**CHUKWUEMEKA AGUGUA**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 10TH DAY OF FEBRUARY, 2017

SC.322/2014

**LEX (2017) - SC.322/2014**

OTHER CITATIONS

2PLR/2017/32 (CA)

(2017) LPELR-42021(SC)

**BEFORE THEIR LORDSHIPS**

IBRAHIM TANKO MUHAMMAD, J.S.C

MARY UKAEGO PETER-ODILI, J.S.C

OLUKAYODE ARIWOOLA, J.S.C

AMINA ADAMU AUGIE, J.S.C

EJEMBI EKO, J.S.C

**BETWEEN**

CHUKWUEMEKA AGUGUA - Appellant(s)

AND

THE STATE - Respondent(s)

**ORIGINATING COURT**

1. COURT OF APPEAL, SOKOTO JUDICIAL DIVISION

2. SOKOTO STATE HIGH COURT (Malami Umar .J., Presiding)

**REPRESENTATION/LAWYERS**

EBENEZER OBEYA, Esq. with him, EMMANUELLA OBEYA - For the Appellant.

AND

SULEIMAN USMAN, Esq. (HAG, Sokoto State) with him, MOHAMMED MOHAMMED, Esq. (Ag. DPP, Sokoto State), ABUBAKAR MOYI, Esq. (PSC, MOJ, Sokoto State), G.C UDEH, SUNMAYYA AMINU ANKA, Esq., - For the Respondent.

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

CRIMINAL LAW AND PROCEDURE - OFFENCE OF ARMED ROBBERY:- Ingredients that must exist to prove the offence of armed robbery - standard of proof required of the prosecution - What the prosecution must prove to succeed

CRIMINAL LAW AND PROCEDURE - OFFENCE OF ARMED ROBBERY:- Weapon used to carry out armed robbery - - Whether must be tendered by the prosecution to secure a conviction.

CRIMINAL LAW AND PROCEDURE - OFFENCE OF CONSPIRACY:- Meaning of - Proper approach to an indictment containing conspiracy charge and substantive charges - Whether the offence of conspiracy is separate and distinct from the actual offence committed - Whether a person can be convicted of conspiracy if the other alleged co-conspirators are acquitted and discharged - What the prosecution must prove to succeed with regards to a charge of conspiracy preferred against an accused person

CRIMINAL LAW AND PROCEDURE - CONVICTION FOR LESSER OFFENCE:- Conditions to be fulfilled before an accused can be convicted for a lesser offence.

CRIMINAL LAW AND PROCEDURE - ACCUSED PERSON RESTING HIS CASE ON THE PROSECUTION’S CASE:- Legal implication of

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - UNAPPEALED FINDING(S)/DECISION(S):- Legal effect of – Duty of appellate court thereto

APPEAL - INTERFERENCE WITH CONCURRENT FINDING(S) OF FACT(S):- Attitude of the Supreme Court to invitation to inter with concurrent finding(s) of fact(s) of Lower Courts

COURT - DUTY OF COURT:- Duty of the trial court before coming to conclusion that an offence has been committed.

EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF:- Burden of proof and standard of proof in criminal cases.- When the burden of proof placed on the prosecution can be said to have been discharged.

EVIDENCE - CONFESSIONAL STATEMENT - Whether confession is the best form of evidence in a criminal trial.

EVIDENCE - ADDRESS OF COUNSEL - Whether address of counsel can take the place of evidence.

EVIDENCE - CONFESSIONAL STATEMENT - Whether a court can convict solely on the confessional statement of an accused person - Whether a confessional statement becomes inadmissible because an accused person retracted or denied making it - Whether a court can convict solely on the basis of a confessional statement of an accused person

WORDS AND PHRASES – “CONSPIRACY” - Meaning of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

On the 9th day of December, 2007 at about 8. 00pm, the appellant and some other men visited house No.45 Sabon-Birnin Road, Low Cost Area, Sokoto. One Zainab Shehu Ladan, Hajiya Fatima and Buhari Muhammed were inside the house when the appellant and one other person entered the house and pointed a gun at Buhari. Buhari’s effort to seize the said gun from the appellant got him assaulted. The appellant and his co-accused later ordered occupants of the house to surrender their money to them. However, at appoint in the robbery, an alarm was raised and the alleged robbers ran out to their motorcycles. However, one of the two motor cycles they had brought refused to start and hence it was abandoned. Two of the alleged robbers escaped on the motorbike while the others ran away on foot while shooting into the air.

The appellant and the co-accused were later arrested with one of the motorcycles. The appellant made statement to the Police, which statement was retracted during trial. After the conduct of a trial-within trial, the objection was overruled and the statement was admitted. The appellant neither testified nor called any other witness in his defence. He relied on the case of the prosecution.

The trial Court found the appellant and the co-accused guilty of the first count of conspiracy but not of the count of armed robbery. He was found guilty of a lesser offence of attempted robbery and they were sentenced to life imprisonment.

DECISION(S) APPEALED AGAINST

The appellant’s appeal against the conviction and sentence to the Court of Appeal was dismissed and the conviction and sentence affirmed. Dissatisfied, the appellant appealed to the Supreme Court.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

"Whether the learned Justices of the Court of Appeal were right in affirming that the charge of conspiracy and attempted armed robbery was proved beyond reasonable doubt."

*BY RESPONDENTS*

"Whether having regard to the totality of the evidence adduced by the prosecution, the learned Justices of the Court of Appeal rightly affirmed that the offences of conspiracy and attempted armed robbery have been proved by the prosecution against the appellant beyond reasonable doubt as found by the trial Court "

*AS ADOPTED BY COURT*

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

JUDGMENT OF THE SUPREME COURT

1. Proof beyond reasonable doubt does not mean proof beyond any iota or shadow of doubt. Yet, the burden of such proof which lies solely on the prosecution never shifts. At the end of a trial and before a Court comes to the conclusion that an offence has been committed by the accused person, it must look for the ingredient of the offence charged and ascertain that the acts of the accused come within the confines of the said offence charged.

2. It is trite law that for the prosecution to achieve success in proof of the offence of Armed robbery, the following essential ingredients must be proved, In proof of armed robbery, the three essential ingredients must be proved conjunctively, beyond reasonable doubt: (a) That there was a robbery incident or series of robberies; (b) That the robbery or each of the robberies was an armed robbery; (c) That the accused was the armed robber or one of the armed robbers.

3. The proper and appropriate approach to an indictment containing conspiracy charge and substantive charge is to deal with the latter, that is, the substantive charge first and then proceed to see how conspiracy count has been made out in answer to the fate of the charge of conspiracy.

4. Conspiracy generally, is an agreement between two or more person to carry out an unlawful act. But failure to prove substantive offence does not make conviction for conspiracy inappropriate, as it is, in itself a separate and distinct offence, that is independent of the actual offence conspired to commit.

5. It takes two or more persons to conspire and a person alone cannot be convicted of conspiracy if the others are discharged and acquitted. In order to establish an offence of conspiracy against an accused person to commit a criminal offence, the prosecution is required by law to prove the following: (a) That there was an agreement between two or more persons to do or cause to be done, some illegal act or an act which is not illegal but by illegal means; (b) Where the agreement is other than an agreement to commit an offence, that some acts besides the agreement was done by one or more of the parties in furtherance of the agreement; (c) Specifically, that each of the accused individually participated in the conspiracy.

6. There need not be an express agreement before common intention can be shown in conspiracy. In the instant case, the trial Court relied on the confessional statement of the appellant from which the Court inferred the agreement by the appellant with other co-accused to carry out the illegal act of armed robbery.

7. There is no law insisting that the prosecution must always tender weapon or gun used in a robbery in order to establish its case. It largely depends on the facts and circumstances of each given case.

8. The Appellant actually gambled, by remaining silent in the face of overwhelming evidence against him. It is true that he was not obliged to say anything at the trial because an Accused Person has the constitutional right to remain silent and leave the trial to the Prosecution to prove the charge alleged against him. In effect, his right to remain silent, even when arraigned for a criminal offence, is an inviolable one. But he was taking a huge risk: the law says that he is obliged to make his defence, if his remaining silent will result in being convicted on the case made out against him.

**MAIN JUDGMENT**

OLUKAYODE ARIWOOLA, J.S.C. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the judgment of the Court of Appeal, Sokoto Division Coram: Amiru Sanusi, JCA (as he then was); Abubakar Datti Yahaya, JCA; Abubakar Alkali Aba, JCA which was delivered on 12th December, 2011 in which the appellant's appeal was dismissed and his conviction and sentence by the trial Court were affirmed.

The appellant and one Aliyu Danjuma who was the 1st accused while the appellant was the 2nd accused were arraigned before the Sokoto High Court. The two were charged with two counts of 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 Laws of Federation of Nigeria, 1990.

At the trial before Malami Umar .J, the prosecution called six (6) witnesses and tendered seven (7) items admitted and marked Exhibits A, B, C, D, E, F and F1.

Originally, the charge was against four accused persons but only two accused stood trial as the other two were said to be at large.

At the point of tendering the Statement of the appellant, he objected and claimed that he was tortured to obtain it by the police. This led to the order for trial -within-trial by the trial Court which dismissed the objection and admitted the said Statement as Exhibit F1.

It is note worthy that the appellant did not testify and chose not to call any evidence in his defence. Upon conclusion of the trial, in its considered judgment, the trial Court convicted the appellant with his co-accused for the 1st count of the charge and for a lesser offence of attempted robbery instead of the count of armed robbery contained in the charge. Appellant was then sentenced to life imprisonment.

Dissatisfied with the conviction and sentence, the appellant appealed to the Court of Appeal, Sokoto division, hereinafter referred to as Court below. In its unanimous decision, the Court below found the appeal unmeritorious, dismissed the appeal and affirmed the conviction and sentence handed down on the appellant by the trial Court.

The appellant was further dissatisfied with the decision of the Court below, hence he appealed to this Court.

Pursuant to the Rules of this Court, parties filed and exchanged briefs of argument, the record of appeal having been duly compiled, transmitted and served, The appeal was then heard on 17th November, 2016.

In the brief of argument filed by the appellant on 31st October, 2012, the following sole issue, was distilled for determination of the appeal:

"Whether the learned Justices of the Court of Appeal were right in affirming that the charge of conspiracy and attempted armed robbery was proved beyond reasonable doubt."

From the same Grounds of Appeal filed by the appellant, the respondent chose to formulate the following sole issue, differently couched for determination of the appeal

"Whether having regard to the totality of the evidence adduced by the prosecution, the learned Justices of the Court of Appeal rightly affirmed that the offences of conspiracy and attempted armed robbery have been proved by the prosecution against the appellant beyond reasonable doubt as found by the trial Court "

The facts relied on by the prosecution as given in evidence are succinctly as follows:

On the 9th day of December, 2007 at about 8. 00pm, the appellant and some other men had visited house No.45 Sabon-Birnin Road, Low Cost Area, Sokoto.

One Zainab Shehu Ladan, Hajiya Fatima and Buhari Muhammed were inside the house when the appellant and one other entered the house and pointed a gun at Buhari. As Buhari tried to seize the said gun from the appellant, he was slapped. The appellant and his co-accused later ordered them to bring money out for them. The appellant stood with the occupants of the house while the other went into the bedroom. He later came out with Hajiya's handbag and people started shouting "thief" "thief". On hearing the shout, the men ran out into their Motorcycles. One of the two motor cycles they had brought refused to start hence it was abandoned. Two of them rode one away while the others ran away. As they were trying to escape, they shot Into the air. The matter was later reported to the Gwiwa Police Station.

The appellant and the co-accused were later arrested with one of the Motorcycles. The appellant made statement to the Police, which statement was retracted during trial. After the conduct of a trial-within trial, the objection was overruled and the statement was admitted and marked Exhibit F1. Other items admitted were, the Jarma UK Motorcycle Exhibit A, a pair of black Sandals Exhibit B, a pair of white covered shoes Exhibit C, a trouser and shirt as Exhibits D and E respectively. The statement of the 1st accused person was also admitted and marked Exhibit F.

The appellant neither testified nor called any other witness in his defence. He relied on the case of the prosecution.

In the considered judgment, the trial Court found the appellant and the co-accused guilty of the first count of conspiracy but not of the count of armed robbery. He was found guilty of a lesser offence of attempted robbery and they were sentenced to life imprisonment.

The conviction and sentence were appealed to the Court below which dismissed the appeal on the 12th December, 2011 leading to the instant further appeal to this Court.

In arguing the sole issue distilled for determination, learned counsel for the appellant referred to the findings of the trial Court on the evidence adduced by the prosecution and contended that the Court below was wrong affirming the said finding on the two counts. He referred to the relevant provisions of the Robbery and Firearms (Special Provision) Act and the alleged confessional statement of the appellant. Learned counsel quoted from the testimonies of PW2 and PW4 and contended that they were not ad idem on some material facts and the lapses and contradictions were not explained away by the prosecution. He submitted that in the face of the lapses and contradictions, the evidence of the prosecution witnesses could not be said to have pointed irresistibly at the guilt of the appellant. He submitted further that the contradictory pieces of evidence weighed heavily on the mind of the trial Judge leading to the finding that the offence of armed robbery was not proved.

Learned counsel urged the Court to discountenance the testimonies of PW2 and PW4 in entirety. He contended that once the testimonies are discountenanced, the Court will be left with the appellant's retracted confessional statement. To that, he relied on the test laid down in Dawa v The State (1980) 8-11 SC 236 following R v Sykes (1913) 8 C.R APP. 233

Learned counsel contended that the ingredient or guidelines to be met in a confessional statement must co-exist, and any statement that fails to meet the test cannot properly found a conviction, otherwise any such conviction cannot be sustained on appeal. He relied on Awosika vs. The State (2010) 8 NWLR (Pt. 1198) 49.

On the count of conspiracy, learned counsel referred to the testimony of appellant's co-accused who denied knowing the appellant, and that he had never met him before, hence could not have conspired with someone he never knew. For the ingredients of the offence of conspiracy, he cited Abdullahi vs. State (2008) 17 NWLR (Pt. 1115) 203

Learned counsel contended that apart from Exhibit F1, no iota of evidence existed in support of the verdict of guilt for conspiracy. He submitted that the judgment of the trial Court was not supported by the evidence before the Court and therefore it was unsafe to convict the appellant on a confession as in Exhibit F1.

On the confession in Exhibit F1 attributed to the appellant, learned counsel gave a poser that "is a trial Judge entitled to pick and choose what to believe and reject in a confessional statement?" He answered by contending that evidently, the appellant in Exhibit F1 admitted that he robbed or was part of the gang that robbed the victims of their possessions as alleged in count 2 of the charge, yet learned trial Judge found that armed robbery was not proved. He submitted that the trial judge's position is proof that Exhibit F1 was obtained involuntarily and should not have been used to corroborate any other piece of evidence.

Learned counsel agreed that if the trial judge had convicted the appellant on the original charge based on Exhibit F1 since it had gone through trial within trial, there would have been no problem. He however contended that since the trial Judge had agreed that the evidence, including Exhibit F1 did not prove the charge, the Court was by implication agreeing that Exhibit F1 or some part therein was not true or voluntary. He submitted that the Court below fell into the same error as the trial Court in admitting that the content of Exhibit F1 was true and correct.

Learned counsel submitted that it is the primary duty of the trial Judge who observed the demeanour of witnesses to make assessment of the probative value of the testimonies of the witnesses. He submitted that the trial Court was right to have concluded that there was no robbery hence the appellant was wrongly convicted on his alleged confession.

Learned counsel contended that the trial Court of its own accord rejected the evidence of armed robbery as borne out by Exhibit F1 and the testimony of the prosecution witnesses, and therefore submitted that the direct and logical implication of that rejection is that Exhibit F1 is of no probative value. He submitted further that having found that armed robbery was not proved by the prosecution, even though confessed to, the trial Court ought to have rejected the confessional statement in its entirety. He contended that the learned trial Court misdirected itself when it relied on Exhibit F1 to corroborate the testimony of PW2 and PW4 and thereby occasioned a miscarriage of justice. He submitted that the appellant deserved the benefit of the doubt created by the inconsistence in Exhibits F and F1 and the Court's findings of fact. He urged the Court to resolve the sole issue in favour of the appellant, discharge and acquit the appellant.

The learned counsel for the respondent in arguing the appeal in the brief of argument on the single issue formulated, he referred to the charge against the appellant. He considered the second count of armed robbery first. He referred to the three ingredients the prosecution was required to establish to prove the charge. He submitted that the prosecution proved all the three ingredients. He referred to the testimony of PW2 and PW4 who he contended were the eye witnesses, being the victims of the incident. He submitted that the evidence of the eye witnesses not only fixed the appellant at the scene of the crime but also described the role he played in the robbery. He referred to the slip by the trial Court in its record, that the offence took place at Shinkafi Road, instead or Sabon-Birni road and contended that the slip is of no moment. He submitted that the Court below was therefore right to have held that the slip was merely a mix up or printer's devil which did not occasion any miscarriage of justice. He submitted further that defects in a trial Court's record of proceedings is only fatal when it can be shown that a miscarriage of justice has resulted from that effects. He relied on Oyakhire vs State (2006) 12 NWLR (Pt. 1001) 162.

Learned counsel contended that the trial Court erred to have rejected the evidence that two mobile phones were stolen because they were not recovered nor their value stated, as the law does not require the production of stolen items or their value. He however, submitted that if there had been cross appeal by the respondent against the judgment of the trial Court, the story would have been different. He referred Sections 218 (2) and 219 of the Criminal Code which the trial Court relied on to convict the appellant, rightly for a lesser offence which the appellant was not charged with.

Learned counsel referred to the confessional statement of the appellant- Exhibit F1 and contended that it corroborated the testimony of prosecution witnesses. He submitted that even the Court is empowered to convict on a confessional statement alone, once it satisfies, the required standard. He relied on Dibie vs State (2007) 7 SCM 101; Ibeme vs The State (2013) 8 NCC 46; Nwachukwu vs State (2008) 4 WRN 1; Salawu vs. State (2010) 28 WRM 157; Awosika Vs. State {2010) 18 WRN 159.

On the failure to tender the weapons allegedly used by the appellant, before the trial Court, learned counsel contended that Exhibit F1 had explained away how the guns were sourced and returned. He submitted that indeed, the failure to tender the guns did not do any harm to the prosecution's case. He relied on Olayinka Vs State (2007) 2 NCC 507 and Alor Vs State LER (1997) SC 76.

On the issue of conspiracy, learned counsel submitted that the offence is usually proved by circumstantial evidence, and the conspirators need not know themselves. He relied on Bello Vs State (2001) 12 SCM (Pt.228); Aduku Vs FRN (2009) 4 NCC 359; Daboh Vs State (1997) 5 SC 197. He submitted that there are sufficient circumstantial evidence to sustain the charge against the appellant. He urged the Court to so hold.

He finally urged the Court to resolve the issue against the appellant, dismiss the appeal and affirm the judgment of the Court below which had earlier affirmed the conviction and sentence by the trial Court.

As earlier indicated, the appellant was charged along with other co-accused persons but only one other person stood trial with him as the 1st accused while the two others were said to be at large. The 1st count of the charge is for conspiracy that they agreed to carry out an illegal act of attacking and robbing the following persons - Zainab Shehu Ladan, Buhari Mohammed and Fatima Abdullahi all of No.45 Sabon Birni Road, Gwiwa Low cost, Sokoto.

However, it had been held that the proper and appropriate approach to an indictment containing conspiracy charge and substantive charge is to deal with the latter, that is, the substantive charge first and then proceed to see how conspiracy count has been made out in answer to the fate of the charge of conspiracy. Conspiracy generally, is an agreement between two or more person to carry out an unlawful act. But failure to prove substantive offence does not make conviction for conspiracy inappropriate, as it is, in itself a separate and distinct offence, that is independent of the actual offence conspired to commit. See, Balogun vs. Attorney General, Ogun State (2002) 9 SCNJ 1961 Lukman Osetola & Anor Vs. The State (2012) LPELR 9348 SC (2012) 12 SCM (Pt.2) 347; (2012) 17 NWLR (pt.1329) 251; (2012) 6 SC (Pt IV) 148.

In this case, the substantive offence was count 2 of the charge which is an offence of armed robbery. The appellant and other co-accused were alleged to have attacked and robbed their victim earlier mentioned - Zainab Shehu Ladan, Buhari Mohammed and Fatima Abdullahi with a gun and forcefully collected two GSM handsets (Nokia and Sagem) and other valuables, valued at the sum of N45, 000.00

It is trite law that for the prosecution to achieve success in proof of the offence of Armed robbery, the following essential ingredients must be proved beyond reasonable doubt;

(a) That there was a robbery incident or series of robberies

(b) That the robbery or each of the robberies was an armed robbery

(c) That the accused was the armed robber or one of the armed robbers.

However, the law is very clear that, this proof which it expects to be beyond reasonable doubt does not mean proof beyond any iota or shadow of doubt. Yet, the burden of such proof which lies solely on the prosecution never shifts. lf at the conclusion of trial, on the entire evidence adduced the Court is left with no doubt that the offence was committed by the accused, then that burden is discharged. See; Bello Vs The State (2007) 10 NWLR (Pt.1043) 564; Amina Vs State (1990) 6 NWLR (Pt 155) 125; Nwachukwu Vs State (1985) NWLR (Pt.11) 218; Ani Vs State (2003) 11 NWLR (Pt. 83) 142: Uwagboe Vs State (2007) 6 NWLR (Pt. 1031) 1.

It equally trite law that at the end of a trial and before a Court comes to the conclusion that an offence has been committed by the accused person, it must look for the ingredient of the offence charged and ascertain that the acts of the accused come within the confines of the said offence charged. See; Amadi Vs The State (1993) 8 NWLR (Pt.314) 644. Alor Vs State (1997) 4 NWLR (Pt. 501) 511.

In the instant case, PW2 and PW4, Hajiya Zainab Shehu Ladan and Buhari Shehu Muhammed respectively were the victims of alleged attack.

PW2 had testified before the trial Court that the appellant, armed with a gun with another who was at large had entered into her house and while he pointed the said gun at them demanded for money. The other person was said to have proceeded into the bedroom and then came out with a bag containing valuables belonging to her. The appellant collected her telephone handset and the handset of PW4

PW4 was Buhari Shehu Moharnmed. His testimony corroborated materially the testimony of PW2. He identified the appellant as one of the two persons who had entered their house on the day of the incident. Indeed, that it was the appellant who pointed gun at him and demanded for money from them. He testified that, as the accused persons suspected that people were already gathering when their victims were shouting "thief" "thief", they ran out, shot their guns into the air and escaped.

One of the Motorcycles that were allegedly used by the said armed robbers was later recovered, tendered by the police and admitted as Exhibit A.

The appellant was said to have made a confessional statement to the Police which though was retracted but after the conduct of a trial-within-trial, the objection was overruled and the Statement was admitted in evidence.

However, the trial Court found that the appellant in his statement denied collecting the GSM phones but that it was his co-accused who was at large that collected the said handsets. The trial Court also held the view that there were doubts whether or not there was any missing GSM Phone handsets and handbag. This doubt was resolved in favour of the appellant, as the Court then came to the conclusion that the prosecution failed to prove beyond reasonable doubt that indeed there was an armed robbery. At best with the testimonies of PW2 and PW4 the trial judge felt that the offence of attempted Robbery was established, instead. The trial Court however found relying on the statement of the appellant to the Police-Exhibit F1 which was admitted as a confessional statement, that the appellant and the co-accused were armed with gun when they visited the complainants' house and attempted to rob them of their possessions.

Relying on Sections 218 (2) and 219 of the Criminal Procedure Code, the appellant was found guilty, convicted and sentenced for the offence of Attempted Robbery.

It is note worthy, that there was no appeal to the Court below against this decision of the trial Court. As earlier stated, this much was admitted by the learned counsel for the respondent in his brief of argument for the state.

Sections 218 (2) and 219 of the Criminal Procedure Code provide as follows:

S. 218(2) "When a person is charged with an offence and facts are proved which reduces it to a lesser offence, he may be convicted of the lesser offence, though he is not charged with it."

S. 219 "When a person is charged with an offence, he may be convicted of an attempt to commit such an offence though the attempt is not separately charged."

The trial Court who had the opportunity to listen and watch the demeanour of witnesses testifying before the Court at the end of the trial of the appellant, inter alia, came to the following conclusion:-

"........ after a very careful perusal of evidence adduced before me, I am quite satisfied that the prosecution had failed to establish a case under Section (2) (a) of the Robbery and Firearms Act, 1990 as amended as there was no evidence of what was stolen from the victims of the robbery. But I have no doubt in my mind that a case of attempt to commit armed robbery contrary to Section 2(1) (a) of the Robbery and Firearms Act, 1990 was proved against the 1st and 2nd accused persons and l found them guilty and convict them accordingly."

This takes me to the count on conspiracy. It is on record that the appellant was arraigned and duly charged along with others, in particular, with one Aliyu Danjuma who was the 1st accused while the appellant was the 2nd accused person before the trial Court. The others were said to be at large and never stood trial.

Generally, as the saying goes, "It takes two to tango" It certainly takes two or more persons to conspire and a person alone cannot be convicted of conspiracy if the others are discharged and acquitted.

However, it is trite law that a conspiracy to commit an offence is a separate and distinct offence and it is independent of the actual commission of the offence to which the conspiracy is related. See; Balogun vs. Attorney General of Osun State (2002) 4 SCM 23, (2002) 2 SCNJ 196; Silas Sule v State (2009) 8 SCM 177.

Generally, conspiracy is an agreement by two or more persons acting in concert or in combination to accomplish or commit an unlawful or illegal act, with an intent to achieve the agreed objective. See; The Salawu vs. State (2011) LPELR - 8252 (SC) (2011) 10 SCM 76.

In order to establish an offence of conspiracy against an accused person to commit a criminal offence, the prosecution is required by law to prove the following:

(a) That there was an agreement between two or more persons to do or cause to be done, some illegal act or an act which is not illegal but by illegal means;

(b) Where the agreement is other than an agreement to commit an offence, that some acts besides the agreement was done by one or more of the parties in furtherance of the agreement.

(c) Specifically, that each of the accused individually participated in the conspiracy.

There is no doubt and it has been held that there need not be an express agreement before common intention can be shown in conspiracy. See: Adekunle Vs The State (1989) 12 SCNJ 184.

In the instant case, the trial Court relied on the confessional statement of the appellant- Exhibit F1 from which the Court inferred the agreement by the appellant with other co-accused to carry out the illegal act of armed robbery.

The Statement of the appellant is on pages 12 -14 of the record where the appellant inter alia states as follows:

"l was born in Bauchi but was brought up in Aba and later completed my secondary education in Bauchi Urban College in the year 1996. I am into Business of selling recharge cards and handset for the past one year. I came to Sokoto in the year 2000 where my brother did his NYSC. I get (sic) to know Ali Murtala who is a member of our gang when he was into business buying and selling of cows. My main reason of coming to Sokoto on Saturday 8/12/2007 was to visit my brother name – Ekene Owando who is a Soldier attached to 26 Motorised Battalion, Sokoto. Even though this is my second time of visiting him.

On 8/12/2007 about 200hrs, I went to mammy market to relax when luckily, I met one Ali Murtala alias Uwem and one Aliyu Danjuma. The said Ali Murtala alias Uwem introduced to me Aliyu Danjuma as his friend before he left.

On 9/12/2007 about 1700hrs, Ali Murtala called me on my GSM phone and asked me to meet him at Kwannawa area around 1900hrs. Reaching Kwannawa, I met Ali Murtala, Aliyu Danjuma and Lumu Abdullahi. At that place, Aliyu Danjuma said he has a work for us which is robbering job, which we instantly agreed to execute the job. The said Ali Murtala and Aliyu Danjuma asked I and Lumo to wait for them there, while they go out to look for their friend, a soldier who is their friend. When they returned from the soldier's place, they came along with a motorcycle with four arms and share it among ourself (sic), then we moved straight to execute the robbery job at a place which I don't know. Aliyu Danjuma carried two people on his Jarma UK Motorcycle while one of us took Okada. Reaching there Aliyu Danjuma decided to stay outside, Lumu Abdullahi stood by the door while I and Ali Murtala entered into the room. When we entered we first arrested the family and demanded for money which they said they don't have and began to shout. Ali Murtala immediately collected two handsets from the victims while we took to our heels. We ran straight to Aliyu Danjuma who was with the Motorcycle to run, but clutch of the motorcycle disappointed us as it refused to on. We then abandoned the motorcycle there and ran away."

I decided to quote extensively from the statement said to have been made by the appellant to the police, because, as earlier noted in this judgment the appellant neither testified nor called any witness to testify in his defence. He chose to rest his case on that of the prosecution.

It is on record that the appellant retracted the above statement when same was being tendered by the prosecution but as I stated earlier upon the conduct of the required trial-within trial, his objection was overruled and the statement was duly admitted. It is already settled, that a confessional statement does not become inadmissible merely because it was subsequently retracted by the maker. A confessional statement is admissible and should be admitted, once it is found to be direct and positive and it relates to the acts. Knowledge or intention of the maker, stating or suggesting the inference that he committed the crime charged. See; Solomon Thomas Akpan Vs The State (1992) LPELR - 351 (SC) Shittu vs State (1970) 1 All NLR 228; Adamu vs AG Bendel State (1986) 2 NWLR (Pt.22) 284; Aremu Vs State (1991) 7 NWLR (Pt. 201) 1; Ejinima Vs State (1991) 6 NWLR (Pt.200) 627.

It is already trite law, that an accused person can be convicted on his confessional statement alone where the confession is consistent with other ascertained facts which have been proved See; Akpan vs. State (1990) 7 NWLR (Pt.160) 101.

The statement credited to the appellant as the confession had graphically given in details the way the alleged robbery act was planned and carried out by him and the co-accused. It gave the role played by each of the accused. The trial Court was therefore right and correctly admitted the statement as a confession. The Court below, in its considered judgment opined, inter alia, as follows:

"The trial Court had properly assessed and evaluated the evidence adduced in the case, bearing in mind the fact that the appellant chose not to give evidence at the trial or call any witness to testify on his behalf. The trial Court had therefore no evidence from the defence which it could weigh in order to see where the balance tilts."

In my view, the Court below rightly affirmed the decision of the trial Court.

Furthermore, as a result of the confessional statement of the appellant, all other sub issues raised by the counsel for the appellant such as failure to tender the alleged guns used in the said robbery attempt, are of no moment. This point in particular was explain away in the statement as noted correctly by the Court below that the guns were quickly returned to the soldier from whom they had gotten them. Indeed, the Court below correctly stated the position that there is no law insisting that the prosecution must always tender weapon or gun used in a robbery in order to establish its case. It largely depends on the facts and circumstances of each given case. See; Olayinka vs The State (2002).

It is already established, that a freely made confession, whether judicial or extra judicial, so long as it is found to be direct positive and proper proved, is sufficient proof of guilt and conviction could be rightly based entirely on such statement. See; Jimoh Yesufu vs The State (1976) 8 SC 167.

My Lords, I must say that I have no slightest doubt in my mind that the appellant's confessional statement was direct, positive and proved to sustain the conviction. In the result, the sole issue is resolved against the appellant.

In the final analysis, I am of the firm view that this appeal is unmeritorious, and should be dismissed. Accordingly, appeal is dismissed. The judgment of the Court below delivered on 12th December, 2011 which affirmed the conviction and sentence of the appellant by the Court is hereby affirmed.

**IBRAHIM TANKO MUHAMMAD, J.S.C**.:

My learned brother Ariwoola, JSC permitted me to read before now a draft of the judgment just delivered. I agree with my Lord's reasoning and conclusion which I adopt. I abide by consequential orders made therein

**MARY UKAEGO PETER-ODILI, J.S.C**.:

I agree with the judgment just delivered by my learned brother, Olukayode Ariwoola JSC and to underscore my support to the reasoning, I shall make some remarks.

The appellant with one other accused person were charged with conspiracy to commit armed robbery and armed robbery contrary to Section 5(b) and 1 (2)(a) of the Robbery and Firearms (Special Provision) Act Cap 398 LFN 1990. They were arraigned before Malam Umar J. of the Sokoto High Court which trial judge tried and convicted the appellant on the 1st count of conspiracy and attempted armed robbery and sentenced him to imprisonment for life. The appellant aggrieved appealed to the Court of Appeal which dismissed the appeal and further dissatisfied has approached the Supreme Court to ventilate his grievance.

FACTS

The version as put forward by the prosecution through six witnesses and seven exhibits tendered which are a black coloured Jarma UK motorcycle, a black sandal belonging to the other accused person. Also tendered were a white cover shoe, a pair of trousers and a pair of shorts belonging to the 2nd accused person Exhibits F and F1 were statements obtained from the appellant and his co-accused which they claimed were obtained under duress thus necessitating a trial within trial offer which the trial Court admitted the said statements.

The appellant neither said anything in testimony nor called any witness. The fuller details are well captured in the lead judgment and there is no point repeating them here.

On the 17th day of November, 2016 date of hearing, learned counsel for the appellant. Mr. Ebenezer Obeya adopted his brief filed on 31st day of October, 2012 and in it, learned counsel raised a single issue which is as follows:

Whether the learned justices of the Court of Appeal were right in affirming that the charge of conspiracy and attempted armed robbery was proved beyond reasonable doubt.

For the respondent, the learned Attorney General of Sokoto State, Suleiman Usman adopted its brief of argument filed on 20th November, 2015 and deemed filed an 20/1/16. He framed a sole issue which is thus;

Whether having regard to the totality of the evidence adduced by the prosecution, the learned Justices of the Court of Appeal rightly affirmed that the offences of conspiracy and attempted armed robbery have been proved by the prosecution against the appellant beyond reasonable doubt as found by the trial Court.

The issues as raised on either side are really two sides of the same coin and any of the issues will suffice. I shall make use of that crafted by the appellant as it seems to me simpler.

SOLE ISSUE

Whether the learned justices of the Court of appeal were right in affirming that the charge of conspiracy and attempted armed robbery was proved beyond reasonable doubt.

Learned counsel for the appellant contended that considering that alleged robbery took place at night it will be necessary to consider in depth the conflicts in the testimony of the witnesses as far as the appellant is concerned. That the evidence of PW2 and PW4 who were eye witnesses conflicted and no explanation proffered to explain the divergence. He cited Oladotun v. State (2010) 15 NWLR (Pt. 1217) 490.

That with the contradictory pieces of evidence of the PW2 and PW4, what the Court was left with was the retracted confessional statement of the appellant which failed the tests in Dauro v The State (2980) 8 - 11 SC 236 following R v Sykes (1913) 1 CR APP 233.

That the judgment is not supported by the evidence before the trial Court, and it was not safe to convict the appellant on a confession such as Exhibit F1. Reliance was placed on Henry Nwokearu v The State (2010) 15 NWLR (Pt. 1251)1.

For the appellant, it was submitted that the learned trial Court misdirected itself when it relied on Exhibits F and F1 to corroborate the shaky testimony of PW2 and PW4 and thereby occasioned a occasioned a miscarriage of justice. That the appellant deserved the benefit of the doubt created by the inconsistencies in Exhibits F and F1 and the Court's findings of fact. He cited Aigbadion v The State (2000) 7 NWLR (Pt. 666) 687 at 704.

In response, learned counsel for the respondent and Attorney General of Sokoto State, Suleiman Usman submitted that the prosecution proved all the three ingredients of the offences charged. He cited Onyeye v The State (2012) NCC 304 at 310 - 311.

That defects in a trial Court record of proceedings is only fatal when it can be shown that a miscarriage of justice has resulted from the defects which is not the case to the matter at hand. He cited Oyakhire v State (2006) 12 NWLR (Pt. 1001)162.

Learned Attorney General contended that the Court is entitled under the provisions of Section 218(2) and 219 of the Criminal Code to convict for a lesser offence, even if the accused is not charged with that offence. That the confessional statement of the appellant corroborated the evidence of the witnesses and in law, the Court can convict on the basis of confessional statement alone once is satisfied the standard required. That the confessional statement is positive and direct sufficient to convict the appellant, even without the evidence of the witness. He cited Dibie v. The State (2007) 7 SCM 101; Ibene v State (2013) 8 NCC 46 etc.

What is before this Court in brief as stated by the appellant that the only inference to be drawn is that there was no attempted robbery at all and no such robbery planned and so the appeal should be allowed and the decision of the Court Appeal affirming the conviction and sentence of the trial Court, set aside.

On the other side as pushed forward by the respondent is that there were credible and cogent evidence eye witnesses who gave unchallenged evidence. That the appellant was at the scene of crime and made confessional statements. That in fact, the two Courts below ought to have found the offence of armed robbery proved instead of the attempted robbery they came up with.

The findings and summation of the learned trial Judge at pages 152, 151 and 144 of the Record thus:

"I am quite satisfied that the prosecution has failed a establish a case under Section 1(2) of the Robbery and Firearms Act 1990 as amended as there was no evidence of what was stolen from the victims of the robbery.."

Earlier at page 151, the Court had conceded that "the non-recovery of the handsets alleged to be forcefully collected from PW2 and PW4 by the accused person showed that the act of robbery against PW2 and PW4 is not proved beyond reasonable doubt by the prosecution...."

The learned trial judge then went ahead to conclude that "from the evidence of the PW2 and PW4 and Exhibits F and F1 ...it is the view of this Court that the prosecution had failed to prove beyond reasonable doubt that there was robbery at the house No. 45 Shinkafi Road, Sokoto. What the evidence of PW2 and PW4 established is an attempt to robbery of the said GSM phones at No. 45 Shinkafi Road, Sokoto."

The provisions of Section 2(1) of the Robbery and Firearms (Special Provisions) Act prescribe as follows;-

i. With intent to steal anything.

ii. Assaults any other Person.

iii. And at or immediately after the assault, uses violence or

v. Threatens to use actual violence to any other person or property in order to obtain the thing intended to be stolen, shall upon conviction be sentenced to imprisonment for not less than 14 years but not more than 20 years.

Subsection (2) Provides,

“if the offender mentioned in Subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any other person so armed: or

At or immediately before or immediately after the time of assault, the said offender wounds or uses any other personal violence to any person,

The offender shall upon conviction be sentenced to imprisonment for life.”

The learned trial judge then held thus:

"In the case at hand, it is pertinent to note that the evidence of PW2, PW5 and Exhibits F1, A, B, C, D and E have corroborated the confession of the first accused person."

The Court below in a judgment anchored by Amiru Sanusi JCA (as he then was) captured at Page 207 - 209 thus:

"In the instant case PWs 2 and 4 are eye witnesses in the case who testified the appellant went to their house at No. 45 Sabon Birni Road, Gwiwa Low cost (as borne out in the two charges) and NOT No. 45 Shinkafi Road (as mistakenly stated on pages 137, 144, 146 of the Record of judgment of the lower Court) armed with a gun and robbed them of their properties after applying some element of violence on them and after gathering all the occupants of the said house in a room. Both prosecution witnesses, the appellant, the first accused person Aliyu Danjuma corroborated those pieces of evidence in their confessional statements (Exhibits F and F1)."

The Court of Appeal further stated as follows:

"These witnesses narrated to the Court all that ensued between them and the appellant and his other two co-conspirators namely Aliyu Danjuma (the 1st accused convict and one Ali Murtala who is at large) The learned trial judge ably and painstakingly considered the evidence adduced before him and applied the ingredients of the offence and conspiracy. The thrust of the evidence of PWs 2, 4 and 5, as rightly found by the trial Court, were duly corroborated by the confessional statements of the appellant and the 1st accused (Exhibits F and F1) wherein, the appellant unequivocally linked himself with the offence of conspiracy between then namely Aliyu Danjuma (the 1st accused) and two others namely Aliyu Murtala and Lawal (accused persons at large). As I said above, the presence of evidence of the two PW2 and PW4, (the victims of the robbery) fixed and identified the appellant and the 1st accused with the offence of conspiracy which were equally corroborated an Exhibit F (the 1st accused person's confessional statement) as well as Exhibit F1 (the appellant's confessional statement)."

The Court of Appeal went on to state at page 209 thus

"I therefore entirely agree with the findings of the trial judge that the 1st count of the offence of conspiracy, contrary to Section 5(b) of the Robbery and Firearms (Special Provisions) Act of 1990 was duly proved against the appellant herein beyond reasonable doubt and I accordingly so hold and in effect I resolve the first leg of the lone issue against the appellant and in favour of the respondent."

On the matter of the attempted robbery, the Court below said:

"I will now proceed to consider the second leg of the issue, that is to say, whether the offence of attempted robbery was proved against the appellant beyond reasonable doubt? The trial Court cited in its judgment at Page 148 of the record the case of Olayinka v State (supra) listed the ingredients of the offence of armed robbery which the prosecution must prove beyond reasonable doubt in order to obtain conviction. These ingredients including the following:

(a) That there was an armed robbery;

(b) That the accused was armed;

(c) That the accused while armed committed robbery.

The learned trial judge duly considered these ingredients vis-a-vis the evidence adduced at the trial before concluding that the offence of armed robbery was not committed or proved by the prosecution. In its stead, the trial Court found that only attempted robbery was committed contrary to Section 5(2) of the Act since the items allegedly stolen or robbed i.e. the handsets etc were not tendered in evidence and that all the items tendered in evidence at the trial were not shown to belong to the PWs 2 and 4 of the robbery. The Court held that the evidence adduced by the prosecution fell short of proving the offence of armed robbery against the appellant and the 1st accused beyond reasonable doubt under Section 1(4) of the Act."

The Court of Appeal at pages 213 - 215 of the record show how it came about its findings and summation as follows:

"In the case at hand, the learned trial judge extensively referred to the testimonies of PWs 2 and 4, the victims of the crime and accepted them in the absence of any challenge or assault on them. He found those testimonies to serve as sufficient corroboration of the appellant's confessional statement (Exhibit F1) and that they strengthened the truthfulness of the confession of the appellant. I cannot agree more. I am certain that the trial judge had duly ascertained the truth and veracity of the said confession and was right in accepting and relying on it.

The learned appellant's counsel raised issue of contradiction in the venue of the offence especially where the Court repeatedly referred to the venue as No. 45 Shinkafi Road. I also noted on pages 137, 144 and 147 of the record where the lower Court in its judgment stated that the witness mentioned No. 45 Shinkafi Road as their residence."

I do not think that was correct. The eye witnesses especially PW4 gave the address of their residence as No. 45 Sabon Birni Road Gwiwa Low Cost. That was the address that was mentioned in the charges. The address which appeared in the lower Court's judgment now on appeal must therefore be a mere mix up or printers devil as could be described on which the appellant even failed to show any miscarriage of justice occasioned him. The learned counsel also raised dust on the reference of PW2 Zainab to PW4 as her son instead of nephew. To my mind, that is minor and certainly not material contradiction since the two relationships are interchangeable depending on the norms in a particular community or traditional set up. No one will rightly expect the testimonies of witnesses to be the same word by word. Similarly, regarding the issue on non tendering of the gun or weapon used in the commissioning of the robbery raised by the learned appellant's counsel, I think that is of no moment, it is in evidence vide Exhibit F1 that the appellant's confession is clear on that. Therein, he stated how they got the guns and how they returned them to the soldier who provided the guns to them. Even at that, there is no law insisting that the prosecution must always tender weapon/gun used in a robbery in order to establish its case. This largely depends on the facts and circumstances of a given case."

The conclusion of the appellate lower Court is as follows:

"The trial Court had properly assessed and evaluated the evidence adduced in the case, bearing in mind the fact that the appellant chose not given evidence at the trial or call any witness to testify on his behalf. The trial Court had therefore no evidence from the defence which it could weigh in order to see where the balance tilts. In my view, it had rightly accepted and acted on the evidence adduced before reaching its conclusion, that the offence of attempted robbery under Section 2(2) of the Act was committed by the appellant herein, agreeable to me."

To go back on track, it is to be restated that the burden of proof is on the prosecution and the standard required is Proof beyond reasonable doubt pursuant to Section 138 of the Evidence Act. That would not be different herein in the two Court charge of conspiracy and armed robbery on which the appellant and his co-accused were charged at the trial Court. In proof of armed robbery, the three essential ingredients that must be proved, I dare say conjunctively are:

1. That there was a robbery or series of robberies

2. That each robbery was on armed robbery.

3. That the accused took part in the robbery or robberies.

I place reliance on the case of Onyenye v. The State (2012) NCC 304 at 310 - 311. Those ingredients contextualized within the facts and circumstances of the case in hand. It is to be stated that there were two eye witnesses, PW2 and PW4 who were victims of the robbery while the appellant and the 1st accused were armed with a gun. The victims were dispossessed of their handset and the evidence rendered by these eye witnesses fixed the appellant at the scene and described the role he played. The confessional statement which of the appellant, Exhibit F1 admitted after a trial within trial effectively corroborated the evidence of the prosecution witnesses. Apart from the confessional statement of itself was sufficient to ground a conviction as the truthfulness of the statement glaring as the background of the appellant and links with several persons were such as could only have come from his personal knowledge and not such as could be contrived by another person. What I am saying is that the confessional statement is positive and direct thus meeting the requirement on which on its own the accused appellant could be convicted in the absence of the evidence of witnesses. See the case of Ibeme v State (2013) 8 NCC 46: Awosika v State (2010) 18 WRN 159; Dibie v. The State (2007) 7 SCM 101.

Also to be noted is that the fact that no weapons used in the robbery was tendered before the Court of trial is not fatal to the prosecution's case just as the two Courts below found as the effect of the absence of such weapons used is ascertained in circumstances of a given case and in the case at hand, it has no negative impact. See Olayinka v State (2007) 2 NCC 507 Alor v. State (1997) SC 76.

With respect to the matter of the charge of conspiracy, it is an offence that is proved by circumstantial evidence, that is inferred from the circumstances surrounding a particular case. This is because it is difficult to prove it by direct evidence being a crime that is usually hatched in secret, a fact well recognized by the law. Therefore in this instance there is a surfeit of evidence from which the meeting of the minds of the offenders is inferred from. I rely on Bello v. State (2012) (Pt. 2) SCM 28; Aduku v. FRN (2009) (1997) 5 SC 197.

In the main from the above and the fuller and better reasoning in the leading judgment of my learned brother Ariwoola JSC, I too dismiss this appeal.

I abide by the consequential orders made.

**AMINA ADAMU AUGIE, J.S.C**.:

I had a preview of the lead Judgment delivered by my learned brother - Ariwoola, JSC, and I agree with him that this Appeal lacks merit.

However, to emphasize the points made, I will add few words. The Appellant and one other accused person were charged with the offence of conspiracy and armed robbery. His statement to the Police which form part of the Prosecution's case, was admitted in evidence after trial within a trial wherein both of them elected not to testify.

The Appellant also chose not to testify in his defence or call any witness in the main trial and the trial Court commenced as follows-

It is the view of this Court that considering the ample evidence adduced by the Prosecution against the Accused Persons, the silence of the second Accused [the Appellant] throughout the trial -- did not assist him in any way. It is rather a gamble, which [he] decided to undertake without success.

In agreeing with the trial Court, the Court below observed as follows-

It should be noted that the Appellant did not call any witness or testify on his own behalf at the trial. He therefore, played a gamble which was obviously fatal to his case.

As to his confessional Statement, the Court below further stated that-

I am not unmindful of the fact that the Appellant retracted his confession. I am also equally mindful of the fact that [he] retracted his confession which led the Court to conduct trial within trial. The Prosecution called three witness at the mini trial but the Appellant (then 2nd Accused) neither testified at the miniature trial nor called any witness and the Court unhesitatingly admitted the Statement in evidence since there was no evidence to weigh from the defence or to prove alleged involuntariness. Similarly at the substantive trial, [he] also did not call any witness to testify for his defence or testify on his own behalf for his defence. In short, he rested his case on that of the Prosecution, now Respondent. What a gamble!

The key word there is - gamble and the Appellant actually gambled, by remaining silent in the face of overwhelming evidence against him. It is true that he was not obliged to say anything at the trial because an Accused Person has the constitutional right to remain silent and leave the trial to the Prosecution to prove the charge alleged against him.

In effect, his right to remain silent, even when arraigned for a criminal offence, is an inviolable one. But he was taking a huge risk; the law says that he is obliged to make his defence, if his remaining silent will result in being convicted on the case made out against him. See Okoro v. The State (1988) 5 NWLR (Pt. 94) 255 at 266 SC. and Igabele V. The State (2006) 6 NWLR (Pt. 975) 100 at 133 SC.

The Appellant herein rested his case on that of Prosecution and was convicted for a lesser offence that was made out against him.

His situation emphasizes the vital importance of defence counsel knowing when it is imperative that an Accused person should testify, to explain particular aspects of the case, which he alone can explain. This is because resting the defence on the case of the Prosecution will not present the trial Court with any explanation or an alternative story. See Nwede v. The State (1985) 3 NWLR (Pt.13) 444 SC. See also Igabele v. State (supra) where this Court per Ogbuagu, JSC, stated-

It was for him to rebut the presumption that he committed the crime, at least, to cast a reasonable doubt on the prosecution's case by preponderance of possibilities. But remarkably and significantly, his learned defence counsel, refused (as he was entitled to do as the master of his client's case) to cross-examine some of the vital witnesses --- He also refused the Appellant testifying and rested the case of the defence on that of the prosecution and thereby "drowning" the Appellant or letting him "stew in his own juice" so to speak/say.

In this case, there is no question that evidence against the Appellant, including his confessional Statement [Exhibit FI], is overwhelming, and his remaining silent in the face of that evidence, did not help him. In fact, the Appellant hobbled his own feet, and handicapped his case.

My learned brother addressed other issues in the lead judgment; I adopt his reasoning thereon thereon as mine, and I also dismiss this Appeal.

**EJEMBI EKO, J.S.C.:**

The Appellant and one Aliyu Danjuma were jointly tried on a two count charge of conspiracy to commit armed robbery punishable under Section 5(b) of the Robbery and Firearms (Special Provisions) Act, and armed robbery punishable under Section 1(2)(a) of the same Robbery and Firearms {Special Provisions) Act Cap 398 LFN 1990. They were alleged to have conspired to rob, and in fact did attack and rob Zainab Shehu Ladan, Buhari Mohammed and Fatima Abdullahi, while armed with guns, of two GSM Handsets (Nokia and Sagem) and other properties valued at N45,000.00. The date of the robbery was 9th December, 2007 at about 17.00 hours. The gang had arranged two motorcycles as get away vehicles. However, the motorcycles meant to convey the Appellant and Aliyu Danjuma from the scene failed to start. Consequently, the Appellant and the co-accused abandoned the motorcycles and fled on foot. They were subsequently arrested.

The Appellant made extra-judicial statement on 17th December, 2007, which was admitted in evidence after a trial-within-trial as Exhibit "F1". It was a confessional statement; and it was quite revealing. The Appellant in Exhibit "F1", states inter alia -

"On 08/12/2007 about 20.00hrs I went to mammy market to relax when luckily, I met one Ali Murtala alias Uwem and one Aliyu Danjuma. The said Ali Murtala alias Uwem introduced to me Aliyu Danjuma as his friend before he left. On 9/12/2007 about 1700hrs, Ali Murtala called me on my GSM phone and asked me to meet him at Kwannawa area around 1900hrs. Reaching Kwannawa, I met (1) Ali Murtala, (2) Aliyu Danjuma and (3) Lumu Abdullahi. At that place, Aliyu Danjuma said he has a work for us which is robbery job, which we instantly agreed to execute the job. The said Ali Murtala and Aliyu Danjuma asked I and Lumu to wait for them there, while they go out to look for their friend, a soldier who is their friend. When they returned from the soldier's place, they came along with a motorcycle with four arms and share it among ourselves. Then we moved straight to execute the robbery job at a place which I don't know. Aliyu Danjuma carried two people on his Jarma UK Motorcycle while one of us took Okada. Reaching there, Aliyu Danjuma decided to stay outside. Lumu Abdullahi stood by the door while I and Ali Murtala entered into the room. When we entered we first arrested the family and demanded for money which they said they don't have and began shouting. Ali Murtala immediately collected two handsets from the victims, while we took to our heels. We ran straight to Aliyu Danjuma who was with the motorcycle to run, but clutch of the motorcycle disappointed us as it refused to on (sic). We then abandoned the motorcycle there. I, Ali Murtala and Lumu Abdullahi later met at a junction where I took Okada to Kwannawa."

In Exhibit "F1", the Appellant further narrated that they (the four of them) later assembled in the soldier's house and there the arms were collected from them. They slept there. The following morning, as he (the Appellant) was making his way to travel to Bauchi, he was arrested by a soldier at the gate. In his words -

"l was taken to the Military Police Quarter Guard, where I met Aliyu Danjuma whom we operated together. When I got there Aliyu Danjuma was called to identify me. He did it by saying that I put on white shirt and describing the shirt and trouser I put on. The soldier went and searched my bag, and all the items Aliyu Danjuma said to identify me was (sic) found."

Exhibit "F1" was recorded by PW.6 under words of caution administered also by the PW6, a police officer.

The PW.6 and one Sgt Ahmed Bello, who was present when the confessional statement was recorded, testified in the trial-within-trial. The trial-within-trial was ordered when the Appellant's counsel objected to the admissibility of the extra-judicial statement of the Appellant on the grounds that the statement was not voluntarily made and that it was made under torture and some inducement. The Appellant after making Exhibit "F1" was taken before a Senior Police Officer and there confirmed that he made the statement voluntarily. The Senior Police Officer also testified in the trial-within-trial undiscredited.

At the trial-within-trial, the Appellant did not prove his assertions. He abandoned the assertions when he elected not to testify to prove them. The learned trial judge believed the narration of the witnesses who testified for the prosecution in the trial-within-trial, holding that their evidence was cogent and credible. The learned trial Judge was right, in my view, when he dismissed the Appellant's assertions that Exhibit "F1" was not made voluntarily.

The Appellant also did not testify in his defence. He raised no iota of defence to counter or cast any doubt on the prosecution's evidence. Only Aliyu Danjuma testified. Mr. Ogiza, the counsel to the Appellant had at the close of the prosecution's case announced that the Appellant "had elected not to testify". Facts not disputed are taken as established unless circumstances exist that make the undisputed facts ridiculous. That is not the situation here. The attempted retraction of Exhibit "F1" appears to be one of the usual gimmicks of lawyers that was not backed by his client. It is thus clear that the feeble attempt made by the Appellant to retract or render inadmissible Exhibit "F1" was not sustained. I therefore find it rather spurious to read in the Appellant's brief of argument, settled by Mr. Ogiza, that Exhibit "F1" was retracted and also that it was obtained involuntarily from the Appellant. The law is trite that counsel's summation and final address in the brief of argument does not have the force of evidence, and it can not be substituted for legal evidence. A bare statement from the Bar does not have the force of legal evidence by which a burden of proving a fact in issue is discharged. See ONU OBEKPA v. COMMISSIONER OF POLICE (1981) 2 NCLR 420.

In my considered view, the Appellant was not aggrieved by the decision of the trial Court, upon the trial-within-trial, that the credible and cogent evidence led by the prosecution witnesses established that the Appellant made Exhibit "F1" voluntarily without torture or inducement. This is an appealable decision within the context of Section 318 of the 1999 Constitution, in respect of which the Appellant's right of appeal is guaranteed by Sections 241 and 242 of the same Constitution. The Appellant, having not exercised his right of appeal against the specific findings of fact or decision, is deemed to have accepted the same. The decision therefore remains binding on him.

Exhibit "F1" is a confessional statement. It is a positive and direct narration of how the four persons, including the Appellant, agreed to commit the offence of armed robbery. Even without any other evidence, the Appellant could have been convicted for the alleged offence only on his confession. See IBEME v. THE STATE (2013) 8 NCC 46.

A confession is the best evidence. See NWACHUKWU v. THE STATE (2008) 4 WRN 1; SALAWU v. THE STATE (2010) 28 WRN 157; AWOSIKA v. THE STATE (2010) 18 WRN 159.

Outside Exhibit "F1" there are abundant and credible evidence supporting the conviction and sentence of the Appellant, as found by the trial Court. PW.2 and PW.4 were eye witnesses and victims of the menacing conduct of the Appellant in the night of 9th December, 2007. Their respective evidence which were not discredited by the cross examination of the defence counsel were corroborated by Exhibit "F1". The PW.2, for instance testified that the Appellant-

''was among the 2 people that entered our house. They pointed my son with a gun and he attempted to collect the gun and they slapped him and at that time I asked what was happening. They met me and Hadiya Fatima and told us that we were under arrest and they said we should give them money. They later collected our GSM Handsets - The 2nd accused (the Appellant) stayed with us while the other accused went into the room. The other accused person came out with a bag and at that time we shouted thieves and the people in the area came and they went out and started shooting in the air. They run to their motorcycle and one of the motorcycle failed to start and the other one started."

The evidence of PW.2, subjected to cross-examination, remained unscathed.

The PW.4's narration of the incident inter alia is-

"On the 9th December, 2007, I was at home - after ishai prayer. I was sitting in the parlour - when somebody knocked at the door - I said who is there and there was no response and the door was opened. After the door was opened somebody pointed at me with a gun by the 2nd accused person, Emeka Agugua (the Appellant). I attempted to collect the gun from the 2nd Accussed person and he slapped me and asked me where is Hajia. I refused to answer and he dragged me by the collar of my Shirt and took me to where Hajia was sitting down in the 2nd parlour,.... The other person that came in to the house called at my sisters two of them and they asked them to kneel down. At that time I was also kneeling down. The second person... called one of my sisters and took her to Hajia's room. She took him to their room and in that room he took a bag while the 2nd accused person (the Appellant) who was with us collected our GSM phones."

The PW.4 testified further that at this juncture, people started shouting and this prompted the Appellant and his colleague to hurriedly leave the room. They shot into the air as they were running towards their motorcycles. One of the two motorcycles failed to start. The PW.4 was cross-examined. Like the PW.2, the cross examination left the evidence of PW.4 unscathed.

The evidence of PW.2 and PW.4 were substantially corroborated by Exhibit "F1". The Appellant's counsel made so much fuss about PW.2 and PW.4 contradicting themselves on whether PW.4, a nephew of PW.2, being referred to as "my son" by the PW.2 and the fact that both of them were not ad idem on at who the gun was pointed. The counsel, totally oblivious of the substance of the evidence of PW.2 and PW.4, had raised to the unrealistically idealistic pinnacle mere semantics and infinitesimal details. When the evidence of PW.2 and PW.4 are juxtaposed against the self-incriminating statement of the Appellant in Exhibit "F1", it is clear that there was no miscarriage of justice to warrant the appellate Court's intervention.

It was through the PW.5, Aliyu Shehu, that Aliyu Danjuma (1st Accused) was arrested on the fateful day. PW.5 heard gun shots and sound of felling motorcycle. He also heard people shouting "thief, thief". On getting to the scene, he saw the bruised 1st Accused (Aliyu Danjuma) as a car flashed light on him. Suspecting that something sinister had happened, the P.W.5 reported to the Police and the 1st Accused was arrested. Some aspects of PW.5 evidence corroborate the testimonies of PW.2 and PW.4 and Exhibit "F1" particularly the shouts of thief, thief, the sound of gun shots and the 1st Accused trying to run from the scene.

The Court of Appeal affirmed the conviction and sentence of the Appellant for conspiracy and attempted robbery. The offence of attempted robbery is a lesser offence than the robbery charged. The ingredients are less onerous to prove. The law is that before an accused can be convicted for a lesser offence, the ingredients of the lesser offence must be subsumed in the original offence charged and the circumstances the lesser offence was committed must be similar to those contained in the offence charged. See THE NIGERIAN AIR FORCE v. KAMALDEEN (2007) 2 SC. 113. The learned trial Judge, in his wisdom exercised the discretion to convict the Appellant for the lesser offence of attempted robbery. The Prosecutor has not complained. He is therefore taken to have accepted the verdict. Let me however add that the discretion or power of the trial Court to convict for a lesser offence must be one to be exercised most judiciously and judicially. It should not be one underlined by pure sentiments, or one in which it thinks that it exercising some clemency or prerogative of mercy. In adjudication sentiments command no place. Accordingly, the discretion or power to convict for lesser offence is not, and should not, be an avenue for the trial Judge to express his sentimental benevolence. I say no more.

This Court is usually loathe to interfere with the concurrent findings of facts by the trial Court and the intermediate Court, unless the Appellant is able to establish that the findings are perverse and/or that substantial miscarriage of justice had been done to him. I do not think that the conviction of the Appellant for attempted robbery, even when there exist abundant evidence that the Appellant and his gang, while armed with dangerous weapons, stole two GSM handsets and a bag from their victims on the fateful day has occasioned any miscarriage of justice to the Appellant. The findings are also not perverse. The Appellant luckily had benefited from the learned trial Judge's large heart towards clemency.

The totality of all I have been saying is that I can not fault the decision the Court of Appeal delivered on 12th December, 2011 in the appeal No. CA/5/214C/2010 affirming the conviction and sentence of the Appellant. For the foregoing reasons and other reasons contained in the judgment just delivered by my learned brother, Olukayode Ariwoola, JSC, this appeal is hereby dismissed.