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 THURSDAY THE 16TH DAY OF MARCH, 2017.

CHARGE NO. HID/4C /2014

BETWEEN:

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

VS.

CHUKWUEMEKA OBI FIDELIS ======= DEFENDANT

JUDGMENT

The defendant was arraigned on one count charge of 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 or about the 6th day of March, 2013 at Oluchukwu Micro Finance Bank Limited, Holy Cross Branch inside Holy Cross Parish Nkpor-Agu within the jurisdiction of this Honourable Court, the defendant and others at large while armed with guns robbed the sum of Seven Hundred and twenty eight thousand, five hundred and thirty Naira (N728,530.00) property of Oluchukwu Micro Finance Bank Limited. The defendant in his plea before the Court denied the commission of the offence. 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 defendant made a no case submission and the parties addressed the Court on the point. In its ruling, the Court held that the prosecution has made out a prima facie case against the defendant. The defendant was called upon to enter his defence and he entered the witness box for his defence and testified as D.W.1. After his evidence the defendant called one other witness who testified as the D. W.2.

At the conclusion of evidence, the parties filed and exchanged written addresses in compliance with the orders of the Court made on the 14th day of November, 2016. As such, on the 17th day of January, 2017 the learned counsel for the defendant adopted the final written address dated the 3rd day of January,2017 but was filed on the 16th day of January, 2017 as their final argument in this matter and urged the Court to dismiss the charge. For the prosecution, her learned counsel placed reliance on the arguments canvassed in the final written address which was filed on the 12th day of January, 2017. He urged the Court to enter a verdict of guilty against the defendant. The charge was then adjourned to the 16th day of March, 2017 for judgment.

In the final written address of the defendant, his learned counsel formulated a sole issue for the determination of this Court to wit:-

> "Whether from the totality of evidence adduced, the prosecution has proved the cases of conspiracy to commit armed robbery and armed robbery against the defendant beyond reasonable doubt?"

For the prosecution, her learned counsel in his final written address equally framed a lone issue for the determination of this Court. The issue for determination is as follows:-

> "Whether the prosecution has proved the charge against the defendant beyond reasonable doubt?

I have looked at the sole issue for determination variously distilled by the learned counsel for the parties in this charge. On sober reflection on the sets of issue for determination as formulated on behalf of the parties shows clearly that the sole issue for determination settled by the learned counsel for the defendant is similar and related to the lone issue for determination prepared by the learned counsel for the prosecution in their final written addresses. 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 issue 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, has the prosecution proved all the ingredients of the offence of armed robbery beyond reasonable doubt in order to secure the conviction of the defendant?

The sole issue for determination in this charge is, from the circumstances of this case and the totality of the evidence adduced, has the prosecution proved all the ingredients of the offence of armed robbery beyond reasonable doubt in order to secure the conviction of the defendant? The facts of this case fall within a narrow compass. It is clear from the totality of the evidence adduced by the prosecution witnesses that the P.W.1 who is the victim of the alleged armed robbery and the P.W.3 are the only eye witnesses of the commission of the crime who testified for the prosecution. It is now settled law as rightly submitted by the learned counsel for the parties in their final written addresses that for the prosecution to succeed in proof of the offence of armed robbery against the defendant, 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.

As I said earlier, the prosecution called only three witnesses and the P.W.1 and the P.W.3 are the only eye witnesses who testified for the prosecution since the P.W.2 was the team leader of the Investigating Police team. I will now proceed to examine the relevant evidence of the P.W.1. I intend to reproduce the said evidence of the witness because of its importance. First of all, the relevant portion of the evidence of the P.W.1 is as follows:-

"In the afternoon of the 6th day of March, 2013, a seminarian made a deposit of money to the tune of N719,360.00 at our bank. After a while, two commercial motorcyclists with one passenger on each of them stopped at the front of our office. The seminarian who made the deposit was still in our office. Two men came into our office while the money I collected from the seminarian was still on the ground behind the counter. They instructed us to lie down facing the ground and all of us did so. One of the robbers opened the door to the counter and came in where I was lying down. He collected all the money on the ground into the bacco bag with which the seminarian brought the money. I was still lying on the ground when people started coming in and it was then that I stood up. The armed robbers stole a total sum of N728,530.00 from the money in my possession. We went to the Ogidi Police Station and lodged a report. The D. P. O. told us to exercise some patients as he had gotten a report that his men apprehended some people. The D. P. O. asked me whether I have inserted the money inside our wrappers and I told him yes. Then he said that the people apprehended were with some money. And if the money is in our wrapper, then it is our money. We waited until his men arrived with the people. And it happened that the money on them was in the wrappers of Oluchukwu Micro Finance Bank. After that day, our officials later went to the police station and the police men gave them the money but the amount is not up to the amount that was forcefully taken away. The money the policemen gave to our officials is a sum of N613,900.00. The policemen said that it was only one of the armed robbers that was apprehended. The armed robber made his statement to the police when we were making our own statement to the police. I see the defendant at the dock. I cannot say whether he was the person we made statements together with as it was dark by the time we were making the statements."

When the witness was cross examined by the learned counsel for the defendant, she testified that she was the only cashier present when the armed robbers came. It is her evidence that she did not observe the face of any of the robbers. The P.W.2 who was the team leader in his evidence confirmed that on the 6th day of March,

2013 at about 14:00 hours, the P.W.1 came to their station to report a case of armed robbery on behalf of Oluchukwu Micro Finance Bank. That 4 armed men invaded their bank stole the bank's money and ran away on their motor-cycles. As the team leader of the investigators, he detailed one of his detectives Corporal Omini Effiong to investigate the case. He was about to take her statement when the D.P.O. called all of them to his office and informed them that the defendant was arrested in respect of the offence. He testified also that the defendant told them at the D.P.O.'s office that they were the people that went to Oluchukwu Micro Finance Bank and stole their money and later ran away on their motorcycle. When they got to building materials market area they were looking for a place to share the money when the patrol men sighted them, suspected them and pursued them. He fell down from the motor-cycle and was arrested with the money they stole from Oluchukwu Micro Finance Bank. From there they took him down to Ogidi Police Station. It is his evidence that the money recovered was wrapped in Oluchukwu Micro Finance Bank's wrappers and the P.W.1 identified them as the money of their bank. The money was released to the bank on bond which he recommended and the D.P.O. approved it. He stated that all he said were what the defendant told them and the I. P.O. recorded it and the defendant signed it.

The P.W.2 tendered the Police Investigation Report, Bond to produce exhibit in court and the extra judicial statement of the defendant and they were admitted as Exhibits "A", "B" and "C" respectively. When he was cross examined by the learned counsel for the defendant, he testified that Supol Okoro and his team were the people that arrested the defendant. It is his evidence also that Supol Okoro is not a member of his team and they did not obtain any statement from him or any member of his patrol team. He stated that each of the armed robbers was carrying gun but he does not know the type of guns they were carrying. It is his evidence that the defendant was not arrested with any gun. It should be appreciated that when the extra judicial statement of the defendant was sought to be tendered through the P.W.2, the learned counsel for the defendant objected to its admissibility on the ground that the statement did not emanate from the defendant and the defendant being educated has no business for the Investigating Police Officer to record his statement for him. In my ruling on the admissibility of the extra judicial statement of the defendant, I stated that the question whether the defendant made

the statement will form part of the facts finding mission of the Court in its judgment. Now, the P.W.1 in her evidence testified that the armed robber apprehended by the Police made his statement to the Police when they were making their own statement to the Police. The P.W. 2 on his own part claimed that at the office of the Divisional Police Officer the defendant narrated how they committed the offence before them and the I.P.O. recorded all that he told them and he signed. However, the defendant as the D.W.1 in his evidence stated that he was handcuffed and leg cuff was used to bind his legs. An iron bar was inserted at his legs and hands where they were bound together and then hanged in such a way that his head was pointing downwards. The police officers were pinching him with pin and the one that was smoking, at intervals will apply the lighted cigarette on him and burned his skin. This went on for two hours before they brought him down and produced a document for him to sign. He refused to sign the document and one of the officers hit him with a dagger injuring him at his hand. They held his hand and signed the document.

It is therefore clear that the defendant in his evidence before the Court is challenging Exhibit "C" on the ground that it was involuntarily obtained. However, he supported the evidence of the P.W.2 to the effect that he signed Exhibit "C". As rightly submitted by the learned counsel for the prosecution in his final written address, the practice is for the defendant who denies that his extra judicial statement made to the police was voluntarily made to object to the statement when the prosecution seeks to tender it in evidence. When this is done at that stage, the Court proceeds to test whether the statement was obtained voluntarily by conducting a trial within trial on the admissibility of the statement and the onus is on the prosecution to prove that the statement was free and voluntary. In the instant case, the extra judicial statement of the defendant was admitted in evidence as its being obtained voluntarily was not challenged at the appropriate time.

SEE: AUTA VS. STATE (1975) 4 S. C. 125.

EFFIONG VS. STATE (1998) 8 NWLR (PT. 562) 362.

As I said earlier, the available evidence adduced by the defendant is that he signed Exhibit "C". The evidence of the defendant did not contradict the evidence of the P.W.1 and P.W.2 to the effect

that he made his statement to the Police and signed the statement which is Exhibit "C". It is therefore my finding that the defendant signed Exhibit "C". Having admitted the statement of the defendant as exhibit, it became part of the case for the prosecution and I am therefore bound to consider its probative value notwithstanding the retraction by the defendant in his 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.

The P.W.3 in his evidence in chief before the Court testified as follows:-

> "As at 2013 I was a security man at Oluchukwu Micro Finance Bank, Holy Cross Parish Nkpor. I see the defendant in the dock. I know him. The defendant and others came to rob at Holy Cross Parish Nkpor with a sack containing AK 47 rifle. The defendants were 4 in number and they came with two motor-cycles. Two of them were on top of the motor cycles, while 2 people entered inside the bank. The defendant pointed a gun at me and told me that if I move, he will shoot me."

When the witness was cross examined by the learned counsel for the defendant, he admitted that he stated in his statement that he hid in one of the vehicles in the compound when the robbers came. He told the Court that he can't recall the name of the vehicle he was inside. It is his evidence also that only one of the robbers was carrying gun. When asked; "At what point did the defendant point the gun at you as you were hiding in the vehicle?" The witness stated; "He was standing at the entrance of the bank, the other person entered the bank and he pointed the gun at me. I then ran away because I was not having a gun and I hid myself beside a vehicle." It is his further evidence under cross examination that the defendant was produced at the police station and he came in company of their managers and identified him. When asked whether it will surprise him to know that there is no

record of his identification of the defendant; he testified that the person who recorded his statement is Omini and he doesn't know whether he recorded it or not.

It is clear from the evidence of the P.W.1, P.W.2 and P.W.3 that the defendant was not arrested at the scene. It should also be appreciated that the extra judicial statement of the P.W.3 which he made to the police on the 6th day of March, 2013 was not tendered through him under cross examination and so was not admitted as an exhibit in this proceeding. The question then is whether the prosecution has successfully established that there was a robbery or series of robberies and that each robbery was an armed robbery. These are the first two ingredients of the offence of armed robbery which the prosecution is expected to prove beyond reasonable doubt. In considering these, I will for now not use the defendant's extra judicial statement which is Exhibit "C" for obvious reasons. From the evidence of the P.W.1 highlighted above, it is clear to me that notwithstanding that intermittently she referred to the people as armed robbers; there is nothing in her evidence to suggest that the people who robbed the bank were bearing gun or guns. As a matter of fact, she did not say that the people were carrying weapons of any kind. The P.W.2 in his evidence testified that the 4 robbers were each carrying gun. But he was not at the scene of crime and did not give evidence of what he saw. His evidence is that he was the team leader of the investigating police team and was not an eye witness of the crime. Even at that, he agreed under cross examination that when the defendant was arrested, no gun was found on him. It was only the P.W.3 that testified that the people who came to rob the bank on that fateful day came with one A.K.47 riffle.

The learned counsel for the defendant in that regard in his final written address contended that the testimony of the P.W.3 is so fraught with discrepancies that it will be very risky to be relied upon to convict anybody for an offence as grievous as armed robbery. He then submitted that the doubt attendant to the evidence of the P.W.3 also taints his testimony that the defendant was bearing arms during the robbery operation. In his response in his final written address, the learned counsel for the prosecution contended that the cumulative evidence of the P.W.1 – P.W.3 and Exhibit "C" have proved the charge alleged against the defendant successfully. He argued that the statement made by the P.W.3 at the Police Station was not tendered by the defence when he was

being cross examined. And the failure to tender the statement has divested the Court the opportunity to compare the said statement with the testimony of the P.W.3 and so affects the probative value of the testimony of the P.W.3. It is his contention also that the PW.3 put to rest any doubt to the credibility of his testimony in that he gave graphic details of how the gun was pointed at him and he sought refuge beside a vehicle. Learned counsel for the prosecution then submitted that the procedure adopted by the defence in its bid to impugn the evidence of the P.W.3 by referring to the contents of his statement to cast aspersions on his testimony in Court is wrong. Relying on the case of **ESANGBEDO VS. STATE (1989) 4 NWLR (PT. 113) 57** he submitted that the only way to discredit the testimony of a witness by demonstrating that it is in conflict with his extra judicial statement is to tender the statement.

The learned counsel for the defendant in his cross examination did not really attack the claim of the P.W.1 that there was a robbery at the bank where she works. This 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 defendant alleged as the actual perpetrator of the offence charged was the person who was seen committing the offence. This case is therefore one of the exceptions in that the learned counsel for the defendant has challenged the claim of the P.W.3 that the robbery was an armed robbery. Let me say straight away that the contention of the learned counsel for the prosecution does not apply in the instant case with reference to the point under consideration. I say so because the P.W.3 admitted before the Court that in his statement he stated that he hid in one of the vehicles in the compound when the robbers came. Having made the admission, the learned counsel for the defendant can no longer tender his statement to contradict him. And of course, that his admission becomes his viva voce evidence before the Court.

Now, looking at his evidence from this perspective; is his testimony that the defendant was standing at the entrance of the bank, and he pointed the gun at him; he then ran away because he was not having a gun and hid himself beside a vehicle truth of what transpired on that day? I don't think so. I say so because when you relate this evidence to his evidence in chief, the point I am making will be appreciated. The witness had earlier in his evidence

in chief testified that two of the robbers were on top of the motor cycles, while the other two entered inside the bank. The witness therefore contradicted himself under cross examination when he testified that the defendant was standing at the entrance of the bank. Apart from this, I cannot fathom how the defendant will point a gun at a witness and even threatened to shoot him when the said witness admitted that when the robbers came; he hid inside one of the vehicles. The learned counsel for the prosecution by his contentions showed that he did not appreciate the import of the question put to the witness and his answer when the following transpired:-

> "Q. At what point did the defendant point the gun at you as you were hiding in the vehicle?
>
> A. He was standing at the entrance of the bank, the other person entered the bank and he pointed the gun at me. I then ran away because I was not having a gun and I hid myself beside a vehicle."

Now, was the gun pointed at the P.W.3 when he was hiding inside a vehicle? If so, did he ran out of the vehicle and hid himself beside the same vehicle or another vehicle. I have as such, considered the import of the evidence of the P.W.3 on the point and the contention of the learned counsel for the defendant that the failure to produce and tender the gun as well as the sum stolen 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.

In the instant case, I have carefully considered the evidence adduced by the prosecution on the crucial points. I must say that I believe the P.W.1 that in the afternoon of the 6th day of March, 2013 there was a robbery at Oluchukwu Micro Finance Bank, Holy Cross branch, Nkpor and a total sum of N728, 530.00 from the bank's money in her possession was stolen. Exhibit "B" which is the bond with which the money recovered from the perpetrators of the offence was released to the bank supports this finding. The P.W.3 in one breadth stated that he hid beside a vehicle when one of the robbers pointed a gun at him and he ran away. In another breadth he admitted that when the robbers came, he hid inside a vehicle. The witness contradicted himself in his testimony before the Court on the crucial point. If the robbers came with A.K.47 rifle as claimed by the P.W.3 naturally they will enter the bank where they are to steal the money with the gun. The evidence that the robbers came with a gun but did not enter the bank where they are to steal the money with the gun does not accord with common sense. I don't believe the P.W.3 who was hiding inside a vehicle when the robbers came that one of the robbers pointed a gun at him. It is therefore clear to me that the evidence of the P.W.3 that one of the robbers was carrying A.K.47 rifle and pointed it at him before he ran away because he had no gun when he admitted that when the robbers came he hid inside the vehicle was merely meant to impress. I don't believe the P.W.3 that the robbers were carrying A.K.47 rifle. The implication of my doubting this evidence of the P.W.3 and not believing him on this crucial point is that the prosecution has not been able to prove that the robbery at the bank 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 afternoon of the 6th day of March, 2013 at Oluchukwu Micro Finance Bank, Holy Cross Parish, Nkpor but failed to establish that the robbery was an armed robbery.

This will now take me to the extra judicial statement of the defendant tendered by the P.W.2 and admitted as Exhibit "C". Is Exhibit "C" really confessional statement? When then 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. Having painstakingly read Exhibit "C" it is clear to me that it demonstrated clearly that there was a robbery on the 6th day of March, 2013 at Oluchukwu Micro Finance Bank Ltd, Holy Cross Parish, Nkpor-Agu where an undisclosed sum of money was stolen and the defendant was shown to be among those who took part in perpetrating the robbery. However, at the concluding portion of Exhibit "C", the defendant made it clear that they were not armed at the point in time. It is therefore pertinent at this juncture to reproduce the concluding portion of Exhibit "C". At the concluding portion of Exhibit "C" it reads:-

> *"I did not carry any gun. Nobody carry gun for this job. That our informant told us that it is only one girl that is staying in the bank...."*

It is therefore, crystal clear that the concluding portion of Exhibit "C" 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 Exhibit "C" is not confessional statement made by the defendant wherein he admitted all the ingredients of the offence of armed robbery with which he was charged. In my view, as long as the offence of armed robbery which the defendant is alleged to have committed is concerned, Exhibit "C" is not a confessional statement made by the defendant stating or suggesting the inference that he committed armed robbery. However, the defendant in Exhibit "C" confessed to having participated in the commission of a lesser offence of robbery or stealing. Accordingly, Exhibit "C" purports to be a confessional statement stating or suggesting the inference that the defendant participated in the commission of a lesser offence of robbery or stealing at Oluchukwu Micro Finance Bank Ltd, Holy Cross Parish, Nkpor-Agu on the 6th day of March, 2013.

We are now left with the last ingredient of the offence which the prosecution has the burden to prove beyond reasonable doubt.

This is the crucial issue and that is that the defendant was among those who took part in the robbery or stealing. In proving this ingredient of the offence of robbery, the P.W.1 whose relevant evidence has been highlighted above made it clear that she did not observe any of the robbers. It was only the P.W.3 that stated in his evidence that the defendant was amongst the people that came and robbed their bank. When he was being cross examined he told the Court that he came to the police station and identified the defendant on the day of the robbery. By the evidence of the P.W.3 he has fixed the defendant at the locus criminis and if his evidence is accepted and believed, then he is one of the perpetrators of the crime. The learned counsel for the defendant in his written address had argued that the P.W.3's evidence of identification of the defendant cannot be believed because from the exhibits before the Court there is no such evidence of identification. He referred to the concluding portion of the statement of the P.W.3 and argued that what is contained there is that "if he sees the robbers he can recognise them" and not that he identified one of them. It is argued also that the evidence of identification is weak not having been tested in an identification parade. I think this is where the learned counsel for the defendant got it wrong as contended by the prosecuting counsel. Having not tendered the statement of the P.W.3 as an exhibit, there is nothing to be compared with his testimony in Court. Apart from this, it was the learned counsel for the defendant that cross examined the P.W.3 to adduce the evidence he is now attacking.

The evidence of the P.W.3 as the security man at the bank, Exhibit "C" and the circumstantial evidence from the P.W.1 and P.W.2 that part of the money stolen was recovered from the defendant when he was arrested are the evidence tendered by the prosecution in proof of the offence of commission of robbery or stealing. The question that is relevant to ask at this point is whether the defendant can be convicted on the basis of his confessional statement which is Exhibit "C" in view of the fact that he retracted his extra judicial statement in his testimony in Court? The law is now firmly established as rightly submitted by the learned counsel for the parties 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 statement passes the tests satisfactorily, it will be proper for me to convict based on it unless other grounds of objection exists. However, if the confessional statement fails to pass the tests, no conviction can properly be founded on it and if any is founded on it, 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 testimony of the P.W.3, the confessional statement of the defendant which is Exhibit "C" and circumstantial evidence that the stolen money was

recovered from the defendant. I have the duty to consider whether there is any evidence corroborating the confession which is Exhibit "C". By the evidence of the defendant, he denied committing the offence which is contrary to Exhibit "C". As a result of this, the learned counsel for the defendant in his written address attacked the correctness of the identification of the defendant which he alleged to be mistaken. In that regard, I have considered the evidence of the identification of the defendant as adduced by the P.W.3. The case here is the correctness of the identification of the defendant by the P.W.3. I have warned myself of the special regard for caution and the need to weigh such evidence of identification of the defendant with other evidence adduced by the prosecution before convicting the defendant in reliance on the correctness of the identification. 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 a defendant 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 witness had enough time to observe the defendant. If the quality of the identification evidence is good and remains good at the close of the defendant's case, the danger of a mistaken identification is lessened but the poorer the quality the greater the danger.

SEE: NDIDI VS. STATE (Supra).

This will now take me to examine whether there is any weakness capable of endangering or rendering worthless the contention that the defendant was sufficiently observed by the P.W.3 at the scene of the crime. In order to satisfy the Court that he sufficiently observed the defendant and will be able to identify him, the P.W.3 testified as follows:-

"..... I see the defendant in the dock. I know him. The defendant and others came to rob at Holy Cross Parish Nkpor with a sack containing A.K.47 rifle. The defendants were 4 in number and they came with two motor-cycles. Two of them were on top of the motor cycles, while 2 people entered inside the bank. The defendant pointed a gun at me and told me that if I move, he will shoot me."

When the witness was cross examined on the point, he testified that the defendant was standing at the entrance of the bank, while the other person entered the bank and he pointed the gun at him. He then ran away because he was not having a gun and he hid himself beside a vehicle. Now, the learned counsel for the defendant has contended in his final written address that there is contradiction in the testimony of the P.W.3 as regards the particular point he was during the robbery operation. 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).

From the evidence of the P.W.1 the incident happened in the afternoon. Although one could not see the outside very well through the sliding door but she could see the robbers through the sliding door when they arrived. It is therefore understandable why the P.W.3 in his evidence under cross examination was not challenged that he could not identify the defendant because it was dark or the weather was not clear on that day. The P.W.3 did not testify that he knows the defendant before or had seen him before the incident. So there was no previous contact between them.

Apart from this, I have rejected his evidence that the defendant was standing at the entrance door of the bank and pointed a gun at him. When he was being cross examined, the P.W.3 admitted that in his statement to the police, he stated that when the robbers came, he hid inside a vehicle in the compound. Later, he stated that he ran away and hid beside a vehicle. In reality, there is contradiction here; and evidence suggestive of lack of close observation of the robbers by the P.W.3. Apart from this, there is no evidence that the P.W.3 was observing the robbers from the vehicle he was hiding or even from beside the vehicle he also claimed that he hid himself. As long as the P.W.3 was not led to testify that he observed the robbers and particularly the defendant as the robbery operation at the bank was going on, the Court cannot speculate that he was observing them. Besides, since the P.W.3 ran away when the robbers came, I don't think he could observe them from where he was hiding as to be able to identify the defendant as one of the robbers who robbed the bank. I cannot imagine how the P.W.3 would still be able to observe the 4 robbers as to be able to identify the defendant when cold fear went down his spine as the robbers came and he hid himself in a vehicle in the compound. As a matter of fact, the circumstance in which the P.W.3 as an eye-witness saw the robbers is not akin to a relaxation mood to be able to identify any of them and the length of time was very brief. It should be appreciated that from the evidence of the P.W.3, he did not say when the robbers left after the robbery operation. It is therefore clear to me that the P.W.3 due to the time and circumstances did not have full opportunity of observing the features of any of the four robbers who robbed the bank as to be able to identify the defendant.

I now come to the evidence of identification of the defendant at the police station by the P.W.3. By the available evidence of the prosecution witnesses, the defendant was held out to be amongst the people who robbed the bank and he was brought in contact with the prosecution's witnesses without any attempt at identification. It should be appreciated that the defendant was not arrested at the scene of crime but in his statement he admitted the commission of the offence of stealing. Since the defendant at least admitted the commission of the offence of stealing there is no need for the P.W.2 to conduct an identification parade for the P.W.3 who claimed that he could recognise the robbers to identify the defendant as being in company of the people who robbed the bank. As I said earlier, the defendant had already been held out to

be amongst the people who perpetrated the offence on that day. And I have found as a fact that the P.W.3 could not be able to identify the defendant as being in company of the people who robbed the bank when there was no close observation of the robbers. If it is true that the P.W.3 identified the defendant at the police station, at least, it will be clearly stated in the evidence of the P.W.2 and the Police Investigation Report which is Exhibit "A". I don't believe the evidence of the P.W.3 to the effect that he identified the defendant at the Police Station. The evidence of the defendant as the D.W.1 is that he was not identified as one of the robbers at the police station. These are the reasons why I viewed the evidence of the P.W.3 identifying the defendant with suspicion. I find the evidence of the P.W.3 to the effect that he observed the defendant during the robbery incident and was able to identify him unreliable and unsafe. The implication is that the P.W.3 did not adduce any direct evidence linking the defendant with the commission of the offence of robbery or stealing.

I will now consider the circumstantial evidence adduced by the P.W.1 and P.W.2. This piece of evidence made the learned counsel for the defendant to argue in his final written address that since the D.P.O. who gave the information to the P.W.1 and P.W.2 as well as Supol Okoro who was the leader of the patrol team that allegedly arrested the defendant did not testify, the testimony of the P.W.1 and P.W.2 in relation to the arrest and recovery of the money from the defendant is hearsay. I have in that regard painstakingly read the evidence of the P.W.1. Her evidence in relation to the arrest of the defendant is clearly hearsay evidence. But her evidence that they waited until his men arrived with the people and it happened that the money on them was in the wrapper of Oluchukwu Micro Finance Bank is not hearsay but evidence of what she observed. In the same vein, the evidence of the P.W.2 to the effect that the defendant told them that he fell down from the motor-cycle and was arrested together with the money they stole from Oluchukwu Micro Finance Bank is not hearsay evidence but evidence of what the defendant told him.

I come to the extra judicial statement of the defendant which is Exhibit "C". The learned counsel for the defendant in his final written address has argued that the Police did not comply with the provisions of section 13 (2) and (3) of the Administration of Criminal Justice Law, 2010 in obtaining the confessional statement of the defendant which is Exhibit "C". He referred to the case of

ORAKUL RESOURCES LTD VS. N. C. C (2007) NWLR (PT. 1060) 302 and submitted that the non compliance with the provisions of the law renders Exhibit "C" void. The Court was urged to disregard and expunge Exhibit "C". In his response, in his final written address, the learned counsel for the prosecution conceded that the mode Exhibit "C" was obtained runs foul of the provisions of section 13(2) and (3) of the Administration of Criminal Justice Law, 2010. However, he contended that notwithstanding this shortcoming, the probative value of Exhibit "C" is not thereby affected adversely. It is submitted that the House of Assembly of Anambra State has no powers to enact section 13(2) and (3) of the Administration of Criminal Justice Law, 2010, an area which concerns Evidence reserved specifically for the National Assembly in Item 23 of the Exclusive Legislative List. He argued that the Evidence Act, 2011 at sections 28 – 32 makes provisions on confession and these provisions are the right law to be applied in this case and not section 13 of the Administration of Criminal Justice Law, 2010 of Anambra State. It is submitted also that relevance governs the admissibility of evidence and the moment a piece of evidence is relevant, it is admissible in evidence irrespective of how it was obtained. Reliance was placed on sections 14 and 15 of the Evidence Act, 2011 and the case of **OGU VS. M. T. & M. C. S. LTD (2011) 8 NWLR (PT. 1249) 345**. Learned counsel for the prosecution also contended that the defendant having not contested the admissibility of Exhibit "C" on the ground that it was involuntarily obtained when it was sought to be tendered, cannot now complain of non-compliance with the provisions of section 13 of the Administration of Criminal Justice Law, 2010. The Court was urged to accord Exhibit "C" probative value and to hold that it meets the yardstick of the provisions of sections 14 and 15 of the Evidence Act, 2011.

In the first place, I don't think that the submission that the moment a piece of evidence is relevant, it is admissible in evidence irrespective of how it was obtained is well founded. I say so because it will not apply in confessional statement where section 29(2) (a) and (b) of the Evidence Act, 2011 renders inadmissible confessional statements that were obtained involuntarily. Again, section 13 (2) and (3) of the Administration of Criminal Justice Law, 2010 under consideration provides as follows:-

> "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 subsection (2) shall also endorse with his full particulars, the confessional statement as having witnessed the recording thereof."

The provision of the law does not affect admissibility of confessional statement which is evidence and specifically reserved for the National Assembly. It is a guiding principle which will apply only where a defendant retracts his confessional statement in court. In other words, where a defendant confesses to a crime in his extra judicial statement to the police but in court, he retracts from his confession, before such a defendant is convicted on the said confessional statement, the court is required to ensure compliance with the said provisions of the Administration of Criminal Justice, Law 2010. The said guiding principle is like the Judges' Rule and complements the six way test and not legislation on admissibility of confessional statement. Coming to the point under consideration, it should be borne in mind that Exhibit "C" as I said earlier, is not confessional statement of the offence of armed robbery for which the defendant was charged. The defendant in Exhibit "C" confessed to having committed a lesser offence than the one he is alleged to have committed. As such, its being made voluntarily was not called to question at the time it was tendered. I therefore, agree with the learned counsel for the prosecution that having not raised objection against its admissibility on the ground that it was not obtained voluntarily, the defendant cannot now call in aid the provision of section 13 (2) and (3) of the Administration of Criminal Justice Law, 2010.

In Exhibit "C" the defendant admitted the commission of the offence of stealing or robbery. It is direct and positive and admits the essential elements of the offence of stealing or robbery. Confession is the best evidence of guilt against the defendant. It is stronger than the evidence of eye witness because the evidence that is to say the confession came from the 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.

Exhibit "C" which is the confessional statement of the defendant as rightly submitted by the learned counsel for the prosecution contains lucid details of the background of the defendant and graphic description of his day-to-day activities up to the steps taken prior to his arrest. I agree that the contents of Exhibit "C" point irresistibly to the fact that it was the defendant that gave the information in the statement to the Police and it was voluntary. As such, I am satisfied and find as a fact that Exhibit "C" was made voluntarily by the defendant. It is positive and unequivocal and amounts to admission of guilt. In my opinion, Exhibit "C" if no doubt is created will suffice to ground a finding of guilt regardless of the fact that the defendant retracted it during the trial. Now considering Exhibit "C" in relation to the applicable test there is the evidence that the defendant was arrested with the stolen money to show that the confessional statement which is Exhibit "C" is true on crucial point. The circumstantial evidence of the P.W.1 and P.W.2 support the veracity of Exhibit "C". It was proved that the defendant had the opportunity of committing the offence. The prosecution has proved the confessional statement of the defendant which is Exhibit "C" and confirmed its content which directly linked the defendant to the commission of the crime. In my view a lesser offence of robbery was thus duly proved by the prosecution against the defendant based on his confession which is Exhibit "C" and the circumstantial evidence of the P.W.1 and P.W.2 which corroborated the confessional statement.

Having all these at the back of my mind, it is now necessary for me to look at the evidence adduced by the defendant to see whether

he succeeded in creating reasonable doubt. In his defence, the defendant as D.W.1 testified that on the 6th day of March, 2013 he was at Emeka Ofor plaza where he was working when one of his customers called him on phone and said that if he completes the installation of applications in his laptop, he should bring it inside the market. He packed it and took it to him at the Building Materials Market, Ogbunike. On his way back he stopped at the bus stop waiting for vehicle or commercial motor cycle. He flagged a commercial motor-cyclist and was negotiating the price with him when he heard a gun shot. People started running and the commercial motor-cyclist he was negotiating with left him and took off. He started walking down the road when a vehicle stopped in front of him. Policemen jumped from the vehicle and arrested him. He was taken to Ogidi Police Station where he was tortured in the bid to force him to say the truth. A boy was brought to identify him but he said that the person he saw has three marks at his face. He denied making any statement to the police station. The witness claimed that the police officers brought a document for him to sign but he refused to sign it. When they could not force him to sign the document after torturing him, they he held his hand and signed it. When he was cross examined, he maintained that he did not commit any offence at the said bank.

The D.W.2 Chijioke Igboamalu claimed to be one of the customers of the defendant. In his evidence he supported the evidence of the defendant as the D.W.1 that on the fateful day, he was at Emeka Offor Plaza when he brought memory card for him to download music for the witness. He supported his evidence when he claimed that when he came to collect the memory card, he was in the defendant's shop when one of his customers called him on phone. After answering the phone, the defendant told him to wait for him that he has to deliver a laptop at the Building Materials Market, Ogidi. The defendant left and he waited for him but he could not come back and that was the last time he saw him before seeing him in Court. From the evidence of the defendant and his witness, it is clear that he raised the defence of alibi in his testimony before the Court as rightly submitted by the learned counsel for the prosecution in his final written address. The essence of defence of alibi is that the defendant was not present at the scene when the crime was committed and so could not have been amongst the persons who committed the offence. Where a defendant who was not apprehended at the scene of crime raised the defence of alibi and the defence was not investigated by the police, it will cast

serious doubt on the case of the prosecution. Again, the moment a defendant puts up his alibi; it is not his function to establish by evidence the alibi but for the prosecution to disprove it.

SEE: ADEKUNLE VS. STATE (1989) 5 NWLR (PT. 123 505).

SALAMI VS. STATE (1988) 3 NWLR (PT. 85) 670.

However, it is obvious from the statement to the police which is Exhibit "C" and evidence in court that the defendant did not properly raise the defence of alibi. In his evidence in court the defendant indicated where he was on the 6th day of March, 2013 till when he was arrested by the police. That is the wrong time to raise the defence of being elsewhere. The duty on the defendant is that the alibi must be unequivocal and must be raised during the investigation of the offence and not during the trial. The rationale behind raising the defence when making statement to the police is to enable the police to investigate the alibi. The burden on the defendant is an evidential burden which means that in his statement to the police he must give particulars of his whereabouts at the particular time. A mere allegation by the defendant that he was not at the scene of the crime at the time the offence was committed but in his shop at Emeka Offor Plaza or with his customer at the Building Materials Market, Ogidi is not enough. He is expected to state where he was and the persons who knew of his presence at that place at the material time of the commission of the offence in question. Where a defendant fails to set up the alibi at the investigation stage with the necessary particulars, the defence will not be available to him.

In the instant case, there is nothing to show that the defendant set up the defence of alibi during the investigation of the allegation made against him. In Exhibit "C" his statement to the police, he did not raise the defence of alibi. The defence of alibi that he was in his shop at Emeka Offor Plaze or with his customer at the Building Materials Market, Ogidi at the material time of the commission of the offence was raised by the defendant for the first time during the trial and without necessary particulars in support in that he did not say with whom he was at the material time of commission of the crime. The defence as such, has not been properly raised timeously. In the case of **OZAKI VS. STATE (1990) 1 NWLR (PT.**

124) 92 particularly at page **116, UWAIS, J. S. C.** stated as follows:-

> "The case for the 1st appellant is however different he did not raise the defence of alibi at his arrest but at the trial of the charge against him. The prosecution was not therefore obliged to investigate the plea of alibi and could rely on the evidence of the prosecution witnesses to disprove the alibi."

SEE: SALAMI VS. STATE (Supra).

NSOFOR VS. STATE (Supra).

The defendant from the evidence before me did not promptly and properly raise the defence of alibi. As such, there was no duty on the police in the circumstances to investigate, as no alibi was properly raised. Apart from this, the defendant did not call his said customer at the Building Materials Market, Ogidi whom he said he delivered the laptop to and was on his way back when he was arrested by the Police. I agree with the contention of the learned counsel for the prosecution that it is only the said customer of the defendant that is in a position to substantiate the defendant's claim that he delivered the laptop to him at the Building Materials Market at that time. Accordingly, the defence does not avail the defendant to warrant the Court to reach a conclusion that the prosecution failed to prove its case beyond reasonable doubt. The implication is that the defence of alibi is not available to the defendant and I reject it as being an after thought and unmeritorious.

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", failed to prove the offence of armed robbery against the defendant beyond reasonable doubt. However, a lesser offence of robbery stood proved beyond reasonable doubt, 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 with one for armed robbery.

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

Having considered the evidence adduced by the prosecution and the defendant 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 defendant and he is found guilty accordingly.

2. The prosecution failed to prove the charge relating to the offence of armed robbery against the defendant beyond reasonable doubt and the defendant is discharged and acquitted in respect of the armed robbery charge.

ALLOCUTUS IN RESPECT OF THE DEFENDANT

Defendant's counsel – Urges the court to be lenient with the defendant. He is a very young man that can still be useful to the society. He says that he is a first offender and is married with a child. The defendant has been in custody for over four years and has shown remorse. He urges the Court to temper justice with mercy.

Prosecuting counsel – 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 defendant CHUKWUEMEKA OBI FIDELIS is sentenced to ten(10) years imprisonment without option of fine.

Note:- The ten(10) years is calculated from the year he went into prison custody, namely the 14th day of March, 2013.

IKE OGU
(JUDGE)
16/03/2017.

Parties –
Defendant is present. He is produced from Prison Custody.

Appearances –
I. E. AGWUNCHA (ESQ.) State Counsel for the prosecution.
ANYABOLU C. C. (ESQ.) with **ANYABOLU M. C. (MRS.)** for the defendant.