

SUPREME COURT OF NIGERIA
FRIDAY 1ST JULY, 2016. SC. 253/2013
CORAM:- O. RHODES-VIVOUR, N. S. NGWUTA, M. U.
PETER-ODILI, M. D. MUHAMMAD, A. SANUSI, JJSC

SUNDAY EHIMIYEIN APPELLANT
V.
THE STATE RESPONDENTS

STEALING - Recent possession - Presumption of guilt - Failure of appellant to explain his possession of recently stolen properties - Raises presumption of guilt as provided in Evidence Act s. 149(a) (H1)

ALIBI - Defence - Proof - Failure of appellant to give details of his whereabouts - And his inability to raise the defence at earliest opportunity - Renders the defence ineffective (H2)

ALIBI - Defence - Weight - Where prosecution has adduced sufficient evidence - To fix appellant at scene of crime - The defence becomes logically demolished (H3)

EVIDENCE - Confession - Retraction - Weight to be attached to confession an accused resiled from - Is to be deciphered from facts and circumstances surrounding the making (H4)

EVIDENCE - Confession - Endorsement by Superior Police Officer - Failure to get such endorsement - Does not render confession inadmissible - As the procedure only makes proof of its voluntariness easier (H5)

ARMED ROBBERY - Proof - Ingredients - Prosecution is to prove beyond reasonable doubt - That there was robbery - That the robbery was armed robbery - And accused participated in same (H6)

EVIDENCE - Single witness - Weight - Evidence of single witness can justify conviction - As credibility of evidence does not depend on number of witnesses that testify on a particular point (H7)

IDENTIFICATION PARADE - Necessity - Conduct of identification parade is unnecessary in the circumstance - As the evidence proffered against appellant was overwhelming (H8)

FACTS

Accused/appellant and one other were arraigned before the High Court of Edo State Benin City on a two count charge of conspiracy to commit armed robbery and armed robbery both punishable under section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act LFN 1990. The case against appellant is that sometime in 1998 armed robbers invaded the house of one late Rev. Raphael Aggi, robbed the household and in the process poured acid on his daughter's (PW1) face. While PW3 (the late wife of late Rev. Aggi) and her husband were making their statements at the Police Station at dawn on the day of the robbery attack, PW4 (Investigating Police Officer) arrived at the station with appellant and 2nd accused person with Exhibits A and B.

PW3 and her late husband spontaneously identified appellant and 2nd accused person on sighting them as the armed robbers who robbed them in their house that morning. Both PW3 and late Rev. Aggi identified Exhibits A and B as their properties that were stolen by the armed robbers. Appellant and the other were thus charged to Court based on these discoveries. At the trial, appellant denied his involvement in the crime. However, in his extra-judicial statement to the Police, appellant voluntarily confessed to the commission of the offences as charged. At the end of the trial, the Court convicted them as charged and sentenced them to death by hanging. Aggrieved, appellant appealed to the Court of Appeal Benin Division. The Court dismissed the appeal and affirmed the conviction and sentence as delivered by the trial Court. Still aggrieved, appellant appealed to the Supreme Court.

ISSUES FOR IDENTIFICATION

1. Whether the Court of Appeal was right in affirming the conviction and sentence of the Appellant on the basis of the doctrine of recent possession.

2. Whether the Court of Appeal was right in affirming the conviction and sentence of the Appellant on the basis of the confessional statement of the Appellant.

3. Whether the Court of Appeal was right in affirming the decision of the trial Court in holding that the Prosecution proved the guilt of the Appellant beyond reasonable doubt.

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

STEALING - Recent possession - Presumption of guilt

1. The directness and cogency of the recent possession of the stolen items just some hours after the robbery lead to the irresistible conclusion that clearly the Appellant and co-travelers were indeed the actors in the robbery or had taken custody of the properties knowing them to have been stolen thus setting into operation the presumption as provided for under Section 149 (a) of the Evidence Act now recaptured as Section 167 (a) of the Evidence Act, 2011 as amended. This with the failure of the Appellant explaining or accounting for having the properties belonging to other people, taken away in a robbery transaction a few hours thereafter. (p. 3607 B)

ALIBI - Defence - Proof

2. On the defence of alibi which learned counsel for the Appellant is persuading availed the Appellant and ought to have been taken account of by the two Courts below. However, this alibi was raised while the Appellant was testifying in his own defence and he had said he was in his home at the time of the incident for which he was charged. No details of who he was with at the home, where the home was also not stated. Again to be faulted in the defence of alibi so raised is that, it was brought up too late as it ought to have been pushed up at the earliest opportunity by which time the prosecution would have had time to investigate to debunk or affirm. Therefore, that failure of a timeous approach rendered the defence of alibi a non-starter. (p. 3607 F)

ALIBI - Defence - Weight

3. Again, to be pointed out is that when the defence of alibi is raised but the prosecution has adduced sufficient evidence to

fix the accused/appellant at the scene of crime at the material time, the alibi becomes logically and physically demolished. That was the case herein with the trial Court making the findings that the Appellant and co-accused presented testimonies that were tissues of lies and after thought and that he, B trial judge believed that the Appellant and collaborators were armed with guns, a cutlass and acid at the time of the armed robbery and that Exhibits 'A' and '8' were recovered from them by the police soon after the robbery. This was concrete evidence of the accused persons being affixed to the scene of C crime at the material time and so the alibi was effectively dislodged. (p. 3608 A)

EVIDENCE - Confession - Retraction

D 4. *With regard to the two confessional statements, Exhibits 'E' and 'G' of the Appellant, the learned counsel for the Appellant raised the issue of a lack of voluntariness of Exhibit E and that with Exhibit 'G', the Appellant had not been taken before a Superior Police Officer to counter-sign. It needs be said that E the voluntariness of the statement - Exhibit 'E' was contested in a trial within trial conducted at the end of which the learned trial judge admitted the Exhibit 'E' as voluntarily made and overruled the challenge to Exhibit 'G' on the basis that the none counter-signing by a superior officer did not render the F statement inadmissible as it fell into the category of a retracted statement or one from which an accused had resiled. This is so as the said extra - judicial statement would have its authorship and weight to be attached deciphered from the facts and G circumstances surrounding the making. (p. 3611 F)*

EVIDENCE - Confession - Endorsement by Superior Police Officer

H 5. *Also to be mentioned is that the failure to observe the procedure of taking the accused/appellant before a Superior Police Officer in respect to Exhibit has not rendered the statement inadmissible as it is not the requirement of any law. All that the taking or the endorsement of the Superior Officer would portend is making proof of its voluntariness easier and no more. (p. 3611 F)*

ARMED ROBBERY - Proof - Ingredients

6. Having considered the two questions earlier raised, then comes the final poser of whether the standard of proof beyond reasonable doubt as required by law has been met by the prosecution/respondent. The Appellant answers in the negative, to which the Respondent disagreed. I agree with learned counsel for the Respondent that the standard of proof in a criminal trial is static and does not shift. It is however to be borne in mind that proof beyond reasonable doubt not beyond all shadow of doubt that is required.

In carrying out or discharging this burden of proof, it is to prove the ingredients of the offence of armed robbery which the Respondent is expected to prove beyond reasonable doubt during the trial, which ingredients or essential elements are thus:-

- (a) That there was a robbery;**
- (b) That the robbery was executed with the use of offensive weapons, that is to say that the robbery was an armed robbery;**
- (c) That the accused person participated in the robbery.** (p. 3612 H)

EVIDENCE - Single witness - Weight

7. The Appellant had raised the issue of the PW1 and PW3's evidence not being enough, that the informant of the PW4 should have testified and that the identification by PW1 and PW3 was not enough. It has to be reiterated and in that respondent posits that the evidence of a single witness can justify a conviction. Stated another way, if one witness whose evidence is cogent, direct and to the point providing the required proof then so be it. It is yet to be seen a specified number of witnesses to be produced before a conviction can lie as the credibility of evidence does not depend on a number of witnesses that testify on a particular point. If the question is whether the evidence of one credible witness on a particular point is believed and accepted and the answer is in the affirmative or positive then, it is sufficient to support a conviction.

IDENTIFICATION PARADE - Necessity

8. Learned counsel for the Appellant had denigrated the identification of the accused persons since an identification parade had not been empaneled. This, the Court below had dismissed stating that in the circumstances of this case, the evidence against the Appellant was overwhelming and so made the issue of identification parade unnecessary. I see no reason for taking a contrary position as I am in agreement with learned counsel for the Respondent that the decision of the trial Court as affirmed by the Lower Court regarding the identity, recognition and participation of the Appellant in the armed robbery were premised not only on the evidence of PW1 and PW3, but on other cogent evidence of all the prosecution witnesses including the unexplained possession of the stolen properties by the Appellant soon after they were stolen and his confessional statements which were admitted following due procedure of law. For a fact, the circumstances of this case fixed the Appellant as one of the armed robbers aside from the oral and direct evidence proffered. If there was a case with concrete, rock solid materials for conviction to be grounded, this is it. (p.3612 H)

REPRESENTATION

Emmanuel Achukwu for the Appellant and with B. C. Hezes and J. N. Okongwu
Adewale A Take for the Respondent and with Godwin Omoaka;
Arnold Ushiadi; Solomon Babajide

CASES REFERRED TO

State v. Salawu (2011) 18 NWLR (pt. 1279) 883
Dibie v. State (2007) 9 NWLR (pt. 1038) 30
Onafowokan v. State (1987) 3 NWLR (pt. 61) 538
Ikem v. State (1985) 1 NWLR (pt. 2) 378
Ogudo v. State (2011) 18 NWLR (pt. 1278) 1
Bozin v. State (1985) 2 NWLR (pt. 8) 465
Abdullahi v. State (2008) 17 NWLR (pt. 1115) 203

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

Eze v. State (1985) 12 SC 4

Eyisi v. State (2000) 15 NWLR (pt. 691) 555

Salami v. State (1998) 3 NWLR (pt. 85) 670

Archibong v. State (2006) 14 NWLR (pt. 1000) 349

Wankey v. State (1993) 5 NWLR (pt. 295) 542

Dairo v F.R.N. (2012) 16 NWLR (pt. 1325) 129

Jua v. State (2010) 4 NWLR (pt. 1184) 217

B

STATUTES REFERRED TO

Robbery & Firearms (Special Provisions) Act LFN 1990, s. 1(2)(a)

Evidence Act LFN 2011, ss. 135, 137, 140167(a)

Evidence Act LFN 1990, s. 149(a)

C

LEAD JUDGMENT BY PETER-ODILI JSC

The Appellant was tried along with one Folorunsho Alufohai by the High Court of Edo State sitting in Benin City on a two count charge of conspiracy to commit armed robbery and armed robbery both punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria 1990.

D

At the end of the trial, the Accused persons were convicted on both counts and on the armed robbery, sentenced to death by hanging by the trial judge, M. I. Edokpayi (as he then was) on 26/9/2005. The Appellant aggrieved appealed to the Court of Appeal or Court below sitting in Benin which Lower-Court affirmed the conviction and sentence of the Appellant.

F

Further dissatisfied, the Appellant has come before this Court vide a Notice of Appeal-filed on the 2nd May, 2013.

G

BACKGROUND FACTS:

The concurrent finding of facts of the trial Court and the Lower Court is that on 5th January, 1998, a gang of armed robbers invaded the residence of one Rev. Raphael Aggi (late) armed with offensive weapons including a gun, cutlass and acid and robbed him of a Video Machine (Exhibit A), a Video Rewinder (Exhibit B) and a 14' colour television and in the process poured acid on his daughter's face. Rev. Aggi's daughter, Ige Aggi testified as PW1.

While PW3, the late Rev. Aggi's wife and her late husband,

Rev. Aggi were making their statements at the Police Station at dawn on the day of the robbery attack, PW4 who was the Investigating Police Officer (IPO) arrived at the station with the Appellant and the 2nd Accused person with Exhibits A and B. PW3 and her late husband spontaneously identified the Appellant and the 2nd Accused person on sighting them as the armed robbers who robbed them in their house that morning. They also informed the police that one Emmanuel or Emma who had worked for them in their house was the third member of the gang, he, it was who held the gun during the robbery operation and was not with the police at the time in the Police Station. Both PW3 and late Rev. Aggi identified Exhibits A and B as their properties that were stolen by the Appellant, the 2nd Accused person and Emma. Prior to the robbery, PW4 had received information that the Appellant and some other persons were planning to dispose of some used electronics to PW4's Informant. Based on the information, PW4, and another policeman by name Sunday and who is now late laid ambush as early as 4.00 am on the way to the Informant's house on the day he was to take delivery of the electronics.

Barely an hour of waiting, the appellant, the 2nd Accused person and one Emma or Emmanuel strolled along the way carrying with them Exhibits A and B and the 14' colour television for disposal to the Informant. It was at this point that PW4 and his team swooped on them and arrested the Appellant and- the 2nd Accused person with Exhibits A and B while Emma escaped with the Television. While Emma remains at large, the Appellant and the 2nd accused persons were charged to Court. At the conclusion of the trial, they were convicted and sentenced to death by hanging for the offences of conspiracy to commit armed robbery and armed robbery.

The case of the Appellant in his testimony in Court was a denial of involvement in the armed robbery. At his trial, the Appellant denied that he committed the offences and stated that it was his co-worker, one "Bushman" who led PW4 and another policeman to his house to arrest him while he was preparing to resume work in the morning of 5 January, 1998, the day of the armed robbery operation. However, in both of his extra-judicial statements made respectively at the Ekiadolor Police Station on the 5/1/1998 and at the State Crime Investigation Department (C.I.D.) on 12/1/98 (Exhibits

E and G respectively), the Appellant voluntarily confessed to the commission of the offences as charged.

On the 14th day of April, 2016 date of hearing, Emmanuel Achukwu of counsel for the Appellant adopted his Brief of Argument filed on the 12/4/16 and deemed filed on the 14/4/16. Also, adopted is the Appellant's Reply Brief filed on 12/4/16. Learned counsel distilled three issues for determination which are viz:-

1. Whether the Court of Appeal was right in affirming the conviction and sentence of the Appellant on the basis of the doctrine of recent possession.

2. Whether the Court of Appeal was right in upholding the conviction and sentence of the Appellant on the basis of the purported confessional statement of the Appellant.

3. Whether the Court of Appeal was right in affirming the decision of the trial Court holding that the Prosecution did prove the guilt of the Appellant beyond reasonable doubt.

Adewale Atake, learned counsel for the Respondent adopted the Respondent's Brief of Argument filed on the 14/11/13 and deemed filed on the 13/5/2015 and adopted the three issues for determination raised by the Appellant.

The issues as crafted are in my humble view best taken together and so I shall answer the questions posed in that manner. The issues recast are thus:-

1. Whether the Court of Appeal was right in affirming the conviction and sentence of the Appellant on the basis of the doctrine of recent possession (Ground 2 of the Grounds of Appeal);

2. Whether the Court of Appeal was right in affirming the conviction and sentence of the Appellant on the basis of the confessional statement of the Appellant (Ground 3 of the Grounds of Appeal); and

3. Whether the Court of Appeal was right in affirming the decision of the trial Court in holding that the Prosecution proved the guilt of the Appellant beyond reasonable doubt. (Ground 1)

Canvassing the point of view of the Appellant, Mr. Achukwu of counsel contended that the Court below holding that the Appellant and co-accused failing to account for their possession of Exhibits 'A' and 'B' led to the logical inference that they were amongst those who robbed the house of PW1 and PW3 on the day of incident. That the

Appellant denied being in possession of the said stolen property and since his evidence was not discredited by the Prosecution under cross examination, the Court below ought to have first determined whether or not the Appellant was actually in possession of the alleged stolen property thereby rendering that failure on the part of the Court below fatal to the finding relied upon by the Courts below. That the prosecution having failed to discredit the evidence of the Appellant then, it cannot be proved conclusively that he was in possession of Exhibits A and B at the time of arrest.

On the contents of the confessional statements, Exhibits E and G, learned counsel said the fact that they were Substantially the same lent credence to the assertion by the Appellants that those exhibits were fabricated. He cited *State v Salawu* (2011) 18 NWLR (Pt. 1279) 883; *Dibie v State* (2007) 9 NWLR (Pt. 1038) 30 at 64.

Learned counsel for the Appellant contended that it is settled that the standard of proof in criminal cases is proof beyond reasonable doubt which burden of proof rests on the prosecution and being static does not shift, in view of that therefore, the prosecution must prove the ingredients of the charge of armed robbery on that standard of proof, beyond reasonable doubt before a conviction can be sustained. He cited *Onafowokan v State* (1987) 3 NWLR (pt. 61) 538; Section 135 of the Evidence Act 2011; *Ikem v State* (1985) 1 NWLR (Pt.2) 378; *Ogudo v State* (2011) 18 NWLR (Pt. 1278) 1 at 32; *Bozin v State* (1985) 2 NWLR (Pt.8) 465.

That from the evidence of PW1 and PW3, the testimony of the identity of the Accused persons was doubtful which doubt should be resolved in favour of the Appellant. He cited *Abdullahi v State* (2008) 17 NWLR (Pt. 1115) 203 at 216; *Ikemson v State* (1989) 3 NWLR (Pt. 110) 455 at 472.

Also, submitted for the Appellant is that the informant referred to by PW4, Sgt. Ola Jonathan ought to have been called and the failure to do so brought into operation Section 157 (d) of the Evidence Act 2011 since his evidence would have been unfavourable to the prosecution. He referred to *Ogudo v State* (supra) 31-32.

In conclusion, learned counsel for the Appellant urged the Court to acquit and discharge the Appellant in that the prosecution failed to prove their case against the Appellant beyond reasonable doubt.

Responding, Adewale Atake Esq. contended that the Lower

Court exhaustively treated the doctrine of recent possession and found the conviction and sentence of the Appellant by the trial Court was right. The conclusion emanating from the concurrent finding of fact by the trial Court and the Court below that the Appellant and the 2nd Accused person were arrested at the house of PW4's informant in possession of Exhibits A and B within a few hours of the robbery. B Also of concurrent finding is the spontaneous identification of the accused persons by PW3 and husband, victims of the robbery. That the doctrine of recent possession pursuant to Section 149 (a) of the Evidence Act, now Section 167 (a) of the Act of 2011 applied with the failure of the Appellant to account for the possession of the stolen C goods. He cited *Everest Eze v The State* (1985) 12 SC 4.

In respect to the alibi raised by the Appellant, Mr. Atake of counsel for the Respondent submitted that the Appellant had not furnished any particulars with which the alibi was to be investigated D by the police at the arrest stage and so stating that the alibi at the time of his defence was a non-issue. He referred to *Eyisi v State* (2000) 15 NWLR (Pt. 691) 555 at 596; *Salami v State* (1998) 3 NWLR (Pt. 85) 670 at 677.

That there is no basis for the interference by this Court with E the concurrent findings of the two Courts below. He relied on *Archibong v State* (2006) 14 NWLR (Pt. 1000) 349; *Wankey v State* (1993) 5 NWLR (Pt. 295) 542 at 552-553.

For the Respondent, learned counsel submitted that the two F confessional statements were admitted after a trial within trial as Exhibits E and G and the subsequent retraction did nothing to change the admission, as their voluntariness had been properly established. He cited *Dairo v F.R.N.* (2012) 16 NWLR (Pt. 1325) 129 at 186-187. Again, there were concurrent findings which the Appellant failed G to establish were arrived from a perverse standpoint or erroneously arrived at. He referred to *Olaiya v State* (2010) 3 NWLR (Pt. 1181) 423 at 438; *Attah v State* (2010) 10 NWLR (Pt. 1201) 190 at 226 etc.

On the requirement of the standard of proof of a criminal of- H fence such as the one in issue, learned counsel for the Respondent said it is proof beyond reasonable doubt and not beyond a shadow of doubt. He cited *Moses Jua v That State* (2010) 4 NWLR (Pt. 1184) 217 at 243.

That in this required proof, the Respondent was not wanting and had discharged the burden and the mere denial of the Appellant did nothing to dent the position of the Respondent. Also, that the witness/informant did not testify did not affect the duty adequately carried out by the prosecution since it could establish its case on the evidence of a single witness to justify a conviction. He relied on *Igbo v State* (1975) 9 NSCC 425 at 428; *Abogede v The State* (1996) 5 NWLR (Pt. 448) 270 at 280.

In reply on points of law, learned counsel for the Appellant said this is an appropriate instance calling for the interference of the Apex Court in the concurrent findings of the two, Courts below as the findings are not based on proper and dispassionate appraisal of evidence given in support of the prosecution's case and so justice was not served. He cited *Lawai v Dawodu* (1972) 8-9 SC 83; *Fashanu v Adekoya* (1974) 6 SC 83 etc. That this Court is still duty bound to scrutinize, assess and determine the credibility and probability, or otherwise of any unchallenged evidence, before it could act on it more so as it is for the prosecution to establish the guilt of the Appellant to prove his innocence. This submission, Mr. Achuckwu contends, stems from the fact that assuming Appellant made no effort during cross-examination at the trial to destroy the evidence of the prosecution witnesses regarding the identification of the Appellant that would not derogate from the well-established principle of law that such evidence could still be credible and probable to be accepted by the Court He cited *Gonzee Iliig Ltd v NERDC* (2005) 13 NWLR (Pt. 943) 634 at 650.

The summary of the divergent standpoint on either side may be stated thus, for the Appellant that:-

The prosecution failed to prove the guilt of the Appellant beyond reasonable doubt for the following reasons:

- i. The doctrine of recent possession was erroneously invoked by the Court of Appeal in sustaining the conviction and sentence of the Appellant.
- ii. The purported confessional statement of the Appellant ought not to have been admitted in evidence and/or relied upon in sustaining the conviction and sentence of the Appellant.
- iii. The identification/recognition of the Appellant by prosecution witnesses 1 and 3 was grossly and fundamentally flawed, incon-

clusive and insufficient and could not be safely relied upon to fix the Appellant to the scene of crime.

The opposing stance of the Respondent being captured thus:

1. That the prosecution led credible and cogent evidence identifying the Appellant as one of the robbers who robbed the house of the late Rev. Aggi, PW1 an PW3 which fixed the Appellant to the scene of crime and the alibi was unproven and the Court right to have rejected it. B

2. Appellant was caught red handed in possession of the stolen properties few hours of the robbery and could not account for the possession of the items. C

3. The voluntarily rendered confessional statements, Exhibits E and G.

4. The findings of the two Courts below being concurrent and supported by the facts and evidence there is no basis for this Court to disturb them. D

Evaluating the evidence before it, the learned trial Judge had made the following findings as shown at pages 131 and 132 of the Records as follows:-

“The I.P.O., PW4 and another Police Officer, one Sunday, now late, had received information from an Informant on 4/1/98 that certain persons were planning to rob in the neighbourhood and then sell the electronics to him. The Informant urged the Police to act fast and gave them the description of the area where the planned armed robbery was to take place in the early hours of 5/8/98. The PW4 and late Sunday laid ambush as early as 4am. At 5am, the 1st and 2nd Accused person and one Emma trolled majestically and triumphantly along the road near Oluku Junction, carrying the robbed electronics, Exhibits ‘A’ and ‘8’ and the colour television and walked into the waiting arms of the Police. The PW4 and the late Sunday there and then arrested the 1st and 2nd Accused persons along with Exhibits ‘A’ and ‘8’ while the third robber Emmanuel, escaped with the colour television. The 1st and 2nd Accused persons and Exhibits ‘A’ and ‘8’ were brought to the Ekiadolor Police Station whereupon the PW3 H and her late husband promptly identified the two Accused persons as the armed robbers who robbed them of exhibits ‘A’ and ‘8’ and a colour television while armed with a gun, machet and acid”. F G

On appeal, the Court below agreed with the application of the

presumption of fact under Section 149 (a) of the Evidence Act of the Laws of the Federation 1990 later 2004 Laws of the Federation, which Section is now constituted as Section 167 (a) of the Evidence Act, 2011 (as amended). For better clarity, that law provides as follows:-

“Section 167 (a): A man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to have been stolen, unless he can account for his possession”.

In fact, the Court of Appeal went along with the earlier findings and conclusion in the following words:-

“The Appellant and the 2nd Accused person were caught with Exhibits ‘A’ and ‘8’ on the same day 5/1/98 at about 5.00am. The robbery which resulted in the removal of Exhibits ‘A’ and ‘8’ occurred on the same 5/1/98 at about 1.30am. The Appellant and the 2nd Accused person failed in their defence to account for their possession of Exhibits ‘A’ and ‘8’.”

That appellate Court came to the conclusion thus:-

“The only logical inference therefore is that Appellant and 2nd Accused person were amongst those who robbed the house of PW2 and PW3 on 5/1/98. The evidence is positive, direct and unequivocal, the provision of Section 149 (a) of the Evidence Act is even a surplus to them. See *Ukorah v The State* (1977) 4 SC 167; *Sunday Madagwa v The State* (1998) 3 NWLR (Pt. 11) 218; *Mufutau Aremu & Anor v. The State* (1991) 7 SCNJ 290; *Monday Udoh & Anor v The State* (1993) 5 NWLR (Pt. 295) 556 at 568. Finally therefore, the learned trial Judge was right in his application of the provisions of Section 149 (a) of the Evidence Act In convicting the Appellant of the offence of robbery”. See pages 235-236 of the Records.

A recap of the facts leading to the arrest and charge of the Appellant and co-accused would be stated, though not in order of the happening of the events. According to the evidence of PW4, the Sergeant Ola Jonathan, he received a report from an Informant that some boys came to him asking if he wanted to buy some electronics and the Informant suspecting the purported sellers alerted PW4 who arranged with the Informant and on a fixed date, they got to the venue at 4am of 5/1/98 and at about 5am, the Appellant and two others came with a video machine and video recorder which later became Exhibits ‘A’ and ‘8’. This led to the arrest of Appellant and

one other, while the third ran away.

PW4 stated on that when they got to the station, they saw PW1 and PW3 who had reported a case of robbery in their house in the same day, early hours 5/1/98 and had reported the theft of the same items, Exhibits 'A' and '8' which PW1 and PW3 identified.

The directness and cogency of the recent possession of the stolen items just some hours after the robbery lead to the irresistible conclusion that clearly the Appellant and co-travellers were indeed the actors in the robbery or had taken custody of the properties knowing them to have been stolen thus setting into operation the presumption as provided for under Section 149 (a) of the Evidence Act now recaptured as Section 167 (a) of the Evidence Act, 2011 as amended. This with the failure of the Appellant explaining or accounting for having the properties belonging to other people, taken away in a robbery transaction a few hours thereafter. This meets the guidance earlier provided by this Court per Oputa JSC in *Everest Eze v The State* (1985) 12 SC 4 as follows:

"The presumption of 'recent possession' as contained in Section 148 (a) of the Evidence Act is not a presumption of law but a presumption of fact. If it were a presumption of law (presumption es juris et de jure) it will be an absolute inference established by law and therefore irrefutable. But being a presumption of fact, it is inconclusive and rebuttable..."

On the defence of alibi which learned counsel for the Appellant is persuading availed the Appellant and ought to have been taken account of by the two Courts below. However, this alibi was raised while the Appellant was testifying in his own defence and he had said he was in his home at the time of the incident for which he was charged. No details of who he was with at the home, where the home was also not stated. Again to be faulted in the defence of alibi so raised is that, it was brought up too late as it ought to have been pushed up at the earliest opportunity by which time the prosecution would have had time to investigate to debunk or affirm. Therefore, that failure of a timeous approach rendered the defence of alibi a non-starter. I place reliance on the cases of *Eyisi v State* (2000) 15 NWLR (Pt. 691) 555 at 596; *Salami v State* (1998) 3

NWLR (Pt. 85) 670 at 677.

Again, to be pointed out is that when the defence of alibi is raised but the prosecution has adduced sufficient evidence to fix the accused/appellant at the scene of crime at the material time, the alibi becomes logically and physically demolished.

B That was the case herein with the trial Court making the findings that the Appellant and co-accused presented testimonies that were tissues of lies and after thought and that he, trial judge believed that the Appellant and collaborators were armed with guns, a cutlass and acid at the time of the armed robbery and that Exhibits 'A' and '8' were recovered from them by the police soon after the robbery. This was concrete evidence of the accused persons being affixed to the scene of crime at the material time and so the alibi was effectively dislodged.

I refer to the case of Patrick Njovens v The State (1998) 1 A.C.L.R 224 at 261.

E It is evident why the Court of Appeal had no difficulty in agreeing with the mindset of the trial Court, as it was neither findings without basis nor stemming from a wrong application of the law, procedural or substantive. Therefore, in the light of there not being presented a miscarriage of justice, I cannot deviate from those concurrent findings or even upset them. See Archibong v State (2006) 14 NWLR (Pt. 1000) 349, Nicholas Wankey v State (1993) 5 NWLR (Pt. 295) 542 at 552-553.

G With regard to the two confessional statements, Exhibits 'E' and 'G' of the Appellant, the learned counsel for the Appellant raised the issue of a lack of voluntariness of Exhibit E and that with Exhibit 'G', the Appellant had not been taken before a Superior Police Officer to counter-sign. It needs be said that the voluntariness of the statement - Exhibit 'E' was contested in a trial within trial conducted at the end of which the learned trial judge admitted the Exhibit 'E' as voluntarily made and overruled the challenge to Exhibit 'G' on the basis that the none counter-signing by a superior officer did not render the statement inadmissible as it fell into the category of a retracted statement or one from which an accused had resiled. This is so as the said extra - judicial statement would have its

authorship and weight to be attached deciphered from the facts and circumstances surrounding the making. See Dairo v F.R.N. (2012) 16 NWLR (Pt. 1325) 129 at 186-187.

To clear the web, I shall quote the said Exhibits 'E' and 'G' as follows:-

EXHIBIT 'E':

"NAME: Sunday Ehimiyein 'M'

ADD:- Iguosa Village near Benin City

OCCUPATION - Saw-miller

TRIBE - Owan 5-1-98

NATIONALITY - Nigerian 25 yrs.

I Sunday Ehimiyein having being duly cautioned in English Language that I am not obliged to say anything unless I wish to do so but whatever I say will be taken down in writing and it may be given in evidence.

SUNDAY EHIMIYEIN 5-1-98.

Yesterday night about 11.30am on 5/1/98, me and my brother Folorunsho as we were about to go and feed at Oluku near the road, we met Emma on the road and he told us that he wanted to go to his brother at Oluku to collect his video and telly and he asked us to follow him and we followed him, when we got to the house, they had closed the door and everybody had slept then Emma carried a mortar to hit the back door and the door forcefully opened then Emma entered the house, Folorunsho stayed by the door post and myself stayed outside watching, the Emma brought out a coloured T.V from the house and video with rewinder (sic) and I collected the video from him and himself carried the T.V while Folorunsho carried the rewinder as Emma was inside the room doing the operation. I heard somebody shouting "O my eye" but I don't know what happened to his eye because I was outside. When we left the man house, we gave all the things to Emma to keep it. Then me and Folorunsho went to sleep inside one canteen at Iguosa. This morning Emma brought the goods to meet us at the canteen where we are waiting for him and all of us went to the place where we are going to sell the goods when we were there at the place we want to see the goods, it was from there the Police arrested us, the police arrested myself and Folorunsho with all the goods excluding the T.V but Emma escaped and ran away. The mortar that Police recovered from the scene of

the crime is the one we used for the opening of the door in that house. When we were going Emma is with a cutlass and Acid he carried it an (sic) to the place, I only carried a broken bottle and Folorunsho also carried bottle, we did not cover our face when we were operating. This is the first time I will follow them to go and
 B *Robbed people, nobody carry gun among us. It was only cutlass, Acid and bottle that we carry. SUNDAY EHIMIYEIN 5-1-98. The statement obtained by me, I read it over to the maker and he signed it as correct while myself counter signed as recorder. SIGNED 5~1998".*

C For Exhibit 'G', it is stated hereunder, viz:-

"NAME: Sunday Ehimiyein 'm'

Address: 8 Nitel Road- Iguosa-Oluku

Age: 26 yrs

D *Occupation: Labourer*

Religion: Christianity

Nationality: Nigerian

Tribe: Ora

Station: State C.I.D, Nigeria Police SHQ B/City.

E *I Sunday Ehimiyein 'm' having been cautioned in English language that I am not obliged to say anything unless I wish to do so but whatever I say will be taken down in writing and may be given in Evidence. I voluntarily elect to state as follows:- SUNDAY EHIMIYEIN 12-1-98. I am a Native of Uzebba in Owan West Local Government*
 F *Area of Edo State. I was born in this my village and brought up there. I attended Primary School but when I was in J.S.S II, I lost my father hence I stopped schooling. I finally came to Benin City year 1995 through one Friday Alufohai 'm' and I started staying with him.*

G *I then look for a labourer job until I was employed in one Sawmill at Oluku where I was now. In that room, we are three staying there, myself, Friday and Folorunsho 'm' who happens to be a brother to Friday. One Emmanuel surname unknown is a friend to Folorunsho.*

On the 4th day of January, 1998 at about 2 pm I was in company of
 H *Friday going to seven-up premises when we met Folorunsho and Emmanuel where, three of us now agreed to go out and thief. The three of us are:- myself, Folorunsho 'm' and Emmanuel 'm' Friday 'm' do not know of our arrangement. At about 8 pm of 4/1/98, myself and Folorunsho 'm' proceeded to Oluku junction where*

Emmanuel 'm' came to meet us. We were there in a restaurant up to midnight when Emmanuel 'm' took us to one house inside the bush within Oluku town. Emmanuel 'm' used mortar wood hit and forced the door open. Emmanuel 'm' entered the house and the occupants inside the house started shouting to my hearing because I was outside. Emmanuel brought out one video player, one video rewinder and one colour TV set. We started going home. We took the three items to Emmanuel's house and hide them in a nearby bush. Myself and Folorunsho 'm' went back to our house and the Gate had been locked, Folorunsho 'm' went to where he was working while I slept in one kiosk. At about 6am of 5/1/98, I got up from the kiosk and stood by the roadside and Folorunsho later came to joined me there. As we were there Emmanuel came with video tape and the rewinder and asked us to follow him to where we would sell them. Three of us took the items to Isibor village and met one man called Bush man. Getting there the said Bush man said he's going to toilet and that we should wait. As three of us were still waiting for Bush man, Policeman came and myself and Folorunsho 'm' was arrested while Emmanuel escaped into the Bush. I am a Robber, I agreed. The Acid we used for the operation was produced by Emmanuel. Emmanuel is the person who poured raw Acid in the face of that girl that night. We did not use gun during the robbery operation but only raw Acid. SUNDAY EHIMIYEIN 12-1-98".

I have set out in quote the two confessional statements of the Appellant to show what informed the concurrent findings regarding the voluntariness of Exhibits E and G which are neither perverse, erroneous nor a violation of any known principle of law. **Also to be mentioned is that the failure to observe the procedure of taking the accused/appellant before a Superior Police Officer in respect to Exhibit has not rendered the statement inadmissible as it is not the requirement of any law. All that the taking or the endorsement of the Superior Officer would portend is making proof of its voluntariness easier and no more.** See *Alarape v The State* (2001) 5 NWLR (Pt. 705) 79 at 99 per Iguh H JSC; *Attah v State* (2010) 10 NWLR (Pt. 1201) 190; *Olokotinti v Sarumi* (2002) 13 NWLR (Pt. 784) 307 at 317.

Having considered the two questions earlier raised, then comes the final poser of whether the standard of proof be-

yond reasonable doubt as required by law has been met by the prosecution/respondent. The Appellant answers in the negative, to which the Respondent disagreed. I agree with learned counsel for the Respondent that the standard of proof in a criminal trial is static and does not shift. It is however to be borne in mind that proof beyond reasonable doubt not beyond all shadow of doubt that is required. See *Onafowokan v State* (1987) 3 NWLR (Pt. 61) 538; *Ikem v State* (1985) 1 NWLR (Pt. 2) 378; *Moses Jua v The State* (2010) 4 NWLR (Pt. 1184) 217 at 243.

In carrying out or discharging this burden of proof, it is to prove the ingredients of the offence of armed robbery which the Respondent is expected to prove beyond reasonable doubt during the trial, which ingredients or essential elements are thus:-

(a) That there was a robbery;
(b) That the robbery was executed with the use of offensive weapons, that is to say that the robbery was an armed robbery;

(c) That the accused person participated in the robbery.

See *Ogudo v State* (2011) 18 NWLR (Pt. 1278) 32; *Bozin v The State* (1985) 2 NWLR (Pt. 2) 378.

The Appellant had raised the issue of the PW1 and PW3's evidence not being enough, that the informant of the PW4 should have testified and that the identification by PW1 and PW3 was not enough. It has to be reiterated and in that respondent posits that the evidence of a single witness can justify a conviction. Stated another way, if one witness whose evidence is cogent, direct and to the point providing the required proof then so be it. It is yet to be seen a specified number of witnesses to be produced before a conviction can lie as the credibility of evidence does not depend on a number of witnesses that testify on a particular point. If the question is whether the evidence of one credible witness on a particular point is believed and accepted and the answer is in the affirmative or positive then, it is sufficient to support a conviction.

See *Igbo v State* (1975) 9 NSCC 415 at 418; *Abogede v State* (1996) 5 NWLR (Pt. 448) 270 at 280.

Learned counsel for the Appellant had denigrated the

identification of the accused persons since an identification parade had not been empaneled. This, the Court below had dismissed stating that in the circumstances of this case, the evidence against the Appellant was overwhelming and so made the issue of identification parade unnecessary. I see no reason for taking a contrary position as I am in agreement with learned counsel for the Respondent that the decision of the trial Court as affirmed by the Lower Court regarding the identity, recognition and participation of the Appellant in the armed robbery were premised not only on the evidence of PW1 and PW3, but on other cogent evidence of all the prosecution witnesses including the unexplained possession of the stolen properties by the Appellant soon after they were stolen and his confessional statements which were admitted following due procedure of law. For a fact, the circumstances of this case fixed the Appellant as one of the armed robbers aside from the oral and direct evidence proffered. If there was a case with concrete, rock solid materials for conviction to be grounded, this is it.

There being no peg on which this appeal can be sustained being unmeritorious, I hereby dismiss it. I affirm the decision of the Court of Appeal in its affirmation of the judgment of the trial High Court in its conviction and sentences to death by hanging of the Appellant on each of the two counts of the charge.

RHODES-VIVOUR JSC

I had the opportunity to read in draft the leading judgment of my learned brother, Peter-Odili, JSC. I agree with my lordship that concurrent findings of both courts below are correct and so there is no merit in the appeal. I intend to comment on the doctrine of recent possession, Section 167 (a) of the Evidence Act 2011 states that:

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

(a) a man who is in possession of stolen goods soon after their

theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession: *See Eze v State* (1985) 12 SC p. 4. Recent possession that is sufficient to justify the presumption that a person in possession of stolen goods is the thief is a presumption that varies. For example, possession of stolen property immediately after it was stolen is very strong presumption that the person in possession of the goods stole them. Conversely, where the stolen goods are found to be in possession of a person, a long time after they were stolen (e.g. one year after they were stolen) it would only amount to probable presumption. The presumption in subsection (a) of section 167 of the Evidence Act is a presumption of fact. Presumptions of fact are logical inference drawn from other known facts. The legal consequence of arriving at a presumption is to call on the appellant to produce contrary evidence. The appellant and the 2nd accused person were caught with exhibits A and B in the morning of 5 January, 1998, a few hours after they participated in an armed robbery where they stole video equipment (exhibit A) a video rewinder (exhibit B). They were on their way to sell them when they ran into a Police ambush and were arrested. To my mind since the stolen goods were in possession of the appellant a few hours after he and others stole them in an armed robbery operation; and the fact that he was easily identified by those he robbed is very strong presumption that he was one of the armed robbers. This reasoning is compelling and conclusive that the appellant was one of the armed robbers in view of the fact that he was unable to produce contrary evidence.

For these brief reasons as well as those more fully given by my learned brother Peter-Odili, JSC, I too dismiss this appeal.

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NGWUTA JSC

I read before now the lead judgment just delivered by my learned brother, Mary U. Peter-Odili, JSC and I agree with the reasons ably advanced for dismissing the appeal.

The statements credited to the appellant were objected to on the grounds that they were not voluntarily made. This led to a trial within trial to establish the voluntariness *vel non* of the making of the statements. After the trial, the Court ruled that the statements were

voluntarily made by the appellant. Appellant did not appeal against the said ruling and he is stopped from raising the issue in his appeal.

He is deemed to have conceded that he made the statements voluntarily as found by the trial Court. The voluntariness of Exhibits E and G is reaffirmed by the recovery of Exhibits A and B, the proceeds of the robbery, from the appellant soon after the robbery. See Section 167 (a) of the Evidence Act 2011. B

How the appellant came by the goods, Exhibits A and B, is a fact especially within his own knowledge and he has the burden to prove it. See Section 140 of the Evidence Act 2011. By Section 137 of the Act, the burden on the appellant shall be discharged on the balance of probabilities but he failed to do so. C

Attestation of an accused person's confessional statement before a superior police officer is in compliance with the Judge's Rules. It is an administrative practice. It is not a legal requirement and its non-compliance will not render inadmissible the confessional statement. See *R v. Nwigboke* (1959) 5 SCNLR 248; *Egboghonome v. The State* {1993} 7 NWLR {Pt. 306} 383; *Edhigene v. The State* {1996} 8 NWLR {Pt. 464} 1. D

This appeal is against the concurrent findings of fact by the two Courts below. Appellant did not demonstrate any perversity therein and this Court shall not disturb the judgment. See *Njoku & ors v. Eme & ors* (1973) 5 SC 293 at 306; *Kale v. Coker* (1982) 12 SC 252 at 271; *Efe v. State* (1976) 11 SC 25. E

For the above and the exhaustive reasoning in the lead judgment also dismiss the appeal for want of merit. Appeal dismissed. F

MUHAMMAD JSC

Having read in draft the lead judgment of my learned brother Mary Ukaego Peter-Odili JSC, just delivered, I am in agreement with the reasoning and conclusion therein that the appeal lacks merit. I shall by way of emphasis state three particular reasons in addition to those others in the lead judgment to also dismiss the unmeritorious appeal. G

The two courts below have concurrently found those facts necessary for the conviction of the appellant as having been established beyond reasonable doubt by the respondent. It is trite that this Court H

is very slow at interfering with concurrent findings of two lower courts on any given issue except the appellant has shown that the particular finding is perverse and amounted to a miscarriage of justice. See *Kale V. Coker* (1982) 12 SC 252 at 271 and *Adisa V. State* (2015) (vol 242) 59 at 941.

B In the instant case the appellant contends with the findings of both courts below on Exhibits E and G, his confessional statements, which not only fixes him at the scene and shows him to be a party to the offences he has been convicted by the one which conviction the other court below also affirmed. Besides, by the content of these
C statements, the items they robbed their victims have equally been found in his and the possession of his co-accused within a day after the robbery.

It is settled that, in law, a voluntary confession of guilt, if direct,
D consistent, probable and coupled with a clear proof that a crime has been committed by the maker is usually accepted as satisfactory evidence on which the court may convict. See *Akpan V. State* {1992} LPELR 381 {SC}, *Ogoala V. The State* {1991} 2 NWLR {Pt 175} 509. Thus, a conviction may be secured on a confessional statement
E that is direct, positive and relates to the convict's own acts, knowledge or intention suggesting the inference that he committed the offence he is charged.

In the case at hand, the recovery of the items the appellant and the 2nd accused robbed their victims soon after the robbery
F makes the confession of the appellant probable that indeed he was a party to the offence for which he has been convicted. Appellant's further failure to rebut the presumption of their being in recent possession of the items they robbed their victim raises adds to the hopelessness of his case.
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It is undoubtedly the law that a person found in possession of property reported to have been recently stolen, with or without violence from another person, may be convicted for the theft of the property. Resort is normally made by the prosecution to the doctrine
H of recent possession, statutorily provided for under Section 167(a) of the Evidence Act 2011 previously Section 149(a), where direct evidence to establish the guilt of the person charged is unavailable. See *Isiakk Ayinde Oseni V. The State* (1984) 11 SC 44 and *Isibor V. State* 2 SC (Pt 11) 110.

In the instant case, in addition to the apposite resort to the doctrine, the respondent further and justifiably relies on Exhibits E and G, the direct and positive confessional statements of the appellant unmistakably suggesting, nay admitting, the commission of the robbery he is convicted for. The concurrent findings of the two courts below on these facts are unassailable. Having failed to show any fundamental breach in their application of the law, substantive or procedural, to proved facts, the appellant is not entitled to have the two judgments set-aside. See *Uwanta V INEC* and *Adebayo V. AG. Ogun State* (2008) 2-3 SC (Pt 11) 50.

It is for the foregoing and more so the fuller reasons given in the lead judgment that I also find the appeal as lacking merit dismiss it and further affirm the judgment of the lower court.

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