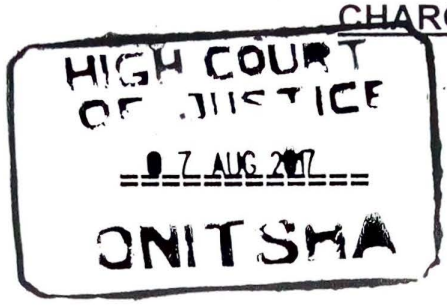
IN THE HIGH COURT OF ANAMBRA STATE OF NIGERIA
IN THE HIGH COURT OF ONITSHA JUDICIAL DIVISION
HOLDEN AT ONITSHA

BEFORE HIS LORDSHIP THE HON. JUSTICE IKE OGU
ON TUESDAY THE 11TH DAY OF JULY, 2017.

CHARGE No. HN/13C /2008



BETWEEN:

THE STATE ========== **PROSECUTION**

VS.

1. **AZUKA NWOKORO** } ==== **DEFENDANTS**
2. **CHUKWUDUM OBIAGAZIE** }

JUDGMENT

By an information dated the 26th day of May, 2008 but was filed on the 28th day of May, 2008 the defendants were arraigned on two count charge of conspiracy to commit felony to wit: armed robbery contrary to Section 5(b) of the Robbery and Firearms (Special Provisions) Act, Laws of the Federation of Nigeria, 2004 and armed robbery contrary to Section 1(2) (a) of the Robbery and Firearms (Special Provision) Act, Laws of the Federation of Nigeria 2004. It was alleged that on the 6th day of July, 2007 at Ebenasa Umunri Amichi in the Nnewi Judicial Division, the defendants and one at large conspired amongst themselves to commit a felony to wit: armed robbery and at the same time and place while armed with locally made short gun and other dangerous weapon robbed one Michael Okeke of the cash sum of One Hundred and twenty thousand Naira (N120,000.00). The defendants in their plea before the Court denied the commission of the offences. The prosecution in a bid to prove its case called on the whole three(3) witnesses in support of the charge who testified as the P.W.1, P.W.2 and P.W.3. After the evidence of the P.W.3 the prosecution closed her case. Thereafter, the 1st defendant entered the witness box for his defence and testified as D.W.1. At the end of his evidence, the 2nd defendant entered the witness box for his defence and testified as

the D. W.2. After the evidence of the D.W.2, the defendants closed their case.

At the conclusion of evidence, the parties filed and exchanged written addresses in compliance with the orders of the Court made on the 9th day of November, 2016. As such, on the 13th day of April, 2017 the learned counsel for the defendants adopted the final written address dated the 10th day of February, 2017 but was filed on the 13th day of February, 2017 and the written reply address on points of law which was filed on the 13th day of April, 2017 as their final argument in this Charge and urged the Court to hold that the prosecution having failed to prove the ingredients of the offences, the defendants are entitled to be discharged and acquitted. For the prosecution, her learned counsel adopted the final written address dated the 20th day of March, 2017 and filed on the same day as their final address. He urged the Court to hold that the prosecution has proved all the ingredients of the offence beyond reasonable doubt and convict the defendants accordingly.

In the final written address of the defendants, their learned counsel formulated one issue for the determination of this Court to wit:-

> "Whether the prosecution has proved the charges against the defendants beyond reasonable doubt with credible evidence?"

For the prosecution, her learned counsel in his final written address framed two issues for the determination of this Court. The issues for determination are as follows:-

(a) Whether the prosecution has proved all the ingredients of the offence beyond reasonable doubt in proving the charges against the defendants, therefore need no further proof?

(b) Whether the extra-judicial confessional statements of the defendants are sufficient to sustain the charge of armed robbery against the defendants?

I have looked at the issues for determination distilled by the learned counsel for the parties in this charge. On sober reflection on the issues for determination as formulated on behalf of the parties shows clearly that the sole issue for determination settled by the learned counsel for the defendants is similar and related to

the 1st issue for determination prepared by the learned counsel for the prosecution. The 2nd issue for determination culled by the learned counsel for the prosecution in his final written address stands on its own. Any of the sets of issue for determination formulated by the parties is apt, relevant and germane to determine this charge. I shall adopt the sets of issues for determination in the consideration of this charge but for easy understanding, I shall address the sole issue for determination as follows:-

> From the circumstances of this case and the totality of the evidence adduced, can the prosecution be said to have proved beyond reasonable doubt that the defendants conspired and committed the offence of armed robbery?

The sole issue for determination in this charge is, from the circumstances of this case and the totality of the evidence adduced, can the prosecution be said to have proved beyond reasonable doubt that the defendants conspired and committed the offence of armed robbery? The facts of this case fall within a narrow compass. It is not being disputed as testified by the P.W.1 and P.W.2 that on the 6th day of July, 2007 at Ebenasa Umunri Amichi in Nnewi South Local Government Area of Anambra State some people robbed them in their compound and in the process stole the sum of N120,000.00. This is so because the learned counsel for the defendants in his cross examination and written addresses did not attack the claim of the P.W.1 and P.W.2 that there was a robbery in their house in the early hours of the morning. It is not surprising because in such circumstances the crucial issue is not ordinarily whether or not there was robbery and the robbery was an armed robbery. In most cases, the controversy always rages over whether the defendants alleged as the actual perpetrators of the offence charged were the persons who were seen committing the offence. In this case, it is glaring from the totality of the evidence adduced by the prosecution witnesses that the P.W.1 and P.W.2 the victims of the alleged armed robbery are the only eye witnesses of the commission of the crime that testified for the prosecution. I say so because the P.W.3 in his evidence claimed that the matter is a case of armed robbery because the defendants fired many gun shots during the robbery operation. He testified also that when they went to Otolo Police Station to get the defendants; they saw the 1st defendant with plaster of wound on

his head. They took them to SARS office for investigation. Thereafter, the defendants volunteered their statements and each of them admitted the offence. The witness tendered the statements of the defendants and the Police Investigation Report as Exhibits "C", "C[1]", "D" and "E" respectively.

However, it is clear that the P.W.3 was not at the scene of crime. His evidence that the defendants fired many gun shots during the robbery operation is not an account of what he saw. His evidence is that he was a member of the investigating police team and was not an eye witness of the crime. Even at that, he agreed under cross examination that he did not see the defendants robbing the complainant and when the defendants were arrested, no locally made gun or dangerous weapon was found on them. In that regard, the learned counsel for the defendants in his written reply address on points of law contended that the prosecution did not prove that the defendants were armed or in company of anybody armed at the material time. This case is therefore one of the exceptions in that the learned counsel for the defendants has challenged the claim of the prosecution that the robbery was an armed robbery. For the prosecution to succeed in proof of the offence of armed robbery against the defendants, as rightly submitted by the learned counsel for the parties in their final written addresses, the following ought to be proved beyond reasonable doubt to wit:-

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

(b) that each robbery was an armed robbery, and

(c) that the defendant was among those who took part in the armed robbery.

SEE: BASSEY VS. THE STATE (2012) LPELR – 7813 (SC) 1.

SOWEMIMO VS. STATE (2012) 2 NWLR (PT. 1234) 400.

ISIBOR VS. STATE (2002) 3 NWLR (PT. 754) 250.

As I said earlier, I have carefully considered the evidence adduced by the prosecution on the crucial point. I must say that I believe

the P.W.1 and P.W.2 that in the early hours of the 7th day of July, 2007 there was a robbery at their house at No. 10 Obiekwe Street, Ebenasa Umunri Village, Amichi and a total sum of N120, 000.00 was stolen. The prosecution has therefore, established the fact that there was robbery in the house of the P.W.1 and P.W.2 in the early hours of the 7th day of July, 2007. The question then is whether the prosecution has successfully established that the robbery was an armed robbery. This is the next ingredient of the offence of armed robbery which the prosecution is expected to prove beyond reasonable doubt. The evidence linking the defendants with the offences alleged were adduced through the testimonies of the P.W.1 and P.W.2. I have considered the relevant evidence of the witnesses on this point because of their importance. The learned counsel for the prosecution in his final written address contended that the P.W.1 and P.W.2 in their evidence testified that the defendants were armed during the armed robbery operation. In considering whether the alleged perpetrators were armed during the robbery operation, I will for now not use the defendants' extra judicial statements which are Exhibits "C", "C1", "D" and "D1" for obvious reasons.

From the evidence of the P.W.1 and P.W.2, it is clear to me that there is nothing in their evidence to suggest that the people who entered their house and robbed them were bearing gun or guns. As a matter of fact, the two witnesses did not say that the people were carrying weapons of any kind. I have as such, considered the import of the contention of the learned counsel for the defendants that failure to recover the arms and ammunition from the defendants and tender them at the trial is fatal to the case of the prosecution. However, it must be borne in mind that in criminal cases, it is only when all the perpetrators of the crime were arrested at the scene of crime while committing the offence that the weapons used or the things stolen can be recovered from them. In most cases they dispose of these things immediately after the commission of the offence in order to avoid suspicion. But where there is cogent, reliable and authentic oral evidence which the Court admits and believes, the failure to tender the weapon employed in a robbery and the thing stolen cannot be prejudicial to the case of the prosecution.

SEE: ATTAH VS. STATE (2009) 15 NWLR (PT. 1164) 284.

VICTOR VS. STATE (2013) 12 NWLR (PT. 1369) 465.

The P.W.1 in his evidence testified that when they were fighting, two gun shots were released very close to their room. And it was then that one person from outside entered his wife's room and the two of them entered into his own room. The P.W.1 did not testify that the persons that entered his wife's room from outside were bearing a gun or weapon of any kind. On the other hand, the P.W.2 who tried to corroborate the evidence of the P.W.1 stated that when they fired two gunshots outside they became afraid and they came into their room and started scattering their properties. As they were leaving and about to jump the fence, her husband drew the last person back and used cutlass to cut him at the back of his head. It is seen that from the evidence of the P.W.2, it was not only one person that joined the person already in their room when they allegedly heard two gun shots. The P.W.2 who saw the people as they enter their room did not testify that the people who entered their room were holding a gun or any weapon at all. The evidence that two gun shots were released during the robbery operation is meant to insinuate that the robbers were armed. In the same vein, the evidence that axe and two bullets belonging to the robbers were recovered at the robbery scene was meant to suggest that the robbers were armed. But if the robbers came with a gun or any weapon at all, naturally they will enter the room where they were to rob with the gun or weapon. Apart from this, the evidence that the robbers fired two gun shots while they were outside but eventually did not enter the room where they were to rob with the gun does not accord with common sense. By the evidence of the witnesses three robbers stormed their house. And as demonstrated by the P.W.2, the three robbers eventually entered their room. It is not logical and believable that the robbers after releasing two gun shots will drop their gun and weapon outside and enter the room where they were to rob empty handed. I must say that in the circumstances of this case, the evidence adduced by the P.W.1 and P.W.2 suggest that the robbers were not armed.

Again, the evidence of the P.W.1 and P.W.2 are that the P.W.1 went after the robbers with machete. As a matter of fact, the P.W.2 testified that as the robbers were leaving and about to jump the fence, her husband drew the last person back and used cutlass to cut him at the back of his head. If the P.W.1 and P.W.2 truly heard

two gun shots released by the robbers, they would naturally understand that the robbers were armed. As rightly contended by the learned counsel for the defendants, where the robbers were armed to the knowledge of the P.W.1, will he attack them with a mere machete? I don't think so. The fact that the P.W.1 summoned enough courage to attack three armed robbers with a machete presupposes that he was aware that the robbers were not armed. This is more logical and accords with common sense. And I ask myself, if the robbers were armed as the P.W.1 and P.W.2 want the Court to believe, wouldn't they at this stage see the gun? I think the P.W.1 and P.W.2 would have been able to see the gun when they followed the robbers up to the wall and saw them jump through the wall fence. The P.W.2 in her evidence in chief alleged that when the robbers ran away, they recovered their axe, 2 bullets wrapped in handkerchief and slip-ass. This evidence as I said earlier was meant to demonstrate that the robbers were armed. But the P.W.1 did not adduce it in his evidence in chief. It was under cross examination that he testified that he went to the Police with the mask, the face cap and bullet and handed them over to the Police. However, as rightly contended by the learned counsel for the defendants in his final written address, the witnesses did not state this fact in their statements to the Police. It should be borne in mind that the learned counsel for the defendants in the course of his cross examination of the P.W.1 and P.W.2 tendered their extra judicial statements to the Police and they were admitted as Exhibits "A" and "B". The extra judicial statement of a witness is not legal evidence and cannot be used at the trial for any purpose whatsoever, including for the purpose of contradicting the witness unless the extra-judicial statement is tendered and admitted in evidence at the trial as an exhibit.

SEE: EDOHO VS. STATE (2004) 5 NWLR (PT. 865) 17.

In the instant case, the extra-judicial statements of the P.W.1 and P.W.2 having been admitted in evidence constituted legal evidence which I will be right to act upon. It will be recalled that the P.W.1 made his statement on the day of the incident. I am of the opinion that if the mask, facing cap, bullet and axe were recovered from the scene, the P.W.1 and P.W.2 would have stated it in their statement to the Police when the facts were fresh in their memory. The Police on their part would have entered the recovery of the items in their Investigation Report which is Exhibit "E" and adduced them in evidence through the P.W.3 who will then go

ahead to tender them as exhibits before the Court. The fact that the P.W.1 and P.W.2 did not state that they made this recovery in their extra judicial statements which were made when the incident was very fresh in their memory demonstrates that it cannot be true that such recovery was made.

Apart from this, I have considered the stage the P.W.1 and P.W.2 stated that they were robbed following the gun shots in their evidence before the Court and when the machete cut injury was inflicted on the 1st defendant. In the evidence of the witnesses, they claimed that they were inside the room with one of the robbers when the gun shots were released and the other robbers entered their room and robbed them of the sum of N120,000.00. They testified also that the machete cut was inflicted on the D.W.1 outside the room. However, the P.W.1 in his statement to the Police which is Exhibit "A" alleged that when they were struggling in his wife's room, the robbers outside fired two gun shots in the air and Chukwudum rushed into his room and robbed him of the sum of N120,000.00, but he gave the one he was struggling with machete cut on his head. He claimed also at the same time that after releasing the shots, the robbers outside ran away. The P.W.2 in her statement to the Police which is Exhibit "B" alleged that 3 robbers entered her room. One of the robbers walked towards her pointing touch light on her face and slapped her while the other two went to their cupboard and removed the sum of N120,000.00. At this juncture, her husband held one of them and as they were struggling he gave him machete cut. The robber called for the assistance of the others who fired two gun shots outside and this enabled the robber to escape because her husband became afraid. It is clear that there are serious discrepancies on the crucial point between the extra judicial statements of the witnesses made after the incident which are Exhibits "A" and "B". Beside this, the statements of the witnesses do not flow in sequence with their testimony in Court and they contained contradictions in detail. Again, there are material discrepancies between the previous written statements of the P.W.1 and P.W.2 and their subsequent oral testimony and this affects their credibility. The benefit of doubt of a discrepancy in the prosecution's case in material points should be resolved in favour of the defendants.

SEE: GABRIEL VS. STATE (1989) 5 NWLR (PT. 122) 457.

OKEREKE VS. STATE (1998) 3 NWLR (PT. 540) 75.

All these suggest the inference that their evidence on this crucial point was not evidence of what they observed. Put bluntly, although the statements are not supposed to tally with their evidence with mathematical accuracy but their statements are different version of the incidence from their testimony in Court. I must say that the statements of the witnesses and their evidence before the Court evince a premeditated and orchestrated plan to make out a case of armed robbery at all cost and not evidence of what transpired of which the witnesses observed. This can only explain the discrepancies, disconnections and omissions on crucial points in their statements vis-à-vis their evidence before the Court. The P.W.1 and P.W.2 even as they testify before the Court cut out a picture of one who was not stating what he observed and hence the lack of coherence and sequence in and between their evidence and extra judicial statements made when the incident was very fresh in their memory.

Again, considering the time when the incident occurred, I don't believe the P.W.1 and P.W.2 who claimed that they were struggling with the first robber that entered their house, that the gun shots they heard (if they were gun shots) were fired within their vicinity. Of course, the tenor of their entire evidence point irresistibly to that conclusion. It is a thing of common knowledge that the day is usually very quiet and calm during the early hours when this incident was said to have occurred. It is also a thing of common knowledge that sound travels very fast during such period as a result of the quietness and calm nature of the environment. It is therefore not surprising that while the P.W.1 testified that two gun shots were released very close to the room, the P.W.2 claimed that they were fired outside. Besides this, there is serious discrepancy at the stage the gun shots were allegedly heard between the statements of the P.W.1 and P.W.2 made when the incident was very fresh in their memory vis-à-vis their evidence before the Court which were made two years after the incident. The discrepancy to my mind suggests that the alleged gun shots were merely added to score a point. It should be borne in mind that the prosecution is relying on the extra judicial statements of the defendants to prove that the defendants were armed during the robbery operation. The prosecution as such through the P.W.3 tendered the said extra judicial statements of

the defendants as Exhibits "C", "C[1]", "D" and "D[1]". The learned counsel for the prosecution in his final written address submitted that the statements are confessional statements of the defendants and so supported their case that the offence was armed robbery. The defendants in their evidence before the Court challenged Exhibits "C", "C[1]", "D" and "D[1]" on the ground that they were not obtained voluntarily. In another breath the 1st defendant claimed that he did not sign any document at the office of the SARS. Having admitted the statements of the defendants as exhibits, they become part of the case for the prosecution and I am therefore bound to consider their probative value notwithstanding the retraction by the defendants in their testimony before the Court. What is important is the weight I will attach to such confession and retraction during my fact finding mission as such a retraction does not necessarily make the confession inadmissible.

SEE: NWACHUKWU VS. THE STATE (2007) 17 NWLR (PT. 1062) 31.

EGBOGHONOME VS. THE STATE (1993) 7 NWLR (PT. 306) 383.

When is a statement confessional? By the provisions of section 28 of the Evidence Act, 2011 "a confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime." For a statement to constitute a confession, the maker must admit or acknowledge that he committed the offence for which he is arrested. The admission must be clear, precise and unequivocal. In other words, a confessional statement will be relevant if it establishes beyond reasonable doubt the ingredients of the offence for which the defendant is charged as well as the identity of the defendant. Again, before there can be said to have been an armed robbery, the defendant or defendants must have stolen something which is capable of being stolen with violence or being armed with dangerous weapon. Any person who is in company of a person armed while robbery is being committed is also guilty of commission of armed robbery. Are Exhibits "C", "C[1]", "D" and "D[1]" really confessional statements? It is therefore pertinent at this juncture to reproduce the relevant portions of Exhibits "C", "C[1]", "D" and "D[1]" in order to ascertain if they are confessional statement. The relevant portion of Exhibit "C" reads:-

"On 6/7/2007 at 3.00pm one Chukwudum Obiagazie "M" a native of Amichi call me at Amichi park where we are working together that we are going to one place to rob one man there in Amichi that I should come in the night for the operation and I agree with him .... at the place I meet one person also by name Izuchukwu Okeke 'm' a native of Amichi which make us to be three in number.....As we reach the man house, the man has fence ..... the man came out and held me at my back and I struggle to escape I couldn't and he use something and hit me at my head in which I fall and I managed to escape with the blood to Chukwudum Okeke house ..... I was there at the hospital when Vigilante group from Amichi came and arrested me and before they came they have already arrested Chukwudum Obiagazie 'm' and Izuchukwu Okeke 'm' and they took us to their office. .... This is the 3rd time we are going for robbery. ..... Chukwudum Okeke 'm' get one stainless knife and was organising for gun for this operation. I have no gun. ..... Yes, I know I am an armed robber and we are three men gang ...."

Relevant portion of Exhibit "C1" which is the 2nd statement made by the D.W.1 reads as follows:-

"..... Truly speaking, Izuchukwu Okeke had never joined us to rob anybody since I know him. He (Izuchukwu Okeke) did not join I and Chukwudum Obiagazie 'm' in robbing one Michael Okeke ..... But the truth remains that he did not rob the victim with us and had no knowledge of the crime ....."

The relevant portion of Exhibit "D" which contains the 1st statement made by the 2nd defendant is as follows:-

"..... I did not rob one Onyenwe or Michael Okeke 'm' of Ebenasa Amichi together with Azuka Okeke. Azuka came to Okeke ran down to my house in the night at about 12 O' clock with machete cut on his head and reported to me that he went and robbed the above person in his house and he was given a machete cut on his head but he managed to escape. ..... When arrested with Izuchukwu on a motorcycle along Ebenasa Amichi road by vigilante

men, I told them that I did not see Azuka Nwokoro for a long time. ..... I involved myself in robbing one woman called Josephine 'f' from Osumenyi sometime ago but I did not join Azuka in this current one. I only helped him to escape public notice and arrest. That is all."

The relevant portion of the 2nd statement made by the 2nd defendant which is Exhibit "D1" is as follows:-

".... Truly speaking, Izuchukwu Okeke did not join us the very night we robbed one Onyenwe or Michael Okeke 'm' of Ebenasa Amichi. I only robbed the man with Azuka Nwokoro on 6-7-07. ..... Izuchukwu Okeke is to the best of my knowledge innocent of this robbery case I involved myself with Azuka Nwokoro. That is all."

Having painstakingly read Exhibits "C", "C1", "D" and "D1", it is clear to me that they demonstrated clearly that there was a robbery on the 6th day of July, 2007 at the house of the P.W.1 and P.W.2 where an undisclosed thing was stolen and the defendants were shown to be those who took part in perpetrating the robbery. It is therefore; crystal clear that the relevant portions of Exhibits "C", "C1", "D" and "D1" reproduced above showed that the robbery was not an armed robbery. This is in tandem with what the prosecution has been able to prove so far. I am therefore of the opinion that Exhibits "C", "C1" and "D1" are not confessional statements made by the defendants wherein they admitted all the ingredients of the offence of armed robbery with which they were charged. Exhibit "D" on the other hand is not confessional statement at all. In my view, as long as the offence of armed robbery which the defendants are alleged to have committed is concerned, Exhibits "C", "C1" and "D1" are not confessional statements made by the defendants stating or suggesting the inference that they were armed during the robbery operation or committed armed robbery. However, the defendants in Exhibits "C", "C1" and "D1" confessed to having participated in the commission of a lesser offence of robbery. Accordingly, Exhibits "C", "C1" and "D1" purports to be confessional statements stating or suggesting the inference that the defendants participated in the commission of a lesser offence of robbery at the house of the P.W.1 and P.W.2 on the 7th day of July, 2007. I don't believe the P.W.1 and P.W.2 that the robbers were carrying a gun or any weapon at all on the day of the incident. The implication of my

doubting the evidence of the P.W.1 and P.W.2 and not believing them on this crucial point is that the prosecution has not been able to prove that the robbery at the home of the P.W.1 and P.W.2 at Ebenasa Umunri Village, Amichi on the 7th day of July, 2007 was an armed robbery. It follows that the prosecution has successfully proved beyond reasonable doubt if un-contradicted that there was a robbery in the early hours of the 7th day of July, 2007 in the house of the P.W.1 and P.W.2 at Ebenasa Umunri Village, Amichi. However, the prosecution failed to establish beyond reasonable doubt that the robbery was an armed robbery.

Coming to the last crucial point, it is clear from the evidence of the P.W.1 and P.W.2 that the defendants were not arrested at the scene. From the evidence of the P.W.1, it is glaring that he claimed that he identified the 1st defendant at the scene but the 2nd person he mentioned was not linked directly to the 2nd defendant. The P.W.2 in her evidence alleged that she identified the two defendants at the scene when she testified that she saw them that day and the 1st defendant while being injured called the name of the 2nd defendant and asked him why he was leaving him there to die. By the evidence of the P.W.1 and P.W.2 they have fixed the defendants at the locus criminis and if their evidence is accepted and believed, then the defendants were among the perpetrators of the crime. I will first of all consider the circumstances in which the P.W.1 and P.W.2 claimed that they saw the 1st and 2nd defendants at the scene. By the evidence of the P.W.1 and P.W.2 the incident occurred between 2 to 3 am. From their evidence it will easily be inferred that their house was dark. Apart from this, by the tenor of the evidence of the P.W.1 and P.W.2 they could not see the people that entered their room until the P.W.1 pointed his touch light. As a matter of fact, the P.W.1 admitted under cross examination that the room was very dark. Even when the P.W.1 pointed his touch light on the person, he could not identify him because he was wearing a face cap. The P.W.2 in her testimony added that the person used something to cover his face and thereby suggesting that he was wearing a mask. It was at this stage that a fight ensued between the P.W.1 and the person. According to the P.W.1, it was while they were fighting that he removed the cap the man was putting on to cover his face and realised that it was Azuka and called him by his name. The P.W.2 in her evidence claimed that her husband removed the thing the person used in covering his face and saw that it was Azuka and called him by his name and they started fighting. Since it was the

touch light that enabled the P.W.1 and P.W.2 to realise that it was a man that entered their house, I don't think it will be logical to say that the P.W.1 kept the touch light pointed on the face of the person in the course of their fight and so was able to realise that the person was Azuka.

Be that as it may, by calling the man Azuka presupposes that the P.W.1 knows Azuka before the incident and so was able to recognise him. It should be borne in mind that recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows; the jury should be directed that mistakes in recognition of close relatives and friends are sometimes made.

SEE: IKEMSON VS. STATE (1989) 3 NWLR (PT. 110) 455.

NDIDI VS. STATE (2007) 13 NWLR (PT. 1052) 633.

Where the identity of the defendants crops up in a case, the Court must not only warn itself but must meticulously examine the evidence proffered to see whether there are any weakness capable of endangering or rendering worthless any contention that the prosecution witnesses had enough time to observe the defendants. If the quality of the identification evidence is good and remains good at the close of the defendants' case, the danger of a mistaken identification is lessened but the poorer the quality the greater the danger.

SEE: NDIDI VS. STATE (Supra).

It is now settled principle of law that to ascribe any value to the evidence of an eye witness regarding identification of a criminal, the courts in guarding against cases of mistaken identity must meticulously consider the following issues:-

1. The circumstances in which the eye-witness saw the defendant.
2. The length of time the witness saw the subject or defendant.
3. The lighting conditions.

4. The opportunity of close observation.

5. The previous contacts between the two parties.

SEE: NDIDI VS. STATE (Supra).

By the P.W.1 recognising the man that entered his wife's room and called him by his name mean that there was previous contact between them or he had seen him before the incident. The question that is pertinent to ask at this juncture, is, whether there is any evidence before the Court to suggest that the P.W.1 knows the said Azuka before the incident? In the evidence of the P.W.1, he did not state that he knows Azuka who is the 1st defendant before the incident. Going by his evidence in Court, when he made the complaint to the Police, the Police would have gone for the arrest of the culprit if he had mentioned that a familiar, well known person identified by name and description or place of abode was connected with and participated in the commission of the crime in question. By the Police telling him according to the P.W.1 that it will be easier to get the culprits if he reports the matter to the Vigilante men is a clear manifestation of the fact that he did not tell the Police that he knows one of the perpetrators. As a matter of fact, in his extra judicial statement which is Exhibit "A" and which he made after the arrest of the defendants, the witness made it clear that he knows the faces of the three suspects very well and not that he knows one of them before the incident. After stating this, he went further to state in his statement which is Exhibit "A" as follows:-

"Then when the day brakes very well, I went to report the incident to the Vigilante men of our area and on getting there, I saw the very armed robber that I fought with in my house with the fresh mark of the machete cut I gave him on his head in the night. I recognised him quite alright."

The above statement of the P.W.1 did not in any way suggest that he knows the 1st defendant at all before the incident. It was at the concluding part of his statement where he stated that the defendants confirmed robbing him in his house in the night that he said that the very one that engaged him in fight in order to escape with the machete cut on his head is called Azuka Nwokoro alias Anini from Utu community. It was as a result of this that the

learned counsel for the defendants in the course of his cross examination of the P.W.1 put it to him that he recognised nobody at all and only ceased the opportunity of seeing arrested persons to claim that they were the ones that robbed him. The answer of the P.W.1 that ensued is very revealing. The witness testified as follows:-

> *"Azuka Nwokoro came to my house, I removed his mask and facing cap he was putting on; I pointed torch-light to his face and called out his name Azuka Nwokoro so you are the one doing this thing."*

It is apparent that it was in the course of the cross examination of the P.W.1 that he realised that there is no way he could see the face of the man that entered their room when the place was very dark and they were fighting. Hence he tried to ameliorate the situation by testifying that he pointed the touch-light to the man's face after removing his mask and face cap and realised that it was Azuka Nwokoro. It should be appreciated that his evidence that when he removed the face cap, he called the man by his name or the second version under cross examination are not contained in Exhibit "A" which is his statement to the Police made on the day of the incident when the matter was very fresh in his memory. The P.W.2 as I said earlier stated in her evidence that her husband removed the thing the person used in covering his face and saw that it was Azuka and called him by his name. However, it is surprising that such fact was not stated in her statement to the Police which is Exhibit "B" and which was made just four days after the incident. The P.W.2 who testified that it was her husband that saw the face of one of the robbers, all of a sudden claimed that the defendants were the people he saw that day. But in her statement which is Exhibit "B", she stated that the robber whom they later discovered to be Azuka escaped with a machete cut which her husband gave him on the head. This shows that they do not know that the person who robbed them was Azuka. It was when they saw Azuka with fresh machete cut already arrested by Vigilante men that they presumed he will be the person that robbed them in their house.

Apart from this, it is not clear in the evidence of the P.W.2 at the point she saw the 2nd defendant. Was it inside her room or when the people were about to jump the fence? By the evidence of the

P.W.1 and P.W.2, it was very dark and so there is no way the P.W.2 could see the 2nd defendant during the robbery operation. Again, Exhibit "B" which is the extra-judicial statement of the P.W.2 to the Police and which was made four days after the incident did not suggest that the P.W.2 saw the 2nd defendant on that day. It could be inferred that it was because the injured robber was calling out Chukwudum for help according to the P.W.1 and P.W.2 that made them to presume that it was the 2nd defendant that was being referred to. The evidence that the 1st defendant mentioned the name Chukwudum in the course of the robbery without more is not enough to reach the conclusion that the 2nd defendant was the person being referred to and so was involved in the robbery especially when the P.W.1 did not adduce it in evidence. Although, the P.W.1 stated it in his extra judicial statement but he omitted to adduce it in evidence. Besides, there is discrepancy at the stage where the 1st defendant allegedly mentioned the name of the 2nd defendant in the statements of the witnesses as to be relied upon by any court. It is seen that even on this point there are material discrepancies between the previous written statements of the P.W.1 and P.W.2 and their subsequent oral testimony and this affects their credibility.

SEE: GABRIEL VS. STATE (Supra).

OKEREKE VS. STATE (Supra).

It appears that the statements of the P.W.1 and P.W.2 which were made after the arrest of the defendants as I pointed out earlier were written in such a way as to link the defendants to the crime. For an instance, the P.W.1 in his testimony before the Court did not mention the 2nd defendant but referred to the 2nd robber who entered their room as one person. In his statement to the Police, he did not mention the 2nd defendant, but in the course of referring to the 2nd robber he stated that he is called Chukwudum. It is interesting that at the time of making the statements by the P.W.1 and P.W.2, the defendants who are Azuka Nwokoro and Chukwudum Obiagazie had been arrested.

Above all, there is no evidence that the P.W.1 and P.W.2 were observing the robbers when they stormed their house and stole their money and when one of them was fighting with the P.W.1. As long as the witnesses were not led to testify that they observed the robbers and particularly the 2nd defendant as the robbery operation

in their house was going on, the Court cannot speculate that they were observing them. Besides, since their room was very dark when the robbers came, I don't think they could observe them in the darkness as to be able to identify the defendants as being among the robbers who robbed them. As a matter of fact, although the P.W.1 and P.W.2 had an opportunity to observe the robbers closely but the circumstance in which they as eye-witnesses saw the robbers is not akin to relaxation mood to be able to identify any of them and the length of time was very brief. It is therefore clear to me that the P.W.1 and P.W.2 due to the time and circumstances did not utilize the full opportunity to observe the features of any of the three robbers who robbed them as to be able to identify the defendants. I find the evidence of the P.W.1 and P.W.2 to the effect that they observed the defendants during the robbery incident and were able to identify them unreliable and unsafe. The implication is that the P.W.1 and P.W.2 did not adduce any direct evidence linking the defendants with the commission of the offence of robbery. Accordingly, it is my finding that the P.W.1 and P.W.2 did not see or identify the defendants as being among the robbers that robbed them in that fateful early morning.

However, it is in evidence that the P.W.1 during the robbery operation confronted one of the robbers and engaged him in a fight. It is also the evidence of the P.W.1 and P.W.2 that in the process, the robber was inflicted with machete cuts. The witnesses also testified that the 1st defendant was arrested that morning by the Vigilante men with fresh machete cut wounds where they identified him. The P.W.3 corroborated the evidence of the P.W.1 and P.W.2 when he testified that when they went to Otolo Police Station to get the defendants, he saw the 1st defendant with a big plaster of wound on his head. I am of the opinion that the evidence are circumstantial evidence pointing to the fact that the 1st defendant was the robber the P.W.1 engaged in a fight and gave machete cut several times on his head. This evidence to my mind if not contradicted is enough to reach the conclusion that the 1st defendant was among the robbers that went to the residence of the P.W.1 and P.W.2.

In Exhibit "C" which is said to be the statement of the 1st defendant, he claimed that he conspired with the 2nd defendant and one Izuchukwu Okeke to rob the P.W.1. In his alleged 2nd statement which is Exhibit "C1", he claimed that Izuchukwu Okeke did not join them in the operation but it was the 2nd defendant that

told him to mention his name. However, the 2nd defendant whom he claimed told him to implicate Izuchukwu Okeke in his statement which is Exhibit "D" denied committing the offence and did not mention the name of Izuchukwu Okeke. It was in his alleged 2nd statement which is Exhibit "D1" that he admitted robbing the P.W.1 with the 1st defendant and also exonerated Izuchukwu Okeke. It is therefore, discernible that Exhibits "C", "C1" and "D1" and the circumstantial evidence from the P.W.1, P.W.2 and P.W.3 that one of the robbers was inflicted with several machete cuts on his head during the robbery operation and the 1st defendant was arrested with fresh machete cuts wound on his head in the morning of the incident are the evidence tendered by the prosecution in proof of the offence of commission of robbery against the defendants. The question that is relevant to ask at this point is whether the defendants (and especially the 2nd defendant) can be convicted on the basis of their confessional statements which are Exhibits "C", "C1" and "D1" in view of the fact that they retracted their extra judicial statements in their testimonies in Court? The law is now firmly established as rightly submitted by the learned counsel for the prosecution that where a defendant confesses to a crime in his extra judicial statement to the police but in court, he retracts from his confession, prudence and the well laid down practice is that before such a defendant is convicted on the said confessional statement, the Court looks for some evidence outside the confession which would make the confession probable.

SEE: OMOJU VS. F. R. N. (2008) 7 NWRL (PT. 1085) 38.

STEPHEN VS. STATE (2013) 8 NWLR (PT. 1355) 153.

In other words, before giving legal effect to a confessional statement of a defendant, I am enjoined to test it as to its truth by examining it along with other evidence to determine whether it is probable. In order to be able to do this, the appellate courts have set some guiding principles and I am implored to ask myself the following questions:-

(a) Is there anything outside the confession to show that it is true?

(b) Is it corroborated?

(c) Are the relevant statements made in it of facts true as far as they can be tested?

(d) Was the defendant one who had the opportunity of committing the offence?

(e) Is his confession possible?

(f) Is it consistent with other facts which have been ascertained and have been proved?

SEE: KABIRU VS. A. G., OGUN STATE (2009) 5 NWLR (PT. 1134) 209.

NSOFOR VS. STATE (2004) 18 NWLR (PT. 905) 292.

If the confessional statements pass the tests satisfactorily, it will be proper for me to convict based on them unless other grounds of objection exists. However, if the confessional statements fail to pass the tests, no conviction can properly be founded on them and if any is founded on them, it will invariably be overturned on appeal. As I said earlier, the evidence the prosecution tendered at the trial in respect of the point under consideration is only the confessional statements of the defendants which are Exhibits "C", "C^1" and "D^1" and the circumstantial evidence that one of the robbers was inflicted with several machete cuts on his head during the robbery operation and the 1st defendant was arrested with fresh machete cuts wound on his head in the morning of the incident. I have the duty to consider whether there is any evidence corroborating the confessions which are Exhibits "C", "C^1" and "D^1". However, in doing that it should be borne in mind that Exhibits "C", "C^1" and "D^1" as I said earlier, are not confessional statements of the offence of armed robbery for which the defendants were charged. The 1st defendant in Exhibits "C" and "C^1" confessed to having committed a lesser offence than the one he is alleged to have committed. In the same vein, the 2nd defendant in Exhibit "D^1" confessed to having committed a lesser offence too.

In the first place, Exhibit "C" which is the 1st confessional statement of the 1st defendant contains lucid details of the background of the 1st defendant and graphic description of his

day-to-day activities up to the steps taken prior to his arrest. The contents of Exhibit "C" point irresistibly to the fact that it was the 1st defendant that gave the information in the statement to the Police and its being voluntary was not called to question. As such, I am satisfied and find as a fact that Exhibit "C" was made voluntarily by the 1st defendant. Now considering Exhibit "C" in relation to the applicable test there is the evidence that the 1st defendant was arrested with fresh machete cut wound on his head to show that the confessional statement which is Exhibit "C" is true on crucial point. The circumstantial evidence of the P.W.1, P.W.2 and P.W.3 support the veracity of Exhibit "C". It was proved that the 1st defendant had the opportunity of committing the offence. It is seen that in Exhibits "C" and "C1", the 1st defendant admitted the commission of the offence of robbery. The confession is direct and positive and admits the essential elements of the offence of robbery and so amounts to admission of guilt. Confession is the best evidence of guilt against a defendant. It is stronger than the evidence of eye witness because the evidence that is to say the confession came from the said defendant. A voluntary confession of guilt is sufficient for the conviction of a defendant and does not need collaboration. In the case of **NSOFOR VS. STATE (2004) 18 NWLR (PT. 905) 292** at page **311**, the Court held that a free and voluntary confession alone, properly taken, tendered and admitted and proved to be true is sufficient to ground conviction provided it satisfies the condition for admissibility.

SEE: QUEEN VS. OBIASA (1962) 2 SCNLR 402.

ONOCHIE VS. THE REPUBLIC (1966) SCNLR 204.

MBANG VS. STATE (2010) 7 NWLR (PT. 1194) 431.

The prosecution has proved the confessional statement of the 1st defendant which is Exhibit "C" and confirmed its content which directly linked the 1st defendant to the commission of the crime of robbery. Exhibit "C" if no doubt is created will suffice to ground a finding of guilt regardless of the fact that the 1st defendant retracted it during the trial. It should be borne in mind that the confession of commission of an offence by a defendant or the commission of an offence as admitted by a defendant can only be evidence against him.

SEE: AMALA VS. STATE (2004) 12 NWLR (PT. 888) 520.

Consequently, the confession and admission of the 1st defendant of the offence of robbery is evidence against him alone. In my view therefore a lesser offence of robbery was made prima facie by the prosecution against the 1st defendant based on his confession which is Exhibit "C" and the circumstantial evidence of the P.W.1, P.W.2 and P.W.3 which corroborated the confessional statement. Having reached this conclusion, it is clear to me that Exhibit "C1" was merely made to exonerate Izuchukwu Okeke from commission of the crime to justify his release by the Police.

I now come to the 2nd defendant's confessional statement which is Exhibit "D1". As I said earlier, the 2nd defendant's first extra judicial statement which is Exhibit "D" is not a confessional statement. This is so because the 2nd defendant in Exhibit "D" completely denied participating during the commission of the offence alleged against him. It was in Exhibit "D1" that he confessed committing the offence of robbery with the 1st defendant. Now considering Exhibit "D1" in relation to the applicable tests there is nothing out side the confessional statement to show that it is true on crucial point. No material facts on material point outside the 2nd defendant's confessional statement which is Exhibit "D1" to support its veracity. The relevant statements in Exhibit "D1" are not true in that there is no evidence to support the fact that the 2nd defendant participated in the crime. However, the statement that Izuchukwu Okeke did not participate in the crime cannot be supported in view of the evidence of the P.W.1 under cross examination that he was one of the robbers. There is no independent evidence corroborating the confession of the 2nd defendant in Exhibit "D1" on material point in that it could not be tested by the evidence of the P.W.1 and P.W.2 who are the only eye witnesses of the crime. There is no established fact on material point through evidence that could be ascertained and proved has been led by the prosecution whose duty it is to prove the offence beyond reasonable doubt. The confession is not consistent with the fact that the 2nd defendant did not participate in the robbery which has been ascertained and proved. As a matter of fact, the 1st defendant in his evidence in Court maintained that the 2nd defendant did not participate in committing the offence but stated that it was Izuchukwu Okeke that joined him in committing the offence of robbery.

There is nothing recovered, arms, facing cap, face mask, money, axe, bullets and slip-ass. The 2nd defendant was arrested in the morning after the incident, but no investigation was carried out to ascertain where he slept the night before or his whereabouts in the earlier hours of the day. Again, the 2nd defendant has not been proved to be one who had the opportunity of committing the offence. And above all, his confession is not possible having initially denied commission of the offence. Since the 2nd defendant made his statement denying commission of the offence, I cannot fathom the basis of making a second statement confessing to the crime. It is therefore clear as testified to by the 2nd defendant that he was tortured and beaten to make the statement. I must say that it is glaring that the 2nd defendant was compelled to make his second statement which is Exhibit "D1" merely to justify the release of Izuchukwu Okeke by the Police. It is the duty of the prosecution to prove the confessional statement of the 2nd defendant or confirm its contents which will then directly link the 2nd defendant to the commission of the crime. There is a heavy burden on the prosecution to prove the charge against the 2nd defendant beyond reasonable doubt in order to secure his conviction. This is more necessary in capital offences such as this one that involves the payment of the supreme price. The evidence that will lead to the conviction must be cogent, convincing and without reasonable doubt. Any doubt in the prosecution's case must be resolved in favour of the 2nd defendant.

Having all these at the back of my mind, it is now necessary for me to look at the evidence adduced by the defendants to see whether they succeeded in creating reasonable doubt. In the evidence of the 1st defendant as the D.W.1, he admitted going to the house of the P.W.1 with Izuchukwu Okeke to rob. He admitted also that the P.W.1 Michael Okeke in the course of the robbery operation gave him machete cut on his head. The evidence the 1st defendant as the D.W.1 adduced before the Court is in line with Exhibits "C" and "C1" as far as commission of the offence of robbery is concerned. The only contradiction is that he excluded the 2nd defendant from the robbery operation and implicated Izuchukwu Okeke whom he exonerated in Exhibit "C1". I must say that where the defendant who made a confessional statement admits the offence in Court as in the instant case, his guilt and blameworthiness can no longer be questioned. On the part of the 2nd defendant, in his evidence as the D.W.2, he did not state that he participated in the robbery. The witness also did not deny taking part in the robbery. I don't think

there is anything wrong with the manner of his evidence since it is not his duty to prove his guilt. This is so because the prosecution considering the circumstances of the case had failed to link him with the commission of the offence. In the final analysis, I find and hold that the evidence adduced by the prosecution as a whole was unsatisfactory to prove as the truth the contents of Exhibit "D^1" on crucial point with the result that the guilt of the 2nd defendant was not proved beyond reasonable doubt to occasion his conviction. Having considered the evidence adduced by the prosecution against the 2nd defendant and the evidence of the 2nd defendant, I hold that the prosecution has not been able to prove the case against the 2nd defendant beyond reasonable doubt.

Having reached this conclusion, can the 1st defendant be convicted of conspiracy? It is trite law that in a conspiracy charge the two or more persons must be found to have combined or acted together in order to ground a conviction for conspiracy. The *actus reus* of each and every conspirator must be referable and very often the only proof of the criminal agreement which is termed conspiracy. In other words, conspiracy is established if it is shown that the criminal design alleged is common to all the suspects. As rightly submitted by the learned counsel for the defendants, the essential element of the offence is the meeting of the minds of the conspirators. Again, the prosecution always has as its primary duty to lead distinct evidence of the existence of the conspiracy and what part each of the conspirators played. In the case of **NWOSU VS. STATE (2004) 15 NWLR (PT. 897) 466**, **ADEREMI, J.C.A.** following the Supreme Court in **MUMUNI & ORS. VS. THE STATE (1975) 1 ALL NLR (PT.1) 294** which approved the guideline laid down by **CUSSEN, J.** in **R. VS. ORTON (1922) V. L. R. 474** seems to agree with this when he said:-

"Each accused is entitled at the onset to have the evidence properly admissible against him considered alone, and it is only when after such evidence so considered you find him to be a party to the conspiracy, if any, that the acts of the other conspirators can be used against him."

The implication of the finding and holding by the Court is that the prosecution has not been able to prove that the defendants conspired to commit the alleged offence. As a matter of fact, the prosecution did not establish the part played by the perpetrator

who is said to be at large. It follows that the 1st defendant cannot be convicted of the offence of conspiracy. In the final analysis, I find and hold that the evidence adduced by the prosecution as a whole with the confessional statement which is Exhibit "C" as well as the evidence of the 1st defendant admitting commission of the offence of robbery failed to prove the offence of armed robbery against the 1st defendant beyond reasonable doubt. However, a lesser offence of robbery stood proved beyond reasonable doubt against the 1st defendant, and I so hold. It is now settled law that the Court can convict a defendant of a lesser offence than the one charged. Thus, a conviction for robbery can be substituted for the offence of armed robbery.

SEE: OGU VS. QUEEN (1963) 2 SCNLR 74.

STATE VS. USMAN (2005) 1 NWLR (PT. 906) 80.

Having considered the evidence adduced by the prosecution and the defendants and found as indicated above, I hold that the sole issue for determination must be and is hereby resolved in terms of the findings; that is, partly in favour of the prosecution and partly against her. Accordingly, judgment is entered in the following terms:-

1. The prosecution proved a lesser offence of robbery contrary to section 1(1) of the Robbery and Firearms Special Provision Act, Laws of the Federation of Nigeria, 2004 beyond reasonable doubt against the 1st defendant and he is found guilty accordingly.

2. The prosecution failed to prove the charge relating to the offences of conspiracy and armed robbery against the defendants beyond reasonable doubt. The defendants are accordingly discharged and acquitted in respect of the conspiracy and armed robbery charge.

ALLOCUTUS IN RESPECT OF THE 1ST DEFENDANT

Defendants' counsel – Urges the court to be lenient with the 1st defendant. He is a very young man who in all intents and purposes can still be useful to the society. He says that he is a first offender who has many years ahead of him. The 1st defendant has been in

custody for over ten years and has shown remorse. He urges the Court to temper justice with mercy.

Prosecuting counsel – There is no record of any previous conviction.

COURT:- The plea under allocutus is noted and appreciated.

SENTENCE

In respect of the lesser offence of robbery, the 1st defendant **AZUKA NWOKORO** is sentenced to twenty one (21) years imprisonment without option of fine.

Note:- The twenty one (21) years shall be calculated from the year he went into custody, namely the 7th day of July, 2007.

IKE OGU
(JUDGE)
11/07/2017.

Parties –
The defendants are present in Court. They were produced from Prison Custody.

Appearances –
T. C. IKENA (ESQ.) Assistant Director of Public Prosecution, Ministry of Justice, Anambra State for the prosecution.
E. E. NGENE (MRS.) of counsel for the defendants.

NIGERIA NSO
HIGH COURT OF JUSTICE
07 AUG 2017
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