

**SUPREME COURT OF NIGERIA**  
10TH JUNE, 1994. SC. 160/1993  
**CORAM:- M. L. UWAIS, O. OLATAWURA,**  
**M. E. OGUNDARE, E. O. OGWUEGBU, Y. O. ADIO, JJSC**

GABRIEL ERIM ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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**CRIMINAL LAW** - Conspiracy- Where conviction on some counts of the information were set aside - Whether to be a basis for not upholding conviction for conspiracy.

**CRIMINAL LAW** - Inconsistency of a verdict- Trial for conspiracy together with that for alleged substantive offences - Whether a verdict of guilty on conspiracy count and not guilty on substantive offence or vice versa - Is necessarily inconsistent.

**CRIMINAL LAW** - Conspiracy - Trial for conspiracy and substantive offence - How actual fact of conspiracy is deduced.

**CRIMINAL LAW** - Conspiracy, stealing and forgery offences - Evidence - Whether appellant's conviction was supported by evidence.

**CRIMINAL LAW** - Conspiracy to steal - Overwhelming evidence against the appellant - Where the crime could not have been committed without his assistance - Whether appellant acted in pursuance of a common criminal purpose together with other accused persons.

**CRIMINAL PROCEDURE** - Mistake of lower courts - Conspiracy to steal from a bank - Overwhelming evidence against the convicted appellants bank manager - Whether there are any mistakes of the lower courts that occasioned miscarriage of justice.

**EVIDENCE** - Inference of guilt- Conspiracy - Proof thereof is generally a matter of inference - Whether there are circumstances from which appellants involvement can be inferred.

### **FACTS**

The Appellant was the Manager of Mercantile Bank Ltd. Aba Branch. Sometime in 1979, he met three of the accused persons at the house of PW3, an Assistant Manager in another bank. Both the Appellant and PW3 refused to accept a request by the said accused persons to come down from Port-Harcourt and open a crooked account at Aba. Eventually, the said accused persons opened an account at the bank being managed by the Appellant. Accused persons perpetrated forgery of a Mail Transfer Order at a Calabar branch of the Mercantile Bank. Upon the arrival of the sum of N782,546.98 vide the said Mail Transfer Order, the accused drew a total of N200,000.00. Appellant had been warned by some bank inspectors on duty at his branch to be cautious in handling the Mail Transfer Order since one of the signatures was questionable. PW4, Appellant's co worker, had warned him not to honour the accused persons' cheque without first clearing with the Calabar branch. Appellant defied all the warning and paid the amount to the accused persons.

It was during a further move to draw another sum of N200,000.00 that the accused persons were arrested by the police. The Police caused the Appellant to be charged to court with 4 other accused persons on six counts of conspiracy, stealing and forgery offences. The trial Calabar High Court convicted all the accused persons on all the six counts of information and sentenced them to a concurrent 7 years imprisonment without the option of fine. On appeal to the Court of Appeal other accused persons were unsuccessful while the Appellant's appeal was partially allowed. He was acquitted in counts 4, 5 and 6, but his convictions and sentences on counts 1 - 3 were affirmed. Appellant has further appealed to the Supreme Court to determine inter alia, whether the Court of Appeal was right in affirming his conviction on counts 1-3 having found him not guilty in counts 4-6.

### **HELD** (Unanimously dismissing the appeal)

1. In count one of the information the appellant and four others were charged with conspiracy to effect unlawful, purpose contrary to Section 518(f) of the Criminal Code. Conspiracy does not sink in the

consummated crime. The fact that the appellant's convictions on those counts (4-6) of the information were set aside was no basis for the court below not upholding the conviction for conspiracy with others to steal. The external or overt act of the crime of conspiracy is concert by which mutual consent to a common purpose is exchanged. (P41 L25)

2. If counts for conspiracy and for substantive offences alleged to have been committed in the carrying out of that conspiracy are tried together, there is no general principle that, whenever a verdict is returned of not guilty on a count charging conspiracy to commit offences and if guilty on other counts in the same information charging those specific offences or vice versa, that the verdict is necessarily inconsistent. Each case must depend on its particular circumstance. In addition, the actual fact of conspiracy may be collected from collateral circumstances. Therefore there was no inconsistency in the convictions and sentences. (P43 L 21)

3. From the facts of this case, there was ample evidence upon which the appellant was convicted and sentenced in counts 1, 2 and 3 of the information, (ie Conspiracy, Stealing and Forgery Offences) (P45 L19)

4. Proof of conspiracy is generally a matter of inference and the inference of involvement of the appellant can be inferred from all the collateral circumstances. Most of the transaction in respect of the account were handled directly by the appellant who would then delegate the appropriate subordinate officers to take one action or the other. There was also undue haste in the withdrawal. Under Section 7 of the Criminal Code, the appellant was rightly convicted on those three counts despite the fact that he might have repented and stopped at a stage. (P47 L4)

5. The evidence against the appellant was overwhelming. Without his assistance the crime could not have been committed. Whatever the mistakes of the courts below, such mistakes did not occasion any miscarriage of justice. He had foreknowledge of the crime and he consented to everything done to execute it by his co-conspirators.

He aided them until he was persuaded to report to the head office of the bank by his subordinate Officers. All the accused persons acted in pursuance of a criminal purpose which was held in common between them. (P47L19)

## **NOTABLE POINTS OF INTEREST**

### **OGWUEGBU JSC**

#### ***1. Conspiracy - When the offence is deemed completed***

The crime of conspiracy is completely committed the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless is completed when they agreed. (P41 L16)

#### ***2. Proof of conspiracy***

In order to prove conspiracy, it is not necessary that there should be communication between each conspirator and every other, but the criminal design alleged must be common to all. Indeed one conspirator may be in one town and the other in another town and they may never have seen each other but there would be acts on both sides which would lead the jury or the judge sitting alone to the inference. (P43 L6)

#### ***3. Involvement in conspiracy by mere assent***

A person may involve himself in the crime of conspiracy by his mere assent to and encouragement of the design, although nothing may have been assigned or intended to be executed by him personally. In other words, it need not be intended that all the conspirators should take part in the crime as principals in the first or second degree. (P43 LI5)

### **REPRESENTATION**

K.G. Agabi with J. Ashang for the Appellant.

E. Jacob-Duke, Assistant Director of Public Prosecutions, Cross River State for the Respondent.

**CASES REFERRED TO**

Onafowokan v. The State (1987) 2 N.W.L.R. (pt. 61) 538

Okonji v. The State (1987) 1 N.W.L.R. (pt. 52) 659

Bakare v. The State (1987) 1 N.W.L.R. (Pt. 52) 579

Nnaji v. Inspector-General of Police (1957) 2 F.S.C. 18

5 Adebayo v. The State (1987) 2 N.W.L.R. (Pt. 57) 469 at 470-471

Atano v. A-G of Bendel State (1988) 2 N.W.L.R. (Pt. 75) 201 at 226.

Ogbozor v. Inspector-General of Police (1964) 1 All N.L.R. 9

**STATUTE REFERRED TO**

10 Criminal Code ss. 518 (f), 467, 390(9), 107(1), 7

**BOOK REFERRED TO**

Criminal Conspiracies (1873) by Wright J. p. 70

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**LEAD JUDGMENT BY OGWUEGBU JSC**

The appellant and four others were tried and convicted by Effanga, J. sitting in the Calabar Judicial Division of the High Court of Cross River State with the following offences:-

20 “*Statement of Offence Count 1*

*Conspiracy to effect unlawful purpose, contrary to section 518(f) of the Criminal Code.*

25 *Particulars of Offence- Paulinus Orok Bassey, George Okon, Justine Geku Orufa, Gabriel Erim and Mfon Akpan Iniunam between the months of June and September, 1979 at Calabar in the Calabar Judicial Division conspired among yourselves and with other persons unknown to effect an unlawful purpose to wit: stealing.*

*Statement of Offence Count 11*

30 *Stealing, contrary to section 390 of the Criminal Code.*

*Particulars of Offence- Paulinus Orok Bassey, George Okon, Justine Geku Orufa, Gabriel Erim and Mfon Akpan Iniunam in or about the month of September, 1979 at Calabar in the Calabar Judicial Division stole one Mercantile Bank of (Nig.) Ltd. Mail Transfer form number 28008 valued 2 kobo property of the Mercantile Bank (Nig.) Ltd.*

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*Statement of Offence Count 111*

*Forgery contrary to section 467 of the Criminal Code.*

*Particulars of Offence- Paulinus Orok Bassey, George Okon,*

*Justine Geku Orufa, Gabriel Erim and Mfon Akpan Iniunam in or about the month of September, 1979 at Calabar, in the Calabar Judicial Division forged one Mercantile Bank of (Nig.) Ltd. Mail Transfer form No. 28007 for the sum of N782,546.98 purporting same to have been issued by Joseph Akpan Udo, Manager of Mercantile Bank of (Nig.) Ltd., Mbukpa Branch, Calabar.* 5

*Statement of Offence Count IV*

*Stealing, contrary to section 390(9) of the Criminal Code.*

*Particulars of Offence- Paulinus Orok Bassey, George Okon, Justine Geku Omfa, Gabriel Erim and Mfon Akpan Iniunamon the 21st day of September, 1979 at Aba in the Aba Judicial Division stole the sum of N124,350.00 property of Mercantile Bank of (Nig.) Ltd.* 10

*Statement of Offence Count V*

*Stealing, contrary to section 390(9) of the Criminal Code;*

*Particulars of Offence- Paulinus Orok Hassey, George Okon, Justine Geku Orufa, Gabriel Erim and Mfon Akpan Iniunam on the 21st day of September, 1979 at Aba in the Aba Judicial Division stole the sum of N75,650.00 property of Mercantile Bank of (Nig.) Ltd.* 15

*Statement of Offence Count VI*

*Stealing, contrary to section 390(9) of the Criminal Code.* 20

*Particulars of Offence- Paulinus Orok Bassey, George Okon, Justine Geku Orufa, Gabriel Erim and Mfon Akpan Iniunam on the 25th day of September, 1979 at Aba in the Aba Judicial Division stole the sum of N200,000.00 property of Mercantile Bank of (Nig.) Ltd."* 25

The facts of the case are as follows:- Sometime in the months of June and July, 1979, the first three accused persons- Paulinus Orok Bassey, George Okon and Justine Geku Omfa approached PW.3- Amaitari Theophilus Dadiolie, an Assistant Manager attached to Union Bank, Aba Road, Aba in his house at No. 203, Tenant Road, Aba. They discussed with PW.3 the possibility of opening an account with the Union Bank, Aba Road Branch. As they were discussing the matter, the 4th accused - Gabriel Erim (appellant) who was then the Manager of the Mercantile Bank Ltd. Aba branch came in and they all joined in the discussion after the PW.3 introduced the appellant to them as well as the topic. 30 35

PW.3 had declined the request to open the said account and they turned their request to appellant. Appellant also queried them

as to their motive for leaving Port Harcourt to open an account in Aba and told them that he was not interested in a crooked account.

On the 9th of July, 1979, the 1st, 2nd and 3rd accused opened the account with Mercantile Bank Ltd., Aba branch where the 4th accused (appellant) was manager at the time material to this case.

5 The name Asirok Construction Company was used in opening the account. They presented a photocopy of Registration of Business name No. 237918 dated June, 1975 and the names of the partners in the business are Okon Asikpo and Orok Bassey who are signatories to the account which was numbered 1393. The account was opened

10 with an initial amount of N100.00 and from the opening of the account the 1st to 3rd accused were sending P.W.1 (Patrick Nyong Effiong) to go to the Mercantile Bank Ltd., Aba and find out from the manager (the appellant) whether their Mail Transfer Order had arrived. Meanwhile a forgery, with the co-operation of the staff of the

15 Mbukpa Road Branch of Mercantile Bank Ltd., Calabar was perpetuated after the original, duplicate and triplicate copies of a Mail Transfer Order No. 28008 was stolen from the Mbukpa Road Branch. With the false or forged Mail Transfer Order (Exhibits 12 and 12A),

20 the sum of N782,546.98 in favour of Asirok Construction Company was transferred to the Aba Branch of the Mercantile Bank from the Mbukpa Road Branch, Calabar of the said bank.

Before the arrival of the Mail Transfer, P.W.1 made only two lodgments of N30.00 and N20.00 on the 4th and 10th September,

25 1979 respectively bringing the total lodgments to N50.00.

On 20th September, 1979, the appellant (4th accused) received the Mail Transfer. He discovered that one of the signatures on the mail transfer was questionable and he called the attention of three

30 bank inspectors who were then on inspection at the Aba branch of the bank. (P.W.5, P.W.6 and P.W.15). After inspecting and comparing the signatures, they warned the appellant to be cautious in the handling of the mail transfer. On 21st September, 1979 the first three accused presented two cheques No. A407503 for N124,350 dated

35 21/9/79 (Exhibit 14) and No. 407501 for N75,650.00 of the same date (Exhibit 14A) totalling N200,000.00 and before payments were made, the cheques were presented to the appellant by the 1st to 3rd accused and he made arrangement for the money to be brought to his office for payment. 1st, 2nd, 3rd and 5th accused persons made

away with the money in a Mercedes Benz saloon car belonging to 1st accused. PW.4 - Clarence Patrick Udoh the Aba Branch Supervisor of Current Account and cash custodian warned appellant not to pay the money and that he should first of all clear with the Mbukpa Road Branch, Calabar. The appellant defied his warnings and paid the money. On 24th September, 1979, the 2nd and 3rd accused persons came again and presented another cheque for N200,000.00 and appellant was pressurized to go to Calabar and check from the Mbukpa Branch. Appellant was later informed that the document (Mail Transfer Order) was a forgery and he then alerted the police. 5

On 25th September, 1979, the PW.8 (Jonah Ekpo - An Assistant Superintendent of Police) arrived at the Aba branch office of the Mercantile Bank Ltd., with his men and informed the 4th accused (appellant) of their presence. PW.8 was told to hold on as the other accused persons were in the appellant's office counting the money. 10 They waited in an office adjoining that of the appellant. Thereafter, the 2nd and 3rd accused persons came out with a carton and a brief case containing money. They were both arrested and taken to the police station, Aba along with the money which amounted to N200,000.00. The 2nd and 3rd accused persons were detained for further investigation which led to the arrest of the remaining accused persons and the recovery of the other exhibits. 20

At the trial, seventeen witnesses gave evidence for the prosecution while the accused persons gave evidence on their own behalf. They called no witnesses. After evaluating all the evidence before him, the learned trial Judge convicted the accused persons on all the counts of the information and sentenced each as follows:- 1st Count - 2 years I.H.L.; 2nd Count - 2 years I.H.L.; 3rd Count - 3 years I.H.L.; 4th Count - 7 years I.H.L.; 5th Count - 7 years I.H.L.; 6th Count - 7 years I.H.L.. The sentences were to run concurrently. 25 The 1st, 3rd, 4th and 5th accused persons filed notices of appeal against the judgment to the Court of Appeal. The 2nd accused did not appeal. Briefs of argument were filed on behalf of the 1st and 3rd appellants (1st and 4th accused in the trial court). None was filed on behalf of the 2nd and 4th appellants (3rd and 5th accused persons). The appeals were unsuccessful. In the case of the 3rd appellant (4th accused), his appeal was partially allowed. His conviction and sentences in counts 4, 5 and 6 of the information were set aside. 35

He was discharged and acquitted on those counts. His convictions and sentences on counts 1,2 and 3 were affirmed. The 3rd appellant (Gabriel Erim) alone has further appealed to this court.

Both learned counsel for the appellant and the respondent filed briefs of argument. From the two grounds of appeal filed by the  
5 appellant, the following three issues were identified as arising for determination in the appeal:-

10 *“1. Whether the lower court was right in holding that the case against the appellant was proved beyond reasonable doubt in counts 1, 2 and 3, having found him not guilty in counts 4, 5 and 6 in spite of all the evidence which if considered would or should have cast grave doubt on the guilt of the appellant.*

15 *2. Whether the lower court gave sufficient consideration to all the issues raised by the appellant and if not, whether such failure occasioned a miscarriage of justice.*

20 *3. Whether the appellant merely failed to exercise due care and caution in the discharge of his duties and thereby innocently, mistakenly, negligently or even stupidly facilitated the commission of the offences by the other accused persons or whether he acted in concert with them deliberately and purposely to steal”*

*Two issues for determination were identified in the respondent’s brief of argument:-*

25 *From the totally (sic) of the case, can it be said that counts 1, 2 and 3 are based on the same facts and evidence with counts 4, 5 and 6, such that it will not be possible to convict on counts 1, 2 and 3 and discharge on counts 4, 5 and 6 without occasioning miscarriage of justice.*

30 *2. Whether there exist (sic) any doubt in the evidence before the court in counts 1, 2 and 3 that could have been decided in favour of the appellant.”*

The first two issues identified by the appellant in his brief of argument are covered by the grounds of appeal and so are two issues formulated by the respondent. The appellant’s issue 3 does not  
35 arise from any of the two grounds of appeal filed. I will therefore ignore it. On the first issue, the learned appellant’s counsel submitted that the court below did not reach its conclusion after due consideration of all the facts and the law and that it was the right of the appellant to have his defence considered however weak or frivolous it

might seem.

He stated that it was the appellant who promptly set in motion the process which led to the discovery of the crime and the arrest of the thieves; that the appellant did not know the other accused persons until the chance meeting in the house of P.W.3 when he first met them and the 3rd accused was introduced to the appellant by P.W.3<sup>5</sup> and all that the other accused persons were seeking to do was to open an account which could not be said to be a criminal offence. It was also submitted that the appellant had no share in the sum of N200,000.00 which was stolen before the arrests; he had no motive to commit the crime and the lapse on his part upon which the learned trial Judge based his conviction were more consistent with negligence,<sup>10</sup> carelessness, mistake and stupidity than with criminality. Learned counsel referred to pieces of evidence which he said showed that the appellant was not and could not have been part of the criminal gang.<sup>15</sup>

As to the forged mail transfer, counsel submitted that it emanated from Mbukpa branch where Effiong Lazarus Ekot who was originally charged as the 4th accused worked. The charge against this Effiong Lazarus Ekot was dropped when he jumped bail. Counsel said that it was this Effiong Lazarus Ekot who requested P.W.16 another staff at Mbukpa branch to teach him how to prepare mail transfers and who had access to Mail Transfer Booklet kept by P.W.16.<sup>20</sup> Learned counsel urged the court to infer from the evidence of P.W.9 that it was Effiong Lazarus Ekot who conspired with the 1st, 2nd and 3rd accused persons to defraud the bank, stole Mail Transfer Form No. 28008 from Mbukpa branch of the Mercantile Bank Ltd. and forged the Mail Transfer Form.<sup>25</sup>

We were also urged to hold that the failure of the learned trial Judge to advert to the role played by Effiong Lazarus Ekot amounted to non-direction upon a vital point and if he had done so, the complexion of the case and the judgment would have been different. It was argued by the learned appellant's counsel that when the Mail Transfer Form came into the bank the appellant showed it to the branch accountant and the inspectors who confirmed that the signatures on the mail transfer were genuine and if the appellant had conspired with the other persons to defraud the bank, he would not have drawn the attention of these persons to the mail transfer form.<sup>35</sup>

Learned counsel stated that it was the appellant himself who

travelled to Calabar to verify the mail transfer, assisted the police to have the other accused persons arrested and that until the 1st accused made Exhibit 24, both the police and the appellant's employers were satisfied that the appellant was not involved in the fraud. He described Exhibit 24 as the statement of a desperate criminal who  
5 had been caught and that the appellant was convicted on the basis of this exhibit and if the appellant is guilty on account of Exhibit 24, then P.W.3 and P.W.4 should also be guilty. He contended that the evidence of P.W.1 showed that Exhibit 24 is false; the statements of  
10 the 2nd and 3rd accused to the police and their evidence in court also showed Exhibit 24 to be manifestly false and the learned trial Judge failed to take these into account as it affected the appellant.

He argued that if all the above features in the case were taken into consideration, grave doubt as to the guilt of the appellant would  
15 have arisen and the doubt should have been resolved in favour of the appellant. Learned counsel referred us to the cases of Onafowokan v. State (1987) 2 NWLR (Pt.61) 538; Okonji v. State (1987) 1 NWLR (Pt.52) 659; and Bakare v. State (1987) 1 NWLR (Pt.52) 579.

Counsel stated that the court below having set aside the convictions in counts 4, 5 and 6 should, in order to be consistent, have set aside the convictions and sentences in counts 1, 2 and 3 and if the appellant is not guilty of the substantive offences, he should not have been found guilty of the preparatory acts. He cited and relied on the  
20 cases of Nnaji & 7 ors. v. Inspector-General of Police (1957) 2 F.S.C. 18; (1957) SCNLR 156; Adebayo v. The State (1987) 2 NWLR (Pt.57) 468 at 470-471; and Atano & Ors. v. Attorney-General of Bendel State (1988) 2 NWLR (Pt.75) 201 at 226. Counsel finally urged the  
25 court to allow the appeal and set aside the convictions and sentences imposed on the appellant in counts 1,2 and 3.  
30

The learned respondent's counsel submitted in his brief of argument that the facts and evidence in counts 1,2 and 3 (conspiracy to steal, stealing of mail transfer form No. 28008 and forgery of the said mail transfer form) were not the same as those in counts 4, 5  
35 and 6. Counsel further submitted that a scheme was originated by the other accused persons and what they wanted was a ready account where the mail transfer could be paid into and by describing the account as "crooked account," the whole scheme must have been explained to the appellant. He immediately rejected it and on a sec-

ond thought, accepted and allowed the account to be opened. He argued that by describing the account as “crooked account” at first, he had knowledge of the scheme and by allowing it to be opened, he qualified as *particeps criminis* as provided in section 7 of the Criminal Code and without the part he played, the offences in counts 1, 2 and 3 could not have been committed and the offences in those counts were completed when the money was transferred into the “crooked account”. He stated that those offences would still have been committed even if no attempt was made to withdraw the money. He cited and relied on *Ogbozor v. IGP* (1964) 1 All NLR 9; *R. v. Ligali* (1959) 4 F.S.C. 7; (1958) SCNLR 14; *Aremu v. IGP* (1965) NMLR 327; and *Atano v. Attorney-General, Bendel State* (*supra*) at 226.

Before deciding the question whether the setting aside of the convictions and sentences on counts 4, 5 and 6 rendered the affirmation of the convictions and sentences on counts 1, 2 and 3 inconsistent, it will be expedient here to observe that the crime of conspiracy is completely committed the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that anyone thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is completed when they agreed. See *R. v. Aspinall* (1876) 2 Q.B.D. 48 at 58-59; and *Majekodunmi v. The Queen* (1952) 14 WACA 64.

In count one of the information the appellant and four others were charged with conspiracy to effect unlawful purpose contrary to section 518(f) of the Criminal Code. Conspiracy does not sink in the consummated crime. For example, an agreement to commit treason is itself an overt act of treason and the conspiracy can be prosecuted without prosecuting for treason: *R. v. Burch & Ors.* 176 E.R. 622. The fact that the appellant’s convictions on those counts of the information were set aside was no basis for the court below not upholding the conviction for conspiracy with others to steal. The external or overt act of the crime of conspiracy is consent by which mutual consent to a common purpose is exchanged: See *Rex v. Plummer* (1902) 2 K.B. at 348; and *Daboh & Ors. v. State* (1977) 5 S.C. 197. Learned counsel for the appellant relied on the case of *Nnaji v. Inspector-General of Police* (*supra*). In that case, the elders of a community

met and agreed to meet from time to time to hear and try cases of theft in their community and to deal with the offenders according to their rules and regulations which were drawn up by a qualified lawyer and which contained a scale of fines for different offences.

As one suspect was being tried for theft of a goat, the police  
 5 came to the scene and arrested the appellants; the other people at the trial escaped. The appellants were convicted by the Magistrate on two counts charging them with (1) conspiracy to commit felony - assuming to act as judicial officers and (2) assuming to act as judicial  
 10 officers contrary to section 107(1) of the Criminal Code. On appeal to the High Court, the convictions on count 2 were quashed.

On further appeal to this court, it was held that the appellants could not properly be convicted of conspiring to assume to act as judicial officers after they had been found not to have assumed to act  
 15 as judicial officers. That decision turned on the definition of “judicial officer” and the expression was held not to cover members of a native community exercising judicial powers. It was therefore logical that if the appellants were found not to have assumed to act as judicial officers, they did not conspire to commit the felony. The case of  
 20 *R. v. Cooper & Compton* (1947) 2 All E.R. 701 is on all fours with *Nnaji v. IGP* (supra). In that case two accused persons were charged with conspiring to steal on count one and with stealing in four other counts. They were found not guilty on the counts of stealing but  
 25 were convicted on the conspiracy count. The Court of Appeal (England) quashed their convictions since the jury had found the prisoners not guilty of doing the things which they were charged with conspiring to do, their verdict that they were guilty of conspiring as a specific offence under the first count was therefore unreasonable.

30 The facts of the above two cases are distinguishable from those of the present appeal. In this appeal all the accused persons were charged with conspiracy, stealing of mail transfer form, forgery and three other counts of stealing various sums of money. The learned trial Judge found all the accused persons guilty on all the six counts of  
 35 the information. In the Court of Appeal the convictions and sentences passed on the appellant in counts 4, 5 and 6 were quashed. The convictions and sentences passed on the other accused persons in all the six counts of the information were affirmed. The convictions and sentences passed on all the accused persons including the appel-

lant in counts 1, 2 and 3 were also affirmed by the court below. Even if all the accused persons including the appellant were acquitted and discharged in counts 4, 5 and 6 of the information, it would not have affected the convictions and sentences passed on the appellant in counts 1, 2 and 3. Apart from the charge of conspiracy in count 1, counts 2 and 3 are substantive offences for which the appellant and the other accused persons were equally convicted. Those convictions and sentences were not quashed by the court below.

In order to prove conspiracy, it is not necessary that there should be direct communication between each conspirator and every other, but the criminal design alleged must be common to all. Indeed one conspirator may be in one town and the other in another town and they may never have seen each other but there would be acts on both sides which would lead the jury or the Judge sitting alone to the inference. See *R. v. Meyrick & anor.* 21 Cr. App. R. 94; *Queen v. Esege* (1962) 1 SCNLR 189; (1962) 1 All NLR 110; *Oyeridan v. Republic* (1967) NMLR 122; and *Haruna & Ors. v. The State* (1972) All NLR 738 (Reprint) (1972) 8-9 S.C. 172. A person may involve himself in the crime of conspiracy by his mere assent to and encouragement of the design, although nothing may have been assigned or intended to be executed by him personally. In other words, it need not be intended that all the conspirators should take part in the crime as principals in the first or second degree. See *Law of Criminal Conspiracies* (1873) by Wright J. at page 70.

If counts for conspiracy and for substantive offences alleged to have been committed in the carrying out of that conspiracy are tried together, there is no general principle that, whenever a verdict is returned of not guilty on a count charging conspiracy to commit offences and if guilty on other counts in the same information charging those specific offences or vice versa, that the verdict is necessarily inconsistent. Each case must depend on its particular circumstances: *R. v. Sweetland* 42 Cr. App. R. 62. In addition, the actual fact of conspiracy may be collected from collateral circumstances. See *Brisac & Scott v. The King* 102 E.R. 793. I therefore hold that there was no inconsistency in the convictions and sentences.

As to whether the court below gave sufficient consideration to all the issues raised by the appellant, the findings of fact made by the learned trial Judge are very material. His findings at pages 23-25 of

the record of appeal are as follows:- “(a) that sometime in the months of June/July, 1979 the accused persons - Paulinus Orok Bassey, Justine Geku Orufa, George Okon approached the P.W.3 - Amaitari Theophilus Dadiolie, an assistant manager attached to Union Bank, Aba Road, Aba in his house at No. 203 Tenant Road, Aba, and discussed the opening of an account with the Union Bank;

(b) that as they were discussing on this topic, the 4th accused, Gabriel Erim, who was then the Manager of Mercantile Bank, Aba branch came and met them, and they all joined in the discussion;

10 (c) that there the host Amaitari Theophilus Dadiolie introduced Mr. Erim to them as the Manager of Aba Branch of the Mercantile Bank, and they re-introduced their topic to Mr. Erim;

(d) that on the 9th of July, 1st, 2nd and 3rd accused opened an account in Mercantile Bank, Aba branch with the name Asirok Construction Company and presented a photostat copy of Registration of Business Name No. 237918 dated June, 1975, and the names of the partners in the business are Okon Asikpo and Mr. Orok Bassey, who are also signatories to the account. The number of the account is 1393;

20 (e) that on opening the account on 9th July, 1979 they made an initial payment of N100.00 from that day they have been sending the P.W.1 (Patrick Nyong Effiong) to go to Aba and find out from the manager whether their transfer order had arrived; meanwhile an ingenuous forgery, with the co-operation of the staff of the Mbukpa Road Branch of the Mercantile Bank, Calabar was perpetuated after the original, duplicate and triplicate copies of the Mail Transfer Order No. 28008 were stolen;

30 (f) that with the false or forged mail transfer order (Exhibits 12 and 12(A), the sum of N782,546.98 in favour of Asirok Construction Company, was transferred to Aba Branch of the Mercantile Bank;

(g) that before the arrival of the mail transfer, the P.W.1 had made only two lodgments of N30.00 and N20.00 on the 4th and 10th September, 1979 respectively;

35 (h) that on the 20th September, 1979 the Manager, Aba Branch of the Mercantile Bank received the Mail Transfer Order;

(i) that one of the signatures on the Mail Transfer was more questionable and the 4th accused called the attention of the three bank inspectors who were in the branch for inspection;

(j) that having examined the signatories the inspectors warned him (4th accused) to be cautious in handling the transaction;

(k) that on the 21st day of September, 1979, the 1st accused, Paulinus Bassey; 2nd accused, George Okon and 3rd accused, Justine Geku; presented two cheques No. A407503 for N124,350.00 dated 21/9/79 (Exhibit 14) and No. 407501 for N75,650.00 dated 21/9/79 (Exhibit 14A). The total amount of money drawn on this account on that day was N200,000.00;

(l) that before the payment was done the cheques were presented to the manager (4th accused) himself, and he made the arrangements for the money to be brought to his office for payment;

(m) that the 1st, 2nd, 3rd and 5th accused persons made away with this money in Mercedes Benz car belonging to the 1st accused;

(n) that by the time this money was being paid, one Clarence Patrick Udo P.W.14, one of the supervisors of the bank, had warned the 4th accused not to pay the money; that he should first of all clear with Mbukpa Branch of the Bank at Calabar;

(o) that the 4th accused defied all these warnings and paid out the money;

(p) that it was when on pressure and when Justine Geku Orufa and George Okon came again on the 24th day of September, 1979 to present another cheque that the 4th accused finally decided to travel to Calabar, and ostensibly to check at Mbukpa Branch. He was later informed that the document is a forgery and the police was then alerted, by that bank's manager... (Italics are for emphasis only).

From the facts of this case, there was ample evidence upon which the appellant was convicted and sentenced in counts 1, 2 and 3 of the information. The following facts are worthy of note in order to appreciate the role played by the appellant in the whole scheme:-

P.W.3 testified that when the 1st, 2nd and 3rd accused came to him in his house in June/July, 1979 they told him that they wanted to open an account with the Barclays Bank (now Union Bank) where the witness was the Assistant Manager. When they explained their reasons for wanting to open the account at Aba, he declined. The appellant met them in the house of P.W.3. The other accused persons introduced the subject to the appellant who queried them as to their motive for leaving Port Harcourt for Aba. The appellant told them that he was not interested in "crooked account". P.W.3 later learnt

from the 3rd accused that they had opened the account in the Mercantile Bank, Aba where the appellant was manager. He later saw the appellant and warned the appellant to scrutinise the payments and withdrawals and to watch the account carefully. PW.5 (James Udo Ido) was the Manager of the Ikom Branch of the Mercantile Bank.

5 He was one of the inspectors who visited the Aba Branch of Mercantile in September, 1979 on inspection. At the close of their inspection duties, the appellant drew their attention to the signatures in the Mail Transfer (Exhibits 12 & 12A). PW.5 examined the Mail Transfer Order. He stated:- *“When I saw it I told him that that other signature*  
 10 *resembles that of Felicia Boco but that it was badly signed and that he should be cautious.”*

PW.6 - Mr. Clement Udom who was one of the inspectors on duty at the Aba Branch of Mercantile Bank in his examination-in-  
 15 chief stated:- *“We discovered that no amount as high as over 1/12 of what was purported to be trust to that account has ever been lodged with that account. We advised the manager to be cautious in dealing with that account.”*

PW.14 was one Clarence Patrick Udoh. He was the cash custodian and supervisor of current accounts at the Aba Branch of the Mercantile Bank. In his examination-in-chief, he stated:- *“On 21/9/79, I was instructed by the Branch Accountant that the manager (4th accused) needed N200,000.00 to cover payment for cheques No: 14 - A407501 for N75,650.00 Exhibit 14A- A407503 for*  
 25 *N124,350.00. The two cheques were presented to him. When our manager requested for this money, I checked to find out if there was sufficient fund in their account. I told the accused that the balance in the account was N150.00. Soon after a mail transfer entry was re-*  
 30 *sponded to and referred to me by the account. I advised 4th accused that we should confirm the signatures at Mbukpa branch before payment. 4th accused did not abide by my advice but advised us to bring the money. The mail transfer was shown to me. The document shown to me now is the mail transfer (Exhibit 12 identified). Since I*  
 35 *was not satisfied with the signatures and transaction or crediting the customer’s account as it was, I sent our messenger to dissuade him from paying. On 24/9/79 - the Manager left for Calabar after I brought much pressure to bear on him to confirm the transfer.”*

PW.15 - Sunday Inyang Ekanem. He was also on inspection

tour of the Aba Branch of the Mercantile Bank on 20/9/79. When the appellant showed him Exhibits 12 and 12A, he queried the signatures in the exhibits. They sent for the signature book in the bank. They turned to the relevant pages and he did not make any comment about the signatures but he told the appellant that the amount in Exhibits 12 and 12A was very big and that he should refer to the customer's account to find out if the customer is used to having such huge amount in his account. He left his office and after winding up their inspection, he returned to the head office of their bank.

The account was opened in July, 1979 with only N100.00. Subsequent deposits came to N50.00 bringing the total deposits to N150.00 until the Mail Transfer of N782,546.98 got its way into the account on 20/9/79 barely two months after the account was opened. No withdrawals were made from the account until the arrival of the Mail Transfer.

Proof of conspiracy is generally a matter of inference and the inference of involvement of the appellant can be inferred from all the collateral circumstances as I have tried to recapitulate above. The appellant might have repented and stopped at a stage. Nevertheless, the crime was complete. See *R. v. Aspinall* (1876) 2 Q.E.D. 48 at 58-59. Most of the transactions in respect of the account were handled directly by the appellant who would then delegate the appropriate subordinate officers to take one action or the other.

There was also undue haste in the withdrawals. The sum of N200,000.00 was withdrawn within twenty four hours of the arrival of the Mail Transfer and within four days the balance of the Mail Transfer was also withdrawn. Under section 7 of the Criminal Code, the appellant was rightly convicted on those three counts despite the fact that he might have repented and stopped at a stage: *R. v. Griffiths* 49 Cr. App. R. 701; and *Daboh & Ors. v. The State* (1977) 5 S.C. 197. The evidence against the appellant was overwhelming. Without his assistance the crime could not have been committed. Whatever the mistakes of the courts below, such mistakes did not occasion any miscarriage of justice. He had foreknowledge of the crime and he consented to everything done to execute it by his co-conspirators. He aided them until he was persuaded to report to the head office of the bank by his subordinate officers. All the accused persons acted in pursuance of a criminal purpose which was held in common be-

tween them.

For the above reasons, I dismiss the appeal and affirm the decision of the Court of Appeal.

In the final result this appeal fails. It is hereby dismissed. I uphold the convictions and sentences of the trial court in counts 1, 2  
5 and 3 and I confirm the judgment of the court below.

### **UWAIS JSC**

10 I have had the opportunity of reading in draft the judgment read by my learned brother, Ogwuegbu, J.S.C. I entirely agree that the appeal has no merit and that it should be dismissed.

Accordingly, the appeal is hereby dismissed and the decision of the lower court is affirmed.

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### **UWAIS JSC (PRONOUNCEMENT)**

The Honourable Justice Olajide Olatawura, who sat with us on the 17th day of March, 1994 to hear this appeal, retired on the 3rd  
20 day of May, 1994. Before his retirement, he took part in the conference which we held on the 23rd day of March, 1994 on the appeal and he was of the opinion that the appeal should be dismissed.

In accordance with the provisions of the proviso to section 258  
25 subsection (2) of the Constitution of the Federal Republic of Nigeria, 1979, Cap. 62 of the Laws of the Federation of Nigeria, 1990, I hereby pronounce the opinion of the Honourable Justice Olajide Olatawura that the appeal be dismissed.

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### **OGUNDARE JSC**

I have had the advantage of the judgment of my learned brother, Ogwuegbu, J.S.C. just delivered. I agree with his reasoning and conclusion that this appeal is lacking in merit. I am satisfied that  
35 there was overwhelming evidence from which it could safely be inferred that the appellant was a party to the fraud perpetrated by his co-accused on his employer the Mercantile Bank of Nigeria Limited. I see no merit in this appeal and I accordingly dismiss it too. I affirm the judgment of the court below.

**ADIO JSC**

I have had the opportunity of reading in draft, the judgment just read by my learned brother, Ogwuegbu, J.S.C., and I agree that the appeal fails. It has no merit and I too dismiss it. I affirm the judgment of the court below. 5

The appellant appeared at first as a loyal employee when he told the other accused persons that he was not interested in the opening of a “crooked account”.

For reasons best known to him, he turned to be an active collaborator with the other accused, ignoring all warnings given to him by well-meaning people that he should be careful in the transactions involved in the commission of the various offences. The prosecution had been very careful in framing the counts in the charge. In most of the cases, each count was separate and distinct from the other counts. 10  
So, there could be no question of a discharge and acquittal for an offence solely on the basis of a discharge and acquittal for another offence. 15

The appeal has no merit and I too dismiss it.

Appeal dismissed. 20

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