

SUPREME COURT OF NIGERIA
3RD JUNE, 1994. SC 114/1993.
CORAM:- M. L. UWAI, O. OLATAWURA,
M. E. OGUNDARE, S. U. ONU, Y. O. ADIO, JJSC

THE STATE APPELLANT

V

1. JOSEPH NNOLIM
2. SUNDAY NWAFOR RESPONDENTS

APPEALS - Reversal of trial court's findings of fact - Where the findings were not shown to be perverse - Whether the Court of Appeal was righting reversing the findings.

APPEALS - Briefs of appeal - Failure to file brief of argument - By the 1st accused before the Court of Appeal - Whether that court can treat the appeal as having been argued and acquit the accused.

COURTS - Receiving of stolen property - If Court is in doubt about accused person's guilty knowledge - Accused will be discharged and acquitted.

CRIMINAL LAW - Stealing - Disappearance of complainant's video recorder after his house was burgled - Reappearing of the video in 1st Respondent's shop - Whether the circumstances lead to the conclusion that the video was stolen.

CRIMINAL LAW - Possession of stolen property - Failure of accused persons to give a true account of how they came into possession - Whether conviction was proper.

CRIMINAL PROCEDURE - Vital witness - Where evidence of a witness could not have determined the case - Whether failure to call that witness was fatal to prosecution's case.

CRIMINAL PROCEDURE - Stealing and receiving stolen property - Evidence that the property was stolen - And that the receiver knew it to be stolen - Must be presented in proof of the offences.

EVIDENCE - *Identification of product - Where stolen property is found to belong to the complainant - Whether Court of Appeal was, right in preferring evidence of PW3 to the contrary.*

EVIDENCE - *Recent possession of stolen property - S. 148 (a) of the Evidence Act - Where the provision is applicable - Burden shifts to accused persons to explain how they came into possession.*

EVIDENCE - *Recent possession of stolen property - Explanation by accused of his possession which might reasonable be true - Would displace the presumption under S. 148 (a) of the Evidence act.*

FACTS

The Respondents were charged before the Anambra State High Court Awka, on three counts namely, conspiracy, burglary and stealing and each of them pleaded not guilty. On the 16th day of June 1988, certain persons broke into the house of the complainant (PW1) at night and stole some of his goods including a Second hand National Video cassette recorder, Exhibit G. The number and serial number of Exhibit G were stated in the receipt issued to PW1 by the previous owner of Exhibit G and the hinges of the channel selector cover were damaged at time of the purchase. Five days after the burglary (on 20-6-88), the PW1 saw Exhibit G displayed for sale in the 1st Respondent's shop at Onitsha. 1st Respondent alleged that he bought Exhibit G from the 2nd Respondent and produced a receipt issued to him. 2nd Respondent alleged that he bought Exhibit G from the PW3 in February, 1988, and tendered two receipts in respect of the transaction. PW3 alleged that he bought Exhibit G from Donmarts Nigeria Enterprises and tendered the receipt they issued to him which did not state the serial number of the video recorder.

It was proved that the model number on one part of Exhibit G was tampered with or altered. PW3 who told PW4 that he could not identify the video recorder he sold to the 2nd Respondent without the serial number, later identified Exhibit G as the recorder he sold to the 2nd Respondent. The trial Judge found the 2nd Respondent guilty of burglary and stealing, found the 1st Respondent guilty of receiving stolen property knowing it to be stolen and convicted them accordingly. Respondents appeal to the Court of Appeal was allowed and their convictions were set aside. The Appellant being dissatisfied has now appealed to the Supreme Court to determine inter alia, whether the Court of Appeal was right in holding that the prosecution did not establish free from doubt that Exhibit G was complainant's property.

HELD (unanimously allowing the appeal)

1. The Court of Appeal was wrong to reverse the findings of the learned trial judge in the circumstances of this case and in holding that there was doubt on the question whether Exhibit G the video recorder, belonged to the PW1 when it was not shown that the findings effect were perverse (R 70 L 24)

2. The evidence of the firm (Donmarts Nigerian Enterprises) could not have determined this case one way or another. The firm was not a vital witness and failure to call it as a witness for the prosecution was not fatal tot he prosecution's case (P. 73 L 14)

3. Since it is the Supreme Court's view that the video recorder (Exh. G) belonged to the PW1 and was stolen from his residence, there was no justification for the lower court to prefer the evidence of PW3 to that of PW4 on the question whether the PW3 could identify the video recorder which he sold to the 2nd Respondent, when the serial number of the said recorder was not stated on the relevant receipt (P. 74 L 33)

4. The Court of Appeal has inherent powers to dismiss an appeal for want of prosecution where a party has failed to file brief of argument. The 1st appellant before the lower court, in failing to file a brief of argument had abandoned his appeal. There was therefore no justification for the Court of Appeal to treat the appeal of the 1st Respondent as having been argued and to give judgment in relation to it acquitting the 1st Respondent. (P. 75 L 15)

5. In order to prove the offences of stealing and receiving stolen property knowing it to be stolen against an accused, there must be evidence that the property in question was stolen. It must also be proved in the case of the offence of receiving stolen property knowing it to be stolen that the accused, when he came into possession of the stolen property, knew that it was stolen. (P. 76 L 13)

6. In the present case, the circumstances surrounding the disappearance of the video recorder from the house of the PW1 and its re-appearance about five days later on display in the shop of the 1st Respondent for sale, reasonably lead to (the conclusion that it was stolen on the 16th day of June, 1988 when PW1's house was burgled in the night. (P. 76 L 18)

7. There was no doubt that each of the Respondents was in possess on of the

stolen video recorder (Exh. G) at one time or another. The provision of S. 148(a) of the Evidence Act became applicable and the burden was on each of the Respondents to explain the circumstances in which Exhibit G came into his possession. (P. 77 L 29)

8. An explanation by an accused of the way in which a stolen property came into his possession which might reasonably be true and which is consistent with innocence, although the court may not be convinced of its truth, would displace the presumption under s. 148 (a) of the Evidence Act. (P. 77 L 33)

9. The Court will discharge and acquit the accused person where it is in doubt about whether the accused knew or did not know that the property was stolen. In the instant case, the Respondents, were unable to give a true account of how each of them came into possession of Exhibit G and the trial Judge rightly convicted them. (P. 78 L 2)

NOTABLE POINTS OF INTEREST

ADIO JSC

1. Appellate Court’s interference with findings of fact

An appellate court will not interfere with the findings of fact made by a trial court unless it is shown that such findings are perverse or are not the result of proper evaluation of the evidence. (P. 69 L 28)

2. Who is a vital witness?

A vital witness is a witness whose evidence may determine a case one way or another. Failure to call a vital witness by the prosecution is fatal to the prosecution’s case (P. 72 L 7)

3. Need to state serial number of products in receipts

“In short, there was nothing distinctive, such as serial number, stated in the receipt given by the firm to the 3rd P. W. or in the receipt given by the 3rd P. W. to the 2nd respondent that could enable the firm or anybody with credibility or in a convincing manner to positively identify Exhibit “G” as or as not the video recorder sold by the 3rd P. W. to the 2nd respondent”. (P. 72 L 34)

4. Accused can call any witness it deemed to be vital though omitted by the prosecution

If the respondents genuinely or seriously thought that the firm was a vital witness nothing stopped them from calling the firm to testify on any relevant point (P. 73 L 17)

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5. Allegation of contradiction in the evidence of prosecution witnesses

..... Whether the principles enunciated in Onubogu v. The State, (1974) 9 S.C. I became applicable. One of the principles is that where one witness called by the prosecution in a criminal case contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation such as showing that the witness was hostile before they can ask the court to reject the testimony of that witness and accept that of another witness in preference to the evidence of the discredited witness. (P. 73 L 30)

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6. When s. 148(a) of the Evidence Act is deemed applicable

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The provision of section 148(a) of the Evidence Act applies when there is evidence that a person is found in possession of some goods and that the goods were recently stolen. In such a case there is a presumption under the provision of the section that the person stole the goods or received them knowing that they were stolen. (P. 77 L 9)

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7. Withdrawal of the appeal against 1st Respondent - Implications

"It is necessary before I come to the final conclusion on this matter to say that the learned counsel for the appellant withdrew the appeal against the discharge and acquittal of the 1st respondent. For that reason, nothing further will be said about the 1st respondent. The appeal succeeds in so far as the 2nd respondent is concerned. (P. 78 L 10)

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REPRESENTATION:

M.T.N. Onwugbufor Esq. D.P.P. Anambra State with Mrs. N. Okonkwo Senior Legal Officer for the Appellant.

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C. Nwanah Esq. for the 2nd Respondent

CASES REFERRED TO

Abdullahi Isa v. The Queen 1961) 2 S.C. N.L.R.L. 374 at 350

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Nafiu Rabiu v. Kano State (1980) 8-11 S.C. 110

Sanyaolu v. The State (1976) 5 S.C. 37 at P. 44.

Adelumola v. The State (1988) 1 N. W.L.R. (Pt. 73) 683 at P. 690

- Sugh v. The State (1988) 2 N. W.L.R. (Pt. 77) 475
 Omogodo v The State (1981) 5 S.C. 5
 Onah v. The state (1985) 3 N.W.L.R (Pt. 12) 236
 5 Ibe v. The State (1992) 5 N. W.L.R (Pt. 244) 642
 Ogbodu v. The State (1987) 2 N.W.L.R. (Pt. 54) 20
 Onubogu v. The State (1974) 9 S.C. 1
 Ajayi v. Omorogbe (1993) 6 N.W.L.R. (Pt. 301) 512
 State v. Aibangbee (1988) 3 N.W.L.R. (Pt. 84) 548
 10 Ikemson v. The State (1989) 3 N.W.L.R. (Pt. 110) 455
 Aiyeola v. The State (1969) All N.L.R. 309
 Eze v. The State (1985) 3 N.W.L.R. (Pt. 13) 423
 Salami v. The State (1988) 3 N.W.L.R. (Pt. 85) 670
 Kinmani v. Bauchi N.A. (1957) NWLR. 42
 15 Philip Omogodo v. The State (1981) 5 S.C. 5
 Pakapakaye Oruwari v. The State (1985) 3 N.W.L.R. (Pt. 13) 486
 Sunday Madagwa v. The State (1988) 5 NWLR (Pt. 68) 69
 Osadewe V. The Queen (1963) 1 All NLR. 362

20 **STATUTES REFERRED TO**

Evidence Act SS. 148(a), 137
 Criminal Code ss. 495(a), 398(a), 353(9)

LEAD JUDGMENT BY ADIO JSC

25 In the High Court of Anambra State of Nigeria. Awka Judicial Division, the respondents were charged, on three counts, with certain criminal offences. The first count was for conspiracy, the second count was for burglary, and the third count was for stealing. Each of them pleaded not guilty to
 30 each of the counts.

 The evidence led by the prosecution was that on the 16th day of June, 1988 certain persons during the night, broke into the house of the complainant. P.W.1 at Nneni and stole some of his goods which included a National Video cassette recorder. Exhibit "G". that the complainant bought, second hand, from the previous owner who had left the country. The receipt
 35 which the previous owner gave to the P.W.1 in relation to the purchase of Exhibit "G" was Exhibit "A ". The model number of Exhibit "G" was NV 2000 EN and its serial number was LIKE 03871. The said numbers were stated in Exhibit "A". At the time that the P.W.1 bought Exhibit "G" from its aforesaid

previous owner, the hinges of the channel select or cover were damaged.

Some days after the burglary, and to be precise on the 20th June, 1988 the P.W.1 saw Exhibit "G" displayed for sale in the shop of the 1st respondent at Onitsha. The P.W.1 told the court that the distinctive features which enabled him to identify Exhibit "G" were the damaged hinges of the cover of the channel selector, the model number, and the serial number. When questioned by the police, the 1st respondent alleged that he bought Exhibit "G" from the 2nd respondent and he produced Exhibit "Q" as the receipt given to him by the 2nd respondent. The 2nd respondent alleged that he bought Exhibit "G" from the P.W.3 and Exhibit "E" and "N" were the receipts that he obtained in relation to the transaction which took place in February 1988. The allegation by the P.W.3 was that he bought the video recorder, new, from Donmarts Nigeria Enterprises that gave him a receipt, Exhibit "F" which did not state the serial number of the recorder. It was proved that the model number of one part of Exhibit "G" and the serial number were tampered with or altered.

The learned trial Judge discharged the respondents in relation to the count of conspiracy. He found the second respondent guilty of burglary and stealing and found the 1st respondent guilty of receiving stolen property knowing it to be stolen and convicted them accordingly. Dissatisfied with the judgment, the respondents appealed to the Court of Appeal which allowed the appeal of each of the respondents and set aside the conviction of each of them. The appellant was dissatisfied with the judgment and has now appealed to this court.

In accordance with the rules of this court, the appellant and the 2nd respondent have filed and exchanged briefs of argument. The appellant, in its brief, set down five issues for determination and the 2nd respondent, in his brief, set down four issues for determination. The appellant filed a reply. Having regard to the grounds of appeal and the issues set down in the briefs of the parties some of which were repetitive, the issues set down in the appellant's brief, as suitably amended, are sufficient for the determination of this appeal. They are:-

(1) Whether the Court of Appeal was right in holding that the prosecution did not establish free from doubt, that Exhibit "G" was the property of the complainant (P.W.1).

(2) Whether the prosecution was bound to call as a witness Donmart Nigeria Enterprises or its representative and, if so, whether failure to call a representative of the firm to testify for the prosecution was fatal to the case of the prosecution.

(3) Whether the Court of Appeal was right in discharging and acquitting the 1st respondent who though he filed notice and grounds of appeal, did not file a brief or present oral argument in the Court of Appeal.

5 (4) Whether the Court of Appeal was right in interfering with findings of fact made by the learned trial Judge, in relation to Exhibit “G” which were not perverse when the Court of Appeal had no opportunity, which the learned trial Judge had, of seeing and comparing Exhibit “G” with the same and other models of video recorder of the same make.

10 (5) Was there any conflict between the evidence of P.W.3 and the evidence of P.W.4, and, if the answer is in the negative, was the Court of Appeal right to prefer the evidence of P.W.3 to the evidence of P.W.4 on the question whether the P.W.3 could identify the video recorder which he sold to the 2nd respondent, when the serial number of the said recorder was not
15 stated on the relevant receipt?

The question raised under the first issue is really fundamental. It will be considered with the question raised under the fourth issue. If, in fact, Exhibit “G” did not belong to the P.W.1, then the prosecution’s case against the respondents could not be sustained. The learned trial Judge considered
20 the question and inter alia, made a finding that Exhibit “G” belonged to P.W.1. Indeed, that was one of the reasons for finding the respondents guilty and for convicting them. When this matter came before the Court of Appeal, the court did not share the view of the learned trial Judge. It felt that there was some doubt on the question whether Exhibit “G” belonged to the P.W.1. The learned
25 Justice at the Court of appeal, who read the lead judgment stated, inter alia. as follows:-

“It seems to me it was not shown, free from doubt, that the video cassette recorder, exhibit “G” was the property of P.W.1. It was vital that this be established. Not having so done, the prosecution did not prove the offences for which the appellants were convicted in accordance with the standard of proof required in criminal cases. In such a situation an appellate court will disregard the finding of a trial court when the evidence in support of that finding does not show that degree of certainty which should be the criterion in criminal trial. See Abdullahi Isa v. The Queen (1961) 2 S.C.N.L.R. 347. Accordingly, I find that the issues of burglary, stealing and receiving stolen property as far as the appellants are concerned would not arise.”
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The appellant pointed out that the evidence led by the respondents was that the video cassette recorder sold by the Donmart Nigeria Enterprises to the P.W.3 was new. It’s model and serial numbers were not altered and its

channel selector was not damaged. The recorder was in the same condition when the 3rd P.W sold it to the 2nd respondent and its condition remained the same when the 2nd respondent sold it to the 1st respondent. It was also pointed out that the cassette recorder. Exhibit “G”, which the P.W.1 found in the shop of the 1st respondent was second hand. It’s model number and serial number had been tampered with and altered and its channel selector was damaged. It was, therefore, argued that as the respondents could not explain the circumstances in which its model number and the serial number were altered and its channel selector was damaged. Exhibit “G” was not the new recorder which the P.W.3 allegedly bought from Donmart Nigeria Enterprises which he allegedly sold to the 2nd respondent and which the 2nd respondent allegedly sold to the 1st respondent in February 1988.

The contention of the 2nd respondent was that the P.W.1 was still in February 1988, when the alleged sale of a new recorder was made to the 1st respondent by the 2nd respondent, in possession of the recorder allegedly stolen from his house. In the circumstance, it was further contended that it could not be the recorder of the P.W.1 that was stolen and sold to the 1st respondent and, for that reason. the finding of the learned trial Judge that Exhibit “G” belonged to the P.W.1 was pen case and the Court of Appeal was justified in reversing it. It was also contended that since Exhibit “G” was found in possession of the 1st respondent it could not be said that the 2nd respondent was in possession of any property recently stolen.

The question whether the recorder. Exhibit “G”, belonged to the P.W.1 and that it was the one stolen in the house of P.W.1 when his house was burgled was a question of fact in respect of which the learned trial Judge made findings. The learned trial Judge found as a fact that Exhibit “G” belonged to the P.W.1 and that it was the recorder stolen from the house of the P.W.1 when his house was burgled. He stated his reasons for the conclusion. An appellate court will not interfere with the findings of fact made by a trial court unless it is shown that such findings are perverse or are not the result of proper evaluation of the evidence. See *Nafiu Rabi v. Kano State* (1980) 8-11 S.C. 130; and *Sanyaolu v. The State* (1976) 5 S.C. 37 at p. 44. In this particular case. the P.W.1 gave evidence of how he bought Exhibit “G”, second hand, from a person who was about to leave the country. He told the court that he was given a receipt in which the model and serial numbers of the recorder were stated. Though an attempt was made to alter the model number and the serial number of Exhibit “G”, it was still possible to determine, by demonstration before the trial court that the real or genuine model number and serial number on the recorder Exhibit “G”, were the same as the model number and serial number stated in

the receipt given to the P.W.1 by the person who sold Exhibit "G" to the P.W.1. The crucial point was whether it was the evidence led by the appellant or the evidence led by the respondents on the point that was credible. The learned trial Judge heard and saw the witnesses when they gave evidence. He witnessed the demonstration by an electronic engineer which showed conclusively that the genuine model number and serial number found on Exhibit "G" belonged to model NV 2000 EN which was the same model as Exhibit "G". The Court of Appeal itself realised the crucial nature of the demonstration and the conclusive effect which it had on the identification of the recorder. It lamented that it did not have the advantage which the learned trial Judge had on witnessing the demonstration. The Court of Appeal remarked, *inter alia*, as follows:

"The video recorder in question was seen by the trial court, so was the other one said to belong to model NV 7000. None of the video recorders is before this court, not having been taken into custody as exhibits by the trial court. Whatever facts of comparison or contrast or alleged alterations that were canvassed at the trial court are not within the visual advantage of this court."

The learned trial Judge who heard the evidence and witnessed the demonstration, found that it was the evidence led by the appellant, on the point, that was credible and he rightly accepted it. An appellate court will ordinarily not interfere with findings of fact based on credibility of witnesses. See *Adelumola v. The State* (1988) 1 NWLR (Pt.73) 683 at p.690: and *Sugh v. The State* (1988) 2 NWLR (Pt.77) 475. The Court of Appeal was, therefore, with respect, wrong to reverse the findings of the learned trial Judge in the circumstances of this case and in holding that there was doubt on the question whether Exhibit "G". the recorder, belonged to the P.W.1 when it was not shown that the findings of fact were perverse. Therefore, if, as alleged by the respondents, there was a sale of new video recorder by Donmarts Nigeria Enterprises to P.W.3 a sale of the same recorder in the same condition by the P. W.3 to the 2nd respondent, and a sale of the same recorder in the same condition by the 2nd respondent to the 1st respondent, in February 1988, then the alleged video recorder was not Exhibit "G". The 3rd P.W. purportedly identified Exhibit "G". with its serial number, as the recorder which he sold to the 2nd respondent. If that was so, the alleged sale was after the house of the P.W.1 had been burgled and Exhibit "G" had been stolen in June 1988, and not in February, 1988 as alleged by the respondents. All the receipt purporting to show that the alleged sales took place in February, 1988 were not genuine. The answer to the questions raised under the first and the fourth issues is in the

negative.

The question raised under the second issue is whether the prosecution was bound to call as a witness, Donmarts Nigeria Enterprises or its representative and, if so, whether failure to call a representative of the firm to testify for the prosecution was fatal to the case of the prosecution. The question arose as a result of the view expressed in the judgment of the Court of Appeal that the effect of the failure of the prosecution to call Donmarts Nigeria Enterprises or its representative to testify, about the video recorder it sold to the P.W.3, was that the ownership of Exhibit "G" was not free from doubt and consequently the prosecution did not prove its case against the respondents beyond reasonable doubt. The court stated. *inter alia*. as follows:-

"If in the prosecution of a criminal case, there is a vital issue either from the nature of the case or from the evidence led and there is one witness whose evidence would settle it one way or another, that witness ought to be called. It follows that if the prosecution makes a piece of evidence. oral or documentary, part of its case but that evidence calls for more explanation in order to resolve a vital issue, then it is the duty of the prosecution to undertake such explanation.

.....
In this case, it is the prosecution which tendered Exhibit 'E' (same as N.) and also Exhibit of'. These Exhibits tend to show that the sale and subsequent movement of a National Video cassette recorder model NV 2000 from Donmarts Nigeria Enterprises to Bonny Bros & Co. Ltd. (through the evidence of P.W.3, the Branch Manger). the 2nd appellant and the 1st appellant say the said recorder is Exhibit G in question. During his examination-in-chief. P. W.3 tendered Exhibit E with which he said he sold the recorder in question (i.e. id I later admitted as Exh. G) to the 2nd appellant on 20/2/88. He also tendered Exh. F with which he said he bought the said recorder from Donmarts Nigeria Enterprises

..... It seems to me that the state of the evidence was such that Donmarts Nigeria Enterprises necessarily became a vital witness

The burden was on the prosecution to produce that vital evidence. Since it failed to do so, it did not prove its case, in my view against the appellants beyond reasonable doubt."

The submission made for the appellant was that failure to call Donmarts Nigeria Enterprises was not fatal to the prosecution's case neither did it create any doubt as to the ownership of the video recorder, Exhibit "G", which was the subject of the charge preferred against the respondents. It was pointed out that the video recorder which the firm allegedly sold to the P.W.3, which P.W.3 allegedly sold to the 2nd respondent and which the 2nd respon-

dent allegedly sold to the 1st respondent. was new and its manual selector was not damaged at the time of the alleged sales. Also, there was no evidence that the serial number of model number of the said new video recorder allegedly sold to P.W.3, which P.W.3 sold to 2nd respondent and which he 2nd respondent sold to the 1st respondent, was tampered with and/or altered at the time that the alleged sales took place.

The question is: who is a vital witness? A vital witness is a witness whose evidence may determine a case one way or another. Failure to call a vital witness by the prosecution is fatal to the prosecution's case. See *Omogodo v. The State* (1981) 5 S.C. 5: and *Onah v. The State* (1985) 3 NWLR (Pt.12) 236. Bearing the foregoing principles in mind, was the Court of Appeal right in holding that the failure of the prosecution to call the Donmarts Nigeria Enterprises was fatal to the case of prosecution? The answer to the question will be in the affirmative if the firm was a Vital witness within the meaning of the expression stated above. In other words, could the evidence of the firm have determined this case one way or another? The evidence led by the respondents was that it was a new video recorder that the firm allegedly sold to the P.W.3 and that it was that new video that 3rd P.W. allegedly sold to the 2nd respondent. The 2nd respondent allegedly sold it to the 1st respondent when the video recorder was still new. At all material times to alleged sales, the manual selector of the new video recorder was not damaged and its model and serial numbers were not tampered with or altered. There was no evidence led by the respondents about who altered the model number and the serial number of the video recorder (Exhibit "G") which was found in the shop of the 1st respondent or who damaged the manual selector or when the manual selector was damaged, if indeed, it was a new video recorder that the firm sold to 3 P.W., which 3rd P.W. sold to the 2nd respondent when still new, and which 2nd respondent sold to the 1st respondent when still new. The receipt (Exhibit "F") which the firm gave to the 3rd respondent in relation to the sale to him of a new video recorder did not contain the serial number of the recorder. In the same way, the receipts Exhibits "E" & "N") which the 3rd P.W. gave to the 2nd respondent to whom he sold the same video recorder did not contain the serial number of the recorder.

In short, there was nothing distinctive, such as serial number, stated in the receipt given by the firm to the 3rd P.W. or in the receipt given by the 3rd P. W. to the 2nd respondent that could enable the firm or anybody with credibility or in a convincing manner to positively identify Exhibit "G" as or as not the video recorder sold by the 3rd P.W. to the 2nd respondent. In any case, the 5th P.W., an electronic engineer, gave evidence, which was unchallenged and

uncontradicted, that the usual model number which the manufacturers of vide recorders like Exhibit “G” used to assign to that type of model used to end with “EN” and that the altered model number found on one part of Exhibit “G” ended with “EM” which was not genuine and which purported to indicate that Exhibit “G” was another or a different model made by the same manufacturers. 5
Whoever in the manner aforesaid altered the model number of Exhibit “G” did not unfortunately for the respondents, see the genuine model number of Exhibit “G” on another part of it which ended with “EN” and so could not or did not tamper with or alter it. He left it inadvertently unaltered thus revealing the criminal intention of those who came into possession of Exhibit “G” immediately after it was stolen from the residence of the P.W.1 but before its discovery in the shop of the 1,[respondent where it was displayed for sale. 10

The result of the foregoing analysis is that the evidence of the firm could not have determined this case one way or another. The firm was not a vital witness and failure to call it as a witness for tile prosecution was not fatal to the prosecution’s case. If the respondents genuinely or seriously thought that the firm was a vital witness nothing stopped them from calling the firm to testify on any relevant point. See *Ibe v. State* (1992) 5 NWLR (Pt.244) 642. In *Ogobodu v. The State* (1987) 2 NWLR (Pt.54) 20, the prosecution did not call, as a witness, a son of the appellant who was present at the time of the incident. 20
It was held that it was open to the appellant to call him, if he so desired, and that it was not fatal to the prosecution’s case. The answer to the question raised under the second issue is in the negative.

The question raised under the fifth issue was whether there was any conflict between the evidence of P.W.3 and the evidence of P.W.4 in relation to the identity of the video recorder. Exhibit “G”. There was controversy, before the trial court and before the Court of Appeal over the question whether there was contradiction or inconsistency in the evidence of the witnesses for the prosecution and. if so, whether the principles enunciated in *Onubogu v. The State* (1974) 9 S.C. 1 became applicable. One of the principles is that where one witness called by the prosecution in a criminal case contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation such as showing that the witness was hostile before they can ask the court to reject the testimony of that witness and accept that of another witness in preference to the evidence of the discredited witness. The learned trial Judge, because of the alleged inconsistency or conflict between the evidence of P.W.3 and P.W.4. disregarded their evidence on the point. In the case of the Court of Appeal, it held the view that the prosecution could not ask the court 25
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not to accept the evidence of the P.W.3 without his being treated as hostile witness. The question whether the principle enunciated in Onubogu's case. Supra, applies in a particular case depends on inter alia, whether there is really any conflict or inconsistency between the evidence of a witness for the prosecution and the evidence of another witness for the prosecution. What happened in the present case was that the P.W.3 testified that he could identify the video recorder that he allegedly sold to the 2nd respondent and in fact, purported to identify Exhibit "G" as the video recorder that he sold to the second respondent. The evidence of the P.W.4 was that the P.W.3 told him that he could not identify the video recorder that he sold to the 2nd respondent without the serial number. The contention then was that since the receipt which the P.W.3 gave to the 2nd respondent did not contain the serial number of the video recorder that he sold to the 2nd respondent, the P.W.3 could not be in position to identify the video recorder.

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In my view, the evidence of the P.W.4 that the P.W.3 told him (P.W.4) that he could not identify the video recorder that he (P.W.3) sold to the 2nd respondent without the serial number is, when carefully considered, not inconsistent or in conflict with the purported identification of the video recorder. Exhibit "G", by the P.W.3 as the recorder which he allegedly sold to the 2nd respondent. It would have been a different thing if the P. W.3 testified that Exhibit "G" was the video recorder that he allegedly sold to the 2nd respondent and the evidence of the P.W.4 was that Exhibit "G" was not the video recorder that the P.W.3 allegedly sold to the 2nd respondent. In that event, the evidence of P.W.4 would have been the opposite of the evidence of the P.W.3. In the present case, the evidence of the P.W.4 only affected the credibility of the evidence of P.W.3 and his purported identification of Exhibit "G" as the video recorder that he allegedly sold to the 2nd respondent and the issue was what probative value, if any, should be given to the purported identification of Exhibit "G" as the video recorder he allegedly sold to the 2nd respondent and that was for the court to determine in the light of the allegation of the P.W.4 that the P.W.3 told him earlier that he could not identify the recorder that he sold to the 2nd respondent without the serial number. In any case, for reasons stated in this judgment, the view of this court is that Exhibit "G" belonged to the P.W.1 and that it was stolen from his residence when the complainant's residence was burgled in June 1988. If the P.W.3 sold any new video recorder to the 2nd respondent in February, 1988, it was not Exhibit "G". There was therefore, no justification for the court below to prefer the evidence of P.W.3 to the evidence of P.W.4 on the question whether the P.W.3 could identify the

video recorder which he sold to the 2nd respondent, when the serial number of the said recorder was not stated on the relevant receipt.

The question raised under the third issue is whether the court below was right in discharging and acquitting the 1st respondent who though he filed notice and grounds of appeal, did not file a brief of argument or present oral argument in the court below. The appellant argued that as the 1st respondent did not file any brief or advance any oral argument, the lower court was incompetent to discharge and acquit him. It was also argued that grounds of appeal in respect of which there is no element in a brief are deemed to be abandoned. The submission in the brief of the 2nd respondent was that it was within the powers of the court below to discharge and acquit the 1st respondent though he did not file any brief or present any argument. The position is that the court below is empowered to dismiss an appeal for want of prosecution where an appellant fails to file his brief within the prescribed time.

Apart from the provisions made in the Court of Appeal Rules 1981 as amended by the Court of Appeal (Amendment) Rules 1984, the Court of Appeal has inherent powers to dismiss an appeal for want of prosecution where a party has failed to comply with certain procedural rules. such as filing of brief of argument. See *Ajayi v. Omorogbe* (1993) 6 NWLR (Pt.301) 512. When the appeal of the respondents came up for hearing in the court below, it could reasonably be said that the 1st appellant, who had not filed a brief of argument, had abandoned his appeal. In the circumstance, there was no justification for the court below to treat the appeal of the 1st respondent as having been argued and to give judgment in relation to it. The court below was, therefore, not right in discharging and acquitting the 1st respondent. If the court below made a mistake in acquitting and discharging an accused/appellant this court, as an appellate court, is not expected to persevere in that error as two wrongs do not make a right. See *State v. Aibangbee* (1988) 3 NWLR (Pt.84) 548; and *Ikemson v. The State* (1989) 3 NWLR (Pt.110) 455. The answer to the question raised under the third issue is in the negative.

The foregoing was not the end of this matter. The relief sought in the notice of appeal. if the appeal is allowed is setting aside of the judgment/decision of the court below and restoring of the judgment of the learned trial Judge who convicted the 1st and 2nd respondents and sentenced the 1st respondent to a term of one year imprisonment or N1,000.00 fine and the 2nd respondent to three years imprisonment or N3.600.00 fine. After reviewing and evaluating the evidence before him, the learned trial Judge, held that the 2nd respondent was in possession of Exhibit "G" which was recently stolen and

he invoked the provisions of section 148(a) of the Evidence Act and found the 2nd respondent guilty of burglary and stealing. In the case of the 1st respondent, the learned trial Judge also found that the 1st respondent was in possession of the said video recorder within five days after it was stolen. He substituted a verdict of guilty of receiving stolen property knowing it to be stolen
5 and convicted the 1st respondent accordingly for the offence. The Court of Appeal was of the view that the ownership of the video recorder was not free from doubt. It set aside the conviction and sentence passed on the respondents and discharged and acquitted them. This court has held that it was wrong for the Court of Appeal to interfere with the findings of the learned trial
10 Judge that the video recorder in question belonged to the P.W.1 and that it was stolen from the house of the P.W.1 when his house was burgled on the 16th August, 1988.

In order to prove the offences of stealing and receiving stolen property knowing it to be stolen against an accused, there must be evidence that
15 the property in question was stolen. It must also be proved in the case of the offence of receiving stolen property knowing it to be stolen that the accused, when he came into possession of the stolen property, knew that it was stolen. See *Aiyeola v. The State* (1969) 1 All NLR 309. In the present case, the circumstances surrounding the disappearance of the video recorder (Exhibit "G")
20 from the house of the P. W.1 on the 16th August, 1988 and its re-appearance about five days later when it was displayed in the shop of the 1st respondent for sale, reasonably lead to the conclusion that it was stolen on the 16th August, 1988. when the house of the P.W.1 was burgled in the night. The conduct of an accused in relation to the stolen property may lead reasonably
25 to the conclusion that the accused knew that the property was stolen when he came into possession of or received it. In the present case, If, as the respondents alleged, the video recorder which the P.W.3 sold to the 2nd respondent and which the 2nd respondent sold to the 1st respondent was new at all material times, the question which arises is who tampered with or altered the
30 model and the serial numbers of the video recorder and for what purpose, if any were the model and the serial numbers tampered with or altered? One should have thought that if the video recorder which the P.W.3 sold to the 2nd respondent, and which the 2nd respondent sold to the 1st respondent was new, there would have been no alteration of its model and serial numbers
35 when it was found in the shop of the 1st respondent displayed for sale. If the alleged sale of the video recorder by the P. W.3 to the 2nd respondent, and the alleged sale of it by the 2nd respondent to the 1st respondent actually took place and were bonafide neither the 2nd respondent nor the 1st respondent would have gone to the extent of tampering with or altering the model and

serial numbers of Exhibit “G” in the manner, which the demonstration carried out in the presence of the learned trial Judge, proved conclusively that the alteration aforesaid was a clear case of forgery. The sale of the video recorder in question by the 2nd respondent to the 1st respondent was at a time between the time that the house of the P.W.1 was burgled and the said video recorder was stolen on the 16th June, 1988, and five days later when the video recorder was displayed in the 1st respondent’s shop. The foregoing facts about tampering with the model and serial numbers of the recorder conclusively pointed to guilty knowledge on the part of each of the 1st and the 2nd respondents. The provision of section 148(a) of the Evidence Act applies when there is evidence that a person is found in possession of some goods and that the goods were recently stolen. In such a case, there is a presumption under the provision of the section that the person stole the goods or received them knowing that they were stolen. See *Eze v. The State* (1985) 3 NWLR (Pt.13) 429. That is the legal implication of the provision of section 148(a) of the Evidence Act which the learned trial Judge, rightly in my view invoked. The section provides, inter alia; as follows:-

“148. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and, in particular, the court may presume-

(a) that a man who is possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.”

The 2nd respondent conceded that he was in possession of Exhibit “G” and that he was the person who sold it to the 1st respondent. In the case of the 1st respondent, he was in possession of Exhibit “G” and he displayed it for sale in his shop. There was, therefore, no doubt that each of them was in possession of Exhibit “G”, when it was a stolen property, at one time or another. In the circumstance, the provision of section 148(a) of the Evidence Act became applicable. The burden was, therefore, on each of the respondents to explain the circumstances in which Exhibit “G” came into his possession. An explanation by an accused of the way in which a stolen property came into his possession which might reasonably be true and which is consistent with innocence, although the court may not be convinced of its truth, would displace the presumption under section 148(a) of the Evidence Act. See *Salami v. The State* (1988) 3 NWLR (Pt.85) 670. In this connection, the court may infer guilty knowledge where the accused gives no explanation at all about how he

came to be in possession of the property recently stolen or where the explanation he has given is untrue. It is only where the court is in doubt about whether the accused knew or did not know that the property was stolen that the court will discharge and acquit him. In this particular case, each of the respondents was unable to give true account or explanation of how he came into possession of Exhibit "G" and the learned trial Judge was right to convict each of them for the offence(s) for which he convicted him. See Aiyeola's case, *supra*. The Court of Appeal was, with respect, wrong to set aside the conviction of the respondents.

It is necessary before I come to the final conclusion of this matter to say that the learned counsel for the appellant withdrew the appeal against the discharge and acquittal of the 1st respondent. For that reason, nothing further will be said about the 1st respondent.

The appeal succeeds in so far as the 2nd respondent is concerned. The judgment of the Court of Appeal setting aside the conviction and sentence passed on the 2nd respondent and discharging and acquitting him is hereby set aside. The judgment of the learned trial Judge convicting the 2nd respondent for burglary and stealing and imposing on him the sentence of three years imprisonment or N3,600 fine and one year six months imprisonment or N1,400 fine respectively is hereby restored. It is hereby ordered that if the 2nd respondent has not already paid the fines imposed on him in the aforesaid judgment of the learned trial Judge, he (2nd respondent) should do so within 30 days from today and failing that he shall be taken to prison for him to serve the terms of imprisonment imposed on him by the learned trial Judge.

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UWAIS JSC

I have had the advantage of reading in draft the judgment read by my brother Adio, J.S.C. I agree with him that the appeal has merit and that it should be allowed. I adopt the consequential order made in the said judgment in respect of payment of fines by the 2nd respondent and failing to do so within 30 days of this judgment he should serve the sentences of imprisonment imposed in the alternative, by the learned trial judge.

OGUNDARE JSC

I have read in draft form the judgment of my learned brother Adio J.S.C. just delivered. I agree entirely with his reasonings and conclusions reached by him and I hereby adopt them as mine. I have nothing more to add. I too allow the appeal set aside the judgment of the Court below and abide by all the consequential orders made in the judgment of my learned brother Adio, JSC.

ONU JSC

I had before now a preview of the judgment just delivered by my learned brother Adio J.S.C. in draft and with it I am in entire agreement.

I wish, however, to comment briefly on the case as follows:-

In the High Court of Anambra State sitting at Awka (per Ekwerekwu. J) the respondent herein were charged and tried on a three count-charge of the offences of conspiracy, burglary and stealing contrary to sections 495(a), 398(a) and 353(9) of the Criminal code respectively.

On the 9th day of October, 1989 the learned trial Judge at the conclusion of trial discharged both respondents on the charge of conspiracy (count 1) but convicted 2nd respondent of the offences of burglary and stealing for which he was sentenced to 3 years I.H.L or a fine of N3,000 on count 2 and 1 year 6 months I.H.L or a fine of N1,000 on count 3. For his part, 1st respondent who was convicted for receiving was sentenced to a term of one year imprisonment or N1,000 fine, with the sentences in either case to run concurrently while the fines were cumulative.

The facts of the case have been so ably set out in the judgment of my learned brother Adio. J.S.C. in my view, no need of re-statement here. Suffice it to say that on being aggrieved by the decision of the trial court, both respondents appealed to the Court of Appeal sitting in Enugu. In a considered judgment delivered on the 16th day of March 1993, the Court of Appeal (hereinafter referred to as the court below) in a unanimous decision (per Oguntade, Uwaifo and Akintan. JJ.C.A.) discharged and acquitted them stating inter alia.

"It seems to me it was not shown, free from doubt, that the video cassette recorder Exhibit G was the property of PW1. It was vital that this be established. Not having been so done, the prosecution did not prove the offences for which appellants were convicted in accordance with the standard of proof required in criminal cases, In such a situation, an appellate court will disregard the finding of a trial court when the evidence in support

of that finding does not show that degree of certainty which should be the criterion in a criminal trial. See Abdullahi Isa v. The Queen (1961) 2 SCNLR 347 at 350 per Ademola C.J.F."

Because the state was dissatisfied with the acquittal and discharge
5 of the respondents they have appealed to this court filing five grounds of appeal assailing the decision of the court below. I only wish in my brief consideration of this appeal to lay emphasis on issue 1 and 2 in particular and issues 3 and 5 in general- issue 4 distilled from ground both having been withdrawn and struck out.

10 But first, I wish to remark that when this appeal came up for hearing on 10th March, 1994, the 1st respondent was absent and the learned Director of Public Prosecutions finding himself unable to argue the case against him, for which I appreciate his difficulty, not only withdrew his appeal against him but urged that appellant's issue 4 specifically referable to 1st respondent be
15 struck out. With his request acceded to learned D.P.P adopted his brief of argument as well as the Reply brief before expatiating orally on them, Learned counsel for the only respondent left, similarly relied on his own brief and made oral submission, with both counsel arguing their cases with all zest and forthrightness at their command.

20 In criminal cases, the law is not that an accused person should prove his innocence: rather the duty of proving the guilt of an accused, and this is settled law, lies all through on the prosecution (See Kinmani v. Bauchi N.A. (1957) NRNLR 42. In all cases it must be beyond reasonable doubt. See section 137 of the criminal code and the case of Philip Omogodo v. The State
25 (1981) 5 S.C.5

ISSUES 1 AND 2

As alleged by the appellant, if Donmarts Nigeria Enterprises, who were not called as a witness in these proceedings, sold the video tape recorder (Exh.G) to P.W.3 and the latter in February. 1988 at Enugu sold the same as new
30 to 2nd respondent supported by receipt (Exhibit F) while 2nd respondent in turn sold the same to the 1st respondent, presumably in the same new condition, then the alleged video recorder would not and could not be Exhibit 'G' - the second hand gadget which was stolen from P.W 1's house with its distinctive features such as the damaged hinges of the cover of the channel selector.
35 This is the moreso, that P. W.3 purported to identity Exhibit 'G' when recorded from 1st respondent's shop in Onitsha with its model number NV. 2000 EN and serial No. LIKE 03R71 as the video recorder which he sold to the 2nd respondent albeit tampered with. Should his (P.W.3's) evidence be accepted and believed then, the alleged sale by him of the video recorder to 2nd respondent

must have taken place after 16th June, 1988, based on the receipt (Exhibit 'F') and on a date after P.W.1's house was burgled and Exhibit 'G' removed therefrom along with other belongings. In other words, it is inconceivable and unworthy of belief that the video tape recorder sold to 2nd respondent by P.W.3 in Enugu in February, 1988 brand new, would be the same video recorder recovered from 1st respondent's shop in Onitsha, second-hand soon after its theft on 16th June, 1988. If the transactions purporting to show that the alleged sales took place between PW3 and 2nd respondent as well as between 2nd respondent and 1st respondent and the receipt in support thereof were made after 5th June 1988, then they could well be genuine. But were they? This informed the trial court's findings of fact which, having itself seen and heard the witnesses on the oral and material evidence before it, convicted both respondents. Hence, PW3 could not in the circumstances have been said to be more credit worthy than P.W.4 and failure to call Donmarts to supply any missing serial number or the full description of the video cassette recorder allegedly sold by P.W.3 in relation to Exhibit 'F' to 2nd respondent be said to be of any avail. Indeed, Donmarts' evidence could not have decided the case either way nor has the withholding of its evidence in my opinion led to any miscarriage of justice. See *Pakapakaye Oruwai v. The State* (1985) 3 NWLR (Pt.13) 486.

It is in the light of my observation above that I hold that the court below ought not to have interfered with the decision properly arrived at by the trial court. It was equally therefore wrong for it to have embarked on a voyage of hypothetical assumption in holding that the evidence of PW3 was more preferable to that of PW4. Strictly considered as I shall seek to show hereunder, there was only a conflict which occurred in the evidence of PW 3 and PW 4 worthy of note and this notwithstanding the attempt to treat PW3 as a hostile witness which was discontinued. The evidence of PW4 if anything, only affected the credibility of PW3 and his purported identification of Exhibit 'G' as the video cassette recorder- a crucial piece of evidence that of the probative value to ascribe thereto in as much as PW4 had in his evidence said that PW3 earlier told him that he could not identify the video cassette recorder which he sold to the 2nd respondent without the serial number which in any case, was not reflected on the receipt (Exhibit F) he (PW3), gave to 2nd respondent.

Significantly, however PW3 did identify Exhibit 'G' in the trial court even though the receipts, Exhibit N and F. relating to its change of hands contained no serial numbers. This piece of evidence the trial court regarded as a conflict between the evidence of PW3 and PW4 and after disregarding it,

declared it to that extent as unreliable. The approach of the court below in debunking this finding of the trial court based on inference in my view was however wrong in that it went on erroneously to hold that a doubt had been created, the benefit of which it held respondents were entitled to.

5 ISSUES 3 AND 5

 The totality of the appellant's case having been based on the credible evidence of PW1 coupled with that of other witnesses which the trial court believed, to wit: that his house was burgled on the night of 16th June, 1988, and that following that event. Exhibit G was within 5 days thereof found
10 in 1st respondent's shop displayed for sale, one event led to the other as 1st respondent identified 2nd respondent as the one who sold the same to him. It became one straight issue namely, who was the thief and who was receiver thereof? This issue the trial Judge resolved when he made unimpeachable findings of fact that all the features of the stolen video tape recorder (Exhibit
15 'G') were present in the one found in 1st respondent's shop and that its model No. NV 200 EN with its serial No. LIKE 03871, though tampered with, was sufficiently identified as the one stolen from PW1. The conclusion arrived at by the trial court after seeing and comparing various models of similar video cassette recorders- an advantage the court below never had but which the
20 trial court had before holding that the respondents' conduct amounted to guilty knowledge, ought not to have been interfered with. Hence, the application of the provisions of section 148(a) of the Evidence Act as to the presumption that a man who is in possession of stolen goods soon after the theft is either the thief or one who received same knowing it to have been stolen, was
25 rightly in my view, applied to the instant case. The 2nd respondent having conceded that he sold Exhibit 'G' to 1st respondent within 5 days of its disappearance from PW 1's house, the burden was on each to explain how he came into possession of the same. In the instant case by using PW3 as a smoke-screen, the respondents having failed to discharge that burden, the learned
30 trial Judge, in my view, was justified to have convicted them of receiving stolen property and of stealing and burglary of same as charged respectively.

 In the recent case of Sunday Madagwa v. The State (1988) 5 NWLR (Pt.92) 60, this court dismissed the appellant's appeal in a robbery case whose facts were as follows:-

35 The appellant with his confederates robbed a person of his taxi-cab at gun point in broad day light on 21st June, 1979 at Ede (now in Osun State). On the same day, appellant in company of others, was seen in the vehicle by witnesses at Ughorden in the defunct Bendel State. A few hours after this, the appellant and his mates-in-crime were stopped at a road block by two night-

guards while still in possession of the stolen vehicle. On their being searched, three locally-made pistols were recovered from them and they were handed over to the police. At a subsequent identification parade: PW4 picked out appellant as the man who robbed him of his vehicle at Ede. The appellant was convicted of armed robbery. His appeals to both the Court of Appeal and the Supreme Court were dismissed. In this court it was held inter alia that the presumption under section 148(a) of the Evidence Act is that where the circumstances are such that the relationship of a person to stolen goods is such that he could be regarded either as the thief or its receiver, the judge is entitled on the facts to presume that he is the thief or the receiver thereof unless of course, he is able to account for his possession. See also *Osakwe v. The Queen* (1963) 1 All NLR 362; (1963) 2 SCNLR 336. *CF Salami v. The State* (1988) 3 NWLR (Pt.85) 670. 5 10

In the instant case I see no reason or justification to interfere with the trial court's conclusion on the facts as well as the law applicable. moreso that the decision is not shown to be perverse. I take the firm view that the court below was wrong to have disturbed and consequently upset the decision of the trial court, having itself conceded that- 15

"The video recorder in question was as seen by the trial court; so was the other one said to belong to Model NV 7000. None of the video recorders is before this court, not having been taken into custody as exhibits by the trial court. Whatever facts or comparison or contrast or alleged alterations that were canvassed at the trial court are not within the visual advantage of this court." 20

For the reasons set out above and the fuller ones contained in the judgment of my brother Adio, J.S.C. with which I entirely agree. I too will allow the appeal, set aside the decision of the court below and restore the decision of the trial court. I affirm the conviction and sentences passed on the 2nd respondent. 25

OLATAWURAJSC

Also agreed with the lead judgment.

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