

**SUPREME COURT OF NIGERIA**  
FRIDAY 1ST JULY, 2016. SC. 523/2014  
**CORAM:- S. GALADIMA, M. U. PETER-ODILI, K. B.**  
**AKA'HS, K. M. O. KEKERE-EKUN, J. I. OKORO, JJSC**

WOLE AKINDIPE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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APPEALS - Reply brief - Purpose - Reply brief is meant to address fresh points raised in respondent's brief - And not to introduce fresh points (H1)

ARMED ROBBERY - Proof - Ingredients - Prosecution must prove that there was robbery - That the robbery was armed robbery - And that accused participated in the robbery (H2)

EVIDENCE - Confession - Weight - Accused can be convicted solely on his confession - If same is found to be voluntarily made - And positive with reference to the offence charged (H3)

EVIDENCE - Confession - Retraction - Will not render confession inadmissible - As Court is to look for other independent evidence - That makes the statement probable (H4)

EVIDENCE - Confession - Truth of - As per Nwaebonyi & Sykes cases - Is established as court finds inter alia - Something outside the confession to show it is true - That it is corroborated - (H5)

EVIDENCE - Confession - Admissibility - Once confession is admitted - It becomes part of evidence for prosecution - And Court is entitled to rely on it (H6)

IDENTIFICATION PARADE - Conduct of - Where there is no doubt as to identity of accused - Or where accused has confessed to the crime - There would be no need to conduct the parade (H7)

ALIBI - Plea of - Weight - Courts rightly rejected appellant's defence

- As same was not raised timeously - Hence the contention that the burden of proof was shifted to appellant is without substance (H8)

CRIMINAL PROCEDURE - Conspiracy - Proof - Ingredient of the offence lies in agreement to do unlawful thing - Which can be inferred from surrounding facts of doing things towards common purpose (H9)

### **FACTS**

The arraignment of accused/appellant along with two others was at the High Court of Ondo State, wherein they were charged with a two-count charge of conspiracy to commit armed robbery and armed robbery contrary to sections 5(b) and 1(2) (a) of the Robbery and Firearms (Special Provisions) Act Cap. 398 Vol. XXII LFN 1990. The allegation against appellant and the others is that while being armed with guns and dangerous weapons, they invaded a supermarket and robbed one Ndubuisi Agachi (Director of the supermarket) of valuable properties and cash valued at about N440,000.00.

They were arrested in respect of the crime. Appellant made confessional statement to the police, which he later stated not to be voluntary. They pleaded not guilty to the charge. At the trial, prosecution/respondent called four witnesses while appellant testified in his own defence and did not call any witness. Five exhibits were tendered and marked Exhibits P1, P2, P3, B1 and B2 respectively. At the conclusion of the trial, appellant and one other were convicted and sentenced to death on the two counts as charged. Aggrieved, appellant appealed to the Court of Appeal Akure Division. The Court after considering the appeal, dismissed same and affirmed the judgment of the trial Court. Aggrieved further, appellant has appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

(a) Whether the prosecution discharged the burden of proving that Exhibit B2 was corroborated or confirmed as true in line with a plethora of Supreme Court authorities?

(b) Whether there was any reliable evidence in proof of the identity of the appellant as committing the offence in view of the material contradictory evidence of PW1, PW2, PW3 and PW4 in re-

spect of the identification? -

(c) In view of the evidence before the court, whether the Court of Appeal was correct to have held that the prosecution proved the case of armed robbery against the appellant beyond reasonable doubt?

**HELD** (Unanimously dismissing the appeal per

**KEKERE-EKUN JSC)**

*APPEALS - Reply brief - Purpose*

**1. I have read the submissions of learned counsel for the appellant as contained in his reply brief in respect of this issue. The submissions constitute a re-argument of the arguments in the appellant's brief. The purpose of a reply brief is to address fresh points raised in a respondent's brief of argument and not to introduce fresh points or take another bite at the cherry. It is not the forum for emphasising the arguments in the appellant's brief.** (p. 3508 H)

*ARMED ROBBERY - Proof - Ingredients*

**2. In order to secure a conviction for the offence of armed robbery contrary to Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, LFN 2004, the prosecution must prove the following beyond reasonable doubt:**

**1. That there was a robbery or a series of robberies.**

**2. That each robbery was an armed robbery.**

**3. That the accused was one of those who took part in the armed robberies.** (p. 3509 B)

*EVIDENCE - Confession - Weight*

**3. It is settled law that an accused person can be convicted solely on the basis of his confessional statement if the statement is found to be free, voluntarily made, direct and positive with reference to the offence charged.** (p. 3509 E)

*EVIDENCE - Confession - Retraction*

**4. The retraction of a confessional statement will not render the statement inadmissible. The only duty on the court in such circumstances is to see if there is any evidence outside the**

**statement that makes the confession probable.** (p. 3509 F)

*EVIDENCE - Confession - Test of*

**5. While it is trite that a confessional statement by an accused person that is positive, direct and unequivocal is sufficient to ground a conviction, it has always been the practice of the courts to look for some evidence outside the statement, no matter how slight, that would show the confession is true. The courts are guided by the following test laid down in: Nwaebonyi Vs The State (supra): R. Vs Sykes [supra]:**

- (a) Is there anything outside it to show that it is true?
- (b) Is it corroborated?
- (c) Are the factors stated in it true as far as can be tested?
- (d) Was the accused the man who had the opportunity of committing the offence?
- (e) Is the confession possible?
- (f) Is it consistent with other facts which have been ascertained and proved? (p. 3512 F)

*EVIDENCE - Confession - Admissibility*

**6. Once a confessional statement has been properly admitted in evidence, it becomes part of the evidence for the prosecution and the court is entitled to rely on it. The trial court rightly applied the test and came to the correct conclusion that the confession was true. The lower court did the same and rightly affirmed the finding.** (p. 3514 H)

*IDENTIFICATION PARADE - Conduct of*

**7. Both learned counsel have referred to the conditions that make the conduct of an identification parade necessary. It has however been held, as rightly submitted by learned counsel for the respondent that an identification parade is not a *sine qua non* in every case. Where there is no uncertainty or doubt as to the identity of an accused person, there would be no need to conduct an identification parade. One of those circumstances is where an accused person confesses to the commission of the offence and the confession is found to be con-**

**sistent with other facts outside it.**

**In the course of resolving issue 1 earlier, I held that the appellant's confessional statement, Exhibit B2 was direct, positive and unequivocal as to his participation in the commission of the offence. In other words, by his confession, he put himself squarely at the scene of crime. The statement was properly tested as to its voluntariness through a trial within trial before being admitted in evidence.**

**The testimonies of PW1 and PW2 that they were able to identify the appellant when he and some other suspects were brought to their shop because they were not masked during the operation was unshaken. Above all, the appellant unequivocally fixed himself at the scene by his confessional statement, Exhibit B2. The finding of the court below, which affirmed the decision of the trial court in this regard cannot be faulted. I hold that the appellant was properly identified as one of those who participated in the robbery. This issue is accordingly resolved against the appellant. (pp. 3519 B/3521 C)**

*ALIBI - Plea of - Weight*

**8. On the feeble defense raised by the appellant, the law is settled that the legal burden of proving its case against the accused person beyond reasonable doubt rests squarely on the prosecution and never shifts. However where an accused person intends to raise a defence of alibi, it must be raised at the earliest opportunity, usually during the course of investigation so that the Police would have an opportunity of establishing the truth or otherwise of the allegation made against him. Where a defence of alibi is properly and timeously raised, the burden is on the prosecution to investigate and affirm or rebut it. It is also settled law that the ipse dixit of the accused person is not sufficient proof of his alibi. He must furnish the Police with sufficient particulars of his whereabouts at the time the offence was committed.**

**A defence of alibi means that the accused person is saying that he was elsewhere when the offence was committed and therefore could not have been one of the perpetrators of the crime. It is important to note that the appellant's defence**

**was not raised timeously. It was raised in the course of his defence after the prosecution had closed its case. Furthermore, as rightly observed by learned counsel for the respondent, the alibi such as it was, did not refer to 11/12/2003, the date the offence was committed but the date of his arrest. I am of the view that this feeble defence by the appellant was rightly rejected by the two lower courts. The contention that the burden of proof was shifted on to the appellant is without substance and I so hold. The conclusion of the court below affirming the decision of the trial court that the prosecution proved the charge of armed robbery against the appellant beyond reasonable doubt is fully supported by the evidence on record. The appellant has not shown any special circumstance to warrant interference by this court. (p. 3524 A)**

**D** *CRIMINAL PROCEDURE - Conspiracy - Proof*

**9. With regard to the offence of conspiracy to commit armed robbery, the essential ingredient of the offence of conspiracy lies in the bare agreement and association to an unlawful thing, which is contrary to or forbidden by law, whether that thing be criminal or not and whether or not the accused persons had knowledge of its unlawfulness. Evidence of conspiracy is usually a matter of inference from surrounding facts and circumstances. The trial court may infer conspiracy from the fact of doing things towards a common purpose.**

**F** **From the totality of the evidence led in this case, which has been reviewed severally in the course of this judgment, there is no doubt that from the credible and substantiated evidence of the prosecution witnesses of the appellant's participation in the robbing of the NAO Supermarket, Akure in the company of his co-accused, and having regard to his confessional statement, Exhibit B2, wherein he gave a detailed account of his role in the crime, I agree with the courts below that the prosecution proved the charge of conspiracy to commit armed robbery against the appellant beyond reasonable doubt. (p. 3524 H)**

**REPRESENTATION**

A. Kazeem Esq. with O. Bolarinwa Esq. for the Appellant  
L.F. Anga Esq. with Raymond Ofagbo Esq. for the Respondent

**CASES REFERRED TO**

- Kanu v. R. (1952) 14 WACA 30 B  
Mbenu v. State (1988) 3 NWLR (pt. 84) 615  
Stephen v. State (1986) 5 NWLR (pt. 46) 978  
Kopa v. State (1971) 1 All NLR 150  
Onuoha v. State (1987) 4 NWLR (pt. 65) 331  
Ikemson v. State (1998) 1 ACLR 80 C  
Nwachukwu v. State (2004) 17 NWLR (pt. 902) 273 C – D  
Adio v. State (2005) 4 ACLR 296  
Tegwonor v. State (2008) 1 NWLR (pt. 1069) 630  
Nwaebonyi v. State (1994) 5 NWLR (pt. 138) 150 D  
R v. Sykes (1913) 8 Cr. App. R. 233  
Alarape v. State (2001) 5 NWLR (pt. 705) 79  
Agboola v. State (2013) 11 NWLR (pt. 1366) 619  
Rev. King v. State (2016) LPELR-SC. 200/2013 E

**STATUTES REFERRED TO**

- Robbery & Firearms (Special Provisions) Act Cap. 398 Vol. XXII LFN  
1990, ss. 1(2)(a), 5(b)  
Evidence Act, ss. 27(1)(2) F

**LEAD JUDGMENT BY KEKERE-EKUN JSC**

This appeal is against the judgment of the Court of Appeal, Akure Division delivered on 25/6/2014 affirming the judgment of the High Court of Justice, Ondo State delivered on 2/11/2010 sentencing the appellant to death for conspiracy and armed robbery. G

On 15/12/2006, the appellant was arraigned before the trial court with two others on a two-count charge of conspiracy to commit armed robbery and armed robbery contrary to Sections 5 (b) and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap.398 H Vol. XXII Laws of the Federation of Nigeria, 1990. It was alleged that at about 9pm on or about the 11th of December, 2003 at NAO Supermarket situate at No. 126 Oba Adesida Road, Akure, Ondo State, the appellant, one Shina Akinrinlola and one Okolie Chimezie,

while armed with guns and dangerous weapons robbed one Ndubuisi Agachi, the director of the supermarket of valuable properties and cash valued at about four hundred and forty thousand naira (N440,000.00) only. The appellant and Shina Akinrinlola (1st accused) pleaded not guilty to each count of the charge. The 3rd accused, Okorie Chimezie, was absent. By an application filed on 29th December 2006, Okorie Chimezie's name was struck out.

At the trial, the prosecution called four (4) witnesses while the appellant testified in his own defence and did not call any witness. Five exhibits were tendered and marked Exhibits P1, P2, P3, B1 and B2 respectively. At the conclusion of the trial, the appellant and the 1st accused were convicted and sentenced to death on the two counts as charged.

It was the prosecution's case that sometime in January 2004, while a team of detectives were investigating a different robbery at Araromi, the appellant confessed to a previous robbery incident, which occurred at NAO Supermarket Akure on the 11th December 2003. The appellant's defence was that he was at his house at Oke Ijebu. That about 10 minutes after he got home, he was arrested by the police and taken to the police station. That his statement Exhibit B2 was not confessional. He denied taking part in the armed robbery. At the conclusion of the trial, the learned trial Judge found the appellant guilty of conspiracy to commit armed robbery and armed robbery and sentenced him to death.

Being dissatisfied with the judgment the appellant appealed to the court below, which affirmed the judgment of the trial court. He is still dissatisfied and has further appealed to this court vide his notice of appeal filed on 14/7/14 containing three grounds of appeal.

At the hearing of the appeal on 28/4/2016, A. KAZEEM ESQ., leading O. Bolarinwa Esq., adopted and relied on the appellant's brief filed on 16/11/2014 and his reply brief deemed filed on 21/10/2015 and urged the court to allow the appeal. L.F. ANGA ESQ., leading Raymond Ofagbor Esq., adopted and relied on the respondent's brief, which was deemed filed on 21/10/2015 and urged the court to dismiss the appeal.

The appellant formulated three issues for determination, namely:

(a) Whether the prosecution discharged the burden of prov-



ing that Exhibit B2 was corroborated or confirmed as true in line with a plethora of Supreme Court authorities?

(b) Whether there was any reliable evidence in proof of the identity of the appellant as committing the offence in view of the material contradictory evidence of PW1, PW2, PW3 and PW4 in respect of the identification? B

(c) In view of the evidence before the court, whether the Court of Appeal was correct to have held that the prosecution proved the case of armed robbery against the appellant beyond reasonable doubt?

The respondent also formulated three issues for determination as follows: C

(a) Whether the learned Justices of the Court of Appeal were right in affirming the conviction and sentence of death imposed on the appellant (solely on the appellant's Confessional Statement) in the light of evidence before the court. D

(b) Whether the procedure adopted for identifying the appellant as one of those who committed armed robbery at NAO Supermarket on 11<sup>th</sup> December, 2003 is valid in law.

(c) Whether the learned Justices of the Court of Appeal were right in holding that the prosecution proved its case beyond reasonable doubt at the trial court. E

The issues formulated by both parties are essentially the same. I shall resolve the appeal on the issues formulated by the appellant. Issue 1

In support of this Issue, learned counsel for the appellant enumerated the ingredients required to establish the charge against the appellant as stated in Adekoya Vs The State (2012) LPELR-7815 (SC) and also reiterated the well settled position of the law that the prosecution must prove its case beyond reasonable doubt. It is the contention of learned counsel that there were material inconsistencies between the content of Exhibit B2 and other evidence before the court that ought to have created doubt in the mind of the court including whether or not the appellant authored the said exhibit. F

Learned counsel submitted that the evidence of PW3 (an Inspector of Police attached to the Anti-Robbery Section, State CID Akure) and PW4 (a Police Sergeant also attached to the Anti-Section, State CID, Akure), indicated that it was the appellant's co-accused, Shina Akinrinlola and one John Thomas (now deceased) who H

were in their custody as suspects in respect of another matter that confessed to the robbery at NAO Supermarket and not the appellant. He submitted that PW3 testified that after writing their confessional statements, they took the Police to the scene of the crime. He noted that PW1 (a sales boy at NAO supermarket and a victim of the armed robbery) and PW2 (the manager of the supermarket) testified that an identification parade was conducted at the supermarket after which they made their statements to the Police. Their statements were admitted in evidence as Exhibits P1 and P2. He posited that as Exhibits P1 and P2 were made on 23rd January 2004, the appellant's statement must also have been made on or before that date. He argued that since the evidence was that it was the 1<sup>st</sup> accused and one John Thomas who took the Police to the scene of crime, there was a strong possibility that Exhibit B2 was made by John Thomas and not the appellant. He submitted that before the court can convict on a confessional statement, it must be consistent with other ascertained facts, which had been proved. He cited the following cases: Kanu Vs R. (1952) 14 WACA 30; Mbenu Vs State (1988) 3 NWLR (Pt.84) 615; Stephen Vs State (1986) 5 NWLR (Pt.46) 978; Kopa Vs State (1971) 1 ALL NLR 150; Onuoha Vs State (1987) 4 NWLR (Pt.65) 331.

He submitted that notwithstanding the fact that the lower court rejected Exhibit P3 (a wristwatch said to have been recovered from the appellant) on the ground that the source of the exhibit was shrouded in ambiguity, it still went ahead to affirm the appellant's conviction on the basis that the evidence of PW1 and PW2 coupled with the fact that the appellant lived in Akure and had the opportunity to commit the crime, constituted corroborative evidence of Exhibit B2. He submitted that the evidence of these two witnesses is materially inconsistent with Exhibit B2. Relying on the case of Iko Vs State (2001) LPELR-1480 (SC) @ 18 B - C, he submitted that corroborative testimony ought to confirm the evidence it seeks to corroborate and not to derogate from it. He noted that while PW1 and PW2 stated that they were robbed by two individuals, in Exhibit B2 it is stated that four persons committed the robbery. On this ground, he submitted that the evidence that the appellant was one of the robbers was not corroborated. He argued that if there were four robbers, then the evidence of PW1 and PW2 was not correct and on

the other hand, if there were only two robbers, then the evidence of PW1 and PW2 could not be corroborative of Exhibit B2. He also challenged the finding of the court below where it held that the appellant had the opportunity to commit the offence because he was familiar with the terrain on the ground that there was no evidential basis for such a conclusion. He urged the court to resolve this issue in the appellant's favour. B

In response to the above submissions, learned counsel for the respondent submitted that the law is trite that once a statement is in compliance with the law and rules governing the method for taking it and it is tendered and admitted as an exhibit, it is good evidence and no amount of retraction would vitiate its admission as a voluntary statement. He referred to: *Ikemson Vs The State* (1998) 1 ACLR 80 @ 92 lines 15 - 20; Also found in (1989) 3NWLR (Pt.110) 455; *Nwachukwu Vs The State* (2004) 17 NWLR (Pt.902) 273 C - D. He submitted further that a free and voluntary confession of guilt by an accused person, if direct, positive and satisfactorily proved, is sufficient to warrant a conviction if the court is satisfied that the case has been proved beyond reasonable doubt. He relied on: *Adio Vs The State* .(2005) 4 ACLR 296 @ 310 lines 5 - 10; *Tegwonor Vs The State* (2008) 1 NWLR (Pt.1069) 630 @ 654. He submitted that Exhibit B2 meets these criteria, as it is direct, positive and voluntarily made. D E

In determining the weight to be attached to Exhibit B2, he submitted that the court is guided by the test laid down in *Nwaebonyi Vs The State* (1994) 5 NWLR (Pt.138) 150 (also referred to as the test in *R V. Sykes* (1913) 8 Cr. App. R. 233). He also referred to *Alarape Vs State* (2001) 5 NWLR (Pt.705) 79 and *Ikemson Vs State* (supra). He submitted that the evidence of PWs 1, 2, 3 and 4 was evidence outside the confessional statement that linked the appellant with the commission of the offence. He referred to various findings of the trial court and the court below at pages 20 - 27, 206 and 209 respectively. He submitted that while it has been the practice that where the statement of an accused person made before the trial is inconsistent with his testimony at the trial, both should be rejected as unreliable, it is not so with evidence obtained through a confession. He referred to *Ikemson Vs The State* (supra) per Karibi-Whyte, JSC. He submitted that there were sufficient facts outside Exhibit B2 to F G H

warrant the appellant's conviction.

With regard to the contention that Exhibit B2 might not have been authored by the appellant and must have been made on 23/1/04, learned counsel noted that both in Exhibit B2 and during his oral testimony, the appellant stated that he was arrested on 2/4/04 and signed his confessional statement on 4/2/04. He also referred to the evidence of PW2, (in the trial within trial) who testified that the appellant was brought to him on 14/4/04 as a superior police officer for the endorsement of his confessional statement. He also referred to the testimony of PW4 to the effect that on 23/1/04 two confessed armed robbers detained for other robbery matters, namely Shina Akinrinlola (1st accused) and one John Thomas (now deceased) confessed to committing the robbery at NAO Supermarket and that they named their other gang members as one Ola (at large) and Wole Akindipe (the appellant). He submitted that at the time the 1st accused made his statement the appellant was still at large.

On the suggestion that Exhibit B2 might have been authored by John Thomas and not the appellant, learned counsel referred to the evidence of PW3 to the effect that John Thomas's statement was taken sometime in January 2004 while the appellant's statement was made on 4/2/04. He also submitted that there were no material contradictions in the evidence of PW1 and PW2 to warrant the judgment of the lower court being overturned. On the alleged contradiction in the number of robbers that carried out the operation as between the testimony of PW1 and PW2 and Exhibit B2, learned counsel referred to the case of Jerry Ikuepenikan Vs State (2011) 1 NWLR (Pt.1229) 449 wherein this court held that there is a distinction between contradiction and discrepancy. That while contradiction goes to the essentiality of something being or not being at the same time, minor discrepancies depend on astuteness and capacity to observe meticulous details. He also referred to Dibia Vs The State (2008) 6 ACLR @ 329 ratio 35. He urged the court to resolve this issue in the appellant's favour.

***I have read the submissions of learned counsel for the appellant as contained in his reply brief in respect of this issue. The submissions constitute a re-argument of the arguments in the appellant's brief. The purpose of a reply brief is to address fresh points raised in a respondent's brief of argu-***

**ment and not to introduce fresh points or take another bite at the cherry. It is not the forum for emphasising the arguments in the appellant's brief.** See *Basinco Motors Ltd. Vs Woermann-Line & Anor.* (2009) 13 NWLR (Pt.1157) 149; *Dairo Vs Union Bank of Nig. Plc.* (2007) ALL FWLR (Pt.392) 1846 @ 1871 E - F; *Rev. King Vs The State* (2016) LPELR-SC.200/2013 @ 34 - 35 E - B. B  
The submissions are therefore discountenanced.

***In order to secure a conviction for the offence of armed robbery contrary to Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, LFN 2004, the prosecution must prove the following beyond reasonable doubt:*** C

**1. That there was a robbery or a series of robberies.**

**2. That each robbery was an armed robbery.**

**3. That the accused was one of those who took part in the armed robberies.** See: *Bozin Vs The State* (1985) 2 NWLR (Pt.8) 465; *Suberu Vs The State* (2010) 8 NWLR' (Pt.1197) 586; *Ani Vs The State* (2003) 11 NWLR (Pt.830) 145; *Attah Vs. The State* (2010) 10 NWLR (Pt.1201) 190 @ 244 B – D; *Olayinka Vs The State* (2007) 9 NWLR (Pt.1040) 561; *Agboola Vs The State* (2013) 11 NWLR (Pt.1366) 619. E

***It is settled law that an accused person can be convicted solely on the basis of his confessional statement if the statement is found to be free, voluntarily made, direct and positive with reference to the offence charged.*** See: *Adio Vs The State* (1986) 2 NWLR (Pt. 24) 581; *Mohammed Vs The State* (2007) 11 NWLR (Pt. 1045) 303; *Okoh Vs The State* (2014) 2-3 SC 184. ***The retraction of a confessional statement will not render the statement inadmissible. The only duty on the court in such circumstances is to see if there is any evidence outside the statement that makes the confession probable.*** See: *Salawu Vs The State* (1971) NWLR 249 @ 252; *Aremu Vs The State* (1991) 7 NWLR (Pt. 201) 1 @ 15 G-H; *Nwachukwu Vs The State* (2007) 17 NWLR (Pt. 1062) 31 @ 69 H; *Blessing Vs FR.N.* (2015) 13 NWLR (Pt. 1475) 1. F G

In his oral testimony before the court, PW1 stated that on the night of 11th December 2003 the accused persons (the appellant and Shina Akinrinlola) came into NAO Supermarket, where he works., with guns and asked them to lie down. That they stole wristwatches, wine, rings and earrings and also the small amount of money they H

made that day. He identified the appellant and his co accused as the robbers who came into the shop and stated that he was able to identify them because they did not wear masks. He stated that after the incident the matter was reported to the Police. Under cross-examination he identified the appellant as the person who was holding the B gun. He stated that he identified the two accused persons from among three suspects brought to the shop by the Police and that in his statement to the Police he had mentioned that he could identify the robbers. PW2, the manager of the supermarket also testified that on the day in question two men rushed into the shop with guns and asked C them to lie down. That in the process of the robbery, they took his handset, his jewelry, some bottles of wine, cuff links, necklaces and wrist watches. He stated that when the robbers left they called their boss, one Mr. Ndubuisi Agachi and the matter was reported to the D Police the next day. He stated that he was able to identify the appellant and his co-accused when they were brought to the shop, as they were not masked during the operation. Both PW1 and PW2 said they made statements to the Police after they identified the robbers. Their statements were admitted in evidence as Exhibits P1 and P2 E respectively. PW2 also stated that it was the appellant who attacked him although the 1st accused was also armed.

PW3 testified that sometime in January 2004, while he and his team at the Anti-Robbery section of the State CID, Akure, were investigating a robbery case at Araromi, one suspect named John Thomas and the appellant's co-accused confessed to participating in a previous robbery that occurred at NAO supermarket on 11<sup>th</sup> December 2003. Both John Thomas and the 1st accused were rearrested, charged and cautioned and they each volunteered statements, which F were endorsed by a senior Police officer. That both of them took the G Police to the supermarket where they confessed to have carried out a robbery operation with others. PW4, a Police officer attached to the s-alary section of the Police Headquarters, Akure, Ondo State, was formerly attached to the Anti- Robbery Section of the State CID. He H identified the appellant and his co-accused. He stated that both accused persons who had earlier been arrested for a different robbery confessed to having participated previously in the robbery at the supermarket. That they named another gang member to include one Ola. They were rearrested, cautioned and they volunteered state-

ments. He was the one who recorded the appellant's statement. The appellant objected to its admissibility on the ground that it was not voluntarily made. After a trial within trial, the statement was admitted in evidence as Exhibit B2. He stated that at the scene of crime, the appellant demonstrated to him and his team how he used the shot gun he was carrying to order the sales boys to lie down. B

The appellant in his evidence in chief denied involvement in the offence and stated that he is in the upholstery business and that on 2/4/04 he was at work at Idanre garage and that about ten minutes after he got to his house at Oke Ijebu, some Policemen knocked on his door and asked him to accompany them to the Police station. That after confirming that he was Wole Akindipe, he was locked up. That he was asked if he knew one John Thomas, which he denied and that he also denied knowing four other suspects shown to him. That Exhibit B2 was obtained after he was tortured. That he did not know his co-accused nor had he met PW1 nor PW2 before. He denied being taken out of his cell to the supermarket at any time. C D

Exhibit B2, the appellant's confessional statement, which is the crux of this issue is at page 12 of the record and reads as follows:

*"...that I am a native of Idanre town in Ondo State born at twenty three years ago to the family Akindipe Oloruntimehim who is now deceased. I last attended St. Thomas Primary school, raka4e(sic) Road. In the year 1992, I went to learn furniture making from one Love Akinmola at Owena mass motor park area Akure. I have no workshop of my own but I usually join other furniture makers to work in order to earn my living. I am also a member of an armed robbery gang comprising of myself, John Thomas, Shina and one Ola and also Akeem and Okolie an Ibo boy selling clothes at Akure. We have one locally made (Akwa made) short gun and is being kept with John Thomas, our gang has robbed in many places at Akure and Idanre. On 11/12/2003 about 9 p.m., myself Wole alias Majata, John Thomas, Shina and Ola went to rob at NAO supermarket along Oba Adesida Road, Akure, During the robbery, we collected cash sum of money of about N20,000.00, many wrist watches, bottle wine, jewelries and one handset my share of the loot is N5,000.00 cash, four wrist watches and I also drink from the stolen wine. It was John Thomas that brought the idea of going to rob the supermarket. It was John Thomas who took the handset. Out of the four wrist watches* E F G H

I gave one to Shina our gang member, I sold two to Okolie Chimezie who is our member, but did not go with us for NAO Supermarket operation the remaining one that I was using I gave to one Victor (m) a pocket picket (sic) at Akure don't know his house. I borrowed the sum of N600.00 from Victor and gave him wrist watch and he promised and agreed to give me back when I pay him his money. The two wrist watch I sold to Okolie Chimezie was in the sum of N2,000.00. He has paid one deposit of N1,000.00 leaving a balance of N1,000.00. Okolie Chimezie has followed us to Alade Idanre one day which I cannot remember but sometimes in October 2003 for a robbery operation. He was the one that even brought the job and he also carried us there with his Mercedes Benz car. We did not succeed in robbing the person we were supposed to rob because when we got there and knock at the door the man did not answer so we turned back. There was another day that Okolie Chimezie and his friend called 'NEAT' gave we the remaining gang robbers a robbery operation to be carried out in the house of one Ibo boy whom he said would be travelling with huge sum of money when we got to the point Okolie asked to us to wait for him, we waited for them for a very long time but did we did not see them that was how we left the place. It was myself and John Thomas that went to wait for Okolie that early morning when the men was expected to travel. I am very surprised that Okolie Chimezie is denying us now that we have been caught by the police." (Emphasis supplied)

**While it is trite that a confessional statement by an accused person that is positive, direct and unequivocal is sufficient to ground a conviction, it has always been the practice of the courts to look for some evidence outside the statement, no matter how slight, that would show the confession is true. The courts are guided by the following test laid down in: Nwaebonyi Vs The State (supra): R. Vs Sykes [supra:**

- (a) Is there anything outside it to show that it is true?
- (b) Is it corroborated?
- (c) Are the factors stated in it true as far as can be tested?
- (d) Was the accused the man who had the opportunity of committing the offence?
- (e) Is the confession possible?



**(f) Is it consistent with other facts which have been ascertained and proved?**

See also: Udofia Vs The State (1984) 12 SC 139; Ojegele Vs The State (1988) 1 NWLR (Pt.71) 414; Akpa Vs The State (2007) 2 NWLR (1019) 500.

The court below reproduced the statement *in extenso* and proceeded to apply the test. It is worthy of note that Exhibit B2 was admitted in evidence after the conduct of a trial within trial. The argument of learned counsel for the appellant that he might not have been the author of Exhibit B2 is not tenable. The finding of the learned trial Judge at the conclusion of the trial within trial that Exhibit B2 was voluntarily made by - him has foreclosed any speculation in this regard. There is no appeal against the ruling on the admissibility of Exhibit B2. The contention of the appellant in this appeal is that the trial court ought not to have placed so much reliance on the said statement and that the lower court was wrong to uphold its decision in this regard. At page 117 of the record, the trial court found as follows:

*“From the totality of the evidence before this court, aside the confessional statements of the accused persons admitted as Exhibits B1 and B2, what other facts in evidence corroborate the facts in issue, to ground a conviction of the accused persons for the offences as charged?”*

*In answer to this, this court shall fall back on the testimony of the witnesses. It is the uncontroverted and unchallenged evidence of PW1 and PW2 that on the night of the alleged robbery they were able to identify the robbers because they were not masked as their faces were open and they saw their faces when they rushed in. They identified the 2 accused persons in court as the people that came into the shop to rob. They specifically and with precision mentioned the items stolen by the robbers and gave a clear and consistent analysis of how the robbery was carried out.”*

In upholding this finding, the court below at page 206 of the record held thus:

*“Exhibit B2 was admitted as a voluntary confessional statement consequent upon the trial within trial conducted by the learned trial judge. Relevant portions of Exhibit B2 which I feel necessary to reproduce read as follows:*

“..... I am also a member of an armed robbery gang comprising of myself, John Thomas Shina and one Ola and also Akeem and Okolie an Ibo boy selling clothes at Akure. We have one locally made (Akwa made) short gun and is being kept with John Thomas. Our gang has robbed in many places at Akure and Idanre. On 11/12/2003 about 9 p.m. myself Wole alias Majata, John Thomas, Shina and Ola went to rob at NAO Supermarket along Oba Adesida Road, Akure. During the robbery we collected cash sum of about N20,000.00, many wrist watches wine, jewelries and one handset. My share of the loot is N5,000.00 cash, four wrist watches and I also drink (sic) from the stolen wine ....”

Relying on the authority of Adio & Anor. Vs The State (supra), the foregoing voluntary confession which is direct and unequivocal is on its own enough to base the conviction of the appellant on.

Aside from the fact of Exhibit B2 being confessional of the offence, the PW1 and PW2 testified that they were at the NAO Supermarket at the time it was robbed by the appellant in company of some others. They said that items which include cash, jewelries (sic), wristwatch and wine were removed from the shop in the course of the robbery. This piece of evidence is in tandem with the confession of the appellant to the effect that they robbed the shop of such items as wrist watch, wine, cash etc.”

I am of the view that the above findings are on solid ground. The statement of the appellant, Exhibit B2, was certainly direct, positive and unequivocal as to the part he played in the commission of the offence. Not only did he admit going to rob the supermarket on the fateful day, he mentioned other members of his gang, which included Shina (the 1st accused), John Thomas and Chimezie Okolie. He specifically excluded Chimezie who he said was a member of the gang but did not go for that particular operation. He admitted that the gang owns one locally made shot gun, kept by John Thomas. He also gave elaborate details of the items stolen, which is in tandem with the evidence of PW1 and PW2, and what he did with his share of the loot. **Once a confessional statement has been properly admitted in evidence, it becomes part of the evidence for the prosecution and the court is entitled to rely on it.** The test in R V. Sykes (supra) is applied as a precaution. **The trial court rightly applied the test and came to the correct conclusion that the**

***confession was true. The lower court did the same and rightly affirmed the finding.***

Learned counsel for the appellant has argued that there was no basis for the finding of the court below that the appellant had the opportunity to commit the crime. Whether or not the appellant had the opportunity to commit the crime is one of the tests laid down in *R. Vs Sykes* (supra). I am of the view that there were sufficient facts in Exhibit B2 to warrant the finding made by the court. Therein the appellant stated that he is a native of Idanre Town in Ondo State, that he learned furniture making at Owena Mass Motor Park area, Akure and that his gang had carried out robberies at many places in Akure and Idanre. The trial court did not rely solely on Exhibit B2 in convicting the appellant. It considered other evidence outside the confessional statement in reaching its conclusions. The court below also considered the evidence of the other prosecution witnesses before affirming the decision of the trial court.

It is not the practice of this court to interfere with the concurrent findings of fact by two lower courts unless the findings are shown to be perverse, not supported by evidence or are shown to have occasioned a miscarriage of justice. See: *Ogundiyan Vs The State* (1991) 3 NWLR (Pt.181) 519 @ 528 - 529 H – A; *Ogoala Vs The State* (1991) 2 NWLR (Pt.175) 509 @ 528 C – D; *Gbadamosi Vs Dairo* (2007) 3 NWLR (Pt.1021) 282. The appellant has not shown that the findings are perverse. This issue is accordingly resolved against the appellant.

## Issue 2

Relying on *Adekoya Vs The State* (2012) LPELR-7815 (SC) and *Adisa Vs The State* (1991) 1 NWLR (Pt.168) 490 @ 506 - 507, learned counsel for the appellant submitted that the prosecution must prove beyond reasonable doubt that the appellant was one of those who robbed NAO supermarket, Akure on 11<sup>th</sup> December 2003. He referred to the finding of fact as gleaned from the judgment of the trial court to wit: that the incident occurred around 9pm at night; that the appellant was not arrested at the scene but sometime afterwards; that PW1 and PW2 testified that they were afraid during the robbery; that they had never met the appellant before the incident and that their encounter was fleeting. After reviewing the findings of the two lower courts, learned counsel submitted that the courts relied on the

*ipse dixit* of PW1 and PW2 in holding that the appellant was properly identified in the circumstances of this case. He submitted that it is wrong for the court to rely on dock identification of an accused person. He relied on: *Ayanwu Vs The State* (1986) 5 NWLR (Pt.43) 612. He submitted that although the incident occurred on 11/12/2003, the dock identification took place between December 2006 and June 2009, a period of between three and six years. He submitted that having regard to the time lapse, the recollection of the witnesses was likely to be fraught with mistakes. He argued that the appellant could have undergone considerable changes in appearance, body weight, etc. as he was in prison custody throughout.

He argued, citing the case of *Ikemson Vs The State* [supra], that a proper identification parade ought to have been conducted to ascertain the identity of the- appellant. He submitted that the conditions in which an identification parade ought to be held are as follows:

- (a) where the victim did not know the accused before and his first acquaintance with him was during the commission of the offence;
- (b) where the victim or witness was confronted by the offender for a very short time; and
- (c) where the victim, due to time and circumstance might not have had the full opportunity of observing the features of the accused.

He referred to: *Afolalu Vs The State* (2010) LPELR- 197 (SC); *Sadiku Vs The State* (2013) LPELR-20588 (CS); *Ndidi Vs The State* (2007) 13 NWLR (Pt.1052) 651; *Mbenu Vs The State* (1988) 3 NWLR (Pt.84) 615 @ 625 and submitted that all the conditions were present in this case to warrant an identification parade. He contended that it was because PW1 and PW2 were unable to identify the appellant that PW3 and PW4 purportedly carried out an identification parade.

Taking the conditions serially, he submitted that it was unlikely that PW1 and PW2 were able to identify their assailants in their frightened state, particularly as they were asked to lie on the floor. On the lighting conditions, he submitted that the incident took place at about 9pm and that there was no evidence before the court to suggest that the supermarket was illuminated. He argued that having regard to the epileptic power supply in Nigeria, it was highly probable that the

shop was not illuminated at the time of the incident. He submitted that there was no evidence of any description given to the Police of any distinguishing features. He submitted that there was no evidence that PW1 and PW2 identified the appellant and communicated such identification to the Police. He also noted that there was no previous contact with the appellant and submitted that all these factors ought to have created doubt in the mind of the court. He argued that the conditions set out in *Ikemson Vs The State* [supra], the authority relied upon by the court below, must be satisfied conjunctively and not disjunctively.

On delays between the commission of the offence and the identification of the accused person, he referred to: *Ozin Vs The State* (1985) LPELR-799 (SC) where it was held that where there is no prompt identification, the evidence of witnesses should be treated with caution. He also relied on the case of: *Ikaria Vs The State* (2012) LPELR-15533 (SC) (wrongly cited as *Casesikaria Vs State*). In one breath he submitted that it is not in dispute that the appellant and the 1st accused were taken to the venue of the crime for identification. In another breath he submitted that the only evidence before the court per PW3 and PW4 was that it was the 1st accused and John Thomas who were taken to the scene of crime. That there was no evidence to show that the appellant was taken there. He submitted that there were contradictions in the evidence of the prosecution witnesses as to how many suspects were brought to their shop for identification. He referred to the evidence of PW4 that at the scene of the crime the appellant and the 1st accused demonstrated the parts they played in the armed robbery and observed that PW2, who was present during the identification parade, testified that when the suspects were brought they did not come out of the car. He submitted that PW1 and PW2's powers of recollection could not be relied upon.

Another issue, which learned counsel contends raises doubt about the identification of the appellant is that there was inconsistency as to the place where the statements of PW1 and PW2 i.e. Exhibits P1 and P2 were made, whether in the supermarket or at the Anti-Robbery section CID, Akure. He argued that if the statements were made at the Anti-Robbery section and not at the shop then PW1 and PW2 did not identify the accused persons prior to making their statements. He submitted that in this regard, the trial court was

wrong to have ascribed probative value to exhibits P1 and P2. He relied on the case of Balogun Vs A.G. Federation (1994) 5 NWLR (Pt.345) 442 @ 456 - 457, where it was held that it is wrong for the Police to shift the proper venue for taking statements, which is the Police station. In conclusion, he submitted that the finding of the lower court is perverse in respect of the identification of the appellant. He urged the court to interfere therewith in the circumstances. He referred to: Nwosu Vs The State (1986) 4 NWLR (Pt.35) 848 and urged the court to resolve the issue in the appellant's favour.

In reply, learned counsel for the respondent submitted that there was proper identification of the appellant in this case. He conceded that the prosecution must establish beyond reasonable doubt that the appellant was one of those who committed the offence charged. He also placed reliance on the case of Ikemson Vs The State [supra] in support of this submission. He referred to various portions of the record where PW1 and PW2 stated unequivocally that they were able to identify the appellant on the day they were brought to their shop because he and his co-accused were not masked. He rejected the submission that the identification was a dock identification. He referred to the findings of the trial court, affirmed by the court below at pages 118 and 215 of the record respectively. He submitted that an identification parade is not a *sine qua non* in cases where there was a brief encounter with the accused persons. He referred to: R V. Turnbull & Ors. (1976) 3 ALL ER 549, to the effect that a fleeting encounter may not prevent a victim from absorbing the accused person's looks or features. He submitted that in the circumstances of the instant case, even though the meeting was fleeting, the lower court was right to affirm the judgment of the trial court on the identification of the appellant after being satisfied that the trial court had considered the totality of the evidence before it before reaching its decision. He noted further that the appellant identified himself in Exhibit B2 as having taken part in the armed robbery. He referred to the finding of the court below in this regard at pages 215 and 216 of the record. He urged the court to resolve this issue against the appellant.

Again, learned counsel for the appellant in his reply brief has attempted to re-hash the arguments in the appellant's brief. The submissions do not meet the requirement of a reply brief and are ac-

cordingly discountenanced.

I had earlier in this judgment set out the elements of the offence of armed robbery that must be established beyond reasonable doubt. One of the elements is proof that the accused was one of those who participated in the armed robbery or series of armed robberies. It must be established beyond reasonable doubt. B

***Both learned counsel have referred to the conditions that make the conduct of an identification parade necessary. It has however been held, as rightly submitted by learned counsel for the respondent that an identification parade is not a sine qua non in every case. Where there is no uncertainty or doubt as to the identity of an accused person, there would be no need to conduct an identification parade. One of those circumstances is where an accused person confesses to the commission of the offence and the confession is found to be consistent with other facts outside it.*** See: Agboola Vs The State (supra) at 650 B - G. It was held in Ikemson Vs The State (supra) at 479 B - C that where by his confession, an accused person identifies himself, there would be no need for any further identification parade. C

***In the course of resolving issue 1 earlier, I held that the appellant's confessional statement, Exhibit B2 was direct, positive and unequivocal as to his participation in the commission of the offence. In other words, by his confession, he put himself squarely at the scene of crime. The statement was properly tested as to its voluntariness through a trial within trial before being admitted in evidence.*** Part of his statement reads: D

*"...on 11/12/2003 at about 9pm, myself Wole alias Majata, John Thomas, Shina and Ola went to rob at NAO Supermarket along Oba Adesida Road, Akure ... During the robbery we collected cash sum of money of about N20, 000.00, many wristwatches, bottle wine, jewelries and one handset. My share of the loot is N5,000 cash, four wristwatches and I also drink from the stolen wine."* E

PW1 at page 3 testified as follows under cross-examination: F

*"Only one of the accused persons was holding a gun when they came in i.e. Mr. Wole Akindipe 2nd accused person. I was frightened when I saw the accused person with a gun. I could identify them even in my frightened state. I saw two of them. They asked me*

*to lie down ... The Police brought 3 of them to our shop. I was able to identify the 2 accused persons. I wrote it down that I will be able to identify the accused persons."*

PW2 at page 5 of the record stated:

*"I was able to identify the robbers because they were not masked  
B their faces were open. I saw their faces when they rushed in."*

Under re-examination he stated:

*"It was the 2nd accused that came to me directly. It was the  
2nd accused that attacked me directly."*

*C PW4 at page 73 of the record testified that when the accused  
persons were taken to the Supermarket the 2nd accused i.e. the ap-  
pellant herein demonstrated to him and his team how he used the  
shotgun he was carrying to order the sales boys to lie down during  
the robbery.*

*D The trial court apart from considering the confessional state-  
ment held as follows at pages 116 - 117 of the record:*

*"It is the uncontroverted and unchallenged evidence of PW1  
and PW2 that on the night of the alleged robbery they were able to  
identify the robbers because they were not masked as their faces  
E were open and they saw their faces when they rushed in. They iden-  
tified the 2 accused persons in court as the people that came into the  
shop to rob. They specifically and with precision mentioned the items  
stolen by the robbers and gave clear and consistent analysis of how  
the robbery was carried out. In the view of this court, contrary to the  
F assertion of counsel to the 2nd accused person, both witnesses had  
the opportunity of close observation even in their frightened stage  
(sic). ... The testimony of PW1 and PW2 corroborates the confes-  
sional statements in Exhibits B1 and B2. The circumstances and the  
G length of time within which the PW1 and PW2 saw the suspects is  
enough to identify the perpetrators. "*

The court below at page 215 of the record held:

*"The evidence of PW1 and PW2 being the victims in the in-  
stant case shows categorically and without equivocation that in spite  
H of the brief period of encounter that they still had full opportunity to  
note the face of the appellant which was not masked moreso as the  
shop being the scene of the robbery was illumined. Moreover the  
appellant identified himself in his confessional statement Exhibit B2."*

It is noteworthy that the trial court, which had the benefit of



seeing and hearing PW1 and PW2 testify and of observing their demeanour found them to be credible witnesses. Their narration of what transpired was consistent in every material particular. Whether or not the appellant had undergone any physical changes that might have affected PW1 and PW2's ability to identify him was not put to them under cross-examination. Neither were they cross-examined as to the illumination of the shop at the time of the" robbery. These issues raised by learned counsel for the appellant are speculative. The court does not speculate. The witnesses maintained that in spite of their frightened state they were able to identify the appellant. From the evidence before the court, it is not correct, as contended by learned counsel for the appellant that the appellant was only identified in the dock. ***The testimonies of PW1 and PW2 that they were able to identify the appellant when he and some other suspects were brought to their shop because they were not masked during the operation was unshaken. Above all, the appellant unequivocally fixed himself at the scene by his confessional statement, Exhibit B2. The finding of the court below, which affirmed the decision of the trial court in this regard cannot be faulted. I hold that the appellant was properly identified as one of those who participated in the robbery. This issue is accordingly resolved against the appellant.***

### Issue 3

The final issue to be determined is whether the prosecution established its case against the appellant beyond reasonable doubt. Learned counsel for the appellant submitted that the trial court wrongly discountenanced the appellant's testimony before the court that he was the victim of a random arrest. He submitted that failure to consider his evidence in this regard amounted to a miscarriage of justice. He relied on: *Oladipupo Vs The State* (1993) LPELR-2549 (SC) @ 11 E- G; *Olayinka Vs The State* (2007) LPELR-2580 (SC). He argued that the trial court erroneously placed the burden of proof on the appellant when it held that he failed to call any witness to corroborate or affirm his testimony. He submitted that by virtue of Section 36 (5) of the 1999 Constitution, the burden on the prosecution to prove its case beyond reasonable doubt does not shift as the accused person has the constitutional guarantee of presumption of innocence. He cited several authorities in support: *Alabi Vs The State*

(1993) 7 NWLR (Pt.307) 511 @ 531 A - C; Solola Vs The State (2005) 5 SC (Pt.1) 135; The State Vs Isiaka (2013) LPELR-20521 (SC); State Vs Ogubunjo (2001) LPELR-3223 (SC).

In response to these submissions, learned counsel for the respondent reiterated the elements of the offence of armed robbery as stated in *Bozin Vs The State* (1985) 2 NWLR (Pt.8) 465 @ 469 and *Egboghonome Vs State* (1993) 7 NWLR (Pt.306) 383 and submitted that from the appellant's statement in Exhibit B2 and the uncontroverted testimony of PW1 and PW2 it was established that there was a robbery, that it was an armed robbery and that the appellant was one of those who took part in the armed robbery. He referred to the evidence of PW1 who testified that the appellant had a gun when he came into the shop with his co-accused to rob and the evidence of PW2 that two men rushed into the shop with guns and ordered them to lie down. He also referred to the evidence of PW2 that the appellant attacked him directly. He submitted that these testimonies were corroborated by the appellant in Exhibit B2 where he admitted being a member of an armed robbery gang and that they own a locally made shotgun, which is kept with John Thomas. He submitted that Exhibit B2 was corroborated by the evidence of all the prosecution witnesses and proved that the offence was carried out with offensive weapons.

On the identity of the appellant as one of the robbers he reiterated his submissions under issue 2 and submitted that the learned trial Judge was right to place evidential value on Exhibit B2, which was corroborated by the evidence of PW1 and PW2.

On the appellant's defence of *alibi*, he submitted that an accused person seeking to rely on the defence of *alibi* must raise it timeously to afford the Police an opportunity to verify his claim. He relied on: *Akpan Vs The State* (1991) 4 SCNJ 1. He submitted that in the instant case, the appellant did not raise the defence timeously, as he raised it for the first time in court. He also noted that it was when the appellant was arrested in respect of another robbery that he confessed to participating in the robbery incident that took place at NAO Supermarket on 11/12/2003. He also observed that the appellant did not raise any *alibi* as to his whereabouts on 11/12/2003. He maintained that the burden of proof was never shifted to the respondent. He referred to the finding of the learned trial. Judge at

pages 118 and 119 of the record wherein it considered the defence raised by the appellant and concluded, rightly in his view, that the prosecution had proved its case beyond reasonable doubt.

I have given careful consideration to the submissions of learned counsel on either side. It is not in dispute that there was a robbery at NAO Supermarket, Akure on 11/12/2003. As to whether it was an armed robbery, I had earlier in this judgment reproduced portions of the evidence of PW1 and PW2, relied upon by the two lower courts wherein they gave credible evidence as to how the appellant and his co-accused came into their supermarket on 11/12/2003 armed with a gun, ordered them to lie down and proceeded to rob them of various items and cash. The witnesses maintained under cross-examination that it was an armed robbery. PW1 specifically identified the appellant as the one who carried the gun while PW2 testified that the appellant attacked him directly. The trial court found the evidence of these witnesses to be credible. PW3 and PW4 also testified to the fact that they were assigned to investigate a case of armed robbery. PW4 testified further as to how the appellant demonstrated at the supermarket how he used the gun to intimidate PW1 and PW2 and forced them to lie on the floor. I repeat for emphasis, part of Exhibit B2 referred to by learned counsel for the respondent:

*“... I am also a member of an armed robbery gang comprising of myself, John Thomas, Shina, and one Ola and also Akeem and Okolie, an Ibo boy selling clothes at Akure. We have one locally made (Akwa made) short gun and is being kept with John Thomas ... On 11/12/2003 about 9pm, myself Wole alias Majata, John Thomas, Shina and Ola went to rob at NAO Supermarket along Oba Adesida Road, Akure.”*

The learned trial Judge considered not only the evidence of PW1 and PW2 and Exhibit B2, he also considered Exhibits P1 and P2, the statements of PW1 and PW2 respectively wherein they stated that the robbers were armed. He found that the statements were consistent with their oral testimony. The court below agreed with him. I have no reason to depart from the concurrent findings of the two lower courts in this regard, which have not been shown to be perverse, that the robbery was an armed robbery.

The final element of the offence, namely, whether the appellant was one of those who committed the armed robbery has been

fully dealt with under issue 2. ***On the feeble defence raised by the appellant, the law is settled that the legal burden of proving its case against the accused person beyond reasonable doubt rests squarely on the prosecution and never shifts. However where an accused person intends to raise a defence of alibi, it must be raised at the earliest opportunity, usually during the course of investigation so that the Police would have an opportunity of establishing the truth or otherwise of the allegation made against him. Where a defence of alibi is properly and timeously raised, the burden is on the prosecution to investigate and affirm or rebut it. It is also settled law that the ipse dixit of the accused person is not sufficient proof of his alibi. He must furnish the Police with sufficient particulars of his whereabouts at the time the offence was committed.*** See: Esangbedo Vs The State (supra) at page 70 B - C; Ozaki Vs The State (1990) 1 NWLR (Pt.124) 92 @ 109 C - G; Agu Vs The State (1985) 9 SC 179; Ayan Vs The State (2013) 15 NWLR (Pt.1376) 34; Ndidi Vs The State (2007) 13 NWLR (Pt.1052) 633.

***A defence of alibi means that the accused person is saying that he was elsewhere when the offence was committed and therefore could not have been one of the perpetrators of the crime. It is important to note that the appellant's defence was not raised timeously. It was raised in the course of his defence after the prosecution had closed its case. Furthermore, as rightly observed by learned counsel for the respondent, the alibi such as it was, did not refer to 11/12/2003, the date the offence was committed but the date of his arrest. I am of the view that this feeble defence by the appellant was rightly rejected by the two lower courts. The contention that the burden of proof was shifted on to the appellant is without substance and I so hold. The conclusion of the court below affirming the decision of the trial court that the prosecution proved the charge of armed robbery against the appellant beyond reasonable doubt is fully supported by the evidence on record. The appellant has not shown any special circumstance to warrant interference by this court.***

***With regard to the offence of conspiracy to commit armed robbery, the essential ingredient of the offence of conspiracy***

**lies in the bare agreement and association to an unlawful thing, which is contrary to or forbidden by law, whether that thing be criminal or not and whether or not the accused persons had knowledge of its unlawfulness. Evidence of conspiracy is usually a matter of inference from surrounding facts and circumstances. The trial court may infer conspiracy from the fact of doing things towards a common purpose.** See: Clark Vs The State (1986) 4 NWLR (35) 381; Gbadamosi Vs The State (1991) 6 NWLR (196) 182; Aje Vs The State (2006) 8 NWLR (982) 345 at 363 A-C.

**From the totality of the evidence led in this case, which has been reviewed severally in the course of this judgment, there is no doubt that from the credible and substantiated evidence of the prosecution witnesses of the appellant's participation in the robbing of the NAO Supermarket, Akure in the company of his co-accused, and having regard to his confessional statement, Exhibit B2, wherein he gave a detailed account of his role in the crime, I agree with the courts below that the prosecution proved the charge of conspiracy to commit armed robbery against the appellant beyond reasonable doubt.**

In conclusion, I hold that this appeal is devoid of merit. It is hereby dismissed. The judgment of the Court of Appeal, Akure delivered on 25/6/2014 affirming the judgment of the High Court of Ondo State sitting at Akure delivered on 2/11/2010 convicting and sentencing the appellant to death for conspiracy to commit armed robbery and armed robbery is affirmed.

Appeal dismissed.

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### **GALADIMA JSC**

I have been obliged the draft of the leading judgment of my learned brother KEKERE-EKUN JSC, I agree entirely with the reasoning and conclusion leading to the dismissal of the appeal for lacking in merit. I too dismiss it and affirm the decision of the Court below.

Appeal dismissed.

**PETER-ODILI JSC**

I agree with the judgment just delivered by my learned brother, Kudirat M. O. Kekere-Ekun, JSC and in support of the reasoning from which the decision came about, I shall make some remarks.

This appeal challenges the decision of the Court of Appeal Akure Division or Court below or Lower Court which Court affirmed the decision of the High Court, Akure wherein the Appellant was sentenced to death by hanging for alleged conspiracy and armed robbery an offence contrary to Sections 5 (b) and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap.38 Volume XXII, Laws of the Federation, 1990.

The detailed facts leading to this appeal have been well captured in the lead judgment and I shall not embark on a repeat of those facts save for when necessary in the course of this discourse. On the 28th day of April, 2016 date of hearing, learned counsel for the Appellant, Adeniji Kazeem adopted the Brief of Argument filed on the 6/11/2014 in which were crafted three issues for determination which are stated hereunder. Viz:-

a) Whether the prosecution discharged the burden of proving that Exhibit B2 was corroborated or confirmed as true in line with a plethora of Supreme Court authorities?

b) Whether there was any reliable evidence in proof of the identity of the Appellant as committing the offence in view of the material contradictory evidence of PW1, PW2, PW3 and PW4 in respect of the identifications?

c) In view of the evidence before the Court, whether the Court of Appeal was correct to have held that the prosecution proved the case of armed robbery against the Appellant beyond reasonable doubt?

Learned counsel for the Appellant also adopted the Reply Brief filed on 21/8/2015 and deemed filed on the 21/10/15.

Mr. L. F. Anga, learned counsel for the Respondent adopted its Brief filed on the 16/7/2015 and deemed filed 21/10/2015. In it were formulated three issues for determination which are thus:-

i) Whether the learned justices of the Court of Appeal were right in affirming the conviction and sentence of death imposed on the Appellant (solely on the Appellant's Confessional Statement) in the light of evidence before the Court?

ii) Whether the procedure adopted for identifying the Appellant as one of those who committed armed robbery at Nao Supermarket on 11th December, 2003 is valid in law?

iii) Whether the learned justices of the Court of Appeal were right in holding that the prosecution provides its case beyond reasonable doubt at the trial Court.

The three issues as crafted on either side being really two sides of the same coin, it does not matter which set of issues are utilised in the determination of the appeal. However, it seems to me that Issue No.3 on either side is enough to settle the question raised in this appeal.

### ISSUE NO. 3

This issue questions whether in view of the evidence before the Court, whether the Court of Appeal was correct to have held that the prosecution proved the case of armed robbery against the Appellant beyond reasonable doubt.

Pushing forward the position of the Appellant, Adeniji Kazeem Esq. of counsel contended that if the Courts below had properly appraised the finding of facts in relation to the evidence before the Court, they would have been able to identify material doubts which questioned the conclusions that the Appellant indeed was the author of Exhibit 'B2', the confessional statement that the prosecution failed to proffer other evidence to support the charge of armed robbery against the Appellant or corroborate Exhibit 'B2' or confirm same as true or possible in line with the decision of this Court in a plethora of authorities. He cited *Kanu v R* (1952) 14 WACA 30; *Mbenu v State* (1988) 3 NWLR (Pt. 84) 615; *Onuoha v State* (1987) 4 NWLR (Pt. 65) 331 etc.

Learned counsel for the Appellant stated further that the evidence of PW1 and PW2 is materially inconsistent with Exhibit.. 'B2' and cannot be said to corroborate Exhibit 'B2'. That a corroborating evidence ought to confirm the main evidence and not to derogate from or be inconsistent with it. He referred to *Iko v State* (2001) LPELR – 1480.

Going on further, learned counsel for the Appellant submitted that the burden of proving that the accused was the robber or one of the robbers is easily discharged when the accused was caught at the scene of the crime or shortly thereafter otherwise the prosecution

must prove beyond reasonable doubt that accused person is the same with the person that actually committed the offence so as to ensure that there are no mistakes of identity between the accused and the actual perpetrator of the offence. He cited *Adisa v State* (1991) 1 NWLR (Pt.168) 490 at 506 - 507; *Anyanwu v State* (1986) 5 NWLR B (Pt.43) 612; *Ndidi v State* (2007) 13 NWLR (Pt.1052) 651 etc.

That given the facts and circumstances of the case, the procedure, methods and principles adopted by the Courts below and evidence therefrom cannot conclusively connect/identify the Appellant as one of the robbers that robbed NAO Supermarket on 11/12/2003. C He cited *Casesikaria v State* (2012) LPELR- 15533; *Alabi v State* (1993) 7 NWLR (Pt.307) 511 etc.

For the Appellant was contended that the trial Court ought to have diligently considered the Appellant's defence rather than summarily dismissed same and that failure occasioned a miscarriage of justice and so the prosecution failed to prove their case beyond reasonable doubt. He cited *Oladipupo v The State* (1993) PLELR - 2549; *Olayinka v State* (2007) LPELR- 2580. D

In response, learned counsel, L. F. Anga for the Respondent E submitted that once a statement is in compliance with the law and rules governing the method for taking it and it is tendered and admitted as an exhibit, then it is good evidence and no amount of retraction will vitiate its admission as a voluntary statement. He cited *Ikemson v State* (1998) 1 ACLR 80 at 92; *Nwachukwu v State* (2004) 17 F NWLR (Pt.902) 273 etc.

That the trial Court can rely on a confessional statement when the confessional statement is direct, positive, unequivocal and voluntarily made which is what happened with Exhibit 'B2' and so the next question to consider is the weight to be attached to the said statement, whether retracted or not. He cited *Emmanuel Nwaebonyi v The State* (1994) 5 NWLR (Pt. 138) 138 at 150; *Alarape v State* (2001) 5 NWLR (Pt. 705) 79. G

For the Respondent was stated that there was proper identification of the Appellant as one of those who committed the armed robbery charged. That the evidence of PW1 and PW2 rightly corroborated Exhibit 'B2' and showed that the learned trial judge properly and rightly placed evidential weight on Exhibit 'B2' in holding that the offence of armed robbery against the Appellant was proved H



beyond reasonable doubt.

For the Respondent, it was further submitted that the alibi raised by the Appellant was not competent as it was not timeously raised and no particulars proffered from which the police would investigate it. Reliance was placed on *Akpan v The State* (1991) 4 SCNJ 1.

The reply on points of law, based on the Reply Brief is really a rehash or re-emphasis of the Appellant's Brief of Argument and there is no point referring to it.

The summary of the case put forward by the Appellant may be stated to be thus:-

That the prosecution did not proffer any other evidence outside Exhibit 'B2' to discharge the burden of proving that the Appellant committed the offence and that the Prosecution failed to discharge the burden of proving that Exhibit 'B2' was corroborated. That there are substantial material doubts in respect of the identity evidence relied by the Courts in convicting the Appellant, whom the trial Court had wrongfully placed the burden of proof.

In reaction, the Respondent opined that the prosecution proved that offence of conspiracy and armed robbery against the Appellant beyond reasonable doubt. That the Court below was right to have attached much weight to Exhibit 'B2', the Confessional Statement in convicting the Appellant who was properly identified as one of those who committed armed robbery at NAO Supermarket on 11th December, 2003.

That thrust of this appeal based on what was placed before Court is whether that burden of proof in offences of conspiracy and armed robbery upon which the Appellant was convicted and sentenced to death were made out as required by law that is beyond reasonable doubt. The situation is anchored on three prongs being the weight attached to the failed to discharge the burden of proving that Exhibit 'B2' was corroborated. That there are substantial material doubts In respect of the identity evidence relied by the Courts in convicting the Appellant, whom the trial Court had wrongfully placed the burden of proof.

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That thrust of this appeal based on what was placed before Court is whether that burden of proof in offences of conspiracy and armed robbery upon which the Appellant was convicted and sentenced to death were made out as required by law that is beyond reasonable doubt. The situation is anchored on three prongs being the weight attached to the confessional statement, the identification of the Appellant as one of the armed robbers and whether there were some other piece or pieces of evidence outside the confessional statement beefing up the probability or veracity of that statement. In the matter of the test of the veracity of the confessional statement, this Court had in a long line of cases laid down some guides which are:-

- a. Is there anything outside the confession which shows that it may be true?
- b. Is it corroborated in anyway?
- c. Are the relevant statements of facts made in it most likely true as far as they can be tested?
- d. Did the accused have the opportunity of committing the offence?
- e. Is the confession possible?
- f. Is the alleged confession consistent with other facts which have been ascertained and established?

See Emmanuel Nwaebonyi v The State (1994) 5 NWLR (Pt. 138) page 138 at 150.

The Supreme Court had held that the test for determining the veracity of a confessional statement, is to seek any other evidence however slight, of circumstances which make it probable that the confession is true. The Court had reiterated the desirability of that evidence which make it probable that the confession is true. See Alarape v The State (2001) 5 NWLR (Pt.705) 79; Ikemson v The State (1998) 1 ACCLR 80 at 92.

The learned trial Court had held as follows:-

*“..... They specifically and with precision mentioned the items stolen by the robbers and gave a clear and consistent analysis of how the robbery was carried out. In view of this Court, contrary to the*

assertion of counsel to the 2<sup>nd</sup> accused person, both witnesses had the opportunity of close observation even in their frightened stage. There is no evidence before this Court that the vision in the shop at the time of the robbery was blurred as to distort their visibility at the time of the robbery. The oral testimony of PW1 and PW2 corroborates the confessional statements in Exhibits 'B1' and 'B2'. The circumstances and the length of time within which PW1 and PW2 saw the subjects is enough to identify the perpetrators .... "I have considered the totality of the evidence adduced in this regard. It is the position of our law that identification parade is not a sine qua non in all cases where there was brief encounter with the victim. The locus classicus on the issue of identification is the English case of R v Turnbull & Ors (1976) 3 ALL ER 549 – a decision of the Court of Appeal (England) Criminal Division, presided over by Lord Widgery CJ. See page 117, lines 2 - 20...."

Again, that Court of first instance stated further and thus:-

"I also find after a careful consideration of the evidence put before the court in this case and I am satisfied that the prosecution has proved its case beyond reasonable doubt and I have no doubts in mind, as to the guilt of the accused persons that the accused persons did rob NAO Supermarket on the 11th December, 2003".

The trial Court held thus:-

"The oral testimony of the 2<sup>nd</sup> accused person on the circumstances leading to their arrest contrary to their confessional statements is not convincing to this court. The 1<sup>st</sup> accused claims to have been arrested at random at Araraomi junction where he was about to take a bike. The second accused testified that he was arrested in his house at Oke Ijebu. Outside these testimonies, both accused persons did not call any other witness to corroborate, confirm or affirm their testimonies in this regard. Contrarily, the prosecution called witnesses in support of the confessional statements of the accused persons as to render the confessional statements probable". See pages 118, lines 22-27 and page 119, of Record of Appeal.

As to what the trial Court did in meeting the requirement laid down in Nwaebonyi v The State (supra) regarding the confessional statement, the dictum of the Judge speaks for itself thus at page 116, lines 20 - 27 and page 117 of the Record of Appeal the trial Court

held thus:-

*“From the totality of the evidence before this Court, aside the confessional statements of the accused persons admitted as Exhibits ‘B1’ and ‘B2’, what other facts in evidence corroborate the facts in issue, to ground a conviction of the accused persons for the offences as charged?”*

*In answer to this, this Court shall fall back on the testimony of the witnesses. It is the uncontroverted and unchallenged evidence of PW1 and PW2 that on the night of the alleged robbery they were able to identify the robbers because they were not masked as their faces were open and they saw their faces when they rushed in.... They specifically and with precision mentioned the items stolen by the robbers and gave a clear and consistent analysis of how the robbery was carried out...*

*The oral testimony of PW1 and PW2 corroborates the confessional statements in Exhibits ‘B1’ and ‘B2’. The circumstances and the length of time within which the PW1 and PW2 saw the subjects is enough to identify the perpetrators”.*

The Court of Appeal’s position is well captured hereunder thus;  
See pages 206 and 207 of the record of Appeal thus:-

*“Exhibit ‘B2’ was admitted as a voluntary confessional statement consequent upon the trial within trial conducted by the learned trial judge. Relevant portions of Exhibit ‘B2’ which I feel necessary to reproduce read as follows:-*

*“I am also a member of an armed robbery gang comprising of myself, John Thomas, Shina and one Ola and also Akeem and Okolie an Ibo boy selling clothes at Akure. We have one locally made (Akwa made) short gun and is being kept with John Thomas. Our gang has robbed in many places at Akure and Idanre. On 11/12/2003 about 9p.m, myself Wole alias Majata, John Thomas, Shina and Ola went to rob at NAO Supermarket along Oba Adesida Road, Akure. During the robbery we collected cash sum of about N20,000.00, many wrist watches, bottle wine, jewelries and one handset. My share of the loot is N5,000.00 cash, four wrist watches and is also drink from the stolen wine...”*

The Lower Appellate Court held further that:

*“...Aside from the fact of exhibit ‘B2’ being confessional statement of the offence, the PW1 and PW2 testified that they were at the*

*NAO Supermarket at the time it was robbed by the Appellant in company of some others. They said that items which include cash, jewelries, wristwatch and wine were removed from the shop in the course of the robbery. This piece of evidence is in tandem with the confession of the appellant to the effect that they robbed the shop of such items as wrist watch, wine, cash etc”.* B

At page 209 the Appellate Court held further that-

*“...It is not in doubt, considering the available evidence that the appellant had the opportunity to commit the crime he confessed to. Akure town from every indication is a familiar terrain to the appellant. He lives and moves about freely within the town. There is nothing to show that the appellant was under any limitation in carrying out his business there whether legal or illegal. More importantly, both the PW1 and PW2 gave clear and unambiguous evidence of how their NAO Supermarket was robbed on the date of the incident by D the appellant and his co-robbers. Both of them corroborated the fact in Exhibit ‘B2’ to the effect that the appellant in the course of their robbery took away the cash realized from the day’s sales, wristwatches, wines and jewelries. The foregoing pieces of evidence as led by the PW1 and PW2 have substantially corroborated the confession of the E appellant as contained in Exhibit ‘B2’. I have no doubt that the confession is true.*

*Indeed, from the available materials before the trial Court, that court had enough corroborative of the confessional statement, Exhibit ‘B2’ and it was right to so hold and that left the Court of Appeal F no room to reach a contrary finding and conclusion, just as I am right now faced.”*

On the identification evidence, it is now well settled that identification evidence is that which tends to show that the person charged G with an offence is the same as the person who was seen committing the offence. In this, the Court should be satisfied that the evidence of identification proves beyond reasonable doubt that the accused person before the Court was the person who actually committed the offence charged. I place reliance on Ikemson v State (1989) 3 NWLR H (Pt. 110) 455 at 478.

The finding of the trial Court is restated hereunder and thus:-

*“In the case at hand, PW1 and PW2 stated unequivocally, their ability to identify the 2 accused persons when they were brought to*

their shop by the police. This piece of evidence was also corroborated by the evidence of PW2 who under oath testified that the accused person were taken to the shop where they demonstrated to the team the parts they took during the robbery incidence and that the 1<sup>st</sup> accused person was caught wearing one of the wristwatches  
 B tendered as Exhibit 'P3'. See page 118, line 16 to 22 of the Record.

The learned trial Judge also held further that:-

*"It is that uncontroverted and unchallenged evidence of PW1 and PW2 that on the night of the alleged robbery, they were able to identify the not masked as their faces were opened and they saw their faces when they rushed in. They identified the 2<sup>nd</sup> accused persons in Court as the people that came into the shop to rob. They specifically and with precision mentioned the items stolen by the robbers and gave a clear and consistent analysis of how the robbery was carried out. In view of this Court, contrary to the assertion of counsel to the 2nd accused person, both witnesses had the opportunity of close observation even in their frightened stage. There is no evidence before this court that the vision in the shop at the time of the robbery was blurred as to distort their visibility at the time of robbery. The oral testimony of PW1 and PW2 corroborates the confessional statements in Exhibits 'B1' and 'B2'. The circumstances and the length of time within the PW1 and PW2 saw the subject is enough to identify the perpetrators". See page, 116 & 117 of the Record.*  
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On appeal, the Court of Appeal held thus:-  
 F  
*"Moreover, the Appellant identified himself in his confessional statement Exhibit 'B2'. This was an added boost to the case of the Respondent. I see the need to refer once more to the authority of Ikemson v State (supra), per Oputa, JSC at page 479, paras B - C where he held as follows:-*  
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*The 3rd accused - the 2nd appellant in this Court needed no further identification. By his confession, he identified himself. In his case, there was no need for any further identification parade. The 2nd accused was identified by his brother thief the 3<sup>d</sup> accused who gave information leading to this arrest ...." See pages 215 and 216 of the Record.*  
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Also, the Court below stated thus:-

*"In the circumstances of the instance case, the learned trial judge considered the totality of the evidence adduced in regard to*

*the identification of the Appellant and his co-assailants and came to a most lucid and unassailable decision to wit: "I have considered the totality of the evidence adduced in this regard. It is the position of our law that identification parade is not a sine qua non in all cases there was a brief encounter with the victim. The locus clasisicus on the issue of identification is the English case of R. v Turnbull & Ors (1976) 3 All ER 549 - a decision of the Court of Appeal (England) Criminal Division, presided by Lord Widgery CJ. The Supreme Court in the case of Ikemson v State (1989) 6 SC (Pt.5) 114 gave approval to the decision of Lord Widgery CJ in Turnbull (supra) when at page 126 it was said:*

*"It seems to me that counsel to the Appellant was under the impression that identification parade is a sine qua non in all cases where there has been fleeting encounter with the victim even if there is other evidence leading conclusively to the identity of the perpetrators of the offence. I do not think so. I agree with the submission of counsel to the Respondent that an identification parade is only essential in the situation enunciated in R.v Turnbull & Ors, (1976) 3 All ER 549 at 551. These are cases where the victim did not know the accused before and was confronted by the offender for a very short time, and in which time and circumstances he might not have had full opportunity of observing the features of the accused. In such a situation, a proper identification will take into consideration the description of the accused given to the police shortly after commission of the offence, the opportunity the victim had for observing the accused and what features of the accused noted by the victim and communicated to the police, marks him out from other persons".*

The Appellant had a grouse with the two Courts below which he claimed failed to consider his defence of alibi which would negate the proof set across by the prosecution. It is true and also trite that a defence raised by an accused person ought to be adequately considered however weak, foolish or unfounded such a defence may appear. Again, it is not important that such defences are contradictory or inconsistent provided they are available on the totality of evidence before the Court to consider and examine a defence by the trial judge does not only raise reasonable doubt in the case of the prosecution but also amount to a failure to perform a vital duty imposed on the trial judge and such will amount to a miscarriage of justice

which would in turn result in the decision appealed against to be set aside and the conviction quashed. See *Oladipupo v The State* (1993) LPELR - 2549; *Fatai Olayinka v State* (2007) LPELR - 2580; *Opayemi v State* (1985) 2 NWLR (Pt.5) 101; *Williams v State* (1992) 10 SCNJ 74; *Namsoh v State* (1993) 5 NWLR (Pt. 292) 129.

B The above stated principles are not to be applied without a foundation as there is a condition attached to them which: is that the defence of alibi should be raised timeously or promptly once the accused/appellant is confronted with the allegation that he has committed a crime. Also, apart from the prompt raising of the defence, C the prosecution or police has to be furnished the materials with which to investigate to confirm or debunk the competence and potency of the alibi when the Appellant as in this case has left that defence dormant and inside the person of the appellant without it being let out D only to bring it up at the time of the defence stage during the trial, then, the situation is akin to a caveat at a wedding ceremony where all and sundry are called upon to raise an objection, failing which the potential objector would have to be silent for all time. The examination of the competence of the alibi is not the duty of Court when not E raised timeously as it is a dead defence without use. See *Akpan v State* (1991) 4 SCNJ 1.

For effect, even if the defence had been raised earlier, being what the Appellant put forward as alibi, it is to be said that the evidence before Court including Appellant's Confessional Statement F which has been established solidly have demolished or dislodged that alibi and had the Appellant pinned to the scene of crime as a participant leaving no room but for the Court to hold that the prosecution has proved its case beyond reasonable doubt. See *Alabi v The State* G (1993) 7 NWLR (Pt. 307) 511 at 531; *Solola v The State* (2005) 5 SC (Pt.1) 135.

From the foregoing and the better articulated lead judgment, I resolve the issue against the Appellant as I find no merit in this appeal. This appeal is hereby dismissed as I abide by the consequential H orders made, that the appeal is lacking in merit. I entirely agree with her that the appeal is devoid of any merit and should be dismissed. The main argument canvassed by learned counsel for the appellant is that the prosecution did not prove the case of armed robbery against the appellant beyond reasonable doubt as there wasn't sufficient evi-



dence to corroborate or confirm that Exhibit B2 which he retracted was true. The issue that the appellant was properly identified as having participated in the armed robbery was also raised.

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### **AKA'AH'S JSC**

I had a preview of the judgment of my learned brother, Kekere-Ekun JSC where she dissected the three issues donated in the appeal for consideration before reaching the conclusion The brief facts leading to this appeal are as follows:- In January, 2004, while a team of detectives were investigating a robbery case at Araromi, the appellant and Shina Akinrinlola admitted participating in the robbery which occurred in NOA Supermarket at about 9p. m. at No. 126 Oba Adesida (also known as Stadium) Road Akure on 11th December, 2003.

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The prosecution called four witnesses and tendered some exhibits including Exhibit B2. The appellant testified in his own defence in which he denied making Exhibit B2. He did not call any other witness in his defence. The Court found him and Shina Akinrinlola guilty and sentenced them to death on the two counts contained in the charge. Each of the accused appealed to the Court of Appeal and lost. This is a further appeal from the decision of the Court of Appeal dismissing the appeal.

E

The argument that someone else other than the appellant made Exhibit B2 cannot fly. When PW3 testified and wanted to tender the appellant's statement in evidence, the appellant objected to its admission on the ground that he was forced to sign the statement and so a trial within trial was ordered and the trial court was satisfied that the statement was a voluntary statement before it admitted it as Exhibit B2. Having admitted Exhibit B2, the trial court had to consider the weight to attach to the Exhibit. It found that Exhibit B2 was a confessional statement. The court considered sections 27(1) and (2) Evidence Act to hold that a confessional statement is the best evidence in criminal procedure, and the statement is enough to ground the conviction of the accused as long as the court is satisfied with the truth of such a confession. It also considered if the appellant was properly identified and stated that the appellant and Shina Akinrinlola were properly identified by PW1 and PW2. It found at page 117 of

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the record thus:-

*“The oral testimony of PW1 and PW2 corroborates the confessional statements in Exhibits 81 and 82. The circumstances and the length of time within which the PW1 and PW2 saw the subjects is enough to identify the perpetrators”.*

B The Court of Appeal affirmed this finding by the trial court; hence there are concurrent findings of two lower courts. The appellant failed to show that the finding was perverse or not based on the evidence adduced. The admission made by the appellant was found to be true.

C There is therefore no merit in this appeal and I am in total agreement with the reasons ably marshaled out in the lead Judgment by my learned brother, Kekere-Ekun JSC that the appeal lacks merit and should be dismissed. I also dismiss it and affirm the decision of the court below.

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### **OKORO JSC**

E I read before now the lead judgment of my learned brother, K.M.O. Kekere-Ekun, JSC, just delivered which I am in agreement that this appeal is devoid of merit and ought to be dismissed. My learned brother has comprehensively dealt with all the issues submitted for the determination of this appeal and I am very confident to agree with both the reasoning and conclusion reached therein.

F Apart from that, I had the privilege of writing the lead judgment in a sister appeal No SC. 524/2014 - Shina Akinrinlola V. The State also delivered today 1/7/16. The issues are the same and I also reached the same conclusion as in this case. I have nothing new to add in this very appeal. I rather adopt the reasons marshaled by my learned brother K.M.O. Kekere-Ekun, JSC in the lead judgment as mine, the conclusion that the appeal be dismissed, inclusive. Appeal lacks merit and is accordingly dismissed.

H