lower Court. Both Courts placed reliance on the oral evidence of PW3 and her extra judicial statement Exhibit ‘C’.

H In this further appeal to this Court, the Appellant in his Notice of Appeal raised seven grounds of appeal from which two issues were

distilled in his brief of argument settled by AYO ASALA ESQ thus:-

“(i) Whether the lower Court was right in upholding the finding of the trial Court that the PW3 gave positive evidence of identification/recognition of the appellant as one of the armed robbers that robbed PW3.

(ii) Whether from the totality of the evidence on the record, the lower Court was right in affirming the conviction of the appellant by the trial Court for the offences of conspiracy to rob and armed robbery.”

On behalf of the Respondent in the brief of argument settled by O. F. ENENMO ESQ on 24th May, 2013, one issue was distilled for determination of this appeal as follows:-

“Whether the lower Court was wrong in affirming the judgment of the trial Court that the prosecution proved the count on the information beyond reasonable doubt.”

On the 28th day of April, 2016 this appeal came up for hearing, counsel for the respective parties AYO ASALA ESQ and P. MRAKPOR ESQ (Hon. Attorney-General of Delta State) were both in Court representing the Appellant and Respondent herein. They both adopted and relied on their respective briefs of argument. While the learned counsel for the Appellant urged the Court to allow the appeal, learned counsel for the Respondent urged the Court to dismiss the appeal.

The two issues raised by the Appellant but compressed into single issue by the Respondent’s counsel is quite apt to the determination of the Appeal. For the main plank of the lower Court decision was its affirmation of the finding of the trial Court that the PW3 gave positive evidence of identification of the Appellant as one of the armed robbers that robbed her. It is the submission of learned counsel for the Appellant that the concurrent findings of the two lower Courts were perverse and should be interfered with and therefore set aside. Reliance was placed on OGUONZEE v. THE STATE (1998) 5 NWLR (Pt. 551) 521; ARUNA v. STATE (1995) 6 NWLR (Pt. 155) 125; STATE v OGBUBUNJO (2001) FWLR (Pt. 37) at 1097 at 1115. That while the trial Court rightly held that counts, II, IV and VI had not been proved beyond reasonable doubt against the Appellant the Court wrongly relied on the inconsistent and unreliable evidence of PW3 to convict the appellant in respect of Counts I and V. This is because

the extra judicial statement of PW3 of 19/11/2006 was not rendered in evidence before the trial Court. It is conceded however that the Court below examined the contents of an extra judicial statement which though form part of the proof of evidence was not tendered in evidence.

B On the question of material inconsistencies in the evidence of the prosecution witnesses, learned counsel for the Appellant submitted that there are some between the oral testimony of PW3 and Exhibit 'C', her extra judicial statement made on 16/1/2007, as to C how she came about recognizing the Appellant as the armed robbers that attacked her. It is further submitted that the evidence of PW2 contradicted the evidence of PW3 on the description of the Appellant and his physiognomy (facial appearance). That the lower Court in addressing the issue of the inconsistency between the oral evidence of PW3 and Exhibit 'C' wrongly concluded that both statements are D not inconsistent, capable of affecting the credibility of PW3 as regards the evidence she gave on oath and her extra judicial statement. It is contended that the issue of whether the PW3 personally saw the Appellant in the course of the armed robbery attack or whether it was information given to her by a third party was a live issue at E the trial Court. This is because the Appellant was consistent in his extra judicial statement and oral testimony that it was one Apijah who brought PW3 to the police station, where the Appellant was arrested for a different offence of assault and the said Apijah pointed F the Appellant to PW3 as one of the armed robbers. In view of the foregoing, the learned counsel submitted that PW3's evidence as to the identification of Appellant as one of the robbers is not based on her personal knowledge but on information she received from other persons who were not called by the prosecution to give evidence. It is argued that the evidence of PW3 as contained in Exhibit 'C' that she G was informed that the Appellant was the leader of the armed robbers gives credence and corroborates the defence of the Appellant that he did not participate in the armed robbery, but that it was one Apijah with whom the Appellant had some misunderstanding that informed PW3 that the Appellant was one of the armed robbers.

H Another reason adduced by the learned counsel for the appellant for his submission that the lower Court was wrong to have affirmed the decision of the trial Judge in relying on the evidence of

PW3 is because of her evidence lacks credibility. That she was not a witness of truth and appeared as interested witnesses set on seeing to the conviction of the Appellant at all cost. This contention is backed by the fact that the PW3 in her evidence-in-chief had stated that she was able to recognise the Appellant as one of the robbers that attacked her because the Appellant had previously visited her compound B with others in a failed robbery attempt. Besides, the learned counsel wonders why PW3 had failed to report her previous encounter with the Appellant to any of her relations, including PW1 and PW4.

C Concluding his submission, learned counsel for the Appellant contended that having regard to the totality of the evidence led at the trial Court, the Court below was wrong to have affirmed the conviction of the Appellant. This Court is urged to discharge and acquit the Appellant.

D The substance of the argument of the Respondent's counsel is that having regard to the evidence before the trial Court, the Court below was right in law when it affirmed the judgment of the said trial Court. In other words, it is his submission that the trial Court rightly held that the prosecution proved the case of conspiracy to commit E robbery and armed robbery against the Appellant beyond reasonable doubt as provided in Section 135 of the Evidence Act, 2011.

Learned counsel for the Respondent in the brief set out three undisputed evidence on record which the trial Court believed and based its findings and equally affirmed by the Court below viz:-

(a) That PW3 was robbed of her money, jewelry, wrappers F and other belongings on 17th November, 2006.

(b) That the robbers that attacked the PW3 on that day were armed with cutlasses and guns.

(c) That the PW3 recognised the Appellant as one of the G robbers.

Learned Counsel for the Respondent, has urged this Court to affirm the judgment of the two lower Courts and dismiss the appeal on the grounds that:

(a) The evidence of PW3 that she recognised the appellant H among the armed robbers that robbed her at her residence on 17/11/2006 is credible and un-contradicted.

(b) The PW3's oral evidence in Court and Exhibit 'C' are facts which the Court below relied on in affirming the findings of the

trial Court to the effect that her evidence on the issue of recognition was proper.

All the two issues formulated by the learned counsel for the Appellant considered together boil down mainly to his complaint that the Appellant was convicted on Counts I and V on the incredible, inconsistent and unreliable evidence of PW3. But in reference to the findings of the learned trial Judge particularly, the portion dealing with his reasons to dispense with an identification parade, I must say, those reasons were in line with the laid down principles on identification by this Court in a number of its decisions, notably, IKEMSON v. THE STATE (1989) 6 SC (Pt.5) ADAMU v. THE STATE (1991) 4 NWLR (Pt.187) 530; ALABI v. STATE (1993) 7 NWLR (Pt.307) 24; ISIBOR v. STATE (2002) 3 NWLR (Pt.754).

It must always be borne in mind that an identification parade is not necessary in all cases. It is however, necessary in the following circumstances; where:-

(a) The victim did not know the accused before and his first acquaintance with him was during the commission of the offence:

(b) The victim or witness was confronted by the offender for a very short time; or

(c) The victim, due to time and circumstances, might not have had the opportunity of observing the features of the accused.

However, the instances, where identification parade is not necessary are as follows: where

(a) there is a clear and un-contradicted eye witness account and identification of the person who allegedly committed the crime;

(b) witness knew the accused previously;

(c) the defendant is linked to the offences by convincing, cogent and compelling evidence; and

(d) the accused in his confessional statement identified himself with the crime.

It must be noted, however that an identification parade is not a sine qua non to a conviction. It has to be established or proved that the accused is guilty of the offence he is being charged with, beyond reasonable doubt.

In the instant case, the facts relied on by the learned trial Judge in convicting the Appellant on the two-count offences of conspiracy to commit armed robbery are credible. The evidence of PW3 at the trial

during cross-examination, where she clearly identified the Appellant was not challenged. Let it be noted that the only issue raised by the Appellant at the Court below which the trial Judge duly considered in his judgment is that the police did not conduct any identification parade. I agree with the learned counsel for the Respondent that the Appellant did not make the findings of the trial Court on the issue of identification parade an issue in the appeal before the Court below. In this case, one of the abiding principles of law regarding the identification parade is applicable. That an identification parade is not necessary when the witness claims that the perpetrator of a crime is a familiar or definite person by name or his abode who can be positively identified if the victim is given the opportunity to do so. See NDIDI v. THE STATE (2007) ALL FWLR (Pt.381) Pt. 1617. The victims in this case, testified as eyewitnesses, and mentioned specific names of people previously known to them, thus clearly excluding the necessity of an identification parade.

I am of the firm opinion that the credibility of PW3 was properly evaluated to warrant the Court coming to the conclusion that the conviction of the Appellant based on the evidence of PW3 was proper.

Learned counsel for the Appellant has urged this Court to apply the consistency rule to the evidence of PW3 simply to discountenance both Exhibit 'C', the extra judicial statement made to the police by him and the evidence made on oath at the trial on the basis of irreconcilable inconsistencies and contradiction in both statements from which this Court cannot pick and choose. What are the main inconsistencies, the Appellant is agitating? One of these is PW3 had stated in Exhibit 'C' that she was informed that the Appellant was the leader of the armed robbery gang but on oath she said she identified the Appellant while the robbery was taking place. If the purpose of tendering Exhibit 'C' is to show inconsistency of PW3's evidence that purpose is not served, in the circumstance of this case. Inconsistency rule does not apply to render the evidence of PW3 incredible and unreliable and to be discountenanced. See UWAGBOE v. THE STATE (2008) 12 NWLR (Pt.1102) Page 621. Particularly when such inconsistency is of a minor nature that does not affect the live issue. See BASIL v. THE STATE (2008) 4 SCNJ 250; THE STATE v. FATAI AZEEZ 4 SCNJ 325; AYO GABRIEL v.

THE STATE (1989) 5 NWLR (Pt.122) 457.

I do not find both aforementioned statements inconsistent, capable of affecting her credibility. The Court below on this point lucidly stated at page 179 of the record thus:

“I do not regard both statements as seriously inconsistent statements capable of affecting her credibility and regards the evidence she gave on oath and her extra judicial statement regarding the salient ingredients of the offence. That is to say that even if it is conceded that there was inconsistency on that point, PW3 at the earliest opportunity on 19th November, 2006, after the robbery while in hospital gave a good description of the Appellant and mentioned him by name. There was no challenge by the defence regarding the description she gave of him in her earlier statement on 19th November, 2006 which she referred to on oath. Neither was there a challenge in that said statement referred to by her under cross examination where she specifically mentioned the Appellant by name as one of the robbers. The question of whether or not he was the leader of the armed robbery gang pales into insignificance when the totality of her evidence on oath and Exhibit C is considered”.

From the foregoing the Court below did clearly take the same stance of the trial learned Judge when he placed reliance on the evidence of PW3 on oath at page 52 of the record. The extract of her evidence runs thus:

“I know their names (sic) of the one recognised. The armed robbers in the course of beating me dragged me outside where I recognised one of them who is black in complexion, short and black boy. I recognised others the short one I recognised told me that he came purposely because of me. I do not know the name of the short one. But the other one of the armed robbers I recognised is FREEBORN who is slim and little bit tall in height. The Freeborn I recognised among the armed robbers is the accused person in the dock. I was able to recognise the accused person on that day because prior to the day of the armed robbery incident the accused person had come once before me in a group of armed robbers who came to the house, but the doors of the house were locked.”

I agree with the Court below that there was no significant inconsistency in the evidence of PW3 and Exhibit C which she made about a month after the incident as to render the evidence unreliable.

The Appellant was recognised by PW3 as one of those who committed the armed robbery. I must say that it is preposterous for the learned counsel for the Appellant to urge the Court to totally discountenance the evidence of PW3 on oath vis-a-vis Exhibit “C”. To do this is to lose sight of the fact that she had made an earlier statement to the police in which she claimed to have identified the Appellant and mentioned his name. The extract of her earlier statement copied above referred. See further the case of IDEMUDIA v. STATE (2015) 24 LRCN 1 at 26 -27; WAKALA v. STATE 1991 8 NWLR (Pt.211) P. 552 at 565.

The conclusion of the learned trial Judge at page 101 of the record, which the Court below equally adopted is apt on this point. It reads thus:-

“The close contact the armed robbers had with the PW3 and the length of time spent at the house of PW3 was enough for PW3 to recognise the accused person in spite of the time of the robbery incident at night time.”

Another point raised by the learned counsel for the Appellant is that of contradiction between the evidence PW3 and PW4 in that while PW3 claimed that it was the Appellant who lived at Erovie Quarters, PW4 said it was one Stainless who lived at that address.

The Court below in resolving this issue had the following explanation at page 181 of the record.

“I cannot find with reasoning any contradiction on this issue of fact. All the victims stated that the robbers were numerous in number and each identified different persons while PW3 on oath specifically said she could identify and mentioned the Appellant by name. PW3 did not mention him among those he could identify even though he mentioned by name Boy ‘O’-Oyoyo and Stainless who lived at Erovie Quarters and also one Deco. The fact that PW3 recognised him and PW4 recognised others does not in my view constitute contradiction. It would have been on entirely different thing if they both identified the Appellant but gave different physical description of him and where he lived”.

I do not think this is a case where the trial Court and the Court below did choose and pick from the evidence of the prosecution witnesses on this point, as contended by the learned counsel for the Appellant. The Court below is not wrong to have upheld the decision of the trial Judge which preferred the testimony of PW3 as

against PW2 or PW4 on the identity and physical description of the Appellant.

For the offences of conspiracy and armed robbery, it is the contention of the Appellant that having regard to the totality of the evidence led at the trial Court, the Court below was wrong to have affirmed his conviction. On the other hand, it is the case of the Respondent that the Court below was right when it affirmed the conviction of the Appellant on the ground of conspiracy.

In affirming the judgment of the trial Court on this issue, the Court below concluded at page 191 of the record thus:

“The record and evidence of the prosecution witnesses clearly shows that the armed robbers who committed the offence were several in numbers. I cannot help but agree with the learned trial Judge that inference of conspiracy can be and must be made from these facts and irrefutable conclusion of conspiracy to commit armed robbery.

We must take into consideration the fact that both the learned trial Judge and my humble self have found sufficient evidence on record to ground the substantive charge of armed robbery”.

Regarding count 1 in which the offence of conspiracy was alleged, the learned trial Judge having carefully reviewed the testimonies of PW1, PW2, PW3 and PW4 held at page 103 of the record thus:

“In Count I, the accused person and others at large are charged with the offence of conspiracy to commit armed robbery at Ozoro on the 17th of November, 2006. In proof of the offence the prosecution called six witnesses who testified in these proceedings. I have already in this judgment reviewed the evidence of PW1, PW2, PW3 and PW4 in relation to the substantive offence of armed robbery on which the prosecution relies for the offence of conspiracy to commit armed robbery.”

Indeed the correct legal principles on evidence of criminal conspiracy is well considered and summed up by the two Courts below. The conspiracy is either by direct evidence of how the conspiracy came about or by inference from certain criminal acts or omissions of the parties concerned, done in pursuance of an apparent criminal purpose common to them. *OZAKI v. STATE* (1990) 1 SC 109; *ON-YENYE v. STATE* (2012) 15 NWLR (Pt. 1324) 586; *NJOVENS v. THE STATE* (1973) 5 SC 7 at 10; *BALOGUN v. ATT. GEN. OGUN*

STATE (1992) 2 NWLR (pt.763) 512.

This Court will not ordinarily disturb concurrent findings of fact by the two lower Courts or even with findings based on evidence believed by the trial Court, unless in very exceptional circumstances, for example where the findings or judgment appealed against are perverse: *KARIMU v. STATE* (1999) 13 NWLR (Pt.633) 1 at 4.

There is no satisfactory evidence of self-defence as raised by the Appellant to the charge of conspiracy to commit armed robbery. His defence at the trial Court was that he was arrested for assault. According to him it was while he was in police custody for the offence of assault that he was identified by PW3 as one of the robbers that robbed her. He contended that the police did not investigate his defence. On this issue the Court below in affirming the findings of the trial Court held at page 187 of the records thus:

“On the issue regarding the failure of the police to investigate the defence raised by the Appellant, it is pertinent to understand that the Appellant’s insistence that he was arrested for assault and not armed robbery cannot be a defence to the charge. Admittedly, he denied the charge, but nowhere in his extra judicial statements. Exhibits G and F and his evidence on oath in his defence did he provide an alibi for the night of the robbery. The problem we have here is that the Appellant was named by one of the complainants, PW3 in a statement to the police on 19th November, 2006, while on admission in hospital after the incident.”

At page 559 of the record PW5, the I.P.O explained why the statements of PW1 and PW3 were obtained late when he stated thus:

“The statements of PW1 and PW3 were recorded about a day or two after the complaint was reported at the police station because they were injured and were hospitalized. I recorded their statements in the hospital.”

I have quoted the evidence of PW3 extensively. Her evidence fixed the Appellant at the scene of the crime. He is to proffer credible alibi and not his defence that he was arrested for a different offence.

When the Appellant was first arrested on 16th January, 2007 and he made Exhibit F he did not mention that he was arrested for assault. He came up with the story of how he was arrested in his statement on oath on 30th January, 2007. At pages 62-64 of the record he claimed that he fought with one James who reported him

for assault for which he was arrested. That the statements of PW1 and PW3 were made on 16th January, 2006 but backdated to 19th November, 2006 in order to implicate him in the robbery. What an incredible tell-tale! Who really wanted to implicate him; PW1 or PW3 if I may ask? I agree with the learned counsel for the Respondent that

“it would have taken a lot of collaboration to get the PW1 and PW3 to the station at the time when the Appellant was accused in order to set about implicating him in the dastardly manner suggested by the Appellant.”

Learned counsel put up a valid argument in his brief. Indeed, if the Appellant had not been identified by PW3 as one of the armed robbers and was accurately described in her statement to the police after the event, and the Appellant had promptly and properly raised the defence of alibi, the police would have been obliged to carry out the investigation of his claim. Having believed the evidence of IPO on oath as to the circumstances of the Appellant's arrest, I do not think that the defence set up by the Appellant will avail him.

Appellant's counsel argued that the Appellant should have been charged and convicted separately with offence of conspiracy to commit armed robbery because the facts upon which both counts were based are the same.

This Court has deprecated the practice of including a count of conspiracy to commit an offence in information as well as a count for actually committing it, where the evidence to support the two counts are the same. The reason is obvious. This is because:

- (i) evidence which otherwise would be inadmissible on the substantive charges against the accused becomes admissible, and
- (ii) such a joinder of charges adds to the length and complexity of the case so that the trial may easily be well near unworkable and impose a quite intolerable strain on the Court.

See R V DAWSON v. WENLOCK (1960) 44 CR APP R 87 Page 93 where the opinion of the Court of Appeal in England on the issue was adopted in lie Nigerian case of CLARK v. STATE (SUPRA). See further AIYEOLA & 2 ORS v. THE STATE SC/27/69 (Unreported) of 7/8/1970. This proposition is good if there will be clogging of otherwise simple trial with a count of complicated conspiracy, especially when there is no independent evidence of conspiracy. This is the merit of this proposition of the law. It should not be over-stressed

or stretched to a ridiculous elasticity. I agree with the stance of the Court below on the point when it held on page 190 of the record, while relying on the cases of CLARK v. STATE (Supra) and SULE v. THE STATE (2009) 17 NWLR (Pt.1169) 33 thus:

“That position of law is eminently suitable (sic). This is because in a charge of conspiracy to commit on (sic) offence such as armed robbery, even although a separate offence from armed robbery, where the facts are intricately interwoven the Courts are enjoined to the deal with the main offence first, since, if the substantive offence is unproven; the case for conspiracy is (sic) such circumstances collapses.”

However, in the present appeal, I am in no doubt that the evidence, as clearly pointed out earlier, support the count of conspiracy to commit armed robbery as well as the count for actually carrying it out. The circumstances of this case when considered, then the charging of Appellant with conspiracy along with the substantive charge does not render the information inherently bad in law.

For all the reasons which I have given above, lead me to conclude that the prosecution did prove its case against the Appellant, beyond reasonable doubt. The appeal fails. I affirm the decision of the Court of Appeal which confirmed the conviction and sentence of the Appellant to death by the High Court of Ozoro, Delta State in case No. HC2/13C/2008 on 14th July, 2010.

Appeal dismissed.

PETER-ODILI JSC

I am in agreement with the judgment just delivered by my learned brother, Suleiman Galadima, JSC and to show support for the reasoning, I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal, Benin Division delivered on the 15/11/2012 affirming the judgment of the High Court of Delta State, Ozoro delivered on the 14/7/2010 in which the Appellant was convicted of conspiracy to Commit armed robbery and armed robbery.

The Appellant on the 22/1/2009 was arraigned before the trial Court upon information containing six counts to wit.

STATEMENT OF OFFENCE: COUNT I

Conspiracy to commit armed robbery punishable under Section 1 (2) (a) of the Robbery and Firearms (Special provisions) Act, Laws of the Federation of Nigeria, 2004.

PARTICULARS OF OFFENCE

B Freeborn Okiemute (m) and others now at large on or about the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division conspired to commit armed robbery.

STATEMENT OF OFFENCE: COUNT II

C Armed robbery punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Laws of the Federation 2004.

PARTICULARS OF OFFENCE

D Freeborn Okiemute (m) and others now at large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division robbed one Okomedono Bright of his Sagem handset while armed with gun.

STATEMENT OF OFFENCE: COUNT III

E Armed robbery punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Laws of the Federation, 2004.

PARTICULARS OF OFFENCE

F Freeborn Okiemute (m) and others now at large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division robbed one Beauty Egbamuno of her handset while armed with gun.

STATEMENT OF OFFENCE: COUNT IV

G Armed robbery punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Laws of the Federation, 2004.

PARTICULARS OF OFFENCE

G Freeborn Okiemute (m) and others now at large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division robbed one Ajiri Egbamuno of her Samsung Handset while armed with gun.

STATEMENT OF OFFENCE: COUNT V

H Armed robbery punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Laws of the Federation, 1990.

PARTICULARS OF OFFENCE

Freeborn Okiemute (m) and other now at large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division robbed one Matilda Egbamuno (f) of N500,000.00 cash, jewelry, wrappers and other personal belongings while armed with gun.

STATEMENT OF OFFENCE: COUNT VI

B Armed robbery punishable under Section 1 (2) (a) of the robbery and Firearms (Special Provisions) Act Laws of the Federation, 1990.

PARTICULARS OF OFFENCE

C Freeborn Okiemute (m) and others now at large on the 17th day of November, 2006 at Ozoro in the Ozoro Judicial Division robbed one Marvelous Okomedono (m) of his Siemens handsets while armed with gun.

The background facts are to be found in the lead Judgment and so, I shall not repeat them herein. Ayo Asala, learned counsel for D the Appellant on the 28/4/2016 adopted his Brief of Argument filed on the 12/2/2013 and in it raised two questions for determination which are, viz:-

1. Whether the Lower Court was right in upholding the finding of the trial Court that the PW3 gave positive evidence of identification/ E recognition of the Appellant as one of the armed robbers that robbed PW3.

2. Whether from the totality of the evidence on the record, the Lower Court was right in affirming the conviction of the Appellant F by the trial Court for the offences of conspiracy to rob and armed robbery.

Peter Mrakpor Esq., Attorney General of Delta State for the Respondent adopted the Brief of argument settled by O. E. Enenmo, Deputy Director, Ministry of Justice, Delta State and filed on the G 24/5/2013. He crafted a single issue for determination of the appeal which is thus:-

Whether the Lower Court was wrong in affirming the judgment of the trial Court, that the prosecution proved the count on the information beyond reasonable doubt. H

The sole issue so crafted by the Respondent apt in the determination of this appeal and I shall use it.

SOLE ISSUE

This raises the question whether the Court of Appeal was right

or wrong affirming the judgment of the trial Court that the prosecution proved the Court on the information beyond reasonable doubt.

Canvassing the stand of the Appellant, Ayo Asala Esq. contended that the Court of Appeal or Lower Court was wrong upholding the finding of the trial Court that pW3 gave positive evidence of identification or recognition of the Appellant as one of the armed robbers that robbed PW3. That the concurrent findings of the two Courts below are perverse and should be set aside. He cited *Oguonzee v State* (1998) 5 NWLR (Pt. 551), *Arwa v State* NWLR (1990) 6 NWLR (Pt. 155) 125.

That the Court below was wrong to have relied on and made use of the contents of the extra judicial statement made by PW3 on 19/11/06 in upholding the findings of the trial Court that the PW3 positively recognised/identified the Appellant as one of the robbers and his conviction based on the evidence of PW3 was not tendered in evidence before the trial Court.

He referred to the case *State v. Ogunbunjo* (2001) FWLR (Pt. 37) 1097 at 1115; *Abacha v. Fawehinmi* (2006) 6 NWLR (Pt. 660) 228 at 295.

That it was the Court of Appeal that suo motu raised the issue of the un-tendered extra judicial statement of the PW3 of 19/11/06. He cited *Kuti v. Jibowu* (1972) 1 All NLR (Pt.11) 180.

Learned counsel for the Appellant stated that there are material inconsistencies between the oral testimony of PW3 and Exhibit 'C' being the extra Judicial statement of PW3 made on 16/1/2007 as to how the PW3 came to recognise the appellant as one of the armed robbers that attacked her. Also, that the evidence of PW2 contradicted the evidence of PW3 on the description of the appellant and his physiognomy. That the inconsistencies were fatal to the case of the prosecution. He referred to *Onubogu v. The State* (1974) 9 NSCC 358; *Ubani v. State* (2004) FWLR (Pt. 191) 1533 at 1551; *Daniels v. State* (1991) 8 NWLR (Pt 212) 715 at 736 (CA).

Stating further, learned counsel for the Appellant said the prosecution to prove the offence of armed robbery must lead credible and cogent evidence establishing the following ingredients:-

- (a) That there was a robbery;
- (b) That the robbery was done by a person(s) armed with offensive weapons; and

(c) That the Appellant was one of the armed robbers.

He stated that the first two ingredients are not seriously in contention but the issue before the two Courts below is whether the Appellant was one of the armed robbers, which the prosecution did not prove. That the police failed to investigate the defences put up by the Appellant in his statement Exhibit 'G' and 'F', including taking statements from those mentioned by name by the Appellant. He cited *Aigbadion v. State* (2000) 4 SCNJ 1 at 13.

He further contended for the appellant that the two Courts below were wrong to have rejected the defences put up by the Appellant.

Countering the position of the Appellant, Peter Mrakpor; Attorney General submitted that the prosecution established beyond reasonable doubt the ingredients of the offences charged. He cited *Abdullahi v. The State* (2008) Vol.164 LRCN 97 at 113-114; *Bakare v. State* (1987) 1 NWLR (Pt. 52) 579; *Oguonzee v. State* (1998) 58 LRCN 3512 at 3551; *Edamie v. State* (1996) 3 NWLR (Pt.38) 530 at 531.

That whenever the case depends wholly or substantially on the correctness of one or more identification of the accused, the Court should examine closely the Circumstances in which the identification by each witness came to be made. He referred to *Bashaya v. State* (1998) 5 NWLR (Pt. 550) 351.

Learned counsel for the Respondent said it was not true that the Court below relied on the extra judicial statement that was not in evidence.

On the offence of conspiracy, learned counsel for the Respondent said it was properly inferred from the evidence before Court. He cited *Njovens v. The State* (1998) ACLR at 264-265; (1973) 5 SC 7; *Balogun v. A. G. Ogun State* (1992) 2 NWLR (Pt. 763) 512.

In a nutshell, the two divergent positions on either side are firstly for the Appellant that the Court of Appeal or Lower Court relied on an inadmissible evidence of PW3, being the extra judicial statement which was not tendered evidence to uphold the conviction of the Appellant. That the Appellant was convicted based on incredible and inconsistent evidence of the PW3 in the light of the police failing to properly investigate the defence raised by the Appellant.

Respondent's side is that PW3 recognised the Appellant

among the armed robbers that robbed her at her residence on the night in question and the evidence credible and uncontradicted.

What this Court is faced with this appeal are decisions of two Lower Courts upon concurrent findings they made. In a situation such as this, there is a long line of authorities that when an appellate Court confronted with concurrent findings of two Lower Courts, the higher Court does not decide off hand to go a contrary way as it must be guided by laid down principles. That to say, that for an appellate Court to overturn the concurrent findings, it must be first satisfied that the findings stemmed from a perverse route in arriving at or came from a miscarriage of justice or the wrong application of procedural law or the substantive law. When none of those occurrences are in place, the appellate Court has no option than to stay its big stick but tow the line of the Lower Courts. See *Attah v. State* (2010) 10 NWLR (Pt.1201) 190; *Olaiya v. State* (2010) 3 NWLR (Pt 1181) 423 at 438.

The evidence of PW3 before the trial Court on the matter of the identification of the Appellant as one of the armed robbers thus at page 52 of the records:-

I recognised Freeborn who is slim and a bit tall in height. The Freeborn I recognised among the armed robbers is the accused person in the dock.”

That the piece of evidence belies the contention of the Appellant that there was no oral testimony on the identification of the Appellant and that the trial Court affirmed by the Court below relied in that regard on what was stated outside the evidence before the Court.

The learned trial judge held thus:- It is obvious firstly that prior to the 17th day of November, 2006, the PW3 had known the accused person for she referred to the earlier encounter when the accused person who came in company of the gang of armed robbers but could not gain entrance into the house as the doors were locked. Furthermore, the PW3 said albeit under cross-examination that the accused person lived in the same Erovie Quarter as herself and she knew the accused person. The PW3 had very close contact with the armed robbers who beat and inflicted several machete cuts on the PW3 and in the process dragged her outside where she was able to recognise some of them including the accused person. Furthermore, there is evidence before this Court that the armed robbers were not

masked and that the armed robbery operation lasted over an hour. The evidence of PW1 and PW2 refers. The close contact the armed robbers had with the PW3 and the length of time spent at the house of the PW3 was enough for the PW3 to recognise the accused person in spite of the time of the robbery incident at night time.

The Court below agreed with the finding of the learned trial Judge holding that the Close Contact the armed robbers had with PW3 and the length of the time thereof was sufficient for PW3 to recognise the Appellant in spite of the operation being night time.

On this offence of armed robbery, the burden of proof on the prosecution to establish the offence beyond reasonable doubt has been stated to be that;

- (a) There was theft by the accused person;
- (b) Hurt was caused or unlawful restraint on the victims by the accused person;
- (c) The said acts complained of were done in the process of committing the theft and/carrying away the property obtained by theft;
- (d) That the accused person(s) did the act complained of voluntarily, and
- (e) That the accused person(s) was/were armed with dangerous weapons while committing the offence in question.

I place reliance on the dictum of Onnoghen JSC in *Abdullahi v. The State* (2008) Vol.164 LRCN 97 at 113 - 114.

From what was placed before the Court, the PW3 had close contact with the robbers and she had known the Appellant before the robbery incident since they both lived in the same Eruvie Quarters and PW3 had had a previous encounter with the Appellant. The PW3 had made two extra judicial statements and mentioned the Appellant as one of the robbers. The fact that one of the said statements was not admitted in evidence would not render the identification as faulty since the Court could rely on that admitted as Exhibit C and then PW3 had in oral testimony made an affirmation of her recognizing the Appellant. The stance of the appellant that the Court relied on evidence that was not before Court in accepting the identification of the Appellant is not supported by the record. It is in keeping with laid down acceptable procedures by which the Court could utilize evidence of identification outside of an identification parade. In the

case of *Bashava v. State* (1998) 5 NWLR (Pt. 550) 351 at 353, this Court had held that whenever the case depends wholly or substantially on the correctness of one or more identification of the accused, the Court should examine closely the circumstances in which the identification by each witness came to be made.

B Clearly, the trial Court had operated within the accepted line and as seen distinctly from the record.

In respect to the offence of conspiracy, one is reminded that established either by the direct evidence of how the conspiracy was hatched or came about or by inference by certain criminal acts of the parties concerned done in presence of an apparent criminal purpose in common between them. It is to be stated that it is obvious that conspiracy can hardly be proved by direct evidence since plotting is done in secrecy being a meeting of the minds. Therefore, conspiracy is a matter deducible by inference from certain criminal acts of the parties concerned done in pursuance of the criminal Purpose between them and proof of conspiracy, the act or omission of the conspirators' furtherance of the common desire may be and is often given in evidence against another of the conspirators. See *Njovens v. State* (1973) 5 SC 7 per Coker JSC; *Balogun v. A. G. Ogun State* (1992) 2 NWLR (Pt. 763) 512.

In the case at hand, the question is whether there was basis for the Court below to have gone along the finding of the trial Court that the offence of conspiracy had been made out. In this, the Court below stated at page 191 per Ogunwumiju, JCA thus:-

F "The record and evidence of the prosecution witnesses clearly show that the armed robbers who committed the offence were several in number. I cannot help but agree with the learned trial judge that an inference of conspiracy can and must be made from these facts and the irrefutable conclusion drawn that the Appellant conspired with others at large to commit the offence of conspiracy to commit armed robbery".

Again, these concurrent findings are not to be trifled with by this Court as they were well founded and not coming from any perversity in the reasoning or misapplication of the law, procedural or substantive and I also concur.

H The Appellant had made a hue and cry of his defence not being investigated by the Prosecution and the Courts not taking his

defence into consideration in making their findings and conclusion. At pages 187 and 188 of the record, the Court below stated thus:-

On the issue regarding the failure of the police to investigate the defence raised by the Appellant, it is pertinent to understand that the Appellant's insistence that he was arrested for assault and not armed robbery cannot be a defence to the charge. Admittedly, B he denied the charge, but now here in his extra judicial statements Exhibits 'G' and 'F' and in his evidence on oath in his defence did he provide an alibi for the night".

At pages 55 - 58, the IPO stated thus:-

"The accused person in the dock, Freeborn Okiemute was identified as one of the boys who attacked the victims I just mentioned and that is how I came to know him",

He stated further:-

"I am not aware that one James laid a complaint of assault against the accused person in our station in Ozoro police station. It is not true that I arrested the accused person in connection with the complaint of assault reported by James against him, the accused person did not tell me of any report of assault against him. I am not aware that accused person told police that he was arrested on the complaint of assault against him by James".

From the foregoing and indeed the better reasoned lead judgment, it is clear this appeal has no peg to hang on and so I too dismiss it. I abide by the consequential orders made.

AKA'AH'S JSC

I was privileged to read in draft the judgment of my learned brother, Galadima JSC. He dealt adequately with the issues arising in the appeal and arrived at the conclusion that the appeal lacks merit and should be dismissed. I entirely agree with him.

The appellant is questioning the failure by the Police to conduct an identification parade. An identification parade is not necessary where there is evidence of the witness who claims that the perpetrator of the crime as a familiar person and identifies him by name. See: *Ikemson v. State* (1989) 3 NWLR (Pt. 110) 455; *Adamson v. State* (1991) 4 NWLR (Pt. 187) 530. *Ndidi v. State* (2007) All FWLR (Pt. 381) 1617.

PW3 in her evidence stated:-

"I recognised some of the armed robbers. The armed robbers in the course of beating me dragged me outside, where I recognised one of them who is black in complexion and short and black boy.....

. I do not know the name of the short one. But the other one of the armed robbers I recognised is Freeborn who is slim and a little bit tall in height. The Freeborn I recognised among the armed robbers is the accused in the dock. I was able to recognise the accused person on that day because prior to the day of the armed robbery incident the accused person had come once before to the house".

The learned trial Judge found that PW3 had very close contact with the armed robbers who beat and inflicted machete cuts on her and in the process dragged her outside where she was able to recognise some of them including the accused person. He also found that the armed robbers were not masked and concluded that the close contact the armed robbers had with the PW3 and the length of time spent at the house of PW3 was enough for the PW3 to recognise the accused person in spite of the fact that the robbery took place at night time and this rendered an identification parade unnecessary. This finding was not disturbed by the Court below since it was not a perverse finding. This Court cannot interfere either.

It is for this reason and the fuller reasons contained in the lead judgment of my learned brother, Galadima JSC that I too find no merit in the appeal and I accordingly dismiss it. The appeal is dismissed.

KEKERE-EKUN JSC

I have had the benefit of reading in draft the judgment of my learned brother, SULEIMAN GALADIMA JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

The appellant herein was arraigned before the High Court of Delta State sitting at Ozoro on a six-count charge of conspiracy to commit armed robbery and armed robbery with others who were at large. He pleaded not guilty to each of the counts. At the conclusion of the trial, he was discharged and acquitted in respect of four counts and convicted and sentenced to death on counts 1 and 5. All the

counts relate to a single incident involving five victims at the same venue and at the same time. Being dissatisfied with his conviction and sentence, he appealed unsuccessfully to the Court below. He is still dissatisfied and has approached this Court in a final attempt to dislodge the unfavourable decisions.

Although the appellant has formulated two issues for the determination of the appeal, I agree with my learned brother that the appellant's issue 2 and the respondent's sole issue is adequate for the resolution of the appeal, to wit:

Whether the lower Court was wrong in affirming the judgment of the trial Court that the prosecution proved the counts in the information beyond reasonable doubt.

In order to establish the guilt of the appellant beyond reasonable doubt, the prosecution must prove:

1. That there was a robbery or series of robberies.
2. That each robbery was an armed robbery; and
3. That the appellant was one of those who took part in the armed robbery or robberies. See: *Bozin Vs The State* (1985) 2 NWLR (Pt.8) 465; *Suberu Vs The State* (2010) 8 NWLR (Pt.1197) 586; *Olayinka vs The State* (2007) 9 NWLR (Pt 1040) 561.

The appellant has taken serious umbrage against the reliance of the trial Court, affirmed by the Court below, on his identification by PW3 as one of those who took part in the robbery.

The prosecution may prove its case against an accused person in several ways:

- (i) By direct evidence;
- (ii) By circumstantial evidence; and/or
- (iii) By the confession of the accused. See: *Adio vs The State* (1986) 5 SC 194 @ 219-220; *Emeka vs The State* (2002) 14 NWLR (Pt. 734) 666; *Olabode Abirifon vs The State* (2013) 13 NWLR (Pt. 1372) 587 @ 596 F-G.

It is also settled law that where a Court of trial unquestionably evaluates the evidence and justifiably appraises the facts and arrives at a conclusion on the credible evidence before it, an appellate Court will not interfere with such findings of fact. It is not the business of the appellate Court to substitute its own views of the facts for those of the trial Court. The duty of the Court is to scrutinize the evidence on record to find out whether there is evidence on which the trial

Court could have acted. See: *Oguonzee Vs The State* (1998) 5 NWLR (Pt.551) 521 @ 543 H - 544 C per Iguh, JSC, *Bakare Vs The State* (1987) 1 NWLR (Pt.52) 579; *Ogundiyin vs The State* (1991) 3 NWLR (Pt.181) 519. It is also settled that once the Court is satisfied with the cogency, high quality and credibility of the evidence of a witness and accepts it, a conviction based on such evidence should not be interfered with unless such evidence, by law, requires corroboration. See: *Oguonzee Vs The State* (supra). PW3, Matilda Egbamuno, testified as to what transpired on the day of the robbery, how she was beaten and wounded on her hands and head by cutlasses wielded by the armed robbers and how she was able to identify the appellant when she was dragged out of the house while being beaten because he had come to the house previously with a gang of armed robbers but was unable to gain entry into the house on that occasion. She testified as to how she and PW1 (another victim of the attack) were rushed to the hospital after the incident. She testified that the robbers were not masked during the robbery. She referred to the appellant by name. She made two statements to the Police, the first statement was made on 19/11/2006, two days after the robbery, while the second statement, which was admitted in evidence as Exhibit C, was made on 16/1/2007.

It was contended on behalf of the appellant that the evidence of his identification by PW3 lacked precision and ought not to have been relied upon by the learned trial judge. It was also argued that the witness did not state in her extra judicial statement Exhibit C that she knew the appellant prior to the incident and therefore her evidence in chief was an afterthought.

The trial Court at pages 100 - 101 and 102 - 103 held:
 "It is obvious firstly that prior to the 17th day of November, 2006, the PW3 had known the accused person for she referred to the earlier encounter when the accused person came in company of the gang of armed robbers but could not gain entrance into the house as the doors were locked. Furthermore, the PW3 said albeit under cross examination that the accused person lived in the same Erovie Quarter as herself and she knew the accused person. The PW3 had very close contact with the armed robbers who beat and inflicted several machete cuts on the PW3 and in the process dragged her outside where she was able to recognise some of them includ-

ing the accused person. Furthermore, there is evidence before this Court that the armed robbers were not masked, and that the armed robbery operation lasted over one hour. The evidence of PW1 and PW2 refers. The close contact the armed robbers had with the PW3 and the length of time spent at the house of the PW3 was enough for the PW3 to recognise the accused person in spite of the time of the robbery incident at night time. In the circumstances, I agree with the learned Assistant Director that an identification parade was not necessary.

The evidence of the PW3 which I believe and accept as true clearly revealed that her money, jewelry, wrappers and other personal belongings were stolen in her house on the 17th of November, 2006 by robbers who were armed with guns and cutlasses, and that the PW3 was hurt in the process of the stealing as corroborated by the medical report Exhibit E1 in these proceedings, and that the accused person was among the armed robbers who attacked and stole property and cash of the PW3 on the said 17th November, 2006.

In the circumstance, I hold that the prosecution proved the offence of armed robbery as charged in count V of the information against the accused person beyond reasonable doubt. I find the accused person guilty of the offence of armed robbery as charged in count V of the information and hereby convict the accused person of the said offence of armed robbery as charged in count V of the information."

The Court below in affirming the judgment held inter alia at pages 179 - 180 of the record:

"Let us consider the circumstances of this case. The PW3 said in Exh, 'C' that she was informed that the appellant was the leader of the gang of robbers but said in Court she was told that fact by the appellant himself. I do not regard both statements as seriously inconsistent statements capable of affecting her credibility as regards the evidence she gave on oath and her extra judicial statement regarding the salient ingredients of the offence. That is to say that even if it is conceded that there was inconsistency on that point, PW3 at the earliest opportunity on 19th November after the robbery while in hospital gave a good description of the appellant and mentioned him by name. There was no challenge by the defence regarding the description she gave of him in her earlier statement on 19th Novem-

ber, 2006 which she referred to on oath. Neither was there a challenge in that said statement referred to by her under cross examination where she specifically mentioned the appellant by name as one of the robbers. The question of whether or not he was the leader of the armed robbery gang pales into insignificance when the totality of her evidence on oath and Exh.'C' is considered."

I do not agree with the learned appellant's counsel that there was a major inconsistency in the evidence on oath of PW3 and Exh.'C' which she made almost a month after the incident as to render her evidence regarding the identity of the appellant as one of those who committed the armed robbery unreliable.

The Court held further at page 182 of the record:

"I find I cannot agree that the learned trial Judge should not have convicted the appellant without further corroboration of his identity by another eyewitness. The identification of the appellant by description and name was clear, unequivocal and made at the earliest opportunity after the robbery. There is no legal requirement for corroboration or the trial Judge to legally warn himself in such circumstances,"

The learned trial Judge had the singular opportunity of seeing and hearing PW3 testify and observing her demeanour. He found her to be a credible witness, The Court below saw no reason to interfere with the findings.

The appellant has failed to show any special circumstance to warrant the interference by this Court in the concurring findings of fact by the two lower Courts. The trial Court thoroughly appraised and evaluated the totality of the evidence before it before reaching the conclusion that the prosecution had proved its case beyond reasonable doubt. The Court below was right to affirm the decision.

For these and the more elaborate reasons advanced in the lead judgment, I hold that this appeal lacks merit. It is accordingly dismissed. The judgment of the Court of Appeal, Benin Division delivered on 15/11/2012 affirming the appellant's conviction and sentence to death for conspiracy to commit armed robbery and armed robbery on 14/7/2010 is affirmed.

Appeal dismissed.

OKORO JSC

I was obliged a copy of the lead judgment of my learned brother, Galadima, JSC just delivered which I read in advance. I totally agree with both the reasoning and conclusion that there is no merit in this appeal and deserve to be dismissed. I shall make a few comments in support of the judgment.

The facts of the case are ably summarized in the lead judgment. I adopt same. Issue of identification of an accused person is very crucial in criminal proceedings, and the real purpose of identification is to ensure that there is no miscarriage of justice. Identification of an accused person can be done by the victim of the crime if he is alive or by witnesses who saw when the offence was committed. An accused can also be identified under Section 167 (a) of the Evidence Act 2011.

This has to do with doctrine of recent possession. The said doctrine which is enshrined in Section 167 (a) of the Evidence Act, 2011 reads:

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in relation to the facts of a 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 are many judicial authorities in which this doctrine has been invoked by our Courts in identifying those who had committed crimes but were not identified at the scene. See *Evarist Eze V. The State* (1985) NWLR (pt 13) 429, *R.V. Palmer Iyakwe* 10 WACA 180.

In the instant case, the PW3, a victim of the armed robbery attack, gave evidence of identification and recognition of the appellant as one of the armed robbers who robbed her. It was held by this Court in *Bozin V. The State* (1985) 2 NWLR (pt. 8) 465 that the importance of the eye witness acting promptly in identifications cannot be over-emphasized. It was stressed that where such witnesses are not prompt to volunteer evidence on the identity of the accused, any such evidence thereafter should be accepted with

caution. Also, in *COP V. Alao* (1959) 10 NLR 39 at 40, it was held that when an eye witness omits to mention at the earliest opportunity the names of persons whom he said he saw committing the offence, a Court must be careful in accepting his evidence given later and implicating the persons charged, unless a satisfactory explanation is given.

The PW3 in the instant appeal promptly identified the appellant structurally and by name. The findings of the lower Court on this point can be found on page 179 of the record as follows;

“PW3 at the earliest opportunity or, 19th November after the robbery while in hospital gave a good description of the appellant and mentioned him by name. There was no challenge by the defence regarding the description she gave of him in her earlier statement on 19th November, 2006 which she referred to on oath. Neither was there a challenge in that said statement referred to by her under cross examination where she specifically mentioned the appellant by name as one of the robbers.”

The learned trial judge’s conclusion on the matter is instructive. On page 101 of the record, his Lordship decided as follows:

“The close contact the armed robbers had with the PW3 and the length of time spent at the house of the PW3 was enough for the PW3 to recognise the accused in spite of the time of the robbery incident at night time.”

It is beyond doubt from the evidence on record that the PW3 not only identified the appellant at the earliest opportunity but also recognised him as Freeborn which she mentioned to the police in Exhibit C, her extra-judicial statement. The fact that she was able to mention his name shows that she was familiar with the appellant before the night of the robbery attack. This was an added advantage for her in easily recognizing and identifying the appellant as one of the armed robbers who attacked her. I agree with the concurrent findings of the two Courts below that the appellant was properly and effectively recognised and identified as one of the robbers who invaded the residence of PW3 on 17th November, 2006 at Ozoro, Delta State.

It is on the above comments of mine and the comprehensive reasons adumbrated in the lead judgment that I am in

agreement that this appeal lacks merit and an order of dismissal is inevitable. Appeal is accordingly dismissed.