**SHOLA FAMUYIWA**

**V**

**THE STATE**

SUPREME COURT OF NIGERIA

17TH DAY OF FEBRUARY 2017

SC. 386/2015

**LEX (2017) - SC. 386/2015**

OTHER CITATIONS

2PLR/2017/123 (SC)

**BEFORE THEIR LORDSHIP**

OLABODE RHODES-VIVOUR, JSC (Presided)

MUSA DATTIJO MUHAMMAD, JSC (Read the Lead Judgment)

CLARA BATA OGUNBIYI, JSC

AMIRU SANUSI, JSC

SIDI DAUDA BAGE, JSC

**BETWEEN**

SHOLA FAMUYIWA – Appellant

AND

THE STATE – Respondent

**ORIGINATING COURT**

1. COURT OF APPEAL, ADO-EKITI DIVISION (Judgment of the Court delivered on 16 December 2014).

2. HIGH COURT OF EKITI (M. O. Abodunde J., Presiding)

**REPRESENTATION/LAWYERS**

J. C. OKAFOR Esq. - for the Appellant.

GBEMIGA ADARAMOLA, DPP Ekiti State with MOSHOOD ABIOLA, Legal Officer - for the Respondent.

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

CRIMINAL LAW AND PROCEDURE – CONFESSION:– Where free and voluntary - Sufficiency of grounding conviction - Corroborative evidence required therefor - Nature of.

CRIMINAL LAW AND PROCEDURE - CONFESSIONAL STATEMENT:- Retraction of - Whether renders it inadmissible.

CRIMINAL LAW AND PROCEDURE – CONSPIRACY:– What constitutes - Evidence sufficient for - Nature of – How proved.

CRIMINAL LAW AND PROCEDURE – CRIME:- Proof of – How established.

CRIMINAL LAW AND PROCEDURE – IDENTIFICATION:– What constitutes - Identification parade - When necessary - When needless.

CRIMINAL LAW AND PROCEDURE - IDENTIFICATION EVIDENCE:- Purport of.

CRIMINAL LAW AND PROCEDURE - IDENTITY OF ACCUSED PERSON:- Importance of - identification evidence – Proper approach of court thereto.

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - FINDINGS OF FACT BY LOWER COURTS:- Where concurrent - Attitude of Supreme Court thereto.

EVIDENCE – CONFESSION:- Where free and voluntary - Sufficiency of grounding conviction – Corroborative evidence required therefor - Nature of.

EVIDENCE - CONFESSIONAL STATEMENT:- Retraction of – Whether renders it inadmissible.

EVIDENCE – CRIME:- Proof of – How established.

EVIDENCE – IDENTIFICATION:- What constitutes – Identification parade - When necessary - When needless.

EVIDENCE - IDENTIFICATION EVIDENCE:- Purport of.

EVIDENCE - IDENTITY OF ACCUSED PERSON:- Importance of - identification evidence - Proper approach of court thereto.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

In the High Court of Ekiti State, the prosecution’s case was that the appellant was part of a gang of armed robbers who invaded the palace of PW1 and carted away valuables with the aid of guns. The appellant was arrested after committing another robbery and was subsequently arraigned on a 4-count charge of conspiracy and armed robbery contrary to sections 5(b) and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, 1990. A confessional statement made by the appellant was admitted in evidence.

In his defence, the appellant denied the charge against him, stating he had been arrested during a fracas with Odua Peoples’ Congress (OPC) and was subsequently framed by the police for the offences he was arraigned for.

The trial court found the appellant guilty and sentenced him accordingly.

Dissatisfied, the appellant appealed to the Court of Appeal and consequent on the dismissal of his appeal. He appealed further to the Supreme Court, contending that his conviction was wrongly affirmed by the Court of Appeal, in view of the fact that his identity as the person who committed the offence was not proved.

**DECISION(S) APPEALED AGAINST**

The Court of Appeal entered judgment, affirming the decision of the trial court that convicted and sentenced the Appellant to death by hanging for the offences of conspiracy and armed robbery. Dissatisfied, the Appellant appealed to the Supreme Court.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

(1) Whether the learned justices of the Court of Appeal were right in holding that the failure to conduct an identification parade to ascertain the identity of the person who committed the alleged offence in the instant case was not fatal to the prosecution’s case. (Ground 1).

(2) Whether the learned justices of the Court of Appeal were right in holding that the appellant conspired with the other co-accused persons to commit the offence of armed robbery. (Grounds 2 and 3).

(3) Whether the learned justices of the Court of Appeal were right in holding that the prosecution had proved the offence of armed robbery against the appellant beyond reasonable doubt, and that failure of the prosecution to tender any of the items allegedly stolen, but which were recovered was not fatal to the prosecution’s case. (Grounds 4 and 5).

(4) Whether the learned justices of the Court of Appeal were right in holding that the alleged confessional statement (Exhibit “B”) had passed the test of admissibility and that the learned trial judge was right to have admitted the statement in evidence in spite of the fact that the police Officer (Inspector Itsenewa) who obtained the alleged confessional statement was not called as a witness by the prosecution.( Grounds 6 and 7).

(5) Whether the learned justices of the Court of Appeal were right in holding that the trial court properly evaluated the defence of the appellant and that the non-tendering of anonymous letters referred to by the PW1 was unfounded. (Grounds 8 and 9).

*BY RESPONDENT:*

(1) Whether the Court of Appeal was not right in upholding the findings of the trial court that failure to conduct identification parade was not fatal to the prosecution’s case.

(2) Whether the Court of Appeal was not right in holding that exhibit B was properly and legally admitted by the trial court.

(3) Whether the Court of Appeal was not right in upholding the decision of the trial court that the offences of conspiracy and armed robbery of 3 April 2002 were proved beyond reasonable doubt against the appellant by the prosecution.

*AS ADOPTED BY COURT*

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

**MAIN JUDGMENT**

PETER-ODILI JSC: (DELIVERING THE LEAD JUDGMENT):

This is an appeal against the judgment of the Court of Appeal sitting at Ado-Ekiti delivered on the 16 December 2014, where the Court of Appeal or court below or the lower court affirmed the trial court’s decision of M. O. Abodunde J. on 25 June 2013, conviction and sentence of appellant to death by hanging for the offences of conspiracy and armed robbery.

The panel of the court below is thus:- A. G. Mshelia, F. O. Akinbami and B. M. Ugo JJCA with the lead judgment anchored by M. G. Mshelia JCA.

The facts of the case leading to the appeal are stated hereunder, viz:

Background facts:

The version as put across by the appellant is thus:

The appellant was a trader at Challenge in Ibadan. In 2002, the landlord of the place where the appellant was selling his wares at Challenge in Ibadan asked the appellant to quit the land where the appellant was selling his wares. Although the notice to quit was sufficient, the appellant and the other traders had no opportunity to rent another shop.

The landlord enlisted or contracted members of OPC to chase the appellant and other traders away from the land whereby a misunderstanding/fight ensued between members of OPC and the traders. The police intervened and transferred the appellant and others that were arrested with him to the Challenge Police Station in Ibadan.

Later on, the appellant and seven other persons that were arrested with him were removed from the cell at Challenge Police Station Ibadan and transferred to Ekiti. On getting to Ekiti State, the appellant was accused by the Police as being one of the armed robbers who operated in Ekiti. The Police demanded for the sum of N50,000.00 (Fifty Thousand Naira) each from the appellant and the other suspects for them to be released. The appellant did not have the sum of N50,000.00 to pay but the other suspects who paid were released.

The Police threatened to deal severely with the appellant if he failed to pay the bail fees of N50,000.00. At about 1.00am the next day, the cell was opened and the appellant was brought out.

The appellant was severely beaten by Policemen and thereafter the appellant was hung on a ceiling fan and hit with a cutlass on the head but the appellant raised his hands in defence and the cutlass cut the appellant’s palm and injured him.

When the appellant started bleeding, the Police took him to the General Hospital, Ado-Ekiti for treatment. At the General Hospital, the appellant told the doctor who treated him that he was innocent and that he was just a victim of police brutality.

The doctor then asked the appellant to inform him anytime the case is being prosecuted.

The appellant denied the charge of conspiracy and armed robbery against him. The appellant also denied entering the palace of Oore of Otun Ekiti, and stealing his properties or driving away his Mercedes Benz car. The appellant stated that he made his statement in Yoruba language and thumb-printed same. The appellant was seriously beaten and brutalized and was forced to thumb-print the statement. The Police did not read the appellant’s statement to him. The appellant denied making any confessional statement relating to armed robbery in Ekiti.

The police subjected the appellant and the others arrested with him to thorough search but nothing incriminating was found on him.

The appellant stated that he does not know the 2nd accused person who was brought along with him from Ibadan. The appellant further stated that he got to know the 2nd accused in cell . The appellant testified that he never met the Oore of OtunEkiti before except on the day he came to testify in court. There was no time an identification parade was conducted before the appellant was brought to court and the appellant was merely charged to court based on suspicion and the charge was not properly investigated by the Police.

On 28 September 2004, the appellant and one other accused person were arraigned before the High Court of Justice of Ekiti State sitting at Ado-Ekiti in charge No. HAD/6C/2003 on a four (4)-count charge of conspiracy to commit armed robbery and armed robbery contrary to section 5(b) and punishable under section 1(2) (a) of the Robbery and Firearms (Special Provision) Act Cap. 398 Vol. xxii, Laws of the Federation of Nigeria, 1990, as amended, by Tribunals (Certain Consequential Amendments, etc) Decree No. 62 of 1999.

The appellant pleaded not guilty to all the counts charge and proceeded to trial with respondent calling six(6) witnesses, while the appellant testified for himself and called no witness.

The respondent’s version of the facts is as follows:

“The respondent’s case was to the effect that on 3 April 2002, a gang of armed robbers (including the appellant and one Adeniyi Owolabi) while armed with guns invaded the palace of PW1, Oba J.A. Popoola, the Oore of Otun Ekiti and made away with his beaded crown, international passport, $6,650 USD, 15 bundles of materials and his Mercedes Benz car which was used in packing the stolen items away from the Palace. The appellant (and one Adeniyi Owolabi) committed another armed robbery on 28 July 2002. The appellant was arrested in Ibadan and PW1’s Mercedes Benz was discovered there. The appellant confessed to the commission of the armed robbery in the palace of PW1 at Otun-Ekiti.”

The learned trial judge found the offence of conspiracy and armed robbery proved beyond reasonable doubt and convicted and sentenced the appellant and his co-accused, Adeniyi Owolabi. On appeal to the court below, the decision of the trial court was affirmed and so dissatisfied, the appellant has come before this court to ventilate his grievance.

On 5 October 2017 date of hearing, learned counsel for the appellant, J. C. Okafor Esq. adopted his brief of argument filed on 29 September 2015 and in it distilled five issues for the determination of the appeal which are as follows:

(1) Whether the learned justices of the Court of Appeal were right in holding that the failure to conduct an identification parade to ascertain the identity of the person who committed the alleged offence in the instant case was not fatal to the prosecution’s case. (Ground 1).

(2) Whether the learned justices of the Court of Appeal were right in holding that the appellant conspired with the other co-accused persons to commit the offence of armed robbery. (Grounds 2 and 3).

(3) Whether the learned justices of the Court of Appeal were right in holding that the prosecution had proved the offence of armed robbery against the appellant beyond reasonable doubt, and that failure of the prosecution to tender any of the items allegedly stolen, but which were recovered was not fatal to the prosecution’s case. (Grounds 4 and 5).

(4) Whether the learned justices of the Court of Appeal were right in holding that the alleged confessional statement (Exhibit “B”) had passed the test of admissibility and that the learned trial judge was right to have admitted the statement in evidence in spite of the fact that the police Officer (Inspector Itsenewa) who obtained the alleged confessional statement was not called as a witness by the prosecution.( Grounds 6 and 7).

(5) Whether the learned justices of the Court of Appeal were right in holding that the trial court properly evaluated the defence of the appellant and that the non-tendering of anonymous letters referred to by the PW1 was unfounded. (Grounds 8 and 9).

The Director of Public Prosecutors (DPP) of Ekiti State, Gbemiga Adaramola Esq. for the respondent, adopted his brief of argument filed on 29 June 2017 and deemed filed on 5 October 2017. In it were crafted three issues for determination which are thus:

(1) Whether the Court of Appeal was not right in upholding the findings of the trial court that failure to conduct identification parade was not fatal to the prosecution’s case.

(2) Whether the Court of Appeal was not right in holding that exhibit B was properly and legally admitted by the trial court.

(3) Whether the Court of Appeal was not right in upholding the decision of the trial court that the offences of conspiracy and armed robbery of 3 April 2002 were proved beyond reasonable doubt against the appellant by the prosecution.

The issues identified by the respondent captured the necessary questions and are apt. I shall use them in answering the questions in this appeal and all together.

Issues 1, 2 and 3:

(1) Whether the Court of Appeal was not right in upholding the findings of the trial court that failure to conduct identification parade was not fatal to the prosecution’s case.

(2) Whether the Court of Appeal was not right in holding that exhibit B was properly and legally admitted by the trial court.

(3) Whether the Court of Appeal was not right in upholding the decision of the trial court that the offences of conspiracy and armed robbery of 3 April 2002 were proved beyond reasonable doubt against the appellant by the prosecution.

Learned counsel for the appellant, J. C. Okafor Esq. contended that the court below was wrong in holding that the failure of the prosecution to conduct an identification parade to ascertain the identity of the person who committed the alleged offence in the instant case was not fatal to the prosecution’s case. That whenever the case against an accused person depends wholly or substantially on the correctness of identification of the accused, which the defence alleges to be mistaken, the court must closely examine and receive with caution the evidence alleged before convicting the accused in reliance on the correctness of the identification.

That the crucial issue in a criminal case is not whether or not the offence was committed, but whether the identification of the actual perpetrators of the offence charged was correct. He cited the cases of Theophilus Eyisi and 2 Ors. v State (2000) 15 NWLR (Pt. 691) 555 at 587, (2000) 12 SCNJ 104, (2000) 4 NSCQR 60, (2001) FWLR (Pt. 35) 750, (2001) 8 WRN 1; Ndidi v. State (2007) 13 NWLR (Pt. 1052) 632 at 651; (2007) All FWLR (Pt. 381) 1617, (2007) 5 SCNJ 274, (2007) 41 WRN 1; Uwaeuzoke v. State (1988) 1 NWLR (Pt. 72) 529 at 532; Onuoha v. State (1988) 3 NWLR (Pt. 83) 460 at 477, (1988) 7 SCNJ (Pt. 1) 20.

Mr Okafor of counsel for the appellant, stated that the court below was in grave error in holding that the appellant conspired with other co-accused persons to commit the offence of armed robbery when the prosecution failed to show that there was a meeting of the minds of two or more persons to do or cause to be done an illegal act or legal act by illegal means. He cited Obiakor v. State (2002) FWLR (Pt. 113) 299, (2002) 10 NWLR (Pt. 776) 612 at 628, (2002) 36 WRN 1, (2002) 6 SC (Pt. II) 33.

Also contended for the appellant is that exhibit B, the alleged confessional statement of the appellant did not pass the admissibility test and so the exhibit is inadmissible. That there is no circumstantial evidence on record which points irresistibly to the guilt of the appellant vis- a-vis the crime of conspiracy. He relied on Adeleke v. State (2013) 16 NWLR (Pt. 1381) 556 at 586 - 587; Afolalu v. State (2010) All FWLR (Pt. 538) 812, (2010) 16 NWLR (Pt. 1220) 584, (2010) 5 - 7 SC (Pt. II) 93, (2010) 6 - 7 MJSC 187, (2010) 43 NSCQR 227 at pages 243-244; Suberu v. State (2010) All FWLR (Pt. 520) 1263, (2010) 5 SCM 215, (2010) 8 NWLR (Pt. 1197) 586, (2010) LPELR - SC. 199/2009, (2010) 41 (Pt. 2) NSCQR 1169 at 1205; Ani v. State (2003) 11 NWLR (Pt. 830) 145.

Learned counsel for the appellant submitted that the evidence of PW6 is in favour of the appellant, as PW6 was not the investigating police officer. That the failure of the prosecution to tender the statement of the appellant made in Yoruba brought into operation section 167 (d) of the Evidence Act, 2011; which leads to the conclusion that the prosecution kept the statement away because it would have been in favour of the appellant and so the standard of proof beyond reasonable doubt cannot be taken to have been discharged by the respondent.

He cited Njoku v. State (1993) 6 NWLR (Pt. 299) 272 at 285, (1993) 7 SCNJ 36; Idowu v. State (2000) FWLR (Pt. 16) 2672, (2000) 12 NWLR (Pt. 680) 48, (2000) 7 SC (Pt. 2) 50 at 79; Oforlete v. State (2000) FWLR (Pt. 12) 2081, (2000) 12 NWLR (Pt.681) 415, (2000) 7 SCNJ 162, (2007) 7 SC (Pt. 1 ) 80 at 95 etc.

It was contended that the failure of the prosecution to tender any of the items allegedly stolen which were recovered cast a serious doubt on the case of the prosecution. He referred to Nwomukoro v. State (1995) 1 NWLR (Pt. 372) 432 at 44.

That the failure of the respondent to call the investigating police officer who obtained the alleged confessional statement of the appellant greatly prejudiced the prosecution’s case.

For the appellant, it was submitted that the learned trial judge did not evaluate the defence of the appellant before convicting him.

In response, learned counsel for the respondent, submitted that identification parade is only one way of establishing the identity of an accused person and that in the case at hand the unchallenged testimony of PW1 fixed and hooked the appellant with the commission of the alleged offences and no need for an identification parade. He referred to State v. Aibangbee (1988) 3 NWLR (Pt. 84) 548 at 590-591, (1988) 19 NSCC (Pt. 11) 192; Attah v. State (2010) All FWLR (Pt. 540) 1224, (2010) 10 NWLR (Pt. 1201) 190, (2010) 30 WRN 1; Ogoala v. State (1991) 2 NWLR (Pt.175) 509, (1991) 3 SCNJ 61, (1991) 1 NSCC 336, (1991) 3 SC 80; Ikemson v. State (1989) 3 NWLR (Pt. 110) 455 at pages 460- 461, (1989) 20 NSCC (Pt. 11) 471, (1989) 6 SC (Pt. 1) 114, (1989) 6 SCNJ 54; Otti v. State (1993) 5 SCNJ 143.

The learned DPP contended that there are instances when the presence of a person who is required to give evidence for any purpose connected with a judicial proceedings may be dispensed with under our criminal justice system and one of the instances being when the non-attendance has been sufficiently explained to the court and the court is satisfied with the explanation as in the instant case. He cited Njoku v. State (1992) 8 NWLR (Pt. 262) 714; Gaji v. State (1975) 5 SC 61, (1975) NNLR 98; Ukpe v. State (2001) 18 WRN 84, (2002) FWLR (Pt. 104) 416 etc.

He further submitted that the issue of admissibility or otherwise of the confessional statement resiled by the appellant does not come in as appellant merely retracted from the statement and did not go into the voluntariness and so nothing stopped the trial court from admitting the statement. He cited Ikemson v. State (1989) 3 NWLR (Pt. 110) 455, (1989) 20 NSCC (Pt. 11) 471, (1989) 6 SC (Pt. 1) 114, (1989) 6 SCNJ 54; Shande v. State (2005) 22 NSCQR 756, (2005) All FWLR (Pt. 279) 1342, (2005) 1 NWLR (Pt. 907) 218, (2005) 6 SC (Pt. 11) 1; Nsofor v. State (2004) 18 NWLR (Pt. 905) 292, (2005) All FWLR (Pt. 242) 397, (2005) 1 MJSC 128; Sule v. State (2009) All FWLR (Pt. 481) 809 at 831, (2009) 17 NWLR (Pt. 1169) 33, (2009) 6 WRN 65, (2009) 8 SCM 177, (2009) LPELR -3125 (SC) 28 etc.

That there is corroborative evidence connecting the appellant with the offences he is charged with and made exhibit B possible. He cited Duugo v. State (1995) 6 NWLR (Pt. 255) 525, Achabua v. State (1976) 10 NSCC 714, (1976) 12 SC 63; Olabode v. State (2007) All FWLR (Pt. 389) 301.

On the count of conspiracy, the appellant stated that there was enough in the evidence of prosecution from which the agreement or meeting of the minds between appellant and his co-accused could be inferred. He referred to Adejobi v. State (2011) All FWLR (Pt. 588) 850, (2011) 12 NWLR (Pt. 1261) 347, (2011) 6-7 SC (Pt. III) 65; Bright v. State (2012) 1 SC (Pt. II) 47, (2012) 8 NWLR (Pt. 1302) 297, (2012) LPELR -7841 (SC) 20; State v. Salami (2011) 12 SC (Pt. IV) 191.

That the prosecution proved the essential ingredients of the offences of conspiracy to commit armed robbery and armed robbery beyond reasonable doubt.

The thrust of the appellant’s case is that there was no identification parade as the identity of the culprits of the armed robbery was not ascertained and so appellant being pointed as one of the robbers was faulty.

Also that the statement, exhibit B ought not to have been admitted in evidence as the police officer, Inspector Itsenewa who obtained it was not called as a witness by the prosecution and subjected to cross-examination by the appellant.

The respondent posited that what the prosecution put across was sufficient in the identification of the appellant as part of the armed robbery attack and there was no need for an identification parade.

It needs to be said that the identity of the accused person who participated in a criminal offence as the one in this instance, armed robbery is crucial and must be given all the attention it requires. Whenever the case against an accused person depends wholly or substantially on the correctness of identification of the accused which the defence alleges to be mistaken, the court must closely examine and receive with caution, the evidence alleged before convicting the accused in reliance on the correctness of the identification.

Indeed, the crucial issue is not whether or not the offence was committed but whether the identification of the person or persons accused are the actual perpetrators of the offence charged was correct. See Theophilus Eyisi and 2 Ors. v State (2000) 15 NWLR (Pt. 691) 555 at 587, (2000) 12 SCNJ 104, (2000) 4 NSCQR 60, (2001) FWLR (Pt. 35) 750, (2001) 8 WRN 1; Ndidi v. State (2007) All FWLR (Pt. 381) 1617, (2007) 13 NWLR (Pt. 1052) 632 at 651; Nwuzoke v. State (1988) 1 NWLR (Pt. 72) 529 at 532, (1988) 2 SCNJ 344.

“On the night of the 3 April 2002, I was sleeping in my room. I heard a voice a very loud bang. I said who is that? I heard a voice which replied “ A wa ni o “ Eyin wo ‘A wa ole ni o “ come and open the door if not, you will be responsible for the consequence.

I dressed up with my wife and the door was opened.

First to come in after the door was opened was one of my security personnel who had his hands tied to the back and his body was soaked with blood. I saw three other people come in heavily armed with guns. I was able to identify them. They were led by the 1st accused person (appellant) he came in, and had a short gun with him...

They asked for the key of my vehicle, Mercedes Benz 280, I was asked to lie down on the bed, after about 2 or 3 minutes they returned and said that they cannot start the car, I told them that I can assist with starting the car facing the gate, so they can leave, all items stolen were put in the car and they drove off. On the next day I wrote a statement at the police station”.

This court had said in numerous occasions that the definition of identification is a whole series of facts and circumstances for which a witness or witnesses associate a defendant with the commission of the offence charged. Another way of saying so is that an identification parade is set up and it is to be limited to cases of real doubt or dispute as the identity of an accused person or his connection with the alleged offences.

That is, that the empanelling of the identification parade is not to be conducted for cosmetic reasons or for the mere asking.

In the case at hand, apart from what PW1 stated earlier, he had mentioned the appellant pointing the gun at his head and threatened to fire if PWl did not bring the money.

Clearly, this is one of those instances where the identification parade is dispensed with as the facts and circumstances were sufficient for the trial court to accept the evidence proffered that the accused was properly identified, and situated at the place of operations at the material time. I place reliance on State v. Aibangbee (1988) 3 NWLR (Pt. 84) 548 at 590-591, (1988) 19 NSCC (Pt. 11) 192; Attah v. State (2010) All FWLR (Pt. 540) 1224, (2010) 10 NWLR (Pt. 1201) 190, (2010) 30 WRN 1; Ogoala v. State (1991) 2 NWLR (Pt.175) 509, (1991) 3 SCNJ 61, (1991) 1 NSCC 336, (1991) 3 SC 80; Ikemson v. State (1989) 3 NWLR (Pt. 110) 455 at pages 460-461, (1989) 20 NSCC (Pt. 11) 471, (1989) 6 SC (Pt. 1) 114, (1989) 6 SCNJ 54; Otti v. State (1993) 5 SCNJ 143.

Again, to be stated is that in our criminal administration there are instances where identification parade will be dispensed with, which situations are thus:

a. Where there is good and cogent evidence linking the accused person to the alleged crime on the day of the incident.

b. By the accused person’s confessional statement in which he identified himself. I rely on Usung v. State (2009) All FWLR (Pt. 462) 1203; Bolanle v. State (2005) 7 NWLR (Pt. 925) 431 at 452.

In this case of the appellant’s confessional statement, exhibit B, the appellant’s contention is that the statement ought not to be admitted in evidence talk less of admitting it in evidence and utilising it in the conviction of the appellant.

The grouse of the appellant is that the police officer, Inspector Itsenewa who obtained the statement was not called to testify and of course had his testimony under cross-examination before the statement could be accepted and made use of. The facts in this case at hand are that Corporal John Aiyetigha testified as PW6 and through him the said statement was admitted as exhibit.

I shall recast some excerpts of the testimony of PW6 for elucidation of what transpired and that is thus:

“The suspects were released to Ekiti State Command. In the Command, Daniel Itsenewa took the statement of the suspects. He was handling the case until he was transferred. I was sent to Delta State Command to fetch him to testify in this case.

... Abuja was contacted and I was also informed that he is with Delta State Police Command. On the next visit, I was able to trace him to Efun and Ekpan where he was involved in an accident. The D.P.O. said that he sustained injuries on both arms and as such have (sic) not been reporting for duty regularly, that they do not know the village he was taken to for treatment. This now made the AC CID to write a letter to be presented to the court in respect of the case”.

Before the PW6 testified the inability of the respondent to procure the presence of Inspector Daniel Itsenewa, he had prompted a letter dated 23 February 2006 addressed to the learned trial judge and signed by one Assistant Commissioner of Police, Sunday S. Anjorin, the Head of the absent officer’s Department. In relation to that letter is the provision of section 50 of the Evidence Act, 2011, which stipulates thus:

“In any case of a person employed in the public service of the Federation or of a State who is required to give evidence for any purpose connected with a judicial proceeding, it shall be sufficient to account for his non-attendance at the hearing of the said judicial proceeding if there are produced to the court either a Federal or State Gazette - or a telegram, an E-mail or Letter purporting to emanate from the head of his department, sufficiently explaining to the satisfaction of the court his apparent default”

It is therefore clear, that the appellant raising the issue or a breach of his fundamental right to fair hearing has been effectively answered since the provisions of section 50 of the Evidence Act, 2011 were met and section 36(1) of the 1999, Constitution of the Federal Republic of Nigeria was not infringed upon. See Njoku v. State (1992) 8 NWLR (Pt. 262) 714; Gaji v.State (1975) 5 SC 61, (1975) NNLR 98; Ukpe v. State (2001) 18 WRN 84, (2002) FWLR (Pt. 104) 416.

What the appellant is going on about can only be taken on his fair hearing right being infringed upon if he was not afforded the opportunity to prepare for his defence and no adequate explanation given as to why the police officer who obtained the confessional statement was absent at the hearing. In the full circumstances of the case at hand it is evident that no breach of fair hearing had occurred. See Emenegor v. State (2010) All FWLR (Pt. 511) 884; Abdullahi v. Nigerian Army (2010) 18 WRN 60.

On the confessional statement, exhibit B which the appellant retracted, it has to be said that the appellant denying making the statement does not translate to the statement being inadmissible rather what would be the resultant effect is the weight the court would attach to it or its contents. See Ikemson v. State (1989) 3 NWLR (Pt. 110) 455, (1989) 20 NSCC (Pt. 11) 471, (1989) 6 SC (Pt. 1) 114, (1989) 6 SCNJ 54; Shande v. State (2005) 22 NSCQR 756, (2005) All FWLR (Pt. 279) 1342, (2005) 1 NWLR (Pt. 907) 218, (2005) 6 SC (Pt. 11) 1.

The appellant had also the grouse that the trial court ought not to have convicted the accused/appellant on his confessional statement. On this, it is necessary to say that an accused can be convicted solely on his confessional statement and that corroborative evidence is only desirable and not necessary.

A free and voluntary confession which is direct, positive and properly proved is sufficient to sustain a conviction and it is now well settled that the nature of the corroborative evidence required does not need to be direct evidence that the accused person committed the offence. It is enough even if it is only circumstantial evidence connecting or tending to connect him with its commission and that is the case here. See Nguma v. Attorney-General, Imo State (2014) 7 NWLR (Pt. 1405) 119, (2014) 16 WRN 1; Olalekan v. State (2001) 18 NWLR (Pt. 746) 793 at 824, (2001) LPELR -2561 (SC) 29, (2001) 8 NSCQLR 207, (2002) FWLR (Pt. 91) 1605, (2002) 4 WRN 146; Nwachuckwu v. State (2004) 17 NWLR (Pt. 902) 262; Durugo v. State (1995) 6 NWLR (Pt. 255) 525; Achabua v. State (1976) 10 NSCC 714, (1976) 12 SC 63; Olabode v. State (2007) All FWLR (Pt. 389) 1301.

In respect to the matter of conspiracy, the appellant’s position is that the respondent had not established that appellant conspired with the other accused persons as there was no evidence to that effect. It has to be reiterated that conspiracy connotes agreement of the parties and in ascertaining that agreement, direct evidence is not indispensable since the meeting of the parties is usually done in secret and nearly impossible for an eye witness account. Therefore, the evidence of conspiracy is usually a matter of inference by the court from surrounding facts and circumstances including the confessional statement of the appellant. See Adejobi v. State (2011) All FWLR (Pt. 588) 850, (2011) 12 NWLR (Pt. 1261) 347, (2011) 6-7 SC (Pt. III) 65; State v. Olashehu Salami (2011) 12 SC (Pt. IV) 191; Bright v. State (2012) 1 SC (Pt. II) 47, (2012) 8 NWLR (Pt. 1302) 297, (2012) LPELR -7841 (SC) 20.

On whether or not the respondent advanced sufficient evidence, direct, confessional and circumstantial to prove the alleged offences against the appellant.

This court had said again and again that the ingredients of the offence of armed robbery are well stated in a long line of cases including Otti v. State (1993) 5 SCNJ 143. It has been held that a crime could be established by all or any of three ways or methods which are namely:

1. By direct evidence of an eye-witness.

2. By circumstantial evidence.

3. by confessional statement.

See Emeka v. State (2002) 14 NWLR (Pt. 734) 666 at 683.

These three ingredients have been established, firstly and secondly that there was a robbery or series of robberies, all the six prosecution witnesses were consistent in their evidence that there was a robbery in the palace of PWl in the night of 3 April 2002 and in that PW1 was an eye-witness.

Thirdly, the respondent with overwhelming and uncontroverted evidence of prosecution witnesses especially that of PW1, exhibit B and circumstantial evidence had established conclusively that appellant was one of the robbers who invaded the palace of PWl on the night in question and carted away his valuables.

The appellant’s confessional statement, exhibit B which is stronger than the evidence of an eye-witness as it came from the accused/appellant himself can secure the conviction of the appellant as in this instance, the confession is positive, direct and has been proved properly.

I place reliance on Amoslivia v. State (2009) Vol. 32 WRN 47; Mbeng v. State (2010) Vol. 22 WRN page iii.

In conclusion, the appellant’s assertion that the evidence proffered was not properly evaluated was not proved by him as having asserted, the burden was on him to prove the assertion and in that, the appellant failed woefully. I rely on State v. Yusuf (2007) All FWLR (Pt. 377) 1001 at 1010-1011; Igago v. State (2001) 2 ACLR 104.

This is one of those cases where the concurrent findings of two courts below cannot be tampered with or interfered with either as there has been no miscarriage of justice or wrong application of the law by either of those two courts below. I place reliance on Onogwu v. State (1993) 6 NWLR (Pt. 401) 276.

The invitation by the appellant for this court to revisit the evidence which has been the subject of the concurrent findings of the trial court and the Court of Appeal which came from very sound reasoning cannot be accepted. All I see is an unmeritorious appeal and the only option available is to dismiss.

I hereby dismiss this appeal as I uphold the decision of the Court of Appeal which affirmed the judgment of the trial High Court.

**RHODES-VIVOUR JSC:**

I have had the advantage of reading in draft, the judgment of my learned brother, Peter-Odili, JSC. I agree that the appeal lacks merit. It is hereby also dismissed by me. The judgment of the Court of Appeal is affirmed.

**OGUNBIYI JSC:**

The appeal is against the judgment of Court of Appeal, Ado-Ekiti, delivered on 16 December 2014, wherein the lower court affirmed the trial court’s conviction and sentence of the appellant to death by hanging for offences of conspiracy and armed robbery.

The Court of Appeal affirmed the judgment of the trial court and hence appeal to this court.

Brief facts:

The appellant’s side of the story was that he along with others occupied the premises of their landlord where they sold in Ibadan. They were given a quit notice to vacate but they did not. As a consequence, the landlord enlisted or contracted members of OPC to chase away the appellant and his comrades from the premises and misunderstanding ensued between the members of OPC and the traders. The police intervened and transferred the appellant and his friends who were arrested with him to Challenge Police station.

It was alleged that appellant and 1 other (Adeniji Owolabi) while armed with guns invaded the palace of PW1, Oba J. A. Popoola of Ekiti on 3 April 2002 and made away with his beaded gown, international passport, N6,650 USD), 15 bundles of material and his Mercedes Benz car, which was used in packing the stolen items; that the appellant and the same Adeniji Owolabi also committed another armed robbery on 28 July 2002.

Appellant was arrested in Ibadan and PW1’s Mercedes was discovered there. The appellant confessed to the commission of the armed robbery in the palace of PWl at Otun Ekiti.

They were arraigned on four counts charge of conspiracy and armed robbery which occurred differently on 3 April 2002 and 28 July 2002.

The trial court convicted the appellant, his co-accused and sentenced them accordingly on account of the robbery committed on 3 April 2002. The Appellant was however acquitted and discharged of the armed robbery of 28 July 2002.

On appeal against the judgment, the Court of Appeal unanimously dismissed the appeal and hence the appeal now before us.

Appellant formulated 5 issues and which were condensed into 3 by the respondent. I will consider the respondent’s 3 issues as sufficient:

(1) Whether the Court of Appeal was right in upholding the findings of the trial court that failure to conduct identification parade was not fatal to the prosecution’s case?

(2) Whether Court of Appeal was right in holding that exhibit B was properly and legally admitted by the trial court.

(3) Whether the Court of Appeal was right in upholding the decision of trial court that the offences of conspiracy and armed robbery of 3 April 2002 were proved beyond reasonable doubt against the appellant by the prosecution?

Issue1:

Appellant argued that the identification of the appellant as one of the armed robbers who allegedly dispossessed PW1 of his valuables was in serious doubts; that identification parade ought to have been conducted to ascertain the true identity of the alleged robbers. The failure to do, counsel argues, is fatal to the prosecution’s case.

I seek to state that it is clear on the record that the testimony of PWl was unchallenged on the identity of the appellant. The evidence fixed vividly and linked the appellant with the commission of the alleged offences. Identification parade is only one way of establishing the identity of an accused. It is not the one and only way.

The testimony of PW1 at page 12, lines 16-23 is very much in point. There was also reasonable interaction between PW1 and the appellant which afforded him the full opportunity of observing the features of the appellant. Thus, the clear and uncontradicted eye-witness accounts by PW1, also the identification of fixing the appellant at the scene was sufficient to have recognized him as one of the armed robbers who invaded his palace on 3 April 2002.

The appellant’s confessional statement, exhibit B, wherein he admitted to the Oyo State Command of Nigeria Police of his involvement in an armed robbery incident at Otun-Ekiti, when he was arrested in Ibadan, is also a very strong supporting evidence.

Issue 2

Appellant contends that Exhibit B did not pass the test of admissibility; also that the police officer who recorded same was not called as a witness to test the veracity of the exhibit. PW6 was a member of the investigating team led by Inspector Itsenewa, who recorded the statements of the suspects in this case (including the appellant). PW6 tried by his evidence to procure the presence of Inspector Itsenewa to testify but he could not come because he was involved in an accident and sustained injuries.

Appellant was present when prosecution witnesses testified, and he had the opportunity to have cross-examined them and defended himself.

Accused could be convicted on his confessional statement alone even without any other corroboration. Corroboration is only desirable but not mandatory. Plethora of authorities are trite and numerous on this.

Issue 3

Whether prosecution proved the appellant guilty beyond reasonable doubt of the charge of 3 April 2002?

In a charge of conspiracy, all that is required is evidence of agreement of the parties, which could be express or implied.

Conspirators need not be seen together before conspiracy can be established. The conspirators can be circumstantially linked with the conspiracy.

In the appeal before us, the case of the prosecution rested heavily on (1) the testimony of PW1 an eye-witness/victim of the violent robbery of 3April 2002; (2) Confessional statement of the appellant; and (3) There are also the circumstantial evidence adduced through other witnesses linking the appellant with the alleged crimes.

All the six prosecution witnesses were consistent in their evidence that there was a robbery in the palace of PW1 in the night of 3 April 2002. The direct eye-witness, PW1 was unequivocal in his testimony that the robbers were armed with guns when they invaded his palace. He maintained that the robbers were led by the appellant who was holding a short gun.

Also, the appellant pointed a gun at his head to coerce him to yield to his unholy demand.

For all intents and purposes, it is obvious that the respondent has the overwhelming and uncontroverted evidence of PW1, exhibit B and also circumstantial evidence all in its favour especially the appellant’s confession in exhibit B during trial without objection.

Confession is stronger than evidence of an eye-witness because it came from the accused’s mouth.

With the few words of mine and relying particularly on the fuller reasoning of my learned brother, Mary Ukaego PeterOdili, JSC, I also subscribe that this appeal lacks merit and is hereby dismissed. The judgment of the lower court is affirmed also by me.

**SANUSI JSC:**

I read before now, the lead judgment of my learned brother, Mary Peter-Odili JSC just delivered. The facts of the case leading to this appeal have been ably summarised by my noble lord and need not be repeated here. I entirely agree with her reasoning and conclusion on the fate of this appeal which is an outright dismissal for being devoid of merit. I however would like to comment on the first issue raised by the appellant that had to do with whether the lower court’s finding that trial court was right when it held that failure to conduct identification parade in the case was not fatal to the prosecution’s case.

I must stress here that identification parade is not a sine qua non to a conviction of a crime alleged. The conduct of identification parade is only required in the following circumstances:

(1) Where the victim did not know the accused before the robbery attack and that he duly came into contact with him for the first time during the incident.

(2) Where the witness or the victim was confronted by the offender for a very short time, and

(3) Where due to time constraint and circumstance, the victim did not have full opportunity of observing the features of the accused or offender.

See Ukpabi v. State (2004) All FWLR (Pt. 218) 814, (2004) 11 NWLR (Pt. 884) 439; Ebri v. State (2004) NWLR (Pt. 885)589.

The purpose of identification evidence is simply to ascertain that the offender/suspect is actually the one responsible in committing the crime. In a situation where a trial court is faced with the issue of identification evidence, all that the trial court is to do is to closely examine the evidence with great caution and it must ascertain that the accused person whose identity is in issue was the actual offender. Ukpabi v. State (supra). It is worthy of note, that in this case there was evidence of reasonable contact or interaction between the appellant and the victim, (PW1), who had duly observed his physique or features, which said evidence given by PW 1, (the victim), was not in any way challenged and such evidence and others had actually fixed the appellant at the scene of the crime i.e the palace on 3 April 2002.

Also adduced, is the confessional statement of the appellant exhibit B, wherein, the appellant owned up his involvement in the crime to the Oyo State Police Command when he was arrested at Ibadan. The law is settled, that where an accused person by his confession, has identified himself, as in this instant case, there would not be any need for any further identification parade. See the case of Archibong v. State (2004)1 NWLR (Pt. 855)488.

Thus, with these few comments, I am at one with the lower court, when it affirmed the finding of the trial court that the non-conduct of identification parade by the respondent was not fatal to its case.

In the result, for these few remarks and the more detailed and much fuller reasoning in the lead judgment of my learned brother, Peter-Odili JSC, I would also dismiss this appeal for being meritless. I affirm the judgment of the lower court in which it had also affirmed the judgment of the trial court. Appeal is equally dismissed by me.

**BAGE JSC:**

I have had the benefit of reading in draft, the lead Judgment of my learned brother, Mary Ukaego Peter-Odili JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is accordingly dismissed by me. Judgment of the Court of Appeal Ado-Ekiti Division is hereby affirmed.

Appeal dismissed.