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CONTENTS

INDEX OF CASES REPORTED
[2017] JSCNLR, VOL. 16

INDEX
OF
SUBJECT MATTER

APPEAL: Concurrent findings – Attitude of Supreme Court thereto – Whether generally will not interfere therewith – Exceptions thereto – Relevant considerations.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

APPEAL: Concurrent findings – Where supported by evidence – Whether will not be disturbed by the Supreme Court
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

APPEAL: Failure to file brief – Where appellant fails to file appellant brief nor apply for extension of time – Effect.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

CASE LAW: A G, Ondo State vs A.G, Federation & Ors (2002) 6 Sc (pt 1) 1
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

CASE LAW: Action in rem – Meaning – Principles in NPA vs. PANAPHINA WORLD TRANSPORT CO. & ANOR (1973) ALL NLR 408;
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

CASE LAW: Action in rem – Meaning – Principles in RHEIN Mass Und. See GMBH vs. RIV WAY LINES LTD (1998) 5 NWLR (Pt. 549) 265
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

CASE LAW: Principles in Abdullahi vs State (2008) 17 NWLR (Pt. 11 15) 203.
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

CASE LAW: Principles in Bakare Vs. State.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CASE LAW: The principles in Isibor v. State (2002) 4 NWLR (Pt. 758) p. 741.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

CASE LAW: The principles in Owahoruke Vs. C.O.P. (2015) 15 NWLR (Pt. 1483) 557 – Whether where the killing is intentional, the defences of accident, provocation, or self defence will not apply.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CONSTITUTIONAL LAW: Constitution of Federal Republic of Nigeria 1999 as amended – S. 6(6)(a) thereof – Purport and import.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

CONSTITUTIONAL LAW: Fair hearing – Breach thereof – Where a police officer who recorded a confession statement did not testify but his non appearance was explained by an official letter and the appellant given full opportunity to prepare his case – Whether no breach of appellant's right to fair hearing.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

CONSTITUTIONAL LAW: S 251 (3) CFRN 1999 (as amended) – Interpretation thereof – Whether the constitution does not intend any exclusive criminal jurisdiction of the Federal High Court.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

CONSTITUTIONAL LAW: S. 257 (1) of CFRN 1999 (as amended) – Import and significance – Criminal jurisdiction of Federal Capital Territory High Court – Whether supports the fact that Federal High Court has no exclusive criminal jurisdiction.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

COURT: Appellate Court 6 – Interlocutory appeal – Attitude thereto – Whether not to undertake any comment on the merit of the substantive appeal.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

COURT: Approach to justice – Whether now inclined to do substantial justice – Relevant considerations thereof.
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

COURT: Attitude of courts to justice – Attitude of the court has since changed against deciding a case on mere technicality – Whether the attitude of the courts now in that cases should be decided on merit – The principle in maker Smelting C. Ltd vs Access Bank Nig Plc (2002) NWLR (Pt 766) 447.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

COURT: Duty Evaluation of evidence by trial court – Whether findings of fact in the primary duty of a trial court which is presumed to be correct.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

COURT: Jurisdiction – Federal High Court – Additional Jurisdiction under S. 251 (3) of CFRN 1999 – Whether no co-terminus with the exclusive civil jurisdiction under S. 251 (1) (a).
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

COURT: Jurisdiction – Federal High Court – S 251 (1) (a) of CFRN 1999 – Whether does not vest exclusive criminal jurisdiction on the Federal High Court.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

COURT: Jurisdiction – Federal High Court – SS 251 (1) (a) and 251 (3) thereof – Nature and distinctions thereof.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

COURT: Jurisdiction – S. 286 (1) (b) CFRN 1999 (as amended) – Jurisdiction of state courts to try Federal Offences – Scope and Significance thereof.

Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

COURT: Mistake of court – Whether not every mistake of a court will lead to a reversal of a judgment.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

COURT: Order thereof – Where court erroneously dismisses an appeal for failure to file brief – Appellant already file an application for extension of time – Effect whether court will restore case in its course list.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

COURT: Rape – Corroboration thereof – What the Court will look out for as constituting corroborative evidence in rape cases.
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Ingredients thereof ways of proof.
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Ingredients thereof – Onus on prosecution to establish ingredients beyond reasonable doubt.
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

CRIMINAL LAW AND PROCEDURE: Charge – Amendment thereof – Relevant principles – Whether amended charge takes effect from the date of the original charge.
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

CRIMINAL LAW AND PROCEDURE: Compounding of an offence – Conditions thereof – S. 14 (2) EFCC Act – Relevant considerations thereof.
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Corroborative evidence thereto – Whether the nature of corroborative evidence required may be circumstantial and not necessarily direct evidence.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Retraction thereof – Whether the court has a duty to test the veracity of the retracted confessional statement – How discharged.
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Veracity thereof – Tests to be applied to determine.
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Where admitted in evidence – Effect.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CRIMINAL LAW AND PROCEDURE: Conspiracy – Connotation thereof – How established – Whether usually a matter of inference.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

CRIMINAL LAW AND PROCEDURE: Conviction – When accused can be convicted on his confessional statement alone – Conditions thereof – The principle in Peter Iliya Azabada Vs. The State (2014) All FWLR (Pt 751) 1620
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

CRIMINAL LAW AND PROCEDURE: Crime – Proof thereof – Modes of establishing the commission of crime.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – Defence therein – The trial court has a duty to consider all defences which may from the evidence avail the accused not withstanding whether or not he has specifically raised it.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – Ingredients thereof – Whether all must co-exist to secure conviction.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – Ingredients thereof – What prosecution must prove.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – Intention thereof – How established – Whether a man who stabs another with a dagger in the neck region has an intention to kill – Principles in Awhoruke Vs. C.O.P. (Supra).
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – Intention to kill – Whether can be inferred from the nature of injury and the kind of weapon used – The principles in Awhoruke Vs. C.O.P. (Supra).
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – Proof thereof – Where prosecution has established that the deceased died from the intentional act of the appellant – Whether the Onus now shifts in the appellant to establish on the balance of probabilities circumstances of exculpation – Principles in Bakare Vs. State.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CRIMINAL LAW AND PROCEDURE: Culpable homicide – S. 221 Penal Code – Ingredients thereof – Whether prosecution must prove beyond reasonable doubt.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

CRIMINAL LAW AND PROCEDURE: Double Jeopardy – Plea thereof – How established.
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

CRIMINAL LAW AND PROCEDURE: Evaluation of evidence – Where accused alleges that the evidence against him was not properly evaluated – Onus on him to prove – Relevant consideration thereof.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

CRIMINAL LAW AND PROCEDURE: Identification – Duty of court thereon – Where the case against an accused substantially depends on his identification – Whether court should examine the evidence more closely to determine the question of proper identification.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

CRIMINAL LAW AND PROCEDURE: Identification – Visual identification – Whether one of the best forms of identifications in a criminal case.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

CRIMINAL LAW AND PROCEDURE: Identification parade – Instances where it will be dispensed with.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

CRIMINAL LAW AND PROCEDURE: Identification parade – Necessity thereof – Relevant principles
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

CRIMINAL LAW AND PROCEDURE: Identification parade – Where accused has been sufficiently identified by evidence of a witness – Whether an identification parade not necessary.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

CRIMINAL LAW AND PROCEDURE: Medical certificate – Whether not necessary where the cause of death is obvious.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

CRIMINAL LAW AND PROCEDURE: Onus on prosecution – Whether to prove the charge beyond reasonable doubt S. 135 of Evidence Act – Relevant considerations thereof.
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

CRIMINAL LAW AND PROCEDURE: Possession of stolen goods – Presumption thereof – S. 167 (d) of the Evidence Act – Conditions necessary thereto.
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

CRIMINAL LAW AND PROCEDURE: Possession of stolen goods – Presumption thereof – Whether rebuttable – Onus on accused How discharged.
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

CRIMINAL LAW AND PROCEDURE: Prima facie Case – Meaning
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

CRIMINAL LAW AND PROCEDURE: Proof – Burden on prosecution in a criminal case – Whether to proved the case beyond reasonable doubt.
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

CRIMINAL LAW AND PROCEDURE: Proof – Cause of death – The nature of direct evidence required therefore – Whether would connect the death of the deceased with the act of the accused.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

CRIMINAL LAW AND PROCEDURE: Proof – Intention to kill or cause grievous harm – How inferred – Relevant considerations thereof.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

CRIMINAL LAW AND PROCEDURE: Proof beyond reasonable doubt – Meaning – When is a charged prove beyond reasonable doubt.
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

CRIMINAL LAW AND PROCEDURE: Proof beyond reasonable doubt – Nature and meaning – Whether does mean proof beyond all possible doubt.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

CRIMINAL LAW AND PROCEDURE: Prosecution – ICPC Act – S. 26(2) thereof – Whether to be initiated under the deemed authority of the Attorney General of the Federation.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

CRIMINAL LAW AND PROCEDURE: Rape – Charge thereof – What prosecution was prove to secure conviction – Whether must prove penetration – The principles in Jegede vs The State (2001) 14 NWLR (pt 733)
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

CRIMINAL LAW AND PROCEDURE: Rape – Ingredients thereof – What prosecution must prove.
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

CRIMINAL LAW AND PROCEDURE: Rape – Uncorroborated evidence thereof – As a general rule the court can convict on the uncorroborated evidence of the prosecution – Whether in practice it is proper for court to warn itself before such conviction.
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C..

CRIMINAL LAW AND PROCEDURE: Withdrawal of a charge – Whether does not amount to an acquittal.
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

CRIMINAL LAW: Criminal liability – Agency – Whether does not apply in criminal liability.
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

CRIMINAL LAW: Defence – Alibi – Meaning – When to be raised.
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

CRIMINAL LAW: KIDNAPING – S. 364 of Criminal code – Meaning and significance.
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

CRIMINAL LAW: Rape – Essential and most important ingredient thereof – Whether penetration is the most important ingredient of rape.
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

CRMINAL LAW AND PROCEDURE: Conviction – Where accused makes a confessional statement – Whether he can be convicted so based solely on his confessional statement – Conditions thereof.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

EQUITY: Estoppel per rem judicatam – Plea thereof – When applicable.
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

EQUITY: Estoppel per rem judicatam – Application thereof – Conditions thereto.
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

EVIDENCE: Admissibility – Where on accused retracts his confessional statement – Whether the more retraction does not make it inadmissible.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

EVIDENCE: Admission by conduct – Meaning – When a clear and direct accusation is made against a person in his presence in circumstances which should warrant instant denial – Whether evidence of failure to deny or refuse the allegation may be given in court as evidence of admission by conduct.
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

EVIDENCE: Confessional statement – Admissibility thereof – Whether does not cease to be admissible merely that the maker has denied it.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

EVIDENCE: Confessional statement – S 28 of the Evidence Act – Import
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

EVIDENCE: Confessional statement – S. 28 of Evidence Act 2011 – Meaning and Significance.
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

EVIDENCE: Contradictions and discrepancies – Effect thereof – Whether not material where did not substantially affect the case of the prosecution.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

EVIDENCE: Credibility thereof – Where a witness did not mention a suspect at the earliest opportunity to the police – Implication – Whether that would detract from any credibility the trial court may wish to ascribe to his evidence.
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

EVIDENCE: Documentary evidence – Purpose thereof – Whether serves as a hanger from which to assess oral testimony.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

EVIDENCE: Hearsay – Evidence of a witness who is not the maker is hearsay – Whether generally such evidence is not admissible.

The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

EVIDENCE: Public officer – Non attendance to a judicial proceedings – How explained – S. 50 of Evidence Act 2011 – Relevant considerations thereof.
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

EVIDENCE: Withholding Evidence – S. 167 (d) of Evidence Act – When does the presumption apply against prosecution in a criminal proceeding – Whether it is after the service on the prosecution a notice to produce evidence
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

JUDGMENT AND ORDERS: Judgment in rem and judgment in personam – Distinction – Relevant principles – The principles in Ikemye Dike & Ors vs. Obi Nzeka II & Ors (1986) LPELR 945 (SC)
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

LEGAL PRACTITIONER: Judicial Authorities – Needs for legal practitioners to understand the ratio decidendi of decided cases before the application.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

LEGISLATION: Judicial legislation – Impropriety thereof – Whether it is not proper for court to read into a statute words which are not there – Principle in Edozie vs Edozie & ors (1998) 12 NWLR (Pt 580) 152.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

PRACTICE AND PROCEDURE: Affidavit evidence – Where documentary evidence supports the position in an affidavit – Effect – Whether such depositions are the correct position of what it seeks to establish.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

PRACTICE AND PROCEDURE: Affidavit evidence – Where facts averred in an affidavit are not controverted – Whether such facts are deemed to been accepted.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

PRACTICE AND PROCEDURE: Dismissal of appeal – Where Supreme Court dismisses an appeal suo motu for failure to file appellant brief – Whether it is not unconstitutional.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

PRACTICE AND PROCEDURE: Evidence on material point – Failure to cross examine thereon – Effect – Whether the court can take the failure that he does not dispute the fact.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

PRACTICE AND PROCEDURE: Fair hearing – Basic attributes or criteria – The principles in Kotoye Vs. CBN (1989) 1 NWLR (Pt. 98) 419.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

PRACTICE AND PROCEDURE: Injunctive order – When grantable – Whether must be based on competing legal right – Equitable remedy – Relevant principle thereof.
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

PRACTICE AND PROCEDURE: Plea of estoppel per rem judicatam – Onus on party replying thereon – What he must established.
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

PRACTICE AND PROCEDURE: Previous judgment – Plea of estoppel – When a party can plead and rely on previous judgment not as estoppel per rem judicatam – Whether a party can plead and rely on such judgment merely as estoppel – Relevant consideration.
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

PRACTICE AND PROCEDURE: Proof – Failure to cross examine a witness on a material point – Whether amount to acceptance of the point.
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

RULES: Supreme Court Rules – Order 6 Rule 3(2) and order 6 Rule 5(1) thereof – Purport and import.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

STATUTE: Constitution of Federal Republic of Nigeria 1999 (as amended) – S. 251 (1) (a) thereof – Intent – Exclusive civil jurisdiction of the Federal High Court – Purport and significance thereof.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

STATUTE: Criminal Procedure Code – S. 217 thereof – Conviction for a lesser offence not charged principle thereof – Whether the facts must have given the accused notice of offence for which he was to be convicted.
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

STATUTE: Criminal Procedure Code – SS 156 and 157 thereof – Purport and significance.
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

STATUTE: Criminal Procedure Code – SS 222, 288 and 382 thereof – Import and imperatives – Relevant considerations thereof.
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

STATUTE: Economic and Financial Crime Commission Act – S. 14 (2) thereof – Scope and significance.
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

STATUTE: Evidence Act – S. 167 (d) thereof – Scope and application
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

STATUTE: Evidence Act 2011 – S. 135 thereof – Nature of proof in criminal cases – How attained.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

STATUTE: ICPC Act S. 26(2) thereof – Purport – Whether every prosecution under the Act shall be deemed to be initiated by the Attorney General of the Federation.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

STATUTE: Interpretation – Principle thereof – Whether courts should give the words and language in a status their simple and ordinary meaning – The principle in unipetrol or E.S.B.I.R. (2006) All FWLR (p 1 319) 413.
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

STATUTE: Interpretation thereof – Whether court is to interpret in accordance with the intent of the legislative – Principles in Ugwu Vs. Ararume (2007) 12 NWLR (Pt 1048) 867
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

STATUTE: Interpretation thereof – Whether with the intention of the law makers.
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

WORDS AND PHRASE: Subject to S 257 (1) CFRN 1999 – Meaning
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

WORDS AND PHRASES: Condonation – Meaning
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

WORDS AND PHRASES: 'Condone' – Meaning.

Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

WORDS AND PHRASES: Summary – Meaning.

Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

INDEX
OF
NIGERIAN CASES CITED

Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Adamu Vs. A-G Benedel State (1986) 2 NWLR (Pt. 22) 284,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Adara Vs. State (2006) All FWLR 177 "1785
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Adebuji Vs. The State (2016) LPELR-40008 (SC).,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

ADEGBUYI Vs. MUSTAPHA (2010) LPELR (3600) 1,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Adejobi v State (2011) 6-7 SC (pt.iii) 65,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Adejobi Vs. State (2011) ALL FWLR (Pt . 588) P. 850,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Adekoya Vs. The State (2017) LPELR 41564 (SC),
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

Adeleke v The State (2013) 16 NWLR (p. 1381) 556,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Adelumola Vs.The State (1988) 1 NWLR (Pt. 73) 683
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Adeyemi Vs. The State (2017) LPELR 42584 (SC),
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

Afolalu v The State (2010) 43 NSCQR 227,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Afolalu Vs. The State (2010) 16 NWLR (t. 1220) 584,
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

AG Rivers State Vs. AG Akwa Ibom State (2011) 8 NWLR (Pt. 1248) 31
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Agala Vs. Okusin (2010) 10 NWLR (Pt. 1202) 412,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Agbo Vs. State (2006) 6 QCCR 48
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Agbo Vs. State (2006) ALL FWLR (Pt. 309) P. 1380,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Agugua Vs. The State (2017) LPELR 42021 (SC).,
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

Ahmadu Vs. Salawu (1974) 9 NSCC 538
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Ajakaiye vs. Idehia (1994) 8 NWLR (Pt. 364) 504,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Ajakaiyi Vs. Idehai (1994) 8 NWLR (Pt. 364) 504,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Ajie Vs. State (2000) FWLR (Pt. 16))P, 2831,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Akilu vs. Fawehinmi (No. 2) (1989) 2 NWLR (Pt 102) P. 122.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

Akinfe Vs. State [1988] 3 NWLR (Pt. 85) 729
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Akinmoju Vs. The State (2000) 4 SCJN 179
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Akinrinmade vs. Lawal (1996) 2 NWLR (Pt. 429) 218;
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Akpan Vs. State (2001) 7 SCJN 567
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Akpan Vs. THE State (1990) 7 NWLR (Pt. 160) 101.,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Akpan Vs. The State (2007) 2 NWLR (Pt. 1019) 500
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Akpan Vs. The State (2007) 2 NWLR (Pt. 2003) 18 NWLR (Pt. 1019) 50,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Alabi Vs. State (1993) 7 NWLR (Pt. 307) P. 511,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Alabi Vs. The State (1993) 7 NWLR (Pt. 307) 511,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Alagbe vs. Abimbola 1978 2 SC P. 39.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

Alamieyesigha Vs. FRN (2006) 16 NWLR (Pt. 1004)
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

ALARAPE Vs. THE STATE (2001) FWLR (Pt. 41) 1872 SC,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Alashe vs. Ilu (1964) 1 All NLR 390.
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Alo Vs. The State (2015) LPELR- 24404 (SC)
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Amalgamated Trustee Ltd vs. Associated Discount House Ltd (2007) 15 NWLR (Pt. 1056) P. 118.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

Amoslivia v State (2009) Vol. 32 WRN 47,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Ani v The State (2003) 11 NWLR (PT.830) 145,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

ANNABI Vs. THE STATE (2008) 4-5 SC (Pt. 11) 229
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Arabambi Vs. Advance Beverages Ind. Ltd. (2005) 19 NWLR (Pt. 959)
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Arabambi Vs. Advance Beverages Ind. Ltd. (2005) 19 NWLR (Pt. 959) 1,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Archibong v State (2004) 1 NWLR (pt.855) 488,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Aremu Vs. State (1991) 7 NWLR (Pt. 201) 1,

Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Arowolo Vs. Olowookere & 2 Ors. 2011 11-12 Sc (Pt. ii) P. 98,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Arowolo Vs. OLOWOOKERE & 2 ORS. 2011 11-12 SC (Pt. II) P. 98,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Artra Ind Ltd. Vs. NBC 1 (1997) 1 NWLR (Pt. 483) 574,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Artraind Ltd Vs. NBCI (1997) 1 NWLR (Pt. 483) 574,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

ARUWA Vs. THE STATE 6 NWLR (Pt. 155),
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Asake Vs. Nigeria Army (2007) 1 NWLR (Pt. 1051) 408
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

ASAKE Vs. NIGERIA ARMY (2007) 1 NWLR (Pt. 1051) 408
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Attah v State (2010) AU FWLR (pt.549) 1224,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Attah Vs. State (1993) 7 NWLR (Pt. 305) 257
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

ATTAH Vs. STATE (1993) 7 NWLR (Pt. 305) 257

Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Attah Vs. State (2010) NWLR (Pt. 1201) 190,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Audu Vs. The State (2003) 7 NWLR (Pt. 820) 516
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Avenue Vs. State (1991) 7 NWLR (Pt. 201) 1,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Awopejo Vs. The State (2002) 3 MJSC 141
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Awopeju Vs. The State (2002) 3 MJSC 141,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Azarada Vs. The State (2014) LPELR-23017,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Bakare Vs. State (1987) 1 NWLR (Pt. 52) 579
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Bakare Vs. The State (1987) 1 NWLR (Pt. 52) 579.,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Bakare Vs. The State (1987) 3 SC. 1 or (1987) LPELR (714) 1,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Balogun Vs. A.G. Ogun State (2002) 6 NWLR (Pt. 762) 512,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

BALUCHAMI Vs. EMPEROR A1933, A.843.,

The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Bello Shurumo Vs. The State (2010) 19 NWLR (t. 1226) 73,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Bello Vs. State (2007) 10 NWLR (Pt. 1043) 564,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Ben Vs. State (2006) 16 NWLR (Pt. 1006) 582 SC.
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Benson Vs. Nigeria Agip Co. Ltd (1982) 5 Sc 1,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Benson Vs. Nigeria Agip Co. Ltd (1982) 5 SC,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Bolanle v State (2005) 7 NWLR (pt.925) 431,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Bowaje Vs. Adewura (1976) 6 143
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Bright v State (2012 ISC (pt.ii) 47,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Busari Vs. State (2015) LPELR 24279 (SC).,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Cameroon Airlines Vs. Otutuizu 2011 12 SC (Pt. III) P. 200,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Cameroon Airlines Vs. Otutuizu 2011 12 Sc (Pt. Iii),

Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

CBN Vs. Ahmed (2001) 11 NWLR (pt. 724) 369
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Chidolue Vs. EFCC (2012) 5 NWLR (Pt. 1292) 160
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Chief Gani Fawehinmi vs. Inspector-General of Police & 2 Ors (2002) 5 SC (pt. 1) 63 at 80
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

Chief of Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 922) 496 **Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.**

Chief of Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 924) 496
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Chief T.A.L Akapo (Ojora of Lagos) vs. Alhaji H.A. Hakeem-Habesb & Ors (1992) 7 SCNJ 119; (1992) 6 NWLR (Pt. 247) 266; (1992) LPLER 325 (SC)
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Chime vs. Ude (1996) 7 NWLR (Pt. 461) P. 379.
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

CHIOKWE Vs. STATE (2013) 8 NCC 185,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Co-operative and Commerce Bank (Nig.) Ltd Vs. A.G. Anambra State & Ors. (1992) 8 NWLR (Pt. 261) 528,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Cop Vs. Okoye (2012) 14 NWLR (Pt. 1320) 396,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Cropper Vs. Smith (1884) 26 CHD 700
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

D. E. Okumagba vs. Egbe (1965) 1 All NLR 62
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

Daboh & Anor. vs. The State (1977) 11 NSCC 309
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

Dakat Vs. Dashe (1997) 12 NWLR (Pt. 531) 46,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Dakat Vs. dashe (1997) 12 NWLR (Pt. 531) 46,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

DHUM SINGH Vs. EMPEROR A1925, A.448,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Durwode Vs. State (2000) 15 NWLR (Pt. 691) 467,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Duugo v The State (1995) 6 NWLR (pt.255) 525,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

EBEINWE Vs. THE STATE (2011) 1 SCNJ 90,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Ebri Vs. The State (2004) NWLR (Pt. 885) 589
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Ede vs. Mba (2011) 18 NWLR (Pt. 1278) 236 at 266
Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

EDET OKON IKO Vs. STATE (2001) 7 SCNJ 391,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

EDHIGERE Vs. STATE (1996) 8 NWLR (Pt. 464),
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Edim Vs. The State (1972) 4 SC 160.,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

EDIRO Vs. THE STATE (2007) 5 SC 135
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Edjerode vs. Ikine (2001) SCNJ 184;
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Edoh Vs. The State (2012) 14 NWLR (Pt. 1214) 651,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Edoho Vs. State (2012) 14 NWLR (Pt. 1214) 652,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Edozie vs. Edozie & Ors (1998) 12 NWLR (pt. 580) at 152

Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

Egbe vs The State (1980) 1 NCR 341
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

Egbe vs. Alhaji & Ors (1990) 21 NSCC (pt 1) 306 at 325
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

EGBOGHONOME Vs. THE STATE (1993) 7 NWLR (Pt. 306) 383 SC,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Egunjobi Vs. FRN (2013) 3 NWLR (Pt. 1342) 534
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Egwumi Vs. State (2013) 2 SC (Pt. iii) P. 119.,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Egwumi Vs. State (2013) 2 SC,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Ehimiyein Vs. State (supra).,
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

Ekaidem Vs. State (2012) ALL FWLR (Pt. 631) P. 1587,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Eke Vs. State (2011) 3 NWLR (Pt. 1235) P. 589,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

EKECHUKWU Vs. COP (1966) NNLR 96,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Elaidem Vs. State (2012) All FWLR (Pt. 631) 1587,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Emeka v State (2002 14 NWLR (pt.734) 666, 8,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Emeka Vs. The State (2014) LPELR 23020 (SC), (2014) 13 NWLR (Pt 1425) 614, **Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.**

Emenegor v State (2010) AU FWLR (pt.511) 884,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Emenegor Vs. State (2010) ALL FWLR (Pt. 511) P. 884,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Emmanuel Igwego & Ors vs. Fidelis Ezeugo & Anor (1992) 6 NWLR (Pt. 249) 561 at 587;
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Emoga Vs. State (1997) 1 NWLR (Pt. 483) 615
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Engineer S.D. Yalaju Amaye vs. Associated Registry Engineering Contractors Ltd & Ors (1990) 6 SC 157; (1990) NWLR (Pt. 145) 422; (1990) LPELR- 3511 (SC).
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Esan vs. Olowa (1974) 3 SC 275.
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Esangbedo Vs. The State (1989) 4 NWLR (Pt. 113) 57,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Essien Vs. The State (1984) 3 SC 14,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Eyisi Vs. The State (2000) 15 NWLR (pt 691) 555,
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

Ezeigwe Vs. Nwawulu (2010) 4 NWLR (pt. 1183) 159,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

EZIGBO Vs. THE STATE (2012) 6 SCN (Pt. 1) 61
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Fabian Nwaturuocha Vs. The State (2011) LPELR 8119 (SC), (2011) 6 NWLR (pt. 1242) 170,
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

Fadiora vs. Gbadebo (1978) 3 SC 219 at 229
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Federal Republic of Nigeria Vs. Lucky Nosakhare Igbinedion & Ors
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Fred Dapere Gira Vs. The State (1996) LPELR 1322 (SC), (1996) 4 NWLR (Pt. 443) 375,
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

FRN Vs. Adewumi (2007) 10 NWLR (Pt. 1042) 399
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

FRN Vs. IGBINIEDION (2015) 2 NWLR (Pt. 1444) 475
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

FRN Vs. LUCKY NOSAAKHARE IGBINEDION
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

FRN Vs. Mohammed (2014)) 3 SCNJ 57,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

FRN vs. Osahon (2006) 5 NWLR (pt. 973) 261
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

FSB Int'l Bank Ltd vs. Imano Nig. Ltd. (2000) 11 NWLR (pt 679) 620 at 639
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

G-A and AFOLABI Vs. STATE (2016) LPELP 40300 (SC),
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Gabriel Vs. State (2010) 6 NWLR (Pt. 1190) 280
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

GABRIEL Vs. THE STATE (1989) 5 NWLR (Pt. 122) 457
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Gaji v State (1975) 5 SC 6,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Garba Vs. Omokhodion (2011) 6 SCNJ 334,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Garba Vs. State (2010) 14 NWLR(Pt. 1266) (sic)
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Garba Vs. The State (2000) 6 NWLR (Pt. 661) 387,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Garuba Vs. Omokhodion (2011) 6 SCNJ,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Gira Vs. State (1996) 4 NWLR (Pt. 443) 375
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Gwoji Jire Vs. The State (1965) NNLR 52
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

HABIBU MUSA Vs. THE STATE (2013) 8 NCC 464,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Hassan Alabi Vs. The State (2007) All NWLR (Pt. 376),
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Ibodo Vs. Enarofia (1980) 5-9 SC 42
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Idan Vs. C.O.P (1964) NMLR P. 103,,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Idiok Vs. The State (2008) 13 NWLR (Pt. 1104) 225
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Idiok Vs. The State (2008) 13 NWLR (Pt. 1104) 225
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Idowu v The State (2000) 7 SC (pt.2) 50,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Igago v State (2001) 2 ACLR 104,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Igbele Vs. The State (2006) 6 NWLR (Pt. 975) 100
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

IGBINE Vs. STATE (1997) 9 NWLR (Pt. 519) 101,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Iheonunekwu Ndukwe Vs. The State (2009) LPELR- 1997 (SC), (2009) 7 NWLR (Pt. 1139) 43,
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

Ike Vs. State (2010) NWLR (Pt. 1186) 41
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Ikemson v State (1989) 3 NWLR (pt.110) 455,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Ikemson Vs. State (1989) 3 NWLR (Pt. 110) P. 455.,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Ikemye Dike & Ors vs. Obi Nzeka 11 & Ors (1986) LPELR-945 (SC)
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Iko Vs. State (2001) 14 NWLR (Pt. 732) 221,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Ikomi vs. The State (1986) 3 NWLR (pt. 28) 240 at 355
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

Isiobor vs. The State (2002) 4 NWLR (Pt. 758) 741

Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

Iweka vs. SCOA (2000) 3 SC 21 at 24-25
Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

Jafiya Kapa Vs. The State (1972) All NLR 50,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

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Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

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Joseph Idowu Vs. The State (2000) 7 SC 50,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Jua Vs. State (2010) 4 NWLR (pt. 1184) 217
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

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Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Lori & Anor Vs. State (1980) NSCC (Vol. 12) 269
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Manga Vs. the State (1993) 3 NWLR (Pt. 279) 108
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Mbang Vs. State (2010) 7 NWLR (Pt. 1194) 431
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Nba Vs. Ojigho (2015) 15 NWLR (Pt. 1481) 186,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

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Sunday Gabriel Ehindero And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 167 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Ndukwe Vs. State (2009) 2 SCNJ p. 223,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

NEPA Vs. Savage (2001) 9 NWLR (Pt. 717) 230
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Obudu Vs. State (1999) 6 NWLR (Pt. 198) 433
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Ochiba Vs. State (2011) 12 SC (Pt. iv) P. 79,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Ochiba Vs. State 2011 12 SC (Pt. IV) p. 79,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Ogba Vs. State (1992) 2 NWLR (Pt. 222) 164
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Ogoala Vs. State (1991) 2 NWLR (Pt. 175) 506
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

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Sunday Oloyede And The State (2017) JSCNLR (Vol. 16), 209 S.C.

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The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

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Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

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Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Otti Vs. State (1993) 4 NWLR (Pt. 290) P. 675,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Owhoruke Vs. C.O.P (2015) 15 NWLR (Pt. 1483) 557 SC
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

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Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

Patrick Ikemson & 2 Ors Vs. The State (1989) 3 NWLR (Pt 110) 455,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Patrick Ikemson & 2 Ors Vs. The State (1989) 3 NWLR (Pt. 110) 455,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Peter Iliya Azabada Vs. The State (2014) All FWLR (Pt. 751) 1620,
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

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Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

Quo Vadis Hotels & Restaurants Ltd Vs. Nigeria Maritime Services Ltd (1992) 7 SCNJ 172
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

R Vs. ALLEN 9C & P 31,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

R Vs. Tatimu 20 NLR 60, 14
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

R Vs. Turnbill (1976) 3 ALL ER P. 549,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

R. Oshunbiyi (1961) 1 All NLR 453
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

RACHUNATH KANDUN Vs. EMPEROR A1926, A.227,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

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The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

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Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

RHEIN MASS UND SEE GMBH vs. RIVWAY LINES LTD. (1998) 5 NWLR (Pt. 549) 265; (1998) ALL NLR 568; (1998) 4 SC 73
Yanaty Petrochemical Limited And Economic And Financial Crimes Commission (2017) JSCNLR (Vol. 16), 427 S.C.

Robert M. Brady Vs. United States 397 U.S. 742 (90 Sc. CT 1563, 25 L. Ed 2d 747)
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Robert M. Brady Vs. United States 397 US 642
Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

Sabi Vs. State (2011) 14 NWLR (Pt. 1286))) 421
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Salami Vs. State (1988) 3 NWLR (Pt. 85) P. 670,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

Salomi Vs. The State (1998) 3 NWLR (Pt 85) 670 at 677
Saleh Dawai And The State (2017) JSCNLR (Vol. 16), 105 S.C.

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Samuel Theophilous Vs. The State (1996) 1 NWLR (Pt. 423) Page 139,
Usaini Mohammed And Commissioner Of Police (2017) JSCNLR (Vol. 16), 344 S.C.

Samuel Theophilous Vs. The State (1996) 1 NWLR (Pt. 423),
Wadata Isah And The State (2017) JSCNLR (Vol. 16), 386 S.C.

Shande v The State (2005) 22 NSCQR 756,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

Shuaibu vs. Maihodu (1993) 3 NWLR (Pt. 284) 748.
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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

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Romrig Nigeria Limited And Federal Republic Of Nigeria (2017) JSCNLR (Vol. 16), 49 S.C.

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Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

Solola Vs. The State (2005) 5 SC (Pt. 1) 135.,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

State v Aigbangbe (1988) 3 NWLR (pt.84) 548,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

State v Olashehu Salami (2011) 12 SC (pt.iv) 191,
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

State v Salami (2011)12 Sc (pt.iv) 191
Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

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Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

State Vs. Danjuma (1997) 5 NWLR (Pt. 506) 512
Umaru Sani And The State (2017) JSCNLR (Vol. 16), 289 S.C.

State Vs. Nnolim (1994) 5 NWLR (Pt. 345) 394,
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

State Vs. Ojo (1980) 2 NCR 391,
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

State Vs. Salawu (2011) 18 NWLR(Pt. 1279) P. 580
Raphael Ewugba And The State (2017) JSCNLR (Vol. 16), 1 S.C.

STEPHEN Vs. STATE (1986) 5 NWLR (Pt. 46),
The State And Muhammed Masiga (Tsolo) (2017) JSCNLR (Vol. 16), 245 S.C.

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Shola Famuyiwa And The State (2017) JSCNLR (Vol. 16), 130 S.C.

SUBRAMANIAN Vs. PUBLIC PROSECUTOR (1956) 1 WLR 956,
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RAPHAEL EWUGBA
AND
THE STATE

SC. 480/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 15TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

CRIMINAL LAW AND PROCEDURE: Identification parade – Necessity thereof – Relevant principles

CRIMINAL LAW AND PROCEDURE: Possession of stolen goods – Presumption thereof – S. 167 (d) of the Evidence Act – Conditions necessary thereto.

CRIMINAL LAW AND PROCEDURE: Possession of stolen goods – Presumption thereof – Whether rebuttable – Onus on accused – How discharged.

CRIMINAL LAW AND PROCEDURE: Proof – Burden on prosecution in a criminal case – Whether to proved the case beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Proof beyond reasonable doubt – Meaning – When is a charged prove beyond reasonable doubt.

CRIMINAL LAW: KIDNAPING – S. 364 of Criminal code – Meaning and significance.

EVIDENCE: Withholding Evidence – S. 167 (d) of Evidence Act – When does the presumption apply against prosecution in a criminal proceeding – Whether it is after the service on the prosecution a notice to produce evidence

PRACTICE AND PROCEDURE: Proof – Failure to cross examine a witness on a material point – Whether amount to acceptance of the point.

STATUTE: Evidence Act – S. 167 (d) thereof – Scope and application

Issues for Determination

Whether having regard to the circumstances of this case and the totality of the evidence on record, the lower court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy to kidnap, kidnapping and armed robbery against the appellant beyond reasonable doubt.

Facts of the Matter

This is an appeal from the judgment of the Court of Appeal, (Benin Judicial Division) which affirmed the decision of a Delta State High Court on 27 May 2015 wherein the appellant as the 2nd accused person and his co-accused person were found guilty of the offences of conspiracy to commit kidnapping, and armed robbery.

At about 12.30 pm on 26 December 2011, Onoriode Yvonne Asheshe, a Magistrate in the Delta State Judiciary was in the process of parking her Honda Sport Utility Vehicle with registration No. DE 387 KTU in front of her house at No. 80 Jakpa Road Effurun in Urnie Local Government Area of Delta State when three men armed with guns surrounded the car and ordered her to open the doors. She opened the doors and spent some time looking for the keys of the car

with the men. The keys were eventually found. She was forced to lie down on the back seat of the car bound hands and feet, blind folded. They drove off.

She was disposed of her handbag, mobile phones (blackberry), ATM cards, money and Jewelry. She had to disclose the PIN number of her ATM card with a warning that if it was found not to be correct she would be killed. After a long ride she was abandoned in the bush in Olukobare village, near Orerokpe in Okpe Local Government Area of Delta State. She was left in the bush, while they drove off in her car. Eventually she was able to remove the ropes from her legs, hands and free herself completely. She made her way to the highway where a good spirited motorcyclist gave her a ride into town where she reported the incident to the police.

Her blackberry phone was eventually found with the appellant, but to this day her car has not be recovered.

Trial got underway on 31 July 2012 after the appellant entered a plea of not guilty to a three count charge which reads:

Three witnesses gave evidence at the trial, PW1, the victim of these crimes and PW2 the investigating police officer, an officer attached to the State Securities Service Delta State Command, both gave evidence for the state (respondent).

The appellant gave evidence in defence, but did not call any witness. The following items were tendered as exhibits.

Exhibit A: Statement of 1st accused person (not relevant in this appeal).
Exhibit B: Statement of 2nd accused person.
Exhibit C: Blackberry Phone with Pin No. 3245D4FE.
Exhibit D: Certificate of (Engr.) Saidi Haruna from lovely Communication.

Judgment was delivered on 10 October 2013. The learned trial judge found the appellant guilty on the three count charge and sentenced him to death on count III.

Dissatisfied with the sentence the appellant filed an appeal to the Court of Appeal. That court affirmed the judgment of the High Court.

This appeal is against that judgment.

Held *(Unanimously dismissing the appeal)*

1. *When is a charge is said to be proved beyond reasonable doubt*

Proof beyond reasonable doubt does not mean proof of a mathematical certainty. It also does not mean proof beyond all possible doubt. A charge is proved beyond reasonable doubt when the facts and circumstances of the case and the quality of the evidence adduced is compelling and reliable to establish the guilt of the accused person. There must be a high degree of probability that the accused person committed the offence. The doubt must be of a reasonable man and the standard must also be of a reasonable man. See *Egwumi Vs. State (2013) 2 SC (Pt. iii) P. 119 Nwaturuocha Vs. State (2011) 2-3 SC (Pt. i) P. 111, Eke Vs. State (2011) 1-2 SC (Pt. ii) P. 219, Ochiba Vs. State (2011) 12 SC (Pt. iv) P. 79.*

If the three issues referred to above are resolved in favour of the respondent the case would be said to have been proved beyond reasonable doubt in the trial court and the Court of Appeal would be right to affirm that judgment, thereby resulting in the fact that concurrent findings of fact are correct. Conversely the appellant would be entitled to an acquittal and discharge. *(P 22 paras B – E)*

2. *When is an identification parade necessary*

An identification parade is necessary when the identity of who committed the crime is disputed and the accused person saw the accused for the first time during the commission of the crime. An identification parade is never full proof. Mistakes as to the identity of the accused persons occur repeatedly. Identification parade would not be necessary where the witnesses (or victim of the crime) knew the accused person before the crime was committed. See *Ikemson Vs. State (1989) 20 NSCC (Pt. ii) P. 471, Orimoloye Vs. State (1984) 15 NSCC P. 654, Otti Vs. State (1993) 4 NWLR (Pt. 290) P. 675.* *(P 24 paras E – G)*

3. *Failure to cross examine a witness on a material evidence amounts to acceptance*

Where a witness testifies on a material point in controversy, in this case that the identification parade was properly conducted, if the appellant does not accept the witness testimony as true should cross-examine him on that fact, or at least show that he does not accept the evidence as true. Where he fails to do either as in this case the court can take his silence as acceptance that he does not dispute the fact. In view of failure to cross-examine properly and highlight errors in the conduct of the identification parade, I am satisfied that the identification parade was properly conducted. *(Pp 25 – 26 paras G – A*)

Per Rhodes Vivour (JSC)

"**Aside from the identification of appellant at a well conducted identification parade I am also satisfied with the testimony of PW1 when she said:**

> **"I saw their face, i.e the accused person on the day of the incident. When they found the key, within about 2 minutes they were looking for the key I took my time to look at their faces and features……..."**

To my mind when a person is traumatized e.g. attacked by armed robbers or raped, the whole episode remains in the mind of the victim for life. He or she remembers faces vividly, despite trauma which usually sets in after the act. When PW1 was surrounded by armed robbers in broad daylight and bundled into the back seat of her car before being blind folded, such a victim would never forget the face of her assailants.

Once again, I am satisfied that the appellant was properly recognized by PW1 as one of the robbers that kidnapped her and stole her blackberry phone on 26 December 2011 and the identification parade conducted on 7 March 2012 was flawless. *(P 26 Paras A – E)*

4. *The application of S. 167 (d) of the Evidence Act*

Learned counsel for the appellant at no time during trial demanded for any document from the prosecution, neither did he adopt the demand/submissions of learned counsel for the 1st accused person.

When does section 167(d) of the Evidence Act apply?

The rule in section 167(d) of the Evidence Act is contained in the maxim "omnia praesumuntur contra spoliatorem." Where a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted.

The withholding of useful evidence naturally leads to the inference that the evidence if produced would go against the party who withholds it. So where the prosecution is served with notice to produce evidence that the defendant needs for his defence and the prosecution willfully refuses to produce the said evidence the courts would act on the natural inference that the evidence is held back because it would be unfavourable. *(Pp 28 – 29 paras E – A)*

5. *The nature and purport of S. 167 (d) of Evidence Act*

Section 167(d) of the Evidence Act states that:

> **167(d) evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.** *(P 29 paras A – B)*

6 *When does the presumption of withholding evidence apply against the prosecution*

The above complaint was not raised at the trial court by learned counsel for the appellant. The defence is entitled to demand for documents it considers relevant for its defence and this is done by serving a subpoena/notice to produce on the prosecution to produce the documents.

The presumption in section 167(d) arises and the court is entitled to presume that documents in possession of the prosecution

would be unfavourable to the prosecution's case if the prosecution after service of notice to produce still refuses to produce the documents. See *Queen Vs. Itule (1961) 1 ALL NLR P. 481, Aremu Vs. State (1991) 7 NWLR (Pt. 201) P. 1.* *(P 29 paras C – E)*

Per Rhodes Vivour (JSC)

"No demand for documents was made either orally or in writing by the appellant and no process was served on the respondent to produce documents. In the absence of notice to produce on the appellant, section 167(d) of the Evidence Act does not apply.

Once again this complaint was not raised at the trial court by learned counsel for the appellant. It must be elementary now that an appeal is a rehearing. It is the duty of an Appeal Court to examine the record of appeal to see if the judgment of the trial court is correct or flawed. New issues can only be raised on appeal with leave. Where leave was not obtained nothing new would be heard on appeal. It follows naturally that a party must be consistent in stating his case in the trial court and on appeal. He will not be allowed to present a case at trial and present a different case on appeal. He will never be allowed to shift ground on appeal as it suits his fancy.

I am satisfied that complaining about the respondent withholding documents/evidence was never the appellant's case in the trial court. It is wrong and is not worth considering on appeal. This is clearly an afterthought by the appellant that is futile in the extreme. The prosecution did not withhold evidence.

Finally on this point. It is learned counsel for the appellant's case that learned counsel for the respondent deliberately withheld six items.

At trial he never raised this issue. It was learned counsel for the 1st accused person who asked for only three items to be produced.

This brings into focus and is further evidence, that this issue on appeal is clearly without foundation. The prosecution once again did not withhold evidence from the appellant since at no time in trial

court did his counsel ask orally or formally for any document to be produced by the respondent." *(Pp 29 – 30 paras E – C)*

7. *The nature and purport of S.167 (a) of the Evidence Act*
Section 167 (a) of the Evidence Act states that:

> **"167(a). The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume**
>
> **(a) that a man is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession.** *(P 31 paras B – E)*

8. *Necessary Conditions before the application of 167 (a) of the Evidence Act*
Before this presumption applies the following factors must be present.

(a) the goods must be goods capable of being stolen.
(b) the goods were recently stolen.
(c) soon after the theft the goods were found in possession of the defendant.
(d) the accused person failed to account for his possession of the goods. See *Idan Vs. C.O.P (1964) NMLR P. 103, State Vs. Aiyeola (1969) ANLR P. 293, Omopupa Vs. State (2008) ALL FWLR (Pt. 445) P. 1648.* *(P 31 paras E – G)*

9. *The presumption of being in possession of stolen goods is rebuttable*
The presumption could arise if the court is satisfied that the person in possession of the stolen goods was the thief or that the person in

possession of the stolen goods received the goods knowing them to have been stolen.

The accused person is required to explain how the goods came into his possession. If the court is satisfied with his explanation the presumption is rebutted. In *Idan Vs. C.O.P (supra)* the accused person was charged with being in possession of stolen goods. He was convicted. On appeal he was able to satisfy the court that although he was in possession of the goods he did not know that they were stolen. The appeal was allowed.

The presumption in section 167(a) of the Evidence Act cannot be drawn in the absence of evidence. Facts are presumed from the common course of events. Section 167 (a) thus applies to the given facts.

According to the appellant (2nd accused person) he bought the blackberry phone from the 1st accused person.

The learned trial judge did not believe the appellant.

(Pp 31 – 32 paras H – C)

10. *The presumption that the appellant is the thief is believable and sustained*

To my mind both courts below were right not to believe the explanation of the appellant as to how the blackberry phone came into his possession. His explanation has always been that he bought the blackberry phone from his co-accused for N14,000.00. This was confirmed by his co-accused when he gave evidence on oath. (see page 56 of the record of appeal), but when the co-accused was shown the blackberry phone in court he examined it and said it was not the phone he sold to the appellant (see page 57 of the record of appeal.) This was never resolved together with the many contradictions in testimony, eventually linking a non existing person by name Rukevwe with the blackberry phone. Both courts below were in the circumstances right that the doctrine of recent possession applies to this case since the appellant explanation as to how he came to possess the blackberry phone is not true. The presumption that the appellant is the thief is believable and sustained. *(P 34 Paras D - G)*

11. *The nature of conspiracy*

There is a conspiracy when two or more persons agree to do an act which is unlawful. They do not necessarily have to know each other so long as they know of the existence and the intention or purpose of the conspiracy. Once there is a meeting of the minds of the conspirators to commit an offence and this is easily inferred by what other person does in furtherance of the offence of conspiracy.

In all cases of conspiracy the court is to ascertain evidence of complicity of the accused person in the offence. See *Adejobi Vs. State (2011) ALL FWLR (Pt . 588) P. 850, Shurumo Vs. State (2011) ALL FWLR (Pt. 568) P. 864, State Vs. Salawu (2011) 18 NWLR(Pt. 1279) P. 580. Posu Vs. State (2001) 3 NWLR (Pt. 1234) P. 393.*

The offence of conspiracy was committed on 26 December, 2011 when the appellant in company of other persons, armed, surrounded the respondent car, bundled her into the back seat of the car and drove off with her, bound and blindfolded, and latter dumped in the bush. Then driving off once again, and to this day the respondent's car has not been recovered. It is easily inferred that the appellant and his co-accused persons conspired to steal the respondent's car. The complicity of the appellant in the offence of conspiracy is established and the charge of conspiracy is proved beyond reasonable doubt. *(P 35 paras D – I)*

12. *Meaning of kidnapping*

Kidnaping contrary to section 364 (2) of criminal code. When a person is detained unlawfully the offence of kidnapping is established. The offence of kidnapping is proved beyond reasonable doubt when the appellant and his co-accused persons bound and blindfolded the respondent and dumped her in the back seat of her car and drove off. The charge of kidnapping contrary to section 364(2) of the criminal code was proved beyond reasonable doubt.
(P 36 paras A – B)

13. *What persecution must prove in the case of armed robbery*

Armed robbery contrary to section 1(2(a) of the robbery and firearms act.

For the prosecution to succeed in a charge under section 1(2)(a) of the robbery and firearms Act the prosecution must prove beyond reasonable doubt that:

(a) there was a robbery.
(b) the robbers were armed,
(c) the appellant was one the robbers. See *Eke Vs. State (2011) 3 NWLR (Pt. 1235) P. 589, Ogudo Vs. State (2011) 18 NWLR (Pt. 1278) P.1, John Vs. State (2011) 18 NWLR (pt. 1278) P. 353.*

My lords, it is no longer in doubt that there was a robbery on 26 December 2011 when the appellant and his co-accused stole PW1's car, her blackberry phone and some of her possessions. The robbers were armed, since evidence of PW1 that the appellant and the other persons who stole her car were armed is unchallenged. Finally the appellant was recognized by PW1 and positively identified at a well conducted identification parade. On these undisputed facts I am satisfied that the charge of armed robbery contrary to section 1(2)(a) of the robbery and firearms act was proved beyond reasonable doubt. (P *36 paras B – G*)

14. *Attitude of the Supreme Court to concurrent findings*

Before going further, I am mindful of the fact that what is before this court is an appeal against the concurrent findings of the two courts below and this court will not interfere with the concurrent findings of facts of both the High Court and the Court of Appeal as long as the said findings are supported by legally admissible evidence and they are not perverse or have led to a miscarriage of justice. In this I am guided by the following cases:-

Onwudiwe Vs. FRN (2006) 10 NWLR (Pt. 988) 382; Agala Vs. Okusin (2010) 10 NWLR (Pt. 1202) 412, Peter Lliya Azabada Vs. The State (2014) LPLER 23017. *(P 40 paras E – G*)

15. *Presumption in S. 167 (a) of the Evidence Act*

The lower court went along the findings of the trial court that the testimonies of 1st accused in his extra judicial statement, EXHIBIT A and on oath were full of material contradictions that they were unreliable and not worthy to be acted upon.

Also the two courts found unacceptable the evidence put across by appellant that he bought the phone, EXHIBIT C from 1st accused. Therefore the court utilized the presumption of fact under section 167(a) of the Evidence Act, 2011. It provides thus:

Section 167 (a) of the Evidence Act 2011 enacts as follows:-

> **"167. The court may presume the existence of any fact which it deems likely to have happened, regard shall be had to the common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case, and in particular the court may presume that**
>
> **(a) a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession".**

Going by the said section 167(a)) of the evidence Act, 2011 it is clear that the trial court had enough on which it could and did in fact activate the presumption that the appellant was either the thief or culprit or obtained the EXHIBIT C knowing it to have been stolen or acquired through unlawful means. *(Pp 41 – 42 paras F – D*)

Per Peter Odili (JSC)

"**I agree with learned counsel for the respondent that the appellant's co-accused failed to adopt the proper procedure as stipulated in**

section 186 and 188 CPL of Delta State and the Court of Appeal was right to have held that the non production of the said documents were not detrimental to the case of the appellant and co-accused and raising the presumption to be applied here and now that its non production was because they would have worked against the prosecution is not only late in the day but of no value to the appellant. See Aremu Vs. State (1991) 7 NWLR (Pt. 201) 1 at 17– 18 per Nwokedi JSC.

Indeed the evaluation and assessment of the evidence as done by the trial court and accepted by the Court of Appeal cannot be faulted in view of the materials available on record which has afforded this court, the opportunity of revisiting what the two courts did and in context and it has not been difficult for me to reach the conclusion that no justification exists for the interference of this court on those concurrent findings of fact. I shall refer to the case of: Oladipo Vs. Moba L.G.A (2010) 5 NWLR (Pt. 1186) 117 at 150-151 Paras H-C, the court held thus:

> **"It must be borne in mind that the evaluation and assessment of evidence as well as the ascription of probative value to such evidence is entirely the primary function of the court of trial which saw, heard and duly assessed the witnesses. Where such a court of trial has justifiably evaluated the evidence, it is not the business of the Court of Appeal to substitute its own views for that of the trial court. What the Court of Appeal is called upon to do when faced with such is to ascertain whether or not there is evidence upon which the trial court acted. Once there is such evidence, the appellate court will not intervene even if it feels that if the facts were before it, it would not have come to the same decision as the trial court". See also Attah Vs. State (2010) NWLR (Pt. 1201) 190 at 217, Paras E-G where this honourable court Mustapha, JSC (as he then was) held thus:**

> **"It is also the law that there is visual and positive identification of the accused at the scene of the crime which is believed by the trial judge, the appellate court should not disturb such a finding".** *(Pp 44 – 45 paras E – F)*

16. *Burden on prosecution in a criminal case*

The burden on the prosecution in a criminal trial is to prove the offence charged beyond reasonable doubt. Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt and where like in this case, the evidence adduced is strong as to have only a remote probability. ***See Miller Vs. Minister of Pensions (1947) 2 All ER. 372 and Bakare Vs. The State (1987) 3 SC. 1 or (1987) LPELR (714) 1 at 12 – 13 where Oputa, JSC*** **had this to say amongst others:**

> **"……**
> **Absolute certainty is impossible in any human adventure including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible and fanciful possibilities but it does admit of a high degree of cogency, consistent with an equally high degree of probability. As Denming J. (as he then was) observed in Miller Vs. Minister of Pensions (1947) 2 All ER 373:**
>
> > **'The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong as to leave only a remote possibility in his favour which can be dismissed with the sentence. "Of course it is possible but not in the least probable" the case is proved beyond reasonable doubt."**

Proof beyond reasonable doubt means proof of an offence with the certainty required in a criminal trial; that certainty is, that the offence was committed, and that the person charged therewith is responsible in committing the offence.

Where like in this case the evidence adduced established these two facts, then the case is proved beyond reasonable doubt. It is not in doubt herein that the appellant conceded the fact that the offence was committed. His point of departure however is whether the evidence did establish that he was indeed one of the offenders.

With all intents and purposes, it is obvious on the record that there is no doubt as to the fact that the evidence established that the appellant was one of the perpetrators of the crime, the victim having identified him by fixing him at the scene of crime.

There is therefore, no rational basis on which the judgment of the lower court should be interfered with. The sole issue is resolved against the appellant. *(Pp 46 – 47 Paras D – F*)

Nigerian cases cited in this judgment

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Adejobi Vs. State (2011) ALL FWLR (Pt . 588) P. 850,
Agala Vs. Okusin (2010) 10 NWLR (pt. 1202) 412,
Agala Vs. Okusin (2010) 10 NWLR (Pt. 1202) 412,
Agbo Vs. State (2006) ALL FWLR (Pt. 309) P. 1380,
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Alabi Vs. State (1993) 7 NWLR (Pt. 307) P. 511,
Aremu Vs. State (1991) 7 NWLR (Pt. 201) 1,
Attah Vs. State (2010) NWLR (Pt. 1201) 190,
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Ekaidem Vs. State (2012) ALL FWLR (Pt. 631) P. 1587,
Eke Vs. State (2011) 3 NWLR (Pt. 1235) P. 589,
Elaidem Vs. State (2012) All FWLR (Pt. 631) 1587,
Emenegor Vs. State (2010) ALL FWLR (Pt. 511) P. 884,
Ezeigwe Vs. Nwawulu (2010) 4 NWLR (pt. 1183) 159,
Idan Vs. C.O.P (1964) NMLR P. 103,,
Ikemson Vs. State (1989) 3 NWLR (Pt. 110) P. 455.,
John Vs. State (2011) 18 NWLR (pt. 1278) P. 353,
Julius Abiriton Vs. The State (2013) LPELR 20807 (SC).,
Miller Vs. Minister of Pensions (1947) 2 All ER 373,
Nwaturuocha Vs. State (2011) 2-3 SC (Pt. i) P. 111,
Ochiba Vs. State (2011) 12 SC (Pt. iv) P. 79,
Ogudo Vs. State (2011) 18 NWLR (Pt. 1278) P.1,
Ogudu Vs. State (2012) ALL FWLR (Pt. 629) P. 1111,
Oladipo Vs. Moba L.G.A (2010) 5 NWLR (Pt. 1186) 117,
Omopupa Vs. State (2008) All FWLR (Pt. 445) 1648,
Onwudiwe Vs. FRN (2006) 10 NWLR (Pt. 988) 382,
Orimoloye Vs. State 1984) 15 NSCC P. 654,
Otti Vs. State (1993) 4 NWLR (Pt. 290) P. 675,
Oyakhere Vs. State (2007) All FWLR (pt. 344) 1,
Peter Lliya Azabada Vs. The State (2014) LPLER 23017,
Posu Vs. State (2001) 3 NWLR (Pt. 1234) P. 393,
Queen Vs. Itule (1961) 1 ALL NLR P. 481,
R Vs. Turnbill (1976) 3 ALL ER P. 549,
Salami Vs. State (1988) 3 NWLR (Pt. 85) P. 670,
Shurumo Vs. State (2011) ALL FWLR (Pt. 568) P. 864,
State Vs. Aiyeola (1969) ANLR P. 293,
State Vs. Nnolim (1994) 5 NWLR (Pt. 345) 394,
State Vs. Salawu (2011) 18 NWLR(Pt. 1279) P. 580

Nigerian statutes cited in this judgment
criminal code section 364(2)
Criminal Code Law section 516

A *Criminal Procedure Law of Delta State Sections 186 and 188*
Criminal Procedure Law sections 186 and 188
Evidence Act section 167(d)
Robbery and firearms (Special Provisions) Act Cap. RII Vol. 4, Laws
B *section 1(2) (a)*

Representation
A. ASALA for the **Appellant**, with him A. Makinde
C **P. MRAKPOR AG of Delta State** for **Respondent** with him, O.F. Enemmo Director Appeals, E.U. Edonwonyi D.P.P, O. Idibar Assistant Chief State Counsel, S. Anumati Assistant Chief State Counsel

D **OLABODE RHODES-VIVOUR, (JSC) (Delivering the lead judgment):** This is an appeal from the judgment of the Court of Appeal, (Benin Judicial Division) which affirmed the decision of a Delta State High Court on 27 May 2015 wherein the appellant as the 2nd accused person and
E his co-accused person were found guilty of the offences of conspiracy to commit kidnapping, and armed robbery.

Trial got underway on 31 July 2012 after the appellant entered a plea of not guilty to a three count charge which reads:

F

COUNT 1
Statement of Offence
Conspiracy to commit a felony to wit:
G **Kidnapping punishable under section 516 of the Criminal Code Law, Cap C21 Vol. 1, Laws of Delta State of Nigeria, 2006.**

H **Particulars of Offence:**
Saidu Haruna (M), and Raphael Egwuba (M) on or about the 26 of December 2011 at Effurun, within the Effurun Judicial Division, conspired with others now at large to
I **commit a felony to wit: Kidnapping.**

COUNT 2
Statement of Offence
Kidnapping, punishable under section 364(2) of the Criminal Code Law, Cap. C21 Vol. 1, Laws of Delta State of Nigeria, 2006.

Particulars of Offence
Saidu Haruna (M), and Raphael Egwuba (M) on or about the 26 of December 2011 at Effurun, within the Effurun Judicial Division, unlawfully imprisoned one Onoriode Yvonne Asheshe (f) against her will.

COUNT 3
Statement of Offence
Armed robbery punishable under section 1(2) (a) of the robbery and firearms (Special Provisions) Act Cap. RII Vol. 4, Laws of the Federation of Nigeria, 2004.

Particulars of Offence
Saidu Haruna (M), and Raphael Egwuba (M) on or about the 26 of December 2011 at Effurun, within the Effurun Judicial Division, robbed one Onoriode Yvonne Asheshe (f) of her Honda Pilot Jeep, ATM card, Jewelleries and Black Berry phone while armed with a gun.

Three witnesses gave evidence at the trial, PW1, the victim of these crimes and PW2 the investigating police officer, an officer attached to the State Securities Service Delta State Command, both gave evidence for the state (respondent).

The appellant gave evidence in defence, but did not call any witness. The following items were tendered as exhibits.

Exhibit A: Statement of 1st accused person (not relevant in this appeal).

Exhibit B: Statement of 2nd accused person.
Exhibit C: Blackberry Phone with Pin No. 3245D4FE.
Exhibit D: Certificate of (Engr.) Saidi Haruna from lovely communication.

On 27 February 2013 the trial judge adjourned the case to 28 March, 2013 for adoption of written addresses and judgment was delivered on 10 October 2013. The learned trial judge found the appellant guilty on the three count charge and sentenced him to death on count III.

Dissatisfied with the sentence the appellant filed an appeal to the Court of Appeal. That court affirmed the judgment of the High Court in the concluding paragraph as follows:

> **The appeal is totally lacking in merit and it is hereby dismissed. The judgment of the lower court embodying the conviction and sentence imposed on the appellant in Suit No. A/37C/2012 delivered on October, 2013 is hereby affirmed.**

This appeal is against that judgment. In accordance with rules of court, briefs were filed and exchanged. The appellant's brief was filed on 14 September, 2015, while the respondent's brief was filed on 17 December 2015.

Learned counsel for the appellant formulated a sole issue for determination. It reads:

> **"Whether having regard to the circumstances of this case and the totality of the evidence on record, the lower court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy to kidnap, kidnapping and armed robbery against the appellant beyond reasonable doubt."**

Learned counsel for the respondent also formulated a sole issue for determination.

> **"Whether on the totality of the evidence adduced on record the court below was right in upholding the judgment of the trial court which found the appellant guilty for the offences of conspiracy to kidnap, kidnapping and armed robbery.**

The sole issue formulated by counsel asks the same question, whether the prosecution proved the charges beyond reasonable doubt. I am satisfied with the issue as framed by the learned counsel for the appellant and so his sole issue shall be considered in this appeal. At the hearing of the appeal on 5 October, 2017, learned counsel for the appellant A. Asala Esq and P. Mrakpor, the Attorney-General of Delta State for the respondent adopted their briefs and had nothing to say in amplification. The appellant's brief was filed on 14 September 2015. Learned counsel for the appellant urged this court to acquit and discharge the appellant. The respondent's brief was filed on 17 December 2015. Learned counsel for the respondent urged this court to dismiss the appeal.

The Facts

At about 12.30 pm on 26 December 2011, Onoriode Yvonne Asheshe, a Magistrate in the Delta State Judiciary was in the process of parking her Honda Sport Utility Vehicle with registration No. DE 387 KTU in front of her house at No. 80 Jakpa Road Effurun in Urnie Local Government Area of Delta State when three men armed with guns surrounded the car and ordered her to open the doors. She opened the doors and spent some time looking for the keys of the car with the men. The keys were eventually found. She was forced to lie down on the back seat of the car bound hands and feet, blind folded. They drove off.

She was disposed of her handbag, mobile phones (blackberry), ATM cards, money and Jewelry. She had to disclose the PIN number of her ATM card with a warning that if it was found not to be correct she would be killed.

After a long ride she was abandoned in the bush in Olukobare village, near Orerokpe in Okpe Local Government Area of Delta State. She was left in the bush, while they drove off in her car. Eventually she was able to remove the ropes from her legs, hands and free herself completely. She made her way to the highway where a good spirited motorcyclist gave her a ride into town where she reported the incident to the police.

Her blackberry phone was eventually found with the appellant, but to this day her car has not be recovered.

The sole issue:

> **"Whether having regard to the circumstances of this case and the totality of the evidence on record, the lower court was right in upholding the decision of the learned trial judge that the prosecution prove the charges of conspiracy to kidnap, kidnapping and armed robbery against the appellant beyond reasonable doubt.**

Learned counsel for the appellant concedes that PW1 was kidnapped and robbed at gun point on 26 December 2011 but, contends that the prosecution failed to adduced credible evidence to prove beyond reasonable doubt that the appellant was one of the persons that committed the offences of kidnapping and armed robbery.

The issue at the trial court and on appeal was whether the fact that the blackberry phone was traced to the appellant conclusively proved that the appellant participated in the kidnapping and armed robbery. The decision of the trial court was challenged in the Court of Appeal on these major issues. It is now the duty of this court to find out if the decision of the Court of Appeal is flawed or correct.

Subsumed in the sole issue for determination are the following issues.

> **(a) Whether there was proper identification of the appellant as one of the kidnappers and armed robbers.**

(b) Whether the prosecution withheld vital documents.
(c) Whether the doctrine of recent possession applies in this case.

Proof beyond reasonable doubt does not mean proof of a mathematical certainty. It also does not mean proof beyond all possible doubt. A charge is proved beyond reasonable doubt when the facts and circumstances of the case and the quality of the evidence adduced is compelling and reliable to establish the guilt of the accused person. There must be a high degree of probability that the accused person committed the offence. The doubt must be of a reasonable man and the standard must also be of a reasonable man. See ***Egwumi Vs. State (2013) 2 SC (Pt. iii) P. 119 Nwaturuocha Vs. State (2011) 2-3 SC (Pt. i) P. 111, Eke Vs. State (2011) 1-2 SC (Pt. ii) P. 219, Ochiba Vs. State (2011) 12 SC (Pt. iv) P. 79.***

If the three issues referred to above are resolved in favour of the respondent the case would be said to have been proved beyond reasonable doubt in the trial court and the Court of Appeal would be right to affirm that judgment, thereby resulting in the fact that concurrent findings of fact are correct. Conversely the appellant would be entitled to an acquittal and discharge.

(a) Whether there was proper identification of the appellant as one of the kidnappers and armed robbers?

This issue shall be addressed under two sub heads:
(i) The identification parade.
(ii) Visual or eyewitness identification of the appellant by Pw1.

Learned counsel of the appellant observed that the identification parade did not meet up with the required standard laid down by judicial pronouncements and as such, the identification parade is unreliable and should be set aside. Reference was made to page 56 and page 63 of the record of appeal.

A On visual identification of the appellant by PW1 learned counsel for the appellant observed that the encounter between PW1 and the armed robbers was for a very short period, a fleeting encounter under a distressed condition. He submitted that the conclusion of the lower court that PW1 B had the opportunity to observe the features of her assailants is incorrect and unsupported by the evidence on record. He urged this court to hold that the identification of the appellant as one of the kidnappers and armed robbers is unsafe and unreliable. Reliance was placed on ***R Vs. Turnbill (1976) 3 ALL*** C ***ER P. 549, Emenegor Vs. State (2010) ALL FWLR (Pt. 511) P. 884, Alabi Vs. State (1993) 7 NWLR (Pt. 307) P. 511.***

Learned counsel observed that there was an identification parade which the trial court and the Court of Appeal found to be regular. He D observed that PW1 had the opportunity of seeing the accused persons (appellant included) when they swooped on her and pointed guns at her since the unchallenged evidence is that the offence was perpetuated in broad day light. On the identification parade learned counsel observed that E PW1 was able to identify the appellant and his co-accused in an identification parade made up of eight persons. He submitted that PW2 never assisted PW1 to identify the appellant, observing that both of them were not confronted with the allegation when they gave evidence. He F submitted that since the appellant failed to confront PW1 and PW2 with the allegation it means the testimony of PW1 and PW2 is correct. He further observed that the contention that the appellant was almost half naked when he participated in identification parade is an afterthought as PW1 and PW2 G were also not confronted with that piece of evidence, further observing that appellant's statement, exhibit B was obtained immediately after the identification parade and he did not complain of any abnormality in the identification parade. Relying on ***Oladipo Vs. Moba LGA (2010) 5 NWLR*** H ***(Pt. 1186) P. 117, Agbo Vs. State (2006) ALL FWLR (Pt. 309) P. 1380, Ikemson Vs. State (1989) 3 NWLR (Pt. 110) P. 455.***

He urged this court not to disturb concurrent findings of the two lower courts:

I PW1 said on oath:

"…….The two accused persons are among the three armed men I am talking about. They started looking for the key. When they found the key within about 2 minutes they were looking for the key. I took my time to look at their faces and features. After getting the key, they ordered me to lie flat on the back seat."

Under cross-examination PW1 said:

"I identified the faces of the accused persons on the day of the incident quite clearly …… I saw their faces for the first time on the day of the incident. I saw their face i.e. the accused person on the day of incident and again on the day of the identification parade and now in court again ……."

An identification parade is necessary when the identity of who committed the crime is disputed and the accused person saw the accused for the first time during the commission of the crime. An identification parade is never full proof. Mistakes as to the identity of the accused persons occur repeatedly. Identification parade would not be necessary where the witnesses (or victim of the crime) knew the accused person before the crime was committed. See ***Ikemson Vs. State (1989) 20 NSCC (Pt. ii) P. 471, Orimoloye Vs. State (1984) 15 NSCC P. 654, Otti Vs. State (1993) 4 NWLR (Pt. 290) P. 675.***

On the conduct of the identification parade the Court of Appeal said:

"The appellant had contended that the victim was able to identify him because of the way he was dressed at the identification parade. The uncontroverted evidence is that six persons were scantily dressed and the question that readily comes to mind is why it was the appellant and not any of the others scantily dressed that was identified by the victim, if as argued it was merely on account of his

having been scantily dressed that the victim identified him. PW2 equally testified as to the conduct of the identification stating that the appellant was identified by the victim at the identification parade."

On whether the victim (i,e PW1) was aided to identify the appellant, the Court of Appeal said:

"…..The appellant in his defence testified that at the identification parade PW2 aided the victim to identify him because PW2 came and stood behind him. Instructively, this fact which goes to the propriety of the identification at the parade was never put to the victim and PW2 and PW2 in cross-examination. I tend to agree with the respondent's submission that it was an afterthought and that no such thing happened during the identification parade ……."

Concluding the Court of Appeal said:

"The evidence adduced as to the conduct of the identification parade was not shaken under cross-examination and there is no reason to interfere with the conclusion of the lower court at page 123 of the records that it was satisfied that the identification parade was genuine and properly conducted."

Where a witness testifies on a material point in controversy, in this case that the identification parade was properly conducted, if the appellant does not accept the witness testimony as true he should cross-examine him on that fact, or at least show that he does not accept the evidence as true. Where he fails to do either as in this case the court can take his silence as acceptance that he does not dispute the fact. In view of failure to cross-examine properly and highlight errors in the conduct of the identification parade, I

A am satisfied that the identification parade was properly conducted.

Aside from the identification of appellant at a well conducted identification parade I am also satisfied with the testimony of PW1 when she said:

B

> **"I saw their face, i.e the accused person on the day of the incident. When they found the key, within about 2 minutes they were looking for the key I took my time to**
C **look at their faces and features……..."**

To my mind when a person is traumatized e.g. attacked by armed robbers or raped, the whole episode remains in the mind of the victim for life. He or
D she remembers faces vividly, despite trauma which usually sets in after the act. When PW1 was surrounded by armed robbers in broad daylight and bundled into the back seat of her car before being blind folded, such a victim would never forget the face of her assailants.

E Once again, I am satisfied that the appellant was properly recognized by PW1 as one of the robbers that kidnapped her and stole her blackberry phone on 26 December 2011 and the identification parade conducted on 7 March 2012 was flawless.

F

(a) Whether the prosecution withheld vital document's.

Learned counsel for the appellant observed that during trial the respondent
G (prosecution) failed, refused and deliberately withheld from the defence the following:

1. **The extra judicial statement of PW1 made to the**
H **police immediately after the incident.**
2. **The written complaint by PW1 to the State Security Service.**
3. **The first extra judicial statement made by PW1 to the State Security Service before the identification**
I **parade.**

4. Bail bonds of sureties who took some of the accused persons on bail.

5. Signals from the headquarter of Delta State Security Service directing its office at Warri to track down and arrest one Rukevwe.

6. The reply and report on the findings by the Warri Zonal Office of State Security Service on the efforts made to track down Rukevwe.

He contended that the failure by the prosecution to produce this vital documents offends section 167(d) of the Evidence Act and amounts to a denial of fair hearing. Reliance was placed on ***Emenegor Vs. State (2010) ALL FWLR (Pt. 511) P. 884, Ajie Vs. State (2000) FWLR (Pt. 16))P, 2831, Ogudu Vs. State (2012) ALL FWLR (Pt. 629) P. 1111, Ekaidem Vs. State (2012) ALL FWLR (Pt. 631) P. 1587.***

In conclusion he submitted that the prosecution failed to prove the charges against the appellant beyond reasonable doubt in view of the failure of the prosecution to make available to the defence vital documents upon demand by the defence, contending that in the absence of these vital documents there is serious doubt which should be resolved in favour of the appellant.

Learned counsel for the respondent observed that the appellant did not demand for any document from the prosecution during trial, contending that the appellant could have asked for the documents by notice to produce or invoking the provisions of sections 186 and 188 of the Criminal Procedure Law. He submitted that the appellant cannot do on appeal what he failed to do at the trial court.

He observed that section 167 (d) of the Evidence Act will only be invoked when the prosecution fails to produce these documents upon the issuance of summons on it by the trial court. Reliance was place on ***Aremu Vs. State (1991) 7 NWLR (Pt. 201) P.1.***

He submitted that section 167(d) is not applicable. Concluding he submitted that all the authorities relied on by the appellants learned counsel are not relevant. He urged this court not to disturb the impregnable

A concurrent findings of the trial court and Court of Appeal.

At the trial the 1st accused person was represented by C.O. Egwuenu while R.O. Olarenwaju represented the 2nd accused person (the appellant).

The State was represented by the Delta State Director of Public
B Prosecutions, E.H. Edema.

On 8 October 2012 learned counsel for the 1st accused person during cross-examination of PW2 made an oral application that the prosecution should produce the following documents:

C

1. **The petition of PW1, to the State Security Service.**
2. **The Bail Bonds of sureties that took the four persons on bail who were arrested in connection with this matter but not charged to court, and**

D

3. **Two signals generated between the State Headquarters of the State Security Services, Asaba and the Warri South Local Government Area office relating to the tracking down of one Rukevwe.**

E

Learned counsel for the prosecution objected on the ground that there was no formal notice to produce in writing. On 5 November, 2012 the learned trial judge delivered a considered ruling wherein he refused to grant the
F application on the ground that no foundation had been laid to warrant the court making an order for the production of the said documents.

Learned counsel for the appellant at no time during trial demanded for any document from the prosecution, neither did he adopt the
G demand/submissions of learned counsel for the 1st accused person.

When does section 167(d) of the Evidence Act apply?

The rule in section 167(d) of the Evidence Act is contained in the maxim "omnia praesumuntur contra spoliatorem." Where a man
H wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted.

The withholding of useful evidence naturally leads to the inference that the evidence if produced would go against the party who withholds it.
I So where the prosecution is served with notice to produce evidence that the

A defendant needs for his defence and the prosecution willfully refuses to produce the said evidence the courts would act on the natural inference that the evidence is held back because it would be unfavourable.

Section 167(d) of the Evidence Act states that:

B

167(d) evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

C

The above complaint was not raised at the trial court by learned counsel for the appellant. The defence is entitled to demand for documents it considers relevant for its defence and this is done by serving a subpoena/notice to D produce on the prosecution to produce the documents.

The presumption in section 167(d) arises and the court is entitled to presume that documents in possession of the prosecution would be unfavourable to the prosecution's case if the prosecution after service of E notice to produce still refuses to produce the documents. See ***Queen Vs. Itule (1961) 1 ALL NLR P. 481, Aremu Vs. State (1991) 7 NWLR (Pt. 201) P. 1.***

No demand for documents was made either orally or in writing by F the appellant and no process was served on the respondent to produce documents. In the absence of notice to produce on the appellant, section 167(d) of the Evidence Act does not apply.

Once again this complaint was not raised at the trial court by learned G counsel for the appellant. It must be elementary now that an appeal is a rehearing. It is the duty of an Appeal Court to examine the record of appeal to see if the judgment of the trial court is correct or flawed. New issues can only be raised on appeal with leave. Where leave was not obtained nothing H new would be heard on appeal. It follows naturally that a party must be consistent in stating his case in the trial court and on appeal. He will not be allowed to present a case at trial and present a different case on appeal. He will never be allowed to shift ground on appeal as it suits his fancy.

I I am satisfied that complaining about the respondent withholding documents/evidence was never the appellant's case in the trial court. It is

wrong and is not worth considering on appeal. This is clearly an afterthought by the appellant that is futile in the extreme. The prosecution did not withhold evidence.

Finally on this point. It is learned counsel for the appellant's case that learned counsel for the respondent deliberately withheld six items.

At trial he never raised this issue. It was learned counsel for the 1st accused person who asked for only three items to be produced.

This brings into focus and is further evidence, that this issue on appeal is clearly without foundation. The prosecution once again did not withhold evidence from the appellant since at no time in trial court did his counsel ask orally or formally for any document to be produced by the respondent.

(c) Whether the doctrine of recent possession applies in this case.

Learned counsel for the appellant observed that the appellant explained to the State Security Service in his extra judicial statement how he came in possession of the blackberry phone. He submitted that the explanation that is expected of an accused person to displace presumption of guilt is on balance of probability and once the explanation is reasonable the onus is discharged. Reliance was placed on ***State Vs. Nnolim (1994) 5 NWLR (Pt. 345) P. 394, Salami Vs. State (1988) 3 NWLR (Pt. 85) P. 670.***

He observed that the blackberry phone was sold to the appellant by the 1st accused person. He urged this court to hold that the appellant gave reasonable explanation that he brought the blackberry phone from the 1st accused person, contending that the doctrine of recent possession relied on by the two lower courts is displaced by this evidence and totally inapplicable in this case.

Learned counsel for the respondent observed that the learned trial judge examined the defence of the appellant and held that the testimonies of the appellant in his extra judicial statement and on oath were full of material contradictions, thus making the oral testimony of the appellant as well as his extra-judicial statement unreliable and not worthy to be relied upon.

Reference was made to page 123 (line 3-13) and 215 lines 15 19) of the record of appeal.

He urged this court not to disturb concurrent findings of fact of the two lower courts and to hold that the doctrine of recent possession was correctly applied by the trial court and affirmed by the Court of Appeal.

Section 167 (a) of the Evidence Act states that:

> **"167(a). The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume**
>
> **(b) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession.**

Before this presumption applies the following factors must be present.

> **(e) the goods must be goods capable of being stolen.**
>
> **(f) the goods were recently stolen.**
>
> **(g) soon after the theft the goods were found in possession of the defendant.**
>
> **(h) the accused person failed to account for his possession of the goods. See *Idan Vs. C.O.P (1964) NMLR P. 103, State Vs. Aiyeola (1969) ANLR P. 293, Omopupa Vs. State (2008) ALL FWLR (Pt. 445) P. 1648.***

The presumption could arise if the court is satisfied that the person in possession of the stolen goods was the thief or that the person in possession of the stolen goods received the goods knowing them to have been stolen.

The accused person is required to explain how the goods came into his possession. If the court is satisfied with his explanation the

presumption is rebutted. In ***Idan Vs. C.O.P (supra)*** the accused person was charged with being in possession of stolen goods. He was convicted. On appeal he was able to satisfy the court that although he was in possession of the goods he did not know that they were stolen. The appeal was allowed.

The presumption in section 167(a) of the Evidence Act cannot be drawn in the absence of evidence. Facts are presumed from the common course of events. Section 167 (a) thus applies to the given facts.

According to the appellant (2nd accused person) he bought the blackberry phone from the 1st accused person.

The learned trial judge did not believe the appellant. His lordship said:

> **"Furthermore exhibit 'C' is among the properties she was robbed of and the said exhibit 'C' a blackberry handset was recovered from 2nd accused person who claimed to have bought it from 1st accused person. An account that 1st accused person originally, admitted but turned around during the trial to change when he contended that exhibit C was not the phone he sold to 2nd accused person.**
> **A new line of defence that destroys the defence of both the 1st and 2nd accused persons."**

Concluding his findings on the blackberry phone his lordship said:

> **"The testimonies of 1st accused in his extra judicial statement, exhibit 'A' and on oath were full of material contradictions that I find them unreliable and not worthy to act upon. I disbelieve him when he stated that the phone was given to him by Rukevwe. I also disbelieve the 2nd accused person who claimed the same fictitious Rukevwe as his friend who lives in the same area with him I do not believe that 2nd accused bought exhibit 'C' from 1st accused. Rather I believe the testimony of PW1 that 1st and 2nd accused were among those who kidnapped her and**

robbed her of her jeep and other valuables including exhibit 'C'.

The trial court applied the doctrine of recent possession in convicting the appellant. Agreeing with the trial court, the Court of Appeal said:

> **"…… It has to be remembered that even though the appellant's co-accused testified that he did not know the appellant before, he sold the blackberry phone to him, the appellant himself testified that he has been seeing his co-accused for about three years before the incident and that he knew his house. He further stated that even though they were not enemies, they were also not friends, so at least they were acquaintances. The appellant also testified that he knew that his co-accused person does not sell phones. This notwithstanding he claimed to have bought a blackberry phone from him for which he was not issued any receipt. The source of the said blackberry phone according to the co-accused of the appellant was one Rukevwe, who most conveniently it was claimed had been shot dead by the police when he went for a robbery operation. The appellant in his extra judicial statement, exhibit 'B' stated that the said Rukevwe lived in the same area as him.**
>
> **Notwithstanding the claim that the said Rukevwe had been shot dead, investigation activities were still carried out, as testified to by PW2 with a view to tracing the said Rukevwe but that the name and address was fictitious as no one knew him in the area where it was claimed that he lived. Doubtless, the law is that the doctrine of recent possession is displaced even though the court may not be convinced of the truth of the explanation but it is imperative that the explanation proffered as to how the stolen property came into possession of an accused person**

might be reasonably true: *State Vs. Nnolim* (supra). Where the explanation might not be reasonably true, there can be no question of the presumption being displaced. In the peculiar circumstances of this case, the fact that the source of the blackberry phone traced by the appellant and his co-accused was revealed by investigations to be a non-existent person clearly shows that the explanation proffered by the appellant might not be reasonably true. Therefore, the lower court rightly applied the doctrine of recent possession to accept and believe the testimony of the PW1 that the appellant was among those who kidnaped the PW1 and robbed her of her vehicle and other valuables, including the blackberry phone, exhibit C."

To my mind both courts below were right not to believe the explanation of the appellant as to how the blackberry phone came into his possession. His explanation has always been that he bought the blackberry phone from his co-accused for N14,000.00. This was confirmed by his co-accused when he gave evidence on oath. (see page 56 of the record of appeal), but when the co-accused was shown the blackberry phone in court he examined it and said it was not the phone he sold to the appellant (see page 57 of the record of appeal.) This was never resolved together with the many contradictions in testimony, eventually linking a non existing person by name Rukevwe with the blackberry phone. Both courts below were in the circumstances right that the doctrine of recent possession applies to this case since the appellant explanation as to how he came to possess the blackberry phone is not true. The presumption that the appellant is the thief is believable and sustained.

The appellant was charged with conspiracy under Section 516 of the criminal code. Kidnapping under section 364(2) of the criminal code and armed robbery under section 1(2) (a) of the robbery and firearms (Special Provisions Act.)

Learned counsel for the appellant observed that the reasons adduced by the lower court for upholding the findings by the trial court that the

prosecution proved the charges against the appellant beyond reasonable doubt are not sustainable having regard to the evidence on record.

On the other side, learned counsel for the respondent observed that the evidence on record is that the appellant and his fellow conspirators swooped on Onoriode Yvonne Asheshe brought out guns, threatened to shoot, got into the victims car, took her to the bush and stole her belongings, submitting that this could only have been done by persons because they had conspired to do so. Reliance was placed on ***Busari Vs. State (2015) LPELR 24279 (SC).***

The appellant was charged and convicted for conspiracy contrary to section 516 of the criminal code. Kidnapping contrary to section 364(2) of the criminal code and armed robbery contrary to section 1(2) (a) of the Robbery and Firearms Act.

There is a conspiracy when two or more persons agree to do an act which is unlawful. They do not necessarily have to know each other so long as they know of the existence and the intention or purpose of the conspiracy. Once there is a meeting of the minds of the conspirators to commit an offence and this is easily inferred by what other person does in furtherance of the offence of conspiracy.

In all cases of conspiracy the court is to ascertain evidence of complicity of the accused person in the offence. See ***Adejobi Vs. State (2011) ALL FWLR (Pt . 588) P. 850, Shurumo Vs. State (2011) ALL FWLR (Pt. 568) P. 864, State Vs. Salawu (2011) 18 NWLR(Pt. 1279) P. 580. Posu Vs. State (2001) 3 NWLR (Pt. 1234) P. 393.***

The offence of conspiracy was committed on 26 December, 2011 when the appellant in company of other persons, armed, surrounded the appellant's car, bundled her into the back seat of the car and drove off with her, bound and blindfolded, and latter dumped in the bush. Then driving off once again, and to this day the respondent's car has not been recovered. It is easily inferred that the appellant and his co-accused persons conspired to steal the respondent's car. The complicity of the appellant in the offence of conspiracy is established and the charge of conspiracy is proved beyond reasonable doubt.

A Kidnapping contrary to section 364 (2) of criminal code. When a person is detained unlawfully the offence of kidnapping is established. The offence of kidnapping is proved beyond reasonable doubt when the appellant and his co-accused persons bound and blindfolded the respondent
B and dumped her in the back seat of her car and drove off. The charge of kidnapping contrary to section 364(2) of the evidence act was proved beyond reasonable doubt.

Armed robbery contrary to section 1(2(a) of the robbery and firearms
C act.

For the prosecution to succeed in a charge under section 1(2)(a) of the robbery and firearms act the prosecution must proved beyond reasonable doubt that:

D

(d) there was a robbery.
(e) the robbers were armed,
(f) the appellant was one the robbers. See *Eke Vs. State*
E ***(2011) 3 NWLR (Pt. 1235) P. 589, Ogudo Vs. State (2011) 18 NWLR (Pt. 1278) P.1, John Vs. State (2011) 18 NWLR (pt. 1278) P. 353.***

F My lords, it is no longer in doubt that there was a robbery on 26 December 2011 when the appellant and his co-accused stole PW1's car, her blackberry phone and some of her possessions. The robbers were armed, since evidence of PW1 that the appellant and the other persons who stole her car were armed is unchallenged. Finally the appellant was recognized by PW1
G and positively identified at a well conducted identification parade. On these undisputed facts I am satisfied that the charge of armed robbery contrary to section 1(2)(a) of the robbery and firearms act was proved beyond reasonable doubt.

H It is for all that I have been saying that I find no merit in this appeal.

Appeal dismissed.

Olabode Rhodes-Vivour
Justice, Supreme Court

I

MARY UKAEGO PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Olabode Rhodes-Vivour JSC and in support of the reasonings from which the decision emanated, I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal, Benin Division otherwise referred to as the lower court or court below, delivered on the 27th day of May, 20015 affirming the judgment of the High Court of Delta State, Asaba Division delivered on 10th day of October, 2013 convicting and sentencing the appellant to death by hanging.

The detailed facts of this appeal are well set out in the lead judgment and I do not want to repeat them save for when it becomes necessary to refer to any part thereof.

On the 5th day of October 2017 date of hearing, Ayo Asala of counsel for the appellant adopted his brief of argument filed on the 14/9/2015 and in it, he raised a single issue, viz:

> **Whether having regard to the circumstances of this case and the totality of the evidence on record the lower court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy to kidnap, kidnapping and armed robbery against the appellant beyond reasonable doubt.**

For the respondent, the learned Attorney-General of Delta State, Peter Mrakpor adopted the brief of argument of the respondent filed on 17/12/2015 and in it distilled a sole issue which is as follows:

> **Whether on the totality of the evidence adduced on record the court below was right in upholding the judgment of the trial court which found the appellant guilty of the offences of conspiracy to kidnap, kidnapping and armed robbery Grounds 1, 2, 3 and 4.**

A The two differently crafted issues asked the same question and I shall answer accordingly. Learned counsel for the appellant, Ayo Asala Esq. submitted that from the totality of the evidence and having regard to the circumstances of this case, the lower court was wrong in affirming the
B decision of the learned trial judge that the prosecution proved the charges of conspiracy to kidnap, kidnapping and armed robbery against the appellant beyond reasonable doubt.

That the lower court was wrong in holding that the prosecution
C rightly refused to produce or make available to the defence the various documentary evidence which was shown to be in existence and requested for by the defence during the trial. That this failure is fatal to the case of the prosecution since it is tantamount to prosecution being unable to discharge
D the burden of proof on it. He cited **Emenegor Vs. State** (2010) All FWLR (Pt. 511) 884 at 931– 932; **Section 167 (d) of the Evidence Act, 2011; Ogundu Vs. State** (2012) All FWLR (Pt. 629) 1111 at 1132; **Elaidem Vs. State** (2012) All FWLR (Pt. 631) 1587 at 1613.

E It was further stated for the appellant that the failure to produce those documents cast serious doubt on the credibility of the evidence of identification of the appellant by PW1 as there was nothing before the trial court to cross-check and confirm the subsequent evidence of identification
F and dock (2006) LPELR (537) 1 at 16– 17; **Balogun Vs. A.G. Ogun State** (2002) 6 NWLR (Pt. 762) 512 at 534.

Mr. Asala, learned counsel for the appellant urged the court to disregard the doctrine of recent possession of the blackberry phone, Exhibit
G C which the trial court applied to the detriment of the appellant as the explanation proffered by the appellant was good enough to settle any questions arising. He referred to **Omopupa Vs. State** (2008) All FWLR (Pt. 445) 1648 at 1674; **State Vs. Nnolim** (1994) 5 NWLR (Pt. 345) 394 at
H 410.

Responding, learned Attorney General, Peter Mrakpor Esq., stated that it is settled law that the Supreme Court will not interfere with the concurrent findings of facts of both the High Court and the Court of Appeal
I so long as the said findings are supported by legally admissible evidence and they are not perverse or have not led to a miscarriage of justice. He cited

Azarada Vs. The State (2014) LPELR-23017; **Onwudiwe Vs. FRN** (2006) 10 NWLR (Pt. 988) 382; **Agala Vs. Okusin** (2010) 10 NWLR (pt. 1202) 412 etc.

That it is settled law that the prosecution can prove its case beyond reasonable doubt by any or the combination of the following means:

(a) By confession of the accused,
(b) By direct evidence of eye witnesses and
(c) By circumstantial evidence.

He referred to **Julius Abiriton Vs. The State** (2013) LPELR 20807 (SC).

Learned counsel for the respondent contended that the appellant who did not demand for any document at the trial cannot turn around to accuse the respondent of withholding documents at this stage. He cited **Avenue Vs. State** (1991) 7 NWLR (Pt. 201) 1 at 17– 18; **Co-operative and Commerce Bank (Nig.) Ltd Vs. A.G. Anambra State & Ors.** (1992) 8 NWLR (Pt. 261) 528 at 556; **Ezeigwe Vs. Nwawulu** (2010) 4 NWLR (pt. 1183) 159 at 207; **Sections 186 and 188 Criminal Procedure Law of Delta State.**

He stated that the offence of conspiracy is complete as soon as two or more agreed to carry the intention into effect and it is open to the court to infer conspiracy from the fact of doing things towards a common end. He cited **Oyakhere Vs. State** (2007) All FWLR (pt. 344) 1 at 12 – 14. That there is no basis for the disturbance of the concurrent findings of the court below.

In a nutshell, the appellant's position is that the identification evidence adduced by the prosecution is unreliable and that the appellant gave cogent explanation of how he came into possession of the blackberry phone belonging to the PW1. That the prosecution deliberately withheld upon demand by the defence vital documents from the appellant.

The respondent in reaction contends that the concurrent findings of facts of the two counts below are not perverse as they are supported by evidence which debunked those concerns of the appellant and that there is no basis for the court to interfere with those findings.

The appellant alongside his co-accused was charged for the offence of kidnapping contrary to Section 364(2) of the Criminal Code Cap. C21, 2006. In proof, the prosecution through the evidence of PW1 and PW2 showed that the culprits stopped PW1's car and dragged her through the bush and sat her on the ground where she was tied up. PW1 had stated that the assailants were three in number and that the two accused persons she identified in an identification parade organized by PW2 were among the three culprits. That she could identify them as she had up to 15-20 minutes with them at which she had close contact with their faces and features thereof.

On being confronted with PW1's blackberry phone found in possession of the appellant, his explanation in his extra-judicial statement contradicted his version in court and even that of his co-accused from whom he said he purchased it.

The learned trial judge had no difficulty in finding against the two accused persons including the appellant on the two offences of kidnapping and conspiracy.

Before going further, I am mindful of the fact that what is before this court is an appeal against the concurrent findings of the two courts below and this court will not interfere with the concurrent findings of facts of both the High Court and the Court of Appeal as long as the said findings are supported by legally admissible evidence and they are not perverse or have not led to a miscarriage of justice. In this I am guided by the following cases:-

Onwudiwe Vs. FRN (2006) 10 NWLR (Pt. 988) 382; **Agala Vs. Okusin** (2010) 10 NWLR (Pt. 1202) 412, **Peter Lliya Azabada Vs. The State** (2014) LPLER 23017.

The court below had held thus:

> **"Furthermore, EXHIBIT 'C' is among the properties she was robbed of and the said Exhibit 'C' a blackberry handset was recovered from 2nd accused person who claimed to have bought it from 1st accused. An account that 1st accused originally admitted, but turned around**

during the trial, to change when he contended that Exhibit 'C' was not the phone he sold to 2nd accused person. A new line of defence that destroys the defence of both the 1st and 2nd accused persons.

The 1st accused tried to make the court believe that he repairs phones and was given Exhibit 'C' in the normal course of his business to repair yet he went ahead to give the name and address of the person he alleged gave him the phone as Rukevwe who lives in Masoje.

At the same time he quickly added in his statement EXHIBIT 'A' that he had been informed that the police had shot Rukevwe. Nevertheless, the State Security Service Operatives Investigating went in serach of the said Rukevwe and PW2 testified of his finding which I capture here. "All attempt by the investigation team to locate the said Rukevwe proved abortive as both the name and address of Rukevwe were fictitious. It was a ploy to misdirect the investigators and exonerate himself from the crime".

The lower court went along the findings of the trial court that the testimonies of 1st accused in his extra judicial statement, EXHIBIT A and on oath were full of material contradictions that they were unreliable and not worthy to be acted upon.

Also the two courts found unacceptable the evidence put across by appellant that he bought the phone, EXHIBIT C from 1st accused. Therefore the court utilized the presumption of fact under section 167(a) of the Evidence Act, 2011. It provides thus:

Section 167 (a) of the Evidence Act 2011 enacts as follows:

"167. The court may presume the existence of any fact which it deems likely to have happened, regard shall

be had to the common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case, and in particular the court may presume that

(b) a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

Going by the said section 167(a)) of the evidence Act, 2011 it is clear that the trial court had enough on which it could and did in fact activate the presumption that the appellant was either the thief or culprit or obtained the EXHIBIT C knowing it to have been stolen or acquired through unlawful means.

The appellant had also raised more than an eyebrow over what he claimed to be withholding of valuable documents that would have assisted his defence. The Court of Appeal tackled the issue as stated hereunder, thus:

"It is trite law that the prosecution is enjoined to make available all the evidence in respect of the case. However, the records shows that the appellant upon demanding that he required certain documents served a notice to produce on the prosecution, thus implying that he had the secondary evidence of the documents to use in the conduct of his defence if the original demanded in the notice to produce was not made available: ADEGBUYI Vs. MUSTAPHA (2010) LPELR (3600) 1 at 33. See pages 43-46 of the records. Upon the lower court ruling that no foundation had been laid for the production of the documents, the appellant rather than tender the secondary evidence which would have followed the failure to produce the original subject of the notice to produce, turned round to vilify the lower court for having aided the

prosecution to withhold evidence. The procedure employed by the appellant was not the correct procedure and there is no justification in the contention that the prosecution with held evidence".

The Court of Appeal had further stated as follows:

"It has to be remembered that the PW2 testified at page 37 of the records that the official pertaining to the case could be obtained from the State Director of the Department of the State Service.

There is nothing to show that the appellant applied to the State Directory for any documents and the same were not given to him. It seems to me that the course open to the appellant was to have proceeded under section 186(1) and 188 of the Criminal Procedure Law Cap. C22 Laws of Delta State 2006 to have a summons and or warrant issued to have whoever had the documents. This is particularly so when the learned Director of Public Prosecutions who prosecuted the charge maintained that the documents desired by the appellant did not form part of his case and were not part of the documents on the basis of which the information was preferred."

The provisions of the said CPL, Sections 186(1) and 188 thus:-

"186. (1) If the court is satisfied that any person likely to give material evidence for the prosecution or for the defence the court may issue a summons for such person requiring him to attend, at a time and place to be mentioned therein, before the court to give evidence respecting the case and to bring with him any specified documents or things or any other

documents or things relating thereto which may be in his possession on power under control."

"188. If the person to whom such summons is directed does not attend before the court at the time and place mentioned therein, and there does not appear to the court on inquiry to be any reasonable excuse for such non-attendance, then after proof to the satisfaction of the court that the summons was duly served or that the person to whom the summons is directed willfully avoids service, the court, on being satisfied that such person is likely to give material evidence, may issue a warrant to apprehend him and to bring him, at a time and place to be mentioned in the warrant, before the court in order to testify as aforesaid."

I agree with learned counsel for the respondent that the appellant's co-accused failed to adopt the proper procedure as stipulated in section 186 and 188 CPL of Delta State and the Court of Appeal was right to have held that the non production of the said documents were not detrimental to the case of the appellant and co-accused and raising the presumption to be applied here and now that its non production was because they would have worked against the prosecution is not only late in the day but of no value to the appellant. See **Aremu Vs. State** (1991) 7 NWLR (Pt. 201) 1 at 17 – 18 per **Nwokedi JSC.**

Indeed the evaluation and assessment of the evidence as done by the trial court and accepted by the Court of Appeal cannot be faulted in view of the materials available on record which has afforded this court, the opportunity of revisiting what the two courts did and in context and it has not been difficult for me to reach the conclusion that no justification exists for the interference of this court on those concurrent findings of fact. I shall refer to the case of: **Oladipo Vs. Moba L.G.A** (2010) 5 NWLR (Pt. 1186) 117 at 150-151 Paras H-C, the court held thus:

> **"It must be borne in mind that the evaluation and assessment of evidence as well as the ascription of probative value to such evidence is entirely the primary function of the court of trial which saw, heard and duly assessed the witnesses. Where such a court of trial has justifiably evaluated the evidence, it is not the business of the Court of Appeal to substitute its own views for that of the trial court. What the Court of Appeal is called upon to do when faced with such is to ascertain whether or not there is evidence upon which the trial court acted. Once there is such evidence, the appellate court wil not intervene even if it feels that if the facts were before it, it would not have come to the same decision as the trial court".** See also **Attah Vs. State** (2010) NWLR (Pt. 1201) 190 at 217, Paras E-G where this honourable court Mustapha, JSC (as he then was) held thus:
>
> "**It is also the law that there is visual and positive identification of the accused at the scene of the crime which is believed by the trial judge, the appellate court should not disturb such a finding".**

I am in agreement with the fuller and better reasoning in the lead judgment and so I too dismiss this appeal as lacking in merit. I abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

CLARA BATA OGUNBIYI, (JSC): The appeal herein is against the concurrent judgment of the Court of Appeal delivered on 27/5/15 affirming the judgment of the High Court, Delta State. The appellant was convicted and sentenced to death by hanging having been found guilty for the offence of conspiracy to commit kidnapping, kidnapping and armed robbery.

The appellant was arraigned on 3 count charge. It was alleged that appellant (1st accused) and one other person while armed with a gun, kidnapped and robbed one Onoriode Yvonne Asheshe on 26th December, 2011.

The lone issue for determination was:

> **Whether having regard to the circumstances of the case and the totality of the evidence on record, the lower court was right in upholding the decision of the learned trial judge that the prosecution proved the charges of conspiracy to kidnap, kidnapping and armed robbery against the appellant beyond reasonable doubt.**

The burden on the prosecution in a criminal trial is to prove the offence charged beyond reasonable doubt. Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt and where like in this case, the evidence adduced is strong as to have only a remote probability. ***See Miller Vs. Minister of Pensions (1947) 2 All ER. 372 and Bakare Vs. The State (1987) 3 SC. 1 or (1987) LPELR (714) 1 at 12 – 13 where Oputa, JSC*** had this to say amongst others:

> **"……**
> **Absolute certainty is impossible in any human adventure including the administration of criminal justice. Proof beyond reasonable doubt means just what it says. It does not admit of plausible and fanciful possibilities but it does admit of a high degree of cogency, consistent with an equally high degree of probability. As Denming J. (as he then was) observed in Miller Vs. Minister of Pensions (1947) 2 All ER 373:**
>
> > **'The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong as to leave only**

a remote possibility in his favour which can be dismissed with the sentence. "Of course it is possible but not in the least probable" the case is proved beyond reasonable doubt."

Proof beyond reasonable doubt means proof of an offence with the certainty required in a criminal trial; that certainty is, that the offence was committed, and that the person charged therewith is responsible in committing the offence.

Where like in this case the evidence adduced established these two facts, then the case is proved beyond reasonable doubt. It is not in doubt herein that the appellant conceded the fact that the offence was committed. His point of departure however is whether the evidence did establish that he was indeed one of the offenders.

With all intents and purposes, it is obvious on the record that there is no doubt as to the fact that the evidence established that the appellant was one of the perpetrators of the crime, the victim having identified him by fixing him at the scene of crime.

There is therefore, no rational basis on which the judgment of the lower court should be interfered with. The sole issue is resolved against the appellant.

On the totality, my learned brother Rhodes-Vivour, JSC has dealt comprehensively with this appeal and I agree without more that same is devoid of any merit and it is hereby dismissed also by me. The judgment of the lower court which affirmed that of the trial court is hereby endorsed further by me. The appeal is dismissed.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): I was served with a copy of the judgment just delivered in this appeal before now by Rhodes-Vivour JSC, who prepared same. Having perused same. I am convinced that his lordship had ably, adequately and painstakingly dealt with all the vital issues raised and canvassed in the appeal by learned counsel to the parties. I entirely agree

A with the reasoning and conclusion in the lead judgment that this appeal is lacking in merit and must be dismissed. While dismissing the appeal, the judgment of the lower court is affirmed by me.

Amiru Sanusi
B ***Justice, Supreme Court***

SIDI DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Olabode Rhodes-Vivour, JSC, just
C delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is accordingly dismissed by me. Judgment of the Court of Appeal Benin Division is hereby affirmed.

D **Sidi Dauda Bage**
Justice, Supreme Court

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I

ROMRIG NIGERIA LIMITED
AND
FEDERAL REPUBLIC OF NIGERIA

SC. 254/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 15TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGBUNBIYI	**JUSTICE, SUPREME COURT**
AMIKU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Attitude of Supreme Court thereof.

CRIMINAL LAW: Criminal liability – Agency – Whether does not apply in criminal liability.

CRIMINAL LAW AND PROCEDURE: Charge – Amendment thereof – Relevant principles – Whether amended charge takes effect from the date of the original charge.

CRIMINAL LAW AND PROCEDURE: Compounding of an offence – Conditions thereof – S. 14 (2) EFCC Act – Relevant considerations thereof.

CRIMINAL LAW AND PROCEDURE: Double Jeopardy – Plea thereof – How established.

CRIMINAL LAW AND PROCEDURE: Withdrawal of a charge – Whether does not amount to an acquittal.

STATUTE: Economic and Financial Crime Commission Act – S. 14 (2) thereof – Scope and significance.

WORDS AND PHRASES: Condonation – Meaning

WORDS AND PHRASES: 'Condone' – Meaning.

Issues for Determination

1. **Whether the Court of Appeal was right when it held that the plea bargain agreement/arrangement entered into in Enugu with the Economic and Financial Crimes Commission (respondent) does not inure to the benefit of the appellant (Grounds 1, 2 &3).**
2. **Whether the Court of Appeal was right when it held that a crime cannot be condoned by the State (Ground 4)**
3. **Whether the Court of Appeal was right when it held that the withdrawal of the charge in the circumstance of this case can never amount to an acquittal (Grounds 5 and 6)**
4. **Whether the Court of Appeal was right when it held that the plea of double jeopardy was not available to the appellant.**
5. **Whether the Court of Appeal was right when it held that the charge preferred against the accused person leading up to the appeal did not constitute abuse of court process (Grounds 10 & 11).**

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Benin Division (the lower court) delivered on the 9th of April 2014 which affirmed the decision of the Federal High Court, Benin division (the trial court).

The background facts which gave rise to this appeal as gathered from the record are summaried below. The prosecution preferred 66 count charge against the appellant and 6 other accused persons before the trial court. The appellant herein, was the 5th accused person and he and his co-accused were alleged to be involved in the laundering of the funds belonging to the Edo State Government and Local Government of the state.

On being served with the charge, the accused persons filed an application dated 4th February, 2011 challenging the jurisdiction of the Federal High Court, Benin to entertain the charge. The application was predicated on the doctrines of double jeopardy and condonation. They complained that they have been charged at the Federal High Court, Enugu in charge No PHC/EN/6C/2008 between **FRN Vs. LUCKY NOSAAKHARE IGBINEDION** and others and that judgment was entered after a plea bargain arrangement between the accused persons and the prosecution.

In opposing the motion, the prosecution filed a counter affidavit, wherein it was stated that neither the appellant herein, nor any of the accused persons was convicted in the charge filed at Enugu Federal High Court for the offence of money laundering and that it was only the 1st accused person (Lucky Igbinedion) who was charged and convicted for the offence bordering non-diclosure of assets (Money in GTB Account) before the trial court.

The prosecution stated that it is not in dispute that charge No FHC/EN/6C/2008 was filed by the respondent herein, at Enugu Division of the Federal High Court and that it is also not in dispute that the name of appellant featured as one of the accused persons in the charge filed at Enugu. While the charge was pending Lucky Igbinedion approached the prosecution for a plea bargain arrangement which was strictly between the EFCC on one part and Lucky Igbinedion and KIVA corporation on the other part and one of the conditions for the plea bargain was for Lucky Igbinedion to make all disclosure of his interests in the appellant herein and his relationship with Patrick Eboigbodim (the 2nd accused in the charge before the trial court and one Amadim David Enyo.

Lucky Igbinedion denied knowing the appellant herein and he also denied ever instructing the duo of Patrick Eboigbodim and Amadim David Eriyo to pay money into the account of the appellant and other companies

including the 4th, 6th and 7th accused persons.

The prosecution also pointed out that Michael Igbinedion and Patrick Eboigbodim were major persons who deposited the various proceeds of crime into the accounts of the appellant herein and that contrary to the contention of the appellant, there was no agreement between it and the prosecution that it will not be prosecuted for various sums of money laundred through the appellant. The prosecution further stated that the appellant was never a party to the settlement arrangement in the charge preferred at Enugu Federal High Court because Michael Igbinedion (the alter ego of the company). Patrick Eboigbodin and Amadi Erigo who paid several sums of money in to the account of the appellant company were not available to explain the circumstances under which they made various lodgments.

At the trial court, parties filed and exchanged written addresses in support and opposition to the joint motion filed by the accused persons before the trial court and oral arguments were also taken (pages 713-748 of Vol II for the accused/applicant written address and pages 848-891 of Vol II of the record for the complainants/respondents written address. In its ruling dated 31st May,2011, the trial court dismissed the application and held that the doctrine of double jeopardy and abuse of court process were not available to the appellant as well as 2nd, 3rd, 4th and 7th accused persons.

Dissatisfied with the ruling, the appellant unsuccessfully appealed to the Court of Appeal (lower court), hence the present appeal to the Supreme Court.

Held *(Unanimously dismissing the appeal)*

1. *No evidence on who represented appellant at the plea bargain*

It is worthy of note that the appellant herein, being a company was not represented by any of its directors who took part in the supposed or alleged plea bargain at the Federal High Court Enugu. Similarly, at Enugu, there was no evidence showing that the appellant was ever tried or was either convicted or acquitted as would constitute or put a bar on the EFCC from arraigning it before the Benin Federal High Court for prosecution on the new charges or counts. There is also no agreement whatsoever, to establish that some charges were to be condoned, especially the charges on which it

was arraigned before Federal High Court Benin. *(P79 paras B – D)*

Per Sanusi (JSC)

My lords, permit me to even observe at this stage, that none of the parties at both the trial court and the lower court produced any term of agreement relating to the "plea bargain arraigned' or 'settlement'. This observation was validly made at page 2426 of volume V of the record of appeal. Therefore, it is also my opinion that by presenting or canvassing the issue of plea bargain which was not backed by any written term/agreement, the appellant only wanted to call upon the two lower courts to act within the realm of conjecture or to speculate which is not the duty or function of a court of law.

It is even instructive to note that the concept of plea bargain become part of the federal law only in 2015 when the National Assembly enacted the Administration of Criminal Justice Act in which in part 28 of that Act, Section 270 (7) made provision for plea bargain agreement which it even had emphasized that such agreement must be reduced into writing. Only Lagos State Government had earlier in 2011 enacted Administration of Criminal Justice Law in which provision of plea bargain was made under Section 75 of that law in which it also insisted in Section 76(4) that agreement between the parties must be in writing and shall be agreed upon by the parties.

Thus, consequent upon all that I have posited above, I am inclined to agree with the finding of lower court when it stated at page 2-26 Vol V of the Record as below:

> **"There is no evidence or documentation of any plea bargain agreement. The fact that the appellant's company herein was not represented by any of its directors either to arrange a plea bargain meeting is also fatal to its case as it has been established that directors**

of the appellant's company were even at large during the period Lucky Igbiniedoin entered in to agreement with the EFCC and all through trial.

I am of the view that a plea bargain agreement is a post arrangement agreement of some sort since it may result in a situation where the accused may plead guilty to some charges against him, so that others may be dropped. In the same vein, a plea bargain cannot be one in absentia or by representation of the accused person. Only directors to an accused corporate entity can represent such a company in a plea bargain arrangement. Since the accused must personally make his plea in court, an accused person must also be present personally to negotiate his plea bargain agreement. Parties cannot expect the court to act on an imaginary agreement"

This lower court's finding above cannot be faulted at all.

In the result, it is my view that the plea bargain did not inure to the appellant herein. *(Pp 79 – 80 paras D – H*)

2. *The purport of S. 14(2) EFCC Act*

Let us now examine the provisions of Section 14 (2) of that Act which reads thus:

"Subject to the provisions of Section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney General of the Federation to institute continue, take over or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit, exceeding the maximum

amount to which that person would have been liable if he had been convicted of that offence" (Emphasis supplied by me). *(P 81 paras D– G)*

3. *Conditions which must be met before an offence is compounded*

From the wordings of the above quoted provisions, there are three conditions which must be met or satisfied before an offence can be compounded; namely

(a) The offence to be compounded must be one that is punishable under the EFCC Act

(b) The sum of money that EFCC can accept must exceed the maximum amount to which person would have been liable to pay if he had been convicted.

(c) the EFCC can accept money in compounding the offence.

In addition, there must be a written agreement between the appellant and the respondent on the issue of compounding of the crime for which the appellant was charged and also the amount to be accepted by the respondent must be explicitly stated in the written agreement for compounding the offence no more no less.

Considering the antecedents of this instant case, I am not convinced that all these pre-requisites mentioned above were met or fulfilled by the appellant for it to benefit from the above provisions which was relied on by the appellant's learned counsel and Section 14(2) is therefore not applicable to this instant case. Similarly, no evidence was adduced by the appellant to show that a sum exceeding the amount involved in the offence was paid by it to the present respondent.

In the light of my discourse above, I endorse the finding of the lower court that plea bargain did not inure to the appellant herein and also there was not any compromise that had existed between Lucky Igbinedion on one hand and the EFCC on the other hand, as would insure in favour of the appellant. *(Pp 81 – 82 paras G – E)*

4. *Meaning of 'condone'*

On condonation, my understanding of the word "condone", is that it means to pardon or to over look (an offence), to forgive or to show act of forgiveness. I do not think such term or terminology fits well in the instance scenario. It is in the light of what I have highlighted above, that I hold the firm view that the crime on which the appellant was accused of committing cannot be condoned as rightly held by the lower court. *(P 82 paras E – F.)*

5. *Withdrawal of a charge does not amount to an acquitted*

The next point canvassed by parties learned counsel, in whether withdrawal of a charge amounted to an "acquittal". Here I do not think much energy should be exerted in answering this question. The issue of acquittal only arises in a situation where there is a full-blown trial in which evidence was led by the prosecution and the defence or that the latter had admitted committing of the offence charged. Where a court having jurisdiction, had taken evidence and finally acquitted or convicted an accused person, in that case such acquitted or convicted person can not latter be taken or arraigned before another court or any court for the trial on the same offence or offences because to do so would certainly amount double jeopardy. See Section 182 of the Criminal Procedure Act, which is in pari materia with Sections 238 and 239 of the Administration of Criminal Justice Act of 2015. For this provisions to apply, it must be shown through credible evidence that there was a previous conviction or acquittal made by a court that had jurisdiction to try that person. See Section 36(a) of the 1999 constitution. See also Chief of Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 924) 496 at 535.

On the other hand, WITHDRAWAL of charge, does not amount to, acquittal as rightly held by the lower court. The prosecution always has the power to withdraw any charge it had filed earlier before a court against an accused person. That withdrawal may be done for purpose of abandonment of the charge or for whatever reason the prosecution decides to do so without necessarily

informing the trial court the reason for such withdrawal. Withdrawal can also be done at any stage of the trial before conclusion or before judgment is delivered either convicting or acquitting the accused person.

In some of our laws however, "withdrawal: does not amount to dismissal of the case, in which case a bar to further prosecution could avail the appellant, depending on the circumstance of a given case. *(Pp 82 – 83 paras G – E)*

6. *The plea of autrefois acquit or convict*

As regards the issue of double jeopardy, an accused person can always plead the doctrine of autrefois convict or autre acquit. It will however be pertinent to examine Section 181 and 182 of the Criminal Procedure Act.

The above two sections are in pari materia with Sections 238 and 239 of the Administration of Criminal Justice Act of 2015.

In the result, a person who has been duly tried by a court which has jurisdiction of any offence and in the end acquitted or convicted cannot later be arraigned before that court or any other court for the same offence, for to do so, will amount to double jeopardy and will thus run riot and violent to the above provisions and Section 36(9) of the 1999 Constitution as amended. It must however be emphasized that for the above provisions to operate, the offence tried and the fresh one to be tried must be the same. In the present case, as rightly found by the trial court and endorsed by the lower court, evidence was not adduced to show that the appellant was in fact convicted or acquitted by any court on the offence, contained in charge No FHC/B/11C/2011. Therefore, it is my humble view, that the doctrine of double jeopardy could not avail the present appellant, as correctly found by the two courts below. *(Pp 83 – 84 paras E – A)*

7. *The filing of the charges of Enugu and Benin did not amount to abuse of process*

A quick answer to this poser, is that it had not been shown by him that there was any conviction or acquittal by any court with regard to the transaction for which the appellant was arraigned on a charge before the Benin Federal High Court and there was no evidence adduced to show that the charge before the Federal High Court Enugu covered the latter charge filed before Federal High Court Benin. Closely looking at the charges filed before Benin Federal High Court (the trial court) they are at wide variance with those filed earlier before the Enugu Federal High Court. I therefore hold that the filing of the charge before Benin Federal High Court which did not relate to the same transaction covered in the charge filed before the Enugu Federal High Court, such did not amount to abuse of court process. The Attorney General of the federation therefore has unfettered right to institute the charge before the trial court.
(P 85 paras C – G)

8. *Supreme court does not interfere with concurrent findings*

What is on ground is a concurrent finding of fact by both the Federal High Court Benin City and the Court of Appeal, Benin Division on the issue that there was no plea bargain agreement or arrangement between the appellant and the prosecution with regard to the charge filed at the Federal High Court, Enugu. This court has over the years and without equivocation shown its attitude not to interfere with the concurrent findings of fact of both courts below, the High court and the appellate court unless it is established by the appellant that such findings are perverse. I rely on the cases of Sobakin Vs. State (1981) 5 SC 375; Abirifon Vs. State (2013) 13 NWLR (Pt. 1372) 619 at 636; Egunjobi Vs. FRN (2013) 3 NWLR (Pt. 1342) 534 at 555.
(P 91 paras C – E)

9. *Elements of plan bargain were not established*

The two courts below noted that there was no evidence of any plea bargain agreement that was placed before the court by the appellant and so touting the plea bargain of the 1st accused i.e Lucky Nosakhare Igbinedion cannot be taken as getting the appellant as co-accused off the hook or deriving the benefit that enure from that plea bargain in the Federal High Court, Enugu of 18th December, 2008.

The appellant at no given point held any meeting either with the prosecution or its agents and a plea bargain cannot be taken or entered into in absentia. This is because a plea bargain must be a deliberate and conscious act taken by the accused and prosecution. Another way of stating it is that a plea bargain is only valid or effective when agreed upon by the prosecution and the accused in person and not by proxy. Also a plea bargain is not such as an accused can inherit the benefit from a co-accused no matter the relationship. It is recognized by me that the concept of plea bargain is new in our administration of justice system hence the paucity of judicial authorities and so the need to resort to the Supreme Court of the United States of America in which the system had taken root for very long and from whom we can tap some way forward. See Robert M. Brady Vs. United States 397 US 642 (90 SCT. 1463, 25 L. Ed. 2d 747) wherein the Supreme Court held thus:

> **"Of course, that the prevalence of guilty plea is explanation does not necessarily invalidates those pleas or the system which produced them. But we cannot hold that it is constitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and enter a correctional system in a frame of mind that affords hope for success in rehabilitation over shorter period of time than**

might be otherwise necessary." *(Pp 91 – 92 paras E – E)*

Per Peter Odili (JSC)

"In this case at hand, at the Enugu Federal High Court proceedings only Lucky Nosakhare Igbinedion and Kiva Corporation Limited of the accused persons including the now appellant approached the prosecution for settlement in Charge No. FHC/EN/6C/2008 and the prosecution agreed in principle on the condition that the said Lucky Igbinedion would make full disclosure of his involvement in all the transactions. Somewhere along the line there was not much progress made on the matter of the disclosure and so as a way to move forward the prosecution removed the name of the appellant as well as those of 4th, 6th and 7th accused persons from that charge, FHC/EN/6C/2008 and so the charge was amended to reflect those accused persons available for prosecution and so the charge was amended to reflect the said Luky Igbinedion and appellant and those others were dropped from this amended charge. That was the situation as at the time, Lucky Igbinedion entered into the plea bargain and the court made an order concerning him. Therefore the order of court and whatever benefits that enured certainly did not affect the appellant and those others discharged. The effect is that the earlier charge becomes a nullity and of no useful purpose while the amended charge takes the valid date of the earlier charge. See Attah Vs. State (1993) 7 NWLR (Pt. 305) 257 at 286; FRN Vs. Adewumi (2007) 10 NWLR (Pt. 1042) 399 at 422.

The Court of Appeal stated thus:

> **"It seems to me that the argument of the appellant is that the plea bargain entered by Lucky Igbinedion covered the appellant's offences. As I mentioned earlier, apart from the fact that a plea bargain agreement cannot be**

made on behalf of an accused, the non-arraignment of the appellant only amounted to the prosecution's exercise of his power of withdrawal. A withdrawal of charge before the accused enters his defence can never amount to an acquittal."

The implication of what the court below stated and which I am in agreement is that, the effect of the amendment or substitution of the charge of 18th December, 2008 by the Enugu Federal High Court in charge No. FHC/EN/6C/2008 was to date back to the day the first charge was filed and the original charge of 22nd January, 2008 and that of 13th October, 2008 are deemed not to be in existence. The appellant and the other accused persons cannot therefore claim that they were charged under those original charges and the amended charge of 13th October, 2008. The effect of the amendment of 18th December, 2008 is to render all earlier or previous charges irrelevant and the appellant has no claim whatever in that which transpired in the amended charges and the benefits thereof.

From the foregoing it can be seen that the issue has to be resolved and it is resolved against the appellant and in favour of the respondent." *(P92 – 93 paras E – G*)

Per Peter Odili (JSC)

The implication of the said section 14(2) of the EFCC is as follows:

(a) The EFCC has the power to compound an offence.
(b) The offence to be compounded must be one that is punishable under the EFCC Act.
(c) The EFCC can accept money in compounding the offence.
(d) The sum of money the EFCC can accept must be

> **that which must exceed the maximum amount to which that person would have been liable to pay if he had been convicted of that offence.**

The Court of appeal in the case of Chidolue Vs. EFCC (2012) 5 NWLR (Pt. 1292) 160 at 177 construed that Section 14(2) of the EFCC Act thus:

> **"The same dictionary gives three elements at common law and under typical compounding statute that must present before an offence can be compounded. These elements are:**
> **1. An agreement not to prosecute**
> **2. Knowledge of the actual commission of crime**
> **3. The receipt of some consideration**

It is clear from the proceedings at the lower court that the appellant had knowledge of the crime for which he was arrested and detained. This is so because all the statements he made were so made after he had been duly cautioned. It is also on record that he paid N100,000,000 to the respondent. However, there is no evidence that there is a valid agreement between the appellant and the respondent on the issue of compounding the crime for which the appellant was charged. The three elements in a typical compounding statute as is provided for under section 13(2) (sic) 14(2) of the Act and they must be established conjunctively. From the provisions of section 13(2) (sic) 14(2) of the Act, the amount liable to be accepted by the respondent shall be such amount that a person convicted should have paid as fine. This is clearly the import of the section… The N100,000,000 received from the appellant is said to belong to Bayelsa State Government. It is not representing the amount of fine which the appellant would have paid if he were convicted. The collection of that money is certainly not in accordance with the provision of section 13(2) (sic) 14(2) of the Economic and Financial

Crimes Commission (Establishment) Act, 2004"

Taking the Chidolue case (supra) in context herein, it is clear that section 14(2) of the EFCC Act is inapplicable to the case at hand as the conditions for the applicability of the said section 14(2) do not exist here. *(Pp 96 – 97 paras A – C)*

10. *Meaning of the word Condonation*

In respect to the condonation which the appellant is hanging on, a definition as stated in Black's Law Dictionary would help.

Black's Law Dictionary 8th Edition defines condonation at page 315 as

> **"A victim's expressed or implied forgiveness of an offence especially by treating the offender as if there has been no offence. Condonation is not usually a valid defence to a crime. One's spouse expressed or implied forgiveness of a material offence by resuming material life and sexual intimacy."**

Also, Professor Itse Sagay in his textbook Nigerian Family Law at page 393 defines legal condonation as:

> **"In law, there is condonation when one spouse, with full knowledge of the matrimonial wrong committed by the other spouse, reinstates the offending spouse to his or her earlier marital position, with the intention of forgiving or remitting the wrong is so condoned does not thenceforth, commit any further matrimonial offence. Condonation has two essential ingredients"**
>
> ***1. Forgiveness of the wronged spouse, and***
> ***2. Reinstatement of the offending spouse to his former position."***

The Court of Appeal per Ogunwumiju JCA held in respect of whether or not the charge had been compounded or condoned as follows:

> **"Suffice it to say that I cannot infer the legal incidents of a plea bargain agreement with uncertain terms in the circumstances of this case. I cannot also find any evidence of the compounding or condonation of any of the offences with which the respondent was charged in FHC/EN/6C/2011 sic 2008. That part of the ruling of the trial judge, Hobon J. in FHC/B/11C/2011 delivered on 31/5/2011 concerning the respondent is hereby set aside. The respondent is hereby ordered to plead to the charges filed on Charge No. FHC/B/11C/2011."**
> *(Pp 97 – 98 paras C – C)*

11. *Nature of Condonation*

This court had however delineated the limits of condonation in the case of Nigerian Army Vs. Aminu Kano (2010) 5 NWLR (Pt. 1188) 429 at 453- 454 per Mummad JSC thus:

> **"I think we need to seek for the definition of the word "condoned" or condone which, literally means to pardon; to overlook (as offence), to forgive or to act so as to imply forgiveness. Thus, condonation is the act of condoning or pardoning a wrong act, the implied forgiving or pardon of an offence by overlooking it. See Lexicon Webster Dictionary, Vol. 1, 1980…. In law, however, the word "condone" or condonation which has several variants such as condonment, condonance, strictly speaking, has to do with marital causes specially and it connotes the conditional remission of forgiveness, by means of continuance or resumption of matrimonial cohabitation by one of the married**

parties of a known matrimonial offence e.g Adultery committed by the other that would constitute a course of divorce, the condition being that the offence shall not be repeated. See Obafemi Vs. Obafemi (1965) 1 NWLR 446 at page 448. If adultery is charged as a ground for divorce and condonation is proved, the forgiving spouse is barred from proof of that offence… in the revised editions of 1999 and 2004 of the Black's Law Dictionary, the authors brought to fore the definition of the word condonation as it relates to, general application of the word where they defined it to mean a victims express or, especially implied, forgiveness of an offence by treating the offender as if there has been no offence".

Clearly, condonation has no place in the case at hand and so the appellant not being charged under a court martial to which Section 171(1)(c) and (2)© of the Armed Forces Act applies nor in a matrimonial dispute under the Matrimonial Causes Act operates and so the matter of cnodonation of the offences charged are not available to him.

Section 171(1)(c) and (2)(c):

"Where a person subjected to service law under this Act

1(c) has had an offence condoned by his commanding officer, he shall not be liable in respect of that offence to be tried by a court martial or to have the case dealt with summarily under this Act.

2(2) an offence shall be deemed to have been condoned by the commanding officer of a person alleged to have committed an offence if any only if, that officer or any officer authorized by him to act in relation to the alleged offence has, with knowledge of all circumstance, informed him

that he will not be charged with the offence.
(Pp 98 – 99 paras D – H)

12. *Agency does not apply in criminal liability*
On the other leg of defence to which the appellant is seeking refuge which is that since the principal, Lucky Igbinedion had taken a plea bargain, the appellant as agent of the said known principal cannot have a charge against him in related offences. This stand is strange to our jurisprudence and cannot be sustained as criminal liability is personal and an accused cannot be heard to say when charged for a criminal offence that he was acting as an agent of a principal. See A.C.B Vs. Okonkwo (1997) 1 NWLR (Pt. 480) 194 at 207.
(Pp 99 – 100 paras H – A)

13. *Principle of autrofois convict or acquit does not apply*
Since the appellant cannot show that he had been previously convicted or acquitted of the offences for which he is now being called upon to answer, the principles of autrofois acquit or autrefois convict are not applicable in this instance. See Chief of Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 922) 496 at 535 per Edozie, JSC.

By the same taken the issue of abuse of court process in the initiation of this present charge flies off the hook as there is nothing on which it can hang. The concurrent findings of the two courts below cannot be faulted. *(P 101 paras C – E)*

14. *The appellant did not approach EFCC for plea bargain*
It is clear on the record that the letters exchanged between Lucky I, Igbinedion and the commission at pages 1256 and 1257 are instructive. In other words from the letters, that exchanged between the parties, there were attempts at settlement between Mr. Lucky Igbinedion and the EFCC.

The various correspondences on record reveal that there is nothing to show that the appellant herein or any of the other accused

persons except Lucky Igbinedion approached the EFCC for plea bargain. This was as rightly said by the two lower courts. There is also no evidence or documentation of any plea bargain agreement.

The fact that the appellant company herein was not represented by any of its directors either to arrange a plea bargain meeting is also fatal to its case as it has been established that directors of the appellant company were even at large during the period Lucky Igbinedion entered agreement with the EFCC and all through trial. *(Pp 102 – 103 paras H – C)*

Nigerian cases cited in this judgment

A.C.B Vs. Okonkwo (1997) 1 NWLR (Pt. 480) 194
Abirifon Vs. State (2013) 13 NWLR (Pt. 1372) 619
AG Rivers State Vs. AG Akwa Ibom State (2011) 8 NWLR (Pt. 1248) 31
Asake Vs. Nigeria Army (2007) 1 NWLR (Pt. 1051) 408
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Attah Vs. State (1993) 7 NWLR (Pt. 305) 257
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Yisi (Nig) Ltd Vs. Trade Bank Plc (2013) 7 NWLR (pt. 1357) 522

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Administration of Criminal Justice Act 2015 28, Section 270, 238-240
Administration of Criminal Justice Law of Lagos State, Section 75, 76(4)
Armed Forces Act, Cap A20 LFN 2004, Section 171((1) (c) & (2) (c)
Constitution of the Federal Republic of Nigeria 1999 Section 174
Criminal Procedure Act Section 181 and 182 - 185
Economic and Financial Crimes Commission (Establishment) Act, 2004, 2010 section 13(2) (sic) 14(2)
Matrimonial Causes Act Cap M7 LFN 2004 Section 26
Nigeria Army Forces Act Cap 294 LFN 1990 Section 119

Representation

Chief Richard Oma Ahonaruogho, for the appellant, with Chukwudubem Chukwara, (Esq).

Adebisi Adeniyi, (Esq) for the respondent with; O.A. Atolagbe, (Esq).

AMIRU SANUSI, (JSC) (Delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal, Benin Division (the lower court) delivered on the 9th of April 2014 which affirmed the decision of the Federal High Court, Benin division (the trial court).

The background facts which gave rise to this appeal as gathered from the record are summaried below. The prosecution preferred 66 count charge against the appellant and 6 other accused persons before the trial court. The appellant herein, was the 5th accused person and he and his co-

accused were alleged to be involved in the laundering of the funds belonging to the Edo State Government and Local Government of the state.

On being served with the charge, the accused persons filed an application dated 4th February, 2011 challenging the jurisdiction of the Federal High Court, Benin to entertain the charge. The application was predicated on the doctrines of double jeopardy and condonation. They complained that they have been charged at the Federal High Court, Enugu in charge No PHC/EN/6C/2008 between **FRN Vs. LUCKY NOSAAKHARE IGBINEDION** and others and that judgment was entered after a plea bargain arrangement between the accused persons and the prosecution.

In opposing the motion, the prosecution filed a counter affidavit, wherein it was stated that neither the appellant herein, nor any of the accused persons was convicted in the charge filed at Enugu Federal High Court for the offence of money laundering and that it was only the 1st accused person (Lucky Igbinedion) who was charged and convicted for the offence bordering non-diclosure of assets (Money in GTB Account) before the trial court.

The prosecution stated that it is not in dispute that charge No FHC/EN/6C/2008 was filed by the respondent herein, at Enugu Division of the Federal High Court and that it is also not in dispute that the name of appellant featured as one of the accused persons in the charge filed at Enugu. While the charge was pending Lucky Igbinedion approached the prosecution for a plea bargain arrangement which was strictly between the EFCC on one part and Lucky Igbinedion and KIVA corporation on the other part and one of the conditions for the plea bargain was for Lucky Igbinedion to make all disclosure of his interests in the appellant herein and his relationship with Patrick Eboigbodim (the 2nd accused in the charge before the trial court and one Amadim David Enyo.

Lucky Igbinedion denied knowing the appellant herein and he also denied ever instructing the duo of Patrick Eboigbodim and Amadim David Eriyo to pay money into the account of the appellant and other companies including the 4th, 6th and 7th accused persons.

The prosecution also pointed out that Michael Igbinedion and Patrick Eboigbodim were major persons who deposited the various proceeds of crime into the accounts of the appellant herein and that contrary to the contention of the appellant, there was no agreement between it and the prosecution that it will not be prosecuted for various sums of money laundred through the appellant. The prosecution further stated that the appellant was never a party to the settlement arrangement in the charge preferred at Enugu Federal High Court because Michael Igbinedion (the alter ego of the company). Patrick Eboigbodin and Amadi Erigo who paid several sums of money in to the account of the appellant company were not available to explain the circumstances under which they made various lodgments.

At the trial court, parties filed and exchanged written addresses in support and opposition to the joint motion filed by the accused persons before the trial court and oral arguments were also taken (pages 713-748 of Vol II for the accused/applicant written address and pages 848-891 of Vol II of the record for the complainants/respondents written address. In its ruling dated 31st May,2011, the trial court dismissed the application and held that the doctrine of double jeopardy and abuse of court process were not available to the appellant as well as 2nd, 3rd, 4th and 7th accused persons.

Dissatisfied with the ruling, the appellant unsuccessfully appealed to the Court of Appeal (lower court), hence the present appeal to the Supreme Court. Parties filed and exchanged their respective briefs of argument. The appellant in its brief of argument formulated five (5) Issues for determination out of the thirteen grounds of appeal. The issues raised by the appellant are set out below:

1. **Whether the Court of Appeal was right when it held that the plea bargain agreement/arrangement entered into in Enugu with the Economic and Financial Crimes Commission (respondent) does not inure to the benefit of the appellant (Grounds 1, 2 &3).**

A

2. Whether the Court of Appeal was right when it held that a crime cannot be condoned by the State (Ground 4)

B

3. Whether the Court of Appeal was right when it held that the withdrawal of the charge in the circumstance of this case can never amount to an acquittal (Grounds 5 and 6)

C

4. Whether the Court of Appeal was right when it held that the plea of double jeopardy was not available to the appellant.

D

5. Whether the Court of Appeal was right when it held that the charge preferred against the accused person leading up to the appeal did not constitute abuse of court process (Grounds 10 & 11).

E

On its part, the respondent which filed its brief of argument on 26/2/16 settled by Rotimi Jacobs SAN in which only two issues were proposed for the determination of this appeal of course, out of the thirteen grounds of appeal. The two issues for determination are set out hereunder:

F

A- Whether the Court of Appeal was right in affirming the decision of the trial High Court that there was no plea bargain agreement between the appellant and the respondent in respect of the charge before the Federal High Court Enugu (see Grounds 1, 2, 3 and 5)

G

H

B- Whether the Court of Appeal was not right in affirming the decision of the High Court that the appellant is not entitled to any of the defences of condonation, plea of autrefors convict, doctrine of double jeopardy and abuse of court process (See Grounds 4, 6, 7, 8, 9, 10, 11, 12 and 13).

I

In its brief of argument, the learned appellant's counsel argued the first issue for determination separately and then argued Issues Nos, 2, 3, 4 and 5 together. I will therefore treat the appeal in the way the appellant argued his issues for destination as stated supra.

SUBMISSION OF COUNSEL ON ISSUES FOR DETERMINATION (BY APPELLANT)

Issue No 1

This issue deals with whether the court below was right when it held that the plea bargain agreement does not inure to the benefit of the appellant.

The learned counsel to the appellant contended that the appellant was only charged in counts Nos. 129, 130, 131, 132 and 134 (pages 1304-1305) of the record. He stated also, that the appellant in this appeal is a corporate entity which can only act through human medium agency. He argued that each count against the appellant herein, has been replicated in the counts preferred against LUCKY IGBINIEDION in counts 1-61, 125, 126, 127, 128 and 133 when he was accused of procuring the appellant herein, and others to commit the alleged offences. He cited several cases and submitted that, in this case it is beyond dispute that the need to amend the charge arose after an agreement had been reached between parties for a compromise and that once parties have agreed to reach a compromise on an issue, effect is given to their agreement and none of the parties should be allowed to renege or go back on the promise made. He cited the case of AG Rivers State Vs. AG Akwa Ibom State (2011) 8 NWLR (Pt. 1248) 31. He submitted further, that as long as the appellant herein, was charged as an agent or privy of the said LUCKY IGBINIEDION, any right or privilege which would ordinarily inure to the said LUCKY IGBINIEDION should also inure in favour of the appellant herein. He argued that as at 17/12/2000, the charge leading to plea bargain and conviction on 18/12/2008, had not been filed and that the amended charge leading to plea bargain and conviction was done on 18/12/208 and that reference to the accused person on 17/12/2008 in court by the prosecution could only have been reference to all the persons contained in the charge as it was on 17/12/2008, wherein the appellant was the 5th accused person as per the

amended charge dated 13/9/08 (pages 1839-1902) of the record and not what the charge metamorphosed into on 18/12/08, when the amended charged dated 17/12/08 was filed.

He argued that at no point in time was it shown that the plea bargain arrangement did not cover every person charged in FHC/EN/6C/08 before the FHC. Enugu as at 17/12/2008. He argued further, that the law does not allow any party to benefit from his wrong doing by failing to find judicial recognition to the agreement which led LUCKY IGBINIEDION to change his plea from NOT GUILTY to GUILTY and to take undue advantage of them when it is the same prosecutor ROTIMI JACOBS SAN, who was the same person who attended on behalf of the respondent at Enugu, when the plea bargain arrangement was entered into. He then urged the court to resolve this issue in favour of the appellant and strike out charge No. FHC/B/NC/2011 or on in the alternative, strike out the name of the appellant herein from that charge.

Issue No 2, 3, 4 And 5

The learned counsel to the appellant argued that where an offence has been compromised by EFCC, it is only the Attorney General of the Federation that can prosecute any person further and that EFCC cannot subsequently re-arraign such accused person in view of Section 14(2) of the EFCC Act, 2010. He submitted that an Act of National Assembly have made provision, for condonation of certain crimes and these provisions have received judicial backing of the Supreme Court in the case of **NIGERIA ARMY Vs. AMINU KANO** (2010) 5 NWLR (Pt. 1188) 429 and **ASAKE Vs. NIGERIA ARMY (**2007) 1 NWLR (Pt. 1051) 408. He referred to the decision of the trial court where it was held that LUCKY INGBINIEDION whose is under scrating in all counts charge can not be tried again for the offences contained in the new charge which no doubt recognized that a compromise was reached along the line with the said LUCKY IGBINIEDION with EFCC. He submitted further, that if law treats agent and principal as one person, the plea bargain agreement entered into with LUCKY IGBINIEDION must therefore be accepted as protecting his agent and all persons who acted under him, as to do otherwise, will put the said

LUCKY through another criminal trial. He quoted the judgment of the trial court in respect of charge no FHC/HC/2011. He then urged the court to resolve these issues in favour of the appellant and allow this appeal.

SUBMISSION ON ISSUES FOR DETERMINATION MADE BY RESPONDENTS SENIOR COUNSEL

The respondent in its own part formulated two issues for determination.

The respondent's issue no 1 deals with whether the court below was right in affirming the decision of the trial court that there was no plea bargain agreement between the appellant and the respondent in respect of the charge before the FHC Enugu.

The learned senior counsel for the respondents referred to the judgment of the court below at page 2426 of Vol V of the record and argued that contrary to argument of the appellants counsel that LUCKY IGBINIEDION has been left off the hook (in paragraphs 2.15 and 2.22 of its brief), he submitted that that argument is misleading and that LUCKY IGBINIEDION has not been left off the hook at all. He pointed out that the correct position of things in relation to the said LUCKY, is that the joint application filed by the accused persons before the FHC Benin was granted only in relation to the said LUCKY IGBINIEDION while the 2nd –7th accused were directed to take pleas. He stated further, that prosecution appealed against the decision discharging the said LUCKY while the 2nd – 7th accused persons also appealed against the decision of the trial court and the Court of Appeal set aside the decision of the trial court when it discharged LUCKY INGBINEDION on the basis of doctrine of plea bargain agreement, double jeopardy condonatin and abuse of court process. See FRN Vs. IGBINIEDION (2015) 2 NWLR (Pt. 1444) 475. He submitted that by virtue of the Court of Appeal decision in **FRN Vs. IGBINIEDION**, the impression being created by the appellant is that LUCKY IGBINIEDION has been set free and hence should be excluded to the appellant, is clearly misleading. He argued further, that the Court of Appeal held that it could not infer any legal mandates of a plea bargain agreement between EFCC and the said LUCKY IGBINIEDION. He urged the court to discountenance any argument that tends to suggest that

LUCKY IGBINEDION has been left off the hook.

On whether there was a plea bargain agreement he referred to the judgment of the court below at page 2414 of Vol V of the record, where the court held that it is alien to the Nigeria Criminal Justice but imported to our judicial system by implication of Section 14(2) of the EFCC Act and also reference of the Court of Appeal to the Administration of Criminal Justice Law of Lagos State, 2011, which can be said to be the first legislation in Nigeria to expressly localize and import plea bargain into Nigeria's Criminal jurisprudence. He referred to Section 26 of the ACJL which prescribes the modality for the plea bargain arrangement. He also pointed out that sometimes in 2015, the National Assembly enacted Administration of Criminal Justice Act and part 28 thereof, is on plea bargain. He submitted that. Section 270(2) of Act provides that the plea bargain agreement must be in writing and that the Act was not in existence as at the time of the facts of the case leading to the instant appeal.

Learned counsel also submitted further, that the appellant's contention that there was a plea bargain is unfounded. He conceded that there were attempts at settling some issues involving LUCKY IGBINIEDION and KIVA Corporate Ltd, but that there were disagreements in the scope and extent of the settlement agreement. He therefore submitted that the appellant having failed to establish that it ever held any meeting with the prosecution in an attempt to enter into plea bargain, renders the contention of the appellant that there was a plea bargain, unfounded.

On circumstances under which the charge was amended, he submitted that the circumstances under which the charge was amended were well illustrated in the counter affidavit filed by the prosecution in opposition to the joint application filed by the appellant and other accused persons at the trial court as contained in pages 783-786 of the record and further counter affidavit at page 833 of Vol II of the record. He argued that Michael Igbiniedion, who is the altar ego of the appellant herein, had escaped from the jurisdiction of the court as at the time of filing charge No. FHC/EN/6C/2008, including Patrick Ejboigbodin and David Amadin Eriyo who were the main persons who laundered funds using the account of

the appellant and those of the 4th, 6th and 7th accused persons. He pointed out that Lucky Igbiniedion was convicted for failure to declare his interest in the account no 4124012983110 with GTB, while KIVA Corporation was convicted for money laundering in the amended charge of 18th December, 2008 before the FHC, Enugu. He submitted that none of the transaction covered by charge no FHC/C/B/UC/2011 leading to the instant appeal featured in the amended charge filed at the FHC Enugu in charge no FHC/EN/6C/2008 on the 18th December, 2008. He therefore submitted that there was no agreement undertaking not to prosecute the appellant and he therefore urged the court to so hold.

On the effect of the amendment, he submitted that charge no FHC/EN/6C/2008 will be deemed to have been filed in the same as the amended charge dated 17 December 2008. See **ATTAH Vs. STATE** (1993) 7 NWLR (Pt. 305) 257 at 286. He urged the court to resolve this issue infavour of the respondent.

Issue No 2 of Respondent

Issue no 2 deals with whether the court below was right in affirming the decision of the trial court that the appellant is not entitled to any of the defences of condonation, plea of autrefios convict or doctrine of double jeopardy.

The learned senior counsel for the respondent referred to Section 14(2) of the EFCC Act and submitted that it is inapplicable to the instant situation and stated that the following must be borne in mind in construing the provisions:

(a) that EFCC has the power to compound an offence
(b) that offence to be compounded is punishable under the EFCC Act
(c) that EFCC can accept money in compound of the offence
(d) that the sum of money the EFCC can accept must be that which must exceed the maximum amount to which that person would have been able to pay if he had been convicted of that offence.

He submitted that no scintilla of evidence have been produced before the court to show that EFCC had at any time accepted or agreed to accept any

A sum of money from the appellant ie Lucky Igbiniedion. He cited the case of CHIDOLUE Vs. EFCC (2012) 5 NWLR (Pt. 1292) 160 where it was held that the amount must exceed the maximum amount. He submitted that none-of the three elements listed above by the court is present in the instant
B case and therefore Section 14(2) of the EFCC Act is not applicable. He again argued that even if the offences were compoundable under Section 14(2) of the EFCC Act, it is without prejudice to the power of the Attorney General of the Federation to still initiate criminal proceedings in view of the
C provisions of Section 174 of the 1999 Constitution as amended. He therefore urged the court to discountenance the appellant's submission and hold that the EFCC did not at any time compound the offences as alleged by the appellant.

D On the issue of condonation, he responded by saying that it is surprising that the appellant can still reproduce that part of the trial court's ruling to buttress his arguments on same when he knows that the ruling has been set aside by the court. He urged the court to discountenance the
E appellant's submission on the issue of condonation. He stressed that condonation has its own intuition when it comes to the application in criminal case and that the application of the doctrine is usually presented by statutes. He referred to Section 26 of the Matrimonial Causes Act Cap M7
F LFN 2004 and Section 171((1) & (2) of the Armed Forces Act, Cap A20 LFN 2004 and Section 119 of the Nigeria Army Forces Act Cap 294 LFN 1990 which specifically provide for condonation. He also cited the case of Nigeria Armed Vs. Aminu Kano (supra) and submitted that apart from
G Matrimonial Causes offences, the other categories of persons to when the doctrine applies are persons subjected to service laws.
He therefore submitted that condonation is not applicable in criminal cases.

On whether agency is a valid defence to criminal responsibility, the
H learned senior counsel for the respondent argued that criminal liability is personal and that it will not serve as a valid defence in law for any person who is alleged to have committed an offence hence he can not argue that he was acting as an agent while committing the offence. He urged the court to
I discountenance all the cases cited by the appellant in paragraphs 2.43 of its brief as they are not applicable.

On the alleged double jeopardy, he submitted that having regard to Section 36(2) of the 1999 Constitution as amended, the issue of double jeopardy will ony arise where a person is able to show that he had earlier been convicted or acquitted in respect of the matter for which he is being prosecuted again. He argued that in the instant case, there is no evidence that the appellant had been convicted or acquitted by any court of law on account of the offence alleged in charge no FHC/B/11C/2011 and that it was only LUCKY IGBINIEDION and KIVA Corporation Ltd who were convicted in charge no FHC/EN/6C/2008. He argued that none of the counts in charge no FHC/B/11C/2011 is similar to the offences alleged in charged filed before the FHC Enugu. He then urged this court to resolve this issue in favour of the respondent and to dismiss the appeal.

The reply brief of the appellant simply contain argument on issues of facts, or at best can be regarded as re-arguments of what has been argued in its main brief. I will therefore bother not to consider it.

Issue No 1

On this issue the appellant's contention is that the lower court was wrong in its finding that the plea bargain agreement entered did not inure the appellants. learned appellant's counsel emphasized that the present appellant's name featured in some of the named charges filed before the Enugu Federal High court even though it is not a natural person but a corporate body. His further contention is that since each of the counts framed against the appellant was replicated and preferred to Lucky Nosakhere Igbiniedion and that the latter procured the appellant and others to commit the alleged offences and since the said Lucky Igbiniedion was let off the hook, then it (ie the appellant) being an agent or accomplice must be let off the hook too. The learned appellant's counsel cited some decided authorities to buttress the point that since they were charged together and that Lucky was let off the hook, it must also have to benefit from the Lucky's exoneration.

His other contention is that there was even no need to amend the charge, since there has already been a standing and subsisting agreement which was reached between the parties arriving at a compromise. It was argued that where there is such compromise, none of the parties should be

allowed to opt out of the already consented agreement. In other words, the respondent is estoped from bolting out of the agreement in which the plea of "Not Guilty" was changed to plea of "Guilty".

Now in the present scenario, one must in the first place consider whether there was actually any agreement on plea bargain between the appellant and the present respondent in the case before the Enugu Federal High Court. It is worthy of note that the appellant herein, being a company was not represented by any of its directors who took part in the supposed or alleged plea bargain at the Federal High Court Enugu. Similarly, at Enugu, there was no evidence showing that the appellant was ever tried or was either convicted or acquitted as would constitute or put a bar on the EFCC from arraigning it before the Benin Federal High Court for prosecution on the new charges or counts. There is also no agreement whatsoever, to establish that some charges were to be condoned, especially the charges on which it was arraigned before Federal High Court Benin. My lords, permit me to even observe at this stage, that none of the parties at both the trial court and the lower court produced any term of agreement relating to the "plea bargain arraigned' or 'settlement'. This observation was validly made at page 2426 of volume V of the record of appeal. Therefore, it is also my opinion that by presenting or canvassing the issue of plea bargain which was not backed by any written term/agreement, the appellant only wanted to call upon the two lower courts to act within the realm of conjecture or to speculate which is not the duty or function of a court of law.

It is even instructive to note that the concept of plea bargain become part of the federal law only in 2015 when the National Assembly enacted the Administration of Criminal Justice Act in which in part 28 of that Act, Section 270 (7) made provision for plea bargain agreement which it even had emphasized that such agreement must be reduced into writing. Only Lagos State Government had earlier in 2011 enacted Administration of Criminal Justice Law in which provision of plea bargain was made under Section 75 of that law in which it also insisted in Section 76(4) that agreement between the parties must be in writing and shall be agreed upon by the parties.

Thus, consequent upon all that I have posited above, I am inclined to agree with the finding of lower court when it stated at page 2-26 Vol V of the Record as below:

> **"There is no evidence or documentation of any plea bargain agreement. The fact that the appellant's company herein was not represented by any of its directors either to arrange a plea bargain meeting is also fatal to its case as it has been established that directors of the appellant's company were even at large during the period Lucky Igbiniedoin entered in to agreement with the EFCC and all through trial.**
>
> **I am of the view that a plea bargain agreement is a post arrangement agreement of some sort since it may result in a situation where the accused may plead guilty to some charges against him, so that others may be dropped. In the same vein, a plea bargain can not be one in absentia or by representation of the accused person. Only directors to an accused corporate entity can represent such a company in a plea bargain arrangement. Since the accused must personally make his plea in court, an accused person must also be present personally to negotiate his plea bargain agreement. Parties cannot expect the court to act on an imaginary agreement"**

This lower court's finding above can not be faulted at all.

In the result, it is my view that the plea bargain did not inure to the appellant herein. This issue is therefore resolved against the appellant herein.

Issues 2, 3, 4 and 5

With regard to the second issue for determination which deal with the power of the EFCC to compound the offences under the Economic and

Financial Crimes Commission (Establishment) Act of 2004, it is the stance of the learned counsel for the appellant that the EFCC has power under Section 14(2) of the Act to compound compromise, condone or compromise such offences and if that is done by the Attorney General of the Federation, as in this instant case, the EFCC can not later-re-arraign such person on the same charge. To the appellant's learned counsel, the prosecutor ie EFCC had reached a compromise and collected from Lucky Igbiniedion (the principal offencder) some amount following the Enugu FHC plea bargain agreement and the offences before Federal High Court Benin (the trial court) had been duly compromised. The above stance of the appellant's counsel were anchored on the provisions of Section 14(2) of the EFCC Act.

Let us now examine the provisions of Section 14 (2) of that Act which reads thus:

> **"Subject to the provisions of Section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney General of the Federation to institute continue, take over or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence" (Emphasis supplied by me).**

From the wordings of the above quoted provisions, there are three conditions which must be met or satisfied before an offence can be compounded; namely:

(a) The offence to be compounded must be one that is punishable under the EFCC Act

(b) The sum of money that EFCC can accept must exceed the maximum amount to which person would have been liable to pay if he had been convicted.

(c) the EFCC can accept money in compounding the offence.

In addition, there must be a written agreement between the appellant and the respondent on the issue of compounding of the crime for which the appellant was charged and also the amount to be accepted by the respondent must be explicitly stated in the written agreement for compounding the offence no more no less.

Considering the antecedents of this instant case, I am not convinced that all these pre-requisites mentioned above were met or fulfilled by the appellant for it to benefit from the above provisions which was relied on by the appellant's learned counsel and Section 14(2) is therefore not applicable to this instant case. Similarly, no evidence was adduced by the appellant to show that a sum exceeding the amount involved in the offence was paid by it to the present respondent.

In the light of my discourse above, I endorse the finding of the lower court that plea bargain did not inure to the appellant herein and also there was not any compromise that had existed between Lucky Igbinedion on one hand and the EFCC on the other hand, as would insure in favour of the appellant.

On condonation, my understanding of the word "condone", is that it means to pardon or to over look (an offence), to forgive or to show act of forgiveness. I do not think such term or terminology fits well in the instance scenario. It is in the light of what I have highlighted above, that I hold the firm view that the crime on which the appellant was accused of committing can not be condoned as rightly held by the lower court.

The next point canvassed by parties learned counsel, in whether withdrawal of a charge amounted to an "acquittal". Here I do not think much energy should be exerted in answering this question. The issue of acquittal only arises in a situation where there is a full-blown trial in which evidence was led by the prosecution and the defence or that the latter had admitted committing of the offence charged. Where a court having jurisdiction, had taken evidence and finally acquitted or convicted an accused person, in that case such acquitted or convicted person can not latter be taken or arraigned before another court or any court for the trial on the same offence or offences because to do so would certainly amount

double jeopardy. See Section 182 of the Criminal Procedure Act, which is in pari materia with Sections 238 and 239 of the Administration of Criminal Justice Act of 2015. For this provisions to apply, it must be shown through credible evidence that there was a previous conviction or acquittal made by a court that had jurisdiction to try that person. See Section 36(a) of the 1999 constitution. See also Chief of Air Staff Vs. Iyen (2005) 6 NWLR (Pt. 924) 496 at 535.

On the other hand, WITHDRAWAL of charge, does not amount to, acquittal as rightly held by the lower court. The prosecution always has the power to withdraw any charge it had filed earlier before a court against an accused person. That withdrawal may be done for purpose of abandonment of the charge or for whatever reason the prosecution decides to do so without necessarily informing the trial court the reason for such withdrawal. Withdrawal can also be done at any stage of the trial before conclusion or before judgment is delivered either convicting or acquitting the accused person.

In some of our laws however, "withdrawal: does not amount to dismissal of the case, in which case a bar to further prosecution could avail the appellant, depending on the circumstance of a given case.

As regards the issue of double jeopardy, an accused person can always plead the doctrine of autrefios convict or autre acquit. It will however be pertinent to examine Section 181 and 182 of the Criminal Procedure Act which are reproduced hereunder for ease of reference.
Section 181 reads

> **"Without prejudice to Section 171 of this Act, a person charge with an offence (in this section referred to as "the offence charged") shall not be liable to be tried thereafter if it is shown.**
>
> **(a) that he has previously been convicted or acquitted of the same offence by a competent court, or**
>
> **(b) that he has previously been convicted or acquitted by a competent court on a charge on**

which he ought to have been convicted of the offence charged; or

(c) that he has been previously convicted or acquitted by a competent court of an offence other than the offence charged, being an offence of which a part from this section, he ought to be convicted by virtue of being charge with the offence charged.

2- Nothing in subsection(1) of the Section shall prejudice the operation of any law giving power to any court, on an appeal to set aside a verdict of finding of any other court and order a retrial.

Section 182 states:

"A person acquitted or convicted of any offence may afterword be tried for any distinct offence for which a separate charge ought to have been made against him in the previous trial under the provisions of Section 158 of this Act".

The above two sections are in pari materia with Sections 238 and 239 of the Administration of Criminal Justice Act of 2015.

In the result, a person who has been duly tried by a court which has jurisdiction of any offence and in the end acquitted or convicted can not later be arraigned before that court or any other court for the same offence, for to do so, will amount to double jeopardy and will thus run riot and violent to the above provisions and Section 36(9) of the 1999 Constitution as amended. It must however be emphasized that for the above provisions to operate, the offence tried and the fresh one to be tried must be the same. In the present case, as rightly found by the trial court and endorsed by the lower court, evidence was not adduced to show that the appellant was in fact convicted or acquitted by any court on the offence, contained in charge No FHC/B/11C/2011. Therefore, it is my humble view, that the doctrine of double jeopardy could not avail the present appellant, as correctly found by

A the two courts below.

The last issue raised by the appellant pertains to alleged abuse of court process.

Although the appellant did not specifically canvass what he really
B perceived to be an abuse of court process on this last issue, it can be gathered from his submissions generally, that his grouse is that the lower court was re wrong in holding that the charge framed against the appellant culminating into the present appeal, constituted abuse of court process. In
C otherwords, the appellant seems to be insinuating that the latter charge No FHC/B/11C/2011 constitutes an abuse of court process in view of the existence of an earlier charge No. FHC/EN/8C/2008 which was earlier filed before the Enugu FHC. A quick answer to this poser, is that it had not
D been shown by him that there was any conviction or acquittal by any court with regard to the transaction for which the appellant was arraigned on a charge before the Benin Federal High Court and there was no evidence adduced to show that the charge before the Federal High Court Enugu
E covered the latter charge filed before Federal High Court Benin. Closely looking at the charges filed before Benin Federal High Court (the trial court) they are at wide variance with those filed earlier before the Enugu Federal High Court. I therefore hold that the filing of the charge before
F Benin Federal High Court which did not relate to the same transaction covered in the charge filed before the Enugu Federal High Court, such did not amount to abuse of court process. The Attorney General of the federation therefore has unfettered right to institute the charge before the
G trial court. Consequently, all the five issues for determination have been resolved against the appellant herein.

In the result, I am unable to find any merit with this appeal. It is hereby accordingly dismissed by me.

H The judgment of the lower court which had earlier affirmed the ruling of the trial Federal High Court Benin is hereby further affirmed. The appeal being lakcing in merit is hereby dismissed by me.

Appeal dismissed.

I **Amiru Sanusi**
Justice, Supreme Court

OLABODE RHODES-VIVOUR, (JSC): I have had the advantage of reading the leading judgment just delivered by my learned brother, Sanusi JSC. I agree with his reasoning and conclusions.

Olabode Rhodes-Vivour
Justice, Supreme Court

MARY UKAEGO PETER-ODILI, (JSC): I agree with the judgment just delivered by my learned brother, Amiru Sansui JSC and to underscore the support I shall make some comments.

This is an appeal by the appellant herein against the decision of the Court of Appeal or court below, Benin Division delivered on the 9th April, 2014 wherein the court below affirmed the decision of the Federal High Court, Benin City and held that the defences of autrefois convict, condonation, plea bargain agreement, double jeopardy and abuse of court process were not available to the appellant.

The background facts of this appeal are well captured in the lead judgment and I shall not repeat them here.

On the 11th day of October, 2017 date of hearing, Chief Richard Oma Ahonarruogho of counsel adopted the appellant's brief of argument filed in 11/3/2015 and deemed filed on 27/1/16. In the brief were crafted five issues for determination which are as follows:

1. **Whether the Court of Appeal was right when it held that the plea bargain agreement/arrangement entered into in Enugu with the Economic and Financial Crimes Commission (respondent) does not inure to the benefit of the appellant herein (Grounds 1, 2 and 3)**

2. **Whether the Court of Appeal was right when it held that a crime cannot be condoned by the state (Ground 4).**

3. **Whether the Court of Appeal was right when it held that the withdrawal of the charge in the**

circumstances of his case can never amount to an acquittal (Grounds 5 & 6).

4. **Whether the Court of Appeal was right when it held that the plea of double jeopardy was not available to the appellant (Grounds 7, 8, 9, 12 and 13).**
5. **Whether the Court of Appeal was right when it held that the charge preferred against the accused person leading to this appeal did not constitute an abuse of court process (Grounds 10 and 11).**

Learned counsel for the respondent, Adebisi Adeniyi Esq. adopted the brief of argument settled by Rotimi Jacobs SAN and filed on 26/2/2016.

In the brief of argument were identified two issues for determination which are, viz:

1. **Whether the Court of Appeal was not right in affirming the decision of the trial High Court that there was no plea bargain agreement between the appellant and the respondent in respect of the charge before the Federal High Court Enugu (Grounds 1, 2, 3 and 5).**

2. **Whether the Court of Appeal was not right in affirming the decision of the trial High Court that the appellant is not entitled to any of the defences of condonation, plea of autrefois convict, doctrine of double jeopardy and abuse of court process. (Grounds 4, 6, 7, 8, 9, 10, 11, 12 and 13).**

I shall utilize the issues as drafted by the respondent since they are simpler and apt.

A ***Issue 1***

Whether the Court of Appeal was not right in affirming the decision of the trial High Court that there was no plea bargain agreement between the appellant and the respondent in respect of the charge before the Federal
B High Court Enugu.

Learned counsel for the appellant contended that the court below was wrong to have held that the plea bargain agreement entered into in Enugu with the respondent does not inure to the benefit of the appellant.
C That it is not disputed that before the Federal High Court Enugu the appellant was amongst those originally charged in Charge No. FHC/EN/6C/2008 between **Federal Republic of Nigeria Vs. Lucky Nosakhare Igbinedion & Ors** wherein the appellant was the 5th accused
D and a corporate body.

That the proceedings of the Federal High Court, Enugu in Charge No. FHC/EN/6C/2008, the appellant herein was covered by the plea bargain arrangement and once the 1st accused person is held to suffer double
E jeopardy same must go for his co-accused person in that charge as they were all taken or deemed to have been taken into consideration before that case, FHC/EN/6C/2008 was terminated.

That with respect to charge FHC/B/11C/2011, the court should
F discharge and acquit the appellant or alternatively to strike out the name of the appellant herein from that charge.

It was further submitted that the appellant is not a natural person and cannot act except through humans. That each and every count against the
G appellant had been replicated in the 66 counts preferred against Lucky Nosakhare Igbinedion in counts to 61, 125, 126, 127, 128 and 133 where he was accused that he procured the appellant herein and others to commit the alleged offences and if for any reason whatsoever, the said Lucky
H Nosakhare Igbinedion is let off the hook in respect of those charges, any other person connected with the charge through him as either an agent or accomplice must also be let off the hook. Learned counsel cited the cases of **Idiok Vs. The State** (2008) 13 NWLR (Pt. 1104) 225; **Ebri Vs. The State**
I (2004) NWLR (Pt. 885) 589; Okoro Vs. The State (2012) ALL FWLR (Pt. 621) 1471; (2012) 4 NWLR (Pt. 1290) 351 etc.

For the respondent, it was submitted that the Federal High Court, Benin City in its ruling found that there was no plea bargain agreement between the appellant and the EFCC to the effect that the appellant would not be prosecuted in respect of the offences which the prosecution alleged against it. That there is a concurrent finding of fact by both the Federal High Court Benin and the court below on the issue as to whether there was a plea bargain agreement or arrangement between the appellant and the prosecution with regard to the charges filed at the Federal High Court, Enugu. That both counts are ad item that there was no plea bargain agreement that was reached between the prosecution and the appellant. That this is one of those occasions in concurrent findings of fact that the Supreme Court ought not to interfere unless it is shown by the appellant that such findings are perverse and that is not the case here. He cited **Sobakin Vs. State** (1981) 5 SC 375; **Abirifon Vs. State** (2013) 13 NWLR (Pt. 1372) 619 at 636; **Egunjobi Vs. FRN** (2013) 3 NWLR (Pt. 1342) 534 at 555.

The appellant's posture is that it is inequitable to allow the respondent to continue with the prosecution of charge FHC/B/11C/2011 having condoned the charges as appellant being an agent of Lucky Nosakahare Igbinedion who had been set free is entitled to be set free also.

The contrary view of the respondent is that the Court of Appeal was right in affirming the decision of the trial high court that there was no plea bargain agreement between the appellant and the respondent in respect of the charge before the Federal High Court, Enugu.

I shall recast some parts of the judgment of the learned trial judge and it is thus:

> **"However, regrettably enough, none of the 2nd 7th accused persons-applicants has shown or adduced evidence to show that he went through or under any trial and was convicted or acquitted or pardoned.**
>
> **No evidence of any plea bargain agreement with the prosecutions (sic) or commission to drop or condone the charges which they are now called upon to answer for the**

second time. In fact, nothing is disclosed in their favour on any of the grounds the application is founded".

In the absence of any evidence, the doctrine of double jeopardy and abuse of court process is (sic) not available and opened to any of the 2nd 7th accused persons applicants.

In fact, there is uncontroverted evidence that some of the accused applicants escaped from jurisdiction while the case at Enugu was going on. How can such accused applicant turn round now and raise the defence of or plea double jeopardy.

It appears upon totality of this case the grounds upon which this application is founded and all points raised, each is traversed, and considered and none is established by the 2nd 7th accused persons-applicants, including a plea for pardoned, (sic) under section 36(10) of the constitution.

Consequently, their application must fail in entirety and be so dismissed. It is hereby dismissed in its entirety for lack of merit, frivolity and wanting in bonafide".

The Court of Appeal found as follows:

"There is no evidence or document of any plea bargain agreement. The fact that the appellant's company herein was not represented by any of its directors either to arrange a plea bargain meeting is also fatal to its case as it has been established that directors of the appellant's company were even at large during the period Lucky Igbinedion entered agreement with the EFCC and all through trial.

I am of the humble view that a plea bargain agreement is a post arraignment agreement of some sort. Since it may result in a situation where the accused may plead guilty to some charges against him, so that other may be dropped. In the same vein, a plea bargain cannot be done in absentia

or by representatives of the accused person. Only directors to an accused corporate entity can represent such a company in a plea bargain arrangement. Since the accused must personally make his lea in court, an accused person must also be present personally to negotiate his plea bargain agreement. Parties cannot expect the court to act on an imaginary agreement."

What is on ground is a concurrent finding of fact by both the Federal High Court Benin City and the Court of Appeal, Benin Division on the issue that there was no plea bargain agreement or arrangement between the appellant and the prosecution with regard to the charge filed at the Federal High Court, Enugu. This court has over the years and without equivocation shown its attitude not to interfere with the concurrent findings of fact of both courts below, the High court and the appellate court unless it is established by the appellant that such findings are perverse. I rely on the cases of **Sobakin Vs. State** (1981) 5 SC 375; **Abirifon Vs. State** (2013) 13 NWLR (Pt. 1372) 619 at 636; **Egunjobi Vs. FRN** (2013) 3 NWLR (Pt. 1342) 534 at 555.

The two courts below noted that there was no evidence of any plea bargain agreement that was placed before the court by the appellant and so touting the plea bargain of the 1st accused i.e Lucky Nosakhare Igbinedion cannot be taken as getting the appellant as co-accused off the hook or deriving the benefit that enure from that plea bargain in the Federal High Court, Enugu of 18th December, 2008.

The appellant at no given point held any meeting either with the prosecution or its agents and a plea bargain cannot be taken or entered into in absentia. This is because a plea bargain must be a deliberate and conscious act taken by the accused and prosecution. Another way of stating it is that a plea bargain is only valid or effective when agreed upon by the prosecution and the accused in person and not by proxy. Also a plea bargain is not such as an accused can inherit the benefit from a co-accused no matter the relationship. It is recognized by me that the concept of plea bargain is new in our administration of justice system hence the paucity of judicial

authorities and so the need to resort to the Supreme Court of the United States of America in which the system had taken root for very long and from whom we can tap some way forward. See Robert M. Brady Vs. United States 397 US 642 (90 SCT. 1463, 25 L. Ed. 2d 747) wherein the Supreme Court held thus:

> **"Of course, that the prevalence of guilty plea is explanation does not necessarily invalidates those pleas or the system which produced them. But we cannot hold that it is constitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and enter a correctional system in a frame of mind that affords hope for success in rehabilitation over shorter period of time than might be otherwise necessary".**

In this case at hand, at the Enugu Federal High Court proceedings only Lucky Nosakhare Igbinedion and Kiva Corporation Limited of the accused persons including the now appellant approached the prosecution for settlement in Charge No. FHC/EN/6C/2008 and the prosecution agreed in principle on the condition that the said Lucky Igbinedion would make full disclosure of his involvement in all the transactions. Somewhere along the line there was not much progress made on the matter of the disclosure and so as a way to move forward the prosecution removed the name of the appellant as well as those of 4th, 6th and 7th accused persons from that charge, FHC/EN/6C/2008 and so the charge was amended to reflect those accused persons available for prosecution and so the charge was amended to reflect the said Luky Igbinedion and appellant and those others were dropped from this amended charge. That was the situation as at the time, Lucky Igbinedion entered into the plea bargain and the court made an order concerning him. Therefore the order of court and whatever benefits that enured certainly did not affect the appellant and those others discharged. The effect is that the earlier charge becomes a nullity and of no useful

purpose while the amended charge takes the valid date of the earlier charge. See **Attah Vs. State** (1993) 7 NWLR (Pt. 305) 257 at 286; **FRN Vs. Adewumi** (2007) 10 NWLR (Pt. 1042) 399 at 422.

The Court of Appeal stated thus:

> **"It seems to me that the argument of the appellant is that the plea bargain entered by Lucky Igbinedion covered the appellant's offences. As I mentioned earlier, apart from the fact that a plea bargain agreement cannot be made on behalf of an accused, the non-arraignment of the appellant only amounted to the prosecution's exercise of his power of withdrawal. A withdrawal of charge before the accused enters his defence can never amount to an acquittal."**

The implication of what the court below stated and which I am in agreement is that, the effect of the amendment or substitution of the charge of 18th December, 2008 by the Enugu Federal High Court in charge No. FHC/EN/6C/2008 was to date back to the day the first charge was filed and the original charge of 22nd January, 2008 and that of 13th October, 2008 are deemed not to be in existence. The appellant and the other accused persons cannot therefore claim that they were charged under those original charges and the amended charge of 13th October, 2008. The effect of the amendment of 18th December, 2008 is to render all earlier or previous charges irrelevant and the appellant has no claim whatever in that which transpired in the amended charges and the benefits thereof.

From the foregoing it can be seen that the issue has to be resolved and it is resolved against the appellant and in favour of the respondent.

Issue No 2

Whether the Court of Appeal was not right in affirming the decision of the trial High Court that the appellant is not entitled to any of the defences of condondation, plea of autrefois convict, doctrine of double jeopardy and abuse of court process.

A For the appellant, learned counsel stated that the EFCC has the power to compound offences under the EFCC Act, 2010 Section 14(2). That where an offence had been thus compounded, condoned or compromised it is only the Attorney General of the Federation that may B prosecute any such person further as the EFCC cannot subsequently re-arraign such person. He cited **Nigerian Army Vs. Aminu-Kano** (2010) 5 NWLR (Pt. 1188) 429; **Asake Vs. Nigeria Army** (2007) 1 NWLR (Pt. 1051) 408.

C He stated that the trial court held that Lucky Nosakhare Igbinedion whose act is under scrutiny in all the charges cannot be tried upon again for offences contained in the new charge that is FHC/B/11C/2011 as the court recognized the fact that a compromise was reached somewhere along the D line with the said Lucky Nosakhare Igbinedon and the EFCC (respondent). That the appellant was charged as an agent used by the said Lucky Nosakhare Igbinedion to launder money. That if the offence against the said Lucky Nosakhare Igbinedion are held to be abuse of court process and E consequently struck out by the trial court, then every person charged along with him as an agent must be allowed to go free under the maxim- he who acts through another acts by himself. That an agent of a disclosed principal bears no liability and where the principal on whose behalf the agent act at all F material times is let off the hook, then the agent must also go scot free especially as the agent has not been charged with anything other than what it did on behalf of the principal that has been set free. He relied on **Yisi (Nig) Ltd Vs. Trade Bank Plc** (2013) 7 NWLR (pt. 1357) 522 at 539 , **Quo** G **Vadis Hotels & Restaurants Ltd Vs. Nigeria Maritime Services Ltd** (1992) 7 SCNJ 172 etc.

In response, learned counsel for the respondent contended that Section 14(2) of the EFCC Act is inapplicable because at no time did the H prosecution enter into an agreement with the appellant not to prosecute it. Secondly nothing before the court to suggest that the appellant conceded to having knowledge of the actual commission of crime. Thirdly there is no evidence that the EFCC received monetary consideration from the I appellant. Also that section 14(2) of the EFCC Act is designed to apply to offences not yet brought before the court that is during investigation and so

cannot applying to a matter pending before a court.

For the respondent, it was further submitted that condonation is applicable only to matrimonial causes and within the Armed Forces Act and not to normal criminal offences. It was cited the cases of **Nigerian Army Vs. Aminun-Kano** (2010) 5 NWLR (Pt. 1188) 429 at 453 – 454; Section 171 (1)(c) and (2) (c) of the Armed Forces Act.

Learned counsel for the respondent contended that it must be borne in mind that in our criminal jurisprudence, criminal liability is personal. He referred to **A.C.B Vs. Okonkwo** (1997) 1 NWLR (Pt. 480) 194 at 207.

That the issue of double jeopardy will only arise where a person is able to show that he had earlier been convicted or acquitted in respect of the matter for which he is being prosecuted. He cited Section 36(a) of the 1999 Constitution of the Federation (as amended), **Kalu Vs. Nigeria Army** (2010) 4 NWLR (Pt. 1185) 433 at 451; Sections 181-185 of the Criminal Procedure Act now Sections 238-240 of the Administration of Criminal Justice Act.

The appellant posits that he is entitled to the pleas of condonation, double jeopardy and abuse of court process. The respondent contends that appellant is confusing the power of the Economic and Financial Crimes Commission to compound an offence under Section 14(2) of the EFCC Act with condonation as the two are distinct and not apposite.

Section 14(2) of the EFCC Act provides as follows:

> **"Subject to the provisions of Section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the commission may compound any offence punishable under this Act by accepting such sum of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence."**

The implication of the said section 14(2) of the EFCC is as follows:

(a) The EFCC has the power to compound an offence.
(b) The offence to be compounded must be one that is punishable under the EFCC Act.
(c) The EFCC can accept money in compounding the offence.
(d) The sum of money the EFCC can accept must be that which must exceed the maximum amount to which that person would have been liable to pay if he had been convicted of that offence.

The Court of appeal in the case of **Chidolue Vs. EFCC** (2012) 5 NWLR (Pt. 1292) 160 at 177 construed that Section 14(2) of the EFCC Act thus:

"The same dictionary gives three elements at common law and under typical compounding statute that must present before an offence can be compounded. These elements are:

1. An agreement not to prosecute
2. Knowledge of the actual commission of crime
3. The receipt of some consideration

It is clear from the proceedings at the lower court that the appellant had knowledge of the crime for which he was arrested and detained. This is so because all the statements he made were so made after he had been duly cautioned. It is also on record that he paid N100,000,000 to the respondent. However, there is no evidence that there is a valid agreement between the appellant and the respondent on the issue of compounding the crime for which the appellant was charged. The three elements in a typical compounding statute as is provided for under section 13(2) (sic) 14(2) of the Act and they must be established conjunctively. From the provisions of section 13(2) (sic) 14(2) of the Act, the amount liable to be accepted by the respondent shall be such amount that a person convicted should have paid as fine. This is clearly the import of the section… The N100,000,000

A received from the appellant is said to belong to Bayelsa State Government. It is not representing the amount of fine which the appellant would have paid if he were convicted. The collection of that money is certainly not in accordance with the provision of section 13(2) (sic) 14(2) of the Economic
B and Financial Crimes Commission (Establishment) Act, 2004"

Taking the Chidolue case (supra) in context herein, it is clear that section 14(2) of the EFCC Act is inapplicable to the case at hand as the conditions for the applicability of the said section 14(2) do not exist here.

C In respect to the condonation which the appellant is hanging on, a definition as stated in Black's Law Dictionary would help.

Black's Law Dictionary 8th Edition defines condonation at page 315 as

D **"A victim's expressed or implied forgiveness of an offence especially by treating the offender as if there has been no offence. Condonation is not usually a valid defence to a crime. One's spouse expressed or implied forgiveness of a**
E **material offence by resuming material life and sexual intimacy."**

Also, Professor Itse Sagay in his textbook Nigerian Family Law at page
F 393 defines legal condonation as:

"In law, there is condonation when one spouse, with full knowledge of the matrimonial wrong committed by the
G **other spouse, reinstates the offending spouse to his or her earlier marital position, with the intention of forgiving or remitting the wrong is so condoned does not thenceforth, commit any further matrimonial offence. Condonation**
H **has two essential ingredients"**

1. Forgiveness of the wronged spouse, and
2. Reinstatement of the offending spouse to his former position."

I

The Court of Appeal per Ogunwumiju JCA held in respect of whether or not

A the charge had been compounded or condoned as follows:

> **"Suffice it to say that I cannot infer the legal incidents of a plea bargain agreement with uncertain terms in the**
B **circumstances of this case. I cannot also find any evidence of the compounding or condonation of any of the offences with which the respondent was charged in FHC/EN/6C/2011 sic 2008. That part of the ruling of the**
C **trial judge, Hobon J. in FHC/B/11C/2011 delivered on 31/5/2011 concerning the respondent is hereby set aside. The respondent is hereby ordered to plead to the charges filed on Charge No. FHC/B/11C/2011"**

D

This court had however delineated the limits of condonation in the case of **Nigerian Army Vs. Aminu Kano** (2010) 5 NWLR (Pt. 1188) 429 at 453-454 per Mummad JSC thus:

E

> **"I think we need to seek for the definition of the word "condoned" or condone which, literally means to pardon; to overlook (as offence), to forgive or to act so as to imply**
F **forgiveness. Thus, condonation is the act of condoning or pardoning a wrong act, the implied forgiving or pardon of an offence by overlooking it. See Lexicon Webster Dictinary, Vol. 1, 1980…. In law, however, the word**
G **"condone" or condonation which has several variants such as condonment, condonance, strictly speaking, has to do with marital causes specially and it connotes the conditional remission of forgiveness, by means of**
H **continuance or resumption of matrimonial cohabitation by one of the married parties of a known matrimonial offence e.g Adultery committed by the other that would constitute a course of divorce, the condition being that the**
I **offence shall not be repeated. See Obafemi Vs. Obafemi (1965) 1 NWLR 446 at page 448. If adultery is charged as**

a ground for divorce and condonation is proved, the forgiving spouse is barred from proof of that offence… in the revised editions of 1999 and 2004 of the Black's Law Dictionary, the authors brought to fore the definition of the word condonation as it relates to, general application of the word where they defined it to mean a victims express or, especially implied, forgiveness of an offence by treating the offender as if there has been no offence".

Clearly, condonation has no place in the case at hand and so the appellant not being charged under a court martial to which Section 171(1)(c) and (2)© of the Armed Forces Act applies nor in a matrimonial dispute under the Matrimonial Causes Act operates and so the matter of cnodonation of the offences charged are not available to him.

Section 171(1)(c) and (2)(c):

"Where a person subjected to service law under this Act

1(c) has had an offence condoned by his commanding officer, he shall not be liable in respect of that offence to be tried by a court martial or to have the case dealt with summarily under this Act.

2(2) an offence shall be deemed to have been condoned by the commanding officer of a person alleged to have committed an offence if any only if, that officer or any officer authorized by him to act in relation to the alleged offence has, with knowledge of all circumstance, informed him that he will not be charged with the offence.

On the other leg of defence to which the appellant is seeking refuge which is that since the principal, Lucky Igbinedion had taken a plea bargain, the appellant as agent of the said known principal cannot have a charge against him in related offences. This stand is strange to our jurisprudence and

cannot be sustained as criminal liability is personal and an accused cannot be heard to say when charged for a criminal offence that he was acting as an agent of a principal. See **A.C.B Vs. Okonkwo** (1997) 1 NWLR (Pt. 480) 194 at 207.

It follows that the issue of double jeopardy cannot arise since the matter of conviction or acquittal had to do with Lucky Igbinedion and not the appellant. The relevant statute being Section 181185 of the Criminal Procedure Act now Sections 238-240 of the Administration of Criminal Justice Act would clear some air. I quote:

Section 181 and 182 of the Criminal Procedure Act provides as follows:

"181

(1) Without prejudice to Section 171 of this Act, a person charged with an offence (in this section referred to as "the offence charged) shall not be liable to be tried thereafter if it is shown-

a. That he has previously been convicted or acquitted of the same offence by a competent court; or

b. That he has previously been convicted or acquitted by a competent court on a charge on which he might have been convicted of the offence charged; or

c. That has previously been convicted or acquitted by a competent court of an offence other than the offence charged, being an offence of which, apart from this section, he might be convicted by virtue of being charged with the offence charged.

Subsection (2) goes on:

(2) Nothing in subsection (1 of this section shall prejudice the operation of any law giving power to

any court, on an appeal, to set aside a verdict or finding of any other court and order a re-trial.

182. A person acquitted or convicted of any offence may afterwards be tried for any distinct offence for which a separate charge might have been made against him on the previous trial under the provisions of Section 158 of this Act".

Since the appellant cannot show that he had been previously convicted or acquitted of the offences for which he is now being called upon to answer, the principles of autrofois acquit or autrefois convict are not applicable in this instance. See **Chief of Air Staff Vs. Iyen** (2005) 6 NWLR (Pt. 922) 496 at 535 per Edozie, JSC.

By the same taken the issue of abuse of court process in the initiation of this present charge flies off the hook as there is nothing on which it can hang. The concurrent findings of the two courts below cannot be faulted and along with the better reasoning in the lead judgment, I find no merit in this appeal. I dismiss it and abide by the consequential orders made.

Mary Ukaego Peter-Odili
Justice, Supreme Court

CLARA BATA OGUNBIYI, (JSC): My learned brother **Sanusi, JSC** has resolved all the issues raised in this appeal comprehensively. I agree also that the appeal lacks merit and should be dismissed.

The facts and historical background of this appeal are all restated very clearly in the lead judgment. I will not repeat same.

Suffice it to say at this point that the concept of plea bargain agreement itself originated from the American jurisprudence and became established in the case of **Robert M. Brady Vs. United States 397 U.S. 742 (90 Sc. CT 1563, 25 L. Ed 2d 747).** It dated as far back as 1959 wherein the accused was charged with kidnapping and faced maximum penalty of death. He pleaded guilty to the charge and was sentenced to 50 years imprisonment. In 1967, he sought for relief under 28 U.S.C 2255

claiming that his plea of guilty was not voluntary but that his counsel mounted impermissible pressure on him to plead guilty. The District Court for the District of New Mexico denied him the relief. The Court of Appeal affirmed the decision of the District Court. The Supreme Court of the United States also affirmed the decision of the Court of Appeal.

Since the seal of approval by the US Supreme Court therefore the courts have treated plea bargain as contracts between the prosecutors and defendants.

It is pertinent to state that section 75 of the Administration of Criminal Justice Law of Lagos State is the first legislation to localize and import the concept of plea bargain into Nigeria's Criminal jurisprudence and it provides thus:

> **"Notwithstanding anything in this law or in any other law, the Attorney General of the State shall have the power to consider and accept a plea bargain from a person charged with any offence where the Attorney General is of the view that the acceptance of such plea bargain is in the public interest, the interest of justice and the need to prevent abuse of legal process."**

It is significant to state that the terms are clear cut as parties must not be in doubt as to what benefits will arise from the terms of agreement because all interests are taken into consideration.

The question that is central in this appeal is:

> **Was there a plea bargain agreement between the parties? If there was, who were the parties involved and what was the procedure employed by the parties involved?**

It is clear on the record that the letters exchanged between Lucky I, Igbinedion and the commission at pages 1256 and 1257 are instructive. In other words from the letters, that exchanged between the parties, there were attempts at settlement between Mr. Lucky Igbinedion and the EFCC.

The various correspondences on record reveal that there is nothing to show that the appellant herein or any of the other accused persons except Lucky Igbinedion approached the EFCC for plea bargain. This was as rightly said by the two lower courts. There is also no evidence or documentation of any plea bargain agreement.

The fact that the appellant company herein was not represented by any of its directors either to arrange a plea bargain meeting is also fatal to its case as it has been established that directors of the appellant company were even at large during the period Lucky Igbinedion entered agreement with the EFCC and all through trial.

The Court of Appeal at page 2426 of the record had this to say on modalities of the procedure:-

> **"Since the accused must personally make his plea in court, and accused person must also be present personally to negotiate his plea bargain agreement.**
>
> **Parties cannot expect the court to act on an imaginary agreement. Even though there was at that time no procedural law of the Federal High Court or the Criminal Procedure Act regulating plea bargain agreement. I am of the opinion that the procedure employed by parties was too causal. Even in ordinary out of court settlement issues, parties reduce their settlement terms into writing and present it to the court. The documentation of a plea bargain agreement is not only desirable, it is most logical as it would prevent the inconsistencies that trail oral evidence such as distortion of agreement terms by parties at will."**

I endorse in totality the view held and expressed by the lower court which same cannot be faulted but bears witness to a solid foundational background binding a plea bargaining agreement.

For all intents and purposes, the appellant seemed to be engulfed in mere imagination of believing that it has entered into a plea bargaining

agreement as thought.

With the few words of mine and relying particularly on the comprehensive judgment of my learned brother **Sanusi, JSC**, I agree that the entire appeal is devoid of any merit and is hereby dismissed also by me in terms of the lead judgment.

Clara Bata Ogunbiyi
Justice, Supreme Court

SIDI DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead judgment of my learned brother Amiru Sanusi, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is accordingly dismissed by me.

Sidi Dauda Bage
Justice, Supreme Court

SALEH DAWAI
AND
THE STATE

SC. 459/2013

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 15TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**
PAUL ADAMU GALINJE	**JUSTICE, SUPREME COURT**

APPEAL: Concurrent findings – Where supported by evidence – Whether will not be disturbed by the Supreme Court

CASE LAW: Principles in Abdullahi vs State (2008) 17 NWLR (Pt. 11 15) 203.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Ingredients thereof – Onus on prosecution to establish ingredients beyond reasonable doubt.

CRIMINAL LAW AND PROCEDURE: Armed robbery – Ingredients thereof ways of proof.

CRIMINAL LAW AND PROCEDURE: Onus on prosecution – Whether to prove the charge beyond reasonable doubt – S. 135 of Evidence Act – Relevant considerations thereof.

CRIMINAL LAW: Defence – Alibi – Meaning – When to be raised.

EVIDENCE: Admission by conduct – Meaning – When a clear and direct accusation is made against a person in his presence in circumstances which should warrant instant denial – Whether evidence of failure to deny or refuse the allegation may be given in court as evidence of admission by conduct.

EVIDENCE: Credibility thereof – Where a witness did not mention a suspect at the earliest opportunity to the police – Implication – Whether that would detract from any credibility the trial court may wish to ascribe to his evidence.

Issue for Determination

"Whether the court below was right to have affirmed the conviction and sentence of the appellant for the offence of armed robbery."

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal, Kaduna Division delivered on 8th March, 2013 wherein the Court of Appeal dismissed the appeal of the appellant and affirmed the decision of the trial High Court which convicted and sentenced the appellant to 14 years imprisonment for the offence of Armed Robbery contrary to Section 2 (1) (a) of the Robbery and Firearms (Special Provisions) Acts, Cap 398, Laws of the Federation of Nigeria 1990.

A brief facts of the case are that on the 31st day of January, 2004, at Kachia in Kaduna State, the appellant was alleged to have forcefully entered the residence of one Alhaji Majarazi Saidu while armed with a locally made pistol and robbed the said victim of the sum of N500,000= (five hundred thousand naira) only.

At the trial, the prosecution called four witnesses and tendered one exhibit to prove the charge against the appellant while the appellant gave evidence in his defence.

After the conclusion of the trial, the learned trial judge convicted the appellant for committing the offence of armed robbery and was accordingly

sentenced to 14 years imprisonment.

Dissatisfied with the decision of the learned trial judge, the appellant filed an appeal at the Court of Appeal, Kaduna which dismissed the appeal for lacking in merit.

Being further dissatisfied with the judgment of the Court of Appeal, the appellant has again, appealed to the Supreme Court.

Held *(Unanimously dismissing the appeal)*

1. *The Onus on the prosecution in a criminal charge*

   The law is trite and well established that in criminal proceedings, the onus lies on the prosecution to prove and/or establish the guilt of an accused person beyond reasonable doubt. To be able to achieve this, the prosecution must ensure that all necessary and vital ingredients of the charge are proved by evidence. By Section 135 of the Evidence Act, 2011, 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. This proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence. A degree of compulsion which is consistent with a high degree of probability. See Fabian Nwaturuocha Vs. The State (2011) LPELR 8119 (SC), (2011) 6 NWLR (pt. 1242) 170, Osuagwu Vs. State (2013) LPELR 19823 (SC), Adekoya Vs. The State (2017) LPELR 41564 (SC), Oseni Vs. The State (2012) LPELR- 7833 (SC), (2012) 5 NWLR (Pt. 1293) 351. *(P 120 paras C – F)*

2. *Ingredients of armed robbery which prosecution must prove beyond reasonable doubt.*

   By Section 1(2) of the Robbery and Firearms (Special Provisions) Act 1990, armed robbery takes place where at the time of the robbery, the offender is armed with firearms or any offensive weapon or is in company with any person so armed at or immediately before or immediately after the robbery, and the said

offender wounds or uses any personal violence to any person. The essential ingredients of the offence of armed robbery which prosecution must prove beyond reasonable doubt to secure the conviction of an accused person include the following:

1. **that there was indeed a robbery or series of robberies;**
2. **that the robbers were armed with dangerous weapons; and**
3. **that the accused person was the robber or one of the robbers. See Afolalu Vs. The State (2010) 16 NWLR (t. 1220) 584, Emeka Vs. The State (2014) LPELR 23020 (SC), (2014) 13 NWLR (Pt 1425) 614, Musa Ikaria Vs. The State (2012) LPELR-15533 (SC) (2014) 1 NWLR (Pt. 1389) 639, Agugua Vs. The State (2017) LPELR 42021 (SC).** *(Pp 120 – 121 paras F – B)*

3. *Ways of proving the ingredients of armed robbery*

In order to establish or prove the above ingredients of the offence of armed robbery, the prosecution's evidence may flow from any of the following ways:

(i) The confessional statement of the accused which has been duly tested, proven and admitted in evidence.

(ii) By circumstantial evidence which is complete, cogent and unequivocal and leads to an irresistible conclusion that the accused and no other person committed the offence charged.

(iii) By direct evidence of eye witnesses who actually saw the accused committing the offence.

In the instant case, the prosecution relied both on the direct evidence of prosecution witnesses especially PW1 and the confessional statement of the appellant to prove the charge of armed robbery against the appellant. On page 160 of the record of appeal, the lower court states this much as follows:

"It is manifestly clear from their snippets of evidence which when clustered together tend to establish the fact that the appellant was part of the gang of armed men that attacked PW1 in his premises.

The appellant in his confessional statement, contained in exhibit A categorically admitted partaking in the said armed robbery that took place in PW1's premises. The admissibility of the said Exhibit A was neither objected to by the learned counsel to the appellant when it was sought to be tendered at the lower court. See page 18. Similarly, PW1 had in the course of his examination also stated that the appellant had admitted before the D.P.O. at Kachia Police Station that he was part of the gang of armed robbers attacked (sic) his premises. The said witness had in page 13 of the record stated thus:

> **"The DPO asked me to ask the accused question. I then ask the accused that he gave me a charm to protect me from armed robbery but I never rob why? Accused then said he cheated me. He said himself and four others were the people that robbed me. He said himself, Yau, Wada, Manu and Sani."**

It could be deduced from the testimony of the PW1 that the appellant had orally confessed to the commissioning of the offence for which he was convicted. It is also imperative to note that the testimony of PW1 had neither been controverted nor contradicted by the appellant his (sic) defence." *(Pp 121 – 122 paras C – G)*

Per Okoro (JSC)

From all that have been said above by the lower court, there is no appeal against any. The PW1 alleged before the trial court that the appellant visited him a day before the robbery attack and gave him charm against armed robbery attack. After the robbery attack, the appellant went back to the PW1 to find out if he was attacked. At the police station, before the Divisional Police Officer, the PW1 asked the appellant why the charm did not work and the appellant replied that he cheated him. It is this same appellant that the PW1 told the trial court that he tried to cover his face when he was leading other robbers to his wife's room. He recognized him. The appellant told the police in exhibit A that he and others were the robbers who robbed the PW1. He also admitted same before the DPO as contained in the evidence of PW1. There is no doubt that since the appellant did not appeal against the above findings, he is deemed to have admitted them, moreso, as he did not object against the admission of Exhibit A, his confessional statement at the trial court. There is, in law, a legal principle commonly referred to as admission by conduct. The law is that when a clear and direct accusation is made against a person, in his presence, in circumstances which should warrant instant denial, refutation, or protest from him and he does not deny, refute or protest against the making of the accusation, evidence of such could be given against him as evidence of admission by conduct. See Udo Vs. R (1964) 1 All NLR 21 at 23, Utteh Vs. The State (1992) 2 NWLR (Pt. 223) 257, Fred Dapere Gira Vs. The State (1996) LPELR 1322 (SC), (1996) 4 NWLR (Pt. 443) 375.

It follows also that where a court has made a finding of fact or pronouncement on an issue and a party affected by such finding or pronouncement fails to challenge such finding by an appeal, he is deemed to have admitted or accepted such pronouncement as proper. Thus, the appellant herein is deemed to have admitted before the DPO that he and Yau, Wada, Manu and Sani were the

robbers who attacked the PW1 in his house. The reason is that both at the trial court and the Court of Appeal, this issue was raised, decided upon and affirmed on appeal and he (the appellant) did not raise any objection. Moreso, when Exhibit A was admitted at the trial court, the appellant did not raise any objection.

It is alleged that the appellant raised a defence of alibi which the trial court failed to consider. The said alibi was made by the appellant in his evidence in chief in court. *(Pp 122 – 123 paras G – G)*

4. *The meaning of Alibi*

***Alibi* is a Latin word meaning "elsewhere." It is a plea raised by a person accused of committing an offence that by the time the offence was alleged to have been committed, he was elsewhere. Thus, having regard to the time and place where and where he is alleged to have committed the offence, he could not have been present. It indeed postulates the physical impossibility of the presence of the accused at the scene of crime at the time the offence was committed because of his presence at another place. See Iheonunekwu Ndukwe Vs. The State (2009) LPELR- 1997 (SC), (2009) 7 NWLR (Pt. 1139) 43, Ozaki & anor Vs. The State (1988) 1 SC. P. 109, (1990) 1 NWLR (Pt. 124) P. 92.** *(P 124 paras B – E)*

5. *When to raise the defence of Alibi*

On when should the defence of *alibi* be raised, it is settled law that for the defence of *alibi* to be properly raised, it must be raised at the earliest opportunity when the accused person is confronted by the police with the commission of an offence so that the police will be in a position to investigate the *alibi*. See Sunday Ehimiyein Vs. The State (2016) EPELR-40841 (SC), Eyisi Vs. The State (2000) 15 NWLR (pt 691) 555 at 596, Salomi Vs. The State (1998) 3 NWLR (Pt 85) 670 at 677. The appellant raised this *alibi* in court while stating his defence. This defence, in my opinion was brought up too late as he ought to have raised it at the earliest opportunity in order to give the prosecution the opportunity to investigate same. Failure to raise the

defence timeously, renders the defence of *alibi* a non-starter. See Ehimiyein Vs. State *(supra).* *(P 124 paras E – H)*

6. *When plea of alibi is not sustainable*

Be that as it may, a defence of *alibi* crumbles completely in the face of compelling evidence to the contrary that fixes the accused person at the scene of crime. That is to say, if the prosecution can lead a strong and positive evidence which fixes the accused person at the scene of crime and which evidence the court accepts, any plea of *alibi* by the accused, naturally collapses. See Kolade Vs. The State (2017) LPELR- 42362 (SC), Adeyemi Vs. The State (2017) LPELR 42584 (SC).

In the instant case, the appellant was clearly fixed at the scene of crime at the time of the robbery incident by PW1. His belated defence of *alibi* has no basis whatsoever. I agree with the court below that the trial court was right to reject the defence.

From all I have said above, I am on a strong wicket to agree with the court below that the prosecution proved the charge of armed robbery against the appellant beyond reasonable doubt. Accordingly, this appeal is devoid of any merit at all. The appeal is hereby dismissed by me. The judgment of the Court of Appeal which affirmed the conviction and sentence of the appellant is hereby upheld. *(Pp 124 – 125 paras H – C)*

Per Augie (JSC)

It is true, as appellant argued, that PW1 failed to mention his name at the earliest opportunity, even as this court held in Abdullahi Vs. State (2008) 17 NWLR (Pt. 1115) 203 that the failure of a witness to mention the name of the accused at the earliest opportunity, would detract from any credibility that the trial court may wish to ascribe to his evidence.

In that case, Abdullahi Vs. State (supra), two witnesses claimed that they knew the appellant, who lived in their area, long

before the robbery incident, in which they were victims; and that he participated in the three other armed robbery attacks on them. They also disclosed that they did not tell the police that they knew any of the robbers that attacked them.

This court per Onnoghen, JSC (as he then was) observed as follows:

> **Both PW1 and PW2 know the appellant before the date of the robberies and testified to the fact that the robbers were not masked while carrying out the robberies. Yet, at the first opportunity of reporting the incidents to the police, neighbours and community leader neither PW1 & PW2 mentioned the identity of the appellant as being one of the armed robbers, who carried out the raid. They only mentioned the name of the appellant five days after the incidents and when they made their statements to the police. There is no explanation from the prosecution as to why PW1 and PW2 omitted to mention the name of the appellant as being part of the gang of robbers of that date in the first opportunity. I hold the view that the circumstances of the non-mentioning of the name of the appellant to the police, community leader, and neigbours soon after the robbery incidents has raised same doubts as to the reliability of the statements of PW1 and PW2 as to the participation of the appellant in the robbery incidents in question particularly as it is in evidence that the said robbers were not masked during the operation. I hold the view that the subsequent mentioning of the name of the appellant in the statement of PW1 and PW2 is clearly an afterthought, which raises serious doubt as to the participation of the appellant in the crime in question and, therefore, hold that the doubt be and is hereby resolved in favour of the appellant.**

That is, indeed, the position of the law, however, it is a well-established principle that every case is and must be determined on its own merits; and it is also settled that the voluntary statement of the accused to the police and circumstantial evidence is sufficient to ground a conviction.

In this case, the Court of Appeal held that "it is manifestly clear from their snippets of evidence, which when clustered together, tend to establish the fact that appellant was part of the gang of armed men that attacked PW1 in his premises". The said """"snippets of evidence" include the appellant's admission in his confessional statement to the police that he participated in the armed robbery, which was not challenged by him; and the testimony of PW1 that the appellant admitted before the D.P.O. at Kachia Police Station that he, the appellant, had cheated PW1 when he gave him a "charm" against armed robbery attack that did not work, which was neither controverted nor contradicted by the appellant.

So, the circumstances in Abdullahi Vs. State (supra) are, certainly, not the same as this, and this court cannot arrive at the same conclusion.

It is for this and the other detailed reasons in the lead judgment that I also dismiss this appeal and affirm the decision of the court below. *(Pp 125 – 126 paras H – E)*

7. *No reason to disturb concurrent findings*

Upon my painstaking perusal of the proceedings and decision of the trial court and the judgment appealed I find no cause to disturb the concurrent findings of the two courts. They are neither perverse nor unreasonable. The findings are very well supported by the evidence admitted in the proceedings against the appellant. I find no basis whatsoever to disturb the concurrent findings of the two courts below. *(P 128 paras E – F)*

Nigerian cases cited in this judgment

Abdullahi Vs. State (supra),
Adekoya Vs. The State (2017) LPELR 41564 (SC),
Adeyemi Vs. The State (2017) LPELR 42584 (SC),
Afolalu Vs. The State (2010) 16 NWLR (t. 1220) 584,
Agugua Vs. The State (2017) LPELR 42021 (SC).,
Ehimiyein Vs. State (supra).,
Emeka Vs. The State (2014) LPELR 23020 (SC), (2014) 13 NWLR (Pt 1425) 614,
Eyisi Vs. The State (2000) 15 NWLR (pt 691) 555,
Fabian Nwaturuocha Vs. The State (2011) LPELR 8119 (SC), (2011) 6 NWLR (pt. 1242) 170,
Fred Dapere Gira Vs. The State (1996) LPELR 1322 (SC), (1996) 4 NWLR (Pt. 443) 375,
Iheonunekwu Ndukwe Vs. The State (2009) LPELR- 1997 (SC), (2009) 7 NWLR (Pt. 1139) 43,
Kolade Vs. The State (2017) LPELR- 42362 (SC),
Musa Ikaria Vs. The State (2012) LPELR- 15533 (SC) (2014) 1 NWLR (Pt. 1389) 639,
Oseni Vs. The State (2012) LPELR- 7833 (SC), (2012) 6 NWLR (Pt. 1293) 351,
Osuagwu Vs. State (2013) LPELR 19823 (SC),
Ozaki & anor Vs. The State (1988) 1 SC. P. 109, (1990) 1 NWLR (Pt. 124) P. 92,
Salomi Vs. The State (1998) 3 NWLR (Pt 85) 670 at 677,
Sunday Ehimiyein Vs. The State (2016) EPELR-40841 (SC),
Udo Vs. R (1964) 1 All NLR 21 at 23,
Utteh Vs. The State (1992) 2 NWLR (Pt. 223) 257

Nigerian Statutes cited in this judgment

Armed Robbery contrary to Section 2 (1)
Robbery and Firearms (Special Provisions) Acts,
Robbery and Firearms (Special Provisions) Act Cap 398 1990 Section 1(2)
Evidence Act, 2011 Section 135

APPEARANCES

Tajudeen Oladoja (Esq) with Murtala Abdulrasheed (Esq,) Olalekan Thammi (Esq,) Ahmed Gobir (Esq) and Barnabas John (Esq) for the Apellant.

Sakinatu Hassan Idris (Mrs) Deputy Director, Ministry of Justice, Kaduna with Binta Pate (Miss) Asst. Director, for the Respondent.

JOHN INYANG OKORO, (JSC) (Delivering the lead judgment): This is an appeal against the judgment of the Court of Appeal, Kaduna Division delivered on 8th March, 2013 wherein the lower court dismissed the appeal of the appellant and affirmed the decision of the trial High Court which convicted and sentenced the appellant to 14 years imprisonment for the offence of Armed Robbery contrary to Section 2 (1) (a) of the Robbery and Firearms (Special Provisions) Acts, Cap 398, Laws of the Federation of Nigeria 1990.

A brief facts of the case are that on the 31st day of January, 2004, at Kachia in Kaduna State, the appellant was alleged to have forcefully entered the residence of one Alhaji Majarazi Saidu while armed with a locally made pistol and robbed the said victim of the sum of N500,000 = (five hundred thousand naira) only.

At the trial, the prosecution called four witnesses and tendered one exhibit to prove the charge against the appellant while the appellant gave evidence in his defence.

After the conclusion of the trial, the learned trial judge convicted the appellant for committing the offence of armed robbery and was accordingly sentenced to 14 years imprisonment.

Dissatisfied with the decision of the learned trial judge, the appellant filed an appeal at the Court of Appeal, Kaduna which dismissed the appeal for lacking in merit.

Being further dissatisfied with the judgment of the lower court, the appellant has again, appealed to this court. Notice of appeal was filed on 5th April, 2013 which has two grounds of appeal. Out of the two grounds of appeal, the appellant has formulated two issues for the determination of this appeal.

A On 28th September, 2017 when this appeal was heard, the learned counsel for the appellant, Tajudeen O. Oladoja, Esq identified and adopted the brief of the appellant which was filed on the 5th of September, 2013. The two issues are contained on page 4 of the said brief as follows:

B

1. **Whether the prosecution proved the case at the trial court beyond reasonable doubt to warrant the affirmation of the conviction and sentence of the**
C **appellant by the Court of Appeal.**

2. **Whether on the circumstances of this case, it was not imperative to conduct an identification parade in order to ascertain whether the appellant was part of**
D **the armed robbery gang who robbed PW1.**

Also, in the respondent's brief settled by Sakinatu Hassan Idris, Esq and
E filed on the 16th day of September 2013, only one issue is donated for the determination of this appeal which states:-

"Whether the court below was right to have affirmed the
F **conviction and sentence of the appellant for the offence of armed robbery."**

Bearing in mind the issues that were ventilated at the court below and the
G judgment generated therefrom, it is my view that the lone issue donated by the respondent can adequately determine this appeal, after\all the two issues formulated by the appellant are clearly subsumed in the respondent's sole issue. I shall therefore determine this appeal on the sole issue as distilled by the respondent.

H The learned counsel for the appellant submitted that the burden of proving that any person has committed a crime rests on the prosecution, and that in discharging this burden, all the essential ingredients of the crime
I alleged must be proved beyond reasonable doubt. He opined that should a court be in doubt having regard to the whole gamut of evidence before it,

A the prosecution would have failed to discharge the burden of proof which the law lays upon it and the accused will be entitled to an acquittal, relying on the cases of **Uzoka Vs. FRN (2010) 2 NWLR (Pt 1177) 118, Jua Vs. State (2010) 4 NWLR (Pt. 1184) 217, Gabriel Vs. The State (2010) 6**
B **NWLR (Pt. 1190) 280, Miller Vs. Minster of Pensions (1974) 3 All ER 372.**

As to what constitutes armed robbery under Section 2 (1) of the Robbery and Firearms (Special Provisions) Act ***(supra)*** learned counsel
C referred to the cases of **Bello Vs. The State (2007) 10 NWLR (Pt 1043) 564 and Olayinka Vs. The State (2007) 9 NWLR (Pt 1040) 561.**

Referring to the evidence of PW1, learned counsel submitted that where an eye witness to an incident claimed to have suspected a specific
D person, but failed to mention the name of such person to the police at the earliest opportunity, the court will not ascribe any credibility to his evidence, relying on **Abdullah Vs. The State (2008) 5 SCNJ 197 at 205 206.**

E Learned counsel further submitted that the failure of the PW1 to describe the clothes which the appellant wore at the scene of crime is fatal to the prosecution's case, citing **Udeh Vs. The State (1999) 7 NWLR (Pt. 609) 1 and Wakala Vs. The State (1991) 8 NWLR (Pt. 211) 552.**

F It is his further submission that the offence for which the appellant was charged was not proved beyond reasonable doubt in that the evidence of the prosecution witnesses are full of material contradictions, though the learned counsel did not point out even one of such contradictions.

G He submitted further that exhibit A does not qualify as a confessional statement in that it was not direct, positive and properly made in law. That the burden of proving affirmatively that the confession was made voluntarily lies with the prosecution, citing the case **Isiaka Auta Vs. The**
H **State (1975) NWLR 60 at 65** amongst others. On the test to be applied to a confessional statement, he cited the case of **R. Vs. Sykes (1913) 8 CR App. R 233.**

Learned counsel wanted to make submission on issue of ***alibi*** but
I could not make it through. He then urged the court to resolve this issue in favour of the appellant.

On the 2nd issue he submitted that the question begging for an answer is whether the evidence of PW1 regarding the recognition of the appellant as the person who robbed him of his money has the potency superimposed on it by both the trial court and the Court of Appeal. He opined that identification parade was necessary in the circumstance, citing **Ani Vs. The State (2009) 6 MJSC (Pt. 11) 1.**

It is his view that the circumstantial evidence relied upon by the trial court to convict the appellant is not sufficient and same does not satisfy the ingredients required by law to entitle the court to hold that the appellant is guilty of the offence charged. He opined that having regard to the evidence of PW2 and PW3 it cannot be safely concluded that the appellant was the robber or one of the robbers.

It is his view that identification parade was necessary in this case, relying on the case of **Alabi Vs. The State (1993) 7 NWLR (Pt. 307) 511.** That failure to conduct identification parade was fatal to the prosecution's case. He urged the court to resolve this issue in favour of the appellant.

In response, the learned counsel for the respondent agrees with the appellant that the burden of proof in criminal cases lies with the prosecution. That from the evidence of the prosecution witnesses, it is crystal clear that armed robbers broke into the house of PW1 about 31st January, 2004 and robbed him of money amounting to about N500,000=. Reviewing the evidence of the PW1 in this case, learned counsel submitted that the PW1 clearly identified the appellant as one of the robbers since he had seen him in his shop a day before the incident. He specifically referred to the contact the appellant had with PW1 in relation to issue of charm against armed robbery attack and the appellant's 2nd visit two weeks after the robbery attack and asked him if anything happened to him.

It is the submission of the learned counsel that with these interactions, it is beyond doubt that the PW1 identified the appellant as one of the robbers. He opined that the PW1 testified that he removed the money from under his bed and gave to the robbers and the appellant in his confessional statement also said that the PW1 took the money from under his bed and gave to them. Learned counsel urged this court to affirm that the court below was right to uphold the conviction of the appellant.

It is his further submission that even if the confessional statement was the only evidence before the court, it was sufficient to convict the appellant, relying on the case of **Yahaya Vs. The State (1986) 12 SC 282.**

On the defence put up by the appellant, learned counsel for the respondent, submitted that apart from stating that he did not commit the offence and that he did not confess to committing the offence, he did not say anything to contradict the overwhelming evidence put forward by the prosecution. He urged the court to resolve this issue against the appellant.

The law is trite and well established that in criminal proceedings, the onus lies on the prosecution to prove and/or establish the guilt of an accused person beyond reasonable doubt. To be able to achieve this, the prosecution must ensure that all necessary and vital ingredients of the charge are proved by evidence. By Section 135 of the Evidence Act, 2011, 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. This proof beyond reasonable doubt does not mean proof beyond all doubt, or all shadow of doubt. It simply means establishing the guilt of the accused person with compelling and conclusive evidence. A degree of compulsion which is consistent with a high degree of probability. See **Fabian Nwaturuocha Vs. The State (2011) LPELR 8119 (SC), (2011) 6 NWLR (pt. 1242) 170, Osuagwu Vs. State (2013) LPELR 19823 (SC), Adekoya Vs. The State (2017) LPELR 41564 (SC), Oseni Vs. The State (2012) LPELR- 7833 (SC), (2012) 6 NWLR (Pt. 1293) 351.**

By Section 1(2) of the Robbery and Firearms (Special Provisions) Act 1990, armed robbery takes place where at the time of the robbery, the offender is armed with firearms or any offensive weapon or is in company with any person so armed at or immediately before or immediately after the robbery, and the said offender wounds or uses any personal violence to any person. The essential ingredients of the offence of armed robbery which prosecution must prove beyond reasonable doubt to secure the conviction of an accused person include the following:

4. that there was indeed a robbery or series of robberies;

5. that the robbers were armed with dangerous weapons; and

6. that the accused person was the robber or one of the robbers. See Afolalu Vs. The State (2010) 16 NWLR (t. 1220) 584, Emeka Vs. The State (2014) LPELR 23020 (SC), (2014) 13 NWLR (Pt 1425) 614, Musa Ikaria Vs. The State (2012) LPELR- 15533 (SC) (2014) 1 NWLR (Pt. 1389) 639, Agugua Vs. The State (2017) LPELR 42021 (SC).

In order to establish or prove the above ingredients of the offence of armed robbery, the prosecution's evidence may flow from any of the following ways:

(i) The confessional statement of the accused which has been duly tested, proven and admitted in evidence.

(ii) By circumstantial evidence which is complete, cogent and unequivocal and leads to an irresistible conclusion that the accused and no other person committed the offence charged.

(iii) By direct evidence of eye witnesses who actually saw the accused committing the offence.

In the instant case, the prosecution relied both on the direct evidence of prosecution witnesses especially PW1 and the confessional statement of the appellant to prove the charge of armed robbery against the appellant. On page 160 of the record of appeal, the lower court states this much as follows:-

"It is manifestly clear from their snippets of evidence which when clustered together tend to establish the fact that the appellant was part of the gang of armed men that attacked PW1 in his premises.

The appellant in his confessional statement, contained in exhibit A categorically admitted partaking in the said armed robbery that took place in PW1's premises. The admissibility of the said Exhibit A was neither objected to by the learned counsel to the appellant when it was sought to be tendered at the lower court. See page 18. Similarly, PW1 had in the course of his examination also stated that the appellant had admitted before the D.P.O. at Kachia Police Station that he was part of the gang of armed robbers attacked (sic) his premises. The said witness had in page 13 of the record stated thus:

> **"The DPO asked me to ask the accused question. I then ask the accused that he gave me a charm to protect me from armed robbery but I never rob why? Accused then said he cheated me. He said himself and four other were the people that robbed me. He said himself, Yau, Wada, Manu and Sani."**

It could be deduced from the testimony of the PW1 that the appellant had orally confessed to the commissioning of the offence for which he was convicted. It is also imperative to note that the testimony of PW1 had neither been controverted nor contradicted by the appellant his (sic) defence."

From all that have been said above by the lower court, there is no appeal against any. The PW1 alleged before the trial court that the appellant visited him a day before the robbery attack and gave him charm against armed robbery attack. After the robbery attack, the appellant went back to the PW1 to find out if he was attacked. At the police station, before the Divisional Police Officer, the PW1 asked the appellant why the charm did not work and the appellant replied that he cheated him. It is this same appellant that the PW1 told the trial court that he tried to cover his face

when he was leading other robbers to his wife's room. He recognized him. The appellant told the police in exhibit A that he and others were the robbers who robbed the PW1. He also admitted same before the DPO as contained in the evidence of PW1. There is no doubt that since the appellant did not appeal against the above findings, he is deemed to have admitted them, moreso, as he did not object against the admission of Exhibit A, his confessional statement at the trial court. There is, in law, a legal principle commonly referred to as **admission by conduct.** The law is that when a clear and direct accusation is made against a person, in his presence, in circumstances which should warrant instant denial, refutation, or protest from him and he does not deny, refute or protest against the making of the accusation, evidence of such could be given against him as evidence of admission by conduct. See **Udo Vs. R (1964) 1 All NLR 21 at 23, Utteh Vs. The State (1992) 2 NWLR (Pt. 223) 257, Fred Dapere Gira Vs. The State (1996) LPELR 1322 (SC), (1996) 4 NWLR (Pt. 443) 375.**

It follows also that where a court has made a finding of fact or pronouncement on an issue and a party affected by such finding or pronouncement fails to challenge such finding by an appeal, he is deemed to have admitted or accepted such pronouncement as proper. Thus, the appellant herein is deemed to have admitted before the DPO that he and Yau, Wada, Manu and Sani were the robbers who attacked the PW1 in his house. The reason is that both at the trial court and the Court of Appeal, this issue was raised, decided upon and affirmed on appeal and he (the appellant) did not raise any objection. Moreso, when Exhibit A was admitted at the trial court, the appellant did not raise any objection.

It is alleged that the appellant raised a defence of ***alibi*** which the trial court failed to consider. The said ***alibi*** was made by the appellant in his evidence in chief in court. The evidence is short on page 21 of the record. I shall reproduce it as follows:-

> **"My name is Saleh Dawai. I leave (sic) at Saminaka. I am a farmer and a cattle rearer. I know PW1 on 31st January, 2004. I was in my house. I do not know anything nor aware of the allegation against me. The testimony of PW4**

is false as I did not make any confessional statement at the Nigeria Police Station, Kachia in respect of this case. It is true that PW1 knew me DW1 came to me through his brother. I admitted in my statement because I was intimidated and tortured. I have two wives and five children."

Alibi is a Latin word meaning "elsewhere." It is a plea raised by a person accused of committing an offence that by the time the offence was alleged to have been committed, he was elsewhere. Thus, having regard to the time and place where and where he is alleged to have committed the offence, he could not have been present. It indeed postulates the physical impossibility of the presence of the accused at the scene of crime at the time the offence was committed because of his presence at another place. See **Iheonunekwu Ndukwe Vs. The State (2009) LPELR- 1997 (SC), (2009) 7 NWLR (Pt. 1139) 43, Ozaki & anor Vs. The State (1988) 1 SC. P. 109, (1990) 1 NWLR (Pt. 124) P. 92.**

On when should the defence of ***alibi*** be raised, it is settled law that for the defence of ***alibi*** to be properly raised, it must be raised at the earliest opportunity when the accused person is confronted by the police with the commission of an offence so that the police will be in a position to investigate the ***alibi***. See **Sunday Ehimiyein Vs. The State (2016) EPELR-40841 (SC), Eyisi Vs. The State (2000) 15 NWLR (pt 691) 555 at 596, Salomi Vs. The State (1998) 3 NWLR (Pt 85) 670 at 677.** The appellant raised this ***alibi*** in court while stating his defence. This defence, in my opinion was brought up too late as he ought to have raised it at the earliest opportunity in order to give the prosecution the opportunity to investigate same. Failure to raise the defence timeously, renders the defence of ***alibi*** a non-starter. See **Ehimiyein Vs. State *(supra).***

Be that as it may, a defence of ***alibi*** crumbles completely in the face of compelling evidence to the contrary that fixes the accused person at the scene of crime. That is to say, if the prosecution can lead a strong and positive evidence which fixes the accused person at the scene of crime and which evidence the court accepts, any plea of ***alibi*** by the accused, naturally

collapses. See **Kolade Vs. The State (2017) LPELR- 42362 (SC), Adeyemi Vs. The State (2017) LPELR 42584 (SC).**

In the instant case, the appellant was clearly fixed at the scene of crime at the time of the robbery incident by PW1. His belated defence of ***alibi*** has no basis whatsoever. I agree with the court below that the trial court was right to reject the defence.

From all I have said above, I am on a strong wicket to agree with the court below that the prosecution proved the charge of armed robbery against the appellant beyond reasonable doubt. Accordingly, this appeal is devoid of any merit at all. The appeal is hereby dismissed by me. The judgment of the Court of Appeal which affirmed the conviction and sentence of the appellant is hereby upheld.

John Inyang Okoro
Justice, Supreme Court

OLU ARIWOOLA, (JSC): I had the privilege of reading in draft the lead judgment of my learned brother **John Inyang Okoro, JSC** just delivered. I agree entirely with the reasoning and conclusion that the appeal is unmeritorious and should be dismissed. I too will dismiss the appeal and uphold the conviction and sentence of the appellant as affirmed by the court below.

Appeal dismissed.

Olu Ariwoola
Justice, Supreme Court

AMINA ADAMU AUGIE, (JSC): I had a preview of the lead judgment delivered by my learned brother, Okoro, JSC, and I agree with him that in the circumstances of this case, this court cannot interfere with concurrent findings of the lower courts that the appellant is guilty as charged for the offence of armed robbery.

It is true, as appellant argued, that **PW1** failed to mention his name at the earliest opportunity, even as this court held in **Abdullahi Vs. State** *(2008) 17 NWLR (Pt. 1115) 203* that the failure of a witness to mention the

name of the accused at the earliest opportunity, would detract from any credibility that the trial court may wish to ascribe to his evidence.

In that case, **Abdullahi Vs. State** *(supra),* two witnesses claimed that they knew the appellant, who lived in their area, long before the robbery incident, in which they were victims; and that he participated in the three other armed robbery attacks on them. They also disclosed that they did not tell the police that they knew any of the robbers that attacked them. This court per Onnoghen, JSC (as he then was) observed as follows

> **"Both PW1 and PW2 know the appellant before the date of the robberies and testified to the fact that the robbers were not masked while carrying out the robberies. Yet, at the first opportunity of reporting the incidents to the police, neighbours and community leader neither PW1 & PW2 mentioned the identity of the appellant as being one of the armed robbers, who carried out the raid. They only mentioned the name of the appellant five days after the incidents and when they made their statements to the police. There is no explanation from the prosecution as to why PW1 and PW2 omitted to mention the name of the appellant as being part of the gang of robbers of that date in the first opportunity. I hold the view that the circumstances of the non-mentioning of the name of the appellant to the police, community leader, and neigbours soon after the robbery incidents has raised same doubts as to the reliability of the statements of PW1 and PW2 as to the participation of the appellant in the robbery incidents in question particularly as it is in evidence that the said robbers were not masked during the operation. I hold the view that the subsequent mentioning of the name of the appellant in the statement of PW1 and PW2 is clearly an afterthought, which raises serious doubt as to the participation of the appellant in the crime in question and, therefore, hold that the doubt be and is hereby resolved in**

favour of the appellant."

That is, indeed, the position of the law, however, it is a well-established principle that every case is and must be determined on its own merits; and it is also settled that the voluntary statement of the accused to the police and circumstantial evidence is sufficient to ground a conviction.

In this case, the Court of Appeal held that *"it is manifestly clear from their snippets of evidence, which when clustered together, tend to establish the fact that appellant was part of the gang of armed men that attacked* ***PW1*** *in his premises".* The said *""""snippets of evidence"* include the appellant's admission in his confessional statement to the police that he participated in the armed robbery, which was not challenged by him; and the testimony of **PW1** that the appellant admitted before the D.P.O. at Kachia Police Station that he, the appellant, had cheated **PW1** when he gave him a *"charm"* against armed robbery attack that did not work, which was neither controverted nor contradicted by the appellant.

So, the circumstances in **Abdullahi Vs. State** *(supra)* are, certainly, not the same as this, and this court cannot arrive at the same conclusion.

It is for this and the other detailed reasons in the lead judgment that I also dismiss this appeal and affirm the decision of the court below.

Amina Adamu Augie,
Justice, Supreme Court

EJEMBI EKO, (JSC): The appellant was tried at the High Court of Kaduna State for armed robbery. He was convicted and sentenced to 14 years imprisonment for the said offence. The Court of Appeal, Kaduna Division, affirmed the conviction and sentence. The instant appeal is against the said concurrent findings by the two courts below.

The PW1 knew the appellant before the robbery. The appellant had visited the PW1 a few days before the robbery. He gave the PW1 a charm against robbery attacks. During the robbery the appellant tried to cover his face. In the course of the robbery the PW1 told the robbers that he had some money (about N65,000.00) under his bed. The robbers went there and picked the money. The PW1 was, at all the material times, being held on

gun-point. The robbers led the PW1 to his wife's room. The PW1 noticed that the appellant who was standing closely trying to cover his face. The PW1 led the robbers to his wife's room where they collected more money. Two weeks later the appellant came to the PW1 and told the PW1 that when he saw the PW1 he was frightened and agitated. He further asked PW1 if anything happened to him after they last met.

At the office of the Divisional Police Office (DPO) the appellant confirmed that he gave the PW1 charm to protect him against robbery. He admitted to the PW1 before the DPO that he gave the PW1 fake charm, that he cheated the PW1 and that it was himself and four others who came to rob the PW1. The appellant's extra-judicial statement, Exhibit A, made subsequent to the chats in the DPO's office also confirmed this narration.

Even though Exhibit A was admitted in evidence without objection, the appellant while testifying tried to retract it. In the process he set up an *alibi* which was not believed by the trial court. He had been fixed to the scene by the evidence of PW1.

Upon my painstaking perusal of the proceedings and decision of the trial court and the judgment appealed I find no cause to disturb the concurrent findings of the two courts. They are neither perverse nor unreasonable. The findings are very well supported by the evidence admitted in the proceedings against the appellant. I find no basis whatsoever to disturb the concurrent findings of the two courts below.

Accordingly, I join my learned brother, HON. JOHN I. OKORO, JSC, whose lead judgment has just been delivered, in dismissing the appeal. The judgment of the Court of Appeal affirming the conviction and sentence of the appellant imposed by the trial court in the case **No: KDH/KAF/S^{C}/2004** delivered on 27th April, 2005 is hereby further affirmed.

Ejembi EKO,
Justice, Supreme Court

PAUL ADAMU GALINJE, (JSC): I have had the privilege of reading in draft the judgment just delivered by my learned brother, Okoro JSC and I entirely agree with the reasoning contained therein and the conclusion

arrived thereat. My learned brother has adequately resolved all the issues submitted for determination of this appeal, so much so that anything I say will amount to repetition. I agree that this appeal is devoid of any merit and should be dismissed. I accordingly dismiss it and affirm the judgment of the lower court.

Paul Adamu Galinje,
Justice, Supreme Court

SHOLA FAMUYIWA
AND
THE STATE

SC. 386/2015

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

ON FRIDAY THE 15TH DAY OF DECEMBER, 2017

BEFORE THEIR LORDSHIPS

BODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

CONSTITUTIONAL LAW: Fair hearing – Breach thereof – Where a police officer who recorded a confession statement did not testify but his non appearance was explained by an official letter and the appellant given full opportunity to prepare his case – Whether no breach of appellant's right to fair hearing.

CRIMINAL LAW AND PROCEDURE: Evaluation of evidence – Where accused alleges that the evidence against him was not properly evaluated – Onus on him to prove – Relevant consideration thereof.

CRIMINAL LAW AND PROCEDURE: Confessional statement – Corroborative evidence thereto – Whether the nature of corroborative evidence required may be circumstantial and not necessarily direct evidence.

CRIMINAL LAW AND PROCEDURE: Conspiracy – Connotation thereof – How established – Whether usually a matter of inference.

CRIMINAL LAW AND PROCEDURE: Crime – Proof thereof – Modes of establishing the commission of crime.

CRIMINAL LAW AND PROCEDURE: Identification – Duty of court thereon – Where the case against an accused substantially depends on his identification – Whether court should examine the evidence more closely to determine the question of proper identification.

CRIMINAL LAW AND PROCEDURE: Identification parade – Instances where it will be dispensed with.

CRIMINAL LAW AND PROCEDURE: Identification parade – Where accused has been sufficiently identified by evidence of a witness – Whether an identification parade not necessary.

CRMINAL LAW AND PROCEDURE: Conviction – Where accused makes a confessional statement – Whether he can be convicted so based solely on his confessional statement – Conditions thereof.

EVIDENCE: Admissibility Where on accused retracts his confessional statement – Whether the more retraction does not make it inadmissible.

EVIDENCE: Public officer – Non attendance to a judicial proceedings – How explained – S. 50 of Evidence Act 2011 – Relevant considerations thereof.

Issues of Determination

1) Whether the Court of Appeal was not right in upholding the findings of the trial Court that failure to conduct identification parade was not fatal to the prosecution's

case.

2) **Whether the Court of Appeal was not right in holding that EXHIBIT B was properly and legally admitted by the trial court.**

3) **Whether the Court of Appeal was not right in upholding the decision of the trial court that the offences of conspiracy and armed robbery of 3rd April, 2002 were proved beyond reasonable doubt against the appellants by the prosecution.**

Facts of the Matter

This is an appeal against the judgment of the Court of Appeal sitting at Ado-Ekiti delivered on the 16th December, 2014 where the Court of Appeal or Court below or the lower Court affirmed the trial Court's decision or M.O. Abodunde J on the 25th June, 2013, conviction and sentence of appellant to death by hanging for the offences of conspiracy and armed robbery.

The panel of the Court below is thus:- A.G. Mshelia, F.O. Akinbami and B.M. Ugo JJCA with the lead judgment anchored by M.G. Mshelia JCA.

The facts of the case leading to the appeal are stated hereunder, viz:-

Background facts

The version as put across by the appellant is thus:

The appellant was a trader at Challenge in Ibadan. In 2002, the Landlord of the place where the appellant was selling his wares at Challenge in Ibadan asked the appellant to quit the land where the appellant was selling his wares. Although the notice to quit was sufficient, the appellant and the other traders had no opportunity to rent another shop.

The Landlord enlisted or contracted members of OPC to chase the appellant and other traders away from the land whereby a misunderstanding/fight ensued between members

of OPC and the traders. The Police intervened and transferred the appellant and others that were arrested with him to the Challenge Police Station in Ibadan.

Later on, the appellant and seven other persons that were arrested with him were removed from the cell at Challenge Police Station Ibadan and transferred to Ekiti. On getting to Ekiti State, the appellant was accused by the Police as being one of the armed robbers who operated in Ekiti. The Police demanded to sum of N50,000.00 (Fifty Thousand Naira) each from the appellant and the other suspects for them to be released. The appellant did not have the sum of N50,000.00 to pay but the other suspects who paid were released.

The Police threatened to deal severely with the appellant if he failed to pay the bail fees of N50,000.00. At about 1.00am the next day, the cell was opened and the appellant was brought out.

The appellant was severely beaten by Policemen and thereafter the appellant was hung on a ceiling fan and hit with a cutlass on the head but the appellant raised his hands in defence and the cutlass cut the appellant's palm and injured him.

When the appellant started bleeding, the Police took him to the General Hospital, Ado-Ekiti for treatment. AT the General Hospital, the appellant told the doctor who treated him that he was innocent and that he was just a victim of police brutality. The Doctor then asked the appellant to inform him anytime the case is being prosecuted.

The appellant denied the charge of conspiracy and armed robbery against him. The appellant also denied entering the

palace of Oore of Otun Ekiti, and stealing his properties or driving away his Mercedes Benz car. The appellant stated that he made his statement in Yoruba language and thumb-printed same. The appellant was seriously beaten and brutalized and was forced to thumb-print the statement. The Police did not read the appellant's statement to him. The appellant denied making any confessional statement relating to armed robbery in Ekiti.

The Police subjected the appellant and the others arrested with him to thorough search but nothing incriminating was found on him.

The appellant stated that he does not know the 2nd accused person who was brought along with him from Ibadan. The appellant further stated that he got to know the 2nd accused in cell. The appellant testified that he never met the Oore of Otun-Ekiti before except on the day he came to testify in Court. There was no time an identification parade was conducted before the appellant was brought to Court and the appellant was merely charged to Court based on suspicion and the charge was not properly investigated by the Police.

On 28th September, 2004, the appellant and one other accused person were arraigned before the high Court of Justice of Ekiti State sitting at Ado-Ekiti in charge No. HAD/6C/2003 on a four (4) count charge of conspiracy to commit armed robbery and armed robbery contrary to section 5(b) and punishable under section1(2)(a) of the Robbery and Firearms (special Provision) Act Cap. 398 Vol. xxii laws of the Federation of Nigeria 1990 as amended by Tribunals (certain consequential Amendments etc) Decree No. 62 of 1999.

The appellant pleaded not guilty to all the counts charge of the charge and charge proceeded to trial with respondent calling six (6) witnesses while the appellant testified for himself and called no witness.

The respondents version of the facts if as follows:

The respondents case was to the effect that on 3rd day of April, 2002, a gang of armed robbers (including the appellant and one Adeniyi Owolabi) while armed with guns invaded the palace of PW1, Oba J.A. Popoola, the Oore of Otun Ekiti and made away with his beaded crown, internation passport, $6,650 USD, 15 bundles of materials and his Mercedes Benz car which was used in packing the stolen items away from the Palace. He appellant (aqnd one Adeniyi Owolabi) committed another armed robbery on 28th July, 2002. The appellant was arrested in Ibadan and PW1's Mercedes Benz was discovered there. The appellant confessed to the Commission of the armed robbery in the palace of PW1 at Otun Ekiti.

The learned trial judge found the offence of conspiracy and armed robbery proved beyond reasonable doubt and convicted and sentenced the appellant and his co-accused, Adeniyi Owolabi. On appeal to the court below, the decision of the trial Court was affirmed and so dissatisfied, the appellant has come before this Court to ventilate his grievance.

Held *(Unanimously dismissing the appeal)*

1. *Duty on court when the case against the accused substantially depends on his identification*

   It needs to be said that the identity of the accused person who participated in a criminal offence as the one in this instance, armed robbery is crucial and must be given all the attention it requires. Whenever the case against an accused person depends wholly or substantially on the correctness of identification of the accused

which the defence alleges to be mistaken, the court must closely examine and receive with caution the evidence alleged before convicting the accused in reliance on the correctness of the identification.

Indeed the crucial issue is not whether or not the offence was committed but whether the identification of the person or persons accused are the actual perpetrators of the offence charged was correct. See Theophilus Eyesi & Ors v The State (2000) 15 NWLR (pt.691) 55 at 587; Ndidi v The State (2007) 13 NWLR (pt.1052) 632 at 651; Nwuzoke v The State (1988) 1 NWLR (pt.72) 529 at 532. *(P 155 paras A – D)*

2. *The definition of identification*

This Court had said in numerous occasions that the definition of identification is a whole series of facts and circumstances for which a witness or witnesses associate a defendant with the commission of the offence charged. Another way of saying so is that an identification parade is set up and it is to be limited to cases of real doubt or dispute as the identity of an accused person or his connection with the alleged offences.

That is, that the empanelling of the identification parade is not to be conducted for cosmetic reasons or for the mere asking.

In the case at hand, apart from what PW1 stated earlier, he had mentioned the appellant pointing the gun at his head and threatened to fire if PW1 did not bring the money.

Clearly this is one of those instances where the identification parade is dispensed with as the facts and circumstances were sufficient for the trial court to accept the evidence proffered that the accused was properly identified and situated at the place of operations and the material time. I place reliance on State v Aibangbee (1988) 3 NWLR (pt.84) 548 at 590-591; Attah v State (2010) AU FWLR (pt.549) 1224; Ogoalo v State (1991) 2 NWLR (pt.175) 509; Ikemson v State (1989) 3 NWLR (pt.110) 455 at 460-461; Otti v State (1993) 5 SCNJ 143. *(P 156 paras A – E)*

3. *Instances where identification parade will be dispensed with*
Again to be stated is that in our criminal administration system or jurisprudence there are instances where identification parade will be dispensed with which situations are thus:-
a. Where there is good and cogent evidence linking the accused person to the alleged crime on the day of the incident.
b. By the accused persons confessional statement in which he identified himself. I rely on Usung v State (2009) AU FWLR (pt.462) 1203; Bolanle v State (2005) 7 NWLR (pt.925) 431 at 452. *(P 156 paras F – H)*

4. *How to account for the absence of a public officer in a judicial proceedings*
Before the PW6 testified the inability of the respondent to procure the presence of Inspector Daniel Itsenewa had prompted a letter dated 23rd February, 2006 addressed to the learned trial Judge and signed by one Assistant Commissioner of Police, Sunday S. Arijorin, the Head of the absent officer's Department. In relation to that letter is the provision of section 50 of the Evidence Act, 2011 which stipulates thus:

> **"In any case of a person employed in the public service of the Federation or of a State who is required to give evidence for any purpose connected with a judicial proceeding. It shall be sufficient to account for his non-attendance at the hearing of the said judicial proceeding if there are produced to the court either a Federal or State Gazette or a telegram, an E-mail of Letter purporting to emanate from the head of his department, sufficiently explaining to the satisfaction of the court his apparent default."**
> *(Pp 157 – 158 paras H – C)*

Per Peter Odili (JSC)

It is therefore clear, that the appellant raising the issue of a breach of his fundamental right to fair hearing has been effectively answered since the provisions of section 50 of the Evidence Act, 2011 were met and section 36(1) of the 1999 constitution of the Federal Republic of Nigeria was not infringed upon. See Njoku v State (1992) 8 NWLR (pt.262) 714; Gaji v State (1975) 5 SC 6; Ukpe v State (2001) 18 WRN 84.

What the appellant is going on above can only be taken on his fair hearing right being infringed upon if he was not afforded the opportunity to prepare for his defence and no adequate explanation given as to why the Police Officer who obtained the confessional statement was absent at the hearing. In the full circumstances of the case at hand it is evident that no breach of fair hearing has occurred. See Emenegor v State (2010) AU FWLR (pt.511) 884; Abdullahi v Nigerianh Army (2010) 18 WRN 60. *(P 158 paras D – G)*

5. *A confessional statement is not in admissible by mere retraction*
On the confessional statement, EXHIBIT B which the appellant retracted, it has to be said that the appellant denying making the statement does not translate to the statement being inadmissible rather what would be the resultant effect is the weight the court would attach to it or its contents. See Ikemson v State (1989) 6 SCNJ 54; Shande v The State (2005) 22 NSCQR 756. *(P 158 paras G – H)*

6. *An accused can be convicted solely on his confessional statement*
The appellant had also the grouse that the trial court ought not to have convicted the accused/appellant on his confessional statement. On this it is necessary to say that an accused can be convicted solely on his confessional statement and that corroborative evidence is only desirable and not necessary.

A free and voluntary confession which is direct, positive and properly proved is sufficient to sustain a conviction and it is now well

settled that the nature of the corroborative evidence required does not need to be direct evidence that the accused person committed the offence. It is enough even if it is only circumstantial evidence connecting or tending to connect him with its commission and that is the case here. See Nguma v A.G. Imo State (2014) 16 WRN 1; Olalekan vs State (2001) 18 NWLR (PT.746) 793 at 824; Nwachukwu vs State (2004) 17 NWLR (pt.902 262; Durugo vs State (1995) 6 NWLR (pt.255) 525; Achabua vs The State (1976) 12 SC 63; Olabode vs State (2007) AU FWLR (pt.389) 1301.
(Pp 158 – 159 paras I – C)

7. *The connotation of conspiracy and how it is established.*
In respect to the matter of conspiracy the appellant's position is that the respondent had not established that appellant conspired with the other accused persons as there was no evidence to that effect. It has to be reiterated that conspiracy connotes agreement of the parties and in ascertaining that agreement, direct evidence is not indispensable since the meeting of the parties is usually done in secret and near impossible for an eye witness account. Therefore the evidence of conspiracy is usually a matter of inference by the court from surrounding facts and circumstances including the confessional statement of the appellant. See Adejobi vs State (2011) 6-7 SC (pt.iii) 65; State vs Olashehu Salami (2011) 12 SC (pt.iv) 191; Bright vs State (2012 1 SC (pt.ii) 47.

This court had said again and again that the ingredients of the offence of armed robbery are well stated in a long line of cases including Otti v State (1993) 5 SCNJ 143. It has been held that a crime could be established by all or any of three ways or methods which are namely:

1. By direct evidence of an eye witness.
2. By circumstantial evidence.
3. By confessional statement.

See Emeka v State (2002 14 NWLR (pt.734) 666 at 683.

These three ingredients have been established, firstly and secondly that there was a robbery or series of robberies, all the six prosecution witnesses were consistent in their evidence that there was a robbery in the palace of PW1 in the night of 3rd April, 2002 and in that PW1 was an eye witness.

Thirdly the respondent with overwhelming and uncontroverted evidence of prosecution witnesses especially that of PW1 EXHIBIT B and circumstantial evidence had established conclusively that appellant was one of the robbers who invaded the palace of PW1 on the night in question and carted away his valuables.

The appellant's confessional statement EXHIBIT B which is stronger than the evidence of an eye-witness as it came from the accused/appellant himself can secure the conviction of the appellant as in this instance the confession is positive, direct and has been proved properly.

I place reliance on Amoslivia v State (2009) Vol. 32 WRN 47; Mbeng v State (2010) Vol. 22 WRN page iii. *(Pp 159 – 160 paras D – D)*

8. *Concurrent findings cannot be tampered with*

In conclusion, the appellant's assertion that the evidence proffered was not properly evaluated was not proved by him as having asserted, the burden was on him to prove the assertion and in that the appellant failed woefully. I rely on State v Yusuf (2007) AU FWLR (pt.377) 1001 at 1010-1011; Igago v State (2001) 2 ACLR 104.

This is one of those cases where the concurrent findings of two courts below cannot be tampered with or interfered with either as there has been no miscarriage of justice or wrong application of the law by either or those two counts below. I place reliance on Onogwu v State (1993) 6 NWLR (pt.401) 276.

The invitation by the appellant for this court to revisit the evidence which has been the subject of the concurrent findings of the trial court and the Court of Appeal which came from very sound

reasoning cannot be accepted. All I see is an unmeritorious appeal and the only option available is to dismiss it. *(P 160 paras E – H)*

9. *An identification parade not necessary where there is a strong evidence of identification against the accused*

I seek to state that it is clear on the record that the testimony of PW1 was unchallenged on the identity of the appellant. The evidence fixed vividly and linked the appellant with the commission of the alleged offences.

Identification parade is only one way of establishing the identity of an accused. It is not the one and only way.

The testimony of PW1 at page 12 lines 16-23 is very much in point. There was also reasonable interaction between PW1 and the appellant which afforded him the full opportunity of observing the features of the appellant. Thus, the clear and uncontradicted eye witness accounts by PW1 also the identification of fixing the appellant at the scene was sufficient to have recognized him as one of the armed robbers who invaded his palace on 3/4/2002.

The appellant's confessional statement Exhibit B, wherein he admitted to the Oyo State Command of Nigeria Police of his involvement in an armed robbery incident at Otun Ekiti, when he was arrested in Ibadan, is also a very strong supporting evidence.
(Pp 162 – 163 paras H – C)

10. *Count can rely only on a confessional statement to convict and was no breach of fair hearing*

PW6 was a member of the investigating team led by Inspector Itsenewa, who recorded the statements of the suspects in this case (including the appellant). PW6 tried by his evidence to procure the presence of Inspector Itsenewa to testify but he could not come because he was involved in an accident and sustained injuries.

Appellant was present when prosecution witnesses testified, and he had the opportunity to have cross-examined them and

defended himself.

Accused could be convicted on his confessional statement alone even without any other corroboration. Corroboration is only desirable but not mandatory. Plethora of authorities are trite and numerous on this. *(P 163 paras E – G)*

11. *Evidence that is required to prove charge of conspiracy*

In a charge of conspiracy, all that is required is evidence of agreement of the parties, which could be express or implied.

Conspirators need not be seen together before conspiracy can be established. The conspirators can be circumstantially linked with the conspiracy.

In the appeal before us, the case of the prosecution rested heavily on (1) the testimony of PW1 an eye witness/victim of the violent robbery or 3rd April, 2002; (2) Confessional statement of the appellant; and (3) There are also the circumstantial evidence adduced through other witnesses linking the appellant with the alleged crimes.

All the six prosecution witnesses were consistent in their evidence that there was a robbery in the palace of PW1 in the night of 3/4/2002. The direct eye witness PW1 was unequivocal in his testimony that the robbers were armed with guns when they invaded his palace. He maintained that the robbers were led by the appellant who was holding a short gun. Also the appellant pointed a gun at his head to coerce him to yield to his unholy demand.

For all intents and purposes, it is obvious that the respondent has the overwhelming and uncontroverted evidence of PW1, Exhibit B and also circumstantial evidence all in its favour especially the appellant's confession in Exhibit B during trial without objection.

Confession is stronger than evidence of an eye-witness because it came from the accused's mouth. *(Pp 163 – 164 Paras H – E)*

Per Sanusi (JSC)

I must stress here that identification parade is not a sine qua non to a conviction of a crime alleged. The conduct of identification parade is only required in the following circumstances:

> **(1) Where the victim did not know the accused before the robbery attack and that he duly came into contact with him for the first time during the incident.**
>
> **(2) Where the witness or the victim was confronted by the offender for a very short time, and**
>
> **(3) Where due to time constraint and circumstance, the victim did not have full opportunity of observing the features of the accused or offender.**

See Ukpabi v State (2004) 11 NWLR (pt.884) 439; Ebri v State (2004) NWLR (p.885) 589.

The purpose of identification evidence is simply to ascertain that the offender/suspect is actually the one responsible in committing the crime. In a situation where a trial court is faced with the issue of identification evidence, all that the trial court is to do is to closely examine the evidence with great caution and it must ascertain that the accused person whose identity is in issue was the actual offender. Ukpabi v State (supra). It is worthy of note, that in this case there was evidence of reasonable contact or interaction between the appellant and the victim, (PW1), Who had duly observed his physique or features which said evidence given by PW1, (the victim), was not in any way challenged and such evidence and others had actually fixed the appellant at the scene of the crime i.e. the palace on 3/4/2002.

Also adduced, is the confessional statement of the appellant Exhibit B, wherein, the appellant owned up his involvement in the crime to the Oyo State Police Command when he was arrested at Ibadan. The law is settled, that where an accused person by his confession, has identified himself, as in this instant case, there would not be any need for any further identification parade. See the case of Archibong v State (2004) 1 NWLR (pt.855) 488. *(Pp 165 – 166 paras A – A)*

Nigerian cases cited in this judgment

Abdullahi v Nigerianh Army (2010) 18 WRN 60.
Achabua v The State (1976) 12 SC 63,
Adejobi v State (2011) 6-7 SC (pt.iii) 65,
Adeleke v The State (2013) 16 NWLR (p. 1381) 556,
Afolalu v The State (2010) 43 NSCQR 227,
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Ani v The State (2003) 11 NWLR (PT.830) 145,
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Attah v State (2010) AU FWLR (pt.549) 1224,
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Ndidi v The State (2007) 13 NWLR (pt.1052) 632,
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Nsofor v The State (2004 18 NWLR (PT.905) 292,
Nwachukwu v State (2004) 17 NWLR (pt.902 262,

Nwomukoro v The State (1995) 1 NWLR (pt.372) 432,
Nwuzoke v The State (1988) 1 NWLR (pt.72) 529,
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Ogoala v State (1991) 2 NWLR (pt. 175) 509,
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Onuoha v State (1988) 3 NWLR (PT.83) 460,
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State v Aigbangbe (1988) 3 NWLR (pt.84) 548,
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State v Salami (2011)12 Sc (pt.iv) 191
State v Yusuf (2007) AU FWLR (pt.377) 1001,
Suberu v The State (2010) 41 (pt.2) NSCOR 1169,
Sule v State (2009) AU FWLR (pt.481) 809,
Theophilus Eyesi and 2 Ors v State (2000) 15 NWLR (pt.691) 555,
Ukpabi v State,
Ukpe v The State (2001) 18 WRN 84,
Usung v State (2009) AU FWLR (pt.462) 1203,
Uwaezuoke v The State (1988) 1 NWLR (pt.72) 529

Nigerian cases cited in this judgment

Evidence Act, 2011section 167(d)
constitution of the Federal Republic of Nigeria 1999 section 36(1)
Robbery and Firearms (special Provision) Act Cap. 398 section1(2)(a)

REPRESENTATIONS:

J.C. Okafor Esq. for appellant.
Gbemiga Adaramola DPP Ekiti State and with him Moshood Abiola, Legal Officer.

MARY UKAEGO PETER-ODILI, (JSC) (Delivering the lead

judgment): This is an appeal against the judgment of the Court of Appeal sitting at Ado-Ekiti delivered on the 16th December, 2014 where the Court of Appeal or Court below or the lower Court affirmed the trial Court's decision or M.O. Abodunde J on the 25th June, 2013, conviction and sentence of appellant to death by hanging for the offences of conspiracy and armed robbery.

The panel of the Court below is thus:- A.G. Mshelia, F.O. Akinbami and B.M. Ugo JJCA with the lead judgment anchored by M.G. Mshelia JCA.

The facts of the case leading to the appeal are stated hereunder, viz:-

Background facts:

The version as put across by the appellant is thus:

> **The appellant was a trader at Challenge in Ibadan. In 2002, the Landlord of the place where the appellant was selling his wares at Challenge in Ibadan asked the appellant to quit the land where the appellant was selling his wares. Although the notice to quit was sufficient, the appellant and the other traders had no opportunity to rent another shop.**
>
> **The Landlord enlisted or contracted members of OPC to chase the appellant and other traders away from the land whereby a misunderstanding/fight ensued between members of OPC and the traders. The Police intervened and transferred the appellant and others that were arrested with him to the Challenge Police Station in Ibadan.**
>
> **Later on, the appellant and seven other persons that were arrested with him were removed from the cell at Challenge Police Station Ibadan and transferred to Ekiti. On getting to Ekiti State, the appellant was accused by the**

Police as being one of the armed robbers who operated in Ekiti. The Police demanded to sum of N50,000.00 (Fifty Thousand Naira) each from the appellant and the other suspects for them to be released. The appellant did not have the sum of N50,000.00 to pay but the other suspects who paid were released.

The Police threatened to deal severely with the appellant if he failed to pay the bail fees of N50,000.00. At about 1.00am the next day, the cell was opened and the appellant was brought out.

The appellant was severely beaten by Policemen and thereafter the appellant was hung on a ceiling fan and hit with a cutlass on the head but the appellant raised his hands in defence and the cutlass cut the appellant's palm and injured him.

When the appellant started bleeding, the Police took him to the General Hospital, Ado-Ekiti for treatment. AT the General Hospital, the appellant told the doctor who treated him that he was innocent and that he was just a victim of police brutality. The Doctor then asked the appellant to inform him anytime the case is being prosecuted.

The appellant denied the charge of conspiracy and armed robbery against him. The appellant also denied entering the palace of Oore of Otun Ekiti, and stealing his properties or driving away his Mercedes Benz car. The appellant stated that he made his statement in Yoruba language and thumb-printed same. The appellant was seriously beaten and brutalized and was forced to thumb-print the statement. The Police did not read the

appellant's statement to him. The appellant denied making any confessional statement relating to armed robbery in Ekiti. led the charge of conspiracy and armed robbery against him. The appellant also denied entering the palace of Oore of Otun Ekiti, and stealing his properties or driving away his Mercedes Benz car. The appellant stated that he made his statement in Yoruba language and thumb-printed same. The appellant was seriously beaten and brutalized and was forced to thumb-print the statement. The Police did not read the appellant's statement to him. The appellant denied making any confessional statement relating to armed robbery in Ekiti.

The Police subjected the appellant and the others arrested with him to thorough search but nothing incriminating was found on him.

The appellant stated that he does not know the 2nd accused person who was brought along with him from Ibadan. The appellant further stated that he got to know the 2nd accused in cell. The appellant testified that he never met the Oore of Otun-Ekiti before except on the day he came to testify in Court. There was no time an identification parade was conducted before the appellant was brought to Court and the appellant was merely charged to Court based on suspicion and the charge was not properly investigated by the Police.

On 28th September, 2004, the appellant and one other accused person were arraigned before the high Court of Justice of Ekiti State sitting at Ado-Ekiti in charge No. HAD/6C/2003 on a four (4) count charge of conspiracy to commit armed robbery and armed robbery contrary to

section 5(b) and punishable under section1(2)(a) of the Robbery and Firearms (special Provision) Act Cap. 398 Vol. xxii laws of the Federation of Nigeria 1990 as amended by Tribunals (certain consequential Amendments etc) Decree No. 62 of 1999.

The appellant pleaded not guilty to all the counts charge of the charge and charge proceeded to trial with respondent calling six (6) witnesses while the appellant testified for himself and called no witness.

The respondents version of the facts if as follows:

The respondents case was to the effect that on 3rd day of April, 2002, a gang of armed robbers (including the appellant and one Adeniyi Owolabi) while armed with guns invaded the palace of PW1, Oba J.A. Popoola, the Oore of Otun Ekiti and made away with his beaded crown, internation passport, $6,650 USD, 15 bundles of materials and his Mercedes Benz car which was used in packing the stolen items away from the Palace. He appellant (aqnd one Adeniyi Owolabi) committed another armed robbery on 28th July, 2002. The appellant was arrested in Ibadan and PW1's Mercedes Benz was discovered there. The appellant confessed to the Commission of the armed robbery in the palace of PW1 at Otun Ekiti.

The learned trial judge found the offence of conspiracy and armed robbery proved beyond reasonable doubt and convicted and sentenced the appellant and his co-accused, Adeniyi Owolabi. On appeal to the court below, the decision of the trial Court was affirmed and so dissatisfied, the appellant has come before this Court to ventilate his grievance.

On the 5th October, 2017 date of hearing, learned Counsel for the

A appellant, J. C. Okafor Esq. adopted his brief of argument filed on the 29th September, 2015 and in it distilled five issues of the determination of the appeal which are as follows:

B **1) Whether the learned justices of the court of Appeal were right in holding that the failure to conduct an identification parade to ascertain the identity of the person who committed the alleged offence in the**
C **instant case was not fatal to the prosecution's case (Ground 1).**

2) Whether the learned justices of the Court of Appeal
D **were right in holding that the appellant conspired with the other co-accused persons to commit the offence of armed robbery. (Grounds 2 and 3).**

3) Whether the learned justices of the Court of Appeal
E **were right in holding that the prosecution had proved the offence of armed robbery against the appellant beyond reasonable doubt and that failure of the prosecution to tender any of the items**
F **allegedly stolen but which were recovered was not fatal to the prosecution's case. (Grounds 4 and 5).**

4) Whether the learned justices of the Court of Appeal
G **were right in holding that the alleged confessional statement (Exhibit "B") had passed the test of admissibility and that the learned trial judge was right to have admitted the statement in evidence in**
H **spite of the fact that the Police officer (Inspector Itsenewa) who obtained the alleged confessional statement was not called as a witness by the prosecution. (Grounds 6 and 7).**

5) Whether the learned justices of the Court of Appeal
I **were right in holding that the trial court properly evaluated the defence of the appellant and that the**

non tendering of anonymous letters referred to by the PW1 was unfounded. (Grounds 8 and 9).

The Director of Public Prosecution (DPP) of Ekiti State, Gbemiga Adaramola Esq. for the respondent adopted its brief of argument filed on 29th June, 2017 and deemed filed on 5th October, 2017. In it were crafted three issues for determination which are thus:

> **4) Whether the Court of Appeal was not right in upholding the findings of the trial Court that failure to conduct identification parade was not fatal to the prosecution's case.**
>
> **5) Whether the Court of Appeal was not right in holding that EXHIBIT B was properly and legally admitted by the trial court.**
>
> **6) Whether the Court of Appeal was not right in upholding the decision of the trial court that the offences of conspiracy and armed robbery of 3rd April, 2002 were proved beyond reasonable doubt against the appellants by the prosecution.**

The issues identified by the respondent captured the necessary questions and are apt. I shall use them in answering the questions in this appeal and all together.

Issues 1, 2 and 3:

> **(1) Whether the Court of Appeal was not right in upholding the findings of the trial court that failure to conduct identification parade was not fatal to the prosecution's case.**
>
> **(2) Whether the Court of Appeal was not right in holding that EXHIBIT B was properly and legally**

admitted by the trial court.

(3) Whether the Court of Appeal was not right in upholding the decision of the trial court that the offences of conspiracy and armed robbery of 3rd April, 2002 were proved beyond reasonable doubt against the appellant by the prosecution.

Learned counsel for the appellant, J. C. Okafor Esq. contended that the court below was wrong in holding that the failure of the prosecution to conduct an identification parade to ascertain the identity of the person who committed the alleged offence in the instant case was not fatal to the prosecution's case. That whenever the case against an accused person depends wholly or substantially on the correctness of identification of the accused which the defence alleges to be mistaken, the court must closely examine and receive with caution the evidence alleged before convicting the accused in reliance on the correctness of the identification. That the crucial issue in a criminal case is not whether or not the offence was committed but whether the identification of the actual perpetrators of the offence charged was correct. He cited the cases of: **Theophilus Eyesi and 2 Ors v State (2000) 15 NWLR (pt.691) 555 at 587, Ndidi v State (2007) 13 NWLR (pt.1052) 632 at 651, Uwaezuoke v The State (1988) 1 NWLR (pt.72) 529 at 532, Onuoha v State (1988) 3 NWLR (PT.83) 460 AT 477.**

Mr. Okafor of counsel for the appellant stated on that the court below was in grave error in holding that the appellant conspired with other co-accused persons to commit the offence of armed robbery when the prosecution failed to show that there was a meeting of the minds of two or more persons to do or cause to be done an illegal act or legal act by illegal means. He cited **Obiakor v The State (2002) 10 NWLR (pt. 776) 612 at 628.**

Also contended for the appellant is that EXHIBIT B the alleged confessional statement of the appellant did not pass the admissibility test and so the exhibit is inadmissible. That there is no circumstantial evidence on record which points irresistibly to the guilt of the appellant visa-vis the crime of conspiracy. He relied on **Adeleke v The State (2013) 16 NWLR**

(p. 1381) 556 at 586, 587; Afolalu v The State (2010) 43 NSCQR 227 at 243-244; Suberu v The State (2010) 41 (pt.2) NSCOR 1169 at 1205; Ani v The State (2003) 11 NWLR (PT.830) 145.

Learned counsel for the appellant submitted that the evidence of PW6 is in favour of the appellant as PW6 was not the investigating Police Officer. That the failure of the prosecution to tender the statement of the appellant made in Yoruba brought into operation section 167(d) of the Evidence Act, 2011; which leads to the conclusion that the prosecution kept the statement away because it would have been in favour of the appellant and so the standard of the proof beyond reasonable doubt cannot be taken to have been discharged by the respondent. He cited **Njoku v The State (1993) 6 NWLR (pt.299) 272 at 285; Idowu v The State (2000) 7 SC (pt.2) 50 at 79; Oforlete v The State (2007) 7 SC (pt.1) 80 at 95** etc.

It was contended that the failure of the prosecution to tender any of the items allegedly stolen which were recovered cast a serious doubt on the case of the prosecution. He referred to **Nwomukoro v The State (1995) 1 NWLR (pt.372) 432 at 44.**

That the failure of the respondent to call the investigating Police Officer who obtained the alleged confessional statement of the appellant greatly prejudiced the prosecution's case.

For the appellant, it was submitted that the learned trial judge did not evaluate the defence of the appellant before convicting him.

In response, learned counsel for the respondent, submitted that identification parade is only one way of establishing the identity of an accused person and that in the case of hand the unchallenged testimony of PW1 fixed and hooked the appellant with the commission of the alleged offences and no need for an identification parade.

He referred to **State v Aigbangbe (1988) 3 NWLR (pt.84) 548 at 590-591; Attah v State (2010) AU FWLR (pt.549) 1224; Ogoala v State (1991) 2 NWLR (pt. 175) 509; Ikemson v State (1989) 3 NWLR (pt.110) 455 at 460-461; Otti v State (1993) 5 SCNJ 1433.**

The learned DPP contended that there are instances when the presence of a person who is required to give evidence for any purpose connected with a judicial proceedings may be dispensed with under our

criminal justice system and one of the instances being when the non-attendance has been sufficiently explained to the court and the court is satisfied with the explanation as in the instant case. He cited **Njoku v State (1992) 8 NWLR** (pt.262) 714; **Gaji v State (1975) 5 Sc 61; Ukpe v The State (2001 18 WRN 84** etc.

He further submitted that the issue of admissibility or otherwise of the confessional statement resiled by the appellant does not come in as appellant merely retracted from the statement and did not go into the voluntariness and so nothing stopped the trial court ffrom admitting the statement. He cited **Ikemson v State (1989) 6 SCNJ 54; Shande v The State (2005) 22 NSCQR 756; Nsofor v The State (2004 18 NWLR (PT.905) 292; Sule v State (2009) AU FWLR (pt.481) 809 at 831** etc.

That there is corroborative evidence connecting the appellant with the offences he is charged with and made EXHIBIT B possible. He cited **Duugo v The State (1995) 6 NWLR (pt.255) 525; Achabua v The State (1976) 12 SC 63; Olabode v State (2007) AU FWLR (pt. 389) 1301.**

On the count of conspiracy, the appellant stated that there was enough in the evidence of prosecution from which the agreement or meeting of the minds between appellant and his co-accused could be inferred. He referred to **Adejobi v State (2011) 6-7 SC (pt.iii) 65; Bright v State (2012 ISC (pt.ii) 47; State v Salami (2011)12 Sc (pt.iv) 191.**

That the prosecution proved the essential ingredients of the offences of conspiracy to commit armed robbery and armed robbery beyond reasonable doubt.

The thrust of the appellant's case is that there was no identification parade as the identity of the culprits of the armed robbery was not ascertained and so appellant being pointed as one of the robbers was faulty.

Also that the statement, EXHIBIT B ought not to have been admitted in evidence as the Police Officer, Inspector Itsenewa who obtained it was not called as a witness by the prosecution and subjected to cross-examination by the appellant.

The respondent posited that what the prosecution put across was sufficient in the identification of the appellant as part of the armed robbery

attack and there was no need for an identification parade.

It needs to be said that the identity of the accused person who participated in a criminal offence as the one in this instance, armed robbery is crucial and must be given all the attention it requires. Whenever the case against an accused person depends wholly or substantially on the correctness of identification of the accused which the defence alleges to be mistaken, the court must closely examine and receive with caution the evidence alleged before convicting the accused in reliance on the correctness of the identification.

Indeed the crucial issue is not whether or not the offence was committed but whether the identification of the person or persons accused are the actual perpetrators of the offence charged was correct. See **Theophilus Eyesi & Ors v The State (2000) 15 NWLR (pt.691) 55 at 587; Ndidi v The State (2007) 13 NWLR (pt.1052) 632 at 651; Nwuzoke v The State (1988) 1 NWLR (pt.72) 529 at 532.**

"On the night of the 3rd of April, 2002 I was sleeping in my room. I heard a voice a very loud bang. I said who is that? I heard a voice which replied "Awa ni o" Eyin wo "Awa ole ni o" come and open the door if not, you will be responsible for the consequence. I dressed up with my wife and the door was opened. 1st to come in after the door was opened was one of my security personnel who had his hands tied to the back and his body was soaked with blood. I saw three other people come in heavily armed with funs. I was able to identify them. They were led by the 1st accused person (appellant) he came in and had a short gun with him…"

"They asked for the key of my vehicle, Mercedes Benz 280. I was asked to lie down on the bed, after about 2 or 3 minutes they returned and said that they cannot start the car, I told them that I can assist with starting the car facing the gate, so they can leave. All items stolen were put in the

car and they drove off. On the next day I wrote a statement at the Police Station."

This Court had said in numerous occasions that the definition of identification is a whole series of facts and circumstances for which a witness or witnesses associate a defendant with the commission of the offence charged. Another way of saying so is that an identification parade is set up and it is to be limited to cases of real doubt or dispute as the identity of an accused person or his connection with the alleged offences.

That is, that the empanelling of the identification parade is not to be conducted for cosmetic reasons or for the mere asking.

In the case at hand, apart from what PW1 stated earlier, he had mentioned the appellant pointing the gun at his head and threatened to fire if PW1 did not bring the money.

Clearly this is one of those instances where the identification parade is dispensed with as the facts and circumstances were sufficient for the trial court to accept the evidence proffered that the accused was properly identified and situated at the place of operations and the material time. I place reliance on **State v Aibangbee (1988) 3 NWLR (pt.84) 548 at 590-591; Attah v State (2010) AU FWLR (pt.549) 1224; Ogoalo v State (1991) 2 NWLR (pt.175) 509; Ikemson v State (1989) 3 NWLR (pt.110) 455 at 460-461; Otti v State (1993) 5 SCNJ 143.**

Again to be stated is that in our criminal administration system or jurisprudence there are instances where identification parade will be dispensed with which situations are thus:

c. Where there is good and cogent evidence linking the accused person to the alleged crime on the day of the incident.

d. By the accused persons confessional statement in which he identified himself. I rely on Usung v State (2009) AU FWLR (pt.462) 1203; Bolanle v State (2005) 7 NWLR (pt.925) 431 at 452.

In the case of the appellant's confessional statement, EXHIBIT B, the appellant's contention is that the statement ought not to be admitted in evidence talk less of admitting it in evidence and utilizing in the conviction of the appellant.

The grouse of the appellant is that the Police Officer, Inspector Itsenewa who obtained the statement was not called to testify and of course had his testimony under cross-examination before the statement could be accepted and made use of. The facts in this case at hand are that Corporal John Aiyetigha testified as PW6 and through him the said statement was admitted as exhibit.

I shall recast some excerpts of the testimony of PW6 for elucidation for which transpired and that is thus:

> **"The suspects were released to Ekiti State Command. In the Command, Daniel Itsenewa took the statement of the suspects. He was handling the case until he was transferred. I was sent to Delta State Command to fetch him to testify in this case.**
>
> **....Abuja was contacted and I was also informed that he is with Delta State Police Command. On the next visit, I was able to trace him to Efun and Ekpan involved in an accident. The D.P.O. said that the sustained injuries on both arms and as such have (sic) not been reporting for duty regularly. That they do not know the village he was taken to for treatment. This now made the AC CID to write a letter to be presented to the court in respect of the case."**

Before the PW6 testified the inability of the respondent to procure the presence of Inspector Daniel Itsenewa had prompted a letter dated 23rd February, 2006 addressed to the learned trial Judge and signed by one Assistant Commissioner of Police, Sunday S. Arijorin, the Head of the

absent officer's Department. In relation to that letter is the provision of section 50 of the Evidence Act, 2011 which stipulates thus:

> **"In any case of a person employed in the public service of the Federation or of a State who is required to give evidence for any purpose connected with a judicial proceeding. It shall be sufficient to account for his non-attendance at the hearing of the said judicial proceeding if there are produced to the court either a Federal or State Gazette or a telegram, an E-mail of Letter purporting to emanate from the head of his department, sufficiently explaining to the satisfaction of the court his apparent default."**

It is therefore clear, that the appellant raising the issue of a breach of his fundamental right to fair hearing has been effectively answered since the provisions of section 50 of the Evidence Act, 2011 were met and section 36(1) of the 1999 constitution of the Federal Republic of Nigeria was not infringed upon. See **Njoku v State (1992) 8 NWLR (pt.262) 714; Gaji v State (1975) 5 SC 6; Ukpe v State (2001) 18 WRN 84.**

What the appellant is going on above can only be taken on his fair hearing right being infringed upon if he was not afforded the opportunity to prepare for his defence and no adequate explanation given as to why the Police Officer who obtained the confessional statement was absent at the hearing. In the full circumstances of the case at hand it is evident that no breach of fair hearing has occurred.

See **Emenegor v State (2010) AU FWLR (pt.511) 884; Abdullahi v Nigerianh Army (2010) 18 WRN 60.**

On the confessional statement, EXHIBIT B which the appellant retracted, it has to be said that the appellant denying making the statement does not translate to the statement being inadmissible rather what would be the resultant effect is the weight the court would attach to it or its contents. See **Ikemson v State (1989) 6 SCNJ 54; Shande v The State (2005) 22 NSCQR 756.**

The appellant had also the grouse that the trial court ought not to have

convicted the accused/appellant on his confessional statement. On this it is necessary to say that an accused can be convicted solely on his confessional statement and that corroborative evidence is only desirable and not necessary.

A free and voluntary confession which is direct, positive and properly proved is sufficient to sustain a conviction and it is now well settled that the nature of the corroborative evidence required does not need to be direct evidence that the accused person committed the offence. It is enough even if it is only circumstantial evidence connecting or tending to connect him with its commission and that is the case here. See **Nguma v A.G. Imo State (2014) 16 WRN 1; Olalekan v State (2001) 18 NWLR (PT.746) 793 AT 824; Nwachukwu v State (2004) 17 NWLR (pt.902 262; Durugo v State (1995) 6 NWLR (pt.255) 525; Achabua v The State (1976) 12 SC 63; Olabode v State (2007) AU FWLR (pt.389) 1301.**

In respect to the matter of conspiracy the appellant's position is that the respondent had not established that appellant conspired with the other accused persons as there was no evidence to that effect. It has to be reiterated that conspiracy connotes agreement of the parties and in ascertaining that agreement, direct evidence is not indispensable since the meeting of the parties is usually done in secret and near impossible for an eye witness account. Therefore the evidence of conspiracy is usually a matter of inference by the court from surrounding facts and circumstances including the confessional statement of the appellant. See **Adejobi v State (2011) 6-7 SC (pt.iii) 65; State v Olashehu Salami (2011) 12 SC (pt.iv) 191; Bright v State (2012 1 SC (pt.ii) 47.**

On whether or not the respondent advanced sufficient evidence, direct, confessional and circumstantial to prove the alleged offences against the appellant.

This court had said again and again that the ingredients of the offence of armed robbery are well stated in a long line of cases including **Otti v State (1993) 5 SCNJ 143.** It has been held that a crime could be established by all or any of three ways or methods which are namely:

4. By direct evidence of an eye witness.
5. By circumstantial evidence.
6. By confessional statement.

A

See **Emeka v State (2002 14 NWLR (pt.734) 666 at 683.**

These three ingredients have been established, firstly and secondly that there was a robbery or series of robberies, all the six prosecution witnesses
B were consistent in their evidence that there was a robbery in the palace of PW1 in the night of 3rd April, 2002 and in that PW1 was an eye witness.

Thirdly the respondent with overwhelming and uncontroverted evidence of prosecution witnesses especially that of PW1 EXHIBIT B and
C circumstantial evidence had established conclusively that appellant was one of the robbers who invaded the palace of PW1 on the night in question and carted away his valuables.

The appellant's confessional statement EXHIBIT B which is stronger than
D the evidence of an eye-witness as it came from the accused/appellant himself can secure the conviction of the appellant as in this instance the confession is positive, direct and has been proved properly.

I place reliance on **Amoslivia v State (2009) Vol. 32 WRN 47;**
E **Mbeng v State (2010) Vol. 22 WRN page iii.**

In conclusion, the appellant's assertion that the evidence proffered was not properly evaluated was not proved by him as having asserted, the burden was on him to prove the assertion and in that the appellant failed
F woefully. I rely on **State v Yusuf (2007) AU FWLR (pt.377) 1001 at 1010-1011; Igago v State (2001) 2 ACLR 104.**

This is one of those cases where the concurrent findings of two courts below cannot be tampered with or interfered with either as there has
G been no miscarriage of justice or wrong application of the law by either or those two counts below. I place reliance on **Onogwu v State (1993) 6 NWLR (pt.401) 276.**

The invitation by the appellant for this court to revisit the evidence which
H has been the subject of the concurrent findings of the trial court and the Court of Appeal which came from very sound reasoning cannot be accepted. All I see is an unmeritorious appeal and the only option available is to dismiss it.

I hereby dismiss this appeal as I uphold the decision of the Court of
I Appeal which appointed the judgment of the trial High Court.

Mary Ukaego Peter-Odili

Justice, Supreme Court.

OLABODE RHODES-VIVOUR, (JSC): I have had the advantage of reading in draft the judgment of my learned brother, Peter-Odili, JSC. I aqgree that the appeal lacks merit. It is hereby also dismissed by me. The judgment of the Court of Appeal is affirmed.

Olabode Rhodes-Vivour
Justice Supreme Court

CLARA BATA OGUNBIYI, (JSC): The appeal is against the judgment of Court of Appeal Ado-Ekiti delivered on 16th December, 2014, wherein the lower court affirmed the trial court's conviction and sentence of the appellant to death by hanging form offence of conspiracy and armed robbery. The Court of Appeal affirmed the judgment of the trial court and hence appeal to this court.

Bried Facts

The appellant's side of the story was that he along with others occupied the premises of the Landlord where they sold in Ibadan. They given a quit notice to vacate but they did not. As a consequence, the landlord enlisted or contracted members of OPC to chase away the appellant and his comrade4s from the premises and misunderstanding ensued between the members of OPC and the traders. The police intervened and transferred the appellant and his friends who were arrested with him to Challenge Police Station.

It was alleged that appellant and 1 other (Adeniji Owolabi) while armed with guns invaded the palace of PW1 Oba J.A. Popoola of Ekiti on 3/4/2002 and made away with his beaded gown, international passport, $6,650 USD, 15 bundles of material and his Mercedes Benz car, which was used in packing the stolen items; that the appellant and the same Adeniji Owolabi also committed another armed robbery on 28/7/2002. Appellant was arrested in Ibadan and PW1's Mercedes was discovered there. The appellant confessed to the commission of the armed robbery in the Palace of PW1 at Otun Ekiti.

They were arraigned on four counts charge of conspiracy and armed

A robbery which occurred differently on 3/4/2002 and 28/7/2002.

The trial court convicted the appellant, his co-accused and sentenced them accordingly on account of the robbery committed on 3/4/2002. The Appellant was however acquitted and discharged of the armed robbery of
B 28/7/2002. On appeal against the judgment, the Court of Appeal unanimously dismissed the appeal and hence the appeal now before us.

Appellant formulated 5 issues and which were condensed into 3 by the Respondent. I will consider the Respondent's 3 issues as sufficient:-

C

1) Whether the Court of Appeal was right in upholding the findings of the trial court that failure to conduct identification parade was not fatal to the
D **prosecution's case?**

2) Whether Court of Appeal was right in holding that Exhibit B was properly and legally admitted by the
E **trial court.**

3) Whether the Court of Appeal was right in upholding the decision of trial court that the offences of conspiracy and armed robbery of
F **3/4/2002 were proved beyond reasonable doubt against the appellant by the prosecution?**

Issue 1

G Appellant argued that the identification of the appellant as one of the armed robbers who allegedly dispossessed PW1 of his valuables was in serious doubt; that identification parade ought to have been conducted to ascertain the true identity of the alleged robbers. The failure to do counsel argues is
H fatal to the prosecution's case.

I seek to state that it is clear on the record that the testimony of PW1 was unchallenged on the identity of the appellant. The evidence fixed vividly and linked the appellant with the commission of the alleged
I offences.

Identification parade is only one way of establishing the identity of

an accused. It is not the one and only way.

The testimony of PW1 at page 12 lines 16-23 is very much in point. There was also reasonable interaction between PW1 and the appellant which afforded him the full opportunity of observing the features of the appellant. Thus, the clear and uncontradicted eye witness accounts by PW1 also the identification of fixing the appellant at the scene was sufficient to have recognized him as one of the armed robbers who invaded his palace on 3/4/2002.

The appellant's confessional statement Exhibit B, wherein he admitted to the Oyo State Command of Nigeria Police of his involvement in an armed robbery incident at Otun Ekiti, when he was arrested in Ibadan, is also a very strong supporting evidence.

Issue 2

Appellant contends that Exhibit B did not pass the test of admissibility; also that the Police Officer who recorded same was not called as a witness to test the veracity of the Exhibit.

PW6 was a member of the investigating team led by Inspector Itsenewa, who recorded the statements of the suspects in this case (including the appellant). PW6 tried by his evidence to procure the presence of Inspector Itsenewa to testify but he could not come because he was involved in an accident and sustained injuries.

Appellant was present when prosecution witnesses testified, and he had the opportunity to have cross-examined them and defended himself.

Accused could be convicted on his confessional statement alone even without any other corroboration. Corroboration is only desirable but not mandatory. Plethora of authorities are trite and numerous on this.

Issue 3

Whether prosecution proved the appellant guilty beyond reasonable doubt of the charge of 3/4/2002?

In a charge of conspiracy, all that is required is evidence of agreement of the parties, which could be express or implied.

Conspirators need not be seen together before conspiracy can be established. The conspirators can be circumstantially linked with the conspiracy.

In the appeal before us, the case of the prosecution rested heavily on (1) the testimony of PW1 an eye witness/victim of the violent robbery or 3rd April, 2002; (2) Confessional statement of the appellant; and (3) There are also the circumstantial evidence adduced through other witnesses linking the appellant with the alleged crimes.

All the six prosecution witnesses were consistent in their evidence that there was a robbery in the palace of PW1 in the night of 3/4/2002. The direct eye witness PW1 was unequivocal in his testimony that the robbers were armed with guns when they invaded his palace. He maintained that the robbers were led by the appellant who was holding a short gun. Also the appellant pointed a gun at his head to coerce him to yield to his unholy demand.

For all intents and purposes, it is obvious that the respondent has the overwhelming and uncontroverted evidence of PW1, Exhibit B and also circumstantial evidence all in its favour especially the appellant's confession in Exhibit B during trial without objection.

Confession is stronger than evidence of an eye-witness because it came from the accused's mouth .

With the few words of mine and relying particularly on the fuller reasoning of my learned brother **Mary Ukaego Peter-Odili, JSC,** I also subscribe that this appeal lacks merit and is hereby dismissed. The judgment of the lower court is affirmed also by me.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): I read before now the leading judgment of my learned brother Mary Pater-Odili, JSC just delivered. The facts of the case leading to this appeal have been ably summarized by my noble lord and need not be repeated here. I entirely agree with her reasoning and conclusion on the fate of this appeal which is an outright dismissal for being devoid of merit. I however would like to comment on the first issue raised

by the appellant that had to do with whether the lower court's finding that trial court was right when it held that failure to conduct identification parade in the case was not fatal to the prosecution's case.

I must stress here that identification parade is not a sine qua non to a conviction of a crime alleged. The conduct of identification parade is only required in the following circumstances:

> **(4) Where the victim did not know the accused before the robbery attack and that he duly came into contact with him for the first time during the incident.**
>
> **(5) Where the witness or the victim was confronted by the offender for a very short time, and**
>
> **(6) Where due to time constraint and circumstance, the victim did not have full opportunity of observing the features of the accused or offender.**

See **Ukpabi v State (2004) 11 NWLR (pt.884) 439; Ebri v State (2004) NWLR (p.885) 589.**

The purpose of identification evidence is simply to ascertain that the offender/suspect is actually the one responsible in committing the crime. In a situation where a trial court is faced with the issue of identification evidence, all that the trial court is to do is to closely examine the evidence with great caution and it must ascertain that the accused person whose identity is in issue was the actual offender. **Ukpabi v State** (supra). It is worthy of note, that in this case there was evidence of reasonable contact or interaction between the appellant and the victim, (PW1), Who had duly observed his physique or features which said evidence given by PW1, (the victim), was not in any way challenged and such evidence and others had actually fixed the appellant at the scene of the crime i.e. the palace on 3/4/2002.

Also adduced, is the confessional statement of the appellant Exhibit B, wherein, the appellant owned up his involvement in the crime to the

Oyo State Police Command when he was arrested at Ibadan. The law is settled, that where an accused person by his confession, has identified himself, as in this instant case, there would not be any need for any further identification parade. See the case of **Archibong v State (2004) 1 NWLR (pt.855) 488.**

Thus, with these few comments, I am at one with the lower court, when it affirmed the finding of the trial court that the non-conduct of identification parade by the respondent was not fatal to its case.

In the result, for these few remarks and the more detailed and much fuller reasoning in the lead judgment of my learned brother **Peter-Odili, JSC,** I would also dismiss this appeal for being meritless. I affirm the judgment of the lower court in which it had also affirmed the judgment of the trial court. Appeal is equally dismissed by me.

Amiru Sanusi
Justice, Supreme Court

SIDI DAUDA BAGE, (JSC): I have had the benefit of reading in draft the lead Judgment of my learned brother Mary Ukaego Peter-Odili, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is accordingly dismissed by me. Judgment of the Court of Appeal Ado-Ekiti Division is hereby affirmed.

Sidi Dauda Bage,
Justice, Supreme Court.

SUNDAY GABRIEL EHINDERO
AND
1. FEDERAL REPUBLIC OF NIGERIA
2. MR. JOHN OBANIYI

SC. 137/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

FRIDAY, 15TH DECEMBER, 2017

BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	**JUSTICE, SUPREME COURT**
OLUKAYODE ARIWOOLA	**JUSTICE, SUPREME COURT**
JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
AMINA ADAMU AUGIE	**JUSTICE, SUPREME COURT**
EJEMBI EKO	**JUSTICE, SUPREME COURT**

CASE LAW: A G, Ondo State vs A.G, Federation & Ors (2002) 6 Sc (pt 1) 1

CONSTITUTIONAL LAW: S 251 (3) CFRN 1999 (as amended) – nterpretation thereof – Whether the constitution does not intend any exclusive criminal jurisdiction of the Federal High Court.

CONSTITUTIONAL LAW: S. 257 (1) of CFRN 1999 (as amended) – Import and significance – Criminal jurisdiction of Federal Capital Territory High Court – Whether supports the fact that Federal High Court has no exclusive criminal jurisdiction.

COURT: Appellate Court – Interlocutory appeal – Attitude thereto – Whether not to undertake any comment on the merit of the substantive appeal.

COURT: Jurisdiction – Federal High Court – Additional Jurisdiction under

S. 251 (3) of CFRN 1999 – Whether no co-terminus with the exclusive civil jurisdiction under S. 251 (1) (a).

COURT: Jurisdiction – Federal High Court SS 251 (1) (a) and 251 (3) thereof – Nature and distinctions thereof.

COURT: Jurisdiction – Federal High Court – S 251 (1) (a) of CFRN 1999 – Whether does not vest exclusive criminal jurisdiction on the Federal High Court.

COURT: Jurisdiction – S. 286 (1) (b) CFRN 1999 (as amended) – Jurisdiction of state courts to try Federal Offences – Scope and Significance thereof.

CRIMINAL LAW AND PROCEDURE: Prima facie Case – Meaning

CRIMINAL LAW AND PROCEDURE: Prosecution ICPC Act S. 26(2) thereof – Whether to be initiated under the deemed authority of the Attorney General of the Federation.

LEGISLATION: Judicial legislation – Impropriety thereof – Whether it is not proper for court to read into a statute words which are not there – Principle in Edozie vs Edozie & ors (1998) 12 NWLR (Pt 580) 152.

STATUTE: ICPC Act S. 26(2) thereof – Purport – Whether every prosecution under the Act shall be deemed to be initiated by the Attorney General of the Federation.

STATUTE: Constitution of Federal Republic of Nigeria 1999 (as amended) – S. 251 (1) (a) thereof – Intent – Exclusive civil jurisdiction of the Federal High Court Purport and significance thereof.

STATUTE: Interpretation – Principle thereof – Whether courts should give the words and language in a status their simple and ordinary meaning –

The principle in unipetrol or E.S.B.I.R. (2006) All FWLR (p 1 319) 413.
WORDS AND PHRASE: Subject to S 257 (1) CFRN 1999 – Meaning

Issue for Determination

1. **Whether the High Court of the FCT has the requisite jurisdiction to try the appellant for the offences created by the Corrupt Practices and other related Offences Act, 2000.**

2. **Whether the charges and the proofs of evidence before the trial court disclose any prima facie case against the appellant to warrant the leave granted and the arraignment of the appellant for the offences charged.**

3. **Having regards to the provisions of Section 6(a), 26(2) and 61(1) of the Corrupt Practices and other Related Offences Act, 2000, whether the Independent Corrupt Practices and other Related Offences Commission (ICPC) and its officers can initiate and prosecute the appellant for offences under the Corrupt Practices and other Related Offences Act, 2000.**

Facts of the Matter

At the High Court of the Federal Capital Territory the appellant and one other are defending a 6-count charge alleging conspiracy to criminally convert public funds and criminal conversion of public funds totaling ₦16,412,315.00 being interests generated from two fixed deposit accounts.

The Bayelsa State Government made a donation of ₦557,995,065.00 to the Nigeria Police Force (NPF), at the time the appellant was the Inspector General of Police, to enable the NPF purchase equipment for proper policing of Bayelsa State. It appears from the summary of the statement of Olayinka

Ayegbayo, an investigator with the Independent Corrupt Practices and other Offences Commission (ICPC), that the appellant and the 2nd accused had agreed to place and did place ₦300,000,000.00 and ₦200,000,000.00 into fixed deposits respectively at Wema Bank Plc and Intercontinental Bank Plc. The two fixed deposits allegedly netted a total ₦16,412,315.56 as interests. Mr. Ayegbayo, listed as a witness in the proofs of evidence, would, at the trial, testify inter alia that: when the President of the Federal Republic of Nigeria directed the appellant to transfer the money donated by the Bayelsa State to the Federal Ministry of Police Affairs to make the necessary purchases for the police the appellant delayed his compliance with the presidential directive until after the maturity of the fixed deposits. When in November 2006, the appellant caused the principal sum donated by the Bayelsa State Government to be transferred to the Ministry of Police Affairs the interests earned from the fixed deposits were not transferred with the principal sum. It is alleged that the appellant and his co-accused conspired and criminally converted the said interests totaling ₦16,412,315.56 to their personal use. The conversion of this sum forms the crux of the 6 charges the appellant and the co-accused are defending at the High Court of the Federal Capital Territory.

The prosecution has listed Mr. Ayegbayo and three bank manager to testify at the trial. The summary of the proposed evidence is attached to the proofs of evidence. The list of exhibits to be tendered together with the extra judicial statement of the accused persons, the appellant's inclusive, are also included in the proofs of evidence.

On 6th June, 2012, the appellant filed a motion on notice, by way of preliminary objection, wherein he prayed the trial court of following orders:

1. **AN ORDER of this court dismissing and/or striking out the amended charge for want of jurisdiction.**

2. **AN ORDER of this honorable court quashing the amended charge against the accused/applicant for want of competency.**

3. AN ORDER of this honourable court debarring Mr. Paul Ahmed Bassi or any official of the Independent Corrupt Practices and other Related Offences Commission from prosecuting the 1st accused/applicant, they having no constitutional power to do so.

4. AN ORDER of this honourable court setting aside its order of 31st May, 2012 granting leave to the complainant/respondent to prefer charge No. FCT/HC/CR/92/12 against the accused/applicant.

The application was predicated on the following 12 grounds:

1. It is the Federal High Court that has jurisdiction to entertain the amended charge preferred against the 1st accused/applicant. Section 251(I)(a) of the 1999 Constitution as altered gives the Federal High Court Jurisdiction over civil matters relating to the revenue of the Government of the Federation in which the said government or any organ thereof or a person suing or being sued on behalf of the said government is a party, or is interested.

2. The respondent having shown by the wide publicity given to the case of the 1st accused/applicant in the world media and on internet even before obtaining the leave of court to prefer the amended charge and before the 1st accused/applicant's arraignment has demonstrated that it can only be a persecutor and not an unbiased, uninvolved prosecutor.

3. Section 251(3) of the 1999 Constitution, as altered,

provides that the Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by, subsection (1) thereof.

4. **The criminal jurisdiction of the Federal High Court derives from its civil jurisdiction as contained in Section 251(1)(a).**

5. **The parties and subject matter in this amended charge fall squarely under the jurisdiction of the Federal High Court not the FCT High Court.**

6. **The Corrupt Practices and Other Related Offences Act, 2000 under which the amended charge is brought is unconstitutional as same was abrogated by the Corrupt Practices and Other Related Offences Act, 2003 and is still an issue for judicial determination, having been, referred back to the court by the Apex Court of Nigeria.**

7. **The proof of evidence discloses no prima facie evidence against the accused/applicant.**

8. **The court wrongly exercised its discretion by granting leave to the prosecution to prefer the amended charge against the accused/applicant.**

9. **The offence alleged is not disclosed by the statement of witnesses or proof of evidence and there is nothing linking the accused person whatsoever with the amended charge upon which he can be called upon to explain his own position.**

10. The amended charge is a complete abuse of court process as the court apparently granted consent to prefer the amended charge in the absence of information linking the accused with the amended charge. There is no nexus howsoever between the 1st accused and the amended charge or any of the offences mention therein.

11. The accounts in the amended charge are not tied to the offending section of the Act such as to enable the court deal with specific criminal conduct.

12. The offences are not known to law.

The trial FCT High Court (Coram: M. N. Oniyangi, J) heard the application on 21st September, 2012. In the reserved ruling delivered on 21st September, 2012, the learned trial judge dismissed the application in its entirety. The appellant's appeal against the decision of the trial court was also dismissed by the Court of Appeal sitting at Abuja on 14th January, 2014. The lead judgment of A. A. Adumein, JCA was unanimously concurred by A. D. Yahaya and T. Akomolafe-Wilson, JJCA. This further appeal is against the order of the lower court dismissing the appeal No. CA/A/S51C/2012**.**

Held *(Unanimously dismissing the appeal)*

1. The nature and difference in the civil and criminal jurisdiction of the Federal High Court.

The additional jurisdiction vested on the Federal High Court by subsection (3) of Section 251 of the Constitution is not synonymous with the exclusive jurisdiction vested on it by Section 251(1)(a) of the same Constitution. This is clear from the two provisions which are herein below reproduced.

251. (1) Notwithstanding anything to the contrary in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters

(a) Relating to the revenue of the Government of the Federation in which the said government or any organ thereof or a person suing or being sued on behalf of the said government is a party;

(3) The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by sub-section (1) of this section. *(Pp 191 – 192 paras D – A*)

2. *S 251(3) of CFRN is not co-terminus with the exclusive civil jurisdiction under S. 251 (1) (a)*

The word "also" as used in subsection (3) of Section 251 of the Constitution connotes or means "in addition; too, or as well." According to Oxford Advanced Learner's Dictionary 7th ed.; Burton's Legal Thesaurus 3rd ed., page 27 and Oxford Dictionary of English, 3rd ed., page 46 According to Oxford Advanced Learners Dictionary, the word also is an adverb, not used with negative verbs and it is more formal than "as well" or "too" Much as I agree with the appellant that the word also, as an adverb, means "in addition"; I do not go any further to agree with him to conclude that the additional jurisdiction vested in the Federal High Court by Section 251(3) of the Constitution "in respect of criminal causes and matters in respects of which" jurisdiction is conferred by subsection (1) of the Constitution is co-terminus with the exclusive jurisdiction vested in the Federal High Court in respect of "civil causes and

matters". The appellant has, in my view, read and interpreted Section 251 (3) of the Constitution with a gloss thereon against all known or acclaimed cannons of interpretation. *(P 192 paras B – E)*

3. *A Court should not embark on judicial legislation.*
The function of the Judex is simply jus dicere, and not jus dare. Accordingly this court, in D. E. Okumagba Vs. Egbe (1965) 1 All NLR 62, had condemned any attempt by a court of law embarking on judicial legislation by reading into the provision of a statute words that are not there, or which words are not contemplated by the law maker. Thus, as the Court of Appeal had rightly stated in Edozie Vs. Edozie & Ors (1998) 12 NWLR (pt. 580) at 152.

> **"Courts should not read into an enactment words which are not to be found there and which will alter its operative effect".**

It is an established cardinal principle of interpretation that the words of the statute which are unambiguous, must be given their ordinary grammatical meaning. It is, therefore, no function of the court to import words into the statute which do violence to the intent and meaning of the statutory provision. See: Egbe Vs. Alhaji & Ors (1990) 21 NSCC (pt 1) 306 at 325; (1990) 1 NWLR (pt. 128) 546 at 581. *(Pp 192 – 193 paras F – A)*

4. *The intent of 251 (1) (a) of CFRN 1999*
The clear intent and purpose of Section 251(1)(a) of the Constitution, as amended, are to vest exclusive jurisdiction on the Federal High Court, as the successor of the defunct Federal Revenue Court, only in respect of "civil causes and matters relating to the revenue of the Government of the Federation in which the said government or any organ thereof or a person suing or being sued on behalf of the said government is a party". The jurisdiction conferred on the Federal High Court by Section 251(3) of the Constitution "in

respect of criminal causes and matters in respect of which jurisdiction is conferred" by Section 251(i) is not a jurisdiction to the exclusion of any other court. If it were intended to be so it would have been so stated expressly in the constitution. *(P 193 paras B – D)*

Per Eko (JSC)

"I completely agree with the lower court when they stated the law correctly thus:

> **"The provisions of Section 251(3) of the Constitution 1999 are clear, plain and unambiguous and effect must be given to the ordinary meaning of this constitutional provision. See the case of Chief Gani Fawehinmi Vs. Inspector-General of Police & 2 Ors (2002) 5 SC (pt. 1) 63 at 80; (2007) 7 NWLR (pt. 767) 60 at 680 where Uwaifo, JSC held, on the proper approach to interpretation of Constitutional provisions, that:**
>
> > **When the terms are plain and involve no ambiguity they must be given their meaning upon the ordinary and surrounding circumstances.**

My interpretation of Section 251(1)(a) & (3) of the Constitution, as amended, is; that the two provisions do not vest exclusive jurisdiction in respect of criminal causes or matters as they relate to, or are in respect of all those civil causes or matters in Section 251(1) of Constitution over which the Constitution has conferred or vested in the Federal High Court, as a civil court, "jurisdiction to the exclusion of any other court in Civil Causes and Matters" The emphasis placed on "civil causes and matters" in Section 251(1) of the Constitution is intentional or purposive. The exclusive jurisdiction vested in the Federal High Court has emphatically been qualified by the words "in civil causes or matters." The appellant,

clearly, is in error and misconception when he criticized the lower court for falling "into grave error when it held that no such word as exclusive jurisdiction appeared in Section 251(3) of the Constitution". The lower court was right. The appellant is wrong on this. *(Pp 193 – 194 paras D – C*)

5. *The Purport and significance of S. 257 (1) of CFRN 1999*

The lower court had further alluded to the general jurisdiction vested in the High Court of the FCT by Section 257(1) of the Constitution "to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person." Section 251(1) of Constitution which limits the exclusive jurisdiction of the Federal High Court to "civil causes and matters" is not relevant for the purpose of Section 257(1). On the other hand, both Sections 251(3) and 257(1) of the Constitution, speak to the criminal jurisdiction of the High Court of the FCT. When the two provisions are reads together it makes some point in the sense that the Constitution does not intend to vest or confer exclusive jurisdiction on the Federal High Court to entertain criminal causes or matters in respect of those matters mentioned in Section 251(1) Constitution as they pertain to the civil jurisdiction of the Federal High Court. In respect of those criminal causes or matters, the Constitution itself has deliberately or intentionally permitted other High Courts, including the Federal High Court, to exercise jurisdiction. For emphasis Sections 251(3) and 257(1) of the Constitution are herein below reproduced.

> **Section 251(3). The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section.**

Section 257(1). Subject to the provisions of Section 251 and any other provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of the Federal Capital Territory, Abuja shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person. *(Pp 194 – 195 paras C – C*)

6. *The 1999 constitution does not intend any exclusive criminal jurisdiction of the Federal high Court under S. 251 (3).*

Sub-Section (3) of Section 251 of the Constitution is the provision that statutorily empowers or enables the Federal High Court to exercise criminal jurisdiction in respect of the causes and matters that Subsection (1) of Section 251 of the Constitution has vested exclusive jurisdiction on the Federal High Court to deal with as a civil court. The provisions of Section 251 (3) are very clear and unambiguous. If the Constitution intends that the Federal High Court shall be imbued with criminal jurisdiction to the exclusion of any other court in respect of all the matters and causes in subsection (1) of Section 251 thereof it should have stated so clearly, as it did when it vested "jurisdiction to the exclusion of any other court in Civil Causes and Matters" in Section 251(1). To me, it is idle to argue, as the appellant did, that simply because Section 257(1) of the Constitution operates subject to Section 251 the jurisdiction the High Court of the FCT has by virtue of Section 257 of the Constitution has been excluded. That cannot be the proper construction of these provisions we are discussing. Section 251(3) of the Constitution that specifically confers on the Federal High Court its criminal jurisdiction must be given its natural and grammatical

meaning. While Section 251(1) of the Constitution vests in the Federal High Court "jurisdiction to the exclusion of any other in civil causes and matters" in respect of the listed matters therein; subsection (3) of the same Section 251 merely enables the Federal High Court to have and exercise criminal jurisdiction in respect of the causes and matters in sub-Section (1) thereof. The Criminal Jurisdiction is clearly not intended to be exclusive to the Federal High Court. *(Pp 195 – 196 paras D – A)*

7. *Courts should give the words and language used in a statute their simple and ordinary meaning*

It has become necessary now for me to recall the statement made by this court, in Unipetrol Vs. E.S.B.I.R. (2006) All FWLR (pt. 317) 413 at 423, on what we should always bear in mind when we are called upon to interpret a provision of statute. That is: that the words of a statute are to be given their ordinary meaning, and that the cardinal principle of law on interpretation is that a court, when interpreting a provision of a statute, must give the words and the language used their simple and ordinary meaning. It is not permissible, therefore, to go outside the words of the provision to introduce extraneous matters that may lead to circumventing or giving the provision an entirely different meaning from what the lawmaker intended it to be. In other words, nothing must be added to, and nothing must be taken from the statute. By this, we shall not interpret the provision to mean what it does not mean, or to interpret it not to mean what it means in actuality. That should be the golden rule. *(P 196 paras A – D)*

8. *The meaning of subject to under S. 257 (1) of CFRN 1999 (as amended)*

The words "subject to" which, in Section 257(1) of the Constitution, usher in "the provisions of Section 251 and any other provisions of this Constitution" are deliberately there to introduce a condition, a restriction, a limitation or proviso to intentionally subordinate the provisions of Section 257(1) to those other provisions of the Constitution. See: Oke Vs. Oke (1994) 1 All NLR (pt. 1) 443 at 450;

NDIC Vs. Okem Enterprise Ltd & Anor (2004) 10 NWLR (pt. 880) 107; FRN Vs. Osahon (2006) 5 NWLR (pt. 973) 261; Oloruntoba-Oju Vs. Abdul-Raheem (2009) 13 NWLR (pt. 1157) 83. This, however, does not mean the supritendency of the exclusive civil jurisdiction of the Federal High Court vested by Section 251(1) of the Constitution over other provisions. The clear intent or purpose to limit the exclusive jurisdiction of the Federal High Court to Civil causes or matters mentioned in Section 251(1) of the Constitution becomes more manifest and poignant with the introductory words of the sub-section "Notwithstanding anything to the contrary contained in this constitution", which words qualify the words "shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters" in respect of the jurisdiction the Constitution in sub-section (1) of Section 251 vests in the Federal High Court. The word "notwithstanding" that heralds the provisions of Section 251(1) merely removes any doubt, or impinging and impeding effect of any other provision of the Constitution, in respect of the civil jurisdiction of the Federal High Court in relation to those matters or causes specifically mentioned therein. *(Pp 196 – 197 paras E – B*)

9. *Power of State Court to try Federal offences*

There is also, or in addition to Sections 251(3) and 257(1), Section 286(1)(b) of the Constitution provides, inter alia, that "where by the law of a State jurisdiction is conferred upon any court for the investigation, inquiry into, or trial of persons accused of offences against the laws of the State the court shall have jurisdiction with respect to the investigation, inquiry into, or trial of persons for Federal Offence". Section 299 of the Constitution provides that "the provisions of this Constitution shall apply to Federal Capital Territory, Abuja as if it were one of the States of the Federation". Accordingly, reference in Section 286(1)(b) of Constitution to either the law or court of a State is also reference to the Law or Court, including the High Court, of the Federal Capital Territory, Abuja. *(P 197 Paras B – D)*

Per Eko (JSC)

"The lower court was right in this view, and I endorse it. It is unfortunate that the appellant persisted in his erroneous view that the ICPC cannot, under Section 26(2) of its enabling Act, initiate and maintain criminal proceedings against any person, including the appellant herein, for an offence under the said Corrupt Practices and Other Related Offences Act, 2000 (i.e. the ICPC Act) inspite of the loud allusions by the 1st respondent and the learned trial judge to the undoubted and authoritative pronouncement on it by this court in A. G., Ondo State Vs. A. G. Federation & Ors (2002) 6 SC. (pt. 1) 1. All the senior counsel to the appellant needed to do, as an officer in the temple of justice, is simply picking the decision of the full panel of this court in A. G., Ondo State Vs A. G. Federation & Ors (supra), read it and advise his client accordingly.

Be that as it may, the full court of this court had cause to consider the constitutional validity of several provisions of the ICPC Act in 2002 in the A. G. Ondo State Vs. A. G. Federation & Ors (supra). Sections 26(3) and 35 of the ICPC Act were struck down as being unconstitutional. The validity of the other provisions, including Section 26(2) of the ICPC Act was affirmed. At page 139 of the report, the opinion of Uwaifo, JSC which says it all is inter alia thus:

> **Section 286(1)(b) of the Constitution makes it clear that any court of a State (including the FCT) which is by the law of that State given jurisdiction to try persons accused of offences against the laws of the State, shall have like jurisdiction with respect to Federal offences.**

Specifically, on the prosecutorial powers of the ICPC viz-a-viz the power of the Attorney-General of the Federal under Section 174 of the Constitution his Lordship had put it viz:

Section 6 of the Act says inter alia that it shall be the duty of the ICPC to prosecute offenders. However, Section 26(2) of the Act provides inter alia that every prosecution for an offence under the Act shall be deemed to be initiated by the Attorney-General of the Federation.

It is no longer in doubt that the High Court of the FCT, like any State High Court, can be used as a venue for the prosecution of the offences under the ICPC Act. The informed opinion of Ejiwunmi JSC at page 190 of A. G., Ondo State Vs. A. G., Federation & Ors (supra) is very clear on this. It is similarly beyond doubt that Sections 6(a), 26(2) and 61(1) of the ICPC Act are constitutionally valid. That was the loud and clear decision of this court in A. G. Ondo State Vs A. G., Federation (supra). Curiously, the senior counsel for the appellant, very cognisant and seised of this fact, is not asking us, my Lords, to depart from it.

In what appears to me to be mere gymnastics of quibbles the learned senior counsel for the appellant had taken strenuous pains to distinguish between the words "initiate" and "prosecution" as they appear in Section 6(a), 26(2) and 61(1) of the ICPC Act to found his solace in the submissions, that the provisions. *(Pp 199 – 200 Paras C – F)*

10. *Prosecution under LCPC Act is deemed to be initiated under the authority of the A - G*

It is, however, not in dispute that Paul Ahmed Bassi, Principal Legal Officer, ICPC who signed the process initiating the prosecution of the appellant is an officer of the ICPC. To that extent he is an agent of the ICPC in the said initiation of the prosecution of the appellant. By this indubitable fact, the prosecution of the appellant for corrupt practices under the ICPC Act was initiated by the ICPC. The grouse of the appellant, as I understand it, is directed against the holding of the lower court, at page 393 of the record, that "it is clear by Section 61(1) of the Act, the prosecution being undertaken by the

Independent Corrupt Practices and other Related Offences Commission (ICPC), in this case, is "deemed" to have been commenced with the consent or under the delegated authority of the honourable Attorney-General of the Federation." *(P 201 paras B – D)*

11. *A difference between to prosecute and to initiate prosecution*

I am afraid, I cannot see the distinction between the terms to prosecute, and to initiate prosecution, as they appear in Sections 6(a), 26(2) and 61(1) of the ICPC Act. The learned senior counsel himself concedes, upon his consulting Oxford Advanced Learners Dictionary, that "to initiate" means to cause something to begin. Accordingly, to initiate prosecution means, in my view, to cause prosecution to begin. The verb: prosecute, in Black's Law Dictionary 9th ed. at p. 134 means, inter alia, to commence and carry out legal action; to institute and pursue criminal action against a person including the appellant herein. There is nothing ambiguous in those provisions, particularly of Section 26(2) of the ICPC Act, to warrant the rigmarole, or the circulocutous argument, about the clause: "every prosecution for an offence under this Act shall be deemed to be initiated by the Attorney-General of the Federation". This is more so that this court in A. G. Ondo State Vs. A. G. Federation & Ors. (supra) has resolved the matter and held that the powers exercised by the ICPC pursuant to Sections 6(a), 26(2) and 61(1) of the ICPC Act, to prosecute offenders under the ICPC Act, are deemed to have been exercised by the Attorney-General of the Federation pursuant to Section 174 of the Constitution.

In enacting Sections 6(a), 26(2) and 61(1) of the ICPC Act, the National Assembly was conscious that by dint of Section 174 of the Constitution, the Attorney-General of the Federation remains the repository of the prosecutorial powers of the Federation and that the ICPC is statutorily presumed and deemed to be prosecuting the offenders under the ICPC Act as an, or the, agent of the Attorney-General of the Federation. The lower court has not gone outside the box to do and say anything to the contrary. In the circumstances, I

hereby resolve Issue 3 against the appellant. *(Pp 201 – 202 paras G – E)*

12. *Meaning of prima facie cases*

A prima facie case means no more than that "on face of it" the facts supporting the charge disclose ground(s) for proceeding in the prosecution. See: Onagoruwa Vs. State (1993) 7 NWR (pt. 303) 49 at 82-83. It also means that the facts, as they stand, if they ae not controverted and they are believed, are sufficient proof of the allegations. Of course, prima facie case and proof beyond reasonable doubt, which comes later, do not stand on the same footing or pedestal. See: Ikomi Vs. The State (1986) 3 NWLR (pt. 28) 240 at 355; Egbe Vs The State (1980) 1 NCR 341; Abacha Vs. The State (2012) 11 NWLR (pt. 779) 437 at 486. To constitute a prima facie case, it is trite that the proofs of evidence must link the accused to the offence he is alleged to have committed. See: Ohwovoriole Vs. FRN (2003) 2 NWLR (pt. 803) 176 at 190-191. In otherwords, that the case against him is not one borne of mere suspicion. See: Ikomi Vs. State (supra)

The elements constituting each offence are very well stated in the provisions which, in my opinion, are unambiguous. Each charge is also clear as to what it alleges and the offence charged. The proofs of evidence and the charges, if juxtaposed against the provisions of ICPC Act, under which the charges have been laid, clearly disclose a prima facie case to warrant the trial to proceed. *(Pp 203 – 204 Paras B – I)*

13. *Attitude of appellate courts to interlocutory appeal*

This is an interlocutory appeal. It is not permissible in law, at this stage, that any comments be made on the merits of the substantive case that is yet to be heard. See: Iweka Vs. SCOA (2000) 3 SC 21 at 24-25; FSB Int'l Bank Ltd Vs. Imano Nig. Ltd. (2000) 11 NWLR (pt 679) 620 at 639. Conscious of this injunction, I shall not undertake any comment on the merits of the case. *(P 205 paras A – B)*

12. *There is established a prima facie case against the appelant*
On these facts and others in the proofs of evidence the appellant has failed to carry me along with him that the facts and the charges do not disclose any prima facie case. The facts speak for themselves and to the allegations against the appellant. I think, and so hold, that on these facts a prima facie case has been made out against the appellant requiring the trial to proceed on the charges in the information sheet. A prima facie case, as this court held in Daboh & Anor. Vs. The State (1977) 11 NSCC 309; (1977) 5 SC 222, is made out by the prosecution if it is sufficient for the accused to be called upon to make some explanations. *(P 206 Paras B – D)*

Nigeria Cases Cited
A. G. Ondo State vs. A. G. Federation & Ors (supra),
Abacha vs. The State (2012) 11 NWLR (pt. 779) 437 at 486
Chief Gani Fawehinmi vs. Inspector-General of Police & 2 Ors (2002) 5 SC (pt. 1) 63 at 80
D. E. Okumagba vs. Egbe (1965) 1 All NLR 62
Daboh & Anor. vs. The State (1977) 11 NSCC 309
Edozie vs. Edozie & Ors (1998) 12 NWLR (pt. 580) at 152
Egbe vs The State (1980) 1 NCR 341
Egbe vs. Alhaji & Ors (1990) 21 NSCC (pt 1) 306 at 325
FRN vs. Osahon (2006) 5 NWLR (pt. 973) 261
FSB Int'l Bank Ltd vs. Imano Nig. Ltd. (2000) 11 NWLR (pt 679) 620 at 639
Ikomi vs. State (supra)
Ikomi vs. The State (1986) 3 NWLR (pt. 28) 240 at 355
Iweka vs. SCOA (2000) 3 SC 21 at 24-25
NDIC vs. Okem Enterprise Ltd & Anor (2004) 10 NWLR (pt. 880) 107

Nigeria Statutes Cited
Constitution of Federal Republic of Nigeria 1999 Section 251(1)
Consitution of Federal Republic of Nigeria 1999 Section 251 (1), (3)
ICPC Act.2002 Section 26 (2)

Representation

Dr. Alex A. Izinyon, (SAN), with C. S. Ekeocha, (Esq.), K. O. Omoruian, (Esq.) and C. U. Adah, (Esq.) for the Appellant.

G. O. Igbadume, (Esq.), with George Lawal, (Esq.) for the 1st Respondent.

E. O. Tela, (Esq.), for the 2nd Respondent

EJEMBI EKO, (JSC): (Delivering the lead judgment): At the High Court of the Federal Capital Territory the appellant and one other are defending a 6-count charge alleging conspiracy to criminally convert public funds and criminal conversion of public funds totaling ₦16,412,315.00 being interests generated from two fixed deposit accounts.

The Bayelsa State Government made a donation of ₦557,995,065.00 to the Nigeria Police Force (NPF), at the time the appellant was the Inspector General of Police, to enable the NPF purchase equipment for proper policing of Bayelsa State. It appears from the summary of the statement of Olayinka Ayegbayo, an investigator with the Independent Corrupt Practices and other Offences Commission (ICPC), that the appellant and the 2nd accused had agreed to place and did place ₦300,000,000.00 and ₦200,000,000.00 into fixed deposits respectively at Wema Bank Plc and Intercontinental Bank Plc. The two fixed deposits allegedly netted a total ₦16,412,315.56 as interests. Mr. Ayegbayo, listed as a witness in the proofs of evidence, would, at the trial, testify inter alia that: when the President of the Federal Republic of Nigeria directed the appellant to transfer the money donated by the Bayelsa State to the Federal Ministry of Police Affairs to make the necessary purchases for the police the appellant delayed his compliance with the presidential directive until after the maturity of the fixed deposits. When in November 2006, the appellant caused the principal sum donated by the Bayelsa State Government to be transferred to the Ministry of Police Affairs the interests earned from the fixed deposits were not transferred with the principal sum. It is alleged that the appellant and his co-accused conspired and criminally converted the said interests totaling ₦16,412,315.56 to their personal use. The conversion of this sum forms the crux of the 6 charges the appellant

A and the co-accused are defending at the High Court of the Federal Capital Territory.

The prosecution has listed Mr. Ayegbayo and three bank manager to testify at the trial. The summary of the proposed evidence is attached to the
B proofs of evidence. The list of exhibits to be tendered together with the extra judicial statement of the accused persons, the appellant's inclusive, are also included in the proofs of evidence.

On 6th June, 2012, the appellant filed a motion on notice, by way of
C preliminary objection, wherein he prayed the trial court of following orders:

1. **AN ORDER of this court dismissing and/or striking**
D **out the amended charge for want of jurisdiction.**

2. **AN ORDER of this honorable court quashing the amended charge against the accused/applicant for**
E **want of competency**

3. **AN ORDER of this honourable court debarring Mr. Paul Ahmed Bassi or any official of the Independent**
F **Corrupt Practices and other Related Offences Commission from prosecuting the 1st accused/applicant, they having no constitutional power to do so.**

G

4. **AN ORDER of this honourable court setting aside its order of 31st May, 2012 granting leave to the complainant/respondent to prefer charge No.**
H **FCT/HC/CR/92/12 against the accused/applicant.**

The application was predicated on the following 12 grounds.

I 1. **It is the Federal High Court that has jurisdiction to entertain the amended charge preferred against the**

1st accused/applicant. Section 251(I)(a) of the 1999 Constitution as altered gives the Federal High Court Jurisdiction over civil matters relating to the revenue of the Government of the Federation in which the said government or any organ thereof or a person suing or being sued on behalf of the said government is a party, or is interested.

2. The respondent having shown by the wide publicity given to the case of the 1st accused/applicant in the world media and on internet even before obtaining the leave of court to prefer the amended charge and before the 1st accused/applicant's arraignment has demonstrated that it can only be a persecutor and not an unbiased, uninvolved prosecutor.

3. Section 251(3) of the 1999 Constitution, as altered, provides that the Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by, subsection (1) thereof.

4. The criminal jurisdiction of the Federal High Court derives from its civil jurisdiction as contained in Section 251(1)(a)

5. The parties and subject matter in this amended charge fall squarely under the jurisdiction of the Federal High Court not the FCT High Court.

6. The Corrupt Practices and Other Related Offences Act, 2000 under which the amended charge is brought is unconstitutional as same was abrogated by the Corrupt Practices and Other Related

Offences Act, 2003 and is still an issue for judicial determination, having been, referred back to the court by the Apex Court of Nigeria.

7. The proof of evidence discloses no prima facie evidence against the accused/applicant.

8. The court wrongly exercised its discretion by granting leave to the prosecution to prefer the amended charge against the accused/applicant

9. The offence alleged is not disclosed by the statement of witnesses or proof of evidence and there is nothing linking the accused person whatsoever with the amended charge upon which he can be called upon to explain his own position.

10. The amended charge is a complete abuse of court process as the court apparently granted consent to prefer the amended charge in the absence of information linking the accused with the amended charge. There is no nexus howsoever between the 1st accused and the amended charge or any of the offences mention therein.

11. The accounts in the amended charge are not tied to the offending section of the act such as to enable the court deal with specific criminal conduct.

12. The offences are not known to law.

The trial FCT High Court (Coram: M. N. Oniyangi, J) heard the application on 21st September, 2012. In the reserved ruling delivered on 21st September, 2012, the learned trial judge dismissed the application in its entirety. The

appellant's appeal against the decision of the trial court was also dismissed by the Court of Appeal sitting at Abuja on 14th January, 2014. The lead judgment of A. A. Adumein, JCA was unanimously concurred by A. D. Yahaya and T. Akomolafe-Wilson, JJCA. This further appeal is against the order of the lower court dismissing the appeal No. CA/A/S51C/2012.

This appeal was argued on three (3) issues. I have decided to condense the issues from the 3 issues submitted by the appellant and the 1st respondent. The 2nd respondent did not file any brief. His counsel, at the hearing of the appeal on 4th October, 2017, conceded that they filed no brief. The 3 issues are:

1. **Whether the High Court of the FCT has the requisite jurisdiction to try the appellant for the offences created by the Corrupt Practices and Other Related Offences Act, 2000.**

2. **Whether the charges and the proofs of evidence before the trial court disclose any prima facie case against the appellant to warrant the leave granted and the arraignment of the appellant for the offences charged.**

3. **Having regards to the provisions of Section 6(a), 26(2) and 61(1) of the Corrupt Practices and other Related Offences Act, 2000, whether the Independent Corrupt Practices and Other Related Offences Commission (ICPC) and its officers can initiate and prosecute the appellant for offences under the Corrupt Practices and Other Related Offences Act, 2000.**

The gravamen of the appellant's case on issue 1 is that the interests accruing from fixed deposits totaling ₦16,412,315.56, allegedly, criminally converted by the appellant and the co-accused constitute an item of revenue

accruable to the Federal Government of Nigeria. The appellant, therefore, contended that as such only the Federal High Court, by dint of Section 251 (1)(a) and (3) of the Constitution, as amended, to the exclusion of the High Court of the FCT, has jurisdiction. In other words, that by the extant provisions of Section 251(1)(a) an (3) of the Constitution, as amended, the Federal High Court is the appropriate court to hear and determine criminal causes and matters arising from the issues that relate to the revenue of the Federal Government of Nigeria. The two courts below had expressed contrary opinion in their dismissal of this contention. The lower court held the opinion that reading Sections 251(1)(a)-(s) and 257(1) of the Constitution together with Sections 61(3) of the Corrupt Practices and Other Related Offences Act, 2000 (Anti Corruption Act, 2000) clearly shows that the Federal High Court and the High Court of the FCT have concurrent jurisdiction.

The additional jurisdiction vested on the Federal High Court by subsection (3) of Section 251 of the Constitution is not synonymous with the exclusive jurisdiction vested on it by Section 251(1)(a) of the same Constitution. This is clear from the two provisions which are herein below reproduced.

251. (1) Notwithstanding anything to the contrary in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters

(a) relating to the revenue of the Government of the Federation in which the said government or any organ thereof or a person suing or being sued on behalf of the said government is a party;

(3) The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal

causes and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by sub-section (1) of this section.

The word "also" as used in subsection (3) of Section 251 of the Constitution connotes or means "in addition; too, or as well." According to Oxford Advanced Learner's Dictionary 7th ed.; Burton's Legal Thesaurus 3rd ed., page 27 and Oxford Dictionary of English, 3rd ed., page 46 According to Oxford Advanced Learners Dictionary, the word also is an adverb, not used with negative verbs and it is more formal than "as well" or "too" Much as I agree with the appellant that the word also, as an adverb, means "in addition"; I do not go any further to agree with him to conclude that the additional jurisdiction vested in the Federal High Court by Section 251(3) of the Constitution "in respect of criminal causes and matters in respects of which" jurisdiction is conferred by subsection (1) of the Constitution is co-terminus with the exclusive jurisdiction vested in the Federal High Court in respect of "civil causes and matters". The appellant has, in my view, read and interpreted Section 251 (3) of the Constitution with a gloss thereon against all known or acclaimed cannons of interpretation.

The function of the Judex is simply jus dicere, and not jus dare. Accordingly this court, in **D. E. Okumagba Vs. Egbe (1965) 1 All NLR 62,** had condemned any attempt by a court of law embarking on judicial legislation by reading into the provision of a statute words that are not there, or which words are not contemplated by the law maker. Thus, as the Court of Appeal had rightly stated in **Edozie Vs. Edozie & Ors (1998) 12 NWLR (pt. 580) at 152.**

"Courts should not read into an enactment words which are not to be found there and which will alter its operative effect".

It is an established cardinal principle of interpretation that the words of the statute which are unambiguous, must be given their ordinary grammatical

meaning. It is, therefore, no function of the court to import words into the statute which do violence to the intent and meaning of the statutory provision. See: **Egbe Vs. Alhaji & Ors (1990) 21 NSCC (pt 1) 306 at 325; (1990) 1 NWLR (pt. 128) 546 at 581.**

The clear intent and purpose of Section 251(1)(a) of the Constitution, as amended, are to vest exclusive jurisdiction on the Federal High Court, as the successor of the defunct Federal Revenue Court, only in respect of "civil causes and matters relating to the revenue of the Government of the Federation in which the said government or any organ thereof or a person suing or being sued on behalf of the said government is a party". The jurisdiction conferred on the Federal High Court by Section 251(3) of the Constitution "in respect of criminal causes and matters in respect of which jurisdiction is conferred" by Section 251(i) is not a jurisdiction to the exclusion of any other court. If it were intended to be so it would have been so stated expressly in the constitution.

I completely agree with the lower court when they stated the law correctly thus:

> **"The provisions of Section 251(3) of the Constitution 1999 are clear, plain and unambiguous and effect must be given to the ordinary meaning of this constitutional provision. See the case of Chief Gani Fawehinmi Vs. Inspector-General of Police & 2 Ors (2002) 5 SC (pt. 1) 63 at 80; (2007) 7 NWLR (pt. 767) 60 at 680 where Uwaifo, JSC held, on the proper approach to interpretation of Constitutional provisions, that:**
> **When the terms are plain and involve no ambiguity there must be given their meaning upon the ordinary and surrounding circumstances.**

My interpretation of Section 251(1)(a) & (3) of the Constitution, as amended, is; that the two provisions do not vest exclusive jurisdiction in respect of criminal causes or matters as they relate to, or are in respect of all those civil causes or matters in Section 251(1) of Constitution over which

A the Constitution has conferred or vested in the Federal High Court, as a civil court, "jurisdiction to the exclusion of any other court in **Civil Causes and Matters"** The emphasis placed on "civil causes and matters" in Section 251(1) of the Constitution is intentional or purposive. The exclusive
B jurisdiction vested in the Federal High Court has emphatically been qualified by the words "in civil causes or matters." The appellant, clearly, is in error and misconception when he criticized the lower court for falling "into grave error when it held that no such word as exclusive jurisdiction
C appeared in Section 251(3) of the Constitution". The lower court was right. The appellant is wrong on this.

The lower court had further alluded to the general jurisdiction vested in the High Court of the FCT by Section 257(1) of the Constitution "to hear
D and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person." Section 251(1) of Constitution which limits the exclusive jurisdiction of the Federal High Court to "civil causes and
E matters" is not relevant for the purpose of Section 257(1). On the other hand, both Sections 251(3) and 257(1) of the Constitution, speak to the criminal jurisdiction of the High Court of the FCT. When the two provisions are reads together it makes some point in the sense that the
F Constitution does not intend to vest or confer exclusive jurisdiction on the Federal High Court to entertain criminal causes or matters in respect of those matters mentioned in Section 251(1) Constitution as they pertain to the civil jurisdiction of the Federal High Court. In respect of those criminal
G causes or matters, the Constitution itself has deliberately or intentionally permitted other High Courts, including the Federal High Court, to exercise jurisdiction. For emphasis Sections 251(3) and 257(1) of the Constitution are herein below reproduced.

H

> **Section 251(3). The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is**
I **conferred by subsection (1) of this section.**

Section 257(1). Subject to the provisions of Section 251 and any other provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of the Federal Capital Territory, Abuja shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

Sub-Section (3) of Section 251 of the Constitution is the provision that statutorily empowers or enables the Federal High Court to exercise criminal jurisdiction in respect of the causes and matters that Subsection (1) of Section 251 of the Constitution has vested exclusive jurisdiction on the Federal High Court to deal with as a civil court. The provisions of Section 251 (3) are very clear and unambiguous. If the Constitution intends that the Federal High Court shall be imbued with criminal jurisdiction to the exclusion of any other court in respect of all the matters and causes in subsection (1) of Section 251 thereof it should have stated so clearly, as it did when it vested "jurisdiction to the exclusion of any other court in **Civil Causes and Matters"** in Section 251(1). To me, it is idle to argue, as the appellant did, that simply because Section 257(1) of the Constitution operates subject to Section 251 the jurisdiction the High Court of the FCT has by virtue of Section 257 of the Constitution has been excluded. That cannot be the proper construction of these provisions we are discussing. Section 251(3) of the Constitution that specifically confers on the Federal High Court its criminal jurisdiction must be given its natural and grammatical meaning. While Section 251(1) of the Constitution vests in the Federal High Court "jurisdiction to the exclusion of any other in civil causes and matters" in respect of the listed matters therein; subsection (3) of the same Section 251 merely enables the Federal High Court to have and exercise criminal jurisdiction in respect of the causes and matters in sub-

Section (1) thereof. The Criminal Jurisdiction is clearly not intended to be exclusive to the Federal High Court.

It has become necessary now for me to recall the statement made by this court, in **Unipetrol Vs. E.S.B.I.R. (2006) All FWLR (pt. 317) 413 at 423,** on what we should always bear in mind when we are called upon to interpret a provision of statute. That is: that the words of a statute are to be given their ordinary meaning, and that the cardinal principle of law on interpretation is that a court, when interpreting a provision of a statute, must give the words and the language used their simple and ordinary meaning. It is not permissible, therefore, to go outside the words of the provision to introduce extraneous matters that may lead to circumventing or giving the provision an entirely different meaning from what the lawmaker intended it to be. In other words, nothing must be added to, and nothing must be taken from the statute. By this, we shall not interpret the provision to mean what it does not mean, or to interpret it not to mean what it means in actuality. That should be the golden rule.

The words "subject to" which, in Section 257(1) of the Constitution, usher in "the provisions of Section 251 and any other provisions of this Constitution" are deliberately there to introduce a condition, a restriction, a limitation or proviso to intentionally subordinate the provisions of Section 257(1) to those other provisions of the Constitution. See: **Oke Vs. Oke (1994) 1 All NLR (pt. 1) 443 at 450; NDIC Vs. Okem Enterprise Ltd & Anor (2004) 10 NWLR (pt. 880) 107; FRN Vs. Osahon (2006) 5 NWLR (pt. 973) 261; Oloruntoba-Oju Vs. Abdul-Raheem (2009) 13 NWLR (pt. 1157) 83.** This, however, does not mean the superintendum of the exclusive civil jurisdiction of the Federal High Court vested by Section 251(1) of the Constitution over other provisions. The clear intent or purpose to limit the exclusive jurisdiction of the Federal High Court to Civil causes or matters mentioned in Section 251(1) of the Constitution becomes more manifest and poignant with the introductory words of the sub-section "Notwithstanding anything to the contrary contained in this constitution", which words qualify the words "shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters" in respect of the jurisdiction the Constitution in sub-section (1) of Section 251 vests in the Federal High

Court. The word "notwithstanding" that heralds the provisions of Section 251(1) merely removes any doubt, or impinging and impeding effect of any other provision of the Constitution, in respect of the civil jurisdiction of the Federal High Court in relation to those matters or causes specifically mentioned therein.

There is also, or in addition to Sections 251(3) and 257(1), Section 286(1)(b) of the Constitution which provides, inter alia, that "where by the law of a State jurisdiction is conferred upon any court for the investigation, inquiry into, or trial of persons accused of offences against the laws of the State the court shall have jurisdiction with respect to the investigation, inquiry into, or trial of persons for Federal Offence". Section 299 of the Constitution provides that "the provisions of this Constitution shall apply to Federal Capital Territory, Abuja as if it were one of the States of the Federation". Accordingly, reference in Section 286(1)(b) of Constitution to either the law or court of a State is also reference to the Law or Court, including the High Court, of the Federal Capital Territory, Abuja.

There is no substance in Issue 1 canvassed and argued by the appellant. I hereby resolve it against the appellant.

Issue 3 is closely related to Issue 1. The question posed in Issue 3, formulated from the appellant's complaint in ground 4 of his grounds of appeal, is: whether the learned justices of the Court of Appeal were right in holding that the Independent Corrupt Practices and Other Related Offences Commission (ICPC) can initiate a charge under its enabling Act, having regards to the combined provisions of Sections 6(a); 26(2) and 61(1) of the Corrupt Practices and other Related Offences Act, 2000, as amended? The grouse of the appellant, as it appears, is directed against the opinion expressed by the lower court at pages 392 those criminal causes or matters, the Constitution itself has deliberately or intentionally permitted other High Courts, including the Federal High Court, to exercise jurisdiction. For emphasis Sections 251(3) and 257(1) of the Constitution are herein below reproduced.

Section 251 (3). The Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal

causes and matters in respect of which jurisdiction is conferred by subsection (1) of this section.

Section 257(1). Subject to the provisions of section 251 and other provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of the Federal Capital Territory, Abuja shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

393 of the record before resolving the issue against the appellant. The lower court has held thus:

When Sections 6(a), 26(2) and 61(1) of the Corrupt Practices and Other Related Offences Act, 2000 are read together and the words used in the said Sections are given their ordinary grammatical meanings, since the words are plain and simple, it is clear that by Section 61(1) of the Act, the prosecution being undertaken by the Independent Corrupt Practices and Other Related Offences Commission (ICPC) in this case is "deemed" to have been commenced with the consent or under the delegated authority of the honorable Attorney-General of the Federation. This is so because the word "prosecution" used in both Sections 26(2) and 61(1) of the Corrupt Practices and Other Related Offences Act, 2000 is the noun of the word "prosecute" which means:

To institute and pursue a criminal action against a person. Black's Law Dictionary. Eighth edition, page 1258

The provisions of Section 6(a) and 61(1) of the Act, 2000 seem to validate a criminal prosecution under the act where the prosecution was not initiated by the Attorney-General of the Federation himself ….

The lower court was right in this view, and I endorse it.

It is unfortunate that the appellant persisted in his erroneous view that the ICPC cannot, under Section 26(2) of its enabling Act, initiate and maintain criminal proceedings against any person, including the appellant herein, for an offence under the said Corrupt Practices and other Related Offences Act, 2000 (i.e. the ICPC Act) inspite of the loud allusions by the 1st respondent and the learned trial judge to the undoubted and authoritative pronouncement on it by this court in **A. G., Ondo State Vs. A. G. Federation & Ors (2002) 6 SC. (pt. 1) 1.** All the senior counsel to the appellant needed to do, as an officer in the temple of justice, is simply picking the decision of the full panel of this court in **A. G., Ondo State Vs A. G. Federation & Ors (supra),** read it and advise his client accordingly.

Be that as it may, the full court of this court had cause to consider the constitutional validity of several provisions of the ICPC Act in 2002 in the **A. G. Ondo State Vs. A. G. Federation & Ors (supra).** Sections 26(3) and 35 of the ICPC Act were struck down as being unconstitutional. The validity of the other provisions, including Section 26(2) of the ICPC Act was affirmed. At page 139 of the report, the opinion of Uwaifo, JSC which says it all is inter alia thus:

Section 286(1)(b) of the Constitution makes it clear that any court of a State (including the FCT) which is by the law of that State given jurisdiction to try persons accused of offences against the laws of the State, shall have like jurisdiction with respect to Federal offences.

A Specifically, on the prosecutorial powers of the ICPC viz-a-viz the power of the Attorney-General of the Federal under Section 174 of the Constitution his Lordship had put it viz:

B **Section 6 of the Act says inter alia that it shall be the duty of the ICPC to prosecute offenders. However, Section 26(2) of the Act provides inter alia that every prosecution for an offence under the Act shall be deemed to be initiated**
C **by the Attorney-General of the Federation.**

It is no longer in doubt that the High Court of the FCT, like any State High Court, can be used as a venue for the prosecution of the offences under the
D ICPC Act. The informed opinion of Ejiwunmi JSC at page 190 of **A. G., Ondo State Vs. A. G., Federation & Ors (supra)** is very clear on this. It is similarly beyond doubt that Sections 6(a), 26(2) and 61(1) of the ICPC Act are constitutionally valid. That was the loud and clear decision of this court
E in **A. G. Ondo State Vs A. G., Federation (supra).** Curiously, the senior counsel for the appellant, very cognisant and seised of this fact, is not asking us, my Lords, to depart from it.

In what appears to me to be mere gymnastics of quibbles the learned
F senior counsel for the appellant had taken strenuous pains to distinguish between the words "initiate" and "prosecution" as they appear in Section 6(a), 26(2) and 61(1) of the ICPC Act to found his solace in the submissions, that the provisions

G **Did not say "commission" have been given authority. Therefore if the Act had contemplated a direct power to initiate from the Attorney-General of the Federation to**
H **ICPC it should have stated so clearly. It is not so stated "Any person or authority" used here means there must be express delegated authority to do so initiate not "implied" authority or decision as the court below held.**

I

The senior counsel further submitted that it must be established that the express authority, or fiat, of the Attorney-General of the Federation was donated to the ICPC or Paul Ahmed Bassi to enable either or both of them initiate the criminal proceedings against the appellant.

It is, however, not in dispute that Paul Ahmed Bassi, Principal Legal Officer, ICPC who signed the process initiating the prosecution of the appellant is an officer of the ICPC. To that extent he is an agent of the ICPC in the said initiation of the prosecution of the appellant. By this indubitable fact, the prosecution of the appellant for corrupt practices under the ICPC Act was initiated by the ICPC. The grouse of the appellant, as I understand it, is directed against the holding of the lower court, at page 393 of the record, that "it is clear by Section 61(1) of the Act, the prosecution being undertaken by the Independent Corrupt Practices and other Related Offences Commission (ICPC), in this case, is "deemed" to have been commenced with the consent or under the delegated authority of the honourable Attorney-General of the Federation."

After consulting dictionaries, particularly Oxford Advanced Learner's Dictionary and Chambers 21st Century Dictionary (Revised Edition), the learned senior counsel submits on behalf of the appellant, thus:

> **5.30 from these Lexicographers, it is clear initiate is distinct from prosecute or prosecution. To initiate is to set in motion-**

I am afraid, I cannot see the distinction between the terms to prosecute, and to initiate prosecution, as they appear in Sections 6(a), 26(2) and 61(1) of the ICPC Act. The learned senior counsel himself concedes, upon his consulting Oxford Advanced Learners Dictionary, that "to initiate" means to cause something to begin. Accordingly, to initiate prosecution means, in my view, to cause prosecution to begin. The verb: prosecute, in Black's Law Dictionary 9th ed. At p. 134 means, inter alia, to commence and carry out legal action; to institute and pursue criminal action against a person including the appellant herein. There is nothing ambiguous in those

provisions, particularly of Section 26(2) of the ICPC Act, to warrant the rigmarole, or the circulocutous argument, about the clause: "every prosecution for an offence under this Act shall be deemed to be initiated by the Attorney-General of the Federation". This is more so that this court in **A. G. Ondo State Vs. A. G. Federation & Ors. (supra)** has resolved the matter and held that the powers exercised by the ICPC pursuant to Sections 6(a), 26(2) and 61(1) of the ICPC Act, to prosecute offenders under the ICPC Act, are deemed to have been exercised by the Attorney-General of the Federation pursuant to Section 174 of the Constitution.

In enacting Sections 6(a), 26(2) and 61(1) of the ICPC Act, the National Assembly was conscious that by dint of Section 174 of the Constitution, the Attorney-General of the Federation remains the repository of the prosecutorial powers of the Federation and that the ICPC is statutorily presumed and deemed to be prosecuting the offenders under the ICPC Act as an, or the, agent of the Attorney-General of the Federation. The lower court has not gone outside the box to do and say anything to the contrary. In the circumstances, I hereby resolve Issue 3 against the appellant.

In paragraph 4.55 of the appellant's brief of argument, it is acknowledged that "the appellant is standing trial on a six count charge before the High Court of the Federal Capital Territory with the 2nd respondent" and that "Counts 1, 2, 3, 4 and 5 relate to the appellant" Counts 1 and 3, dealing with the offence of conspiracy, are brought under Section 26(1)(c) of the ICPC Act. Count 4, dealing with the offence of using the office to confer corrupt advantage, is brought under Section 19 of the ICPC Act. While count 5, dealing with knowingly making false statements to officers of ICPC, is an offence contrary to and punishable under Section 25(1)(a) of the ICPC Act. The pith and gist of all the allegations are the conspiracy to illegally convert, and the criminal conversion of, the sum of ₦16,412,315.06, being the interest generated from placing ₦300,000.00 and ₦200,00000 on fixed deposits respectively at Wema Bank Plc and Intercontinental Bank Plc.

For the appellant, it is submitted that the proofs of evidence and the

charges disclose no prima facie facts on the elements of the 3 offences under Sections 19, 25(a) & (b) and 26(1)(c) of the ICPC Act. The questions to ask are: what are the elements of these offences, and whether the facts disclosed by the proofs of evidence sustain any prima facie case of the commission of the alleged offences?

A prima facie case means no more than that "on face of it" the facts supporting the charge disclose ground(s) for proceeding in the prosecution. See: **Onagoruwa Vs. State (1993) 7 NWR (pt. 303) 49 at 82-83.** It also means that the facts, as they stand, if they ae not controverted and they are believed, are sufficient proof of the allegations. Of course, prima facie case and proof beyond reasonable doubt, which comes later, do not stand on the same footing or pedestal. See: **Ikomi Vs. The State (1986) 3 NWLR (pt. 28) 240 at 355; Egbe Vs The State (1980) 1 NCR 341; Abacha Vs. The State (2012) 11 NWLR (pt. 779) 437 at 486.** To constitute a prima facie case, it is trite that the proofs of evidence must link the accused to the offence he is alleged to have committed. See: **Ohwovoriole Vs. FRN (2003) 2 NWLR (pt. 803) 176 at 190-191.** In otherwords, that the case against him is not one borne of mere suspicion. See: **Ikomi Vs. State (supra)**

I will need to reproduce the provisions of Sections 19, 25(1)(a) and 26(1)(c) of the ICPC Act. They are:-

> **19. Any public officer who uses his office to gratify or confer corrupt unfair advantage upon himself or any relation or associate of public officer or any other public officer shall be guilty of an offence and shall on conviction be liable to imprisonment for five (5) years without option of fine.**
>
> **25.(1) Any person who makes or causes any other to make to an officer of the Commission or to any other public officer, in the course of the exercise by such public officer of the duties of his office, any**

statement which to his knowledge of the person making the statement, or causing the statement to be made:-

(a) is false, or intended to mislead or untrue in any material particular;

or

(b) is not consistent with any other statement previously made by such person to any other having authority or power under any law to receive or require to be made such other statement notwithstanding that the person making the statement is not under any legal or other obligation to tell the truth, shall be guilty of an offence and shall or conviction be liable to a fine not exceeding One Hundred Thousand Naira or to imprisonment not exceeding two (2) years or to both such fine and imprisonment

26(1) Any person who

(c) abets or is engaged in a criminal conspiracy to commit any offence under this Act. Shall be guilty of an offence and shall, on conviction, be liable to the punishment provided for such offence.

The elements constituting each offence are very well stated in the provisions which, in my opinion, are unambiguous. Each charge is also clear as to what it alleges and the offence charged. The proofs of evidence and the charges, if juxtaposed against the provisions of ICPC Act, under which the charges have been laid, clearly disclose a prima facie case to warrant the trial to proceed.

A This is an interlocutory appeal. It is not permissible in law, at this stage, that any comments be made on the merits of the substantive case that is yet to be heard. See: **Iweka Vs. SCOA (2000) 3 SC 21 at 24-25; FSB Int'l Bank Ltd Vs. Imano Nig. Ltd. (2000) 11 NWLR (pt 679) 620 at**
B **639.** Conscious of this injunction, I shall not undertake any comment on the merits of the case.

Mr. Ayegbayo, an investigating officer of the ICPC, is apparently the star witness the ICPC intends to call at the trial of the appellant. The other 3
C witnesses are drawn from the various banks. Their evidence, in essence, are intended merely to corroborate one or two facts. There are also documents to be produced at the trial. These following facts among others, appear to stand out in the synopsis of the proposed evidence of the said ICPC
D investigator, Mr. Ayegbayo. That is:

> **The President directed the 1st accused to handover the money (i.e. ₦557,995,065.00) donated by Bayelsa State**
E **Government) received from Bayelsa State Government to the Ministry of Police Affairs to carry out the necessary purchases. That the accused persons failed to comply with the directives of the President to remit the money to the**
F **Ministry of Police Affairs to make the purchases until November, 2006 when the deposit (in the interest yielding accounts) had reached maturity and the sum of ₦16,412,315.56 was the interest generated on the**
G **principal amount.**
>
> **That the accused person then released the (principal) sum of ₦557,995.065 to the Ministry of Police Affairs minus**
H **the interest generated. The accused persons deliberately withheld from the Ministry of Police Affairs the fact that the amount donated had been placed in an interest yielding accounts and that it had generated a substantial**
I **amount of interest.**

(And) that the accused persons collected the ₦16,412,315.56 as interest from the 2 fixed deposit accounts and converted same to their personal use.

On these facts and others in the proofs of evidence the appellant has failed to carry me along with him that the facts and the charges do not disclose any prima facie case. The facts speak for themselves and to the allegations against the appellant. I think, and so hold, that on these facts a prima facie case has been made out against the appellant requiring the trial to proceed on the charges in the information sheet. A prima facie case, as this court held in **Daboh & Anor. Vs. The State (1977) 11 NSCC 309; (1977) 5 SC 222,** is made out by the prosecution if it is sufficient for the accused to be called upon to make some explanations.

The appellant has not satisfactorily made out his complaint as argued under Issue 2. Accordingly, I resolve the Issue against him, and in favour of the 1st respondent.

On the whole, I find no substance in this appeal. It is unfortunate that, inspite of the decision of this court in A.G. Ondo State Vs. A.G. Federation (supra) on facts almost on all fours with the facts of the instant appeal, this interlocutory appeal was fought doggedly from the High Court of the FCT to this court. In the end, notwithstanding the huge resources, time, money and energy inclusive, wasted this case has to go back to the zero or starting point at the High Court of the FCT for the appellant, as the accused person to face his trial

It is hereby ordered that the case against the appellant at the trial court shall forthwith resume or continue, and shall be given accelerated hearing and the attention it deserves

Ejembi Eko,
Justice, Supreme Court

I. T. MUHAMMAD, (JSC): I have had the advantage of reading before now, the judgment just delivered by my learned brother Eko, JSC in which he dismissed the appeal. I am in entire agreement with my lord that the appeal lacks merit and ought to be dismissed. I, too, dismiss the appeal. I

A abide by consequential orders made in the leading judgment.

Ibrahim Tanko Muhammad
Justice, Supreme Court

B

OLU ARIWOOLA, (JSC): I had the privilege of reading in draft the lead judgment of my learned brother, **Ejembi Eko, JSC.** His Lordship dealt with the issues involved exhaustively and I have nothing new to add. I agree
C entirely with the reasoning that led to the final conclusion that the appeal lacks merit and should be dismissed. I shall also dismiss the appeal.

Appeal dismissed.

I abide by the consequential orders in the lead judgment.

D **Olu Ariwoola**
Justice, Supreme Court

JOHN INYANG OKORO, (JSC): I was obliged in advance a copy of the
E judgment of my learned brother, Ejembi Eko, JSC just delivered with which I am in agreement that this appeal lacks merit and ought to be dismissed. My learned brother has admirably resolved the three issues distilled for the determination of this appeal. I adopt both the reasons
F marshaled and the conclusion therein as mine. I have nothing new to add. I abide by all the consequential orders made in the lead judgment.

Appeal Dismissed.

John Inyang Okoro
G ***Justice, Supreme Court***

AMINA ADAMU AUGIE, (JSC): I had a preview of the lead judgment delivered by my learned brother, Eko, JSC and I am in agreement with him
H that in the circumstances of this case, a *prima facie* case has been made out against the appellant.

A prima facie case in a criminal trial simply means that there is ground for proceeding. It is not the same as proof, which comes later, when
I the court has to find whether the accused is guilty or not guilty **Ajidagba Vs. I.G.P. (1958) SCNLR 60.** In this case, there is ground for proceeding

A with the trial against the appellant; his argument to the contrary is not borne out by the facts. Thus, I also dismiss this appeal.

Amina Adamu Augie
Justice, Supreme Court

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SUNDAY OLOYEDE
AND
THE STATE

SC. 58/2014

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

ON FRIDAY, 15TH DAY OF DECEMBER, 2017

BEFORE THEIR LORDSHIPS

OLABODE RHODES-VIVOUR	**JUSTICE, SUPREME COURT**
MARY UKAEGO PETER-ODILI	**JUSTICE, SUPREME COURT**
CLARA BATA OGBUNBIYI	**JUSTICE, SUPREME COURT**
AMIRU SANUSI	**JUSTICE, SUPREME COURT**
SIDI DAUDA BAGE	**JUSTICE, SUPREME COURT**

APPEAL: Failure to file brief – Where appellant fails to file appellant brief nor apply for extension of time – Effect.

CASE LAW: The principles in Isibor v. State (2002) 4 NWLR (Pt. 758) p. 741.

CONSTITUTIONAL LAW: Constitution of Federal Republic of Nigeria 1999 as amended – S. 6(6)(a) thereof – Purport and import.

COURT: Order thereof – Where court erroneously dismisses an appeal for failure to file brief – Appellant already file an application for extension of time – Effect whether court will restore case in its course list.

LEGAL PRACTITIONER: Judicial Authorities – Needs for legal practitioners to understand the ration decidendi of decided cases before the application.

PRACTICE AND PROCEDURE: Affidavit evidence – Where documentary evidence supports the position in an affidavit – Effect – Whether such depositions are the correct position of what it seeks to establish.

PRACTICE AND PROCEDURE: Affidavit evidence – Where facts averred in an affidavit are not controverted – Whether such facts are deemed to been accepted.

PRACTICE AND PROCEDURE: Dismissal of appeal – Where Supreme Court dismisses an appeal suo motu for failure to file appellant brief whether it is not unconstitutional.

RULES: Supreme Court Rules – Order 6 Rule 3(2) and order 6 Rule 5(1) thereof – Purport and import.

Issues for Determination

1. **Whether the Supreme Court is competent to set aside its decision shown to be wrong, or given in error.**

2. **In what circumstances can the Supreme Court relist an appeal it dismissed.**

3. **Whether the dismissal of the applicant's appeal in their absence by the Supreme Court suo motu is constitutional.**

4. **Whether the applicant can appeal after his death sentence was reduced to life imprisonment.**

Facts of the Matter

The applicant's Motion on notice filed on 21 February, 2016 seeks the following orders:

1. **An Order setting aside the judgment of this Honourable court delivered on 1 April, 2015, dismissing the appeal of the applicant in appeal No. SC. 58/2014 pursuant to Order 6 Rule 3(2) of the Supreme Court Rules.**

2. **An Order relisting the appeal of the applicant earlier dismissed in the appeal No. SC. 58/2014 to the cause list of this Honourable court for hearing on the merits.**

The application is supported by a 12 paragraph affidavit deposed to by Abiola Aina a litigation clerk in chambers of learned counsel for the applicant. Annexed to the application are documents marked.

Exhibit A - Notice of Appeal filed on 24 December 2014.
Exhibit A1 - Appellant's brief filed on 31 March 2014
Exhibit A - Proceedings of this court dismissing the appeal on 1 April, 2015.

On 1 March, 2017, Mrs. O. Adedokun, a litigation officer in chambers of learned counsel for the applicant, deposed to a 7 paragraph further affidavit. Annexed to the further affidavit is a copy of the proceedings of this court dismissing the appeal, marked exhibit A3.

On 31 August, 2017, Abiola Aina, a litigation clerk, in chambers of learned counsel for the applicant, deposed to a 12 paragraph further and better affidavit. Annexed to the further and better affidavit are documents marked.

Exhibit A4 - Application dated 2 March 2017 for certified copies of process filed by the parties.
Exhibit A5 - Appellant's brief filed on 31 March 2014.
Exhibit A6 - Respondent's brief filed on 15 May 2015.
Exhibit A7 - Respondent's motion filed on 14 May 2015 to regularize respondent's brief.
Exhibit A8 - Receipt showing that the applicant paid required fees for certified true copes of the above processes.

Adekunle Sodeinde Esq, a legal practitioner and principal state counsel in the Attorney General's chambers, Ministry of justice, Ogun State (Counsel for the respondent) deposed to a six paragraph counter affidavit, and a further counter-affidavit of three paragraphs. Annexed to the counter-affidavit are documents marked.

Exhibit R1 - Proof that the applicant as prisoner No. A775 "applied" to the Governor of Ogun State for the exercise of prerogative of mercy.
Exhibit R2 - Proof that the Governor of Ogun State exercised prerogative of mercy in favour of the applicant.
Exhibit R3 - Evidence that the applicant's sentence to death was committed to life imprisonment.

At the hearing of the application on 5 October, 2017 learned counsel for the applicant **F**. **Onibalusi Esq,** observed that the applicant's appeal was dismissed in error, contending that the court was wrongly of the view that the applicant had not filed appellant's brief, when in fact his brief had been filed.

Held:

1. *Consequence when appellant fails to file brief within time nor fails to apply for extension of time.*
The well laid down position of the law is that where an appellant fails to file his brief of argument within time and fails to apply for extension of time to file his brief the Supreme Court can suo motu dismiss the appeal in chambers. Where an appeal is dismissed under Order 6 Rule 3(2) of the Supreme Court Rules, the Supreme Court has no power under its Rules, or the Supreme Court Act, or inherent jurisdiction to relist the appeal suo motu or on application by the appellant except where the dismissal of the appeal was made in error, or the court was misled, or there was pending before the court an application for extension of time to file brief at the time of dismissal of the appeal. See Amalgamated Trustee Ltd vs. Associated Discount House Ltd (2007) 15 NWLR (Pt. 1056) P. 118. Chime vs.

Ude (1996) 7 NWLR (Pt. 461) P. 379. *(P 225 Paras B – D)*

2. *The purport of Order 6 Rule 3(2) and ord. 6 Rule 5(1) Supreme Court Rules*

Now, what does Order 6 Rule 3(2) supra say. It says that:

> **"(2) Where the appellant has failed to file a brief within the period prescribed by this Order and there is no application for extension of time within which to file the brief, the court may subject to the proviso to Rule 9 of this order proceed to dismiss the appeal in chambers without hearing argument.**

What is the period prescribed by this Order for the appellant to file a brief?

Order 6 Rule 5(1) of the Supreme Court Rules states that:

> **"5(1)(a). The appellant shall within ten weeks of the receipt of the record of appeal referred to in Order 7 file in the court and serve on the respondent a written brief……..."**

(P 225 Paras E – H)

3. *Facts querred in affidavit which are not controverted are deemed correct and accepted.*

Paragraph 6 of the applicant's affidavit reads:

> **"7. That the record of appeal was duly complied and a copy served on the applicant's counsel on 22 January, 2014.**

The respondent filed a 6 paragraph counter-affidavit and 3 paragraph further counter- affidavits. Paragraph 6 of the

applicant's affidavit wherein he stated that the record of appeal was served on the applicant's counsel on 22 January, 2014 is not denied in any of the two counter-affidavits.

The position of the law is that where facts deposed to in an affidavit have not been controverted, such facts must be taken as true. The court would readily act on uncontroverted affidavit evidence. See Alagbe vs. Abimbola 1978 2 SC P. 39.

I am in the circumstances satisfied that the applicant was served with the record of appeal on 22 January, 2014.

According to Order 6 Rule 5(1)(a) of the Supreme Court Rules the applicant (as appellant) has 10 weeks from 22 January 2014 to file in court and serve on the respondent the appellant's brief.

Paragraph 7 of the affidavit in support reads:

> **7. That the applicant's brief of argument dated 28 March, 2014 was filed in this Honourable court on 31 March, 2014. A copy of the said brief of argument is attached herewith and marked exhibit A1.**

The above deposition is not denied in any of the two counter-affidavits filed in opposition to this application. That the applicant's brief was filed in this Honourable court on 31 March, 2014 is true and correct in the absence of a denial by the respondent, and on the authority of Alagbe vs. Abimbola (supra). *(P 226 Paras A – H)*

4. *Where documentary evidence supports deposition in an affidavit*

Furthermore, where documentary evidence support depositions in an affidavit such depositions are the correct position of what it seeks to establish.

Exhibit A1 is the applicant's brief. It is clear thereon that it was filed in this Honourable court on 31 March, 2014.

10 weeks from 22 January, 2014 runs out on 5 April, 2014. The applicant's brief was filed on 31 March, 2014. There was

compliance with Order 6 Rule 5(1)(a) of the Supreme Court Rules.

It is now clear that the Supreme Court was wrong to dismiss appeal No. SC. 58/2014 for failure to file brief. The order of this court made in chambers on 1 April 2015 dismissing the applicant's appeal under Order 6 Rule 3(2) of the Supreme Court Rules was wrong, because the applicant's brief was properly filed on 31 March, 2014.

This court was in grave error to dismiss an appeal for non filing of brief when as a fact the brief had been filed a year before the order dismissing the appeal was made.

It is abundantly clear that there was an error, and that error emanated from the Registry of this court. When this court sat in chambers on 1 April 2015 it acted on the information supplied by the Registry that the applicant had not filed a brief, when in fact he had.

There can be no doubt that is court acted on an administrative error that has its roots in the Registry of this court. On no account would this court deny a litigant his right of appeal as a result of blunders by the Registry. *(Pp 226 – 227 Paras H – F)*

5. *Need for counsel to understand the ratio decidendi of a case*

Counsel should first of all examine the acts of a case and strive to understand what was in issue to appreciate what was decided as a case is authority for what is decides. The ratio decidendi must be read and understood.

This case explained in detail the Constitutional nature of the office of the Attorney-General of the Federation and that courts should decide living issues and not engage in academic issues. It is not an authority for what learned counsel for the respondent proposes, that a case dismissed in error should not be relisted. The case is irrelevant and is not in the least of any help on this issue being considered. *(P 228 Paras F – I)*

6. *Where court erroneously dismisses an application*

It is the correct position of the law that if a court makes an order dismissing an appeal when in fact the appeal is pending or when

there is an application for extension of time to regularize the appeal the court should rise to the occasion and pronounce its order as null and void, as the court has inherent jurisdiction to correct the obvious flaws by stating in clear language that the appeal is pending, provided application is made to the court as in this case. Appeal No. SC. 58/2014 is hereby relisted and restored on the cause list of this court. *(P 229 Paras A – B)*

7. *The purport CFRN 1999*
The power conferred in the courts by section 6(6) (a) of the Constitution is broad but not unlimited. Section 6(6) (a) of the Constitution enables superior courts exercise inherent supervisory jurisdiction over inferior courts. Power which is necessary for the smooth administration of justice. See Akilu vs. Fawehinmi (No. 2) (1989) 2 NWLR (Pt 102) P. 122. Kotoye vs. CBN (1989) 1 NWLR (Pt. 98) P. 419. *(P 229 Paras F – G)*

8. *Decision of court to dismiss appeal suo motu is not unconstitutional*
To my mind, it is so obvious from the above that this court has the power to deal with applicant's "default" suo motu under Order 6 Rule 3(2)) of the Supreme Court Rules.

In the spirit of the golden rule that justice delayed is justice denied, this court has the duty to do away with frivolous cases filed with the clear intention to overreach of deny the respondent the fruit of the judgment. Where this court is satisfied that the antics of the appellant are designed to further congest the court, or where there is apparent non compliance with the rules, it would be constitutional for this court to invoke its inherent jurisdiction to deal with the infractions. The decision of this court dismissing the appeal suo motu is not unconstitutional.

The court (in chambers) acted quite righty within the Constitution. It is only when it has been shown as in this case that the court acted under a mistake of fact in that the applicant's brief was indeed filed within time that the court can exdebito justiciae set

aside the dismissal of the appeal under Order 6 Rule 3(2) of the Supreme Court Rules.

The dismissal of the applicant's appeal in his absence by the Supreme Court suo motu was constitutional. *(Pp 229 – 230 Paras G – C)*

9. *Distinction between Isibor's case*

Isibor's case does not appear relevant as in that case the appellant was released from prison custody and so there was nothing to appeal on, or against as he suddenly became a free man. While in this case the appellant is serving a life sentence. He is not a free man.

He never applied for prerogative of mercy, and his intention is to be a free man. An appeal could very well go either way. A death sentence may again be affirmed or the appeal allowed.

The appellant has a choice, and he decided to appeal. The applicant can appeal after his death sentence was reduced to life imprisonment in view of what I have been saying. *(P 232 Paras E – G)*

Per Peter Odili (JSC)

In the prevailing circumstances showcased by the supporting and countering affidavit and in context of the order of court. In this case in hand, Order 6 Rule 5(1)(a) of the Supreme Court Rules 1999 (as amended) has provided that applicant file his brief of argument in support of the notice of appeal within 10 weeks of his receipt of the record of appeal. The facts shown are that the record of appeal was received by the counsel to the appellant on 22/1/2014 and the appellant's brief of argument was filed on 31/3/2014, a period of 9 weeks and 5 days from the receipt of the record of appeal.

That shows that the provisions of Order 5 Rule 5(1)(a) of the rules of court were met and the appeal ought not to have been struck out under Order 6 Rule 3(2) of the same rules of court. The question that is the naturally thrown up is if this court would not review that order of striking out which on the face of it seems to have been in advertently made. See Order 8 Rule 16 of the Supreme Court Rules.

The reasons for this second look at what had been done is to forestall an inadvertence made by the administrative personnel of the court being visited on a hapless litigant and I dare say also his counsel. Such visitation would be the elevation of technicalities to a superior level to the detriment of the interest of justice. In contemplation of such a situation this court had in the case of Ede vs. Mba (2011) 18 NWLR (Pt. 1278) 236 at 266 per Muhammad JSC stated as follows:

> **"Certainly, the error committed by the registry was an administrative error which was irregular. But the most relevant question one would pose here is: should this court allow an unsuspecting litigant to suffer as a result of the mistakes/omissions occasioned by the registry staff? Certainly No.**

The court had further stated at page 267 per Muhammad JSC thus:

> **"It is an established principle of law that if an appeal is pending or there is an application for extension of time within which to file such a brief of argument, if the court makes an order of dismissal that order is a nullity. The court has inherent jurisdiction to set aside that judgment and declare that appeal is still pending when a proper application is made before the court."**
> *(Pp 240 – 241 Paras B – C)*

10. *The facts of Isibor vs. The State are not applicable*

For a fact the case of Ede vs. Mba (supra) above highlighted has settled the matter at hand. Learned counsel for the respondent would want the court not to so apply the principles in that case in view of the application for the prerogative of mercy and the commutation made by the governor in consequence thereof.

Interestingly it is the respondent that referred to Exhibit R1 praying for the mercy of the Governor. It was the prison officially who made the recommendations and application for the prerogative of mercy and so the applicant cannot be taken to be estopped by an action he did not precipitate. The position is all the more not self defeating for the applicant since the remission of death sentence upon him to a prison sentence is not tantamount to a pardon which would lead to his release from prison. Therefore the case of Isiobor vs. The State (2002) 4 NWLR (Pt. 758) 741 relied on by the respondent is not applicable here as it is distinct from the facts and circumstances of the present scenario. *(P 241 Paras C – G)*

Per Ogbunbiyi (JSC)

The justice of this application will be well met therefore, if the reliefs sought for are granted as prayed. This is in view of the fact that the appellant/applicant cannot be held to suffer for the lapses of the registry of this court which should have placed all processes before the court. The court, in this instance was mislead and that should not be to the detriment of the appellant/applicant.

The appellant in this case would want to exercise his fundamental right under the constitution. In other words his right to appeal which the constitution did not make it conditional to the happening of any event whatsoever. This is more so in the present situation at hand especially where the application for prerogative of mercy was made by the prison authorities on behalf of the appellant and not by himself.

As far as the appellant/applicant was concerned, he was awaiting his appeal which was dismissed, unfortunately due to no fault of his. The merit of this application cannot be under estimated but should be considered as done and well deserved.
(P 242 Paras C – F)

Per Sanusi (JSC)

From the affidavit evidence presented by the applicant, it is shown that he had already filed his appellant's brief on31 March 2014 i.e nearly one year before we dismissed the appeal. Such evidence was never controverter or challenged. This clearly shows that the registry staff gave erroneous information when it stated that no such brief of argument was filed. It is sequel to that, that the applicant is approaching this court to set aside its order of dismissal of the appeal on the wrong assumption that no brief was filed by the applicant. Indeed from the affidavit evidence it is clear that appellant had actually filed his brief of argument within time.

Having adumbrated all that had ensued in this instant case, it goes without saying that the dismissal of the appeal suo motu by this court was as a result of the misrepresentation by the registry of this court. A court is always at liberty to set aside its own judgment which it gave as a result of a mistake or misrepresentation as in this instant case, since the appellant/applicant had really filed his brief of argument within time and therefore did not require any extension of time. To my mind therefore, this is a clear example of a case in which this court will not hesitate to set aside the judgment it delivered on 1st day of April 2016 dismissing the appellant's appeal. The appellant should therefore be allowed to pursue his appeal as he wishes and without any hindrance. Since the dismiss all of his appeal was done as a result of misrepresentation. See Okechukwu vs. Benkay Industry Nig Ltd (1989) 3 NWLR (Pt. 108) 234. *(P 243 Paras C – H)*

Nigeria Cases cited

Akilu vs. Fawehinmi (No. 2) (1989) 2 NWLR (Pt 102) P. 122.
Alagbe vs. Abimbola 1978 2 SC P. 39.
Amalgamated Trustee Ltd vs. Associated Discount House Ltd (2007) 15 NWLR (Pt. 1056) P. 118.
Chime vs. Ude (1996) 7 NWLR (Pt. 461) P. 379.
Ede vs. Mba (2011) 18 NWLR (Pt. 1278) 236 at 266

A *Isiobor vs. The State (2002) 4 NWLR (Pt. 758) 741*
Kotoye vs. CBN (1989) 1 NWLR (Pt. 98) P. 419.
Okechukwu vs. Benkay Industry Nig Ltd (1989) 3 NWLR (Pt. 108) 234.

B **Representation**
F. ONIBALUSI for the Applicant
DR. O, AYENI Hon. Attorney-General of Ogun State for the respondent.
Mrs. O.O. Osufisan DDP Ogun State
C **O. Ebose** Special Assistant 1 to the Attorney-General
A. Ilori Special Assistant 1 to the Attorney-General
P.C. Akubue

D **RHODES-VIVOUR, (JSC) (Delivering the Lead Judgment):** The applicant's Motion on notice filed on 21 February, 2016 seeks the following orders:

E **3. An Order setting aside the judgment of this Honourable court delivered on 1 April, 2015, dismissing the appeal of the applicant in appeal No. SC. 58/2014 pursuant to Order 6 Rule 3(2) of the**
F **Supreme Court Rules.**

4. An Order relisting the appeal of the applicant earlier dismissed in the appeal No. SC. 58/2014 to the cause list of this Honourable court for hearing on the merits.
G

The application is supported by a 12 paragraph affidavit deposed to by Abiola Aina a litigation clerk in chambers of learned counsel for the applicant. Annexed to the application are documents marked.
H

Exhibit A - Notice of Appeal filed on 24 December 2014.
Exhibit A1 - Appellant's brief filed on 31 March 2014
Exhibit A - Proceedings of this court dismissing the appeal on 1
I **April, 2015.**

A On 1 March, 2017, Mrs. O. Adedokun, a litigation officer in chambers of learned counsel for the applicant, deposed to a 7 paragraph further affidavit. Annexed to the further affidavit is a copy of the proceedings of this court dismissing the appeal, marked exhibit A3.

B On 31 August, 2017, Abiola Aina, a litigation clerk, in chambers of learned counsel for the applicant, deposed to a 12 paragraph further and better affidavit. Annexed to the further and better affidavit are documents marked.

C

Exhibit A4 - Application dated 2 March 2017 for certified copies of process filed by the parties.

Exhibit A5 - Appellant's brief filed on 31 March 2014.

D **Exhibit A6 - Respondent's brief filed on 15 May 2015.**

Exhibit A7 - Respondent's motion filed on 14 May 2015 to regularize respondent's brief.

Exhibit A8 - Receipt showing that the applicant paid required fees for

E **certified true copes of the above processes.**

Adekunle Sodeinde Esq, a legal practitioner and principal state counsel in the Attorney General's chambers, Ministry of justice, Ogun State

F (Counsel for the respondent) deposed to a six paragraph counter affidavit, and a further counter-affidavit of three paragraphs. Annexed to the counter-affidavit are documents marked.

G **Exhibit R1 - Proof that the applicant as prisoner No. A775 "applied" to the Governor of Ogun State for the exercise of prerogative of mercy.**

Exhibit R2 - Proof that the Governor of Ogun State exercised

H **prerogative of mercy in favour of the applicant.**

Exhibit R3 - Evidence that the applicant's sentence to death was committed to life imprisonment.

I At the hearing of the application on 5 October, 2017 learned counsel for the applicant **F. Onibalusi Esq,** observed that the applicant's appeal was

dismissed in error, contending that the court was wrongly of the view that the applicant had not filed appellant's brief, when in fact his brief had been filed. He observed that the application for prerogative of mercy was made by the Prison authorities and not by the applicant. He urged this court to grant the application so that the applicant's appeal can be heard by this court.

Opposing the application learned counsel for the respondent's **Dr. O. Ayeni,** the Attorney-General of Ogun State submitted that if an appeal is dismissed in error, it is wrong for the court to relist it. Reliance was placed on **A.G. Federation Vs. ANPP (2003) 18 NWLR (Pt. 851) P. 182.**
He observed that after the appeal was dismissed the applicant approached the Ogun Sate Government for prerogative of mercy. He further observed that after the applicant made that election, and the Ogun State Government accepted the recommendation of prerogative of mercy and committed death sentence to life imprisonment, he cannot come back to agitate that appeal reliance was placed on **Isibor Vs. State (2002) 4 NWLR (Pt. 758) P. 741.**

He finally observed that the applicant cannot eat his cake and have it. He urged this court to dismiss this application.

I perused the written submissions filed in addition to hearing oral submissions of both counsel and found that the oral submissions were a repetition of the written submissions, hence there is no longer the need for me to repeat what has already been very well spelt out.
The facts are these.
The applicant and there other persons were charged before an Abeokuta High Court with conspiracy to commit armed robbery and armed robbery under section 5(b) and 1(2) (a) of the Robbery and Firearms (Special Provisions) Act.

The applicants with the other persons were found guilty and sentenced to death on 4 January 2003. His appeal to the Court of Appeal was dismissed on 5 December, 2013. On 24 December 2013 the applicant filed a notice of appeal to the Supreme Court.

The record of appeal was received by the Supreme Court on 7 February, 2014 while the applicant's brief (appellant's brief) was filed in

this court on 31 March 2014. 1 April, 2015 was a Wednesday. This court had its chamber sitting. On such days appeals are brought before the judge's to be dismissed for one reason or the other. SC/58/2014 was one of the ten pending appeals which the Registry brought before us for dismissal for non compliance with Order 6 rule 3(2) of the Supreme Court Rules. All the appeals were accordingly dismissed since the appellant's in the ten appeals, according to the Registry had not filed brief and so had not complied with Order 6 Rule 3(2) of the Supreme Court Rules. The applicant no longer had an appeal pending before this court.

On 28 April 2016 the Ogun State Advisory Council on the prerogative of mercy recommended to the Governor of Ogun State that the Governor exercises mercy in favour of the applicant. On 25 May 2016 the Governor acceded to the request of the State Advisory Council on the prerogative of mercy and committed the sentence of death imposed by the court of life imprisonment.

The applicant now wants this appeal relisted so that he can appeal to the Supreme Court.

The issues for determination are:

5. Whether the Supreme Court is competent to set aside its decision shown to be wrong, or given in error.

6. In what circumstances can the Supreme Court relist an appeal it dismissed.

7. Whether the dismissal of the applicant's appeal in their absence by the Supreme Court suo motu is constitutional.

8. Whether the applicant can appeal after his death sentence was reduced to life imprisonment.

I shall examine issues 1 and 2 together.

On 1 April 2015 this court had its chamber sitting. On such days, the court sits to deal with applications that can be handled without hearing counsel, e.g. motion for accelerated hearing, and to regularise briefs. It

also dismisses appeals for non compliance with the Supreme Court Rules, Appeal No. SC.58/2014, was one of ten appeals dismissed under Order 6 Rule 3(2) of the Supreme Court Rules for failure of the applicant to file his appellant's brief.

The well laid down position of the law is that where an appellant fails to file his brief of argument within time and fails to apply for extension of time to file his brief the Supreme Court can suo motu dismiss the appeal in chambers. Where an appeal is dismissed under Order 6 Rule 3(2) of the Supreme Court Rules, the Supreme Court has no power under its Rules, or the Supreme Court Act, or inherent jurisdiction to relist the appeal suo motu or on application by the appellant except where the dismissal of the appeal was made in error, or the court was misled, or there was pending before the court an application for extension of time to file brief at the time of dismissal of the appeal. See **Amalgamated Trustee Ltd Vs. Associated Discount House Ltd (2007) 15 NWLR (Pt. 1056) P. 118. Chime Vs. Ude (1996) 7 NWLR (Pt. 461) P. 379**

Now, what does Order 6 Rule 3(2) supra say. It says that:

> **"(2) Where the appellant has failed to file a brief within the period prescribed by this Order and there is no application for extension of time within which to file the brief, the court may subject to the proviso to Rule 9 of this order proceed to dismiss the appeal in chambers without hearing argument.**

What is the period prescribed by this Order for the appellant to file a brief?

Order 6 Rule 5(1) of the Supreme Court Rules states that:

> **"5(1)(a). The appellant shall within ten weeks of the receipt of the record of appeal referred to in Order 7 file in the court and serve on the respondent a written brief……..."**

A Paragraph 6 of the applicant's affidavit reads:

> **"6. That the record of appeal was duly complied and a copy served on the applicant's counsel on 22**
> B **January, 2014.**

The respondent filed a 6 paragraph counter-affidavit and 3 paragraph further counter- affidavits. Paragraph 6 of the applicant's affidavit wherein
C he stated that the record of appeal was served on the applicant's counsel on 22 January, 2014 is not denied in any of the two counter-affidavits.

The position of the law is that where facts deposed to in an affidavit have not been controverted, such facts must be taken as true. The court
D would readily act on uncontroverted affidavit evidence. See **Alagbe vs. Abimbola 1978 2 SC P. 39.**

I am in the circumstances satisfied that the applicant was served with the record of appeal on 22 January, 2014.

E According to Order 6 Rule 5(1)(a) of the Supreme Court Rules the applicant (as appellant) has 10 weeks from 22 January 2014 to file in court and serve on the respondent the appellant's brief.

Paragraph 7 of the affidavit in support reads:

F

> **7. That the applicant's brief of argument dated 28 March, 2014 was filed in this Honourable court on 31 March, 2014. A copy of the said brief of argument is**
> G **attached herewith and marked exhibit A1.**

The above deposition is not denied in any of the two counter-affidavits filed in opposition to this application. That the applicant's brief was filed in this
H Honourable court on 31 March, 2014 is true and correct in the absence of a denial by the respondent, and on the authority of **Alagbe vs. Abimbola (supra).**

Furthermore, where documentary evidence support depositions in
I an affidavit such depositions are the correct position of what it seeks to establish.

A Exhibit A1 is the applicant's brief. It is clear thereon that it was filed in this Honourable court on 31 March, 2014.

10 weeks from 22 January, 2014 runs out on 5 April, 2014. The applicant's brief was filed on 31 March, 2014. There was compliance with
B Order 6 Rule 5(1)(a) of the Supreme Court Rules.

It is now clear that the Supreme Court was wrong to dismiss appeal No. SC. 58/2014 for failure to file brief. The order of this court made in chambers on 1 April 2015 dismissing the applicant's appeal under Order 6
C Rule 3(2) of the Supreme Court Rules was wrong, because the applicant's brief was properly filed on 31 March, 2014.

This court was in grave error to dismiss an appeal for non filing of brief when as a fact the brief had been filed a year before the order
D dismissing the appeal was made.

It is abundantly clear that there was an error, and that error emanated from the Registry of this court. When this court sat in chambers on 1 April 2015 it acted on the information supplied by the Registry that the applicant
E had not filed a brief, when in fact he had.

There can be no doubt that is court acted on an administrative error that has its roots in the Registry of this court. On no account would this court deny a litigant his right of appeal as a result of blunders by the
F Registry.

Learned counsel for the respondent relied on **A.G. Federation vs. ANPP & 2 Ors (2003) 18 NWLR (Pt. 851) P. 182** as authority that where an appeal is dismissed in error it is wrong for the court to relist it.

G The facts are these.

The 3rd respondent instituted an action at the Federal High Court, Abuja against the 1st and 2nd respondents claiming two declaratory reliefs and three injunctive reliefs seeking to bar the 2nd respondent from
H contesting the 2003 election into the office of the Governor of Kogi State for the third time. The 2nd respondent, who was the Governor of Kogi State at the material time, counter-claimed, in the main to the effect that his election into the office of Governor of Kogi State in 1991 is not within the
I contemplation of section 182(1) (b) of the 1999 Constitution. The

A appellant was the 3rd defendant in the suit. At the end of the hearing, the trial court dismissed the claim of the rd respondent and granted the counter-claim of the 2nd respondent. The appellant appealed to the Court of Appeal. His appeal was dismissed. He further appealed to the Supreme Court. The
B appeal to the Supreme Court was filed on 27 May 2003 after the dissolution of the Federal Executive Council. The gubernatorial election was held in Kogi State on 19 April 2003 with the 2nd respondent participating as the candidate of the 1st respondent. Though he lost. While the appeal was
C pending, Alhaji Adamu M. Waziri who was the candidate of the PDP in the same election for Yobe State applied for leave to also appeal against the decision of the Court of Appeal.

Alhaji Adamu M. Waziri lost the Governorship election in Yobe
D State to Alhaji Bukar A. Ibrahim. In the election petition he filed, he had contended that the victorious candidate was not qualified to contest the election having been previously elected in 1991 and 1999. The petition was dismissed at the Court of Appeal. He then sought leave to appeal as an
E interested party against the decision off the Court of Appeal in this case which decided to the contrary in respect of the 2nd respondent.

The appellant urged this court to hold that by virtue of section 182(1)(b) of the Constitution the 2nd respondent was not qualified to contest
F for the office of Governor of Kogi State in the 2003 election. In determining the appeal this court considered the provisions of sections 150 (1) and 182 (1)(b) of the Constitution.

Counsel should first of all examine the acts of a case and strive to
G understand what was in issue to appreciate what was decided as a case is authority for what is decides. The ratio decidendi must be read and understood.

This case explained in detail the Constitutional nature of the office of
H the Attorney-General of the Federation and that courts should decide living issues and not engage in academic issues. It is not an authority for what learned counsel for the respondent proposes, that a case dismissed in error should not be relisted. The case is irrelevant and is not in the least of any
I help on this issue being considered.

A It is the correct position of the law that if a court makes an order dismissing an appeal when in fact the appeal is pending or when there is an application for extension of time to regularize the appeal the court should rise to the occasion and pronounce its order as null and void, as the court has
B inherent jurisdiction to correct the obvious flaws by stating in clear language that the appeal is pending, provided application is made to the court as in this case. Appeal No. SC. 58/2014 is hereby relisted and restored on the cause list of this court.

C

5. Whether the dismissal of the applicant's appeal in their absence by the Supreme Court suo motu is constitutional.

D

Section 6 (6) of the Constitution states that:

"(6) The judicial powers vested in accordance with the
E **foregoing provisions of this action.**
(a) Shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law."

F

The power conferred in the courts by section 6(6) (a) of the Constitution is broad but not unlimited. Section 6(6) (a) of the Constitution enables superior courts exercise inherent supervisory jurisdiction over inferior
G courts. Power which is necessary for the smooth administration of justice. See **Akilu vs. Fawehinmi (No. 2) (1989) 2 NWLR (Pt 102) P. 122. Kotoye vs. CBN (1989) 1 NWLR (Pt. 98) P. 419.**

To my mind, it is so obvious from the above that this court has the
H power to deal with applicant's "default" suo motu under Order 6 Rule 3(2)) of the Supreme Court Rules.

In the spirit of the golden rule that justice delayed is justice denied, this court has the duty to do away with frivolous cases filed with the clear
I intention to overreach of deny the respondent the fruit of the judgment. Where this court is satisfied that the antics of the appellant are designed to

further congest the court, or where there is apparent non compliance with the rules, it would be constitutional for this court to invoke its inherent jurisdiction to deal with the infractions. The decision of this court dismissing the appeal suo motu is not unconstitutional.

The court (in chambers) acted quite righty within the Constitution. It is only when it has been shown as in this case that the court acted under a mistake of fact in that the applicant's brief was indeed filed within time that the court can exdebito justiciae set aside the dismissal of the appeal under Order 6 Rule 3(2) of the Supreme Court Rules.

The dismissal of the applicant's appeal in his absence by the Supreme Court suo motu was constitutional.

"4. Whether the applicant can appeal after his death sentence was reduced to life imprisonment.

Learned counsel for the respondent was of the view that since the applicant approached the Ogun State Governor to exercise prerogative of mercy in his favour, and was successful he cannot appeal after his death sentence was reduced to life imprisonment. He relied on ***Isibor vs. State (supra).***

Learned counsel for the applicant observed that the applicant never applied for mercy, rather it was the prison authorities who forwarded his name and that of several other prisoners to the Ogun State prerogative of mercy. He further observed that ***Isibor vs. State (supra)*** is not applicable.

It is important at this stage that the facts in ***Isibor vs. State (supra)*** are reproduced.

Isibor was charged before a High Court for armed robbery contrary to and punishable under section 1(2) (a) of the Robbery and Firearms Act. At the conclusion of trial he was found guilty of armed robbery and sentenced to death. His appeal against his conviction was dismissed by the Court of Appeal.

He appealed to the Supreme Court. When the appeal was being heard in the Supreme Court, the court was told that he had been released from custody. He was one of the prisoners granted amnesty/release by the Head of State, General Abdul-Salam Abubakar on 5 May 1999.

The appeal was dismissed on 29 November, 2001. In view of the amnesty granted by the Head of State Mr. Isibor became a free man. He cannot be punished as provided by law in respect of the offence for which he was convicted.

Are these the facts in this case? Definitely not. In this case, the applicant was charged before an Abeokuta High Court for conspiracy to commit Armed Robbery and Armed Robbery under sections 5(b) and 1(2)(a) of the Robbery and Firearms Act. He was found guilty and sentenced to death. His appeal to the Court of Appeal was dismissed on 5 December, 2013.

He immediately filed a notice of appeal to this court on 24 December 2013 and his brief on 31 March 2014, while he was waiting for his appeal to be heard this court dismissed his appeal on 1 April 2015, on facts which have been found to be wrong.

By a letter ref. PHAB.1-6/Vol. XIIIL/1768 dated 6 April 2016 Exhibit R1 the Chief Superintendent of the Nigerian Prisons Service Ogun State Command wrote to the Attorney-General of Ogun State. Relevant extracts from exhibit R1 reads:

> **"REMISSION OF PRISONERS SENTENCE AND RELEASE OF PRISONERS ON 29 MAY, 2016 IN COMMEMORATION OF DEMOCRACY DAY ANNIVERSARY".**
>
> **I am directed to forward herewith the attached list and all relevant documents of twenty-one (21) inmates in respect of Ogun State Command short listed for recommendation for amnesty on the 29 May, 2016 in commemoration of Democracy Day Anniversary**
>
> **……..**
>
> **This is for your information and further necessary action, please."**

My lords, at no time did the applicant approach, or apply to the Ogun State Governor to exercise prerogative of mercy in his favour, rather it was the

prison authorities that forwarded the names of the applicant and other prisoners to the Ogun State Advisory Council on the prerogative of mercy for the remission/release of prisoners to commemorate democracy day in 2016.

On 5 December 2013 the applicant's appeal to the Court of Appeal was dismissed. The applicant quickly filed an appeal on 24 December 2013, and filed his brief of argument (applicant's brief) on 13 March 2014.

The facts in Isibor's case and this case are different. It was when isibor's appeal was being heard in the Supreme Court that the court was informed that he had been discharged from prison custody by the fiat of the Head of State, Commander-In-Chief of the Armed Forces, General Abdul-Salam Abubakar on 5 May, 1999.

In this case the applicant's death sentence was reduced to life imprisonment. He is still not a free man like Isibor. He wants to be free.

After the applicant lost this appeal at the Court of Appeal on 5 December 2013, he exercised his right of appeal to the Supreme Court as provided by section 233(2)(d) of the Constitution, and no one can deny him that right of appeal. Isibor's case does not appear relevant as in that case the appellant was released from prison custody and so there was nothing to appeal on, or against as he suddenly became a free man. While in this case the appellant is serving a life sentence. He is not a free man.

He never applied for prerogative of mercy, and his intention is to be a free man. An appeal could very well go either way. A death sentence may again be affirmed or the appeal allowed.

The appellant has a choice, and he decided to appeal. The applicant can appeal after his death sentence was reduced to life imprisonment in view of what I have been saying.

In the end the application succeeds.

(a) The order of this court made by this court on 1 April, 2015 dismissing Appeal No. SC. 58/2014 pursuant to Order 6 Rule 3(2) of the Supreme Court Rules is hereby set aside.

(b) Appeal No. SC. 58/2014 is hereby relisted on the cause list of this court for hearing on the merits.

Olabode Rhodes-vivour
Justice, Supreme Court

PETER-ODILI, (JSC): I agree with the ruling just delivered by my learned brother, Olabode Rhodes-Vivour JSC and to show my support with the reasoning I shall make some remarks.

The applicant had filed a motion on notice on the 5th day of February, 2016 which sought the following two prayers:

1. **An Order setting aside the judgment of the honourable court delivered on 1st April, 2015, dismissing the appeal of the applicant in appeal No. SC. 58/2014 pursuant to Order 6 Rule 3(2) of the Supreme Court Rules.**

2. **An Order relisting the appeal of the applicant earlier dismissed in the Appeal No. SC. 58/2014 to the cause list of this honourable court for hearing on the merits.**

The applicant is supported by a 12 paragraph affidavit deposed to by Abiola Aina, Litigation Clerk in the law firm of Adebola Onibaliusi & Co of counsel for the applicant. Applicant filed a further and better affidavit on the 31/8/2017 in response to the counter affidavit of the respondent filed on 20/6/2016 and also a further counter affidavit filed on 12/6/2016. Applicant had also filed a further affidavit on the 1/3/17 deposed to by Oluwabunmi Adedokun (Mrs.), Litigation officer of counsel for the applicant.

Learned counsel also field along with the motion paper, a brief or written address and a reply to the response of the respondent's counter affidavit and written address.

Learned counsel for the applicant contended that by the provisions of Order 6 rule 5(1) (a) of the Supreme Court Rules 1999 (as amended) the applicant is required to file his brief of argument in support of his notice of appeal within 10 weeks of his receipt of the record of appeal. That the record of appeal was received by counsel to the appellant on 22/1/2014 and the appellant's brief of argument dated 28/3/2014 was filed in this court on

31/3/2014 which is a period of about 9 weeks and 5 days from the receipt of the record of appeal.

He stated that the applicant's brief of argument was filed within the time specified by Order 5 Rule 5(1) (a) of the Rules of Court and the appeal of the appellant in Suit No. SC. 325/2014 ought not to be struck out under Order 6 Rule 3(2) Rules of Court. He further contended that even though this court is not supposed to set aside its judgment except as provided in Order 8 Rule 16 of the Supreme Court Rules, this court in appropriate cases lime the present one, review its judgment in the interest of justice without regard to a strict compliance with the technicalities. He cited **Ede vs. Mba (2011) 18 NWLR (Pt. 11278) 236 at 266.**

In response, learned counsel for the respondent, the Attorney General of Ogun State, Dr. Olumide Ayeni contended that the applicant had misled the Governor of Ogun State into exercising his discretion of prerogative of mercy in his favour cannot allowed to take advantage of his web of deceit to agitate the present appeal after the impression given of having exhausted his legal rights. That this application is now otiose or hypothetical who no utilitarian value and so an abuse of process. He cited **Attorney-General of the Federation vs. All Nigeria Peoples Party & Ors** (2003) 18 NWLR (Pt. 851) 182 at 215.

Responding to the respondent, learned counsel for the applicant, Femi Onibalusi Esq. referred the court to Exhibit R1, the applicant of the prison authorities for the remission of prisoner's sentence and release of prisoners on 29th May, 2016 towards the celebration of Democracy Day and it can be seen that it was not prepared by the applicant.

Also that a remission of death sentence to a prison term is not the same as a pardon and a release from prison as in the case of **Isibor vs. The State** (2002) 4 NWLR (Pt. 758) 741.

The summary of the contending views on either side having been stated above, I still feel a rehash of some of the salient parts of the supporting affidavit to the motion, the further and better affidavit and of course the counter affidavit might produce with clarity the facts on ground in and of the court reaching a just decision in this application.

A Some relevant paragraph of the supporting affidavit of 5/2/2016 deposed to by Abiola Aina, litigation clerk of learned counsel of the applicant is helpful and they are thus:

B **4. *That the Court of Appeal delivered judgment in this case on 5/12/2013.***

5. That the applicant filed an appeal against the said
C **judgment which notice of appeal is dated and filed on 24/12/2013. A copy of the said notice of appeal is attached herewith and marked Exhibit A.**

D **6. That the record of appeal was duly compiled and copy served on the applicant's counsel on 22/01/2014.**

E **7. That the applicant's brief of argument dated 28/3/2014 was filed in this honourable court on 31/3/2014. A copy of the said brief of argument is attached herewith and marked Exhibit A1.**

F

8. That on 1/14/2015, this honourable court dismissed the appeal of the applicant in Appeal No. SC. 58/2014 under Order 6 Rule 3(2) of the Supreme
G **Court Rules, 1999 (as amended). A copy of the proceedings of this honourable dismissing the appeal is attached herewith and marked Exhibit A2.**

H **9. That the applicant is still interested in the pursuit of his appeal before this honourable court.**

10. That if this application is granted the respondent
I **will not e prejudiced.**

For a clearer picture in adumbration if I might use the language is the further and better affidavit in support of the application, this filed on 31/8/17 and deposed by the same Abiola Ain and the necessary contents are thus:

> ***4. that Femi Onibalusi Esq. of counsel informed me in our office at about 2p.m on 13/8/2017 and I verily believe him to be true that this honourable court in its sitting of 2/3/2017 directed the applicant to file a further and better affidavit in support of his motion on notice dated 3/2/2016.***
>
> ***5. that in pursuance of the said direction of this honourable court our office applied by a letter dated 2/3/2017 for the certified true copies of the processes already filed by the parties in the course of the prosecution of the appeal dismissed. A copy of the said letter of 2/3/2017 is attached herewith and marked exhibit A4.***
>
> ***6. that upon the said application of the applicant obtained from the registry of this honourable court certified true copies (CTC) of the processes as filed by the parties to wit:***
>
> ***i. Appellant's brief of argument dated 28/3/2014, filed on 31/03/2014, a copy of the CTC is attached herewith and marked Exhibit A5.***
>
> ***ii. Respondent's brief of argument dated 14/5/2015, filed on the same date a copy of the CTC is attached herewith and marked Exhibit A6.***
>
> ***iii. Respondent's motion on notice for extension of time to file the respondent's brief of argument and to deem the brief of argument as filed dated***

A ***14/5/2015 and filed on the same date. A copy of the CTC is attached herewith and marked Exhibit A7.***

B ***7. That upon the application for the CTC of the above mentioned processes the applicant paid the required fees and was issued a receipt dated 6/4/2017. A copy of the said receipt is attached herewith and marked*** C ***Exhibit A8.***

8. That the appellant's brief of argument was filed before the appeal of the applicant was dismissed on D ***1/4/2015.***

9. That Femi Onibalusi Esq. of counsel further informed me in our office at about 2pm on 13/8/2017 E ***and I verily believe him to be true that the respondent's brief of argument and motion on notice for extension of time dated 14/5/2015 was filed after the dismissal of the appeal oblivious of the fact that the appeal had*** F ***been dismissed.***

On its own part, the respondent had by counter affidavit filed on 20/6/2016 and deposed to by Adekunle Sodeinde Esq. legal practitioner and principal G state counsel of the Attorney General's chambers in the Department of Public Prosecution of the Ministry of Justice Ogun State. The relevant paragraphs for our purpose and hereunder stated as follows:

H **1. Where the facts deposed are not within my personal knowledge or obtained from the files of documents in relation to this case, I have been informed by Dr. Olumide Ayeni, the Attorney General of Ogun State** I **whom I verily believe.**

2. I have been and read the applicant's motion on notice dated 3rd February, 2016 and filed on 5th February, 2016 service of which was effected on the Ministry of Justice on 12th February, 2016 together with accompanying affidavit deposed by one Abiola Aina Esq. together with Exhibits A, A1 and A2.

3. I now deposed the following facts:

(i) That by Exhibit A2 the appeal to the Supreme Court of the present applicant (Sunday Oloyede) was among the ten (10) appeals dismissed by the honourable court (Coram: Muntaka-Coomassie Rhodes Vivour, Ngwuta, Ogunbiyi and Akaahs, JJSC) a on Wednesday 1st April, 2015.

(ii) That on 6th April, 2016 the applicant (Sunday Oloyede) through the Nigerian Prisons Service and as Prisoner No 775 applied to the Governor of Ogun State for the exercise of prerogative of mercy. There is now produced, shown to me and marked Exhibit R1 proof in respect thereof.

(iii) That on 28th April, 2016 the Ogun State Advisory Council on the prerogative of mercy recommended to the Governor of Ogun State a favourable exercise of prerogative of mercy in the applicant's favour. There is now produced, shown to me and marked Exhibit R2 relevant proof thereof.

(iv) That on 25th May, 2016 the Governor of Ogun State, H/E Senator Ibikunle Amosun, CON FCA acting on the basis of Exhibits R1 and R2 exercised his prerogative of mercy and substituted/commuted the sentence of death imposed on the applicant (Sunday Oloyede), to a sentence of life imprisonment. There is now produced, shown to me and marked

Exhibit R3 relevant proof thereof.

4. Dr. Olumide Ayeni, the Attorney General of Ogun State informed me and I verily believe that:

(i) That Exhibit R3 has since been implemented with Public Announcements on Radio and Television, Media in Ogun State made on the 9th June, 2016.

(ii) That no useful or utilitarian purpose will be served by a continuous agitation of this appeal which has been overtaken by events.

(iii) That the application of 5th February, 2016 constitutes a gross abuse of the process of this honourable court.

(iv) That paragraphs 10, 11 and 12 of Abiola Aina's affidavit of 5th February, 2016 are false.

The attack by the respondent on this application is based upon the stance of the Attorney-General of Ogun State for the respondent that the application for prerogative of mercy, Exhibit A2 and R1 has produced an estoppel which debars the applicant to seek to resuscitate this appeal as the situation has by what the Governor of Ogun State had done commuting the death sentence to life imprisonment and done upon the application for prerogative of mercy.

That is really a persuasive argument and even seductive in nature. This is because there cannot be said to be at live issue in litigation if what is presence to a court for a decision when decided cannot affect the parties thereto in any way either because of the fundamental nature of the reliefs sought or of changed circumstances since after the litigation. That is to say that in the case of an appeal such as the present it becomes academic at the time it is due or hearing even though originally there was a living issue between the parties. It then becomes a fact that the decision may help one of the parties to redirect its affairs in an entirely different or probably anticipated situation does not change anything. I place reliance on **Attorney-General of the Federation vs. All Nigeria Peoples Party & 2**

Ors (2003) 18 NWLR (Pt. 851) 182 at 215 per Uwaifo JSC.

That being the principle that operates in normal setting as shown above, when the facts on grounds are such as present unique feature of extenuating circumstances then a second hook needs be given by the court called upon as we are right now.

In the prevailing circumstances showcased by the supporting and countering affidavit and in context of the order of court. In this case in hand, Order 6 Rule 5(1)(a) of the Supreme Court Rules 1999 (as amended) has provided that applicant file his brief of argument in support of the notice of appeal within 10 weeks of his receipt of the record of appeal. The facts shown are that the record of appeal was received by the counsel to the appellant on 22/1/2014 and the appellant's brief of argument was filed on 31/3/2014, a period of 9 weeks and 5 days from the receipt of the record of appeal.

That shows that the provisions of Order 5 Rule 5(1)(a) of the rules of court were met and the appeal ought not to have been struck out under Order 6 Rule 3(2) of the same rules of court. The question that is the naturally thrown up is if this court would not review that order of striking out which on the face of it seems to have been in advertently made. See Order 8 Rule 16 of the Supreme Court Rules.

The reasons for this second look at what had been done is to forestall an inadvertence made by the administrative personnel of the court being visited on a hapless litigant and I dare say also his counsel. Such visitation would be the elevation of technicalities to a superior level to the detriment of the interest of justice. In contemplation of such a situation this court had in the case of **Ede vs. Mba (2011) 18 NWLR (Pt. 1278) 236 at 266** per Muhammad JSC stated as follows:

> **"Certainly, the error committed by the registry was an administrative error which was irregular. But the most relevant question one would pose here is: should this court allow an unsuspecting litigant to suffer as a result of the mistakes/omissions occasioned by the registry staff? Certainly No.**

The court had further stated at page 267 per Muhammad JSC thus:

> **"It is an established principle of law that if an appeal is pending or there is an application for extension of time within which to file such a brief of argument, if the court makes an order of dismissal that order is a nullity. The court has inherent jurisdiction to set aside that judgment and declare that appeal is still pending when a proper application is made before the court."**

For a fact the case of **Ede vs. Mba** (supra) above highlighted has settled the matter at hand. Learned counsel for the respondent would want the court not to so apply the principles in that case in view of the application for the prerogative of mercy and the commutation made by the governor in consequence thereof.

Interestingly it is the respondent that referred to Exhibit R1 praying for the mercy of the Governor. It was the prison officially who made the recommendations and application for the prerogative of mercy and so the applicant cannot be taken to be estopped by an action he did not precipitate. The position is all the more not self defeating for the applicant since the remission of death sentence upon him to a prison sentence is not tantamount to a pardon which would lead to his release from prison. Therefore the case of **Isiobor vs. The State** (2002) 4 NWLR (Pt. 758) 741 relied on by the respondent is not applicable here as it is distinct from the facts and circumstances of the present scenario.

From the foregoing and the well articulated reasoning in the lead ruling that there is merit in this application which should be granted as prayed. Application is granted by me as I abide by the consequential orders made.

Mary Ukaego Peter-odili
Justice, Supreme Court

BATA OGBUNBIYI, (JSC): The application at hand seeks to set aside the judgment of this court delivered on 1st April, 2015 wherein the applicant's

appeal No. SC. 58/2014 was dismissed pursuant to Order 6 Rule 3(2) of the Supreme Court Rules. The applicant also seeks an order of this court relisting the said appeal so dismissed.

Without belabouring the point in this application, it is apparent as revealed on the affidavit in support thereof that, the appellant/applicant's brief of argument was filed in this court on 31/3/2014 and his appeal was dismissed on 1/4/2015. Paragraphs 7 and 8 of the affidavit in support are in point.

The justice of this application will be well met therefore, if the reliefs sought for are granted as prayed. This is in view of the fact that the appellant/applicant cannot be held to suffer for the lapses of the registry of this court which should have placed all processes before the court. The court, in this instance was mislead and that should not be to the detriment of the appellant/applicant.

The appellant in this case would want to exercise his fundamental right under the constitution. In other words his right to appeal which the constitution did not make it conditional to the happening of any event whatsoever. This is more so in the present situation at hand especially where the application for prerogative of mercy was made by the prison authorities on behalf of the appellant and not by himself.

As far as the appellant/applicant was concerned, he was awaiting his appeal which was dismissed, unfortunately due to no fault of his. The merit of this application cannot be under estimated but should be considered as done and well deserved.

My brother Rhodes-Vivour, JSC has dealt sufficiently to the point and I also endorse his ruling as mine in terms of the orders made herein the lead ruling.

Clara Bata Ogunbiyi
Justice, Supreme Court

AMIRU SANUSI, (JSC): I had the opportunity to read in advance the ruling just delivered by my learned brother Rhodes-Vivour, JSC.

The gravamen of the application is that this applicant appeal No. SC. 58/2014 was dismissed pursuant to Order 6 Rule 3(2) of the Supreme Court

Rules during the routine chambers sitting. Reason for the dismissal was that the appellant/applicant allegedly failed to file and serve the respondent with his (applicant's) brief of argument within the ten (10) weeks as period stipulated by Order 5(1) (a) of the Rules of this court.

On the 1-4-2015 during the chambers sitting, the registry of the court informed the court that no brief was filed by the applicant in the appeal and that there was no application pending in the file too. Based on that information, the court acted on same and dismissed the appeal. The applicant has now applied for the relisting of his appeal dismissed on 1st April 2015.

From the affidavit evidence presented by the applicant, it is shown that he had already filed his appellant's brief on31 March 2014 i.e nearly one year before we dismissed the appeal. Such evidence was never controverter or challenged. This clearly shows that the registry staff gave erroneous information when it stated that no such brief of argument was filed. It is sequel to that, that the applicant is approaching this court to set aside its order of dismissal of the appeal on the wrong assumption that no brief was filed by the applicant. Indeed from the affidavit evidence it is clear that appellant had actually filed his brief of argument within time.

Having adumbrated all that had ensued in this instant case, it goes without saying that the dismissal of the appeal suo motu by this court was as a result of the misrepresentation by the registry of this court. A court is always at liberty to set aside its own judgment which it gave as a result of a mistake or misrepresentation as in this instant case, since the appellant/applicant had really filed his brief of argument within time and therefore did not require any extension of time. To my mind therefore, this is a clear example of a case in which this court will not hesitate to set aside the judgment it delivered on 1st day of April 2016 dismissing the appellant's appeal. The appellant should therefore be allowed to pursue his appeal as he wishes and without any hindrance. Since the dismiss all of his appeal was done as a result of misrepresentation. See Okechukwu vs. Benkay Industry Nig Ltd (9189) 3 NWLR (Pt. 108) 234.

In the result, I am at one with my learned brother Rhodes-Vivour's reasoning and conclusion with regard to the merit of this application. As a

corollary, I adjudge the application meritorious and it is accordingly allowed by me. I accordingly endorse the consequential orders made in the leading ruling, in view of the merit of the application.

Amiru Sanusi
Justice, Supreme Court

SIDI DAUDA BAJE: I have had the benefit of reading in draft the lead judgment of my learned brother Olabode Rhodes-Vivour, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The application brought by the appellant succeeds.

Sidi Dauda Bage,
Justice, Supreme Court