IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRRITORY ABUJA
IN THE GWAGWALADA JUDICIAL DIVISION
HOLDEN AT ZUBA
THIS THURSDAY, THE 18TH DAY OF APRIL, 2019

BEFORE HIS LORDSHIP:- THE HON. JUSTICE A. O. EBONG

CASE NO: CR/85/2017

BETWEEN:

COMMISSIONER OF POLICE ..... COMPLAINANT

AND

PRINCE ORIGAR ..... DEFENDANT

JUDGMENT

The defendant was arraigned before me on a 2-count charge dated 19/1/2016, containing the following offences: (i) conspiracy to commit armed robbery punishable under section 6(a) of the Robbery and Firearms (Special Provisions) Act, Cap R11, LFN 2004; (ii) armed robbery punishable under section 1(a) [sic: s.1(2)(a)] of the Robbery and Firearms (Special Provisions) Act, Cap R11, LFN 2004.

He pleaded not guilty to both counts and the case went to trial.

The prosecution called two witnesses, who gave oral and documentary evidence and were cross-examined; while the defendant testified in his own defence and called no other witness. He was also cross-examined.

The Prosecution's Case

The First Prosecution Witness (**PW1**) **was Mr. Theophilus Uttah**, the victim of the alleged crime. He told the Court that on the 25/11/2016, at about 9.15pm, he returned from Church and stopped his car at the gate to his residence. He needed to walk in and open the main gate so that he could drive the car into the premises. As he came out of the car, three men attacked him, trying to force him back into the car; but they did not succeed. One of the men hit him on his head with an axe, but he was able to force his way into the compound where he raised alarm. At that point the assailant drove away with his car, and he was bleeding

seriously. His neighbours came out and wanted to chase after the robbers but he told them that the car will stop at a given interval. He asked them to take him to the hospital due to the amount of blood he had lost.

One Joseph Owoicho, a neighbour, drove him to the hospital. On their way, they saw where his own car had stopped, but there was no one inside. They stopped and reported the case to the Police at Jikwoyi Police Station and made statements to the Police. He requested the Police to send surveillance to the place where the car had stopped as he suspected the robbers would return to take the car away. Thereafter he was taken to a medical centre opposite the Police Station. While the doctor was attending to him and stitching his wound, he asked his neighbour to use a motorbike and to go back to where they saw his car.

When his neighbour got there, he did not see the car. He asked the motorcyclist to take himaround the locality to enable him check for the car. They found it not far from the spot where it had stopped initially. When they found it, it was moving slowly with just two persons inside. PW1's chaplet was hanging inside as usual. On seeing the chaplet, his neighbour said, *"Is this not Theophilus' car?"* At that point, one of the two occupants of the car opened the car door and ran away. The defendant, who was driving the car, also tried to come out and escape, but the motorcyclist used his motorcycle and blocked him from exiting the car. Having been prevented from leaving the car, the defendant in his attempt to escape in the narrow street where the car was, then reversed the car into a building behind him. He was at that point arrested by Joseph Owoicho and other persons around, and handed over to the Police.

PW1 further informed the Court that before this time, while they were on their way to the hospital, they had enquired from people around if they had seen his car, and they were told that the car made a stop at Fine Trust Academy, Jikwoyi, Phase 3, and one person was dropped off. He gave the registration number of his car as FUG 231 AA, and said the car stopped the robbers on the road because it was on security. He tendered his statements to the Police both at Jikwoyi Police Station and

at the Special Anti-Robbery Squad (SARS) as Exhibits P1 and P1a respectively.

Under cross-examination, PW1 said he did not know anything about the defendant; that he was just seeing him for the second time. He first saw the defendant while he was in detention at SARS. He affirmed that he saw three persons when the robbery occurred. He did not know what other arms the robbers had with them, apart from the axe they used on him. He did not know if they also had a gun. As regards the identity of the robbers, PW1 said he would be unable to identify any of them even if they are paraded before him, as the time and manner of occurrence of the robbery did not afford him the opportunity to take a close look at them.

He admitted he did not see when the defendant was arrested; but said he was sure the defendant was the person driving the car because the defendant himself told him so. That after his treatment at the hospital, the Investigating Police Officer (IPO) invited him back to the Station, and when he got there the Police were interrogating the defendant. That on seeing him, the defendant almost grabbed his feet and was pleading that he is not staying in Abuja but in Lagos; that he was called to come fix a spoiled car. But when the Police asked who called him to come and fix the car, he refused to mention any name. PW1 said he was aware that after the defendant's transfer from Jikwoyi Police Station to SARS some days later, he finally disclosed to the Police at SARS that it was one Tochi who called him to come and fix a car. He said he got the information from his IPO.

Still in cross-examination, PW1 said he had never had the experience of his car developing electrical fault, but that he knows that cars do develop electrical fault, and that in such instances an auto electrician would be invited. He said he was aware that the defendant had informed the Police during investigation that he was an auto-electrician; but that from all that happened he would say that the defendant was one of those that attacked him and took his car that night.

PW2 was Inspector Joseph Ihiokhan, the IPO. He is with the Criminal Investigation and Intelligence Department (CIID) FCT Police Command. He said he investigated the case and took the statements of the complainant (PW1), the witnesses and the defendant. He and two of his team members visited the crime scene and the place of arrest of the defendant. They also obtained a search warrant and searched the defendant's residence, where they recovered two pairs of keys for Toyota and Peugeot vehicles, as well as a bag containing spanners, pliers, screw drivers and a Bible, all belonging to the defendant. He stated that the defendant lives at Mararaba, Nasarawa State, in a house located near a place called "Sharp Corner." He said the only thing that happened in their office is that they recorded the statements of the relevant persons, and registered the exhibits recovered with the Exhibit Keeper. He tendered the defendant's statement to the Police at SARS dated 28/11/2016, and same was admitted without objection as Exhibit P2.

PW2 was cross-examined on the 19/6/2017 and on the 30/11/2017. He stated that the robbers were armed with dangerous weapons, and that according to the complainant, they were armed with axe and cutlasses; even though they did not recover any weapons from the defendant. He said the items recovered from the defendant's house belong to him, and that he found out that the defendant was an automobile electrician. That from their investigation, the offence committed was armed robbery. That in the course of their investigation the defendant mentioned one Tochi residing in Jikwoyi; that they went to various places where the defendant said he worked for customers on the day in question and found that his story was not true. That Tochi was a friend to the defendant; that the defendant said Tochi called him to come and repair his vehicle, a Toyota with registration No. FUG 231 AR, the same car robbed from the nominal complainant. That with the assistance of the defendant and his relations they tracked Tochi to Asaba, but he was transferred to Kwali thereafter, and Tochi is yet to be arrested. He agreed that the items recovered from the defendant's house are tools that auto electricians use, and that if Tochi had been arrested he would probably have shed more light on the incident. He also agreed that it is not unusual for someone to call an auto electrician to repair a faulty car, but insisted that

at the time the defendant was at the scene of the crime, he was there as a robber not as an innocent auto electrician called by Tochi. PW2 admitted that he was not at the scene of the incident when it happened, and that all that they found and got to know about the snatching of the vehicle, where it stopped and how the defendant was arrested, are facts they gathered from witnesses. That apart from what the complainant and witnesses told him, he would not know if the defendant was among the robbers, as he was not at the scene of the incident.

In further cross-examination on the 30/11/2017, PW2 admitted that their inability to go further and arrest Tochi after tracking him to Delta State cannot be blamed on the defendant. He stated that apart from the information given to them by the defendant about his having been called to do auto electrical work, they were also able to establish that there were communications between the defendant and the other suspects-at-large prior to the time of his arrest. That even as at 30 minutes before the commission of the crime, the defendant had been in telephone communication with the said other suspects.

Upon the discharge of PW2, the prosecution took several adjournments spanning about 1 year to bring their remaining witnesses, including Mr. Joseph Owoicho, PW1's neighbour who is alleged to have been instrumental to the defendant's arrest. In the end, no further witnesses were forthcoming. The prosecution then proceeded to tender the original copy of the said Mr. Joseph Owoicho's statement to the Police from the Bar; same was admitted against objections by the defence counsel, and marked as Exhibit P3. Thereafter, the prosecution closed their case. Perhaps, I should state here that Exhibit P3 was admitted in evidence on the ground of its relevance to the trial; the weight to be attached to it, if any, will be determined in the course of this judgment.

The Defendant's Case

In his evidence in defence of the charge, the defendant stated that on the 25/11/2016, one Mr Tochi called him when he entered Abuja and told him that his car has a problem with its fuel pump, that he should come and check it. That he went there and saw the car parked along

the street close to one woman's shop. The woman was disturbing Tochi, the owner of the car, telling him to push the car away. Tochi did so with the help of some people at the place. The defendant then used his equipment to read the car and discovered that it was a security problem not a problem of fuel pump. He informed Tochii who asked him to repair it. When he completed the work and asked for his payment, Tochi said they should both go to the nearest ATM machine so he can withdraw money and pay him. Immediately they entered the car and started it to move, he heard shouts of "Thief", "Thief", "Thief", and Tochi immediately jumped out of the car. That the car was still rolling and he was confused, so he tried to park it on one side of the road. In the process, one of the car doors got brushed. He was then taken to Jikwoyi Police Station and thereafter to SARS.

At SARS, he says he gave them the phone number of the person who called him to work on the car to enable them track and arrest him. He also provided the Police with the money required to carry out the tracking. After tracking the person to Asaba, the Police requested for money to go there and arrest the person, but the defendant's brother declined to provide the money as he wanted the complainant to also contribute for the trip, which he refused to do. In the end the Police did not effect Tochi's arrest.

Under cross-examination, the defendant said it was about 5 pm that Tochi called him to come and do the work, but that he was engaged at the time, so he went to meet him abount 8 pm. He said he did not know the time he was arrested. He denied that he was running with the car on the day in question. What happened, according to him, was that the person driving the car jumped down and the car kept rolling, so he had to put it to a stop. He claimed he did not know why the driver jumped down; that he was only called to come and repair the car. He also denied informing the Police that he was not living in Abuja, until the Police later discovered where he was staying. He equally denied smashing the car into somebody's house while attempting to run away with the car on the day in question. He said Mr. Tochi was his customer and that he sells cars. When asked of the whereabouts of Tochi, he

said the Police was in a better position to answer the question as he had given them money to track him.

At the end of his cross-examination, the defendant was re-examined by his counsel with respect to the allegation that he had smashed PW1's stolen car into someone's house in his attempt to escape with the car. He explained that what the car he was driving brushed was another car parked by the side of the road.

Issue for Determination

Final written addresses were filed and exchanged at the close of the defendant's case. In his final address dated 27/11/2018 but filed 5/12/2018, Mr. Uche Amulu, learned counsel for the defendant, posed a single issue for determination thus:

> *Whether the prosecution has proved the offences of armed robbery and conspiracy to commit armed robbery beyond reasonable doubt.*

A similar issue was framed by the prosecution in their final address filed by Stanley Nwodo, Esq. on the 11/1/2019.

Defendant's Argument

Arguing his sole issue, the defence counsel canvassed that the burden is on the prosecution to establish the ingredients of the offences charged against the defendant beyond reasonable doubt. He relied on section 135 of the Evidence Act as well as the case of AIGBADION V. STATE (2000) 4 SC (Pt.1) 1. He listed the ingredients to be proved by the prosecution for the offence of armed robbery as pronounced in BOZIN V. STATE (1985) 2 NWLR (Pt.8) 465, and AKWUOBI V. STATE (2017) ALL FWLR (Pt.893) 1169 at 1196, as follows:

i. That there was a robbery or series of robberies;
ii. That the robbery was armed (sic), and
iii. That the defendant actively participated in the robbery.

On the charge of conspiracy, he said the prosecution is duty bound to prove beyond reasonable doubt that there was agreement, whether express or implied, between or among the defendant and others to commit an illegal act. In other words, that there was a *"meeting of the minds of the conspirators*", which is the gist of the offence of conspiracy as decided by the Supreme Court in FRIDAY V. STATE (2017) ALL FWLR (Pt.885) 1814 at 1832 A-D.

Learned counsel then undertook a review of the evidence adduced. He submitted that Exhibit P3, the statement of Joseph Owoicho, the eye-witness to the arrest of the defendant, lacks evidential value as it was not tendered by its maker, but by the prosecuting counsel from the Bar. He contended that there was no witness to cross-examine with respect to the statement; that the exhibit was merely dumped on the court and thus no premium can be placed on it. He relied on OMISORE V. AREGBESOLA (2015) 15 NWLR (Pt.1482) 205 at 322 & 323-324; NYESOM WIKE V. PETERSIDE (2016) CWLR (Pt.1) 1 SC.

Learned counsel argued further that PW1, the nominal complainant, did not identify any of his assailants. He in fact stated in his evidence that he did not see the armed robbers who attacked him as it was night. He could only recognise that they hit him on his head with an axe. Even when they found his stolen car parked by the road side on their way to the hospital, there was no one in it. Counsel also pointed out that PW1 did not witness the arrest of the defendant. That his account of the said arrest was related to him by his neighbour, Joseph Owoicho, and amounted to hearsay evidence which is inadmissible in law, citing section 38 Evidence Act; DOMA V. INEC (2012) 13 NWLR (Pt.1317) 297at 328-329; OSHO V. STATE (2012) 8 NWLR (Pt.1302) 243 at 290H, among other authorities.

Defence counsel argued that throughout his own evidence PW2, the IPO, did not also establish that the defendant played any role in the armed robbery attack on the nominal complainant. He detailed the course of the evidence provided by PW2 involving his investigation activities in the matter, and submitted that in reality PW2 did not do

anything beyond taking the statement of the witnesses, conducting search of the defendant's apartment, and tracking one Tochi to Asaba or Warri. It is his view that beyond the information supplied to him by the nominal complainant, PW2 knows nothing more about the robbery incident. That PW2's evidence relating to the scene of the crime and the arrest of the defendant amount to hearsay evidence and inadmissible. Learned counsel argued also that there was contradiction between the evidence of both prosecution witnesses as regards the time of the robbery attack. He opined that PW2's evidence dwelt on conjecture and assumptions.

On the other hand, learned counsel contended that the defendant's evidence both in his extra-judicial statement and in his oral testimony in court was unimpeached. That the defendant maintained throughout that he was called by one Tochi to repair a faulty car. After he had done the work and they were on their way to an Automatic Teller Machine (ATM) where Tochi was to withdraw money and pay him, they were suddenly rounded up and Tochi escaped while the defendant was arrested. That this evidence tallied with PW1's evidence of what the defendant told him when they met for the first time at the FCT Police Command, namely that he was an automobile electrician called on phone to come and repair a faulty vehicle. Counsel submitted that there is no evidence that automobile engineers are required to ask for proof of ownership of vehicles which they are asked by their customers to repair.

Returning to the ingredients of the offence of armed robbery as earlier set out by him, the defence counsel conceded that the prosecution may have succeeded to prove the first two elements thereof, namely, that there was a robbery, and that the robbery was with arms. But he submitted that the third and cardinal element of the defendant's participation therein has not been proved. He contended that there was even no iota of evidence adduced in that regard by the prosecution. Counsel also opined that the prosecution had failed to prove any agreement by the defendant with other persons to commit the armed robbery; that PW2's evidence in that regard was mere conjecture, consisting of what he believed rather than what he found out through investigation.

He finally urged the Court to discharge and acquit the defendant on both counts for the reasons, among others, that: (i) the defendant was not fixed at the scene of the crime or linked to the offences alleged; (ii) Exhibit P3 lacks evidential value; (iii) failure of the Police to arrest Tochi despite tracking him to Delta State; (iv) PW2 found no incriminating evidence in the defendant's alleged abode, but rather confirmed his trade; (v) the defendant's evidence was unimpeached and corroborated.

Prosecution's Argument

Mr. Stanley Nwodo opened his argument on the prosecution's sole issue for determination with an analysis of the evidence of PW1 who recounted how the armed robbery attack occurred. He noted that PW1's testimony pointed to the fact that three persons attacked him on that *"ugly day"* and made away with his car, which had a tracker on it making it easy for it to be recovered. That the defendant was later found trying to escape with the car as confirmed by the prosecution's evidence. Relying on section 167(a) of the Evidence Act, 2011, and the cases of EKLEMUTE V. STATE (2016) 15 NWLR (Pt.1535) 297 at 339, SOWEMIMO V. STATE (2012) 2 NWLR (Pt.1284) 372 at 404, MOHAMMED V. STATE (2015) 10 NWLR (Pt.1468) 396 at 506-507, he submitted that where robbed items are found with a person shortly after a robbery, the court will be right to invoke the presumption that the person was either the thief or a receiver of the stolen items.

It is the prosecution's view that the three persons who attacked and robbed PW1 had been accounted for in the chain of evidence led by the prosecution, right down to the defendant who was finally arrested with the car. Mr. Nwodo contended that the "doctrine of last seen" applies in this case, wherein just a few hours after the crime, the car was found with an escaping driver, the defendant, who destroyed a building in his bid to get away. He submitted that armed robbery is committed by a person carrying a dangerous weapon, whether or not the weapon is revealed; that in this case the three armed robbers were armed with an axe and machetes with which they attacked and dispossessed PW1 of his car, and therefore a case of armed robbery has been established.

That the defendant having been found with the car thereafter was one of the armed robbers, and his claim of being an automobile electrician was false.

Counsel submitted on the authority of OLATINWO V. STATE (2014) 9 NCC 180, that prove beyond reasonable doubt is not proof with mathematical certainty or proof beyond every shadow of doubt. He contended that in this case there are strong evidences linking the defendant with the alleged offences; that he was a member of a gang of armed robbers whose plans failed and the defendant became unfortunate. He submitted that as admitted by the defence, there was a robbery, and the robbers were armed; that the defendant being found in possession of the robbed car, makes section 167(a) Evidence Act and the decision in MOHAMMED V. STATE (2015) 10 NWLR (Pt.1468) 496 at 506-507, applicable

On the charge of conspiracy, the prosecution submitted that conspiracy is proved by circumstantial evidence and inference from proved facts, but rarely by direct evidence, citing OSUAGU V. STATE (2013) 1-2 SC 1. That it is not necessary therefore that there should be direct communication between each conspirator and every other accused person, only that the criminal design alleged must be common to all, as in the instant case. USUFU V. STATE (2007) 3 NWLR (Pt.1020) 94 at 113-114, is cited in support of the argument. The prosecution finally urged the Court to convict the defendant on the charge.

Defendant's Reply on Points of Law

The defence counsel filed a reply on points of law in which he argued firstly, that the record of court is the recognised account of the proceedings in a case, and that a counsel's address cannot be used to alter or supplant evidence led in a matter before the court. This submission arose from certain references made by the prosecution in its final address to facts which were not part of the evidence led at the trial. Secondly, he submitted that the presumption of being in possession of stolen goods is a rebuttable presumption which, in his view, has been rebutted in this case. He cited the case of OMOPUPA V. STATE (2008)

ALL FWLR (Pt.445) 1648 at 1674-1675, on the conditions for the application of the said presumption. Thirdly, the defence counsel argued that circumstantial evidence cannot establish a fact which direct evidence has proved its opposite. This argument is in relation to the plaintiff's evidence as to how he came by the car that he was arrested with. It is his contention that with the defendant's direct evidence on the issue, circumstantial evidence cannot apply to show otherwise. That for circumstantial evidence to ground a conviction, it must lead to the irresistible conclusion that the accused person and no one else committed the offence. He cited IGBIKIS V. STATE (2017) ALL FWLR (Pt.883) 1405 at 1420-1421 and 1426. He submitted that there is no such circumstantial evidence in this case. Counsel also repeated his argument that the prosecution has failed to prove the ingredient of conspiracy. He finally contended that the prosecution's final address was improperly before the court, as same was filed out of time with no leave of court to regularise it.

RESOLUTION

In a criminal trial, the duty to prove the guilt of the defendant rests on the prosecution, and it must be discharged beyond reasonable doubt. In this regard, section 135 of the Evidence Act (2011) provides as follows:

> *"(1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.*
>
> *(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.*
>
> *(3) If the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on the defendant."*

On what it means to prove a case "*beyond reasonable doubt*", the Supreme Court had this to say in DAIRO V. THE STATE (2017) LPELR-43724(SC) at 23G-24B, per Kekere-Ekun, JSC:

> *"It is also settled law that proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. It was held by this Court in Afolalu Vs. The State (2010) 16 NWLR (Pt.1220) 584 that 'proof beyond reasonable doubt' means proof to moral certainty; such proof as satisfies the judgment and conscience of a judge as a reasonable man, and applying his reason to the evidence before him that the crime charged has been committed by the defendant...."*

The prosecution cannot secure a conviction unless it proves all the ingredients of the offence(s) charged: DAIRO V. THE STATE, supra. In this case, the defendant is charged with the offences of conspiracy to commit armed robbery, and armed robbery. The prosecution needs to prove the elements of each of these offences to the required standard in order to succeed. I will now see how the prosecution has fared on these allegations.

The ingredients of armed robbery are well established, and have been correctly identified by learned counsel for the defence. What the prosecution has to prove on a charge of armed robbery are:

(1) That there was a robbery or a series of robberies;
(2) That the robbery was an armed robbery; and
(3) That the defendant took part in the robbery.

See DAIRO V. THE STATE, supra, at page 23 paras. D-F.

The first two ingredients as set out above, have been clearly established on the unchallenged and uncontradicted evidence of PW1, the victim of the attack. Both in his statement to the Police admitted as Exhibit P1, and in his oral evidence in Court, PW1 stated how he returned from church that fateful evening and parked his car in front of the gate to their premises. He said he needed to enter the compound through the

pedestrian gate so that he could open the main gate and drive his car inside. As soon as he stepped out of his car to walk into the premises, he was attacked by three men who hit him on the head with an axe in an attempt to force him back into the car; but they did not succeed. That God helped him and he was able to force his way into his compound where he raised alarm to attract the help of his neighbours. At that point, the attackers drove off with his car, and left him bleeding from the axe-wound to his head. Throughout the trial, the defendant did not question the veracity of this lucid and very graphic evidence of PW1 on the occurrence of the armed robbery.

By section 1(2)(a)&(b) of the Robbery and Firearms (Special Provisions) Act, if a robber is armed with any offensive weapon during a robbery operation, or is in the company of any person so armed, or if he wounds or uses any personal violence on any person either in the course of such operation or immediately before or after it, such robbery amounts to an armed robbery. The axe used on PW1 by the robbers during the attack in this case is an offensive weapon within the definition of that term in section 11 of the Robbery and Firearms (Special Provisions) Act. See SOWEMIMO V. THE STATE (2010) LPELR-4972(CA) at page 27.

On the evidence proffered, therefore, the first two elements of the offence of armed robbery have been duly established, and the defence counsel was right to have conceded that fact in paragraph 4.28 of his final written address. The bone of contention appears to be with the third ingredient of the offence, concerning which the defence counsel has submitted as follows:

> *"But the third and cardinal element of the defendant's participation therein remains unproved. There is even no iota of evidence in that regard."*

The question then is whether there is any concrete evidence linking the defendant with the commission of the armed robbery in this case. The first major piece of evidence in this regard is that the defendant was the person caught with PW1's stolen car shortly after the robbery. There was evidence to that effect from PW1, but I agree with the defence

counsel that PW1's evidence on that point is hearsay and inadmissible. PW1, by his own admission, was not present during the arrest of the defendant. He got the details of the arrest from Joseph Owoicho, his neighbour, who engineered and participated in the arrest, but did not testify at the trial. Section 38 of the Evidence Act forbids the reception of hearsay evidence in proof of facts in issue in a trial; and section 126 of the Act requires that oral evidence shall in all cases be direct, and if it relates to a fact which could be seen, heard or perceived, it must given by a person who saw, heard or perceived such fact. In relation to the fact of how the defendant was arrested, PW1 does not fall within the categories of persons authorised by law to testify on it, as he has no direct evidence to give on the matter.

Joseph Owoicho, who related the details of the arrest to PW1, however made a statement to the Police which the prosecution tendered from the Bar and was admitted as Exhibit P3. The exhibit gives a concise account of the said arrest as recounted by PW1 in his oral evidence. The defence counsel has equally attacked Exhibit P3 as having no probative value because its maker did not testify at the trial to defend the contents of the exhibit. Again, I must agree with the defendant's submission on this point. As a matter of law, admissibility of evidence is a different thing from the weight to be attached to the evidence. The fact that a piece of evidence has been admitted in proceedings is not conclusive that it has evidential weight or any weight at all. Admissibility is governed by relevance while weight is influenced by the cogency or credibility of the evidence. Evidence may be admissible because it is relevant, but still lack probative value. An instance of such is where, as in this case, a document is tendered by a person other than its maker; the person tendering not being in any position to explain the contents of the document. See VIWANU-OJO V. TOWAKENNU (2015) LPELR-41989(CA) at 42-47.

The pronouncement of the Supreme Court in UNION BANK OF NIGERIA PLC V. ISHOLA (2001) 15 NWLR (Pt.735) 47 is relevant here. In that case the apex Court held as follows:

"It is certainly the law that the proper person through whom a document is to be tendered is the maker of such document. ... And it is the law that if as in the instant case, a person who was not the maker of a document tendered the document, the trial judge should not attach any probative weight to the document. This is so because the person tendering the document not being the maker of the document cannot answer questions arising from any cross-examination."

A document tendered in the absence of its maker may only be accorded weight in the circumstances set out in the proviso to section 83(1)(b) of the Evidence Act, namely, where the maker is dead, or unfit by reason of bodily or mental condition to attend as a witness, or is outside Nigeria and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success. None of these circumstances was proved to exist in the instant case. All the Court was told by the prosecution is that Joseph Owoicho declined to come to court for personal reasons. That does not bring the matter within the above-stated proviso. I cannot accord any probative value to Exhibit P3 in the circumstances. The document is accordingly discountenanced.

But there is Exhibit P2, the defendant's own voluntary statement to the Police, which was tendered without any objection from the defendant. At pages 3 to 4 of the exhibit the defendant stated as follows:

"Immediately I left Gwarinpa Abuja, Mr. Tochi 'm' a friend introduced to me by one Mr. Abuchi 'm' of Masaka N/S called my phone line with phone No. 09095635969 that I should come to Jikwoyi Abuja to repair his Toyota Corolla vehicle that is doing break and off, that I should meet him at Junction after Jikwoyi Police Station. When I got there at about 20.00 hours waiting for Mr. Tochi 'm', at about 21.00 hours he called me again that he has pushed the car to one corner street in Jikwoyi. When I got there I saw four of them pushing the Toyota Corolla car; as they saw me they stopped pushing the vehicle. When I checked the car I found out that the car has security problem. I told them to on the security

of the car. Mr. Tochi told me they have being (sic) trying to on the security of the car but it refused to start. Then I searched for the security of the car and when I found it under the car dashboard I on it by myself and the vehicle started ... I was the one driving the car and Mr. Tochi 'm' was seating (sic) in front at passenger seat. As we (were) about going ... and I was in gear to reverse the car, just of sudden we heard group of motor cycle riders shouting thief thief thief. With fear I went and hit a building on reverse speed and the building collapsed and damaged one vehicle parked by the building. I was arrested by the mob while Mr. Tochi escaped. I was rescued by the Police who arrested me and took me to Jikwoyi Police Station."

It is the law that when the extra-judicial statement of a defendant is admitted without objection from the maker or his counsel, it implies that the maker of the statement agrees with everything in the statement, and that he made the statement voluntarily as the truth on his role in the case. So said the Supreme Court in SMART V. THE STATE (2016) LPELR-40728(SC), at page 21 E – F, per Rhodes-Vivour, JSC. As I stated earlier, there was no objection when Exhibit P2 was tendered in evidence. The implication is that it represents the truth of the defendant's involvement in this case, as he would want it believed. And that truth, as clearly shown in Exhibit P2, is that he was the person caught with the stolen car sometime after 9pm on the night of the robbery. That being the case, unless he can account for his possession, the court would presume that he is either the robber or that he received the car knowing it to have been stolen.

The case made by the defendant to explain his possession of the stolen car, is that he was an innocent automobile electrician called to repair a defective car. However, bits and pieces of this story are in conflict with the contents of Exhibit P2, his voluntary statement on the matter. For instance, he claimed under cross-examination that he was not the person driving the car at the time of his arrest, and that he did not smash anybody's house with the stolen car before his arrest. Exhibit P2 however shows the contrary; and the law is trite that where the extra-judicial statement of a defendant conflicts with his oral evidence in court,

the Court should rely on the extra-judicial statement and disregard the inconsistent oral evidence. See AKINLOLU V. THE STATE (2015) LPELR-25986(SC); also, SMART V. THE STATE, supra. So, Exhibit P2 prevails over the defendant's oral testimony on all points of conflict between the two.

The question that disturbs my mind in the present case is why the defendant felt compelled to lie about the above facts. Was it the product of a guilty mind? Is the defendant's story credible, and are the facts as proved consistent with his claim of innocence? I believe it is appropriate at this stage to set down my view of the evidence led as it bears on the defendant's said claim of innocence.

1. Firstly, his case is that Tochi called him at about 5pm on the date in question to come and fix a car at Jikwoyi. The car turned out to be PW1's car which had not yet been stolen and which had a security devise on it. The question is, why was the defendant called to come and fix a car that was yet to be stolen? The only reasonable explanation I can conceive of is that the call was part of the arrangement to ensure the success of the robbery operation as it clearly required the skill of an automobile electrician to take care of the security device on the car.

2. The defendant claims that when he met Tochi and checked the car, he discovered that it had security problem and he told Tochi to put on the security of the car. But Tochi obviously did not know where the device was located and so was unable to put it on. It was the defendant himself who searched for the device and found it under the car's dashboard. As an innocent auto electrician that the defendant claims to be, did it not seem strange to him that Tochi, the supposed owner of the car, did not know where the security device of his car was located? This fact would have warned any reasonable technician in the defendant's position not to proceed with the work without confirming the true ownership of the car, unless of course he was himself a party to the robbery.

3. The defendant further stated in Exhibit P2 that he was the person driving the car and that when he heard shouts of “thief”, “thief”, “thief”, he reversed the car with speed and crashed it into a building which collapsed. Again, the question is, why was he the one driving the car, and why did he zoom off with speed in reverse if he was just an innocent auto electrician called to fix a car? Clearly, no reasonable answers can be given to these posers to support his claim of innocence, and that is why he lied under cross-examination by saying that he was not the person driving the car. An innocent technician would have had no cause to seek to escape in the manner recorded in Exhibit P2, or to lie about it afterwards.

4. PW1 gave unchallenged evidence that when he met the defendant being interrogated by the Police, the defendant told him that he was not staying in Abuja but at Lagos, and that he was called to come and fix a defective car; but that when the Police asked him who called him to come and fix the car, he refused to mention any name. In my view, suppressing or shielding the identity of a prime suspect from the Police, betrays a guilty mind rather than innocence.

Now, there are four ways by which the prosecution can prove the guilt of a defendant in a criminal trial, namely:

(i) by evidence of an eye witness;
(ii) by confessional statement;
(iii) by circumstantial evidence; and
(iv) by admission through conduct of the accused person which is inconsistent with his innocence.

See OGOGOVIE V. THE STATE (2016) LPELR-40501(SC). The facts of this case and the defendant’s conduct as x-rayed above are clearly not consistent with his claim of innocence in the matter. While he may not personally have been caught with any dangerous weapon, it is obvious to me that his role was to deploy his skill as an automobile electrician to neutralise PW1’s car security device and ensure the success of the robbery operation.

Part of the argument of the defence is that PW1 did not identify his assailants and that the defendant was not fixed at the scene of the crime or linked to the offences alleged. It is true that PW1 did not identify any of the robbers throughout his evidence in court. However, evidence adduced shows that the defendant was present at Jikwoyi on Tochi's alleged invitation to "fix a car" at the time the robbery took place. He stated in his own evidence that Tochi called him at about 5pm and that he arrived Jikwoyi at about 8pm, and later met with Tochi at about 9pm. Meanwhile, by PW1's unchallenged evidence, the armed robbery attack on him occurred at about 9.15pm on the relevant date. So, it is clear that both the defendant and Tochi were together at the time the robbery is said to have taken place.

The evidence further shows that three persons attacked PW1 and made away with his car. Shortly thereafter the car stopped at Fine Trust Academy, Jikwoyi Phase 3, where one person was dropped off. When the defendant was later caught with the car not long afterwards, there were just two of them (i.e. himself and Tochi) remaining in the car. PW1 stated under cross-examination, that his car was recovered within 20 minutes after it was stolen. This chain of events clearly supports the view that the defendant was one of the three robbers who attacked and robbed PW1 of his vehicle. More so, as he was the person actually caught trying to escape with the car so soon after the robbery. I am of the view that the principles stated in the case of KAZEEM OMOPUPA V. THE STATE, supra, cited by the defence counsel, actually support the application of the doctrine of recent possession in this case. In that case it was held that for the doctrine to apply, the prosecution must prove: (i) that the accused was found in possession of goods, (ii) that the goods were recently stolen, and (iii) that the accused failed to account for his possession of the goods upon interrogation. The Court in that case further referred to the decision of the Supreme Court in THE STATE V. NNOLIM (1994) 6 SCNJ 48, where it was stated that for the doctrine to be displaced, the defendant's explanation should be reasonably true and consistent with his innocence. I believe that these elements are satisfied in this case. PW1's car was found in the defendant's possession very soon after the armed robbery, and the explanation offered by the defendant was inconsistent with his innocence in the matter.

It is important to state that the facts of OMOPUPA's case are very different from those of this case. In Omopupa's case, it was about 10 months after the incident that the appellant was found with the stolen item, whereas here the time lapse was less than one hour. On these facts, this Court cannot reach the same verdict as that in Omopupa's case. But the principles espoused in the case are (if I may with respect say so) the correct position of the law on the doctrine of recent possession.

The defence counsel also argued that there was a contradiction between the evidence of the two prosecution witnesses as to when the robbery actually occurred. That while PW1 said it happened at about 9.15pm, PW2 said it was between 7pm and 8.30 pm. For one piece of evidence to contradict another, both pieces of evidence must be admissible. An inadmissible piece of evidence has no place, effect or relevance in proceedings. It is invalid for all intents and purposes, and cannot form the basis of any competent finding of a Court of record. See NWAOGU V. ATUMA (2013) LPELR-20667(SC); NNAMANI V. FIRST BANK OF NIGERIA PLC (2013) LPELR-22818(CA). I take note that the defence counsel had earlier on in his written submission argued that the bulk of the evidence of PW2 was made up of conjecture and hearsay, and was inadmissible. He submitted that in reality PW2 did not do anything beyond taking the statement of the witnesses, conducting search of the defendant's apartment, and tracking one Tochi to Asaba or Warri. I agree with this submission; and the consequence is that the only issues on which PW2 could competently testify, are as regards what he personally did by way of investigation, namely, taking the statements of the parties and witnesses, conducting search in the defendant's premises, and tracking of Tochi's telephone line. Any other evidence beyond this is hearsay and inadmissible. This, to my mind, includes his evidence as to the time of occurrence of the robbery. It is hearsay and inadmissible. In the circumstance, the only valid and admissible evidence on the time of the robbery is that of PW1, the victim of the robbery; and same stands uncontradicted in law.

With regard to the other sundry arguments of the defence counsel, I would like to state briefly that it is not the law that the prosecution must arrest and produce all parties to a crime in court before a conviction can be secured against any of the participants. Each defendant's case is decided on the evidence proffered against him; and once such evidence establishes his guilt for the offence charged, a conviction will lie. Consequently, the failure of the Police to arrest Tochi in this case, cannot absolve the defendant of liability for the role he is proved to have played in the offences charged.

Also, it is not material to a conviction for armed robbery to prove that the defendant was caught with the offensive weapon used for the attack. All that section 1(2)(a)&(b) of the Robbery And Firearms Act requires is that a party to the robbery should be armed with such weapon, or that a person was wounded or visited with personal violence in the course of the robbery. Thus, the fact that the defendant was not found with the axe or some other weapon used in the robbery of PW1 is irrelevant to his guilt for the offences charged. Proof that PW1 was wounded in the attack and that the defendant played a role in it, is enough for the purpose.

The defence counsel had questioned the competence of the prosecution's final address filed out of time. Failure to file an address within time is at best an irregularity and has nothing to do with the merits of a trial. Besides, no prejudice is shown to have been done to the defendant who had been served with the said final address and had also fully responded to same. I will therefore discountenance the said complaint by the defence counsel.

On the totality of the foregoing, therefore, I find the defendant guilty of the offence of armed robbery in count 2 of the charge and I convict him accordingly.

The elements to be proved by the prosecution for the offence of conspiracy are as follows:

(i) That there was an agreement between two or more persons to do an illegal act or to do a legal act by illegal means;

(ii) That the illegal act was done in furtherance of the agreement;

(iii) That the each of the accused persons participated in the conspiracy. See AGUGUA V. THE STATE (2017) LPELR-42021(SC) at 19E-20A.

The general principle is that a charge of conspiracy is proved either by leading direct evidence of the common criminal design of the actors or by inference derived from the commission of the substantive offence. See LAWSON V. THE STATE (1975) 4 SC 115 at 123. In this case, it has been established that an armed robbery occurred in which PW1's car was stolen. The defendant admitted that some hours prior to the attack, there was communication between himself and one Tochi, possibly the leader of the gang, in which they discussed issues relating to the car that was yet to be stolen. When the car was finally stolen, the defendant was available in line with their earlier discussion with Tochi, to aid the gang in taking the car away. Unfortunately, luck ran out on him and he was apprehended with the car while Tochi successfully absconded. There is no doubt in my mind that this evidence has established all the above elements of the offence of conspiracy to commit armed robbery. The robbers obviously had PW1's car as their target of attack, and knowing that the security device in it would pose a problem, arranged with the defendant to take care of that aspect of the operation, which he did. I am satisfied on these facts that the charge of conspiracy is proved against the defendant. I therefore find him guilty of the said charge and convict him accordingly.

Both counts of the charge carry a mandatory death sentence under section 1(2) and section 6 of the Robbery and Firearms (Special Provisions) Act. An *allocutus* in the circumstance would serve no purpose. The defendant is hereby sentenced to death on each of the two counts of the charge. I order that he be hanged by the neck until he be dead, and may the good Lord have mercy on his soul.

(SGD)

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HON. JUSTICE A. O. EBONG
(18/4/2019)

Legal Representation:

(1) STANLEY NWODO, ESQ., for the Prosecution.

(2) UCHE AMULU, ESQ. for the Defendant.