IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

BEFORE HIS LORDSHIP: THE HON. JUSTICE PETER O. AFFEN

THURSDAY, SEPTEMBER 29, 2016

CHARGE NO: FCT/HC/CR/74/2013

BETWEEN

COMMISSIONER OF POLICE ... ... PROSECUTION

AND

FREDRICK DANIEL ... ... DEFENDANT

J U D G M E N T

SEPTEMBER 22, 2013 was no ordinary day. At least, for *Mr Jonas Uche Apollos,* a patent medicine dealer at Dape 2 [also known as Angwan Cement]: a settlement at Life Camp Extension within Federal Capital Teritory, Abuja. A robbery incident occurred. It was said to be an armed robbery. *Mr Jonas Uche Apollos* was attending to customers in the evening when he was robbed of money and other valuables at gun point. The Defendant, *Fredrick Daniel* is alleged to have taken part in the armed robbery. He was arraigned on a four (4) count charge: two (2) counts of armed robbery, and one count apiece of conspiracy to commit armed robbery and unlawful possession of firearms. The Defendant pleaded *'Not Guilty'* to all the counts of the charge, thereby setting the stage for the Prosecution to discharge the non-shifting burden of establishing his guilt beyond reasonable doubt. The specifics of the charges preferred against the Defendant are as follows:

COUNT ONE:

That you Fredrick Daniel 'Male' 23 years of Aso Panda Mararaba Nasarawa State and one other now at large on or about the 22/09/2013 at Life Camp Extension within FCT Abuja judicial Division, while fully armed with a prohibited firearm locally made pistol you conspired among yourselves to rob Mr Jonas Uche 'Male' you thereby committed an offence contrary to Section 6(b) and punishable under Section 1(2)(b) of Robbery and Firearms (Special Provisions) Act, Laws of the Federation of Nigeria, 2004.

COUNT TWO

That you Fredrick Daniel 'Male' 23 years of Aso Panda Mararaba Nasarawa State and one other now at large on or about the 22/09/2013 at Life Camp Extension within FCT Abuja judicial Division, while fully armed with a prohibited firearm locally made pistol you robbed Mr. Jonas Uche Male a cash sum of One Hundred and Sixty-Five Thousand Naira (₦165,000.00) you thereby committed an offence punishable under Section 1(2)(a) of Robbery and Firearms (Special Provisions) Act, Laws of the Federation of Nigeria, 2004.

COUNT THREE

That you Fredrick Daniel 'Male' 23 years of Aso Panda Mararaba Nasarawa State and one other now at large on or about the 22/09/2013 at Life Camp with a prohibited fire arm locally made pistol you robbed Mr. Jonas Uche of mobile handset (phones) belonging to different persons valued at about Two Hundred and Fifty Thousand Naira, you thereby committed an offence punishable under section 1(2)(a) of Robbery and Firearms (Special Provisions) Act, Laws of the Federation of Nigeria, 2004.

COUNT FOUR

That you Fredrick Daniel 'Male' 23 years of Aso Panda Mararaba Nasarawa State and one other now at large on or about the

High Court of Justice FCT-Abuja
CERTIFIED TRUE COPY
Name: S. SHEHU
Rank: PRI
Sign.....Date.....

22/09/2013 at Life Camp Extension within FCT Abuja Judicial Division you were found in an unlawful possession of firearm locally made pistol and you thereby committed an offence punishable under section 3 of Robbery and Firearms (Special Provisions) Act, Laws of the Federation of Nigeria, 2004.

The Prosecution called five (5) witnesses and tendered Exhibits P1 – P5 in a frantic bid to demonstrate the Defendant's guilt. Exhibit P1 is the Defendant's extra-judicial statement dated 22/9/13; Exhibit P2 is a locally made pistol; Exhibit P3 is a black-striped (Pierre Cardin) jacket; Exhibit P4 is a black HP laptop bag; whilst Exhibit P5 is the Defendant's extra-judicial statement dated 24/9/13. The Defendant testified in his own defence and called one other witness.

The PW1, *Jonas Uche Apollos,* stated that the Defendant and *Jennifer Apollos* [who is his younger sister] are well known to him; and that he was in his shop at Dape 2 (Angwan Cement) on 22/9/13 at about 7:00 p.m. when he turned on his generator in preparation for the evening sales and customers started trickling in; that two boys also came in and picked up video disc/cassette and pretended as if they were bringing out money from their bag, but to his utmost surprise, both of them brought out pistols whilst one other person locked the door of the passage leading to the shop; that the boys ordered him to lie down under the table as they took his wallet, opened his drawer and made away with ₦65,000 and seven (7) telephone handsets, after which one of them left the shop and the other boy was also about to leave but asked for his key and he (PW1) told him the key was on the table; that as the boy was trying to get the key and no longer pointing the gun at his forehead, he plucked up courage and held the boy by his jacket, whereupon struggling ensued and his sister [*Jennifer Appolos*] started shouting:

thief! thief!; that two other boys came to the aid of the robber he was struggling with and started hitting him with a stick and plastic chair; that he somehow missed his step and was dragged to the entrance of the shop where the boy he was struggling with eventually eased himself out of the jacket and escaped; and that as he was about to pick up the jacket to see if the stolen items were inside, the Defendant [whom he recognised as someone who had earlier patronised him] picked up the jacket and attempted to run but he caught up with him and queried why he did that, at which point other people came out and were shouting: *thief! thief!!* The PW1 testified further that he held on to the Defendant whilst some neighbours [whose names he could not recall] invited the Police and they were taken to the Police Station at Angwan Cement where he made a statement; that the case was transferred to Life Camp Police Station where he made another statement, before the matter was subsequently transferred to SARS where he made a third statement.

Under cross examination by *Mrs G. U. Gbadume* of counsel for the Defendant, the PW1 stated that he holds a school certificate and runs a patent medicine shop. He maintained that the armed robbery took place at about 7.00 p.m.; that he held on to the Defendant for not quite long before people gathered to help him; and that he was holding the jacket when the robber eased himself out of it whereupon he dropped the jacket on the ground in front of his shop from where the Defendant picked it up. He conceded that the robbers were not wearing masks, and the Defendant was not one of the boys who came into his shop and pointed gun at him, nor was he among those who later hit him with stick and plastic chair; and that group of boys he saw outside the shop neither took to their heels nor offered any assistance to the robber he was struggling with. The PW1 maintained that both the jacket and the

bag were black in colour; that his younger sister, *Jennifer* was with him in the shop when the robbery took place; that seven (7) telephone handsets were stolen from him; and that he held on to the accused person before others came to assist.

The PW2, *Jennifer Appolos* stated that she is a hairstylist; that *Jonas Uche Appolos* (PW1) is her older brother and that she knew the accused person; that on her way to her brother's shop at Angwan Cement to give him food on 22/9/13, she saw eight (8) young boys including the Defendant under a tree close to the shop; that on getting to the shop, she saw customers and decided to stay back; that two (2) boys came into the shop, went straight to the video cassette/disc section and picked one which they brought to her brother to test-play but he told them he was busy and that they should do it themselves; that the boys stayed behind as her brother was attending to other customers and when he was done, he removed the video disc from the VCD player and gave it to them; that whilst they thought the boys were bringing out money to pay for the video disc, they brought out pistol instead; that one of the boys who was standing outside locked the door of the shop. She stated that the boys ordered them to lie down and asked her brother to bring out money and he gave them his wallet which contained money; and that they equally took money from the drawer as well as telephone handsets and packs of juice drinks. The PW2 could not remember the exact amount of money but stated they were still lying down when her brother shouted, *thief! thief!* and the robbers ran out but her brother succeeded in holding on to one of them; that they continued to shout but no one came to their rescue and one of the gang members came back and hit her brother with a plastic chair; that her brother then released the robber but his jacket fell down and a gun was found inside it; that the

Defendant picked up the jacket and people around queried him about where he was taking the jacket to; that her brother held on to the Defendant and people started beating him. She stated that when her father came to the scene, he prevailed on the crowd to stop beating the Defendant and requested that the Police should be invited; that the Police eventually came and took the accused to the Police Station; that they were asked to come to the Life Camp Police Station the following next day, which they did; and that the matter was subsequently transferred to SARS.

Under cross examination by *Mrs G. U. Gbadume,* the PW2 insisted that she counted the boys she saw under the tree and they were eight (8) in number, but the only person she knew amongst the boys was the Defendant. She stated that she was present in the shop when the armed robbery took place; that she and her brother complied with the robbers' command by lying down on the floor; and that it was not her brother but other people around who caught the Defendant and that he was taken to Life Camp Police Station the same day. The PW2 stated that the robbers cracked the gun and asked them to lie down but did not shoot her or her brother; and that no one came to their rescue when they shouted *thief!, thief!,* but one of the robbers came back. She identified her extra-judicial statement at Life Camp Police Station and denied the suggestion that she was not present when the robbery took place. Upon being confronted with her extra-judicial statement wherein she claimed to have seen four (4) boys under the tree, the PW2 insisted that she was a witness of truth.

The PW3 *Igwe Moses* is a Police Officer attached to Divisional Police Headquarters, Divisional Crime Bureau (DCB), Life Camp, Abuja. He

stated that he knew both *Jonas Uche Appolos* (PW1) and the Defendant; that at about 9:30 p.m. on 22/9/13, he was on night duty at DCB, Life Camp, Abuja when the PW1 reported a case of armed robbery and joint act against *Frederick Daniel* [i.e. the Defendant] at the counter; that the PW1 reported that he was robbed in his shop by a gang of armed robbers at about 8:00 p.m. that same day; and that in the course of the robbery, the PW1 held one of the robbers [whose name he did not mention] but they overpowered him and escaped, leaving behind a jacket containing a locally made pistol; that as he was running after the robber, the Defendant came from nowhere and picked up the jacket containing the pistol and was about to escape when PW1 held him and invited the Police through Police Distress Call; that the Defendant was arrested and brought to the Police Station and the matter referred to him for investigation. The PW3 stated that he recorded the statement of the Defendant under words of caution whilst the statement of PW1 was obtained voluntarily; that he later visited the crime scene with both parties and took them for DPO/DCO interview; and that one locally made pistol, one jacket containing the pistol and a black bag were recovered. He maintained that the Defendant confessed to him that one *Tupac* abandoned his bag and escaped with his own pistol; and that the case was subsequently transferred to FCT Police Command and referred to SARS. The PW3 identified the Defendant's extra judicial statement which he countersigned; as well as the locally made pistol, black jacket and bag he earlier talked about.

Cross-examined by *Mrs G. U. Gbadume* of counsel for the accused person, the PW3 stated that having been in the Police for 12 years, he is an experienced officer; that he recognised the Defendant who is charged with armed robbery; and that he recovered a black bag at the scene of

crime. He stated that he discovered in the course of investigation that four (4) boys robbed the complainant, but could not confirm if the accused was among them; that Tupac who is yet to be apprehended was one of the robbers; and that three (3) guns were used for the robbery.

The PW4, *Aminu Ali* is an Assistant Superintendent of Police with State CID, SARS Branch, F.C.T. Abuja. He stated that he knew *Cpl. Igwe Moses* (PW3) as well as the Defendant; that a case of armed robbery was transferred from Life Camp Division to State CID on 24/9/13; that the case file was brought along with the suspect and the exhibits, namely: one locally made pistol, a black bag, and one black jacket; that he recorded the statements of the complainant [PW1], the witnesses and that of the suspect; that the scene of crime was visited with the parties and the investigation pointed to a case of conspiracy and armed robbery; and that the exhibits were registered and the matter formally charged to court. The PW4 identified the Defendant's extra-judicial statement and the exhibits said to have been brought along with the accused to State CID, SARS Branch.

Under cross examination by *Mrs G. U. Gbadume* of counsel for the accused person, the PW4 stated that he is an experienced officer who has been with the Nigeria Police for a total of 30 years: 20 years with the State CID and 2 years at SARS; that he visited the scene of crime in September 2013 but could not recall the exact date; and that he heard of *Tupac* as one of the suspects in this case but does not know him. He insisted that the Defendant and *Tupac* were the two persons who robbed the complainant; and that although the Defendant did not enter the shop, he positioned himself outside. The PW4 conceded that *Tupac* is

needed for the just conclusion of this matter, and they are still looking for him.

At the close of the Prosecution's case, the Defence raised a no-case submission which was overruled by the court, whereupon the Defendant entered his defence.

Testifying for the Defence as DW1, *Lazze Ladan* stated that he is a hairstylist and lives at Angwan Cement, Life Camp Area, Abuja; that he was a professional footballer before he sustained injury; that he was coming out of his house on 22/9/13 when he saw the Defendant sitting in front of his former compound; that the Defendant informed him that he came to pay monthly contribution and was waiting for his brother; that they went to their band director, *Yohanna Yaoo*'s house to eat, but there was no food to eat, so they decided to go to a restaurant; that they saw a guy called *Tupac* on the way and exchanged greetings with him; and that after they had left *Tupac*, they heard people shouting *thief! thief!*, whereupon they then ran in different directions. He stated that the Defendant is more than a friend to him: they are like brothers as they lived in the same compound before he packed out; that the band director's house is opposite the scene of the robbery, and that they did not know that a robbery had taken place. The DW1 maintained that the Defendant was wearing a long-sleeved shirt with the sleeves folded; and that they did not enter the chemist that day and he did not see the Defendant pick up anything. He maintained that he saw people beating the Defendant when he came out of hiding, and was told they saw him (Fredrick) with a jacket; and that someone in the crowd slapped him when he insisted that the Defendant was not a thief. The DW1 stated that because of the crowd, he ran to inform the Police about what was happening and they came to the scene; that the complainant [PW1] is

like a friend to them and they normally go to his shop; and that when they met that day in front of his former compound, the Defendant showed him ₦15,000.00 which he said was his monthly contribution.

Under cross examination by the Learned Prosecuting Counsel, *P. A. Ogele, Esq.*, the DW1 stated that he has known the Defendant for over 10 years; and that he does not reside where the incident happened. He maintained that since he and the Defendant ran in opposite directions, he would not know what happened where the Defendant ran to; and that he only came out from where he was hiding to see/hear what had happened. He insisted that he was not arrested by the Police and would be surprised to hear that his friend [the Defendant] said he was arrested that very day. The DW1 maintained that his real name is *Lazze* but most people mistake it for a nickname; and that he did not make any statement when he reported the matter to the Police. He denied being present when *Tupac* hit the complainant (PW1) with a chair; and would be surprised to hear that the Defendant said he saw *Tupac* hit the complainant with a chair or that he saw one of the robbers drop the jacket the Defendant picked up. The DW1 could not recall how long he was in hiding after he and the Defendant ran in opposite directions but conceded that he would not know if the Defendant committed robbery after they parted. He maintained that when he came out from hiding and saw people beating the Defendant, he was told a jacket was picked up by the Defendant, but no one told him the content of the jacket. The DW1 stated that he would be surprised to learn that the jacket contained a gun; and that he made a statement at Life Camp Police Station.

The Defendant, *Frederick Daniel* (DW2) stated that he lives at Asobi Panda, Mararaba and that he is a laundryman; that his brother, *Gabriel*

Adamu who lives at Angwan Cement asked him to bring his contribution of ₦15,000 on 21/9/13 but he could not make it because he was busy; that his brother was not at home when he got there at about 7:00 pm on Sunday 22/9/16 as he had gone to work – his brother works as a chef in a hotel – so he sat outside to wait for him; that as he was waiting for his brother, he saw *Lazze* and they exchanged greetings; that *Lazze* said he was going to the house of their band director to eat and invited him to come along so that he could also greet the band director whom he had not seen for quite a long time; and that they met the band director at home but there was no food so he and *Lazze* decided to go to a restaurant. The Defendant stated that they met *Tupac* who was his former neighbour on the way, exchanged greetings with him and moved on; and that shortly afterwards, they then heard shouts of *thief! thief!,* with people running in different directions, so he (the Defendant) too ran in one direction; that he saw a crowd gathered and on getting there, he saw people touching a jacket on the ground; that he raised up the jacket and called *Uche* [PW1] but someone in the crowd slapped him, saying he was seen shaking hands with *Tupac* earlier, and other people started beating him at that point. He stated that he used to patronise *Uche* [PW1] who was his friend; and that the distance between his brother's house and the chemist is quite far. The Defendant insisted that he picked up the jacket in order to hand it over to *Uche;* and denied knowing that a robbery had just taken place or that there was anything inside the jacket he picked up. He stated that he was putting on a long-sleeved shirt which he folded; and that he used to live at Angwan Cement before he moved to Mararaba when his brother's wife relocated to the village and he took over her house.

Under cross examination by *P. A. Ogele, Esq.,* the Defendant denied having any relationship with *Tupac.* He maintained that he saw *Uche* [PW1] standing in the crowd gathered in front of his shop; and that he made statements at both Life Camp and State CID but did not write the statements by himself. The Defendant rejected the suggestion that he was standing with *Tupac* when *Tupac* hit the complainant [PW1] with a chair, insisting that he did not make any such statement. He maintained that he did not see anything inside the jacket he picked up, and still does not know what was inside the jacket. He equally maintained that he is not aware that his lawyer filed a bail application on his behalf. The Defendant confirmed *Daniel Jatau* as his father but stated that he would be surprised that his father deposed in an affidavit that he [Defendant] inadvertently picked up jacket containing a gun. He conceded that he does not habitually pick up whatever he sees on the ground; but stated that he would be surprised that what his father deposed is also contained in his statement at Life Camp Police Station. The Defendant, who could neither tell whether the Police and his father conspired to lie against him nor where *Tupac* was when the crowd was gathered, insisted that the crowd pounced on him because someone said he saw him shaking hands with *Tupac* earlier. He maintained that other people were present when *Uche* (PW1) was shouting, *thief! thief!;* and denied the suggestion that he picked up that particular jacket because he knew it belonged to one of his gang members, or that that he deliberately picked up the jacket in order to conceal the gun. The Defendant also denied knowing the whereabouts of *Tupac* or that himself, *Tupac* and others agreed to rob the complainant.

The Defendant's testimony brought the plenary trial to a close, and the parties filed and exchanged final written address pursuant to the orders

of this court, which addresses were adopted in open court by learned counsel on both sides of the divide on 25/4/16. The Defendant's final address and reply on points of law settled by *Mrs G. U. Gbadume* are dated 4/3/16 and 21/4/16 respectively, whilst the Prosecution's final address settled by *P. A. Ogele, Esq.* is dated 14/4/16. Save for differences in phraseology, the sole issue distilled for determination in the final addresses filed on behalf of the parties is whether the prosecution has established/proved its case beyond reasonable doubt.

Now, it is merely restating the obvious that our adversary criminal justice system is accusatorial in nature and substance, and every person charged with a criminal offence is presumed innocent until proved guilty. See ***s. 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).*** A necessary corollary of the presumption of innocence is that in a criminal trial such as the present, the burden is always on the prosecution to establish the guilt of the accused person beyond reasonable doubt. Quite unlike civil proceedings, this burden on the prosecution is static in a manner akin to the fabled constancy of the *'Northern Star'* and never shifts to the accused. It is if, and only if, the prosecution succeeds in proving the commission of a crime beyond reasonable doubt that the burden of establishing that reasonable doubt exists shifts to the accused. See ***ss. 135 and 137 of the Evidence Act 2011.*** The Prosecution has the onus of proving all the material ingredients of the offence(s) charged beyond reasonable doubt. See ***STATE v SADU [2001] 33 WRN 21 at 40.*** Where the prosecution fails to do so, the charge is not made out and the court is bound to record a verdict discharging and acquitting the accused. See *MAJEKODUNMI v THE NIGERIAN ARMY [2002] 31 WRN 138 at 147.* Also, if on the totality of the evidence adduced the court were left in a state of doubt

or uncertainty, the prosecution would have failed to discharge the onus of proof cast upon it by law and the accused would be entitled to an acquittal. See ***UKPE v STATE [2001] 18 WRN 84 at 105.*** However, in the words of the venerable *Lord Denning* in the case of ***MILLER v MINISTER OF PENSIONS (1947) 2 ALL E.R. 372:*** *"Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is [established] beyond reasonable doubt, but nothing short of that will suffice"*. See also ***AKALEZI v THE STATE [1993] 2 NWLR (PT. 273) 1*** and ***EBEINWE v STATE [2011] 1 MJSC 27.*** The three modes of evidential proof in a criminal trial such as the present are: (a) direct evidence of witnesses; (b) circumstantial evidence; and (c) the confessional statement voluntarily made by a criminal defendant. See ***OKUDO V THE STATE [2011] 3 NWLR (PT. 1234) 209 at 236, ADIO v THE STATE (1986) 5 S.C. 194 at 219-220, EMEKA v THE STATE [2002] 14 NWLR (PT. 734) 666*** and ***OLABODE ABIRIFON V THE STATE [2013] 13 NWLR (PT.1372) 587 at 596.*** Against the backdrop of the foregoing, the straightforward issue arising for determination is whether the prosecution has adduced sufficient, cogent, credible and compelling evidence to establish the charge against the accused person beyond reasonable doubt; and it is on this basis that we shall proceed presently to evaluate the evidence adduced which has already been set out *in extenso* hereinbefore.

For purposes of convenience and not on account of any reverse hierarchical ordering, I will begin with **Count Four** which borders on

unlawful possession of firearm. By ***s. 3(1)*** of the ***Robbery and Firearms (Special Provisions) Act, Cap. R11, Laws of the Federation of Nigeria, 2004*** *"[a]ny person having a firearm in his possession or under his control in contravention of the Firearms Act or any order made thereunder shall be guilty of an offence under this Act and shall upon conviction under this Act be sentenced to a fine of Twenty Thousand Naira or to imprisonment for a period of not less than ten years or to both".* In order to prove the offence of unlawful possession of firearms, the law requires the prosecution to establish that: (i) the defendant was found in possession of firearms; (ii) the firearms were within the meaning of the Act; and (iii) the defendant had no license to possess the firearms. See ***STATE v OLADOTUN (2011) Vol. 199 LRCN 66, BELLO OKASHETU v THE STATE (2016) LPELR-40611(SC).*** The offence of unlawful possession of firearms is one of strict liability which does not require proof of *mens rea* in conventional criminal jurisprudence. The gravamen of the offence is possession, and once it is shown that a person has knowingly taken possession of an article which falls within the definition of firearm and retains control of it, the offence is made out. Insofar as the defendant did not come into possession of the weapon pursuant to the emphatic dictates of the Act or any order made thereunder, it is of no moment that his intentions were entirely lawful. A person under constant threat is expected to have recourse to the police or other law enforcing agency, and it is not necessarily a reasonable excuse that the weapon is carried only for self-defence. See ***Smith & Hogan's Criminal Law, 10th Edn., (2002), pp. 461-462*** and the case of ***STEPHEN v STATE (2008) LPELR-8360(CA).***

It is forcefully submitted on behalf of the Prosecution that since the evidence adduced shows that the Defendant was caught red-handed

when he picked up the jacket containing the gun, and the Defendant admitted in his extra-judicial statements that he actually picked up a jacket which contained a gun belonging to one of the robbers after witnessing the robbery operation, and no objection was taken to the admissibility of the said statement, the court is empowered to convict the Defendant without further assurance. Reliance is placed on the following cases: ***SEGUN AJIBADE v THE STATE (2013) MRSCJ VOL. 14 pg. 135, ADENIYI ADEKOYA v THE STATE (2012) 7 NCC pg 6; DEMO OSENI v THE STATE (2012) 7 NCC page 137;*** and ***MANU GALADIMA v THE STATE (2013) MRSCJ Vol. 14 at page 80.***

On behalf of the Defendant, it is contended that the Defendant cannot be said to have had possession of the locally made pistol [Exhibit P3] because there is clear evidence that the Defendant was not one of those who robbed the PW1 neither was Exhibit P3 found on his person: he merely picked up a jacket belonging to one of the robbers with whom the PW1 was struggling in good faith for the purpose of handing it over to the PW1 who is well known to him; and that the Defendant's arrest was based on mere suspicion and/or for being present at the scene of crime, whereas it is trite law that mere suspicion does not amount to guilt, citing *THE STATE v JOHN OGBUBUNJO & ANOR (2006) VOL. 5 LRCNCC 406 at 408, EME ORJI v THE STATE (2010) VOL. 8 LRCN,* just as mere presence at the scene of crime without more will not amount to being a participant in a crime, citing *POSU & ANOR v THE STATE (2011) VOL. 193 LRCN 52 at 56*

Now, the evidence adduced by the Prosecution witnesses, [notably PW1 and PW2] is that the Defendant picked up a black-striped jacket [Exhibit P3] belonging to the robber with whom the PW1 was struggling; and

that upon discovering that a locally made pistol (Exhibit P2] was inside the jacket, those around queried why the Defendant picked up the jacket and started beating him, whilst the PW1 held on to him until the police eventually came and took him to the Police Station. The Defendant conceded that he picked up the jacket but insisted that he did know it contained a gun and that he picked up the jacket with a view to handing it over to the PW1 who is well known to him. The point has already been made that proof of *mens rea* is not required in order for the Prosecution to secure conviction for the offence of illegal possession of firearm. But the Prosecution's case, as I understand it, is not that the jacket and/or the locally made pistol belong to the Defendant, but that the Defendant picked up a jacket belonging to one of the robbers with whom the PW1 was struggling and a locally made pistol was found inside the jacket so picked up by him. Can it then be said that the locally made pistol was in the possession or under the control of the Defendant? I do not think so. Possession is said to be *'nine-tenths of the law.* In ***STATE v OLADOTUN [2011] ALL FWLR (PT. 586) 399 at 412,*** possession was judicially defined as *"something you have with you at a particular time".* According to *Lord Scarman* in ***R v BOYESAN [1892] 2 ALL ER 161 at 163 (HL),*** *'[p]ossession is a deceptively simple concept. It denotes physical control or custody of a thing plus knowledge that you have it in your control. You may possess a thing without knowing or comprehending its nature; but you do not possess it unless you know you have it'.* See ***Words and Phrases Legally Defined, Volume 3, p. 400.*** Possession implies the exercise of dominion over property; the right under which one may exercise control over something to the exclusion of all others: the continuing exercise of a claim to the exclusive use of a material object; something that a person owns or controls. See *Black's Law Dictionary, 8th Ed., p. 1201* and the case of *OKE v OKE [2006] 17 NWLR (PT.*

1008) 242. Can the Defendant be said to *'have the locally made pistol with him'* or *'to exercise dominion or control over the pistol'* by merely picking up a jacket belonging to another which contained the pistol? Again, I do not think so.

Since the Defendant did not pick up the locally made pistol *per se* but a jacket which was found to contain the pistol, the prosecution ought to demonstrate by credible evidence that the Defendant knew that a pistol was inside the jacket at the time he picked it. As stated by *Lord Scarman* in ***R v BOYESAN supra,*** *'you do not possess it unless you know you have it'*. Quite clearly, merely picking up a jacket belonging to another which is found to contain a prohibited firearm does not constitute *'having a firearm in his possession or under his control'* within the meaning and intendment of the *Robbery and Firearms (Special Provisions) Act.* The necessary corollary is that the Prosecution has failed to prove an essential ingredient of the offence of unlawful possession of firearm, and Count Four of the charge remains unsubstantiated.

The charge in **Count One** is that the Defendant conspired with one other now at large, while fully armed with a prohibited firearm locally made pistol, to rob *Mr Jonas Uche* (PW1) on or about the 22/09/2013 contrary to s. 6(b) and punishable under s. 1(2)(b) of the *Robbery and Firearms (Special Provisions) Act, Cap. R11, Laws of the Federation of Nigeria,* 2004. The inchoate offence of conspiracy consists not merely in the *intention* of two or more, but in the *agreement* of two (not being a husband and wife) or more persons to do an unlawful act or to do a lawful act by an unlawful means. So long as design rests in intention alone, it is not indictable; but when two or more persons agree to carry their design into effect, the very plot is an act in itself punishable if it is

for a criminal object or for the use of criminal means. See ***MAJEKODUNMI v R (1952) 14 WACA 64.*** The gravamen of the offence of conspiracy lies not in the doing of the act or effectuating of the purpose for which the conspiracy is formed, but in the forming of the scheme or agreement between the parties. The actual agreement alone constitutes the offence and it is not necessary to prove that the criminal act has in fact been consummated. Owing to its very nature, the offence of conspiracy is seldom proved by direct evidence but by circumstantial evidence and inference deducible from certain proved acts. See ***OBIAKOR v STATE (2002) 6 SC (PT II) 33 at 40; EGUNJOBI v FRN [2001] 53 WRN 20 at 54*** and ***STATE v OSOBA [2004] 21 WRN 113.*** Since the offence of conspiracy consists in the meeting of minds for a criminal purpose whereby the minds proceed from a secret intention to the overt act of mutual consultation and agreement, the offence can be proved through inferences drawn from the surrounding circumstances. The circumstantial evidence on which a successful conviction for conspiracy can be predicated is evidence, not of the fact in issue but of other facts from which the fact in issue can be inferred. The evidence in this connection must be of such quality that leads compellingly or irresistibly to an inference of the defendant's guilt. See ***ODUNEYE v STATE (2001) 1 SC (PT 1) 1 at 7.*** The point to underscore here is that conspiracy is an offence of itself, quite distinct and separate from the substantive offence. Indeed, in a trial for conspiracy and a substantive offence, it is not unusual for a court to discharge an accused for the substantive offence but convict him for conspiracy. This is so because the ingredients for the offences are different and the actual commission of the substantive offence is not necessary to ground a conviction for conspiracy. See ***OBIAKOR v STATE supra at 39*** and ***ATANO v A-G BENDEL STATE [1988] 2 NWLR (PT 75) 201 at 226 - 227.***

The Defendant, *Frederick Daniel* is charged with having conspired with ONE other person who is at large to rob *Jonas Uche* [PW1] on 22/9/13 at Angwa Cement, Life Camp Extension, Abuja. It occurs to me that the Prosecution is required to establish a meeting of minds between the Defendant and that other person, which necessarily requires proof by credible evidence that the Defendant and that other person were associated for the purpose of committing armed robbery or that there is an overt act or conduct on the part of the Defendant from which the existence of that common purpose can be inferred. But the PW1 [the victim of the armed robbery] conceded under cross examination that the Defendant was neither one of those who came into his shop to rob him at gun point nor was he one of the two boys who subsequently came to hit him with stick and plastic chair when he was struggling with one of the robbers. The PW3 also testified under cross examination that he could not tell if the Defendant was among the four (4) robbers and that three (3) guns were used for the robbery, whereas the evidence of PW1 is that the two boys who came into his shop under the pretext of buying video disc/cassette each pulled out a gun [which suggests that two guns were used] and that it was the gun belonging to one of these two boys with whom he was struggling that was found inside the jacket picked up by the Defendant. On his part, the PW4 stated that it was only two (2) persons [i.e. the Defendant and Tupac] that robbed the complainant, and that whilst Tupac entered the shop, the Defendant positioned himself outside. There are obvious inconsistencies in the evidence put forward by the Prosecution and it seems to me incongruous that whereas the evidence points to four persons who were actively involved in the robbery, the Defendant is alleged to have conspired with only one other person who is at large to commit armed robbery. Again, the PW1 stated that there was a group of boys outside the shop when he ran after the

robber who broke free from his grip but these boys neither came to the aid of the robber nor did they run away. The obvious implication of this piece of evidence is that even if it is assumed *arguendo* that the Defendant was among the group of boys outside the shop to whom the PW1 referred, there is no overt action or conduct on the part of the Defendant from which the existence of a common intention or purpose between him and only one other person [who is said to be at large] can be inferred.

What is more, the PW2 insisted under cross examination by *Mrs Gbadume* that she saw eight (8) boys under a tree on the way to her brother's shop because she counted them. But not only is this piece of evidence at variance with her extra-judicial statement to the Police (which is in the case file before me) wherein she wrote in her own handwriting that she saw four (4) boys under the tree, which renders her testimonial evidence manifestly unreliable, the PW2 did not say the two boys who ordered them to lie down on the floor and robbed her brother of money and other valuables with the aid of 'pistol' were among the boys she saw under the tree.

The point has already been made that because the inchoate offence of conspiracy is hardly capable of direct proof, it is a matter of inference from certain criminal acts of the parties done in common between them. See ***NJOVENS v STATE (1973) NNLR 76.*** In the instant case however, the only thing the Defendant is alleged to have done is that he picked up a jacket belonging to the robber with whom the PW1 was struggling, which jacket contained a gun. I find no positive criminal act on the part of the Defendant in furtherance of the armed robbery from which the existence of a common intent or purpose between him and only one of

the robbers can be inferred. The Defendant's act of picking up the jacket belonging to the robber who escaped from the grip of the PW1 [which jacket was found to contain a locally made pistol] certainly does not seem to me to constitute an overt criminal act done in common between him and ONE of the robbers from which a common purpose or intention between them can be inferred. Quite clearly therefore, the evidence adduced by the Prosecution does not point irresistibly to any scheme, meeting of minds or agreement between the Defendant and any other person(s); and I cannot but find and hold that the inchoate offence of conspiracy to commit armed robbery alleged in Count Two has not been made out.

Let us shift attention presently to **Counts Two & Three** which deal with the substantive offence of armed robbery. In order to secure conviction for armed robbery, the prosecution is obligated to prove that: (i) there was a robbery or series of robberies (ii) the defendant participated in the robbery; and (iii) the defendant was armed with an offensive weapon or in the company of those so armed. See *OLAYINKA v STATE [2007] 9 NWLR (PT. 1040) 561, NWACHUKWU v STATE [1985] 3 NWLR (PT. 11) 218* and *SUBERU v STATE [2010] 8 NWLR (PT. 1197) 586.* The three modes of evidential proof by which the Prosecution may establish the guilt of a criminal defendant are set out hereinbefore. Since the Defendant's extra-judicial statements [i.e. Exhibits P1 and P5] are not confessional statements *per se*, the prosecution must necessarily rely on direct or circumstantial evidence [or both] in order to prove the Defendant's guilt. Judging by the evidence adduced before me (as reproduced above), there is little or no doubt that an armed robbery incident occurred at the PW1's patent medicine store on 22/9/13. But the crucial question crying for resolution is whether the evidence put

forward by the prosecution points irresistibly, either directly or circumstantially, to the Defendant being a party of the robbery.

Now, it would seem that there is no evidence pointing directly to the Defendant's involvement or participation in the armed robbery. Neither the PW1 nor PW2 [who were the victims/eyewitnesses of the armed robbery] identified the Defendant as one of the two boys who robbed them at gun point. As a matter of fact, the PW1 stated that the Defendant was not one of the two boys who came into his shop under the pretext purchasing video disc/cassette but ended up pulling out guns with which they robbed him of money and other valuables; and that he was also not one of those who came to hit him with stick and plastic chair when he was struggling with one of the robbers. The evidence of PW3 and PW4 [who are police officers who came into the picture *ex post facto*] is not quite helpful either. Whereas the PW3 testified that his investigation revealed that four (4) people robbed the PW1 in his shop but could not confirm if the Defendant was among the robbers, the PW4 was emphatic that *Tupac* and the Defendant were the two persons who robbed the PW1, although the Defendant merely positioned himself outside and did not enter the shop. Apart from the fact that the PW4 [who merely came into the picture *ex post facto* sequel to the transfer of the case from Life Camp Police Station to SARS on 24/9/13] did not explain the basis for his conviction, his evidence is inconsistent with that of both PW1 [who was the victim of the robbery] and PW3 [who is his fellow police officer].

It is forcefully contended on behalf of the Prosecution that the Defendant, in agreement with others now at large, robbed PW1 at gun point; and that the facts taken together disclose the active role the

Defendant played in the fulfilment of the robbery operation. The learned prosecuting counsel, *P. A. Ogele, Esq.* harped on the Defendant's extra-judicial statement dated 24/9/13 wherein the Defendant is said to have admitted that he was standing outside the shop with *Tupac* [who is his friend/former neighbour] when the robbery operation was underway inside the shop, and that not only was the Defendant present when *Tupac* hit the PW1 with a chair, he equally saw one of the robbers ease himself out of PW1's grip leaving his jacket behind in the process, yet the Defendant *"rushed to the spot and picked up the jacket"*. The Learned Prosecuting Counsel has therefore urged the court to discountenance the Defendant's testimonial evidence [to the effect that he picked up the jacket with a view to handing it over to the PW1 who is well known to him] as an afterthought and a deliberate attempt to mislead the court as no such reason or excuse was proffered in his two extra-judicial statements [Exhibits P1 and P5] and other court processes filed on his behalf in these proceedings.

Attractive as the above argument may seem at first blush, I am neither enthused nor seduced by it. My disposition towards the argument put forward by the prosecution is informed by the well settled proposition of law that in the absence of any positive evidence pointing to any prior or contemporaneous action(s) taken by the Defendant to aid or abet the commission of the armed robbery [as held in the case of ***OBASI ONYEYE v THE STATE (2012) 7 NCC 304 at 308 & 311*** cited by learned prosecuting counsel], his mere presence at the scene of crime does not render him a *participes criminis* [i.e. participant in the crime]. See ***EME ORJI v THE STATE [2008] 10 NWLR (PT.1094) 31, YAKUBU MOHAMMED v THE STATE (1980) FNR 155*** and ***ADETOKUNBO OGUNLANA v THE STATE (1995) 5 SCNJ 189.***

The PW1 conceded that the Defendant was not one those who robbed him at gun point inside his shop, and that the Defendant was also not one of those who hit him with stick and plastic chair when he was struggling with one of the robbers. Although the PW1 stated that someone shut the door of the passage leading to his shop when the two robbers were operating inside, he did not positively identify the Defendant as that person. It bears pointing out however that the Defendant's testimonial evidence [to the effect that 'he did not find anything inside the jacket he picked up and still does not know what was inside the jacket'] is in conflict with his extra-judicial statement in Exhibit P1 wherein he stated: *"...that is how I pick (sic) up the suite (sic) and I dicovered (sic) therise (sic) local (sic) made pistol inside the suite (sic)..."*. Nevertheless, the only nexus the Prosecution seeks to establish between Defendant and the robbery is that he picked up a jacket belonging to one of the armed robbers who broke free from the grip of the PW1, which jacket was found to contain a locally made pistol [Exhibit P2].

This seems to me a rather tenuous nexus, and it is certainly not a score in favour of the prosecution. Whilst picking up a jacket left behind by a robber fleeing from the scene of crime may be ill-advised, or even downright foolish, I am far from being persuaded that the act of picking up a jacket found to contain a locally made pistol without more in the circumstances that have come to light in these proceedings constitutes a valid basis for a court of law, which is also a court of equity, to infer that the Defendant was a party to the armed robbery. Quite the contrary, the explanation proffered by the Defendant in his testimonial evidence [that he picked up the jacket with a view to handing it over to the PW1 who is well known to him] resonates with me. The Defendant's explanation is plausible and cannot be lightly wished away, especially as both PW1 and

PW2 conceded that the Defendant is also well known to them; and the fact that no reason for picking up the jacket was given in the Defendant's extra-judicial statements [Exhibit P1 and P5] neither derogates from nor diminishes the credibility of his testimonial evidence which was not shaken under cross examination. It occurs to me that the natural reaction of a criminal when a colleague criminal is embroiled in struggle with the victim of their joint act with a view to fleeing from the scene of crime would be to either run for his dear life or to come to the aid of his colleague, but certainly not to stand aloof and watch the scuffle between his colleague and the victim only to pick up a jacket left behind by his fleeing colleague! It simply does not add up! Considerable doubt is implanted in the mind of the court as to the Defendant's involvement in the armed robbery, and the law enjoins the resolution of such doubts in favour of the Defendant. See ***KALU v STATE [1988] 4 NWLR (PT. 90) 503, IKEMSON v STATE [1989] 3 NWLR (PT. 110) 455*** and ***NNOLIM v STATE [1993] 3 NWLR (PT. 283) 569.*** This being so, although there is evidence before me that an armed robbery incident occurred inside PW1's patent medicine store on 22/9/13, the Prosecution did not succeed in establishing that the Defendant was one of the armed robbers, either as a principal actor or an accessory thereto. The charge of armed robbery in Counts Two & Three must therefore fail without further assurance.

We have now arrived at a convenient juncture to draw the curtains on this Judgment. I have already held that the Prosecution neither proved that the Defendant had possession or control of a prohibited firearm nor that he conspired with one other [who is said to be at large] to commit armed robbery, even as I have equally held that the Prosecution did not demonstrate by credible [illegible] that the Defendant participated in the

armed robbery incident that occurred inside PW1's patent medicine shop on 22/9/13. This being so, the inescapable conclusion to which I must come is that the Prosecution has not successfully discharged the onus of demonstrating the Defendant's guilt on the criminal threshold of proof beyond reasonable doubt. See ***WOOLMINGTON v D.P.P. (1935) AC 462.*** Accordingly, I will and do hereby record an order discharging and acquitting the Defendant, *Frederick Daniel* on all the four (4) counts of the charge preferred against him.

PETER O. AFFEN
Honourable Judge

Counsel:

P. A. Ogele, Esq. for the Prosecution.

Mrs. G. U. Gbadume (with *Mrs Chioma Obot, Miss Mfon Ekanem, T. B. Eto (Mrs)* and *K. Usoro, Esq.*) for the Defendant.