**SEGUN FASINU**

**V**

**THE STATE**

COURT OF APPEAL (IBADAN DIVISION)

23RD DAY OF MARCH 2016

CA/I/288C/2013

**LEX (2016) - CA/I/288C/2013**

OTHER CITATIONS

2PLR/2017/125 (CA)

**BEFORE THEIR LORDSHIP**

OBIETONBARA DANIEL-KALIO, JCA

NONYEREM OKORONKWO, JCA (Read the Lead Judgment)

HARUNA SIMON TSAMMANI, JCA

**BETWEEN**

SEGUN FASUNU – Appellant

AND

THE STATE – Appellant

**ORIGINATING COURT**

HIGH COURT OF OGUN STATE (Judgment of the Court delivered on 9 July 2013).

**REPRESENTATION/LAWYERS**

A. O. OMOTOSO with S. O. ATAHOKOR - for the Appellant.

O. O. OSUNFISAN, Director of Public Prosecution (DPP), Ministry of Justice, Ogun State - for the Respondent.

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

CRIMINAL LAW AND PROCEDURE - CONFESSIONAL STATEMENT:- Admission of the commission of the offence therein - Import of.

CRIMINAL LAW AND PROCEDURE - CONFESSIONAL STATEMENT:- Admission of in evidence without objection from accused person - Attitude of court thereto.

CRIMINAL LAW AND PROCEDURE - CONFESSIONAL STATEMENT:- Where retracted - Attitude of the court thereto.

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - Confessional statement - ADMISSION OF IN EVIDENCE WITHOUT OBJECTION FROM ACCUSED PERSON:- Attitude of court thereto.

EVIDENCE:- CONFESSIONAL STATEMENT - Admission of the commission of the offence therein - Import of.

EVIDENCE - CONFESSIONAL STATEMENT:- Where retracted - Attitude of the court thereto.

EVIDENCE - CONTRADICTORY EVIDENCE AND DISCREPANCY IN EVIDENCE:- Distinction between - Discrepancy or contradiction capable of affecting a criminal case – Nature of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant and his co-accused were arraigned at the High Court of Ogun State for the offences of conspiracy to commit armed robbery and attempted armed robbery. They were alleged to have attempted to rob PW1 of his motorcycle when they contracted him to convey them to Iju. A knife was put at PW1’s throat and a rope, all in a bid to dispossess him of his motorcycle. They abandoned their purpose when they sighted two other motorcyclists riding their way. They were arrested by the vigilante in Mosa village, where the incidence took place.

During trial, the appellant failed to object to the confessional statement where he alluded to having committed the offence.

The trial court relying on the confessional statement and other evidence raised at the trial, found him guilty as charged.

Dissatisfied, the appellant appealed the court’s decision, challenging it on grounds that the charge against him was not proved beyond reasonable doubt.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment, convicting and sentencing the Appellant and his co-accused to 14 years imprisonment for the offences of conspiracy to commit armed robbery and attempted armed robbery. Dissatisfied, the Appellant appealed to the Supreme Court.

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

*BY APPELLANT:*

1. Whether the trial court ought to have relied on the appellant’s retracted confessional statement in convicting the appellant of the offences of conspiracy to commit armed robbery and attempted armed robbery. (Distilled from ground 1 of the notice of appeal).

2. Whether the trial court was right to have relied on the contradictory evidence of PW1 and PW2 to convict the appellant of the offences of conspiracy to commit armed robbery and attempted armed robbery. (Distilled from ground 2 of the notice of appeal).

3. Whether the failure of the trial court to consider and uphold the appellant’s defence of alibi occasioned a miscarriage of justice to the appellant. (Distilled from ground 3 of the notice of appeal).

4. Whether in the light of the evidence adduced at the trial, the respondent proved, beyond all reasonable doubt, that the appellant committed the offences of conspiracy to commit armed robbery and attempted armed robbery as to justify the appellant’s conviction by the trial court. (Distilled from grounds 4 and 5 of the notice of appeal).

*BY RESPONDENTS:*

i. Whether from the totality of evidence adduced at the trial, the prosecution has proved the charge against the appellant beyond reasonable doubt in accordance with section 135 of the Evidence Act, 2011.

ii. Whether the judgment of the learned trial judge was against the weight of evidence.

**MAIN JUDGMENT**

OKORONKWO JCA (DELIVERING THE LEAD JUDGMENT):

By its judgment delivered on 9 July 2013, the High Court of Ogun State convicted the appellant and his co-accused of the offences of conspiracy to commit armed robbery and attempted armed robbery and sentenced each to 14 years imprisonment on each count, ordered to run concurrently.

Dissatisfied with the sentence and conviction, the appellant, Segun Fasinu by a notice of appeal dated and filed 22 July 2013, logged this appeal.

The facts of the case leading to the appeal as rendered by the respondent in its brief, is as follows:

“The case for the prosecution at the court was that on 23 February 2010 at about 7.30 p.m., one Mujeeb Fashina (PW1), a commercial motorcyclist using his motorcycle for commercial purpose was stopped by the appellant and one Taiwo Olatunji (appellant’s co-accused). The appellant and his co-accused asked to be conveyed to Iju and the PW1 agreed. While on their way, getting to Odo Mosa (River Mosa), PW1 was asked to stop but he refused. Upon his refusal, a rope was thrown around the PW1’s neck from behind by the appellant’s co-accused. In a bid to remove the rope from around his neck, the PW1 lost control of the motorcycle, causing the motorcycle and everyone riding on it to fall. In a bid to dispossess the PW1 of the key to his motorcycle, the appellant’s co-accused put a knife to the PW1’s throat and injured him. In the course of the struggle by the appellant and his co-accused to dispossess the PW1 of the key to his motorcycle, the appellant’s co-accused put a knife to PW1’s throat and injured him. During the struggle between the PW1 and the duo of appellant and his co-accused, PW1 was able to tear off the dress of the appellant’s co-accused. After a while, two motorcyclists were seen approaching the scene and PW1 screamed. The appellant covered PW1’s mouth to prevent him from shouting while the appellant’s co-accused choked PW1’s neck. The PW1 bite the appellant’s hand with aggression and the appellant shouted. Both the appellant and his co-accused ran into the swamp. With the assistance of his fellow motorcyclists, the PW1 looked for the appellant and his co-accused but did not get them.

The incident was reported to the Baale of Mosa village. Vigilante men were summoned and dispatched to the scene where the appellant’s co-accused was first arrested and the appellant was later arrested. A case of conspiracy to commit armed robbery and attempted robbery was incidented against the appellant and his co-accused. This led to the trial of the appellant and his co-accused, and both were subsequently convicted for the offences of conspiracy to commit armed robbery and attempted robbery.”

The notice of appeal earlier filed was amended by leave of court of 25 February 2005, whereby the appellant supplanted the notice of appeal with 5 grounds reproduced hereunder with their particulars.

Ground 1

The learned trial judge erred in law and, thus, came to a wrong decision in respect of the criminal charges against the appellant herein when she failed to consider the appellant’s retraction of his alleged confessional statement (Exhibit B) and proceeded to convict the appellant of the offence of conspiracy to commit armed robbery and attempted armed robbery.

Particulars:

i. The appellant had testified at the trial court that he was beaten up by the police before hemade his confessional statement (Exhibit B), thus same was involuntarily made.

ii. The appellant, under cross-examination at the trial court, had denied everything stated in exhibit B, the confessional statement made involuntarily by him.

iii. Although the defence counsel had omitted to object to the admissibility of exhibit B at the time the prosecution sought to tender same in evidence, the appellant remained at liberty to challenge the contents of the said exhibit during his defence, which the appellant did.

iv. In view of the evidence of the appellant during trial, retracting his confessional statement (Exhibit B) on the ground that same was involuntariness of the said exhibit B, which it did not do, and, accordingly, the prosecution failed to discharge the burden of proving that the confessional statement of the appellant was free, voluntary, and made without fear, and/or oppression. See State v. Salawu (2011) 18 NWLR (Pt. 1279) 580 at page 625, paragraphs H - A, (2011) LPELR - 8252, (2012) All FWLR (Pt. 614) 1.

v. Exhibit B should have been expunged from the evidence before the trial court. The law is settled that any confessional statement that is not voluntary made by an accused person is not admissible in evidence and where it is wrongly admitted without conducting a trial-within-trial, it ought to be expunged from the evidence before the court. See the case of Dele v. State (2011) 1 NWLR (Pt. 1229) 508 at page 535,

vi. The reliance of the learned trial judge on exhibit B without testing ITS veracity or occasioned a miscarriage of justice in respect of the appellant.

Ground 2

The learned trial judge erred in law and thereby came to a wrong decision in respect of the criminal charges against the appellant herein when he relied on the conflicting evidence of PW1 and PW2, and, thereafter, proceeded to convict the appellant of the offence of conspiracy to commit armed robbery and attempted robbery.

Particulars

i. PW1 and PW2 gave conflicting evidence at trial. While PW1 testified that he was not present when the appellant was arrested. PW2 testified that PW1 was present.

ii. Though the defence brought this contradiction to the trial judge’s attention, the trial judge held that it is not a contradiction but a discrepancy.

iii. The contradiction in the evidence of PW1 and PW2 is a material as it gives a different account of what transpired, whereupon the prosecution failed to discharge the onus of proving their case beyond reasonable doubt.

The Supreme Court has held that a contradictory statement is an affirmation of the contrary of what was earlier stated or spoken. It is a statement which states the opposite of what is being contradicted. See Sagayya v. State (2006) 7 NWLR (Pt. 980) 637 at page 668, paragraphs B - C.

iv. Where a confessional statement is admitted and an accused has raised an issue as to its voluntariness, there is the need for corroboration to lend weight to the value of that statement.

Such corroboration could come from other evidence adduced at trial and is required to underscore the exercise of caution to which the court of trial is obligated so as to rule out any reasonable doubt that may be lurking in the corner. See the case of State v. Salawu (2011) 18 NWLR (Pt. 1279) 580, at page 625, paragraphs C - D (2011) LPELR - 8252, (2012) All FWLR (Pt. 614) 1.

v. Though the court had admitted the confessional statement of the appellant as exhibit B, in view of the fact that the appellant retracted that confessional statement while giving evidence, the court ought to have ensure that there was corroboration of the said statement.

vi. The law is that any evidence which serves as corroboration must not be flawed, doubtful or discredited, as was the case with the conflicting evidence of PW1 and PW2. See the case of Ahmed v. Nigerian Army (2011) 1 NWLR (Pt. 1227) 89, paragraph H.

Ground 3

The learned trial judge erred in law and thereby came to a wrong decision in convicting the appellant of the offence of conspiracy to commit armed robbery and attempted armed robbery when it failed to consider and uphold the defence of alibi of the appellant without the prosecution showing evidence of investigation of same and without any evidence of the prosecution discrediting same.

Particulars

i. During cross-examination, the appellant testified that on the day the alleged crime was committed, he, on his mother’s instructions, went to weed her building site and on his way home from the site, he was accosted and arrested by four boys who accused him of being a burglar.

ii. The appellant further testified that policemen appeared at the scene and took him to the police station. At the police station, he explained to the policemen that his mother could confirm his story.

iii. In spite of the above testimony of the appellant, the court held that the appellant never testified that he told the police that he had an alibi.

iv. In addition, the court further held that the evidence of the appellant was a ruse as he was not able to dislodge the fact that he was at the scene of the crime. In reaching this conclusion, the court failed to avert its mind to the well settled principle that it is not for an accused person to prove his alibi, rather, the onus is on the prosecution to disprove his alibi. See Aiguoreghian v. State (2004) All FWLR (Pt. 195) 716, (2004) 3 NWLR (Pt. 860) 367 at page 401, paragraph C (SC), (2004) 1 SCNJ 65.

v. It is also well settled that once there is a slightest defence of alibi, the plea must be investigated and failure to do so is fatal to the prosecution’s case. See Aiguoreghian v. State (2004) All FWLR (Pt. 195) 716, (2004) 3 NWLR (Pt. 860) 367 at page 401, paragraph C (SC), (2004) 1 SCNJ 65. The police did not investigate the appellant’s alibi to ascertain its veracity.

vi. The failure of the prosecution to investigate and counter the alibi set-up by the appellant at the earliest opportunity should have been adjudged by trial court as fatal to the prosecution’s case as has been held in a plethora of cases. See Mustapha v. State (2007) 12 NWLR (Pt. 1049) 637 at page 658, paragraph H (HA).

vii. The learned trial judge’s failure to consider the alibi raised by the appellant occasioned a miscarriage of justice in respect of the appellant.

Ground 4

The learned trial judge erred in law and thereby came to a wrong decision in convicting the appellant of the offence of conspiracy to commit armed robbery without any credible evidence showing the intention and the agreement to conspire between the 1st accused and the appellant.

Particulars

i. The appellant testified that he got to know the 1st accused at the police station.

ii. The appellant also retracted the alleged confessional statement (Exhibit B) wherein he allegedly stated that he conspired with the 1st accused to commit the alleged armed robbery.

iii. As earlier stated, where a confessional statement is admitted and an accused has raised an issue as to its voluntariness, there is the need for corroboration to lend weight to the fact of conspiracy between the appellant and the 1st accused.

iv. The learned trial judge thereby occasioned a miscarriage of justice in respect of the appellant when he convicted him of conspiracy to commit armed robbery in the absence of any credible evidence to that fact.

Ground 5

The judgment is against the weight of evidence.

In the brief filed for the appellant of the following issues were formulated:

1. Whether the trial court ought to have relied on the appellant’s retracted confessional statement in convicting the appellant of the offences of conspiracy to commit armed robbery and attempted armed robbery. (Distilled from ground 1 of the notice of appeal).

2. Whether the trial court was right to have relied on the contradictory evidence of PW1 and PW2 to convict the appellant of the offences of conspiracy to commit armed robbery and attempted armed robbery. (Distilled from ground 2 of the notice of appeal).

3. Whether the failure of the trial court to consider and uphold the appellant’s defence of alibi occasioned a miscarriage of justice to the appellant. (Distilled from ground 3 of the notice of appeal).

4. Whether in the light of the evidence adduced at the trial, the respondent proved, beyond all reasonable doubt, that the appellant committed the offences of conspiracy to commit armed robbery and attempted armed robbery as to justify the appellant’s conviction by the trial court. (Distilled from grounds 4 and 5 of the notice of appeal).

On the converse, the respondent by its own brief formulated two related issues namely:

i. Whether from the totality of evidence adduced at the trial, the prosecution has proved the charge against the appellant beyond reasonable doubt in accordance with section 135 of the Evidence Act, 2011.

ii. Whether the judgment of the learned trial judge was against the weight of evidence.

Appellant by his counsel elaborately argued relying on oko v. State (2007) 17 NWLR (Pt. 1063) 272 at page 298 that:

“For a court to uphold a confessional statement which has been resiled, it should be tested strictly as to its truth by examining it along with other evidence to determine whether:

1. There is anything outside it to show that it is true.

2. It is corroborated.

3. The facts stated in it are true in so far as can be tested.

4. The accused’s confession is possible.

5. The confession is consistent with other facts which have been ascertained and proved.” See also Akpan v. State (1990) 7 NWLR (Pt. 160) 101; Eghoghoneme v. State (1993) 7 NWLR (Pt. 306) 383.

And went on to argue as follows:

(i) That there is nothing outside the appellant’s confessional statement to show that the statement is true.

(ii) That the alleged confessional statement of the appellant was not corroborated and the statement of the co-accused cannot serve as corroboration, citing Ahmed v. Nigerian Army (2011) 1 NWLR (Pt. 1227) 89 at page 113.

(iii) That because of what appellant considered as contradiction, that the confession was not possible.

(iv) That the appellant’s confessional statement is not coincident with any ascertained or proved fact.

On issue No. 2, the contradiction the appellant relied on is as stated in paragraph 4.2.7 thus:

The contradiction in the above testimony of PW1 and PW2 are as follows:

i. PW1’s testimony makes no mention of meeting with the vigilantes at the scene of the alleged crime, however, PW2’s testimony was himself and other vigilante officers met PW1 at the scene of the crime and saw blood on his neck.

ii. PW1 was informed the next day that the 1st accused had been arrested, however, PW2’s testimony implies that PW1 was at the scene when the 1st accused was arrested on the night of the alleged crime.

Secondly, PW1 testified as follows:

“The vigilante recovered a knife and rope from the accused persons.” (See page 20 of the record of appeal) On the other hand, PW2 testified as follows:

“We saw a knife and rope on the ground at the scene.” (See page 22 of the record of appeal)

The contradiction in the above testimonies is clear. While PW1 testified that the appellant and the 1st accused were found with the knife and rope used in committing the alleged robbery, PW2 testified that the knife and rope were found at the scene of the alleged crime.

In the case of Al-Mustapha v. State (2013) 17 NWLR (Pt. 1383) 350 at page 403, paragraph G, the court held as follows:

“Where evidence of witnesses are contradictory of each other, it is duty of the judge to discountenance same and treat the entire evidence as unreliable. It is a duty in law, not one marked by discretion. See Onubogu v. State (1974) 1 All NLR (Pt. II) 561, (1974) 9 SC 1 at pages 19 - 20” (Italicizing for emphasis) On issue No. 3, appellant charges that the trial judge failed to consider the defence of alibi raised by the appellant citing Aiguoreghian v. The State (2004) All FWLR (Pt. 195) 716, (2004) 3 NWLR (Pt. 860) 367, (2004) 1 SCNJ 65; citing Ikemson v. State (1989) 3 NWLR (Pt.110) 455, (1989) 1 CLRN 1, (1989) 20 NSCC (Pt.11) 471 and Usufu v. State (2007) 3 NWLR (Pt. 1020) 94 at page 113, (2008) All FWLR (Pt. 405) 1731, appellant submits thus at paragraphs 4.4.6 and 4.4.7 of his rief; We submit that other than the retracted confessional statements of the appellant and the co-accused, and the testimony of PW1, no evidence was adduced which tended to establish that the appellant agreed or conspired with the co-accused to rob PW1 of his unregistered Boxer Bajaj Motorcycle.

The following points must be noted in respect of the above-said evidence:

1. As had been detailed under issue 1, if the trial court had properly evaluated the retracted confessional statement of the appellant, it would not have attached any weight to it.

2. The co-accused, had, during his trial, objected to the voluntariness of the confessional statement purportedly made by him even though the trial court did not take cognizance of this.

3. The evidence of PW1 conflicts with the evidence of PW2 as detailed under issue 2.

The said evidence also conflicts with the alleged confessional statement of the appellant. As the courts have repeatedly held, where evidence of witnesses are contradictory of each other, it is the duty of the judge to discountenance same and treat the entire evidence as unreliable. See Onubogu v. State (1974) 1 All NLR (Pt. II) 561, (1974) 9 SC 1; Al-Mustapha v. State (2013) 17 NWLR (Pt. 1383) 350, at page 403, paragraph G.

It is our respectful submission that the absence of any evidence other than the above “unreliable” evidence necessarily raises doubt as to the guilt of the appellant regarding the commission of the offence of conspiracy.

On the charge of attempted armed robbery, appellant argued that apart from the confessional statement, the evidence led by the prosecution witnesses is so contradictory and ought not to have been relied on, citing Iregu v. The State (2013) 12 NWLR (Pt. 1367) 92 at page 129.

In regards to the appellant’s defence of alibi, appellant submit as follows at paragraphs 4.4.13 - 4.4.15:

We also comment the dictum of Mohammed JSC. In Olayinka v. State (2007) All FWLR (Pt. 373) 163, (2007) 4 SC (Pt. 1) 201, (2007) 9 NWLR (Pt. 1040) 561 at page 586, paragraphs H - B, where my lord held as follows:

“The law has for long been settled in criminal law that it is the duty of a trial court to consider a defence no matter how improbable or stupid it might be. Failure to consider and examine a defence by the trial judge does not only raise reasonable doubt in the case of the prosecution but also amounts to a failure to perform a vital duty imposed on the trial judge and such will amount to a miscarriage of justice which must result in the decision appealed against to be set aside and the conviction quashed.”

It is our respectful submission that the failure of the trial court to consider and examine the defence of the appellant raises reasonable doubt in the respondent’s case and amounts to a miscarriage of justice. Consequent upon which this honourable court is urged to set aside the decision of the trial court and quash the conviction of the appellant.

Moreover, the courts have held that where the identity of an accused and his presence at and participation in a crime had not been satisfactorily proved, the trial court is in no position to convict the accused. See the case of Mustapha v. State (2007) 12 NWLR (Pt. 1049) 637 at page 659, paragraph H. It is our submission that presence and participation of the appellant in the alleged crime was not satisfactorily proved by the respondent.

For the respondent, the various issues of the appellant were encapsulated in the one broad issue of the respondent, which is:

Whether from the totality of evidence adduced at the trial, the prosecution has proved the charge against the appellant beyond reasonable doubt in accordance with section 135 of the Evidence Act, 2011.

In arguing the issue, the respondent urged at paragraphs 4.02 and 4.08 of the respondent’s brief thus:

With regards to count 2 of the charge, it is trite that the offence of attempted robbery is established when the prosecution proves the doing of acts towards the commission of armed robbery and with such intent but falling short of actual perpetration due to intervening circumstance(s).

See Ido v. State (2011) LPELR - CA/I/257/06; Subomi v. State (2010) 16 NWLR (Pt. 1218) 65. To prove a charge of armed robbery, the prosecution must prove the following beyond reasonable doubt against the accused namely:

i. That there was a robbery;

ii. That the robbery was armed robbery; and,

iii. That the accused person was the armed robber or one of the armed robbers.

Please see: Olayinka v. State (2007) All FWLR (Pt. 373) 163, (2007) 4 SC (Pt. 1) 201, (2007) 9 NWLR (Pt. 1040) 561, (2007) 8 SCM 193, (2007) 4 SCNJ 53; Oseni v. State (2012) All FWLR (Pt. 619) 1010, (2012) 5 NWLR (Pt. 1293) 351 at page 386, (2012) 2 MJSC (II) 98.

The prosecution in proving the above ingredients against the appellant in respect of the charge adduced evidence through witnesses and also tendered exhibits.

The appellant has complained that the respondent failed to prove the alleged offence beyond reasonable doubt. It is submitted that the evidence adduced at the trial of the appellant revealed that there was an attempt to rob the PW1 of his motorcycle at Odo-Mosa (River Mosa) on 23 February 2010. It was further revealed that PW1’s assailants were passengers he was conveying to Iju. Also revealed was the fact that PW1 was attacked with rope and knife by his assailants. It was also in evidence that the emergence of two motorcyclists frustrated the armed robbery attack. I refer to the evidence of PW1 on pages 19 - 20 of the record.

It is clear from the evidence of PW1 that the robbers that attacked him were armed with rope and knife (Exhibits D and E) which rope and knife were used to injure the PW1. I urge this honourable court to hold that the prosecution had sufficiently proved that there was an armed robbery attack on PW1 which fell short of actual perpetration due to an intervening circumstance.

It was the appellant’s contention that there was no admissible, credible or reliable evidence placed before the trial court that he was involved in the incident in any way.

It is submitted, that there is overwhelming evidence to prove that the appellant was one of the two armed men that attempted to rob PW1 on 23 February 2010.

PW1 in his evidence stated in clear terms, the specific roles played by the appellant in the frustrated armed robbery attack. I refer to the evidence of PW1 on page 19 lines 17 - 27 and page 20 lines 2 - 17. The PW1 testified that he conveyed the appellant and his co-accused as passengers on 23 February 2010 and that the attempted armed robbery attack took place in the course of the journey. The PW1 was not cross examined on that point. The implication is that the (Appellant) accepts the truth of that matter as led in evidence. Where the adversary fails to cross-examine a witness upon a particular matter, the court is bound to accept the evidence. See Oforlette v. State (2000) FWLR (Pt. 12) 2081 at pages 2098 and 2099, paragraphs H - A, (2000) 12 NWLR (Pt. 631) 415, (2000) 7 SC (Pt. 1) 80. The trial court was therefore right when it helds “I wish at this stage to say that the evidence of the PW1 was not shaken under cross examination as to who his assailants were.” Please see page 54 lines 1 - 2 of the record. The PW2 testified that the appellant was arrested in the swampy bush where the PW1 said his assailants ran into. The PW2 was not cross-examined on this point.

The court is bound to accept the evidence. See Oforlette v. State (supra). In exhibit B, the appellant confessed to the fact that he and his co-accused were the armed men that attacked the PW1 on 23 February 2010. It is trite that once a voluntary confessional statement is admitted, the prosecution’s job is almost done because the confessional statement ends the need to prove the guilt of the accused. See Musa v. State (2012) 3 NWLR (Pt. 1286) 59 at page 94, paragraphs E - F.

Regarding the charge of conspiracy to commit armed robbery in count 1, learned respondent’s counsel submitted at paragraph 4.12 thus:

With regards to count 1 of the charge, it is submitted that proof of the offence of conspiracy is generally a matter of inference. See Bright v. State (2012) 1 SC (Pt. II) 47, (2012) 8 NWLR (Pt. 1302) 297 at page 320, paragraphs E - F. The involvement of the appellant in the conspiracy to rob the PW1 could be inferred from the circumstances of the case. The offence of conspiracy is complete upon meeting of the minds and in order to complete the offence, it is not necessary that any act should be done beyond the agreement. Please see e Bright v. State (supra) at page 320, paragraph H. In the instant case, the collateral circumstances of the case and exhibits A and B constituted fact from which the ingredients of conspiracy could be inferred. The trial court was therefore right when it held: “I therefore hold that from all the above evidence considered, the 1st and 2nd accused persons were acting in concert and were ad idem in conspiracy to dispossess the PW1 of his motorcycle.”

On the second issue of the respondent, it was argued that the trial judge adequately evaluated the entire evidence led and related to the confessional statements, exhibit A and B to the evidence of PW1 and PW2 which show a consistency. In paragraphs 5.03 - 5.04 respondent argue thus:

It is submitted that the trial court properly and adequately evaluated the retracted confessional statement of the appellant. The trial court after properly and adequately evaluating the retracted confessional statement of the appellant held severally thus: “Exhibits A and B, to all intents and purposes is almost a verbatim account of the evidence of PW2 (sic) as to the fact that the two accused persons were acting in concert when they tried to rob him. PW1 also stated that it was 1st accused who put a rope on his neck and 2nd accused finger was bitten when he put his hand in PW1’s mouth when he was shouting and screaming for help” See page 50 lines 5 - 9 of the record. The learned judge further held: “I wish at this stage to again refer to the retracted confession of the accused person in exhibits A and B. The 1st and 2nd accused persons in these statements stated unequivocally and with much clarity as to how they were arrested. In every material particular, the statements are consistent with the evidence of PW1 as to the fact that the accused persons are the culprits and in exhibits A and B each of the accused persons owned exhibits D and E as the weapon they used to perpetrate the robbery.” Please see page 54 lines 6 - 14.

The learned trial judge in his judgment did properly and adequately evaluate the appellant’s retracted statement and this is reflected in the judgment of the court. It is trite that the order in which a trial court considered the evidence before it, having heard the witnesses at the trial is entirely within the discretion of the court which heard the evidence. It may begin with the case of the defence or of the prosecution. It may compare the evidence of one of the witnesses against the other. The important consideration is that the trial court evaluates all the evidence before it in respect of the prosecution and defence before reaching its decision. Please see Igago v. State (1999) 14 NWLR (Pt. 637) 1, (1999) 10 SC 84. In the instant case, the style of subjecting the appellant’s retracted confessional statement to the subjecting tests is entirely within the discretion of the court. The important consideration is that the court subjected the appellant’s statement to the required test. It is [2017] All FWLR Fasinu v. State (Okoronkwo JCA) 1867 submitted that the trial court properly evaluated the appellant’s statement.

On contradictions, learned respondent’s counsel argues that it is not whatever appears contradictory of another that is material. A contradiction must be material and go to the substance of a case if it is to be of any worth citing, Gira v. The State (1996) 4 NWLR (443) 375, (1996) 37 LRCN 688, (1996) 4 SCNJ 95 at page 109 and Musa v. State (2012) 3 NWLR (Pt. 1286) 59. Where what amounts to a contradiction was explained thus:

“For a contradiction in the case of prosecution witnesses to affect conviction, it must cause a doubt as to the guilt of the accused person. A contradiction which is peripheral to the fundamental issue or the substance of the offence or the ingredients of the offence charged or issues in the matter will not avail an accused person. If the contradictions do not touch on a material point or substance of the case, it will not vitiate a conviction once the evidence is clear and it is believed or preferred by the trial court.

Thus, it is not in all cases where there are discrepancies or contradiction in the prosecution’s case, that an accused person will be entitled to an acquittal. It is only the discrepancies or contradictions are on material point or points in the prosecution’s case which create some doubt the accused person is entitled to benefit therefrom.”

Further on contradictions, learned counsel cited Tanko v. State (2008) 16 NWLR (Pt. 1114) 597 at page 640, where the dicta was given thus:

“Minor discrepancies in the evidence of prosecution witnesses which did not mislead the defence and occasioned a miscarriage of justice to the accused, cannot warrant a reversal by an appellate court of the judgment appealed against;”

And also in Archibong v. State (2006) All FWLR (Pt. 323) 1747, (2006) 14 NWLR (Pt.1000) 349, (2006) 5 SC (Pt. III) 1, (2006) 5 SCNJ 202 at page 236, where the same point was made thus:

“Human faculty may miss some minor details mostly due to lapse of time and even error in narration in order of sequence. Contradictions, to be fatal to the prosecution’s case, must go to the substance of the case and not be of a minor nature.”

On the defence of alibi raised in the brief of the appellant, respondent’s counsel submits at paragraph 5.14 of respondent’s brief thus:

It is submitted that where the defence of alibi is raised, the evidential burden or secondary burden is on the accused person to adduce evidence of where he was at the material time. See Tanko v. State (2008) 16 NWLR (Pt. 1114) 597 at page 621, paragraphs E - F. In the instant case, the appellant did not raise the defence of alibi during investigation of the offence.

Please see exhibit B. It is trite law that it is incumbent on an accused person who wishes to raise the defence of alibi to do so at the earliest opportunity, giving sufficient particulars in respect thereof. The proper and auspicious time to do this is at the stage when the allegation against him is being investigated. See Tanko v. State (supra) at page 622, paragraphs A - B. When the PW3 (Investigating Police Officer) testified before the trial court, it was not even suggested to him that the appellant raised the defence of alibi at the stage of investigation. Please see pages 23 - 25 of the record. The Supreme Court in Oforlette v. State (2000) FWLR (Pt. 12) 2081 at pages 2098 - 2099, paragraphs A - D held; ... the noble art of cross-examination constitutes a lethal weapon in the hands of the adversary to enable him effect demolition of the case of the opposing party. It is therefore good practice for counsel to put across his client’s case through cross-examination. He should, as a matter of the utmost necessity, use the same opportunity to negative the credit of that witness whose evidence is under fire. Plainly, it is unsatisfactory, if not suicidal bad practice for counsel to neglect to cross-examine a witness after his evidence-in-chief in order to contradict him or impeach his credit while being cross-examined, but attempt at doing so only by calling other witness or witnesses thereafter. That is demonstrably wrong and will not even feebly dent that unchallenged evidence by counsel leading evidence through other witness to controvert the unchallenged evidence. “Hence, the evidence of alibi led during the appellant’s defence amounts to nothing, having failed to cross-examine the PW3 on whether or not the appellant raised an alibi at the state of investigation, which the PW3 failed to investigate.

The trial judge was therefore right when he held:

“The story they have told the court, they did not state they told the police in their (sic) statement they gave the police so their claims could be investigated by the police. Their evidence in court does not contain details of where they were with persons and addresses or exact places the police could have used in investigating same. In fact in their evidence before the court, the accused persons never testified they told the police they had an alibi.” See page 54 lines 20 - 25 of the record.

Still on alibi, respondent further countered that a defence of alibi will break down where there is positive evidence, strong and positive enough to convince the court that an accused person had been seen at the scene of the crime, citing State v. Azeez (2008) All FWLR (Pt. 424) 1423, (2008) 14 NWLR (Pt.1108) 439, (2008) 4 SCNJ 325.

In conclusion, respondent’s counsel, on the basis of earlier submissions advised thus at paragraph 5.19 of respondent’s brief thus:

It is further submitted with respect, that, it is trite that an appellate court must in the absence of compelling evidence indicating erroneous appraisal of facts and conclusions, show the utmost restraint, resist and reject any temptation to interfere with well - considered findings made by a trial judge who had the singular opportunity of not only hearing the evidence but of watching the demeanor of the witnesses. Please see Agbanyi v. The State (1995) 1 NWLR (Pt. 369) 1. In the instant case, the learned trial judge found as a fact that the appellant committed the offence as charged, a finding that was based on evidence laid before the court. It is respectfully submitted that this honourable court should not disturb these findings of facts of the trial court since it is not perverse, erroneous or against the weight of evidence.

In resolving the main issue in this appeal, it seems to me necessary and even desirable to go back to the records of trial, to the point where exhibits A and B were tendered during the trial. The relevant portion is at pages 23 - 24 of the record where the trial judge recorded as follows:

PW3 = Male, Christian, sworn on bible and states in English as follows:

I am No. 365987 CPI Aturami Okikiola attached to state CID Eleweren Abeokuta. I know the two accused persons.On 23 February 2010, a case of armed robbery was reported at CID office Sango Otta and was transferred to state CID Abeokuta and I was detailed to investigate. During the course of my investigation, I obtained statement of complainant I rearrested charged and cautioned accused person. I cautioned each individual in Yoruba each separately volunteered confessional statement without inducement. I recorded the statement, read it over to them and they signed as correct I counter signed as recorder. I took each of the accused person before SPO Folahan Ogunkoya SP before whom the statements were read over to them and each confined it to be true. It was read over to each of them in Yoruba language. The supol endorsed the statements, in company of two other police officers. I visited the scene of crime. I can identify the statements of the two accused persons. This is it, (witness identified statement of 1st and 2nd accused persons) Ifemeje - I seek to tender the statement of the 1st and 2nd accused persons.

Aiyedun- No Objection Court - Statement of the 1st accused is admitted as exhibit A while that of the 2nd accused is admitted exhibit B. The accused persons including the appellant who was 2nd accused were represented by learned counsel, Mrs. A. K. Aiyedun who had instructions and authority to represent the accused persons and who was dominis litis for the accused persons. Stage by stage, the PW3 who was the investigating police officer, Aturami Okikiola, obtained statement from each accused after caution in Yoruba language and confirmation before a superior police officer, Folayan Ogunkoya.

At the trial stage, when the statements were tendered by the prosecuting counsel Ifemeje, the learned defence counsel said “No objection”. That is, the confessional statements, exhibits A and B were not objected to by the accused persons including the appellant and the court declared.

“Statement of the 1st accused is admitted as exhibit A, while that of the 2nd accused is admitted as exhibit B”

At the vital stage when the statement of the appellant was being tendered, the appellant, through his counsel declared that he had no objection to the statement, exhibit B being tendered.

The trial judge in duty then received the statement in exhibit as exhibit B.

What is left is for the trial judge to act on the statement at the evaluation and application stage. The matter cannot be revisited.

The scenario here is different from where after making the statement at the police stage, the accused came to court to deny the statement by objecting to it either on the grounds of involuntariness or on grounds of non est factum whereby he denies making it. This is the normal retraction in court. It must be raised at the point the statement is sought to be tendered.

A situation where an accused declared by his counsel in court that he does not have objection to his confessional statement being admitted in court and the court admits such statement, the question of retraction can no longer be raised or considered. If the said accused/appellant in his further testimony says anything inconsistent with the statement he admitted, that, in my view will, be reprobation after an approbation which the law forbids.

Qui approbat non reprobate. See Codrington v. Codrington (1875) 45 L.J Ch. 660; See also Express News Papers v. News (U.K) Ltd (1990) 3 All E. R. 376.

If the law forbids the reprobation, the implication is that everything said in such reprobation is of no moment, of no use, and ought to be discountenanced or disregarded.

Notwithstanding, the trial judge out of abundance of caution considered the confessional statement of the appellant against all the parameters of the law and came to the conclusion that it was made by the appellant and the statement was consistent with other facts found and proved of the hearing.

In Abasi v. State (1992) 8 NWLR (Pt. 260) 383, (1992) 10 SCNJ 113, it was said that where the confession of an accused person is that the accused committed the crime charged; it is in the nature of a plea of guilty to such offence. It was further held therein that the accused can be convicted on his confession alone if the court is satisfied that it is true.

Other than the confesion in exhibit B, the trial judge found sufficient corroboration in the evidence of PW1 and PW2 and the arrest of the appellant and his co-accused in a swamp within the scene of crime. The learned trial judge narrated the account thus at page 52 of the record.

The next issue to be determined is the identity of the culprits.

The PW1 in his evidence in court graphically gave an account as to how the 1st and 2nd accused persons boarded his motorcycle, attempted to strangle him with a rope and put a knife to his neck and tried to take away the key of the motorcycle. PW1 also succeeded in taking the shirt of the 1st accused.

I wish to also refer to the evidence of the PW2 who was part of the vigilante team who eventually arrested the accused in the swamp.

It was the testimony of the PW2 that the 1st accused upon being brought out of the swamp identified the knife exhibit E and rope exhibit D as his property and the (PW2) was part of the team of person including the policemen who brought the 1st accused to the Eleweran Police Station, Abeokuta. It was also his testimony that it was in the swamp the 1st accused was captured. Accused person has not given any evidence why PW3 will lie against them.

It was also PW2’s evidence, the 2nd accused upon being arrested also in the swamp was brought to join 1st accused who had earlier been arrested.

Issues were also raised in this appeal about contradictions.

At page 53 of the record, the learned trial judge resolved the issue thus:

Learned counsel to the accused persons had submitted that there is a contradiction as to whether the PW1 was present when 1st accused was arrested.

While PW1 said he was not, PW2 said PW1 was present.

I have looked at this piece of alleged contradiction and in my mind; it is not a contradiction but a discrepancy for the following reasons:

1. The offence on the charge was allegedly committed on 23 February 2013.

The PWs gave evidence in 2013 that is about 3 years later.

In this regard, the court per Fasannu JCA in Ebiebeniwa v. The State (2008) LPELR - CA/162/2005 explaining the principle and distinction made between contradictory evidence and discrepancy in evidence said thus;

“... A piece of evidence contradicts another when it affirms the opposite of what other evidence has stated not when there is just a minor discrepancy between them. Two pieces of evidence contradict another when they are by themselves unreasonable.

On the other hand, a discrepancy may occur when a piece of evidence stops short of or contains some minor difference in details.

Human faculty may miss some minor details due to lapse of time and error in narrating order of sequence.”

See also from Uwagboe v. State (2008) All FWLR (Pt. 419) 425 at pages 432 - 433, (2008) 12 NWLR (Pt. 1102) 621.

It is therefore trite, it is not every discrepancy or contradiction which affects the substance of [2017] All FWLR Fasinu v. State (Okoronkwo JCA) 1875 a criminal case.

In addition to the work of the trial court, reference must be made to The State v. Fatai Azeez & 4 Ors. (2008) All FWLR (Pt. 424) 1423, (2008) 14 NWLR (Pt.1108) 439, (2008) 4 SCNJ 325, where it was declared that contradictions in order to have effect on the case of an accused person must be material, substantial and must relate unequivocally to the charge against the accused person. See also Jimoh Awopejo & 6 Ors. v. The State (2000) FWLR (Pt. 4) 656, (2002) 2 SCM 47.

Like the trial judge, I see no material contradiction, not even discrepancies that relate to the charge. Even, beside the confession, trial judge found sufficient evidence in the evidence of PW1, PW2 and PW3 upon which to rest the conviction of the appellant.

In the final analysis, the appeal lacks merit on all fronts raised in the grounds of appeal and the issues distilled therefrom.

Accordingly, appeals fails and is dismissed.

The conviction and sentence imposed by the trial judge is hereby affirmed.

**TSAMMANI JCA:**

I had a preview of the judgment just delivered by my learned brother, Nonyerem Okoronkwo JCA.

I agree with the reasoning and conclusion that this appeal has no merit and that it be dismissed.

The record discloses clearly that when the extra-judicial statement of the appellant was tendered at the trial, the appellant who had the benefit of legal representation did not raise any objection. Having not raised any objection, the learned trial judge rightly admitted same in evidence, and duly acted on it in finding for the guilt of the appellant. The fact that the appellant purported to resile from the statement is of no moment as the trial court properly evaluated the confessional statement along with other evidence adduced before him before coming to a conclusion to convict. This is because, it is the law that, a court can convict on a retracted confessional statement of an accused person, once the statement is properly evaluated along with other facts adduced at the trial. See Edhigere v. State (1996) 8 NWLR (Pt. 464) 1, (1996) 42 LRCN 1082; Chukwuka Ogudo v The State (2011) LPELR (SC) 51, (2011) 12 SC (Pt. 1) 71, (2011) 18 NWLR (Pt. 1278) 1 and Stephen Harna v. The Attorney-General of Federation (2012) LPELR - 7821 (SC).

See also R v. Sykes (1913) CAR 113 and R. v. Omokaro (1941) 7 WACA 146. In the instant case, the learned trial judge satisfied himself of the voluntariness of the appellant’s confessional statement and found same to be properly proved. He was therefore right to have, having considered other facts, have convicted the appellant thereon.

I also hold that this appeal has no merit. It is accordingly dismissed.

**DANIEL-KALIO JCA:**

I have had the privilege of a preview of the judgment of my lord Nonyerem Okoronkwo JCA and I agree with my lord’s views in his judgment. On the three issues of resiling from the confessional statement, contradictory evidence of prosecution witnesses and the raising of an alibi, no reasonable case had been made out on appeal to upset the judgment of the learned trial judge. The appeal lacks merit and is accordingly dismissed. The judgment of the lower court is affirmed.

Appeal dismissed