NASIRU YUSUF v. THE STATE

(2018) LPELR-46718(CA)

In The Court of Appeal of Nigeria

On Wednesday, the 23rd day of May, 2018

CA/K/168/C/2017

Before Their Lordships

ZAINAB ADAMU BULKACHUWA Justice of The Court of Appeal of Nigeria

OLUDOTUN ADEBOLA ADEFOPE-OKOJIE Justice of The Court of Appeal of Nigeria

AMINA AUDI WAMBAI Justice of The Court of Appeal of Nigeria

Between

NASIRU YUSUF Appellant(s)

AND

THE STATE Respondent(s)

Other Citations

RATIO DECIDENDI

1. APPEAL - BRIEF OF ARGUMENT: Attitude of Court to a bad/faulty/inelegant brief of argument

"the inelegant nature of the Appellant's brief of argument notwithstanding, it is settled law that no matter how bad or faulty a brief of argument is written, an Appellate Court should not close its eyes to its existence in order to do substantial justice in the matter. This is so because the overriding interest of justice supersedes the inelegant and faulty format of the brief more so in a criminal case such as the one at hand where the liberty of a citizen is at stake." Per WAMBAI, J.C.A. (Pp. 5-6, Paras. E-A) (...read in context)

2. EVIDENCE - BURDEN OF PROOF/STANDARD OF PROOF: Burden and standard of proof in criminal cases; whether the burden of proof on the prosecution can shift to the accused person

"Starting from the very beginning by re-stating the well entrenched position of the law in Criminal trials, it is merely a restatement of the time hallowed and immutable principle of law to say that the prosecution has the heavy and unshifting burden of proving the guilt of an accused person beyond reasonable doubt and with no corresponding duty on the accused to prove his innocence. See ASAKE VS THE NIG. ARMY COUNCIL & ANOR (2007) 1 NWLR (PT. 1015) 408; OGIDI VS THE STATE (2005) 5 NWLR (PT. 918) 286." Per WAMBAI, J.C.A. (P. 12, Paras. A-C) (...read in context)

3. EVIDENCE - CONFESSIONAL STATEMENT: Whether a retracted confessional statement can corroborate evidence

"On the Appellant's submission that Exhibit A cannot corroborate the evidence of PW1, the law is settled that a retracted confessional statement of an accused is not only sufficient to corroborate evidence that requires corroboration, but is in itself sufficient to sustain the conviction of an accused so long as it is direct, positive, and unequivocally and clearly suggestive of the guilt of the accused person. The retraction does not render the confession inadmissible nor deter the Court from acting thereon. See GALADIMA VS THE STATE (2012) 18 NWLR (PT. 1333) 610; SOLOLA & ANOR VS THE STATE (2005) 11 NWLR (PT. 937) 460 and OGUDO VS THE STATE (Supra)." Per WAMBAI, J.C.A. (Pp. 23-24, Paras. D-A) (...read in context)

4. EVIDENCE - CONFESSIONAL STATEMENT: When is the proper time to raise an objection to the admissibility of a confessional statement

"Aside from not objecting to its admissibility, no questions were asked in cross-examination regarding the non-signing of Exhibit A by the Appellant. In other words, the admissibility of the unsigned Exhibit A was not challenged or made an issue at the trial. Given to the aforestated facts and circumstances, the dictum in the case of OGUDO VS THE STATE (Supra) that "after all an unsigned document is worthless", is distinguishable and inapplicable to this case. Obviously, the facts in OGUDO's case (Supra) are not on all fours with the facts of the case at hand. In addition to the aforestated reasons, in OGUDO's case

(Supra) unlike in the present appeal, there was no other version of the Appellant's statement the voluntariness and authenticity of which the Appellant therein admitted from which the unsigned statement was recorded. The fact that the Appellant herein does not contend that the contents of Exhibit A are at variance with the contents of Exhibit A1 which he made and signed, nor challenge the contents of Exhibit A1, further renders the decision in OGUDO's case (Supra) inapplicable to this case. Furthermore, as it is with an objection to the voluntariness of a confessional statement, the proper time and stage to raise the question of non-signing of a confessional statement is at the time it is sought to be tendered in evidence by the prosecution. This, the Courts have repeatedly stated in a plenitude of judicial authorities. See MUHAMMAD VS THE STATE (2017) LPELR 42098 (SC); IKEMSON VS THE STATE (1989) 3 NWLR (PT. 110) 455." Per WAMBAI, J.C.A. (Pp. 21-22, Paras. B-E) (...read in context)

5. EVIDENCE - CONFESSIONAL STATEMENT: The position of the law on a retracted statement

"...The Appellant has however resiled from this statement in his evidence in Court. That notwithstanding, a denial or retraction of a confessional statement does not affect its admissibility. See SULE VS THE STATE (2009) LPELR - 3125 (SC); OSENI VS THE STATE (SUPRA). However, the Courts have enjoined, as decided in R VS SYKES (1913) 8 CAR 233, on trial Courts, to look for some other evidence no matter how slight outside the confession which will vindicate its veracity; whether it is corroborated in any way; whether its contents are true; whether the accused had the opportunity to commit the offence charged; whether the confession is possible and consistent with other facts which have been proved. See KAREEM VS FRN (2002) 8 NLWR (PT. 770) 664; OSETOLA & ANOR VS THE STATE (2012) LPELR 9348." Per WAMBAI, J.C.A. (Pp. 25-26, Paras. D-B) (...read in context)

6. EVIDENCE - CONFESSIONAL STATEMENT: Whether a confessional statement must be recorded in the language in which it is made for it to be admissible

"Exhibit A1, as is highly recommended, was recorded in the language of the Appellant, the Hausa Language. The wisdom for this as reasoned in OLANIPEKUN VS THE STATE (2016) LPELR - 40440 (SC) per Aka'ahs JSC, is to avoid technical arguments which could be raised. Though not an invariable practice, it is to ensure the correctness and accuracy of the statement made by the accused person. Exhibit A1 is for that purpose." Per WAMBAI, J.C.A. (Pp. 19-20, Paras. E-A) (...read in context)

7. EVIDENCE - CONFESSIONAL STATEMENT: Whether the statement of an accused becomes inadmissible because it is not signed by the accused; criteria to ascribe weight to such statement

"The law is that a confessional statement does not become inadmissible merely because it is unsigned by the accused person, the issue of admissibility being different from that of probative value to be ascribed to the statement. In CHUKWUKA OGUDO VS THE STATE (2011) 18 NWLR (pt. 1278) 1, Rhodes-Vivour JSC aptly stated the Law in the following phrase:- "... Where on the other hand, the accused person says he did not sign the statement, the statement should be admitted in evidence, thereafter, the question of what weight should be attached to such statement becomes an issue for the Judge to decide at the end of the trial ..." See also YAHAYA VS THE STATE (2016) LPELR - 40254 (CA). ?On the criteria to ascribe weight to such an unsigned statement the law lord Rhodes-Vivour JSC in the said case gave the conditions as follows: 1. The cautionary words must be well written and signed. 2. The body of the statement written by the accused person or by someone usually a police officer on the accused person's directives given a detailed confession which will show clearly that he committed the offence for which he is charged. 3. The statement must be endorsed by a superior police Officer and signed by the accused person." Per WAMBAI, J.C.A. (Pp. 18-19, Paras. D-E) (...read in context)

8. EVIDENCE - CONFESSIONAL STATEMENT: Effect of failure of an accused person to object to the admission of his confessional statement

"Where an objection is not taken to the admissibility of a confessional statement or where as in the case at hand, the issue of non-signing of the confessional statement was not raised throughout the trial, on the authorities, it will be too late on the day to raise the issue on appeal. In OSENI VS THE STATE (2012) LPELR 7833 (SC); I.T. Muhammad JSC held inter alia: "It is regrettable that Appellant's Counsel at the trial stage did not object to the admissibility of this confessional statement, yet he went on to blame the trial Court in not treating Appellant's statement with utmost caution. It will appear too late in the day to seek to supply a remedy to a dented or a crucified matter which can hardly be revived".? For the foregoing reasons, I agree with the learned Respondent's Counsel that the Appellant cannot seek to attack the reliance placed on Exhibit A on the ground of its non-signing by the Appellant." Per WAMBAI, J.C.A. (Pp. 22-23, Paras. E-D) (...read in context)

9. EVIDENCE - CORROBORATION/CORROBORATIVE EVIDENCE: Nature and meaning of corroboration

"Corroborative evidence is confirmatory evidence or additional evidence to that already given. It is supplementary evidence that tends to strengthen or confirm the evidence already given which it is to corroborate. It is an additional evidence of a different character on the same point. See Blacks Law Dictionary, 6th Edition page 344 and MUSA VS THE STATE (2013) ALL FWLR (PT. 1688) B - C. In STATE VS GWANGWAN (2015) LPELR 504/2012 (SC). Of necessity, evidence in corroboration is an independent testimony which affects the accused by connecting or tending to connect him with the crime in some respects material to the charge in issue but it needs not consist of direct evidence that the accused committed the offence, nor amount to a confirmation of the whole account given by the witness. It is sufficient if it corroborates the evidence in some respects material to the charge. See EZIGBO V. STATE (2012) LPELR - 7855 (SC); R. VS BASKETVILLE (1916-17) ALL ER REPRINT 38 AT 43; IKO VS STATE (2001) 14 NWLR (PT. 732) 221 AT 241." Per WAMBAI, J.C.A. (Pp. 15-16, Paras. F-E) (...read in context)

10. EVIDENCE - CORROBORATION/CORROBORATIVE EVIDENCE: Whether the unsworn evidence of a child requires corroboration to warrant a conviction

"I quite agree with the learned Counsel that the unsworn evidence of PW1, a child below the age of 14 years, requires corroboration both as a matter of law as stipulated in Section 209 (1) and (3) of the Evidence Act and by established practice as a matter of prudence. See OBRI VS THE STATE (1997) LPELR - 2194 (SC); DAGAYYA VS THE STATE (2006) LPELR - 912 (SC)." Per WAMBAI, J.C.A. (P. 15, Paras. D-E) (...read in context)

11. EVIDENCE - CORROBORATION/CORROBORATIVE EVIDENCE: Whether corroboration is required for a confessional statement to sustain a conviction

"In OSENI VS THE STATE (Supra) the Supreme Court in considering the question whether the trial Court can convict on an uncorroborated confessional statement, held that even without corroboration, a confessional statement is sufficient to support a conviction so long as the Court is satisfied of its truth. This is premised on the established principle that a confessional statement which is free, direct, positive and voluntary is enough to ground or sustain a conviction. See MOHAMMED VS THE STATE (2007) 11 NWLR (PT. 1045 303; OKOH VS THE STATE (2014) 2 - 3 SC 184." Per WAMBAI, J.C.A. (P. 24, Paras. B-D) (...read in context)

12. EVIDENCE - CORROBORATION/CORROBORATIVE EVIDENCE: Nature of evidence required as corroboration for the offence of rape

"It must be pointed out that the corroboration required in rape needs not be direct evidence that the accused committed the offence. It is sufficient if it corroborates in material respect the evidence of the prosecutrix. It is any evidence which tends to show that the story of the prosecutrix (victim) is true that the accused committed the crime. See EZIGBO VS THE STATE (Supra). The corroborative evidence, it must also be emphasized is sufficient even if it is circumstantial in nature so long as it connects or tends to connect the accused to the commission of the offence. See DURUGO VS THE STATE (1992) NWLR (PT. 255 525; OGUNBAYO VS THE STATE (2007) LPELR-2323 (SC)." Per WAMBAI, J.C.A. (Pp. 16-17, Paras. E-B) (...read in context)

13. EVIDENCE - DOCUMENTARY EVIDENCE: Effect of an unsigned document

"An unsigned document as rightly submitted by the Appellant's Counsel is a worthless document; worthless is it that it commands no value in legal proceedings. It has no efficacy. An unsigned document is inadmissible in law and if wrongly admitted should be discountenanced because it is like no document at all. It cannot be reckoned with in deciding the fact in issue which the document purports to prove. See OMEGA BANK (NIG) PLC VS O.B.C. LTD (Supra) and ANYAOHA VS OBIAHA (Supra)." Per WAMBAI, J.C.A. (Pp. 17-18, Paras. F-B) (...read in context)

14. APPEAL - FORMULATION OF ISSUE(S) FOR DETERMINATION: Principles guiding formulation of issues for determination in an appeal

"The issues formulated by the Appellant Counsel consist largely of abstract legal principles or at best legal argument that should be canvassed in support of the appeal. An issue for determination is not the legal argument that will be canvassed in the appeal nor bare abstract legal principles. Rather, an issue for determination is a substantial question of law or fact or both, arising from the grounds of appeal the determination in favour of one of the parties to the appeal, which will entitle the party to the judgment of the Court. An issue for determination should be a proposition of law or fact so cogent, weighty and compelling that a decision on it in favour of a party to the appeal will entitle him to the judgment of the

Court. See CONSORTIUM M.C. 3632 LOT. 4, NIG. VS NEPA (1992) 6 NWLR (PT. 246) 132; STANDARD CONSOLIDATED DREDGING CONST. CO. LTD. (1986) 5 NWLR (PT. 44) 791, 799; EZEUGO VS THE STATE (2010) 9 NWLR (PT. 1360) 508. A well drafted issue for determination should have the qualities of precision, brevity, accuracy and clarity. It should be concise and comprehensive. See UWAIFO VS UWAIFO (2005) 3 NWLR (PT. 913) 479." Per WAMBAI, J.C.A. (Pp. 4-5, Paras. E-E) (...read in context)

15. CRIMINAL LAW AND PROCEDURE - GUILT OF AN ACCUSED PERSON: How to establish/prove the guilt of an accused person

"It has been established over time that the prosecution may establish the guilt of an accused person either by the confessional statement of the accused; by circumstantial evidence; or by the evidence of eye witness account of the commission of the crime. See IGABELE VS THE STATE (2009) 6 NWLR (PT. 975) 100; ADEKOYA VS THE STATE (2012 VOL. 3 M JSC (PT. 11) 77; NIG. NAVY & 2 ORS VS LT. COMMANDER S.A. IBE LAMBERT (2007) ALL FWLR (PT. 398) 574, AT 586." Per WAMBAI, J.C.A. (P. 14, Paras. A-C) (...read in context)

16. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: Meaning and essential ingredients of the offence of rape

"In legal parlance, rape simply means a forceful sexual intercourse with a girl or woman without her giving consent to it or when in law she is incapable of giving her consent. See POSU & ANR VS THE STATE (2011) LPELR - 1969 (SC). The essential ingredients of the offence of rape statutorily provided in Section 282 of the Penal Code as judicially interpreted and endorsed in a plethora of judicial authorities which the prosecution must prove to succeed are the following:- a. That the accused had sexual intercourse with the prosecutrix (the victim). b. That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force threat, intimidation, deceit or impersonation or when she is under the age of 14 years. c. That the prosecutrix (victim) is not his wife and d. That the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not. e. That there was penetration. See LUCKY VS THE STATE (2016) LPELR - 40541 (SC); IKO VS THE STATE (2001) 14 NWLR (PT. 332) 195; POSU & ANOTHER VS THE STATE; EZIGBO VS THE STATE (2012) (Supra) ?It is unquestionable that to secure or sustain a conviction for the offence, the prosecution must positively prove beyond

reasonable doubt, each and every listed ingredient of the offence. It is needless to emphasize that failure to prove any of the ingredients of the offence means failure to prove the charge even if the other ingredients are proved beyond shadow of doubt and ultimately, the accused will be entitled to a discharge and acquittal. See BELLO VS THE STATE (2012) 8 NWLR (PT. 1302) 207, 237; UTUK VS THE STATE (2010) 34 NWLR 171 AT 179; HARUNA VS A.G.(2012) 9 NWLR (PT. 1306) 419, 444 - 445 PARA G." Per WAMBAI, J.C.A. (Pp. 12-13, Paras. C-F) (...read in context)

17. EVIDENCE - WITHHOLDING EVIDENCE: The presumption of law as to withholding of evidence where a party in possession of material evidence in a case fails to produce it in Court

"Again, the Appellant's learned Counsel forcefully argued that Exhibit A cannot be relied upon in the absence of the Appellant's first statement made at Bamaina Police Station, the first Station he was taken to, and that failure to tender that statement amounts to withholding of evidence and fatal to the conviction and sentence. His strength for this position are the cases of OLAYINKA VS THE STATE (Supra) and OGUDO VS THE STATE (Supra). In his evidence in Court the Appellant stated as confirmed by PW4, that he made a statement at the Bamaina Police Station where he was first taken to, which statement, PW4 admitted was in the case file but was not tendered in evidence. While the Appellant contends that the statement was not a confessional statement, PW4 contends it was a confessional statement. In OLAYINKA VS THE STATE (Supra) it was held that: "The statement of a defendant made to the Police, if not confessional, is the very foundation of his defence; hence the prosecution has a duty to make the said statement or statements available to the Court". ?On the other hand, as contended by PW4, if the statement was confessional, why was it not tendered though PW4 admitted that it was in the file? The issue then is whether the non-tendering of the statement is fatal to the prosecution's case as contended by the Appellant. The Appellant has invoked Section 167 (d) of the Evidence Act: By the said Section 167, the Court may presume the existence of any fact which it thinks likely to have happened, regard been had to common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case, and in particular the Court may presume that: (d) evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it. It must be pointed out that there is a distinction between failure to call a witness and failure to call or adduce evidence. The Section deals with failure to call evidence and not failure to call a particular witness. See BELLO VS KASSIM (1969) NMLR 148, 152. Therefore, the rule in Section 167 (d) applies where a party fails to adduce evidence by withholding evidence which could have been but was

not produced. See ONWUJUBA VS OBIENU (1991) 4 NWLR (PR. 183) 16 SC; OLUSANYA VS OSINLEYE (2013) 12 NWLR (PT. 1367) 148; and SHODIYA VS THE STATE (2013) 14 NWLR (PT. 1373) 147 where Alagoa JSC quoted the provisions of Section 167 (d) of the Evidence Act, that the Court may presume evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it. While it is the law that the prosecution is not bound to call a particular witness where his case can otherwise be proved, See ARCHIBONG VS THE STATE (2006) 14 NWLR (PT. 1000); STATE VS OLATUNJI (2003) 14 NWLR (PT. 839) 138; SHURUMO VS THE STATE (2010) 12 SCNJ 47, its failure to adduce evidence at its disposal which it is supposed to adduce amounts to withholding of ??evidence and calls for invocation of Section 167 (d) see EMEKA VS CHUBA IKPEAZU & ORS (2017) LPELR - 41920 (SC) where Ogunbiyi JSC, referring to BUHARI VS OBASANJO per Belgore JSC as he then was held that failure to produce the letter in question meant either that the letter did not exist or if existed, and not produced, it could be presumed that if produced, its contents would not have supported the Appellant's case. ?The purport of the Rule in Section 167 (d) of the Evidence Act is to permit the Court to presume that a Party who withholds evidence which could be but was not produced, would if produced, be unfavourable to or against him. Such a Party withholds the evidence at his peril. A party in civil action in possession of material evidence in support of pleaded facts, and is in criminal trials, the prosecution in possession of material evidence, who withholds that evidence which could be but was not produced, does so at his peril. Failure to adduce vital evidence at a Party's disposal which he is supposed to adduce amounts to withholding evidence and would raise a presumption that if produced, the evidence would be unfavourable to him. TSOKWA MOTORS NIG. LTD VS AWONIYI (1999) NWLR (PT. 586) 1999; TEWOGBADE VS AKANDE (1968) NMLR 404. Undoubtedly, the prosecution has a duty to tender any statement made by an accused person during the investigation of the crime with which the accused is charged whether or not it is in his favour. It is not only a damming statement of an accused person that should be tendered with glee by the prosecution. A favourable statement to the accused should not be left out in a bid to secure conviction by the prosecution at all cost. This is to avoid the invocation of Section 167 (d) of the Evidence Act against the prosecution. See PEOPLE OF LAGOS STATE VS UMARU (2014) 7 NWLR (PT. 1407) 584, and OGUDO VS THE STATE (Supra). However, before the presumption under the Section can operate, it must be shown and established that: (a) Such evidence exists; (b) That it could be produced; (c) That it has not been produced and; (d) That it has been withheld by the person who could produce it, as held in MUSA VS YERIMA (1997) 7 NWLR (PT. 511) 27 per Ogundare JSC. All the listed conditions are present in the case at hand, the statement exists and was in prosecution's case file; it could be produced; but was not produced; PW4 who could have produced it withheld it. Thus, the

prosecution's failure to produce the said statement squarely amounts to withholding of evidence. In a similar situation which arose in the case of OGUDU VS THE STATE (Supra) where the learned trial Judge had held that failure to tender the statement made by the accused at the 1st Police Station would not have made any difference in the finding of the Court, the Supreme Court strongly disagreed. Fabiyi, JSC had this to say: "The Appellant said he made a statement at Birnin Gwari Police Station. The same was not tendered during his trial. The prosecution has a duty to tender any statement made by an accused person during the investigation of the offence with which he was charged whether or not it is in his favour. See DANDARE VS THE STATE (1967) NMLR 56. This must be so in order to avoid the invocation of the provision of Section 149 (1) (d) of the Evidence Act against the prosecution which failed to tender the vital statement... The above view, with due diffidence, flies in the face of my views as stated above. The statement must be tendered in the first instance before one can surmise difference it will have on the finding of the trial Court". Similarly, the same Apex Court emphatically restated the law in the case of PEOPLE OF LAGOS STATE VS UMARU (2014) ALL FWLR (PT. 737) 679 Per I.T. Muh'd. when he held: "...What paragraph (d) of Section 149 (now Section 167 [d]) of the Evidence Act stipulates is that where a party claims to have evidence that goes to show the existence of a document in proof of his case, the document should be tendered. Where such evidence could be produced but it is not produced, it is presumed to be against the interest of the party withholding it. See EBOH VS PROGRESSIVE INSURANCE COMPANY LIMITED (1987) 2 QLRN 167; GEORGE VS THE STATE (2009) 1 NWLR (PART 1122)." ?As in the aforestated decided authorities and the clear provision of Section 167 (d) of the Evidence Act, the prosecution who admitted that the Appellant's first statement made at the Police Station, Bamaina, was in his case file ought to have tendered same in evidence whether it was favourable to its case or to the Appellant's defence. The failure of the prosecution to tender that statement amounts to withholding evidence and the Court would presume that the statement would have been detrimental to its case if produced. To deprive the Appellant the use of his first statement to the Police at the first Police Station prior to Exhibit A, as held per Rhodes - Vivour JSC in the OGUDU's case (Supra) at Page 31, paragraphs E - G, renders the trial unfair. The same decree was reinforced in the case of OLAYINKA VS THE STATE (Supra), by the same Court when it held that "in the absence of the statement of the Appellant made prior to his making of Exhibit A, the Appellant could not be held to have had a fair trial guaranteed even under the Constitution". ?Indeed the failure to tender the said statement in the prosecution's case file has the effect of casting a doubt on the veracity of Exhibit A. Sadly, therefore, on the strength of these authorities, the prosecution's failure to tender the said Appellant's first statement he made at the 1st Police Station at Bamaina, has had a serious consequence on the prosecution's case. The provision of

Section 167 (d) of the evidence Act inures the Appellant against the Respondent with a fatal consequence that inspite of the other evidence on record including the Appellant's confessional statement, the conviction and sentence of the Appellant cannot be sustained. Regrettably, the Respondent now has to bear the brunt of the damning effect of its failure, for whatever reason, in the first place for not tendering the statement in evidence. The beneficiary of that failure must be the Appellant against whom the evidence was withheld. Ironically, the learned Respondent's Counsel relying on the same case of PEOPLE OF LAGOS STATE VS UMARU (Supra) contended that the none tendering of the statement would have been an issue if the learned trial Judge had relied on it. This argument is completely off track. Firstly, the question of relying on an untendered document is out of the way, and expectantly being off target, it missed the goal post. Conversely, his argument that the Court decided that the non-tendering of the statement was not fatal is anything but the correct position of that decision. Nothing can be further away from what was therein decided. The decision is quite diametrical to the Counsel's argument. It is precisely against him and unequivocally in favour of the Appellant. This is what the Court held at the said paragraphs F - G at page 679 of the report: "I think the tendering of the accused's statement made to the Police (considered to be confessional) is very vital, necessary and fundamental in grounding a conviction otherwise the conviction is defective and can be quashed and any sentence premised upon can equally be set aside...". ?It is crystal clear that this authority does not support the Respondent but only helps the case of the Appellant. It will therefore by flying on the face of the above decision to contend that the none-tendering of the statement is not fatal. On the whole, all said and done, the sum effect of all these is that the issue is resolved in favour of the Appellant against the Respondent. Resultantly, the appeal has merit and it is accordingly allowed. Consequentially, the conviction and sentence of the Appellant by the lower Court in its Judgment of 21/12/2016 are hereby set aside. In their stead, the Appellant is discharged and acquitted." Per WAMBAI, J.C.A. (Pp. 26-36, Paras. C-A) (...read in context)

AMINA AUDI WAMBAI, J.C.A. (Delivering the Leading Judgment):Â This appeal before us emanated from the judgment of Jigawa State High Court in charge No. JDU/050/C/2012 delivered by Hon. Justice Umar M. Sadiq, on 21/12/2016 which convicted the Appellant for the offence of rape punishable under Section 283 of the Penal Code and sentenced him to 7 years imprisonment without an option of fine.

The facts on the part of the Respondent are that on the 30/04/2012 while Maryam Abdullah then aged 10 years was returning from the farm (Garden) with her friends, Shamsiyya Ibrahim (PW 2) and Nafisa

Tukur (PW 3), they met the Appellant rearing cattle. They greeted him, he refused to reciprocate their greeting but rather chased them. While PW 2 and PW 3 were able to escape, the Appellant caught up with the Victim and got hold of her. He put his penis in her vagina. She felt pain. The other two girls who were able to run awayÂ reported the incident to Maryam???s parents but by the time they arrived at the scene, the Appellant had escaped. A report was made to the Ward Head and later to the Police. The Appellant was subsequently arrested and

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volunteered a statement in Hausa language, Exhibit A1 to PW 4, the Investigating Police Officer, which was translated into English language, Exhibit A.

On the part of the defence, the Appellant testified on his behalf but called no other witness. He denied committing the offence but that when he saw the 3 girls, two of them ran away leaving behind the victim whom he saw crying, she told him that it was someone who tried to rape her but had runaway.

???Both parties having not addressed the Court, the learned trial Judge upon the review of the evidence before the Court, resolved the sole issue he formulated against the Appellant having found that the prosecution had proved its case beyond reasonable doubt and returned a verdict of guilty against the Appellant. Appellant was sentenced to 7 years imprisonment.

Upset by his conviction and sentence, the Appellant commenced this appeal by a notice of appeal filed on 14/03/2017 predicated upon 7 grounds from which E.U. Chinedum Esq. of Counsel who settled the Appellant???s brief of argument filed on 10/05/2017, formulated 3 issues for determination, namely:

1. Under Nigerian legalÂ jurisprudence, for a document Â ???

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to be admissible in evidence and be accorded probative value, it must be duly signed by the maker. It is also settled that the language of Court in Nigeria is English. The Accused never did sign the translated

English version of his confessional statement marked Exhibit ???A???. is a translated English language version of a confessional statement admissible in evidence against an accused when same was not signed by the accused person?

2. Under the Nigerian law of Evidence, can an accused be legally convicted for a crime of rape only on the uncorroborated evidence or testimony of a child who has not attained the age of fourteen (14) years tendered?

3. In criminal law, the standard of proof placed upon the prosecution is proof beyond reasonable doubt. The right to fair hearing is also guaranteed by the Nigerian Constitution. Will prosecution be said to have discharged the burden of proof beyond reasonable doubt and the defendant accorded fair hearing when prosecution failed or neglected to tender before a trial Court all statements made to the Police by defendant?

Pursuant to an order of this CourtÂ made on 13/03/2018Â

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vacatingÂ our earlier order of 15/01/2018 directing the hearing of this appeal only on the Appellant???s brief of argument, the learned Director of Public Prosecutions, (DPP), Jigawa State Ministry of Justice, Musa M. Imam who settled the Respondent???s brief of argument filed on 09/10/2018 but deemed on 13/03/2018 identified a sole issue worthy of determination to wit:

Whether the learned trial Judge was right when he convicted and sentenced the Appellant to seven years imprisonment based on the evidence adduced by the prosecution.

I shall determine this appeal on the Respondent???s sole issue which encapsulates the 3 issues inelegantly formulated by the Appellant???s Counsel. But before doing so, I feel obliged, by way of general observation, to comment on the manner in which the Appellant???s Counsel formulated his issues for determination.

???The issues formulated by the Appellant Counsel consist largely of abstract legal principles or at best legal argument that should be canvassed in support of the appeal. An issue for determination is not the legal argument that will be canvassed in the appeal norÂ bare abstract legal principles.

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Rather, an issue for determination is a substantial question of law or fact or both, arising from the grounds of appeal the determination in favour of one of the parties to the appeal, which will entitle the party to the judgment of the Court. An issue for determination should be a proposition of law or fact so cogent, weighty and compelling that a decision on it in favour of a party to the appeal will entitle him to the judgment of the Court. See CONSORTIUM M.C. 3632 LOT. 4, NIG. VS NEPA (1992) 6 NWLR (PT. 246) 132; STANDARD CONSOLIDATED DREDGING CONST. CO. LTD. (1986) 5 NWLR (PT. 44) 791, 799; EZEUGO VS THE STATE (2010) 9 NWLR (PT. 1360) 508.
A well drafted issue for determination should have the qualities of precision, brevity, accuracy and clarity. It should be concise and comprehensive. See UWAIFO VS UWAIFO (2005) 3 NWLR (PT. 913) 479.

Having said this, however, the inelegant nature of the Appellant???s brief of argument notwithstanding, it is settled law that no matter how bad or faulty a brief of argument is written, an Appellate Court should not close its eyes to its existence in order to do substantial justice in the matter.

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This is so because the overriding interest of justice supersedes the inelegant and faulty format of the brief more so in a criminal case such as the one at hand where the liberty of a citizen is at stake.
I hope that Counsel will take heed.
I shall therefore consider and make use of the brief of argument as best possible.

In arguing the appeal, the learned Appellant???s Counsel submitted that the English Version of the Appellant???s confessional statement Exhibit A, which was wrongly admitted in evidence having not been signed by the Appellant, notwithstanding the clause in Exhibit A1 ???already signed by the accused in Hausa Language??? renders the statement (Exhibit A) inadmissible. An unsigned document, he argued, is a worthless and valueless document, which ought not to have been acted upon. We were referred to the cases of GLOBAL SOAP & DETERGENT NIG. LTD. VS NAFDAC (2011) ALL FWLR (PT. 599) 1025; ANUM NIG. LTD VS LEVENTIS MOTORS NIG. LTD (1990) 5 NWLR (PT. 151) 458 AT 488; AIKI VS IDOWUÂ (2006) ALL FWLR (PT. 304) 432; OMEGA BANK (NIG) PLC vs O.B.C. LTD (2005) ALL FWLR (PT. 249) 1964 SC.

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Exhibit A1Â (the Hausa version) which was properly signed by the Appellant, learned Counsel argued, is irrelevant and cannot be relied upon as the language of the Court is English language citing in support the case of F.R.N. VS USMAN (2012) 8 NWLR (PT. 1301) 141 AT 167 D ??? H; ASINOLA VS FATUDU (2009) 6 NWLR (PT. 1136) 184 198.

The heavy reliance placed on Exhibit A in convicting the Appellant, it was further submitted, occasioned a serious miscarriage of justice against the Appellant and rendered the proceedings a nullity as something cannot be placed on nothing. We were referred to the case of MACFOY VS UNITED AFRICA CO. LTD (1961) 3 ALL ER 1169, 1172.

???While urging us to expunge Exhibits A and A1 for being incompetent and when so expunged renders the evidence of PW 1, a child of less than 14 years of age bereft of the required corroboration, the learned trial Judge, learned Counsel argued, was wrong to have held that Exhibits A and A1 aptly corroborate the evidence of PW 1.

It was submitted that in a criminal trial the prosecution has the duty to tender all statements made by an accused person either confessional or exculpatory as the tendering

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of one and none tendering of the other amounts to unfair trial with the consequential effect of the acquittal of the accused person as decided in the cases of OLAYINKA VS THE STATEÂ Â (2007) ALL FWLR (PT. 373) 163 SC; OGUDO VS THE STATE (2011) 18 NWLR (T. 1278) II.

He contended that it was the Appellant???s evidence that he made a statement at the Bamaina Police Division where the case was first reported, which PW 4 admitted, though not believed, but the statement was not tendered in evidence. Failure to tender the said statement in evidence he argued, calls for invocation of Section 167 (d) of the Evidence Act for withholding evidence unfavourable to the prosecution which entitles the Appellant to acquittal as decided in OGUDO VS THE STATE (Supra), the prosecution having failed to prove its case beyond reasonable doubt against the Appellant.
In his response, the learned Respondent???s Counsel while insisting that the prosecution proved its case beyond reasonable doubt against the Appellant, stated the ingredients of the offence which the prosecution must prove in a case of rape as held in the case of EZIGBO VS THE STATE (2012) ALL FWLR (PT.Â 683) 841 to be:Â

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i. That the accused had sexual intercourse with the woman in question.
ii. That the act was done in circumstances envisaged in any of the five paragraphs of Section 282 (1) of the Penal Code.
iii. That the woman was not the wife of the accused; or if she was the wife, she had not attained puberty.
iv. That there was penetration.

On the first ingredient, that the accused/Appellant had sexual intercourse with the victim (PW 1), he submitted that the evidence of PW1 in which she narrated how the Appellant got hold of her and inserted his penis in her vagina and which fact was confessed to by the Appellant in Exhibits A and A1, proved the 1st ingredient of the offence.

On the 2nd ingredient it was submitted that PW1 the victim, is a woman under the age of 14 years, falling within Section 282 (1)(e) of the Penal Code.
On the 3rd ingredient, it was submitted that there is nothing to suggest that the victim is the wife of the Appellant.
On the 4th ingredient, learned Counsel argued that the slightest penetration of the penis into the vagina completes the offence as decided in MUSA VS THE STATE

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and POSU VS THE STATE (2011) 2 NWLR (PT. 1234) 393. Again he referred us to the evidence of the victim that the Appellant inserted his penis in her vagina as well as the Appellant???s confessional statement, which he argued, proved penetration and completes the offence.

Responding to the Appellant???s submission on Exhibit A, learned Respondent???s Counsel submitted that the nonÂ signing of Exhibit A does not render it inadmissible or fatal to the prosecution???s case, in that Exhibit A1 from which Exhibit A was translated into English language, was as required by practice, to ensure correctness and accuracy, recorded in Hausa language the language of the Appellant, in which it was made and thumb printed by the Appellant, counter-signed by the PW4, and endorsed by a superior Police Officer before whom it was read. The case of OLANIPEKUN VS THE STATE (2016) 13 NWLR (PT. 1528) 118 B ??? D was referred to. The translation of the statement he argued, is only for the Court???s consumption and PW4 who recorded it being its maker having testified and produced the statement before the Court, the statement is admissible. HeÂ

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pointedÂ out that since Exhibit A could even be translated by the Court official translators, the absence of the Appellant???s signature on Exhibit A does not render it inadmissible, but assuming without conceding that it is inadmissible in evidence, it is too late for the Appellant who raised no objection at

trial to complain on appeal, citing in support the case of OSENI VS THE STATE (2012) ALL FWLR (PT. 619) 1037, para 71.

On the Appellant???s contention that the learned trial Judge placed reliance on the uncorroborated evidence of a child (PW1), it was submitted in response that Exhibits A and A1 as well as the evidence of PW4 aptly corroborated the evidence of PW1.
On the nonÂ tendering of the Appellant???s statement at Bamaina Police Station, it was submitted that same does not amount to withholding of evidence and not fatal to the prosecution???s case since the learned trial Judge did not rely on it. The case of PEOPLE OF LAGOS STATE VS UMARU (2014) ALL FWLR (PT. 737) 679, F ??? GÂ was cited in support. Besides, the prosecution is not bound to call a particular number of witnesses, as decided in BELLO SHURUMO VS THE STATE (2010)Â 12 SCNJ 47.

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Starting from the very beginning by re-stating the well entrenched position of the law in Criminal trials, it is merely a restatement of the time hallowed and immutable principle of law to say that the prosecution has the heavy and unshifting burden of proving the guilt of an accused person beyond reasonable doubt and with no corresponding duty on the accused to prove his innocence. See ASAKE VS THE NIG. ARMY COUNCIL & ANOR (2007) 1 NWLR (PT. 1015) 408; OGIDI VS THE STATE (2005) 5 NWLR (PT. 918) 286.

In legal parlance, rape simply means a forceful sexual intercourse with a girl or woman without her giving consent to it or when in law she is incapable of giving her consent. See POSU & ANR VS THE STATE (2011) LPELR ??? 1969 (SC).
The essential ingredients of the offence of rape statutorily provided in Section 282 of the Penal Code as judicially interpreted and endorsed in a plethora of judicial authorities which the prosecution must prove to succeed are the following:-
a. That the accused had sexual intercourse with the prosecutrix (the victim).
b. That the act of sexual intercourse was done without

her consent or that the consent was obtained by fraud, force threat, intimidation, deceit or impersonation or when she is under the age of 14 years.

c. That the prosecutrix (victim) is not his wife and

d. That the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not.

e. That there was penetration.

See LUCKY VS THE STATE (2016) LPELR ??? 40541 (SC); IKO VS THE STATE (2001) 14 NWLR (PT. 332) 195; POSU & ANOTHER VS THE STATE; EZIGBO VS THE STATE (2012) (Supra)

???It is unquestionable that to secure or sustain a conviction for the offence, the prosecution must positively prove beyond reasonable doubt, each and every listed ingredient of the offence. It is needless to emphasize that failure to prove any of the ingredients of the offence means failure to prove the charge even if the other ingredients are proved beyond shadow of doubt and ultimately, the accused will be entitled to a discharge and acquittal. See BELLO VS THE STATE (2012) 8 NWLR (PT. 1302) 207, 237; UTUK VS THE STATE (2010) 34Â NWLR 171 AT 179; HARUNA VS A.G.(2012) 9 NWLR (PT. 1306) 419, 444 ??? 445 PARA G.

It has been established over time that the prosecution may establish the guilt of an accused person either by the confessional statement of the accused; by circumstantial evidence; or by the evidence of eye witness account of the commission of the crime. See IGABELE VS THE STATE (2006) 6 NWLR (PT. 975) 100; ADEKOYA VS THE STATE (2012 VOL. 3 M JSC (PT. 11) 77; NIG. NAVY & 2 ORS VS LT. COMMANDER S.A. IBE LAMBERT (2007) ALL FWLR (PT. 398) 574, AT 586.Â

In case at hand, the prosecution relied on the evidence of the victim (PW1), PW4 (the IPO) and the confessional statement of the Appellant, Exhibits A & A1.

On the proof of the first ingredient, that Appellant had sexual intercourse with the victim, PW1, the victim of the offence in her evidence at pages 3 ??? 4 of the record, testified as follows:

???PW1 My names are Maryam Abdullahi, I am 11 years of age. I live in Gidan Kaya in Birnin-Kudu Local Government Area. My occupation is to make ropes. Yes, I know the accused person only on the day of the incident.

On theÂ 30/04/2012 we went to the garden, on our way

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back we met the accused person rearing cows on the way we greeted the accused but the accused did not reply our gesture. The accused run towards us and got hold of me.

The accused person then put his penis inside my vagina. I felt pain. The rest that we were coming back went to my home and informed my father, but before the arrival of my father the accused escape from the scene???.

Learned Appellant???s Counsel has argued that the unsworn testimony of PW1, a child of 11 years of age requires corroboration and that the evidence of PW4 and the wrongly admitted Exhibit A do not corroborate her evidence. I quite agree with the learned Counsel that the unsworn evidence of PW1, a child below the age of 14 years, requires corroboration both as a matter of law as stipulated in Section 209 (1) and (3) of the Evidence Act and by established practice as a matter of prudence. See OBRI VS THE STATE (1997) LPELR ??? 2194 (SC); DAGAYYA VS THE STATE (2006) LPELR ??? 912 (SC).

???Corroborative evidence is confirmatory evidence or additional evidence to that already given. It is supplementaryÂ

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evidence that tends to strengthen or confirm the evidence already given which it is to corroborate. It is an additional evidence of a different character on the same point. See Blacks Law Dictionary, 6th Edition page 344 and MUSA VS THE STATE (2013) ALL FWLR (PT. 1688) B ??? C. In STATE VS GWANGWAN (2015) LPELR 504/2012 (SC).

???Of necessity, evidence in corroboration is an independent testimony which affects the accused by connecting or tending to connect him with the crime in some respects material to the charge in issue but it needs not consist of direct evidence that the accused committed the offence, nor amount to a confirmation of the whole account given by the witness. It is sufficient if it corroborates the evidence in some respects material to the charge. See EZIGBO V. STATE (2012) LPELR ??? 7855 (SC); R. VS BASKETVILLE (1916-17) ALL ER REPRINT 38 AT 43; IKO VS STATE (2001) 14 NWLR (PT. 732) 221 AT 241.

It must be pointed out that the corroboration required in rape needs not be direct evidence that the accused committed the offence. It is sufficient if it corroborates in material respect the evidence of the prosecutrix. It is any evidence

which tends to show that the story of the prosecutrix (victim) is true that the accused committed the crime. See EZIGBO VS THE STATE (Supra).

The corroborative evidence, it must also be emphasized is sufficient even if it is circumstantial in nature so long as it connects or tends to connect the accused to the commission of the offence. See DURUGO VS THE STATE (1992) NWLR (PT. 255 525; OGUNBAYO VS THE STATE (2007) LPELR ??? 2323 (SC).

Cognizance of this requirement of the law, the learned trial Judge at page 53 of the record held:

???As earlier in this judgment that evidence in corroboration is the evidence of PW4 the investigation Police Officer who recorded the evidence of PW4 (sic) (it should be PW1), together with Exhibits A and A1 provides (sic) evidence in corroboration???.

???The learned Appellant???s Counsel has vehemently attacked this finding of the lower Court on the ground that Exhibit A which was unsigned by the Appellant was wrongly admitted and being worthless cannot corroborate the evidence of PW1.

An unsigned document as rightly submitted by the Appellant???s Counsel is a worthlessÂ document; worthless

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is it that it commands no value in legal proceedings. It has no efficacy.
An unsigned document is inadmissible in law and if wrongly admitted should be discountenanced because it is like no document at all. It cannot be reckoned with in deciding the fact in issue which the document purports to prove. See OMEGA BANK (NIG) PLC VS O.B.C. LTD (Supra) and ANYAOHA VS OBIAHA (Supra).

The document here is the English translated version of the Appellant???s statement as recorded in Hausa language, Exhibit A1. The contention of the learned Appellant???s Counsel is that though the Appellant signed, by thumb printing the Hausa version, Exhibit A1, he did not sign Exhibit A. The law is that a confessional statement does not become inadmissible merely because it is unsigned by the accused person, the issue of admissibility being different from that of probative value to be ascribed to the statement. In CHUKWUKA OGUDO VS THE STATE (2011) 18 NWLRÂ (pt. 1278) 1, Rhodes-Vivour JSC aptly stated the Law in the following phrase:-
???... Where on the other hand, the accused person says he did not sign the statement, the statement should be

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admitted in evidence, thereafter, the question of what weight should be attached to such statement becomes an issue for the Judge to decide at the end of the trial ...???
See also YAHAYA VS THE STATE (2016) LPELR ??? 40254 (CA).
???On the criteria to ascribe weight to such an unsigned statement the law lord Rhodes-Vivour JSC in the said case gave the conditions as follows:

1. The cautionary words must be well written and signed.
2. The body of the statement written by the accused person or by someone usually a police officer on the accused person's directives given a detailed confession which will show clearly that he committed the offence for which he is charged.
3. The statement must be endorsed by a superior police Officer and signed by the accused person.

In the instant case though the Appellant did not sign Exhibit A, Exhibit A1, from which Exhibit A was translated, was signed by the Appellant. Exhibit A1, as is highly recommended, was recorded in the language of the Appellant, the Hausa Language. The wisdom for this as reasoned in OLANIPEKUN VS THE STATE (2016) LPELR ??? 40440 (SC) per Aka???ahs JSC, is toÂ avoid technicalÂ ???

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arguments which could be raised. Though not an invariable practice, it is to ensure the correctness and accuracy of the statement made by the accused person. Exhibit A1 is for that purpose. It is not the case of the Appellant that the contents of Exhibit A are not the true or correct translation of Exhibit A1, which the Appellant signed. It is also not the Appellant???s case that Exhibit A1 was not voluntary. Both the cautionary word and the main body of Exhibit A1 (the Hausa version) were duly thumb printed by the Appellant. Exhibit A though not signed by the Appellant, bears an endorsement at the signature column that ???already signed by the accused in Hausa version???. This much as borne out on the record, the learned Appellant???s Counsel admits.

???Furthermore and of paramount significance is the fact that the Exhibit A1 before being translated into Exhibit A, was taken together with the Appellant to a superior Police Officer, Abdulkadir Nura, and read to the hearing of the Appellant who admitted its contents before being endorsed by the superior Police Officer. Appellant has not stated that what is in Exhibit A1 isÂ different from the contents of Exhibit A.Â ???

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Additionally, both Exhibits A1 and A were tendered in evidence without objection through PW4 who recorded both Exhibits A1 and A and translated A1 to English language, (Exhibit A). He narrated how he recorded Exhibit A1 which he read over to the Appellant who signed same after which he also counter signed, and that after endorsement by the superior Police Office, he translated the statement into English language, (Exhibit A). Aside from not objecting to its admissibility, no questions were asked in cross-examination regarding the non-signing of Exhibit A by the Appellant. In other words, the admissibility of the unsigned Exhibit A was not challenged or made an issue at the trial. Given to the aforestated facts and circumstances, the dictum in the case of OGUDO VS THE STATE (Supra) that ???after all an unsigned document is worthless???, is distinguishable and inapplicable to this case.
Obviously, the facts in OGUDO???s case (Supra) are not on all fours with the facts of the case at hand. In addition to the aforestated reasons, inÂ OGUDO???s case (Supra) unlike in the present appeal, there wasÂ no other versionÂ of the Appellant???s

statement the voluntariness and authenticity of which the Appellant therein admitted from which the unsigned statement was recorded. The fact that the Appellant herein does not contend that the contents of Exhibit A are at variance with the contents of Exhibit A1 which he made and signed, nor challenge the contents of Exhibit A1, further renders the decision in OGUDO???s case (Supra) inapplicable to this case
Furthermore, as it is with an objection to the voluntariness of a confessional statement, the proper time and stage to raise the question of non-signing of a confessional statement is at the time it is sought to be tendered in evidence by the prosecution. This, the Courts have repeatedly stated in a plenitude of judicial authorities. See MUHAMMAD VS THE STATE (2017) LPELR 42098 (SC); IKEMSON VS THE STATE (1989) 3 NWLR (PT. 110) 455.

Where an objection is not taken to the admissibility of a confessional statement or where as in the case at hand, the issue of non-signing of the confessional statement was not raised throughout the trial, on the authorities, it will be too late on the day to raiseÂ the issue on appeal.

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In OSENI VS THE STATE (2012) LPELR 7833 (SC); I.T. Muhammad JSC held inter alia:
???It is regrettable that Appellant???s Counsel at the trial stage did not object to the admissibility of this confessional statement, yet he went on to blame the trial Court in not treating Appellant???s statement with utmost caution.
It will appear too late in the day to seek to supply a remedy to a dented or a crucified matter which can hardly be revived???.???
For the foregoing reasons, I agree with the learned Respondent???s Counsel that the Appellant cannot seek to attack the reliance placed on Exhibit A on the ground of its non-signing by the Appellant.

On the Appellant???s submission that Exhibit A cannot corroborate the evidence of PW1, the law is settled that a retracted confessional statement of an accused is not only sufficient to corroborate evidence that requires corroboration, but is in itself sufficient to sustain the conviction of an accused so long as it is direct, positive, and unequivocally and clearly suggestive of the guilt of the accused person. The retraction does not render the confession

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inadmissible nor deter the Court from acting thereon. See GALADIMA VS THE STATE (2012) 18 NWLR (PT. 1333) 610; SOLOLA & ANOR VS THE STATE (2005) 11 NWLR (PT. 937) 460 and OGUDO VS THE STATE (Supra).

In OSENI VS THE STATE (Supra) the Supreme Court in considering the question whether the trial Court can convict on an uncorroborated confessional statement, held that even without corroboration, a confessional statement is sufficient to support a conviction so long as the Court is satisfied of its truth. This is premised on the established principle that a confessional statement which is free, direct, positive

and voluntary is enough to ground or sustain a conviction. See MOHAMMED VS THE STATE (2007) 11 NWLR (PT. 1045 303; OKOH VS THE STATE (2014) 2 ??? 3 SC 184.

In Exhibit A, the Appellant stated inter alia :

"I could remember on 30/04/2012 at about 12:00hurs. I was rearing cows at Damukash near to our village I saw three girls coming from irrigation farm I blocked them two of the girls run away and they left one standing I hold her and lay her down and have sexual intercourse with her. After I finish having sexual intercourse with her, IÂ stood up and when (sic)

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to rearing of my cow. I came back home in the evening, my father told me that they are looking for me at our village head house from there we came to the Bamaina Police Station and we later come to Dutse. As a matter of fact by the time I make use of the girl, I draw the zip of my trouser I did not remove my trouser I then bring out my penis and put it into her private part and had sexual intercourse with her. I did not released (sic) my sperm. I left her and go away this all what happen."Â

From the above stated facts in Exhibit A there can be no doubt that Exhibit A amply corroborates the evidence of PW1 and PW3 and support not only the 1st ingredient that the Appellant had sexual intercourse with the victim but also the 4th ingredient, that he had the mens rea to commit the offence. The Appellant has however resiled from this statement in his evidence in Court. That notwithstanding, a denial or retraction of a confessional statement does not affect it???s admissibility. SeeSULE VS THE STATE (2009) LPELR ??? 3125 (SC); OSENI VS THE STATE (SUPRA). However, the Courts have enjoined, as decided inR VS SYKESÂ (1913) 8 CAR 233, onÂ trial Courts, to look for

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some other evidence no matter how slight outside the confession which will vindicate its veracity; whether it is corroborated in any way; whether its contents are true; whether the accused had the

opportunity to commit the offence charged; whether the confession is possible and consistent with other facts which have been proved. See KAREEM VS FRN (2002) 8 NLWR (PT. 770) 664; OSETOLA & ANOR VS THE STATE (2012) LPELR 9348.

Again, the Appellant???s learned Counsel forcefully argued that Exhibit A cannot be relied upon in the absence of the Appellant???s first statement made at Bamaina Police Station, the first Station he was taken to, and that failure to tender that statement amounts to withholding of evidence and fatal to the conviction and sentence. His strength for this position are the cases of OLAYINKA VS THE STATE (Supra) and OGUDO VS THE STATE(Supra).
In his evidence in Court the Appellant stated as confirmed by PW4, that he made a statement at the Bamaina Police Station where he was first taken to, which statement, PW4 admitted was in the case file but was not tendered in evidence.

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While theÂ Appellant contends that the statement was not a confessional statement, PW4 contends it was a confessional statement. In OLAYINKA VS THE STATE (Supra) it was held that:
???The statement of a defendant made to the Police, if not confessional, is the very foundation of his defence; hence the prosecution has a duty to make the said statement or statements available to the Court???.
???On the other hand, as contended by PW4, if the statement was confessional, why was it not tendered though PW4 admitted that it was in the file?
The issue then is whether the non-tendering of the statement is fatal to the prosecution???s case as contended by the Appellant. The Appellant has invoked Section 167 (d) of the Evidence Act: By the said Section 167, the Court may presume the existence of any fact which it thinks likely to have happened, regard been had to common course of natural events, human conduct and public and private business, in their relationship to the facts of the particular case, and in particular the Court may presume that:
(d) evidence which could be and is not produced would, if produced be unfavourable to the person whoÂ withholds it.Â ???

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It must be pointed out that there is a distinction between failure to call a witness and failure to call or adduce evidence. The Section deals with failure to call evidence and not failure to call a particular witness. See BELLO VS KASSIM (1969) NMLR 148, 152. Therefore, the rule in Section 167 (d) applies where a party fails to adduce evidence by withholding evidence which could have been but was not produced. See ONWUJUBA VS OBIENU (1991) 4 NWLR (PR. 183) 16 SC; OLUSANYA VS OSINLEYE (2013) 12 NWLR (PT. 1367) 148; and SHODIYA VS THE STATE (2013) 14 NWLR (PT. 1373) 147 where Alagoa JSC quoted the provisions of Section 167 (d) of the Evidence Act, that the Court may presume evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it. While it is the law that the prosecution is not bound to call a particular witness where his case can otherwise be proved, See ARCHIBONG VS THE STATE (2006) 14 NWLR (PT. 1000); STATE VS OLATUNJI (2003) 14 NWLR (PT. 839) 138; SHURUMO VS THE STATE (2010) 12 SCNJ 47, its failure to adduce evidence at its disposal which it is supposed to adduce amounts toÂ withholding ofÂ ??????evidence

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and calls for invocation of Section 167 (d) seeEMEKA VS CHUBA IKPEAZU & ORS (2017) LPELR ??? 41920 (SC) where Ogunbiyi JSC, referring to BUHARI VS OBASANJO per Belgore JSC as he then was held that failure to produce the letter in question meant either that the letter did not exist or if existed, and not produced, it could be presumed that if produced, its contents would not have supported the Appellant???s case.

???The purport of the Rule in Section 167 (d) of the Evidence Act is to permit the Court to presume that a Party who withholds evidence which could be but was not produced, would if produced, be unfavourable to or against him. Such a Party withholds the evidence at his peril. A party in civil action in possession of material evidence in support of pleaded facts, and is in criminal trials, the prosecution in possession of material evidence, who withholds that evidence which could be but was not produced, does so at his peril. Failure to adduce vital evidence at a Party???s disposal which he is supposed to

adduce amounts to withholding evidence and would raise a presumption that if produced, the evidence wouldÂ be unfavourable to him.

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TSOKWA MOTORS NIG. LTD VS AWONIYI (1999) NWLR (PT. 586) 1999; TEWOGBADE VS AKANDE (1968) NMLR 404.

Undoubtedly, the prosecution has a duty to tender any statement made by an accused person during the investigation of the crime with which the accused is charged whether or not it is in his favour. It is not only a damming statement of an accused person that should be tendered with glee by the prosecution. A favourable statement to the accused should not be left out in a bid to secure conviction by the prosecution at all cost. This is to avoid the invocation of Section 167 (d) of the Evidence Act against the prosecution. See PEOPLE OF LAGOS STATE VS UMARU (2014) 7 NWLR (PT. 1407) 584, and OGUDO VS THE STATE(Supra). However, before the presumption under the Section can operate, it must be shown and established that:

(a) Such evidence exists;

(b) That it could be produced;

(c) That it has not been produced and;

(d) That it has been withheld by the person who could produce it, as held in MUSA VS YERIMA (1997) 7 NWLR (PT. 511) 27 per Ogundare JSC.

All the listed conditions are present in the case at

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hand, the statement exists and was in prosecution???s case file; it could be produced; but was not produced; PW4 who could have produced it withheld it. Thus, the prosecution???s failure to produce the said statement squarely amounts to withholding of evidence.

In a similar situation which arose in the case of OGUDO VS THE STATE (Supra) where the learned trial Judge had held that failure to tender the statement made by the accused at the 1st Police Station would not have made any difference in the finding of the Court, the Supreme Court strongly disagreed. Fabiyi, JSC had this to say:

???The Appellant said he made a statement at Birnin Gwari Police Station. The same was not tendered during his trial. The prosecution has a duty to tender any statement made by an accused person during the investigation of the offence with which he was charged whether or not it is in his favour. See DANDARE VS THE STATE (1967) NMLR 56. This must be so in order to avoid the invocation of the provision of Section 149 (1) (d) of the Evidence Act against the prosecution which failed to tender the vital statement??? The above view, with due diffidence,Â flies in the face of my views as stated above.

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The statement must be tendered in the first instance before one can surmise difference it will have on the finding of the trial Court???.

Similarly, the same Apex Court emphatically restated the law in the case of PEOPLE OF LAGOS STATE VS UMARU (2014) ALL FWLR (PT. 737) 679 Per I.T. Muh???d. when he held:

??????What paragraph (d) of Section 149 (now Section 167 [d]) of the Evidence Act stipulates is that where a party claims to have evidence that goes to show the existence of a document in proof of his case, the document should be tendered. Where such evidence could be produced but it is not produced, it is presumed to be against the interest of the party withholding it. See EBOH VS PROGRESSIVE INSURANCE COMPANY LIMITED (1987) 2 QLRN 167; GEORGE VS THE STATE (2009) 1 NWLR (PART 1122)."

???As in the aforestated decided authorities and the clear provision of Section 167 (d) of the Evidence Act, the prosecution who admitted that the Appellant???s first statement made at the Police Station, Bamaina, was in his case file ought to have tendered same in evidence whether it was

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favourable to its case or to the Appellant???s defence.

The failure of the prosecution to tender that statement amounts to withholding evidence and the Court would presume that the statement would have been detrimental to its case if produced. To deprive the Appellant the use of his first statement to the Police at the first Police Station prior to Exhibit A, as held per Rhodes ??? Vivour JSC in the OGUDO???s case (Supra) at Page 31, paragraphs E ??? G, renders the trial unfair. The same decree was reinforced in the case of OLAYINKA VS THE STATE (Supra), by the same Court when it held that ???in the absence of the statement of the Appellant made prior to his making of Exhibit A, the Appellant could not be held to have had a fair trial guaranteed even under the Constitution???.

???Indeed the failure to tender the said statement in the prosecution???s case file has the effect of casting a doubt on the veracity of Exhibit A.

Sadly, therefore, on the strength of these authorities, the prosecution???s failure to tender the said Appellant???s first statement he made at the 1st Police Station at Bamaina, has had aÂ serious consequence on the prosecution???s case.

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The provision of Section 167 (d) of the evidence Act inures the Appellant against the Respondent with a fatal consequence that inspite of the other evidence on record including the Appellant???s confessional statement, the conviction and sentence of the Appellant cannot be sustained. Regrettably, the Respondent now has to bear the brunt of the damning effect of its failure, for whatever reason, in the first place for not tendering the statement in evidence. The beneficiary of that failure must be the Appellant against whom the evidence was withheld.

Ironically, the learned Respondent???s Counsel relying on the same case of PEOPLE OF LAGOS STATE VS UMARU (Supra) contended that the none tendering of the statement would have been an issue if the learned trial Judge had relied on it. This argument is completely off track. Firstly, the question of relying on an untendered document is out of the way, and expectantly being off target, it missed the goal post. Conversely, his argument that the Court decided that the non-tendering of the statement was not fatal is anything but the correct position ofÂ that decision.Â ???

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Nothing can be further away from what was therein decided. The decision is quite diametrical to the Counsel???s argument. It is precisely against him and unequivocally in favour of the Appellant.

This is what the Court held at the said paragraphs F - G at page 679 of the report:

???I think the tendering of the accused???s statement made to the Police (considered to be confessional) is very vital, necessary and fundamental in grounding a conviction otherwise the conviction is defective and can be quashed and any sentence premised upon can equally be set aside??????.

???It is crystal clear that this authority does not support the Respondent but only helps the case of the Appellant.

It will therefore by flying on the face of the above decision to contend that the none-tendering of the statement is not fatal. On the whole, all said and done, the sum effect of all these is that the issue is resolved in favour of the Appellant against the Respondent. Resultantly, the appeal has merit and it is accordingly allowed. Consequentially, the conviction and sentence of the Appellant by the lower Court in its Judgment

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of 21/12/2016 are hereby set aside. In their stead, the Appellant is discharged and acquitted.

ZAINABÂ ADAMUÂ BULKACHUWA J.C.A.:I have read before now the draft of the judgment just delivered by my Learned brother A. A. Wambai, JCA.

I also agree with the conclusion reached therein that the non-tendering of the appellant first statement made at the Bamaina Police Station was fatal to the prosecution case. See Section 167 (d) Evidence Act 2010.People of Lagos StateÂ v. UmaruÂ 2014 ALL FWLR (Part 737) 652.

I find merit in the appeal and abide by the orders in the lead judgment, discharging and acquitting the appellant.

OLUDOTUN ADEBOLAÂ ADEFOPE-OKOJIE, J.C.A.: I have had a preview of the lead judgment of my learned brother Amina Audi Wambai, JCA and agree with the reasoning and conclusion reached.
I am in concurrence with the order of discharge and acquittal of the Appellant by my learned brother.

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Appearances:

E. U. Chinedum Esq., with him, Pereboh Sanami Esq., Adula Samson Esq., and O. B. Ibenegbu (Mrs) Esq., S. J. Akos Esq., and Anayo Ilo Esq.For Appellant(s)
M. M. Imam Esq. with him, Aliyu Abdullahi Esq.For Respondent(s)>

Appearances
E. U. Chinedum Esq., with him, Pereboh Sanami Esq., Adula Samson Esq., and O. B. Ibenegbu (Mrs) Esq., S. J. Akos Esq., and Anayo Ilo Esq.For Appellant

AND
M. M. Imam Esq. with him, Aliyu Abdullahi Esq.For Respondent