

SUPREME COURT OF NIGERIA
FRIDAY 1ST JULY, 2016. SC. 448/2011
CORAM:- S. GALADIMA, M. U. PETER-ODILI, K. B.
AKAAHS, K. M. O. KEKERE-EKUN, J. I. OKORO, JJSC.

THE STATE APPELLANT
V.
ODUNAYO AJAYI RESPONDENTS

ARMED ROBBERY - Meaning - Robbery is committed if violence is used on anyone to facilitate stealing - Or stealing added with violence (H1)

CRIMINAL PROCEDURE - Proof - Element of doubt - Effect - As prosecution failed to prove ingredients of the offence - Due to lapses in its case - Benefit of doubt should be resolved in favour of accused (H2)

CRIMINAL PROCEDURE - Conspiracy - Acquittal - As the co accused were discharged and acquitted of conspiracy - Respondent cannot under the law be solely convicted of same offence (H3)

FACTS

Accused/respondent along with two others was arraigned before the High Court of Ekiti State Ado-Ekiti on a six-count charge of conspiracy to commit armed robbery and armed robbery. They were alleged to have conspired to rob and did break into the homes of PW1, PW2 and PW4, while armed with dangerous weapons and stole money and various items therein. None of the victims was at home at the time of the crime. Respondent was arrested by PW3 (DSP Nasiru) who at the commencement of the trial, testified that while at home on the fateful day, he heard shouts of “*ole, ole, ole,*” i.e. “*thief! thief! thief*”. He took his gun and went out to search the neighbourhood. In the process, he found respondent lying under a fowl cage in his (PW3’s) landlord’s nearby compound. He testified that he recovered the knife respondent used in committing the offence from under his car where he allegedly dropped it. He went further to state that for his timely intervention, the neighbours would

have lynched respondent. He also stated that respondent confessed that there is another of his accomplice in the crime, who ran away.

Under cross-examination, PW3 admitted that he did not see respondent jump down from the premises where the robberies took place. At the conclusion of prosecution/appellant's case, the other two accused persons were discharged after a successful no case submission. Respondent was called upon to enter his defence. In his defence, he denied the offence and stated that he was an innocent bystander who was about to be lynched but was saved by PW3. At the end of the trial, the Court discharged and acquitted respondent on counts (II), (IV), (V) & (VI) but convicted him on counts I and III (bordering on conspiracy and armed robbery). He was sentenced to 14 years imprisonment and to death by hanging. Dissatisfied, respondent appealed to the Court of Appeal Ekiti Division which allowed the appeal and set aside the judgment of the trial court. Respondent was accordingly acquitted and discharged. Aggrieved, appellant appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether the court below was right to hold that the case of armed robbery against the respondent was not proved beyond reasonable doubt to warrant his conviction and sentence to death by the trial court for same.

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

ARMED ROBBERY - Meaning

1. Then of note is the definition of robbery stated under section 11 of the Robbery and Firearms (Special Provisions) Act Cap. R11 LRN, 2004 to be thus:

“Stealing anything and, at or immediately before or after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to being stolen or retained.”

Interpreting the words above, this court has in many instances stated that the offence of robbery is consummated if violence is used on anyone to facilitate the stealing or stated

another way to be stealing added with violence. (p. 3851 H)

CRIMINAL PROCEDURE - Proof - Element of doubt - Effect

2. Indeed the case put up by the prosecution has produced very curious facts, firstly whilst counts 1 and 3 of the Amended Charge Sheet clearly fixed the respondent at the home of PW1 at No. Opopogboro Road, at Ado Ekiti at 10.30 hours on 2nd February 2003, count 4 accused respondent of stealing on the same date 2nd February 2003 and at the same time, 10.30 hours the property of one Veronica Arigbede at No. E 10 Okeode Street, Ilupeju, Ekiti. The implication is that at the same time and date, respondent and others carried out robberies at two different locations. This situation taken with the proceeding in court where the confessional statement was rejected by court in the trial-within-trial, no eye-witness and no cogent circumstances viewed with the fact that respondent was not seen at the scene of crime nor the items found with his person then placed alongside the defence of the respondent that he was an innocent bystander awaiting a commercial motor-cycle to take food to his sick sister in hospital. Therefore what I see before me are very serious lapses in the case of the prosecution throwing up doubts which cannot be ignored and the logical conclusion being that the prosecution failed to prove the ingredients of the offence charged beyond reasonable doubt. It follows that the benefit of the doubt has to be resolved in favour of the respondent. (p. 3854 D)

CRIMINAL PROCEDURE - Conspiracy - Acquittal

3. Another interesting part of this case is that the respondent's co-accused were discharged and acquitted under count 1 the charge of conspiracy, meanwhile respondent was convicted thereof and sentenced to 14 years. This is a funny thing as the implication is that the respondent conspired with himself, a legal impossibility which cannot stand and the court below was right in its findings and conclusion. (p. 3855 A)

NOTABLE POINT OF INTEREST

GALADIMA JSC

1. Armed robbery – Ingredients – Proof

In order to convict an accused person for armed robbery the prosecution must prove the following, ingredients:

- B
- (a) That there was an armed robbery;
 - (b) That the accused person was armed; and
 - (c) That the accused was armed when he participated in the robbery. (p. 3856 D)

C

REPRESENTATION

L. P. Anga Esq; with him Raymond Ofagbor Esq, for the Appellant a Segun Fowowe for the Respondent and with him are J. O. Taiwo and S. U. Nweze

D

CASES REFERRED TO

Olaekan v. State (2001) 18 NWLR (pt. 476) 822

Bozin v. State (1985) 2 NWLR (pt. 8) 465

Sele v. State (1993) 1 NWLR (pt. 269) 276

E Olayinka v. State (2007) 30 NSCQLR 149

Gbadamosi v. State (1991) 6 NWLR (pt. 196) 182

Ajiloye v. State (1983) 6 SC 1

Okobi v. State (1984) NSCC Vol. 15 p. 520

F Aruna v. State (1990) 6 NWLR (pt. 155) 125

Okobi v. State (1954) NSCC vol. 15 p. 520

Otti v. State (1991) 8 NWLR (pt. 207) 103

Abieke v. State (1975) 9-11 SC 97

Abacha v. State (2002) 11 NWLR (pt. 779) 437

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

Adekunle v. State (2006) 14 NWLR (pt. 1000) 217

Abacha v. State (2002) 11 NWLR (pt. 779) 437

STATUTES REFERRED TO

H Robbery & Firearms (Special Provisions) Act Cap 390 Vol. XXII LFN 1990, ss. 1(2)(A), 5(8), 11

Evidence Act LFN 2011, s. 135

LEAD JUDGMENT BY PETER-ODILI JSC

This is an appeal against the judgment of the Court of Appeal, Ekiti Division, delivered on the 17th day of May, 2011 which set aside the conviction and sentence of the respondent herein by the trial court to 14 years imprisonment for conspiracy to commit armed robbery as well as to death for committing armed robbery and in lieu discharged and acquitted the respondent herein of all the charges against him. B

For clarity, I shall recast the six (6) counts charge which are hereunder stated as follows:

CHARGE NO HAD/22CM/03 C

THE STATE..... COMPLAINANT

VERSUS

1. ODUNAYO AJAYI ‘M’

2. GODWIN EJUMOPHOR ‘M’} DEFENDANTS D

3. IPOOLA FALOPE ‘M’

That you Odunayo Ajayi -”M” Godwin Ejumophor “M” and Ipoola Falope “M” on or about the 2nd February, 2003 at about 10.30hrs at No. 1 Ile-Ileri Street off Opopogboro Road, Ado-Ekiti in the Ado Judicial Division did conspire together to commit felony E to wit: armed robbery and thereby committed an offence punishable under section 5(8) of the Robbery and Firearms (Special Divisions) Act Cap 390 Vol. XXii Laws of the Federation of Nigeria 1990 as amended by Tribunals and certain consequential Amendment etc) F decree No. 62 of 1999.

COUNT II: That you Odunayo Ajayi ‘M’ Godwin Ejumophor ‘M’ and Ipoola Falope ‘M’ on or about the month of November 2002 at Ado-Ekiti in the Ado Judicial Division did conspire together to commit felony to wit: armed robbery and thereby committed an offence punishable under section 5 (8) of the Robbery and Firearms (Special Provision) Act Cap 390 Vol. XXii Laws of the Federation of Nigeria 1990 as amended by Tribunals and certain consequential Amendment etc) decree No. 62 of 1999. G

COUNT III: That you Odunayo Ajayi “M” Godwin Ejumophor H “M” and Ipoola Falope “M” on or about the 2nd February, 2003 aforementioned Judicial Division whilst armed yourselves with gun and other dangerous weapons did steal three sets of Guinea Brocade amount yet unknown, shoes and other items not yet known

property of one Akinmulegun Ojo Sunday “M” and thereby committed an offence punishable under section 1(2)(A) of Robbery and Firearms Special Provisions Act Cap. 398 Vol. XXii Laws of the Federation of Nigeria 1990 as amended.

COUNT IV: That you Odunayo Ajayi “M” on the same date, B time and place in the aforementioned Judicial Division whilst armed yourselves with gun and other dangerous weapons did steal the sum of Twenty-Five Thousand Naira (N25,000.00) property of one Veronica Arigbe, the daughter of elder Joseph O. Ibigbami and thereby committed an offence punishable under section 1 (2) (A) of Robbery and Firearms Special Provisions Act Cap. 398 Vol. XXii Laws of the Federation of Nigeria 1990 as amended. C

COUNT V: That you Odunayo Ajayi “M” Godwin Ejumophor “M” and Ipoola Falope “M” on the 21ST July 2002 at about 200am D at Olorunsogo Street, Adebayo Estate, Ado-Ekiti whilst armed yourselves with gun and other dangerous weapons did steal the following properties:

- (A) A Stabilizer value yet unknown
- (B) A new bed sheet with undisclosed value
- (C) A pillowcase
- (D) A torch light
- (E) A new cloth George

(F) A sum of five thousand Naira only (N5,000.00) all property of one Ogunmilade Julis “M” and thereby committed an offence punishable under Section 1(2) (A) of the Robbery and Firearms (Special Divisions) Act Cap 390 Vol. xxii Laws of the Federation of Nigeria 1990 as amended by Tribunals and certain consequential Amendment etc.) decree No. 62 of 1999. F

COUNT VI: That you Odunayo Ajayi “M” Godwin Ejumophor “M” and Ipoola Falope “M” on the is” day of October 2002 at about 1pm at Omisanjana Area, Ado-Ekiti whilst armed yourselves with gun and other dangerous weapons did steal the following properties: G

- (a) Toshiba video player valued at N10,000.00
- (b) Wrist watch valued at N2500
- (c) Intercom set valued at N3000.00 and a cash sum of five thousand Naira only N5000.00 property of one Adesola Ogunmilade “M” and thereby committed an offence punishable under 1(2) (A) of the Robbery and Firearms (Special Divisions) Act Cap 390 Vol. H

Xxii Laws of the Federation of Nigeria 1990 as amended by Tribunals and certain consequential Amendment etc) decree No. 62 of 1999.

FACTS BRIEFLY STATED

The facts as stated by the appellant are that, the respondent conspired with two other co-accused persons to rob and did carry out a series of robberies armed with a gun and other dangerous weapons. Out of the 6 counts preferred in the charge against him and his two co-accused persons, the respondent was convicted of Counts 1 and 3, whilst his two co-accused persons were discharged and acquitted by the trial court of all offences. In proof of its case, the appellant called a total of 5 witnesses. PW1, PW2 and PW4 being the persons who were allegedly robbed by the respondent and his co-accused persons, although none of these witnesses was at home at the time the respondent and the co-accused persons allegedly robbed their respective homes. PW3 a police officer, testified that he arrested the respondent, not quite at the scene of the crime but where he was hiding under a fowl cage in the next compound or premises, whence he (PW3) recovered some weapons from under the car where the respondent dropped them and thereafter handed over both the respondent and the recovered weapons to PW5 (another police officer on duty) at the police station.

The appellant did not produce any exhibit at the trial in proof of its case against the respondent, although it alleged that the respondent made a confessional statement to the police and sought to tender same in evidence but the confessional statement was found to have been made involuntarily following the torture of the respondent by the police.

At the conclusion of the prosecution's case, the respondent's counsel made a no case submission which failed and respondent was called upon by the trial court to make his defence.

The respondent's case, on the other hand, is a total denial of both charges of conspiracy and armed robbery. The respondent's testimony is that on 02/2/2003 he was accosted by a group of butchers when he wanted to go and give food to his sick sister in the hospital. As he awaited a commercial motor cycle otherwise known as "Okada", the butchers demanded to know where he was going and he told them he was going to see his sister in the hospital. They told him that there was a robbery in the area and that his face was not

familiar. Those in the area started beating him until he was rescued by PW3 who later arrested and subsequently took him to the police station.

The respondent opened and closed his defence on 12/9/07 and after listening to the final addresses of both counsel, the trial court delivered its judgment on 27/11/07 convicting the respondent of:

- (i) Conspiracy to commit armed robbery and
- ii) The substantive offence of armed robbery.

Being dissatisfied with his conviction by the trial court, the respondent appealed to the Court of Appeal which, by its judgment dated 17th May 2011, set aside the conviction and sentence to death of the respondent and discharged and acquitted him of all charges.

Dissatisfied therewith, the appellant has now appealed to this honourable court with the Notice of Appeal it filed on the 3rd day of June, 2011 which Notice contained 2 Grounds of Appeal.

On the 28th day of April, 2016 date of hearing, learned counsel for the appellant, L. F. Anga adopted appellant's Brief of Argument settled by Gbenga Adaramola, The Deputy Director, Law Review Department, Ministry of Justice, Ado-Ekiti, Ekiti State, filed on 3/5/2013 and deemed filed on 5/3/2014. He crafted two issues for determination which are thus:

- (a) Whether the court below was right to hold that the case against the respondent was not proved beyond reasonable doubt.
- (b) Whether the court below was right to hold that not tendering of a weapon of robbery was fatal to the case of the appellant.

Segun Fowowe Esq. of counsel for the respondent adopted his Brief of Argument filed on 10/6/13 and deemed filed 5/3/14. He raised a sole issue which I consider all embracing to answer the questions arising and for the determination of the appeal. I shall utilise it and it is as follows:

SOLE ISSUE

Whether the court below was right to hold that the case of armed robbery against the respondent was not proved beyond reasonable doubt to warrant his conviction and sentence to death by the trial court for same.

Learned counsel for the appellant contended that the onus in every criminal matter lies on the prosecution to prove its case against

the accused person beyond reasonable doubt and the duty of proving such must be that the doubt if in existence should arise from some evidence and not from the imagination and any conjecture or inference not supported by evidence. He cited *Olalekan v. The State* (2001) 18 NWLR (pt. 476) 822.

That it is trite that the elements of the offence of armed robbery are as follows:

- (a) That there was robbery,
- (b) That the robber(s) was armed with offensive weapon during the robbery. And
- (c) That the accused person participated in the robbery.

He referred to *Bozin v The State* (1985) 2 NWLR (Pt. 8) 465 at 469.

It was further stated for the appellant that the prosecution can use any of the following methods in proving the guilt of an accused person.

- (1) Eye witness account
- (2) Confession by the accused person
- (3) Circumstantial evidence surrounding the case.

Learned counsel stated that the prosecution employed one of the above recognized methods i.e. eye witness account and in this he mentioned the evidence of PW3, one Mijinyaya Nasril DSP and also Dr. Sunday Ojo Akinmulegun one of the victims of the robbery. That it is part of the evidence of PW3 that knife, machete were found under the car where the respondent was arrested and where he kept them and those weapons were handed over to the police. He cited section 2(2) (a) and section 15(1) of the Robbery and Firearms (Special Provisions) Act, 1990 as amended; *Mohammed Sele v State* (1993) 1 NWLR (Pt. 269) 276.

For the appellant it was contended that the guilt of the respondent stemmed from the pieces of evidence adduced by all the prosecution witnesses who gave cogent and compelling testimonies of the culpability of the respondent and not from the involuntary rejected confessional statement as the lower court posited in its judgment on page 232 of the record. That it is to be noted that PW2 identified the respondent even at the police station and at the earliest stage. He stated further that the failure of the prosecution to tender the offensive weapons used in the commission of the crime is immaterial to

the proof of the offence. That the pieces of evidence of PW3 on the recovered weapons, the issue of respondent hiding in a cage belonging to PW3's landlord and the evidence of PW5, the IPO were neither controverted nor discredited under cross-examination by the respondent and the failure to tender the said weapons used is not fatal to the prosecution's case. He cited *be Fatai Olayinka v State* (2007) 30 NSCQLR 149 at 162-163; *Gbadamosi v The State* (1991) 6 NWLR (Pt. 196) 182 at 192.

Learned counsel for the appellant urged the court to allow the appeal and set aside the decision of the court below and restore the decision of the trial court.

Learned counsel for the respondent submitted that the appellant could not in law prove its case, that the respondent committed the crime of armed robbery against PW1 beyond reasonable doubt. That the reasons are that there was no credible evidence showing or proving that the respondent was armed with firearms or any offensive weapon or in the company of any person so armed at the scene of crime. That there are several and overwhelming material contradictions and inconsistencies that a painstaking thorough evaluation of the facts of this case reveals all of which necessarily leave lingering doubts in the appellant's case. He referred to Section 11 of the Robbery and Firearms (Special Provisions Act Cap. R11 LFN, 2004; *Ajiloye v State* (1983) 6 SC 1; *Okobi v The State* (1984) NSCC Vol. 15 Page 520; *Aruna v State* (1990) 6 NWLR (Pt. 155) 125 at 135.

That out of five prosecution witnesses called, none of them was present at the scene of the crime and they could therefore not testify that they saw the respondent with a gun or any offensive weapon at the scene. That the nearest the prosecution came to an eye-witness is PW3 who testified that he arrested the respondent, not quite at the scene of the crime but where he was hiding behind a "fowl cage" at the next or neighbouring compound or premises. All these producing doubts which ought to be resolved in favour of the accused/respondent as the Court of Appeal found and concluded.

Also, another source of doubt according to the respondent counsel stems from the material contradiction inherent in the charge sheet such as the exact address of the scene of crime. Again that the trial court relied on evidence not before it such as the purported confessional statement of the respondent which the same trial court

rejected during the trial within trial, only to turn to utilize it in believing the prosecution. He relied on *Olayinka v The State* (2007) 45 WRN 147 at 165-166.

The summary of the standpoint of the appellant is captured in a few words as:

1. That the prosecution successfully proved the offence of armed robbery against the respondent beyond reasonable doubt. B

2. That it is the use which a weapon is put to which makes it offensive and so razor blade, knife, machet or the likes could be used as offensive weapons.

3. The failure of the prosecution to tender the weapons used is not fatal to the prosecution's case. C

That the Court of Appeal erred in its decision in setting aside the judgment of the trial court and this court should reverse the situation. D

The respondent took a contrary position contending thus:

1. That the respondent had been wrongly convicted by the trial court of armed robbery even though the essential elements of the offence i.e. the use or threat of use of violence was never proved.

2. The police did not tender any weapon found at the scene and there was no other credible evidence to prove that there were weapons at the scene. E

3. There are too many material contradictions, including the charge sheet placing the respondent at two separate crime scenes at the same day and time which left reasonable doubts. F

4. The two witnesses whose testimonies the trial court convicted the respondent upon were not witnesses of truth having attempted to pass off an involuntarily made confessional statement as voluntarily made by respondent. G

5. The trial court in its judgment had relied on a document it earlier rejected in deciding to disbelieve the respondent on the vital issue of whether the respondent was an innocent bystander as opposed to a robber awaiting a commercial motor-cycle to take food to his ill sister at the hospital. H

The two opposing postures, juxtaposed with the findings and conclusions of the learned trial judge which excerpts thereof are hereunder quoted thus:

In his judgment, the learned trial judge said:

“There is evidence that the accused was arrested at the scene of crime armed with some offensive or dangerous weapons like knife, matchet, screw driver which were found on him. He broke into the house of one Akinmulegun Ojo Sunday (PW1) and stole his properties such as guinea brocade, pair of shoes, handset and so on. PW3, DSP Nasiru who arrested the accused person at the scene of the crime and recovered the aforementioned dangerous or offensive weapons from him at the scene of crime took him to the C.I.D section, Ado-Ekiti Police State. PW5 Cpl. Chidi Anthony who investigated the case said that the accused was handed over to him together with the dangerous weapon found on him at the scene of crime for investigation which he carried out.

It is crystal clear from the evidence adduced by the prosecution in the instant case that there were armed robberies and that the accused participated in at least one of them as shown in the evidence of PW1, PW3 and PW5. Though PW1 was not an eye witness, he is a credible witness as regard his property stolen by the accused when the accused broke into his house.

Failure of the prosecution to tender the offensive weapons recovered from the accused at the scene of crime is not fatal to the prosecution’s case. See Gbadamosi v The State (Supra) at page 206 para. E-F.”

On review on appeal, the Court of Appeal took a different stance holding thus:

“It is therefore clear that, for the prosecution to prove its case of robbery against the appellant beyond reasonable doubt, it must necessarily prove that the appellant used or threatened to use violence when he stole the items or things he was accused of stealing at the time of the robbery. Has this fact been proved by the prosecution? In the instant case the prosecution has not proved that the appellant at the time of the robbery had firearms or any offensive weapons with him or was in company of any person so armed when he carried out the offence of robbery. The prosecution also did not lead evidence whatsoever to established the use or threatened use (sic) of violence by the appellant as no evidence was led that anybody heard any gun shot or that anybody was injured or that anybody was fearful for his life or that anybody witnessed the appellant use or threatened to us violence in the commission of the crime. The prosecution

had therefore failed to prove an essential element of the robbery against the appellant beyond reasonable doubt.”

It seems appropriate at this stage to go back to the statute relevant for our purpose which is the Robbery and Firearms Act in which are provided thus in sections 2(2) and 15(1) thereof as follows:

B

Section 2(2) (a) of the Robbery and Firearms Act provides:

“Any person who, with intent to steal anything, assaults any other person and at or immediately after the time of assault, uses or threatens to use actual violence to any other person or any property in order to obtain the thing intended to be stolen... if any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any other person so armed”

C

While section 15(1) provides as follow:

D

“... “robbery” means stealing anything and, at or immediately before or after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained”

E

This court had laid down the ground rules on when an armed robbery can be said to have been committed, the case of Olayinka v The State (2007) 45 WRN 147 being a pointer stated per Tobi JSC as follows:

“In order to convict for armed robbery the prosecution must prove:

F

(a) There was an armed robbery

(b) The accused was armed.

(c) The accused with arms, or arm participated in the robbery which makes it armed robbery.

G

Once the prosecution proves the above ingredients beyond reasonable doubt, failure to tender the offensive weapon cannot result in the acquittal of the accused person.”

Then of note is the definition of robbery stated under section 11 of the Robbery and Firearms (Special Provisions) Act Cap. R11 LRN, 2004 to be thus:

H

“Stealing anything and, at or immediately before or after the time of stealing it, using or threatening to use actual

violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to being stolen or retained.

Interpreting the words above, this court has in many instances stated that the offence of robbery is consummated if violence is used on anyone to facilitate the stealing or stated another way to be stealing added with violence. See Ajiloye v State (1983) 6 SC 1; Okobi v The State (1984) NSCC Vol. 15 Page 520; Aruna v State (1990) 6 NWLR (Pt. 155) 125 at 135.

In the light of the connotation or meaning of robbery, one would take a look at the evidence of PW3 who stated thus:

“On 2nd February 2003 at about 10.13am I was in bed in my house along Mountain of Fire Miracle Church, Ado Ekiti when I heard people shouting “Ole Ole Ole” meaning “thief thief thief”. I quickly stood up took my gun and went out. I went round the area searching for the thieves. I succeeded in arresting the 1st accused person from where he was lying under one of the fowl cage of my landlord. Witness identified the 1st accused persons in the dock. I recovered the knife he hold during the coming of the crime under my car where he dropped it. The following were recovered from him; a serah and knife, matchet, a bunch of key a wraque of inction bearing one wrist watch etc. People wanted to lynch him but I prevented them from doing so. The accused told us that they were two and the second persons had run away. I took the 1st accused to the state CID Ado-Ekiti police station in company of one Mr. Ojo (1st PW) whose house the 1st accused and his colleague burgled. I handed him over to the appropriate officer. I made statement to the police”

Under cross-examination PW3 stated:

“At the time the 1st accused jumped down from the house where he went to rob I did not see him.”

I do not see my way out without having a recap of the substance of the materials before the trial court to see if the findings and decision were in order and then the reaction of the Court of Appeal to the earlier position taken at the court of first instance.

The PW1, Dr. Sunday Ojo Akinmulegun whose house was allegedly robbed stated that on the day of question, he was in Church when he got the information that his house had been broken into and on getting home he was told the appellant was arrested and

taken to chairman of landlords and on getting there he saw the appellant. That he saw a knife as the instrument used in the theft and discovered that the thieves stole a set of guinea brocade, a pair of shoes and other things. That the appellant was then handed over to the police. PW2, Julius Ogunmilade testified that on 21st July 2002 he went to church and on getting back saw that his house had been broken into and several things stolen and reported to the police. That on the 5th February 2003 the police brought some robbers arrested to his house and he identified the stabilizer among the items recovered.

Also PW4, Adesola Ogunmilade testified that his own house was burgled sometime in October 2002 when he went to work and the fact that his house had been broken into was told him when he got home. That he reported the matter to the police and about six months later the police invited him to the police station that they had arrested the persons who broke into his house armed with guns and dangerous weapons.

PW3, Mijinyaya Nasiru (OSP) formally attached to State CIO Ado-Ekiti but later attached to Kwara State Police Command testified that on 2nd February, 2003 at about 10.13 am he was in bed in his house when he heard people shouting “Ole Ole Ole” meaning “thief thief thief” and taking his gun and going to where the noise, was searching for the thieves and saw the 1st accused/appellant hiding under one of the fowl cages of his landlord. That he had recovered a knife under his car, machete, bunch of keys, a wrap of Indian hemp and a wrist watch etc., where they were hidden under a car near where the appellant was hiding.

Of note is that appellant was not arrested at the scene of crime but a compound next to the scene of crime and the items were not in the physical possession of the appellant at the time he was accosted under the cage.

The Investigating Police officer who testified as PW5 stated that the appellant was handed over to him, along with one screw driver, one matchet, two bunches of keys, one knife and a wrap of weed suspected to be Indian hemp. From this testimony of PW5, no gun was amongst the weapons handed over to him at the Police Station.

From these pieces of evidence, one would be inclined to the submissions of learned counsel for the respondent, Segun Fowowe

that out of the 6 counts of the charge, respondent was found guilty of counts 1 and 3 only. That a gun and other dangerous weapons used were not made out. Also that the offence under section 11 of the Robbery and Firearms Act cannot be said to have been established in the light of the contradiction of the gun in the charge sheet
 B not borne out by the evidence and no eye witness testified with the lacuna in existence. And PW3 who arrested the respondent did not see him at the scene of crime, damnified all the more by the dangerous weapons not brought before the court. I agree with the learned
 C trial judge that not tendering the offensive weapons at trial is not fatal but there must be other serious pieces of evidence on which the court could utilise in the absence of the weapons. This is all the more worrisome where the alleged confessional statement has failed in a trial within trial and the court finding the statement was not voluntarily
 D obtained from the respondent. In such a situation the principle under *Gbadamosi v State* (1991) 6 NWLR (pt. 196) 182 at 206 would not save the position of appellant.

***Indeed the case put up by the prosecution has produced very curious facts, firstly whilst counts 1 and 3 of the Amended
 E Charge Sheet clearly fixed the respondent at the home of PW1 at No. Opopogboro Road, at Ado Ekiti at 10.30 hours on 2nd February 2003, count 4 accused respondent of stealing on the same date 2nd February 2003 and at the same time, 10.30
 F hours the property of one Veronica Arigbede at No. E 10 Okeode Street, Ilupeju, Ekiti. The implication is that at the same time and date, respondent and others carried out robberies at two different locations. This situation taken with the proceeding in court where the confessional statement was
 G rejected by court in the trial-within-trial, no eye-witness and no cogent circumstances viewed with the fact that respondent was not seen at the scene of crime nor the items found with his person then placed alongside the defence of the respondent that he was an innocent bystander awaiting a commercial motor-cycle to take food to his sick sister in hospital.
 H Therefore what I see before me are very serious lapses in the case of the prosecution throwing up doubts which cannot be ignored and the logical conclusion being that the prosecution failed to prove the ingredients of the offence charged beyond***

reasonable doubt. See Olayinka v State (2007) 7 NWLR 561 at 582. ***It follows that the benefit of the doubt has to be resolved in favour of the respondent.***

Another interesting part of this case is that the respondent's co-accused were discharged and acquitted under count 1 the charge of conspiracy, meanwhile respondent was convicted thereof and sentenced to 14 years. This is a funny thing as the implication is that the respondent conspired with himself, a legal impossibility which cannot stand and the court below was right in its findings and conclusion.

In conclusion as there is no need continuing with a matter that is clearly based on suspicion with the prosecution making efforts to substantiate what does not exist, I see no basis or merit in this appeal and so I dismiss it. I affirm the decision of the Court of Appeal when it set aside the conviction and sentences of 14 years for conspiracy and death by hanging for armed robbery. I also affirm the acquittal and discharge of the respondent on all counts.

GALADIMA JSC

I have had the privilege of reading the lead judgment of my learned brother PETER-ODILI JSC, just delivered. I am in entire agreement that the appeal lacks merit and ought to be dismissed. I shall add a few words for emphasis, particularly having regard to the unfortunate circumstances of this case.

The gravamen of the Appellant's case was that the prosecution successfully proved the offence of armed robbery against the Respondent. That, it is the use which a weapon is put to, which makes it offensive and so things like razor blade, knife, machete or the likes could be used as offensive weapons. That the failure of the prosecution to tender the weapons used is not fatal to the prosecution's case.

Interestingly the Respondent herein, took a contrary position, when he contended as follows:

(i). That he was convicted of armed robbery even though an essential element of the offence, that is the use or threatened use of violence, was never proved.

(ii). That the police did not tender any weapon found at the scene and there was no other credible evidence to prove that there

were weapons at the scene.

(iii). That there are too many material contradictions (including the charge sheet placing the Respondent at two separate scenes of crime at the same day and time) that leaves lingering doubts in the prosecution's case.

B (iv). That the conviction of the Respondent based on the testimonies of the two prosecution witnesses who were not witnesses of truth, has cast doubt on the free and voluntariness of confessional statements of the Respondent.

C (v). That whether the trial court was right when it relied on a document it had earlier rejected in deciding to disbelieve the Respondent was an innocent bystander as opposed to a robber who was waiting for a commercial motor-cycle to take food to his sister who was ill in the hospital.

D In order to convict an accused person for armed robbery the prosecution must prove the following, ingredients:

(a) That there was an armed robbery;

(b) That the accused person was armed; and

E (c) That the accused was armed when he participated in the robbery. See *OLAYINKA v. THE STATE* (2007) 45 W.R.N 147.

By the definition of the word "*robbery*" under section 11 of the Robbery and Fire-Arms/Special Provision) Act. Cap. 11, LFN 2004, robbery is established if accompanied by violence or threat of violence to facilitate the stealing. See *ARUNA v. STATE* (1990) 6 NWLR (Pt.155) *OKOBI v. THE STATE* (1954) NSCC vol. 15 page 520.

F I have carefully gone through the evidence of the prosecution witnesses, particularly PW1, PW3 and PW5. PW3 who arrested the Respondent did not see him at the scene of crime with any dangerous weapons. Moreover; during his trial no offensive weapon was tendered. The so-called confessional statement made by the Respondent when subjected to the test of trial within trial, it failed and was adjudged unreliable by the trial court, as it was not obtained voluntarily.

H Reviewing the evidence of the witnesses generally and circumstances surrounding this case, the court below rightly concluded at page 222-223 of the record of Appeal thus:

"It is therefore clear that for the prosecution to prove its case of robbery against the Appellant beyond reasonable doubt, it must nec-

essarily prove that the Appellant used or threatened to use violence when he stole the items or things he was accused of stealing at the time of the robbery. Has this fact been proved by the prosecution? In the instant case the Prosecution has not proved that the Appellant at the time of robbery had firearms or any offensive weapon with him or was in company of any other person so armed when he carried B out the offence of robbery. The Prosecution also did not lead evidence whatsoever to establish the use or threatened use of violence by the Appellant as no evidence was led that anybody heard any gun shot or that anybody was injured or that anybody was fearful for his life or that anybody witnessed the Appellant used or threatened to C use violence in the commission of the crime. The Prosecution has therefore failed to prove an essential element of the offence of robbery against the Appellant beyond reasonable doubt.

The general or legal burden of proof which lies on the Prosecution and does not shift is in consonance with Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999, which guarantees to all persons accused or charged with criminal offence the right to be presumed innocent until he is proved guilty. The constitutional provision therefore squarely places on the Prosecution the ultimate E burden of proving the guilt of the accused person. Thus} the Prosecution must discharge this burden beyond doubt by proving every ingredient of the offence charged by credible evidence. See *Mustapha vs. State* (2007) 12 NWLR (Pt.1049) 637; *Chukwu vs. State* (2007) 13 NWLR (Pt.1052) 430; and *Abdullahi vs. State* (2008) All FWLR F (Pt.432) 1047 at 1049. See also Sections 135 and 138 of the Evidence Act. Cap. 112, LFN 1990. Therefore, where at the close of evidence an essential ingredient of the offence has not been proved, a doubt would have been created as to the guilt of the accused and G he shall be discharged and acquitted."

I cannot agree more. The foregoing findings by the Court below are sound. For this contribution and more detail resolution of other issues in the lead judgment, I too, dismiss the appeal. I hereby affirm the decision of the court below which set aside the conviction H of the Respondent and sentence of 14 years for conspiracy and death sentence.

In consequence the Respondent is acquitted and discharged forthwith.

AKA'AH'S JSC

I read in draft the judgement just delivered by my learned brother Mary Peter-Odili JSC affirming the judgement of the Court of Appeal, Ekiti Division delivered on 17/5/2011. In the said judgement, the Court of Appeal set aside the judgement of the High Court of Ekiti State which sentenced the accused/appellant (now respondent) to 14 years imprisonment for conspiracy to commit armed robbery. He was also sentenced to death for the offence of armed robbery. The Court of Appeal acquitted the respondent and discharged him accordingly. The State is aggrieved and decided to lodge an appeal to this Court against the order of acquittal and discharge made by the Court below in favour of the respondent.

I agree with the conclusion arrived thereat that the appeal lacks merit and is liable to be dismissed. I wish to add my own voice in dismissing the appeal.

The facts leading to this appeal may be stated as follows:- A series of burglaries took place in Ado-Ekiti in the months of July, October and November, 2002 and on 2nd February, 2003 involving Odunayo Ajayi, Godwin Ejumophor and Ipoola Falope which led to the arraignment of the three accused persons before the Ekiti State High Court, Ado-Ekiti in charge No. HAD/22C/03 alleging two counts of conspiracy to commit armed robbery and three for armed robbery. The charge was later amended and the sixth count added which is for armed robbery. The accused all pleaded not guilty to the amended charge. The prosecution called six witnesses. PW1, PW3 and PWS testified in respect of counts 1 and 3 while PW4's evidence was in relation to count 5 and PW2's evidence was in respect of count 6. Counts 1 and 3 dealt with the burglary of 2nd February, 2003 while count 2 dealt with the burglary of November, 2002. Counts 5 and 6 were in respect of the burglaries which occurred on 21st July and 16th October, 2002 respectively. No date is stated in count 4 when the robbery took place and it is a matter of conjecture whether the incident occurred on 2nd February, 2003. Since the conviction of the respondent by the trial court was based on counts 1 and 3 of the charge, I shall limit my consideration of the appeal to those counts and I reproduce them as follows:-

"COUNT 1

That you ODUNAYO AJAYI 'M', GODWINE EJUMOPHOR 'M' and IPOOLA FALOPE 'M' on or about the 2nd February, 2003 at about 103hrs at No.1, Ile-lieri Street off Opopogboro Road, Ado-Ekiti in the Ado Judicial Division did conspire together to commit felony to wit: armed robbery and thereby committed an offence punishable under section 5(8) of the Robbery and Firearms (Special Provisions) Act Cap 398 Vol. XXII laws of the Federation of Nigeria 1990 as amended. B

COUNT III

That you ODUNAYO AJAYI 'M', GODWINE EJUMOKPOR 'M' and IPOOLA FALOPE 'M' on or about the 2nd February, 2003 in the afore-mentioned Judicial Division whilst armed yourselves with gun and other dangerous weapons did steal three sets of guinea brocade amount yet unknown, shoes and other items not yet known property of one Akinmulegun Ojo Sunday 'M' and thereby committed an offence punishable under section 1(2) (A) of Robbery and Firearms (Special Provisions) Act, Cap 398 Vol. XXII laws of the Federation of Nigeria 1990 as amended". C D

The witnesses called by the prosecution to prove the ingredients of the offences under these two counts were PW1, PW3 and PW5. The evidence of PW1 was that on February 2, 2003 he was in church where he received an information that thieves had broken into his house and stole a set of guinea brocade, a pair of shoes and other things. When he reached home he was told that the 1st accused was arrested and taken to the Chairman of Landlord and later handed over to the police. PW1 admitted under cross-examination that he was in the church when the thieves broke into his house and he did not know the person who broke into the house. F

PW3 was the star witness and his evidence ran as follows: G

"On 2nd February, 2003 at about 10.13am I was in bed in my house along Mountain of Fire and Miracle Church Ado-Ekiti when I heard People shouting "ole" "ole" "ole" meaning "thief" "thief" "thief". I quickly stood up took my gun and went out. I went round the area searching for the thieves. I succeeded in arresting the 1st accused person from where he was lying under one of the fowl cage of my landlord I recovered the knife he hold (sic) during the coming (sic) of the crime under my car where he dropped it. The following were recovered from him: a serah (sic) and knife, matchet, a bunce (sic) of H

key, a wrage of inction bearing one wrist watch etc. People in the neighbouring houses came out and came to our compound after the arrest of the 1st accused... The accused told us they were two and that the second persons had run away. I took the 1st accused to the State C.'. D. Ado-Ekiti Police Station in company of one Ojo (1st PW)

B whose house the 1st accused and his colleague burgled. I handed him over to the appropriate officer". Under cross-examination PW3 said:-

C "At the time the 1st accused jumped down from the house where he went to rob I did not see him".

D 5th PW was the IPO. He was in the State C.I.D when PW1 accompanied by PW3 reported a case of armed robbery. The 1st accused was handed over to him together with a screw driver, one matchet, two bunches of keys, one knife and a wrap of weed suspected to be Indian hemp. He obtained statements from PW1 and PW3. He visited the scene of the crime and on getting back to the station he cautioned the 1st accused who volunteered a statement where the names of 2nd and 3rd accused were mentioned. They were also arrested and they made statements. The prosecution sought to
E tender the statements of the accused but they raised objection on the grounds that the statements were not made voluntarily and so the trial Judge ordered for a trial within trial to be conducted. The 1st accused testified alleging that he was tortured and forced to make the statement. In his ruling the trial Judge believed that the statements
F the accused made were not voluntarily made and so were inadmissible in evidence. They were accordingly rejected.

G After the ruling PW5 stopped going to court and PW6 another Policeman who was familiar with the handwriting of PW5 identified PW5's handwriting and signature on the statement of 2nd accused. At this stage the prosecution did not know what to do with the statement and after several adjournments the learned trial Judge closed the prosecution's case on 19/2/2007. On 6/7/2007 learned counsel for the accused made a no case submission which was upheld in
H respect of the 2nd and 3rd accused. The trial Judge found that from the totality of the evidence adduced by the prosecution there was no prima facie case of conspiracy made against the 2nd and 3rd accused persons to warrant calling upon them to defend themselves but held that a prima facie case had been made out against the 1st accused

that he had a case to answer. The 1st accused thereafter gave evidence in his defence. He stated that on the 2nd February, 2003 his sister was sick and he went to visit her at the State Hospital Ado-Ekiti. She requested for food and after he had collected it he was standing by the main road to take a commercial motorcycle ride popularly called "Okada". Some butchers asked him where he was going and he told them he was going to the hospital to see his sister. This was around 10am. The butchers told him that an armed robber had visited the area that day for a robbery operation and one of them said his face was not familiar and that the food he was carrying should be collected from him. They searched the polyethylene bag where he was holding the food. He overheard some students in the premises asking if he was the person. One of the students slapped him in the face and the people around joined in the beating. He admitted knowing PW3, that he was the one who came out to rescue him. PW3 then arrested him and detailed four people to watch over him while he went to take his bath. Someone came from the church and tried to find out if those who were watching over him knew him. PW3 and the man who had come from the church (PW1) then took him to the Police Station. He denied conspiring with other accused persons to commit armed robbery on 2nd February, 2003 or November, 2002. He said he did not arm himself with offensive weapon to rob PW1 and that at the time he was arrested no offensive weapon was found on him. He also denied robbing Mr. Ogunmilade on 21st July, 2002 or Mrs. Adesola Ogunmilade. He said he did not go to Mr. Akinwale's house on February 2, 2003 and that he was arrested at Adehun Area on Iworoko Road.

In convicting the 1st accused and sentencing him to 14 years imprisonment for conspiracy and to death for the armed robbery, the learned trial relied heavily on the evidence of PW3.

The evidence given by PW3 can at best amount to strong suspicion of burglary but certainly not armed robbery since all the victims of the theft were not at home when the thieves burgled their residences and so violence could not be used or threatened against them. See: Section II Robbery and Firearms (Special Provisions) Act Cap. RII Laws of the Federation of Nigeria 200 (sic); *Ajiloye v. State* (1983) 6 SC 11; *Okobi v. State* (1984) NSCC Vol. 15 page 520; *Aruna v. State* (1990) 6 NWLR (Pt. 155) 125; *Otti v. State* (1991) 8

For an act to constitute robbery, there must be that experience by the victim of fear and intimidation brought about by apprehension of possible violence to his person before the robbery. The fear of possible injury instilled on the victim must of necessity precede the taking. So, notwithstanding the fact that PW3 arrested the 1st accused and recovered a knife, matchet and screw driver which are obviously offensive weapons, he could not be convicted of armed robbery as he was not shown to have used or threatened to use any of them on anybody before taking any of the victim's properties.

The 1st accused was not caught at the locus criminis. PW3 arrested him under one of the fowl cages of his landlord and when he was cross-examined he said that "at the time the 1st accused jumped down from the house where he went to rob I did not see him". The evidence of PW1 that 1st accused broke into his house through the window is hearsay evidence because he did not see the 1st accused entering inside the house through the window. He admitted that he did not know the person who broke into his house. The breaking into the house by 1st accused was merely speculative and remained a suspicion which could not ground a conviction no matter how strong. See: *Abieke v. The State* 1975) 9-11 SC 97; *Abacha v State* (2002) 11 NWLR (Pt. 779) 437. There are occasions when the conviction of the accused can be based on circumstantial evidence but such evidence must be compelling and cogent and point unequivocally to the guilt of the accused. See: *Archibong v. State* (2006) 14 NWLR (Pt. 1000) 349 and *Adekunle v. State* (2006) 14 NWLR (Pt. 1000) 717. There was no direct or circumstantial evidence on which the 1st accused could be convicted of having committed burglary in PW1's house. The evidence required to convict him of armed robbery for which the death sentence is mandatory under section 1(2)(A) of the Robbery and Firearms (Special Provisions) Act Cap 398 Vol. XXII Laws of the Federation of Nigeria 1990 as amended should be stronger and more compelling than the evidence required to convict for burglary. See: *Tanko v. State* (2008) 16 NWLR (pt. 1043) 564. There was not sufficient evidence on which the 1st accused could be convicted of stealing talk less of armed robbery.

On the issue of conspiracy, the learned trial Judge found con-

spiracy proved based on what the 1st accused told PW3 after he was arrested. The learned trial Judge reasoned thus:

“The 3rd PW who arrested the accused at the scene of crime said that the accused told him that his colleague in crime had run away. They were at the scene to rob. This piece of evidence was not denied nor controverted by the defence. Conspiracy can be inferred from what the accused told PW3 and from the criminal acts of the accused and his colleague in crime (now at large) done in pursuance of an apparent criminal purpose in common between them”.

This reasoning is rather curious because it was after the 1st accused had been arrested and made his statements which the court ruled was not voluntarily made, that led to the arrest of the 2nd and 3rd accused. In his ruling on the no case submission the learned trial Judge held that there was no prima facie case of conspiracy made against the 2nd and 3rd accused persons as to call upon them to defend themselves. Since the three accused persons were jointly charged for conspiracy and there was no evidence against the co-conspirators, the 1st accused should have equally been entitled to a discharge since he could not conspire with himself to commit the offence; neither was there a separate count charging him and persons unknown with conspiracy. Further an accused person cannot be convicted of conspiracy to commit an offence on the strength of his own confession unless there is an independent evidence that at least one other person has conspired with him. See: *Fayemi v. Attorney-General, Western Nigeria* (1966) All NLR 180. The conviction of the 1st accused based on what he purportedly told PW3 was wrong in law. In the appeal lodged by the 1st accused to the Court of Appeal against this conviction, that Court in allowing the appeal found that the prosecution failed to prove conjunctively all the ingredients of the offence of armed robbery against the appellant (now respondent) beyond reasonable doubt and the trial Judge exceeded his jurisdiction in convicting and sentencing the appellant for armed robbery when the prosecution failed to prove the existence of the offensive weapons mentioned in the charge. Having reviewed the judgement of the Court of Appeal, I have no doubt in my mind that that court arrived at the right decision in allowing the appeal. Having charged the respondent of the offence of armed robbery, it was incumbent on the prosecution to prove that the respondent committed the of-

fence of stealing and at the time of the commission of the offence he was armed with offensive weapons which he used or threatened to use against the victims of the robbery. But since the respondent was neither caught stealing nor did he threaten to use any offensive weapons to injure or put the victim in fear, the offence of armed robbery was not proved beyond reasonable doubt. I am therefore satisfied that the Court of Appeal's decision was right and the 1st accused/appellant (now respondent) was wrongly convicted by the learned trial Judge. The lower court properly set aside the conviction and sentence imposed on him and instead entered a verdict acquitting him of the charge and discharging him of the offence.

It is because of the reasons I have given and the more detailed reasons contained in the judgement of my learned brother, Mary Peter-Odili JSC that I find no merit in the appeal and I accordingly dismiss it. Appeal is hereby dismissed.

KEKERE-EKUN JSC

The respondent in this appeal was charged along with two others before the High Court of Ekiti State sitting at Ado-Ekiti on a six-count charge of conspiracy to commit armed robbery and armed robbery. They were alleged to have conspired together to rob and did break into the homes of PW1, PW2 and PW4, while armed with dangerous weapons and stole money and various items therein. None of the victims was at home when the robberies took place. The respondent was arrested by PW3, one DSP Nasiru who testified that at about 10.30 am on 02/02/2003 he heard shouts of "*Ole, ole, ole,*" meaning- "*thief! thief! thief!*" while he was lying in bed at home. He took his gun and went out to search the neighbourhood. In the process, he found the respondent lying under a fowl cage in his (PW3's) landlord's compound nearby. He testified that he recovered the knife the respondent used in committing the offence from under his car where he allegedly dropped it. He testified that he also recovered a "serah knife", matchete, bunch of keys and wrist watch. He testified that the neighbours wanted to lynch the respondent but he prevented them from doing so. He also stated that the appellant confessed that two of them carried out the robberies but his accomplice had run away. Under cross-examination he admitted that he did not see the

respondent jump down from the premises where the robberies took place.

At the conclusion of the prosecution's case the other two accused persons were discharged after a successful no-case submission. The respondent was called upon to enter his defence. In his defence, he stated that he was on his way to take food to his sick sister in hospital and was waiting for a commercial motorcycle (okada) to convey him. That he was accosted by butchers in the area who were not satisfied with his explanation as to where he was going. That they pounced on him as a suspect and started beating him. He was saved by PW3.

At the conclusion of the trial, the court discharged and acquitted him on counts (II), (IV), (V) & (VI) but *convicted* him on counts I and III. He was sentenced to 14 years imprisonment for conspiracy to commit armed robbery and to death by hanging for armed robbery. He was dissatisfied with his conviction and sentence and appealed to the court below, which allowed the appeal on 17/5/2011 and set aside the judgment of the trial court. He was accordingly acquitted and discharged. The appellant is dissatisfied with the judgment and has further appealed to this court.

Although learned counsel for the appellant formulated two issues for the determination of this appeal, I am of the *view* that the only issue for determination is whether the court below was right in setting aside the judgment of the trial court in the circumstances of this case.

The position of the law, which hardly requires the citing of any legal authorities, is that where the commission of a crime is in issue in any proceeding, civil or criminal, the allegation must be proved beyond reasonable doubt. In criminal proceedings, the burden of proof is on the prosecution and does not shift. See: Section 135 of the Evidence Act 2011; Woolmington Vs D.P.P. (1935) AC 462; Esangbodo Vs The State (1989) NWLR (Pt.113) 57; Michael Vs The State (2008) 13 NWLR (Pt. 1104) 361.

In order to prove the offence of armed robbery, the prosecution must prove the following beyond reasonable doubt:

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

robbery or robberies. See: *Bozin Vs The State* (1985) 2 NWLR (Pt.B) 465; *Olayinka Vs The State* (2007) 9 NWLR (Pt.1040) 561; *Agboola Vs The State* (2013) 11 NWLR (Pt.1366) 619.

In discharging the burden of proof the prosecution may rely on direct evidence of an eye witness, circumstantial evidence and/or the confession of the accused person himself.

In the instant case, the prosecution relied on circumstantial evidence to prove its case since none of the victims was at home when the alleged armed robbery took place. PW3 who arrested the respondent was also not a witness to the crime. Where the prosecution relies on circumstantial evidence to establish its case, the evidence must be conclusive enough to lead to the irresistible conclusion that the accused person and no one else committed the crime. See: *Ikomi Vs The State* (1986) 5 SC 313 @ 359; *Ogidi Vs The State* (2005) 1 SC (Pt.1) 110; *Yongo Vs C.O.P.* (1992) 4 SCNJ 113.

As earlier observed, there were no eye witnesses to the offence. The arrest of the respondent did not take place at the scene of the crime but in the premises of PW3's landlord nearby. Items allegedly recovered from him were recovered under a car near where he hid. There was no evidence to show that it was the respondent who placed the items there." None of the dangerous weapons allegedly recovered from him was tendered in evidence. Furthermore, none of the prosecution witnesses testified to having heard gun shots. In order to prove the charge of armed robbery as stated earlier, the prosecution must prove not only that there was a robbery but that the robbers were armed. There was no such evidence in this case.

The entire case of the prosecution," in my view was built on suspicion. The law is that suspicion, no matter how strong cannot ground a conviction for a criminal offence. It cannot take the place of legal proof. See: *Abieke Vs The State* (1975) 9 – 11 SC (Reprint) 60; *Idowu Vs The State* (1998) 11 NWLR (Pt.574) 354; *Shehu Vs State* (2010) 8 NWLR (Pt.1195) 112.

To compound matters in this case, the learned trial Judge in his judgment relied on the respondent's extra-judicial statements which were tendered in evidence but rejected in reaching the conclusion that the respondent's testimony was unreliable. This error by the court has no doubt occasioned a miscarriage of justice. On this ground alone the court below was right to set aside the judgment.

Taking all the facts in this case into account, I agree entirely with my learned brother, MARY UKAEGO PETER-ODILI, JSC that the court below was right in setting aside the judgment of the trial court on the ground that the prosecution failed to prove its case against the appellant beyond reasonable doubt. I agree that the failure of the prosecution to tender the dangerous weapons allegedly used in the commission of the offence was fatal to its case. B

In the circumstances, I agree with my learned brother that this appeal is completely unmeritorious. I also dismiss it and affirm the judgment of the lower court. Appeal dismissed. C

OKORO JSC

I read in draft the lead judgment of my learned brother, Mary Ukaego Peter-Odili, JSC just delivered and I am in total agreement D with both the reasons advanced and the conclusion that the appeal is devoid of merit and deserves an order of dismissal. My learned brother has commendably resolved the sole issue adopted for the determination of this appeal and I am tempted to just adopt it as mine. That notwithstanding, I shall chip in a few words of mine in support of the E judgment.

The facts leading to this appeal are well captured in the lead judgment. I need not repeat the exercise except as may be referred to in the course of this judgment. The big question is: Was the court below right in setting aside the conviction and sentence of the respondent for the offence of armed robbery? Without much ado, I answer the question in the affirmative. I shall give reasons *anon*. F

It is trite that in criminal proceedings, the onus is always on the prosecution to establish the guilt of the accused beyond reasonable G doubt and the prosecution will readily achieve this result by ensuring that all the necessary and vital ingredients of the charge or charges are proved by evidence. See *Yongo V. COP* (1992) 4 SCNJ. 113, (1992) LPELR - 3528 (SC); *Uche Williams V. The State* (1992) 10 SCNJ. 74. It must be noted that under our system of criminal justice, H accused person is presumed innocent until he is proved guilty and the burden of proof is always on the prosecution. See *Okputuobiode & Ors v. The State* (1970) ALL NLR 36, (1970) LPELR - 2524 (SC).

In the instant case, two issues call for determination. The first

has to do with the failure of the prosecution to tender the weapons allegedly used in the robbery attack. One DSP Nasiru (PW3) who arrested the respondent near the vicinity of the robbery testified that he recovered a knife, machete and screw driver from under his (PW3's) car near to where the respondent was arrested while hiding under a fowl cage at the next compound. These items were handed over to the police alongside the respondent. The prosecution neither produced the weapons nor tendered them in court. Was this fatal to the case?

In *Olayinka V. The State* (2007) 9 NWLR (pt. 1040) 561 at 514, this court held as follows regarding failure to tender weapon of armed robbery. It states:

“with respect to the submissions of the appellant about the failure of the prosecution to tender the weapons of the alleged robbery and its effect on the prosecution, I do not think there is any principle of law requiring the tendering of the weapons of an alleged robbery to establish the guilt of an accused person. Whether or not the prosecution needed to tender the weapons with which the appellant allegedly committed robbery depends, by and large, on the character and circumstance of the case.”

May I state clearly that once there is cogent, reliable and authentic oral and documentary evidence which the court believes and admits, failure to tender the weapons employed in the robbery cannot be prejudicial to the case of the prosecution. See *Gbadamosi V. The State* (1991) 6 NWLR (pt. 196) 182.

As was suggested in *Olayinka's* case (supra), the character and circumstances of the case will determine whether the tendering of the weapon was necessary or not. In the instant case, none of the prosecution witnesses saw the respondent robbing in their homes or elsewhere. They were not even at home. The PW3 who arrested the respondent did not see him committing the offence. The respondent was arrested hiding in the next compound while the weapons were recovered under the PW3's car. In view of the defence put up by the respondent that he was just passing by when he was arrested, I think the alleged weapons ought to have been tendered to enable the court see if the respondent could be linked with them and for what purpose. For me, I think the failure to tender the weapons weakened the prosecution's case the more since the evidence was circumstan-

tial. Failure to tender the weapons shows that it would have been unfavourable to them if tendered. See Section 149 (d) of Evidence Act.

The other issue which vitiates the trial of the respondent is the action of the learned trial judge who, after he rejected the alleged confessional statement of the respondent for having been extracted from him by torture and force, nonetheless relied upon it and made findings to the detriment of the respondent. On page 71 of the record, the learned trial judge states as follows:-

“Failure of the Police to investigate the accused’s defence that he was arrested when he was looking for vehicle to board to the hospital to take food to his sick sister is not fatal to the case of the prosecution. Though his statements to the police were not admitted in evidence, in the interest of justice I took pain to read them And I discovered that he did not tell police that he was arrested when he was looking for vehicle to take him to the hospital to give food to his sick sister. I do not believe that the accused made such a statement to the police. I believe the evidence of PW3, Deputy Superintendent of Police who arrested the accused at the scene of the crime and recovered offensive weapons such as knife, matchet, screw driver, bunch of keys etc from him.”

There is no doubt that the learned trial judge relied on the alleged confessional statement of the respondent which had clearly rejected. The rejected statement was not legal evidence before the court. The said statement influenced the learned trial judge to take the decision he did against the respondent. It is settled law that when a finding of fact is based on inadmissible evidence, the finding is perverse and an appellate court has a duty to interfere therewith and set it aside. See *Olayinka V. State* (supra). I strongly hold the view that the Court of Appeal was right in setting aside the conviction and sentence of the respondent.

Based on the above and fuller reasons adumbrated in the lead judgment, I also agree that this appeal is devoid of merit and deserves an order of dismissal. It is accordingly dismissed by me. I affirm the order of acquittal and discharge entered for the respondent by the lower court. Appeal Dismissed.