89

IN THE HIGH COURT OF JUSTICE OF BENUE STATE OF NIGERIA
IN THE BENUE STATE JUDICIAL DIVISION
HOLDEN AT MAKURDI.

ON THE 12TH DAY OF JULY, 2013

BEFORE HIS LORDSHIP: HON. JUSTICE M. A. IKPAMBESE - JUDGE

MOTION NO: MHC/26C/2011

BETWEEN:
THE STATE ---------- COMPLAINANT

AND

TIMOTHY DUNG ---------- ACCUSED

JUDGMENT

Pursuant to leave granted by this Honourable court on the 16th day of March, 2011, two head count charges are preferred against the accused person to be summarily tried to wit:

"***1ST HEAD OF CHARGE***

That you, Timothy Dung on or about the 24-7-2010 at about 2028 hrs at Coca-Cola Plant 'A' on Gboko Road Makurdi, Benue State within the jurisdiction of this Honourable Court agreed with two others who are at large, to do an illegal act to wit: rob one, Iorshenge Stephen of his Honda Academy car with registration number DB 261FST Lagos and other valuables properties and the same act was done in pursuance of the said agreement and you thereby committed an offence punishable under Section 6(b) of the Robbery and Firearms (Special Provisions) Act CAP. R. 11 Laws of the Federation of Nigeria, 2004.

2ND HEAD OF CHARGE

That you, Timothy Dung on or about the 24-7-2010 at about 2028 hrs at Coca – Cola Plant 'A' on Gboko Road Makurdi, Benue State within the jurisdiction of this Honourable Court committed armed robbery to wit: you attacked one Iorshenge Stephen while armed with a gun and robbed him of his Honda Accord car with registration number DB 261FST Lagos and other valuable properties including Zain Sim Pack No. 08084415119 which sim pack was later found in your possession a recovered from you and you thereby committed an offence punishable under Section

1(2)(a) of the Robbery and Firearms (Special Provisions) Act CAP. R. 11 Laws of the Federation of Nigeria, 2004."

The accused person, Timothy Dung, pleaded not guilty to the two head count charge.

The prosecution in order to prove her case against the accused person called two witnesses who testified as the PW1 and PW2 respectively to close her case. On the other part, defence called three witnesses who testified as the DW1, DW2 and DW3 respectively and closed the defence.

The evidence adduced by the prosecution and defence witnesses on oath can be tersely stated.

PW1, Iorshenge Stephen, of No. 178 Kilometre 4 Gboko Road Makurdi who is a businessman owns Honda Academy car with Registration No. DB 261FST (Lagos). On the 24/7/2010, the PW1 went out in the evening to use his car and ply town taxi. At about 8.06 pm, the PW1 received a phone call from unknown person and was asked whether he has come out for work (do taxi) and he answered, yes. Further, the PW1 was asked his location and he answered, High Level, Makurdi driving down to Wurukum round about, Makurdi. Before the PW1 could ask the name of his caller the call cut. PW1 drove and reached Mr. Biggs round about when a tall guy putting on black jacket stopped him. He requested the PW1 to take him to Coca - Cola Plant 'A' gate at Gaadi Village to pick two girls and drop them at T.C. Wine bar around Kashim Ibrahim Road Makurdi.

PW1 picked the guy to the Coca – Cola gate and he dropped and took few metres away. When the PW1 wanted to drive away from the gate the said guy asked him to stop and he did. The said guy then pointed a gun on the head of the PW1 who got shocked. Before he could recover from the shock two other guys emerged from the bush and joined the first guy. One of the two guys that emerged from the bush was putting on Ash colour monkey jacket while the other was putting on a white T, shirt.

They held PW1 and drag him to the back seat of his car and the man with monkey jacket took over the control of the car. They drove the car towards Gboko while the guy (PW1) picked at Mr. Biggs was holding him on the neck. They guy in white T. shirt held the PW1 on the legs.

The guy holding the PW1 on the neck hit him with a pistol on the head and he started bleeding. When the PW1 started to shout for help the one holding his legs requested the one holding his neck to shoot him if he does not want to cooperate. On that note, the PW1 stopped shouting. He was driven on until the suspects sighted the police check point after Air Force Base, they reversed the car and stopped at the sharp bend before the check point where they searched him.

In their search, they collected ₦4,800.00, shirt valued ₦1,800.00, open sandals value ₦4,000.00, Samsung set valued ₦32,000.00, Zain Phone valued ₦2,500.00, China Phone valued ₦7,000.00, two MTN sim packs with

No. 08033468464 and 08069755957, two GLO sim packs with Nos. 08070793287 and 08074410016, two Etisalat Nos. 08091691769 and 08096849882 and Zain sim pack No. 08084415119.

The PW1 also had driving licence, BSU identity card, two UBA Cheque booklets, two ATM card, Diamond ATM card, etc in the pegeon hall of his car.

After searching the PW1, they pushed him down and drove away. PW1 reported first to the police at the check point who assisted by taking to 'E' Division Police Station, Makurdi where he reported.

On 20/8/2010, the PW1's friend from Wukari called him through his wife's phone to inform him that someone is using his Zain No. 08084415119. When the PW1 called his said Zain number, it rang but no one picked. He had to report to 'A' Division Police Station and reported. PW1 also reported at the State C.I.D. Police Headquarters, Makurdi.

When cross examined, the PW1 answered that he was able to identity those who accosted him and that he use to go out for taxi in Makurdi hence he gave his phone numbers to customers in case they need his services.

PW2, ASP Dennis Tarhemba who investigated this case on the 20/8/2010 stated he was serving at the State C.I.D. Makurdi, then, as a team leader that investigated the case against the accused person, Timothy Dung.

According to the PW2 on the 20/8/2010 a case of armed robbery was transferred from the 'E' Division Police Station to the State Criminal Investigation Department (C. I. D.). PW2 stated on oath that the PW1 narrated what happened to him and even stated that he will recognize the guy who wore monkey jacket with light brownish colour. PW1 volunteered a statement before the police.

According to the PW2, they swung into action by applying their detective mechanism to arrest the person because the line snatched was still going. Police applied to court to obtain a court order to serve Airtel/Zain who was the service provider of the line (Zain) snatched from the PW1. Airtel/Zain complied with the court order and released the cordinate to the Police. The coordinate enabled the Police to set a security trapping system that showed them the exact direction and position where the accused was using that particular line at that time was standing. The system gave the latitude and longitude on google earth. It shows that the accused person who was with the stolen line was at Abuja and the call history of the line after the Robbery was within Abuja town and a town in Plateau State. However, about three days back, the line was showing that it was in Abuja. The Police went to Abuja and the system directed them to Federal Fire Service in Abuja town and they went there. When the PW2 and his team called the number/line, it rang and accused received the call. The PW2 then arrested the accused and interviewed him. The accused admitted that he was a driver. The PW2 obtained search warrant in a court at Abuja and conducted a search in the house and premises of the accused and recovered sim pack certificate of the

Airtel line snatched from the PW1, Etisalat sim pack certificate along side with jacket and handset. The accused endorsed the search warrant that those items were recovered from his house. The PW1 also identified the items recovered as the items snatched from him at Makurdi.

According to the PW2, the accused offered to pay for the cost of the taxi car but the police told him the case was beyond the powers of the police to compound.

The extra judicial statement of the accused dated 25/9/2010 is admitted in evidence as Exhibit 'A' while the Airtel sim pack and Etisalat sim pack certificates Nos. 08084415119 and 08096849882 respectively light brownish monkey jacket and sk Xtel Handset are marked Exhibits B1, B2, B3 and B4 respectively in evidence.

According to PW2, the accused was found in recent possession with the Airtel line snatched from the PW1 after the robbery.

Defence counsel tender in evidence through the PW2 call records on Zain line 08084415119 dated 15/9/2010 and mark same as Exhibit 'C'.

PW2 admitted that his statement was made on 29/10/2010 while the statement of accused and PW1 were made on the 25/9/2010. The statement of PW2 was tendered and admitted in evidence as Exhibit 'D'. On further cross examination of PW2, he answered that identification parade was conducted and the PW1 identified the accused as one of those that robbed him. The PW2 answered that he requested the accused to produce the panel beater but he could not.

The accused testified as the DW2 on oath and stated that on the 24/7/2010 the DW3, Yusufu Pam Jack, called him in the morning to collect his wife's car to service and wash all the seats. According to the accused, he washed the seats and kept in his sister's house when rain started. He waited until 5.00 pm when rain stopped and fixed the seats. The accused was going back to Abacha Road when rain started again. The case slipped and summersaulted and people came around to bring it up and this was about 6.00 pm. It was 8.00 pm that the accused reached his boss, DW3 and narrated the incidence to him. DW3 called his panel beater, DW1 to go with the accused and check the vehicle. Accused waited at Abacha junction for the DW1 based on the instructions of DW3. The DW1 met the accused and all went to the scene of the crime. The accused checked his phones allegedly lost but could not find it at the scene. They could not even move the car but managed to keep it to a nearby filling station.

The DW1 and accused agreed to come back early in the morning. According to accused, he was searching around when he saw a sim card and a sim pack and picked them. After, DW3 came with a hayap to tow the car to DW1's workshop.

Accused claimed that one Mr. Andrew loaned him a Nokia set which he inserted the ZAin sim card and called Personal Assistant of DW3, Oluwa Femi

who saved it and went on to communicate with him. According to accused, he continued to use the line till the 27/9/2010 when the PW2 arrested Oluwa Femi and himself. The accused phone was seized by the Police together with the Zain/Airtel line in question. The accused alleged that he bought the phone from one woman selling minerals but the woman denied selling it to him when questioned by the Police.

Further, accused said there was no identification parade when the PW1 pointed at him.

The DW1, Joseph Gyang Pam, stated that he is a panel beater that the DW3 engaged to recover the vehicle which accused allegedly had accident for repairs at his workshop. He confirm that the accused was searching for his alleged lost phones where he saw the sim pack/cards on the ground and picked.

DW3 confirm the story of the accused and stated that the accused can not be involved in a motor accident at Abuja and be at Makurdi at the same time. When cross examined, the DW3 answered that he does not know or can not recall the phone number he use to call the accused. Both parties close their case and defence respectively.

On the 15/4/2013, both counsel adopted written addresses.

Defence counsel in his written address dated and filed on the 11th day of March, 2013 formulated a lone issue to wit:

> *"Whether the prosecution has proved with credible evidence, that the accused committed the offences alleged to secure conviction."*

Prosecution counsel in the written address dated and filed on the 22nd March, 2013 also formulated a lone issue to wit:

> *"Considering the totality of the evidence adduced by the prosecution, has the guilt of the accused person been proved beyond reasonable doubt as required by law to secure his conviction as charged."*

The issue formulated by defence counsel and prosecution counsel have the same content and effect save it needs to be fine tuned. The issues fine tuned is reframed as follows:

> *"Whether by the evidence adduced before this court the prosecution has proved her case against the accused person beyond reasonable doubt to warrant him to be convicted as charged."*

It is submitted by defence counsel that the prosecution has totally failed to prove the guilt of the accused on the two count charges preferred against him to warrant or secure the conviction of the accused and the court is urged to so hold.

From the recorded, it is submitted, there is no evidence establishing that the accused standing trial was involved in any illegal act or did any legal

act through an illegal mean in conjunction with any body to render him liable to conviction on the offence of criminal conspiracy when all along he is standing trial alone. Counsel placed reliance on the cases of **Adamu v. State (1986) 3 NWLR (Pt. 32)? Page 865 878** and **Waziri & Anor v. State (1997) 3 NWLR (Pt. 496) 689 at 723** where the court hold that the offence cannot exist without the consent of two or more persons. According to defence, the accused was not in Makurdi on the 24/7/2010 let alone the partaking in the commission of the offence alleged either alone or in conjunction with any other person.

Further, defence counsel submitted that there is a total absence of identification of the accused to link him to the commission of the offence alleged and my lord is urged to so hold. According to the submissions of defence counsel, the court of law does not convict accused on mere speculation or sentiments. He placed reliance on the cases of **ABU v. State (2008) ALL FWLR (Pt. 447) 126 at 139** and **I. B. N. Ltd v. Attorney General, Rivers State (2008) ALL FWLR (Pt. 417) 1 at 36**. It is contended that rather the evidence of PW2 corroborate the Alibi raised by the accused person.

Further, it is submitted that the duty of the police in proving offences alleged is to be proved with direct and credible evidence, not only the fact of the occurrence of the offence, but the ingredients of the offence directly linking an accused to same. These are totally absent in the evidence of the prosecution.

Defence counsel submitted that the prosecution led contradictory evidence as to the colour of the monkey jacket (Exhibit B3) and identification of the accused. He urged court to resolve the doubt created in favour of the accused. He commended the case of **Oshodin v. The State (2002) FWLR (Pt. 90) 12336 at 1346** to buttress his argument.

On issue of alibi, he submitted that when accused raise defence of alibi in an allegation, it is the duty or the investigation to thoroughly investigate no matter how faint or feeble the defence may appear and it does not lie in the month of the investigation to swiftly wave such defence without investigation. He commenced the cases of **Tolowoyo v. State (2012) 36 WRN 112 at 3545, Mustapha v. State (2007) 12 NWLR (Pt. 1049) 637 at 658** to the court.

He mentioned that DW3 extra judicial statement was not produced by the prosecution and that warranted the presumption of withholding evidence under Section 167 of the Evidence Act, 2011.

Defence counsel submitted that the fact that accused was found in recent possession of GSM line which was snatched only goes to circumstantial evidence which has not and can not prove any of the offences for which the accused is standing trial. According to him, circumstantial evidence that could warrant a conviction must be direct, conclusive and point to one conclusion that fixes the accused to the scene of the alleged crime. He cited the case of **Mohammed v. The State (2007) 13 NWLR (Pt. 1050) 186**

at 211. He urged the court to dismiss all the alleged charges against accused, discharged and acquit him in the interest of justice.

The query about the written address is that there is no pagination or numbering of paragraphs. The page of the Law Report cited must be stated before the emphasised page(s).

Prosecution in paragraph 5.1 submitted that in criminal trials, the law has placed a duty on the prosecution to prove the guilt of an accused person for any offence charged with beyond reasonable doubt in order to secure conviction. He placed reliance on the cases of **Idemudia v. State (1999) 7 NWLR (Pt. 610) 182 at 215, Kwale v. State (2003) FWLR (Pt. 139) 1504 at 1522**.

Moreso, proof in criminal cases is based on direct or circumstantial evidence. He cited the cases of **Igabele v. State (2005) ALL FWLR (Pt. 285) 568 at 585 – 586, Ogidi v. State (2005) ALL FWLR (Pt. 251) 202 at 224 – 225, Julius Abifiron & 1 Or. v. The State (2009) ALL FWLR (Pt. 471) 873 at 925, Omotola v. State (2009) ALL FWLR (Pt. 464) 1490 at 1631** and **Lori v. State (1998) 1 ACLR 267 at 272**.

According to prosecution, counsel conspiracy is an offence is usually not proved by direct evidence but inference from certain acts of the parties accused and done in pursuance of an apparent criminal purpose between them. He cited the case of **Balogun v. Attorney General of Ogun State (2002) FWLR (Pt. 100) 1306** in support of his contention.

For the charge of Armed Robbery, prosecution counsel stated the elements of or ingredients that must be proved and placed reliance on the cases of **Emenegor v. State (2010) ALL FWLR (Pt. 511) 884 at 918, Attah v. State (2010) ALL FWLR (Pt. 540) 1224 at 1256**. He rehearsed the evidence on record and submitted that the prosecution has proved all the ingredients of the offence of armed robbery.

On identification, he submitted in paragraph 5.6 that where there is copious evidence linking the accused person with the commission of the alleged armed robbery, his identification by the victim of the armed robbery in order to ground a conviction on the charge is irrelevant.

On defence of alibi, prosecution submitted in paragraph 5.14 of the written address that the evidence of the PW2 has discredited the aforesaid defence.

On Section 167(d) of the Evidence Act, 2011, prosecution submitted that it is only invoked where prosecution is required to call evidence on a particular fact but he failed to do so. He cited the case of **Edoho v. State (2003) FWLR (Pt. 173) 29 at 53-54** and that the prosecution can not be told which evidence to prove and which not to be produced by defence.

He urged on me to hold that the prosecution has proved the material ingredients of the offences charged beyond reasonable doubt as required by law and, that the accused be convicted as charged.

It is pertinent to reproduce hereunder Section 6(b) of the Robbery and Firearms (Special Provisions) Act Cap. R. 11 Laws of the Federation of Nigeria, 2004 to wit:

> "S.5 *Any person who –*
>
> *(b) conspires with any person to commit such an offence, whether or not he is present when the offence is committed or attempted to be committed, shall be deemed to be guilty of the offences as a principal offender and shall be liable to be proceeded against and punished accordingly under this Act."*

Conspiracy is defined as an agreement by two or more persons to commit an unlawful act, coupled with an intention to achieve the agreement's objective, and action or conduct that furthers the agreement; a combination for an unlawful purpose (see **Black's Law Dictionary, Eight Edition by Byran A. Garner page 329**).

In the case of **Alhaji Mohammed Sani Abacha & Or. v. The State (2002) 11 NSCQR 345 at 404 to 405** Onu, JSC, remarked:

> *"The best evidence of conspiracy is usually obtained from one of the conspirators or from inference. See this court's remarks in the case of* ***Patrick Njoven & Ors v. The State (1973) NNLR 76 at page 95:***
>
> > *"When it is proposed to give evidence of the happenings inside hell it is only a matter of common sense to call one of the inmates of that place or one whose business is carried out in a reasonable propinquity to hell and it must be surprising indeed to find even a lone angel fit and qualified for the assignment. Indeed, it would be preposterous to look for such evidence in other directions.*
>
> *The overt act or omission which evidence conspiracy is the actus reus and the actus reus of each and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius Caesar, were seen together coming out of the same place at the same time and indeed conspirators need not know each other. They need not all have started the conspiracy at the same time for a conspiracy started by some persons may be joined at a later stages by others. The gist of the offence of conspiracy is the meeting of the mind of the conspirators. This is hardly capable of direct proof for the offence of conspiracy is complete by the agreement to do the act or make the omission to complained about. Hence, conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an*

97

apparent criminal purpose in common between them and in proof of conspiracy the acts or omissions (an or commissions) of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators. It is therefore, the duty of the court in every case best it could the evidence of the complexity of any of those charged with that offence."

In the case of **Oduneye v. The State (2001) 5 NSCQR 1 at 25 – 26** Ejiwunmi, JSC, remarked on the principles that ought to guide a court in deciding whether a charge of conspiracy was established thus:

"In stating the principles that ought to guide a court in deciding whether a charge of conspiracy was established, the court has a duty to consider what evidence was led and draw the necessary inference therefrom the acts of commission or omission attributable to the person accused."

The PW1 who is the victim of the said offence on oath testified that on the 24th day of July, 2010 he met a young guy at Mr. Biggs round about, Makurdi when he was heading down to Wurukum. PW1 picked the young guy in his Honda Academy he was using for taxi. The young guy requested him to take him to Coca – Cola Plant 'A' gate to take some girls and drop them to at T. C. Wine bar, Kashin Ibrahim Road, Makurdi. The accused obliged and on reaching at Coca – Cola Plant 'A', the guy took steps few metres away from the gate and requested him not to move. When PW1 stopped, the guy pointed a gun on his head and he was shocked. Before he could recover from the shock, two other guys came out from the bush and joined the guy he carried. One of the guys who emerged was the accused who wore ash monkey jacket while the other put on a white T. shirt. This happened at night but cars were passing with light and he saw the culprits. They forced PW1 to the back of the seat of his car. The guy in the monkey jacket (accused) took over the control of the PW1's car. The guy in the white T. shirt held PW1's leg while the first guy he went to drop held him on the neck and even hit him with the gun on the head.

The evidence of the PW1 adduced on oath is not challenged by defence by way of cross examination. The experience thePW1 had in the hands of the accused and the other two guys has not been debunked except the plea of alibi raised by the accused person.

For now, the evidence on record disclose vividly the experience the PW1 had in the hands of the robbers that eventually carted away with his Hondaa Academy car, Registration No. DB 261 FST (Lagos). Exhibit s B1, B2, B4 and other valuables. To this extent, it is proved that the PW1 was robbed by three guys of his aforesaid car and other valuables at gun point on the 24th July, 2010 at Coca – Cola Plant 'A' gate along Gboko Road, Makurdi, Benue State.

The consistency which the accused and two others at large got involved at Coca – Cola Plant 'A' gate and robbed the PW1 of his car and other valuables shows conspiracy. Therefore, it is open to the court to infer conspiracy from the fact of doing things towards common end by the execution of a planned and premeditated common intention and common purpose. This is because the crime of conspiracy is usually hatched with utmost secrecy and the law recognizes the fact that in such a situation, it might not always be easy to lead direct and distinct evidence (see **Aduku v. Federal Republic of Nigeria & Or (2000) VOL. 4 NCC 350.**

In any case, the fact is that only the accused person is standing trial before this court. The question is whether an accused standing trial on a case of conspiracy which involves two or more persons can be convicted in absence of the others.

In the case of **Bello Shurumo v. The State (2010) 44 NSCQR 135 at 175**, it was held:

> *"The offence of conspiracy is complete once a concluded agreement exists between two or more persons that share a common criminal purpose. It is immaterial that the persons had not meet each other, and concluded agreements can be inferred by what each person does, or does not do in furtherance of the offence of conspiracy."*

Further, it was held in the Supreme Court case of **Usman Kaza v. The State (2008) 33 NSCQR (Pt. 2) 1351 at 1409** per Niki Tobi, JSC, thus:

> *"... that the unlawful or illegal nature of an act could also be found in combination and confederacy, that is better reserved to conspiracy in criminal law, as an agreement between two or more persons to behave in a manner that will invariably or automatically constitute the commission of an offence by two or more persons, or by at least one of them. The offence of conspiracy can only be committed if there is meeting of two or more minds. The offence can not be committed by one person because that person can not be convicted as a conspirator, the meaning of which is one involved in a conspiracy."*

At page 411 – 412, same Niki Tobi, JSC, held:

> *"From the above, I sift the following ingredients of the offence of conspiracy:*
>
> *(i) There must be an agreement of two or more persons. In other words, there must be a meeting of two or more minds.*
>
> *(ii) The person must plan to carry out an unlawful or illegal act, which is an offence.*
>
> *(iii) Bare agreement to commit an offence is sufficient.*

(iv) *An agreement to commit a civil wrong does not give rise to the offence, as Section 97(1) of the Penal Code provides only for criminal conspiracy.*

(v) *One person can not commit the offence of conspiracy because he can not be convicted as a conspirator.*

(vi) *A conspiracy is complete if there are acts on the part of an accused person which lead the trial court to the conclusion that he and others were engaged in accomplishing a common object or objective."*

Before this court, there is unchallenged evidence of the prosecution witness(es) on oath that three persons variously described by the PW1 at one point or the other got involved in the Robbery incidence against him. According to him, he conveyed one of the culprits to Coca – Cola Plant 'A' gate along Gboko Road, Makurdi when he dropped, the said person removed a gun against him. At that point in time, the accused emerged with the third person in white T – shirt to assist the first person. The accused took over PW1's car while the two others held him by the neck and the other on the legs. The position of the law is that evidence that is neither challenged nor debunked remains good and credible evidence which should be relied upon by a trial judge, who would in turn ascribe probative value to it (see **Ebeinwe v. The State (2011) 1 SCNJ 90 at 99**).

The foregoing unchallenged evidence shows that the accused and two other persons at large agreed to rob the PW1 or any person they find and did rob him. The guy picked at Mr. Biggs round about kurdi took the PW1 to a place where the two others joined him to execute their preconceived plan/intention. In executing their common intention, the culprit took away the PW1's car and other valuables. This shows that the culprits planned the robbery very well before executing it. On execution of their criminal acts, conspiracy is deemed complete.

In the set of facts before the court, and the common sense, it is not possible for the accused alone or any other person to hold a gun, hold the legs and neck of the PW1 and drove the car taken away from him. Definitely, the two other suspects are person which they agreed, planned and executed the robbery against the PW1. Therefore, the accused before the court did not commit the conspiracy alone but with two others at large. The fact that the two other persons are at large and or were not arrested does not render the proof of conspiracy against the accused of no consequence.

It is trite that the best evidence of conspiracy is usually obtained from one of the conspirators or from inferences (see **Patrick Njovens & Ors v. The State (1973) NNLR 76 at 95**). The foregoing unchallenged facts are enough to warrant inference that the accused conspire with two others at large to rob PW1 of his Honda Academy car Registration No. DB 261 FST Lagos Exhibits B1 and B2.

I must quicken to state that there is no obligation on the prosecution to call a host of witnesses. What matters really is not the number of witnesses called but rather, the quality of evidence from the witnesses called (see **Olayinka v. The State (2007) ALL FWLR (Pt. 373) 163 at 174, 181**). In the case of **Nkebisi v. The State (2010) 42 NSCQR 1173 at 1186**, it was held that the evidence of one witness if believed can secure conviction of accused charged with a capital offence.

I have no doubt about the unchallenged evidence of PW1 and, I believe it *in toto*.

In the circumstance, the prosecution has discharged the onus on her by proving the case of conspiracy against the accused person beyond reasonable doubt as required by law.

On the second count/head charge, the prosecution is obliged to adduce evidence and prove the following ingredients/essentials:

(a) That there was a robbery or series of robbery.
(b) That each robbery was an armed robbery.
(c) That the accused was one of those who robbed.

(See **Fabian Nwaturuocha v. The State (2011) 45 NSCQR 278** and Section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap. R. 11 Laws of the Federation of Nigeria, 2004).

The prosecution led in the evidence of PW1 and PW2 to prove the ingredients of the offence of Robbery against the accused person.

It is the evidence of the prosecution witnesses on oath that on the 24th July, 2010, the PW1 was robbed of his Honda Academy car Registration No. DB 261 FST (Lagos), Exhibits B1, B2 and other valuables mentioned in detail in the evidence on record at Coca – Cola Plant 'A' gate along Gboko Road Makurdi. The PW1 and PW2 were not cross examined by defence counsel to impeach their credit or debunk or contradict the evidence adduced.

In the case of **Patrick Ofor Lette v. The State (2000) FWLR (Pt. 12) 2081 at 2102** Ayoola, JSC, held:

> *"A party who fails to cross examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses tacitly accepts the truth of the witnesses' evidence in chief on the matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while in the witness box or at any rate, to make it plain to him at that stage, his evidence is not accepted."*
>
> (See **Isaac Gaji & 2 Ors v. Emmanuel D. Paye (2003) 14 NSCQR 613 at 629** per Edozie, JSC, **Fatilewa v. The State (2007) ALL FWLR (Pt. 347) 695 at 721 – 722**).

Defence counsel in her supposed page 4 lines 30 – 33 of the written address dated filed on the 11th day of March, 2013 conceded to the fact that

there may be a robbery on the PW1 whereat his valuable items were allegedly taken away! I hasten to say that it is not question of 'may' but proved/established by the evidence on record that the robbery actually took place on the 24th day of July, 2010 at about 8.06 pm and the PW1 was the victim whose Honda academy car Registration No. DB 26[illegible] FST (Lagos), Exhibit B1, B2, B4 and other valuables were taken.

The prosecution has to lead evidence to prove that each robbery was armed robbery.

PW1 adduced oral evidence on oath to show that the accused and two other guys robbed him of his aforesaid valuables at a gun point on the 24/7/2010. The PW1 stated that it was the guy he picked at Mr. Biggs round about Makurdi that had the gun and threatened to shoot him if he does not cooperate with them. Consistent with the evidence, the accused and his gang at large carted away with the car and other valuables belonging to the PW1 afore stated. The Honda Academy car has not been recovered except Exhibits B1, B2 and B4 which were found in possession of the accused at Abuja. The fact that the guys that robbed the PW1 had a gun and armed is not challenged. The gun was held by the guy that was picked at Mr. Biggs round about Makurdi by the PW1. It is not the requirement that the weapon of armed robbery be tendered in evidence (see **Olayinka v. The State (2007) 30 SCNQR 149 at 162 – 163**).

The law requires proof that the accused was one of those who robbed.

The PW1 in his evidence on oath gave evidence that he described the persons who robbed him on the 24/7/2010 along Coca – Cola Plant 'A' Gboko Road, Makurdi to the Police. In Exhibit D which is the extra judicial statement of PW2, investigation police officer, it is stated therein that the person who collected key of his car was wearing a monkey jacket ashed colour and of moderate height, black in complexion. PW1 stated that he will identity the person if seen. PW1 in his evidence confirmed the contents of Exhibit 'D' to effect of identifying the culprits particularly the accused who took his car key. That is not all, the PW1 on oath stated that the person he picked at Mr. Biggs round about, Makurdi was tall and wore a black jacket while the 3rd wore a white T - Shirt.

Most importantly, the PW1 restated the description of he accused as narrated to him word for word. Further, the PW1 on oath stated that the robbery took place in the night but some vehicles were passing on the road hence the light of those vehicles made him to see the accused

When the PW1 reported the case to 'E' Division Police Station, Makurdi, it was transferred to State C. I. D. Headquarters, Makurdi where it was assigned to the PW2 and other junior officers under him.

The PW2 after listening to the PW1 moved into action with his team to trace the culprits.

Based on the information, the PW1 received that the line (Exhibit B1) he was robbed of is going through by his friend, he reported to the PW2 on 20/8/2010.

The PW2 in his evidence stated that his team and himself did not know the culprits and had to apply their detective mechanism to arrest the person who had Exhibit B1 because the line was still going. According to the PW2, they went to the court and obtained an order to serve on Airtel/Zain who was the service provider of Exhibit B1 which was snatched from the PW1. Airtel/Zain complied with the order of the court and released the coordinate to the police hence they were able to set a security trapping system that shows the exact direction and position where the person who was using Exhibit B1 that time was standing. It showed that the person with Exhibit B1 was at Abuja. The PW2 and his team left for Abuja and continued with their investigation using the call coo rdinate as per Exhibit 'C'.

The PW2 and his team found that the person with Exhibit B1 was at Abuja and the call history of it after the robbery was at Abuja and a town in Plateau State. They moved to Abuja because the previous three days the line (Exhibit B1) was showing it was in Abuja.

The PW2 used the device and called the line and the phone rang in a particular office at Federal Fire Services Abuja. When they rang again, the accused picked and the PW2 arrested him.

The PW2 conducted search of the accused, his house and premises and recovered Exhibit B1, B2, B3 and B4. Exhibits B1 and B2 and explained. Exhibit B3 is a monkey jacket which is khaki or ashed colour. The accused admitted that he is a driver and this tallied with the description of the PW1 when he reported the robbery incidence to the police. The PW1 also identified the Exhibits B1, B2 and B4 as the items he lost during the robbery on him. He identified Exhibit B3 as the monkey jacket the driver of his car on the date of the robbery incidence wore.

During cross examination, PW2 answered that identification parade was conducted on the 25/9/2010 and the PW1 identified the accused as one of those culprits that robbed him on the 24/7/2010.

Throughout the length and breadth of PW2, defence counsel did not cross examine on the mechanism employed to track down the accused person with Exhibit B1, B2 and Exhibit B3. In effect, it is accepted that the mechanised/technical investigative skills employed by the police to track and arrest the accused with the afore stated exhibits is not in doubt. Again, it is not in doubt that Exhibit B1 and B2 belong to the PW1.

From the fore going, the prosecution has proved that the accused was one of those who robbed the PW1.

The accused was found in possession of Exhibits B1 and B2 which were kept in the Honda Academy car belonging to the PW1. The PW1 did not

recover his Honda Academy and all the valuables kept in it except Exhibits B1 and B2 police recovered from the accused during investigation at Abuja.

Accused raised many defence amongst which is alibi, non identification and that he picked Exhibits B1 and B2 on the road where he had accident.

I shall resolve the defences raised seriatim based on the evidence adduced by the parties on record.

On the defence of alibi, it is the evidence of the accused and his witnesses that he was at Abuja and could not have been at Makurdi on same date of 24/7/2010 8.06 pm to commit the allege offences.

Defence of alibi seeks to persuade the court that the accused could not possible be at the scene of the crime as he was somewhere else where most probably there were people who could testify that at the time of alleged incident or act he was not at the scene of the crime unless he is capable of being in two places at same time (see **Sowemimo v. The State (2004) 18 NSCQR 24 at 34**).

Alibi is a defence available to the accused person which should be raised timeously, preferably as a suspect or later as an accused in police interrogation room (see **Ukwu Nnenyi v. The State (1989) 4 NWLR (Pt. 141) 131**. When the defence is raised timeously by the accused, the police have a duty to investigate in order to know the veracity or authenticity of the defence (see **Aiguobarueghian v. The State (2004) 17 NSCQR 442 at 488**).

It is incumbent on the accused person who raises defence of alibi to supply to the police timeously, as a suspect or during police interrogation on particulars as to where he was, with who, when, and distance between the scene of crime and where he was, that it could be impossible for him to be at the scene of crime at that point in time (see **Balogun v. Att – Gen., Ogun State (2002) FWLR (Pt. 100) 1287 at 1302**).

The accused tried to raise defence of alibi in his extra judicial statement before the police (Exhibit A). The accused in Exhibit 'A' admitted in evidence without objection stated amongst others as follows:

> *"On the 12th July, 2010 I took my oga's wife's car for servicing and had an accident with it at about 1800 hrs in Abuja, it was a minor accident and people rescued me out. I left the car at the scene together with two of my handsets in the car and took a bik to go an inform my matter, ... when we arrived the scene with panel beater, my brother known as Bitrus second name not known was with me, I looked for my two phones but could see them. The following day being in the day time, I cam to search for my phones but could not see any rather I saw two sim cards on the ground, one was Etisalat and one was Zain Network. I picked all of them but discovered that the Etisalat sim card was blocked but the Zain one was useful, I had no phone but kept it and was looking for phone ..."*

The date which the accused claimed he was sent by the PW3 to go and service his wife's car at Abuja was 12th July, 2010 and different from the 24th July, 2010 when the robbery incidence against the PW1 took place in Makurdi Coca – Cola Plant 'A' gate along Gboko Road, Makurdi.

The PW2 during cross examination answered that the plea of alibi was investigated and found not true after interrogation of DW3.

Therefore, if the extra judicial statement of the accused admitted in evidence (Exhibit A) is considered vis-à-vis the evidence of prosecution witnesses, the date he raised alibi in it is different from the 24/7/2010 when the robbery took place. Thus, there is no evidence before the court to s8upport the defence of alibi. This court can not pick or choose and select whether the alibi claimed by the accused was on the 12 July, 2010 or 24th July, 2010. In the circumstance, the defence of alibi claimed by the accused is collapsed like placards. It is during trial that the accused raised defence of alibi that on the 24th day of July, 2010 his boss (DW3) sent him to service the car of his wife and at about 1800 hrs he had accident with it at Abuja. This is against the holding of the Supreme Court that the defence can not be raised during trial but when an accused is a suspect and when he is under the police per interrogation (see **Aiguo Barueghian v. The State, supra, Udeobere v. The State (2006) 6 NSCQR 766 at 767**).

In the instant case, there was no validly raised plea of alibi by the accused and the police were not obliged to have investigated.

In Exhibit 'A', the accused stated that he was with one of his brothers named Bitrus whose second name is forgotten. If one is truly your brother, it is not possible for his name to be forgotten like that. In any case, the said Bitrus did not testify in this court as to the time the accused picked Exhibit B1 and B2 on the ground. Most interesting is that Exhibits B1 and B4 were picked at the scene which the accused had accident and this goes to confirm that those lines were in his possession before they dropped where he had an accident. No evidence on record to suggest that another person had accident in the same place after that one by the accused.

The accused who has been a driver to the DW3 had two phones before the allege robbery. When cross examined the DW3, Yusufu Pam Jack, answered he does not know the GSM number of accused. Even the name of DW1 was not given in Exhibit 'A'.

From the foregoing, it is clear that the accused and his witnesses are only employed to assist his defence.

Firstly, the accused was found by the PW2 and arrested in Fire Services Building Abuja and not Directorate of Trafffic Services. There is no evidence that the Fire Services office is the same offices with Directorate of Traffic Services. The fact that DW2 and DW3 are from Plateau State with similar names showing they came from same area is a pointer to my aforesaid remarks. The same accused said he left his two persons in the car and took a

bike to inform DW3 after parking it in a filling station. There is no report that the car parked at the police station was broken into through the windscreen or doors but the handset/phones of the accused got missing. The accused said he bought the China phone from the woman who sell minerals at the outside gate of their office but the said woman denied during police investigation.

It could be seen from the above revealed pieces of evidence that the accused and his witnesses can not be believed having watched their demeanour during testimony before this court.

On whether identification parade was committed, the PW2 during cross examination by defence counsel stated:

> *"... It is when we conducted identification parade that the PW1 pointed at the accused as one of those that robbed him. It was conducted the day accused made statement i.e. 25/9/2010. the identification was conducted at the council State C. I. D. Makurdi. We paraded about 20 people including his colleagues who work with him in the office and he made a statement to us. The PW1 pointed at the accused direct. The parade was conducted in respect of only this case. Almost all of them looked like accused."*

It is the victim, PW1 who identified the accused person. The police vividly explained how the identification parade was conducted. I can not see anything wrong in the conduct of the police. Thus, the identification parade conducted is proper and evidence based on it is admissible (see **Okasi & 1 Or. v. The State (1989) 2 SCNJ 183 at 188**).

Even before the identification parade, the PW1 at the State C. I. D. gave identification/described the accused to the PW2 as he saw them by the light from the vehicles on the road at the Coca – Cola Plant 'A' gate, Gboko Road, Makurdi. The PW1 described that the person who collected key of his car was wearing a monkey jacket ash colour, moderate in height, black in complexion. Really, the accused is moderate in height and black in complexion. To reinforce the description of given by PW1 of the accused, he is found to be a driver and a monkey jacket (Exhibit B3) recovered in his house. Exhibit B3 is asked colour/khaki colour. In colour descriptions, it is not possible for a person to be exact and this may be due to different perceptions of human being possessed. Thus, three quarter of the descriptions fitted the accused.

To crown it all, Exhibits B1 and B2 which were kept in the Honda Academy which the accused and the others at large took away was found in possession of the accused barely about two months after the robbery. Therefore, there is no way to avoid linking the accused with the robbery of 24th July, 2010 at Coca – Cola Plant 'A' gate along Gboko Road, Makurdi.

Exhibit 'C' which is the case record showing that immediately after the robbery Exhibit B1 was being used by the accused when he knew that it did not belong to him.

No other robbery took place on the 24/7/2010 at Coca – Cola Plant 'A' gate along Gboko Road, Makurdi apart from the one in issue.

Therefore, the only irresistible inference from the circumstantial evidence in this case is that the accused robbed the PW1 in company of others on the 24/7/2010. I am convinced that the circumstantial evidence adduced by the prosecution against the accused to prove his guilt is positive, unequivocal and leads irresistibly to the conclusion that it is the accused that committed the offences charged (see **Aigbadon v. The State (2000) 2 NSCQR 1 at 13**).

Guilt of an accused person can be proved in three (3) ways as follows:

"*(i) By confessional statement voluntarily made or*

(ii) By direct evidence of an eye witness; or

(iii) By circumstantial evidence

(See **Maigari v. The State (2010) ALL FWLR (Pt. 546) 405 at 427**).

It is my considered view based on the evidence before the court that the prosecution has proved the guilt of the accused person by circumstantial evidence beyond reasonable doubt as required by law.

Proof beyond reasonable doubt is not proof beyond iota of doubt or proof to the hilt (see **Eke v. The State (2011) 45 NSCQR 652 at 668 – 669**). There are bound to be contradictions but if immaterial and or inconsequential touching on the proof of the ingredients of the offence, it should not vitiate proceedings (see **Eke v. The State, supra, aty page 666**).

Having said that, it is firmly established that the prosecution has proved the guilt of the accused on the two head court as charged. The accused, **Timothy Dung**, is convicted as charged. For avoidance of doubt, he is convicted under Sections 6(b) and 1(2) a of the Robbery and Firearms (Special Provisions) Act Cap. R. 11 Laws of the Federation of Nigeria, 2004.

Sgd
M. A. Ikpambese
Judge
12.07.2013

12.07.2013.

Accused present speaks English.

S. O. Idukwu Esq. (with Miss C. Atsor) for accused.

E. O. Kpojime Esq. (SSC) for the State holding brief for E. C. Ayangebee Esq.

Court: Judgment is delivered in open court today being 12/7/2013.

Sgd
M. A. Ikpambese
Judge
12.07.2013

S. O. Idukwu Esq.: We thank your Lordship for the time taken to read this judgment. However, in handling down your lordship sentence, I wish to draw

107

your lordship's attention to certain facts. That throughout this case, the accused consistently presented himself in court after you granted him bail. Even the fact that the court admitted him to bail is that he has a contagious disease that require constant medication. He is young man who has no records of previous conviction. The convict is with a wife and young baby. Even though, your lordship is guided by the provisions of the law which the convict was charged, your lordship can use his judicial power to act by considering these facts in handling this application.

COURT: The accused person, **Timothy Dung**, has committed a heinous offence of robbery with arms against an innocent citizen of this country. I have heard the plea of defence counsel and moved in my heart except that my hands are tied. I can only advise that you write to the Executive Governor for clemency.

SENTENCE: On the 1st head charge, the convict is sentenced to 21 years imprisonment without option of fine. On the second charge, the convict is sentenced to death by hanging on the neck or shooting by firing squad subject to the directive of the Governor of Benue State.

That shall be the judgment of this court.

M. A. IKPAMBESE
JUDGE
12.07.2013

HIGH COURT OF JUSTICE
MAKURDI
REGISTRY/REGISTRAR
DATE
BENUE STATE