

**SUPREME COURT OF NIGERIA**  
16TH MAY, 1995. SC. 30/1992  
**CORAM:- M. L. UWAIS, A. B. WALI, I. L. KUTIGI,**  
**M. E. OGUNDARE, A. I. IGU, JSSC.**

ADETOKUNBO OGUNLANA

& 3 ORS

V.

..... APPELLANT

THE STATE

.....RESPONDENT

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**APPEALS** - Concurrent findings of two Lower Courts - In convicting witness - Is neither inadmissible nor hearsay.

**CRIMINAL PROCEDURE** - Conviction - Evidence of prosecution witness - Whether sufficient to sustain conviction.

**CRIMINAL LAW** - Accomplices - Failure of a prosecution witness - To report a Criminal to the police - Whether the witness is made an accomplice or tainted witness thereby.

**CRIMINAL LAW** - Participes criminis - No allegation that prosecution witnesses participated in the crime charged - Whether the witnesses are ricipes criminis.

**CRIMINAL PROCEDURE** - Forfeiture Order - Property acquired with proceeds of stolen goods - Whether the forfeiture order is lawful.

**CRIMINAL PROCEDURE** - Forfeiture Order - Onus is on prosecution to prove that acquisition is from the proceeds of theft - Whether this onus which is on a balance of probabilities - Is established in this case.

**EVIDENCE** - Contradictions - Alleged in evidence of prosecution witnesses - Must be substantial - In order to be fatal.

**EVIDENCE** - Circumstantial evidence - Whether ample enough - To justify the finding that forfeited property - Were acquired with proceeds from sale of stolen goods.

**EVIDENCE** - Hearsay - Direct oral evidence of prosecution witness - Is

*neither inadmissible nor hearsay.*

**EVIDENCE** - *Witnesses for the prosecution - Alleged to be accomplices, tainted or begrudged - Whether the allegation is well founded.*

**EVIDENCE** - *Witnesses - Credibility of prosecution witnesses - mere fact of grouse against the accused - Will destroy the credibility of the evidence.*

### **FACTS**

The appellants together with four others were arraigned before the Lagos High Court. They were charged in count one with conspiracy to commit felony and in count two with stealing 649,000 Champion Spark Plugs worth N1,998,920.00. They all pleaded not guilty to the charges. The said plugs were removed from the Complainant's warehouse where they were packed. There was an opening on the ceiling and roof of the said warehouse to the adjacent building which is the residence of some of the accused. A ladder, some champion sparkling plugs parkings and some of the roofing materials from the warehouse were found in the said persons' residence. There were various direct testimonies that incriminated the appellants as having committed the offences charged, including PW3 and PW4 who were girl friends of the 1st accused person.

The trial court found the accused persons guilty as charged and sentenced them to various terms of imprisonment. The court further made forfeiture or restitution order in respect of appellants' properties that it found to have been acquired with proceeds of the theft. Appellants' appeals to the Court of Appeal were dismissed by that court which allowed the appeal of only one of the accused persons. The lower court also set aside the trial court's forfeiture order. Being dissatisfied, the appellants have further appealed to the Supreme Court on five issues. Respondent cross-appealed on the discharge of the forfeiture order by the court below.

### **ISSUES FOR DETERMINATION**

1. *Whether on the facts of this case, the court below is not in error when it upheld the decision of the trial Court that P.W.3 and P.W.4 are accomplices in the offence charged or at least tainted witnesses and whether the failure of the trial Judge so to hold and to remind himself of the need for caution in regard to their evidence did not occasion a miscarriage of justice.*

2. *Whether the Court below was right to have upheld the conviction of the 1st and 4th Appellants bearing in mind the evidence led before the*

trial court.

3. *Whether the learned Trial Judge was right in convicting the 3rd Appellant for the count of conspiracy and was the Court of Appeal right in not setting aside the conviction of the 3rd Appellant based solely on the evidence of PW3 that 3rd Appellant instigated the 1st Appellant to start stealing the sparkling plugs and that it was the 3rd Appellant who knew when the 3-container loads of sparkling plugs were brought in and the fact that the 3rd Appellant once lived at 142 Ojuelegba Road which said evidence of PW3 was not admissible in law because same infringed Section 76 of the Evidence Act.*

4. *On a proper evaluation of the evidence of PW1, PW3 and PW4 and that of 3rd Appellant (not necessarily on basis of demeanour but based upon what the learned trial Judge believed on record), was reasonable doubt not created in favour of the 3rd Appellant in respect of the 2nd count of stealing and are the findings of the learned trial judge not perverse and have they not occasioned miscarriage of justice to the 3rd Appellant.*

5. *In the absence of any other direct evidence linking the 2nd and 3rd Appellants with the commission of the alleged offences whether the evidence of PW3 and PW4 are reliable enough to ground the convictions of the 2nd and 3rd Appellants or whether the evidence is full of contradictions and inconsistencies material enough to create reasonable doubt in favour of the 2nd and 3<sup>rd</sup> Appellants.*

### **RESPONDENT'S CROSS APPEAL ISSUE**

*Whether the Court of Appeal was right in vacating the orders of restitution made by the High Court.*

**HELD** (Unanimously dismissing the appellants appeal, allowing the respondent's cross appeal per lead judgment of **IGUH JSC**)

#### ***Whether failure to report crime makes witness an accomplice***

1. The mere failure of a witness to report to the Police a person who designs to commit an offence or whom he has seen committing an offence does not *ipso facto* make him unworthy of credit should he testify on behalf of the prosecution in such a trial. Accordingly the mere failure of P.W.3 and P.W.4 to report the appellants to the Police did not *ipso facto* make them accomplices of offences charged. Nor did the fact that they were present and saw the appellants at various times engage in the burglary and theft of the sparkling s without more make them accomplices to the crime or "tainted" witnesses. (p. 1047 H)

#### ***Whether witnesses are participes criminis***

2. The point must be stressed that there is no evidence whatsoever in the

present case that P.W.3 or P.W.4 are participes criminis to the offences charged. It is not alleged that they participated in the conspiracy of the theft. There is also no evidence that they received the stolen goods or the proceeds thereof knowing the same to have been stolen. Indeed they were not cross-examined on those lines. (p. 1048 A)

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***Credibility of prosecution witnesses***

3. Additionally there is nothing from the tenor of the evidence of P.W.3 and P.W.4 to suggest in whatever manner, any purpose of their own to be served by their evidence. No doubt, it could be suggested that P.W.3 and P.W.4 being ex-girlfriends of the 1st appellant must have had a grouse against him. That suggestion on its own however cannot per se destroy their credibility. This is because where the evidence led is reliable and true in fact, as was found in the present case by the trial court with regard to the evidence of P.W.3 and P.W.4, the fact that the witness has a grouse against the accused will not weaken the validity or credibility of his evidence. So long as such evidence has been carefully considered by the trial court and is found to be direct, unassailable and true, the mere fact that the witness is the accused's mortal enemy will not render his evidence unreliable. (p. 1048 B)

E

***Whether witnesses are accomplices, tainted or begrudged***

4. In the present case, there is nothing on record from which P.W. 3 and P.W.4 may be described as accomplices, tainted or begrudged witnesses. Both witnesses testified before the court and effectively incriminated the appellants by direct evidence with the offences charged. The evidence of P.W.1, P.W.2, P.W.10 and P.W.11 which were also direct, corroborated the evidence of P.W.3 and P.W.4 in various particulars on the issue of how the appellants carried out their stealing expedition of the sparkling plugs. The court was satisfied with and accepted the evidence of the said P.W.3 and P.W.4. (p. 1048 E)

***Concurrent findings***

5. It is trite that this court will not normally interfere with the concurrent findings of the two lower courts unless there is some miscarriage of justice or violation of some principles of law or procedure. No miscarriage of justice or violation of any principle of law or procedure has been established by the appellants in this case and I entertain no doubt that the court below was right have upheld the convictions of the 1st and 4th appellants. Accordingly the second issue must again be resolved against the appellants.

(p. 1050 C)

***Hearsay - Direct oral evidence***

6. It must be emphasized that the evidence of P.W.3 against the 2nd and 3rd appellants was neither hearsay nor inadmissible. Her evidence was direct evidence of what she saw and witnessed and the conviction flowing from evidence which was accepted by the trial court as true cannot be described, no matter how remotely, as based on hearsay or speculation. I will accordingly resolve the first two issues raised by the 2nd and 3rd appellants in favour of the respondent. (p. 1050 F)

***Conviction - Evidence of prosecution witnesses***

7. The evidence of P.W.3 and P.W.4 which the trial court believed together with the evidence of the other prosecution witnesses are more than sufficient to sustain the conviction of the 2nd and 3rd appellants. (p. 1051 F)

***Contradictions - Alleged in evidence of prosecution***

8. On the alleged contradictions in the evidence of the prosecution, I must state that a close study of the record of appeal does not bear this out. At all events, for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to the prosecution's case, the conflict or contradiction must be substantial and fundamental to the main issues in question before the court. No such substantial and fundamental conflict or contradiction has been established in the present appeal. (p. 1051 F)

***Whether forfeiture order is lawful***

9. The term "property" under part 30 of the Criminal Procedure Law of Lagos State therefore includes, in the case of property regarding which an offence appears to have been committed, not only the original property in species but also such other property into which the same has been converted or exchanged and anything acquired by such conversion or exchange. In my opinion the forfeiture or restitution orders of the trial court in the present case are amply covered by the combined effect of sections 263 and 263 A of the criminal Procedure Law, Lagos State in view of the finding of the trial court that the properties covered by the restitution orders were acquired with proceeds of sale of the complainant's stolen champion sparkling plugs in issue. (p. 1053 G)

***Circumstantial evidence - Whether ample enough***

10. A close study of the record of proceedings does show that there was ample circumstantial evidence before the trial court to the effect that all

the appellants acquired their respective properties in question within the period of the theft and with the proceeds of sale of the complainant's stolen sparkling plugs. (p. 1054 C)

***Forfeiture order - Onus is on prosecution***

- B 11. It ought however to be noted that the onus of proving that the property in respect of which a restitution or forfeiture order is to be made is from the proceeds of an alleged theft is on the prosecution. But this onus, as in civil cases, is discharged on the preponderance or balance of probabilities and not beyond reasonable doubt as prescribed in criminal cases. Upon a careful consideration of all the evidence adduced before the trial court, I cannot, with respect, accept the view of the court below that the prosecution did not establish that the complainant is entitled to the properties restored to him by the orders of the trial court. (p. 1055 E)

**D NOTABLE POINTS OF INTEREST  
IGUH JSC**

***1. Accomplices and tainted witnesses defined***

- It seems to me settled that persons are accomplices to a crime who participes criminis in respect of the actual crime charged whether as principals or accessories before or after the fact. On the other hand, it has been said that the term "tainted witness" should be confined to one who is either; accomplice or who by the evidence he gives, whether as a witness for prosecution or defence, may be regarded as having some purpose of his own to serve. I am prepared to accept that a tainted witness may be defined as witness who may not in strict sense, be an accomplice, but who on giving his evidence is established to have some purpose of his own to serve and respect of whom it is desirable that the warning as to the corroboration of his evidence may appropriately be given. (p. 1046 E)

**G 2. Mere cohabiting with the accused does not make one an accomplice**

- A person does not become an accomplice to a particular crime by merely co-habiting without more with one who is established to be concerned with the commission of a crime unless the former is aware of the criminal conduct of the latter and aids and abets or assists him in the commission of the offence or counsels or procures the latter to commit the offence or knowingly gives succour or encouragement to the criminal or facilitates the commission of the offence. In other words, one becomes an accomplice to a crime if he is participes criminis whether as principal or accessory before or after the fact with regard to the offence charged. (p. 1047 C)

*3. When a person will be deemed to be an accomplice*

The mere presence of a person at the commission of a crime does not ipso facto make one an accomplice to such a crime. A person must be purposely facilitating or aiding the commission of a crime by his presence before he can be regarded as an accomplice. So too, the mere failure of a witness to report the commission of a crime will not ipso facto make the witness to the commission an accomplice. (p. 1047 E) B

*4. Clear evidence that incriminated the appellants*

It must also be emphasized that both PW.3 and PW.4 gave direct oral evidence of what they saw and witnessed. PW.3 gave clear evidence connecting the 1st appellant with the offences charged, PW.4 in the like manner also incriminated the 4th appellant with the offences charged. The learned trial Judge upon an exhaustive consideration of all the evidence led before the court held that the prosecution had established its case against the 1st and 4th appellants beyond all reasonable doubt. On the issue of conspiracy, he observed, having watched all the witnesses testify, that the matter was a clear case of conspiracy with the 1st and 3rd appellants as the hub around whom the other appellants revolved. On the second count of stealing, the trial court held that this was also proved beyond all reasonable doubt against the 1st and 4th appellants. (p 1049 D) C  
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*5. Less premium not to be placed on proof by circumstantial evidence*

It is important to observe that the 1st appellant admitted in his examination in chief that he was only a clerk at the Government coastal Agency on a salary of N180.00 per month. Similarly the 2nd appellant admitted that he was on a salary of only N220.50 per month. It is also worthy of note that the appellants by some strange coincidence acquired their respective properties in issue contemporaneously with the burglary and stealing for which they were tried and convicted. It was in the face of the above sudden metamorphosis of the appellants from the humble rank of low working class, with some of them jobless, to nouveaux riches of posh saloon cars owning class contemporaneously with the theft in question that the trial court, in the absence of any reasonable explanation, came to the irresistible conclusion that the appellants properties in issue were properties into which the complainant's plugs had been converted. I think that the learned trial Judge was entitled to infer circumstantially that these properties were bought, all about the same time as it were, with the proceeds of the crime. I agree entirely with the learned counsel for the respondent that to insist, as the Court of Appeal appeared to have done, on direct evidence of the fact F  
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of acquisition of these properties with the proceeds of the theft will tantamount to placing less premium on the practice of proof by circumstantial evidence. (p. 1055 A)

**UWAIS JSC**

**B** *Direct and circumstantial evidence abound on acquisition of property*

6. The evidence before the trial court about the acquisition of wealth by the Appellants after committing the theft was both direct and circumstantial that the learned trial judge had cogent evidence on which to come to conclusion, as he did, that the goods tendered in evidence and the money in

**C** the account of the 1st Appellant with the National Bank of Nigeria Ltd., were acquired from the proceeds of the sale of the goods stolen. He did not assume but relied on the evidence, both real and circumstantial, admitted by him. (p. 1057 G)

**D** **REPRESENTATION**

Mr. Kehinde Sofola, S.A.N. with A. Idris Esq. and H.S. Umar(Miss) for 1st and 4th appellants

Chief BO.Benson,S.AN. with B. Jagun Esq.for the 2nd and 3rd appellants

B. B. Ayodele (Mrs.) Chief Legal Officer (Lagos State) for the respondent

**E**

**CASES REFERRED TO**

Bello v. R. (1967) N.M.L.R. 1

R. v. Omisade (1964) N.M.L.R. 67

R. v. Prater (1960) 4 Cr. App. R. 83

**F** Onafowokan v. The State (1987) 3 N. W.L.R. (Part 61) 538.

Bakare v. The State (1987) 1 N.W.L.R. (Part 52) 579 at 594

Omisade v. The Queen (1964) N.M.L.W. 67

Njovens v. The State (1973) 5-7 S.C. 17

Enahoro v. The Queen (1965) 1 All N.L.R. 125

**G** Barclays Bank Ltd. v. Milne (1963)3 All E.R. 663

Ishola v. The State (1978) N.S.C.C. (Vol. 2) 499

Idahosa v. R. (1965) N.M.L.R. 85

Wilcox v. Jeffrey (1951) 1 All E.R. 464

R. v. Ezekpe (1962) 1 All N.L.R. 637

**H** R. v. Ukpe (1938) 4 W.A.C.A. 141

Onyikoro v. R. (1959) N.R.N.L.R. 103

Azuma v. R. (1950) 13 W.A.C.A. 87

Oteki v. The State (1986) 4 S.C. 222 at p. 225

Ugwumba v. The State (1993) 5 N. W.L.R. (Part 296) 660 at 671



Osayeme v. The State (1966) N.M.L.R. 388

Wankey v. The State (1993) 5 N.W.L.R. (Part 295) 542 at 552

Nasamu v. The State (1979) 6-9 S.C. 153

Ibe v. The State (1992) 5 N.W.L.R. (Part 244) 642 at 649

Azu v. The State (1993) 6 N.W.L.R. (Part 299) 303 at 316

Kalu v. The State (1988) 4 N.W.L.R. (Part 90) 503

B

R v. Ukut (1960) 5 FSC 183

Azuwa v. R. 13 WACA 87

### **STATUTES REFERRED TO**

Criminal Code Cap. 31 Laws of Lagos State, 1973 ss.516, 390 (9)

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Criminal Procedure Law of Lagos State ss. 269, 270, 263

Evidence Act Cap. 112 LFN 1990 s. 178 (1)

### **LEAD JUDGMENT BY IGUH JSC**

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The appellants, Adetokunbo Ogunlana, Segun Adebayo Onile, Kayode Bakare and Caroline M. Ogunlana along with four others were arraigned on the 12th day of January, 1987 before the High Court of Lagos State, holden at Ikeja on a two count information. They were charged in count one with conspiracy to commit felony, to wit, stealing contrary to section 516 of the Criminal Code, Cap. 31, Laws of Lagos State of Nigeria, 1973 and in count two with stealing 649,000 Champion Sparkling Plugs Model N.97, valued at N1,998,920.00 property of Alhaji Yinusa Saliu Layeni contrary to section 390(9) of the Criminal Code. Each of them pleaded not guilty to both counts and was released on bail.

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The prosecution called twelve witnesses at the trial. In the course of the trial, the 5th accused person, Samuel Olaiya Awolaja jumped bail. The case against him was consequently withdrawn and he was discharged but not on the merits. The remaining seven accused persons testified on their own behalf and called witnesses. The learned trial Judge also visited the locus in quo which was numbers 140 and 142 Ojuelegba Road, Surulere.

The substance of the case as presented by the prosecution is that on the 26th March, 1986, the complainant, one Alhaji Layeni who is P.W. 1 in this case together with his storekeeper, P.W. 2 went to his warehouse at No. 142 Ojuelegba Road, Surulere where he had stored three container loads of Champion Sparkling Plugs. On getting to the warehouse, they discovered to their amazement that a large quantity of the said Sparkling Plugs valued N1,998,920.00 property of P. W. 1, had been stolen by unknown persons. On close inspection, they noticed that there was an opening

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of the ceiling which extended to the roof of the warehouse. This prompted them with some sympathisers to visit the adjacent building, known as No. 140 Ojuelegba Road, Surulere which was the residence of the 1st, 3rd, 7th and 8th accused persons.

B At the latter premises, they saw a ladder Exhibit H placed on the wall there and noticed that those who gained entrance into the warehouse had done so by removing some of the roofing materials at 142 Ojuelegba road, Surulere. Exhibits J and J1, some Champion Sparkling Plugs parkings, were also found in the compound at No. 140 Ojuelegba road, Surulere. As a result of this discovery a report was made to the Police who after their investigations arrested all the accused persons and arraigned them before C the court as aforesaid.

I think it ought to be noted that both P.W. 3 and P.W. 4, Theresa Onafuwa and Remi Onwufuju respectively were at all material times at one time or the other girl friends of the 1st accused person. They had cohabited D severally with him as husband and wife at the said 140 Ojuelegba road, Surulere at various times material to the commission of the offences charged. P.W. 3 testified that she ended the relationship between the 1st accused and herself when she discovered that the 1st accused with the other accused persons were stealing the champion sparkling plugs of P.W.1 from the warehouse. She gave details of the roles the other accused persons played E along with the 1st accused in stealing the plugs of P.W. 1. Her relationship with the 1st accused ended late in November, 1985 when she saw him stealing the plugs with the other accused persons and advised him to desist from doing so. Following this advice, the 1st accused grew annoyed and F threw her out of the house.

P.W.4 also gave evidence which in many ways incriminated the accused persons with the commission of the offences charged. All the accused persons testified in their own defence and called seven other witnesses. Theirs was a total denial of the charge.

G The learned trial Judge, Oshodi, J., after an exhaustive review of the evidence on the 4th August, 1989 found each and every one of the seven accused persons guilty of the offences charged. The 1st, 2nd, 3rd, 4th and 6th accused persons were sentenced to 7 years imprisonment on each count and the 7th and 8th accused persons were sentenced to 5 years H imprisonment on each count with hard labour, sentences to run concurrently. The court further made forfeiture and/or restitution orders in respect of some of the properties of the accused persons.

Dissatisfied with this judgment of the trial court, the accused persons appealed to the Court of Appeal, Lagos Division against the said convictions and sentences. On the 18th December, 1991, the Court of

Appeal affirmed the convictions and sentences of the 1st, 2nd, 3rd, 4th, 6th and 7th accused persons whilst the appeal of the 8th accused person was allowed and his convictions and sentences were set aside. The court also set aside all the orders of the trial court in respect of the forfeiture of the properties. It is against this judgment of the court below that the 1st, 2nd, 6th and 7th accused persons, hereinafter referred to as the 1st, 2nd, 3rd and 4th appellants respectively, have now appealed to this court.

Both the appellants and the respondent filed and exchanged their respective written briefs of argument. In the 1st and 4th appellants' brief, the undermentioned issues were formulated for resolution, namely:-

1. Whether on the facts of this case, the court below is not in error when it upheld the decision of the trial court that P.W. 3 and P.W. 4 were not accomplices in the offence charged or at least tainted witnesses and whether the failure of the trial Judge so to hold and to remind himself of the need for caution in regard to their evidence did not occasion a miscarriage of Justice.

2. Whether the court below was right to have upheld the conviction of the 1st and 4th appellants bearing in mind the evidence led before the trial court.

The 2nd and 3rd appellants, on the other hand, identified three issues in their written brief of argument for the determination of this court. These are as follows:-

1. Whether the learned trial Judge was right in convicting the 3rd appellant for the count of conspiracy and was the Court of Appeal right in not setting aside the conviction of the 3rd appellant based solely on the evidence of P.W. 3 that 3rd appellant instigated the 1st appellant to start stealing the sparkling plug and that it was the 3rd appellant who knew when the 3 container loads of sparkling plugs were brought in and the fact that the 3rd appellant once lived at 142 Ojuelegba road which said evidence of P.W. 3 was not admissible in law because same infringed section 76 of the Evidence Act.

2. On a proper evaluation of the evidence of P.W. 1, P.W. 3 and P.W. 4 and that of 3rd appellant (not necessarily on basis of demeanour but based upon what the learned trial Judge believed on record), was reasonable doubt not created in favour of the 3rd appellant in respect of the 2nd count of stealing and are the findings of the learned trial Judge not perverse and have they not occasioned miscarriage of justice to the 3rd appellant.

3. In the absence of any other direct evidence linking the 2nd and 3rd appellants with the commission of the alleged offences whether the

evidence of P.W. 3 and P.W. 4 are reliable enough to ground the convictions of the 2nd and 3rd appellants or whether the evidence is full of contradictions and inconsistencies material enough to create reasonable doubt in favour of the 2nd and 3rd appellants.

The respondent, for its own part, identified three issues in its brief B in respect of the 1st and 4th appellants appeal for determination. These are couched as follows:

- 3.1. Whether P.W. 3 and P.W.4 were accomplices or tainted witnesses.
- 3.2. Whether the conviction of the appellants was based on suspicion.
- 3.3. Whether as husband and wife, the charge of conspiracy is maintain- C able against the 4th appellant and her husband who was the 8th accused person at the trial.

The respondent in its brief in respect of the 2nd and 3rd appellants also identified the under-mentioned two issues for the determination of this court.

D These are as follows:-

- (1) Whether the charges against the 2nd and 3rd appellants were proved beyond reasonable doubt.
- (2) Whether there were material contradictions in the prosecution's case.

E A close study of the issues raised in the respondent's briefs of argument discloses that they are sufficiently encompassed by those identified by the appellants in their respective briefs in the main appeals. Accordingly, I shall in this judgment confine myself to the issues raised in the appellants' two sets of briefs of argument.

F The respondent did also cross-appeal to this court against the forfeiture orders which were set aside by the court below.

In its brief in respect of this cross-appeal, the under-mentioned issue was identified for determination, namely:-

1. Whether the Court of Appeal was right in vacating the orders of G restitution made by the High Court.

The 1st and 4th appellants in their reply to the respondent's amended brief in respect of the Cross-Appeal identified a similar issue for resolution in the following terms:-

H Whether the Court of Appeal was right in vacating the orders made by the learned trial Judge in respect of properties and monies belonging to the appellants.

Learned counsel for the 2nd and 3rd appellants in his reply brief indicated that the respondent's cross-appeal did not touch the appeal of his clients in the cause. Accordingly, learned counsel filed respondent's

brief to the cross-appeal as *amicus curiae* wherein he adopted the lone issue formulated by the cross appellant.

At the hearing of the appeal before us on the 16th February, 1995 learned counsel for the appellants and the respondent adopted their respective briefs and made oral submissions in amplification thereof.

Learned Senior Advocate of Nigeria, Kehinde Sofola, Esq. in his arguments on behalf of the 1st and 4th appellants in respect of the first issue contended that their conviction was based principally on the testimony of P.W. 3 and P.W. 4 who were the prosecution's star witnesses in the case. He submitted that these two witnesses were "tainted witnesses if not totally accomplices" He argued that both witnesses along with the 1st appellant were *participes criminis* and were therefore caught by Section 7 C of the Criminal Code, Cap. 31, Laws of Lagos State 1973 as they gave succour and encouragement to the 1st appellant and facilitated the commission of the offences. He therefore submitted that their testimony should not have been acted upon without caution or corroboration. He cited in support, the decisions of *Odofin Bello v. R.* (1967) NMLR 1; *R v. Omisade & Ors* (1964) NMLR 67 and *R. v. Prater* (1960) 4 Cr. App. R. 83. He defined a "tainted witness" as a witness who may not in strict sense, be an accomplice but a person who in giving evidence may have some purpose of his own to serve and in respect of whom the warning as to corroboration must be given. He stressed that P.W. 3 saw the appellants on several occasions break into the warehouse and that her entire evidence showed her as a full participant in the organisation of the gang that broke into No. 142, Ojuelegba road as alleged. He claimed too that P.W. 4 admitted not only that she gave succour to the gang who committed the burglary until the 1st appellant was arrested but that on a number of occasions she went with the 1st appellant to Ikeja to collect some of the proceeds of the sale of the stolen property. He submitted that the trial court having neglected to warn itself of the danger of acting on the evidence of P. W. 3 and P.W.4 in convicting the 1st and 4th appellants, the court below was in error to have failed to set aside the judgment of the trial court.

On the second issue, learned Senior Advocate conceded that although the warehouse at No. 142 Ojuelegba road might have been burgled sometime between 1985 and 1986, he contended that the quality of evidence before the trial court was not such as would have warranted the conviction of the 1st and 4th appellants. He therefore submitted that the court below was in error not to have set aside the convictions of the 1st and 4th appellants. He referred to the evidence of P.W. 3 in particular and described it as unreliable. He pointed out that there was discrepancy in her evidence as at one time, she said she was driven out by the 1st appellant and at another time she said she left the 1st appellant after she advised him

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to stop stealing the plugs. He urged the court to allow the appeal of the 1st and 4th appellants.

B Learned Senior Advocate of Nigeria, Chief B.O. Benson in his submissions on behalf of the 2nd and 3rd appellants argued that there was no reason why the evidence of the 3rd appellant should be treated as unreliable. He described the testimony of P.W. 3 as fabricated and therefore incapable of grounding a conviction of the 3rd appellant for conspiracy. He attacked her testimony with considerable force and he invited this court to hold that the evidence of P.W. 3 on which the trial Judge based the conviction of the 3rd appellant for conspiracy was wrongfully admitted and infringed section 76 of the Evidence Act. He submitted that the evidence of C P.W. 3 and P.W. 4, particularly with regard to the first count of conspiracy, as against the 2nd and 3rd appellants was not to their personal knowledge.

D On the 2nd issue which questions whether on a proper evaluation of the evidence of P.W. 1, P.W. 3 and P.W.4, reasonable doubt was not created in favour of the 3rd appellant in respect of the stealing charge, Chief Benson submitted that P.W. 3 had no personal knowledge of the facts she testified upon. He stressed that the defence of the 3rd appellant that he was in Port Harcourt from December 1985 amounted to a plea of alibi which plea was never dislodged. He argued, citing the case of Onafowokan v. The State (1987) 3 NWLR (Pt. 61) 538 that the onus was on the prosecution to disprove such a plea. He cited the case of Bakare v. State (1987) E 1 NWLR (Pt. 52) 579 at 594 and submitted that the 3rd appellant had showed special circumstances for the setting aside by this court of the concurrent findings of facts of the two courts below against him.

F On the 3rd issue, learned counsel submitted that the evidence of P.W. 3 and P.W. 4 created some doubt which ought to have been resolved in favour of the 2nd and 3rd appellants. He urged the court to allow the appeal of the 2nd and 3rd appellants.

G Learned counsel for the respondent, B. B. Ayodele (Mrs.), Chief Legal Officer, Ministry of Justice, Lagos State in her reply submitted that P.W. 3 and P.W.4 are not accomplices as they are not participes criminis to the offences charged as provided in section 7 of the Criminal Code. She cited in support the cases of Omisade v. The Queen (1964) NMLR 67; (1964) 1 All NLR 233; Njovens v. The State (1973) 5-7 S.C. 17 and Enahoro v. The Queen (1965) 1 All NLR 125; (1965) 5 S.C. 119; (1965) NMLR H 265. She contended that those witnesses are not "tainted" witnesses either. She conceded that P.W. 3 and P.W. 4, lived at various material times between 1983 and 1985 with the 1st appellant and that neither of them reported the burglaries to the police. She however argued that this did not make them accomplices or tainted witnesses. They were merely eye wit-

nesses to the theft of the plugs. She argued in the alternative that even if they were accomplices, the evidence of P.W. 1, P.W. 2, P.W.9 and P.W. 10 fully corroborated their testimony concerning the burglary and theft of the plugs in issue. She therefore urged the court to dismiss these appeals.

On the cross-appeal against the lower court's vacation of the orders of forfeiture and/or restitution made by the trial court, Mrs. Ayodele learned Chief Legal Officer contended that the prosecution through P.W. 3, P.W. 4, P.W. 5, P.W. 6 and P.W. 7 clearly established that the appellants acquired the properties in issue with the proceeds of the sale of the complainant's plugs. She stressed that both P.W. 3 and P.W. 4 testified that the appellants acquired their various properties in issue within the period of the theft and that the trial court accepted their evidence on the point. She conceded that there was no direct evidence that the appellants acquired their sudden wealth with the proceeds of the theft but submitted that there was abundant circumstantial evidence in proof of that fact. She argued that to permit the appellants to keep the proceeds of their criminal activity would tantamount to making stealing a profitable venture. She urged the court to set aside the orders of the court below in this regard.

Learned Senior Advocate, Mr. Kehinde Sofola in his reply submitted that it was not circumstantial evidence but sheer speculation for the trial court to have assumed that it must be the proceeds of sale of the sparkling plugs that were converted into accounts and personal effects without specific evidence to this effect. He argued, citing the decision in *Barclays Bank Ltd. v. Milne* (1963) 3 All E.R. 663, that the power of the court to make any order of restitution under the provisions of Section 270 of the Criminal Procedure Law of Lagos State is limited to the property specified in the charges and identified at the trial as being the subject matter of the offence. He urged the court to dismiss the Cross-appeal for lacking in merit and to affirm the decision of the Court of Appeal vacating the orders of the learned trial Judge.

Learned Senior Advocate, Chief B.O. Benson, in his own reply was in doubt as to whether the legal basis for the making of an order for restitution in the case existed. He conceded that the finding of the trial court was in effect that it was established that the vehicles, money and other properties found to be in possession or in the names of the appellants were in fact proceeds/properties to which the complainant's plugs had been converted or exchanged within the meaning of section 263(A) of the Criminal Procedure Law. He submitted that subject to the existence of an enabling law to validate the restitution order made by the trial court, the Court of Appeal was in error to have vacated the restitution order of the trial court. He argued that this is because the evidence of P.W. 3 and P.W.

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4 when closely examined, the sudden metamorphosis of the appellants from the rank of low working class (messengers/clerks) to wealthy conservatives of posh saloon cars owning class contemporaneously with the theft of the complainant's plugs would lead one to the irresistible conclusion that the cars, monies and landed properties found with the appellants were properties into which the stolen plugs had been converted.

B The first issue for determination in the appeal of the 1st and 4th appellants is whether on the facts of this case, the court below was not in error when it upheld the decision of the trial court that P.W. 3 and P.W. 4 were not accomplices to the offences charged, or at least tainted witnesses, and whether the failure of the trial court so to hold and to remind itself of  
C the need for caution in regard to their evidence did not occasion a miscarriage of justice. It was the complaint of the 1st and 4th appellants that the evidence of P.W. 3 and P.W. 4 is that of accomplices or tainted witnesses and that the trial court did not advert its mind to this fact.

I think it should be mentioned at this stage that it is not in dispute  
D that P.W. 3 and P.W. 4 were the star witnesses of the prosecution at the trial. This fact is common ground in this appeal. It is also clear that their testimony along with those of the other prosecution witnesses incriminated the 1st and 4th appellants in no small measure with regard to the two counts for which the two appellants were tried and convicted. The learned  
E trial Judge believed the said evidence of the two star witnesses and proceeded to convict the appellants as charged. The question for determination is whether, as contended by Mr. Sofola, SAN, the evidence of the said P.W. 3 and P.W. 4 was that of accomplices or tainted witnesses.

It seems to me settled that persons are accomplices to a crime  
F who are participis criminis in respect of the actual crime charged whether as principals or accessories before or after the fact, See *Omisade & Ors v. The Queen* (1964) NMLR 67; *Njovens v. The State* (1973) 5-7 S.C. 17; *Jimoh Ishola v. The State* (1978) 9-10 S.C. 81; (1978) 2 LRN 125; (1978) NSCC (Vol. 2) 499 and *William Idahosa v. R.* (1965) NMLR 85. On the  
G other hand, it has been said that the term "*tainted witness*" should be confined to one who is either an accomplice or who by the evidence he gives whether as a witness for the prosecution or defence, may be regarded as having some purpose of his own to serve. See *Idahosa v. The State* (1965) NMLR 85 and *Jimoh Ishola v. The State*, supra at P. 509. I am  
H prepared to accept that a tainted witness may be defined as a witness who may not in strict sense, be an accomplice, but who on giving his evidence is established to have some purpose of his own to serve and in respect of whom it is desirable that the warning as to the corroboration of his evidence may appropriately be given.



It seems to me important, however to recall the admonition of Idigbe, J.S.C. in *Garuba Mailayi & Anor v. The State* (1968) 1 All NLR 116 at 123 with regard to this class of witnesses described as “tainted”. Said he:-

*“Recently, there has been a tendency among criminal lawyers to create a category of “tainted” witnesses. We however observe that the expression “tainted” is very loose and if its application is not kept within proper bounds, a great deal of confusion will be unleashed in an area of evidence which even now is fraught with difficulties.”*

I must, with respect, endorse the above observation of Idigbe, J.S.C. as sound and worthy of note. The application of this loose class of witnesses described as “tainted” must therefore be kept within proper bounds to avoid unnecessary confusion that may becloud this area of our law of Evidence. Having examined the questions of accomplices and “tainted” witnesses, I will now return to the first issue for determination in the appeal.

It must be conceded that PW. 2 and PW. 4 lived at various material times with the 1st appellant. It is also common ground that neither of them reported the burglary and theft to the police. But a person does not become an accomplice to a particular crime by merely cohabiting without more with one who is established to be concerned with the commission of a crime unless the former is aware of the criminal conduct of the latter and aids and abets or assists him in the commission of the offence or counsels or procures the latter to commit the offence or knowingly gives succour or encouragement to the criminal or facilitates the commission of the offence. See for example *Wilcox v. Jeffrey* (1951) 1 All ER 464 and *R. v. Ezekpe & Anor* (1962) 2 SCNLR 393; (1962) 1 All NLR 637. In other words, one becomes an accomplice to a crime if he is participates criminis whether as principal or accessory before or after the fact with regard to the offence charged.

The mere presence of a person at the commission of a crime does not ipso facto make one an accomplice to such a crime. See *R. v. Ukpe* (1938) 4 WACA 141. A person must be purposely facilitating or aiding the commission of a crime by his presence before he can be regarded as an accomplice. So too, the mere failure of a witness to report the commission of a crime will not ipso facto make the witness to the commission an accomplice. See *Imoke Onyikoro v. R.* (1959) NRNLR 103 and *Yaw Azuma v. R.* (1950) 13 WACA 87. The fact that one did not report a crime to the police until they interviewed him does not indicate complicity as it is common knowledge that in this country, witnesses often refrain from coming forward in case they might get into some sort of trouble.

Similarly the mere failure of a witness to report to the police a person who designs to commit an offence or whom he has seen committing an

offence does not ipso facto make him unworthy of credit should he testify on behalf of the prosecution in such a trial. See *Jimoh Ishola v. The State*, supra at P. 508. Accordingly, the mere failure of P.W. 3 and P.W. 4 to report the appellants to the police did not ipso facto make them accomplices to the offences charged. Nor did the fact that they were present and saw the appellants at various times engage in the burglary and theft of the sparkling plugs without more make them accomplices to the crime or “*tainted*” witnesses.

The point must be stressed that there is no evidence whatsoever in the present case that P.W. 3 or P.W. 4 are participes criminis to the offences charged. It is not alleged that they participated in the conspiracy of the theft. There is also no evidence that they received the stolen goods or the proceeds thereof knowing the same to have been stolen. Indeed they were not cross-examined on those lines. Additionally there is nothing from the tenor of the evidence of P.W. 3 and P.W. 4 to suggest in whatever manner, any purpose of their own to be served by their evidence.

No doubt, it could be suggested that P.W. 3 and P.W. 4 being ex-girl friends of the 1st appellant must have had a grouse against him. That suggestion on its own however cannot per se destroy their credibility. This is because where the evidence led is reliable and true in fact, as was found in the present case by the trial court with regard to the evidence of P.W. 3 and P.W. 4, the fact that the witness has a grouse against the accused will not weaken the validity or credibility of his evidence. So long as such evidence has been carefully considered by the trial court and is found to be direct, unassailable and true, the mere fact that the witness is the accused’s mortal enemy will not render his evidence unreliable. See *Stephen Oteki v. AGBendel State* (1986) 2 NWLR (Pt. 24) 648; (1986) 4 S.C. 222 at P. 225.

In the present case, there is nothing on record from which P.W. 3 and P.W. 4 may be described as accomplices, tainted or begrudged witnesses. Both witnesses testified before the court and effectively incriminated the appellants by direct evidence with the offences charged. The evidence of P.W. 1, P.W. 2, P.W. 10 and P.W. 11 which were also direct, corroborated the evidence of P.W. 3 and P.W. 4 in various particulars on the issue of how the appellant carried out their stealing expedition of the sparkling plugs. The court was satisfied with and accepted the evidence of the said P.W. 3 and P.W. 4. Indeed it is in evidence that when P.W. 3 became aware of the criminal conduct of the appellants, she advised the 1st appellant to desist from his conduct but the latter grew annoyed with her as a result of which she left him. That is certainly not the behavior of an accomplice or a tainted witness.

P.W. 4, for her own part neither joined the appellants in their crimi-

nal activities nor did she received the stolen goods or the proceeds thereof. She did nothing to facilitate or encourage the commission of the offences charged. In my view she, too can neither be described as an accomplice nor a tainted witness. I therefore agree with the findings of the trial court as affirmed by the Court of Appeal that P.W. 3 and P.W. 4 are neither accomplices nor “tainted” witnesses. I must, with respect, reject the submissions of learned senior advocate to the contrary as misconceived and unmeritorious in the circumstance, the first issue must be resolved against the 1st and 4th appellants.

The second issue postulated by the learned Senior Advocate for the 1st and 4th appellants is whether the court below was right to have upheld the conviction of the 1st and 4th appellants bearing in mind the evidence led before the trial court. The contention of learned counsel is that the quality of evidence led in the case by the prosecution was insufficient in law to warrant a conviction of the appellants. He argued that had the learned trial Judge directed himself that P.W. 3 and P.W. 4 were accomplices or, at least, tainted witnesses, he might have given the benefit of doubt to the 1st and 4th appellants. He added in any case that neither the two witnesses nor the others alleged that the 1st and 4th appellants were members of the gang that committed the crime.

I have already held that P.W. 3 and P.W. 4 may under no stretch of the imagination be regarded as accomplices or “tainted” witnesses. It must also be emphasized that both P.W. 3 and P.W.4 gave direct oral evidence of what they saw and witnessed. P.W.3 gave clear evidence connecting the 1st appellant with the offences charged. P.W. 4 in the like matter also incriminated the 4th appellant with the offences charged. The learned trial Judge upon an exhaustive consideration of all the evidence led before the court held that the prosecution had established its case against the 1st and 4th appellants beyond all reasonable doubt. On the issue of conspiracy, he observed, having watched all the witnesses testify, that the matter was a clear case of conspiracy with the 1st and 3rd appellants as the hub around whom the other appellants revolved. On the second count of stealing, the trial court held that this was also proved beyond all reasonable doubt against the 1st and 4th appellants. Of the 4th appellant, in particular, it stated that she was “a party to the crime of the theft of the champion sparkling plugs stolen from the warehouse at 142 Ojuelegba road and accordingly she is found guilty of the offence as charged.” There is evidence in support of these findings which were affirmed by the court below. Said the court below per Sulu-Gambari, J.C.A.:-

*“I have examined the evidence given by the P.W. 3 and P.W. 4 and having considered their positions, I come to the conclusion that they*

*were not accomplices nor tainted witnesses. I am unable to agree that the totality of the evidence given against the appellants were mere suspicion upon which no conviction can be grounded. Even if they are either accomplices or tainted witnesses, there is enough evidence to support the testimonies of the 3rd and 4th prosecution witnesses to warrant the conviction of the 1st, 2nd, 3rd, 4th, 6th and 7th appellants.*

*I therefore come to the conclusion that this court does not see any justification for interfering with the judgment of the learned trial Judge in respect of the evidence he considered or evidence to be considered in the entire case for arriving at the conclusion that the 1st, 2nd, 3rd, 4th, 6th and 7th appellants were guilty of the offences charged."*

I myself have closely considered the entire evidence given before the court by P.W. 3 and P.W. 4 and find no reason to interfere with the findings of the trial court thereupon.

It is trite that this court will not normally interfere with the concurrent findings of the two lower courts unless there is some miscarriage of justice or a violation of some principles of law or procedure. See *Ugwumba v. The State* (1993) 5 NWLR (Pt. 296) 660 at 671; *Osayeme v. The State* (1966) NMLR 388; *Sanyaolu v. The State* (1976) 6 S.C. 37 and *Wankey v. The State* (1993) 5 NWLR (Pt. 295) 542 at 552. No miscarriage of justice or violation of any principle of law or procedure has been established by the appellants in this case and I entertain no doubt that the court below was right to have upheld the convictions of the 1st and 4th appellants. Accordingly, the second issue must again be resolved against the appellants.

Turning now to the appeal filed by the 2nd and 3rd appellants, the first issue raised by their learned counsel complained against the wrongful admission of the hearsay evidence of P.W.3 by the trial court and convicting the 2nd and 3rd appellants on such inadmissible evidence. The second issue questioned whether on a proper evaluation of the evidence of PW1, P.W.3 and P.W.4 a reasonable doubt was not created in favour of the 3rd appellant in respect of the 2nd count of stealing. I will consider these issues together.

With profound respect to Chief Benson, SAN., it must be emphasized that the evidence of P.W. 3 against the 2nd and 3rd appellants was neither hearsay nor inadmissible. Her evidence was direct oral evidence of what she saw and witnessed and the conviction flowing from this evidence which was accepted by the trial court as true cannot be described, no matter how remotely, as based on hearsay or speculation.

According to P.W. 3, it was in November 1985 that she saw the 1st appellant stealing the sparkling plugs with "*his friends*". She identified the 2nd and 3rd appellants with others as the "*friends*" of the 1st appellant, all of whom were stealing the plugs. The 1st appellant grew annoyed and

threw her out of his house because she advised him to desist from stealing the complainant's plugs.

The trial court found that P.W. 3 and P.W. 4 were both witnesses of truth and that the 2nd and 3rd appellants were members of the gang that stole the complainant's champion sparkling plugs from No. 142 Ojuelegba road. Said the learned trial Judge of the 2nd appellant:-

*"I do not believe the evidence of the 2nd accused. I accept the evidence of the prosecution witnesses that the 2nd accused is a member of the gang that stole the champion sparkling plugs and that he spent the proceeds from the stolen goods to purchase the car"*

Of the 3rd appellant, he said:-

*"The 6th accused as I have earlier said is the hub of the syndicate and he must have used the proceeds of the sale of the stolen goods to pay his rent, furnish his apartment and travelled to Port Harcourt. He is a member of the gang that stole the champion sparkling plugs from the warehouse at 142 Ojuelegba road and accordingly he is guilty of the offence."*

Earlier on in his judgment, the trial court had on the evidence before it found the count of conspiracy established against the 2nd and 3rd appellants. These findings were carefully considered by the court below and duly affirmed. It is not established that these findings are perverse or have occasioned a miscarriage of justice to the 2nd or the 3rd appellant. I will accordingly resolve the first two issues raised by the 2nd and 3rd appellants in favour of the respondent.

The last issue raised by the 2nd and 3rd appellants is whether in the absence of any other evidence incriminating the 2nd and 3rd appellants, the evidence of P.W.3 and P.W.4 is reliable enough to ground their conviction and whether the evidence contains contradictions material enough to create reasonable doubt in favour of the 2nd and 3rd appellants. This issue is closely related with the first issue raised on behalf of the 1st and 4th appellants in respect of which I have already considered in extenso. It suffices for me to state that the evidence of P.W.3 and P.W.4 which the trial court believed together with the evidence of the other prosecution witnesses are more than sufficient to sustain the conviction of the 2nd and 3rd appellants.

On the alleged contradictions in the evidence of the prosecution, I must state that a close study of the record of appeal does not bear this out. At all events, for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to the prosecution's case, the conflict or contradiction must be substantial and fundamental to the main issues in question before the court. See *Nasamu v. The State* (1979) 6-9 S.C. 153; *Enahoro v. The Queen* (1965) 1 All NLR 125; *Ibe v. The State* (1992) 5

NWLR (Pt. 244) 642 at 649; Azu v. The State (1993) 6 NWLR (Pt. 299) 303 at 316 and Kalu v. The State (1988) 4 NWLR (Pt. 90) 503. No such substantial and fundamental conflict or contradiction has been established in the present appeal. I must in the circumstance answer the first arm of this last issue in the affirmative and the second arm thereof in the negative.

B Turning now to the cross-appeal, the solitary question posed is whether the Court of Appeal was right in vacating the orders of restitution made by the trial court in respect of the monies and properties belonging to the appellants. These orders are in the following terms:-

"(i) I hereby direct that the Manager, First Bank, Adeniran Ogunsanya C Street, Surulere should freeze the Savings Account No. 3210 and the Short Fixed Deposit Account in the name of the 3rd accused person, Effiong Okonkon and make same payable to the Deputy Chief Registrar of this Court who is directed to open a Saving Account in the money so realised and later made payable to the complainant Alhaji Y. S. Layeni after the D period of appeal has lapsed or made payable to the 3rd accused if he succeeds on appeal.

(ii) I also direct that the Manager, National Bank of Nigeria Ltd., Balogun Street Branch, Lagos should freeze the sum of money as shown in Exhibit PP in the name of Chief Registrar of the Court who should open E the Savings Account for the amount.

(iii) The Exhibit Keeper is hereby directed to release Exhibits P to P69, S2 to S7, P70, Q2 and S7 to the Deputy Sheriff because the goods are now lying waste for public auction and all money realized should be paid to the Deputy Chief Registrar who should keep same in a savings F account.

(iv) The 8th accused is hereby directed to submit all the papers and documents relating to the property being erected at Ikenne Road, Aiyeye, Ogun State as shown in Exhibit VI to the Deputy Chief Registrar who should take care of the documents.

G (v) It is ordered that the Deputy Chief Registrar should maintain all the accounts stated above until after the period of appeal lapses or in the event of appeal being lost pay the moneys to the complainant Alhaji Y.S. Layeni and the house shown in Exhibit VI should also be forfeited to him. In the event of the accused succeeding on appeal, the moneys should be H returned to the 1st, 2nd and 4th accused persons respectively and the house to be returned to the 8th accused person."

The first point that must be made is that order number (i) concerns the 3rd accused who is not a party to this appeal. So, too, order number (iv) concerns the 8th accused who was acquitted and discharged

by the court below and is therefore not a party to this appeal. Accordingly the cross-appeal only concerns orders numbers (ii), (iii) and (v).

The court's order number (ii) is in respect of the 1st appellant's Bank Account, Exhibit PP.

Order number (iii) involves Exhibits P to P69 which are various properties recovered from the 1st appellant when P.W. 11 executed a search warrant in respect of his premises at No. 8, Olufunmilola Okikiolu Street, Ikeja. It also covers Exhibit P70 which is 1st appellant's Jetta Saloon Car and Exhibit Q2 which is the 2nd appellant's BMW Saloon Car. Exhibit S2 to S7 included in order number (Hi) pertain to the properties of the 4th accused who is not concerned in this appeal. Accordingly, for the purpose of this appeal, only Exhibits P-P69, P70 and Q2 are relevant in so far as the trial court's order number (iii) is concerned.

Order number (v) is in connection with the Bank Accounts mentioned in order numbers (ii) and (Hi) above in so far as they concern the appellants or any of them.

Learned Senior Advocate, Mr. Sofola did submit that it would be proper to suggest that the said orders were made under sections 269 and 270 of the Criminal Procedure Law of Lagos State Cap. 32. It seems to me clear, with respect, that these sections of the Criminal Procedure Law cannot apply to cover the forfeiture orders.

Section 263 of the Criminal Procedure Law of Lagos State confers the court with wide discretionary powers to deal with the issue of orders for the disposal of property regarding which an offence appears to have been committed or which has been used for the commission of any offence. In particular section 263(A) of the same Law defines the term "property" under Part 30 of that Law as follows:-

*"In this Part of this law the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise."* (italics supplied for emphasis)

The term "property" under part 30 of the Criminal Procedure Law of Lagos State therefore includes, in the case of property regarding which an offence appears to have been committed, not only the original property in specie but also such other property into which the same has been converted or exchanged and anything acquired by such conversion or exchange. In my opinion, the forfeiture or restitution orders of the trial court in the

present case are amply covered by the combined effect of sections 263 and 263A of the Criminal Procedure Law, Lagos State in view of the finding of the trial court that the properties covered by the restitution orders were acquired with the proceeds of sale of the complainant's stolen champion sparkling plugs in issue. The next question must be whether there was evidence in support of the finding of the trial court that the relevant properties covered by the orders were acquired with the proceeds of sale of the complainant's stolen sparkling plugs.

In this regard, the court below observed as follows:-

*"Learned Senior Advocate submitted and I agree that the learned Senior State Counsel who applied for the restitution at the trial court had not established that the complainant is entitled to the goods restored to him in the orders made by the learned trial Judge. The learned trial Judge cannot assume, as he did, that the monies in the banks and the vehicles and other properties were acquired with the proceeds of the sale of the stolen properties belonging to the complainant."*

With profound respect, I am unable to agree that the court below was right in the above observation. This is because a close study of the record of proceedings does show that there was ample circumstantial evidence before the trial court to the effect that all the appellants acquired their respective properties in question within the period of the theft and with the proceeds of sale of the complainant's stolen sparkling plugs. Said P.W. 3 -

*"When I was with 1st accused, he was working with Government Coastal Agency as a clerk. When I knew him, he had nothing but when they discovered the plugs, they enriched themselves overnight. At the time I met the 1st accused in 1982, he had no car. 1st accused bought a Jetta car light blue registration number LA 3642 SL but the colour is now changed black.....1st accused has a car, a Jetta LA 3642 SL which he bought in November, 1985. (Italics supplied)*

A little later in her evidence, P.W. 3 continued as follows:-

*"6th accused has a car - Honda Accord in 1986. 5th accused also has a Jetta car LA 9555 LB which he bought between 1985-1986. 2nd accused has a BMW car which he bought only in 1986. 4th accused had a Honda Civic Car red colour which he bought in 1986"*  
(italics supplied for emphasis)

P.W.4 in her own evidence testified as follows:-

*"During that period, 1st accused was trying to set up a night club at Ikeja at 8 Okikiolu Street Off Toyin Street. 1st accused told me that every member of his family except his father knew that he was trying to set up a night club at Ikeja."*



Later that day when we got home at 140 Ojuelegba Road, 1st accused told me that he wanted to go and rent a flat at International Airport Road. I later went with him around February 1986 to pay for the flat and he paid two years rent in advance. It was that same day in February, 1986 that Samuel, the 5th accused bought a Jetta car ..... *All of them had cars except Tito and Scorpion, Samuel had 2 cars, also Segun B and Sunday.*” (italics supplied)

It is important to observe that the 1st appellant admitted in his examination in chief that he was only a clerk at the Government Coastal Agency on a salary of N180.00 per month. Similarly, the 2nd appellant admitted that he was on a salary of only N220.50 per month. It is also worthy of note that the appellants by some strange coincidence acquired their respective properties in issue contemporaneously with the burglary and stealing for which they were tried and convicted. It was in the face of the above sudden metamorphosis of the appellant” from the humble rank of low working class, with some of them jobless to nouveaux riches of posh D saloon cars owning class contemporaneously with the theft in question that the trial court, in the absence of any reasonable explanation, came to the irresistible conclusion that the appellants’ properties in issue were properties into which the complainant’s plugs had been converted. I think that the learned trial Judge was entitled to infer circumstantially that these properties were bought, all about the same time as it were, with the proceeds of E the crime. I agree entirely with the learned counsel for the respondent that to insist, as the Court of Appeal appeared to have done, on direct evidence of the fact of acquisition of these properties with the proceeds of the theft will tantamount to placing less premium on the practice of proof by F circumstantial evidence.

It ought however to be noted that the onus of proving that the property in respect of which a restitution or forfeiture order is to be made is from the proceeds of an alleged theft is on the prosecution. But this onus, as in civil cases, is discharged on the preponderance or balance of prob- G abilities and not beyond reasonable doubt as prescribed in criminal cases. See *R. v. Ferguson* (1970) 2 All E.R.820. Upon a careful consideration of all the evidence adduced before the trial court, I cannot, with respect accept the view of the court below that the prosecution did not establish that the complainant is entitled to the properties restored to him by the orders of H the trial court. In the circumstance, the lone issue for determination in the cross-appeal must be answered in the negative.

In the final result and for all the reasons I have given above, the main appeals of the 1st and 4th and the 2nd and 3rd appellants fail and

are hereby dismissed. Their convictions and sentences on each of the two counts charged as affirmed by the court below are hereby further affirmed. The respondent's cross appeal succeeds and it is hereby allowed. The orders of the court below vacating those of the trial court enumerated as in (ii), (iii) and (v) above in so far as they concern the appellants herein are hereby set aside. The orders of the trial court as in (ii), (iii) and (v) above are hereby restored. The 1st and the 4th appellant who are on bail pending the determination of this appeal should now be taken into prison custody to serve as from today the sentences passed on them by the trial court as follows, the 1st, 2nd and 3rd appellants, 7 years imprisonment in respect of each of the two counts for which they were convicted and the 4th appellant, 5 years imprisonment for each of the two counts for which she was charged and convicted. All the sentences are to run concurrently.

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### **UWAIS JSC**

I have had the advantage of reading in draft the judgment read by my learned brother Iguh, J.S.C. I quite agree that despite the strained relationship between the 1st appellant and P.W. 3 and P.W.4 respectively, the latter, that is P.W. 3 and P.W. 4 could not be regarded as either accomplices to the appellants or as tainted witnesses. It was not, therefore, necessary for the trial court to look for corroboration as required by section 178 subsection (1) of the Evidence Act, Chapter 112 of the Laws of the Federation of Nigeria, 1990 which reads thus:-

*"178(1) An accomplice shall be a competent witness against an accused person, and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.*

*Provided that in cases tried with a jury when the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular implicating the accused, the judge shall warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so and in all other cases the court shall so direct itself."*

If corroboration were even necessary, for the testimonies of P.W. 3 and P.W. 4 to be believed, that was amply provided by the finding of a ladder and roofing materials from the warehouse, where the stealing took place, in the compound of the 1st appellant and the sudden riches acquired by the appellants soon after the stealing occurred.

With regard to the cross-appeal by the respondent, sections 263 and 263A of the Criminal Procedure Code, Chapter 32 of the Laws of Lagos State, 1973 provide, as relevant, as follows:-

“263(1) During or at the conclusion of any trial or inquiry the court may make such order as it thinks fit for the disposal whether by way of forfeiture, confiscation or otherwise of any property produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence.

(2).....

(3) *The power conferred by subsections (1) and (2) upon the court shall include the power to make an order for the forfeiture or confiscation or for the destruction or for the delivery to any person of such property, but shall be exercised subject to any special provisions regarding forfeiture, confiscation, destruction, detention or delivery contained in the written law under which the conviction was heard or in any other written law applicable to the case.*

(4) .....

263A *In this part of this law the term “property” includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise.*”

There was evidence adduced before the learned trial Judge, which he believed, that the property stolen had been converted to money by sale. There was also evidence, accepted by the trial court, that the 1st and 2nd appellants who were employees on salaries of N180.00 and N220.50 per month respectively suddenly became owners, with the commission of the crime, of property far beyond their means, including cars. The learned trial Judge was, therefore right in exercising his discretion under sections 263 and 263A of the Criminal Procedure Law, Chapter 32, to order the forfeiture of the property to the owner of the stolen goods - Alhaji Y.S. Layeni who was P.W.1 before him. In the light of the aforesaid, the Court of Appeal was, in my opinion, in error to have set aside the order of forfeiture by holding as follows:-

*“The learned trial Judge cannot assume, as he did, that the monies in the banks and the vehicles and other properties were acquired with the proceeds of the sale of the stolen properties belonging to the complainant. ”*

The evidence before the trial court about the acquisition of wealth by the appellants after committing the theft was both direct and circumstantial. So that the learned trial Judge had cogent evidence on which to come to the conclusion, as he did, that the goods tendered in evidence and the money in the account of the 1st appellant with the National Bank of Nigeria Ltd., were acquired from the proceeds of the sale of the goods

stolen. He did not “*assume*” but relied on the evidence, both real and circumstantial, admitted by him.

For these and the more detailed reasons contained in the judgment of my learned brother Iguh, J.S.C., I too dismiss the appeals by the appellants and allow the cross-appeal by the respondent. In the result I affirm the convictions and sentences of the appellants by the High Court as upheld by the Court of Appeal. I set aside the order of the Court of Appeal discharging the order of forfeiture Nos. (ii), (iii) and (v) made by the High Court. The bail, having been granted to the 1<sup>st</sup> and 4th appellants on the 30th day of September, 1993 pending the determination of their appeals, is hereby revoked and that they should be taken into prison custody forthwith to serve as from today the sentences passed on them by the learned trial Judge, Oshodi, J., to wit, the 1st, 2nd and 3rd appellants 7 years imprisonment in respect of each of the two counts for which they were found guilty and the 4th appellant to 5 years imprisonment in respect of each of the two counts with which she was charged. All the sentences are to run concurrently.

### **WALI JSC**

I have had the privilege of reading before now, the lead judgment of my learned brother, Iguh, J.S.C. and with which I entirely agree.

Both the trial court and the Court of Appeal are right in their conclusions that P.W. 3 and P.W. 4 are neither accomplices nor tainted witnesses. The fact that both P.W. 3 and P.W. 4 were girl-friends of the appellant, particularly at the time he conspired with others (2nd, 6th and 7th appellants inclusive) to commit the offences with which they were charged and convicted, is no sufficient evidence to label P.W. 3 and P.W. 4 as accomplices or tainted witnesses. There was no evidence to show that they participated in the commission of the crime or encouraged the appellant” in its commission. Nor was there any evidence that they derived any benefit from its commission. P.W. 3 and P.W. 4 were merely eyewitnesses to the commission of the crime and failure to make a report of the same to the police simpliciter, is not sufficient to turn them into accomplices or tainted witnesses. See *R. v. Essien Ukut* (1960) SCNLR 441; (1960) 5 FSC 183; *Imoke Onyikoro v. R.* (1959) SCNLR 659; (1959) NRNLR 103 and *Yaw Azumah v. R* 13 WACA 87.

Even if, for the sake of argument, P.W. 3 and P.W. 4 are regarded as accomplices or tainted witnesses, there is sufficient corroboration of their evidence in the body of evidence adduced by the prosecution.

The concurrent findings of fact as regards the guilt of the appellants in this case, is firmly supported by the credible evidence accepted by the trial court and affirmed by the court below.

As for the cross-appeal by the respondent, I entirely agree with the conclusion of my learned brother, Iguh, J.S.C. that it has merit and must therefore be allowed. For the cogent reasons given in the lead judgment, I hereby also allow the cross- appeal and subscribe to the consequential orders contained therein to wit:- the orders of the Court of Appeal Nos. (ii), (iii) and (iv) including those of the trial court orders Nos. (ii), (iii) and (v) which are hereby restored.

C

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**KUTIGI JSC**

I read before now the judgment just delivered by my learned brother Iguh, J.S.C. The facts and the issues have been setout fully in the judgment. I agree with his conclusion that the appellants were properly convicted. I therefore dismiss the appeals and confirm their convictions.

D

As for the cross-appeal, there is no doubt that the Court of Appeal erred in setting aside the forfeiture orders made by the learned trial Judge in this case. The cross-appeal therefore succeeds.

I endorse all the consequential orders made in the said lead judgment of my brother Iguh, J.S.C.

E

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**OGUNDARE JSC**

I have had the advantage of a preview of the judgment of my learned brother Iguh, J.S.C. just read. The issues raised in these appeals have been adequately set out and considered by my learned brother. I agree entirely with his reasoning and conclusions which I hereby adopt as mine.

F

The courts below came to the right conclusions on the convictions of the appellants having regard to the weight of evidence led at the trial. In my respectful view, P.W. 3 and P.W. 4 cannot, on the evidence, be described as accomplices nor were they tainted witnesses as submitted by learned leading counsel for the appellants.

G

On the cross-appeal, I think the court below erred in setting aside the forfeiture orders made by the learned trial Judge.

In conclusion, I too dismiss the appeals of the appellants and allow the respondent's cross-appeal. I affirm the convictions and sentences passed on the appellants and abide by the consequential orders made by my learned brother Iguh, J.S.C. on the cross-appeal.

H