**KAZEEM AKINTUNDE**

**V.**

**THE STATE**

IN THE COURT OF APPEAL OF NIGERIA

THE 29TH DAY OF JUNE, 2017

CA/IB/100C/2015

**LEX (2017) - CA/IB/100C/2015**

OTHER CITATIONS

2PLR/2017/182 (CA)

(2017) LPELR-42862 (CA)

**BEFORE THEIR LORDSHIPS**

MONICA BOLNA'AN DONGBAN-MENSEM, J.C.A

CHINWE EUGENIA IYIZOBA, J.C.A

HARUNA SIMON TSAMMANI, J.C.A

**BETWEEN**

KAZEEM AKINTUNDE - Appellant(s)

AND

THE STATE - Respondent(s)

**ORIGINATING COURT**

OGUN STATE HIGH COURT, OTA JUDICIAL DIVISION (Judgment of Hon. Justice A. O. Asenuga).

**REPRESENTATION/LAWYERS**

THELMA OTAIGBE OLULEYE with AGBELU AMINAT O. and JOHN PIUS - For Appellant.

AND

S. A. SOLANA (Principal State Counsel, Ogun State Ministry of Justice, Abeokuta)- For Respondent.

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

CRIMINAL LAW AND PROCEDURE - OFFENCE OF ARMED ROBBERY:- What the prosecution must prove to succeed on the offence of armed robbery - Standard of proof required of the prosecution.

CRIMINAL LAW AND PROCEDURE - OFFENCE OF CONSPIRACY:- Meaning of conspiracy - How it can be inferred.

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - BURDEN OF PROOF/STANDARD OF PROOF:- Burden of proof and standard of proof in criminal cases.

EVIDENCE - CONFESSIONAL STATEMENT:- Conditions for admissibility of a confessional statement.

EVIDENCE - CONFESSIONAL STATEMENT:- Meaning of confession/confessional statement.

EVIDENCE - CONFESSIONAL STATEMENT:- Tests for determining the truth or weight to attach to a confessional statement before a court can convict on same.

EVIDENCE - PROOF BEYOND REASONABLE DOUBT:- Whether proof beyond reasonable doubt means proof beyond all shadow of doubt.

EVIDENCE - PROOF BEYOND REASONABLE DOUBT:- Whether proof beyond reasonable doubt is attained by the number of witnesses called by the prosecution.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant, a labourer, went to his place of work. Prior to his leaving home, he had a sick child. While at work, he got a call from his wife that the sick child was running temperature and he had been taken to the hospital. The wife asked Appellant to come. On his way to the hospital at Akinade, he met OPC men who arrested him and asked for his residence and occupation which he supplied them. He was not allowed to contact his family members but was whisked away to the OPC farm. This was at about 5pm.

On getting to the OPC farm, the Appellant met the Baba Bose who laughed at him and told him he had caught him at last. The Appellant was kept at the OPC farm till night and was taken to Sango Police Station and handed over to a police officer called Anthony. That was how the Appellant’s ordeal began.

In his evidence on oath, the Appellant denied taking part in the robbery, that he was only arrested while on his way to the hospital to see his sick child.

At the conclusion of the police investigation, the Appellant 1st and 3rd accused persons where charged before the trial Court with a three (3) count offence of conspiracy to commit armed robbery and armed robbery. The Appellant and other accused persons pleaded not guilty to the charges where upon the Respondent opened its case by calling five (5) witnesses as against the nine(9) listed in its proof of evidence. The Appellant gave evidence in his defence. He denied ever taking part in any armed robbery operation. He maintained that he was roped into the crime due to his defending his father’s land from one Baba Bose, an OPC leader who wanted to take the land from his family. That he was induced to sign Ex. D and D1 after having his teeth removed by plier by one Ejembe. His mother gave evidence as DW4, corroborating appellant’s story and was duly cross-examined. She confirmed the Appellant’s alibi.

In the course of PW4 tendering the extra-judicial statement trial within trial was conducted as to the voluntariness of the statements but at the end of trial, the learned judge overruled the objection to the voluntariness of the statements and admitted them in evidence.

The learned trial Judge found the Appellant and his co-accused guilty as charged and sentenced them to death by hanging.

Dissatisfied, the Appellant appealed to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment, finding the Appellant guilty and convicting and sentencing the Appellant to death by hanging for the offences of conspiracy and armed robbery. Dissatisfied, the Appellant appealed to the Court of Appeal.

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

*BY APPELLANT:*

1. Whether the prosecution has proved the offences of conspiracy, armed robbery or even robbery simplicita beyond reasonable doubts.

2. Whether the learned trial judge can safely convict the Appellant of offences of conspiracy and armed robbery with the involuntary and/or legally defective confessional statement wrongly admitted in evidence by him.

3. Whether in view of the haphazard manner of investigating this case, the trial judge could gloss over the alibi of the Appellant when he was not arrested while committing the offence nor his description given to the police by the complainant prior to his arrest.

4. Whether the learned trial judge in his judgment properly evaluated the evidence before him in reaching his decision to convict the Appellant on conspiracy and armed robbery.

*BY RESPONDENTS*

(i) Whether from the totality of the evidence adduced at trial, the Respondent proved the charge of conspiracy to commit armed robbery and armed robbery against the Appellant beyond reasonable doubt in accordance with Section 135 of the Evidence Act, No. 18 of 2011?

(ii). Whether the Appellant properly raised a defence of alibi in this case so as to warrant its consideration by trial Judge?

(iii). Whether the trial Judge was right in admitting Exhibits D, D1 and H and relying on same to convict the Appellant in this case?

(vi). Whether the failure of the trial Court to properly evaluate the evidence place before him in this case amounts to a miscarriage of justice which could lead to the acquittal of the Appellant?

**MAIN JUDGMENT**

**MONICA BOLNAAN DONGBAN-MENSEM, J.C.A.** (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the Judgment of Hon. Justice A. O. Asenuga of the Ogun State High Court, Ota Division, Ogun State. The Appellant who was charged along with two others were convicted of Conspiracy and Armed Robbery under the provisions of Section 6(b) and Punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions Act (CAP R. II) Laws of the Federation of Nigeria, 2004. They were each sentenced to death by hanging. The Appellant appealed to this Court seeking an order of discharge and acquittal against his conviction and sentence.

The facts which led to this appeal as captured in the brief of argument of the Appellant and partly modified in this Judgment are as follows:

That the 21st December, 2006, the Appellant, a labourer, went to his place of work. Prior to his leaving home, he had a sick child. While at work, he got a call from his wife that the sick child was running temperature and he had been taken to the hospital. The wife asked Appellant to come. On his way to the hospital at Akinade, he met OPC men who arrested him and asked for his residence and occupation which he supplied them. He was not allowed to contact his family members but was whisked away to the OPC farm. This was at about 5pm (Record book p. 108, line 14).

On getting to the OPC farm, the Appellant met the Baba Bose who laughed at him and told him he had caught him at last. The Appellant was kept at the OPC farm till night and was taken to Sango Police Station and handed over to a police officer called Anthony. That was how the Appellant’s ordeal began.

The Brief of the Appellant dated 15/10/15 was filed on the same date.

In his evidence on oath, the Appellant denied taking part in the robbery, that he was only arrested while on his way to the hospital to see his sick child.

At the conclusion of the police investigation, the Appellant 1st and 3rd accused persons where charged before the trial Court with a three (3) count offence of conspiracy to commit armed robbery and armed robbery.

Trial commenced on 21st November, 2008 and the Appellant and other accused persons pleaded not guilty to the charges where upon the Respondent opened its case by calling five (5) witnesses as against the nine(9) listed in its proof of evidence. The Appellant gave evidence in his defence. He denied ever taking part in any armed robbery operation. He maintained that he was roped into the crime due to his defending his father’s land from one Baba Bose, an OPC leader who wanted to take the land from his family. That he was induced to sign Ex. D and D1 after having his teeth removed by plier by one Ejembe. His mother gave evidence as DW4, corroborating appellant’s story and was duly cross-examined. She confirmed the Appellant’s alibi.

In the course of PW4 tendering the extra-judicial statement trial within trial was conducted as to the voluntariness of the statements but at the end of trial, the learned judge overruled the objection to the voluntariness of the statements and admitted them in evidence. (Record @ p. 91-99, 55-62).

The learned trial Judge after reviewing the evidence of parties held @ pp. 123 of the record that:

“It is therefore my findings that in all the circumstances of the case, all the accused persons are guilty of the offences of conspiracy to commit armed robbery and armed robbery as charged. The punishment for the offence under the law is death. All the accused persons are hereby sentenced to death by hanging”.

It is against this judgment that the Appellant has appealed to this Court. Out of the nine (9) grounds of appeal raised, the appellant formulated four (4) issues; the Respondent also raised four (4) issues.

The Appellant’s brief of argument dated 15/10/15 was filed on the same date and deemed on 09/02/17 The Respondent’s brief of argument dated was filed on 09/03/17

APPELLANTS ISSUES

1. Whether the prosecution has proved the offences of conspiracy, armed robbery or even robbery simplicita beyond reasonable doubts. (Grounds, 1, 6 and 7)

2. Whether the learned trial judge can safely convict the Appellant of offences of conspiracy and armed robbery with the involuntary and/or legally defective confessional statement wrongly admitted in evidence by him. (Grounds 2, 3 and 4)

3. Whether in view of the haphazard manner of investigating this case, the trial judge could gloss over the alibi of the Appellant when he was not arrested while committing the offence nor his description given to the police by the complainant prior to his arrest. (Ground 8)

4. Whether the learned trial judge in his judgment properly evaluated the evidence before him in reaching his decision to convict the Appellant on conspiracy and armed robbery. (Grounds 5 and 9).

RESPONDENTS ISSUES

(i) Whether from the totality of the evidence adduced at trial, the Respondent proved the charge of conspiracy to commit armed robbery and armed robbery against the Appellant beyond reasonable doubt in accordance with Section 135 of the Evidence Act, No. 18 of 2011?

(ii). Whether the Appellant properly raised a defence of alibi in this case so as to warrant its consideration by trial Judge?

(iii). Whether the trial Judge was right in admitting Exhibits D, D1 and H and relying on same to convict the Appellant in this case?

(vi). Whether the failure of the trial Court to properly evaluate the evidence place before him in this case amounts to a miscarriage of justice which could lead to the acquittal of the Appellant?

All the issues raised by the Appellant and the Respondent touch on the evaluation and application of evidence as required by law and case law. All the issues can be taken together.

The Appellant submits that there are material contradictions, in the case of the prosecution which casts doubt as to if any robbery took place; cites Ikemson v. The State (1989), 3 NWLR (Pt. 110) 455. Appellant submits that the 3rd ingredient of armed robbery is totally absent. Maintains that the victims PW2 and PW3 in their evidence denied knowing the Appellant but relied on the hearsay evidence. That the learned trial Court should not have acted on such evidence.

Appellant contends that the cartridge recovered and admitted in evidence has no link with the injury sustained, no evidence was led to that end.

Also raised is the material contradictions as to the total amount alleged stolen. That PW1 gave the amount stolen to be N700, 000 against the amount of N590, 000 stated by the PW2.

Appellant contends further that the confessional statement obtained from him was done under duress.

Respondent acknowledged that the burden lies with it to proof the guilt of the accused and that Prosecution has done that beyond reasonable doubt cites Richard v. The State (2013) LPELR 22137 @ 14-15, para E-A.

Respondent further maintains that there was evidence led that money and handsets were stolen by the Appellant and co by the use of force.

That this was buttressed by the evidence of PW2 and PW3 at pages 84-87 of the record, whom the Respondents described as eye witnesses to the robbery. Respondent maintains that the Prosecution proved its case beyond reasonable doubt, there was thus no need to investigate the alibi raised by the Appellant because it was not raised at the point of interrogation.

The respondent also cited several cases to buttress his arguments. Among the cases cited are: EKE v. STATE 2011 LPELR 1133 SC; ODU & ANOR v. THE STATE (2001) 5 SCNJ 115 @ 120; YANOR v. THE STATE NMLR 337.

Can it be said that the ingredients of armed robbery exist in this appeal? The trial Court found as follows:

1. That there was robbery. The Court found out that the evidence of PW2 and PW3 corroborated the confessional statements supplied by the Accused. The above clearly suggest conspiracy in line with the position of ingredients of conspiracy and armed robbery.

2. That the accused was armed. This was held substantiated by the evidence supplied to the Court. The Court treated the second issue and came to the conclusion that tendering of weapon used is immaterial.

3. That the accused participated. This was confirmed by the apprehension of the Appellant by the OPC. The Court drew inference of this ingredient and came to the conclusion that the 2nd and 3rd accused who were caught at the scene of the crime made statements which confirm same.

Court stated that confessional statement of the 1st accused though not at the scene of the crime but was the one that procured 2nd and 3rd accused persons to commit the offence. The Court concludes that he is principal offender. These were reflected at pages 123 of the record. Appellant was a principal offender. The following cases were cited:

Bozin v. State (1985) 2 NWLR (Pt. 8) 465; Suberu v. State (2010) All FWLR (Pt. 520) 1263, (2010) 8 NWLR (Pt. 1197) 586; Ani v. State (2003) 11 NWLR (Pt. 830) 142; Attah v. State (2010) All FWLR (Pt.540) 1224, (2010) 10 NWLR (Pt. 1201) 190; Olayinka v. State (2007) All FWLR (Pt. 373) 163, (2007) 9 NWLR (Pt. 1040) 561, Agboola v. State (2013) All FWLR (Pt. 704) 139, (2013) 11 NWLR (Pt. 1366) 619 referred to) (P. 1065).

Confession is defined in Section 28 of the Evidence Act, 2011 Cap. E14 as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.

Niki Tobi (OBM) gave an exposition of what constitutes and is acceptable confessional statement in the case of GBADAMOSI V STATE (1991) 6 NWLR (PT. 196) 182. I find the pronouncement made therein as topical and compelling and I crave indulgence to quote extensively therefrom:-

I move now to the issue of confessional statement. The learned trial Judge held that all the three appellants confessed to the commission of the offences charged. He relied on Exhibits H, J and K as the confessional statements of the 1st, 2nd and 3rd appellants respectively.

The word “confess”, the verb variant of the noun, confession, in general parlance, means to acknowledge fully, especially something which is wrong. It is also means to own up or admit, again particularly a wrong. Legally, the word confession means an admission of an offence by an accused person. It means an acknowledgment of crime by an accused person. In SAIDA V. THE STATE (1982) 4 S.C. 41, the Supreme Court defined “confession” as an admission made at any time by a person charged with a crime stating or suggesting the inference the he committed the crime. See AKPAN V THE STATE (1990) 7 NWLR (PT. 160) 101.

Therefore a statement which is made by an accused person admitting or acknowledging the fact that he really committed the offence for which he is charged is called a confessional statement. Because a confessional statement is, in most cases, a short cut to determining the guilt of an accused person, a Court of law should not take it lightly. Because the owner of the mind knows his mind best as he is the master of it, because the committer of an offence knows the offence he has committed better than any other person, once he voluntarily admits the commission of the offence, the only function of the Court, in most cases, is to convict him. There are however certain situations where the law requires some corroboration. As a matter of law, confessional statement voluntarily made appears to me to be the strongest evidence because it comes out directly from the head and mouth of the accused person himself.

Because of the importance attached to confessional statement in the administration of our criminal process, a trial Judge must be very sure and satisfied that a statement is really a confessional statement and not a caricature of it.

A confessional statement must be clear, precise and unequivocal. A confessional statement should, on no account, give any room for doubt in the mind of the trial Judge. Once the trial judge nurses some doubt, however thin or infinitesimal it may be, that doubt must be resolved in favour of the accused person. By this singular act, he has vindicated the basic requirements of the adversary jurisprudence that we operate. Otherwise no.

In considering whether a statement qualifies as a confessional statement, a trial judge must examine the totality of the statement as if it is a ‘corporate’ entity. A trial judge cannot pick phrases here and there or expressions here and there and come to the conclusion that the statement is a confessional one. He has no such jurisdiction.

What constitutes confessional statement is a matter of fact. It is not a matter of law. After all, the trial judge is dealing with the factual position of the statement, and that is his only interest. Accordingly, where the interplay of the facts of the statement does not unequivocally satisfy the requirements of a confessional statement, a trial judge will be in error in admitting it as such a statement See generally SHAZALI V. THE STATE (1988) 5 NWLR (PT. 93) 164; OJEGELE V. THE STATE (1988) 1 NWLR (PT. 71) 414; OKAROH V. THE STATE (1990) 6 NWLR (PT. 155) 141.

If at all any statement does not qualify as a confessional statement, it is the statement of denial of the commission of the offence by the accused person. As a matter of fact, the opposite of confessional statement, if I may so naively put it, is the statement of the accused person denying the commission of the offence in the instant case, the learned trial judge admitted the statements of the 1st and 2nd appellants as confessional statements. I am in agreement with him in respect of the 1st appellant. I am afraid I part ways with him in respect of the 2nd appellant. I have gone through Exhibit J, the statement the learned trial judge admitted and made use of as a confessional statement, in his judgment, and I cannot see my way clear that it is in fact a confessional statement.

Perhaps the point I am making will become clear if I state hereunder, verbatim ad literatim the statement of the 2nd appellant, I can do this with convenience as it is not a long statement. This is what he said in his 21/9/81 statement to the Police.

..Because the learned trial judge believed that the above statement is a confessional statement that made him to conduct a trial within trial. This is part of what he said as it related to all the three appellants:

They each denied their respective statements at the trial. A trial within trial was conducted, at the end of which the Court was of the view that the statement credited to each of the accused persons, namely, Exhibits H, J and K, respectively was made voluntarily by the accused concerned.

As a preface to the reproduction of the so-called confessional statement of the 2nd appellant, the learned trial judge said:

Similarly, the 2nd accused in Exhibit J confessed in material particular to the commission of the offence. He stated as follows:

Obviously, Exhibits H, J and K are confessional statements. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them in Section 27(2) of the Evidence Act. And so the learned trial judge closed the curtain with a 25 year sentence.

How can Exhibit J be a confessional statement? What portion of it gave the learned trial judge that impression? How and why did he come to that conclusion? What are the material particulars of the facts contained in the alleged confessional statement? One can ask and ask questions galore.

The factual and true position of Exhibit J is that it is not a confessional statement. Far from it. It cannot be. On the contrary, it is a statement of denial on the part of the 2nd appellant. If the learned trial judge was not quite sure whether the statement was a denial right through, it ought to have dawned on him in the penultimate five-word sentence that the statement was nothing but a clear denial of the 2nd appellants participation in the crime. Let me once again quote the very important sentence in Exhibit J.

I am not a robber.

Such are the clear words of the 2nd appellant. He said that he is not a robber. And there is nothing in the rest of Exhibit J to the effect that he committed the offences he was charged with in my view, Exhibit J was wrongly admitted as a confessional statement and I so hold.

In this appeal, can Exhibits D-D1 be said to be a confessional Statement? What are the independent elements in the said statement?

The alleged confessional statement of the Appellant was copiously reproduced in the body of the Judgment. However, nowhere in the Judgment did the learned trial Judge subject the alleged confessional statement of the Appellant to the judicial scrutiny of such extra-judicial statements.

I find as instructive and historical the pronouncement of the need for judicial scrutiny of a confessional statement in the dictum of my Lord Nweze JSC in the case of NWEZE V. STATE (2017) LPELR-SC.79/2012.

My Lord started with a review of the general practice as follows:-

My Lords, in this day and age, it would, in my humble view, serve no useful purpose to rehearse the well-worn or hackneyed definition of the word “Confession” having been repeated ad nauseam in cases too numerous to mention here. Some of these cases include: Yusufu v. The State (1976) 6 SC 167, 173; Okegbu v. The State (1984) 8 SC 65; Kim v. The State (1992) 4 SCNJ 81, 110; (1992) 4 NWLR (Pt. 233) 17; Ikpo & Anor v. The State (1995) 2 SCNJ 64, 75; (1995) 9 NWLR (PT. 421) 540 Suffice it, however, to observe that the logic of the reasoning in all cases at this point is that a free and voluntary confession of guilt, whether judicial or extrajudicial, if it is direct and positive and properly established, is sufficient proof of guilt. In effect, it is enough to sustain a conviction so long as the Court is satisfied with the truth thereof (that is, the truth of the confession), Adebayo v. The State (2014) LPELR-22988 (SC) 40-41; Akpan v. State (2001) 11 SCM 66; (2001) 15 NWLR (Pt. 737) 745; (2001) 7 SC (Pt. 1) 124; Onuoha v. The State (1987) 4 NWLR (Pt. 65) 331. However, outside the confession, it is desirable to have some corroborative evidence, no matter how slight of circumstances which make it probable that the said confession is true and correct. The reason for this prescription is simple: Courts are not generally disposed to act on a confession without testing the truth thereof. Onochie and Ors. v. The Republic (1966) NMLR 307; R v. Sykes (1913) 8 CAR 233, 236. The six tests which have been admirably formulated for the guidance of the Courts in the execution of this exercise are represented in the subjoined questions:

(a) Did the accused person even have the opportunity of committing the alleged offence?

(b) If indeed he had such opportunity, was his confession possible?

(c) Even then, is there anything outside the confessional statement which evinces its truth?

(d) Was such a confession corroborated?

(e) Can such a statement withstand the scrutiny of the assessment of its veracity?

(f) Then there is the ultimate question of its consistency or reliability having regard to the other facts which have been ascertained and which have accordingly been proved. These formulations which trace their roots to the old case of R v. Sykes (1913) 8 CAR 233, 236, have been endorsed by this Court in numerous decisions: Queen v. Obiasa (1962) 1 ANLR 65; (1962) 2 SCNLR 402; Ikpasa v. Attorney-General of Bendel State (1981) 9 SC 7; Akpan v the State (1992) 6 NWLR (Pt. 248) 439, 460; (1992) 7 SCNJ 22; Per NWEZE, J.S.C. (Pp. 24-27).

By this profound dictum of the Apex Court, confessional statement must not be taken hook, line and sinker as the truth, the end all in all of the case. The trial Court is expected to look outside the alleged confessional statement. In this appeal, was such exercise undertaken? It appears the trial Court, in an attempt to comply with this vital exercise, found corroboration of the alleged confessional statement in the testimonies of the PW2 and PW3, who were in fact the victims of the robbery. How can the statement of the victims corroborate the confessional statement of the accused when what is needed is some external element outside the scene and the circumstances of the robbery? The alleged confessional statement of the Appellant appears more like a report of the incidence which tends to give credence to the rejection made by the Appellant and the assertion that he did not make the statement. The structure, texture and nature of the statement fits into a typical Police style statement custom made.

The Appellant out-rightly denied any involvement in the robbery. He gave a sworn testimony in which he stated where he was arrested and even made assertions of being framed by the leader of the OPC men who arrested him.

If any of these assertions were investigated and found to be false, there could be a probability of culpability backed by the confessional statement. No such evidence was placed before the Court because there was no investigation. Thus omission is grave because of the constitutional entrenchment of the right of the accused person to remain silent until his guilt is established- Section 35 (2) of the 1999 Constitution.

The Appellant raised issues about his Primary accuser - Baba Bose who handed him over to the Police. No iota of evidence was adduced to debunk the assertions of the Appellant. The learned trial Judge totally ignored these assertions of the Appellant. The prosecution dismissed it with a wave of the hand under the clandestine rhetoric that the Prosecution needs not call a host of witnesses to proof its case. One vital witness can no doubt prove the case of the Prosecution. However, where the facts are not that clear but clouded with uncertainty, the Prosecution must do more.

Having stated that the prosecution case is premised on the confessional statement of the Appellant; did the Court nonetheless consider the defence of the Appellant in all its ramifications? A close perusal of the Judgment of the trial Court discloses that the Court did not allude to the sworn testimony of the Appellant taken in Court and which is recorded at page 107 of the Records.

The alleged confessional statement of the Appellant was copiously reproduced in the body of the Judgment. However, nowhere in the Judgment did the learned trial Judge subject the alleged confessional statement of the Appellant to the judicial scrutiny of such extra-judicial statements.

The Appellant raised the defence of alibi at the trial Court and not before the police during investigation, thus eroding the possibility of investigating same at the appropriate period. Not that any form of investigation has been disclosed in this appeal. Thus, was the Appellant given a chance to raise the alibi? With the hindsight/facts as reviewed infra I dare say that the appellant was not given a chance to state his case at the investigation beyond stating his personal details.

Thus the principle of the defence of alibi to be raised on time at the stage of interrogation as stated above is correct. However, that is not applicable in the instant appeal as Appellant was not given the opportunity to raise it. The Court should not have ignored his alibi raised in evidence before the Court rather the Court should have tested its veracity along with the confessional statement. In our adversatorial criminal system the defence of the accused no matter how whimsical should be countenanced.

Why did the Prosecution not produce Baba Bose so he could be cross-examined?

If this were a civil matter, one would ask why did the Accused person not subpoene Baba Bose to be treated as a hostile witness?

The answer is not far-fetched. An accused person has no responsibility to establish his innocence (Section 36 (5) of the 1999 Constitution as amended). The entire burden rests with the prosecution. (Section 131 of the Evidence Act 2011)

The exception is only when facts are within the exclusive knowledge of the accused person. Such circumstances are for example, when an accused is caught within the vicinity of a scene of crime with incriminating materials. If he fails to explain, then he must be presumed to possess guilty knowledge. Section 140 of Evidence Act the presumption is also rebuttable and the standard of rebuttal is not as high as that expected of the prosecution. Whereas a doubt cast on the culpability of the accused is sufficient, the prosecution must proof beyond reasonable doubt. A mere denial in the face of weighty incriminating materials could raise the suspicion. Suspicion however strong does not take the place of evidence. (LORI v. STATE (1980) 8-10 SC 81; ADIE v. STATE (1980) 1-2 SC 116.

The Court proceeded with the mind set of dealing with a confessional statement and therefore did not pay much attention to the defence of the Appellant.

The principle has long been established that it is better to let ten guilty men go free than convict one innocent man (WOOLMINGTON v. DPP 1935 AC 462 @481). The crime of armed robbery is intense, it is horrific and callous and the punishment is equally intense and terminal in most cases. Robbery is an act which touches the very core of the victim; sometimes right in the home of the victim, a place where one should feel most safe, secured and relaxed. A person found to engage in such intrusion of privacy and criminal act of taking by use of force the possession of his victim should be severely punished when caught.

No doubt, the punishment for Armed Robbery has undergone several amendments. The extant law is no doubt aimed at deterring aspiring robbers, if robbery is something to aspire to.

Has the law achieved its purpose? Has any meaningful success been recorded? The incidences of robberies persist with daring styles - kidnapping has been added as a lucrative aspect of robbery. Unfortunately, the manner of apprehending, prosecuting or preventing these criminal acts seem to have defied change. The method of investigation and prosecution have remained static. In most cases, the investigation starts and ends with the recording of the statement of the accused person who is a mere suspect. It is worrisome that investigation seems totally taken for granted but there seems to be an eagerness to secure convictions. Without proper investigation, how can we be sure that the persons brought to Court are actually the robbers? There are many unemployed youths on our streets today. Some of them are in the cities seeking for unavailable jobs and are therefore turned scavengers looking for anything to keep body and soul together. It is imperative that the prosecution conducts thorough investigation before rushing to Court. The propensity to arrest and prosecute for conviction must be ‘checked’ where a suspect has given particulars as to his place of residence and work, particularly, such information should be investigated.

Life must be dignified by the application of modern methods of investigation before suspects are encast in chains of robbery.

The Courts too must be slow in accepting alleged extra-judicial statements often tagged (confessional statements) of suspects. The Judiciary has over the years evolved and developed our criminal justice case law. The basic ingredients of an alleged confessional statements have been set out by the Apex Court and are been severally re-stated in subsequent decisions. The case of YINUSA SAIDU V. THE STATE (1982) LPELR-2977 (SC) state that:

A confession is irrelevant in a criminal proceeding if the making of the confession has been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority (see Section 28 Evidence Law Cap. 49 LFN 1963). It has therefore long been established as a positive rule of Nigerian criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution that it was a voluntary statement. The principle is as old as the laws received from England and in England the principle is as old as Hale. See Ibrahim v. R. (1914) AC 559 at 609; Godwin Ikpasa v. The State (1981) 9 S.C 7 at 29; Corporal Jona Dawa and Anor. v. The State (1980) 8-11 S.C 236 at 258. The evidential value of a confession if true is very great indeed.

It is very much sought after by police investigators and prosecutors. It lightens the burden of prosecution by dispensing with the need to call a host of witnesses in cases where there are no or very few eye witnesses. A confession can support a conviction if proved to be made and true. Per Obaseki, J.S.C. (Pp, 18-19).

This principle as shown in the body of this judgment have been applied consistently over the years i.e. that confessional statements must be voluntary and must be confirmed to be so by the Courts before relying on such. The veracity of the confessional statement must be tested by the other facts placed before the Court.

In an eight pages Judgment, the Appellant along with two others, was convicted and sentenced to death by hanging:-

The statement of the Appellant bear very unusual similarity with those of the other two accused persons. The records are before the Court and the interest of justice compels me to look into the records in the face of the evidence upon which the Appellant was convicted. It is necessary to state that the Appellant challenged and rejected the said confessional statement. A trial within trial was conducted after which the statement was admitted. The ruling by which the statement was admitted is however not in the record. The learned trial Court however unequivocally relied on the said confessional statement in convicting and sentencing the Appellant to death.

It is alleged that the Appellant was arrested at the scene or in the vicinity of the crime. There is however no evidence of the recovery of any of the stolen items in the possession of the Appellant. The prosecution did not also ‘extract’ from the Appellant, information as to which of his cohorts had possession of all, some or any of the stolen items.

This lacuna is one that should arouse the judicial sensitivity of the trial Court in the interest of justice.

The Respondent refers to the PW2 and PW3 as eye witnesses but they made no reference whatsoever to the features of the robbers and the prosecution has not led evidence to proof that the features as described by the eye witness march the description of the Appellant. The PW2 and PW3 are the victims of a robbery which took place in their home. Part of their respective testimonies in Court are hereby reproduced anon:-

PW2: Elder Azeez Salawu Omowamiwa:

I am a trader. I live at No.4, Adeyemi Street, Saka Palace. Abule Iroko, Ogun State. I know the 1st accused person. On the 21st day of December 2006 at about 7.45pm. I saw about five people, they entered into my sitting room while I was watching the T.V. with my wife and my children. My residence is on the 1st floor. One of them said “you are under arrest, everybody face the ground” the next thing I knew was that my left hand was shot with a gun that a person close to me had been arrested upon information by the armed robbers i.e. the 1st accused person...there was light in my sitting room on that day.

Mr. Ojo Cross-examination:

I have never met any of the five armed robbers before, 1st accused person was not in their midst. At 7.45pm people were still outside on the street. All the people downstairs including my security man had been arrested and locked up before the robbers came upstairs... party member warned me to beware of the 1st accused person. The person was a pastor. I never met the 2nd and 3rd accused persons before.

Pw 3: - Mrs. Fisayo Omowamiwa:

On 21st December, 2006, I was at home with my husband and my children. Some people entered and said You are under arrest. I heard a gunshot, we were all asked to lie on the floor. My husband shouted, I looked up and I saw one short person and one tall person... I did not notice whether the robbers had any other weapon apart from the gun which they fired. When I lifted up my head I saw one dark and one fair complexion man. They were not masked. I did not see their faces clearly. I only saw their complexion. About five armed robbers entered our house. I only know the 1st accused person before the incident.

Mr. Ojo Cross-examination:

My neigbhours that arrested the robbers said so.

It is probable that robbery took place, the victims did not however identify the Appellant as one of the robbers.

Is it safe then to have convicted the Appellant as one of the robbers? A rush prosecution of a person without concrete facts allows the real culprits a filled day to continue in their nefarious activities unchecked. The Police are also let off guard until another robbery incidence occurs.

The case of WOLE AKINDIPE V. THE STATE (2016) ALL FWLR Part 860 PG. 1050-1055 held that:

By the provisions of Section 1(2)(a) of Robbery and Firearms (Special Provisions) Act, 2004, in order to secure a conviction for the offence of armed robbery, the prosecution must prove the following beyond reasonable doubt:

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

(b) That each robbery was an armed robbery; and

(c) That the accused was one of those who took part in the robbery.

Where the above ingredients are proved by the prosecution, the lower Court can appropriately convict and this Court shall upheld the appellant’s conviction. (Bozin v. State (1985) 2 NWLR (Pt. 8) 465; Suberu v. State (2010) All FWLR (Pt. 520) 1263, (2010) 8 NWLR (Pt. 1197) 586; Ani v. State (2003) 11 NWLR (Pt. 830) 142; Attah v. State (2010) All FWLR (Pt.540) 1224, (2010) 10 NWLR (Pt. 1201) 190; Olayinka v. State (2007) All FWLR (Pt. 373) 163, (2007) 9 NWLR (Pt. 1040) 561, Agboola v. State (2013) All FWLR (Pt. 704) 139, (2013) 11 NWLR (Pt. 1366) 619 referred to) (P. 1065).

It is the duty of prosecution to establish the guilt of accused beyond reasonable doubt. In this appeal, the Appellant has not been positively identified as one of the robbers. The third ingredient of establishing armed robbery has not been established against the Appellant. Further, the assertion of the Appellant in his evidence at trial of being framed which assertion was corroborated by his mother as a witness was not investigated. These are facts that could easily have been verified before the conclusion of the prosecution. The failure to so investigate coupled with the unverified confessional statement of the Appellant as an accused leave much to be desired. With these lapses it is unsafe to convict and sentence a man to death. A criminal trial should not be turned to persecution.

The Appellant was also charged with the offence of conspiracy to commit armed robbery. In the case of Alufohai v. State (2014) LPELR-24215. My Lord Ariwoola JSC defined conspiracy as an agreement between two or more persons to do an unlawful act. It is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them and which hardly are ever confined to one place. Therefore, failure to prove a substantive offence does not make conviction for conspiracy inappropriate, as it is, in itself a separate and distinct offence, independent of the actual offence conspired to commit. (See also Oduneye v. State (2001) 2 NWLR (Pt. 697) p. 311; The State v. Olashehu Salawu (2011) LPELR-8252).

It is instructive that apart from the alleged confessional statement of the Appellant, there is nothing external to the statement which corroborates the allegation of a common associate between the Appellant and the other accused persons. This apathy of co-relation creates a doubt which ought to be resolved in favour of the Appellant as provided by Section 36(5) of the Constitution of the Federal Republic of Nigeria.

The reason given by the learned trial Court for preferring the case of the Prosecution is stated at pg 7 (122) of the records. His Lordship held that:

All the confessional statement of the entire three accused person gave a detailed description of how the robbery operation was planned and executed and how they were arrested, the confessional statements tally with the description of how the robbery operation was carried out given by the victims Pw2 and Pw3.

The truth of the confessional statements has thus been tested.

Exhibit ‘D’ which is the 2nd accused person’s (DW3) statement states and I quote:

I know Mr. Segun Odunayo a.k.a pastor at Iyana School Abule Iroko, Sango Ota where his house is, he told me that one Chief Azeez Omowamiwa is sponsoring Hon. Abiola generation to be a House of Assembly member. He has money and he wants us to go and rob him. That was on Monday 16-12-06, on 18-12-06 Mr. Segun Odunayo a.k.a pastor took me to Chief Azeez Omowamiwa’s house. We discussed that after the operation his share will be N50,000.00.

On 21-12-2006 Abbey ‘M’ Ahmed Salami ‘M’, Moses ‘M’ and two other men whom I do not know their names came to meet (sic) me at Saka Abule Iroko Sango Ota at about 8.00pm and six of left to Chief Azeez Omowamiwa’s house. Abbey was with the long gun, Moses with the short gun. As we got there, Abbey fired the Chief and he fell down I went and stabbed (sic) thigh to see if he is dead. We robbed him about N690,000.00 (Six Hundred and Ninety Thousand Naira)...As we were robbing Chief Azeez Omowamiwa and his family, people shouted Ole, Ole- robber, so we ran away and I entered Hammed ‘M’ Okada as we were running away OPC men and other people chased us and caught me and Hammed. OPC men handed us over to the Police at Sango-Ota Police Station. As a matter of fact myself, Abbey and Moses are the ones that throw the wife and son of Chief Azeez Omowamiwa down from the upstairs when they failed to bring out more money.

In the entire judgment, the learned trial Court dwelt more on the fact of the robbery and paid little or no attention at all to the protestations of the Appellant. Was the Court correct in admitting the extra-judicial statement of the Appellant as a confession? Were the characteristics of a confessional statement discernible from the evidence before the Court? I find not so in this appeal for reasons already highlighted in line with the cases cited in this Judgment.

No doubt proof beyond reasonable doubt is not attained by the number of witnesses fielded by the Prosecution. It depends on the quality of the evidence tendered by the Prosecution. (See Akalezi v State (1993) 2 NWLR (pt. 273) 1. However, some witnesses are vital and failure to call them deal a fatal blow to the case of the prosecution. In this appeal Baba Bose is one of such vital witnesses who was missing in action among the Prosecution witnesses.

Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt, and if the evidence is strong against a man, as to leave only a remote probability in his favour, which can be dismissed with the sentence: “of course it is possible, but not in the least probable”. The case is proved beyond reasonable doubt. (Akalezi v State (1993) 2 NWLR (pt. 273) 1).

It is correct that proof beyond reasonable doubt is also not proof beyond all shadow of doubt. (DIBIE &ORS v. THE STATE 2007 9 NWLR pt.1038, 30; AKALEZI v. STATE 1993 2 NWLR pt.273, 1). In this appeal, the doubt raised is more than a shadow of doubt. It is substantial especially as it relates to the arresting OPC outfit. No doubt, the OPC is an essential voluntary organ in crime prevention and detection. It is nonetheless a human body with all the excesses of human weaknesses.

Accordingly, I am unable to affirm the decision of the learned trial Court in convicting and sentencing the Appellant to death.

I therefore allow this appeal as meritorious and hereby quash the conviction and sentence of the Appellant who is hereby discharged and acquitted.

The decision of the Ogun State High Court Coram A. O. Asenuga (J) is hereby set aside.

It is hereby ordered that the Appellant be released forthwith from prison custody.

**CHINWE EUGENIA IYIZOBA, J.C.A.:**

I agree

**HARUNA SIMON TSAMMANI, J.C.A.:**

I read the draft of the judgment delivered by my learned brother, Monica B. Dongban-Mensem, JCA.

I agree that the appeal has merit and it is accordingly affirmed. The judgment of the Court below, delivered on the 21/12/2010 is hereby set aside.