

SUPREME COURT OF NIGERIA
10TH SEPTEMBER, 1993. SC.172/92
CORAM:- A-G KARIBI - WHYTE, U. OMO, I.L. KUTIGI,
U. MOHAMMED, S.U. ONU, J JSC

NOSIRU ATTAH APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW AND PROCEDURE - Failure to take fresh plea after alteration or amendment of charge- whether conviction is rendered invalid thereby

EVIDENCE - Evidence used to prove pleaded count in a charge - whether it can be admissible to prove the unpleaded counts in that charge

EVIDENCE - Counts in a charge framed against distinct acts - whether evidence in proof of each count could stand alone

FACTS

The Appellant was arraigned at the Lagos High Court on a charge of armed robbery and conspiracy to commit armed robbery. The complainant testified that she came back home in her car to see the Appellant sitting in his car, a white Passat with the engine on. She said that her neighbour warned her that three men were already in the house, and one of them was carrying a gun. She then sought the help of a passerby who went inside the house and challenged the intruders and they rushed out of the house into the waiting Passat car. They were later arrested by mobile police men on duty around the scene. At the end of the trial during addresses, the prosecution was of granted leave to add a fifth count to the charge (Possession of a thing reasonably suspected of having been stolen.) The trial court convicted the Appellant of armed robbery and conspiracy to commit armed robbery but acquitted him on the charge of possession of a thing reasonably suspected of having been stolen, and sentenced him to 30 years imprisonment on each count to run concurrently. The Appellant appealed to the Court of Appeal Gaining that his fresh

plea was not taken when the charge was amended. The Court of Appeal confirmed the judgment of the trial court. The Appellant then appealed to the Supreme Court to determine whether failure to take Appellant's plea on all counts which make up the amended charge rendered the whole proceedings null and void.

HELD (dismissing the appeal, **KARIBI-WHYTE JSC** dissenting)

1. It is settled law that failure to comply strictly with the provisions of section 164(1) of the criminal procedure Law (Fresh Plea for a new charge or alteration of an old charge) is fatal and renders any conviction to the proceedings invalid as regards the amended counts. But the nullity decision will affect duly the new and altered counts. The earlier plea entered to the counts which were not amended remains valid. (P. 87 L1).

2. From the facts of this case, it is abundantly clear that all the five counts in the charge were framed against distinct acts and the evidence given in proof of each count could stand alone. (P.87 L17)

3. It is not correct to say that the evidence used to prove the pleaded counts would be admissible to prove the unpleaded count. Each victim of the Appellant and his particeps criminis (still- at- large) gave evidence of what they had been robbed. The evidence of one victim cannot support the count framed against the theft from another victim's apartment. (P.87 L23)

REPRESENTATION

M.A. Bashua for the Appellant

Bode Rhodes - Vivour, DPP Lagos State with H.O. Ugbaja, Legal Officer, Ministry of Justice for the Respondent.

CASES REFERRED TO

1. Eronini v. The Queen (1953) 14 WACA 366.
2. Adisa v. A.C. Western Nigeria (1965) 1 All NLR 412.
3. Queen v. Ogunremi (1961) 1 All NLR 467.
4. Fox v. C.OP. (1947) 12 WACA 215.
5. R. v Ijoma (1947) 12 WACA, 220
6. R v. Nji Achie 12 WACA, 209

7. Youngman v. C. OP. (1949) 4 FSC 283
8. Rv. Arisah (1981) 20 NLR 22
9. Madukolu v. Nkemdilim (1962) 1 All NLR 587
10. Jones v. Police (1960) 5 FSC. 38

STATUTES REFERRED TO

1. Criminal Code Lagos State s. 402 (2) (a) & 403A
2. Criminal Procedure Law ss. 162, 163, 164, (1) and (4).
3. Interpretation Act. s.3

LEAD JUDGMENT BY MOHAMMED JSC

The single issue formulated by the learned counsel for the appellant, from the ground of appeal filed in this appeal reads as follows: *"Whether the Court of Appeal was right in holding that the failure to take the plea of the appellant on all the counts which made up the amended charge did not render the whole proceedings null and void."*

The appellant was arraigned before Obadina, J., of Lagos High Court on a four-count charge of armed robbery and conspiracy to commit armed robbery, contrary to sections 402(2) (a) and 403A of the Criminal Code Law of Lagos State. At the end of the trial, during addresses, prosecution was granted leave to add a fifth count. The count was based on being in possession of a thing reasonably suspected of having been stolen, contrary to section 430(1) of Criminal Code Law. In his judgment, the learned trial judge convicted appellant of the offences of armed robbery and conspiracy to commit armed robbery. He however discharged and acquitted appellant of being in possession of a thing reasonably suspected of having been stolen. The appellant was sentenced to thirty years imprisonment on each count. The sentences were made to run concurrently.

The brief facts of the prosecution's case are in the following narrative: Mrs. Yetunde Oduneye testified, in this case, as PW.1 and told the trial court that on 27th January, 1982, at about 10.30a.m, she was coming from the market when she saw a white Passat car parked in front of her house. She saw appellant sitting in the car with the engine of the car no. Immediately appellant saw her he blew the horn of the car three times. As soon as she parked her car a neighbour warned her that there were three people inside the house and one of

them was carrying a shot-gun. Mrs. Oduneye stood by her car. A few minutes later she saw a man, who was later known to be Mr. Olude, coming along the street. Mrs. Oduneye sought his help. But she warned him that one of the intruders was holding a gun. Mr. Olude went inside the house and challenged the intruders and when they
5 rushed out. Mrs. Oduneye saw three people rushing out of the house. They went straight into the waiting Passat car. The appellant who was in the car drove off. Mrs. Oduneye saw one of the robbers holding a gun; the second was holding a broken gulder bottle and the third
10 was carrying the hand bag of her neighbour, Mrs. Florence Beyioku.

People began to shout Ole! Ole! Ole! meaning thief! thief! thief! The robber holding Mrs. Beyioku's bag dropped it and the one holding a gun started shooting in the air to scare the people away. The road was rough and the car could not gain speed. The car came
15 towards Igbobi Round About where three mobilie police men were on duty. When the policemen saw a Passat car with registration No.LA 1251 BD being pursued by a crowd shouting thief! thief! they entered another vehicle and gave a chase. The vehicle reached a dead end, near the army gate, and it stopped. The appellant was arrested.
20 When asked about the others appellant said they had ran away. A lady's handbag containing some items, a bunch of keys, a necklace, two driving licences, and some other articles were found in the car.

Mrs. Oduneye told the trial court that the robbers stole her
25 two neck chains, a pair of ear rings and N250.00 cash. Mrs. Beyioku, P.W.2, narrated in evidence that they stole her jewelries worth N4,000.00, N400.00 cash and her sons headphone cassette. Mrs. Beyioku was later invited at the police station where she identified the jewelries that were stolen from her flat. Mr. Biodun Awoyungbo,
30 P.W. 3 in his evidence told the trial court that the burglars stole his wrist watch in his flat and N768 in cash. In his wife's bedroom they removed a box of trinkets and N500.00 in cash. The three mobile policemen also gave evidence for the prosecution and described how the appellant was arrested. The appellant on his part gave the only
35 evidence for his defence. He told the trial court that on the day in question he was driving his father's Passat car Reg. No. LA 1251 BD on his way to his shop at No.42B Tejuosho Road, Surulere. When he got at Defecto a saloon car hit him from the back. Three men came out of the car that hit him and began to argue with him. Later two

mobile policemen came and directed them to move their cars to the side in order to allow the traffic to flow. e He was then asked about his vehicle's particulars and thereafter they were all taken to Panti Police Station. At the police station one of the men that hit his car told the police that the Passat car was a stolen vehicle. The appellant told the court that the police searched his house. He denied robbing 5 anybody on the 27th January, 1982.

At the close of the case for the defence Mr. Popopla, learned counsel for appellant, addressed the court. Mrs. Alao, Senior State Counsel, who appeared for the State, asked for an adjournment to prepare for a reply. On the adjourned date Mrs. Alao brought an application under s. 162 of Criminal Procedure Law asking for permission to amend the charge. Mr. Popoola, after going through the proposed amendment raised no objection to the application. The learned trial judge granted the application and the charge was 15 amended accordingly. In the amendment a fifth count of being in possession of a thing reasonably suspected of having been stolen was added to the charge. Thereafter the court recorded the following proceedings:

Registrar:- Please read the amended charge to the accused 20 and take his plea.

Court:- Charge is read and explained to the accused person in Yoruba by the Registrar, a sworn interpreter and he pleaded as follows:- 1st count, Not guilty, 2nd count, Not guilty, 3rd count, Not 25 guilty.

Court: Mr. Popoola, do you want all the prosecution witnesses to be re-called for the purposes of being cross examined.

Mr. Popoola:- I am not asking the court to recall any of the prosecution witnesses. There is no need. 30

Mrs. Alao:- I have two additional witnesses to call. I have a right to call additional witnesses, having amended the charge.

I rely on Section 165 of the Criminal Procedure Law.

Mr. Popoola: I agree she has a right to recall witnesses to be examined on the new count. 35

Court:- Case is adjourned to 30/7/85 for the prosecution to recall or resubmon its witnesses.

On the next day of hearing Mrs. Alao did not produce any of the prosecution witnesses she had earlier said she would recall. The

learned trial judge considered all the evidence adduced before him and, in a considered judgment, convicted the appellant on four counts of the amended charge. The appellant was discharged and acquitted in respect of the fifth count because the prosecution had not led any evidence to prove offence in the court. On appeal to the Court of Appeal, only one ground was filed and the issue formulated against it is simple and it reads: *"Was the learned trial judge right in convicting appellant and sentencing him to jail when his plea was not taken on every count of the amended charge."*

In his argument on the single issue, reproduced above, the learned counsel for the appellant before the Court of Appeal submitted that an amended charge is a fresh charge and it is imperative on the accused to plead to every count in the charge. He referred to section 164(1) of Criminal Procedure Law of Lagos State and stated that it was mandatory for the court to call upon the accused to plead to the amended charge. The learned counsel cited the case of *Eronini v. The Queen* (1953) 14 WACA 366; *Adisa v. Attorney-General Western Nigeria* (1965) 1 All NLR 412; *Queen v. Ogunremi* (1961) 1 All NLR 467 and *Fox v. Commissioner of Police* (1947) 12 WACA 215.

The Court of Appeal, as per the lead judgment of Awogu, JCA, with which Kalgo and Niki Tobi, JJCA., concurred, held that complaint of appellant was the failure to take his fresh plea when the charge was amended. The learned justice went on, in his judgment, and said: *"Although a plea was taken in respect of the 4th count when the trial commenced, there appears to be no plea, on amendment, in respect of this count. Similarly, while there was a plea in respect of the 3rd count, on amendment, the count was not mentioned at pages 52 - 53, although there was conviction for it. The 5th count, introduced on amendment led to no conviction and so is immaterial for the purpose on had (sic). Assuming therefore that there was an irregularity in respect of counts 3 and 4, no such irregularity attached to the 1st and 2nd counts. I agree therefore that the appellant was irregularly convicted in respect of counts 3 and 4. He is hereby discharged and acquitted in both counts."*

His conviction and sentence in respect of counts 1 and 2 are however affirmed. Accordingly, he is to serve a term of 30 years imprisonment with effect from 3rd December 1985 in respect of each count, but the sentence and (sic) to run concurrently."

It is against the above decision of the Court of Appeal that this appeal has been lodged and the only ground of appeal filed in support of the appeal, shorn of its particulars, reads: *"The learned Justices of the Court of Appeal erred in law in confirming the conviction and sentences of the appellant in spite of the fact that, fresh plea of the appellant was not taken on the amended charge."* 5

The issue for determination in this appeal therefore, is the procedure of taking a plea when a charge of more than one count is amended. The amendment may be through alteration by substitution of new counts for the original ones or addition of new counts to the charge. When such amendment" takes place is it mandatory, considering the provisions of section 164(1) of the Criminal Procedure Law, to take a fresh plea to all the counts in the charge, including those which have not been amended? On the other hand, is it only those counts which have been amended or newly added to the charge that a fresh plea shall be taken thereto. 10 15

Mr. Bashua, the learned counsel for the appellant, submitted that when a charge is amended, the amended charge becomes a fresh charge and by the provision of section 164(1) of the Criminal Procedure Law of Lagos State, it is imperative that the accused person must plead to the new charge as amended. Failure to do so, according to the learned counsel, renders the whole proceedings null and void. He argued that the Court of Appeal was in error to say that if the irregularity affected only part of the charge and not the whole of it, the proceedings will only be null and void to the extent of the part of the charge affected by the irregularity. 20 25

Mr. Bashua argued further that whether a charge contains one or several counts it is, by the provision of section 164(1) of Criminal Procedure Law, a charge. He referred to the case of R v. Ijoma (1947) 12 WACA 220 where the West African Court of Appeal held as follows: *"We have no doubt, however, that where the word "charge" is used in Section 162 and 163 of the present ordinance is refers to the document the accused is charge and includes, therefore, a document which may contain more than one statement of an offence."* 30 35

On the above authority counsel argued that a plea to a part of a charge is definitely not a plea to the whole charge. With respect to the submission of the learned counsel for the appellant the issue decided in the case of R. v. Ijoma (supra) can be distinguished from the

facts of this case. The issue in *R v. Ijoma* dealt with the power of a trial judge to alter or add to any charge at any time before judgment, as is provided for under s. 163 of Criminal Procedure Law. There is no dispute over the meaning of a charge in a criminal trial. It is also trite that, where there is more than one statement of offence in a charge, each such statements is in effect a separate count. *R. v. Nji Achie* 12 WACA, 209. The relevant issue for determination in this appeal, is whether it is mandatory, after the amendment of a charge containing more than one count, a fresh plea must be taken to all counts in the charge or only to those counts which have been amended.

In order to prove that a fresh plea must be taken by the accused to all the counts, including those not amended in the charge, Mr. Bashua cited the cases of *Fox v. C.O.P.* (1947) 12 WACA 215; *Eronini v. Queen* (1953) 14 WACA 366; *Queen v. Ogunremi* (1953) 1 All NLR 467 and *Adisa v. A-G of Western Nigeria* (1965) 1 All NLR 430. I have gone through those cases and I do not hesitate to say that none was decided on similar issue as the case in hand. In *Fox v. C.O.P.* the charge was of a single count and after the amendment, appellant's plea was not taken. The magistrate before delivering his judgment discovered that accused had not taken his plea. The magistrate thereafter wrote a ruling declaring the proceedings, so far recorded, a nullity and started a fresh trial. He was held right to do so.

In *Eronini v. The Queen*, appellant was charged of an offence and he pleaded not guilty. Before the trial commenced the charge was amended but no fresh plea was taken. After some evidence had been recorded the charge was again amended. But this time the appellant's plea was taken. At the end of the trial the appellant was convicted. On appeal it was held that the evidence taken before the second amendment was a nullity since the court did not comply with the provisions of s. 164(1) and (4) of Criminal Procedure Law. In *Ogunreni v. The Queen* (1961) NSCC, 220, the appellant was charged with rape but the prosecution in error wrote "contrary to section 229 of the Criminal Code". During the trial the error was pointed out and the prosecution amended the charge to read contrary to section 358 of Criminal Code. The trial court ruled that no fresh plea was necessary. On appeal it was held that failure of the trial judge to order for a fresh plea rendered the conviction and sentence a nullity.

In *Adisa v. A-G of Western Nigeria*, the offence charged in the

information was murder under section 257(1) punishable with death, but the particulars alleged that the defendant "unlawfully killed" the deceased which is a definition for manslaughter. During the trial the words "unlawfully killed" were deleted and replaced by the word "murder". The appellant was not called upon to enter a fresh plea nor was he permitted to recall witnesses. On appeal this court held 5 that upon amendment of a charge it was imperative for a fresh plea to be taken. The appeal was allowed; but retrial ordered.

It is quite clear that all the cases referred to by Mr. Bashus dealt with a single count in a charge. The case involves five counts in a charge. From the facts of the case, after the amendment, the appellant was made to plead to only three of the five counts. There were 10 no fresh pleas taken in respect of the 4th and 5th counts. The trial court convicted the appellant of the offences in the 1st, 3rd and 4th counts. Could the failure of the court to take the plea of the appellant 15 in respect of the 4th and 5th counts affect the whole trial?

The Court of Appeal quashed the conviction and sentence against the offences in the 3rd and 4th counts on the ground that there was an irregularity in respect of those counts. The irregularity 20 against the 3rd count is that the learned judge did not mention the count in his judgment and for the 4th count, although at the commencement of the trial a plea was taken, no fresh plea was made after the amendment of the charge.

The learned Director of Public Prosecutions, Lagos State, Mr. Rhodes-Vivour. in his submission referred to the original plea taken 25 to the first four counts which were earlier framed against the appellant and pointed out that after the 5th count had been added to the charge fresh pleas were taken to counts 1, 2, and 3, Mr. Rhodes-Vivour agreed that the appellant was not given any opportunity to 30 enter a fresh plea to count 4 or plead to count 5. The Director of Public Prosecution conceded therefore, that the conviction of the appellant against count 4 was wrong. He however submitted that the error affected only counts 4 and 5 and did not affect the conviction 35 against counts 1, 2 and 3. The issue of taking a fresh plea after amendment of a charge is a fundamental procedure in a criminal trial. In a one - count charge the position is very clear. Section 164(1) of the Criminal Procedure Law of Lagos State provides as follows:

"If a new charge is framed or alteration made to a charge un-

der the provisions of section 162 or section 163 of this Act the court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered charge."

However, where a charge contains more than one count the question is whether a fresh plea must be taken to each count or only
 5 to the counts which were altered or added to the charge. In the case of *Youngman v. Commissioner of Police* (1949) 4 F.S.C 283, at the hearing before a magistrate court, two of the counts of a four-count charge were amended, after the 8th prosecution witness had given
 10 evidence. The appellant was not called upon to plead to the amended counts and Mr. Okorodudu, who appeared for the appellant, in that case, submitted to the Federal Supreme Court that after alterations were made to counts 2 and 4 the Chief Magistrate should have called upon the appellant to plead and state whether he would still submit
 15 himself to be tried by the Chief Magistrate. The counsel argued that since no fresh plea was taken the trial was vitiated. Ademola C.J.F. (as he then was) writing the judgment of the court delivered his opinion in the following conclusion:- "*We are not in doubt, that the failure by the learned trial Magistrate to carry out the provisions of Section*
 20 *164(1) of the Criminal Procedure Ordinance was fatal; nor was the learned Crown Counsel prepared to support the conviction on count 2 of the charge which was so amended and which directly affected the appellant. At that stage there remained the question to be de-*
 25 *cided whether in view of the fact that counts 1 and 3 relate to a separate and different transaction from counts 2 and 4, the effect of noncompliance with Section 164(1) in so far as it relates to counts 2 and 4 could have effect on count 1. There was no amendment made to count 1, the facts of which constitute a different and separate of-*
 30 *fence to counts 2 and 4.*

Crown Counsel did not submit that the evidence going to prove counts 2 and 4 would have been admissible on counts 1 and 3 under any of the rules permitting evidence of similar offences to be given. We cannot feel assured that in reaching his finding on counts 1 and 3
 35 *the learned Magistrate did not take into consideration the evidence going to prove counts 2 and 4, and in face of Crown Counsel's concession we thought it unsafe to allow the conviction on counts 1 and 3 to stand. We therefore allowed the appeal on these counts also."*

It is settled that failure to comply strictly with the provisions of Section 164(1) of the Criminal Procedure Law is fatal, and renders any conviction in the proceedings invalid as regards the counts, the amendment of which is the occasion of the noncompliance. In other words, if a charge contains several counts and, after an amendment, the trial court fails to permit the accused to enter a fresh plea to the counts which have been altered or to new counts which have been added to the charge, the conviction against the unamended counts may not necessarily be quashed. In such a situation the nullity decision will affect only the new and altered counts. The earlier plea entered to the counts which were not amended is still valid.

The conviction against the unamended counts may however be nullified if the appeal court became satisfied that the evidence adduced in support of the amended counts, whose conviction had been quashed for non-compliance to s. 164(1) Criminal Procedure Law, influenced the findings in respect of the unamended counts.

I have given the full facts of this case and evidence adduced by both the prosecution and the defence, in his judgment. It is abundantly clear from those facts that all the five counts in the charge were framed against distinct acts and the evidence given in proof of each count could stand alone. The first four counts were based on conspiracy and robberies in separate houses and apartments. The 5th count was framed against the offence of being in possession of a thing, to wit, a Passat car, reasonably suspected of having been stolen. It is not correct as the learned counsel for appellant had submitted that the evidence used to prove the pleaded counts would be admissible to prove the unpleaded count. Each victim of appellant and his particeps criminis (still at large) gave evidence of what she or he had been robbed. The evidence of one victim cannot support a count framed against the theft from another victim's apartment.

In the result, I find no merit in this appeal. It is accordingly dismissed. The judgment of the Court of Appeal dismissing the appellant's appeal against conviction in respect of counts 1 and 2 of the charge framed against the appellant is hereby affirmed.

KARIBI-WHYTE JSC (Dissenting)

This appeal has raised an issue of critical procedural impor-

tance commonly encountered in the criminal courts. The practice is taken for granted. There errors are perpetuated. The threat of hardening or crystallizing into a rule of law is real. A charge is in law different from a count in the charge, even though colloquially the concept is interchanged. I have a preview of the judgment of my learned
5 brother Mohammed, JSC in this appeal. As our interpretations of the relevant decisions are diametrically opposed, I have decided to express my opinion in the way I understand the law. I will allow the appeal.

10 The issue for determination arising from the ground of appeal argued before us is as follows-

"Whether the trial judge was right in convicting the appellant and sentencing him to jail when his plea was not taken on every count of the Amended Charge."

15 The facts relating to the above issue are not in dispute. The dispute is only as to the interpretation of the mandatory provisions of section 164(1) of the Criminal Procedure Law of Lagos State.

The facts of the case

20 On the 30th November, 1983. Nosiru Attah, hereinafter referred to as the appellant was arraigned before Obadina J of the High Court of Lagos State, sitting at Ikeja, on a four count charge. consisting of conspiracy with persons unknown to commit armed robbery, contrary to section 403A of the Criminal Code, and the
25 2nd, 3rd and 4th counts of Armed Robbery, of various items of personal property of Mrs. Yetunde Oduneye on the 27th January, 1982. He pleaded not guilty to each of the four counts of the charge. The trial proceeded with the offences as in the counts to which the ac-
30 cused pleaded and was concluded on the 21st May, 1985. The Court adjourned to 4th June, 1985 for address.

Learned Counsel to the accused, Mr. Popoola, made his address on behalf of the accused on the 4th June, 1985. The Court adjourned to the 13th June, 1985 for the address of learned Counsel
35 for the prosecution. On the 13th June, Mrs. Alo appearing for the prosecution applied to amend the charge under section 162 of the Criminal Procedure Law. Learned Counsel relied on R v. Arisah & Kano (1981) 20 NLR. 22 and submitted that the addition of a new charge will not jeopardise the interest of the accused. Mr. Popoola for

the accused opposed the application. He submitted that the amendment will cause injustice to the accused.

Because learned counsel to the prosecution, Mrs. Ala had not at the time of the application even framed the amendment sought, she sought for an adjournment to bring the amendment. The application was adjourned to 25/6/85, and further at the instance of the prosecution to the 11th July, 1985. On the 11th July, 1985, Mrs. Alo, appearing for the prosecution applied to add a 5th Count to the charge before the Court.

Mr. Popoola for the accused on being shown the charge withdrew his opposition to the application for amendment. The application was granted, and the charge accordingly amended. The amendment granted became the 5th count to the charge which alleged that on the 27th January, 1982, accused at Shomolu in Ikeja Judicial Division, has in his possession in a car with registration No. LA 125/BD reasonably suspected to have been stolen.

It is pertinent to mention that the record of proceedings of the 11th July, 1985 at p.49 shows that the accused pleaded Not guilty to the 1st, 2nd and 3rd, Counts. It does not appear he was asked to plead to the 4th and 5th Counts. There is in fact no record of his plea in respect of those counts.

Mr. Popoola, in his reaction to the Court's question said it was not necessary to recall any of the prosecution witnesses. The trial was adjourned to 30/7/85 for the prosecution to recall or resummon its witnesses. There had to be a further adjournment to 5/11/85 at the instance of the prosecution when the case was closed because of the inability of the prosecution to produce its witnesses.

Mrs. Alo in her address left the facts entirely at the mercy of the Court. She urged nothing, disputed nothing, in address. The case was adjourned to 3/12/85 for judgment. The learned trial judge found the accused guilty of the offences charged in counts 1, 2, 3 and 4. He was sentenced to 30 years imprisonment on each count to run concurrently. The offence was reduced to that of robbery simpliciter in counts 2, 3 and 4. As there was no evidence in support of count 5, accused was acquitted and discharged on that count.

In the Court of Appeal

The accused appealed to the Court of Appeal. Only one ground of appeal was filed and relied upon. It is as follows excluding particu-

lars -

"(1) The learned trial Judge erred in law when he failed to take the plea of the appellant on every count to the charge after it was amended by the prosecution."

Before the Court of Appeal, learned Counsel to the appellant
 5 submitted that an amended charge being a fresh charge it was imperative that accused should plead to every count in the charge. Appellant relied on the provisions of section 164 (1) of the Criminal Procedure Law. It was submitted that the provision is mandatory and must be complied with. The decisions of Eronini v. The Queen (1953)
 10 14 WACA. 366, Adisa v. A-C. Western Nigeria (1965) 1 All NLR 412, Queen v. Ogunremi (1961) 1 All NLR. 467, Fox. v C.OP. (1947) 12 WACA 215 were cited and relied upon.

The Court of Appeal found that there was no plea in respect of
 15 the 4th and 5th counts. The Learned trial judge did not mention the 3rd Count, but found appellant guilty on the 1st, 2nd 3rd and 4th Counts.

The Court of Appeal observed that although there was a plea to the 4th Count at the commencement of trial, no further plea was
 20 taken after the amendment of the charge. The Court of Appeal regarded the absence of a plea in respect of the 4th Count after the amendment of the charge, and the failure to mention the 3rd Count in the judgment, as an irregularity, and acquitted the appellant in respect of those counts. The conviction and sentence in respect of
 25 counts 1 and 2 which were held robe regular, the pleas having been taken after the amendment were affirmed.

Concisely stated the irregular counts 3 and 4, were severed from the regular counts 1 and 2 for the purposes of the validity of the
 30 charge. Appellant has now come before us challenging the decision of the Court of Appeal. In the Supreme Court

The four grounds of appeal filed by appellant in Prison Custody were withdrawn by Mr. Bashua, learned Counsel to the appellant who on the 23rd February, 1993 filed in substitution only one
 35 ground of appeal in their stead. The ground of appeal substituted is in substance and in effect identical with the only ground filed and argued in the Court below. It reads-

"1. The learned Justice of the Court of Appeal erred in law in confirming the conviction and sentence of the appellant in spite of

the fact that, fresh plea of the appellant was not taken on the Amended Charge."

Particulars of Error

(a) The appellant was originally charged with a four count charge and he pleaded to all the four Counts of the charge before the proceedings stated at page 24 of the proceedings. 5

(b) The said charge was under section 162 & 163 of the Criminal Procedure Law amended by the addition of another count, making it a five count charge.

(c) Contrary to the mandatory provision of section 164(1) of the Criminal Procedure Law Lagos State, the appellant at page 49 pleaded to only three of the five counts charged, and not to the whole charge, but the trial judge found him guilty on four of the five counts charged and sentenced him accordingly. 10

(d) The Justices of the Court of Appeal in spite of the failure to comply with the provisions of section 164(1) of the Criminal Procedure Law, Lagos, confirmed the conviction and sentence of the appellant on the 1st and 2nd counts of the charge. 15

(e) On the authorities of *Adisa v. Attorney-General of Western Region* (1965) 1 ANLR. 412 and *R v. Ijoma* (1947) 12 WACA. 220 the non-compliance with the mandatory provisions of section 164 (1) of the Criminal Procedure Law, render the whole proceedings null and void, because there is only one charge which is not separable." 20 25

In Appellant's brief of argument in this appeal filed by Mr. Bashua, the only issue for determination was formulated as follows -

"Whether the Court of Appeal was right in holding that the failure to take the plea of the appellant on the counts which made up the amended charge, did not render the whole proceedings null and void." 30

Mr. Bode Rhodes- Vivour for the Respondent in his brief of argument agreed with the formulation of the issue but expressed his own formulation differently. Mr. Bashua opened his argument with the proposition that an amended charge is afresh charge. He then went on to submit that it is imperative and in compliance with the mandatory provisions of section 164(1) of the Criminal Procedure Law that the accused person must plead to the charge as amended. 35

Non-compliance renders the proceedings null and void. Learned Counsel relief on *Fox v. C.O.P.* (1947) 12 WACA 215; *Eronini v. The Queen* (1953) 14 WACA, 336; *Queen v. Ogunremi* (1961) 1 ANLR 412; *Adisa v. Att. Gen. Western Nigeria* (1965) 1 All NLR 412.

5 It was submitted that the Court of Appeal was wrong to hold that the non compliance with the mandatory provisions of section 164(1) is a mere irregularity, which did not affect the whole charge as laid.

10 It was submitted that a charge is a charge in respect of S. 164 (1) within the definition whether it contains one or several counts. *R. v. Ijoma* (1947) 12 WACA 220 was cited. Non-compliance with the provision of section 164(1) in respect of all the counts that make up the charge will render the proceedings null and void.

15 The plea of the accused in respect of the charge is a condition precedent to his valid criminal prosecution, and failure to comply with such a fundamental requirement will render the proceedings a nullity. Failure to take the plea is not a mere irregularity that can be cured or waived. *Madukolu & Ors v. Nkemdilim & Ors.* (1962) 1 All NLR 587 was cited in support. It was submitted relying on the defini-
20 tion of the word "charge" and *R v. Ijeoma* (1947) 12 WACA 220 that a plea to a part of a charge is definitely not a plea to the whole charge; therefore a plea to three out of five counts is not a plea to the charge. Finally, learned Counsel argued that counts 1 and 2 cannot
25 be saved by non-compliance with S.164(1), if the evidence going to prove the counts to which there is plea would be admissible to prove those in respect of which there is no plea - *Youngman v. C.O.P.* (1959) 4 FSC 283. The conviction of the accused was based on the same evidence.

30 The determination of this appeal would seem to me to turn on the proper interpretation of the provisions of section 164(1) of the Criminal Procedure Law of Lagos State and related sections of that law. It is common ground that before the judgment and after the address of counsel for the appellant, the prosecution applied for and
35 was granted leave to amend the charge. The charge was accordingly amended before the judgment. The complaint in the court below and before this court has been consistent. It is that the charge was not read to the accused after the amendment. hence the trial, consequently the conviction and sentence was a nullity.

The Court of Appeal however accepted the fact that not all the counts in the charge was read to the appellant. It found that the 5th count in the charge which was the subject-matter of the amendment was read to the appellant, and the appellant pleaded to it. Appellant was not found guilty of that count. It was held that the absence in the record of proceedings of the plea in respect of the 4th count after the amendment, and the failure to mention the 3rd count in the judgment were irregularities, which did not affect the convictions in the 1st and 2nd counts. I do not think this represents the law. 5

The question now is whether this represents the proper construction of the enabling section 164(1) of the Criminal Procedure Law of Lagos State, under which the amendment was made? I shall now reproduce the section and attempt analysis of its provision. 10

Section 164 (1) provides,

"(1) If a new charge is made or alteration is made to a charge, under the provisions of section 162 or section 163 the Court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried in such charge or altered charge." 15

I think it is necessary also to reproduce section 163 of the Criminal Procedure Law which is relevant to the interpretation of section 164(1) and pertinent to the determination of this appeal. It is as follows - 20

"163. Any Court may alter or add to any charge at any time before judgment is given or verdict returned and every such alteration or addition shall be read and explained to the accused." 25

Reading and construing section 163 alone and in isolation suggests that a court is empowered to alter or add to any charge at any time before judgment, or verdict of the trial. It goes on to provide that such alteration or addition which constitutes the amendment shall be read explained to the accused. It has been suggested that it is not necessary to read the whole charge to the accused; and that it was sufficient if the alteration or addition to it was read to the accused. The word "charge" is here used in two senses. The document containing the charge or charges on which the accused has been arraigned or the count charging a particular offence. It is the free interchange of this ambivalent meaning that has led to the confusion. 30 35

The expression here used in "shall" which in this circumstance is mandatory. Section 2 of the Criminal Procedure Law has defined

the word "charge" to obviate the importation of the two meanings. "Charge" has been defined to mean,

"the statement of offence or statement of offences with which an accused is charged in a summary trial before a court."

This definition contemplates a document containing one offence or a number of offences. It does not seem to me that it envisages the separate counts of offences in the document. This is the meaning given to the word by the West African Court of Appeal in *R v. Ijoma* (1947) 12 WACA. 220, when it said,

"It is clear from the definition in section 2, that a "charge" is a document whereby the accused is charged with the commission of an offence or of more than one offence."

It is clear from this that the Court was referring to the document containing the statement of offence or offences, rather than the offences themselves. For the separate offences where there are more than one in the document, the Court referred to *R v. Nji Achie* 12 WACA 209, where it was held that where there is more than one statement of offence in a charge each of such statements is in effect a separate count. The Court pointed out the confusion resulting from the use of the word "charge" to describe the "document which may contain statements of more than one offence, because it is also used in the more ordinary sense of accusation. The Court then declared firmly the scope of the Criminal Procedure Ordinance, in pari materia with sections 162 and 163 of the Criminal Procedure Law, as follows

"We have no doubt however, that where the word "charge" is used in sections 162 and 163 of the present Ordinance it refers to the document whereupon the accused is charged and includes, therefore, a document which may contain more than one statement of offence" "per Verity C.J. at p.222.

Thus the "charge" in law, is the document, and not the statement of offence or offences in the document. This was made clear in the judgment when the learned C.J., referring to the amendment powers said;

".....in a summary trial, by virtue of section 162 and 163 of the Ordinance it is clear that under the former section the Court may, when the accused is arraigned, permit or direct the framing of a new charge (that is to say, an entirely new document) or add to or other-

wise alter the original charge (that is to say, add to or otherwise alter the document then before it). Under section 163 the court may at any charge (that is to say, add to or alter the document then before it). The distinction is to be found in the fact that, whereas before the accused has pleaded thereto, the Court may permit or direct the framing of an entirely new charge, after plea it is only open to the court to permit or direct such alteration of or addition to the original charge as may be permissible having regard to the rules for the joinder of offence in one charge."

It is a well settled principle in the interpretation of statutes that where a word has been defined in a statute, the meaning 'given to it in the definition must be adhered to in the construction of the provisions of the statute unless the contrary intention appears from the particular section or the meaning is repugnant in the context in which the definition is used - See S.3 Interpretation Act, 1964, Ejoh v. IGP. (1963) 1 All NLR. 250, Apompa v. State (1982) 6 C 47. The word "charge" having been defined by S.2 of the Criminal Procedure Law, the definition must govern the other sections wherever it appears unless the context otherwise requires or it is repugnant. As I do not construe it to be so, it governs.

There is no dispute in this case that there was an amendment to the charge in respect of which appellant was being tried. The dispute is whether section 164(1) of the Criminal Procedure Law was complied with. The learned trial judge invoked the provisions of section 163. It is an essential condition for the validity of the exercise of the power under section 164(1) for the alteration of a "charge", that the Court shall forthwith call upon the accused to plead to the charge, and to say whether he is ready to be tried on such charge or altered charge.

The condition precedent to the exercise of the power to amend the charge is clearly prescribed in section 164(1) of the Criminal Procedure Law already reproduced in this judgment.

It is essential that the accused must be called upon to plead to the charge as amended - See Fox v. Police (1947) 12 WACA 215. Eronini v. The Queen (1953) 14 WACA 366. The charge as amended must have been read and explained to the accused - See Adisa v. A-G. Western Nigeria (1965) 1 All NLR. 412. The accused shall be asked to state whether he is ready to be tried on the charge as altered. - See

Jones v. Police (1960) 5 FSC. 38. The requirements of section 164(1) are mandatory. The expression "shall" used therein is imperative and not merely directory or predatory. The provision is demanding that something be done. - See Bucknor - Maclean Ltd. v. Inlak Ltd. (1980) 8 -11 S.C. 1. The requirements of section 164(1) must be strictly

5 complied with, Non-compliance results in nullity of the trial however otherwise well conducted - See Eronini v. The Queen (1947) 12 WACA 210, Jones v. Police (1960) 5 FSC. 38; The Queen v. Ogunremi (1961) 1 All NLR 467 - See also Okegbu v. State (1979) 11 S.C.1

10 It is important to consider also the effect of the provisions of section 164(4) which reads-

15 *"(4) Where a charge is so amended, a note of the order for amendment shall be endorsed on the charge, and the charge shall be treated for the purpose of all proceedings in connection therewith as having been filed in the amended form."*

Sub-section (4) of section 164 renders as amendment retrospective to the date of the filing of the charge. Hence, it is always necessary to read sub-sections (1) and (4) of section 164 together. It is only when so read together and the "charge" treated for the purpose of all proceedings in connection therewith, will it be obvious that offences which form an integral

20 part of the charge cannot be treated in isolation. The amendments to the offences relate back to the date of the filing of the document containing them. - See R v. Ijoma (supra). This is because the alteration or addition to the charge is an alteration of the document containing the offences. Hence

25 a new document results from the amendment. There is no doubt however that it is permissible to amend a charge after final addresses and before delivery of judgment where there is compliance with the mandatory provisions of sections 164 and 165 - See R v. Kano & Arisah (1951) 20 NLR. 32;

In Duvall v. Commissioner of Police (1961) 1 All NLR. 115, the

30 Federal Supreme Court held that where the charge contains more than one count, the accused shall plead in each count separately Non-compliance results in a fatal irregularity rendering the prosecution a nullity. The fact that it is an amendment is immaterial. It is a fresh charge - See R v. Ijoma (supra).

35 Let us now consider the position in the appeal before us. A few anomalies in the trial patent on the face of the record are deserving observation. It is on record that the learned trial judge read and explained the amended charge to the appellant, but he recorded appellant's plea only in respect of the 1st, 2nd and 3rd counts of the charge. There is nothing to

show that the 4th and 5th counts were read to appellant, and that his plea was taken in respect of these counts. It is therefore not correct to say that the charge as amended was read to the appellant and his plea was taken in respect of them. As Mr. Bashua correctly pointed out, reading part of the charge, namely some of the counts is not reading the whole charge. The confusion arose from the difficulty in making a clear distinction between a charge and a count for the purpose of the amendment. 5

Again, the learned trial judge was able to indicate in his judgment that only the 1st 2nd, 4th and 5th counts constituted the amended charge. He omitted the 3rd count. The learned trial judge found the appellant guilty on the 3rd count which was not mentioned in the charge as amended. 10 These non-compliance with section 164(1) were accentuated in the judgment of the Court of Appeal where it stated as follows - at p.86 lines 9-14,

"Although a plea was taken in respect of the 4th count when the trial commenced, there appears to be no plea in respect of the 3rd count, on amendment, the count was not mentioned at pages 52-53, although there was a conviction for it." 15

The Court below regarded these non-compliance as irregularities. I cannot on the state of the authority of decided cases agree with the categorisation of the noncompliance. The Court of Appeal has followed the logical conclusion of their erroneous view to hold that the non-compliance with section 164(1) was an irregularity in holding as follows - (See p. 20 86 lines 14-19),

"Assuming therefore that there was an irregularity attached to the 1st and 2nd counts. I agree therefore that the appellant was irregularly convicted in respect of counts 3 and 4. He is hereby discharged and acquitted in both counts 3 and 4. His conviction and sentence in respect of counts 1 and 2 are however affirmed." 25

It seems to me that the court below has ignored the definition of the word "charge" in section 2 of the Criminal Procedure Law, and the judicial interpretation of the section in R v. Ijoma (supra). The court below also 30 ignored the unambiguous provision of sub-section (4) of section 164 which provided that the amendment was to be retrospective to the filing of the charge. The correct view based on the enabling statutory provisions and judicial decisions is that the charge is the document containing the offences. Any amendment is an introduction of a new charge, which should 35 be read and explained to the accused. Hence it is not sufficient merely to read and explain the particular count which is altered or added.

In Youngman v. C.O.P. (1959) SCNLR 690; (1959) 4 FSC 283 it was clearly stated, and following earlier cases, that the failure to carry out

the provisions of section 164(1) of the Criminal Procedure Ordinance, which is in pari materia with the present Criminal Procedure Law was fatal.

In that *Youngman v. C.O.P.* (supra), appellant was tried together with three other accused persons by the Chief Magistrate, Jos, on four counts of conspiracy and obtaining money by false pretences. The 1st and
5 3rd counts relate to one transaction, whilst the 2nd and 4th relate to another. All the accused were convicted on all the counts in respect of which they were charged. Appellant and the 2nd accused appealed to the High Court, Jos. The appeal of 2nd accused was allowed on the two counts. Appellants conviction was affirmed. He appealed to the Supreme Court.
10 The only ground of appeal was on the non-compliance with section 164(1) of the Criminal Procedure Ordinance.

There was evidence, which was not disputed, that count 2 with which appellant was charged, and count 4 which did not concern him were amended by the alteration of certain figures without calling upon him to
15 plead thereto and to state whether he would submit to summary trial before the Chief Magistrate. It was argued that this non-compliance vitiated the whole trial. The Supreme Court agreed with this submission.

Now, *Youngman v. C.O.P.*(supra) is particularly relevant to this appeal because the reasoning is in all fours with the appeal before us. However, the Court of Appeal adopting a different view arrived at a different
20 conclusion.

In the case as in the instant appeal, counts 1 and 3 relate to a separate transaction and were not prima facie affected by the non-compliance with section 164(1). There was no amendment to counts 1, 2, 3 and
25 4 in the instant appeal, as there was none to count 1 in *Youngman v. C.O.P.* (supra). But the Supreme Court did not consider it safe to ignore the non-compliance, which has always been regarded as fatal and vitiating, and said,

"We cannot feel assured that in reaching his findings on counts 1
30 and 3 the learned Magistrate did not take into consideration the evidence going to prove counts 2 and 4, and in face of crown counsel's concession we thought it unsafe to allow the conviction on counts 1 and 3 to stand. We therefore allowed the appeal on these counts also." - per Ademola, FCJ.

35 The legal situation in the instant case is compelling. The amendment to the charge consisting in count 5 was shown to have been read to the accused. It is however patent and self evidence on the record of proceedings that though the amendment consists in the entire charge, which is the document containing all the counts, not all the counts were read and

explained to the appellant and in respect of which he pleaded after the amendment. There is no clearer non-compliance with the provisions of section 164(1) of the Criminal Procedure Law. Mr. Bashua has submitted, and I agree entirely with him, that counts 1 and 2 of the charge cannot be saved by the non-compliance of the provisions of section 164(1) of the Criminal Procedure Law. The entire proceedings being a nullity, the appellant is entitled to be discharged. 5

The question therefore arises whether in the circumstances where the trial is a nullity a retrial was not the appropriate order. The conditions for ordering a retrial has been prescribed in *Abodundu v. R.* (1959) SCNLR 162; (1959) 4 FSC. 70. Though not exhaustive they have been accepted as invaluable guides. - See *Okoduwa v. State* (1988) 2 NWLR. (Pt76) 333, *Ankwa v. State* (1969) 1 All NLR, 133, *Okosun v. State* (1979) 3 & 4 S.C. 31 at p.52. The Court must be satisfied:-

"(a) that there has been an error in law (including the observance of the law of evidence), or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand, the Court is unable to say that there has been no miscarriage of justice; and to invoke the provision of section 22 of the Supreme Court Act. 15

(b) that leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant 20

(c) that there are no such special circumstances that would render it oppressive to put the appellant on trial a second time.

(d) that the offence or offences with which the appellant was convicted, or the consequences to the appellant or any other person of the conviction or acquittal of the appellant, are not merely trivial, and 25

(e) that to refuse an order of re-trial would occasion a greater miscarriage of justice than to grant it."

All these conditions must co-exist for a Court to order a retrial - See *Ankwa v. The State* (1969) 1 All NLR. 133, *Okafor v. The State* (1976) 5 SC. 13. Applying the above principles, and the fact that appellant was convicted and sentenced to 30 years imprisonment in each of the counts to run concurrently since 3rd December, 1985, and has been serving the term since that date, to order a retrial will be oppressive to the appellant. Memories of the witnesses must by now be dim and some of the witnesses might now be inaccessible. I do not consider it right in all the circumstances to 35 order a retrial - See *State v. Lopez* (1968) 1 All NLR 356.

The appellant is entitled to be acquitted and discharged of the offences with which he was convicted and sentenced. I hereby so order.

OMO JSC

I have had a preview of the judgment of my learned brother Uthman Mohammed, JSC.

5 For the reasons he has set out in his judgment, which I entirely agree with and adopt as my own, I also dismiss this appeal.

In addition to the reasons set out in the aforementioned judgment. I will add that no injustice has been occasioned by allowing a conviction to stand on a count properly pleaded to and proved. It would be a case of
10 relying on a technicality to hold the contrary.

KUTIGI JSC

The only issue for determination in this appeal is whether failure by
15 the trial court to take a fresh plea on each and every count of the charge after an amendment did render that trial a nullity.

The appellant at the Lagos High Court faced a four-count charge as follows

"STATEMENT OF OFFENCE -1ST COUNT

20 Conspiracy to commit armed robbery contrary to Section 403A of the Criminal Code.

PARTICULARS OF OFFENCE

Nosiru Attah (m) on or about the 27th day of January, 1982 at Shomolu, in the Ikeja Judicial Division conspired together with others now
25 at large to commit armed robbery.

STATEMENT OF OFFENCE - 2ND COUNT

Armed robbery. contrary Losection 402(2) (a) of the Criminal Code.

PARTICULARS OF OFFENCE

Nosiru Attah (m) on or about the 27th day of January. 1982 at
30 Shomolu, in the Ikeja Judicial Division being in company of other persons unknown and armed with a firearm and an offensive weapons to wit, a pistol and broken bottle respectively robbed one Mrs. Yetunde Oduneye (f) of her jewellery valued at N450.00k and the sum of N250.00.

STATEMENT OF OFFENCE - 3RD COUNT

35 Armed robbery, contrary to section 402 (2) (a) of the Criminal Code.

PARTICULARS OF OFFENCE

Nosiru Attah (m) on or about the 27th day of January, 1982, at Shomolu, in the Ikeja Judicial Division, being incompany of other persons unknown and armed with a firearm and an offensive weapon to wit, a

pistol and broken bottle respectively robbed on Mrs. F. Beyioku of her jewellery valued at N4,000.00 the sum of N400.00 cash and a pocket cassette player.

STATEMENT OF OFFENCE - 4TH COUNT

Armed robbery, contrary to section 402(2) (a) of the Criminal Code.

PARTICULARS OF OFFENCE

Nosiru Attah (m) on or about the 27th day of January 1982 at Shomolu, in the Ikeja Judicial Division, being in company of other persons unknown and armed with a firearm and an offensive weapon to wit: a pistol and broken bottle respectively robbed one Mr. Awotungbe (m) of jewellery valued at N4,000.00 a purse valued at N450.00, a wrist watch 10 valued at N150.00, packet of clips valued at N15.00k and the sum of N1,276.00k."

The records shows on page 24 that after the charge were read and explained to the appellant, he pleaded as follows

1ST COUNT

NOT GUILTY

2ND COUNT

NOT GUILTY

3RD COUNT

NOT GUILTY

4TH COUNT

NOT GUILTY

The prosecution thereafter called its witness and closed its case. The appellant then gave evidence on his own behalf but called no witnesses. The case was then adjourned for addresses by counsel. On the adjourned 25 date, counsel for the appellant addressed and the case was further adjourned for the prosecution to reply. Meanwhile the prosecution filed an application under section 162 of the Criminal Procedure Law (Lagos State) to amend the charge by adding another count to the charge. The application which was not opposed was granted. The new count, now count 5, 30 reads thus:

"STATEMENT OF OFFENCE - 5TH COUNT

Being in possession of things reasonably suspected of having been stolen contrary to Section 403(1) of the Criminal Code Law.

PARTICULARS OF OFFENCE

Nosiru Attah on or about the 27th day of January, 1992, at Shomolu in the Ikeja Judicial Division, had in your possession car with registration No. LA 1251 BD reasonably suspected to have been stolen."

After the amendment, the record on page 49 shows that the charges

were read and explained to the appellant wherein he pleaded again as follows-

1ST COUNT
NOT GUILTY
2ND COUNT
5 NOT GUILTY
3RD COUNT
NOT GUILTY

It is surprising that there was no plea recorded for either the (old) 4th Count or the (new) 5th Count.

10 The High Court in its judgment found the appellant guilty on count 1, for conspiracy. In respect of counts 2, 3 & 4 he was found guilty of robbery under section 402(1) of the Criminal Code. He was convicted and sentenced accordingly. He is a however discharged and acquitted in respect of the (new) 5th Count.

15 Dissatisfied with the judgment of the High Court, the appellant appealed to the Court of Appeal on the sole ground that his convictions and sentences were wrong because his pleas were not taken afresh on each and every count of the amended charge.

20 The Court of Appeal in a reserved judgment said there were some irregularities (which I cannot see as explained hereunder) in connection with pleas in respect of counts 3 & 4 and consequently set aside convictions and sentences on those counts. It however found no irregularities in respect of counts 1 & 2 and therefore confirmed the convictions and sentences on the two counts.

25 Still not satisfied with judgment of the Court of Appeal the appellant has now further appealed to this Court. As I said above the only issue for resolution is whether or not failure by the trial court to take fresh plea on each and every count after the amendment, rendered the entire proceedings or trial null and void.

30 Mr Bashua learned Counsel for the appellant submitted that failure by the court to take of fresh plea in respect of the amended charge in strict compliance with the mandatory provision of section 164(1) of the Criminal Procedure Law rendered the whole proceedings null and void. He said whether a charge contains one count or several counts, it is by the provision
35 of section 164(1) CPL a charge, and that non compliance with the section in respect of all the counts that make up the charge will render the proceedings null and void. That the taking of a plea of the accused in respect of the charge is a condition precedent to the Criminal prosecution and failure to comply will render the proceedings a nullity because it is fundamental and

not a mere irregularity that can be cured or waived. It was contended that plea to part of a charge is not a plea to the whole charge and therefore a plea to three out of the five count-charge is not a plea to the charge. A charge is not separatable. He said counts 1 & 2 of the charge ,cannot be saved by non compliance with the provision of section 164(1) C.PL, if the evidence going to prove the pleaded count would be' admissive to prove the unpleaded count, in which case the whole proceeding is null and void. He said the conviction of the appellant on all the four counts were based on the same evidence and that the appellant is entitled to be discharged and acquitted.

The following cases were relied upon -

Fox v. Commissioner of Police (1947) 12WACA 215

Eronini v. The Queen 1953 14 WACA 366

Queen v. Ogunremi (1961) 1 All NLR 467

Adisa v. A.G. Western Nigeria (1965) 1 All NLR 412

R. v. Ijoma (1947) 12 WACA 220

Youngman v. Commissioner of Police (1959) 4 FSC 283

Madukolu v. Nkemdilim (1962) 1 All NLR 587

Mr. Bode Rhodes-Vivour learned Director of Public Prosecutions submitted that there was no doubt that before the trial commenced appellant pleaded to the four count-charge preferred against him. He said after the charge was amended and a fifty count added, appellant pleaded to only three of the five counts. It was his view therefore that the appellant was not properly tried in respect of counts 4 & 5 to which he did not plead. Since the irregularity affected only party of the charge, the proceedings would only be void to the extent of the irregularity. He said only counts 4 & 5 were affected by the wrong procedure and that Counts 1, 2 & 3 were not affected at all.

Now section 164(1) of the Criminal Procedure Act reads as follows-

164 (1) If a new charge is framed or alteration made to a charge under the provision of section 162 or section 163 the Court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered charge."

There is no doubt that the word "charge" in section 162 to 165 CPA is sometimes used in the sense of an accusation of an offence, the equivalent of a "count" in an information. It is also sometimes used in the sense of a "charge sheet" a whole document which may contain one or more counts of accusation or statements of offence. The task here now is to ascertain the appropriate meaning of the word within the context of the law. I am clearly of the view that the word "charge" in section 164(1) CPA above

means a count of accusation only (see for example *Edun & Ors v. I.G.P.* (1966) 1 All NLR 17; *R v. Ijoma* (1947) 12 WACA 220)

It follows therefore that in a document where there is more than one statement of offence (as in this case) each and everyone of the statements of offence is easily a charge and any or all of them may be altered or amended.

5 They may also be added to. In such a situation it will be mandatory on the Court to call upon the accused to plead to the altered or amended count or charge or the new count or charge. There will be no need for appellant to plead again to any charge or count not affected by the alteration or amendment. This was the procedure followed in the cases of *Eronini v. Queen* (supra) and *Youngman v. C.O.P.* (supra) heavily relied upon by appellant. I am not in doubt at all that failure by the learned trial judge to carry out the mandatory provision of section 164(1) CPL was fatal to the new count 5 of the charge. That failure rendered the trial of count 5 a nullity. *Eronini v. Queen* (supra), *Youngman v. C.O.P.* (supra).

15 As for counts, 1, 2, 3 & 4 the appellant had properly pleaded to those counts at the commencement of trial as shown above. Those pleas were not affected by the new counts, and the appellant was not expected to plead all over again to those counts. As shown above the learned trial judge attempted to take fresh pleas after the amendment was granted, but
20 he stopped along the way after count 3. I am of the view that the omission to take a fresh plea on count 4 which was never amended or altered did not affect the plea already recorded for the count at the commencement of trial.

I need hardly state that the original four counts on which the appellant was convicted related to conspiracy and robberies involving jewellery, sums of money, a cassette player, a wrist watch, a purse and a packet of clips. The new 5th count, however, related to the possession of a car reasonably suspected to have been stolen. It is significant not to note that neither the prosecution nor the defence called or recalled any witness after 5th
30 count was added to the charge. There was no question therefore, of any possibility of the learned trial judge reaching his findings on counts 1, 2, 3 & 4 without taking into consideration the evidence going to prove count 5 as was the case in *Youngman v. C.O.P.* (supra). The appeal clearly lacks merit and it fails.

35 For the above reasons and the fuller reasons given by my learned brother Mohammed J.S.C. I will also dismiss the appeal. The convictions and sentences are hereby affirmed.

ONU JSC

I have had the privilege to read in draft the lead judgment of my learned brother Uthman Mohammed, J.S.C. just delivered. I agree with it that the appeal lacks merit and ought to fail.

I wish to add a few words of mine to what I consider to be a very comprehensive consideration of the lone, but tricky issue in the lead judgment regarding which there have been few or no direct authorities. It is as to whether it is mandatory, after the amendment of a charge containing more than one count, a fresh plea must be taken to all the pre-existing in the charge or only as to those counts which are subsequently amended. The preponderance of decided cases reviewed in the lead judgment though not directly apposite would tend to the latter rather than the former view point.

In the instant case on appeal, the charge to which a plea had earlier been recorded contained four counts and after an amendment was effected by the addition of a fifth count, there was a failure on the part of the trial Court to take a fresh plea to the 4th and 5th counts. While the appellant was discharged and acquitted in respect of the 5th count, he was convicted on counts 1 to 4 of the amended charge by the trial court. On appeal to the Court of Appeal, his conviction on count 3 and 4 was set aside while that on counts 1 and 2 was affirmed.

I do not share learned counsel for the appellant's view, upon a careful consideration of the available authorities both before and in respect of section 164(1) of the Criminal Procedure Law of Lagos State, duly taken account of in the lead judgment as hereinbefore alluded to, that failure to plead to the new charge involving the five counts when conviction was eventually secured on counts 1 and 2 to which a plea had earlier been taken before the amendment, is fatal to the case.

Rather, I agree with the learned D.P.P's view-point as correct and in accordance with procedural law.

Moreover, it is noteworthy firstly, that the appellant having been represented by counsel through out his trial and secondly, that in as much as it appears to me clear that no miscarriage of justice has been occasioned thereby, the appellant's conviction upheld by the Court must be allowed to stand and should in no way be disturbed.

For these and the fuller reasons set out in the lead judgment with which I entirely agree, I will accordingly myself dismiss the appeal.