In the Supreme Court of Nigeria

On Friday, the 16th day of December 2011

Before their Lordships

Ibrahim Tanko Muhammad	.....	Justice Supreme Court
John Afolabi Fabiyi	.....	Justice Supreme Court
Olufunlola Oyelola Adekeye	.....	Justice Supreme Court
Nwali Slyvester Ngwuta	.....	Justice Supreme Court
Mary Ukaego Perter-Odili	.....	Justice Supreme Court

SC. 11/2011

Between

The State ..... Appellant

And

Olashehu Salawu ..... Respondent

Judgment of the Court
Delivered by
Nwali Sylvester Ngwuta. JSC

The Respondent was arraigned before the Kwara State High Court of Justice, Ilorin Judicial Division on a two count amended charge, hereunder reproduced:

> "Count One: That you Olashehu Salawu and five others at large on or about 8/5/2007 at Adeta round about in Ilorin, Kwara State, within the jurisdiction of this Honourable Court conspired to commit a criminal offence, to with (sic) rob one Mr. Suleman Alafara while armed with dangerous weapon at Adeta round about Ilorin and you thereby committed an offence contrary to Section 97 of the Penal Code.
>
> Count Two: That you Olashehu Salawu and five others at large on or about 8/5/2007 at Adeta round about in Ilorin Kwara State within the jurisdiction of this honourable court while armed with dangerous weapon did rob one Mr. Suleman Alafara of his Car Honda Bullet with dealer number KWD142 AL Nurus Motors and you thereby committed an offence contrary to Section 1 (2) (a) of Robbery and Fire Arms (Special Provisions) Act, Cap. R11, Law (sic) of the Federation of Nigeria, 2004."

The Respondent pleaded not guilty to the amended charge on 11/04/08 and the Appellant opened its case, calling a total of four witnesses. The Appellant sought to tender the statement allegedly made by the Respondent through P.W4 but learned counsel for the Respondent objected to the admissibility of the statement on the following two grounds:

> "(1) This is not the primary evidence of the Accused person because the Accused speaks and understands Yoruba alone and its only the Yoruba version coupled with the English version that can be admitted in this honourable court.
>
> (2) Secondly, on the voluntariness of the statement, the Accused in conjunction with his counsel will be raising an objection to the admissibility of the statement on ground that it was not voluntarily made. Finally, the statement of the Accused being a public document but coming from proper custody should have been certified in line with the Evidence Act."

In reaction to the objection to the admissibility of the statement credited to the Respondent, the learned trial judge Garba, J., ruled as follows:-

> "Court: In view of the objection to the statement of the Accused on ground of not being voluntary, the best thing to do is to conduct trial within trial to determine its voluntariness or otherwise."
>
> (See Pages 41-42 of the record of the trial court).

In the ensuing trial within trial the Appellant called two witnesses while the Respondent testified as the only witness for the Defence.

Learned counsel for the parties addressed the trial court. In its ruling of 22/05/08, the learned trial judge held:

> "..... that I find the confessional statement of the Accused voluntary and it is accordingly admitted in evidence and marked Exhibit 4."

At the conclusion of the evidence of the P.W.4, the Appellant rested its case.

The only witness for the Defence was the Respondent who testified as DW1. The Defence closed its case on 23/06/08 and the trial court adjourned to 14/07/08 for counsel's addresses.

On 14/07/08, learned counsel for the parties adopted their written addresses and the case was adjourned to 23/9/08. However, the case did not come up again until 10/10/08 from which date it was adjourned to 14/10/08 for judgment after learned counsel at the instance of the trial court, had resolved some issues relating to the number of those at large referred to in the charge and the numbering of the Exhibit 4, i.e. the alleged statement of the Respondent.

In its judgment of 14/10108 spanning Pages 78-92 of its record, the trial court concluded as follows:

> "It is apparent from the overwhelming and believable evidence adduced by the Prosecution, the circumstances culminating into the arrest of Accused, his lack of respect for truth and his inconsistency in his testimony, I feel satisfied that the Prosecutor has proved the charge of armed robbery against the Accused person to the standard required in criminal cases. That is, beyond reasonable doubt and he is found guilty of the offence charged. He is accordingly convicted."
>
> (See Page 52 of the trial court's record).

The trial court passed sentence of the Respondent, thus:

> "In respect of the 1st count of criminal conspiracy, which I have a discretion to exercise, the convict is sentenced to 6 (six) months imprisonment without an option of fine.
>
> On the 2nd count of armed robbery, he is sentenced to death by hanging him in his neck till he is pronounced dead. The convict has right of appeal to the Court of Appeal."

On the 5th day of November, 2008, the Respondent filed a notice of appeal in the Court of Appeal, Ilorin, Kwara State.

In the unanimous judgment of the court below delivered on 13/11/2010 by Denton-West, JCA., his lordship concluded thus:

> "I have found that there is merit in this appeal and I hold that the conviction by the lower court is null and void, and therefore the death penalty has no effect and significance on the Appellant. I accordingly set aside the conviction of the Appellant by the lower court and order that the Appellant be released from custody forth."

Aggrieved, the Appellant herein appealed the judgment on three grounds, reproduced hereunder but shorn of their particulars:

> "Ground 1:
> The lower court erred in law when it held that Exhibit 5, the extra-judicial statement of the Respondent cannot be used to corroborate any other evidence.
>
> Ground 2:
> The lower court erred in law when it held that the Appellant breached the legal principle espoused in the case of *NMM v The State (2007) 2 NCC 598 at 611*; on the identification of the Respondent as the person who committed the robbery in question.
>
> Ground 3:
> The learned trial judge erred in law when it held that the Prosecution has not led evidence to show common criminal design to sustain the offence of criminal conspiracy for which the Respondent was convicted by the trial court."

Learned counsel for the Appellant formulated three issues in his brief of argument. The issues, one from each of the three grounds of appeal are:

(1) Whether the Court of Appeal was right to have held that Exhibit 4, the extra-judicial statement of the Respondent was wrongly admitted. (Relates to Ground 1 of the grounds of appeal)

(ii) Whether the Court of Appeal was right to have come (sic) to the conclusion that the Respondent was not properly identified by PW2 who was the victim of the robbery operation. (Relates to Ground 2 of appeal).

(iii) Whether the Court of Appeal was right to have held that the Prosecution had not led sufficient evidence to sustain the offence of criminal conspiracy against the Respondent. (Relates to Ground 3 of the grounds of appeal).

Learned counsel for the Respondent adopted the issues framed by the Respondent.

At the hearing of the appeal, learned counsel for each party adopted and relied on his brief of argument in urging the court to decide in favour of his client.

Arguing issue 1 in his brief as to whether the Court of Appeal was right to have held that Exhibit 4, the extra-judicial statement of the Respondent, was wrongly admitted, learned counsel for the Appellant drew our attention to Page 42 of the record of the trial within trial to determine the voluntariness *vel non* of the Respondent's confessional statement. He referred to the trial court's determination in the trial within trial where it held that

> "the effect of the above findings is that I find the confessional statement of the Accused voluntary and it is accordingly admitted in evidence and marked Exhibit 4."

Based on the above, learned counsel impugned the observation of the lower court that

> "it is unfortunate that the trial court refused to rule on the trial within trial, but rather claimed that the Appellant retracted his statement. Though the Appellant never argued on this point, but just by the way. A trial judge is expected to rule on the trial within trial."

Learned counsel argued that admission of Exhibit 4 was not a ground of appeal nor was it raised as an issue before the lower court, contending that the lower court's erroneous view on the said exhibit led to a miscarriage of justice. He referred to *Iyayi v Ejigebe (1987) 7 SCNJ 148; Modupe v The State (1988) 9 SCNJ 1;* in support of his contention that even if Exhibit 4 had been raised as an issue before the trial court it ought to have been discountenanced on the ground that it did not emanate from a ground of appeal before the lower court. With reference to *Nwokoro v Onuma (1990) 5 SC (Part I) 124; (1990) 3 NWLR (Part 136) 22*, he said it was wrong for the lower court to have formulated an issue *suo motu* for the parties.

Learned counsel reproduced Exhibit 4 for what he called salient revelations therein and contended it was wrong for the lower court to hold that the trial court, in reliance on *Egboghonome v The State (1993) 7 NWLR (Part 306) 383;* should have subjected the confessional statement to the "six baptismal fire test to test or verify the truthfulness of the statement." He argued that the fact that Exhibit 4 was admitted by the trial court despite its retraction by the Respondent does not in any way depreciate its evidential value as espoused by this court in *Egboghonome's case (supra).* He argued further that, the intents of Exhibit 4 were in accord with the natural cause of events and in line with and in agreement with the six cardinal principles of veracity highlighted by this court in *Onochie v The Republic (1966) NMLR 107*. In learned counsel's submission, Exhibit 4 is corroborated by other evidence led by the Appellant, the Respondent had the opportunity to commit the offence and the confession is consistent with other facts which have been established at the trial.

Learned counsel referred to Page 161 of the record for the finding of the lower court that the only evidence in support of the confession was the stolen car and submitted that though the unregistered used car was released to its owner, i.e. the victim of the robbery before the trial, the Appellant tendered the bond releasing the car which was received in evidence and marked Exhibit 1. According to learned counsel, there was no basis for the trial court to raise and rely on the non-production of the car even though its existence was not disputed at the trial. Counsel argued that Exhibit 4 in itself is enough to ground a conviction for the offence charged, even without the evidence corroborating it as led at the trial. He urged the court to resolve Issue One in favour of the Appellant.

In his own submission on Issue One, learned counsel for the Respondent conceded that an Accused can be convicted on his confessional statement alone but he stressed that the confessional statement is subject to evaluation and assessment in the light of the totality of the evidence before the court to reach a just decision in the case. He relied on *Egboghonome v State (supra)*. If the confessional statement is not supported by evidence before the trial court it ought to be accorded little or no probative value or completely disregarded.

In response to the argument of learned counsel for the Appellant that the trial court *suo motu* formulated a new issue for the parties, learned counsel said it is a settled principle that an appellate court can rightly interfere with the findings of fact of a trial court if the finding is not supported by evidence. He relied on *Akinbisade v State (2006) 9 SC l18; (2006) 17 NWLR (Part l007) 184 at 211-212*. He contended that issue allegedly formulated *suo motu* by the trial court flowed from the issue as to whether or not the Prosecution proved its case as formulated by the Respondent before the lower court. In his view, the cases of *lyayi v Ejigbo (supra*) and *Nwokoro v Onuma (supra)* relied on by the Appellant are not applicable to the case at hand. Learned counsel contended that what was in issue before the lower court was not the admissibility of Exhibit 4 but rather it was the weight to be attached to it. He referred to Pages 162-163 of the record of the lower court. He maintained that the lower court was concerned that the trial court did not subject Exhibit 4 to the legal scrutiny enunciated in *Egboghonome v The State (supra),* adding that in the light of the above, there is no substance in the Appellant's argument that the Respondent did not appeal against the reception of Exhibit 4 in the trial court.

Learned counsel relied on *Tanko v State (2008) 164 NWLR (Part 1114) 594 at 628-629; Isa v State (2007) 12 NWLR (Part l049) 582*; in support of his contention that there is need to exercise caution with a confessional statement, no matter how startling the revelations therein, adding however that retraction of a confessional statement is not synonymous with the truth or the guilt of an Accused. Where a confession is retracted, he argued further, the trial court ought to evaluate the confession in the light of evidence before the court to determine what weight or value to attach to it. He relied on *Nsofor v State (2004) 11-12 SC 43; (2004) 18 NWLR (Part 905) 292 at 314-315 Paragraphs E-B.* He contended that the weight

placed on Exhibit 4 by the trial court was unreasonable when viewed in the light of the evidence before the court. He argued that not only did the Respondent retract the confessional statement but his evidence was wholly corroborated by other pieces of evidence before the trial court. He added that even if it could be said that the Respondent lied before the court, that fact alone will not relieve the State of the duty of proving its case beyond reasonable doubt. Counsel argued that it is not enough to say that the contents of Exhibit 4 accord with the natural cause of events and in accord with the six cardinal principles of veracity enumerated in *Onochie v The Republic (supra)* and *John Ebagua & Ors v Attorney General of Bendel State; In Re Gabriel Osakwe (1994) 2 NWLR (Part 326) 273;* without stating the facts proved to support the contention. He said the lower court was right in holding that Exhibit 4 cannot be used to corroborate the fact that a car was stolen. He relied on *Udosen v The State (2007) 1-2 SC 27; (2007) NCC 409*. He noted that the Appellant did not state the pieces of evidence that corroborated the confessional statement of the Respondent, i.e. Exhibit 4. Learned counsel urged the court to resolve this issue in favour of the Respondent.

In Issue One, the Appellant complained of the decision of the court below that Exhibit 4 - the extra- judicial statement credited to the Respondent was wrongly admitted by the trial court. Exhibit 4 was objected to by the Respondent when it was sought to be tendered in evidence as a confessional statement made by the Respondent.

The trial court, rightly in my view, ordered a trial within trial to determine the voluntariness *vel non* of the alleged confessional statement. At the said trial, the Respondent gave a detailed account of his arrest in Lagos and his journey from Lagos to lIorin, from lIorin to Abuja and back to Ilorin on the allegation that he was the Oluwashun who was wanted for the assassination of some SSS men in Abuja. At the instance of the police who were in Lagos looking for Oluwashun, he gave his name as Ola Shehu. The police said he was the man they wanted for murder. At the end of his cross-examination as the DW1 in the trial within trial, the Respondent said:

> "I made one statement at Lion Building Police Station and three statements at the Police CID Headquarters, llorin. From all the statements I made to the police, none of them is before the court and the one in court is not my statement."
>
> See Page 51 of the records.

Based on the above statement, the trial court jettisoned the evidence at the trial within trial and admitted the statement as retracted statement of the Respondent.

In the totality of the evidence at the trial within trial, the learned trial judge made two contradictory decisions. At Page 501 of the record, his lordship held:

> "In effect, I quite agree with the learned DPP that since the Accused has retracted his confessional statement, the question of involuntariness does not arise again. The court is entitled to admit the statement and consider it on its own and determine if it was made by the Accused or not and I so hold."

At Page 61 of the record, the learned trial judge held also:

> "The effect of the above findings is that I find the confessional statement of the Accused voluntary and it is accordingly admitted in evidence and marked Exhibit 4."

Be that as it may, I will take the issue as framed: whether the court below was right in holding that the confessional statement Exhibit 4 was wrongly admitted by the trial court. Whether or not Exhibit 4 was made by the Respondent, as distinct from the issue of its voluntariness, is not in issue in this appeal.

Section 27(1) of the Evidence Act, Cap.112, Laws of the Federation of Nigeria, 1990 defines a confession thus:

> "S.27(1) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime."

sub-section 2 provides:

> "Confessions, if voluntary, are deemed to be relevant facts as against the person who made them only."

I shall now consider the evidence in the records of the trial court to determine whether or not the lower court was right in the decision that Exhibit 4 was wrongly admitted by the trial court. At Page 41 of the record, the PW3 stated on oath:

> "Being a member of the anti-robbery section, I was instructed by the team leader to <u>obtain the statement of the Accused person which I did</u> (underlining mine) by cautioning him in English language. It was Insp. Matthew Adino that brought the Accused to me to take his statement because he (Inspector Adino) did not understand Yoruba language."

My Lords, a statement, confessional or exculpatory, made by an Accused to the police officer investigating the crime for which he is arrested are a form of evidence. PW3 said she was instructed to obtain the statement of the Respondent, a form of evidence. The word "obtain" connotes a demand and in my view, the statement made by the Respondent on demand by

the police officer cannot be said to have been voluntarily made. The demand for the statement wholly dissipated the effect of the caution administered by the Police. See *The State v Mati Audu (1971) NNLR 91 at 92* and *Nakumde v Jos NA (1966) NNLR 52 at 58-59.* Even the words of caution have been held to be an inducement to speak to the Police for the Accused cannot be expected to keep mute after the caution. See *Queen v Viaphony (1961) NNLR 47 at 47- 48.* In *Onobu v IGP (1957) NNLR 25,* it was held that when a person is under arrest in a criminal charge, it is not the duty of the police to obtain evidence in the form of a statement from him. The duty of the police, after the Accused has been charged and cautioned, is to take or record the statement of the Accused, if he makes any.

The police have no authority to obtain a statement from him, having told him he is not obliged to say anything. The judges rules, though rules of practice, are designed to leave it open to the arrested person to say nothing and to prevent police officers from trying to get the arrested person to say anything.

The Respondent was arrested in Lagos and taken to Ilorin on allegation of assassination of SSS men. He was told if he co-operated by making a confessional statement he would not be taken to Abuja. He was eventually taken to Abuja and presented to the Police boss as the assassin. The police boss ordered them out when the policemen who brought him admitted that the assassination took place three days after he was arrested. He was taken back to Abuja and subjected to inhuman treatment as a result of which he spent two months in the hospital. He named the officers at whose hands he suffered torture and humiliation as Adino, Dada and two others. The above facts can be verified at the police headquarters, Abuja and the hospital he was taken to in Ilorin.

From his unchallenged evidence when he was taken back to Ilorin, the police said that there had been a robbery in Ilorin and took him to a torture chamber where he confessed under torture. Apart from fruitless cross-examination the evidence of the Respondent in the trial within trial went unchallenged. None of the officers he named - Adino, Dada and two others was called to the stand to disprove his story and show that Exhibit 4 was voluntarily made.

The Prosecution did not explain the absence of the officers to give evidence in rebuttal. The court is entitled to hold that the evidence of the named policemen which could be, but was not produced, would if produced, be unfavourable to the case of the Appellant who withheld it.

The same applies to the evidence that the Respondent spent two months in the hospital as a result of the torture he was subjected to in order to extract Exhibit 4 from him. The Appellant could have tendered his medical record from the hospital he was taken to and admitted. That evidence was withheld because if produced, it would have destroyed the Appellant's case and proved that Exhibit 4 was not made voluntarily. See Section 149 of the Evidence Act which provides:

> "149(d) The court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

I find nothing in the evidence at the trial to corroborate the statement in Exhibit 4. On the other hand, the evidence of PW1 at the trial within trial gives the lie to the statement in Exhibit 4. It is the duty of the Appellant to prove, positively, that Exhibit 4 was voluntarily made by the Respondent and the Appellant failed to do so. (See *Adekanbi v A-G Western Nigeria (1966) 4 NSCC 46 at 48).* I hold the view that the court below was right in the decision that Exhibit 4 was wrongly admitted in evidence by the trial court. Issue One is hereby resolved against the Appellant.

In Issue 2, learned counsel for the Appellant, referred to Page 163 of the record of the court below on the mode of identification of the Respondent by the PW2 and submitted that the conclusion of the lower court is not supported by the evidence before the trial court. He referred to Pages 37 and 38 for the testimony of the PW2 on the identification of the Respondent. He argued that in the peculiar circumstances of the case, the PW2's identification of the Respondent was in accord with the decision of the Supreme Court in *NMM v The State (2007) 2 NCC 598 at 611;* a case he said the lower court quoted copiously from at Page 164 of its record.

Learned counsel relied on the *State v Collins Ojo Aibangbee & Anor. (1988) 7 SC (Part I) 96; (1988) 2 SCNJ (Part I) at 128 and 162, and Page 165* per Oputa, JSC., for the meaning of the verb "to identify" and its noun form "identification" and Nnaemeka-Agu, JSC., on the meaning of "identification", respectively. He referred to Exhibit 3 - a statement the victim of the robbery - PW2 - made to the police on the night of the incident and said the name of the Respondent was given in the said statement as Sheun and that the policemen who recorded the Exhibit 3 also gave the Respondent's name as Sheun.

According to learned counsel, the name Olasheu given by the Respondent is an enlarged form of Sheun and that "the name Sheun was derived and recollected from the scene and during the robbery operation while PW2 was struggling with the Accused/Respondent and his gang." See Pages 34-38 of the record.

On the evidence of the P.W.3 (police officer who made a call through the handset alleged to have been recovered from the Respondent at the scene of crime) and which he described as neither shaken nor rebutted under cross-examination, and as "direct, cogent, reasonable and compelling as to admit of no evidential conjections or make shift" he impugned the finding of the court below to the effect that the failure to call Muritala, the younger brother of the Respondent who picked the policeman's call and through whom the Respondent was arrested was fatal to the Appellant's case.

On the identification of the Respondent as the felon, counsel argued that:

"(1) The evidence of P.W.3 was unshaken under cross-examination.

(2) The victim of the crime at the earliest opportunity and even though he did not know the Respondent prior to the robbery, recalled the name Sheun which tallies with the Respondent's name.

(3) The Respondent was identified by the victim, PW2, even before the Respondent identified the victim as shown on Page 37 of the record.

(4) The robbery operation was done at about 7.30 p.m where there was light, and

(5) The evidence of Muritala could have been most relevant if the evidence of the PW3 was either shaken or rebutted under cross-examination."

Based on the above, learned counsel said the lower court was in error in the finding on the identity and identification of the Respondent, a decision that is contrary to the conclusion reached on the same issue by the trial judge who saw and listened to the witnesses in court. He submitted that there was no mistaken identity and urged the court to resolve the issue in favour of the Appellant.

In Issue 2, learned counsel for the Respondent listed the essential ingredients which must be proved in a case of armed 25 robberies to be:

(a) That there was a robbery.

(b) That the robbery was armed robbery

(c) That the Accused was one of those who robbed.

He relied on *Ani v State (2002) 5 SC (Part I) 33; (2003) 11 NWLR (Part 830) 142 at 161 Paragraphs C-E; Bello v The State (2007) 10 NWLR (Part l043) 564 and 564 at 566-567; Nwachukwu v State (1988) 1 NWLR (Part 11) 218*. Counsel said that the case of the Appellant was on the third element of the offence of armed robbery.

He pointed out that the robbery took place in Ilorin but that the Respondent was arrested in Lagos nine clear days after the robbery. The above, coupled with the flawed identification of the Respondent by the victim, made it impossible for the Appellant to link the Respondent with the crime. He said that the identification of the Respondent did not conform with the definition of that word in *Archibong v The State (2006) 5 SC (Part III) 1; (2006) 14 NWLR (Part 1000) 349 at 371 Paragraphs F- B, 393 Paragraph D. He referred also to Ibe v State (1992) 5 NWLR (Part 244) 642; State v Ojo Aibangbee & Anor. (1988) 7 SC (Part I) 96; (1988) 7 SCNJ (Part1) 128 at 162,* also cited by the Appellant.

On identification parade as a mode of identification of an Accused and when it will be necessary to conduct the exercise, counsel referred to *Ikemson v State (1989) 6 S.C. (Part I) 114; (1989) 3 NWLR (Part 110) 455 at 472,* where it was stated that identification parade will be required:

"(a) Where the victim did not know the Accused prior to the crime and his first acquaintance with him is only the commission of the offence.

(b) Where the victim was confronted by the offender for a very short time; and

(c) Where the victim, due to time and circumstances, might not have had the opportunity of observing the features of the Accused."

Counsel submitted that the facts and circumstances made it imperative to hold an identification parade to establish the identity of the perpetrator of the crime. He argued that no proper identification parade was conducted as the Respondent was made to identify the man he allegedly robbed. He emphasized that the incident occurred, from the evidence, between 7.30 p.m and 8 p.m in an area where there was no street lighting, with reflection of light from houses twenty feet away. He contended that there was no sufficient illumination for the victim to identify the person who robbed him.

Counsel argued that in view of the uncontroverted evidence of the Respondent that he was an only child of his parents, the Appellant should have called the Respondent's alleged brother, Muritala. He urged the court to resolve the issue against the Appellant.

Issue 2 reads: "Whether the Court of Appeal was right to have come to the conclusion that the Respondent was not properly identified by PW2 who was the victim of the robbery operation." The totality of the evidence of PW2 on this alleged identification of the Respondent is at Page 37 of the record. It is hereunder reproduced:

"I identified the Accused person at the police station, when he was arrested and brought. The Accused also identified me and said it publicly that he took the vehicle from me."

Wittingly or by deliberate design, the police turned the process of identification on its head and a subsequent identification parade would have been a farce as the witness has been firmly fixed upon the Respondent as the person who took a car from him. See - *Baloqun v A.G. (2003) 2 SCNJ 196 at 211-212.*

The robbery was said to have taken place about 7.30 to 8pm on a street without street light. Even though the PW2 claimed he could observe the Respondent, by the reflection of light from houses 20 feet from the street, there is no evidence that the PW2, if he did observe the person who robbed him, stated the physical features of that person to the police at the earliest opportunity he had. As if enough harm had not been inflicted on the Appellant's case, the police decided to work from the answer to the problem they had to solve by ordering the Respondent to identify his alleged victim.

The facts as presented, warrant conduct of an identification parade, taking into account the need for:

(a) description of the Accused given by the witness to the police shortly after the commission of the crime;

(b) the opportunity the witness had of observing the Accused, and

(c) the features of the Accused noted by the witness and communicated to the police which mark him out from other people.

See - *Patrick Ikemson & 2 Ors. v The State (1989) 6 SC (Part I) 114; (1989) 1 CLRN 1 at 18.* It is disturbing that learned counsel for the Appellant would urge the court to endorse the conviction of the Respondent based on a travesty of the identification process. I resolve Issue 2 against the Appellant.

In Issue 3 on whether or not there was sufficient evidence to sustain the charge of criminal conspiracy, learned counsel referred to Page 124 of the record, and relying on *Lazarus Akano & Anor. v A-G Bendel State (1988) 2 NWLR (Part 75) 201 at 232; Francis Tete Lawson & Ors. v The State (1975) 4 SC 115 at 123; (1975) 4 SC (Reprint) 84; R. v Sweetland (1957) 42 CR App R 62 at 66,* he contended that the fact that the Respondent was exonerated on the charge of armed robbery does not necessarily mean that the charge of conspiracy is not proved, bearing in mind that conspiracy and the offence committed in pursuance thereto are two separate and distinct offences. He referred to the evidence of P. W.2 that he was attacked by six men in unison and Exhibit 4 the statement of the Respondent, in part, to the effect that:

> "Myself and one Rasaqi Majibare of Jankara in Lagos State came to Ilorin to join the rest of our gangs members and robbed one Honda Bullet Car unregistered in Ilorin."

He also referred to the evidence of P.W.3 and said that the three set of evidence proved the offence of conspiracy against the Appellant. He referred to Section 96 of the Penal Code for the definition of conspiracy as:

> "When two or more persons agree to do or cause to be done:
>
> (a) an illegal act;
>
> (b) an act which is not illegal by illegal means, such an act is called criminal conspiracy."

He urged the court to resolve Issue 3 in favour of the Appellant.

In conclusion, learned counsel urged the court to allow the appeal based on the following:

(1) The lower court was wrong to have come to the conclusion that Exhibit 4 was wrongly admitted by the trial court.

(2) The Accused! Appellant was properly identified by PW2 who was the victim of the crime.

(3) The Prosecution led direct, cogent and compelling evidence to sustain the charge of conspiracy,

In Issue 3, learned counsel for the Respondent said that "a charge of conspiracy purports an agreement formed by two or more minds with the intention to do an agreed but unlawful act."

He relied on *Amachree v Nigerian Army (2003) 3 NWLR (Part 807) 256 at 280 Paragraphs D-E*. He said that conspiracy is established if it is shown that the criminal design alleged is common to the suspects, relying on *Nwosu v State (2004) 15 NWLR (Part 897) 466.* He said that the *actus reus* must be referable to the common criminal design. For the Prosecution to prove conspiracy to commit armed robbery, it must be proved beyond reasonable doubt:

(a) that there was an agreement or confederacy between the convict and the others to commit the offence of armed robbery;

(b) that in furtherance of the agreement or confederacy, the Accused took part in the commission of the robbery or series of robberies;

(c) that the robbery or each robbery was armed robbery.

He relied on *Usufu v State (supra) at 113 Paragraphs F-H.*

Learned counsel conceded that a charge of conspiracy can be sustained where the substantive offence fails but added that for this to happen the Prosecution must lead direct and independent evidence in proof of conspiracy. He added that where the court is urged to infer conspiracy from the proof of the substantive offence, the offence of conspiracy will sink or swim with the substantive offence. He relied on *Amachree v Nigerian Army (supra); Usufu v The State (supra) and Njovens v The State (1973) 5 SC 17; (1973) 5 SC (Reprint) 12.*

In the case at hand, counsel argued there was no independent evidence to prove conspiracy nor did the Appellant show that the *actus reus* is referable to a common criminal design. He contended that on the facts before the court the charge of conspiracy shared the same fate with the substantive offence. He urged the court to resolve issue 3 in favour of the Respondent.

In conclusion, he urged the court to dismiss the appeal and endorse the judgment of the court below.

Issue 3 is whether the Court of Appeal was right to have held that the Prosecution had not led evidence to sustain the offence of criminal conspiracy against the Respondent. The case for criminal conspiracy is built on a portion of Exhibit 4 reproduced hereunder:

> "Myself and one Rasaq Majibare of Jankara in Lagos State came to Ilorin to join the rest of our gangs members and robbed one Honda Bullet Car unregistered in lIorin."

Contrary to the submission of learned counsel for the Appellant, I find nothing in the evidence of the PW2 or PW3 relating to criminal conspiracy, not to talk of linking the Respondent thereto. While I accept the definition of conspiracy and the fact that conspiracy and the offence committed in pursuance thereto are two separate and distinct offences as elucidated in *Lazarus Akano & Anor. v A-G Bendel State(1988) 2 NWLR (Part 75) 201 at 232* and the other authorities relied on by the Appellant, the bottom of the Appellant's case has been knocked out by the resolution of Issue One in this appeal. Exhibit 4, being a product of coercion and torture of the Respondent, is inadmissible. At best, the Appellant failed to discharge its duty to prove that the confessional statement was voluntarily made. Issue 3 is also resolved against the Appellant.

My lords, though this is not an issue before us in this appeal, there is need to comment on the mode the trial court adopted in passing sentence on the Respondent.

A man condemned to death should have the sentence addressed directly to him. The sentence of death at Page 92 of the record of the trial court was conveyed as information not to the Respondent but to the world at large.

Having resolved all the three issues in the appeal against the Appellant, I hold that the appeal is devoid of merit and it is hereby dismissed. I affirm the judgment of the lower court setting aside the judgment of the trial court.

Judgment delivered by
Ibrahim Tanko Muhammad. JSC

The version from the Appellant as Prosecution on the facts giving rise to this appeal is that on, or about the 8th day of May, 2007, the Respondent as Accused, was, along with others (who are now at large) conspired to rob one Suleman Alefara (P W2) at gun point along Adewole Area of lIorin. During the robbery operation, the Nokia handset of the Respondent dropped and PW2 picked same to the police station at Adewole Area of Ilorin. Through the handset, the police were able to trace the Respondent and the Respondent made a confessional statement admitting the offences. The trial court found the Respondent guilty as charged. On appeal, the trial court's judgment was set aside. An order of discharge and acquittal was entered by the court below for the Respondent. The Prosecution now appealed to this court on three grounds of appeal.

The Appellant's learned counsel formulated the following issues for determination:

> "i. Whether the Court of Appeal was right to have held that Exhibit 4, the extrajudicial statement of the Respondent was wrongly admitted.
> (Relates to Ground 1 of the grounds of appeal).
>
> ii. Whether the Court of Appeal was right to have come (sic) to the conclusion that the Respondent was not properly identified by P. W.2 who was the victim of the robbery operation.
> (Relates to Ground 2 of appeal)
>
> iii. Whether the Court of Appeal was right to have held that the Prosecution had not led sufficient evidence to sustain the offence of criminal conspiracy against the Respondent.
> (Relates to Ground 3 of the grounds of appeal)."

Learned counsel for the Respondent adopted the issues formulated by the Appellant.

Permit me my lords to comment briefly on Issue No 3 which is on conspiracy. The general definition assigned to the word "Conspiracy", in the realm of criminal law, is that it is an agreement by two or more persons acting in concert or in combination to accomplish or commit an unlawful/illegal act, coupled with an intent to achieve the agreement's objective. Burton's Legal Thesaurus 4th Edition. In the Penal Code (PC) of the Northern Region of Nigeria, Cap. 89 Laws of Northern Nigeria (1963) under which the Respondent was charged, Section 96 thereof defines "conspiracy" as follows:

> "(1) When two or more persons agree to do or cause to be done-
>
> a) An illegal act; or
>
> b) An act which is not illegal by illegal means."

Count One on the charge sheet before the trial court reads as follows:

> "Thet you Ola Shehu Salawu and five others at large on or about 8/8/2007 at Adeta round about in lIorin Kwara State within the jurisdiction of this honourable court conspired to commit a criminal offence to with (sic) rob one Mr. Suleman Alafara while armed with dangerous weapon at Adeta round about lIorin and you thereby committed an offence contrary to Section 97 of the Penal Code."

The finding of the trial court on the offence of conspiracy is as follows:

> "in view of the above and my earlier findings, I find the charge of criminal conspiracy proved by the Prosecution and the Accused is convicted as charged having found him guilty of the offence."

Thus, the trial court found the Respondent guilty of the offence and sentenced him accordingly. The court below, on its part, was of the opinion that since:

> "the armed robbery charge cannot be proved against the Appellant by the Prosecution in the first issue which is resolved in favour of the Appellant, the series of acts and omissions connected to the armed robbery cannot be grounded. It is therefore impossible for the Act of conspiracy to succeed *simpliciter* ..... Since the Issue One is resolved in favour of the Appellant, this Issue Two that is a subsidiary one will also go in favour of the Appellant."

In essence, the finding of the court below is in favour of the Respondent.

Now, who amongst the two is correct? In justifying their views, each of the two courts below made some analysis on the offence of criminal conspiracy, supporting the views with decided authorities.

In order to establish that conspiracy has been committed by some set or group of persons suspected to have committed a crime/crimes, the law requires the Prosecution to prove that:

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

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

c) specifically that each of the Accused individually participated in the conspiracy.

Now, having reviewed the whole proceedings of the trial court, I fail to see any separate, categorical and direct finding by the trial court on any of the above ingredients of the offence of conspiracy. The only authority upon which the trial court placed heavy reliance is the case of *Ezekiel Adekunle v The State (1989) 12 SC 203; (1989) 12 SCNJ 184* (which is a decision of this court) which held that:

> "There need be no express agreement before common intention can be shown. It can be inferred from the circumstances."

Thus, the trial court concluded that it can be inferred that the Accused and five others at large agreed to and indeed attacked the PW2 at Adeta round about on 8/5/07 where he was beaten with club, iron rod and axe and later dispossessed him of his Honda Bullet Car which the Accused herein, was said to have driven away from the scene of the attack.

Now, it was found by the court below, as against the finding of the trial court, that the offence of armed robbery upon which the Appellant was charged was not proved before the trial court and consequent upon that the offence of conspiracy could not succeed.

Although I agree with the learned counsel for the Appellant in his submission that conspiracy and armed robbery are two separate and distinct offences and that an Accused can be found guilty of one and not guilty of the other or vice versa, I must add that that is wholly dependent on the evidence placed before the trial court and other surrounding circumstances.

There was no evidence to sanction the offence of armed robbery against the Respondent. There was also no evidence to establish the ingredients (highlighted above) of the offence of conspiracy. See the cases of: *Lawson & Ors. v The State (1975) 4 SC 115 at 123 (1975) 4 SC (Reprint) 84; Akano & Ors. v A-G Bendel State (1988) 2 NWLR (Part 75) 201 at 232; Amachree v Nigerian Army (2003) 3 NWLR (Part 807) 256 at 281 D-E; Nwosu v The State (2004) 15 NWLR (Part 897) 466.* The general principle of law enunciated in these cases is that a charge of conspiracy is proved either by leading direct evidence in proof of the common criminal design or it can be proved by inference derived from the commission of the substantive offence. As there was no direct, cogent, convincing and compelling evidence to warrant the trial court to convict the Appellant, the call on the trial court to draw inference from the offence of armed robbery (which was not proved beyond reasonable doubt against the Respondent) and to convict him on conspiracy must fail as there is no evidence to prove either of the two offences. There was no nexus connecting the Respondent with the two offences charged. So, the charge of conspiracy, as found by the trial court, has no legs to stand. The evidence required in this kind of criminal offence is of such quality that irresistibly compels the court to draw such inferences as to the guilt of the Accused. In other words, there must be the criminal intention (*actus reus*) of two or more persons, *Actus Contra Actum* which is punishable where it is translated into achieving a criminal objective through a criminal means. See: *Njovens v The State (1973) 5 SC 17; (1973) 5 SC (Reprint) 12; Dabo v The State (1977) 5 SC 197; (1977) 5 SC (Reprint) 122.* A charge of conspiracy in a criminal trial, in my view, is by no means peripheral. Commission of grievous offences in most cases lay their eggs on that fertile ground for the offence to germinate. Where that offence is established as required by law, the offender must be ready to accept the punitive result of his nefarious act.

For this and the more comprehensive reasoning of my learned brother, Ngwuta JSC, which I adopt, I too find no merit in this appeal. The appeal is hereby dismissed by me. I affirm the lower court's decision.

Judgment delivered by
John Afolabi Fabiyi. JSC

I have read before now the judgment just delivered by my learned brother - Ngwuta, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

The Respondent was arraigned before the trial high court for the offences of conspiracy contrary to Section 97 of the Penal Code and armed robbery contrary to Section 1 (2)(a) of the Robbery and Fire Arms (Special Provisions) Act, Cap. R11, LFN, 2004 respectively.

The charges relate to the use of unspecified dangerous weapon to rob PW2. As the victim, he said axe was used to cut him four times. There was no evidence of treatment in any real hospital and no evidence of any injury or scar was shown by P W2. One Muritala who facilitated the arrest of the Appellant from Lagos to Ilorin was not called to clear the air. In the process of conducting an unusual identification parade, it was the Respondent, the Accused who was made to identify PW2 - the victim. The trial court relied on a so-called confessional statement credited to the Respondent to nail him as it found him guilty of the charges and sentenced him to six months imprisonment for the offence of conspiracy and to death by hanging on the count of armed robbery.

The Respondent herein appealed to the Court of Appeal, Ilorin Division where his appeal was allowed. The State has decided to appeal to this court.

The essential ingredients for the offence of armed robbery have been stated in a host of authorities by this Court. I wish to restate them here below as follows:

1. That there was a robbery.

2. That the robbery was an armed robbery.

3. That the Accused was one of those who robbed.

The decisions in *Bello v The State (2007) 10 NWLR (Part 1043) 564 at 566; Nwachukwu v The State (1985) 1 NWLR (Part 11) 218;* are in point.

In this matter, the Prosecution said an identification parade was conducted. There is no doubt that from the circumstances of the matter, same was required. It is extant in the record of appeal that it was the Respondent the Accused who was made to identify PW2 - the victim. To my mind, such equates with the employment of inquisitorial procedure and not the aquisitorial procedure enjoined by the provisions of Section 36 of the 1999 Constitution. The procedure adopted was a farce as the law was made to walk on its head; as it were. As I said earlier on, PW2, the victim said axe was used to cut him four times on his hand. There was no evidence of treatment and no scar was shown to the trial court. One Muritala who facilitated the arrest of the Respondent from Lagos to llorin after 9 days was not called to clear the air. I think he should have been called. To say the least, there was no shred of convincing corroborative evidence to beef up the so-called confessional statement which was admitted as Exhibit 4. In its real essence, can it be said that armed robbery was established that connected the Respondent? I have my reservation and serious doubt. I am not taken aback that the court below had the same view.

Let me now comment on the count of conspiracy.

In *Patrick Njovens v The State (1973) 5 SC 17; (1973) 5 SC (Reprint) 12; (1973) 1 NMLR 331*, this court per GBA Coker, JSC, (of blessed memory) said conspiracy is often hatched in utmost secrecy and the circumstance of the matter must be carefully considered by the court.

In this matter, the Appellant hinged the proof of the charge of conspiracy on the proof of the substantive offence. No direct evidence in proof of the charge of conspiracy was laid before the trial court. The Prosecution failed to prove that the Respondent's *actus reus*, referable to a common criminal design with other(s), existed.

It has been shown that the evidence relied upon by the Appellant in proof of the substantive offence to wit: armed robbery was not cogent, convincing and compelling enough to nail the Respondent herein. And so, the count in respect of conspiracy must fall to the ground as it rests on nothing. See: *U.A.C. Ltd. v Mcfoy (1962) AC 150 at 160.*

The Appellant felt that it proved its case beyond reasonable doubts as evolved by Lord Sankey, L.C. in *Woolmington v DPP (1935) AC 485*. It needs no gainsaying that the doubt arising in this matter, as earlier on adumbrated, are legion. I am unable to close my eyes to them. All the ingredients of the offences charged have not been clearly established. It is only when all the essential ingredients for the offences have been established beyond peradventure that the case is proved beyond reasonable doubt. See: *Alabi v The State (1993) 7 NWLR (Part 307) 511 at 523.*

For the above reasons and those ably set out in the leading judgment, I too feel that the appeal is devoid of merit and should be dismissed. I order accordingly. I affirm the judgment of the court below.

Judgment delivered by
Olufunlola Oyelola Adekeye. JSC

I have had the opportunity of reading in draft the judgment of my learned brother, N.S. Ngwuta, JSC. The facts of the case are as aptly narrated by my learned brother.

The Appellant before this court raised three issues for the determination of this court in this appeal namely-

(1) Whether the Court of Appeal was right to have held that Exhibit 4, the extrajudicial statement of the Respondent was wrongfully admitted.

(2) Whether the Court of Appeal was right to have come to the conclusion that the Respondent was not properly identified by P. W.2 who was the victim of the robbery operation.

(3) Whether the Court of Appeal was right to have held that the Prosecution had not led sufficient evidence to sustain the offence of criminal conspiracy against the Respondent.

My learned brother exhaustively considered all the above three issues in his leading judgment. I wish to pass a few remarks on the issue of the identification of the Respondent.

It is trite that for the Prosecution to succeed in proof of the offence of robbery there must be proof beyond reasonable doubt of the following essential ingredients:

(1) That there must be robbery or series of robberies.

(2) That the robbery or each robbery was an armed robbery.

(3) That the Accused was one of those who took part in the robbery.

I had to go further to explain that proof of a case beyond reasonable doubt does not mean proof beyond any iota or shadow of doubt. The burden of such proof which lies on the Prosecution never shifts. If at the conclusion of trial, on the entire evidence the court is left with no doubt that the offence was committed by the Accused, that burden is discharged. See *Bello v The State (2007) 10 NWLR (Part 1043) 564; Amina v State (1990) 6 NWLR (Part 155) 125; Nwachukwu v State (1985) 1 NWLR (Part 11) 218; Ani v State (2002) 5 SC (Part l) 33; (2003) 11 NWLR (Part 83) 142; Uwagboe v State (2007) 6 NWLR (Part 1031) 606*

The 1999 Constitution of this country as it affects our criminal legal system, in Section 36(5) stipulates that-

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts."

Also Section 138 (1) of the Evidence Act provides that-

"If the commission of a crime by a party to any proceeding is directly in issue in any proceedings civil or criminal it must be proved beyond reasonable doubt."

Before a trial court comes to the conclusion that an offence had been committed by an Accused person the court must look for the ingredients of the offence and ascertain critically that acts of the Accused come within the confines of the offence charged. See *Amadi v The State (1993) 8 NWLR (Part 314) 644; Alor v State (1997) 4 NWLR (Part 501) 511*.

Identification of the Respondent becomes an important issue in establishing that aspect of the essential ingredients of the offence of armed robbery, that the Accused was one of those who took part in the incident of armed robbery.

This is even more pressing in the circumstance of the case in view of the flaws in the evidence adduced by the Prosecution to establish that there was a robbery on the day in question and that the Respondent was linked with the robbery.

Such loopholes identified in the case of the Appellant were-

(1) The victim of the incident of armed robbery whose Honda Bullet Car was snatched by the supposed six member robbery gang could not give detailed description of the car that was allegedly robbed from him. He could not remember the colour of the car or give details of the engine number and chassis number under oath. He could not produce the car. The failure of the Prosecution to produce the item stolen or give convincing or vivid description of it falls short of proof that there was a robbery.

(2) There was no weapon tendered though the Appellant through the victim gave evidence that he was attacked with clubs and axe on his hand four times during the robbery.

(3) The voluntariness of Exhibit 4 - the extra judicial statement of the Respondent, the retraction, the admissibility and the consequent probative value was not properly settled by the trial court.

As regards the identification of the Respondent, the Appellant disclosed that he was not apprehended immediately at the scene of crime in Ilorin but was arrested nine days after the robbery incident in Lagos. It is therefore imperative that the Respondent must be linked with the crime by cogent and convincing identification. It is settled law that it is not in all criminal cases that an identification parade is necessary. Where there is good and cogent evidence linking the Accused person to the crime on the day of the incident a formal identification may be unnecessary. Furthermore, where an Accused person by his confession has identified himself, there would be no need for any further identification parade. Identification is the means of establishing whether a person charged with an offence is the same person who committed the offence.

It is essential in instances where -

(a) The victim did not know the Accused before and his first acquaintance with him was during the commission of the offence.

(b) The victim or witness was confronted by the offender for a very short time.

(c) The victim due to time and circumstances might not have had the full opportunity of observing the features of the Accused.

Archibong v State (2006) 5 SC (Part III) 1; (2004) 1 NWLR (Part 855) 488; Ukpabi v State (2004) 11 NWLR (Part 884) 439.

Identification parade is not the only way of establishing the identification of an Accused person in relation to the offence charged. Where the witness has ample opportunity to identify the Accused a parade is not necessary.

Recognition of an Accused may be more reliable than identification. *Eyisi v The State (2000) 12 S.C. (Part I) 24; (2001) 8 WRN 1.*

In practice, in an identification parade the proper thing for the Police to do is to shield an Accused from members of the public before the identification parade is conducted. The victim testified that he could identify the Respondent during the incident with the reflection of light from the nearby house but the police decided to resort to recognition. The system adopted in the process of recognition was contrary to normal routine. The police got the Respondent to identify his victim. The mode of identification adopted by the police deprived the court of considering issues such as -

(a) Circumstance in which the eye witness saw the suspect.

(b) The length of time the witness saw the suspect or Defendant.

(c) Longer observation made in difficult condition.

(d) Previous contact between the two parties.

This irregular identification parade of the Respondent was against his claim that he has no brother named Muritala whom the police claimed was their link in bringing the Respondent back to llorin. It was the evidence of the Respondent that he was not arrested and brought back to Ilorin in connection with any robbery incident - but for shooting Shittu Abdullahi, son of General Adangba.

The police and the court refused to release him contrary to the order of the Inspector General of Police. With the surrounding lapses and lacuna in the evidence of the Prosecution coupled with the poor identification parade, the court cannot return the verdict of guilty against the Respondent. The proof beyond reasonable doubt admits that if on the totality of the evidence a reasonable doubt is created, the Prosecution would have failed to discharge the onus of proof which the law vests upon it. The lower court did not mince words in holding that the Respondent was entitled to an acquittal. I find the decision of the lower court impeccable. It deserves no disturbance by this court.

With fuller reasons given by my learned brother in the leading judgment, I equally dismiss the appeal for lacking in merit.

I abide the consequential orders made by him.

Judgment delivered by
Mary Ukaego Peter-Odili. JSC

I agree with the leading judgment delivered by my learned brother, Ngwuta, JSC., which draft he graciously made available to me.

The Appellant before the lower court (now Respondent) was arraigned before Honourable Justice I. B. Garba of the Kwara State High Court in two count charge of criminal conspiracy and armed robbery contrary to Sections 97 of the Penal Code and 1 (2) of the Robbery and Fire Arms Act respectively.

At the close of the case, the trial judge found the Respondent guilty as charged and convicted him accordingly. On appeal to the Court of Appeal that court set aside the conviction and sentence on the 13th October, 2010. Dissatisfied the Appellant has appealed to this court upon three grounds.

The case of the Appellant (then the Prosecution) was that on or about the 8th day of May, 2007 at Adeta round about in Ilorin, Kwara State, the Appellant and five other persons now at large conspired and robbed one Sulaiman Alapara of his car. The Respondent at the trial court testified in his defence as the only witness.

The case for the Defence is that the Prosecution did not prove its case against the Respondent as the totality of the evidence before the court did not disclose any reasonable inference that the Respondent committed any offence. Pursuant to the rules of this court the counsel to the Appellant on 3/3/2011 filed Appellant's brief in which were couched three issues for determination which are:

1. Whether the Court of Appeal was right to have held that Exhibit 4, the extra judicial statement of the Respondent was wrongly admitted.

2. Whether the Court of Appeal was right to have come to the conclusion that the Respondent was not properly identified by P. W.2 who was the victim of the robbery operation.

3. Whether the Court of Appeal was right to have held that the Prosecution had not led sufficient evidence of criminal conspiracy against the Respondent.

Equally based on the same rules of court, the Respondent on 9/3/2011 filed Respondent's brief in which he adopted the three issues for determination as framed by the Appellant.

In line with the Appellant's brief, learned counsel on his behalf tackled the first issue of whether or not the court below was right to have held that Exhibit 4, the extra judicial statement of the Respondent was wrongly admitted. The learned counsel for the Appellant said the Respondent did not appeal against the admission of Exhibit 4, before the trial court, neither was the admission of same made an issue in the Respondent's brief before the lower court, which court however ruled on. That since the Accused/Respondent had not made it an issue before the court below, that court ought to have discountenanced same on the ground that it did not emanate from any of the grounds of appeal before the Court of Appeal. That it is the primary obligation of every court to hear and determine issues in controversy before it and as presented by litigants and not for the court to *suo motu* formulate a case for the parties. He cited *Iyayi v Ejigebe (1987) 7 SCNJ 148; Modupe v The State (1988) 9 SC 1; (1988) 9 SCNJ 1.*

For the Appellant it was further contended that Exhibit 4 was admitted by the trial court despite its retraction by the Respondent did not in any way depreciate its evidential value as espoused by this court in *Egboghonome v The State (1993) 7 NWLR (Part 306).* That Exhibit 4 accords with the natural cause of events as it is in line and agrees perfectly with the six cardinal principles of veracity highlighted by this court in *Onochie v The Republic (1966) NWLR 107*. He said Exhibit 4 was properly corroborated with other evidence led by the Prosecution, and the non-tendering of the stolen car which was later released to the owner did not diminish the weight of evidence. He cited *R. v Sykes & CAR 233 at 236.*

On the matter of identification of the Accused/Respondent, it was submitted for the Appellant that the identification at the police station by the P. W.2 from whom the vehicle was taken was positive.

In response, learned counsel of the Respondent said the appeal court was right to have interfered in the findings of the trial court since the decision based on the confessional statement's evaluation was not supported. He cited *Egboghonome v. State (1993) 7 NWLR (Part 306) 382; Akinbisade v State (2006) 9 SC 118; (2006) 17 NWLR (Part 1007) 184 at 211- 212.*

He said the court below did not formulate any new issue. Also that there was need for the court to exercise caution over the confessional statement especially after it was retracted. He referred to *Tanko v State (2008) 16 NWLR (Part 1114) 594 at 628 - 629; Isa v State (2007) 12 NWLR (Part 1049) 582; Nsofor v State (2004) 11-12 SC 43; (2004) 18 NWLR (Part 905) 292 at 314-315.*

On the matter of identification of the Accused/ Respondent's counsel on his behalf said the Appellant adopted an identification exercise unknown to law and prejudicial to the constitutionally guaranteed right of presumption of innocence of the Respondent. He cited *Ani v State (2002) 5 SC (Part I) 33; (2003) 11 NWLR (Part 830) 142 at 161; Bello v The State (2007) 10 NWLR (Part 1043) 564 at 566-567; Nwachukwu v State (1985) 1 NWLR (Part 11) 218; Archibong v State (2006) 5 SC (Part III) 1; (2006) 14 NWLR (Part 1000) 249 at 371, 393.*

It is true that a court can convict on the confessional statement of an Accused person alone, but such a statement of the law can only apply after such a confessional statement has been evaluated and properly assessed by the trial judge in the context of the evidence adduced. Where that has not been done, then the Court of Appeal will be at liberty to interfere in the findings that have been thrown up. When that has taken place it will not be correct to say that the appeal court *suo motu* formulated a new issue for the parties or went out of line. I place reliance on *Egboghonome v The State (1993) 7 NWLR (Part 306) 382; Akinbisade v State (2006) 9 SC 118; (2006) 17 NWLR (Part l007) 184 at 211-212.*

The confessional statement Exhibit 4 in this instance featured facts that could not be ruled out to have come out from the Accused/Respondent. The fact that the Respondent had recanted making it, made that statement admissible and in my humble view made unnecessary, a trial within trial as to the voluntariness or otherwise of the statement. However, though it is admissible, there is a necessity of corroboration to lend weight to the value of that statement and that could come from other evidence 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 *Tanko v State (2008) 16 NWLR (Part 1114) 594 at 628-629; Isa v State (2007) 12 NELR (Part 1049) 582; Nsofor v State (2004) 11-12 SC43; (2004) 18 NWLR (Part 905) at 292.*

It is not enough that in trying to wriggle out of trouble the Accused/Respondent had told some lies like in one breath saying he was an illiterate and never been to school, while in another instance stated the name of his school from where he had obtained a primary six certificate. Though these would show the Respondent as a liar that does not change or reduce the burden squarely and rightly placed upon the Prosecution to establish the guilt of the Accused/Respondent beyond reasonable doubt. This coming on the heels of a botched identification which left loose ends and was a mode of identification with a strange feature in that the Prosecution had asked the Accused to identify the complainant in a way that led to a nagging or possible conclusion that the guilt of the Accused had been determined even before he was brought to court. That negated the provisions of Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria. See *Usufu v State (2007) 1 NWLR (Part 1020) 94 at 112.*

What I am in effect saying is that the conditions upon which the guilt of the Accused could be said to have been established had not been met. The conclusion being that the Prosecution had as the Court of Appeal found failed to prove its case beyond reasonable doubt and the conviction and sentence of the trial court cannot be sustained.

The appeal is dismissed and discharge and acquittal of the Respondent affirmed.

Counsel

K. Ajibade *Attorney-General Kwara State* *with him* Jimoh Adebimpe Mumuni *Director of Public Prosecution, Ministry of Justice, Ilorin*	.....	For the Appellant
Olalekan Yusuf *with him* Adeyemi Ogunluwoye	.....	For the Respondent