

IN THE HIGH COURT OF JUSTICE, EDO OF NIGERIA
THE BENIN JUDICIAL DIVISION, HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, THE HON, JUSTICE E.O. AHAMIOJE -
JUDGE ON FRIDAY, THE 12TH DAY OF OCTOBER, 2012.

BETWEEN:

SUIT NO. B/33C/2006

COMMISSIONER OF POLICE í í .. í í í .

COMPLAINANT

VS.

- 1. AUGUSTINE OSAKUE
- 2. LUCKY ADODO
- 3. ISREAL AGHAZERUHE
- 4. OMONIGHO EBHODEM
- 5. MUSIBAU AMADU



ACCUSED PERSONS

JUDGEMENT

The 5 Accused Persons are arraigned on a three count charge as follows:

COUNT1: That you Augustine Osakue (m), Lucky Adodo(m), Israel Aghazeruhe (m) Omonigho Ebhodem(m) and Musibau Amedu(m) on or about the 17th day of June, 2005 at Asemota street, off Adolor Road, Ogida Quarters, Benin City. In the Benin Judicial Division conspired with others now at large to commit a felony to wit: Armed Robbery and thereby committed an offence punishable under section1

(2) (b) of the Robbery and Firearms (Special provisions) Act Cap. 398 Laws of the Federation of Nigeria 1990.

COUNT II: That you Augustine Osakue (m), Lucky Adodo (m) Isreal Aghazeruhe (m) Ebhodem (m) and Musibau Amedu on or about the 17th day of July 2005, at Asemota street, off Adolor Road, Ogida Quarters, Benin City in the Benin Judicial Division did rob one Fred Oyomire of the sum of ₦354,000(Three Hundred and Fifty Four Thousand Naira), one siemen camera GSM hand set and Jewelries while armed with guns, cutlasses and a battle axe and thereby committed an offence punishable under section 12 (2) (b) of the Robbery and Firearm (Special Provisions) Act Cap 398 laws of the Federation of Nigeria 1990.

COUNT III:That you, Augustine Osakue (m), Lucky Adodo(m), Israel Aghazeruhe(m) Omonigho Ebhodem(m) and Musibau Amedu on or about the 17th day of July 2005 at Asemota Street, off Adolor Road, Ogida Quarters, Benin City in the Benin Judicial Division did rob one Nicholas Oyomire of his Sony G.S.M hand set while armed with guns, cutlasses and a battle axe and thereby committed an offence punishable under Section 12 (2) (b) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990.

To prove the charges against the Accused persons, the prosecution called the five (5) witnesses. The Accused persons denied the charge, gave evidence on Oath, and the 5th Accused called two witnesses in support of his defence.

For the sake of convenience and good order, I shall summarize the case as presented by the prosecution briefly as follows:

PW1 is Fred Oyomire. He testified that he is a Motor Technician and live at NO. 9, Oyomire Street, off Adolor Street, Ogida Quarters, Benin city. He said that 1st Accused Person is his employee, whilst the 3rd Accused is his cousin or Nephew. He stated that on the 16/6/2005, between the hours of 9-10p.m., he was in his sitting room watching television. Suddenly, he saw two (2) boys with a cut to size double barrelgun. They ordered him to lie on the floor and he obeyed. They asked about his wife money, went into the bed room and ransacked it. They asked him when the wife will return from the market, he told them that he does not know. They ordered PW2 with a pot of soup from the corridor into the sitting room. He was asked to lie down with him on the floor. The son, PW3 woke up and started shouting when he could not find his handset, that the robbers ran away because of the shout of PW3 who ran to the parlour. When he got up he saw a boy lying with him on the floor. When he asked the boy how he got to his sitting room, he told him that the armed robbers ordered into the sitting room. He went into his room

and discovered that the handset and the money in the wardrobe had been stolen. That the money he worked with the 1st Accused on that day (₦7,000) he kept in his bible was equally stolen. That the wife told him that the sum of ₦354,000 she kept was stolen as well as her Jewelries. He took the boy he met in the room to the Police Station and lodged a complaint. He was later told by PW2 that he saw the 1st and 3rd Accused persons when the robbery was going on. They went and arrested them. The following day, he was informed that the 1st Accused Person gave the names of seven (7) other persons to the Police and they were arrested by the Police. He made statement to the Police and the matter was later transferred to State C.I.D., Benin for further investigation.

Cross-examined by A.E OKPOSIN, ESQ of learned counsel for the Accused persons, PW1 denied the suggestion that as at on the 16/6/2005, the 1st Accused was on longer working with him. That he only referred to him as his former boy in his statement to the Police because he had been arrested. That he did not lock the door to the sitting room on the day of the incident and that the light was on. That the 1st Accused Person had worked for him for 3 years before the day of the incident. That he would not know if the 1st Accused person was among the two boys that entered his sitting room on the day of the incident because he was so shocked when they entered. He stated that the house of the 1st Accused is opposite his house. He denied the fact that he had grudges against the 1st Accused because

he refused to allow him go after training with him. That it was not at the Police station that he knew the 3rd Accused is his Cousin.

PW2, is Augustine Ojo, is a student. He lives with PW1. He stated that sometime in the month of June 2005, he was in the Kitchen cooking. After cooking he carried the pot of the soup when he met a boy standing at the corridor of the house holding a gun. That the boy ordered him into the sitting room. As he was moving into the sitting room, he saw the 1st Accused standing near the gate of the house at about 9.00pm. He said that the light was on that day. He stated that when he entered the sitting room, he saw the 3rd Accused and one other boy sitting down on the chair questioning PW1. They ordered him to lie down on the floor and one of the boys marched his head with his leg and asked him where the mother kept her money in the house, he told him that he did not know the particular place in the house. They went into the room, searched and took away certain things before they left. That PW3 later raised an alarm over his missing handset. He stated that he knew the 3rd Accused person because he is a relation of PW1 and he lives within their vicinity. That he knew the 1st accused person as a worker of PW1. He stated that the matter was reported to the Police the following day at Ogida Police Station, and he made a statement to the Police.

Under cross-examination PW2 stated that the kitchen at the back of the main house and a corridor leads from the kitchen to the house. That there is an uncompleted

house between the kitchen and the main completed house. That there are no doors installed in the uncompleted building. That no one can see the main gate of the house from the kitchen but can see it from the corridor. That when one steps out of the corridor, the door leads straight to the main gate. That he did not panic when the boy with gun ordered him into the sitting room. He said that the 1st Accused person was facing the building when he sighted him, but he did not know the clothes he wore. That he did not wear a face-cap. That he told the PW1 that he knew some of the Armed robbers that robbed him on the night of the incident. That he also told the Police at the station about the robbers and how he knew them. He said that the 1st Accused was living in the same street with PW1, whilst the 3rd Accused live at the street behind PW1's street. That he and PW1 knew the house of the 1st Accused person but did not go to his house on the night of the incident (16/6/2005). He said that it was the next day that the neighbors knew of the incident. That the 1st Accused was arrested in the house of one of the robbers. He stated that he did not see the 5th Accused Person on that day.

Next to testify is Nicholas Oyomire, PW3. He testified that on the 16/6/2005, he returned to the house at about 7.00p.m. He fell asleep while relaxing in his room. He woke up at about 9.00pm. but could not find his handset. He raised an alarm and ran to the sitting room where he met PW1, PW2 and one other boy

lying on the floor. He was told that they were attacked by armed robbers. He made a statement to the Police.

Under cross-examination, he stated that there are two buildings in the compound, and that the one at the back is uncompleted where he lives. He states that he did not tell the Police in his statement that it was the following day that PW2 told him that he knew the robbers.

PW4 is Corp. Jacob Adeyi. He began his testimony but on the 19/01/2010, M.E. Okojie, the Learned Director of Legal Drafting applied and was granted leave to dispense with his evidence.

The last witness is PW5, Corp. Igbe Ureko, the Investigating Police Officer. He stated that on the 25/6/2005, he was in the office when the 5 Accused Persons were transferred from Ogida Police Station to State C.I.D, Benin City in connection with an alleged case of conspiracy and armed robbery. He obtained cautionary statements from the Accused Persons which are admitted as **Exhibits A, B, C, D, & E** after a trial within-trial. He visited the scene of crime and executed search warrants in the houses of the Accused Persons and nothing incriminating was found. That the Accused persons were arraigned before a court.

Under cross-examination, he stated that he was not the person who took the statement of the Accused Persons to a superior officer for attestation. That the

investigation report was written by Corp. Jacob Adeyi. He stated that the Policemen at Ogida Police Station handed over to them a cutlass, some electronics and other items but did not know how they were recovered. That the I.P.O at Ogida Police Station made a written statement. That he confirmed that the 1st accused person was formerly working with PW1, but did not find out when he completed his apprenticeship with. That he confirmed that 3rd Accused is a relation of PW1. That the 3rd Accused live close to the house of PW1 and they are also related. That he visited the scene of the crime. That the scene of the crime, i.e. the house of PW1 was not fenced in 2005 when he visited.

At the close of the case for the prosecution, the 1st Accused testified that he was formerly living at No. 6 Asemota Street, off Siluko Street, Benin City. That he worked as a motor mechanic with the PW1.

He stated that in 2001, he started work with PW1 and completed his apprenticeship with him in 2005. After this, he told PW1 that he wanted to disengage to start his workshop, but PW1 refused to allow him go on the sole reason that he was the only competent mechanic working with him PW1 insisted that he must perform the ceremony involved in his disengagement. The mother accompanied him to PW1 to allow him start his workshop. He went and secured a place to work with another mechanic, and went to inform the PW1. He told him that he wanted to work with promised to pay him N6,000 per month. The PW1 was

not happy about it and threatened to deal with him. He said that he left PW1 and went to his new place of work at Textile Mill Road, Benin City. After he left, he was in the house one morning when he saw PW1 in company of his son, PW3 and four other boys. He went to PW1 to ask what happened. PW1 demanded for the handset he took from his house, and he told him that he did not take any handset. He was dragged to the house of PW1 which is on the same street with his house. When he got there, he met some members of PW1's family. PW1 brought out his car and took him to Ogida Police Station in company of PW3. He was detained for about 4 days. On the 5th day, the 2nd- 5th Accused Persons were brought to the Police Station. The Investigating Police Officer asked him if he knew the 2nd -5th Accused persons and he answered in the negative. He was beaten and asked to admit that he knew them but he refused. thereafter, they were transferred to State C.I.D, Benin City. At the State C.I.D, Benin City, PW1 told the Police that the matter had been settled. He was hung with an iron while his hands were tied. After this, he was forced to sign his statement without being read to him. He was also beaten with a cutlass. He stated that his house is directly opposite PW1's house. He denied the fact as alleged by PW2 that he was standing near the gate of PW1 on the day of the incident.

Under cross examination, the 1st Accused person stated that he told the Police when he completed his apprenticeship with PW1 and the disagreement they

had, but was not included in his statement. That he normally go to the house of PW1 when he was working with him, and well known to members of his family.

The 2nd Accused person stated that he was living along Asemota Street, Benin City before the day of the incident. He said that on the day he was arrested, he went with a bucket to fetch water form a borehole. When he got there, he met people on the queue. He dropped his gallon and went to near by chemist store to buy dugs. When he wanted to cross the road, he saw a bus coming on ahigh speed and he stopped. As the bus got to where he was standing, the driver stopped the vehicle in his front. He saw three men came down to arrest their vehicle in plain clothes. They came to him to say they have come to arrest him. He asked what he did but they refused to tell him. He was ordered to enter their vehicle to Ogida Police Station. He requested to allow him tell his parents but they refused and dragged him onto the vehicle. As he was dragging with them, they hit him with the butt of the gun and took him to Ogida Police Station. He was detained and later taken to State C.I.D., Benin City where he was told that he was arrested for armed robbery. That one Obaro took his statement. That **Exhibit 'B'** was not made by him and was never read to him by the Police. He said he did not write his name on **Exhibit 'B'**. That the Police did not recover any incriminating object from him.

The 3rd Accused testified that on the 17/6/2005, in the morning he wanted to leave for work when he saw Policemen surround his house. He said they were

looking for Israel and he came out to tell that he is the person. He asked them what happened, and they told him that he is a suspect in case of armed robbery. he was taken to Ogida Police Station. The IPO, Amayo started to beat him, and informed him that somebody told them that he took part in the robbery operation. He demanded to see the person but the Police refused to produce him after about 4 days in the cell, the Police brought the other Accused Persons and asked him if he knew them, and he answered in the negative. They were transferred to State C.I.D., Benin City where he was tortured. A search warrant was executed in his house and nothing incriminating was found. He said that PW4 wrote Exhibit 'C' and asked him to sign it. He was forced to sign after the torture.

Under cross examination, he denied knowing one Lugard, the alleged leader of a robbery gang. He also denied robbing PW1 with battle axe and cutlass. That he was never taken to any superior Police officer to attest Exhibit 'C'.

The 4th Accused testified that on the day of his arrest, he went out to buy things. On the way, he saw some persons walking towards him. As they met, the people held him. He asked them what happened he was told that he is a suspect in a criminal case. He was asked to follow them to the Police station, and he sent for his father who came to the scene. He was taken to the Ogida Police Station, Benin City and detained in the cell. After 5 days, he was transferred to the State C.I.D., Benin City. He was tortured and asked to sign a statement but he refused. The

I.P.O brought out a gun and threatened to kill him if he did not sign the statement. He signed it to avoid being killed by the Police. He said he did not know the PW1 before this incident and nothing incriminating was found in his house. That he did not tell PW4 that 10,000 was shared to him

Under cross examination, he stated that he did not go with the 1st Accused Person to rob PW1 and his wife.

The 5th Accused Person testified that before on the 17/6/2005, when he was arrested, he went to Obanosa street to work for DW1. He could not complete the work and decided to go back there on the 17/6/2005. DW1 left him to buy two bags of cement to enable him complete the work. He decided to leave there to call the boy who normally work with him, on his way, he saw a bus which passed him. After a few distance, the driver stopped the vehicle and a Policeman came with gum and asked him to stop. He asked what he did and was ordered to enter the vehicle. He was taken to Ogida Police Station and a Policeman brought out a cutlass and asked him if he knew Asemota's street where a robbery incident took place. He used the cutlass to hit before he made a statement. After about four (4) days, he was taken to the State C.I.D., Benin City, he was tortured and told to cooperate with the Police. He was eventually forced to sign the statement written by the Police. That he told the Police where he was working on that day and was

never taken to see DW1. He stated that he did not know the 1st-4th Accused Persons before the day of incident.

Under cross examination, the 5th Accused denied the fact that he normally accompany the wife of the PW1 to market, because of the interaction, he got to know that she had a lot of money. That he is not aware that he was arrested based on the confessional statement of the 1st and 2nd Accused Persons. He denied robbing the PW1 and his wife while armed with offensive weapons and collected the sum of N150,000 from them. He denied the fact that he was arrested at the back of St. Thomas Group of School, Ogida.

DW1, elder Roland Idada testified that sometime in the month of June 2005, he invited the 5th Accused Person who is a bricklayer to do the concrete of his compound. He supplied him the bags of cement and other material needed to do the work. Later he told him that he needed two extra bags of cement. He left the 5th Accused Person in the house to get the cement. When he returned, he could not find him. He went to report to his senior brother because the 5th Accused worked for him in 2002 and 2004. The brother pleaded with him to wait till the following day, and he did not see the 5th Accused Person. He stated that no Policeman came to his house to interview him since 2005 in respect of the matter. He was later told by the brother that the 5th Accused was arrested by the Police.

DW2 is Nosa Adams. He stated that he live in the same quarters with PW1 and PW5, and the 5th Accused Person is his younger brother.

He stated that some time in the month of June 2005, the wife of PW1 came to inform him that she was robbed. After about 3 days, PW1 came with the wife to his house again. PW1 told him that those who came to rob them must have been arrested by the Police, and that they can not identify the robbers. He advised that they employ local vigilante group to secure the area and they agreed. He stated that after about a week, he was shocked to find Policemen raiding their area and arresting some boys. He was shocked to find that the 5th Accused was also arrested. The 5th Accused Person and other boys arrested were taken to Ogida Police Station in a bus. At the Police Station, he saw PW1 and his wife who told him that he did not mention the names of the boys arrested by the Police. He stated that the 5th Accused was not intelligent and he sent him to learn a trade and was doing well as a bricklayer before he was arrested by the Police.

Under cross examination, DW1 stated that he was not invited to make statement and was told that his statement was not necessary by the I.P.O at Ogida Police station., he said that at State C.I.D., Benin City, he was not allowed to see the 5th Accused Person and could not have made statement.

At the close of the defense of the Accused Persons, A. E. Okposin Esq of Learned Counsel for the 1st -4th Accused persons formulated an issue for determination thus:

“Whether or not the prosecution has proved the charge of conspiracy and armed robbery against the 1st -4th Accused Persons beyond reasonable doubt?”

In respect of count 1, he submitted that the prosecution has not led credible evidence in proof of this offence beyond reasonable doubt. He gave a detailed review of the evidence of PW1, PW2, PW3, PW4 and PW5. He submitted that there are serious and material contradictions between the evidence of PW2 and PW5. That PW2 stated under cross-examination that the house of PW1 is fenced round with gate, but PW5 stated affirmatively that the house was not fenced as at 2005 when he went there. Learned Counsel submitted that this a major conflict which has cast doubt on the prosecution’s case; and cited *ABDULLAHI V. STATE (2008) 164 LRCN 96 AT 113*. He submitted that the prosecution never established any agreement by the Accused Persons by. That there is no evidence linking the 1st -4th Accused Persons as having participated in the crime. He submitted that the 1st and 3rd Accused Person were allegedly identified by PW2

He posited further that PW2 said that the 1st Accused was standing at the gate in the fenced compound, but PW5 contradicted this evidence when he said that there was no fence and gate. He submitted that PW2 stated that he could not identify what the 1st Accused wore and also did not mention the clothes the 3rd Accused wore and the colour of the face cap of the 3rd Accused, and cited ***ABDULLAHI V. STATE (SUPRA) AT 108; UDEH .V STATE (1999) 7 NWLR (PT. 609) 1, WAKALA V. THE STATE (1991) 8 NWLR (PT. 552) & R V TURNBULL (1976) CR APPEAL REPORT132.***

He submitted that PW2 never mentioned the names of the 1st and 3rd Accused Persons to the Police who are well known to him and relied on ***CHUKWU V. STATE (1996) 42 LRCN 1726 AT 1742***

On the issue of material contradiction, Learned counsel cited ***IKEMSON V. STATE (1989) 1 CLRN 1 AT 12, CHUKWU V. STATE (SUPRA) AT 1748, ATTAH V. THE STATE (2010) 183 LRCN 1 AT 21.***

He submitted that no other witness link the 1st -4th Accused Persons with the offence. That the alleged confessional statements of the 1st -4th Accused Persons have been retracted, and cited ***KAREEM V. FRN NO. 2 (2002) 8 NWLR (PT 770) 664 AT 683.***

Learned Counsel submitted that there is nothing outside the confessional statements to show that they are correct, and there is no corroboration.

He submitted that the Accused Persons were randomly arrested by the Police as buttressed by the evidence of the 2nd witness to the 5th Accused. That the evidence seem cogent, probable and was not controverted by the prosecution and he urged the Court to believe same. He submitted that the evidence of the prosecution witnesses were not consistent and he did not sufficiently connect the 1st & 4th Accused persons with the offence.

On count 2, Learned Counsel submitted that the evidence led is at variance with the charge as to the ownership of the money and jewelries which belong to the wife of PW1. That the wife of PW1 was not called to testify and no explanation offered for her absence. He submitted that none of the items stolen was recovered and the alleged weapons used were not tendered in court.

He submitted that the identification of the 1st and 3rd Accused Persons by PW2 is clouded with doubts. He submitted that PW1 worked with the 1st Accused, and the 3rd Accused being his relation was unable to identify them. He therefore urge the court to be cautious in believing the evidence of PW2, and referred to *ATTAH V. STATE (SUPRA) AT 35*.

In count 3, Learned Counsel submitted that there is no evidence from the prosecution in proof of the count. That there is no evidence to link 1st ó 4th Accused Persons with the offence alleged, and cited *NWATUTUOCHA V. STATE (2011) 197 LRCN 114 AT 132*. He finally urged the court to discharge and acquit the 1st ó 4th Accused Persons in Counts 1, 2 and 3.

Mr. O.G. Izevbuwa Esq, of Learned Counsel for the 5th Accused also formulated two issues for determination thus:

- (1) Whether on the stage (sic) of the evidence before the court, the prosecution has been able to prove beyond reasonable doubt the guilt of the 5th Accused Person?
- (2) Whether *Exhibit 'E'*, the purported confessional statement without more is sufficient to establish the guilt of the 5th Accused Person as charged.

On issue 1, Learned Counsel submitted that the prosecution has failed abysmally to establish the guilt of the 5th Accused Person. He submitted that no eye witness identified the 5th Accused Person at the scene of crime. That PW2 never made mention of the 5th Accused Person and did not identify him as one of the armed robbers on that day. He submitted that the prosecution is duty bound to establish the guilt of the accused person beyond reasonable

doubt, and cited **ABAYOMI V. THE STATE (2010) 1 WRN 41; ADEGBESIN V THE STATE (2010) 14 WRN 177 AT 187 – 188.**

He contended that there is fundamental inconsistencies between the evidence of PW1 and PW2 serious enough to cast doubts in the case of the prosecution. He urged the Court to believe the evidence of the 5th Accused Person and his two witnesses. He submitted that the prosecution failed to call the IPO at Ogida Police station as a witness. That the statement of the 5th Accused at Ogida Police station was not also made part of the proof of evidence before this Court which was made at the earliest possible time. That the prosecution failed to offer any explanation as to why they choose not to exhibit the statement ***ALLAH V. THE STATE (2010) 50 WRN 1 AT 23*** on contradiction.

On issue 2, Learned Counsel posited that even where an Accused in his Statement to the Police admitted committing the offence, the prosecution is still not relieved of the burden of proving the guilt of the Accused beyond reasonable doubt, and cited ***AWOSIKA V. THE STATE (2010) 18 WRN 149 AT 181, AIGBEDION V. THE STATE (2000) 7 NWLR (PT 666) 686.***

He submitted that in determining the truth or otherwise of a confessional statement, it is necessary to seek other evidence of

circumstances which makes it probable that the confession is true, and cited *IGRI V. THE STATE (2010) 7 WRN 21 AT 55*. He submitted that a statement made by a Accused remains his statement and not his evidence, and it is binding on him only; and cited *SUBERU V THE STATE (2010)183LRCN 55 AT 81*. He submitted that the statement of the co-Accused does not bind the 5th Accused, and therefore the prosecution never intended to use any of the to the co-accused statement against any of the Accused persons. That all the Accused stated that they never knew themselves, and no evidence was adduced to the contrary. He submitted that *Exhibit 'E'* was obtained through question and answer. And that a confession obtained through such process cannot be voluntary, and that a confession obtained through such process cannot be side to be answer, and referred to *SALAWU V. THE SAATE (2010) 28 WRN 149 AT 179- 180*.

He submitted that for a Court to convict an accused solely no his confession, such confession must satisfy the six tests laid down in *RABIU V. THE STATE (2002) 23 NWLR41 AT 75-76 -76 NWACHUKWU V. THE STATE (2002)12 NWLR (PT 782)543 AT 572, UBLERHO V. THE STATE (2005) 5 NWLR (PT 919)644 AT 685*. He submitted that there is no slightest evidence to satisfy the tests mentioned above by the prosecution. That there is nothing outside *EXHIBIT 'E'* to show that its content is true, it

was never corroborated, and the evidence of the prosecution witnesses did not tally with it. He finally urged the Court to discharge and acquit the 5th Accused person.

On his part, M.E. Okojie, Esq Learned Director of Legal Drafting submitted that the issue for determination is whether the prosecution has proved the case of conspiracy and armed robbery against the Accused Persons. He highlighted the ingredients of armed robbery which the prosecution must establish. He submitted that the requirement of the law is proof beyond reasonable doubt and not beyond shadow of doubt, and cited *EDAMINE V STATE (1996) 36 LRCN455, RATIO 3*.

He submitted that when a confessional statement is admitted in a criminal proceeding, it forms part of the case for the prosecution and becomes good evidence and no amount of retraction can vitiate the admission of the voluntary statement, and cited *IKEMSON V. STATE (1989) 1 AT 4 RATIO 4; R V. ITULE (1961) 1 ANLR 462; IKPESA V. STATE (1981) 9 SC 7*. He urged the Court to disbelieve the evidence of the 1st -4th Accused Persons. That the denial is an after thought.

He submitted that when a confessional statement is retracted it is desirable to have outside of the when a confessional some evidence of

circumstances which makes it probable that the confession is true, and highlighted the guiding principles for the weight to be attached to it, and cited *GIRA V STATE (1996) 37 LRCN 688 AT 704*.

He submitted that the Accused Person acted in agreement to commit the offence of robbery with arms. That where more than one person are charged with the joint commission of a crime, it is enough to prove that they all participated in a crime. That what each accused person did is immaterial.

He submitted that failure to call the Police official from Ogida Police Station is not fatal to the case of the prosecution. That calling of prosecution witnesses is at the discretion of the prosecution. That no obligation is placed on the prosecution to call a host of witnesses during the trial, and law is more concern with the quality of evidence adduced by the prosecution witnesses, and cited *OLAYINKA V. STATE (2007) 9 NWLR (PT.1040) 561*.

He submitted that there is no contradiction in the evidence of the prosecution witnesses, and if there is any, which is not admitted, it is immaterial. He submitted that PW2 actually stated in his statement that he was in the passage and not gate. That the importation of gate and fence by the defense is to becloud the facts in issue. He submitted that count 2 is not

at variance with the evidence of the provision. That the Accused Person is found to have robbed the N14, 000 which PW1 claimed to be his personal money out of N354, 000 said to belong to the wife. He submitted that PW4 and PW5 testified on how the statement of the 5th Accused was obtained and the issue of **Exhibit 'E'** being recorded through question and answer was never raised. He urged the court to disregard the point. He finally submitted that the prosecution had proved the case against the Accused Persons beyond reasonable doubt, and urged the Court to convict them accordingly.

It is pertinent to state that, it is the cardinal principle in a criminal trial and *afortiori*, in an armed robbery case that the onus is always on the prosecution to prove the guilt of the Accused Person beyond doubt, though not beyond any shadow of doubt. In other words, the burden of proof lies on the prosecution and it never shifts.

See **ESANGBEDO V. STATE (1989) NWLR (PT. 113) 57; MBENU V. STATE (1988) 3 NWLR (PT. 84) 615 AT 626; IGABELE V. STATE (2006) 6 NWLR (PT. 975) 100 AT 127; UBANI V. STATE (2003) 18 NWLR (PT. 851) 224.**

In a charge of armed robbery, the prosecution is required to prove by credible evidence the following:

- (a) That there was an armed robbery
- (b) The Accused was either armed with fire arm, or any offensive weapon, or was in company of any other person(s) so armed;
and
- (c) That the accused, while with the arm or arms, participated in the robbery.

**See OLAYINKA V. STATE (2007) 9 NWLR (PT. 1040) 561 AT 582;
TANKO V. STATE (2008) 16 NWLR (PT. 1114) 597, FRN V. USMAN (2012)
8 NWLR (PT. 1301) 141.**

In the instant case, the prosecution in proof of the offences as laid, relied essentially on the testimony of PW2, an alleged eye witness against the 1st and 3rd Accused Persons. In other words, there is no direct evidence of any eye witness account of the participation of the 2nd, 4th and 5th Accused Persons. Therefore, I propose to consider the case of the 2nd, 4th and 5th Accused persons together, and thereafter consider the 1st and 3rd Accused Persons.

As earlier stated, in proof of the offences charged, the prosecution called PW1- PW5 in support of its case against the 2nd, 4th and 5th Accused Persons. PW1, the alleged victim of the crime testified before this court and his evidence did not link the 2nd, 4th and 5th Accused persons with the commission of the offence of

armed robbery. PW2 gave evidence but only mentioned the names of the 1st and 3rd Accused Persons. PW3, the son of PW1 stated that he only woke up after the armed robbers had left their premises, and discovered that his handset was stolen. PW5, and the Investigating Police Officer stated that he executed a search warrant in the houses of the Accused Persons but found nothing incriminating against them.

In the case of **EMEKA V. STATE (2001) 14 NWLR (PT. 734) 668 AT 882**, it was held that the guilt of an Accused Person can be proven by:

- (i) Confessional statement of the Accused Person.
- (ii) Circumstantial evidence, and
- (iii) Evidence of eye witness of the crime.

In the instant case, the prosecution, however sought to rely on the alleged confessional statements, **Exhibits 'B, D and E'** made by the 2nd, 4th and 5th Accused Persons to the Police, in the absence of the evidence of eye witness of the crime.

Now, confession has been defined by Section 27 (1) of the Evidence Act 1990, to be admission made at anytime by a person charged with crime, stating or suggesting the inference that he committed that crime

It follows that once the Accused Person makes a statement under caution saying or admitting that he committed the offence(s) charged, the statement becomes confessional. And being so, it becomes relevant to the proceedings by virtue of Section 27(2) of the Evidence Act, which provides thus:

“A confession, if voluntary are deemed to be relevant facts as against the person who made them only.”

The law is firmly settled by strings of judicial authorities that a free and a voluntary confession which is direct and positive, and properly proved is sufficient to sustain a conviction without corroborative evidence, so long as the Court is satisfied with its truth. See *BRIGHTV. STATE (2012) 8 NWLR (PT. 1302) 297*, *DRIBE V. STATE (2007) 9 NWLR (PT. 1038) 30*.

It must, however be stressed that there is a duty on a trial Judge to test the truth of a confession by examining it in the light of other evidence before the Court. See *JIMOH YESUF V STATE (1976) 6 S.C. 167*.

In the instant case, as earlier stated, the 2nd, 4th and 5th Accused Persons in their evidence before the Court resiled or retracted from the contents of **Exhibits “B, D & E”**, their confessional statements to the Police. They gave different evidence from the facts stated in **Exhibits “B, D & E”**.

It is, now settled law by plethora of authorities, that where there is a confessional statement, the fact that it has been retracted does not preclude the Court from acting on it. In other words the mere fact that the Accused Person is now denying the admission, does not make it inadmissible. See **AKINMOJU V. STATE (2007) 77 LRCN 885; EDAMINE V. STATE (1996) 36 LRCN 455.**

In **IKE V. STATE (2010) 5 NWLR (PT. 1186) 41 AT 54-55**, the Court of Appeal held thus:

“An Accused Person’s confession is relevant and should not be disregarded merely because he later resiles from it. What is important is the weight the trial Judge will attach to such confession and retraction.”

In the case of **STATE V. SALAWU (2011) 8 NWLR (PT. 1279) 580 AT 625**, the Supreme Court held that though confessional statement is admissible, therein as necessity of corroboration to lend weight to the value of the statement and that could come from other evidence to underscore the exercise of caution to which the Court of trial is obligated so as to rule out any reasonable doubt that may be lurking in the corner. See **ISAH V. STATE (2007) 12 NWLR (PT. 1049) 582.**

In other words, it is desirable to have some evidence outside the retracted confession before a conviction is recorded based on the retracted confession.

In **NWAEGBONYI V. THE STATE (1994) 5 NWLR (PT. 343) 138 AT 150**, the Supreme Court reiterated the approach to be followed in assessing the quality or weight to be attached to a confessional statement whether retracted or not thus:

- (i) Is there anything outside the confession which shows that it may be true.
- (ii) Is it corroborated in any way?
- (iii) Are the relevant statement of fact made in it most likely true as farthey can be tested?
- (iv) Did the Accused have the opportunity of committing the offence?
- (v) Is the confession possible?
- (vi) Is the alleged confession consistent with other facts that have been ascertained and established.

See **OSENI V. STATE (2012) 5 NWLR (PT. 1293) 351 AT 374**.

It is, my view that whether a conviction is based on a confessional statement will depend or whether or not the confessional statement passed satisfactorily, the six tested listed above. I shall therefore evaluate the confessional statements, **Exhibits “B,D & E”** in the light of the totality of evidence before me.

Let me quickly say that in Exhibits "B, D & E". It was stated that the 2nd, 4th and 5th Accused allegedly robbed PW1 and members of his family while armed with battle axe, cutlasses and not gun. It was equally stated that they robbed PW1 of the sum of an150,000.00.

However, the PW1, the alleged victim of the crime stated emphatically that he did not see the 2nd, 4th and 5th Accused Persons on that day of the incident. He stated also that he did not mention their names to the Police as those who robbed him of his money on that fateful day. PW1 stated that the alleged armed robbers came to his house with a cut to size double barrel gun and not a battle axe and cutlasses. Furthermore, none of the alleged instrument used for the commission of the offence was recovered in the houses of the 2nd, 4th and 5th Accused Persons, and none was tendered as Exhibits before this Court during trial. PW5, Corp. Igbe Ureko, the IPO stated that the Policemen at Ogida Police station handed over to them a cutlass, some electronics and other items but did not know how they were recovered. He failed to tender the recovered items as Exhibits before this Court, and offered no explanation for his failure to produce and tender them in this case. The prosecution also failed to call the Policemen at Ogida Police station who allegedly recovered the items to testify before the Court as to where, when and whom the items were recovered from. PW1 also stated that his N7,000.00 and the wife's sum of N354,000 was stolen and her jewelries.

Besides, there is nothing in the evidence of PW2 and PW3 which corroborates Exhibits “B, D & E”. PW3 stated that he never saw the persons who took his handset, and therefore could not have known whether they were armed with gun (as alleged by PW1) or battle axe and cutlasses and as stated in Exhibits “B, D & E”.

Flowing from the above analysis, it is my firm but humble opinion, even at the risk of repetition that there is no evidence on record from the prosecution witnesses which corroborate the contents of Exhibits “B, D & E”, and there is nothing outside the said Exhibits “B, D & E”, to show that the contents therein are true. The prosecution witnesses particularly PW1 and PW2 categorically stated that those who robbed them were armed with gun, whilst Exhibits “B, D & E”, stated that they were armed with battle axe and cutlasses. In other words, the story of the alleged armed robbery as narrated by the prosecution witnesses do not tally with the contents of Exhibits “B, D & E”.

In the case of **JOHN V. THE STATE (2012) 7 NWLR (PT. 1299) 336 AT 355**, it was held by Court of Appeal thus:

õThe purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and

satisfactory and credible; and corroborative evidence will only fill its role if itself is completely credible evidence.ö

In the instant case, learned counsel for the prosecution Mr. M.E. Okojie sought to rely on the statement of the Accused Persons as providing corroboration to the confessional statement when he submitted at page 4 thus:

öSubmit that although corroboration is not a requirement in proof of armed robbery cases, the statement of the Accused which is admitted as Exhibits in this case shows that all the ingredients listed above are available in this case.ö

With due respect to the Learned Counsel for the prosecution, it is absolutely wrong to rely on the statement of the Accused as corroborative evidence of the confessional statement.

In **JOHN V. STATE (SUPRA) AT 355**, it was held by the Court of Appeal thus:

öIt is not proper for a Judge to use the evidence of an Accused to corroborate his confessional statement more especially when the Accused Person maintains a firm denial of the facts leading to his conviction.ö

In the instant case, the 2nd, 4th and 5th Accused Persons firmly denied the commission of the offences charged. The

Accused Persons stated that they were randomly arrested along the road by the Policemen at Ogida Police Station after the incident of the alleged robbery. The 5th Accused Person called two witnesses to support his assertion.

They stated that PW1, PW2 and PW3 did not mention their names to the Police as those who robbed them on that day. It is interesting if not remarkable to note that the statements of the Accused Persons made at the earliest opportunity upon their arrest by Ogida Police officers mysteriously disappeared from the Police case file. Their statements were never made part of the proof of evidence in the court's file, nor were the Learned Counsel for the Accused Persons furnished with the said statements made at Ogida Police Station. Moreover, during the course of trial, Learned Counsel for the Accused Person made application for the production of the statements of the Accused at Ogida Police station which the prosecution, failed, refuse or neglected to produce for their use at trial. Therefore, the evidence of the 2nd, 4th and 5th Accused Persons that they were randomly arrested or picked up by the Policemen along the road, at different and various locations without any person(s) identifying or mentioning their names to the Police as the alleged armed robbers who robbed

PW1 and members of his family remained challenged or uncontroverted. Therefore, the failure of the prosecution to call the Investigating Police Officer of Ogida Police station (a material witness), to testify to the circumstances of the arrest of the 2nd, 4th and 5th Accused Persons, and more importantly how and from whom he is allegedly recovered the cutlass, electronics and other items mentioned by PW5 is fatal to the case of the prosecution. It is, in my view, that this fundamental omission casts serious doubt on the reliability of the case of the prosecution against the 2nd, 4th and 5th Accused Persons.

It is, therefore, in my view, that **Exhibits "B, D & E"** cannot be said to be direct, positive and probable in view of the gaping omission in the case of the prosecution coupled with my earlier analysis.

Let me now return to consider the cases of the 1st and 3rd Accused Persons. I shall begin with the case of the 1st Accused Person.

In the instant case, the evidence led by the prosecution in proof of the charge against the 1st Accused is principally based on the evidence of identification by PW2, an alleged eye witness. What then is identification in Law?

Identification means a whole series of facts and circumstances for which a witness or witnesses associate a Defendant with the commission of the alleged

offence. It may consist of or include finger prints, hand writing, palm prints, voice, identification parade, photographs, or the recollection of the features of the culprit by a witness who saw him in the act of commission which is called in question or a combination of two or more of these. See **IBE V. STATE (1992) 5 NWLR (PT. 244) 642; STATE V. AIBANGBEE (1988) 3 NWLR (PT. 84) 548; (1989) 1 ACLR 168 EYISI V. THE STATE (2000) 15 NWLR (PT. 691) 555.**

In other words, an identification evidence is one tending to show that the person charged with an offence, is the person who committed the offence. In summary, an identification parade is limited to case or real doubt or dispute as to the identity of an Accused Person or his connection with the offence charged.

It is not conducted as it is not necessary where a witness or victim knew the culprit or Accused Person well before and gave his name. see **OBAKPOLOR V. THE STATE (1991) 1 NWLR (PT. 165) 113.**

In the case of **UKPABI V. STATE (2004) 11 NWLR (PT. 884) 439 AT 445, UWAIFO JSC** stated inter alia as follows:

“It is true that whenever the case against an Accused Person depends wholly or substantially on the correctness of the identification of the Accused, and the defense alleges that the identification was mistaken, the Court must closely examine the evidence. In acting on it, it must

view it with caution, so that any real weakness discovered about it must lead to giving the Accused the benefit of the doubt.ö

See **ABUDU V. STATE (1985) 1 NWLR (PT.1) 55 AT 61-62; (1998) 1 ACLR 411.**

In the case of **R V. TURNBULL (1976) 3 ALL ER 549; 3 WLR 445 AT 447**, Lord Wiggery C.J. in his immutable words, stated as follows:

öFirst, whenever the case against an Accused Person depends wholly ,or substantially on the correctness of one or more identifications ofthe accused which the defense alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the Accused person in reliance on the correctness of the identification or identifications.At what distance, in what light? Was the observation impeded in any way? Had the witness ever seen the Accused person?

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows,the jury should be reminded that mistakes inrecognition of close relatives and friends are sometime made.

All these matters got the quality of the identification evidence.

If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger.

It is in the light of the above principles; I shall critically examine the evidence of the prosecution witnesses, particularly that of PW2.

In the instant case, PW2, Augustine Ojo testified that on that day, he was in the kitchen cooking. After cooking, he carried the pot of soup when he met a boy standing at the passage of the house holding a gun. The boy with the gun ordered him into the sitting room. As he was moving into the sitting room, he saw the 1st Accused who was outside the house standing near the gate of the house at about 9.00 p.m. That there was light on that day, but did not know the clothes worn by the 1st Accused Person. He stated that the 1st Accused lives on the same street with PW1, and they knew his house but did not go to his house after the robbery.

It is demonstrable clear from the evidence of PW2 that the incident occurred at night i.e. about 9.00 p.m. which makes visibility poor or blurred or rather less bright than during the day time. It is also clear from the testimony of PW2 that he was confronted with the boy armed with a gun on the passage of the house for a very short time before he was ordered into the sitting room and made to lie on the floor, it is, also clear, from the testimony of PW2 that he had no opportunity to

observe any special feature of the 1st Accused and the clothes he wore on that day because of the short time he was confronted by the boy with gun.

In the case of the 3rd Accused Person, PW2 stated that he was ordered into the sitting room by the boy with the gun and asked to lie on the floor. He stated that when he entered the sitting room, he saw the 3rd Accused person and one other boy sitting down on the chair questioning PW1. He said that the 3rd Accused Person is a relation of the PW1.

The pertinent question that arises for determination is whether the evidence of PW2 is credible enough to convince this Court that the 1st and 3rd Accused Persons now standing trial are the same persons PW2 saw that robbed PW1 on that day of the incident.

Let me say and quickly too that PW2 must be a very courageous young boy who being confronted with a live gun was not only able to withstand the fright of the gun, but also to recognize a person standing some distance at the gate of the house. He must have what is known as "Dutch" courage. He must have had the courage of David who killed Goliath the giant with just a cater pot. His courage is unparalleled when compared to his age as a toddler being a secondary school student at the time of the incident. That fanciful story which he labored to build of his unparalleled courage, and bravado about his recognition of the 1st Accused Person

who was standing at the gate of the house collapsed like a pack of cards on the face of the testimony of PW5 the IPO who stated that the premises of PW1 was not fenced in 2005 when he visited the scene of crime, let alone having an erected gate. It is patently clear that PW2 who was confronted at the passage or corridor by a boy with a gun for a very short time; i.e. within some seconds, is very unlikely to have ample opportunity within such time and peculiar circumstances to recognize the 1st Accused whom he alleged was standing near a non-existent gate on the day of the incident. The evidence of PW2 is typical of a fleeting encounter which have been held to a suspect.

The case of the alleged recognition of the 3rd Accused by PW2 is ever more bizarre. PW2 stated that when he entered the sitting room, he saw the 3rd Accused Person and one other boy sitting down on a chair questioning PW1. However, PW1 who is a relation of the 3rd Accused and well known to him stated that the PW2 was ordered into the parlour with the pot of soup and asked to lie on the floor with him, and he obeyed. PW1 stated that he would not recognize the armed robbers because he was so shocked when they entered the sitting room. Strange as it may seem PW1 never stated before this Court that he saw the 3rd Accused let alone questioning him. If the 3rd Accused was indeed present with PW1 in the sitting room and being known to him, he would have been able to recognize him facial or through his voice when he was questioning him as alleged by PW2. That being the

position, I am satisfied that the so-called identification or recognition of the 1st and 3rd Accused Persons by PW2 is not completely free from doubt. It is settled law that what is required here is proof beyond reasonable doubt that the Accused Persons committed the offence charged and not the likelihood of having committed it. Tragically, the quality of evidence in support of the issue of identification or recognition of the 1st and 3rd Accused Persons by PW2 is very poor and unreliable. And the poorer the quality of such piece of evidence, the greater the danger of convicting on it.

This is not the end of the matter. It is significant to note that the 1st Accused Person is well known to PW1. In fact, he is an employee or rather works with him as a mechanic for over a period of 3 years before the date of the incident. The 3rd Accused is also known to PW1, and in fact his blood relation. It is also remarkable to note that PW1, live on the same Asemota Street, Benin City with the 1st Accused Person. In fact, the house of PW1 is opposite the house of the 1st Accused person, whilst that of the 3rd Accused Person live on the street behind that of the PW1. PW2 stated emphatically that he informed the PW1 that he recognized the 1st and 3rd Accused Persons as the armed robbers who robbed them, soon after the alleged armed robbery left the scene or crime on that day. In other words, he promptly told the PW1 on the day of the incident that he recognized the 1st and 3rd Accused Persons as the armed robbers. Strange and curious as it may seem, PW1, PW2, and

PW3 did nothing until the following morning when he reported the matter to the Police. The prosecution witnesses did not raise any alarm and the neighbors were unaware of the incident of robbery within their vicinity.

It is pertinent to state that in the normal course of human conduct, having regard to the previous knowledge of the 1st Accused Person place of abode, which is opposite PW1 house at No. 9 Asemota Street, and the house of the 3rd Accused, one would have expected PW1, PW2 and PW3 to raise alarm immediately the robbers left their house to invite neighbors and mobilize to the houses of the 1st and 3rd Accused Persons to confront them with the incident of the armed robbery which took place few minutes thereafter. It is also plausible that if the prosecution witnesses had immediately gone to the houses of the 1st and 3rd Accused Persons, there is the possibility of the items alleged stolen and the instrument used in the operation being recovered from them. Rather, the prosecution witnesses did nothing throughout the night but slept peacefully until the following day when PW1 went to the Police station to lodge a complaint. I am firmly of the view that the failure of PW1 and his witnesses to mobilize to the house of the 1st Accused which is opposite his house that night at the first opportunity cast a great doubt on the evidence of PW2 that he saw the 1st and 3rd Accused persons that night in the act of the robbery. From all the facts and surrounding circumstances of this case, it cannot be safely said that the identity of the 1st and 3rd Accused Persons as the

alleged armed robbers was established up to high degree required in criminal cases - that is ó established beyond reasonable doubt see *BOZIN V. THE STATE (1985) 7 SC 450*.

The next key fact which calls for emphasis is the failure of the Police to pay even a cursory attention, by the way of investigation to the 1st Accused Person claim that PW1 was angry because he, the only compete mechanic with him left to work with another person. That he completed his training with PW1 in 2005 and PW1 refused to pay him. That PW1 threatened to deal with him if he left his employment. PW5 stated that he confirmed that the 1st Accused was formerly working for PW1, but did not know when he completed his apprenticeship. If PW5 had contacted the mother of the 1st Accused Person to obtain her statement, and went further to investigate when he completed his training, and whether he left him to work with somebody else might have advanced the course of the truth in this matter.

It is, trite law, which needs no citation of authorities that a Court Must be wary in convicting an Accused Person based on the evidence of a witness who is shown to entertain grudges against the Accused person.

Let me turn to the issue of the alleged confessional statements made by the 1st and 3rd Accused Persons, **Exhibits "A and C"**. I had earlier in the course of this

judgment held that the facts stated in the alleged confessional statements, **Exhibits “B, D and E”** do not tally with the evidence of PW1, PW2, PW3 and PW5. My position has not changed with regard to the **Exhibits “A and C”** made by the 1st and 3rd Accused. I need only to reiterate that there is nothing in the evidence of the prosecution witnesses which **Exhibits “A and C”**. Suffices to say that in **Exhibits “A and C”** it was stated that the Accused Persons while armed with cutlasses and battle axe robbed the prosecution witnesses. However, PW1 and PW2 stated that the armed robbers were armed with cut to size barrel gun, this demonstrably shows that the story of the alleged armed robbery as narrated in the testimony of witnesses by the prosecution is radically different from what is/was stated by the police investigating police officer in **Exhibits “A and C”** respectively.

It is, my view, that **Exhibits “A and C”** cannot be said to be direct, positive and probable with regard to my earlier analysis.

Lastly, let me say a word or two about the Counts dealing with conspiracy. A charge of conspiracy purports an agreement formed by two or more minds with the intention to do an agreed but unlawful act. See *NWOSU V. STATE (2004) 15 NWLR (PT. 897) 466; STATE V. SALAWA (SUPRA) AT 610.*

It is, trite law, that a charge of conspiracy can be sustained where the substantive offence fails. However, for this to happen, the prosecution must lead direct and independent evidence in proof of conspiracy. Where the Court is urged to infer conspiracy from the proof of the substantive offence, the offence of conspiracy will sink or swim with the substantive offence. See *USUFU V. STATE (2007) 3 N WLR (PT. 1020) 94 AT 113*.

In the instant case, there is no iota or modicum of independent evidence from the prosecution witnesses in proof of the offence of conspiracy. The case of conspiracy is built on portions of the alleged confessional statement Exhibits “A-E” made by the Accused persons. I have earlier held that the evidence of the prosecution witnesses have cast serious doubt about the reliability of Exhibits “A-E”. In other words, the prosecution failed to discharge its duty to prove that Exhibits “A-E” are direct, positive and probable.

Before I put the last dot in this judgment, I wish to state that it is cardinal principle of the law that it is better for a guilty person to go scot free than to allow an innocent person to be condemned to death.

In the final analysis, I hold that the prosecution has failed woefully to prove the guilty of each of the Accused beyond reasonable doubt as required by law.

Accordingly, each of the Accused Person is hereby discharged and acquitted in counts 1, 2 and 3 of the charge.

í í í í í í í í í í í í .

E.O. Ahamioje

(JUDGE)

12/10/2012

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