AKEEM ADEBOWALE

V.

THE STATE

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/836/11

CHIMA CENTUS NWEZE, J.C.A. *(Presided and Read the Leading Judgment)*
RITA NOSAKHARE PEMU, J.C.A.
FATIMA OMORO AKINBAMI, J.C.A.

FRIDAY, 31ST MAY 2013

APPEAL - Exercise of discretion by trial court - Attitude of appellate court thereto - When will interfere therewith.

COURT - Abuse of court process - What amounts to.

COURT - Abuse of process - Meaning of.

COURT - Exercise of discretion by trial court - Attitude of appellate court thereto - When will interfere therewith.

CRIMINAL LAW AND PROCEDURE - Confessional statement- Confessional statement of a co-accused person – Whether evidence against a co-accused who has not adopted same.

CRIMINAL LAW AND PROCEDURE - Conviction - Conviction of an accused person on the statement of another accused person- Propriety of.

CRIMINAL LAW AND PROCEDURE - Extra-judicial statement -Extra-Judicial statement of a co-accused - Nature of – Whether binding or admissible against a co-accused.

CRIMINAL LAW AND PROCEDURE - Incriminating statement made in the presence of an accused - Whether can be evidence against him at trial.

CRIMINAL LAW AND PROCEDURE - Recall of Witness – Power of trial court to recall witnesses in criminal proceedings.

CRIMINAL LAW AND PROCEDURE - Statement made by an accused person - Where implicates a co-accused person -Whether evidence against the co-accused person.

CRIMINAL LAW AND PROCEDURE - Trial-within-trial – Meaning of - Purpose of - When should be resorted to.

CRIMINAL LAW AND PROCEDURE - Trial-within-trial – When should be conducted.

CRIMINAL LAW AND PROCEDURE - Witnesses - Witnesses in criminal proceedings - Power of trial court to call and re-call.

EVIDENCE - Confessional statement - Admissibility of – Test therefor - Issue of voluntariness of confessional statement -Where raised - Effect.

EVIDENCE - Confessional statement - Confessional statement of a co-accused person - Whether evidence against a co-accused who has not adopted same.

EVIDENCE - Extra-judicial statement of co-accused - Nature of -Whether binding or admissible against a co-accused.

EVIDENCE - Statement - Incriminating statement made in the presence of an accused - Whether can be evidence against him at trial.

EVIDENCE - Statement made by an accused person – Where implicates a co-accused person - Whether evidence against the co-accused person.

EVIDENCE - Witness - Whether can be recalled for further cross-examination.

PRACTICE AND PROCEDURE - Abuse of court process – What amounts to.

PRACTICE AND PROCEDURE - Abuse of process - Meaning of.

PRACTICE AND PROCEDURE - Exercise of discretion by trial court - Attitude of appellate court thereto - When will interfere therewith.

PRACTICE AND PROCEDURE - Judicial process – Employment of - When regarded as abuse of process.

WORDS AND PHRASES - "Trial-within-trial" - Meaning of.

WORDS AND PHRASES - "Abuse of process" - Meaning of.

Issues:

1. Whether the trial court was right in refusing to consider the appellant's objection to the admissibility of his two statements on the ground that they were involuntarily obtained, for the reason that it was an abuse of judicial statement.
2. Whether the trial court was right in admitting the appellant's two statements to the police as exhibits E and F without conducting a trial within trial and subsequently relying on same to convict the appellant.
3. Whether the trial court was right in admitting the statements of the 1st and 2nd accused persons as exhibits C, D, G and H and subsequently relying on them in convicting the appellant.

4. Whether the trial court was right in dismissing the appellant's application to recall PW2 and PW3 who recorded and tendered exhibits G and H for cross-examination.

Fact:

The appellant, a dockworker, was arraigned as 3rd accused at the High Court of Lagos State on 10th February 2009 on a two-count charge of conspiracy to commit armed robbery and armed robbery. He pleaded not guilty to the two counts.

According to the PW1, on August 11th 2005, he was robbed of a white Toyota Corolla car. PW3 was a police officer, a sergeant at the State Criminal Investigation Department, Panti Lagos who in the course of his testimony, sought to tender two statements which the appellant allegedly made. Initially, appellant's counsel objected to their admissibility on the ground that, being public documents, they ought to be certified. However, during his reply to the prosecution's submissions, he raised the issue of the inadmissibility of the statements on the grounds of their involuntariness. The trial court did not conduct a trial-within-trial. In its ruling, it dismissed the objection as being an abuse of process and admitted the statements in evidence as exhibits E and F.

While counsel for the 1st and 2nd accused was cross-examiningPW3, they tendered exhibits G and H, statements of the 1st and 2ndaccused recorded on their behalf by PW2. The said exhibits were not part of the proof of evidence. Therefore, counsel to the appellant saw them for the first time on the day they were tendered in court.

After the day's proceedings, the counsel to the appellant applied and obtained a certified true copy of the said exhibits with a view to studying them. He later applied by motion on notice to recall PW2 the Police Officer who recorded the statements and alsoPW3 who tendered them for cross-examination. In its ruling of15th December 2009, the trial court dismissed the application. The appellant could therefore not cross-examine PW2 and PW3 on the exhibits.

The appellant testified in his own defence. He denied the charges against him. He stated he only met the other accused persons for the first time at the police station in Panti, Lagos.

In its judgment delivered on 1st March 2011, the trial court, convicted the appellant for the offence of conspiracy to commit armed robbery and sentenced him to twenty-one years imprisonment. It however discharged and acquitted him on the charge of armed robbery. The trial court in convicting the appellant placed reliance on the said exhibits C, D, E, F, G and H.

The appellant was dissatisfied with the judgment and therefore appealed to the Court of Appeal.

Held *(Unanimously allowing the appeal):*

1. *On Meaning of "abuse of process" –*

The term, abuse of process, is generally applied to a proceeding which is destitute in good faith. It is a term applied to a suit which is not only frivolous but also vexatious or oppressive. Such a suit or proceeding, almost always has an element of malice in it, since it is commenced malafide, to irritate or annoy the opponent. [Okafor v. A.-G., Anambra (1991) 6 **NWLR (Pt. 200) 659 referred to**.] (P.127, paras. F-G)

2. *On What amounts to an abuse –*

The multiplicity of suits by the same plaintiff against the same defendant in respect of the same subject matter is prima facie vexatious, oppressive and an abuse. The abuse lies more in the multiplicity of the actions than in the exercise of the right. [NV Scheepv. MV. "S. Araz" (2000) 15 **NWLR (Pt. 691) 622**; FRNv. Abiola (1997) 2 **NWLR (Pt. 488) 444;** Owonikoko v.Arowosaiye (1997) 10 **NWLR (Pt. 523) 61;** Morgan v.W.A.A. & Eng. Co. Ltd. **(1971) 1 NMLR 219 referred to**.] (P.128, paras. A-C)

3. *On When employment of judicial process regarded as an abuse of process –*

The employment of judicial process can only be regarded as an abuse of process when party, improperly, uses the issuance of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. Irritation or annoyance of an opponent could be provoked by the institution of a multiplicity of actions on the same subject matter, against the same opponent, on the same issue. [Ekpuk v Okon **(2002) NWLR (Pt. 760) 445;** Saraki v. Kotoye (1992) 9 **NWLR (Pt. 264) 156;** Okorodudu v. Okoromadu (1977) 3 SC21; Agwasim v. Ojichie (2004) 10 **NWLR (Pt. 882)613** referred to.] (Pp. 127-128, paras. G-A; 128, paras. C-D)

4. *On Test for admissibility of confessional statement and effect where issue of voluntariness of same is raised –*

The test for admissibility of a confessional statement is its voluntariness. Once the issue is raised, it must be resolved or settled one way or the other before its admission or otherwise. [Agholor v. A.-G., Bendel State (1990) 6 **NWLR (Pt. 155) 141**; Eguabor v.Queen (No. 1) (1962) 1 SCNLR 409; Olabode v. State(2009) 11 **NWLR (Pt. 1152) 254 referred to**.] (P. 126, paras. D-E)

5. *On Meaning of trial-within-trial and purpose of –*

A trial-within-trial is a mini trial wherein the prosecution is afforded the opportunity marshaling evidence in support of its claim that the accused confessional statement was made voluntarily. In the said mini trial, the defendant and his witnesses (if any) have an opportunity of debunking such claims. As such, it is in that mini trial that the defence counsel endeavours to foreclose the admissibility of

such a statement. [Osuagwu v. State (2013) 5 **NWLR (Pt. 1347) 360referred to**.] (Pp. 126-127, paras. H-A)

6. *On Purpose of trial-within-trial –*

A trial-within-trial also called "voire dire" is the only process of determining the voluntariness of a confession once it is raised as an issue in a case. [Nsofor v. State (2004) 18 **NWLR (Pt. 905) 292;** Gbadamosi v. State (1991) 6 **NWLR (Pt. 196) 182;** Igri v. State (2012) 16 **NWLR (Pt.1327) 522 referred to**.] (P. 126, paras. G-H)

7. *On Purpose of trial-within-trial and when should be resorted to –*

As the purpose of a trial-within-trial is to determine the admissibility of a confession where it is challenged on the ground that it was not made voluntarily, the proper time to resort to the said minitrial is at the point when the confessional statement is sought to be tendered in evidence. Thus, when the prosecution has not closed its case or still has the opportunity of re-opening its case, it would be improper to refuse recourse to the process of trial-within-trial. [Igri v. State (2012) 16 **NWLR (Pt.1327)522;** Nwachukwu v. State (2002) 2 **NWLR (Pt. 751)366;** Okaroh v. State (1988) 3 NWLR (Pt. 81) 214; Equabor v. Queen (No. 1) (1962) 1 SCNLR 409; Akpav. State (2008) 14 **NWLR (Pt. 1106) 72 referred to**.] (P.127, paras. A-C)

8. *On When a trial-within-trial should be conducted –*

When an alleged confessional statement of an accused is sought to be tendered and he challenges it on the ground that it was not made voluntarily, atrial-within-trial should be conducted. [Osuagwu v. State (2013) 5 **NWLR (Pt. 1347) 360;** Balogun v. A.-G., Federation (1994) 5 **NWLR (Pt. 345) 442;** Ikpasa v. A.-G., Bendel **(1981) 9 SC 7 referred to.]** (P.126, paras. E-F)

9. *On Whether a confessional statement of an accused person evidence against a co-accused person –*

A statement made by an accused person implicating his co-accused person is not evidence against that other accused person. Section 27(3) of the Evidence Act 2004 forbids the use of such statement even when it is confessional except where it is adopted by the accused. [Gbadamosi v. State (1991) 6 **NWLR (Pt. 196) 182;** Ajani v. R 3 WACA 3; Aigbe v. State (1976) 9-10 SC 77; Ozaki v. State (1990) 1 **NWLR (Pt. 124) 92 referred to**.] (P.136, paras. E-G)

10. *On Whether confessional statement of a co-accused evidence against another accused who did not adopt same –*

By virtue of section 27(3) of the Evidence Act 2004,where more persons than one are charged jointly with a criminal offence, and a confession made by one of such persons in the presence of one of the other persons so charged is given in evidence, the court, or a jury where the trial is one with a jury, shall not take such statement into consideration against any of such other person in whose presence it was made, unless he adopted the said statement by words or conduct. (P.136, paras. B-D)

11. *On Whether an incriminating statement made in the presence of an accused can be evidence against him at trial –*

An incriminating statement made even in the presence of an accused person, even on an occasion which could reasonably be expected to call for some explanation from him, is not evidence against him on his trial of the fact therein stated, save in so far as he has accepted the statement. (Pp. 136-137, paras. H-A)

12. *On Nature of extra-judicial statement of a co-accused and admissibility of against a co-accused –*

An extra-judicial statement of a co-accused person must not be confused with evidence which a co-accused person gave on oath. An extra-judicial statement of a co-accused person remains a statement and not his evidence. It is binding on the maker only. It is thus not admissible against his co-accused person. [Suberu v. State (2010) 8; **NWLR (Pt. 1197) 586;** Ozaki v. State (1990) 1 **NWLR (Pt.124) 92; referred to**.] (P. 137, paras. C-E)

13. *On Propriety of convicting an accused person on the statement of another accused person –*

It is an error in law to convict an accused person on the statement of another accused person to the police. It is indeed a travesty of justice and gross violation of all known rules of evidence. Therefore, where the statement of a co-accused is used to found or secure a conviction of an accused, without the latter adopting same, the conviction must on appeal be quashed. [Jonah v. R (1934) 2 WACA 120; Suberu v. State (2010) 8 **NWLR (Pt. 1197) 586;** State v. Onyeukwu (2004) 14 **NWLR (Pt. 893) 340;** Ozaki v. State (1990) 1 **NWLR (Pt. 124) 92 referred to**.] (P.137, paras. A-C)

Per NWEZE, J.C.A. at page 137, paras. F-G:

> **"As stated above, PW3 did not show that the appellant adopted the said exhibits either orally or through his body language. We, therefore, hold that the lower court was wrong in relying on exhibits C; D; G and H, (pages180-181 of the record), as evidence upon which it convicted the**

appellant for conspiracy. We are under obligation to expunge them. We hereby expunge and hold that they no longer constituted evidence for the purpose of the judgment under appeal, see per Obaseki, JSC in Ozaki v. State **(supra). We resolve this issue in favour of the appellant."**

14. *On Power of trial court to call or recall witnesses in criminal proceedings –*

By the provision of section 36(6)(d) of the Constitution, a witness can be recalled for further cross examination. Thus, there is a statutory warrant for a trial court's power to call or recall witnesses in criminal proceedings. [Tsaku v. State (1988) 1 **NWLR (Pt. 17) 576 referred to**.] (Pp. 147,para. G; 148-149, paras. H-A)

15. *On Power of trial court to recall a witness in criminal proceedings* - **A trial court is permitted, at any stage of a criminal trial, to recall any witness, including the accused person himself, if it appears to the court to be essential to the just decision of the case**. (P.149, para. A)

Per NWEZE, J.C.A. at page 149, paras. B-E:

"We, entirely, agree with Andrew Igbokwe, for the appellant, that the lower court, entirely, misconceived the application before it. Surely, the above reasoning of the court, clearly, demonstrate that, in the exercise of its discretion, the said court acted "upon a wrong principle or mistake of law ...thereby occasioning injustice." This court will, therefore, not abdicate its duty. Rather, we find

that we have to interfere with that exercise of discretion in order to prevent injustice to the appellant, Ogolo v. Ogolo (supra); Adejumo v.Ayantegbe [1989] 3 **NWLR (Pt. 110) 417, 445;** Amako v. State (supra).

We endorse the appellant's submission that, in the circumstances narrated above, the lower court's refusal of the application for the re-call and cross examination of PW2 and PW3on exhibits G and H amounted to a breach of section 36 (6) (d) (supra). This conclusion becomes even more cogent and compelling against the background of the fact that the said exhibit was one of the building blocks in the architecture of the judgment that saw to the appellant's conviction, see page 181 of the record where the court relied on exhibit G. We, entirely, agree with counsel for the appellant that the exhibit must be, and is hereby expunged from the judgment of the lower court. We, accordingly, resolve issues 4 and 5 in favour of the appellant.

16. *On Attitude of appellate court to exercise of discretion by trial court and when will interfere therewith –*

A discretion properly exercised by a trial court will not be lightly interfered with by an appellate court even if the appellate court was of the view that it might have exercised the discretion differently. Itis only when a trial court exercised its discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or considered irrelevant or

extraneous matters or excluded relevant matters thereby occasioning injustice, that an appellate court will not abdicate its duty or interfere with the exercise of that discretion in order to prevent injustice. [Ogolo v. Ogolo (2006)5 **NWLR (Pt. 972) 163 referred to.**] (P.147, paras.C-F)

Nigerian Cases Referred to in the Judgment:

A.-G., Rivers State v. Ude (2006) 17 **NWLR (Pt. 1008) 436**

Abubakar v. Yar'Adua (2008) 4 **NWLR (Pt. 1078) 465**

Adejugbe v. Ologunja (2004) 6 **NWLR (Pt. 868) 46**

Adejumo v. Ayantegbe (1989) 3 **NWLR (Pt. 110) 417**

Adekanbi v. A.-G., Western Nigeria (1966) 1 SCNLR 75

Adekeye v. Akin-Olugbade (1987) 3 **NWLR (Pt. 60) 214**

Aderogba v. Queen (1960) SCNLR 482

Adigun v. A.-G., Oyo State (1987) 1 **NWLR (Pt. 53) 678**

Agholor v. A.-G., Bendel State (1990) 6 **NWLR (Pt. 155) 141**

Agwasim v. Ojichie (2004) 10 **NWLR (Pt. 882) 613**

Ahmed v. State (1999) 7 **NWLR (Pt. 612) 641**

Aigbe v. State (1976) 9-10 SC 77

Ajani v. R. (1936) 3 WACA 3

Akpa v. State (2008) 14 **NWLR (Pt. 1106) 72**

Archibong v. State (2006) 14 **NWLR (Pt. 1000) 349**

Auta v. State (1975) NNLR 60

Balogun v. A.-G., Fed. (1994) 5 **NWLR (Pt. 345) 442**

Bamaiyi v. State (2001) 8 **NWLR (Pt. 715) 270**

Bayol v. Ahemba (1999) 10 **NWLR (Pt. 623) 381**

Bello v. A.-G., Oyo State (1986) 5 **NWLR (Pt. 45) 828**

Brosette Manufacturing (Nig.) Ltd. v. M/S Ola Ilemobola Ltd. (2007) 14 **NWLR (Pt. 1053) 109**

C.O.P. v. Olatilewa (1958) WRNLR 200

Dawa v. State (1980) 8-11 SC 236

Effiong v. State (1998) 8 **NWLR (Pt. 562) 362**

Eguabor v. Queen (No.1) (1962) 1 SCNLR 409

Egwuatu v. R. (1940) 6 WACA 79

Eke v. Odoleyin (1961) All NLR 404

Eke v. State (2011) 3 **NWLR (Pt. 1235) 589**

Ekpuk v. Okon (2002) 5 **NWLR (Pt. 760) 445**

Emeka v. State (2002) 14 **NWLR (Pt. 734) 666**

Evbuomwan v. C.O.P. (1961) WNLR 257

F.R.N. v. Abiola (1997) 2 **NWLR (Pt. 488) 444**

Gbadamosi v. State (1991) 6 **NWLR (Pt. 196) 182**

Gbadamosi v. State (1992) 9 **NWLR (Pt. 266) 465**

Horvat v. Police (1952) 20 NLR 52

Ibori v. F.R.N. (2009) 3 **NWLR (Pt. 1128) 283**

Igri v. State (2012) 16 **NWLR (Pt. 1327) 522**

Igwe v. Queen (1960) SCNLR 158

Ikpasa v. A.-G., Bendel (1981) 9 SC 7

Ikpo v. State (1995) 9 **NWLR (Pt. 421) 540**

Jonah v. R (1934) 2 WACA 120

Kaza v. State (2008) 7 **NWLR (Pt. 1085) 125**

Kim v. State (1992) 4 **NWLR (Pt. 233) 17**

Kotoye v. C.B.N. (1989) 1 **NWLR (Pt. 98) 419**

Lori v. State (1980) 8-11 SC 81

Maiduguri v. State (1969) 1 SCNLR 436

Morgan v. W.A.A. & Eng. Co. Ltd. (1971) 1 NMLR 219

N. V. Scheep v. MV. S. Araz (2000) 15 **NWLR (Pt. 691) 622**

Ndukwe v. State (2009) 7 **NWLR (Pt. 1139) 43**

Nsofor v. State (2004) 18 **NWLR (Pt. 905) 292**

Nwachukwu v. State (2002) 2 **NWLR (Pt. 751) 366**

Nwangbomu v. State (1994) 2 **NWLR (Pt. 327) 380**

Nwankwo v. F.R.N. (2003) 4 **NWLR (Pt. 809) 1**

O.B.I. Ltd v. U.B.N. Plc (2009) 3 **NWLR (Pt. 1127) 129**

Obiakor v. State (2002) 10 **NWLR (Pt. 776) 612**

Obodo v. Olomu (1987) 3 **NWLR (Pt. 59) 111**

Ogoala v. State (1991) 2 **NWLR (Pt. 175) 509**

Ogolo v. Ogolo (2006) 5 **NWLR (Pt. 972) 163**

Okafor v. A.-G., Anambra State (1991) 6 **NWLR (Pt. 200) 659**

Okaroh v. State (1988) 3 **NWLR (Pt. 81) 214**

Okongwu v. N.N.P.C. (1989) 4 **NWLR (Pt. 115) 296**

Okorodudu v. Okoromadu (1977) 3 SC 21

Olabode v. State (2009) 11 **NWLR (Pt. 1152) 254**

Olalekan v. State (2001) 18 **NWLR (Pt. 746) 793**

Omokaro v. R. (1941) 7 WACA 146

Omozeghian v. Adjarho (2006) 4 **NWLR (Pt. 969) 33**

Orisakwe v. State (2004) 12 **NWLR (Pt. 887) 258**

Osuagwu v. State (2013) 5 **NWLR (Pt. 1347) 360**

Owonikoko v. Arowosaiye (1997) 10 **NWLR (Pt. 523) 61**

Ozaki v. State (1990) 1 NWLR (Pt. 124) 92

Rex v. Jonah (1934) 2 WACA 120

S.C.E.N. v. Nwosu (2008) 3 **NWLR (Pt. 1074) 288**

Saraki v. Kotoye (1992) 9 **NWLR (Pt. 264) 156**

State v. Onyeukwu (2004) 14 **NWLR (Pt. 893) 340**

Suberu v. State (2010) 8 **NWLR (Pt. 1197) 586**

Tewogbade v. Agbabiaka (2001) 5 **NWLR (Pt. 705) 38**

Tsaku v. State (1988) 1 NWLR (Pt. 17) 516

Tulu v. Bauchi N.A. (1965) NMLR 343

U.B.N. Plc v. Emole (2001) 18 **NWLR (Pt. 745) 501**

Uluebeka v. State (2000) 7 **NWLR (Pt. 665) 404**

Unongo v. Aku (1983) 2 SCNLR 332

Usikaro v. Itsekiri Comm. L.T. (1991) 2 **NWLR (Pt. 172) 150**

Usufu v. State (2007) 3 **NWLR (Pt. 1020) 94**

West v. Police 20 NLR 71

Willoughby v. I.M.B. (Nig.) Ltd. (1987) 1 **NWLR (Pt. 48) 105**

Foreign Cases Referred to in the Judgment:

D.P.P. v. Ping Lin (1975) 3 All ER 175

Ming v. Queen (1979) 2 WLR 81

R v. Burgess (1968) 2 All ER 54

R v. Chadwick (1934) 24 Cr. App. R.138

R v. Francis (1959) 43 Cr. App. R. 174

R v. Ovenell (1969) 1 QB 17

R v. Richards (1967) 51 Cr. App. R.266

R. v. Norton (1910) 2 K.B.D. 496

Nigerian Statutes Referred to in the Judgment:

Administration of Criminal Justice Law No 10, 2007, Ss. 255,256, 260

Administration of Criminal Justice Law No. 10 of 2011 Ss.251, 256, 260

Constitution of the Federal Republic of Nigeria, 1999, S. 36(4)and (6)(b)(d)

Evidence Act, Cap. E8, Laws of Lagos State, 2003, S. 138(1)

Evidence Act, 2011, Ss. 29(4), 135(1)

Evidence Act, Cap. E14, Laws of the Federation of Nigeria,2004, Ss. 27(3), 138(1), 150(1), 178(2)

Illiterates Protection Law, Cap. I3, Laws of Lagos State ofNigeria, 2003, S. 2

Book Referred to in the Judgment:

Archbold's Criminal Pleadings, 34th Edition, paras. 1114,1115.

Appeal:

This was an appeal against the judgment of the High Court which convicted the appellant for the offence of conspiracy to commit armed robbery and sentenced him to twenty-one years imprisonment accordingly. The Court of Appeal, in a unanimous decision, allowed the appeal.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Lagos

Names of Justices that sat on the appeal: Chima Centus Nweze, J.C.A. (Presided and Read the Leading Judgment); Rita Nosakhare Pemu, J.C.A. Fatima Omoro Akinbami, J.C.A.

Appeal No.: CA/L/836/11

Date of Judgment: Friday, 31st May, 2013

Names of Counsel: Andrew C. Igboekwe (with him, J.C.Ugo and Opeyemi Afeni) - for the Appellant

Biola Adeyinka (Mrs.) Assistant Director, DPP's Office, MOJ, Lagos State - for the Respondent

High Court:

Name of the High Court: High Court of Lagos State

Name of the Judge: Dada J.

Date of Judgment: Tuesday, March 1st , 2011

Counsel:

Andrew C. Igboekwe (with him, J.C. Ugo and Opeyemi Afeni)- for the Appellant

Biola Adeyinka (Mrs.) Assistant Director, DPP's Office, MOJ, Lagos State - for the Respondent

NWEZE, J.C.A. (Delivering the Leading Judgment): The appellant, a Dockworker, was arraigned, as the third defendant, at the High Court of Lagos State (hereinafter referred to as the lower court) on February 10, 2009 on a two count charge of conspiracy to commit armed robbery and armed robbery. The other two defendants were Idris Adamu, the first defendant, and Yahuza Musa, the second defendant. He pleaded not guilty to the two counts. In proof of its case, the prosecution marshaled three witnesses. PW1, one Olusemade Adekunle Stephen, alleged that on August 11, 2005, he was robbed of a white Toyota Corolla car. PW2, PC Joseph Agum, was a Police Officer of the Anthony Lagos Police Station. PW3, Fidelis Dike, was a Sergeant at the State CID Panti, Lagos.

PW1 and PW2 testified. PW3, in the course of his testimony, sought to tender two statements which the appellant, allegedly, made. Initially, appellant's counsel objected to their admissibility on the ground that, being public documents, they ought to be certified.

At that stage, he did not canvass their involuntariness. However, during his reply to the Prosecution's submission, he raised the issue of the inadmissibility of the statements on the grounds of their involuntariness. This was before the lower court ruled on the admissibility of the said statements. The court did not conduct a trial within trial. It dismissed the objection and admitted the statements in evidence as exhibits E and F.

While counsel for the first and second defendants was cross-examining PW3, they tendered exhibits G and H, statements of the first and second defendants, recorded on their behalf by PW2, through him. The said exhibits G and H were not part of the proof of evidence given to the appellant's counsel before the trial. In effect, he saw the said exhibits G and H for the first time on the day they were tendered in court.

After that day's court proceedings, he applied and obtained a certified true copy of the said exhibits with a view to studying them. Subsequently, he applied, by a motion on notice, to recallPW2, who recorded the statement, and also PW3, who tendered them, for cross-examination. In its ruling of December 15, 2009, the lower court dismissed the application. Thus, the appellant could not cross-examine PW2 and PW3 on exhibits G and H.

At the close of the case of the prosecution, the appellant testified in his own defence. He denied the charges against him. He stated that he only met the first and second defendants for the first time at the police station in Panti, Lagos. The lower court (DadaJ), in its judgment of March 1, 2011, convicted the appellant for the offence of conspiracy to commit armed robbery. It sentenced him to twenty-one years imprisonment. It, however, discharged and acquitted the appellant on the charge of armed robbery. In its said judgment, it placed reliance on the said exhibits C, D, E, F, G and H. Dissatisfied, the appellant appealed to this court. He formulated six issues for the resolution of his appeal from the ten grounds of appeal in the amended notice of appeal. The issues were couched in these terms:

ISSUES FOR DETERMINATION

1. Whether the learned trial Judge was right in refusing to consider the appellant's objection to the admission of his two statements on the ground that they were involuntarily obtained for the reason that it was an abuse of judicial process?

2. Whether from the facts and circumstances of this case, the learned trial Judge was right in admitting the appellant's two statements to the Police as exhibits E and F without conducting a trial within trial and subsequently relying on same to convict the appellant?

3. Whether from the facts and circumstances of this case, the learned trial Judge was right in admitting the statements of the 1st and 2nd defendants to the Police as exhibits C, D, G and H and subsequently relying on them in convicting the appellant?

4. Whether the learned trial Judge denied the appellant his constitutional right to fair hearing when on 15thDecember, 2009, she dismissed the applicant's application to recall PW2 who recorded exhibits G and H for cross examination?

5. Whether from the facts and circumstances of this case, the learned trial Judge denied the appellant his constitutional right which has occasioned a miscarriage of justice?

6. Whether the learned trial Judge was right in convicting and sentencing the appellant for the offence of conspiracy to commit armed robbery?

The respondent adopted the above six issues. Issues one and two will be considered together so also will issues four and five be treated jointly.

ARGUMENTS OF COUNSEL

ISSUE 1

Whether the Learned Trial Judge was right in refusing to consider the appellant's objection to the admission of his two statements on the ground that they were involuntarily obtained for the reason that it was an abuse of judicial process?

When this appeal came up for hearing on April 17, 2013, counsel for the appellant, Andy Igboekwe, with J. C. Ugo and Opeyi Afeni, adopted the appellant's brief filed on June 8, 2012, but deemed properly filed on February 15, 2013 and the reply brief filed on February 28, 2013. In the main brief, he explained that, in the course of the trial at the lower court on October 28, 2009, the court refused to consider the appellant's objection to the admission of his two statements on the ground that they were involuntarily obtained. The court reasoned that it was an abuse of judicial process, pages95 - 96 of the record.

He elaborated further. When the prosecution sought to tender the appellants' statements, his counsel, initially, objected to their admissibility. Due to inadvertence or mistake, he forgot to predicate his objection on the ground of their involuntariness. However, during his reply to the prosecution's submission, he raised the issue of the inadmissibility of the statements on the grounds of their involuntariness. The court, as shown above, reasoned that it was an abuse of judicial process. Counsel noted that, at that time, the court was not yet functus officio on the issue of the admissibility of the two statements of the appellant and therefore had the requisite jurisdiction to entertain the said objection. He maintained that since the two statements were yet to be admitted in evidence at the time, it was not an abuse of judicial process for the appellant to raise the issue of the involuntariness of the two statements he made to the police.

He opined that the objection to the admission of his statements was made in good faith. Above all, it was in line with the truth of the facts of the case and in the exercise of the appellant's constitutional right to defend himself against the criminal charges proffered against him. He contended that the failure to raise the objection earlier than when it was made was due to the fault or the inadvertence of the appellant's counsel. Thus, by refusing the objection, the court was

visiting the sins of counsel on the appellant. This has now occasioned a miscarriage of justice, Adekeye v. Akin-Olugbade [1987] 2 NSCC 865, 870, (1987) 3 **NWLR (Pt. 60) 214**.

He canvassed the view that where, as in this case, by inadvertence of counsel, the objection as to involuntariness of the two statements sought to be tendered was not raised initially but was nevertheless raised before the ruling of the court, the court ought to readily consider the objection as it would enable the court to decide the rights of the parties in litigation. This was particularly so because the appellant's liberty and entire life were at stake. He maintained that the respondent would not have been prejudiced in any way if the objection had been considered. In his view, as atrial within trial would have followed, the respondent would have afforded it ample time and opportunity to contest and, if possible, rebut the claim of involuntariness of the statements. On the other hand, by refusing to consider the issue of involuntariness of the statements, the appellant was greatly prejudiced and suffered a miscarriage of justice. The reason is simple. The involuntarily made statements became the platform or the bedrock upon which he was convicted as the lower court relied heavily on the said statements in convicting and sentencing him.

He maintained that, by that decision, the lower court allowed technical justice to reign over substantial justice, Bello v. A.-G., Oyo State [1986] 5 **NWLR (Pt. 45) 828, 886.** He took the view that the lower court erred in refusing to consider the appellant's objection to the admission of his two statements on the ground that they were involuntarily obtained for the reason that it was an abuse of judicial process. This had occasioned a miscarriage of justice in that the said involuntarily made statements, exhibits E and F, became the basis for the appellant's conviction. He, therefore, urged the court to resolve the first issue for determination in this appeal in favored the appellant.

RESPONDENT'S CONTENTION

Learned counsel for the respondent, Abiola Adeyinka (Mrs.), Assistant Director, DPP's Office, Lagos State Ministry of Justice, adopted the brief filed on October 10, 2012, although deemed properly filed and served on February 15, 2013. In the said brief, she explained that, when on September 16, 2009, the Prosecution tendered the appellant's statements, his counsel did not object to their admissibility. Rather, he predicated his objection that, being un-certified public documents, the statements were inadmissible. The Prosecution then asked for a date to reply.

After subsequent adjournments, the Prosecution responded to objection of the appellant's counsel. It was in the process of appellant's counsel's reply that he raised the question of the involuntariness of the statements for the first time. The lower court overruled the objection, holding that it was an abuse of process.

Counsel submitted that the appellant's counsel having opted to object to the admissibility of the documents on the ground of non-certification, he was foreclosed from contesting the admissibility of the statements on other grounds. In his view, the question of visiting the sins of counsel on the litigant did not arise. He maintained that if the appellant had raised the issue of voluntariness of the statements at the right stage, a trial within trial would have been conducted. He took the view that, having not done so, the appellant had lost that opportunity. He submitted that no miscarriage of justice was done when the court admitted the statements. He urged the court to resolve this in favour of the respondent.

APPELLANT'S REPLY

As noted at the outset, the appellant's counsel, equally, adopted the reply brief filed on February, 28, 2013. In the said brief, he replied to the fresh points that arose in the respondent's brief, first, on the question of the "right" or "appropriate stage" to object to the admission of an accused person's statement to the Police on grounds of involuntariness.

He canvassed the view that the "right" or "appropriate stage" in criminal trial to raise an objection to the admission of a confessional statement on grounds of involuntariness is any time before the statement is admitted in evidence by the court. In his submission, once the statement has been admitted in evidence, then the objection can no longer be raised as the court would at that stage be functus officio on the issue of the admission of the exhibits, Archibong v. State [2006] 14 **NWLR (Pt. 1000) 349**, 377 - 378.

He maintained that prior to the admission of the statement, thecourt has the requisite jurisdiction and or competence to consider the objection on grounds of involuntariness and, thereafter, conduct a trial within a trial. Thus, in a criminal trial, once an objection is raised to the admissibility of a confessional statement on grounds of involuntariness before the admission of

the statement in evidence, the trial court must resolve the issue one way or the other before admitting or rejecting the statement, Eke v. State [2011] 3 **NWLR (Pt. 1235) 589**, 603.

Against this background, he submitted that in so far as the appellant raised the issue of involuntariness of exhibits E and F before the two statements were admitted in evidence at the trial, the lower court was duty bound to have conducted a trial within trial to resolve the issue of their voluntariness or otherwise before admitting them in evidence. Thus, by failing to do so, the lower court was in error Eke v. State (supra).

He canvassed the view that the error became even more manifest in the approach of the lower court. It did not conduct a trial to determine their voluntariness or otherwise before admitting the statements. In the course of its judgment, it, suo motu, decided that the appellant made the two statements voluntarily, page 161[lines 22-23] of the record: "I am satisfied that the two statements were voluntarily made by the 3rd defendant".

He observed that, without conducting a trial within trial, the lower court concluded that exhibits E and F were voluntarily made. He contended that that was highly prejudicial to the appellant. Above all, it was a clear manifestation of the fact that the lower court denied the appellant his right to fair hearing as it failed to hold the scales of justice evenly between the parties by leaning in favour of the respondent against the appellant. He urged the court to expunge the two statements, exhibits "E" and "F", Eke v. State(supra).

ISSUE 2

Whether from the facts and circumstances of this case, the Learned Trial Judge was right in admitting the appellant's two statements to the Police as Exhibits E and F without conducting a trial within trial and subsequently relying on same to convict the appellant?

Counsel adopted all the arguments in issue one with respect to this issue. He explained that before the lower court admitted the two statements of the appellant in evidence as exhibits E and F, his counsel had raised the issue of the involuntariness of the statements, that is, that they were not made voluntarily by the appellant and or that they were obtained under duress.

He pointed out that the lower court refused to consider the issue of the voluntariness or otherwise of the two statements of the appellant, pages 95 - 96 of the record. He further explained that, at the time the appellant's objection was made, the lower court was not yet functus officio on the issue of the admissibility of the two statements of the appellant and therefore had the requisite jurisdiction in law to entertain the appellant's objection. He noted that, without any trial within trial, the lower court held that it was satisfied that the two statements were made voluntarily by the appellant, page 181 of the record. Counsel contended that the lower court erred in not conducting the said exercise. In his view, this omission occasioned a miscarriage of justice, Gbadamosi v. State [1992] 9 **NWLR (Pt. 266) 465, 495** - 496; Saidu v. State (supra); The Igwe v. Queen [1960] SCNLR 158; 5 FSC 55, 56. He observed that the appellant's conviction by the lower court was, essentially, predicated on the appellant's wrongly admitted two statements, exhibits E and F, without which he would not have been convicted. He urged the court to set aside the conviction of the appellant.

He submitted that, by failing to conduct a trial before admitting the appellant's two statements as exhibits E and F, the lower court denied the appellant his constitutional right to fair hearing: an error that occasioned a miscarriage of justice. He posited further that the lower court was duty- bound to consider all possible hence forward by or available to the accused person, Kaza v. The State [2008) 7 **NWLR (Pt. 1085) 125**, 169; Ahmed v. The State [1999] 7 **NWLR (Pt. 612) 641,** 679; Ndukwe v. State [2009] 7 **NWLR (Pt.1139) 43**, 96.

This failure to consider the said defences would lead to a miscarriage of justice; Usufu v. State [2007] 3 **NWLR (Pt 1020)94,** 121; Ahmed v. The State [1999] 7 **NWLR (Pt. 612) 641**. He urged the court to hold that the lower court's failure to consider and or properly appraise the defence of the appellant occasioned a miscarriage of justice.

He noted that, in the instant case, the involuntariness of the appellant's two statements to the police was a vital defence in his case. The said defence was totally ignored and or not considered by the lower court. This resulted in a miscarriage of justice. He maintained that exhibits E and F became the platform upon which the appellant was convicted by the lower court for conspiracy, page180 - page 181 of the record.

RESPONDENT'S SUBMISSIONS

Learned counsel for the respondent adopted her earlier argument that there was nothing before the court on the issue of involuntariness of any statement so the court could not adjudication the matter not brought before it. She maintained that a trial within trial could only be conducted when the issue of involuntariness was raised by the defence counsel. Where it was not raised, the court would not raise it suo motu. She canvassed the view that where itwas raised at an inappropriate stage the court would discountenance it, Sunday Effiong v. The State (1998) 8 **NWLR (Pt. 562) 362**, 364.He re-iterated his view that, in the instant case, the appellant's statement was only challenged on the grounds of non-certification and not its involuntariness which was not done at the appropriate time.

She canvassed the view that the lower court did not breach the appellant's right to a fair hearing as it gave him the opportunity to object. In his view, the appellant had raised all possible defences. She maintained that the lower court was right when it admitted the said statements as exhibits and, eventually, relied on them with other testimony before it to convict the appellant.

RESOLUTION OF ISSUES 1 and 2

We find it curious that learned counsel for the respondent could attempt to support the approach of the lower court. In her view, the appellant's counsel having opted to object to the admissibility of the documents on the ground of non-certification, he was foreclosed from contesting the admissibility of the statements on the ground of its involuntariness.

With respect, this contention is, manifestly unsupportable. From our reading of binding decisions on this question, the following proposition finds anchorage on good law. The test for admissibility of a confessional statement is its voluntariness. Once the issue is raised as done at the trial court, it must be resolved or settled one way or the other before its admission or otherwise, Agholor v. Attorney-General, Bendel State (1990) 6 **NWLR (Pt.155) 141**, 151; Eguabor v. Queen (No 1) [1962] 1 SCNLR 409; Olabode v. The State [2009] 5-6 SC (Pt. 11) 29; [2009] 11 **NWLR (Pt. 1152) 254.**

Put differently, when an alleged confessional statement of an accused person is sought to be tendered and he challenges it on the ground that it was not made voluntarily, a trial-within-trial should be conducted, Osuagwu v. State [2013] 5 **NWLR (Pt. 1347) 360**, 388; Balogun v. A.-G., Federation [1994] 5 **NWLR (Pt. 345) 442**; Ikpasa v. A.-G.,Bendel [1981] 9 SC 7.

As well-settled by superior authorities, a trial-within-trial [also called voire dire) is the only process of determining the voluntariness of a confession once it is raised as an issue in a case, Nsofor v. State [2004] 18 **NWLR (Pt. 905) 292**; Gbadamosi v. State [1991] 6 **NWLR (Pt. 196) 182;** Igri v. State [2012] 16 **NWLR (Pt. 1327) 522,** 545. It is a mini trial wherein the prosecution is afforded the opportunity of marshalling evidence in support of its claim that the said statement was made voluntarily. In the said minitrial, the defendant and his witnesses (if any) have an opportunity of debunking such claims. As such, it is in that mini trial that the defence counsel endeavors to foreclose the admissibility of such a statement, Osuagwu v. State (supra).

Since the purpose of a trial-within-trial is to determine the admissibility of a confession where it is challenged on the ground that it was not made voluntarily, the proper time to resort to the said mini trial is at the point when the confessional statement is sought to be tendered in evidence. Thus, when the prosecution has not closed its case or still has the opportunity of re-opening its case, it would be improper to refuse recourse to the process of trial-within-trial. This much is deducible from the eloquent reasoning of Chukwuma-Eneh JSC in Igri v. State (supra), 544, paragraphs C-F;545-546, paragraphs G-D, Nwachukwu v. State [2002] 2 **NWLR (Pt.751) 366;** Okaroh v. State [1988] 3 **NWLR (Pt. 81) 214**; Equaborv. Queen (No. 1) [1962] 1 SCNLR 409; Akpa v. State [2008) 14 **NWLR (Pt. 1106) 72.**

At the lower court, counsel for the appellant, first, anchored his objection to the admissibility of the said statement on the ground of its non-certification in the belief that it was a public document. The prosecutor replied him. It was at the stage of his reply on points of law that he raised the question of the involuntariness of the statement for the first time. The lower court took the view that it was an abuse of court process.

We are mindful of the fact that the appellant, at the lower court, was tried for the offence of conspiracy to rob and armed robbery. How, then, could the lower court have off-handedly,

declared the objection as an abuse of process? Our understanding of the law is that the term, abuse of process, is generally applied to a proceeding, which is destitute in good faith. It is a term applied to a suit which is not only frivolous, but also vexations or oppressive. Such a suit or proceeding, almost always, has an element of malice in it, since itis commenced mala fide, to irritate or annoy the opponent, Okafor v. A.-G., Anambra [1991] 6 **NWLR (Pt. 200) 659**.

The consequence of this postulate is that the employment of judicial process can only be regarded as an abuse of process when a party, improperly uses the issuance of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice, Ekpuk v. Okon (2001) 44 WRN 85; (2002) 5 **NWLR (Pt. 760) 445;** Saraki v. Kotoye [1992] 9 **NWLR (Pt. 264) 156**, 188. Irritation or annoyance of an opponent could be provoked by the institution of a multiplicity of actions on the same subject matter against the same opponent on the same issue; Okorodudu v. Okoromadu [1977] 3 SC 21.

Thus, it is generally accepted that the multiplicity of suits by the same plaintiff against the same defendant in respect of the subject matter is prima facie vexatious, oppressive and an abuse, N.V. Scheep v. MV. "S. Araz" (2000) 15 **NWLR (Pt. 691) 622**.The abuse lies more in the multiplicity of the actions than in the exercise of the right, F.R.N. v. Abiola (1997) 2 **NWLR (Pt. 488)444;** Owonikoko v. Arowosaiye (1997) 10 **NWLR (Pt. 523) 61;** Morgan v. W.A.A. & Eng. Co. Ltd. (1971) 1 NMLR 219.

It would amount to an abuse of process if counsel, improperly, uses the judicial process to the annoyance of the adverse party, and the administration of justice, Okorodudu v. Okoromadu [1977] 3SC 21; Ekpuk v. Okon [2002] 5 **NWLR (Pt. 760) 445;** Agwasim v.Ojichie [2004] 10 NWLR (Pt. 882) 613.

As shown above, having taken the position that the objection was an abuse of process, the court admitted the statement without conducting a voire dire even in the face of the strenuous objection of the counsel for the defendant. If we have read the above opinion of Chukwuma-Eneh JSC [in Igri v. State (supra), 544, paragraphs-F; 545-546], correctly, then the lower court could not have been right. In the first place, the prosecution had not closed its case. What is more, it had

the opportunity of confronting the accused person and his counsel with irrefutable proof of the voluntariness of the said statement during a trial within trial [if the court had conducted it].

There, the court would have had the opportunity of assessing the credibility and demeanour of the witnesses who would show proof of the voluntariness of the statement. This is so because in such a trial, credibility of witnesses is based on demeanour,Osuagwu v. State (supra) 389-390.

As it turned out, the lower court, notwithstanding the said objection that was raised as to the voluntariness of the statement, proceeded to admit it. Three errors are obvious here. In the first place, it admitted the statement without resolving or settling the objection of learned counsel one way or the other before admitting the statement. That was wrong, Agholor v. Attorney-General, Bendel State (1990) 6 **NWLR (Pt. 155) 141**, 151; Eguabor v. Queen (No. 1) [1962] 1 SCNLR 409; Olabode v. The State [2009] 5-6 SC (Pt. 11) 29, [2009] 11 **NWLR (Pt. 1152) 254.**

Secondly, it proceeded to admit the statement without a mini trial. In the circumstance, its position was untenable. The consequence is that the statements must be expunged, Balogun v. A.G., Federation (supra); Ikpasa v. A.-G., Bendel (supra); per Rhodes-Vivour JSC in Osuagwu v. State (supra) 388.

In the third place, by its posture, the lower court, unwittingly, relieved the prosecution of its binding duty of establishing the voluntariness of the statement: a duty it would have, possibly, discharged at a trial-within-trial. In our view, the said court erred when it wished away such a pivotal procedural step that should have been taken at the point when the objection was raised, R v. Francis and Murphy (1959) 43 Cr. App 174: R v. Omokaro (1941)7 WACA 146; Ogoala v. The State (1991) 2 **NWLR (Pt. 175) 509;** Joshua Adekanbi v. Attorney-General, Western Nigeria (1968) 2All NLR 198 (1966) 1 SCNLR 75; Auta v. The State (1975) NNLR60, 65; Eke v. State [2011] 3 **NWLR (Pt. 1235) 589**, 603. In the very felicitous and lucid words of Wali JSC in Augustine Nwangbomu v.State [1994] 2 **NWLR (Pt. 327) 380** at 395 paras. F-G.

> It is trite law that where the admissibility of a statement is challenged on the ground that it was not made voluntarily, it is incumbent on the Judge to call upon the prosecution to establish that it was voluntarily made by conducting a trial-within-trial, R. v. Francis and Murphy (1959) 43C. App. R. 174; R. v. Omokaro 7 WACA

146; Ogoala v. The State [1991] 2 **NWLR (Pt.175) 509;** Joshua Adekanbi v. A.-G., Western Nigeria (1966) 1 All NLR 47; (1966) 1 SCNLR 75; Paul Ashake v. The State (1968) 2 All NLR 198; Auta v. The State (1975) NNLR 60 at 65.

True, indeed, the court not only wished away that vital procedural step, it decided on its own accord that the statement was made voluntarily. In the course of its judgment, it decided on its own accord that the appellant made the two statements voluntarily, page 161 [lines 22 -23 of the record: I am satisfied that the two statements were voluntarily made by the 3rd defendant.'" With respect, that approach finds no anchorage on case law. In Dawa v. The State [1980] 8- 11 SC 236 at 258-259 [1980] 12 NSCC 334,345, Obaseki, J.S.C., delivering the lead judgment of this court, observed that:

> It has long been established as a positive rule of law which has found a healthy place in our statutes ... that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it was not obtained from him by fear of prejudice or hope of advantage, exercised or held out to him by persons in authority. The principle is as old as Hale and in this country since the reception of English law into our legal system. Voluntariness is only a test of admissibility. It is not an absolute test of the truth.
>
> Where the admissibility of a statement is challenged on the ground that it was not made voluntarily, it is for the Judge to determine whether or not the prosecution have established that it was made voluntarily to the extent that the Judge is satisfied so that he feels sure about it. Where the question is raised it is for the Judge to rule upon it after hearing any evidence on either side bearing upon any contested question of fact relevant to the determination. It is the duty of the trial judge to hear any evidence as to the manner in which it is made at a trial within a trial in the absence of a jury. [Italics supplied].

The authorities are many, R. v. Chardwick (1934) 24 Cr. App.R.138; The Eguabor v. Queen (1962) 1 All NLR 287,29; (1962)1 SCNLR 409; Chan Wei Keung v. R. (1967) (sic); R. v.

Ovenell(1969) 1 QB 17; R v. Burgess (1968) 2 All ER 54; (1968) 2 QB112; D.P.P. v. Ping Lin (1975) 3 All ER 175; Maiduguri v. TheState (1969) 1 NMLR 143; (1969) 1 SCNLR 436; R. v. Francis andMurphy (1969) Cr. App. R 174; R. v. Richards (1967) 51 Cr. App.R 266; Wong Kam Ming v. The Queen (1979) 2 W.L.R. 81; Saidu v.The State (supra); The Queen v. Igwe 5 FSC 55, 56 reported as Igwev. Queen (1960) SCNLR 158; Archbold's Criminal Pleading, (34thedition] paragraphs 1114 and 1115.

Against the background of this healthy position of the law, we find that the lower court was in error when it failed to carry out the mandatory mini trial for the purpose of determining the voluntariness of the statement credited to the accused person [now, appellant in this appeal]. The court, therefore, labored in vain when it purported to have admitted the said exhibits, Eke v. State(supra) at page 603. The outcome of it all is that we have a duty to expunge the said exhibits E and F, Balogun v. A.-G., Federation(supra); Ikpasa v. A.-G., Bendel (supra); per Rhodes-Vivour JSC in Osuagwu v. State (supra) 388. We, therefore, resolve these two issues in favour of the appellant.

ISSUE 3

> Whether from the facts and circumstances of this case, the learned trial Judge was right in admitting the statements of the 1st and 2nd defendants to the Police as exhibits C, D, G and H and subsequently relying on them in convicting the appellant?

On this issue, counsel pointed out that, in convicting the appellant for the offence of conspiracy to commit armed robbery, the lower court relied heavily on the two statements of the first and second defendants to the Police, exhibits C, D, G and H, pages180 and 181 of the record. He opined that, from the facts and circumstances of this case, those statements ought not to have been admitted in the first place and therefore ought not to have been relied upon in convicting the appellant.

He explained that exhibits C and D were admitted in evidence without conducting a trial within trial. They were tendered and admitted at the same time as the appellant's two statements which were admitted as exhibits E and F. He noted that, despite the first and second defendants' counsel's objection that the two statements were made involuntarily, the lower court still admitted them as exhibits C and D without conducting a trial within trial.

Adopting his earlier submissions with respect to exhibits E and F [as contained in the first and second issues for determination above], he canvassed the view that exhibits C and D were, erroneously, admitted in evidence. In his view, the error occasioned a miscarriage of justice as the lower court relied on the said exhibits in convicting and sentencing the appellant. He gave other reasons why exhibits C and D as well as G and H should not have been admitted.

In the first place, he noted that the first and second defendants from the facts before the court were illiterates and could not read or write in the English language. Worse still, their alleged statements were written on their behalf by third parties. He pointed out that exhibit C [statement to the Police at Panti] and exhibit G [statement to the Police in Anthony Village] were the first defendant's alleged statements. In the second paragraph of exhibit C, it was recorded on behalf of the first defendant thus: "I attended Arabic School small," page 15 of the record. In exhibit G, the

first defendant stated thus: I did not attend any school in my life before." He opined that any person who has never attended any school in his life was an illiterate.

He advanced reasons to buttress his contention that exhibits C and G are not credible and are inadmissible evidence. The first defendant, being an illiterate, who is unable to read or understand English Language in which he was cautioned and the statement was taken, did not understand both the caution and or the statement which he, purportedly, made to both PW2 and PW3 who recorded same, citing section 2 of the Illiterates Protection Law Cap I 3 Laws of Lagos State of Nigeria 2003.

He contended that there is clearly no such jurat as required by the law on either of exhibits C and G. They are, therefore, inadmissible in law and ought to be discountenanced by thecourt for failing to meet the mandatory requirements of section 2, Illiterates Protection Law Cap. I3 Laws of Lagos State of Nigeria2003, Omozeghian v. Adjarho (2006) 4 **NWLR (Pt. 969) 33**, 56; Eke v. Odolofin (1961) All NLR 404.

He maintained that, applying the same principles in respect of illiterate persons in the case of Omozeghian v. Adjarho (supra), exhibits D and H which the second defendant, purportedly, made were also inadmissible and ought to be discountenanced by your Lordships. He pointed out that, just like exhibits C and G, the jurat required by section 2 of the Illiterates Protection Law is also clearly absent.

He argued that by virtue of section 27(3) of the Evidence Act and the Supreme Court decision in Suberu v. State [2010] 8 NWLR (Pt. 1197) 586; [2010] 3 SC (Pt. 11) 105, 120 - 121, the lower court ought to have expunged and or given no consideration to exhibits C, D, G and H. He contended that section 27(3) (supra) [now section 29(4) of Evidence Act 2011] deals with the use to which the statement of a co-accused can be put when considering the case of another accused.

He observed that, in the instant case, the prosecution at the trial neither stated that the first and second defendants made exhibits C, D, G and H in the presence of the appellant nor did it state that the said statements were adopted by the appellant whether by words or by conduct, citing the evidence of PW3 who tendered exhibits C, D, G and H, pages 93 - 105 of the record. He contended

that, in the circumstances, the lower court could not be said to be right when, in convicting the appellant, it relied heavily on the contents of exhibits C, D, G and H, pages 178 - 181 of the record, Suberu v. State; The State v. Onyeukwu [2004] 7 SCNJ 1; [2004] 14 **NWLR (Pt. 893) 340;** Ogiri and Anor. v. The State (supra) 5; Chukwuekev. The State (supra) at page 616; R. v. Afose and Ors (supra); Ozakiand Anor v. The State (supra); Yongo v. C.O.P. (supra).

He submitted that by virtue of section 27(3) of the Evidence Act 2004 and the Supreme Court decision in Suberu v. State (supra), the lower court ought to have expunged exhibits C, D, G and H. He pointed out that Suberu v. State (supra) was cited to the lower court by the appellant's counsel. The court, however, totally ignored it and or refused to follow that binding decision. He maintained that the lower court was in error when, in convicting the appellant, it relied heavily on the contents of exhibits C, D, G and H. In his view, the error occasioned a miscarriage of justice.

He urged the court to correct that error in this appeal by finding and holding that the lower court was wrong in admitting the statements of the first and second defendants to the Police as exhibits C, D, G and H and subsequently relying on them in convicting the appellant. He urged the court to resolve the third issue for determination in this appeal in favour of the appellant.

RESPONDENT'S SUBMISSIONS

Counsel adopted her arguments in respect of issues 1 and 2in the argument of issue 3. She contended that where extra judicial statement of an accused person was confessional in nature, such was sufficient to sustain conviction if proved to be direct and voluntary, Sunday Uluebeka v. The State [2000] 7 **NWLR (Pt. 665)404,** 428; Ikpo v. The State [1995] 9 **NWLR (Pt. 421) 540;** Emeka v. State [2002] 14 **NWLR (Pt. 734) 666**, 682. He submitted that in the evaluation of evidence and ascertaining the truth of a confessional statement, including its voluntariness, a trial Judge was in a better position of the opportunity to hear evidence of witnesses and observe their demeanor during examination.

She explained that the statements that were admitted in evidence, namely, exhibits C, D, E, F, G and H were all the statements of the three defendant, He noted that exhibits C, D, E and F were made at the State CID, Panti and tendered by the Prosecution through PW3 while the first and second defendants statements, namely, exhibits G and H, made at Anthony Police Station,

were tendered through the same PW3. In his view, the relevant question the lower court asked was whether there were similarities in these two set of statements made by the same defendants as to suggest they were freely and fairly made. He maintained that the answer was in the affirmative. He wondered why counsel who accepted exhibits G and H to be the true statements of the first and second defendants would turn around to contest the admissibility of exhibits C and D. He explained that these statements were made the same way, thus there was point contesting one set and affirming the others.

She cited Olalekan v. State [2002] I MJSC 159 (2001) 18 **NWLR (Pt. 746) 793** as authority for the view that a statement which is admissible in all other respects is not inadmissible on the ground it was taken down in English and not in whatever language that may have been used by the person making it. What has to be proved is that what was written down is in effect and meaning the statement made by the accused person? The nearer it is proved to be his very words, the more weight which can be attached to it. In his view the way of getting nearest to the very presumption is that of regularity, citing section 150(1) of the Evidence Act.

She submitted that the lower court could admit the statements. However, it had a duty to determine the truth/veracity and probative value of such a confession. In doing so, the court shall be guided by the principles laid down in Ikpo v. The State [1995] 9 NWLR (Pt.421) 540, 554.

APPELLANT'S REPLY

He turned to the question of the propriety of the approach of admitting and utilising the first and second defendants' statements to the Police, namely, exhibits C, D, G and H in convicting the appellant. He noted that the respondent only, partly, contested the appellant's arguments, citing paragraphs 3.12 - 3.17 at pages 8 - 11of the respondent's brief of argument. Thus, the respondent did not respond to the appellant's arguments in paragraphs 4.28 - 4.31 of the appellant's brief. He maintained that the respondent had conceded and or accepted the appellant's arguments in the said paragraphs 4.28 - 4.31 of the appellant's brief, Okongwu v. NNPC [1989] 7SCNJ 106, [1989] 4 **NWLR (Pt. 115) 296**, 309; Oluyori Bottling Industry Limited v. Union Bank of Nigeria Plc (2009) 3 **NWLR (Pt.1127) 129**. He noted that in the said paragraphs 4.28 - 4.31 of the appellant's brief,

it was contended that by virtue of section 27(3) of the Evidence Act 2004 [now section 29(4) of the Evidence Act2011]; Suberu v. State [2010] 8 **NWLR (Pt. 1197) 586**, the lower court, as far the appellant's case was concerned, ought not to have considered at all, much less, use exhibits C, D, G and H as the basis or the evidence upon which the appellant was convicted for conspiracy. He noted that the statutory conditions precedent to the use of exhibits C, D, G and H, being the statements of co-accused persons, against the appellant were not satisfied in this case from the records.

He maintained that the said exhibits should not have been used against him, Suberu v. State (supra). This is so as the said exhibits were inadmissible evidence against the appellant when considering his case. He contended that the lower court ought to have expunged the said exhibits and should not have given them any consideration whatsoever in determining the case against the appellant. He urged the court to expunge exhibits C; D; G and H, section 27(3) of the Evidence Act (supra); Suberu v. State (supra).

He pointed out that if the said exhibits E and F, on the one hand, and exhibits C, D, G and H, on the other hand are expunged, there would be no evidence whatsoever before the court upon which the conviction of the appellant for conviction of the appellant for conspiracy could be sustained. He explained that the conviction of the appellant for conspiracy was based, entirely, on exhibits E, F,C, D, G and H, citing page 180 lines 24 - 41 of the record and page 181 lines 22 - 34 of the record.

Learned counsel submitted that the lower court's admission and reliance on exhibits E, F, C, D, G and H in convicting the appellant for the offence of conspiracy to commit armed robbery was erroneous in law. He urged the court to expunge those exhibits for being inadmissible, Eke v. State (supra) and Suberu v. State (supra). He explained that, in view of the lower court's denial of the appellant's constitutional right to cross examine PW2 and PW3, this court is duty bound to expunge the evidence of PW2 and PW3 in the determination of the case of the appellant. In his view, when these are done, there would be no evidence whatsoever to justify the conviction of the appellant for conspiracy. He urged the court to hold that the appellant is entitled to be discharged and acquitted.

RESOLUTION OF THE ISSUE

The *main or principal complaint* in this issue was that the lower court, in convicting the appellant, placed heavy reliance on the confessional statements of his co-accused persons. PW3tendered exhibits C; D; G and H, extra-judicial statements of the first and second defendants, pages 93-105 of the record. We have, painstakingly, scrutinized the record, particularly, the testimony of PW3. We found no evidence that the said exhibits were either made in the appellant's presence or that he adopted them orally or through his body language.

We are, rather, surprised that this elementary principle in the jurisprudence of confessions could be violated with such brazenness and facility. Section 27(3) of the Evidence Act 2004[then applicable to the proceedings] provided thus:

> Where more persons than one are charged jointly with a criminal offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, thecourt, or a jury where the trial is one with a jury, shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct.

Decisions woven around the above section of the repealed Evidence Act are so explicit on the conditions for the admissibility of the confessional statement of a co-defendant that they ought to constitute something akin to a judicial catch- phrase for trial courts. The import of these decisions may be summed up thus. A statement made by an accused person implicating his co-accused person is not evidence against that other accused persons. Section 27(3) (supra)forbade the use of such statement even when it was confessional,per Ogundare JSC in Gbadamosi v. State (supra), R v. Ani 3 WACA 3; Aigbe v. The State [1976] 9-10 SC 77, Ozaki v. State [1990] 1 **NWLR (Pt. 124) 92.**

Put differently, a confessional statement of a co-accused person is no evidence against an accused person who has not adopted the statement, Evbuomwan v. Commissioner of Police (1961) WNLR 257, approvingly, adopted in Ozaki v. State (supra). Indeed, Obaseki JSC maintained in Ozaki v. State (supra) that an incriminating statement made even in the presence of an accused

person, even on an occasion which could reasonably be expected to call for some explanation from him, is not evidence against him on his trial of the fact therein stated save in so far as he has accepted the statement.

It is, thus, an error in law to convict an accused person on the statement of another accused person to the police. It is, indeed, a travesty of justice and gross violation of all known rules of evidence, Ozaki v. State (supra). The consequence is that where the statement is used to found or secure a conviction, the conviction must on appeal be quashed, Rex v. Philip Jonah & Ors. (1934) 2WACA 120; R. v. Norton (1910) 2 K.B.D. 496, approvingly, adoptedin Rex v. Philip Jonah and Ors (supra) per Deane CJ page 122; Suberu v. State; The State v. Onyeukwu [2004] 7 SCNJ 1, [2004] 14NWLR (Pt. 893) 340.

A final clarification may not be out of place here. An extra-judicial statement of a co-accused person [which was governed by section 27 (3)] must not be confused with evidence which a co-accused person gave on oath [which was provided for in section178 (2) of the old Evidence Act]. An extra-judicial statement of a co-accused person remains a statement and not his evidence. It is binding on the maker only, per Fabiyi JSC in Suberu v. State [2010]3 KLR at 1362, (2010) 8 NWLR (Pt. 1197) 586, citing Ogiri and Anor v. The State (supra) 5; Chukwueke v. The State (supra) at page616. It is, thus, not admissible against his co-accused person [in this appeal, the appellant], Per Fabiyi JSC in Suberu v. State (supra), citing R. v. Afose and Ors (supra); Ozaki and Anor v. The State(supra); Yongo v. C.O.P. (supra)

As stated above, PW3 did not show that the appellant adopted the said exhibits either orally or through his body language. We, therefore, hold that the lower court was wrong in relying on exhibits C; D; G and H, [pages 180-181 of the record], as evidence upon which it convicted the appellant for conspiracy. We are under obligation to expunge them. We hereby expunge and hold that theyno longer constituted evidence for the purpose of the judgment under appeal, see per Obaseki JSC in Ozaki v. State (supra). We resolve this issue in favour of the appellant.

ISSUE 4

Whether the learned trial Judge denied the appellant his constitutional right to fair hearing when on 15thDecember, 2009, she dismissed the appellant's application to recall PW2 who recorded exhibits G and H for cross examination?

On this issue, counsel pointed out that, after PW2 (PC Joseph Agum) had given his evidence, PW3 (Sergeant Fidelis Dike) gave his own evidence and in the process, he tendered exhibits G and H. He explained that these two exhibits were statements made by the first and second defendants. PW3 said that PW2 recorded these exhibits for them [first and second defendants], pages 101 - 102 of the record. Counsel pointed out that it was the first and second defendants who, in the course of cross examining PW3, tendered the said exhibits G and H through him. He pointed out that these two statements, that is, exhibits G and H were not part of the proof of evidence given to the appellant before the trial. Worse still, the appellant's counsel saw these statements for the first time when they were tendered in court. He further explained that, after thecourt proceedings for that day, considering that the appellant had been taken by surprise by the tendering and admission of exhibits G and H which he had not seen before until they were tendered in court, the appellant, promptly, applied for a certified true copy of the said exhibits, page 54 of the record. After obtaining the certified true copies of the said exhibits G and H, his counsel promptly studied them. Upon these state of affairs and considering that the said statements, exhibits G and H which were statements of co-accused persons, were prejudicial to the third defendant, that is, the appellant herein, his counsel, in the interest of fair hearing and justice, then by a motion on notice dated November 6, 2009, formally, applied to the court for leave to recall PW2 who recorded the said statements and also PW3 who tendered the statements for cross examination and or re-examination, pages 45-49 of the record. He cited pages 108 -109 where the court refused the application.

Counsel contended that the lower court displayed a total misconception and misapprehension of the simple and innocuous application before it. He canvassed the view that the lower court fundamentally misconceived and or misapprehended the application before it to be an attempt by the appellant to "legally stop the tendering of documents that did not emanate from

him." He noted that that was not the application before the court. He explained that all the statements had already been admitted in evidence and marked exhibits G and H. He re-iterated that the application before the lower court was for an order "... that the Prosecution witness2, PC Agum Joseph, and Prosecution witness 3, Sergeant Fidelis Dike, be recalled as witnesses for cross examination and or re-examination," [page 45 of the record].

He canvassed the view that the lower court misconceived the application before it and this had occasioned a miscarriage of justice, Union Bank of Nigeria Plc v. Emole (2001) 18 **NWLR (Pt. 745)501**, 517 - 518. As such, the refusal of the application should notbe allowed to stand and must be reversed in this appeal, Adejugbev. Ologunja [2004] 6 **NWLR (Pt. 868) 46**.He submitted that the lower court's decision dismissing the appellant's application to recall PW2 and PW3 for purposes of cross examination on exhibits G and H was erroneous: an error that occasioned a miscarriage of justice as the constitutional right of the appellant to fair hearing was thereby breached, Tewogbade v. Agbabiaka [2001] **5 NWLR (Pt.705) 38**.He explained that the appellant, in the course of his trial, was suddenly confronted with exhibits G and H which were not part of the proof of evidence given to him before the trial. He neither had the time to study the said exhibits nor did he have adequate opportunity to react to same in every material particular. As soon as he obtained the certified true copy of the said exhibits G and H, he promptly applied to the court to recall PW2 and PW3 for cross-examination and or re-examination. In moving the application, the appellant's counsel clearly expressed the predicament of the appellant as recorded by the lower court thus:

> **MR. ATEH:** Moves. PW 2 was the one who took the statements and we had no opportunity of cross examining him and PW3 through whom exhibits and(sic) court were tendered under cross-examination, ... We were not given sufficient time to evaluate the documents. The justice of this case is sufficient to grant the discretion in our favour, the court will look at the gravity of the charge. [page 106 of the record]

Counsel observed that, despite this predicament of the appellant, which bordered on his constitutional guaranteed right to fair hearing under section 36(4) and 6(b) of the 1999

Constitution, the lower court nevertheless dismissed his application. He maintained that, in the circumstances, the appellant was denied the right to cross examine PW2 who recorded exhibits G and H. The appellant was, also, not given adequate time and facilities to cross examine PW3 who tendered exhibits G and H. He submitted that these were in breach of the appellant's constitutionally guaranteed rights to fair hearing under section 36(4) and section 36(6) (b) of the 1999 Constitution, Ibori v. F.R.N. [2009] 3 **NWLR (Pt. 1128)283**, 315; A.-G., Rivers State v. Ude (2006) 17 **NWLR (Pt. 1008)436,** 456.

He canvassed the view that the appellant had a constitutional right to cross examine PW2 and PW3 but he was denied that right. Rather than totally expunge the evidence of PW2 and PW3, the lower court, in convicting the appellant on the charges against him relied, on the evidence of PW2 and PW3. Undoubtedly, the lower court's reliance on the evidence of witnesses whom the appellant did not have the opportunity of cross-examining was in breach of the appellant's constitutional right to fair hearing. The legal effect of the breach of the appellant's constitutional right to fair hearing is that the entire proceedings before the lower court were all a nullity, Okafor v. A.-G., Anambra State [1991] 6 **NWLR (Pt. 200) 659**, 678; Adigun v. A.-G., Oyo State [1987] 1 **NWLR (Pt. 53) 678**; Obodo v. Olumo [1987] 3 **NWLR (Pt. 59) 111.**

He contended that the right of the appellant who is charged with a criminal offence to fair hearing is constitutionally guaranteed, section 36(4) and 36(6)(d) of the 1999 Constitution. He opined that the right to cross examination is a vital ingredient of the right to fair hearing in a criminal trial, citing section 36(6)(d) of the Constitution which gives the appellant the inalienable right to cross examine the respondent's witness.

He submitted that the lower court's reliance on the evidence of witnesses whom the appellant did not have the opportunity of cross examining was in breach of his constitutional right to fair hearing, Tewogbade v. Agbabiaka (2001) 5 **NWLR (Pt. 705) 38, 52.**

Counsel contended that, in all civilized jurisdictions of the world, including Nigeria, where the right to cross examine a prosecution witness has been denied an accused person and he is subsequently convicted, his conviction would be unconstitutional and liable to be quashed on

appeal, Tulu v. Bauchi Native Authority (1965) NMLR 343. He urged the court to allow this appeal and discharge and acquit the appellant.

He submitted that the lower court's refusal of the appellant's application on December 15, 2009, was a denial of the appellant's constitutional right to fair hearing which had occasioned a miscarriage of justice. This is even more so as the lower court relied, heavily, on the said exhibits G and H in convicting the appellant, page 180 of the record. He observed that exhibit G became the platform and the basis upon which the appellant was convicted and sentenced for conspiracy, citing page 181 lines 26 - 33 of the record.

He noted that the appellant was, thus, convicted and sentenced on the strength of the contents of exhibits G and H which document she was denied the right to cross examine PW2 and PW3 on and or not given adequate time or facilities to prepare his defence thereon. He invited the court to consider section 36 (6) (b) of the1999 Constitution to see that the appellant's constitutional rights as guaranteed therein were breached in two different ways.

In the first place, the appellant was not given adequate time for the preparation of his defence. This is so as exhibits G and H were tendered and admitted by the court in the course of the cross examination of PW3 by the counsel to the first and second defendants, page 102 of the record. Immediately after that cross examination by the first and second defendant's counsel, the appellant's counsel had to conduct the cross examination of PW3on, inter alia, exhibits G and H which documents the appellant's counsel saw for the first and only time just a few seconds earlier. He explained that it was obvious that he could not do justice by cross examining PW3 on exhibits G and H which he had not even readthrough much less of having adequate time to prepare his defence vide cross examination thereon as constitutionally guaranteed by section 36(6) (b) of the 1999 Constitution.

In his view, the lower court's refusal of the appellant's application to recall PW2 and PW3 for the purpose of cross examining them on exhibits G and H, after he must have had adequate time to study the said exhibits G and H, was clearly in breach of the appellant's right under section 36(6) (b) as he was given no time whatsoever to cross examine PW2 on exhibits G and H. In

respect of PW3, he was not given adequate time to cross examine him on exhibits G and H all in breach of section 36(6) (b)of the 1999 Constitution.

He further, contended that section 36(6) (b) constitutionally guaranteed the appellant the right to adequate facilities for the preparation of his defence. He explained that, in the instant case, part of the "facilities" to be given to the appellant to prepare his defence ought to be exhibits G and H, which was tendered against the appellant in the criminal charge. He canvassed the view that the appellant ought to be given exhibits G and then given time to study same and prepare his defence thereon, section 366) (b) of the 1999 Constitution. He explained that it was, also, the reason behind the requirement that the prosecution must give the defence the proof of evidence before the trial commences so that the defence will know the case that they have to meet at the trial and then adequately prepare their defence.

He explained that, in this case, since the trial was a full trial commenced by the filing of an information, page 1 of the record, by virtue of sections 255, 256 and 260 of the Administration of Criminal Justice Law No. 10 of 2007 published in Lagos State of Nigeria Official Gazette No. 21 of 20th March 2008 [applicable to the proceedings] (equivalent to sections 251 and 256 of Administration of Criminal Justice Law No. 10 of 2011 respectively), the appellant had the legal right to be served with the proof of evidence and list of exhibits including the documents admitted as exhibits G and H at least three days before the trial. This was not done by the prosecution. This denied the appellant his statutory right.

He explained that exhibits G and H were not part of the proof of evidence given to the appellant before trial. It was thus only fair and proper that, upon its being tendered in court, the appellant be given copies thereof. Thereafter, he should given adequate time to prepare his defence in relation thereto before continuing with the trial so that at the time that trial resumes, the appellant would have prepared his defence in relation to exhibits G and H, citing sections 255, 256 and 260 of the Administration of Criminal Justice Law No. 10 of 2007 published in Lagos State of Nigeria Official Gazette No. 21 of 20th March, 2008 being the law in force at the relevant time (equivalent to S. 251, 256 and 260 of Administration of Criminal Justice Law No. 10 of 2011 respectively).

He submitted that the denial of the appellant the right to cross examine PW2 and PW3 after he had obtained the certified true copy of exhibits G and H from the court was in breach of his constitutionally guaranteed rights in both sections 36 (4) and36 (6) (b) of the 1999 Constitution. It was, also, in breach of the appellant's statutory right under sections 255, 256 and 260 of the Administration of Criminal Justice Law No 10 of 2007 published in Lagos State of Nigeria Official Gazette No. 21 of 20th March, 2008.He urged the court to resolve the fourth issue for determination in this appeal in favour of the appellant.

He pointed out that hasty justice is justice denied or outright injustice as the appellate courts have admonished lower courts of the danger of sacrificing justice on the altar of speed, Unongo v. Aku and Ors [1983] 14 NSCC 563, 577; (1983) 2 SCNLR 332; Abubakar v. Yar'Adua [2008] 4 NWLR (Pt. 1078) 465, 537. He noted that the lower court sacrificed justice on the altar of speed by its refusal of the appellant's request to recall PW2 and PW3for cross examination. He took the view that this had occasioned a miscarriage of justice, Usikaro v. Itsekiri [1991] 22 NSCC 281,298 - 299, (1991) 2 **NWLR (Pt. 172) 150.**

RESPONDENT'S SUBMISSIONS

On this issue, counsel for the respondent submitted that the lower court did not deny the appellant his right to fair hearing. In her view, it was the discretion of the court to either grant an application or not. She explained that the appellant's application was taken and refused, citing pages 108 and 109 of the record. He contended that the appellant was not denied fair hearing, S.C.E.N. v. Nwosu (2008) All FWLR (Pt. 413) 1399, 1421; (2008) 3 **NWLR (Pt. 1074) 288**; Ishaya Bamaiyi v. The State and Ors [2001] 8 NWLR (Pt. 715) 270; Kotoye v. Central Bank of Nigeria and Ors [1989] 1 **NWLR (Pt.98) 419**. He urged the court to hold that the appellant's argument on this issue was, grossly, misconceived that there was no denial off air hearing.

He, further, submitted that the exhibits were not even part of the proof of evidence served on the parties. He noted that the first and second respondents tendered these exhibits. The Prosecution, first, objected to their admissibility at that time. He contended that the appellant had the option of objecting to the exhibits when they were sought to be tendered. He did not object to them. He took the view that the appellant's argument hinged on his having been taken by surprise

was misconceived as the Prosecution did not tender the exhibits. He maintained that an appellant's application to recall was unnecessary. The lower court's refusal did not amount to denial of any constitutional right. He, further, submitted that the appellant was not convicted and sentenced on the strength of these 2 exhibits alone but all the evidence before the court.

In response to the appellant's contention that his right undersection 36(6) (b) of the 1999 Constitution was breached because he was not given time to prepare for his defence and secondly that he was not served with the exhibits to prepare himself, he submitted that the appellant's counsel was present when the first and second defendants' counsel requested from the Prosecution to give them the statement that was made at Anthony Police station. Appellant's counsel did not object at the lower court even if he was seeing them for the first time. He noted that the Prosecution even objected to the tendering of the documents. The objection was later withdrawn and these statements were admitted.

He took the view that whenever a counsel was in court he should be adequately prepared for anything that may come his way and should be ready to react to anything. He submitted that the Prosecution had served the defence with his proof of evidence and all necessary statements that it intended to use. Thus, if one of the defendants decided to use any other documents, it was not the fault of the Prosecution. In his view, the defendants' counsel should have collaborated to know how to conduct their trial in defending their clients.

APPELLANT'S REPLY

Counsel observed that the legal effect of the breach of the appellant's constitutional right to fair hearing is that the entire proceedings before the lower court were all a nullity no matter how well conducted, Okafor v. A.-G., Anambra [1991] 6 **NWLR (Pt.200) 659**, 678; Adigun v. A.-G., Oyo State [1987] 1 **NWLR (Pt. 53) 678;** Obodo v. Olomo (1987) 3 **NWLR (Pt. 59) 111**. He urged thecourt to allow this appeal; set aside the conviction and sentence of the appellant and discharge and acquit him.

ISSUE NO. 5

> Whether from the facts and circumstances of this case, the learned trial Judge denied the appellant his constitutional right to fair hearing which has occasioned a miscarriage of justice?

On this issue, he explained that, having shown under the fourth issue (supra) that the refusal of the lower court to grant the appellant's application to recall and cross examine PW2 and PW3 on exhibits G and H was a wrong exercise of discretion, the inevitable consequence was the denial of the appellant's constitutional right to fair hearing as constitutionally guaranteed in section 36(6) (b) of the 1999 Constitution.

He explained that the lower court denied the appellant his constitutional right to fair hearing. He observed that, in its judgment, the lower court ignored and did not consider the appellant's arguments and submissions which were vital to his case. He cited the lower court's refusal to follow the Supreme Court decision in Suberu v. State (supra) which the appellant brought to its attention. He pointed out that, beyond mentioning that the appellant's counsel cited the case (page 173 of the record), the court did nothing more. It neither considered the case nor followed and applied it. Alternatively, where it chose not to follow and apply it, it ought to have explained the reason for so doing or distinguish it from the present case. He maintained that the lower court was bound by the decision in Suberu v. State (supra). He took the view that, by ignoring and or refusing to consider the said Supreme Court decision, the lower court failed to hold the scales of justice evenly between the parties. He explained that if it had considered and or followed the said decision, it would have come to a different conclusion.

He pointed out that a court, in arriving at a decision, must give full and adequate consideration of all issues raised by the parties before the court, Bayol v. Ahemba [1999] 10 NWLR (Pt. 623) 381,392- 393. He submitted that by ignoring and or not considering all the appellant's arguments which were vital to his case (pages 130to 135 of the record), the lower court did not accord full, adequate and dispassionate consideration to the appellant's case. In so doing, it denied the appellant his constitutional right to fair hearing which denial occasioned a miscarriage of justice.

He, further, pointed out that the lower court failed to hold the scale of justice evenly between the parties all through the trial. He contended that the lower court tended to favour the respondent to the detriment of the appellant. He observed that the Law and its technical rules were made to strictly apply to the appellant herein so much so that very innocuous applications by the appellant made in the interest of doing substantial justice in the matter in accordance with the rights of the parties were routinely dismissed or refused.

He pointed out that, besides summarizing the contents of the appellant's defence, the lower court totally ignored and or gave no consideration whatsoever to the appellant's defence. It neither analyzed same nor did it state whether or not it believed or accepted the appellant's defence. He submitted that a court is duty bound to consider the defence of the accused person no matter how stupid and return a verdict thereon, Kaza v. State [2008] 7 **NWLR (Pt. 1085)125**, 169; Ahmed v. The State (1999) 7 **NWLR (Pt. 612) 641**, 679; Ndukwe v. State [2009] 7 **NWLR (Pt. 1139) 43,** 96. He canvassed the view that a court's failure to consider all possible defences raised by the parties will lead to a miscarriage of justice, Usufuv. State (2007) 3 **NWLR (Pt. 1020) 94**, 121; Namsoh v. The State(supra); Ahmed v. The State (1999) 7 **NWLR (Pt. 612) 641**.

He submitted that the failure of the lower court to consider and or properly appraise the defence of the appellant as required by law occasioned a miscarriage of justice. He further contended that failure to consider an accused person's defence and return a verdict thereon amounts to the denial of the accused person's right to fair hearing, Usufu v. State (supra).

He pointed out that, on the other hand, the lower court took time to analyze and return verdicts on the evidence (the exhibits) of the prosecution, pages 178 - 181 of the record. He

submitted that the lower court's approach was a manifestation of its failure to hold the scales of justice evenly between the parties which had occasioned a miscarriage of justice.

He took the view that the appellant had established that there were several instances of the denial of his right to fair hearing by the lower court, particularly, the denial of his constitutional rights in sections 36 (4) and 36 (6) (b) of the 1999 Constitution. In his view, that had occasioned a miscarriage of justice. The appellant's trial was therefore a nullity. Thus, his conviction and sentence ought to be quashed. He should be discharged and acquitted, Okafor v. A.-G., Anambra State [1991] 6 **NWLR (Pt. 200) 659**, 678; Adigun v. A.-G., Oyo State [1987] 1 **NWLR (Pt. 53) 678;** Obodo v. Olomu[1987]3 **NWLR (Pt. 59) 111.**

He canvassed the view that, in a criminal trial, the breach of the accused person's constitutional right to fair hearing renders the trial, conviction and sentence of the accused persons nullity. He is, therefore, entitled to be discharged and acquitted, Kim v. State [1992] 4 **NWLR (Pt. 233) 17**. He submitted that the entire trial of the appellant was nullity. He urged the court to resolve the fifth issue for determination in this appeal in favour of the appellant and discharge and acquit him.

RESPONDENT'S SUBMISSIONS

With respect to this issue, counsel adopted his arguments under issue 4. He submitted that the lower court had a duty to weigh all evidence and testimony before it and give judgment as it deems fit. In his submission, the lower court did all it could with the evidence before it, Bayol v. Ahemba [1999] 10 **NWLR (Pt. 623) 381,** 392 - 393. He maintained that the lower court never ignored the case of the defendants when giving its judgment. It considered all the evidence, testimony and the address of all the counsel and eventually gave its judgment on only one count charge of conspiracy to commit armed robbery. He took the view that thecourt considered the defences raised before it and found them only guilty of Conspiracy. He submitted that the lower court considered and properly appraised the defence of the appellant. There was, therefore, no miscarriage of justice.

RESOLUTION OF ISSUES 4 and 5

We are mindful of the fact that what is involved in this issue is a complaint against the exercise of discretion. We must, thus, remind ourselves of the well- settled principles in dealing with complaints of this nature. In Ogolo v. Ogolo [2006] 5 **NWLR (Pt.972) 163**, 180 paras. F-H, Onnoghen JSC held that:

The law is settled that a discretion properly exercised by trial court will not be lightly interfered with by an appellate court even if the appellate court was of the view that it might have exercised the discretion differently. It is only when a trial court exercised its discretion upon a wrong principle or mistake of law or under a misapprehension of the facts or took into account irrelevant or extraneous matters or excluded relevant matters thereby occasioning injustice, that an appellate court will not abdicate its duty to interfere with the exercise of that discretion in order to prevent injustice. [italics supplied]

We shall proceed by considering the question whether, in refusing to exercise its discretion in favour of the applicant's said application, the lower court acted "upon a wrong principle or mistake of law...thereby occasioning injustice." We note that unlike civil cases, there is a statutory warrant for a trial court's power to call or recall witnesses in criminal proceedings. Indeed, as Oputa JSC, once noted in Willoughby v. I.M.B. Nig. Ltd. [1987] 11 SC 137(1987) 1 NWLR (Pt. 48) 105, most of the cases on this point did not deal with the existence of the power but with the manner in which that existing power was exercised, citing Horvat v. Police 20 NLR52; Police v. Olatilewa (1958) WRNLR 200; West v. Police 20 NLR71; R v. Egwuatu (1940) 6 WACA 79; Queen v. Victor Aderogba (1960) 5 FSC 212, reported as Aderogba v. Queen (1960) SCNLR482 etc. As the distinguished jurist noted, all these cases dealt with the trial court's use or misuse of the said power to call or recall witnesses.

As the learned counsel for the appellant observed, the appellant, in the course of his trial [as third defendant], was suddenly confronted with exhibits F and H which were not part of the proof of evidence given to him before the trial. He neither had the time to study the said exhibits nor did he have adequate opportunity to react to same in every material particular. As soon as he obtained the certified true copy of the said' exhibits, he promptly applied to the court to recall PW2

and PW3 for cross examination and or re-examination. The court, on December 15, 2009, refused the application in these words:

It is a well settled principle of law that I and P E are not pleadings that must be filed to avoid the springing of surprises on the other parties as in civil cases. Therefore, the issue of surprise does not arise. I hold that no party was taken by surprise on the issue any way and that the third defendant was afforded ample opportunity to observe and react to the tendering of the said exhibits and therefore that this application is an attempt to re-litigate on an issue that had been litigated and a further attempt to delay the early conclusion of this case. If at the end of the trial and the court's finding is unfavorable to the third defendant, it can be made part of its appeal and the appellate court will be able to determine the issue and see whether it has subsequently adversely affected the case of the third defendant. Moreover, the said exhibits were the statements of only the first and second defendants and none of the third defendant. So I do not see how the third defendants can legally stop the tendering of documents that did not emanate from him. This application is therefore unmeritorious and hereby dismissed. I so hold. [See pages 108 - 109 of the record].

Andrew Igboekwe, learned counsel for the appellant, contended inter alia, that, in the circumstances, the appellant was denied the right to cross examine PW2 who recorded exhibits G and H. We find considerable merit in this contention. Section 36(6) of the Constitution has been interpreted as authority for the recall of witnesses for further cross examination, Tsaku and Ors.v. State [1988] 1 NWLR (Pt. 17) 516. As Uwais CJN explained in Orisakwe v. State [2004] 12 NWLR (Pt. 887) 258, 285, a trial court is permitted, at any stage of a criminal trial, to ... recall any witness, including the accused person himself, if it appears to the court to be (6) essential to the just decision of the case.

We, entirely, agree with Andrew Igbokwe, for the appellant, that the lower court, entirely, misconceived the application before it. Surely, the above reasoning of the court, clearly, demonstrate that, in the exercise of its discretion, the said court acted "upon a wrong principle or mistake of law ...thereby occasioning injustice. "This court will, therefore, not abdicate its duty. Rather, we find that we have to interfere with that exercise of discretion in order to prevent injustice

to the appellant, Ogolo v. Ogolo (supra); Adejumov. Ayantegbe [1989] 3 NWLR (Pt. 110) 417, 445; Amako v. State(supra).

We endorse the appellant's submission that, in the circumstances narrated above, the lower court's refusal of the application for there-call and cross examination of PW2 and PW3 on exhibits G and H amounted to a breach of section 36 (6)(d) (supra). This conclusion becomes even more cogent and compelling against the background of the fact that the said exhibit was one of the building blocks in the architecture of the judgment that saw to the appellant's conviction, see page 181 of the record where the court relied on exhibit G. We, entirely, agree with counsel for the appellant that the exhibit must be, and is hereby expunged from the judgment of the lower court. We, accordingly, resolve issues 4 and 5 in favour of the appellant.

ISSUE 6

Whether the learned trial Judge was right in convicting and sentencing the appellant for the offence of conspiracy to commit armed robbery?

Counsel for the appellant contended that, in a criminal trial, the burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt, section 138(1) of Evidence Act 2004[now section 135 (1) of the Evidence Act 2011]. He canvassed the view that to discharge this burden, the prosecution must adduce credible and legally admissible evidence. Accordingly, where the prosecution's evidence in proof of the guilt of the accused personal turn out to be inadmissible evidence, they ought to be expunged from the record. This done, there would be no admissible evidence upon which the accused could be convicted, Brosette Manufacturing (Nig.) Ltd. v. M/S Ola Ilemobola Ltd. (2007) 14 NWLR (Pt. 1053)109, 151.

He pointed out that, in the instant case, even though the appellant was charged for both armed robbery and conspiracy to commit armed robbery, he was only found guilty of conspiracy to commit armed robbery. He observed that the basis upon which the appellant was found guilty

of conspiracy to commit armed robbery were the contents of exhibits C, D, E, F, G and H, citing page 178lines 4 - 8, where the lower court stated thus:

The issue therefore is whether the prosecution has successfully proved the offence of conspiracy against all or any of the defendants. The statement of the three defendants, namely exhibit C, D, E and F made at the state C.I.D, Panti were tendered by the prosecution through PW3 while the first and second defendants 'statements made at Anthony Police Station namely exhibits G and H were tendered by their counsel through the same PW3.

He pointed out that, after stating that the issue was whether the prosecution had successfully proved the offence of conspiracy against the defendants, the lower court, immediately, proceeded to examine and analyze exhibits C, D, E, F, G and H, citing page 181 lines 29 - 34 of the record where it concluded thus:

From the foregoing therefore all the three defendants acted in concert towards a common end. The court has clearly ascertained the evidence of complicity of each of the three defendants herein in respect of count 1. The offence of conspiracy against each of them has been proved beyond reasonable doubt and each of them is hereby found guilty and convicted as charge under count 1.

He observed that "the foregoing" as used by the lower court, referred to its analysis and conclusion from exhibits C, D, E, F, G and H. He pointed out that there was no analysis whatsoever of the evidence on oath of the witnesses at the trial. He maintained that the conviction of the appellant was entirely based on the contents of exhibits C, D, E, F, G and H which were inadmissible evidence. They, therefore, ought to have been expunged. They were not supposed to be considered by the court. He contended that, in determining a case, the court will only rely on legally admissible evidence and will never base its judgment or conviction of an accused person on inadmissible evidence, per Fabiyi JSC in Suberu v. State (supra) at page 604 paras. F-H:

It is the law that if evidence is inadmissible, thecourt cannot make use of it at any stage. This is even so where no objection has been raised against it at the trial. See Alade v. Olukade (supra) at page 13;(1976) 10 NSCC 34. The court below ought to have discountenanced exhibit 'I'. It is hereby excluded from the consideration of the case preferred against the appellant by the

prosecution. After all, a court is expected in all proceedings before it to act only on evidence which is admissible in law. (italics supplied for emphasis)

He, further, contended that even if a document is relevant, if it is inadmissible then it must be expunged. It, thus, should not be considered as relevancy is not the only yardstick or test for admissibility, per Fabiyi JSC in Suberu v. State (supra) at page 604paras. C-D:

The court below held that exhibit 'I' was admissible against the appellant because it was relevant. With due respect, relevancy is not the only yardstick or test for admissibility. A document may be relevant and still be excluded if there is in existence a law, like the provision of section 27(3) of the Evidence Act, which renders exhibit 1 inadmissible as against the appellant. It is akin to a deed of conveyance which though relevant in an action for declaration of title and yet may be excluded because it had not been registered.

He took the view that exhibits C, D, E, F, G and H were all inadmissible evidence which ought to be expunged. He urged thecourt to expunge them, Suberu v. State (supra). In his view, when this is done, there would be no basis for the appellant's conviction for conspiracy. He urged the court to discharge him. Suberu v. State(supra).

He maintained that the respondent did not prove all the essential ingredients of the offence of conspiracy to commit armed robbery by credible and admissible evidence in every material particular. He took the view that the judgment of the lower court was unreasonable and unwarranted having regard to the legally admissible evidence on record. Accordingly, the conviction of the appellant for the offence of conspiracy to commit armed robbery was an error in law which error has occasioned a miscarriage of justice. He urged thecourt to resolve the sixth issue for determination in this appeal in favour of the appellant. He urged the court to allow this appeal and discharge and acquit the appellant.

RESPONDENT'S SUBMISSIONS

Counsel took the view that the lower court was right in convicting and sentencing the appellant for the offence of conspiracy as it was obvious that there was a meeting of the minds to

commit armed robbery. He explained that the conspiracy even went to fruition because the car that was found with the first and second defendants. He noted that conspiracy was the meeting of two or more minds to carry out an unlawful purpose in an unlawful way. In effect, the purpose of the meeting of the two minds was to commit an offence, Gbadamosi and Ors v. State [1991] 6 **NWLR (Pt. 196) 182.**

He canvassed the view that for the prosecution to succeed in proving the offence of conspiracy, it must prove the conspiracy as described in the charge and that the defendants were engaged in it or prove the circumstances from which the Judge may presume or infer from it, Benson Obiakor and Anor v. The State [2002] 10 **NWLR (Pt. 776) 612,** 628; Usufu v. The State [2007] 3 **NWLR (Pt.1020) 94**. He noted that the kernel of the offence of conspiracy does not lie in the doing of the act or the purpose for which the company was formed. Rather, it lies in the forming of the scheme or agreement between the parties. The external or avert act of the crime of conspiracy is the concert with mutual consent to a common purpose is exchanged, Nwankwo v. FRN [2003] 4 **NWLR (Pt. 809)1.**

He prayed in aid section 138 (1) of the Evidence Act Cap E8Laws of Lagos State 2003; Lori v. State [1980] 1 NSCC (1980) 8-11SC 81. He submitted that the case was proved beyond reasonable doubt. All the essential elements of conspiracy to commit armed robbery were proved through the consistent evidence of PW1, PW2 and PW3 coupled with the confessional statement of all the defendants. The respondent was able to prove conspiracy between the defendants. The case of the prosecution at the lower court was that the appellant and his co-defendants conspired to commit armed robbery. He submitted that the evidence adduced by the Prosecution justified the conviction of the appellant

RESOLUTION OF THE ISSUE

Just like morning follows the night, the conclusions arrived at with regard to issues one and two and four and five on the status or pedestal of exhibits C; D; G; E and F would, invariably, dictate the conclusion on this issue. For the avoidance of doubt, we had found that the said exhibits, for the reasons

> offered above, should not have been utilized in the conviction and sentence of the appellant for the offence of conspiracy. In consequence, we took the liberty to expunge them from the judgment of the lower court. Having been expunged, these exhibits no longer constituted evidence for the purpose of the judgment, per Obaseki, JSC in Ozaki v. State (supra). For ease of reference, we shall re-iterate our earlier findings with regard to the exhibits which formed the fulcrum of the judgment of the lower court.

We maintain that the lower court was in error when it failed to carry out the mandatory mini trial for the purpose of determining the voluntariness of the statement credited to the accused person [now, appellant in this appeal]. The court, therefore, labored in vain when it purported to have admitted the said exhibits, Eke v. State (supra) at page 603. The outcome of it all is that we have a duty to expunge the said exhibits E and F, Balogun v. A.-G., Federation(supra); Ikpasa v. A.-G., Bendel (supra); per Rhodes - Vivour, JSC in Osuagwu v. State (supra) 388.

Exhibits C; D; G and H were extra-judicial statements of the first and second defendants who were the co-accused persons of the appellant [third defendant at the lower court]. PW3 did not show that the appellant adopted the said exhibits either orally or through his body language. The lower court was wrong in relying on the said exhibits C; D; G and H, [pages 180-181 of the record], as evidence upon which it convicted the appellant for conspiracy. It was on that ground that we felt obliged to expunge them. We maintain that they no longer constituted evidence for the purpose of the judgment under appeal, see per Obaseki JSC in Ozaki v. State(supra).

What is more, the lower court's refusal of the application for the re-call and cross examination of PW2 and PW3 on exhibits G and H amounted to a breach of section 36 (6) (d) (supra). We found that this conclusion had become even more cogent and compelling against the background of the fact that the said exhibit was one of the building blocks in the architecture of the judgment that saw to the appellant's conviction, see page 181 of the record where thecourt relied on exhibit G.

In all, having expunged the above exhibits, we endorse the submission of the appellant's counsel that there is nothing left in the judgment of the lower court to sustain the conviction of the

appellant for the offence of conspiracy. Against this background, we have come to the inevitable conclusion that the appellant should not have been convicted in the first place. We have no hesitation, therefore in setting aside the judgment and sentence of the lower court on him.

In their place, we hereby enter an order discharging and acquitting him. Appeal allowed. The appellant's conviction and sentence are hereby set aside. Judgment of Dada J. delivered on March 1, 2011 is, hereby set aside.

PEMU, J.C.A.: I had the advantage of reading in draft, the lead Judgment just delivered by my brother CHIMA CENTUS NWEZE J.C.A. I agree with his opinion and conclusion.

The appeal succeeds and the judgment of Dada J, delivered on the 1st of March 2011 is hereby set aside, while the conviction and sentence of the appellant is hereby quashed.

AKINBAMI, J.C.A.: I have read before now the judgment prepared by my learned brother NWEZE, J.C.A. in which I fully concur with these few words, by way of emphasis.

In the course of the trial of the appellant in the lower court on October 28, 2009, the court refused to consider the appellant's objection to the admission of his two statements on the ground that they were involuntarily obtained.

The involuntary statement became the fulcrum upon which the appellant was convicted as the lower court placed reliance on the said statements in convicting and sentencing the appellant.

I agree with the reasoning and conclusion of my learned brother in this appeal. I have nothing to add. The appeal succeeds, the judgment and sentence of the lower court on appellant I also set aside in their place enter an order discharging and acquitting him.

Appeal allowed. The appellant's conviction and sentence are hereby set aside, the judgment of Dada J. delivered on March l,2011.

Appeal allowed.