**AFOLAHAN**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

15TH DAY OF DECEMBER 2017

SC. 447/2012

**LEX (2017) - SC. 447/2012**

OTHER CITATIONS

3PLR/2017/29 (SC)

**BEFORE THEIR LORDSHIPS**

OLABODE RHODES-VIVOUR, JSC (Presided)

MARK UKAEGO PETER-ODILI, JSC

CLARA BATA OGUNBIYI, JSC

AMIRU SANUSI, JSC

SIDI DAUDA BAGE, JSC (Read the Lead Judgment)

**BETWEEN**

AKEEM AFOLAHAN – Appellant

AND

THE STATE – Respondent

**ORIGINATING COURT**

1. COURT OF APPEAL, AKURE JUDICIAL DIVISION

2. HIGH COURT OF OSUN STATE HOLDEN AT OSOGBO

**REPRESENTATION/LAWYERS**

A. Olaleru, (with him, A. O. Oloriaje) - For the Appellant

A. A. Afolabi (with him, O. Afolabi) - For the Respondent.

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

CRIMINAL LAW AND PROCEDURE - ARMED ROBBERY:- Conviction for - What the prosecution must prove to secure.

CRIMINAL LAW AND PROCEDURE – “BEYOND REASONABLE DOUBT”:- Degree of reasonable doubt sufficient to justify an acquittal

CRIMINAL LAW AND PROCEDURE – CONFESSION:– What constitutes - Where involuntary - Inadmissibility of - Evidence Act, 2011, sections 28 & 29 considered.

CRIMINAL LAW AND PROCEDURE – CONSPIRACY:– Charge of - What prosecution must establish to succeed.

CRIMINAL LAW AND PROCEDURE – PRESUMPTION OF INNOCENCE:- Basis of - Section 36(5), 1999 Constitution considered – Duty on Court and prosecution thereto

CRIMINAL LAW AND PROCEDURE - GUILT OF ACCUSED - Onus on prosecution to prove crime alleged beyond reasonable doubt - When deemed discharged - Whether means proof beyond all shadow of doubt - Section 135, Evidence Act, 2011 in review

CRIMINAL LAW AND PROCEDURE - MATERIAL CONTRADICTIONS IN PROSECUTION’S CASE:- How determined - Proper approach of court thereto.

CRIMINAL LAW AND PROCEDURE - ACQUITTAL - Nature of - reasonable doubt sufficient to justify.

CONSTITUTIONAL LAW - SECTION 36(5), 1999 CONSTITUTION – Constitutional presumption of innocence – Necessity of affording same to an accused person – Effect of failure thereto

ETHICS - LEGAL PRACTITIONER:- Duty of candour as an officer of court - Where modifies quoted passage to suit his position - Impropriety of – 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.

EVIDENCE - BEYOND REASONABLE DOUBT:- Meaning of – State of the evidence in criminal proceedings required to uphold a reasonable doubt so as to justify an acquittal.

EVIDENCE - GUILT OF ACCUSED PERSON:- Prosecution - Onus on to prove case beyond reasonable doubt - When would be deemed discharged - Section 135, Evidence Act, 2011 in review

EVIDENCE - Material contradictions in prosecution’s case Proper approach of court thereto.

INTERPRETATION OF STATUTE - EVIDENCE ACT, 2011, SECTIONS 28 AND 29:– Confession – Statutory requirements for validity thereof

INTERPRETATION OF STATUTE - EVIDENCE ACT, 2011, SECTION 135:- Onus on Prosecution to prove beyond reasonable doubt – Statutory basis of

WORDS AND PHRASES – “BEYOND REASONABLE DOUBT” – Meaning of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant was arraigned at the High Court of Osun State sitting in Osogbo on a two-count charge of conspiracy to commit felony, to wit: armed robbery, contrary to section 5(b) of the Robbery and Firearms (Special Offences) Act Cap. 398 Vol. XXII, Laws of the Federation of Nigeria, 1999, and the offence of armed robbery contrary to section 1(2)(a) of the Robbery and Firearms (Special Offences) Act Cap. 398 Vol. XXII, Laws of the Federation of Nigeria, 1999. The prosecution called five (5) witnesses to prove its case. The appellant gave evidence in his defence and called another witness.

The case for the prosecution was that the appellant with others at large, at about 10:30 p.m on the 21 December 1999, robbed one Alhaja Sariyu at gun point while armed with guns, and dispossessed their victim of the sum of one hundred and forty thousand naira (N140,000.00) at No. 44 Kola Balogun Street, Osogbo, Osun State.

In his defence, the appellant denied participating in the crime for which he was charged. He said he only took somebody to the scene as a passenger on his commercial motorcycle popularly called “Okada”, which he rented from the owner on terms as to the amount of money to pay or ‘deliver’ to the owner on daily basis. The appellant said he had a disagreement with the passenger as to payment of his fare and that in the course of his disagreement with the passenger, he heard a gunshot which caused him to take to his heels. He was later arrested and charged for armed robbery. The trial court found him guilty on both counts. He was then convicted and sentenced to death by hanging. The verdict was affirmed by the lower court leading to this appeal.

Being dissatisfied with the decision of the lower court, the appellant appealed to the Supreme Court.

DECISION(S) APPEALED AGAINST

The Court of Appeal, Akure Dvision entered judgment, upholding the decision of the High Court, preceded over by the learned trial judge, Bada J. (as he then was) which had convicted and sentenced the appellant for the charge of armed robbery.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

(1) Whether the court below did not err in law when it held that the trial court was right in admitting exhibit “Q” in evidence in support of the prosecution/ respondent’s case. (Grounds 1 and 5).

(2) Whether the learned trial judge and indeed the justices of the court below were not in error when they appeared to presume that the mere fact that the appellant was caught at the scene of an alleged crime without more, makes him guilty of conspiracy to commit armed robbery and proceeded to hold that the prosecution proved counts 1 and 2 of charge No: HOS/702000 and Appeal No: CA/1/97/2005 beyond reasonable doubt and consequently convicted and sentenced the appellant to death by hanging thereby. (Grounds 1, 2, 3, 4, and 5).

(3) Whether there was sufficient evidence led from which the two lower courts could infer a conspiracy to commit an unlawful purpose to wit: armed robbery by the appellant? And whether the appellant who admittedly by evidence of PW1 was not one of the people that entered her house to commit the alleged act of armed robbery could have been convicted of the charge of armed robbery in all the surrounding circumstances of this case? (Grounds 1, 2, 3, 4 and 5).

*BY RESPONDENTS*

(1) Whether the learned justices of the court below in their decision upheld the admission of exhibit “Q” in evidence by the trial court and relied on same to affirm the conviction of the appellant.

(2) Whether by the totality of the evidence adduced the respondent proved the charge against the appellant beyond reasonable doubt.

*AS FORMULATED BY COURT*

Whether the learned trial judge and the court below erred in law in relying on exhibit “Q” and appellant’s presence at the scene of the alleged crime as basis for finding him guilty and consequently convicting him for conspiracy to commit armed robbery and the actual offence of armed robbery.

DECISION OF SUPREME COURT

1. The lower court expressed doubt that the alleged confessional statement of the accused was voluntary: a doubt that should have been resolved in the accused’s favour. The law is trite that any confessional statement obtained in an oppressive manner is liable to be vitiated for not being voluntary, and is thus inadmissible in law.

2. There was insufficient evidence left on record after excluding the confessional statement which could have sustained the verdict of guilt returned by the trial court. The inevitable conclusion is that the guilt of the appellant on the offence of conspiracy and armed robbery was not established. The appellant must therefore be discharged and acquitted.

3. There are obvious gaps, lacuna and seemingly irreconcilable doubts in the proceedings leading to the trial and conviction of the appellant, both at the trial court and at the court below.

*Appeal allowed. Order of conviction substituted with an order of acquittal and discharge.*

**MAIN JUDGEMENT**

**BAGE JSC:** (Delivering The Lead Judgment):

This is an appeal that arose from the judgement of the Court of Appeal of Nigeria, Akure division delivered on 8 May 2012, as contained at pages 128-158 of the record of appeal. In its judgment, the court below upheld the decision of the learned trial judge, Bada J. (as he then was) which had convicted and sentenced the appellant for the charge of armed robbery.

Being dissatisfied with the decision of the lower court, the appellant filed the instant appeal vide a notice of appeal dated 16 June 2014, and filed 18 June 2014, wherein he raised five (5) ground of appeal as contained at pages 162-167 of the record of appeal.

Summary of facts:

The appellant was arraigned at the High Court of Osun State sitting in Osogbo on a two-count charge of conspiracy to commit felony, to wit: armed robbery, contrary to section 5(b) of the Robbery and Firearms (Special Offences) Act Cap. 398 Vol.XXII, Laws of the Federation of Nigeria, 1999, and the offence of armed robbery contrary to section 1(2)(a) of the Robbery and Firearms (Special Offences) Act Cap. 398 Vol. XXII, Laws of the Federation of Nigeria, 1999.

The prosecution called five (5) witnesses to prove its case. The appellant gave evidence in his defence and called another witness. The case for the prosecution was that the appellant with others at large, at about 10:30 p.m on the 21 December 1999, robbed one Alhaja Sariyu at gun point while armed with guns, and dispossessed their victim of the sum of one hundred and forty thousand naira (N140,000.00) at No. 44 Kola Balogun Street, Osogbo, Osun State.

In his defence, the appellant denied participating in the crime for which he was charged. He said he only took somebody to the scene as a passenger on his commercial motorcycle popularly called “Okada”, which he rented from the owner on terms as to the amount of money to pay or ‘deliver’ to the owner on daily basis. The appellant said he had a disagreement with the passenger as to payment of his fare and that in the course of his disagreement with the passenger, he heard a gunshot which caused him to take to his heels. He was later arrested and charged for armed robbery.

The trial court found him guilty on both counts. He was then convicted and sentenced to death by hanging. The verdict was affirmed by the lower court leading to this appeal.

Issues for determination:

The appellant filed his brief of argument dated 27 June 2014, and formulated three issues for determination before this court. The appellant also filed a reply brief dated 16 October 2014.

On its part, the respondent filed respondent brief dated 19October 2014, and formulated two issues for determination.

The issues formulated by the appellant are:

(1) Whether the court below did not err in law when it held that the trial court was right in admitting exhibit “Q” in evidence in support of the prosecution/ respondent’s case. (Grounds 1 and 5).

(2) Whether the learned trial judge and indeed the justices of the court below were not in error when they appeared to presume that the mere fact that the appellant was caught at the scene of an alleged crime without more, makes him guilty of conspiracy to commit armed robbery and proceeded to hold that the prosecution proved counts 1 and 2 of charge No: HOS/702000 and Appeal No: CA/1/97/2005 beyond reasonable doubt and consequently convicted and sentenced the appellant to death by hanging thereby. (Grounds 1, 2, 3, 4, and 5).

(3) Whether there was sufficient evidence led from which the two lower courts could infer a conspiracy to commit an unlawful purpose to wit: armed robbery by the appellant? And whether the appellant who admittedly by evidence of PW1 was not one of the people that entered her house to commit the alleged act of armed robbery could have been convicted of the charge of armed robbery in all the surrounding circumstances of this case? (Grounds 1, 2, 3, 4 and 5).

On its part, the respondent formulated two issues for determination, thus:

(1) Whether the learned justices of the court below in their decision upheld the admission of exhibit “Q” in evidence by the trial court and relied on same to affirm the conviction of the appellant.

(2) Whether by the totality of the evidence adduced the respondent proved the charge against the appellant beyond reasonable doubt.

In determining this appeal, I have formulated one issue for determination. This is because, from the briefs filed by the parties, one issue is central, which is: Whether the learned trial judge and the court below erred in law in relying on exhibit “Q” and appellant’s presence at the scene of the alleged crime as basis for finding him guilty and consequently convicting him for conspiracy to commit armed robbery and the actual offence of armed robbery.

Consideration and resolution of the issue:

The appellant’s counsel premised his submission on issue 1, on wrongful admission of exhibit “Q.” The learned counsel for the appellant contended that, quoting him, “the learned trial court and indeed the Court of Appeal erred in law when they admitted exhibit “Q” and relied on it in finding the appellant guilty of the 2 count charge of conspiracy to rob and robbery and proceed therein to sentence him to death by hanging (sic)”.

The learned counsel to the applicant planked his submission on section 28 of the Evidence Act, 2011 and the case of Shella v. State (2007) 18 NWLR (Pt. 1066) 240 at page 292, paragraph H; Saibu v. State (1982) 4 SC 41 at 258 and Ibrahim v. R (1914) A.C. 599 at page 609.

Counsel also placed reliance on the provisions of sections 29(2) and (5) of the Evidence Act (supra) which he quoted verbatim, and submitted that by a combined reading of sections 28 and 29 of the Evidence Act, any confessional statement made by an accused person as a result of the use of threat or the use of actual violence to the body of the accused person is rendered inadmissible. He argued further that any confessional statement obtained in an oppressive manner is liable to be vitiated for not being voluntary, and is thus, inadmissible in law. Counsel cited the Supreme Court’s decision, per Ngwuta JSC in State v. Salawu (2011) All FWLR (Pt. 594) 35, (2011) LPELR - 82, (2011) 18 NWLR (Pt. 1279) 580 at page 605, paragraphs C-F.

The appellant counsel argued further that his client did not make the confessional statement (exhibit Q). Counsel contended that, the essence of his evidence at trial-within-trial at page 24 of the record of appeal, is to the effect that the policemen knocked his head against the wall and that he was mercilessly beaten and that the policemen used carpenters’ instruments to injure him in his chest and shoulders. Counsel submitted that the evidence of beating, torture, inhuman treatment and oppression of the appellant were not rebutted by the respondent, as the appellant was not cross-examined on this issue. Thus, the evidence is admitted.

Counsel stressed that the respondent has been unable to prove beyond reasonable doubt that the confessional statement was voluntarily made by the appellant. Counsel relied on the case of Namsoh v. State (1993) 5 NWLR (Pt. 292) 129, (1993) 6 SCNJ (Pt. 1) 55 and submitted that where a statement is the product of a question and answer session between the police and the defendant, such a statement cannot be regarded as being voluntary. Counsel posits that the involuntariness of the appellant’s confessional statement coupled with the prosecution’s failure to prove beyond reasonable doubt were enough for the trial court not to have relied on the evidence to convict the appellant in this case. Counsel stressed the point that outside the confessional statement, there was no evidence on which to anchor the conviction and sentence of the appellant.

The learned appellant’s counsel concluded on this point by urging this court to set-aside the conviction and death sentence of the appellant, as the case failed the impotent test of voluntariness. On the manner of taking the statement of the accused person by the police, counsel cited the case of Nsofor v. State (2004) Vol. 20 NSCQR 74, (2004) 18 NWLR (Pt. 905) 292 at pages 314-315, (2005) All FWLR (Pt. 242) 397, and submitted that the process of recording such statement does not allow the accused person to be subjected to all sorts of inhuman treatment by the law enforcement officers in order to obtain accused’s statement. Counsel differed with the position of the court on the effect of exhibit Q, as indicated at pages 152-153 of the record of appeal, where the lower court reasoned thus:

“I had earlier determined while resolving issue 1 that exhibit “Q” is not a confessional statement. The fact that it was not shown to have been made voluntarily did not affect its admissibility. Being just a statement obtained by the prosecution from the accused person, it is admissible as part of the case of the prosecution.”

The learned appellant’s counsel submitted that the distinction made by the court below on admissibility is strange and not tenable in law. Counsel urged this court to so hold. Counsel argued vehemently, that failure of the prosecution to call Akeem and Azeez, whom the appellant testified in his evidence that he carried on the motorcycle in the course of his business was fatal to the case of the prosecution. Counsel buttressed his argument with the provisions of section 167(d) of the Evidence Act, 2011 on presumption of evidence or fact not proved. Counsel also cited the cases of State v. Azeez (2008) All FWLR (Pt. 424) 1423, (2008) 14 NWLR (Pt.1108) 439 at 475, (2008) 4 SC 188, (2008) 4 SCNJ 325, (2008) LPELR - 3215 (SC) 20, para C; 501, page D and Salawu v. State (supra).

In his submission on issue 2, the learned counsel for the appellant argued that by virtue of section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), there is a presumption of innocence in favour of the appellant. The learned counsel also alluded to the standard of proof beyond reasonable doubt, as required under section 135(1) of the Evidence Act, 2011 to ground conviction of an accused person. He cited the case of Ani v. State (2009) All FWLR (Pt. 482) 1044, (2009) 16 NWLR (Pt. 1168) 443 at pages 457-458, paragraphs F-B. The learned counsel relied on the case of Ogudo v. State (supra) in amplifying what the prosecution must prove in respect of the offence of armed robbery.

These are that:

(i) There was a case of robbery;

ii) The robbery was carried out with the use of offensive weapons; and the accused person participated in the robbery.

The learned counsel submitted that the prosecution in the case at hand failed woefully to satisfy the above requirements. Counsel contended vehemently at page 24 of the appellant’s brief that the requirement of a common intention for an unlawful purpose was not satisfied, as the person who was identified as having drawn a gun in the course of the alleged robbery operation has been released without charge and without any explanation. Furthermore, the learned counsel for the appellant strongly contended that a certain “3rd alleged co-conspirator” has vanished into thin air with no explanation whatsoever for his whereabouts and the statement allegedly taken from him is not in evidence.

The appellant also contended, through his counsel, that the prosecution did not fulfil the legal requirement of the offence of armed robbery. The learned counsel highlighted the perceived contradiction in the decision of the lower court on pages 142- 143 of the record of appeal. The learned counsel also drew our attention to the fact that exhibit P.3, an English translation of exhibit P.4 is a concocted corroboration, which he described as being “perverse and unfounded” and made by the appellant’s adversary, in person of Sergeant Ologunde, the PW3. Counsel also alluded to the inability of the PW1 to identify the appellant as the person who robbed her at gun-point. This is because, the learned counsel for the appellant stressed, the only person the complainant (the PW1) identified as the one who robbed her at gun-point was not charged with the offence. For this and other reasons highlighted above, the learned counsel to the appellant submitted that the prosecution has not provided sufficient evidence to link the appellant to the alleged offence of armed robbery. This formed the basis of his plea to us to set aside the conviction of the appellant.

On issue 3, the learned counsel to the appellant contented that the finding of the lower court on page 155 of the record and the conclusion reached thereof is perverse (and/or erroneous) as the evidence did not emanate from the English translation of exhibit 3. Counsel then submitted that apart from the purported confessional statement of the appellant (which is challenged for not being voluntary), there is no direct or circumstantial evidence by either PW1, PW2, PW3 or PW4 suggesting that the appellant agreed or conspired with anyone to commit an unlawful purpose.

Counsel anchored this supposition on the fact that the alleged

“Principal Actor” who was arrested was released without any charges being brought against him. Counsel cited the case of Ikwunne v. State (2000) 5 NWLR (Pt. 658) 550 at page 561, paragraphs B-C to drive home his point.

In his conclusion, the learned counsel to the appellant amplified his contention that, it is not reasonable that an alleged conspirator who was said to be the one armed with a gun and whose evidence would have been very useful in proving conspiracy was arrested but was later released without charged and his testimony was not offered in evidence to sustain the charge of conspiracy against the appellant. The learned counsel urged this court to see reason to disturb the concurrent findings of the two courts below, and, in sum, to allow this appeal and set aside the decision of the courts below.

As I often say, a coin must always have the other side. The flip side of the issue in this appeal is presented in the 32 page respondent’s brief of argument dated 9 October 2014. In his respondent’s brief, the learned counsel for the respondent submitted that there is a slight misrepresentation on the part of the appellant of the purport and effect of the decision/position of the Court of Appeal on the opinion held by the trial court on the admissibility of exhibit Q and the weight attached to it by the trial court and court below. This is because, the learned counsel pointed out in the court below, at pages 139-140 of the record, he pointed out that (quote):

“Whether the accused was telling the truth or not, it is wrong in my view to have treated this statement as a confessional statement. The appellant did not therein admit participating in the robbery. Perhaps that was why PW5, Sgt. Lucky Uyabieme treated the statement with such laxity. He did not even counter sign the statement as the recorder. The learned trial judge was in my view wrong to have admitted Exhibit Q as a confessional statement voluntarily made. Issue 1 is resolved in favour of the appellant.”

I wish to observe, and to also point out that, the rules of English composition requires that a quoted portion of a statement must be reproduced verbatim, and any errors or language problems indicated as appropriate as having been imported directly in its original version or form. This is not the case in respect of the above-quoted portion. The above is contained at page 140 of the record. However, the respondent, while quoting same, did not copy the exact words of the quoted potion, as counsel reproduced the passage with modifications, to suit his position, in pages 9-10 of the respondent’s brief. Even though skipping are tolerated, appropriate indicators should be inserted to avoid distorting the original words or its meanings. While relying on the above quoted portion, the learned counsel for the respondent submitted that the lower court did not in any way affirm the decision of the trial court on the basis of admissibility of exhibit Q as a confessional statement voluntarily made by the appellant in upholding the conviction of the appellant. Counsel reiterated that the court below did not rely on exhibit Q in affirming the conviction of the appellant and further asserted that the court below arrived at a correct decision.

The learned counsel buttressed his arguments by citing the cases of Oredoyin v. Arowolo (1989) 4 NWLR (Pt.114) 172, (1989) 7 SC (Pt 11) 1 and Attorney-General, Rivers State v. Ude (2006) 7 SC (Pt. 11) 133, (2006) 17 NWLR (Pt. 1008) 436, (2007) All FWLR (Pt. 347) 598 at 610, paragraphs A-B.

On the need for every statement of an accused person sought to be relied upon by the prosecution to be voluntary, the learned counsel for the respondent also made recourse to the pages 152-153 of the record of appeal on the decision of the lower court particularly on exhibit Q, and submitted that the contentious exhibit ‘Q’ was not a confessional statement. He contended that the case of Nsofor v. State and Salawu v. State (supra) cited by the learned counsel to the appellant are not applicable. Counsel relied on section 251(1) of the Evidence Act and contended that assuming without conceding that exhibit Q was wrongly treated as a confessional statement, the appellant has not shown in their submission how the decision of the court below in this regards has occasioned a miscarriage of justice.

The learned counsel for the respondent contended that an appellate court will not quash a conviction or reverse a judgement where it is clear that expunging the admitted inadmissible evidence will not alter the decision of the court appealed against, citing the case of Okoro v. State (1998) 14 NWLR (Pt. 584) 181; Queen v. Haske (1961) 2 SCNLR 90 and Archibong v. State (2006) All FWLR (Pt. 323) 1747, (2006) 14 NWLR (Pt. 1000) 349, (2006) 5 SCNJ 202, (2006) LPELR 537, where the learned counsel for the respondent quoted extensively from the decision of the Supreme Court per Musdapha JSC, (as he then was). The learned counsel then urged this court to resolve issue one in favour of the respondent.

On issue two, the learned counsel relies on the case of Oduneye v. State (2001) FWLR (Pt. 38) 1203, (2001) 1 SC 1, (2001) 2 NWLR (Pt. 697) 311, (2001) 5 NSCQR 1, (2001) 83 LRCN 1, (2001) 1 SC (Pt.1) 6 and submitted that the prosecution has proved the alleged offence of conspiracy, since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties. He alluded to the evidence of PW2 and 4 and exhibits P.3 and P.4 in justifying his submission. The learned counsel contended that the prosecution has proved its case, as the standard of proof beyond reasonable doubt does not mean “proof to the hilt” or beyond all shadow of doubt. The learned counsel cited the case of Moses Jua v. State (2010) All FWLR (Pt. 521) 1427, (2010) 4 NWLR (Pt. 1184) 217, (2010) 1-2 SC 96, (2010) 2 MJSC 152, (2010) LPELR -1637 (SC). Counsel submitted further that there are cogent, direct and positive confession as well as eye witness evidence that positively identified the appellant as one of the armed robbers that robbed at the scene of the crime on the day of the incident. The learned counsel contented, at page 21 of the respondent’s brief, that the appellant placed himself at the scene by his own extra-judicial statement, which shows that he was not only at the scene but was part of the armed gang that struck at PW.l’s house.

On the issue of failure of the prosecution to either charge or call as witnesses certain “Azeez” and “Seun”, the respondent contended that the prosecution is not under any obligation to call them to resolve whether the appellant is a commercial motorcyclist that carried the suspects to the scene. Counsel pointed out further, that nothing stopped the appellant from also calling them as witnesses. In his final submission, the learned counsel for the respondent urged this court to resolve issue two in favour of the respondent, and to uphold the appeal and affirm the decision of the lower court which had earlier affirmed the judgement of the trial court.

In his reply brief of argument dated 16 October 2014, the appellant reiterated his earlier position that the lower court relied heavily on exhibits ‘P’ and ‘Q’ in convicting the appellant and that those were wrongly admitted and unreliable and cannot be the foundation upon which any judgment or conviction can be based. Counsel also urged us to discountenance the attempt of the respondent’s counsel to distinguish the case of Nsofor v. State and Salawu v. State (supra). Counsel further contended that there is nothing from the testimony of the witnesses to justify the conviction of the appellant. In sum, the learned appellant’s counsel also urged this court in his reply brief, to allow this appeal and set aside the decision of the lower court. I have decided to engage in detailed analysis of the submission of counsel in this appeal, for obvious reasons. Put differently, the basis of detailed evaluation of submissions made by the respective counsel in this appeal will become obvious or clear before or at the end of delivering this judgment. As clearly evidenced above, this appeal could be effectively resolved by answering one issue, which is that, as stated above:

“Whether the learned trial judge and the court below erred in law in relying on exhibit “Q” and accused’s presence at the scene of the alleged crime as basis for finding him guilty and consequently convicting him for conspiracy to commit armed robbery and the actual offence of armed robbery.”

I now return to answer the above question. The point that must be made, and clearly made, is that the appeal before us borders on conspiracy to commit the offence of armed robbery and the actual act of armed robbery. The offence of conspiracy to commit armed robbery is charged pursuant to section 5 (b) of the Robbery and Firearms (Special Offences) Act Cap 398 Vol.XXII, Laws of the Federation of Nigeria 1999 and while the actual act of armed robbery is charged pursuant to section 1(2) (a) of the Robbery and Firearms (Special Offences) Act Cap 398 Vol.XXII, Laws of the Federation of Nigeria 1999.

The offence for which the appellant is charged is a very serious one, and by virtue of section 135(1) of the Evidence Act 2011, the offence must be strictly proved by cogent and convincing evidence that leaves no iota or doubts or scepticism in the minds of the parties and members of the public, and I dare say this court. The section provides:

“135. Standard of proof where commission of crime in issue; and burden where guilt of crime etc. asserted.

(1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.”

It is now well settled that in our criminal jurisprudence, in order for the prosecution to succeed whenever the commission of a crime is in issue against an accused person, he is under a duty to establish its case beyond reasonable doubt. It must however be noted that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. I need to emphasize that in criminal proceedings, the onus is on the prosecution to establish the guilt of the accused beyond reasonable doubt and this would be achieved by ensuring that all the necessary and vital ingredients of the charge or charges are proved by evidence. See Yongo v. Commissioner of Police (1992) 9 SCNJ 113, (1992) 8 NWLR (Pt. 257) 36, (1992) LPELR - 3528 (SC); Ogundiyan v. State (1991) LPELR-2333 (SC),(1991) 3 NWLR (Pt. 181) 519; Akigbe v. IOG (1959) 4 FSC 203; Onubogu v. State (1974) 1 All NLR (Pt. II) 561, (1974) 9 SC 1 at 20; Babuga v. State (1996) LPELR-701 (SC), (1996) 7 NWLR (Pt. 460) 279.

The next question is, what is or are the quality, nature, context, manner and configuration of the totality of evidence before the trial court on the basis of which the appellant was convicted and sentenced? The appellant’s counsel had premised his submission on wrongful admission of exhibit Q. The learned counsel to the appellant contended that:

“The learned trial court and indeed the Court of Appeal erred in law when they admitted exhibit Q and relied on it in finding the appellant guilty of the

2 count charge of conspiracy to rob and robbery and proceed therein to sentenced him to death by hanging.”

The learned counsel to the applicant planked his submission on section 28 of the Evidence Act, 2011. Sections 28 and 29 of the Evidence Act, 2011, become relevant in the context of this appeal. Section 28 defines confession as: A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.

Section 29 states conditions for making confession relevant.

“(1) In any proceedings a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained:

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far of the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.

3. In any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either paragraph (a) or (b) of subsection (2) of this section.

(4) In this section “oppression” includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture.”

What is the essence of the above provisions? There is no ambiguity in the law. Clearly, the law intends that any confessional statement obtained in an oppressive manner is liable to be vitiated for not being voluntary, and is thus inadmissible in law. That was the decision of this court in State v. Salawu (2011) All FWLR (Pt. 594) 35, (2011) LPELR - 82, (2011) 18 NWLR (Pt. 1279) 580 at page 605, paragraphs C-F.

The appellant’s contention seems compelling; to the extent that he did not make the confessional statement (exhibit Q). This is premised on the ground that, in his evidence at trial-within – trial at page 24 of the record of appeal, the appellant stated in clear words that the policemen knocked his head against the wall and that he was mercilessly beaten and used carpenters’ instruments to injure him in his chest and shoulders.

I wish to pay particular attention to the position of the lower court on the effect of exhibit Q, as indicated at pages 152- 153 of the record of appeal, where the lower court reasoned thus:

“I had earlier determined while resolving issue 1 that exhibit “Q” is not a confessional statement. The fact that it was not shown to have been made voluntarily did not affect its admissibility. Being just a statement obtained by the prosecution from the accused person, it is admissible as part of the case of the prosecution.”

It is puzzling that the lower court acknowledged the fact that exhibit Q might not have been voluntary, but nonetheless, I think inadvertently, failed to give attention to the prejudicial effect of placing reliance on it in the arriving at its decision. The lower court had remarked at pages 134-140 of the record, that (quote):

“Whether the accused was telling the truth or not, it is wrong in my view to have treated this statement as a confessional statement. The appellant did not therein admit participating in the robbery. Perhaps that was why PW5, Sgt Lucky Uyabieme treated the statement with such laxity. He did not even countersign the statement as the recorder. The learned trial judge was in my view wrong to have admitted Exhibit Q as a confessional statement voluntarily made. Issue 1, is resolved in favour of the appellant.”

Resolution of issue one in favour of the appellant was in my considered view, enough to arrive at a different conclusion by the lower court. The question that follows is whether there was sufficient evidence left on record after excluding exhibit ‘Q’ which could have sustained the verdict of guilt returned by the trial court. The result is that, when the statement in exhibit ‘Q’ is excluded from the evidence, as it should be, the inevitable conclusion is that the guilt of the appellant on the offence of conspiracy and armed robbery was not established. The appellant must therefore be discharged and acquitted. See the case of Nsofor v. State (supra).

Another ‘cloud’ in the decision of the lower court is the inability of the prosecution to provide sufficient justification for failure to either charge or call as witnesses certain “Azeez” and “Seun”. On this, the respondent contended that the prosecution is not under any obligation to call them to resolve whether the appellant is a commercial motorcyclist that carried the suspects to the scene. The respondent also asserted that nothing stopped the appellant from also calling them as witnesses.

This is misplaced, in my considered view. This amounts to asking the appellant to prove his innocence. The law is since settled, and requires no citing of legal authority, the constitutional presumption of innocence under section 36(5) of the Constitution of the Federal Republic of Nigeria (1999) as amended which says “Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty;” is to the benefit of the accused person, the appellant in this appeal. As firm as the respondent might sound, the above, like exhibit ‘Q’ leaves some doubts in the minds of innocent by-standers as to the guilt or innocence of the appellant.

The learned counsel to the appellant had relied on the above among others in submitting that the prosecution had failed woefully to satisfy the requirements of conspiracy to commit the offence of armed and armed robbery. This is because a common intention for an unlawful purpose was not satisfied, as the person who was identified as having drawn a gun in the course of the alleged robbery operation has been released without charge and without any explanation. It is also the contention of the appellant that the 3rd alleged co-conspirator has “vanished into thin air with no explanation whatsoever for his whereabouts and the statement allegedly taken from him is not in evidence”.

This is also another weighty submission that deserves attention. Counsel also alluded to the inability of the PW1 to identify the appellant as the person who robbed her at gun-point. This is because the only person the complainant (the PW.1) identified as the one who robbed her at gun-point was not charged with the offence.

The reliance on exhibit ‘Q’ despite ruling it out of order as not being a confessional statement; failure to call “a 3rd alleged co-conspirator” who has allegedly “vanished into thin air with no explanation whatsoever for his whereabouts and the statement allegedly taken from him is not in evidence”; lack of sufficient justification for failure to either charge or call as witnesses certain “Azeez” and “Seun”; among others as highlighted above are crucial and necessitate revisiting the finding of facts by the two courts below.

The law is settled that there are concurrent findings of fact made by the High Court and Court of Appeal, the Supreme Court will not readily set them aside or substitute its own views unless there is no evidence to support the findings. See Re: Mogaji (1986) 1 NWLR (Pt .19) 759; Salami v. State (1988) 3NWLR (Pt. 85) 670; Mbenu v. State (1988) 3 NWLR (Pt. 84) 615. “per AKA’AHS JSC (P. 18, paragraphs D-F).

However, the instant appeal is one of those rare occasions that this court would revisit, for the purpose of fairness and justice re-assess and re-align the concurrency in the findings of the two Courts below us. The law is trite and well established that it is open for an appellate court to interfere with findings of a trial court when such findings have been made on legally inadmissible evidence, or they are perverse or are indeed not based on any evidence before the court. See the cases of Sele v. State (1993) 1 NWLR (Pt.267) P. 276 at 282, (1993) 1 SCNJ 15 and Iyaro v. State (1998) 1 NWLR (Pt. 69) 256. In this appeal, we found facts different from the two courts below.

A critical view of this appeal shows that apart from the confessional statement of the appellant (exhibit ‘Q’), which is challenged for not being voluntary, there is no direct or circumstantial evidence by either PWl, PW2, PW3 or PW4 suggesting that the appellant agreed or conspired with anyone to commit an unlawful purpose. More worrisome, the alleged or supposed “Principal Actor” who was earlier arrested was later released without any charges being brought against him. What is the effect of all these?

The above, in effect, casts serious doubts on the guilt of the appellant where there is or are doubts, as in this case, the law is settled that such must be resolved in favour of the suspect, the appellant in this case. Doubts, as in this case, must be necessarily be resolved in favour the appellant in line with the tradition of this court. In the case of Oforlete v. State (2000) FWLR (Pt. 12) 2081, (2000) 12 NWLR (Pt. 681) 415 at 436, (2000) 7 SCNJ 162, (2000) 7 WRN 80 at 106, (2000) 7 SC (Pt. 1) 80. Achike JSC., (as he then was) observed that, doubt (referring to doubt as to the possibility of the appellant committing the offence) must be resolved in favour of the appellant where the allegation of his offence has not been proved beyond reasonable doubt. This court per Wali JSC, (as he then was) held in the case of Chukwu v. State (1996) LPELR (856) 1, (1996) 7 NWLR (Pt. 463) 686 at 701, paragraphs G-H as follows:

“Where prosecutions evidence is found to be contradictory on a material issue, the court should give the benefit of that doubt to an accused person that stems from the non-credibility of such evidence and discharge and acquit him.”

This court had amplified the cardinal principle in criminal proceedings that the burden of proving a fact, which if proved would lead to the conviction of the accused, is on the prosecution who should prove such fact beyond reasonable doubt. In criminal cases, any doubt, as to the guilt of the accused arising from the contradictions in the prosecution’s evidence of vital issues must be resolved to the benefit of the accused. See Ahmed v. State (1999) 7 NWLR (Pt. 612) 641 at 673, (1999) 5 SC (Pt. II) 39, (2001) FWLR (Pt. 34) 438.

The law demands that, irrespective of sentimental and other subjective considerations, we must always step forward, to resolve doubt on the guilt of an accused in favour of the accused, the appellant in this case, as established and re-confirmed in several cases, not the least the cases of Kalu v. State (1988) 4 NWLR (Pt. 90) 503, (1988) 10-11 SCNJ 1; Ikemson v. State (1989) 3 NWLR (Pt. 110) 455, (1989) 1 CLRN 1, (1989) 20 NSCC (Pt. 11) 471, (1989) 6 SC (Pt. 1) 114, (1989) 6 SCNJ 54; Nnolim v. State (1993) 3 NWLR (Pt. 283) 569.

In concluding this judgment, I wish to reiterate that, as I have pointed above, there are obvious gaps, lacuna and seemingly irreconcilable doubts in the proceedings leading to the trial and conviction of the appellant, both at the trial court and at the court below us. To begin to enumerate them one after the other would be tautological having, sufficiently amplified those instances above.

In view of the foregoing, this appeal is resolved in favour of the appellant. The appeal is, consequently allowed. The judgment of the court below is set aside. The appellant is hereby discharged and acquitted of the charge of conspiracy to commit armed robbery and the main offence of armed robbery.

**RHODES-VIVOUR JSC:**

I have had the opportunity of reading in draft, the judgment just delivered by my learned brother, Bage JSC. I agree with the reasons he has given for allowing the appeal. The appellant is acquitted of the charge/s of conspiracy and armed robbery and discharged from court.

**PETER-ODILI JSC**:

I agree with the judgment just delivered by my learned brother, Sidi Dauda Bage and I shall make some remarks to properly register my support.

This appeal arose from the judgment of the Court of Appeal, Akure Division delivered on 8 May 2012, which upheld the decision of the trial court per Jimi Bada J (as he then was).

Facts briefly stated:

The appellant was arraigned before Jimi Bada J (as he then was) at Osun State High Court, Osogbo on a two count charge of conspiracy to commit felony to wit: conspiracy to commit armed robbery and armed robbery contrary to sections 5 (b) and 1(2) (a) of the Robbery and Firearms (Special Provisions) Act Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1990.

The prosecution called 5 witnesses while the appellant gave evidence in his defence and called another witness. The case for the prosecution is that on 21 December 1999, while one Alhaja Sariyu Aladorin, a trader (PW1) was praying in her house, she heard the voice of one Kemi outside the gateknocking and she instructed her daughter to open the gate for her. As soon as the gate was opened some men armed with guns entered the compound and commanded the woman to her room, beat her mercilessly and robbed her of the sum of N140,000.00. The men also took her passbooks of Savannah Bank Plc, UBA Plc and First Bank Plc, all in Osogbo. PW4 (the night guard) who had unknown to the assailants scaled the fence after the assailants entered the compound, caught the appellant at the gate of the victim. He managed to escape at first but was re-arrested few minutes later. After his arrest, he said he used Okada (motorcycle) to bring others who had run away but when the scene was checked no motorcycle was found around the area. During the investigation, it was discovered that a vehicle was snatched by, the assailants and when the vehicle was recovered, a savannah bank savings withdrawal book and identity card of the victim (PW1) were found in the car. When the appellant was interrogated by the police, he volunteered extra judicial statements exhibits “P3”, “P4”, and “Q” confessing that he participated in the crime.

In his defence, the appellant denied any participation in the crime. He said he only took somebody to the scene on his motorcycle as a commercial motorcyclist and that he was arrested at the scene, when he had a misunderstanding with the passenger as to the agreed fare.

After the address of counsel the trial court found the accused guilty on both counts and sentenced him to death by hanging.

The appellant dissatisfied with the said judgment, lodged an appeal against it at the Court of Appeal Holden at Ibadan. Judgment was delivered by the Court of Appeal, Akure on 8 May 2012. The court dismissed the said appeal as lacking in merit and affirmed the judgment of the trial court. This pending appear is against the judgment of the Court of Appeal, Akure affirming the judgment of the trial court.A. Olaleru Esq., learned counsel for the appellant on 5 October 2017, date of hearing, adopted his brief of argument filed on 11 July 2014 and reply brief filed on 17 October 2014. He formulated three issues for determination, the first and third of which he abandoned at the hearing and the surviving one is thus:

“Crime without more makes him guilty of conspiracy to commit armed robbery and proceeded to hold that the prosecution proved counts 1 and 2 of Charge No: NOS/7C/2000 and Appeal No. CA 1/97/2005 beyond reasonable doubt and consequently convicted and sentenced the appellant to death by handing thereby.” (Grounds 1, 2,3, 4, and 5).

Learned counsel for the respondents, Adewale Afolabi who is also the Attorney General of Osun State adopted its brief of argument filed on 13 October 2014 in which were crafted two issues for determination:

Issue I:

Whether the learned justices of the court below in their decision upheld the admission of exhibit Q in evidence by the trial court and relied on it in affirming the conviction of the appellant. (Grounds 1 & 3 of the Notice of Appeal).

Issue II:

Whether by the totality of the evidence adduced, the respondent proved the charge against the appellant beyond reasonable doubt. (Grounds 2 & 5 of the Notice of Appeal.

I shall make use of that surviving Issue 2 of the appellant in the determination of this appeal and I shall recast it as sole issue.

Sole issue:

“Whether the learned trial judge and indeed the justices of the court below were not in error when they appeared to presume that the mere fact that the appellant was caught at the scene of an alleged crime without more makes him guilty of conspiracy to commit armed robbery and proceed to hold that the prosecution proved counts 1 and 2 of charge No: HGS/7C/2000 and Appeal No: CA/1/97/2005 beyond reasonable doubt and consequently convicted and sentenced the appellant to death by hanging thereby?” (Grounds 1, 2, 3, 4 and 5).

Abiodun Olaleru of counsel for the appellant contended that there is a presumption of innocence of any accused person and the burden of establishing his guilt lies with the prosecution. He cited section 36 (5) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN). That section 135 (1) of the Evidence Act, 2011 sets out the standard of proof required of the prosecution in criminal cases. That if the commission of a crime by a party in any proceeding is directly in issue in any proceedings, civil or criminal, it must be proved beyond reasonable doubt.

He referred to Ani v. State (2009) All FWLR (Pt. 482) 1044, (2009) 16 NWLR (Pt. 1168) 443; That the respondent as prosecution failed woefully to satisfy the requirement of a common intention to commit an unlawful purpose on the part of the appellant and as such, could not have been said to have succeeded in proving the charge of conspiracy against, the appellant especially when one considers that the person who was identified as having drawn a gun in the course of alleged robbery operation had been released without charge and without any explanation and a third alleged co-conspirator had vanished into thin air, also without explanation as to his where about and the statement allegedly taken from him not in evidence. He cited Onyenye v. State (2012) All FWLR (Pt. 643) 1810, (2012) 15NWLR (Pt. 1324) 586 at 617, (2012) LPELR - 7866.

For the appellant, it was submitted that there was no shred of convincing corroborative evidence to shore up the so-called confessional statement, upon which the two lower counts relied heavily in convicting the appellant. Also, that the third ingredient of robbery there is the need to link the accused person by hard evidence to the commission of the offence. Mr. Olaleru of counsel submitted further that there are lots of doubts serious enough that would make the court find for the appellant. That the respondent failed to provide sufficient evidence linking the appellant to the alleged offence of armed robbery. That the absence of that hard evidence is fatal to the prosecution’s case. He referred to Ani v. State (supra) 458.

Learned counsel for the respondent Adewale Afolabi Esq. submitted that there is a slight misrepresentation of the purport and effect of the decision/position of the Court of Appeal on the opinion held by the trial court on admissibility of exhibit Q and the weight attached to it by the trial court and the court below. That aside exhibit Q there are other cogent and positive evidence upon which the conviction of the appellant can be based. That the appellant has not shown how the alleged moving admission of exhibit Q affected his case.

For the respondent, it was further submitted that the offence of conspiracy has been inferentially deducted from the acts of the parties towards the commission of the offence by the credible evidence of PW2, PW4 and the admission of the appellant in exhibit P4, the other extra-judicial statement, it was contended that the respondent proved the charge against the appellant beyond reasonable doubt by cogent, positive and reliable evidence as prescribed by law. Also, that the respondent was not obligated to call every conceivable witness the appellant thought may be helpful to him for his defence, having been able to advance enough evidence to prove the charge against him.

Again, the respondent is not under any obligation to charge all persons mentioned by appellants as accomplices or cohorts. The following cases were relied on: Okoh v. State (2014) All FWLR (Pt. 736) 443, (2014) 2-3 SC 184, (2014) 6 SCM; Arogundade v. State (2009) All FWLR (Pt. 469) 409, (2009) 2 SCNJ 44, (2009) 6 NWLR (Pt.1136) 165; (2009) 2SCM 40 at 46.

In reply on point of law, learned counsel for the appellant raised the fact that there were material inconsistencies between the evidence of PW2 and that of PW4 as to the number of persons involved in the robbery operation. The contending positions on either side are in the case of the appellant, that the prosecution failed to prove the offences for which the appellant was charged beyond reasonable doubt.

The reasons being that there was a dearth of evidence from which to draw the inference of these being a conspiracy to commit any unlawful purpose and that overall, the evidence led did not point irresistibly to the conclusion that the appellant was the person that committed the offence of armed robbery. The respondent holding the contrary view pointed to the confessional statement, exhibit Q which though rejected by the Court of Appeal did not detract from other corroborating evidence, cogent, positive and reliable linking the appellant to the offences charged.

A recourse to what is meant by proof beyond reasonable doubt would be helpful and I shall go to the case of Ani v. State (2009) All FWLR (Pt. 482) 1044, (2009) 16 NWLR (Pt. 1168) 443 per Tobi JSC thus:

“The expression beyond reasonable doubt in evidence means fully satisfied, entirely convinced. In criminal cases, the guilt of the accused mus t be established beyond reasonable doubts which means that the facts proven must, by virtue of their probative force, establish guilt. Reasonable doubt which will justify acquittal is doubt based on reason and arising from, evidence or lack of evidence, and it is doubt which a reasonable person might entertain and it is not fanciful doubt, is not imagined doubt. Reasonable doubt is such a doubt as would cause a prudent man to hesitate before acting in matters of importance to him.”

The importance of the phrase beyond reasonable doubt cannot be over-emphasised and so a long line of judicial authorities have not let off the opportunity to dwell on it in consonance with the Evidence Act section relating thereto. It is trite, that for the prosecution to establish the offences charged, it must prove beyond reasonable doubt that there was a robbery, with offensive weapons and. that the accused was involved in the operation.

The Supreme court has no difficulty in restating the above principles in the case of Ogudo v. State (2011) LPELR (SC) 51, (2011) 12 SC (Pt. 1) 71, (2011) 18 NWLR (Pt. 1278) 1, (2011) LPELR- SC 341 and held thus:

“All the above must be proved beyond reasonable doubt before a conviction can be sustained. Proof beyond reasonable doubt entails the prosecution producing enough evidence to justify the charge. The above ingredients were not proved in this case. In the case the learned trial judge believed the contents of exhibit “1” and disbelieved the testimony of the appellant on oath wherein he gave his own version of events. It amounts to improper evaluation of evidence for a judge to rely on his belief or disbelief.

The learned trial judge should ask himself the six questions earlier alluded to in this judgment and this includes looking for some independent evidence to corroborate or show that the confession is true. That was not obtained in this case”.

I shall go into the evidence of two of the prosecution witnesses so as to see how reliable they were to be taken in proof of the case at hand. PW2 stated:

“The 1st PW is a friend to my mother. I do not know the accused I remember 21 December 1999. At about 7p.m. on that day, my mother sent me to 1st PW and as I knocked the 1st PW directed that the door should be opened for me. As soon as Fatimo opened the door, 2 people entered along with me and one of them brought out a gun and asked for 1st PW but I replied that I do not know her. We were directed to lie flat on the floor and face the floor. While we were facing the floor, they went to Alhaja and she took them inside. Later one of them was arrested and the accused said he came with 3 other people. He was shouting Seun and Akeem.”

PW4 testified as follows:

“On 21 December 1999, I resumed duty at about 8pm and it was during the Ramadan Festival that PW1 use to party outside with other people in the house. At about 8.30 I heard a knock on the gate and one of the daughters of PW1 opened the gate, 4 people then rushed inside, 2 of them stood at the gate. One of the two who came used handkerchief to cover his nose and he brought out a gun. I was in the dark, they did not see me. I jumped the fence of the house of the PW1 into the Hospital and turned round to come to the front house. At that time two of the robbers were about to leave, I then held on to the accused who started struggling with me. And he managed to free himself from me but ‘he was rearrested. He said he used Okada to bring the other accused now at large but on getting outside there was no Okada around. He was taken to the Police Station at Ayetoro. We did not recover anything from the accused.

Court - The statement of Mufutau Jegede made to the police on 21 December 1999 is admitted in evidence without objection and is marked as exhibit “P5”.

The material contradictions occurred between the two testimonies as to the actual number of the participating criminals at the same event and time. The Court of Appeal in its summarization did not hold up a glorification flag to the case put up by the respondent when it held thus:

“It is clear that the evidence of PW1 in court mentioning the accused person as one of those that entered and were asking for her is inconsistent with her extra-judicial statement that she could not recognize the people that robbed as she was unconscious. The issue of the identity of the accused person as one of those who entered and robbed Alhaja is very material to the charge against the accused. I have carefully examined the judgment of the trial judge at pages 32-37 of the record of appeal, although his lordship dismissed the contradictions as immaterial and as not going to the root case, he did not base the conviction of the appellant on that aspect of PW1’s testimony. He relied mainly on exhibits P(sic P3 and P4) and Q, the alleged confessional statements. In the circumstances, in answer to issue

2, in respect of the evidence of PW1, I would say that the contradiction was material but since it did not form the basis of the judgment of the trial judge the question of treating her evidence as unreliable does not arise.”

The questioning nature from which the purported confessional statement, exhibit Q was obtained and was jettisoned by the Court of Appeal coupled by the material inconsistencies which rear up every now and then in the testimonies of the prosecution witnesses produce a scenario where the court cannot say no reasonable doubt occurred.

The situation applies in either the armed robbery charge or that of the conspiracy as the court cannot safely infer conspiracy from a dubious source of evidence. The resultant effect is that the standard of proof beyond reasonable doubt cannot be said to have been attained. Indeed this is one of those instances calling for the intervention of an appellate court such as the present one in spite of the concurrent findings of the two courts below. This is to avert a miscarriage of justice especially in the case at hand where doubts abound and should be resolved in favour of the appellant. See Yaro v. Arewa Construction Limited (2007) 17 NWLR (Pt. 1063) 333 at 373, (2008) All FWLR (Pt. 400) 603.

In conclusion and along the better reasoning’s in the lead judgment, there is merit in this appeal which I allow. I abide by the consequential orders as made.

**OGUNBIYI JSC:**

The appeal herein emanates from a concurrent judgment of the Court of Appeal, Akure Division. The appellant was arraigned on a two count charge of conspiracy to commit felony to wit: armed robbery. The appellant, a motorcycle rider was alleged to have robbed one Alhaja Sariyu Aladorin at a gun point while armed with a gun.

My learned brother Bage JSC, has dealt adequately with the lone issue he reformulated in this appeal. I agree with the reasoning and conclusion arrived there at that the appeal has merit and should be allowed.

For purpose of lending in my voice however, I would chip in a few words of mine. The crux of the appeal is centered on exhibit Q the appellant’s statement and also the circumstantial evidence of the appellant’s presence at the scene of the alleged crime.

Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended is clear on the presumption of innocence which is always in favour of the accused in criminal cases. In other words, every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty.

The burden of proof is generally on the prosecution to prove the guilt of the accused, who is regarded as not having committed the offence charged. The onus lies on the prosecution to prove the fact that the accused committed the offence. See the case of Ani v. State (2009) All FWLR (Pt. 482) 1044, (2009) 16 NWLR (Pt. 1168) 443, a decision of this court at page 458 of the report wherein Niki Tobi (JSC) (of blessed memory) had this to say:

“The expression “beyond reasonable doubt” in evidence means fully satisfied, entirely convinced.

In criminal cases, the guilt of the accused must be established beyond reasonable doubt which means that the facts proven must, by virtue of their probative force, establish guilt. Reasonable doubt which will justify acquittal is doubt based on reason and arising from evidence or lack of evidence, and it is doubt which a reasonable person might entertain and it is not fanciful doubt, is not imagined doubt. Reasonable doubt is such a doubt as would cause a prudent man to hesitate before acting in matter of importance to him.”

As rightly submitted on behalf of the appellant, apart from the purported confessional statement of the appellant, there is nothing in form of evidence, which can be credited as positive and of the standard of proof required in criminal cases, shown on the record herein which could justify the conviction and sentence of the appellant.

It is pertinent to state that there is no direct or circumstantial evidence adduced by either PW1, PW2, PW3 or PW4 suggesting that the appellant agreed/conspired with anyone to commit an unlawful act, especially when viewed against the back drop of the fact that the alleged principal actor, who was arrested was released without any charge being brought against him. The question to raise in this appeal is, whether the mere fact that the appellant was arrested at the scene of the alleged crime while trying to run away, when he heard a gunshot, was enough to make him guilty of conspiracy to commit a felony to wit: armed robbery?

In the case of Ikwunne v. State (2000) 5 NWLR (Pt. 658) 550 at page 561, (of a persuasive authority), Niki Tobi (JCA) (as he then was) held and said:

“In a charge of conspiracy, the prosecution has the burden to prove not only the inchoate or rudimentary nature of the offence but also the meeting of the minds of the accused persons with a common intention and purpose to commit a particular offence. See Gbadamosi & Ors. v. State (1991) 6 NWLR (Pt.196) Page 182. It is merely saying the obvious that a court cannot convict for the offence of conspiracy where there is no evidence. In other words, a court cannot infer conspiracy in the absence of evidence.”

Following, from the foregoing and particularly on presumption of innocence as provided by the Constitution, I hold that in the absence of any admissible evidence by the respondent to prove the offence of conspiracy to commit the offence of armed robbery, the court will exercise caution in affirming the conviction of the appellant for the offence of conspiracy to commit armed robbery.

As rightly submitted on behalf of the appellant, it is not reasonable that an alleged conspirator, who was said to be the one armed with a gun and whose evidence would have been very useful in proving a conspiracy, was arrested without charge and his testimony was not offered in evidence to sustain the charge against the appellant.

On the totality of the record before us, there was no credible and independent evidence upon which the lower court relied thereon to corroborate the confessional statement. In other words, there was no admissible and credible evidence before the lower court and the trial court which directly linked the appellant with the commission of the offence.

The evidence led by the prosecution, did not point irresistibly to the conclusion that the appellant was the person that committed the alleged offence of armed robbery. With the few words of mine and while relying, on the fuller reasoning of my learned brother Bage JSC, whose judgment I endorse as mine, I also allow this appeal as it has merit. Appeal is also allowed by me. Appellant is acquitted and discharged accordingly.

**SANUSI JSC:**

I had the opportunity of reading in draft form, the judgment just rendered by my learned brother, Bage JSC.

While agreeing with him that this appeal is meritorious, I shall also allow it, having adopted the reasoning and conclusion arrived at in the leading judgment. In this case, the confessional statement of the accused person now appellant was rejected by the trial court. Also besides the confessional statement exhibit Q, there had not been any reliable and credible evidence to corroborate the confessional statement as would warrant the conviction and sentence of the accused person, now appellant. The evidence adduced by the respondent in my view, fell short of proof of the beyond reasonable doubt of the offences the appellant was charged with, tried and convicted.

Thus, I am in agreement with the reasoning and conclusion reached in the leading judgment of my learned brother, Bage JSC, that this appeal is meritorious and ought to be allowed. I accordingly allow it and consequently substitute the conviction with order of acquittal and discharge.

Appeal allowed.