

SUPREME COURT OF NIGERIA
26TH NOVEMBER 1993, SC. 62/1990
CORAM:- A.G. KARIBI-WHYTE, S. M. A. BELGORE, O. OLATAWURA,
U. MOHAMMED, S. U. ONU, JJSC

S.A. OREPEKAN & 7 OTHERS.

IN RE: 1. N.O. AMADI)

2. DANIEL OKORAFOR APPELLANTS

3. COLLINS UBANIOCHA

V.

THE STATE RESPONDENT

CRIMINAL PROCEDURE - Where prosecution's case is full of unproven facts and Loopholes - whether conviction is safe

CRIMINAL PROCEDURE - Evidence of an accomplice - where unreliable - need for corroboration

EVIDENCE - Criminal law - Conspiracy to steal - whether there is direct and positive evidence incriminating the appellant

EVIDENCE - Criminal procedure - evidence of an accomplice - requirement of corroboration - how properly determined.

FACTS

The Appellants together with other accused persons were arraigned before the Lagos High Court for offences of conspiracy to steal, conspiracy to commit forgery, Stealing, forgery, uttering a false document and inducing delivery of money by false pretences. The prosecution alleged that six United Bank For Africa (U.B.A.) cheques belonging to N.E.P.A. were stolen from the Authority's premises. The stolen cheques were later forged and fraudulently uttered to U.B.A. which was induced to deliver them to Bank of India, Lagos on the pretence that one Sadayan Overseas Industrial Company Limited was the owner of the money expressed on the six cheques totalling about N1,769,813.00.

The trial Judge found the Appellants guilty on some of the charges against them and sentenced them to various terms of imprisonment, whilst acquitting two of the accused persons. Appellant's appeal to the Court of

Appeal was dismissed. On further appeal to the Supreme Court, the 3 Appellants presented various issues for determination as it affected them, one of which was, whether imprudent or negligent conduct can sustain a charge of stealing or conspiracy under the code as held by the lower courts.

HELD (unanimously allowing the appeal)

1. From the findings of the learned trial Judge, it is without doubt that he did not receive direct and positive evidence incriminating the 1st Appellant in the conspiracy to steal. (P.46 L13)

2. The prosecution's case is full of unproven facts and loop-holes that make it unsafe to convict the 2nd Appellant of the offences in the various counts. (P.47 L36)

3. Since an accomplice is a suspect witness hence the requirement of corroboration to his testimony, it is not for the Judge to pick and choose which part of the accomplice's evidence he could believe and which part needs corroboration. (P.49 L20)

4. The court can convict once it is satisfied that the evidence of an accomplice is reliable even without corroboration. But once the court is in doubt as to the truth of such evidence, it is unsafe to convict an accused based on any part thereof. One lie in an accomplice's testimony, makes the whole of his evidence suspect and the judge ought not convict unless he receives corroboration of material particular implicating the accused. (P.49 L24)

5. The evidence of PW2 from beginning to the end disclose how unreliable that witness is-and being an accomplice who took a leading part in the commission of the crime, his evidence as a whole ought to be corroborated. The Court of Appeal is, therefore, in error to affirm the conviction and sentence of the Appellants. (P.49 L30)

PER OLATAWURA JSC *This finding appears, to me to have been based on what the appellant ought to have done, but not on what he did. It is my view that finding of fact must be based on credible evidence or reasonable inference drawn from the facts presented by the prosecution or the parties in the case of a civil action. It is unsafe to base a conviction on speculative findings". (P. 52 L15)*

PER ONU JSC. *“The learned trial Judge’s findings set out above to the effect that the 1st Appellant (with another) was grossly negligent and that this resulted in the removal of the six cheques mentioned in count 3 of the Information - a finding upon which his conviction partly hinged, is in my view, therefore clearly wrong. For as rightly conceded in the respondent’s brief by its Counsel, negligence is not an express requirement for a charge of stealing under Section 383 of the Criminal Code nor is there general criminal liability for negligence except in the Law of Torts. Where, however, negligence is a mental element of a crime, a penal statute would normally make an express provision for it.” (P. L)*

REPRESENTATION:

Ben. E. Nwazojie SAN, with Chief P.O. Okolo, Frank Ezekwueche, E.S.C. Obiora, Emma Okafor and Miss Uche Nwazojie for the 1st Appellant Bankole Aluko Esq. with D.O. Bello for the 2nd Appellant B A. Bodede Esq., for the 3rd Appellant

David Onyeike Esq., with O. Afoikeya (Legal Officers Lagos State) for the Respondent.

CASES REFERRED TO

1. Edu v. C. O. P. 14 WACA 163
2. R. v. Cooper & Compton (1947) 2 ALL E.R. 701.
3. Nnaji & Ors. v. Inspector General of Police (1957) 1 F.S.C. 18
4. Onubogu v. The State (1974) 9 S.C.I
5. Nwosu v. The State (1986)2 NWLR (pt 35)648
6. Akpan Udo Ukut & Ors. v. The State (1966) 4 FSC. 119
7. Shittu Layiwola & 3 Ors. v. The State (1959) 4 FSC. 119
8. Gbadamosi v. Queen (1959) 5 F.S.C. 183
9. Odutola v. Coker (1981) 5 S.C. 197 at 263
10. Acka v. Akure (1987) 1 NWLR (Part 47) 74
11. Niger Construction Ltd. v. Okugbeni (1987)4 NWLR (Pt 69) 787.
12. Ogugu & ORS. v. The State (1990) 2 NWLR (Pt 134) 539
13. Obodo v. Olomu (1987) 3 NWLR (Part 59) 111
14. Latifu Salami v. Chairman LE.D.B. & Ors. (1989) 5 NWLR (Part 123) 539 at 555-556
15. Alluyi Umaru Abba Tukur v. Gongola State Govt. (1988) 1 S.C. 78 at 101
16. Boy Muka v. The State (1976) 9-10 S.C. 305 at 325-326.
17. Okagbpe & Ors. v. The Queen (1958) 3 FSC. 27

18. Oteki v. The State (1986) 4 S.C. 222 at 249.
19. Alli v. The State (1988) 1 S.C. 35 at 47
20. Mbele v. The State (1990) 4 NWLR (Part 145) 484.
21. Ben. Okafor v. Commissioner of Police (1965) NMLR.
22. Abioye v. The State (1987) 7 NWLR (Part 58) 645.

STATUTES REFERRED TO

1. Criminal Code ss. 173(2), 138, 383, 516, 419, 410, 429, 390, 186.
2. Road Traffic Law Cap. 124 Laws of Lagos State 1973 s. 28(1).
3. Evidence Act s. 177(1).

LEAD JUDGMENT BY MOHAMMED JSC

On Thursday, the 23rd September, 1993, when this appeal was argued, Mr. Onyeike, Legal Officer, Lagos State who represented the state told this court that he was not supporting conviction and sentence of 1st, 2nd and 3rd appellants. Having gone through the record I agree that learned legal officer is right. Consequently, I allowed the appeal argued by learned counsel for each appellant, discharged and acquitted them. I indicated then that I would give my reasons later. I now give my reasons.

The appellants together with five other accused persons were arraigned before Oladipo Williams, J. of Lagos High Court for offences of conspiracy to steal, conspiracy to commit forgery, stealing, forgery, uttering a false document and inducing delivery of money by false pretences. The facts for the prosecution's case were that six United Bank for Africa (U.B.A.) cheques belonging to NEPA were stolen from that Authority's premises. The stolen cheques were later forged and fraudulently uttered to U.B.A which was induced to deliver them (the cheques) to the Bank of India, Lagos, with the pretence that a company known as Sadayan Overseas Industrial Company Limited was the owner of the sums of money expressed on the six cheques. The six cheques were exhibit I for the sum of N375,750.57, Exhibit 24 for N367,570.76, Exhibit 25 for N200,083.76, Exhibit 26 for N125,500.500, Exhibit 27 for N325,657.57 and Exhibit 28 for N375,250.75.

After the conclusion of hearing and evidence the learned trial judge, in a considered judgment, accepted that all the above listed cheques had been forged and large sums of money stolen. He found guilty and convicted the 1st, 2nd, 5th and 7th accused persons and sentenced them to various terms of

imprisonment. The 4th and 6th accused died before the conclusion of the trial. The 3rd and 8th accused were found not guilty of the offences charged and were discharged and acquitted.

5 Dissatisfied with the trial courts' decision the 1st, 2nd, 5th and 7th convicted persons appealed to the Court of Appeal. In a unanimous decision learned justices of the Court of Appeal dismissed the appeal. On further appeal to this court, Mr. N.D. Amadi, Mr. Daniel Okoroafor and Mr. Collins Ubaniocha filed notices and grounds of appeal. Only three appellants remain
10 to prosecute the appeal from the decision of the Court of Appeal. The 1st accused, Mr. Orepekan had been released following the state pardon granted to him by the Lagos State Government. This appeal concerns Mr. N.D. Arnadi as the 1st appellant, Mr. Daniel Okoroafor as the 2nd appellant and Mr. Collins Ubaniocha as the 3rd appellant.

15 Mr. Ben Nwawjie, S.A.N formulated the following four issues for determination of the appeal of the 1st appellant:

"(i) Whether imprudent or negligent conduct can sustain a charge of stealing or conspiracy under the Code as held by the lower courts.

*(ii) Whether the finding or conclusion that "the appellant must know
20 when and how the cheque, exhibit 27, was removed from the relevant pad" was perverse and unsupportable from the evidence adduced at the trial.*

(iii) Whether the sentence is not erroneous in law or too harsh.

(iv) Whether the decision is unreasonable and unsupportable having regard to the evidence led at the trial."

25 Mr. Nwazojie referred to 1st appellant's conviction on count of conspiracy to steal and the second count of stealing six blank cheque leaves belonging to NEPA and valued at 12kobo. In finding 1st appellant guilty the learned trial judge said:

*"I have no doubt at all in my mind that the 2nd accused must know when
30 and how the cheque, exh. 27 was removed from the relevant pad or that he was grossly negligent up to the point of abandoning his duties entirely"*

It was this finding which convinced the Court of Appeal to affirm the conviction of the 1st appellant. Mr. Nwazojie, S.A.N., submitted that the conviction of the 1st appellant for stealing the six cheques rested on the finding of the learned trial judge that 1st appellant was grossly negligent. The learned
35 S.A.N. argued that negligence is not a mental element of stealing under the Criminal Code. Section 383 of the Code sets out six intents which must be proved in order to sustain a conviction for stealing. The conviction of 1st appellant was not based on any of those intents. The learned counsel distin-

guished the case of *Edu v. C.O.P 14 WACA 163* in which Bairarnian J. (as he then was) was mistakenly held by both the trial court and the Court of Appeal to have decided that gross negligence is an element of an offence of stealing. *Edu* was convicted of an offence under S. 173(2) of the Criminal Code in which negligent act was made an ingredient of the offence. The section provides:

"Any person who -

(2) being employed by or under the department of Posts and Telecommunications, negligently loses any postal matter or telegram or negligently retains or delays, or permits the detention or delay of, any postal matter or telegram, is guilty of a simply offence, and is liable to a of fine ten pounds."

Mr. Tamuno who wrote the joint respondents brief wasted no time in conceding that the mental element of negligence is not an express requirement for a charge of stealing under S. 383 of the Criminal Code. The learned counsel went further, in his submission and said:

"There is no general criminal liability for negligence although there is one in the law of Torts, where negligence is a mental element of a crime a penal statute normally makes it an express requirement. For example: Police or Prison Officers negligently permitting escape of a person in lawful custody (Section 138 of the Code), negligent lose of postal matter by NIPOST Staff (Section 73(2) of the Code), negligently destroying telegraph works (Section 186 of the Code), driving a motor vehicle on a highway recklessly or negligently (Section 28(1) of the Road Traffic Law Cap. 124 Laws of Lagos State 1973). The West African Court of Appeal decision of *Edu v. C.O.P. 4 WACA 163* cannot be authority for punishing negligence as proof of criminal liability. That case was decided on its peculiar fact (based on Section 173(2) of the Code."

Having conceded that the main element upon which the 1st appellant had been convicted of stealing the six blank cheques does not exist in law, Mr. Onyieke, learned legal officer, for the respondent told this court that he could not support the 1st appellant's conviction and sentence in count 3.

Count 1 in which the 1st appellant was convicted of conspiracy to steal is not without problems either. In attacking the conviction of 1st appellant on that count Mr. Nwazojie S.A.N. submitted that stealing was inferred from gross negligence of the 1st appellant and there was no evidence directly showing that the 1st appellant and Mr. Orepekan (who has been released through a state pardon) acted in concert with the others to commit the offence of conspiracy to steal. Learned counsel argued that the 1st appellant and Mr. Orepekan were only inferentially said to have joined the conspiracy to steal.

To support this submission learned counsel referred to a finding of the trial judge at page 239, where he said:

"It is my opinion that the 4th accused (now deceased) who was at the helm of affairs on the matter of stealing and forgery acted in such a way that only very limited facts were known to those who were prepared to deal with him. Be that as it may, there was enough evidence to show that the 4th accused, P.W.2, 5th accused 7th accused started together to originate the conspiracy to steal NEPA cheques and that the 1st, 2nd 6th accused persons, by inference joined it afterwards as the NEPA men who would make available the cheques in their care. They are patently accessories to the conspiracy.

It is without doubt, from the above finding, that the learned trial judge did not receive direct and positive evidence incriminating the 1st appellant in the conspiracy to steal Learned Senior Advocate argued that if the only evidence of conspiracy is the evidence which supports the commission of the substantive offence conviction for conspiracy, but not for substantive offence, will be quashed for inconsistency See *R. v. Cooper and Compton* (1947) 2 All E.R. 701. This was followed by the Federal Supreme Court in *Nnaji and Ors. v. Inspector General of Police* (1957) SCNLR 156 (1957) 2 F.S.C. 18.

Learned counsel for the respondent had no convincing reply to offer against the above submission and therefore declined to support conviction on the count.

Mr. Bankole Aluko, learned counsel for Daniel Okoroafor, the 2nd appellant, handed down a 51 page brief in support of the appeal. I must pause here to say that most of the submissions have been repeated times without number. Counsel must always bear in mind that repetition does not improve an argument. However, the learned counsel formulated one single issue for the determination of this appeal. It is as follows:

"Whether the Court of Appeal arrived at a judicially sound and correct decision in approving the trial - conviction of the 5th accused person for the offences of conspiracy to steal, conspiracy to forge, forgery, uttering, and obtaining money by false pretences as charged in various counts of the Information, given the failure by the prosecution to prove its case on any of the relevant counts beyond reasonable doubt."

Be that as it may, the main pivot of Mr. Aluko's submission in this appeal centres on the evidence of the handwriting expert who gave evidence as P.W.22. The learned trial judge in his judgment explained that the handwriting expert found that it was the 2nd appellant (5th accused) who wrote exhibit 29,

the bank teller by which one of the stolen cheques Exhibit 26 for N125,700.55 was paid into the "Sadayan" account at the Bank of India. Sadayan Overseas Industrial Company Limited, in the name of which the cheques were made out at the Bank of India rendered no service to NEPA. But huge withdrawals were made from that company's account totalling about N1,433,470.70. The learned trial judge personally compared the writing on exhibit 29 (the bank teller) and the sample of the writing of the 2nd appellant in exhibit 63 and found that the writer of the two documents was the same person. 5

Mr. Aluko argued strongly that the 2nd appellant was not charged of forging the bank teller but of the cheque, exhibit 26. I agree with Mr. Aluko that there is some confusion in the finding of the learned trial judge over the possession of the cheque, exhibit 26. In the judgment learned trial judge convicted 1st and 2nd accused for being in custody and control of exhibit 26 before its forgery. There is doubt therefore in the evidence over the forgery of exhibit 26. If 1st and 2nd accused were found to be in custody and control of the exhibit before it was forged, it is relevant to adduce evidence that they passed this cheque before its alteration to the 5th accused who is second appellant in this appeal. There is cloud over the chain of communication within which the cheque exhibit 26 was forged and altered at the Bank of India. 10 15

The evidence of the prosecution' on the issue of this cheque was shattered more when P.W.2 said that NEPA cheque was give to him to go and deposit in the Bank of India, Bread shit Street and that it was the 4th accused who gave him the cheque in his house at Ikorodu Road. The cheque had been entered in a teller before it was given to him. Exhibit 29 was the teller. The learned trial judge found also that P.W.2 and one Solomon took exhibit 26 to the Bank for lodgment. To further complicate the case of the prosecution P.W.2 told the court that he and one Solomon signed and presented almost all the forged cheques to the Bank. The witness said that it was later, on 6th October 1978 that the 5th accused took over signing the cheques after Solomon had left. It is relevant to note that P.W.2 was the accomplice whose evidence the respondent counsel conceded had not been corroborated. From the evidence of P.W.2, it is clear that exhibit 26 had been made and presented before the Bank two months before the 5th accused was alleged to have taken over the signing of the forged cheques. 20 25 30

I agree with Mr. Aluko that the prosecution's case is full of unproven facts and loop-holes which, in my view, makes it unsafe to convict the 2nd appellant of the offences in counts, 4, 5, 6, 9, 12, 15, & 18 See Onubogu v. The State (1974) 9 S.C. 1. In Nwosu v. The State (1986) 4 NWLR (Pt.35) 348, this court 35

held that where two or more witnesses testify at a criminal proceeding and the testimony of such witnesses is contradictory and irreconcilable, it would be illogical to accept and believe the evidence of such a witness. The Court of Appeal was therefore in error to affirm such convictions.

5 Counts 1 and 2 which were framed against the 2nd appellant jointly with the other accused persons were based on the allegation that the accused conspired to forge the cheques and steal between the months of July and August 1978. But P.W.2 who gave the evidence upon which the counts were framed
10 told the court that he and one Solomon signed the cheques and presented them to the bank during that period. P.W.2 later told the court that the 5th accused (2nd appellant) joined the group on 6th October, 1978 when he took over the job of signing the cheques from Solomon. In his evidence P.W.2 told the trial court thus:

15 "In August, 1978, I went to the Bank of India in the company of Solomon we presented Exh. 38 and the certificate of incorporation..I see Exh. 38. I signed as Alabi Obene on page 3 of Ex. 38 and Solomon signed as Augustine Ejiba on the same page."

20 Learned counsel for the respondent after being confronted with these contradictions told this court that he was not supporting conviction of the 2nd appellant on all the counts.

The appeal of Mr. Collins Ubaniocha, the 3rd appellant, was next argued by Mr. Babajide Bodede. The appellant has been convicted and sentenced on
25 counts one - conspiracy to steal, count two - conspiracy to commit forgery and counts six, nine, twelve and eighteen all framed on inducing delivery of money by false pretences. Mr. Bodede formulated four issues for the determination of the 3rd appellant's appeal. The issues are as follows:

30 "(1) Whether the Court of Appeal could properly affirm the conviction of the appellant when it was based solely upon the uncorroborated testimony of an accomplice.

(2) Whether the failure of the Court of Appeal to consider the issue of the corroboration of the evidence of P.W.2 constituted a miscarriage of justice.

35 (3) Whether the Court of Appeal was correct to accept the inference of the High Court that the appellant purchased the Volvo with proceeds of the alleged crime.

(4) Whether the Court of Appeal was correct in the circumstances of this case to affirm the conviction of the appellant on the counts of conspiracy to

steal and conspiracy to commit forgery when the appellant was discharged on the substantive counts of stealing and forgery."

The only issue not substantially considered in this judgment from the issues raised by the learned counsel for the 3rd appellant is the requirement of corroboration to the evidence of P.W.2 has been adjudged by the learned trial judge to be an accomplice. It is trite law that an accomplice shall be a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. See S. 177(1) of the Evidence Act. The sub-section however imposes a statutory duty on the trial judge to warn himself that it is unsafe to convict solely on the uncorroborated evidence of an accomplice. The omission to give the said warning, when needed, usually has the consequence of acquittal on appeal unless the appellant court, in a given case, thinks that no substantial miscarriage of justice was occasioned by the omission. See Akpan Udo Ukut and Ors. v. The State (1966) NMLR 18.

The learned trial judge in his judgment said that he observed that P.W.2 gave both relevant and irrelevant testimonies in his evidence before the court and that he would only accept that part of the evidence of P.W.2 which was corroborated. That obviously is a wrong and erroneous decision. An accomplice is a suspect witnesses hence the requirement of corroboration to his testimony. It is not for the judge to pick and choose which part of the accomplice's evidence he could believe and which part needs corroboration. The court can convict once it is satisfied that the evidence is reliable even without corroboration. But once the court is in doubt as to the truth of the evidence of an accomplice it is unsafe to convict an accused based on any part of that evidence. One lie in an accomplice's testimony makes that whole of his evidence suspect and the judge ought not convict unless he receives corroboration of material particular implicating the accused.

Reading the evidence of P.W 2 from it beginning to the end disclose how unreliable the witness is and being an accomplice, who in fact took a leading part in the commission of the crime, his evidence as a whole ought to be corroborated. It is for this same reason that the learned legal officer for the respondent, quite correctly, announced that he would not support the conviction of the 3rd appellant.

In the final result and for all the reason given above, the Court of Appeal is in error to affirm the conviction and sentence of the appellants. Consequently, I allow the respective appeals of N.O. Amadi, Daniel Okoroafor and Collins Ubaniocha. They are discharged and acquitted of all the offences in the counts framed against them.

KARIBI-WHYTE JSC

After argument by learned counsel in this appeal on the 23rd Sep-
 5 tember, 1993, David Onyeike Esqr. learned Counsel to the respondent rightly
 in my view, agree with the contention of the appellants and conceded the
 argument that the appellants were wrongly convicted. He stated before us
 that the respondent no longer supported the conviction. I accordingly al-
 lowed the appeal of the appellants, and set aside their convictions in the
 10 courts below. I indicated then that I will give my reasons today.

I have read the reasons for judgment in this appeal of my learned
 brother Mohammed, J.S.C.

I agree entirely with him and adopt them as mine.

15

BELGORE JSC

I agree that the appellants on the evidence before trial court in the
 light of the charges against them deserve nothing less than discharge and
 20 acquittal. The reasons set forth by my learned brother, Mohammed, J.S.C., are
 the same reasons I hereby adopt as mine for discharging and acquitting the
 appellants on 23rd September, 1993. I hardly have anything more to add.

25

OLATAWURA JSC

After listening to the submissions of learned counsel for the appel-
 30 lants and the respondent and also the concession made by Mr. Onyeike, the
 learned counsel for the respondent that he could not support the convictions,
 I allowed the appeal, set aside the convictions and sentences passed on the
 appellants, I indicated I would give reasons for my judgment. I now proceed to
 do so.

35 The appellants and five others were charged before the Lagos High Court
 on 20 counts to wit: conspiracy to commit felony, stealing, forgery, altering,
 inducing delivery of money by false pretences. They were duly tried. The
 appellants before, us were acquitted on eighteen counts. The first appellant
 was found guilty on counts 1 and 3 i.e conspiracy to commit felony contrary

to section 516 of the Criminal Code, Cap. 31, Laws of Lagos State 1973 and stealing contrary to section 390 of the Criminal Code, Laws of Lagos State 1973. The second appellant who was the 5th accused in the High Court was found guilty on counts, 1, 2, 9, 12, 15 and 18, i.e. conspiracy to steal, conspiracy to forge a cheque, inducing delivery of money by false pretences contrary to sections 516, 419, 410 and 429 of Criminal Code of Lagos State respectively. The third appellant who was the 7th accused was found guilty of conspiracy to steal, conspiracy to commit forgery and inducing delivery of money by false pretences contrary to sections 516, 419 and 429 of the Criminal Code respectively. The facts revealed in the case of the prosecution were that the cheque books and money stolen were the property of the National Electric Power Authority (NEPA). There is hardly any doubt that these cheque book were stolen and also forged, the cheques were altered. The amount in respect of each cheque belonged to NEPA. After these cheques had been stolen, the amounts which formed the basis of the various amounts in each count of stealing were paid into the account of Sadayan Overseas Industrial Company Ltd. from where they were cashed and shared. After a review of the evidence and submissions made, the learned trial judge found the appellants guilty on the various counts set out above. They appealed to the Court of Appeal against their convictions and sentences. Their appeals were dismissed. They appealed to this Court against the dismissal of their appeals.

It is better to state the common ground to their appeal. Their convictions were based on the evidence of 2nd P.W. who was rightly described by the learned trial judge as an accomplice whose evidence must be corroborated. Far and above this requirement of law, he was described by the trial judge as:

"..... a person who could say anything at any time to implicate any person and that was the reason why I said earlier that his evidence must be corroborated before it was acted upon. It would appear to me that a host of other persons were involved in the offences as charged but either by design by P.W.2 or the inefficiency of the investigators, they were not brought before the court."

If the evidence of 2nd P.W. was not credit worthy and as such unreliable it will be unsafe to base a conviction on such evidence. There is common to these appellant what must be proved by the prosecution in respect of each count or generally when anybody is charged with an offence contrary to the provisions of the criminal code. I now consider the case of the 1st appellant - N.O. Amadi.

The issues raised for determination are:

"(i) Whether imprudent or negligent conduct can sustain a charge of

stealing or conspiracy under the Code as held by the lower courts.

- (ii) *Whether the finding or conclusion that "the appellant must know when and how the cheque, exhibit 27, was removed from the relevant pad" was perverse and unsupportable from the evidence adduced at the trial.*
- (iii) *Whether the sentence is not erroneous in law or too harsh.*
- (iv) *Whether the decision is unreasonable and unsupportable having regard to the evidence led at the trial."*

On issue 1, the learned trial judge found as a fact that the 1st appellant was grossly negligent in the performance and discharge of his duties. His findings based on negligence are as follows:

"I have no doubt at all in my mind that the 2nd accused must know when and how the cheque, exhibit 27 was removed from the relevant pad or that he was grossly negligent up to the point of abandoning his duties entirely."

This finding appears to me to have been based on what the appellant ought to have done, but not on what he did. It is my view that finding of fact must be based on credible evidence or reasonable inference drawn from the facts presented by the prosecution or the parties in the case of a civil action. It is unsafe to base a conviction on speculative findings. Such findings are no longer findings of fact. Quite apart from this, before a trial court comes to the conclusion that an offence had been committed by an accused person, the court must look for the ingredients of the offence and ascertain critically that the acts of the accused come within the confines of the particulars of the offence charged. Where negligence is the ingredient of the offence, this must be established. To succeed in any criminal trial, the basic requirement that the "prosecution must prove its case beyond reasonable doubt is now too well entrenched in our criminal law that it cannot be side-tracked: *Alonge v. Inspector-General of Police* (1959) SCNLR 516; (1959) 4 FSC 203/205. The particulars of the 1st count on conspiracy which reads:

"(1) S.A. Orepekan (2) N.O. Amadi and others between the months of July and August 1978 at Lagos 'E2'80'a6'E2'80'a6'E2'80'a6 conspired together and with others unknown to commit a felony, to wit stealing."

negate any finding of negligence. Mr. Nwazojie, S.A.N. has analysed the ratio in *Edu v. Commissioner of Police* 14 W.A.C.A 163. I agree with learned counsel that both lower courts were in error to have based the conviction of 1st appellant charged with stealing on negligence. Negligence is not an ingredient of the offence charged. Further more where an accused person is one of those who had access to the property stolen, evidence led must point irresistibly to

the fact he alone and no any other person stole the property.

On the issue of conspiracy, this has not been proved. The learned trial judge based his finding of stealing on negligence and as said earlier, negligence is not an ingredient of the offence of stealing. Consequently any inference drawn from the facts of the case to warrant a conviction must be compelling. It will amount to a misdirection in law to infer conspiracy from a charge of stealing based on negligence. Where an accused person has been acquitted on a charge of stealing a specific amount, he cannot at the same time be found guilty of conspiracy for stealing the same amount: *R v. Cooper and Crompton* 32 C.A.R. 102.

On the whole and for the above reasons I allowed the appeal of the first appellant.

The case of the 2nd appellant is also predicated on the findings which I set out when I dealt with the case of the 1st appellant. I have read the reasons for allowing the appeal in the reasons given by my learned brother Uthman Mohannmed, J.S.C. I will with respect adopt them also.

The case of the 3rd appellant is similar to that of the first appellant. The issues raised are in the main on corroboration and conspiracy. The principles of law I applied in the appeal of the first appellant will also apply. Consequently the reasons for allowing the appeal of the first appellant will inevitably apply to the third appellant. If only for the purpose of emphasis, the evidence of 2nd P.W. who is an acknowledged accomplice by the trial judge and a man who was prepared to fabricate evidence against anybody, more so in a matter in which he was deeply involved, was a witness who had his own personal interest to serve. He was not in any way a credible witness. His evidence ought to have been corroborated. His evidence not having been corroborated, it will be unsafe to convict the third appellant. I will also allow his appeal.

I will place on record the concession made by Mr. Onyeike that he could not support the convictions. His reasons for coming to that decision are supported by decided case.

Where the prosecution after the conclusion of trial made a submission that the prosecution did not adduced sufficient evidence to prove a case against an accused person, the trial court or appellate court, if made on appeal, should not brush aside such submission without adequate reasons.

It is true that a court is not bound to accept a mere declaration of inability to support a conviction by the State Counsel, but where adequate reasons are given for a submission that no case has been made for an accused person to answer, or that the conviction was wrong in law, the trial judge or the appellate court should give adequate consideration for the submission. It follows therefore that before a case is brought to court, the Ministry of Justice should ensure that a Prima facie case has been made out from the proof of evidence filed and supplied to the accused.

In his reply to the submissions made by the counsel for the 1st and 2nd accused persons. Mr. Alatisha who appeared for the State had this to say:

"Relying solely on evidence of P.W.2, we have failed to prove the 1st and 2nd accused participated in the commission of offences for which they were charged. There is no doubt that they were careless in handling the cheque. Their carelessness is not a proof per se of guilt."

I agree with that submission based entirely on the evidence before the Court and the submissions made by counsel for the accused persons. If that submission by the State Counsel had been upheld it would have saved time of the court and at the same time it would have terminated the distress of the accused person. As it turned out, their convictions were based on negligence which is not an ingredient of the offence charged.

It is for the reasons set out above that I allowed the appeal.

25 **ONU JSC**

On the 23rd of September, 1993 I allowed the appeals of the appellants after hearing counsel and reading the record of proceedings together with the briefs of argument and reserved my reasons for the judgment till today. I now proceed to give my reasons. However, before now, I had the opportunity of reading in advance the draft of the reasons for judgment just delivered by my learned brother Uthman Mohammed, J.S.C. As I find those reasons fully in agreement with mine, I do hereby adopt them as mine.

Be that as it may, I wish as part of my contribution to this judgment to make the following comments. The facts of the case as made out in the court of trial are that the three appellants (hereinafter in the rest of this judgment referred to as 1st, 2nd and 3rd appellants respectively) were the 2nd, 5th and 7th of the original eight of nine accused persons (the ninth was nowhere to be found to stand his trial) arraigned before the High Court of Lagos State (per

Oladipo Williams, J) sitting in Lagos, on a 20 - count charge of conspiracy to steal, conspiracy to forge, stealing, forgery, fraudulent uttering and obtaining goods (money) by false pretences, all punishable under the criminal code law of Lagos state. The prosecution called 22 witness in all, while each of the appellants testified on his own behalf in self defence. The 1st appellant (N.O. Amadi) was acquitted and discharged on all but two of the counts of the charges to wit: Stealing and conspiracy and he was on those counts for which he was convicted accordingly sentenced to five and four years imprisonment respectively. The second appellant, Daniel Okorafor, i.e. 5th accused, while adjudged not guilty on counts 3, 7, 8, 10, 11, 13, 14, 16, 17, 19 and 20 of the information and so discharged and acquitted was, however, found guilty of the offences charged in counts, 1, 2, 4, 5, 6, 9, 12, 15 and 18 respectively and sentenced to serve concurrent terms of imprisonment ranging between 4 and 6 years imprisonment. The 3rd appellant, Collins Ubaniocha, in his joint trial with his co-accused was 7th accused as exemplified hereinbefore. After standing his full trial, he was convicted on counts 1, 2, 6, 9, 12, 15 and 18 and sentenced to terms ranging between 4 and 5 years respectively.

Being dissatisfied with the judgment of the trial court, each appellant appealed to the Court of Appeal sitting in Lagos which upon hearing their appeals, dismissed same in it's judgment delivered on 21st February, 1990. Being further aggrieved by the decision, the appellants have appealed to this court.

Counsel for each appellant filed a brief of argument and exchanged same with the respondent in accordance with the rules of court. On behalf of 1st appellant, the following four issues were identified as arising for determination, to wit:

1. Whether imprudent or negligent conduct can sustain a charge.
2. Whether the finding or conclusion that "*the appellant must know when and how the cheque, Exhibit 27, was removed from the relevant pad*" was perverse and unsupportable from the evidence' adduced at the trial.
3. Whether the decision is unreasonable and unsupportable having regard to the evidence led at the trial.

One primary question (several subsidiary questions revolve round it) was submitted on behalf of the 2nd appellant for our determination. It is stated thus:

"Whether the Court of Appeal arrived at judicially sound and correct decision in approving the trial - conviction of the 5th accused person for the offences of conspiracy to steal, conspiracy to forge, forgery, uttering and obtaining money by false pretences as charged in various counts of the

information given the failure by the prosecution to prove its case on any of the relevant counts beyond reasonable doubt."

The four issues which, in 3rd appellant's view, can be distilled from his four grounds of appeal (see his Notice and Grounds of Appeal at pages 471 - 473 of the Record) are:

1. Whether the Court of Appeal could properly affirm the conviction of the appellant when, it was based solely upon the uncorroborated testimony of an accomplice.

2. Whether the failure of the Court of Appeal to consider the issue of the corroboration of the evidence of P.W.2 constituted a miscarriage of justice.

3. Whether the Court of Appeal was correct to accept the inference of the High Court that the appellant purchased the Volvo with the proceeds of the alleged crime.

4. Whether the Court of Appeal was correct in the circumstances of this case to affirm the conviction of the appellant on the counts of conspiracy to steal and conspiracy to commit forgery when the appellant was discharged on the substantive counts of stealing and forgery.

In a joint brief by the respondent, possibly in response to all three appellant's briefs of argument filed on 6th August, following four issues for determination:

1. Whether negligence is a mental element of stealing required by section 383 of the criminal code Cap.31 Laws of Lagos State, 1973, as amended.

2. Whether the sentence imposed on 2nd appellant can be said to be harsh with regards to the findings of the trial Judge.

3. Whether the trial Judge was correct to convict the 3rd applicant (sic) after warning himself that it was unsafe to rely on the uncorroborated evidence of P.W.2.

4. Whether the conviction of the appellants can be supported by the evidence of the record.

Before arguments were embarked upon by learned counsel for the 1st appellant, Mr. Nwazojie, S.A.N, first moved in terms of his motion which was not opposed and so was accordingly granted, for leave for 1st appellant's brief dated 28th July, 1993 and filed on 29th July, 1993 to substitute his former brief of argument dated 18th June, 1991.

In view of the fact that on 23rd September, 1993 while replying to the submissions made by learned counsel for the 1st, 2nd and 3rd appellants respectively, learned Legal Officer for the respondents, Mr. David Onyeike, threw in

the towel by conceding that he no longer would support the conviction of all three appellants, I deem it pertinent in respect of the 1st appellant against who the prosecution had doubts to consider only issues 1 and 4 formulate on his behalf and which, in my view, dispose of the appeal without more. Hence the mere fact of the non-support of his conviction by the prosecution in its address before the trial court at page 226 of the Record of Proceedings, would have been sufficient to earn the 1st appellant an acquittal and a discharge. Said Alatishe, learned counsel representing the state at page 266 of the Record on 11th December, 1985:

"I concede that the prosecution has not adduced sufficient evidence to prove the case against the 1st accused, 2nd and 3rd accused persons beyond reasonable doubt on all the counts. It is common ground that the 1st and 2nd accused collected Ex.1, Ex.24, Ex.25, Ex.26, Ex.27 and Ex.28 from the cash office of NEPA because of their official duties, relying solely on evidence of P.W.2, we have failed to prove that 1st and 2nd accused participated in the commission of offences for which they were charged. There is no doubt that they were careless in handling the cheques. Their carelessness is not a proof per se of guilt."

It is an established principle of law that it is the prerogative of the prosecution to decide in the light of what the public interest requires, in any particular case, who shall be charged and with what offences. See Shittu Layiwola and 3 ors v. The State (1959) SCNLR 279 (1959) 4 F.S.C.119. In the instant case, the prosecution, after all the evidence led conceded unsolicitedly in its address through Alatishe, of counsel that the charge preferred by it was not after all proved. It may well be argued that had the prosecution charged the 1st appellant for the offence of obtaining some of the cheques by false pretences by virtue of section 419 of the code as amended, it would have done better but certainly not for stealing or conspiracy. Since 1st appellant was not charged for obtaining a thing under section 419 (ibid) and this is not an offence for which he could, in the alternative be convicted by virtue of sections 169 to 179 of the C.P.A., the 1st appellant's conviction for stealing and conspiracy was wrongful. See Gbadamosi v. Queen (1959) SCNLR 471 (1959) 5 F.S.C.183. That the concession of non-support of 1st appellant's conviction proceeded by way of an address from counsel would, in my view, not derogate from its potency and effect. This is because an address although not a suitable substitute for evidence- See Oduola v. Coker (1981) 5 S.C.197 at 263 and Acka v. Akure (1987) 1 NWLR (Pt.47) 74 - qualifies in the circumstances of the instant case as admission as provided in sections 19 and 20(1) of the Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990. The two sections state:

"19. An admission is a statement, oral or documentary, which suggests

any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances, hereinafter mentioned.

20(1) *Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards, in the circumstances of the case, as expressly or impliedly authorised by him to make them, are admission. "*

What Mr. Alatishe said in the extract set out above is no more than an admission by an agent. Although addresses are designed to assist the court and the court may dispense with them, where facts are straightforward and undisputed and failure to call on one party's counsel to address the court is not a matter for the other party to complain about - See Niger Construction Ltd. v. Okugbeni (1987) 4 NWLR (Pt.67) 787; Ogugu and others v. The State (1990) 2 NWLR (Pt. 134) 539 and Obodo v. Olomu (1987) 3 NWLR (Pt.59) 111 - whereas in the instant case the prosecution by its own admission capitulates, as it were, both on the facts and the law, an address of necessity forms a vital part of the proceeding deserving serious and weighty consideration. Besides, when on 19th March, 1981 P.W.2 was being subjected to a long process of cross-examination he made the following decisive admission in respect of the 1st appellant at page 102 of the record thus:

20 *"There is a Mr. Amadi: When we got to Lagos, 2nd accused was invited to the station and I told the police it was not the 2nd accused I first referred to in my statement."*

In the result, the conviction of the 1st appellant proceeding as it did on what the trial court regarded as imprudent or negligent conduct, is in my view, unsustainable in law. I hold that the lower court's conclusion at page 499R, seven lines from the bottom to page 499 s. lines 1 - 11 to the effect that:

30 *"The prosecution has laid before the court sufficient and credible evidence oral and documentary which showed that five of the six cheques which are subject of the stealing charge, were removed from the accounting system.*

If an employee is aware of his duty to take care and he is imprudent or negligent in its performance he will be guilty of any offence which is found to result from his actions: Edu v. Commissioner of Police 14 WACA 163 and gross negligence is the best evidence that a man in acting dishonestly - Police v. Obianaba (1966) 1 All NLR 208.

35 *The conduct of the 1st and 2nd appellants leaves no room for any other inference than that they are parties to the stealing of the cheques for which they were convicted particularly when the cheques were stolen, forged, dated and uttered on the same date they were acquisitioned for in most irregular*

manner and contrary to all regulations governing their issuance."

was not only erroneous but perverse, the more so when the excerpt above sallied forth from the findings of the trial court in which at page 283, lines 2-8 it held as follows:-

"For the reasons given above, I find that the facts point quite clearly 5 to the gross negligence of the 1st and 2nd accused which resulted in the removal of the cheques from the accounting system. The facts however show that the six cheques were not requisitioned for at all and it could not be said that the 1st and 2nd accused had anything to do with that cheque which was numbered 005122 and dated 17th August, 1978 for the sum of 10 N125,700.55."

The learned trial Judge's finding set out above to the effect that the 1st appellant (with another) was grossly negligent and that this resulted in the removal of the six cheques mentioned in count 3 of the information - a finding upon which his conviction partly hinged is in my view therefore clearly wrong. 15 For, as rightly conceded in the respondent's brief by its counsel, negligence is not an express requirement for a charge of stealing under section 383 of the Criminal Code nor is there general criminal liability for negligence except in the Law of Torts. Where, however, negligence is a mental element of a crime, a penal statute would normally make an express provision for it. For example, 20 police or prison officers negligently permitting the escape of a person in lawful custody contrary to section 138 of the Code; negligent loss of postal matter by NIPOST staff contrary to section 173(2) of the code; negligently destroying telegraph works contrary to section 186 of the code; driving a motor vehicle on a high way recklessly or negligently contrary to section 28(1) 25 of the Road Traffic Law Cap. 124, Laws of Lagos State, 1973. The case of *Edu v. C.O.P. 14 WACA 163* which was decided on facts based on section 173(2) of the code and called in aid by the prosecution, ought therefore to be distinguished from the facts of the instant case. It is pertinent here to stress that failure to adhere to the words of a statute that can convey the intention of the legislature will do violence to its purport vide the decisions of this court in 30 *Latifu Salami v. Chairman L.E.D.B. and ors* (1989) 5 NWLR (Pt. 123) 539 at page 555- 556, and *Alhaji Umaru Abba Tukur v. Gongola State Govt.* (1988) NWLR (Pt. 68) 39 (1988) 1 S.C.78 at 101.

The prosecution's reliance on section 7(b) of the criminal code for the 35 appellant's conviction founded on an act or omission by any person enabling another to commit the offence and this court's decision in *Sunday Iyaro v. The State* (1988) 1 NWLR (Pt.69) 256 (1988) 2 S.C.1, 167 are, in my view, of no avail in the circumstances of the-case in hand.

From the foregoing, I agree with learned Senior Advocate's submission when he observed that the learned trial Judge had by so holding mindlessly but understandably, (because of his dealing with other counts involving money) mixed up the 1st appellant's counts (i.e. counts 1 and 2) not involving money with those of others involving money.

5 It is for the above also that I hold that the prosecution had in respect of the 1st appellant not proved its case beyond reasonable doubt and therefore, rightly in my view, conceded that 1st and 3rd counts of the charge for which 1st appellant was convicted, were not established against him at the trial. Issues 1 and 4 which constitute the linchpin of 1st appellant's appeal having
10 been answered in the negative and affirmative respectively, the consideration of issues 2 and 3 are in my view rendered superfluous.

I will now turn to the appeal of the 2nd appellant. In commencing the consideration of the one contracted issue in respect of 2nd appellant, it is necessary to firstly point out how by the trial court's judgment this appellant who
15 was 5th accused was discharged and acquitted on counts 3, 7, 8, 10, 11, 13, 14, 16, 17, 19 and 20, leaving nine counts of the charge upon which he was convicted, to wit: counts 1, 2, 4, 5, 6, 9, 12, 15 and 18 respectively. The only portion of the judgment of the court below which dealt with the 2nd appellant can be traced to page 499 of the Record where Babalakin, J.C.A. (as he then was) and
20 whose judgment was concurred in by Ademola and Awogu, J.J.C.A., had the following to say about him (2nd appellant):

*"The case against 5th appellant is simple and straight forward, P.W.22, the handwriting expert found that it was the 5th appellant who wrote Exhibit 29 the bank teller by which one of the stolen cheques exhibit 26 for
25 N125,700.55 and which was also a forged cheque was paid in. The learned trial Judge himself compared the dispute (sic) writings and found that the said bank teller was written by the 3rd appellant (sic) and have been in possession of the stolen cheque before he entered it into exhibit 29 and exhibit 26 being a forged cheque, he either forged it himself or procured
30 someone to forge it.*

P.W.2 testified and the trial Judge accepted his testimony that the 5th appellant was their confederate in their various visits to the Bank of India to withdraw money wrongfully deposited by them therein and that he always took his share of the money.

35 *There was cogent and positive evidence of the 5th appellant (sic) participation in the crime.*

I do not find that the sentence imposed on the 5th appellant (sic) is excessive having regard to the circumstances of this case."

Now, in confirming the 2nd appellant's conviction by the trial court

for the offence of forgery, uttering and obtaining money by false pretences concerning Exhibit 26 i.e. NEPA cheque No. LCU/005122 dated 17th August, 1978 for N125,700.55 payable to "Sadayan" vide counts 4, 5 and 6 of the Information, the court below merely adopted those findings of fact as exemplified in the extract quoted above when it regarded the evidence adduced by the prosecution on the issue as sufficient to warrant such conviction, in particular, the conviction founded on the judgment of the trial court at page 283, last line to page 286, lines 1 - 4, the penultimate portion being at page 285 four lines from the bottom to page 286, lines 1 - 14 wherein the learned trial Judge held inter alia:

"As the signatures on the cheque Exhibit 26 were forged and as the amount on it was cashed after it had been in the possession of the 5th accused there did arise the irresistible inference that the 5th accused either forged the signature himself or procured someone to forge it for him - See Ayo Scott v. The King 13 WACA 25. In accordance with the decision in that case, the 5th accused can be convicted for the offence of forgery of the cheque Exhibit 26 as charged in count 4. Following this decision therefore I have no doubt on the facts that the 5th accused was the person who procured someone else to forge the cheque Exhibit 26 and he being therefore an accessory as defined in section 7(c) of the Criminal Code is guilty of the offence of forgery. I therefore find him guilty of the offence of forgery of the cheque Exhibit 26 as charged in count 4 and he is convicted accordingly. As gain (sic) in accordance with the same decision and for the reason that he completed the teller Exhibit 29, I find him guilty of the offence of uttering as charged in count 5 and he is convicted accordingly."

From the foregoing, while it is clear that 2nd appellant wrote Exhibit 29 'E2'80" the bank teller by which the cheque said to have been forged (Exh.26) was paid into the "Sadayan" account at the Bank of India - a finding which the learned trial Judge held he believed implicitly from the opinion evidence he received from P.W.22 (Patrick Nwemena), a handwriting analyst called by the prosecution. Be it noted, however, that the forgery charge contained in count 4 of the charge is the forgery of Exhibit 26 but certainly not that of Exhibit 29. In other words, there was no finding of fact that 2nd appellant was the author of Exhibit 29, the latter which, to all intents and purpose is alien to the charge. That P.W.22 never compared Exh.26 with Exhibit 63 (2nd appellant's specimen handwriting), but rather Exhibit 63 with Exhibit 29, can be seen at page 196 of the Record where (P.W.22) testified thus:

"On 20/7/79, I received Exh.29 to Exh.34 and Exh.36 with Exh.63 and Exh.64 for further examination. I was asked to examine only handwritings. I carried out the comparison of these handwritings of those Exhibits, I found features of the writers of Exh. 63 similar Exh.29 only "

5 As the latter (Exh.29) was not the subject of any charge but the trial Judge proceeded to convict the 2nd appellant thereon and not on Exhibit 26, the conviction in count 4 was perverse, similarly, is the inference made by the court below that it was safe to presume that having written the bank teller (Exh.29) with which the cheque (Exh.26) said to have been forged was paid in
10 at the Bank of India, the 2nd appellant must have been in possession of Exh.26 before he made writings on the teller (Exh.29) and therefore either forged the cheque (Exh.26) himself, or procured somebody else to forge it and that accordingly, he was guilty of forgery as an "accessory" as defined in section 7(c) of the Criminal Code, is patently wrong. Equally wrong and erroneous is
15 the findings that have made the bank teller (Exh.29) with which the cheque (Exh.26) said to have been forged was paid in at the Bank of India, the 2nd appellant was thereby guilty of the offence of uttering the cheque (Exh.26). Needless to say, the 2nd appellant had in his extrajudicial statement to the police (See Exh.59 at page 350-351 of the Record of Proceedings) corroborated
20 by the testimony of P.W.21, Inspector of Police, Benedict Okonkwo at page 182 of the Record of Proceedings as well as the 2nd appellant's own testimony at page 236-239, particularly at p.237, lines 6 - 7, to the effect that he (2nd appellant) did not get any cheque from any NEPA man and that P.W.2 Jerewani Dokubo, told a lie to cast a doubt on the prosecution's case. I will shortly
25 comment on P.W.2 in this judgment. Suffice it to stress here that as 2nd appellant was neither shown to be a NEPA employee nor had ever been to NEPA office, there was therefore no proof of the case against him beyond reasonable doubt.

In spite of all that I have said above about Exh.26 on which no conviction of
30 the 2nd appellant could be sustained and indeed on any other cheques contained in the information, the learned trial Judge in convicting 2nd appellant on the cheques had this to say at page 289 of the Record:

*"I am of the view that if each of them got enough money to buy saloon car, there must exist some documents which should show when and how they
35 were paid. I find on the facts in the defence of the 5th and 7th accused that they knew P.W.3 and that it was from the proceeds of the cheques which were deposited with the Bank of India Limited that they bought their cars, I find that because of the inability of the 5th and 7th accused to show the source of their incomes, a matter which should be within the knowledge of them. P.W.2*

(sic) evidence was true about their complicity in the delivery of the cheque Exh.27 to the Bank of India Limited and withdrawals therefrom in respect of other NEPA cheques which had been cleared. I find on the facts that each of the 5th and 7th accused persons took part in the delivery of Exh.27 to the Bank and that they shared in the proceeds of that cheque and other cheques. I find each of them guilty as charged in count 15 and each of them is hereby convicted accordingly. Because they accompanied P.W.2 and others to withdraw other cheques the 5th and 7th accused persons aided in the delivery of those cheques and in fraudulent pretence that the money belonged to Sadayan Overseas Industrial Company Limited. I therefore find each of them guilty as charged in counts 6, 9, 12 and 18 and each of them is convicted accordingly. (underlining above is mine for emphasis).

The above findings are not only perverse, but in the words of the Senior Advocate with which I agree, savour of the probing of the 2nd appellant's assets instead of embarking on a criminal trial where the prosecution owes it as its bounden duty to prove the case beyond reasonable doubt. See *Boy Muka v. The State* (1976) 910 S.C.305 at 325 326. That duty, the prosecution has failed to discharge in the instant case. Be it noted that 2nd appellant adduced evidence that he brought his Toyota Cresida Registered No.LA 7371MA with money realized from his business with Ubaniocha and Company Limited on 14/12/78 for about N8,710 before his case arose. The learned trial Judge's disbelief of 2nd appellant's story in that regard and the court's non-acceptance of same is clearly erroneous.

Now, coming to what significant role or lack of it the evidence of P.W.2 played in the proof or non-proof of the counts of the information, I wish firstly to advert to the trial court's judgment in parts at pages 286 and 287 thus:

"As I have said above the prosecution relied to a very great extent on the evidence of P.W.2 in connection with the offences of forgery and uttering and indeed with other offences as charge. P.W.2 said a/or in his evidence which at times was relevant and at times so irrelevant that it is better not to accept only that evidence which was corroborated in every material particularly in compliance with section 177 of the Evidence Act. This is the reason why the 5th accused only was convicted of the offences of forgery and uttering of the cheque Exh.26. I therefore find each of the 1st, 3rd, 7th and 8th accused not guilty of the offence of forgery as charged in counts 4, 7, 10, 13, 16 and 19 and each of them is discharged and acquitted accordingly on those counts. For the same reasons I find each of the 1st, 2nd, 3rd, 7th and 8th accused not

guilty as charged for the offence of uttering as charged in counts 5, 8, 11, 14, 17 and 20 and each of them is discharged and acquitted on those counts for want of evidence. I also find 5th accused not guilty of the offence of forgery as charged in counts 7, 10, 13, 16, and 19 and he is discharged and acquitted
 5 on each count accordingly for want of evidence. I find him not guilty of the offence of uttering as charged in counts 8, 11, 14, 17 and 20 and he is discharged and acquitted on each count."

Further more, in relation to conspiracy to steal the learned trial Judge observed at page 290 lines 23-25 thus:

10 "The prosecution relied solely on the evidence of P.W.2 in regard to the count for conspiracy to steal."

And showing how most unreliable the evidence of P.W.2 was, the learned trial Judge himself said at page 292, lines 13-28 and page 293, Lines 1-4 as follows:"

15 In his statement Exh.44, P.W.2 said that the conspiracy was hatched in the house of the 8th accused in Lagos but in his evidence he said that he implicated the 8th accused and had nothing to do with the matter at all. That evidence made P.W.2 a person who could say anything at any time to implicate and that was the reason why I said earlier that his evidence must be
 20 corroborated before it was acted upon. It would appear to me that a host of other persons were involved in the offences as charged but either by design by P.W.2 or the inefficiency of the investigators, they were not brought before the court. That there might be other persons involved was shown by the number of documents sent to the handwriting analyst, the result of which
 25 had not determined anything except the handwriting of the 5th accused in respect of Exh.29, I would however say that all confusion was the handiwork of P.W.2 who did not want to reveal the names or identities of all those whom he wanted to." (Italics above is mine).

The learned trial Judge having earlier in his judgment held that "P.W.2
 30 Jerewani Dokubo was patently an accomplice" or that he was a man capable of saying anything anytime, he cannot in my view, fall on the evidence of P.W.2 to provide the needed corroboration he being a thoroughly discredited witness or through Exhibits 29 and 63 when the count of the charge for forgery is founded on Exhibit 26. This is the more so when the evidence of P. W. 2
 35 focused on Exh. 29 - which was not the subject of the charge. Hence, the finding by the court below as set out on page 4991 lines 5-24 to the effect that:

"The case against the 5th appellant is simple and straight forward. P.W.2, the handwriting expert found that it was the teller by which one of the

stolen cheques Exh.26 for N125,700.55 and which was also a forged cheque was paid in. The learned trial Judge himself compared the dispute (sic) writings and found that the said bank teller was written by the 5th appellant and come to the conclusion rightly in my view, that the 5th appellant must have been in possession of the stolen cheque before he entered it into Exh.29 5 and Exh.26 being a forged cheque, he either forged it himself or procured someone to forge it.

P.W.2 testified and the trial Judge accepted his testimony that the 5th appellant was their confederate in their various visits to the Bank of India to withdraw money wrongfully deposited by them therein and that he always 10 took his share of the money.

There was cogent and positive evidence of the 5th appellant's participation in the crime."

is not only unsustainable but perverse in that neither the evidence of P.W.2 who was shown to be an accomplice and may well have been the foremost 15 accused in the case giving rise to this appeal nor P.W.22 provided the needed corroboration to warrant 2nd appellant's conviction; the warning given by the learned trial Judge before doing so notwithstanding.

The 2nd appellant having been discharged and acquitted of stealing six cheque leaves which included Exhibit 26, all worth 12 kobo and contained in 20 count 3, of the information under no circumstances cognisable in law can an inconsistent verdict adjudging 2nd appellant guilty by inference as an "assessory" be justified. See Okagbue and ors. v. The Queen (1958) SCNLR 371 (1958) 3 F.S.C.27. In such a situation too, the 2nd appellant's conviction for 25 conspiracy to steal, conspiracy to commit forgery and forgery in counts 1,2 and 4 cannot be sustained. A fortiori, that of uttering in count 5 founded on Exhibit 26 as well as those of obtaining by false pretences in counts 9, 12, 15 and 18, founded as they were, on Exhibit 24, 25, 27 and 28. The sum total of all I have been saying is that the trial court having misapprehended the law as 30 applicable to the facts in all its ramifications, the court below ought to have disturbed the conclusion arrived at by the trial court and set same aside. In the result, the conviction of 2nd appellant on counts 1, 2, 4, 5, 6, 9, 12, 15 and 18 of the information for conspiracy to steal, conspiracy to forge, uttering and obtaining money by false pretences are accordingly set aside.

Coming to 3rd appellant, while adopting all I have said hereinbefore in 35 respect of the 2nd appellant, I wish to point out that the trial Judge recognised the fact that P.W.2 was an accomplice and said that much when at page 284 of the Record he observed:

"The prosecution relied upon the evidence of P.W.2 Jerewani Dokubo who

was patently an accomplice."

He continued:

"Because of the nature of the evidence of P.W.2, I consider that evidence as one which must be corroborated before it could be acted upon."

One of the dangers of violating this rule of practice i.e. of the need for an accomplice evidence to be corroborated, is that an accomplice may have a personal interest, call it an end to serve or he may exaggerate facts to implicate an accused person. However, it is now well settled that a court can convict upon the evidence of one relevant and credible witness without more, if the witness is not an accomplice in the commission of the offence and his evidence is sufficiently probative of the offence with which the accused has been charged. See *Alli v. The State* (1988) 1 NWLR (Pt.68) 1 (1988) 1 S.C.35 at 47 and *Oteki v. The State* (1986) 2 NWLR (Pt. 24) 648 (1986) 4 SC.222 at 247. Hence, the learned trial Judge having clearly expressed the danger of reliance upon the evidence of P.W.2 without corroboration and proceeded to say of it at page 286 and 292 of the Record respectively:

"P.W.2 said a lot in his evidence which at times was relevant and at times so irrelevant that it is better to accept only that evidence which was corroborated in every material particular in compliance with section 177 of the Evidence Act."

20

"And that evidence made P.W.2 a person who could say anything at anytime to implicate any person and that was the reason why I said earlier that his evidence must be corroborated before it was acted upon."

(Emphasis mine).

25 The following pieces of evidence would not, in my view, have provided the necessary corroboration upon which to base the 3rd appellant's conviction, viz:

1. That 3rd appellant as 7th accused accompanied him and others to deliver the cheque (Exhibit 27) into the account of Sadayan Overseas Limited at the Bank of India.

30 2. That 3rd appellant owned a Volvo car with which he took them to the Bank on one occasion.

3. That 3rd appellant accompanied him (P.W.2) and others to the Bank of India on numerous occasions when money was withdrawn from the account of Sadayan Overseas Limited.

35 4. That on almost every occasion when withdrawals were made the 3rd appellant was present at the house of the 4th accused to collect his share of the money.

My reasons for saying that no corroboration of the above pieces of evidence was established are that none of the other people referred to by P.W.2

in his evidence implicated the 3rd appellant by way of any corroborative evidence. Nor was the contemporaneity of the purchase of the Volvo Saloon car to the time of the commission of the offences alleged proved. See Mbele v. The State (1990) 4 NWLR (pt.145) 484 where at page 500, Agbaje, J.S.C. expounded the law as follows:

"Corroborative evidence must be evidence which confirms in some material particular not only that the crime has been committed but also that it was the Appellant who committed it."

The 3rd appellant in his testimony and under cross-examination had shown that he bought his Volvo car in November, 1978 for N12,000.00 and this after he had received from the contract work he did for the Armed Forces Development Projects Task Force his pay amounting to N17,000.00. Since the purchase of the volvo car was not adduced as circumstantial evidence against this appellant it ought not to have been treated as such. The conviction of the 3rd appellant on that piece of evidence based on the reasoning of the learned trial Judge at page 289 of the Record amounted to no more than a conviction based on suspicion. See Ben Okafor v. Commissioner of Police (1965) All NLR 89, a case of robbery in which the four items of evidence adduced against the appellant might raise suspicion or that together they made the suspicion strong. the Supreme Court there held that their (hems of evidence) union could not give them a quality of being corroborative evidence in the true sense, which none of them in fact had. Further, that the trial Judge having treated as corroborative evidence what was not corroboration, the appeal would be allowed. In the instant case whose circumstances are similar to those in the Okafor v. C.O.P (supra), evidence adduced that 3rd appellant accompanied him (PW.2) and others to pay the cheque (Exhibit 27) into the account of Sadayan Overseas Limited at the Bank of India; (a) did not show that it was 3rd appellant who paid the money in. Evidence that 3rd appellant owned a Volvo car with which he took the confederates to the Bank on one occasion; (b) was not proof positive that the Volvo car was purchased from the proceeds of the crime or that its purchase was made contemporaneously with the crime. Furthermore, evidence that 3rd appellant accompanied him (P.W.2) and others to the Bank of India on numerous occasions when money was withdrawn from the Sadayan Overseas Limited account (c) was no evidence that he (3rd appellant) partook or joined in the actual withdrawal of the money. Also, P.W.2's assertion that on almost every occasion when withdrawals were made the 3rd appellant was present at the house of 4th accused to collect his share is neither here nor there; (d) when neither 4th accused nor any other person testified to corroborate this piece of evidence on the point.

In the case of Odofoin Bello v. The State (1966) All NLR 223 at 228, Ademola, C.J.N. said:

"Also we cannot quarrel with the rule of practice to which the learned trial Judge referred more than once in his judgment: namely that it is not safe to convict on the evidence of an accomplice unless such evidence has been corroborated in a material particular."

The learned Chief Justice stated further at page 231 of the Report:

"The aim of the warning no doubt is to dissuade the Jury from convicting without corroboration and the usual effect of it is acquittal."

The conviction of the 3rd appellant, proceeding as it did solely upon the unreliable, discredited evidence of an acknowledged accomplice, no verdict other than that of a discharge and acquittal of the 3rd appellant became inevitable.

Issues 2 and 3 having earlier in this judgment been given full treatment in the overlapping appeal of the 2nd appellant and hereinbefore in my consideration of issue 1, I deem it unnecessary to further consider them. Suffice it to say that my answers thereto are in the affirmative and negative respectively.

Lastly, is Issue 4 which enquires whether the Court of Appeal was correct in the circumstances of this case to affirm the conviction of the 3rd appellant on the counts of conspiracy to steal and conspiracy to commit forgery when he was discharged on the substantive counts of stealing and forgery. Here, it is pertinent to point out that the court below affirmed the 3rd appellant's conviction on counts 1 and 2 for the offences of conspiracy to steal and conspiracy to commit forgery respectively. Significantly, however the trial court had discharged and acquitted the 3rd appellant (along with 2nd appellant) on count 3 for the offence of stealing. The 3rd appellant had also been discharged on counts 4, 7, 10, 13, 16 and 19 for the offences of forgery and on counts 5, 8, 11, 17 and 20 for the offences of uttering. The position therefore was clearly that the 3rd appellant was convicted of conspiracy to commit offences whereas he had been discharged and acquitted on, the counts of the substantive offences themselves.

The question is, could the 3rd appellant have been convicted of conspiracy, having been acquitted of the substantive offences themselves? The answer would seem to come from the illuminating judgment of Akpata, J.C.A. (as he then was) in the case of Abioye v. The State (1987) 7 NWLR (Pt.58) 645 in which the learned Justice put it pointed at page 653 of the Report thus:

"To some extent it is a general principle of law that an accused person cannot be convicted of conspiracy where he has been acquitted of committing the substantive offence,"

He went on to state that this general principle is not without exceptions, Ogundere, J.C.A. in his judgment then complemented the above statement of the law by stating thus:

"However this proposition of law is subject to some exceptions. Thus where a co-accused admits the conspiracy and or there are other evidence to sustain the conspiracy count." 5

As earlier pointed out in this judgment, apart from the uncorroborated evidence of P.W. 2 which implicated the appellants, there was no other piece of evidence upon which the learned trial Judge relied to sustain the convictions for stealing and forgery. There being no evidence outside that of P.W.2 to sustain the conviction for conspiracy to steal and conspiracy to commit forgery, the trial court ought to have discharged and acquitted the 3rd appellant on counts 1 and 2 of the information. The court below therefore erred in law to have affirmed his conviction thereon. Hence, the learned legal Officer, David Onyeike, therefore said right when at the end of the day he conceded that he no longer supported the convictions of all three appellants. 15

It is for these reasons and the fuller ones contained in the judgment of my learned brother Mohammed, J.S.C, the draft of which I had a preview that I made the orders acquitting and discharging the appellants on 23rd September, 1993. 20

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