**ADO**

**V**

**THE STATE**

SUPREME COURT OF NIGERIA

SC.139/2013

FRIDAY, 7 APRIL 2017

**LEX (2017) - SC.139/2013**

OTHER CITATIONS

3PLR/2017/28 (SC)

**BEFORE THEIR LORDSHIP**

WALTER SAMUEL NKANU ONNOGHEN JSC (Presided)

M. DATTIJO MUHAMMAD JSC (Read the Lead Judgment)

K. MOTONMORI OLATOKUNBO KEKERE-EKUN JSC

EJEMBI EKO JSC

SIDI DAUDA BAGE JSC

**BETWEEN**

SALE ADO (Alias Dangajere)

**AND**

THE STATE

**ORIGINATING COURT**

THE COURT OF APPEAL, KADUNA JUDICIAL DIVISION

KANO STATE HIGH COURT

**REPRESENTATION/LAWYERS**

Nureini Jimoh (with him, A. A. Muhammad, O. F. Osasona, Barbara Onwubiko, A. A. Abdulkareem and Saidat Abimbola) - For the Appellant.

Amina Yusuf Yarrayo, Director Legal Services (with him, Salisu Hamisu Danjidda, S.C, Zubaida Ado Ya’u PSC) - for the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW AND PROCEDURE:- Circumstantial evidence - Nature of - When sufficient to ground conviction.

CRIMINAL LAW AND PROCEDURE:- Conviction secured on lawful evidence - Criminal appeals with capital punishment- Duty of prosecution thereto

CONSTITUTIONAL LAW AND HUMAN RIGHTS - FAIR HEARING:- Denial of – Burden of proof=ving same – On whom lies – Party who fails to take opportunity offered to present own case - Where alleges denial of fair hearing – Attitude of Court thereto

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - FINDINGS OF FACT BY LOWER COURTS:- Where concurrent - Attitude of Supreme Court to invitation to interfere therewith

APPEAL - OBITER DICTUM:– Meaning of – Appeal filed against an obiter dictum - Competence of.

APPEAL - PROCEDURE CONSENTED TO:- Whether a party may appeal against same as of right.

COURT - SUPREME COURT:- Criminal appeals with capital offence – Attitude of the Supreme Court towards.

JUDGMENT AND ORDER - JUDICIAL PRECEDENT - STARE DECISIS:- Case - Relevance of as authority – Whether restricted to cases with issues/facts decided therein only.

JUDGMENT AND ORDER - JUDICIAL PRECEDENT - STARE DECISIS:- Doctrine of stare decisis - Applicability of - Decisions of Supreme Court - Bindingness of on all other courts.

EVIDENCE - CIRCUMSTANTIAL EVIDENCE:- Nature of – When sufficient to ground conviction.

EVIDENCE - FURTHER EVIDENCE AFTER CLOSE OF DEFENCE’S CASE AT THE TRIAL COURT:- Propriety of – Relevant consideration

EVIDENCE – WITNESSES:- Power of trial court to summon witness at any stage of proceedings - Section 237(1), Evidence Act, 2011 and section 36(1)(2)(a), 1999 Constitution in review

JUDGMENT AND ORDERS - JUDGMENT NOT APPEALED AGAINST:- Bindingness of Duty of appeal court thereto

JUDGMENT AND ORDERS - OBITER DICTUM:- Appeal filed against same - Competence of.

JURISDICTION - ISSUE OF:- Fundamental nature of - Lack of – Legal effect - How may be raised.

INTERPRETATION OF STATUTE - 237(1), EVIDENCE ACT, SECTION AND SECTION 36(1) (2) (A), 1999 CONSTITUTION:- Power of trial court to summon at any stage of proceedings – Statutory basis of

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant who was the Accused before the trial Court faced a criminal charge of conspiracy, robbery and culpable homicide. At the end of the case, he was convicted and sentenced for the offences of conspiracy, robbery and culpable homicide. Dissatisfied with this judgment, the appellant appealed to the Court of Appeal, complaining that the trial court granted the respondent to call and lead PW3, PW4, PW5 and PW6 in evidence after the appellant had testified and closed his case, and that this was improper. He further contended that the trial court’s order facilitating the wrong procedure stands in breach of section 36(9) of the Constitution of the Federal Republic of Nigeria, 1999 and section 237 of the Criminal Procedure Code under which it was made. The procedure, he contended, offered an opportunity to the prosecution to strengthen its case against him. He further contended that all the three heads of charge is based on circumstantial evidence

In response, the respondent contended that the respondent was forced to close its case on 7 July 2009 prematurely by the trial court. Faced with the untimely closure of its case, the respondent sought and obtained the trial court’s order pursuant to section 36 (6) (9) of the Constitution of the Federal Republic of Nigeria, 1999 and section 237 of the Criminal Procedure Code to enable it completely put its case against the appellant before the trial court. That, the trial court’s ruling allowing the respondent to call the witnesses has not been appealed against.

After hearing the parties, the Court of Appeal entered judgment on 14 March 2013 dismissing the appellant’s appeal against his conviction and sentence for conspiracy, robbery and culpable homicide by the Kano State High Court delivered on 27 July 2010.

Dissatisfied, the appellant appealed the decision of the appeal court to the Supreme Court.

**DECISION(S) APPEALED AGAINST**

The Court of Appeal, Kaduna Division entered judgment on 14 March 2013 dismissing the appellant’s appeal against his conviction and sentence for conspiracy, robbery and culpable homicide by the Kano State High Court delivered on 27 July 2010.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

“(1) Whether the learned justices of the Court of Appeal were right when they affirmed the procedure embarked upon by the prosecution at the trial.

(2) Whether the learned justices of the Court of Appeal were right in affirming the trial court’s decisions that the prosecution had proved their case beyond reasonable doubt and affirmed the conviction and sentence of the appellant.”

*BY RESPONDENTS*

[The Respondent adopted the issues formulated by the Appellant].

*AS ADOPTED BY COURT*

[The Court adopted the Issues presented by the Appellants].

DECISION(S) OF SUPREME COURT

1. The application to re-open prosecution’s case was filed with an affidavit in support. No counter-affidavit was filed and the application was not opposed. It is also borne out by the record that the premature closure of the prosecution’s case by the court was because of the persistent absence of Accused’s counsel. Having put its house in order, it sought and was granted without objection, leave to call its remaining witnesses. It was not a situation where the prosecution had voluntarily closed its case and then sought to re-open same after the defence had closed.

2. It therefore, does not lie in the mouth of the appellant to complain about the procedure they expressly consented to and approved. They are estopped from complaining about the procedure by operation of estoppel by conduct. The appellant has not shown that he suffered any miscarriage of justice upon the same procedure they expressly consented to and approved of.

Appeal dismissed. Conviction and sentence affirmed.

**MAIN JUDGEMENT:**

**MUHAMMAD JSC:** (DELIVERING THE LEAD JUDGMENT):

The Kaduna Division of the Court of Appeal, hereinafter referred to as the lower court, on dismissing the appellant’s appeal against his conviction and sentence for conspiracy, robbery and culpable homicide by the Kano State High Court, the trial court, affirmed the judgment of the latter delivered on 27 July 2010. Dissatisfied with the judgment of the lower court dated 14 March 2013, Sale Ado (Alias Dangajere), the convict, has appealed to this court on ten grounds.

In the appellant’s brief settled by Nuraini Jimoh Esq. and filed on 3 May 2013, two issues have been distilled as calling for determination of the appeal thus:

“(1) Whether the learned justices of the Court of Appeal were right when they affirmed the procedure embarked upon by the prosecution at the trial.

(2) Whether the learned justices of the Court of Appeal were right in affirming the trial court’s decisions that the prosecution had proved their case beyond reasonable doubt and affirmed the conviction and sentence of the appellant.”

These two issues have been adopted by the respondent in its brief.

The respondent who did not file any notice of preliminary objection, at paragraphs 3.00 to 3.11 of its brief, appears to be challenging the competence of some of the grounds in the notice of appeal and or issue(3) distilled from the grounds by the appellant.

The issue of jurisdiction is certainly a threshold one. It is either that a court has it and legitimately proceeds or in unlawfully proceeding, without the necessary jurisdiction, wastes not only the litigants but its own precious time. It is trite that proceedings of courts that lack jurisdiction, no matter how well same were conducted, are nullities. Jurisdiction remains the lifeline of all trials and that is why a challenge to the court’s jurisdiction, in order to save time and costs, are raised even viva voce and for the first time in this court. See N.D.I.C. v. Central Bank of

Nigeria (2002) FWLR (Pt. 99) 1021, (2002) 7 NWLR (Pt. 766) 272, (2002) 3 SC 1 and Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387, (1989) 20 NSCC (Pt. III) 177, (1989) 7 SCNJ 216.

Learned respondent’s counsel has however done the needful by conceding, at the end of arguments in respect of its objection that, in criminal appeals where sentence of death has been passed, as in the instant case, this court does not readily jettison the appellant’s right of appeal as conferred by the Constitution.

Instead, learned respondent’s counsel is right, this court will readily facilitate such a constitutionally guaranteed right. Learned counsel’s reliance on the decision of this court in Shola v. State (2005) 11 NWLR (Pt. 937) 460 at pages 488-489 and Dagayya v. State (2006) All FWLR (Pt. 308) 1212, (2006) 7 NWLR (Pt. 980) 637 at 655, in support of his submission in this regard is apposite. Appellant’s reply brief principally controverting respondent’s challenge to the competence of aspects of the appeal has, therefore, become otiose. Respondent counsel’s concession and the particularly overriding practice evolved by this court to hear and determine the appeal even if respondent has not withdrawn his objection make further consideration of respondent’s seeming objection to this court’s jurisdiction unnecessary. Now to the appeal.

On the 1st issue, learned appellant’s counsel contends that the leave the trial court granted the respondent to call and lead PW3, PW4, PW5 and PW6 in evidence after the appellant had testified and closed his case remains improper. The trial court’s order facilitating the wrong procedure stands in breach of section 36(9) of the Constitution of the Federal Republic of Nigeria, 1999 and section 237 of the Criminal Procedure Code under which, submits learned counsel further, it was made. The procedure, it is contended, offered an opportunity to the prosecution to strengthen its case against the appellant. Relying inter-alia on the cases of West v. Police (1952) 20 NLR 71; Ogbodu v. State (1987) 2 NWLR (Pt. 54) 20, (1987) 3 SC 497; C.O.P. v. Prediegha (1975) NNLR 270 and Onuoha v. State (1989) 2 NWLR (Pt. 101) 23, (1989) 2 SC (Pt. 11) 115, learned appellants counsel urges that this court interferes by setting aside the lower court’s affirmation of the trial court’s perverse judgment. Further relying on Kajubo v. State (1988) 1 NWLR (Pt. 73) 721, (1988) 1 NSCC 475, learned appellant’s counsel insists that the fact that appellant’s counsel did not oppose the prosecution’s application for the leave to call further evidence does not legalize the otherwise fundamentally irregular procedure that led to the conviction of the appellant. On the whole, learned counsel urges that the issue be resolved in appellant’s favour.

On the 2nd issue, learned appellant’s counsel submits that from the record of appeal, appellant’s conviction for all the three heads of charge is based on circumstantial evidence. The law, it is further contended, requires that such evidence be direct, positive, compelling and irresistibly pointing to no other conclusion than the appellant’s guilt. Once the possibility of any person other than the appellant intervenes as to who committed the offence, it is argued, the appellant cannot be rightfully convicted for the offence(s). The quality of circumstantial evidence the trial court relied upon to convict the appellant for the offences, learned counsel submits, which conviction the lower court affirmed, does not meet the criteria specified in Mbang v. State (2012) 6 SCNJ 395, Ubani Igri v. State (2012) All FWLR (Pt. 653) 1826, (2012) 16 NWLR (Pt. 1327) 522, (2012) 6 SCNJ (Pt. II) 360; Ubani v. State (2003) 18 NWLR (Pt. 851) 224, (2004) All FWLR (Pt. 191) 1533 and Okoro v. State (2012) All FWLR (Pt. 621) 1471, (2012) 1 SCNJ (Pt. 1) 36. Such evidence cannot sustain the convictions.

On the whole, learned counsel urges that both issues be resolved against the respondent and that the appeal be allowed. Responding to appellant’s arguments on the 1st issue, learned respondent counsel submits that the record of appeal belies learned appellant counsel’s contentions. It is evident from the record, he further submits, that the respondent was forced to close its case on 7 July 2009 prematurely by the trial court. Faced with the untimely closure of its case, the respondent sought and obtained the trial court’s order pursuant to section 36 (6) (9) of the Constitution of the Federal Republic of Nigeria, 1999 and section 237 of the Criminal Procedure Code to enable it completely put its case against the appellant before the trial court. The trial court’s ruling allowing the respondent to call the witnesses, it is submitted, has not been appealed against. Appellant’s reliance on the plethora of decisions of this court, on facts which are dissimilar to the instant case, learned respondent counsel submits, does not avail him. The appellant who has not in any way been put to any disadvantage by the procedure which allowed the respondent to put its case completely across to the court, it is argued, is not entitled to have the lower court’s judgment set aside.

On the 2nd issue, learned counsel for the respondent submits that a number of circumstances have been established by the respondent to establish the unbroken chain of evidence the trial court properly acted upon to convict the appellant. The inferences drawn from the circumstances built by the prosecution, it is submitted, points strongly to the appellant as being one of those who agreed with another to and indeed committed the offences for which they have been convicted. The strong, credible and unbroken chain of evidence which meets the requirements of the law does sustain appellant’s conviction. Failure of the prosecution to tender the weapon used by the appellant and his co-convict, submits learned respondent counsel, does not diminish the quality of the circumstantial evidence on which appellant’s conviction as affirmed by the lower court is founded.

To the contrary, it is argued, the grounds to warrant the intervention of this court have not been established by the appellant. Citing the cases of Adesina v. State (2012) All FWLR (Pt. 644) 1, (2012) 14 NWLR (Pt. 1321) 429, (2012) 6 SC (Pt. III) 159; Musa v. State (2009) All FWLR (Pt. 492) 1020, (2009) 15 NWLR (Pt. 1165) 467 at 488; Archibong v. State (2006) All FWLR (Pt.323) 1747, (2006) 14 NWLR (Pt.1000) 349 at 376; Olayinka v. State (2007) All FWLR (Pt. 373) 163, (2007) 9 NWLR (Pt. 1040) 561 at 575 and Jua v. State (2010) All FWLR (Pt. 521) 1427, (2010) 4 NWLR (Pt. 1184) 217 at 247, learned counsel submits that appellant’s second issue for the determination of the appeal does not avail him.

Concluding, learned respondent counsel argues that the appellant having failed to establish that the concurrent findings of the two lower courts are perverse, must fail in his appeal against the findings. Relying on Olaiya v. State (supra), learned counsel so urges.

Now, is learned appellant counsel correct in his submission that the lower court’s affirmation of the trial court’s resort to the testimonies of PW3, PW4, PW5 and PW6 is improper and perverse? I think not.

The appellant has asserted that the testimonies of the witnesses came after he had testified and closed his defence; that the leave granted the respondent to call these witnesses at that stage not only weakened his case but unjustly strengthened the respondent’s case. Learned respondent’s counsel, not unexpectedly, contends differently. What happened in the trial court, learned respondent counsel is right, is determinable by reference to the record of appeal. It binds both sides. An examination of the record, bears out learned respondent counsel and, belies the appellant’s claim.

It is evident from the record of proceedings, see page 27 thereat, that the respondent was, after series of futile adjournments to enable it call all it witnesses, forced by the trial court to close its case. This was on 2 July 2009. The appellant and his co-accused testified and closed their defence on 29 September 2009 from which date the case was adjourned to 10 November 2009 for judgment. By 28 January 2010 when the case resurfaced, with no clue as to what occurred from the date the judgment was to have been delivered, the respondent had filed an application for leave to call its outstanding witnesses. The application was granted on 2 February 2010. Thus PW3, PW4, PW5, PW6 and PW7 testified, see pages 32 to 42, between 25 February 2010 and 21 April 2010, consequent upon the leave, the trial court granted the respondent.

Appellant’s notice of appeal to the lower court against the trial court’s judgment dated 18 April 2011 was filed on 19 April 2011. None of the four grounds in the said notice challenged the trial court’s order granting leave to the respondent to call its remaining witnesses after the closure of appellant’s defence. Learned respondent counsel is on a firm ground that judgment of a court of competent jurisdiction subsists until set aside on appeal. Indeed, the appellant having not appealed against that order of the trial court is deemed to have accepted same as binding. See Chuba Chukwuogor & Ors. v. Chukwuma Chukwuogor & Ors. (2006) 7 NWLR (Pt. 979) 302, (2007) All FWLR (Pt. 349) 1154 and Victor J. Rossek v. African Continental Bank Ltd & Ors. (1993) 8 NWLR (Pt. 312) 382, (1993) LPELR - 2955 (SC).

Ordinarily, this would have brought the disclosure on appellant’s 1st issue to an end. However, the nature of the offences the appellant is convicted for and the enormity of the sentences imposed on him justify a further consideration of the issue. For completeness, a decision is required as to whether or not the evidence of PW3, PW4, PW5, PW6 and PW7 has indeed unjustly strengthened the respondent’s case.

In answering the very question in its resolution of the 2nd issue distilled by the appellant thereat, the lower court held at pages 147-148 of the record of appeal thus:

“However from what transpired in the present case, when the application for calling additional witnesses was made, the appellants counsel was there before the trial court and the learned counsel Mr. M. A. Lawal was asked and he conceded to the application to call additional witnesses before it was granted by the trial court. This concession of the learned counsel clearly has shown that whatever the case cited in the appellant reply brief ... amount to non-issue and the additional witnesses called (i.e. PW3-6) cannot be regarded as a nullity ... The learned trial judge was right when he used the additional evidence of PW3- PW6 in finding the circumstantial evidence as she did.”

I agree with and venture beyond the foregoing unassailable finding of the lower court.

My lords, the utility of precedents or the application of the doctrine of stare-decisis in the administration of justice cannot be over-emphasized. Under the doctrine, decisions of superior courts are binding on inferior courts. Thus, in the hierarchical system of courts we operate in this country, the decision of the Supreme Court is binding on all the other courts. See Suleiman v. Commissioner of Police, Plateau State (2008) All FWLR (Pt. 425) 1627, (2008) 8 NWLR (Pt. 1089) 298, (2008) 162 LRCN 155 at 188 and Abacha v. Fawehinmi (2000) FWLR (Pt. 4) 533, (2000) LPELR-14 SC.

Learned appellant’s counsel contends that the decisions of this court inter-alia in Onuoha v. State (supra) and Ogbodu v. State (supra), denouncing the recall of prosecution witnesses, after the close of defence in a case, unreservedly rule the instant case. Learned counsel insists that the failure of the two courts below to be bound by the decisions renders their concurrent convictions and sentence of the appellant unsustainable. I am unable to agree. Cases cannot be authorities for what they did not decide. A decided case furnishes a basis for the determination of a later case only if the facts or issues in the subsequent case are similar to those in the earlier case. Thus a lower court would not be bound to follow decisions of superior courts cited before it which decisions were not informed by similar facts or issues the lower court subsequently confronts. See Tejumade A. Clement & Anor. v. Bridget J. Iwuanyanwu & Anor. (1989) 3NWLR (Pt. 107) 39; Babatunde & Anor. v. Olatunji & Anor. (2000) FWLR (Pt. 5) 874, (2000) 2 NWLR (Pt. 646) 557.

Learned appellant’s counsel must be under serious misapprehension of what this court actually decided in the cases he cites and relies on. It has never been the decision of this court that prosecution witnesses should never be called or recalled, either by the court suo motu or at the instance of the prosecution, after the prosecution and nay any of the parties before the court, or the defence has closed their respective cases. The cases the appellant cites and relies upon in support of his contention, certainly, do not support his cause. From the case of Harvot v. Police 20 NLR 53, this court cited with approval in Denloye v. Medical and Dental Practitioners Disciplinary Committee (1968) 1 All NLR 306, (1968) NSCC 260 leading and not limited to Onuoha v. State (supra), this court’s decision is to the effect that, as a general principle of law and practice in our adversarial system, after the close of a case, no further evidence ought ordinarily be given by any of the parties. It is not the decision of this court that, in all situations, further evidence may not be given by any of the parties after the closure of defence. The court in Godwin Chukwuma v. Federal Republic of Nigeria (2011) All FWLR (Pt. 585) 231, (2011) 13 NWLR (Pt. 1264) 391, (2011) LPELR863 (SC) per my learned brother, I. T. Muhammad JSC asked the “pertinent questions” to which the trial court must find “potent” answers before allowing any of the parties to call further evidence after the case had been closed and date fixed for judgment thus:

“(I) Whether a trial court can re-open a case after it has been closed.

(II) If it can, what are the rights open to the other party (the appellant in this case)?

(III) Has the trial court in this case afforded the (accused) appellant such rights?”

In the instant case the witnesses testified pursuant to respondent’s application for leave to call them by virtue of section 36(1)(2)(a) of the Constitution of the Federal Republic of Nigeria, 1999, (as amended) and section 273 of the Criminal Procedure Code. The latter provision is particularly reproduced below for ease of reference.

“Section 237(1). Any court may at any stage of any trial or other judicial proceeding under this Criminal Procedure Code summon any person as a witness or call as a witness any person in attendance though not summoned as a witness, and shall summon or call any such person:

(a) If his evidence appears to the court to be essential to the just decision of the case; or

(b) On the application of the Attorney-General, and if such application is made, the accused shall have a similar right, on applying to the court, to have any person summoned or called as a witness by the court.

(2) The court may examine or allow the prosecutor or complainant or the accused, as the case may require, to examine any person summoned or called as a witness under this section, and shall allow the prosecutor or the accused person, as the case may require, to examine any person so summoned or called under paragraph (b) of subsection (I).

(3) Any person summoned or called as a witness under the provisions of this section may:

(a) if examined by the prosecutor or complainant be cross-examined by the accused and then re-examined by the prosecutor or complainant;

(b) if examined by the accused be cross-examined by the prosecutor or complainant and then be re-examined by the accused.

(4) Notwithstanding anything contained in section 222 of the Evidence Law, any person summoned or called as a witness under the provisions of this section who is examined by the court may be cross-examined by the prosecutor or complainant and by the accused.

(5) The powers conferred by this section may be exercised whether or not the person to be summoned or called and examined has already been examined as a witness in the proceedings.” (Italicizing mine for emphasis).

A reading of the foregoing clear and unambiguous provision shows the enormous powers the trial court enjoys in summoning witnesses at any stage of its proceedings, whether suo motu or at the instance of any of the parties thereto provided doing same does not overreach any of the parties to the proceedings. The section is in consonance with section 36 (1) (2)(a) of the 1999 Constitution and both provisions not only empower but place the duty on the trial court, given the facts of the instant case, to grant the respondent leave to call and lead all material evidence that would in one way or another help in the determination of the matter at hand. See Abdulkadir Gusau v. C.O.P (1968) NMLR 329; Adaje v. State (1979) 6-9 SC 18 and Opayemi v. State (1985) 2 NWLR (Pt. 5) 101, (1985) 2 NSCC 291 at 927.

The appellant who, from the record, did not object to the grant of the leave to call and had cross-examined all the witnesses the respondent called in furtherance of the leave obtained from the court, the lower court is right, cannot be heard to say that the procedure had in anyway either weakened his case or strengthened that of the respondent.

The law requires that the charge against the appellant be proved by evidence. Where conviction is secured based on lawful evidence and the appellant, as required by law, has had the opportunity of cross-examining the witnesses, neither the proceedings nor the conviction therefrom would be adjudged perverse. See Manawa Ogbodu v. State (1987) 2 NWLR (Pt. 54) 20, (1987) 3 SC 497, (1987) 1 NSCC 429 at 437 and Sunday v. State (2010) All FWLR (Pt. 548) 874, (2010) 18 NWLR (Pt. 1224) 223. I so hold.

Both sides agree, and rightly too, that the trial court’s conviction and sentence of the appellant which the lower court affirmed is founded on circumstantial evidence. What remains an issue between the two is as to the quality of the evidence. Whereas the appellant insists that the evidence is not of the quality this court decided may ground appellant’s conviction and sentence, the respondent submits to the contrary. Both appear to rely on the decisions of this court on the issue. And the two cannot, certainly, be right at the same time.

This court has held, in a seemingly endless body of its decisions, that circumstantial evidence is as good and sometimes even better than any other type of evidence; that the evidence comprises of a number of complete and unbroken chain of circumstances which if established to the satisfaction of the court entitles the court to act on same in convicting the accused; that in drawing inference of the accused’s guilt from such evidence, the court must necessarily exclude any co-existing circumstances which weaken or destroy the inference; that where the circumstantial evidence led against the accused is strong and gives rise to the irresistible, cogent and compelling inference of the guilt of the accused, leaving no room for any other rational conclusion, a conviction thereon may enure. See R v. Sala Sati (1938) 4 WACA 10; Paulinus Udedibia & Ors. v. State (1976) 11 SC 133 at 138, (1976) NSCC 669; Peter v. State (1997) 12 NWLR (Pt. 531) 1 and Yongo & Anor. v. State (1982) LPELR3528 (SC).

The question to answer in resolving the 2nd issue for the determination of this appeal, therefore is whether the evidence which grounds appellant’s conviction does constitute such unbroken chain of circumstances that leads compulsively, indisputably and conclusively to his guilt. See R v. Tepper (1952) AC 480 at 489; State v. Edobor (1975) 9 - 11 SC 69 at 77 and Orji v. State (2008) All FWLR (Pt. 422) 1093, (2008) 10 NWLR (Pt. 1094) 31. In my considered view, it does.

At page 73 of the record of appeal is the trial court’s summary of the evidence led by the respondent against the appellant and the court’s reasons for acting on same to convict the appellant. There at, the trial court enthused as follows:

“The evidence of the prosecution in the instant case is that the deceased was killed by the robbers who came to steal his guinea-fowl. The evidence of the PW5 to the effect that the deceased called out to him to come to his aid is cogent and compelling, so is the items discovered at the scene which were shown to belong to the 1st accused. The evidence of the PW3, the 1st accused’s neighbour and that of PW4 positively identified the shoes, facing cap and the stick found at the scene as belonging to the 1st accused. The evidence of these witnesses were not shaken under cross-examination. An essential ingredient of the offence of robbery under section 298(c) of the Penal Code is that the accused at the time of the robbery was armed with an offensive weapon.

Although the prosecution failed to tender the knife found at the scene along with items identified as belonging to the 1st accused, such failure is not fatal to the prosecution’s case since abounding evidence exists showing that the robbers were armed with an offensive weapon and indeed the offensive weapon i.e. a knife was actually recovered at the scene and taken to the police station. See the case of Olayinka v. State (2007) All FWLR (Pt. 373) 163, (2007) 9 NWLR (Pt. 1040) 561, (2007) 4 SCNJ 52 at 72.

The 1st accused person denied the items recovered at the scene of the crime however I find his denial unsubstantiated. The evidence of the prosecution witnesses is one that weighs heavily in my mind particularly as one of them is the 1st accused’s neighbour and ward head and both PW3 and PW4 are witnesses who knew the 1st accused very well. Though the evidence against the 1st accused on the offence of robbery is circumstantial, it is of such a nature that the evidence is positive, irresistible and leave no room for other explanation other than the guilt of the 1st accused.” (Italicizing supplied for emphasis).

In affirming the foregoing the lower court, per Dalhatu Adamu JCA (of blessed memory), concluded at pages 148-149 of the record thus:

“I therefore agree with the submission in the respondent’s brief that the circumstantial evidence relied on by the trial court to convict the appellants are direct and overwhelming. The findings of the learned trial judge was not perverse but based on the evidence of PW3, PW4, PW5 and PW6. Consequently, I am of the sound opinion that the conviction and sentence of the appellants based on circumstantial evidence was justified and the prosecution has proved its case beyond reasonable doubt. We are not interfering with the view of the trial court and its findings of facts - see Musa v. State (supra), cited in the respondents brief.”

The appellant is convicted for conspiracy, robbery and culpable homicide. The respondent through PW3, PW4, PW5 and PW6 provided evidence of an unbroken chain of circumstances that makes the inference of appellant’s guilt in all the three heads of charge irrestistible and compulsive: the deceased’s retort that he was being slain as his guinea-fowls were being stolen and his call for aid; the shoes, facing cap and stick all positively identified to belong to appellant; the fresh footsteps from the scene of crime leading to and ending at appellant’s abode. These, it is logical to presume, are not coincidental. The two courts are entitled to infer from all these pieces of evidence, in the absence of any explanation to the contrary, that the appellant and co-traveller are guilty of the offences. In evaluating the evidence led through the witnesses, including the appellant, the trial court demonstrated the advantage it had of seeing and observing them while testifying. Neither the lower court nor this court shares the same advantage, the non-availability of which disentitles either of the two from interfering with the trial court’s findings arrived at not only on the basis of the hard evidence put before the court but on the basis of the credibility of the witnesses as well. The trial court’s findings not being perverse, its affirmation by the lower court cannot be any different. It is not the practice of this court to interfere with these findings: Bashaya v. State (1998) 5 NWLR (Pt. 550) 351, LPELR-755 (SC) and Ubani v. State (2003) 18 NWLR (Pt. 851) 224, (2004) All FWLR (Pt. 191) 1533.

It is for the foregoing that both issues for the determination of the appeal are resolved against the appellant. On the whole, the unmeritorious appeal is hereby dismissed. The trial court’s judgment by the lower court is hereby further affirmed.

**ONNOGHEN JSC**:

I have had the benefit of reading in draft, the lead judgment of my learned brother, M. D. Muhammad JSC just delivered.

I agree with his reasoning and conclusion that the appeal is devoid of merit and should consequently be dismissed.

I therefore order accordingly and affirm the judgment of the lower court. Appeal dismissed.

**KEKERE-EKUN JSC**:

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

In support of the judgment I shall make a few comments in respect of issue 1, which challenges the procedure adopted by the trial court whereby the prosecution was allowed to call eight additional witnesses after the close of the defence.

In the process of establishing the charges of conspiracy, robbery and culpable homicide punishable with death under sections 97, 298(c) and 221 of the Penal Code respectively against the appellant and his co-accused, the prosecution called PW1 and PW2, police officers involved in the investigation of the offence. PW1 investigated the case of Gwarzo Division of the Nigerian Police Force before it was transferred to the State C.I.D. where PW2 took over the investigation. He sought to tender the extra-judicial statements of the appellant and his co-accused.

The defence objected on the ground that the statements were not made voluntarily. After a trial-within-trial, the statements of both accused were found not to have been voluntarily made and they were rejected.

As a result of the inability of the prosecution to proceed with the hearing of the case, due to persistent absence in spite of several hearing notices served on them, the court closed their case and the appellant and his co-accused opened their defence. They were cross-examined and at the close of their defence, the matter was adjourned to 10 November 2009 for judgment. The written addresses of counsel were to be deemed adopted.

On 2 February 2010, learned counsel for the prosecution moved a motion filed on 28 January 2010 for leave to call eight of its witnesses who were yet to testify and for an order staying the filing and adoption of final addresses pending the closure of the prosecution’s case after the evidence of the witnesses sought to be called. It is noted at page 32 of the record that learned counsel for the appellant, A. Lawal Esq., did not oppose the application. It was accordingly granted as prayed and the prosecution was given two consecutive days, 25 and 26 February 2010 for continuation of hearing. The prosecution called PWs 3, 4, 5, 6 and 7. All of them except PW5 were cross-examined by learned defence counsel. On 21 April 2010, learned counsel for the prosecution closed its case. Learned counsel for the accused persons stated thus at page 41 of the record:

“Gambo: The defence has closed its case before the prosecution re-open (sic) its case. We are also done. We ask for a date for address.” (Emphasis mine).

Both counsel urged the court to deem the written addresses to be filed as adopted so that a date for judgment could be given. The court obliged and adjourned the matter to 21 June 2010 for judgment. The appellant was found guilty on all three counts and sentenced to 3 years imprisonment for conspiracy, 5 years imprisonment for robbery and death by hanging for the offence of culpable homicide punishable with death.

It is noteworthy that there was no appeal to the lower court against the order made on 2 February 2010. There was also no attempt by the defence to call any other witnesses after PWs 3- 7 testified. Indeed, as shown above, learned counsel was content to rely on the case put forward by the defence prior to the evidence of the additional prosecution witnesses.

The law is that a party who has an opportunity of being heard but failed to utilise it, cannot be heard to complain of lack of fair hearing thereafter. See Darma v. Ecobank (2007) LPELR41663 (SC) at pages 18-19, paragraphs A-D; Okike v. Legal Practitioners Disciplinary Committee (2005) All FWLR (Pt. 266) 1176, (2005) 15 NWLR (Pt. 949) 471; Attorney-General, Rivers State v. Gregory Ude (2006) 17 NWLR (Pt. 1008) 436, (2007) All FWLR (Pt. 347) 598.

The appellant’s counsel had the opportunity, at the stage when the application to call further witnesses was made, to stoutly oppose same. He did not avail himself of the opportunity. Another opportunity presented itself to discredit the evidence of the witnesses during cross-examination. The appellant had yet another opportunity after the prosecution closed its case to re-open his defence and call evidence to repair whatever damage might have been done to his case by the evidence of these witnesses.

With due respect to learned counsel for the appellant, the case of Onuoha v. State (1989) 2 NWLR (Pt. 101) 23, (1989) 2SC (Pt. 11) 115 is clearly distinguishable from the facts of this case. In Onuoha’s case, the two witnesses called after the close of the case for the defence were called suo motu by the learned trial judge. It was obvious in that case that the learned trial judge had made an assessment of the case for the prosecution and found it wanting and therefore ordered the calling of two additional witnesses to clear whatever doubt he believed to exist in the prosecution’s case. There is no doubt that in those circumstances the learned trial judge descended into the arena in a manner that was highly prejudicial to the appellant.

In the instant case, an application was filed with an affidavit in support. No counter-affidavit was filed and the application was not opposed. It is also borne out by the record that the premature closure of the prosecution’s case by the court was because of the persistent absence of counsel. Having put its house in order, it sought and was granted without objection, leave to call its remaining witnesses. It was not a situation where the prosecution had voluntarily closed its case and then sought to re-open same after the defence had closed.

I find no merit whatsoever in this issue and accordingly resolve it against the appellant. I am in full agreement with the manner in which my learned brother, M. D. Muhammad JSC has resolved the second issue for determination. I agree with him that there was sufficient circumstantial evidence before the trial court to satisfy the burden of proof beyond reasonable doubt imposed on the prosecution. In the circumstances I hold that the appeal lacks merit. It is hereby dismissed. The judgment of the lower court affirming the appellant’s conviction and sentence by the trial court is affirmed.

**EKO JSC:**

The Kano State High Court had on 27 July 2010 convicted and sentenced the appellant for offences of conspiracy, robbery and culpable homicide punishable with death. The appellant’s appeal to the Court of Appeal (the court below) was dismissed. The court below affirmed the conviction and sentence imposed on the appellant.

In this further appeal to this court, the appellant has distilled two issues for the determination of his appeal. That is:

1. Whether the learned justices of the Court of Appeal were right when they affirmed the procedure embarked upon by the prosecution at the trial

2. Whether the learned justices of the Court of Appeal were right in affirming the trial court’s decisions that the prosecution had proved their case beyond reasonable doubt and affirmed the conviction and sentence of the appellant”

I read in draft, the lead judgment in this appeal just delivered by my learned brother, Musa Dattijo Muhammad JSC. It represents my views in the appeal. Accordingly, I hereby adopt the judgment including the consequential orders made therein.

My answers to the issue posed for the determination of the appeal are, therefore, that the learned justices of the Court of Appeal were right when they affirmed the procedure embarked upon by the prosecution at the trial. At page 27 of the record of appeal, the trial court issued an order foreclosing further evidence from the prosecution.

Thereafter, the 1st and 2nd accused persons testified and closed their defences. The trial court then ordered that written addresses be filed, and then adjourned the case for judgment on 10 November 2009. Judgment was not delivered, as ordered on the said date. The parties had not also filed written addresses as ordered.

On 28 January 2010, the motion to re-open the case for the prosecution to conclude their case was filed. The motion, heard on 2 February 2010, was not opposed. It was granted as prayed. The order re-opening the case was a consent order. It was not appealed.

At the resumed hearing of the case at pages 32-42 of the record of appeal, the prosecution witnesses were each cross-examined by the defence counsel. When the prosecution closed their case the response of the defence counsel, as to whether they would re-open their defence was, as recorded in the minutes of the proceedings:

“The defence has closed its case before the prosecution re-opened its case. We are also done. We ask for a date for address.”

It therefore, does not lie in the mouth of the appellant to complain about the procedure they expressly consented to and approved. They are estopped from complaining about the procedure by operation of estoppel by conduct. I cannot see how the appellant suffered any miscarriage of justice upon the same procedure they expressly consented to and approved of.

The case: Onuoha v. State (1989) 2 NWLR (Pt. 101) 23, (1989) 2 SC (Pt. 11) 115 and other authorities cited in aid of the appellant are completely irrelevant and not applicable to the facts of this case.

In any case, the appellant could not appeal or raise an issue against the consent order re-opening the case without leave of either the trial court or the Court of Appeal by virtue of section 241(2)(c) of the Constitution of the Federal Republic of Nigeria, 1999. The appellant cannot appeal a consent order as of right.

This issue of improper procedure was held by the court below to be a non-issue (per Adamu JCA) or a fresh issue arising from obiter dictum, which was raised for the first time in the reply brief (per Abiru JCA). The issue was discountenanced as arising from obiter dictum. The law is settled that an appeal or ground of appeal against mere obiter dictum, as opposed to the ratio decidendi of the decision appeal, is incompetent.

The finding of the trial court that the allegations against the appellant were proved beyond reasonable doubt was also affirmed by the Court of Appeal. My answer to the second issue: whether the learned justices of the Court of Appeal were right in affirming the trial court’s decisions that the prosecution had proved their case beyond reasonable doubt and affirmed the conviction and sentence of the appellant, is that the Court of

Appeal was right.

The alleged offences were committed in a small community where everybody knows what belongs to the other. The evidence of the PW3 and PW4 linking the appellant to exhibits A-A3, respectively the sandals and face cap (exhibits A and A2) belonging to the 1st accused and the trap (exhibit A3) belonging to the 2nd accused were undiscredited by cross-examination.

The evidence to the effect that footsteps from the scene of crime to the house of the 1st accused ended at the house of the 1st accused was also unscathed. The PW6 also testified that on the fateful day, the 2nd accused was emotionally agitated, and that he was going about saying that he had never seen such a horrible thing as he saw that day where a human being was being slaughtered like a ram was also not discredited. The only case of a human being slaughtered like a ram that day in the community was the alleged killing or slaughter of the deceased accused persons were charge for. When the 2nd accused, the appellant, testified he made no effort to deny the statement credited to him nor did he explain what he meant by saying he had never seen a human being slaughtered like a ram. He also did not explain why his trap was found at the locus criminis, where the birds were stolen and the owner slaughtered.

There has been no miscarriage of justice. The appellant has not shown any. There is no substance in this appeal. The appeal, lacking in merits, is hereby dismissed. The decision of the Court of Appeal is hereby affirmed.

**BAGE JSC:** I have had the privilege of the preview of the judgment just delivered by my learned brother, M. D. Muhammad JSC, I am in full agreement. I can only add a few words of my own in support.

The law is settled that this noble court, will not interfere with concurrent findings of the facts made by the trial court and the Court of Appeal unless such findings are perverse, or are not supported by the evidence or are reached as a result of a wrong approach to the evidence or as a result of wrong application of any principle of substantive law or procedure. See Arabambi v. Advance Beverages (Nig.) Ltd (2005) 19 NWLR (Pt. 959) 1, (2006) All FWLR (Pt. 295) 581.

In this case, since the appellant has not been able to show these findings to be perverse, this court cannot interfere with the decisions of both courts below.

The evidence of PW3, PW4, PW5 and PW6 are direct and clear and the appellant was not able to discredit it at the trial court.

I am satisfied that the conviction and sentence of the appellant based on evidence adduced at the trial court was justified and the prosecution has proved its case beyond reasonable doubt.

For the more detailed reasoning contained in the lead judgment, I also dismiss the appeal. The decision of the Court of Appeal affirming the conviction and sentence of the appellant is hereby affirmed.

Appeal dismissed.