

IN THE HIGH COURT OF JUSTICE
EDO STATE OF NIGERIA
IN THE BENIN CRIMINAL DIVISION
HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP HONOURABLE JUSTICE R. IRELE-IFIJEH – JUDGE
ON FRIDAY THE 20TH DAY OF JULY, 2018

BETWEEN:

CHARGE NO. B/CD/121C/2014

THE STATE
VS.

.....

COMPLAINANT/RESPONDENT

THANKGOD MARKSON UDOMIJU

.....

ACCUSED/APPLICANT

J U D G M E N T

The Accused ThankGod Markson is standing trial on the following counts:

COUNT I

That you ThankGod Markson ‘m’ and others now at large, on or about the 21st day of October, 2013 at Ologbo, in the Benin Judicial Division did conspire amongst yourselves to commit a felony to wit: Armed Robbery and thereby committed an offence contrary to Section 6(b) and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provision) Act Cap R. II, Vol. 14, Laws of the Federation of 2004.

COUNT II

That you ThankGod Markson ‘m’ and others now at large, on or about the 21st day of October, 2013 at Ologbo, in the Benin Judicial Division did rob one Kabakwu Samuel of his laptop (Toshiba) valued ₦90,000.00, two Nokia touch light phones valued ₦5,000.00 four wrist watches valued at ₦20,000.00, two bags valued ₦6,000.00 and a cash of ₦1,000.00 and at the time of robbery, you were armed with offensive weapon to wit: cutlass and battle axe and thereby committed an offence contrary to Section 6(b) and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provision) Act Cap R. II, Vol. 14, Laws of the Federation of 2004.

COUNT III

That you ThankGod Markson ‘m’ and others now at large, on or about the 21st day of October, 2013 at Ologbo, in the Benin Judicial Division did rob one Obose John of his strong Satellite Decoder valued ₦16,000.00, clothes valued ₦10,000.00, pressing iron valued ₦3,500.00, Adaptor of PS 2 game valued ₦15,000.00 and a cash

of ₦5,000.00 and at the time of robbery, you were armed with offensive weapon to wit: cutlass and battle axe and thereby committed an offence contrary to Section 6(b) and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provision) Act Cap R. II, Vol. 14, Laws of the Federation of 2004.

COUNT IV

That you ThankGod Markson 'm' and others now at large, on or about the 21st day of October, 2013 at Ologbo, in the Benin Judicial Division did rob one Ifeanyi Dominic of his Nokia handset C1 valued ₦6,000.00 and a cash of ₦40,000.00 and at the time of robbery, you were armed with offensive weapon to wit: cutlass and battle axe and thereby committed an offence contrary to Section 6(b) and punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provision) Act Cap R. II, Vol. 14, Laws of the Federation of 2004.

The Accused person took his plea on the 17/11/14 where he pleaded not guilty to each of the four counts.

In proof of its case, the Prosecution called four (4) witnesses. Five Exhibits were tendered. They are:

Exhibit 'A' – Statement of the Accused person dated 2/11/13.

Exhibit 'B' – One cutlass.

Exhibit 'C' – Blackberry phone.

Exhibit 'D' – Laptop

Exhibit 'D1' – Laptop charger.

The Accused opened his defence on oath on 27/10/17 and was cross examined on 4/5/18. He called no witness.

The facts of the case as narrated by the Prosecution witnesses is that on the 21/10/13 at about 12:15am at Ologbo in the residence of Kabakwu Samuel Chuks (PW1) behind Waynos Hotel Ologbo, PW1 and one Obose John (PW2) were robbed of their phones, Laptop, money, wristwatch, clothes and satellite decoder by the Accused and others at large. That at the time of the robbery they were armed with cutlass. That they (PW1 and PW2) reported the incident to the Police at Ologbo where they made statements that same day.

Under cross examination, PW1 admitted that he never knew the Accused before the incident and because torchlight was shone in his face, he could not identify the robbers.

PW2 under cross examination admitted that because the incident happened at midnight and it was dark, he could not see the faces of the Robbers.

PW3 is Obose Juliet Adesuwa. She is a sister to PW2. According to her, she was informed by PW2 that himself and Pw1 had been robbed. After a few days someone started chatting with her using her brother's phone. That herself and PW2 reported to the Police. She arranged to meet with the person chatting with her (whose name is Goodluck). The location for the meeting was at Abraka. She went with Policemen to Abraka and met with Goodluck who was then arrested by the Police. Upon interrogation, Goodluck told the Police that he bought the phone from someone who lives in Abraka and he had not completed payment for the phone. The Police asked Goodluck to call the person to come and collect the balance payment. The said Goodluck put a call across to the Accused to come and get his balance money. The Accused came and was arrested.

Under cross Examination P. W.3 admitted that she only met the Accused in the course of his arrest. She admitted that she does not live in the same house with her brother.

Inspector Bakar Musa was the head of the Investigating Team, he had started giving evidence as PW4 when he fell ill and died. His evidence was expunged and Inspector Samuel Arise was substituted in his stead as PW4, because he was a member of the Investigating Team.

PW4 testified as to how a case of burglary and stealing was reported at Ologbo Police Station and their office was detailed to take over the case. That they visited the scene of crime but no Exhibit was recovered from the scene. That after a few weeks information came that the blackberry bold phone that was stolen from PW2 was being used by someone to chat with his sister (PW3). That they were informed that the pin number of the phone was the same with that of the

Complainant and they encouraged PW3 to schedule a meeting with the person after which the Late Inspector Bakar Musa and one PC Thomas went to Abraka on the 1/11/13. That on the 2/11/13 they returned with the Accused to the Station. That there was no way the Late Inspector would have tortured the Accused because he had tuberculosis. That the Accused volunteered his statement which was confessional, that they were three in number that went for the robbery, and he mentioned their names. He identified the handwriting of the Late Inspector and tendered the statement of the Accused as Exhibit 'A'.

PW4 told the Court that they (himself and his team members) visited the house of the Accused person's father where they recovered the cutlass used which was tendered and marked Exhibit 'B'. He also identified Exhibits 'C', 'D' and 'D1'. He further told the Court that the Accused was taken before a Superior Police Officer who attested to the statement.

Under cross examination he admitted that he was in the office when the statement of the Accused was recorded. That upon the death of Inspector Bakar Musa he took over as he was the second in command. That the statement was read over to the Accused in his presence.

The defence of the Accused is a total denial. According to him, his father was down with stroke at Mosogar so he decided to come to Benin to inform his mother about his father's condition. That he boarded a vehicle to Benin and fell asleep while on board. That he was woken up by a lady who accused him of indecently assaulting her. That the lady slapped him which resulted in a fight between them. That on getting to a checkpoint a Policeman tried to find out what the problem was but the woman took the Police aside and told him something after which he was arrested. The Police then took him and the woman to the Station at Ologbo where he was locked up in the cell, that the woman left after promising to deal with him but never came back. That on the 6/11/13 the IPO took him to the back of the Station where he was tortured and made to sign a paper which the IPO had written, that the content of the paper was not read to him. On the 7/11/13 he was made to

sign another paper, that he was taken to a compound on the 8/11/13 after which he was charged to Court.

Under cross examination he admitted that he was arrested at Presco Junction and was not told his offence.

He maintained that he was on his way to Benin when he was arrested, that it was the Police at Ologbo that took him and the woman with whom he had a fight to the Police Station.

That the reason he is in Court is because he was accused of armed robbery whereas he had a fight with a woman. That he was beaten to sign a statement. he did not know the content of (Exhibit 'A') until it was read in Court.

Still under cross examination he stated that it is not true he was arrested with a bag containing a laptop and a blackberry phone. He denied when asked if he knew any person called Giwa or Harrison. That he never told the Police anything about Cutlass or that he sold the blackberry phone to anyone at Oria in Abraka. He claimed the Policeman who arrested him did not come to Court to testify.

Final written addresses were filed and adopted by learned defence and Prosecuting Counsel on the 8/6/18.

In his written address, defence Counsel A. Onochie Esq. formulated a sole issue for determination which is:-

“Whether the Prosecution can rightly be said to have proved its case beyond reasonable doubt as required by the law to enable it secure conviction against the Accused person.”

Counsel submitted that it is a cardinal principle of law that the guilt of an Accused must be proved beyond reasonable doubt. That this burden rests on the Prosecution and does not shift.

He referred to:

ARCHIBONG V. STATE (2008) 6
LRCNCC PG.296 RATIO 10.

He highlighted the ingredients of the offence of armed robbery.

He referred to: **STATE VS. PETER ADEWUMI (1999) 2**
LRCNCC PG. 252.

He submitted that from the totality of evidence led by the Prosecution, there is nothing to lead to the conclusion that the Accused committed any offence.

He reproduced the evidence of PW1, PW2, PW3 and PW4.

He submitted further that the Prosecution cannot be said to have proved its case beyond reasonable doubt as required by the law as none of the witnesses was able to convince the Court that the Accused was one of the persons that committed the alleged offence.

That the identity of the person who actually robbed the victims is in doubt and as such the Prosecution must fail.

He referred to: **NDIDI vs. STATE (2007) ALL FWLR (381) 1617.**

That the evidence of the Prosecution witnesses having created doubt in the mind of the Court, such doubt ought to be resolved in favour of the Accused.

He further submitted that PW3 contradicted herself both in her oral evidence in Court and her statement to the police when she admitted that all she told the Court was not contained in her statement to the police. That the person PW3 told Court she was chatting with is Mr. Goodluck from Asaba who is different from the Accused.

That the Black berry pin number was never mentioned in the statement of any of the witnesses and was not made available to the Court for scrutiny.

He further submitted that PW4 was not among the persons that arrested the Accused at Abraka and does not know how Exhibit 'A' was obtained or how the other Exhibits were recovered.

That the Court should disregard the evidence of PW4 and treat it as hearsay.

He referred to Section 39 of the Evidence Act 2011.

He further submitted that PW4 did not carry out any investigation in this case.

That none of the witnesses came to testify in Court with proof of ownership or evidence that Exhibits 'C', 'D' and 'D'1 belongs to them.

On the charge of conspiracy, he submitted that the Prosecution must establish meeting of two or more minds for the purpose of committing an offence. That the Accused having been arrested and charged to Court alone, he should be discharged on the Count of conspiracy as the Prosecution has not been able to establish the ingredients of the offence.

That the only thing linking the Accused with the crime is the confessional statement which was earlier objected to on grounds of involuntariness though admitted in evidence by the Court.

Counsel reproduced the defence of the Accused and submitted that the ingredients of the offences for which the Accused is charged have not been successfully proved by the Prosecution.

That irrespective of the evidence led by the Prosecution, there is still doubt as to the identity of the person who actually robbed the victims. He urged the Court to resolve this doubt in favour of the Accused.

He referred to:

SHEKETE V. NIGERIAN AIRFORCE (2002) 2 NCLN 290
at 294 RATIO 1.

In reply Prosecuting Counsel A.O. AIGBAVOA Assistant Director whose written address was signed by I.I. Omokhodion Esq. raised an issue for determination which is:-

“Whether owing to the totality of evidence led by the Prosecution, the Prosecution has proved the offences of conspiracy to commit armed robbery and armed robbery against the Accused person beyond reasonable doubt.”

He gave brief facts of the case and summarized the evidence of all the Prosecution witnesses.

He submitted that it is trite that a person found to have been in possession of a robbed item shortly after it was robbed, is presumed to either be the robber or

has the knowledge that it was robbed unless he can account for his possession of the item.

He referred to:

SECTION 149(D) OF THE EVIDENCE ACT

AND

AREMU V. STATE (1991) 17 NWLR (PT.210) PG.1
amongst others.

That the Accused could not give a legitimate account for his possession of the Black berry mobile phone and laptop. That the Accused made confessional statement wherein he admitted committing the offences for which he is charged.

He highlighted the ingredients of conspiracy and referred to

CLARK V. STATE (2003) 5 ACLR 100 AT 118
amongst others.

He submitted further that conspiracy is difficult to prove because it is hatched in the secret but can be inferred from circumstantial evidence.

He referred to **OMOTOLA V. THE STATE (2011) VOL.9**
LRCNCC PG.72 @ 103

That the inference that can be drawn from the evidence of the Prosecution witnesses is that the Accused and others now at large conspired to rob P.W.1 and P.W.2.

He listed the ways through which the guilt of an Accused can be proved.

He referred to **EMEKA v. STATE (2005) 4 LRCNCC PG. 187**
Particularly at Page 199.

He also highlighted the ingredients of Armed Robbery which the Prosecution must prove and referred to

ONYENYE v. THE STATE (2012)
VOL. 212 LRCN 107 @ 112 RATIO 2.

He further submitted that, the confessions in the extra Judicial statement of the Accused corroborates the evidence of P.W.3 as to how the Accused was

arrested and the evidence of P.W.4 as it relates to the investigations carried out by him and his team. That the Prosecution has discharged the burden of proof in this case by linking the Accused to have participated in the armed robbery.

That the best evidence for the purpose of conviction is a confession to the commission of the crime by the Accused.

He referred to **MOSES JUA v. STATE (2010) 4 NWLP
PT. 1184 P. 249 amongst others.**

He enumerated the six way tests which a confessional statement should be subjected to for it to be admissible.

He referred to **R. v. SYKES 8 C.R.I, APP. R 233 @ 236 – 238
amongst others.**

That the Accused having been found in possession of the laptop robbed from P.W.1, and the Prosecution haven established that the Accused sold the black berry stolen from P.W.2 coupled with his confessional statement wherein he admitted he robbed P.W.1 and P.W.2, the Accused played a vital role in the armed robbery incident that happened on the 21/10/13. He urged the Court to so hold.

He submitted that the defence of the Accused which is a total denial of the offence, is unrealistic and an attempt to distort facts. He urged the Court to reject the concocted story put up by the Accused in his defence.

He referred to **AIGUOKHIAN v. THE STATE (2004) 7 NWLR
(PT. 873) 565 Per Pats – Achonolu J.S.C.**

He submitted further that the Prosecution has proved the ingredients of Armed Robbery.

That the evidence of the Prosecution witnesses and the surrounding circumstances of the case point undeniably to the guilt of the Accused.

He referred to **ONYENYE v. THE STATE (SUPRA)
amongst others.**

He submitted finally that the Prosecution has proved the case of conspiracy to commit Armed Robbery and Armed Robbery itself against the Accused beyond reasonable doubt.

He referred to **BOLANLE ABEKE v. THE STATE (2007) 3 S.C (PT. 11) 105.**

He urged the Court to convict the Accused.

In criminal cases, the law is well settled that the onus is on the Prosecution to prove the guilt of the Accused beyond reasonable doubt.

See **SECTION 135 OF THE EVIDENCE ACT 2011**

A N D

ADEBOYE v. STATE (2011) LPELR – CA/1C/62A/2010.

The guilt of the Accused can be proved either by direct oral evidence, circumstantial evidence or the confessional statement of the Accused, if it is direct, positive and satisfactorily proved.

See **OBASI ONYENYE v. THE STATE (2012) LPELR 9866 S.C.**

In proving the guilt of the Accused, the Prosecution must prove all the necessary and vital ingredients of the offence for which he is charged.

See **YONGO v. COMMISSIONER OF POLICE (1992) NWLR (PT. 257) PG. 36**

As I earlier mentioned the charge against the Accused are four (4) counts, which are conspiracy to wit: Armed Robbery and Armed Robbery itself.

The law is trite that in a case of armed robbery the Prosecution must prove beyond reasonable doubt the following:

- (a) That there was robbery.
- (b) That the robbery was an armed robbery.
- (c) That the Accused took part in the armed robbery.

See **SUBERU v. THE STATE (2010) LPELR – 3120 (S.C).**

A N D

AFOLALU v. THE STATE (2010) LPELR – 197 S.C.

These ingredients must co-exist.

See **GODWIN PIUS v. THE STATE (2012) LPELR – 9304.**

In establishing these ingredients, the Prosecution must adduce cogent evidence linking the Accused with the robbery incident that took place on the 21/10/2013.

See **ODUNAYO AJAYI v. THE STATE (2011) LPELR – 4682 C.A.**

The issue the Court is to determine is whether or not the Prosecution was able to prove all the ingredients of the offences of conspiracy to commit armed robbery and armed robbery itself beyond reasonable doubt.

It flowed from P.W.1 and P.W.2, that they were robbed in the room of P.W1 by some persons armed with a cutlass, in the early hours of 21/10/13. P.W.1 stated that, he was robbed of his phone, laptop, wrist watch and money. While P.W.2 on his part stated that he was robbed of his clothes, handset, satellite decoder and money.

They admitted they did not see the faces of the robbers hence they could not identify them.

P.W.3 on her part told Court that, her brother informed her about the robbery incident. Infact she said and I quote “my brother had reported to me that he and his roommate were robbed”. Under cross-examination she said and I quote “my brother reported the robbery incident to me and I believed him”. From these piece of evidence it is clear that the evidence of P.W.1 and P.W.2 are the only eye witness account. P.W.4 apparently did not witness the armed robbery. He is an independent witness. P.W.4 in his evidence told Court that it was a case of burglary and stealing that was reported to them at the Police Station, hence this case was earlier charged to the Magistrate Court but the evidence of P.W.1 and P.W.2 at the Magistrate Court revealed that the robbers were armed. The Magistrate haven discovered that there was element of Armed Robbery in the case referred it to the DPP for legal advice. Hence the Accused person was charged to this court for Armed Robbery.

A person who fraudulently takes anything capable of being stolen or fraudulently convert to his own use or to the use of any other person anything capable of being stolen is said to steal that thing.

See **ADEPOJU v. STATE (2014) LPELR – 23312 (CA)**.

In **THE STATE v. ISIAKA (2013) LPELR – 20521 (SC)** the Supreme Court held that the simplest break down of Armed Robbery is to Rob with arm. Armed Robbery can also be defined as stealing plus violence, use of arms threatened.

See **EYONAOWA v. C.O.P. (2014) LPELR – 22339 (CA)**.

From the above definitions it is clear that from the evidence of P.W.1 and P.W.2 the incident that happened on the 21/10/2013 was an armed robbery attack because the robbers were armed with a cutlass. If the said robbers had broken into P.W.1's house and moved away their properties without the use of any arm, violence or threat, then it would have been a case of burglary and stealing which can be tried by the Magistrate Court, but since P.W.1 and P.W.2 were robbed by men who were armed with cutlass, it is a clear case of armed robbery.

The testimony of P.W.1 and P.W.2 corroborate one another to the extent that an armed robbery incident happened in P.W.1's room on the 21/10/2013, that the robbers were armed with a cutlass (Exhibit 'B').

Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act, Cap R. II Laws of the Federation of Nigeria 2004 reads:

“If any offender mentioned in subsection (1) of this Section is armed with any firearms or any offensive weapon or is in company with persons so armed... the offender shall be liable upon conviction under the Act to be sentenced to death.”

In the case of **NWACHUKWU v. THE STATE (1986) LPELR – 2085 (SC)**. It was held that offensive weapon includes an air gun, air pistol, bow and arrow, spear, cutlass, matchet, dagger, cudgel, or any piece of wood, metal, glass or stone capable of being used as an offensive weapon.

It is settled law that “offensive weapon” is “any article apart from a firearm made or adapted, used for causing injury to a person or intended by the person having it for such use by him and it includes a cutlass, wood, knife or any blunt object.

See **SECTION 11 OF THE ROBBERY AND FIREARMS (SPECIAL PROVISIONS) ACT 291.**

A N D

KAYODE v. THE STATE (2012) LPELR – 1999 C.A.

From the above it is clear that cutlass falls within the offensive weapons referred to by Section 1(2)(a) of the Robbery and Firearms (Special Provision) Act.

P.W.1 and P.W.2 in their evidence in Court were narrative and mentioned their properties which were robbed by the said robbers. From the testimony of P.W.1 and P.W.2 there is no doubt that there was robbery on the 21/10/2013 and the robbers were armed with cutlass.

The evidence of P.W.3 and P.W.4 corroborates one another as to how the Accused was apprehended though P.W.4 did not go to Abraka for the arrest, he was a member of the team and has led evidence that his superior who effected the arrest had passed on and PC Thomas had been transferred from Ologbo Police Station. The law allows him as a member of the team to give evidence by virtue of Section 39 of the Evidence Act which provides thus:

Statements, whether or not written or oral of facts in issue or relevant facts made by a person:

- (a) who is dead;
- (b) who cannot be found;
- (c) who has become incapable of giving evidence; or
- (d) whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are admissible.

The Accused and his counsel were in Court when P.W.3 and P.W.4 testified that the Accused was arrested at Abraka neither him nor his counsel cross-examined the witnesses (P.W.3 and P.W.4) to dispute this fact.

It is trite that an Accused can be convicted based on circumstantial evidence, but it must be sufficient to link him with the offence charged and point unmistakably and irresistibly to the commission of the offence.

See **OMOGODO v. THE STATE (1981) 5 SC PAGE 5.**

The Accused denied ever robbing anyone of his phone yet he showed up in Abraka where he was apprehended by the Police haven received a call from the said Goodluck who claimed he bought the phone (Exhibit 'C') from him and in whose possession Exhibit 'C' was recovered.

The question I wish to ask is, why did the Accused and not someone else show up to collect the said balance money for the payment of the blackberry phone, when the said Goodluck called the alleged seller of the phone? It is obvious that he was the one that was called to come for his balance money hence he showed up at the scene where he was arrested by the Police.

It is not in dispute that the phone was sold to a third party (Goodluck) as narrated by P.W.3 and P.W.4 which led to the arrest of the Accused. During cross-examination of P.W.3 and P.W.4 by the defence no question was asked on how the phone was recovered by the Police from the third party. When the Prosecuting counsel sought to tender the phone and the Accused was shown the phone all he said was "I do not know anything about the phone."

What can be deduced from this is that the Accused sold Exhibit 'C' (the blackberry phone) to the said Goodluck from whom it was recovered.

The said Goodluck from whom Exhibit 'C' which led to the arrest of the Accused was recovered did not testify as a witness in this case. However he can be said to have been used as a bait to apprehend the Accused, this is so as the Prosecution has the discretion to call witnesses it considers relevant to prove its case. Although it is desirable to call witnesses who are vital and can help determine

the case one way or the other, but failure to call such a witness cannot avail the Accused when there are other evidence sufficient and convincing enough to convict him, especially as there is no rule of law which says that once a particular witness is not called, it is fatal to the Prosecution's case.

See **IMHANDRA v. NIGERIAN ARMY (2007) 14 NWLR (PT. 1053) 76 at 93 (CA).**

A N D

ALIYU v. STATE (2013) LPELR – 20748 (SC).

It is a settled principle of law that an Accused can be convicted on his confessional statement alone regardless of the fact that he resiled or retracted it at the trial, if it is direct, positive, duly made and satisfactorily proved.

See **SHOLA FAMUYIWA v. THE STATE (2017) LPELR – SC – 386/2015.**

Now on the confessional statement of the Accused.

When the Prosecution sought to tender the confessional statement of the Accused, the learned defence counsel objected to the admissibility of it on the ground that P.W.4 was not the recorder. However the Court overruled his objection and the statement was admitted and marked Exhibit 'A'.

Before the Court can rely on the confessional statement of the Accused to convict him, the six ways test must be applied.

See **SEMIU AFOLABI v. THE STATE (2013) LPELR – 20700 S.C**

A N D

OJEGELE v. THE STATE (1980) 1 NWLR (PT. 71) PAGE 414.

On the first test which is, if there is anything outside the statement to show that it was true? P.W.1 and P.W.2 testified that they were robbed in P.W.1's house behind Waynos Hotel Ologbo, and one of the robbers was armed with a cutlass. The Accused in Exhibit 'A' stated that himself and two other persons met at about 10pm on the 20/10/2013 and perfected their plans to rob, that when it was 12am they went to a house near Waynos Hotel, where they robbed two men. This

piece of evidence shows that Exhibit 'A' is true, that P.W.1 and P.W.2 were robbed at about 12am on the 21/10/2013 by the Accused and other persons at large.

On whether Exhibit 'A' is corroborated. The evidence of P.W.1 and P.W.2 were narrative and they listed the items robbed from them to include phones. P.W.3 in her evidence told Court that, her brother informed her that he had been robbed; and after some days someone was chatting with her with her brother's blackberry phone that was stolen and with the help of the Police the person was arrested and the blackberry phone was recovered from him, which led to the arrest of the Accused.

P.W.3 in the latter part of her evidence said and I quote

"... the Police came in and arrested the said Goodluck ... At the bar the Police searched the boy and found the black berry he used to chat with me ... He told the Police that he had not completed payment of the phone. The Police then told Goodluck to call the person that sold the phone to him to come and collect his balance money that was how the Accused was called by Goodluck on phone and he was arrested".

The Accused stated in Exhibit 'A' and I quote

"I sold the blackberry phone to one boy called Lucky at Oria in Abraka at the rate of ₦5,000 but he made part payment of ₦1,500.00 he promised to pay the balance in the later date."

The Accused also admitted in Exhibit 'A' and I quote

"After the operation I took the laptop and one blackberry handset."

These piece of evidence extracted from Exhibit 'A' corroborates the evidence of P. W. 2 and P.W.3, that the said blackberry phone was robbed from P.W.2, and the Accused sold it to the person from whom it was recovered as narrated by P.W.3.

On whether the facts as contained in the confessional statement of the Accused are true as far as they can be tested. P.W.1 told Court that he was robbed of his phone, laptop, wristwatch and money while P.W.2 told Court that he was robbed of his money, clothes, handset and satellite decoder. P.W.4 on his part told the Court in his evidence that, the cutlass (Exhibit 'B') with which the Accused

threatened P.W.1 and P.W.2 before they robbed them was recovered from his father's house and a laptop Exhibit 'D1' was also recovered from him (Accused).

In Exhibit 'A' the Accused admitted and I quote

"After the operation, I took the laptop and one blackberry handset. Harrison took the decoder and two handsets ... I have not sold the laptop".

The content of Exhibit 'A' are facts which are true haven been corroborated by the evidence of P.W.1, P.W.2 and P.W.4. This is so as the Accused further admitted and I quote

"The battle axe we used is with Harrison while the cutlass is in where I kept it in my father's house".

The Accused had the opportunity to rob P.W.1 and P.W.2, as he stated in Exhibit 'A' that one Giwa called him on the 19/10/2013 and asked him to come to Ologbo for a robbery operation, that he in turn called Harrison who live near Ughelli in Delta State and passed the information to him, that on the 20/10/2013 at about 10pm the three of them met at Ologbo and perfected their robbery plans, when it was '12am' which is obviously the 21/10/2013 they took off and eventually carried out the robbery in a house near Waynos Hotel which is apparently the house of P.W.1, where they robbed P.W.1 and P.W.2. This means that the Accused and others now at large left their various places of abode to Ologbo where the robbery took place.

The confession of the Accused in Exhibit 'A' is possible, as the Accused in Exhibit 'A' gave a narrative as to how he got to know the said Harrison and Giwa now at large, he even mentioned the name of the said Giwa's father. Infact he said and I quote "Giwa 'm' the son of Prince Johnson of Waterside Ologbo".

What can be inferred from this is that the Accused had a close relationship with the other persons now at large hence he could give proper information about the persons with whom he robbed P.W.1 and P.W.2.

P.W.1 in his evidence in Court said

“the robber took my friend to my sitting room, it was at that stage I realized that the robbers were more than one.”

The Accused also admitted in Exhibit ‘A’ and I quote “the three of us are gang members”.

The Accused being a member of the gang made it very possible for himself and the others now at large who are his gang members to have robbed P.W.1 and P.W.2.

On whether Exhibit ‘A’ is consistent with other facts which have been ascertained and have been proved? From the evidence of P.W.1 and P.W.2 it has been established that, they were robbed on the 21/10/2013 at about 12.15am, that the robbers were armed with cutlass. In Exhibit ‘A’ the Accused admitted thus: “we arrived at a house near Waynos Hotel, Giwa and I forcefully bursted the door opened with our foots (sic) and we gained entry”. Still in Exhibit ‘A’ he admitted and I quote “none of us hold gun except the battle axe I posed with as gun and Giwa hold cutlass which we used to threatened them before we stole their properties”.

These confessions by the Accused in Exhibit ‘A’ shows that the Accused was part of those who robbed P.W.1 and P.W.2 on the 21/10/2013.

The contents of Exhibit ‘A’ are consistent with other facts which have been proved by the Prosecution through their witnesses.

On the issue of voluntariness, there is evidence that Exhibit “A” was voluntarily made because PW4 mentioned that there is no way the late Inspector Bakar Musa would have tortured the Accused to make Exhibit “A” since he had tuberculosis and had little or no strength with which he would have tortured the Accused. That he was present in the office at the time the Accused volunteered his statement. The defence counsel was in court when PW4 testified, he did not object to the voluntariness of the confessional statement neither did he cross examine PW4 to that effect, nor did the Accused deny making the statement voluntarily. The

only objection raised by the defence counsel was that PW4 was not the recorder of the statement.

It is a settled principle of law that where an extra judicial confession has been proved to have been voluntarily made, it is positive and unequivocal, it will suffice to ground a finding of guilt regardless of the fact that the maker resiled there from or retracted it at the trial since such a retraction does not necessarily make the confession inadmissible.

See **BATURE v. THE STATE (1990) 1 NWLR (PT. 320)**
PG. 267 @ 285 Paragraphs A to E.

Having held that the confessional statement of the Accused was voluntarily made and duly admitted, it therefore forms part of the case for the Prosecution.

As earlier mentioned the defence of the Accused is a total denial. He claims he was arrested at a check point at presco junction at the instance of a certain woman, who accused him of sleeping on her body in a vehicle he boarded from Mosogar to Benin. That the lady accused him of harassing her indecently and she slapped him, he retaliated and a fight ensued between them, which continued till they arrived a Police check point, that their fight attracted the attention of the Police who inquired what the matter was and he explained all that transpired between him and the woman, that the woman took the Police aside, and discussed with him, that upon the return of the said Police, he asked the other passengers in the bus to go while he was taken to Ologbo Police Station. That the complainant came to the Police and threatened to deal with him.

The Accused and his counsel were in Court when P.W.3 and P.W.4 testified that, he was arrested in Abraka upon the call he received from one Goodluck to whom he sold Exhibit 'C' (P.W.2's blackberry phone) asking him to come and collect the balance payment for the phone. He did not cross-examine P.W.3 and P.W.4 to counter the place of his arrest he waited till his defence to say he was arrested in Benin by Presco Junction and not Abraka. The Accused was also in Court when Exhibit 'A' was tendered, he did not deny being the maker, neither did he say

Exhibit 'A' was obtained involuntarily, he also waited till his defence before he told Court that he was tortured to sign Exhibit 'A'.

The Accused was also in Court when P.W.4 testified that Exhibit 'D' (a laptop) which was robbed from P.W.1 was recovered from him, neither he nor his counsel objected to the tendering of the laptop by the prosecution nor did his counsel cross examine PW4 on how the laptop was recovered.

P.W.4 also told Court that the Accused was earlier charged to Magistrate Court for burglary and stealing, that, when evidence was led, the learned Magistrate withdrew from the case, haven discovered that the case had elements of armed robbery. The Accused and his counsel who were both present in Court also did not cross-examine P.W.4 with regards to this issue nor raised any objection to it.

All of these are pointers to the fact that the Accused tried to retract his earlier confession. I do not believe the defence of the Accused. It is an afterthought.

It is trite that the fact that an Accused resiled from his confession does not make the confession inadmissible.

See **IKECHUKWU OKOH v. THE STATE**
(2014) LPELR 22589 S.C.

Let me consider the issues raised by the defence counsel.

Learned defence counsel submitted that the armed robbery incident took place at midnight, that P.W.1 and P.W.2 haven admitted that torchlight was shone at their faces, they could not recognize the robbers. That P.W.3 also admitted that she knows the Accused by name and not facially as she saw him for the first time when he was arrested by the Police. That from the evidence led by the Prosecution witnesses the identity of the robbers is in doubt, hence the case of the Prosecution must fail. The Prosecution was silent on this issue.

It is true that the evidence of PW1 and PW2 reveals that a torch light was shone at their faces hence they could not identify the armed robbers but the evidence of PW3 and PW4 as to how the Accused was apprehend by the police was very clear and unshaken even under cross examination. It was well established by

PW3 and PW4 that the Accused was arrested at Abraka upon a phone call made to him by Goodluck in whose possession Exhibit 'C' which was robbed from PW2 on the 21/10/2013 was recovered. Based on the information the police got from the said Goodluck, the Accused was arrested and he made Exhibit 'A' to the police wherein he admitted he sold Exhibit 'C' to a certain person in Abraka. It is clear that the Accused was one of the robbers who robbed PW1 and PW2 on the 21/10/2013 and I so hold that his identity is not in issue nor in doubt.

See:- **SADIKU V. STATE (2003) LPELR 20588 SC**

I also want to draw the attention of defence counsel to his written address, and state that the facts contained therein, that PW1 was reading his PDF on his laptop and someone walked into his room to rob them, as well as the evidence of PW3 summarized by him that PW3 got a whatsapp chat from Exhibit 'C' are at variance with the evidence given by the witnesses. A perusal at Court's record in Vol.1446 folio 86, 87, and 438 reveals that, the evidence of the witnesses are different from that summarized by counsel.

It is trite that written address of counsel no matter how beautifully written cannot take the place of evidence.

See:- **EZE V. STATE (2015) LPELR 24556 CA**

Learned defence counsel also submitted that, PW3 contradicted herself in her oral testimony in Court and in her statement to the police. That she admitted all she told the Court was not contained in her statement to the Police. That the person she was chatting with is Goodluck who is different from the Accused.

The Prosecution was also silent on this issue. The statement of PW3 to the police was not tendered or admitted as Exhibit in this case to contradict her, hence the court would not know if there are contradictions, so it can act on it, since it is not before it. Counsel did not cross examine the witness to know if it was Goodluck or the Accused that she was chatting with.

Also from the record of Court in Vol. 1446 folio 440 it is clear that what PW3 admitted in Court was and I quote "majority of what I told Court are contained in

my statement” this is different from what learned defence counsel summarized. It is settled law as earlier stated that counsel’s address cannot take the place of evidence.

See:- **EZE V. STATE (Supra)**

On the issue of the Black berry pin not made available to Court for scrutiny. It is common knowledge and the Court takes judicial notice of the fact that, a Black berry pin is peculiar to only one Black berry phone. What I mean is that two Black berry phones can’t have the same pin number.

On the issued raised by learned defence counsel that PW4 did not investigate the matter and all he told Court was hearsay. On his part Prosecuting counsel replied that PW4 had told Court that himself and his team carried out investigation on the matter, that he visited the scene of crime and Exhibit ‘A’ was recorded in his presence. I agree with the Prosecuting counsel on this issue, as it flowed from PW4 in his evidence that members of his team who went to Abraka to arrest the Accused brought him to the police station where the statement of the Accused (Exhibit ‘A’) was recorded in his presence and himself and his team went to the Accused father’s house together with the Accused where Exhibit ‘B’ was recovered. He also told Court that, after the robbery incident on the 21/10/2013 PW1 and PW2 reported the matter at Ologbo Police Station that himself, and other members of his team went to the scene of crime to carry out their investigations but nothing incriminating was recovered. Learned defence counsel urged Court to treat the evidence of PW4 as hearsay evidence. In line with Provisions of Section 39 of the Evidence Act 2011 as earlier set out in this Judgment. With due respect to the learned defence counsel section 39 of the Evidence Act does not apply in the context it was used by him, as section 39 of the Evidence Act provides for the admissibility of certain statements, whether written or oral of facts in issue or relevant facts made by a person who cannot be reached.

The provision of section 39 of the Evidence Act makes the evidence of PW4 admissible especially as the team leader Inspector Baka Musa, who led PW4 and

other members of the team in the investigation, recovery of Exhibit and arrest of the Accused is dead.

Learned defence counsel also raised an issue that the Prosecution failed to link the Accused to the crime, on their part the Prosecuting counsel replied that the Accused admitted he committed the offence in Exhibit 'A' and that links him to the commission of the crime. I also agree with the Prosecuting counsel on this issue, as Exhibit 'A' was very narrative wherein the Accused explained his involvement in the robbery incident and Exhibit 'A' haven passed the Six ways test provided by law was duly admitted. Also, the circumstances leading to his arrest as well as Exhibits recovered from him point irresistibly to the guilt of the Accused and sufficiently links him to the crime.

See:-

OMOGODO V. THE STATE
(1981) 5SC Pg. 5.

On the issue raised by Learned defence counsel that the Accused was arrested and charged alone and that the Prosecution failed to prove the elements of the offence of conspiracy, Prosecuting counsel replied that conspiracy is the agreement between two or more persons to do something which is unlawful and is best proved by circumstantial evidence because it is hatched in the secret, that from the evidence led by them (Prosecution) through it's witnesses it can be inferred that the Accused conspired with others at large to rob PW1 and PW2. That the Prosecution has proved the offences of conspiracy to commit armed robbery and armed robbery.

Conspiracy is proved once the criminal desire is common to all the conspirators.

From the facts contained in Exhibit 'A' which has been duly admitted and formed part of the Prosecution's case, it is obvious that the Accused and two others now at large conspired amongst themselves to rob PW1 and PW2.

Let me X-ray the counts one after the other. On count one, the Accused is charged for the offence of conspiracy to wit; armed robbery. It is alleged that the

Accused conspired with others now at large on the 21/10/2013 in Ologbo to commit armed robbery contrary to section 6(b) and punishable under section 1(2)(a) of the robbery and firearms (Special Provision) Act.

For the Prosecution to succeed in a charge of conspiracy to commit armed robbery, it must prove beyond reasonable doubt the following:-

- (a) That there was an agreement or confederacy between the Accused and others to commit the offence of robbery.
- (b) That in furtherance of the agreement or confederacy, the Accused took part in the commission of the offence of robbery.
- (c) That the robbery was an armed robbery.

See:- **USUFU V. STATE (2008) ALL FWLR (Pt.405) 1731 @ 1748.**

It is trite that proof of agreement to commit an offence is sufficient proof of conspiracy.

See:- **AFOLAHAN V. STATE (2012) LPELR – 7963 C.A.**

It is a settled principle of law that a charge of conspiracy can be proved either by leading direct evidence in proof of the common criminal intention or it can be inferred from the commission of the substantive offence which in this case is armed robbery.

See:- **THE STATE V. SALAWU (2011) LPELR – 8252 SC.**

From the evidence of PW1 in Court, where he stated thus:-

“The robber took my friend to my sitting room, it was at that stage I realized that the robbers were more than one” and the contents of Exhibit ‘A’ where the Accused admitted and I quote “on Sunday been (sic) 20/10/2013 at about 2000 hours the three of us met in my father’s house at the above address where we perfected our plans, when it was 0000 hours, all of us went out, I took battle axe, Giwa took a cutlass while Harrison followed with empty hand. We arrived at a house near Waynos Hotel, Giwa and I forcefully bursted the door opened with our foots and we

gained entry into the house.” The only inference the Court can draw is that the Accused and two others now at large conspired and robbed PW1 and PW2 of their properties as contained in count one. I therefore find him guilty on count one.

I shall examine count two and three together.

PW1 and PW2 gave evidence before this Court, they narrated how they were robbed and listed their properties which were robbed by the robbers on the 21/10/2013. The Accused in Exhibit ‘A’ also gave a narrative as to how himself and two others robbed PW1 and PW2 of their belongings which he listed in Exhibit ‘A’. The Black berry phone robbed from PW2 was recovered from the person whom the Accused sold it to which led to his arrest and the laptop (Exhibit ‘D’) which PW1 told Court was robbed from him on the 21/10/2013, which the Accused also referred to in Exhibit ‘A’ was recovered from him.

Although PW1 and PW2 did not tender receipts to prove ownership of the items robbed from them, counsel to the Accused was in Court when PW1 and PW2 gave evidence concerning the items robbed he did not cross examine them to debunk their evidence, neither did he call for the receipts of the items.

It is trite that a party who had the opportunity to cross examine the other party but failed to do so has waived his right. Since the defence failed to cross examine PW1 and PW2 in this regard he is deemed to have waived his right and I so hold. It is trite that a trial Judge is to decide the effect of failure to cross examine a witness on a particular matter, on the evidence of a witness, having regard to the circumstances of the case.

See:- **JOEL IGHALO V. THE STATE (2013) LPELR 20762 CA**

Though the receipts were not tendered, the Accused in Exhibit “A” which was duly admitted, admitted that they robbed the victims of their laptops, satellite decoder and phones.

The evidence of PW1 and PW2 which corroborates the contents of Exhibit ‘A’ to a large extent wherein the Accused admitted that PW1 and PW2 were robbed by

himself and two others now at large. This points irresistibly to the guilt of the Accused, I therefore find him guilty in counts two and three.

Now on count four, the Accused and others now at large are charged for robbing one Ifeanyi Dominic of his Nokia handset C1 and Forty Thousand Naira. The said Ifeanyi Dominic did not come to Court to testify, the Prosecution did not give reasons as to why he was not called to give evidence in proof of this count. Ifeanyi Dominic is a vital witness whose evidence would have helped the Court to decide count four one way or the other, the Prosecution is expected to lead credible evidence to prove each count beyond reasonable doubt and any count not proved must fail. I therefore hold that count four of the charge fails, the Accused is discharged and acquitted on this count.

Having evaluated the evidence of the Prosecution and that of the defence, I come to the conclusion that the Prosecution has proved its case beyond reasonable doubt that on the 21/10/2013 the Accused and others now at large at midnight forced their way into the house of PW1 where they robbed PW1 and PW2 of their phones, laptop, satellite decoder and money while armed with cutlass. That PW3 a sister to PW2 had a chat with one Goodluck who bought the phone from the Accused. The police used the said Goodluck to lure the Accused to come and collect his balance money and he was arrested. Upon his arrest he made confessional statement (Exhibit "A") wherein he confessed to the crime. I believe the evidence of the Prosecution witnesses. It is my view that it has sufficiently linked the Accused to the commission of the crime especially as they were corroborated by the confessional statement of the Accused which was duly admitted. I do not believe the defence of the Accused as I earlier said, it is an afterthought, I accept the version of the prosecution witnesses.

From the foregoing I find you, ThankGod Markson Udomiju guilty in count one for the offence of conspiracy to wit armed robbery contrary to section 6(b) and punishable under section 1(2)(a) of the robbery and firearms (Special Provisions) Act 2004.

I also find you guilty in count two for the offence of armed robbery, that you robbed one Kabakwu Samuel an offence punishable under Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act 2004.

Also I find you guilty in count three for the offence of armed robbery, that you robbed one Obose John an offence punishable under section 1(2)(a) of the robbery and firearms (Special Provisions) Act 2004.

As I earlier said, the Accused is discharged and acquitted on count four for the offence of armed robbery against one Ifeanyi Dominic who did not testify.

I therefore convict you accordingly. Since I have found you ThankGod Markson Udomiju guilty of the offence of armed robbery which carries the highest punishment known to law, Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act 2004 does not give the Court any discretionary power.

By virtue of section 402 (2) of the Edo State Administration of Criminal Justice Law 2016, the sentence of this Court upon you ThankGod Markson Udomiju, is that you shall be hanged by the neck till you be dead.

May God Almighty have mercy on your soul.

ORDER AS TO EXHIBITS:

Blackberry Phone (Exhibit C), laptop (Exhibit D), and Laptop charger (Exhibit D1) to be returned to the victims.

APPEARANCES:

A. O. Aigbavoa Esq. and I. I. Omokhodion Esq. for the State

Q. C. Osawe-Odeh holds A. Onochie's brief for the Accused.

HON. JUSTICE R. IRELE-IFIJEH (MRS.)
(J U D G E)
20/07/18