**KOLA AKANJI**

**v.**

**THE STATE**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 21ST DAY OF FEBRUARY, 2020

CA/IB/145C/2017

**LEX (2020) - CA/IB/145C/2017**

**OTHER CITATIONS**

3PLR/2020/26 (CA)

(2020) LPELR-49531 (CA)

**BEFORE THEIR LORDSHIPS**

HARUNA SIMON TSAMMANI, JCA

NONYEREM OKORONKWO, JCA

FOLASADE AYODEJI OJO, JCA -end!

**BETWEEN**

KOLA AKANJI - Appellant(s)

AND

THE STATE - Respondent(s)-end!

**ORIGINATING COURT(S)**

OGUN STATE HIGH COURT [Holden at Abeokuta, A. A. Akinyemi, J Presiding].-end!

**REPRESENTATION**

A.M. Kotoye, Esq. - For Appellant

AND

Mrs. F.E. Bolarinwa - Adebowale (Chief State Counsel, Ogun State Ministry of Justice) with him, M.M. Akintunde, Esq. (State Counsel, Ogun State Ministry of Justice) – For Respondent -end!

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

CONSTITUTIONAL LAW - RIGHT TO DEFENCE/LEGAL REPRESENTATION:- Constitutional requirement in Section 36(6)© of the Constitution of the Federal Republic of Nigeria, 1999 that “Every person who is charged with a criminal offence shall be entitled to ... defend himself in person or by legal practitioner of his own choice – Where accused person is unrepresented and is assigned a court appointed counsel – Failure to complain timeously about any concern as to representation – When would be fatal to any claim of lack of fair hearing

CRIMINAL LAW AND PROCEDURE - OFFENCE OF ARMED ROBBERY:- Proof of – Elements that a prosecution must prove to establish the offence of armed robbery - Duty of prosecution to prove that the accused person was armed with an offensive weapon - Failure of the prosecution to tender the offensive weapon without more - Whether fatal in all cases

CRIMINAL LAW AND PROCEDURE – CAPITAL OFFENCE:- Duty of Court to assign a legal practitioner for the defence of an accused charged with a capital offence where the accused person is not defended by a legal practitioner - Section 352 of the Criminal Procedure Act – Exercise – Whether requires the consent of or any consultations with such an accused person

CRIMINAL LAW AND PROCEDURE – CAPITAL OFFENCE:- Where a Court appoints counsel for a person accused of a capital offence who is not represented by own counsel – Whether the accused person is at liberty to reject, disown, protest, or even change such counsel if he is not satisfied with the performance of the counsel assigned to him by the Court - Section 7(3) of the Legal Aid Act, Cap.205, Laws of the Federation

CRIMINAL LAW AND PROCEDURE – PROOF OF CRIME - IDENTIFICATION EVIDENCE:- Way(s) through which the commission of an offence may be proved - Principle that that evidence of an eye witness is one of the best evidence available in criminal trials as it is direct and provides an on the spot narration of the commission of the crime - Duty of trial to examine such eye-witness evidence – Justification of – Relevant considerations -end!

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - INTERFERENCE WITH EVALUATION OF EVIDENCE: Duty of trial judge to evaluate evidence – Attitude of appellate Court to invitation to interfere therewith

APPEAL - ISSUE(S) FOR DETERMINATION:- Issue on which no argument is advanced/proffered – Legal effect of – Duty of Court thereto

EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF:-Presumption of innocence pursuant to Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 – Duty of prosecution to adduce credible evidence which will prove every ingredient of the offence charged beyond reasonable doubt – Effect of failure thereto

EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF:- Where the evidence adduced by prosecution is contradictory on material elements of the offence – Legal effect that a doubt has been created in the mind of the Court – Proper decision for the Court to reach

EVIDENCE - CONTRADICTION IN EVIDENCE:- Nature of contradiction that will affect the credibility of the prosecution's case – Whether must be on material facts that touch on the root or essential elements of the offence charged so as to be capable of creating doubt in the mind of the Court on a material issue at the trial-end!

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant was alleged to have, in company of two others (now at large), violently robbed one Fashola Moses of his Bajaj Motorcycle, one Nokia Mobile phone and the sum of six thousand naira (N6,000.00) on or about the 16/12/2010 along Olujobi Village via Itori, Ogun State. Thereupon, he was arraigned on a two counts charge of conspiracy to commit armed robbery and armed robbery contrary to and punishable under Sections 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. R.11, Laws of the Federation of Nigeria, 2004.

The Appellant who had made an extra-judicial statement to the police confessing to the crime, retracted same at the trial. At the trial, the prosecution called four witnesses and tendered four (4) exhibits marked as Exhibits “1A”, “1B”, “2” and “3” respectively. The Appellant testified in his own defence but called no witness. -end!

DECISION(S) APPEALED AGAINST

On the 18th day of January, 2017 the trial Judge convicted the Appellant on both counts of conspiracy to commit armed robbery and for armed robbery and sentenced him to death. -end!

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

1. Whether the allegations of conspiracy to commit armed robbery and armed robbery brought against the Appellant were proved by the prosecution so as to justify the conviction of the Appellant by the trial Court?

2. Whether the Appellant got fair trial before the trial Court?-end!

*BY RESPONDENTS*

1. Whether from the totality of evidence at the trial, the prosecution has proved the offence of conspiracy to commit armed robbery and armed robbery against the Appellant beyond reasonable doubt.

2. Whether the Appellant was given fair hearing during the trial at the lower Court.-end!

*AS ADOPTED BY COURT*

[On consideration of the issues raised by both sides, the Court distilled the following three (3) issues for the determination of the appeal]:

“1. Whether from the proceedings on record, the Appellant had a fair trial in the trial Court?

2. Whether from the totality of the evidence adduced at the trial, the trial Court was right in convicting the Appellant for conspiracy to commit armed robbery?

3. Whether from the available oral and documentary evidence on the record, the trial Court was right in convicting the Appellant for having committed armed robbery?”-end!

DECISION OF COURT OF APPEAL

“On the whole therefore, it would be seen that this appeal has no merit. It has failed and is accordingly dismissed. Consequently, the judgment of Ogun State High Court sitting at Abeokuta in Charge No: AB/5R/2014 delivered on the 18th day of January, 2017 is hereby affirmed.”-end!

**MAIN JUDGMENT**

HARUNA SIMON TSAMMANI, J.C.A. (Delivering the Leading Judgment):

This appeal is against the judgment of the Ogun State High Court sitting in Abeokuta delivered on the 18th day of January, 2017 by A. A. Akinyemi, J in Charge No: AB/5R/2014.

The Appellant was arraigned on a two counts charge of conspiracy to commit armed robbery and armed robbery which are offences contrary to and punishable under Sections 6(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap. R.11, Laws of the Federation of Nigeria, 2004. The Appellant was said to have, in company of two others (now at large), robbed one Fashola Moses of his Bajaj Motorcycle, one Nokia Mobile phone and the sum of six thousand naira (N6,000.00) on or about the 16/12/2010 along Olujobi Village via Itori, Ogun State.

The case of the prosecution on record is that, at about 7.00p.m on the 16/12/2010, the complainant (Fashola Moses) who testified as the PW1 was on his way to Ijoko in Yewa North Local Government Area on his Bajaj Motorcycle when the Appellant and two others stopped him and requested him to convey them to Ago-Olowo. That on their way, the engine then switched-off; and not knowing that it was deliberately switched-off by one of the passengers, the complainant stopped to check. That immediately one of the passengers struck him with a broken bottle on the forehead causing the complainant to fall down. The Appellant and his co-assailants took-off with the motorcycle leaving the complainant behind. That shortly after that, another motorcyclist came by and offered to assist the complainant pursue the robbers.

The prosecution also stated that the assailants were however involved in an accident in their bid to escape. That on arrival at the scene of the accident, the complainant explained to the villagers who had rushed to the scene of the accident, what transpired between him and those involved in the accident. That the villagers and the local Vigilante group then combed the surrounding bush where the Appellant and his co-assailants had run into, leading to the arrest of the Appellant while the others escaped.

The Appellant who had made an extra-judicial statement to the police confessing to the crime, retracted same at the trial. At the trial he (Appellant), told the Court that, he had a body rash and had gone to the stream to bath and thereafter proceeded to Babalumo Village to buy fulcin to use for the body rash. That on his way, he saw some six (6) boys who were saying ”it is this kind of cloth”. That the boys then took him to the OPC office where he was beaten and later handed over to the police. That the police then called someone who came and accused him of being one of the persons who robbed him of his motorcycle. He therefore denied that he was one of the persons that robbed the PW1 on the 16/12/2010.

At the trial, the prosecution called four witnesses and tendered four (4) exhibits marked as Exhibits “1A”, “1B”, “2” and “3” respectively. The Appellant testified in his own defence but called no witness. Learned counsel addressed the Court and in a considered judgment delivered on the 18th day of January, 2017 the learned trial Judge convicted the Appellant on both counts of conspiracy to commit armed robbery and for armed robbery and sentenced him to death. Being aggrieved by the decision, the Appellant has filed this appeal.

The Original Notice of Appeal which consisted of only the omnibus ground of appeal, was filed on the 17/2/2017. However, by leave of this Court granted on the 26/11/2018, the Appellant filed an Amended Notice of Appeal on the 29/11/2018 consisting of three (3) Grounds of Appeal. The parties then filed and exchanged Briefs of Arguments. The Appellant’s Brief of Arguments which was filed on the 15/1/19 raised therein, two issues for determination as follows:

1. Whether the allegations of conspiracy to commit armed robbery and armed robbery brought against the Appellant were proved by the prosecution so as to justify the conviction of the Appellant by the trial Court?

2. Whether the Appellant got fair trial before the trial Court?

The Respondent’s Brief of Arguments settled by Mrs. Olajumoke S. Ogunbode (Principal State Counsel, Ogun State Ministry of Justice) was filed on the 08/4/19 but deemed filed on the 20/5/19. Two issues were also raised by the Respondents for determination as follows:

1. Whether from the totality of evidence at the trial, the prosecution has proved the offence of conspiracy to commit armed robbery and armed robbery against the Appellant beyond reasonable doubt.

2. Whether the Appellant was given fair hearing during the trial at the lower Court.

Having carefully considered the issues raised by both sides in this appeal, I am of the view that the following three (3) issues are germane for the determination of this appeal:

1. Whether from the proceedings on record, the Appellant had a fair trial in the trial Court?

2. Whether from the totality of the evidence adduced at the trial, the trial Court was right in convicting the Appellant for conspiracy to commit armed robbery?

3. Whether from the available oral and documentary evidence on the record, the trial Court was right in convicting the Appellant for having committed armed robbery?

In the determination of this appeal, I shall start with issue one (1), which raises the issue of fair hearing.

On issue one (1) therefore, learned counsel for the Appellant contended that the Appellant in the trial Court was represented by counsel who are staff of the Ogun State Ministry of Justice. That the office of the Public Defender is a Department under the leadership of the Attorney-General and Commissioner for Justice of Ogun State. That by Section 211(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Attorney-General as well as Officers of his department can only prosecute criminal cases but cannot defend an accused person in a criminal matter. That the Records show that a letter was written to the office of the Public Defender requesting for legal representation for the Accused/Appellant, but there is nothing on record to show that the Appellant was consulted before the request was made on his behalf. It was then submitted that, by being represented by counsel from the same office of the Attorney-General of Ogun State who are prosecuting him, the Appellant was exposed to the risk of a breach of his confidence and/or compromise of his legal interest in the proceedings in the lower Court.

Learned Counsel for the Appellant went on to submit that, in law a person accused of a capital offence has the right to be defended by a legal practitioner of his own choice; or by counsel assigned to him by the Court if he is unable to afford the services of a counsel. The cases of Josiah v. State (1985) 1 NWLR (pt.1) 125 and Adigwe v. F.R.N. (2015) 8 NWLR (pt.1490) 105 at 135 were cited in support and to further submit that, in the instant case, the Appellant did not request to be represented by counsel from the office of the Ogun State Ministry of Justice. Furthermore, that it is clear from page 60 of the Record of Appeal, that the trial Court did not call upon the Appellant’s Counsel to address it on allocutus; and that the failure of the Court do so, rendered the entire proceedings null and void and of no effect. The case of Audu v. State (2016) 1 NWLR (pt.1494) 557 at 565 was cited in support; and to urge us to resolve this issue in favour of the Appellant.

On this issue, learned counsel for the Respondent contended that, the principle of fair hearing is fundamental to the administration of justice. That, the principle requires that the Court conduct the trial of a case with fairness and impartially, and without bias to any of the parties. The cases of Peter Pam & Anor v. Mohammed & Anor (2008) 5 S.C. (pt.1) 83 and Orugbo v. Una (2002) 13 SCM 153 were cited in support. That the essence of fair hearing is to give the parties equal opportunity to be heard or present their cases.

The case of Okeke v. State (2003) 15 NWLR (pt.842) 25 was then cited to submit that, in the instant case, there is no proof of any conflict of interest on the part of the defence counsel nor bias on their part. That in the instant case, the record show that, on the 06/11/14 when the plea of the Appellant was taken, one O. Omoniyi; Esq. of counsel whose chamber is in Lagos appeared for the Appellant. That, one S. O. Ogunyemi; Esq. from the Chamber of O. O. Omoniyi represented the Appellant all through the trial. In other words, that the Appellant was represented by a private legal practitioner throughout the trial. That in any case, throughout the trial, the Appellant never made the issue of choice of counsel an issue at the trial.

Learned Counsel for the Respondent went on to submit that, assuming (which he does not concede), that the office of the Citizen Rights Department represented the Appellant during the trial, it did not lead to a breach of the Appellant’s right to fair hearing. That in the case of The State v. Ibiloye Mathew (2018) LPELR - the Supreme Court held that, by Section 211(1)(b) and (c) of the 1999 Constitution, the powers of the Attorney-General is not just prosecutorial but also defensive, depending on the circumstances of each case. Furthermore, that the right of an accused is not compromised where a lawyer from a department of the Ministry of Justice takes up his defence. We were accordingly urged to resolve this issue against the Appellant.

Now, Section 36(6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) stipulates that:

“36(6). Every person who is charged with a criminal offence shall be entitled to -

(a) .......

(b) ……..

(c) defend himself in person or by legal practitioner of his own choice;”

By the above provision therefore, the right of an accused person to defend himself is therefore an inviolable constitutional right in favour of an accused person. Such right is for the accused person to exercise either in person, or through a legal practitioner of his own choice. To that end, where an accused person appears before a trial Court unrepresented by counsel, the trial Court has a duty to inquire from him, whether he desires to defend himself in person or through a legal practitioner. Where he intends to defend himself in person, the Court shall proceed but where the charge is one that carries the sentence of death, and the accused has no capacity to secure the services of a legal practitioner, the Court has a duty under Section 352 of the Criminal Procedure Law of Ogun State to assign one.

I have perused the record of appeal. At page 27 of the record of appeal, it is recorded that when the Accused/Appellant was presented before the Court, the Appellant was not represented by counsel; and he (Appellant) requested the Court to assign one for his defence. The trial Court then directed the Registrar of the Court to write to the Citizen Rights Department to provide legal representation to the Accused/Appellant. On the 06/11/2014, when the plea of the Appellant was taken, one O. Omoniyi; Esq. of counsel appeared for the accused. The said O. Omoniyi; Esq. with S.O. Oluyemi; Esq. appeared for the accused when PW1 and PW2 testified; and were duly cross-examined by counsel. Similarly, when PW3 and PW4 testified, the Appellant was duly represented by one S.O. Ogunyemi; Esq. of counsel who duly cross-examined the two witnesses and also raised necessary objection when the extra-judicial statements of the Appellant were tendered. Though, there is no indication whether counsel were from the Citizen Rights Department of the Ogun State Ministry of Justice, there is no indication that the Appellant protested the appearance of counsel for him. Indeed, it has been held in the case of Okon v. State (1995) 1 NWLR (pt.372) 382 that, Section 36(6)(c) which guarantees to an accused person the right to defend himself in person, or brief counsel of his own choice is intended to ensure, in the interest of justice, that an accused person is not denied the right to defend himself either personally, or through counsel of his own choice. Where an accused person has surrendered his right of choice of counsel to the Court, he cannot be heard to complain, where the Court does his bidding by assigning counsel. Thus in Okon v. State (supra), the Supreme Court, per Iguh, J.S.C. said:

“Where, the offence charged involves capital punishment on conviction and the accused person is not defended by a legal practitioner, the Court under Section 352 of the Criminal Procedure Act is enjoined and indeed bound to assign a legal practitioner for his defence. The assignment of counsel by the Court to an accused person is unable, or, has abandoned his right to brief a legal practitioner of his own choice to conduct his defence. The reason is because it is mandatory that an accused person shall be defended by a legal practitioner throughout his trial for an offence which involves capital punishment. Consequently, where in such a trial, an accused person fails to brief counsel, the Court shall assign one for his defence as he cannot be kept in custody indefinitely without trial because he does not have a legal practitioner of his own choice to conduct his defence. I think I should add that this duty imposed on the Court to assign counsel to defend an accused person who is unable to brief a legal practitioner for his defence in a capital offence does not, in my view, call for or require the consent of or any consultations with such an accused person before the same may be discharged.”

It should also be noted that, it is not the law that once a Court assigns counsel to an accused person, such an accused person will remain bound by it throughout the trial. Such an accused person is at liberty to reject, disown, protest, or even change such counsel if he is not satisfied with the performance of the counsel assigned to him by the Court. See Section 7(3) of the Legal Aid Act, Cap.205, Laws of the Federation and the case of Nwambe v. State (1995) 3 NWLR (pt.384) 385. See also Nemi & Ors v. State (1994) LPELR - 24854 (SC). In the instant case, the Appellant did not complain about the conduct of counsel assigned to defend him throughout the trial. On appeal before us, aside from making the assertion of likelihood of bias, or conflict of interest by counsel, the Appellant has not laid before this Court, facts upon which the Court can make such assumption or conclusion. Indeed, the record of appeal show that, counsel dutifully conducted the defence of the Appellant by cross-examining the witnesses called by the prosecution, and even raised objection to the admissibility of the extra-judicial statement of the Appellant when same were tendered. I am therefore of the view that, this issue raised by the Appellant is an afterthought. It is accordingly resolved against the Appellant.

Now, on issue one formulated by me, which deal with the conviction for armed robbery, learned counsel for the Appellant cited the cases of David Obue v. The State(1976) All NLR 139 and Ogidi & Ors v. The State (2005) 1 NCC 163 at 177 to submit that, in order to secure a conviction in any criminal trial, the prosecution must prove the charge against the accused person beyond reasonable doubt. That arriving at a decision, the trial Court must carefully consider the totality of the evidence presented before it in order to arrive at a decision as to whether or not the prosecution has been able to establish a case against the accused person beyond reasonable doubt. That, the prosecution’s case must be devoid of such contradictions that will cast doubt on its case, as once there are significant contributions in the prosecution’s case, the Court is enjoined to ascribe the benefit of it in favour of the accused person. The case of Olayinka v. State (2007) 9 NWLR (pt.1040) 561 at 584 was cited in support.

Learned Counsel for the Appellant went on to submit that, the case of the prosecution was fraught with so much inconsistencies and contradictions on material facts that left the prosecution’s case short of the standard required by law. That, PW4 failed to establish that the broken bottle he recovered at the scene of crime was the same one used by the Appellant to commit the robbery. That the broken bottles were not even tendered as exhibits nor did the PW4 give evidence that the Appellant’s finger prints were analyzed to be on the broken bottle. That this fact is important because the Appellant denied visiting the place with any other person including the PW4. It was therefore contended that, the learned trial Judge was therefore wrong to convict the Appellant based on the testimony of PW4 who could not prove that the Appellant attacked PW1 with broken bottles. The cases of Egwu v. The State (2013) All FWLR (pt.682) 1812; Johnson v. The State (2013) 3 NWLR (pt.1340)78; Okeke v. The State (1995) 4 NWLR (pt.392) 676 and Okpulor v. The State (1990) 2 NWLR (pt.164) 541 were cited in support; and to further submit that the circumstances of the case require that the alleged broken bottles be tendered.

It was also argued by learned counsel for the Appellant that, PW1 did not say that the broken bottle recovered is the same as that with which he was stabbed nor is there any medical report to establish the fact that the injury/scar on PW1’s head was the result of a stab he received by the use of the broken bottle. Learned Counsel then submitted that, any piece of evidence which has been discredited cannot be relied upon by the trial Court in the determination of the guilt of an accused person. The case of Lateef v. The State (2013) 17 NWLR (pt.1383) 281 was then cited to submit that, the evidence of the prosecution with regards to the broken bottles is incomplete.

Learned Counsel for the Appellant went on to submit that, the Appellant maintained that the contents of Exhibits “1A”, “1B” and “3” were dictated to him by PW3 and PW4 and therefore not voluntarily made by him. In other words, the Appellant denied making those statements. That, nonetheless, the learned trial Judge went on to convict the Appellant based on Exhibits “P3” and “P7” and the evidence of PW1 who never identified the Appellant. It was then submitted that, the trial Court could only convict the accused person based on his confessional statement if such statement was proved to be free, voluntary, direct and positively proved. The cases of Adisa v. The State (2013) 14 NWLR (pt.1375) 567 and Obosi v. The State (1965) NMLR 119 were cited in support. That Exhibits “1A”, “1B” and “3” were not voluntarily made and therefore, the trial Court erred by relying on them to convict. We were accordingly urged to hold that the prosecution failed to prove their case against the Appellant beyond reasonable doubt.

In response, learned counsel for the Respondent contended that in law, the commission of a crime may be proved by any one or all of the following ways:

(a) by the account of eye witness(es) who saw the commission of the offence.

(b) by circumstantial evidence which unequivocally point at the guilt of the accused person.

(c) through the voluntary confessional statement of the accused person.

That, the evidence led must establish the following ingredients of the offence of armed robbery beyond reasonable doubt

(i) that there was a robbery.

(ii) that the accused person was the robber or one of the robbers.

(iii) that the robber was armed at the time of committing the robbery.

Learned Counsel for the Respondent then submitted that, the fact that there was an armed robbery was not in dispute at the trial. That, the testimony of PW1 who was the victim established beyond reasonable doubt that there was a robbery on the 16/12/2010. As for the second (2nd) ingredient, learned counsel contended that, there is ample evidence that the Appellant was armed with a broken bottle in the course of committing the robbery. To that extent, learned counsel commended the testimony of PW1 who was the victim of the robbery. Furthermore, that PW4 testified that broken bottles were recovered at the scene of the robbery. That, the Appellant admitted in his statement to the police Exhibits “1A”, “‘1B”‘ and “‘3”‘ that he was in possession of a broken bottle. The case of Osung v. The State (2011) 11 SCM 176 at 197 was cited in support, and to also submit that, the prosecution satisfied the burden of proof that the Appellant was armed at the time of the robbery. The cases of Olayinka v. State (2007) 9 NWLR (pt.1040) 561 and Hamza v. The State (2016) LPELR - 41557 (CA) were then cited to further submit that, the non-production of the weapon used by the Appellant is not a sine qua non to a conviction in a charge of armed robbery.

On the third ingredient, learned counsel for the Respondent submitted that, PW1 who doubled as a victim and eye witness of the offence, recognized the Appellant upon his arrest. The case of Nkebisi & Anor v. The State (2010) 3 SCM 170 at 174 was then cited to submit that, the evidence of a single witness which is believed, given the circumstances of a case will not in law, require corroboration. That in the instant case, the testimony of PW1 is the direct evidence of a person who witnessed the crime and was able to identify his assailant. That in any case, where there is good and cogent evidence linking the accused to the crime charged, a formal identification parade is not necessary. The case of Adebayo v. The State (2014) 8 SCM 34 was cited in support and to further submit that in the instant case, there was no dispute as to the identity of the Appellant as one of the persons that robbed PW1 on the 16/12/2010. That the Appellant was arrested on the date of the robbery and made a statement to the police giving the graphic details of his involvement in the commission of the crime.

Learned Counsel for the Appellant also referred to Sections 28 and 29 of the Evidence Act, 2011 which define what confession is, and its effect, and proceeded to submit that, a trial Court can rely solely on the confessional statement of an accused person to convict him; provided such a statement is direct, positive and duly proved. The case of Akpa v. State (2008) 8 SCM 68 at 70 was cited in support. That in the instant case, objection was raised as to the voluntariness of Exhibits “‘1A”‘, “‘1B”‘ and “‘3”‘ which led to a trial within trial before those statements were admitted. The cases of Ogudo v. The State (2011) 11 - 12 SCM 209 at 212; Lasisi v. The State (2013) 6 SCM 216 were cited to submit that the trial within trial was conducted even though the complaint of the Appellant was that he did not make those statements but that he was forced to sign an already prepared speech. It was then submitted that, the learned trial Judge having found that those statements were voluntarily made, was right to have considered them in convicting the Appellant.

Now, by Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), every person who is charged with the commission of a criminal offence, shall be presumed to be innocent until he is proved guilty. By that presumption of innocence therefore, the prosecution has the onerous duty of adducing credible evidence which will prove every ingredient of the offence charged beyond reasonable doubt. It therefore means that where any of the ingredients of the offence charged is not proved, or the evidence led in proof thereof is discredited by way of cross-examination, the charge has not been proved beyond reasonable doubt. Similarly, where the evidence adduced is contradictory on material elements of the offence, it would mean that a doubt has been created in the mind of the Court; and it would therefore be concluded that the charge has not been proved beyond reasonable doubt. See Sections 131, 132 and 135 of the Evidence Act, 2011.

See also State v. Isiaka (2013) 11 NWLR (pt.1430) 374 and State v. Azeez & Ors (2008) 14 NWLR (pt.1108) 439. Thus in the case of Rasaki v. The State (2011) 10 NWLR (pt.1273) 251, I said:

“in an accusatorial system of administration of justice as practiced in this country, the general burden of proof lies always on the person who alleges. In criminal trials, the general or legal burden of proof lies on the prosecution and does not shift, to prove the guilt of the accused person. This legal burden is supported by Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria, which guarantees to all persons accused or charged with a criminal offence, the right to be presumed innocent until proven guilty. This burden, the prosecution must discharge beyond reasonable doubt by proving every ingredient of the offence charged by credible evidence which also rebuts any defense raised by the defense. Where at the close of evidence an essential element of the offence charged has not been proved, a doubt would have been created as to the guilt of the accused, and he shall be entitled to a discharge and acquittal.”

In the instant case, the Appellant was charged for having committed the principal offence of armed robbery. The hackneyed elements to be proved in a charge of armed robbery are:

(a). that there was a robbery or series of robberies;

(b). that the robbery or each of the robberies was an armed robbery;

(c). that the accused person was the robber or one of those who took part in the armed robbery.

It is also trite law that the commission of an offence, including armed robbery may be proved through any one or a combination of the following ways:

(a). by the direct evidence of a person or persons who saw the commission of the offence;

(b). by circumstantial evidence which lead to no other conclusion than that the accused person committed the offence.

(c). by the confessional statement(s) of the accused person which is direct, positive, unequivocal and duly proved.

See Michael Adeyemo v. The State (2015) LPELR - 24688 (SC); Gabriel Ogogovie v. The State (2016) LPELR - 40501 (SC); Joseph Bille v. The State (2016) LPELR - 40832 (SC) and Onuoha & Ors v. State (1989) 3 NWLR (pt.101) 23.

In this appeal, the Appellant complains first of all, that the evidence led by the prosecution in the trial Court is full of contradictions on material facts. Specifically that the prosecution failed to establish that the broken bottle the PW4 said he recovered from the scene of crime are the same ones used in the commission of the robbery on PW1. It should be noted that, it is not every contradiction or inconsistency in the evidence adduced by the prosecution that will have the effect of discrediting the totality of the prosecution’s case. For a contradiction to affect the credibility of the prosecution’s case, it must be on material facts that touch on the root or essential elements of the offence charged. Therefore, minor or minute contradictions will be treated under the deminimis rule. See Osung v. The State (2012) 18 NWLR (pt.1332) 256 at 278 paragraphs F - H; Bassey v. State (2012) 12 NWLR (pt.1314) 209; Edet Okon Iko v. The State (2001) LPELR - 1480 (SC) and Corporal Isah Ahmed v. The Nigerian Army (2016) LPELR - 40826 (SC). Thus, in Musa v. State (2009) 15 NWLR (pt.1165) 467, the Supreme Court, per Fabiyi, J.S.C. said:

“It is necessary at this juncture to point out that contradiction in the evidence of the prosecution that will be fatal must be substantive. It is not every miniature contradiction that can vitiate the case of the prosecution. Minor contradiction which did not affect the credibility of witnesses will be of no avail to the Appellant. Contradiction, to be worthy of note, must relate to the substance and indeed the vital ingredients of the offence charged. Trivial contradiction should not vitiate a trial”

It is clear therefore, that for a contradiction to avail an accused person, it must be one that is capable of creating doubt in the mind of the Court on a material issue at the trial. In the instant case, the complaint of the Appellant before us does not relate to any contradiction. At best, the complaint relate to evidence of the identity of the weapon used by the assailants on the PW1. Incidentally, no issue was raised at the trial on the identity of the weapon used in the commission of the robbery. This is more so, as the said broken bottle(s) allegedly recovered by the PW4 at the scene of crime was not tendered in evidence. This issue is therefore a non-sequitur; but same leads us to the second complaint of the Appellant.

The Appellant had therefore complained that the prosecution failed to tender the broken bottles used in attacking the PW1. That, failure to so tender is fatal to the prosecution’s case. It is not the law that the prosecution must tender the weapon used in the commission of the robbery. In other words, it has never been the law that the weapon of robbery be tendered in evidence, and therefore, the prosecution need not tender the weapon of the offence of armed robbery. Failure of the prosecution to tender the offensive weapon without more, cannot result in the acquittal of the accused person. Once there is credible evidence that an offensive weapon was used, it will suffice, so long as all the essential elements that constitute the offence are proved by credible evidence beyond reasonable doubt. See Kayode Ayodeji v. The State (2017) LPELR - 42374 (CA); Olayinka v. The State (2007) 7 NWLR (pt.1040) 561 and Babarinde & Ors v. The State (2014) 3 NWLR (pt.1395) 568. This is particularly so where there is cogent eye witness evidence of the commission of the offence. As My Lord, Kekere-Ekun, J.S.C. in the case of Babarinde v. The State (supra) said:

“In order to secure a conviction for armed robbery, the prosecution must prove that the accused person was armed with an offensive weapon. The weapon may be a gun or any other object likely to induce fear of bodily harm in the victim such as a cutlass or machete. Where a gun or other offensive weapon is used in the commission of an offence, it is not essential to tender the weapon to secure a conviction, provided there is cogent eye witness evidence or in the absence of eye witness evidence, there is enough unequivocal circumstantial evidence that points to the guilt of the accused.”

My Lord, I.T. Muhammad, J.S.C. (as he then was) in the case of The People of Lagos State v. Mohammed Umaru (2014) 7 NWLR (pt.1407) 584 put light to it in these words:

“Although non-tendering of a weapon or weapons alleged to have been used on a victim of an armed robbery or any crime, for that matter, may not be fatal to prosecution’s case where the defendant confesses to the commission of the crime, the production of the items recovered from the scene of crime, including the alleged dagger, along with the statements made by PW1, and more importantly, the confessional statement said to have been made by the respondent, would have gone a long way to lay same weight to the evidence led by the prosecution”

In the instant case, the evidence on record discloses that, the persons who attacked the PW1 hit him on the head with a bottle causing him to bleed. That they took away his motorcycle and rode away; and that in their bid to escape, fell with the motorcycle thereby attracting the attention of other persons around. They (robbers) then escaped into a nearby bush before the PW1 who had gotten help from a fellow motorcyclist could arrive the scene of the accident. With the help of PW2, a local vigilante leader, a search was organized and the Appellant was arrested some few hours after the incident in the nearby bush while the others escaped. The PW3 testified under cross-examination that, when the crime was reported at the Ewekoro Police Station, he saw that the complainant (PW1) had injury on his head inflicted with a bottle by the Appellant and his gang. The PW1 also gave evidence that he was hit on the forehead with a bottle and his motorcycle taken away. The learned trial Judge made findings on the issue of the weapon of the offence and concluded at page 54 lines 18 - 28 of the record of appeal as follows:

“The evidence of PW2, PW3 and PW4 which were all cogent and credible, clearly corroborated that of PW1 that those who robbed him hit him on the head with a bottle, which caused him to bleed. I hold therefore that the prosecution has proved that the robbery was carried out with the use of an offensive weapon. The argument of Learned Defence Counsel to the effect that the failure of the prosecution to tender the broken bottles, and to produce medical report of the injury sustained by the PW1 or his failure to show his scar to the Court is fatal to the prosecution’s case, cuts no ice with me. While it is always desirable to tender the weapon of crime, where there are other compelling evidence linking the Accused to the offence, production of the weapon is unnecessary. See Olayinka v The State (2007) 9 NWLR (pt.1040) 561; Sunday v. The State (2013) LPELR - 20196”

The above finding of the learned trial Judge is supported by the evidence on record. The victim of the crime who testified as the PW1, stated that the Appellant and his gang hit him on the forehead with a bottle (or broken bottle) and he fell down. That he sustained injury on his head as a result, leading to bleeding. The PW2 stated that PW1 had injury on his head, and that he and his boys took the PW1 and treated him of the injury. Under cross-examination, PW2 stated that:

“When I got to the scene, I saw the victim on the ground with blood.”

The evidence of injury on the victim’s head was corroborated by the testimony of PW3 who testified under cross-examination that, he noticed that the complainant (PW1) had injury on his head; and when asked the source of the injury, PW1 informed him that it was the Appellant and his gang that inflicted the injury on him with a bottle. That was on the 18/12/2010, just two days after the robbery incident. On that note, I am satisfied with the finding of the trial Court, that the robbery was an armed robbery.

I also find that there is ample evidence on record which linked the Appellant with the robbery incident. In other words, there was evidence from the prosecution witnesses, including the confessional statements of the Appellant which fixed him at the scene of crime. I therefore agree with the findings of the learned trial Judge at page 55 lines 8 - 18 of the record of appeal, when he held as follows:

“The final requirement in the charge of Armed Robbery is to link the Accused with active participation. PW1, the victim, testified that the Accused was among those who robbed him. There is ample evidence that the incident occurred at about 7:00p.m, when it was not yet too dark for PW1 to see and recognize his assailants. They stopped him like normal innocent passengers. They were not masked. He negotiated the fare with them, which gave him an opportunity to see their faces. He even had the presence of mind to notice that the Accused was the tallest of the three. Soon after he was robbed, the Accused was caught, and without any hesitation, he identified him as one of the robbers.”

After considering the relevant evidence of the PW1 and PW2 on the issue of identification, the learned trial Judge concluded at page 57 lines 2 - 23 of the record of appeal as follows:

“In the instant case, as can be seen from the evidence reproduced above, PW1, the victim, gave a clear and unequivocal evidence of identification of the Accused at the earliest opportunity ... There is strong and convincing evidence that the Accused was one of the three (3) persons who had an accident with the motorcycle stolen from PW1, and who ran into the bush after the accident. There is also convincing and cogent evidence that he was caught inside the bush that he ran into that evening. There is further evidence that the moment PW1 saw him, he promptly and unhesitatingly recognized and identified him as one of those who robbed him. I find the evidence of PW1, PW2 and PW4 linking the Accused to the crime, cogent, credible and convincing. I believe them as witnesses of truth. I disbelieve the evidence of the Accused that he was coming from the farm or the stream, and going to buy a drug for body rash, when he was accosted and arrested by same six (6) boys. In my view, there was sufficient evidence linking him with the crime, making a formal identification parade unnecessary. From the totality of the evidence before the Court, even without considering the confessional statements, I find and hold that the Accused was one of the three (3) persons who robbed PW1 of his motorcycle and other valuables on the 16th of December, 2010 after hitting him on the head with a bottle.”

It would be seen therefore, that the trial Court did not reach its decision to convict on the confessional statement of the Appellant alone. Rather, the learned trial Judge was of the view that the confession of the Appellant went to corroborate the evidence led by the prosecution witnesses. It should be noted that the confessional statements of the Appellant were tendered and admitted in evidence after a trial-within-trial. There is no ground of appeal which specifically challenges the admission of those statements in evidence. The effect therefore, is that, the Appellant has no complaint against the admissibility of those statements. The best that can be ascribed to the complaint of the Appellant on those confessional statements, would be under ground one (1), which is the omnibus ground. The complaint would therefore be that the learned trial Judge did not evaluate, or properly evaluate the evidence of confessional statements before ascribing weight thereto.

It is trite law that the primary or initial duty of evaluating and apportioning probative value or weight to evidence adduced at the trial, is on the trial Court which saw, heard and observed the witnesses as they testified. Therefore, once the learned trial Judge has dutifully performed his role, this Court, being an Appellate Court will not interfere. This Court can only validly interfere with the findings of the trial Court where such findings are perverse, in the sense that they have occasioned injustice, or that the trial Court wrongly applied the law to the facts, or introduced extraneous facts into the issue(s) under consideration. See Okechukwu Chukwu v. The State (2012) LPELR - 15360 (CA); Akindipe v. State (2008) 15 NWLR (pt.1111) 560 and Umaru Hassan v. Markus Gwani (2014) LPELR - 24594 (CA). See also Dr. Soga Ogundalu v. Chief A.E.O. Macjob (2015) LPELR - 24458 (SC). Thus, in evaluating the confessional statements of the Appellant made to the police, the learned trial Judge held at pages 57 line 24 - 58 line 5 as follows:

“Notwithstanding, I shall still consider the confessional statements of the Accused person. Exhibit “3”, which was admitted after a trial-within-trial, was the 1st Statement made by the Accused the very next day after the commission of the crime, at Ewekoro Police Division. In it, he confessed to his participation in the crime and mentioned the two (2) other members of his gang to be Alaja and Ebony. He narrated how the robbery was executed and how he was subsequently arrested. His narration in the statement does not materially differ from the narration of PW1, the victim. It was graphic, direct, positive and straight forward. The Court held after the trial within trial that it was freely and voluntarily made. The other facts in evidence clearly support and corroborate the content of this statement. The Accused had the opportunity to commit the crime, being on the scene that night, and he could have made the statement, considering the way he was arrested, leaving him with no other choice.

It is my considered view that this statement passes the test of truth and is reliable to be acted upon by the Court. I find and hold that the Accused made Exhibit “3” freely and voluntarily and that its contents are true.”

The learned trial Judge went on to make findings at page 58 lines 23 - 32 of the record of appeal as follows:

“Again, I find that the contents of these statements are corroborated by other evidence in the case, outside of the statements (especially evidence of PW1 and PW2) and hold that they are true as far as can be tested by all the surrounding facts and circumstances. I also find and hold that the Accused had the opportunity to commit the offence as he was fixed at the scene of the crime by the evidence of PW1. Also, the confession is very possible considering how he was arrested within a short distance and time from the commission of the crime. Furthermore, the confession is very consistent with the other facts as proved by other evidence before the Court.”

I endorse the above findings of the learned trial Judge. Indeed, the PW1, being the victim of the crime testified that he had to negotiate with his assailants for the fare they would pay. Which means that, the PW1 had sufficient time and opportunity to observe his assailants. The Appellant was arrested a short distance from the scene of crime and a few hours after the robbery incident. It should also be noted that the robbery incident took place at about 7.00p.m on the 16/12/2010 and the Appellant was arrested a few hours later that night. The Appellant did not give account of his whereabouts at 7.00p.m on the 16/12/2010. He only stated that:

“On 16th December, 2010, I went to the farm to farm - had a body rash. I went to the stream to bath and I went to Babalumo Village to buy fucin to use for the body rash. As I was going I saw about 6 boys saying ‘it is this kind of cloth. They took me to OPC Zone.’”

As I stated earlier, the robbery took place at about 7.00p.m. It is inconceivable that the Appellant could have been going to the farm to farm at 7.00p.m. I do not therefore believe the testimony of the Appellant as it did not in any way state his whereabout at the time of the robbery incident. The only logical conclusion is that, the confession of the Appellant which was made immediately after his arrest is true, considering the entire circumstances of the case. In any case, the confessional statements of the Appellant were amply supported by other evidence on record. The learned trial Judge was therefore right when he held that:

“.. with or without the confessional statements of the Accused person, the prosecution has satisfactorily proved beyond reasonable doubt, all the ingredients of Armed Robbery against the Accused Person.”

On that note, I am of the view that the learned trial Judge was right in convicting the Appellant for having committed the offence of armed robbery.

On the conviction for conspiracy, learned counsel for the Appellant did not proffer any argument on the issue of the conviction for conspiracy to commit armed robbery. It is the law that, issues for determination formulated in a Brief of Arguments and on which no arguments are proffered in the Brief of Arguments, are deemed abandoned. Such issue should be struck out. See Agbo v. State (2006) 6 NWLR (pt.977) 545, Ali v. State (2012) 7 NWLR (pt.1299) 209 and Institute of Health, Ahmadu Bello University Hospital Management Board v. Anyip (2011) 12 NWLR (pt.1260) 1. Thus, in Buhari & Ors v. Obasanjo & Ors (2003) 17 NWLR (pt.850) 510, the Supreme Court held as follows:

“The law is settled that where counsel proffered no argument on any issue before the Court, such an issue is deemed as having been abandoned”.

In the instant case, the Appellant having not proffered any arguments on his conviction for conspiracy, is deemed to have abandoned that issue. The implication of that is that the conviction of the Appellant for conspiracy to commit armed robbery has not been challenged.

On the whole therefore, it would be seen that this appeal has no merit. It has failed and is accordingly dismissed. Consequently, the judgment of Ogun State High Court sitting at Abeokuta in Charge No: AB/5R/2014 delivered on the 18th day of January, 2017 is hereby affirmed.

**NONYEREM OKORONKWO, J.C.A.:**

After an extensive review of this case of armed robbery on appeal before us, my learned brother quoting the trial judge at page 27 of the lead Judgment said:

The only logical conclusion is that, the confession of the Appellant which was made immediately after his arrest is true, considering the entire circumstances of the case. In any case, the confessional statements of the Appellant were amply supported by other evidence on record. The learned trial judge was therefore right when he held that:

" ....with or without the confessional statements of the Accused person, the prosecution has satisfactorily proved beyond reasonable doubt, all the ingredients of Armed Robbery against the Accused Person.”

I agree entirely with the conclusion arrived at. I will also dismiss the appeal as lacking in merit.

**FOLASADE AYODEJI OJO, J.C.A.:**

I have read in advance the judgment delivered by learned brother, Haruna Simon Tsammani J.C.A.. His Lordship has dealt exhaustively with the issues in this appeal and I agree completely with the reasoning and conclusions reached therein.

The law is trite that evidence of an eye witness is one of the best evidence available in criminal trials as it is direct and provides an on the spot narration of the commission of the crime. It is more reliable than an identification parade. Such evidence must however be examined in detail by the trial judge. The need for detail examination is hinged on the tendency of victims of violent crimes to quickly implicate anyone shown to them by the Police as the culprit. It is for this reason that Courts are enjoined to take into consideration certain factors in resolving eye-witness identification of a criminal. See State vs. Yahaya (2019) 13 NWLR (Pt. 1690) 397; Ochiba vs. State (2011) 17 NWLR (Pt. 1277) 633; Ndidi vs. State (2007) 13 NWLR (Pt. 1052) 633. In Adekoya vs. State (2017) 7 NWLR (Pt. 1565) 343, the Supreme Court, per Peter-Odili, J.S.C. held that:

"The Court of Appeal had this to say that in view of the circumstances of the case that there was no need for an identification parade as the evidence of PW1 and PW4 in particular was overwhelming and cogent enough to show that the appellant was one of armed robbers that robbed PW1 at her residence on 11/2/2005. In the guide as reiterated in Ndidi v State (2007) 5 SCNJ 274 at 286-287 the Supreme Court had stated that in proving identity of an accused the following must be taken into consideration:

a. Circumstances in which the eye-witness saw the accused:

b. The length of time the witness saw the accused;

c. The light conditions:

d. The opportunity of close observation:

e. The previous contact between the parties."

In the instant appeal, PW1 was the victim of the crime. As stated in the lead Judgment, PW1 negotiated with the Appellant and his co-assailant on the transport fare to be paid by them. There was therefore sufficient time for him to note the physical features of the Appellant to wit: that the Appellant was taller than his co-assailants. Furthermore, it was not yet dark as the robbery took place at 7.00pm. PW1 therefore had the opportunity to closely observe the Appellant and the other assailants who stopped him like normal passengers. The trial Court took into consideration laid down guiding factors before ascribing probative value to the eye-witness account of P.W. 1. His conclusion cannot be faulted.

It is for the foregoing and the fuller reasons contained in the lead Judgment that I also find this appeal unmeritorious and it is accordingly dismissed by me. I equally affirm the Judgment of the trial Court.-end!