

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

SUIT NO.A/37C/2016

BEFORE HIS LORDSHIP, HON. JUSTICE DENNIS C. MADUECHESI,
DELIVERED ON THE 16TH DAY OF OCTOBER, 2018

BETWEEN

STATE

VS

1. UCHENNA OKEKE ----- 1ST DEFENDANT

2. CHIJOKE NWOYE ----- 2ND DEFENDANT

JUDGMENT

The defendants were charged before this court on one count charge of Armed Robbery punishable under Section 1 (2) (a) of Robbery and Firearms (Special Provisions) Act, Chapter R 11 Laws of the Federation, 2014.

The defendants pleaded not guilty to the charge. Thereafter, the case proceeded to trial. The prosecution called four witnesses in proof of its case.

The 1st defendant opened his defence by testifying as DW1. The 2nd defendant did not testify neither did he call any witness. He rested his case on the prosecution's case.

SUMMARY OF FACTS OF THE CASE.

From the prosecution's perspective, Chinenye Ileagu (PW1) Nkechi Ileagu (PW2) and Chidera Ileagu (PW3) are sisters. They live in Umueze-Awuvo village, Enugwu – Ukwu. They claimed that on the 19/5/16, between 10:30pm to 11:00pm, four young men scaled the wall of their fence and entered into their compound. That two of the four men are the defendants. One of the defendants was the person that was armed on that day. The defendants and their gang members robbed them of their money, handsets, clothing, perfumes, recharge cards and drank beverages in the refrigerator. After the robbery, the defendants escaped by scaling the wall of the fence into safety.

PW1 reported the robbery to the police at Police station Abagana on the 20/5/16. The defendants denied all the allegations.

REVIEW OF THE EVIDENCE OF THE PROSECUTION WITNESSES.

PW1

This witness gave her name as Chinenye Ileagu. In her evidence in chief, she narrated the events that happened on the 19/5/16. According to her, after the close of her business on that day, she went back to the apartment she occupies with her sisters. They are living in the same compound where her shop is located. She stated that between 10:30pm and 11:00pm, four men scaled the wall of their fence and jumped into their compound. She identified two of the men as the defendants in the instant case. One of the defendants was armed and he ordered her and her sisters to lie face down on the floor. She identified the 2nd defendant as the person that pointed the gun at her. She was ordered to bring all the money she realized from her sales and those she kept in the house. She obeyed and brought the sum of One Hundred Thousand Naira (₦100,000:00) from her room. The 2nd defendant insisted for more. She took her hand bag hanging on the wall and brought out the sum of Forty Five Thousand Naira (₦45,000:00) therein and gave it to him. The 2nd defendant continued to insist on more money. She fetched the sum of Two Hundred and Eighty Thousand Naira (₦280,000:00) from a carton where she hid it and gave same to the 2nd defendant. Yet the 2nd defendant persisted for more money. She told him that no more money was left in the room. The defendants then marched her to her shop. The defendants took eight singlets, perfumes, recharge cards and drank the beverages she stored in her refrigerator, after the robbery episodes, the defendants scaled the wall fence and jumped out of the compound making good their escape.

In the following morning, being 20/5/16, she reported the incident to the police at the Police station, Abagana. After lodging her robbery complaint, the police told her to call them on phone whenever she saw the armed robbers. Ten days after the robbery incident, the 1st defendant came to her shop to enquire about her business. She recognized him as one of those that robbed her. She placed a call to the police and policemen came after about twenty minutes and arrested the 1st defendant. She identified the 1st defendant because the armed robbers came with torch lights which were on when they were searching for money. The light from the torchlight reflected on the 1st defendant's face and she took notice of him. She had known the 1st defendant before the robbery incident because he was always coming to her

shop to buy sticks of cigarettes and tom – tom. The defendants were not wearing face masks on the day of the incident. She equally saw the 2nd defendant on the night of the incident but she had never seen him before that day.

After the 1st defendant was arrested and detained, she was called by the police to come to their station. She went and identified the 2nd defendant as one of the men who robbed her. That it was the 1st defendant that informed the police about the involvement of the 2nd defendant in the robbery. The other two members of the gang were not caught by the police. She does not know them.

Under cross – examination, PW1 stated that she did not know the full names of the 1st defendant before the robbery incident. She admitted telling the police the 1st defendant's name. She claimed that she made enquiry about the 1st defendant and someone told her his name. The person that told her the 1st defendant's name was not at the scene of the robbery but that person was the 1st defendant's acquaintance. She did not see the 1st defendant on the day she reported the robbery incident to the police. She admitted that she reported the robbery incident to the police before she was told the 1st defendant's name. She admitted that on the day of the incident, it was dark and there was no electricity light. On that day she identified only two of the armed robbers. She identified the 1st defendant because of the torch light he had put on. The light from the torch reflected on his face. She flashed her own torch light at the robbers before the 2nd defendant snatched it from her. That was when she saw the 2nd defendant's face. She maintained her evidence that the 2nd defendant pointed the gun at her and kicked her. That he had a pistol but she did not know the colour of the pistol. She did not give the 1st defendant money, but the 2nd defendant was collecting money and other items from her. That nobody opened the compound's gate. The robbers scaled the wall fence into the compound. The robbers attacked her at her shop. She admitted that none of the items and money that were stolen was recovered from the robbers. She admitted that she did not know the 2nd defendant prior to the robbery incident. That she saw the 2nd defendant on the robbery incident because of the light from the torch light. She stated that she told the police that she knows the defendants. That she told the police the 1st defendant's name but she did not know the 2nd defendant's name. She did not describe the 2nd defendant to the police because she could not identify him. That it was the 1st defendant that informed the police about the involvement of the 2nd defendant. She does not know one Vincent Okafor. She does not know any

other person that participated in the robbery. She is not aware that the 1st defendant exonerated the 2nd defendant. She stated that all the sums of money that were stolen belonged to her. She saw the four robbers when they came into the compound. That it was only the 2nd defendant that was having a gun and a torch light out of the two robbers that came into her room. It was the 2nd defendant that collected all the sums of money from her and handed same to the 1st defendant. He held the gun in his right hand and used his left hand to snatch the torch light from her. The 2nd defendant held the gun in his right hand and the torch light with his left hand throughout the operation. She purchased the recharge cards that were stolen from an authorized dealer called Amaka. She does not know the 1st defendant's residence. The police did not tell them whether any of the items stolen was recovered in the defendant's apartment. That the two robbers that entered her room did not come with a bag but they took a bag that was hanging on the wall when they finished their operation and she told the police about it. She pointed the 2nd defendant out at the police station as one of the robbers that robbed her. Apart from the police officers, it was only the 2nd defendant that was there when she identified him.

PW2

She gave her name as Nkechiyere Ileagu. In her evidence in chief, she stated that after she came back from her shop in the night and was with her sisters in the room, she saw four men that scaled the wall fence at the back and came into the compound. Two of the men accosted her sister. The other two forced her and her sister to lie down using their feet to pin them down. The other two men were robbing her sister. After they finished with her, they brought her to where they were lying down and equally forced her to lie down. The robbers warned them not to shout or do any thing otherwise they would return to kill them. The robbers later escaped by scaling the fence. Her sister told her that she recognized one of the robbers that has always been coming to her shop to buy cigarettes and tom – tom. She saw her bag outside and discovered that her Thirty Thousand Naira (₦30,000:00) was missing. The money and recharge cards she kept in her Ecolac box and her wrist watch was stolen. Her sister Chineye Ileagu lodged a report to the police. She (PW2) made extra judicial Statement to the police.

Under cross – examination, she admitted that she did not identify any of the robbers but her sister did. The robbers scaled the wall of the fence to gain entry into the compound. There was no electricity light that day. Two robbers entered into their room and accosted her sister. Prior to the robbery incident, she did not know any of the robbers but her sister knows one of them. She admitted making a Statement at the police and she identified her Statement. She can read and write in English language. She admitted that all she knew about the robbers was what her sister Chinenye (PW1) told her.

PW3

This witness gave her name as Chidera Cynthia Ileagu. In her evidence in chief, she stated that after they closed from their shop located in the same building in which they live, she was with PW2 in the sitting room. Four men scaled the wall fence and came into the sitting room. One of them was armed. Two of them held her and PW2 while the other two went to PW1. The men robbed them of their money, phones and other items and left. PW1 told her and PW2 that she saw the faces of two of the men because she flashed her torch on them. That she recognized the second person that came with the one with gun. The next day, PW1 lodged a complaint to the police. She (PW3) did not recognize any of the robbers. She saw the face of one of them when he wanted to snatch her hand set from her. The light from the hand set reflected on his face. She discovered that he has tribal marks with large eye balls. A few days later, the 1st defendant enquired about her hand set. She told him about the robbery incident, that her phone was stolen. That the 1st defendant also enquired about the security men. She knows the 1st defendant before the robbery incident because he was always coming to the shop to buy things. The robber with the large eyeballs was not caught but she came across him later. He was driving a tricycle.

Under cross – examination, she admitted that the robbery incident took place in the night and every where was dark. When the robbers came into the apartment, they ordered every body to lie face down on the floor until they concluded their operation. She did not see the defendants but her sister saw them. She denied that her sister was lying on the floor during the operation. The robbery took place on the 19//5/16 but could not remember when she made her Statement to the police. She had met the 1st defendant before she made her Statement to the police. The

robbers were with a black gun on that day. She did not know the 2nd defendant before the incident. She did not see the 2nd defendant. She knows that the 1st defendant participated in the robbery. The 1st defendant enquired about her handset stolen on the day of the robbery when she met him at Ezi – Elias, Enugu ukwu.

PW4

He is Sgt Ifeanyi Nwauzu with Force No: 368495. He is one of the Investigation Police Officers that investigated the robbery allegation. He stated that on 25/5/16, he was on duty at the Police Station when a case of stealing was referred to him for investigation. The complainants were Chinenye Ileagu (PW1) and two others. They volunteered statements and based on their statements, he carried out his investigation. According to him, the PW1 informed him that while she was in the room with her sisters, a gang of four men broke into the room and ordered them to lie face down at gun point. That their room is located in the same compound with their shop where they sell provisions, beverages and other items. That the robbery attack happened in the night. That the 1st defendant had been the PW1's customer and PW1 made effort to look at the face of the intruders. PW4 stated that based on the complaint, the police mounted surveillance. On the 30/5/16, the 1st defendant was arrested, cautioned and he made statement. At first he denied all the allegations. Later he confessed that they were gang of three robbers and not four. Based on his confession, the 1st defendant was taken to a superior officer for attestation. In his Statement, the defendant revealed the names of his two members. He mentioned one Chijioke and Ifeanyi as his accomplices. A search was conducted at the 1st defendant's house but nothing was recovered. On the 14/6/16, the 2nd defendant was arrested, cautioned and he volunteered statement. He denied the allegations and claimed that he did not participate in the robbery. That a further surveillance was mounted by the police to know whether the 3rd member of the gang would be arrested. The police also conducted search on the 2nd defendant's abode and nothing was recovered. That the 1st defendant confessed that they did not use gun but a stick to carry out the operation. That the stick was thrown away while they were escaping that night. That the 1st defendant could not show the police where the stick was thrown into. PW4 stated that preliminary investigation of armed robbery crimes are concluded at Divisional Police level. He stated that the case and the defendants were later transferred to the Special Anti – Robbery

squad (SARS), Awkuzu for further investigation. That the police found that the 1st defendant used an object but not gun in the robbery.

Under cross – examination, the PW4 stated that he investigated the case at the preliminary stage. That it was on the strength of the complaint lodged by PW1 that a case of stealing was entered in the crime diary and he investigated same. That the PW1 informed the police that she can identify the defendants when she volunteered her statement. He stated that the 1st defendant did not deny the allegation when he was arrested and he was the person that mentioned the 2nd defendant as well as gave the number of the persons that committed the crime.

PW4 admitted he would be surprised if it is shown on the minutes of his team leader that the defendants denied the allegations. That the stolen items were not recovered because it took some time before the defendants were arrested. He did not also recover the stick with which the defendants committed the crime because the 1st defendant told the police that he threw away the stick when he was escaping. Secondly, the 1st defendant could not identify the place where he threw away the stick. The he (PW4) could not have picked any stick since the original stick was thrown away by the 1st defendant. He admitted that at the Divisional Police level, the investigation was not concluded because it was an armed robbery matter. That the investigation was supposed to be concluded at SARS but is yet to be concluded. He admitted that the 2nd defendant was arrested based on the information contained in exhibit “P1”. That the complainant (PW1) did not mention the name of the 2nd defendant but she said that she knew the name of one of the robbers. He did not know that the author of exhibit “P1” exonerated the 2nd defendant neither did he know the final outcome of police investigation of the case. That in obtaining the extra judicial Statement of the defendant, he (PW4) adopted question and answer method. That he did not ask the 2nd defendant where he (the 1st defendant) was. That there were two persons who share the name “Chijioko”. The PW1 immediately identified the 2nd defendant as one of the persons that robbed her. He admitted discovering, in the course of his investigation, that the 2nd defendant had a roommate and that the extra judicial Statement of the 2nd defendant’s roommate was not obtained because he was always accompanied by a lawyer. He admitted that all he knew about the involvement of the 2nd defendant was as a result of what he was told. That he also found out during investigation that the 2nd defendant is a tenant to the 1st defendant. He maintained that he carried out

a perfect and thorough preliminary investigation of the case. That one of the robbers is at large and he was living in the same village with the defendants but he is not a tenant of the 1st defendant.

REVIEW OF DEFENCE CASE.

DW1

He is the 1st defendant. In his evidence in chief, he admitted knowing the complainant (PW1) as a native of Enugwu Ukwu. He stated that on the 30/5/16, he was at St. Jude's Anglican Church Adazi – Ani. His brother called him on phone and asked him to come home to supervise the building of his work. That he went home as requested. He saw the progress of the building. He went out to the main road to purchase something. He was accosted and arrested by the police. At the police station, the police asked him whether he knows Ileagu family; to which he admitted knowing because the said family belong to the neighboring village from his. The police also asked him his occupation and about the robbery that took place at Ileagu's family compound. That he told the police that he came to the town that day and did not know about the incident. That the policeman wrote his extra judicial Statement and asked him to sign. That he demanded to know the content of the Statement. That the content of the extra judicial statement written by the police officer was that he was one of the persons that participated in the robbery incident at Ileagu's compound. He then told the police that he did not say so despite his protest, the police officer demanded that he should sign the statement. When he refused to sign the statement, the police officer slapped him. Thereafter, he was detained in a cell. Two days later, the police officer came to him and demanded that he should sign the statement in order to facilitate his release on bail. That he then signed the Statement. He was returned to the cell and was subsequently transferred to Special Anti – Robbery Squad Awkuzu where he was interrogated severely, tortured and asked to say what happened. He told the SARS police his occupation, town and how he got to know the complainant's family. That he denied being an armed robber and the investigation police officer recorded all he said and demanded that he sign it. He did. He identified the Statement and his counsel tendered same as an exhibit. It was received and marked as exhibit D1. The 1st defendant admitted knowing the 2nd defendant whom he claimed to be his

tenant. He stated that the 2nd defendant came to Divisional Police Station Abagana to seek for his bail. He was arrested and detained by the police. That he pleaded with the IPO that the 2nd defendant should be released but his plea was ignored. The police claimed that the 2nd defendant was implicated in the robbery. That when he was transferred alongside the 2nd defendant to Awkuzu, he (1st defendant) told the police that the 2nd defendant is only a tenant. He denied robbing the complainants.

Under cross – examination, he maintained that the 2nd defendant is his tenant and not an armed robber. He admitted making a Statement at SARS, Awkuzu but denied making any Statement at Divisional Police Station, Abagana. He admitted signing a document at Divisional Police Station, Abagana which the IPO there claimed that it would be used in releasing him on bail. That he did not know what was recorded. He denied stating in exhibit “D1” that he robbed the complainants. He did not confess to the police that he robbed PW1 and her sisters. He was surprised that PW1 told the police that he robbed her and her sisters. He did not own any gun and he is not an armed robber. He does not know how to use a gun. He learnt the trade of coil but joined St. Jude Anglican Church, Adazi Ani as security in order to raise money. That this case was the first time he was ever accused of a crime. He only visits Enugwu – Ukwu but does not reside there. He told the police that he hails from Uruokwe village but works at St. Jude Anglican Church Adazi Ani. He denied participating in the armed robbery attack on PW1 and her sisters neither did he confess to the crime.

The 1st defendant after his testimony closed his case. The 2nd defendant did not testify neither did he call any witness. As I said earlier, he rested his case on the prosecution’s case.

Both the prosecution counsel and the defence adopted their final addresses at the close of evidence.

ISSUES FOR DETERMINATION.

In his final address, the 2nd defendant’s counsel: C.C. Ezeh, Esq formulated a lone issue to wit:

“Whether the prosecution has proved the case of armed robbery against the 2nd defendant?”

The counsel for the 1st defendant: S.C. Nwosu, Esq. raised the following issues for determination:

1. Whether the confessional Statement of the 1st defendant fell short of the procedure stipulated under section 13 of Administration of criminal justice law of Anambra State 2010 and whether probative value can be attached to same to ground the conviction of the 1st defendant in this case.
2. Whether the fact contained in exhibit P3 created doubt as to the guilt of the 1st defendant and whether court can safely rely on same to exonerate the 1st defendant from any criminal liability.
3. Whether by the evidence adduced by the parties, the prosecutor has proved his case beyond reasonable doubt.

The learned counsel for the prosecution: J.C. Emebie, Esq distilled a lone issue, to wit:

“Whether in view of the totality of evidence at the trial, the prosecution has discharged the onerous burden of proof placed on it under the law, thereby proving the case against both or any of the defendants beyond reasonable doubt”

Having critically examined all the issues as formulated by counsel, I found issues 2 and 3 as formulated by the learned counsel for the 1st defendant to have the same consequence or connotation or implication with the issues that were formulated by the 2nd defendant’s counsel and the prosecution counsel. In other words, all the four issues can be resolved under a generic issue. Learned prosecution counsel generously supplied such an issue. I would, therefore, adopt the issue raised by him as issue No. 2. The 1st defendant’s counsel issue with regard to the admissibility or otherwise of the confessional Statement of the 1st defendant would be treated as issue No. 1. All the arguments which were proffered by counsel would be considered within the confines of the two issues I have indicated.

In essence, the extant issues for determination in this case are:

1. Whether the confessional Statement of the 1st defendant fell short of the procedure stipulated under section 13 of Administration of criminal justice law of Anambra State 2010 and whether probative value can be attached to same to ground the conviction of the 1st defendant in this case.



2. Whether in view of the totality of evidence at the trial, the prosecution has discharged the onerous burden of proof placed on it under the law, thereby proving the case against both or any of the defendants beyond reasonable doubt.

Pertinently, I would resolve the issues seriatim.

ARGUMENTS

The learned counsel for the 2nd defendants stated that the defendants are standing trial for armed robbery. He submitted that the prosecution must prove the three ingredients as handed down in the case of Sunday .v. State (2010) All FWLR (pt.548) 874.

He went on to review the prosecution's evidence and came to the conclusion by conceding that the PW1, PW2 and PW3 were robbed. Counsel contended that the identities of the robbers were not proved. He argued that exhibits P1 and D1 as well as the oral evidence of DW1 showed that evidence on the participation of the 2nd defendant was contradictory. Relying on the case of Musa .v. State (2009) All FWLR (pt.492) 1020 @ 1023, counsel submitted that contradiction in the evidence of the prosecution that will be fatal must be substantial. He maintained that the only evidence that the prosecution laid against the 2nd defendant is exhibit P1. He argued that there are contradictions with respect to whether the 2nd defendant participated in the robbery or not. That this contradiction goes to the root of the case. He submitted that the burden of proof lies on the prosecution. He referred to Section 135 (1) of the Evidence Act 2011. Reliance was placed on Usung .v. State (2009) All FWLR (pt.462) 1203.

He contended that the only nexus between the crime and the 2nd defendant was exhibit P1 which was tendered by the maker of exhibit D1. That the implication of exhibit D1 and exhibit P1 created doubt as to whether the 2nd defendant actually took part in the robbery. He argued that the doubt should be resolved in favour of the 2nd defendant. He referred to Abdullahi .v. State (2008) All FWLR (pt.432) 1047 @ 1064.

The court was urged to hold that the prosecution failed to prove its case against the 2nd defendant.

On the part of the counsel for the 1st defendant, he submitted that the confessional statement did not meet the conditions stipulated under Section 13 of the Administration of Criminal Justice Law of Anambra State, 2010. He urged the court not to attach any probative value or weight to the document. He argued that any doubt in a criminal trial must be resolved in favour of the accused person. Reliance was placed on *Igbenovia .v. the State* (1981) 2 SC, 5 @ 17 – 18.

He stated that the police did not recover any of the stolen items from the defendants neither was the weapon recovered. He referred to *Nwa Ebonyi .v. The State* (1994) 5 NWLR (pt.345) 138 @ 150; *Diana .v. The State* (1980) 8 – 11 SC 238 and *Rebin .v. State* (2010) 10 NWLR (pt.201) 127 @ 133.

He contended that the complainant by exhibit P3 stated she could not identify any of the robbers therefore the allegation was based on suspicion. He submitted that criminal allegation must be proved beyond reasonable doubt. He referred to Section 135 of the Evidence Act 2011. He argued that there is doubt as to whether the 1st defendant participated in the robbery. He contended that the prosecution failed to prove its case beyond reasonable doubt. It was further argued that PW1 gave contradictory evidence. He stated that the prosecution must adduce evidence to establish the ingredients of offence of armed robbery. He referred to *Oseni .v. The State* (2012) LPELR, 7833, SC.

Counsel conceded that the prosecution proved there was robbery but failed to prove armed robbery. He maintained that it was not proved that the 1st defendant was involved in either of the offences. That neither the gun nor the stick used was tendered. He urged the court to discharge and acquit the 1st defendant for lack of evidence.

In his own argument, learned counsel for the prosecution reminded the court that the defendants are standing trial for armed robbery which has death upon conviction as its punishment. That once the court finds that the prosecution proves its case beyond reasonable doubt; the court must impose the death sentence. He submitted that where the court finds that lesser offence of robbery was proved, the court is empowered under Section 287 Administration of Criminal Justice Law, Anambra State to convict the defendants on that lesser offence. He referred and relied upon Section 1 (2) (a) (b) of the Robbery and Firearms (Special Provisions) Act CAP R 11, Laws of the Federation, 2014 and Section 363, Criminal Code, CAP 36, vol. 11 Laws of Anambra State 1991.

Learned counsel conceded to the submissions of the defendants' counsel that the prosecution is expected to prove the ingredients of the offence of Armed Robbery as stated in *Sunday v. State supra*, and *Oseni v. State, supra*. He contended that by the evidence of the prosecution witnesses, the offence of robbery was established. That the prosecution equally established that there was robbery, and that the defendants took part in the robbery and at the time of the robbery, the defendants were armed. Learned counsel contended that PW1 positively identified the defendants as being among the four man robbery gang. That the evidence of PW1 was corroborated by PW2, PW3 and PW4. He argued that the attempt by the 1st defendant to resile from his confessional statement failed by virtue of his exhibit D1 wherein he admitted making the confessional statement. That the defence of alibi raised by the 1st defendant came too late in the day in that it was not raised timeously and at the earliest opportunity to enable the police to investigate same. Having not done so, in his exhibits P2 and D1, the defence of alibi cannot avail the 1st defendant. Reliance was placed on the cases of *Udo v. State (2016) 12 NWLR (pt.1525) 1*; *Ude v. State (2016) 14 NWLR (pt.1531) 122*. Learned counsel further contended that by the oral testimony of the 1st defendant and exhibit "D1" in which he exonerated the 2nd defendant and the fact that the 2nd defendant rested his case on that of the prosecution, the 2nd defendant subjected himself to the court's evaluation of the evidence of prosecution witnesses. That the PW1 adduced evidence to show that she recognized the two defendants out of those that robbed her and her sisters,, her evidence remained uncontradicted by the 2nd defendant in the light of exhibits P2 and "D1". Counsel went on to postulate that the robbery operation could not have been successful without the use of an offensive weapon that induced fear in the victims. He referred to the evidence of DW1, exhibit P2 and PW4 by which it was made clear that the defendants used a stick to carry out the operation. It was argued that the stick induced fear and apprehension in the minds of PW1, PW2 and PW3 making them to surrender to the defendants.

It was further stated that the evidence of PW2 and PW3 to the effect that the defendants ordered them to lie face down, marched on their backs and threatened to harm them was akin to violence. Counsel urged the court to hold that the prosecution proved its case beyond reasonable doubt and to pronounce a verdict of "guilty" against the defendants as well as enter the desired sentence.

On points of law, learned counsel for the 2nd defendant submitted that the prosecution witnesses did not identify the 2nd defendant. He placed reliance on Archibong .v. State (2006) 3 All FWLR (pt.323) 1747; Ikemson .v. State (1989) 3 NWLR (pt.110) 455.

Counsel contended that the identity of the 2nd defendant as one of those who robbed the complainants was in doubt. That no identification parade was carried out. He referred to and relied upon Ndidi .v. State (2007) All FWLR (pt.381) 1617. Also relying on Bozin .v. State (1986) 2 QLRN, 69, counsel submitted that there is a world of difference between recognition and identification. He argued that PW1 did not give the police the 2nd defendant's description. That identification is evidence of opinion and such evidence is fraught with a lot of human errors that may result in mistaken identity. Reliance was placed on Okosi .v. State (1989) 9 NWLR (pt.567) 686.

Counsel went on to point out that the PW1 testified that she did not describe the 2nd defendant to the police at the time she laid her complaint because she did not identify him. He concluded that there is no evidence fixing the 2nd defendant at the scene of the crime except the extra judicial statement of the 1st defendant at Abagana Police Station (Exhibit P1.) He contended that exhibit P1 was rendered impotent by the 1st defendant's exhibit D1 and his oral evidence. That PW4 (IPO) corroborated this fact when he admitted that the 2nd defendant was arrested based on exhibit "P1" made by the 1st defendant and that apart from exhibit "P1" no other evidence implicated the 2nd defendant. Relying on the case of Ozaki .v. State (1990) All NLR 94, counsel submitted that a confessional statement by an accused is evidence against the maker only and not any other person unless the other person has adopted the statement by words or conduct. He stated that the 2nd defendant from the time of his arrest has maintained his innocence in his extra judicial statement exhibit "P2". Finally counsel urged the court to discharge and acquit the 2nd defendant.

RESOLUTION OR DETERMINATION OF THE ISSUES.

ISSUE NO1

Learned counsel for the 1st defendant relied on Section 13 (2) and (3) of the Administration of Criminal Justice Law, 2010 in urging the court not to attach probative value or weight on exhibit P1 (i.e. confessional Statement of the 1st

defendant) on the ground that the condition stipulated under the above Section of the law were not met. For me to resolve this, I would reproduce the said provisions.

Section 13 (2) – “where any person who is arrested with or without a warrant volunteers to make a confessional statement, the police shall ensure that the making and taking of such statement is recorded on video, and the said recording and copies thereof may be produced at the trial provided that in the absence of video facility, the said statement shall be in writing in the presence of a private legal practitioner or any other person of his choice”.

(3) – “the legal practitioner or any other person referred to in sub section 2 shall also endorse with his full particulars, the confessional statement as having witnessed the recording thereof”.

Learned counsel objected to the admissibility of the document when it was tendered in the course of trial. He based his objection virtually on the same ground. I overruled his objection and admitted the document as an exhibit. Having raised the issue again as an issue for determination in his address, I am constrained to, once more; consider the admissibility of the document as an exhibit in view of the recent decision rendered by the Court of Appeal in Charles .v. The F.R.N. (2018) 13 NWLR (pt.1635) 50 @ 64 – 71.

The appellate court while interpreting Sections 15 (4), 17 (1) and 2 of the Administration of Criminal Justice Acts (ACJA) 2015 and Section 9 (3) of the Administration of criminal Justice Law (ACJL) 2007 of Lagos State held:

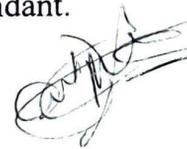
“Unlike the case with judges Rules, which were cautionary, the provisions of ACJA have force of law. Non – compliance with these provisions would automatically throw a purported confessional statement out of the window. The provisions of the Section as well as Section 9 (3) of the Act which are for the benefit of a suspect are therefore mandatory.

Failure to comply with Section 9 (3) of the ACJL, 2007 of Lagos State which requires video recording of the making of a confessional statement or,

in its absence, the presence of the suspect's legal practitioner, during the writing of such statement renders such statement impotent and inadmissible".

The prosecution in the case before me tendered the document to show that the 1st defendant actually made the extra judicial statement. I would have expunged the document based on the above decision but for the fact that the 1st defendant himself tendered another of his extra-judicial statement in which he relied upon and referred to facts contained in that statement. It is settled that a party cannot approbate and reprobate on the same piece of evidence. See the case of B.B. Apugo & Sons Ltd .v. O.H.M.B (2016)13N.W.L.R (Pt.1529) 206@254. By his reference to the document in his exhibit D1, the 1st defendant gave the document exhibit P1 the oxygen to breath again. In other words, the document has become a fact relevant to fact in issue. See section 258 of the Evidence Act, 2011. Galadima.v. State (2016)13NWLR (Pt.1636)357@381. It is therefore admissible in evidence. Even though the conditions outlined in Section 13 (2) and (3) of Administration of Criminal Justice Law (ACJL), Anambra State 2010, were not shown to have been complied with, the document is relevant in this case. Relevancy is a cardinal consideration in the admissibility of a document. In Ajiboye .v. FRN (2018) 13 NWLR (pt.1636) 430 @ 462, the Supreme Court gave the formal requirements of an extra judicial statement. I scrutinized the document. It met all the requirements. The Supreme Court in the same case made it clear that it is not incumbent upon the prosecution to record an accused person's statement in the presence of his counsel. However, the Supreme Court's decision was not on the interpretation of the provisions of the Administration of Criminal Justice Law which many States including Anambra State have adopted. Therefore the above decision of the Court of Appeal in Charles .v. F.R.N., supra, remains the extant or prevailing law on that point.

In the light of the foregoing, I would be very cautious in attaching any probative value or weight to the extra judicial statement made by the 1st defendant and which was marked as exhibit "P1" unless there are other proved pieces of evidence that would corroborate it. I resolve the issue partly in favour of the 1st defendant.



ISSUE 2.

It is trite that in criminal cases the burden of proof of offence lies squarely on the prosecution. The standard of proof is proof beyond reasonable doubt. See *Agu .v. State* (2017) 10 NWLR (pt.1573) 171 @ 211 – 212.

In the instant case, the defendants were charged and arraigned for armed robbery which is a capital offence. The prosecution must prove it beyond reasonable doubt. In the proof of armed robbery, there are three essential ingredients that must be proved conjunctively. These are.

- (a) That there was a robbery incident or series of robberies;
- (b) That the robbery or each of the robberies was an armed robbery;
- (c) That the accused person was the armed robber or one of the armed robbers.

See the following cases: *Sunday .v. State*, supra, *Usung .v. State*, supra, *Oseni .v. State*, supra, *Agugua .v. State* (2017) 10 NWLR (pt.1573) 254 @ 288 -289 and *Adoba .v. State* (2018) 12 NWLR (pt.1633) 236 @ 253 – 254.

Generally, the prosecution can prove the guilt of a person who is charged with commission of crime in the following ways:

- (a) Confessional Statement of the accused which has passed the requirement of the law;
- (b) Evidence of eye witness who saw or witnessed the commission of the alleged crime; or
- (c) Circumstantial evidence which links the accused and no other person with the commission of the crime or offence charged.

See the following cases: *Orisa .v. State* (2018) 11 NWLR (pt.1631) 453 @ 478 and *Ayedatiwor .v. State* (2018) 11 NWLR (pt.1631) 542 @ 554.

In the instant case, the prosecution appears to be relying on confessional statement of the 1st defendant and on an eye witness account.

PW1, PW2 and PW3 were the victims of the crime. They were together in the night of 19/5/16 at their residence at Umuezu, Awuvo village, Enugwu Ukwu when the robbery incident occurred. I have earlier given the essential parts of their evidence. From the evidence of PW1, the robbery occurred at about 10:30pm. It was dark but the robbers came with their torchlight which was on. The light from the torches reflected on the face of the 1st defendant. Before the robbery incident, she knew the 1st defendant because he was always coming to her shop to buy

cigarettes and tom – tom. She saw the 1st defendant in that night the robbery incident took place because none of the robbers wore face mask. Significantly, she further testified in chief that the 1st defendant was insisting and compelling her to bring all the money from the places she hid them. The 1st defendant forced her to go to the shop with him where more money and other items were taken. In other words she spent some time with the 1st defendant during the robbery operation. Under cross – examination, she answered to the following questions:

Qtn: Do you know the 1st defendant's full name prior to the robbery incident?

Ans: I did not know the full name of the 1st defendant before the robbery incident.

Qtn: Did you mention the name of the 1st defendant when you reported the case to the police?

Ans: I told the police his name. We made enquiry about the 1st defendant from someone who told us the name of the 1st defendant.

Qtn: Was that person at the scene of the robbery incident on the day you were robbed?

Ans: The person was not there. I know the 1st defendant personally but I do not know his name. The person that told me the name of the 1st defendant was his acquaintance.

Qtn: How many of the robbers did you identify that day?

Ans: In that night, I identified two of the robbers.

Qtn: How did you identify the two robbers?

Ans: The robber who was armed with a gun had torchlight. He flashed the torchlight and it reflected light on the face of the 1st defendant. The 2nd defendant was armed and he had the torchlight. When he flashed the torchlight it reflected on the face of the 1st defendant.

Qtn: How did you identify the 2nd defendant who was armed with a gun and torchlight?

Ans: I was holding torchlight when the robbers came in. I flashed the light at them before the 2nd defendant snatched it from me. It was then that I saw his face.

Qtn: It is true that the armed robbers first attacked you at your shop, is that correct?

Ans: It is true.

Qtn: It is correct that on that faithful day you were robbed, you did not identify the 2nd defendant, is that correct?

Ans: I saw the 2nd defendant that day. I identified him because of the torchlight.

Qtn: On the day after the incident being 20/5/16 when you went to the police to lodge your complaint you did not tell the police that the 2nd defendant was a member of the gang that robbed you, is that correct?

Ans: I went to the police to lodge the report over the robbery incident. I told the police that I know the 1st defendant and told the police his name. I equally told the police that I know the 2nd defendant but I did not know his name.

Qtn: Did you describe the 2nd defendant to the police so that he can be apprehended?

Ans: I did not describe the 2nd defendant to the police. It was the 1st defendant that gave the police the description of the 2nd defendant.

Qtn: It is true that the reason you were not able to identify him that day made you not to be able to give the 2nd defendant's description to the police, is that correct?

Ans: Yes. It is correct.

Qtn: It is then correct to say that it was the 1st defendant that informed the police that the 2nd defendant participated in the robbery, is that correct?

Ans: Yes. It is correct.

Qtn: Of the two robbers that entered your room, it was the 2nd defendant that was carrying a gun and torchlight, is that correct?

Ans: It is correct.

Qtn: The three different sums of money that was collected from you, it was the 2nd defendant that collected the money from you that day, is that correct?

Ans: The 2nd defendant collected the money and handed same to the 1st defendant.

Qtn: Which of his hands did the 2nd defendant hold the gun?

Ans: The 2nd defendant was holding the gun with his right hand. He used his left hand to snatch the torchlight from me.

Qtn: Did the 2nd defendant hold the gun in his right hand and the torchlight with his left hand throughout the operation?

Ans: Yes. That is correct.

Qtn: When you went to the police station to identify the 2nd defendant, he was sitting alone with the IPO, is that correct?

Ans: It is not correct. I saw the 2nd defendant when they came to rob us on that fateful day. When I went to the police after he was arrested, I pointed out the 2nd

defendant as one of the robbers who robbed us. There were other policemen that were there that day.

Qtn: Apart from the police officers there, it was only the 2nd defendant that was the suspect there when you went to identify him, is that correct?

Ans: It is correct.

I deliberately reproduced PW1's evidence which was elicited under cross – examination because of the issue of identification of the robbers that robbed her and her sisters. More so, the PW1 appears to be the star witness of the prosecution. From both her evidence in chief and her evidence under cross – examination, she was consistent that she identified the 1st defendant as one of the robbers that attacked her in the night of 19/5/16.

Juxtaposing the PW1's evidence with those of PW2 and PW3, I found that indeed there was a robbery attack against them in the night of 19/5/16. The fact was not contradicted neither was it challenged during trial. It is trite that facts not challenged are taken as established. See the case of *Musa .v. State* (2018) 13 NWLR (pt.1636) 307 @ 314 – 318.

I therefore hold that there was armed robbery attack on the PW1 and her sisters. This fact was established by the prosecution. The question now is: Who were the robbers? There is no doubt that PW1, PW2 and PW3 were the victims and of course eye witnesses of the robbery. They pointed at the defendants as participants in the robbery. The PW1 stated that she was able to identify the defendants, particularly the 1st defendant whom she claimed to have known before the robbery incident with aid of the light from the torchlight used by the robbers during the operation. This fact was corroborated by PW2 under cross – examination where she said that PW1 told her she recognized one of the robbers who used to buy tom – tom and cigarettes from her store. Again PW3 testified that PW1 told them after the attack and departure or escape of the robbers that she recognized two of the robbers. She testified that she knows the 1st defendant before the incident because he was always buying cigarettes and tom – tom from their shop.

PW4, the IPO, testified and tendered the confessional statement. He stated that after their investigation, they found that the robbers used an object and not a gun to carry out the robbery that night. The 2nd defendant's extra judicial statement was also tendered through him. Under cross – examination, counsel for the 1st

defendant tendered the police crime diary through the PW4 and same was received in evidence as exhibit P3.

PW4 insisted that PW1 mentioned the name of the 1st defendant who in turn revealed the name of the 2nd defendant. PW4 further stated that he did the preliminary investigation before the case was transferred to SARS Awkuzu for conclusion of the investigation.

In all the evidence of PW1, which was corroborated by other defence witnesses, it was maintained that the 1st defendant was at the scene of the crime. The 1st defendant himself testifying as DW1 admitted that he knows the PW1's family and he knows the complainant. He admitted signing exhibit P1 when he was told it would assist in facilitating his release on bail. However, the police officer who wrote the extra judicial statement did not write what he told him to write. Essentially, he told the police officer that he did not participate in the robbery. Due to the significance of the confessional statement, I am constrained to reproduce it here. It was made on the 30/5/16, the same day the 1st defendant admitted he was arrested. He stated, shorn of the preliminary information and cautionary words, as follows:

"I am of the above address and I reside same (sic) I know the complainant in this case as well as other family members. They are my customers as I usually go to their shop to buy cigarettes and other items. It is truth (sic) that I and two other (sic) went to the complainant's house/store to rob them of their cash and other valuables. We are only three not four as claimed by the complainant. The people involved are one Chijioke Nwoye of same address and Ifeanyi Okafor of same address. The money we got was shared equally at ₦35,000:00 (Thirty Five Thousand Naira only) each. The other items which includes phones, singlets and others were taking (sic) by Ifeanyi Okafor who has fled to Enugu State. We did not use gun but a ply wood that is short in size. After the operation, we threw it into the Uruokwe primary school as we were running home".

Now the 1st defendant (DW1) in his evidence in chief stated that when he was taken to SARS Awkuzu, he was interrogated. He admitted making another statement. According to him, he told the men of SARS that:

“Who I am, my occupation and how I got to know the members of Ileagu’s family. I told the men of SARS that I hail from the same town with the Ileagu family and that I am not an armed robber. My Investigation Police Officer (IPO) at SARS wrote what I told him after which he demanded that I should sign. I signed the statement that was recorded”.

He identified his extra judicial statement at SARS which was shown to him by his counsel. The statement was tendered, admitted in evidence and marked as exhibit “D1” without an objection. Let me also reproduce that statement here:

“That I am a native of the above mentioned address. That I was born in the family of late Mr. Ikechukwu Okeke “m” and Late Mrs. Magret Nkem Okeke “f”. That I attended our Ladies (sic) primary school, Nkpor Unu (sic). Thereafter I proceeded to G.T.C. Onitsha were (sic) I had my O’level certificate in the year 2013. That after my school certificate, I learn on (sic) how to re – wiring of coil (sic). That after my graduation, I could not raise money for my shop so I went into security/watchman till date. That I know Chinenye Ileagu “f”. I do go to her shop to buy things like cigarette etc. That truly I told police that I am the person who robbed Chinenye Ileagu. That I did not do so I only said so when my brother Ejike Okeke denied a bag that was recovered from our room. So it is because of it I agreed but truly I am not the person that robbed them. That the said Chijioke I mentioned is not an armed robber he is my tenant. I called him so that he will help and raise some money for me. That the reason I called Ifeanyi Okafor as my gang member is because I called his father Vincent Okafor to help me. He now go at my back (sic) to the complainant to tell them to hold my well (sic) that I am an armed robber. I never rob (sic) before even police went for searching in my house. They did not recover any items (sic) the complainant alleged that was stolen. That truly if I did such thing or commit the offence, I would have confessed since. That I don’t have any body I am an orphan”.

I am of the firm view that by the foregoing extra judicial statement, the 1st defendant impliedly acknowledged his confessional statement as expressed in exhibit “P1”. In other words, he admitted in exhibit D1 telling the police in exhibit

P1 that he is one of the robbers, being familiar with PW1 and was her customer, and above all, revealing the names of his gang members. In exhibit D1, the 1st defendant admitted making exhibit "P1". In his oral evidence, he set up a different story. He raised the defence of alibi by claiming to be at St. Jude's Anglican Church Adazi Ani. He vacillated from and/or oscillated between his confessional statement (exhibit P1) and his exhibit "D1". I noted that exhibit P1 was made on the 30/5/16 and exhibit D1 was made on the 28/6/16, a couple of days less than one month from the date exhibit "P1" was made. He did not tell the police that he was at St. Jude's Anglican Church, Adazi Ani on the date the robbery incident occurred when he made the two statements.

It is settled that the essence of a defence of alibi is that a person cannot normally be present in two different locations simultaneously. In other words, a man cannot be said to be at a different location while allegedly committing an offence at another location at the same time. A plea of alibi should be raised at the earliest opportunity in the accused person's statement to the police investigating the case. It is the duty of the accused to state particulars relating to where he was at the material time as well as the person or persons he was with and the place of the alleged crime. Alibi is not a magic wand available to all accused of crime. It must be raised timeously and particulars supplied to enable the veracity of same to be proved.

It is perplexing and intriguing that the 1st defendant has raised the defence of alibi for the first time in the witness box while giving his evidence. I hold that his evidence of alibi is worthless and an after thought. See the following cases Ude .v.State (2016) 14 NWLR (pt.1531) 122 @ 153 – 154 and Asuquo .v. State (2016) 14 NWLR (pt.1532) 309 @ 333

There is no doubt that the 1st defendant is inconsistent with his viva voce evidence in court. The law is that where an accused person gives evidence that is at variance or inconsistent with the earlier statement made by him to the police, such evidence should be and ought to be taken with a pinch of salt if not disregarded as unreliable. See the case of Isong .v. State (2016)14NWLR(Pt.1531)96 @112.

By the evidence of PW1, PW2, and PW3 it is established that the 1st defendant was at the scene of the crime. I asked myself this pertinent question: Are there other pieces of evidence, apart from exhibit P1, which was proved against the defendant

in view of the decision in *Musa .v. State*, supra @ 318? Certainly there were. Firstly, his affirmation in exhibit "D1" wherein he impliedly admitted making exhibit P1. He admitted expressly that exhibit "D1" represented what he told the police at SARS Awkuzu to record. In the said exhibit, he admitted telling the police that he was the person that robbed Chinenye Ileagu (ie PW1). He went further to state that he mentioned Chijioke (2nd defendant) who is his tenant. In his evidence, he stated that he knows the 2nd defendant and the 2nd defendant is his tenant. He further testified that he pleaded with the police to leave the 2nd defendant because he is his tenant. Secondly, the PW1 and PW2 positively identified the 1st defendant as one of the robbers that attacked them. They gave uncontradicted evidence that they know the 1st defendant before the robbery incident. The 1st defendant himself admitted knowing the PW1 and being her customer before the robbery.

It is trite that in proving the identity of an accused person, the court should consider:

- (a) Circumstances in which the eye witness saw the accused.
- (b) The length of time the witness saw the accused.
- (c) The light conditions.
- (d) The opportunity of close observation.
- (e) The previous contact between the parties.

See the case of *Adekoya .v. State* (2017) 7 NWLR (pt.1565) 343 @ 358.

In the instant case, it is in evidence that the 1st defendant, particularly, had known the PW1 and her sisters before the robbery; the PW1 testified that she flashed her torchlight at the robbers before it was snatched from her. She saw the face of the 1st defendant and the robbers took her into all the hidden places she kept her money and even spent some time to take some drinks. Therefore, the 1st defendant was positively identified by PW1. I have no doubt in my mind that PW1 visually and positively identified the 1st defendant at the scene of the crime. I believe her.

It is against the above that I conclude that there are other ascertained and proved facts that corroborated exhibit "P1". See the case of *Lawal .v. State* (2016) 14 NWLR (pt.1531) 69 @ 89.

It is important to point out that exhibit P3 (ie police crime diary) has become irrelevant in view of exhibit P1, "D1" and of course, the oral evidence of the 1st

defendant. In other words, it is no longer material whether PW1 told the police that she identified any body or not when she lodged her complaint.

It is my inference therefore in view of the light of the totality of evidence adduced that the 1st defendant participated in the robbery incident at the home of PW1 and her sisters. The next question is: Did the 2nd defendant participate in that robbery? In his terse extra judicial statement, he said:

“I am from Izzi in Ebonyi State but resides at the above address. I am an okada rider (sic) at Ezi – Elias area. I know the said Uchenna Okeke. He is my landlord. Concerning the issue on ground it is not truth (sic) that I took part in the robbery in which he is involved in. It is not truth (sic) that I partook in sharing of the looth (sic) they got from the said robbery. I think or feel that Uchenna Okeke mentioned me in the said act out of hatred”.

From his extra judicial statement as reproduced, it can be seen that he denied being involved. However, the 1st defendant in his exhibit “P1” mentioned him as a member of the gang that robbed PW1 and her sisters.

It is settled that a statement amounting to a confession may be used against the maker alone. It cannot be used against his co – accused unless it was made in his presence and he adopted it by words or conduct. See Section 29 (4) of the Evidence Act. *Ajaegbo .v. State* (2018) 11 NWLR (pt.1631) 484 @ 508.

It was not shown that the 2nd defendant was present when the 1st defendant made exhibit “P1” neither did the 2nd defendant adopt the exhibit by words or conduct. At the trial, the 2nd defendant rested his case on that of the prosecution. He did not testify neither did he call any witness to testify on his behalf.

It is settled that an accused person has the right to remain silent and leave the trial to the prosecution to prove the charge against him. This is because the citizen’s right to remain silent even when arraigned for a criminal offence is an inviolable one. The prosecution is bound to prove its case beyond reasonable doubt. But he runs a risk; he will be obliged to make his defence to the charge if his remaining silent will result in his being convicted on the case made against him by the prosecution. See the case of *Igabele .v. State* (2006) 6 NWLR (pt.975) 100 @ 133. In the case of *Nwede .v. State* (1985) 3 NWLR (pt.13) 444 @ 455, the Supreme Court warned that:

“A defence counsel should know when it is imperative that an accused person should give evidence in the witness box and explain certain aspects of the case which are exclusively within his knowledge; it is improper in such a situation to rest the defence on the case for the prosecution. This improper procedure denies the trial court of hearing the story of the accused and making a choice between accepting his story or that of the prosecution. A piece of evidence which is either unchallenged or uncontradicted will be accepted as proof of a fact it seeks to establish”.

See also *Agugua .v. State*, supra @ 291 – 294. Flowing from the above, PW1 testified that the 2nd defendant was among the robbers that attacked her and her siblings. She gave evidence of the role the 2nd defendant played and how she came to identify him. Subsequently, she admitted that she was not able to describe the 2nd defendant to the police because she could not identify him. She further admitted that it was the 1st defendant that gave the police the description of the 2nd defendant. She also admitted that before the robbery incident she did not know the 2nd defendant. Lastly, she admitted that it was the 1st defendant that informed the police that the 2nd defendant participated in the robbery. Both PW2 and PW3 who were eye witnesses adduced evidence that they did not see or identify the 2nd defendant on the day of the robbery. The evidence of PW1 is contradictory on the identity of the 2nd defendant. In one breath she stated that she saw the 2nd defendant on the scene of the crime with the aid of a torch, in another breath, she admitted that the reason she could not give the description of the 2nd defendant to the police was because she could not identify him that day.

It is settled that whenever the case against an accused depends wholly or substantially on the correctness of the identification of the accused, and the defence alleges that the identification was mistaken, the court must closely examine the evidence and in acting on it must view it with caution so that any real weakness discovered about it must lead to giving the accused the benefit of doubt. See the case of *Adamu .v. State* (2017) 7 NWLR (pt.1565) 459 @ 487.

In the instant case, despite the fact that the 2nd defendant decided to rest his case on the prosecution’s case, there is doubt cast on his identity and participation in that operation. I must say that he took a calculated risk and it paid off for him. The same cannot be said of the 1st defendant. I believe he planned and participated in

the robbery. Furthermore, there is this issue whether a weapon was used in the robbery incident. The defence counsel made fuss about the failure of the prosecution to tender the weapon or gun used in the robbery. I am of the view that this stance cannot be right in the light of the explanation given by the PW4 regarding the weapon. Apart from that, there is no law insisting that the prosecution in order to prove or establish its case must always tender weapon or gun used in a robbery. It largely depends on the facts and circumstances of each given case. See *Agugua .v. State supra @ 280 – 289*.

The DW1's extra judicial statement that he and his men used a ply wood or stick in committing the act and while they were escaping, threw away the stick at Uruokwe Primary School, Enugwu Ukwu comes into focus. It became impossible for the police to go fishing for the stick or plywood.

I further asked myself the ultimate question: Did the prosecution prove or establish that the offence of armed robbery was committed? PW1, PW2 and PW3 testified that a gun was used in that operation. This fact was not contradicted. Rather, DW1 in exhibit P1 admitted using the stick or ply wood in the robbery. The PW4 in his evidence stated that the police found or came to the conclusion that an object was used in the robbery operation. It is clear that evidence abound that at the time of the robbery operation, the victims were frightened at the sight of what one of the robbers held and pretended that it was a gun. Therefore, the stick or ply wood was a weapon in the eye of the law. See the case of *Ekpo .v. State (2018) 12 NWLR (pt.1634) 408 @ 418*.

The next question is: amongst the robbers who was in possession of the weapon? PW1, who bore the brunt of the robbery, stated that the 2nd defendant was in possession of the gun. That it was he that pointed the gun at her. I held earlier that the participation of the 2nd defendant is doubtful on the ground that the prosecution failed to establish his identity. The 1st defendant's confessional statement in exhibit P1, his subsequent reaffirmation of his confession in exhibit D1 and other proved or ascertained or corroborative pieces of evidence adduced by the prosecution witnesses showed that he could be in company of one of the robbers who was armed with a weapon but it is doubtful if the weapon was actually deployed or used on the day of the operation.. See the case of *Sunday .v. State, supra. Usung .v. State supra* .In addition, I still entertained doubt in my mind over exhibit P1 because of the non compliance with the extant law; even though, I have

demonstrated above that there are corroborative pieces of evidence that have been laid by the prosecution. Ordinarily, a court can convict an accused on his confessional statement without more. See Akpan.v.State (1990)7 NWLR (pt.160)101. I am reluctant to attach much weight or probative value on exhibit P1 for lack of compliance with Administration of Criminal Justice Law of Anambra State, 2010.

In conclusion and, for reasons I have set out above, I hold that from the totality of evidence adduced in this case, the prosecution proved the offence of robbery against the 1st defendant only beyond reasonable doubt. It is settled that the court can convict an accused person for a lesser offence than the one charged if the following conditions are met:

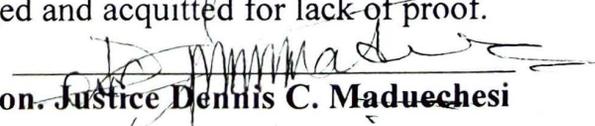
- a. the elements in the offence charged and those in the lesser offence for which the accused is convicted are the same
- b. the evidence adduced and facts found must be insufficient for the conviction in respect of the offence charged but must at the same time support the lesser offence.

See the case of Adoba .v. State, supra @255. See also Section 287 (2) of ACJL Anambra State 2010.

In the light of the fore going, I hereby convict the 1st defendant for the offence of robbery. He is guilty of the offence of robbery only. The prosecution failed to prove the offence of armed robbery against the defendants beyond reasonable doubt.

ALLOCUTUS

I have listened attentively to the mitigation plea by the 1st defendant's counsel. I have taken into consideration that the 1st defendant is a young man and an orphan. The law must take its course. Punishment is a consequence of a crime. The 1st defendant is hereby sentenced to 21 years imprisonment which will run concurrently starting from the day he was remanded in prison custody awaiting his trial. The 2nd defendant is hereby discharged and acquitted for lack of proof.


Hon. Justice Dennis C. Maduechesi

Appearances;

J.C Emembie, Esq Senior State Counsel, for the Prosecution

S.C. Ugwunna, Esq for the 1st defendant

C.C. Eze, Esq for the 2nd defendant