

SUPREME COURT OF NIGERIA
 6TH JUNE, 1995 SC. 286/1991
CORAM:- I.L. KUTIGI, E.G. OGWUEGBU,
U. MOHAMMED, S. U. ONU, A.I. IGUH, JJSC.

MAGDALENE ONOGWU APPELLANT
 V.
 THE STATE RESPONDENT

APPEALS - *Concurrent findings - Fair decision of lower courts - Whether an appellate court would interfere.*

CRIMINAL LAW - *Criminal breach of trust - Whether the offence is disclosed - Vide adduced evidence.*

CRIMINAL PROCEDURE - *Substitution of conviction - For criminal breach of trust - Other than theft charged - Propriety thereof - Whether breach of fair hearing.*

EVIDENCE - *Admission - What is admitted or not challenged - Whether further proof thereof is needed.*

JUDICIAL REVIEW- *Statutory duty of appellate court - To review case and holding based on findings of fact and law - Whether justified.*

FACTS

The Appellant who was a Cashier with the Bank of the North Limited, Makurdi, was arraigned along with two other accused persons on 17th December, 1984, before the Chief Magistrate Court on a First Information Report alleging criminal conspiracy, forgery and theft of N50,500. The learned Chief Magistrate upon oral evidence of prosecution witnesses framed a two-count charge, one of conspiracy against the 1st and 2nd accused and a second count of theft against the 1st accused Upon which second count the 1st accused (Appellant hereinafter) was convicted and sentenced to 3 years imprisonment.

Dissatisfied with this decision, Appellant appealed to the High Court of Benue State, Makurdi, which court, dismissed Appellants appeal, substituted a conviction for criminal breach of trust for that of theft and reduced the sentence from 3 years to 1 year imprisonment. Appellant further appealed to Court of Appeal Jos Division. The Court dismissed the appeal against conviction for criminal breach of trust, however, it reviewed the sentence from 1 year to 6 months imprisonment. It is against that decision of the Court of Appeal

Jos that the Appellant appealed to the Supreme Court, raising 6 issues for determination, which issues, the Supreme Court reduced to 3 adopting the issues raised in the Respondent's Brief.

ISSUES FOR DETERMINATION

1. *Whether the appellant's right to fair hearing was infringed by the Court of Appeal, Jos, when it upheld the substitution of the conviction of the appellant for the offence of theft with that of criminal breach of trust by the Benue State High Court sitting on appeal.*

2. *Whether the Court of Appeal sitting at Jos was right in law in affirming the decision of the Appellate High Court, Makurdi convicting the appellant for the offence of criminal breach of trust contrary to S.314 of the Penal Code in substitution for a conviction for theft contrary to S.289 of the penal Code.*

3. *Whether upon a careful consideration of the available evidence before the trial Chief Magistrate Court, Makurdi, and concurrently relied upon by the appellate High Court and the Court of Appeal, the Court of Appeal, Jos, was right in holding that the case of criminal breach of trust was proved against the appellant.*

HELD (Unanimously dismissing the appeal per lead judgment of **ONU JSC**)
Criminal breach of trust

1. Upon a careful perusal of the evidence presented before the trial Chief Magistrate, excerpts of which I have hereinbefore exemplified and adverted to no reasonable appellate court would have drawn any better or other irresistible conclusion and arrived at a fairer decision than the appellate High Court holden in Makurdi did and was rightly, in my view, upheld by the court below. It would have been otherwise if it was shown that the available evidence did not disclose any punishable offence against the appellant. The totality of the evidence adduced at the trial, portions of which I have adverted in this judgment, clearly disclose the offence of criminal breach of trust. (p. 1269 H)

Admission - What is admitted or not challenged

2. Evidence abounds from the testimonies of P. W.1, P. W. 2, P. W. 3, P. W. 4 and the appellant herself that she (appellant) was Cashier 1 at the Bank of the North, Makurdi that as servant, the Bank reposed trust in her; that in that capacity she was entrusted with the property in question, to wit: N50,500 00 and that she committed breach of trust in respect of that amount In this regard, it is trite law that what is admitted or not challenged needs no further proof. (p. 1270 B)

Indicial review - Statutory Duty of appellate court

3. The Appellate High Court sitting in Makurdi upon its own prompting, fol-

lowed by the concession of the learned state counsel, was right, being statutorily bound, to review the case and where necessary, as in the instant case, to proceed to hold: “*Therefore she could properly be convicted of the offence of criminal breach of trust under S. 314 by the trial court even though she was not charged with it. We can do on this appeal what the trial court ought to have done.*” The Court below was accordingly justified to affirm the decision. (p. 1270 G)

Substitution of conviction

4. Neither can it be expressly alleged nor impliedly insinuated that in performing its statutory duty to substitute a conviction of one offence for the other, the Appellate High Court relied upon no evidence to base such a substitution or that the court below erroneously confirmed such order. To say that the Appellate High Court thereby breached the appellant’s right to fair hearing as enshrined in S 33(4) and 33(6)(a)-(e) of the Constitution of the Federal Republic of Nigeria, 1979, is therefore not only a fallacious assumption but a complete misconception. Equally it is incorrect to argue, that by applying section 217 of the C.P.C. in the instant appeal, the appellant was thereby denied her fundamental right of fair hearing. Neither would it be right to say in the instant case where there was abundant evidence, that the court below relied on circumstantial evidence of “entrustment” etc. to confirm the conviction of the appellant. (p. 1271 G)

Appeals - Concurrent to findings

5. There was, on the totality of evidence adduced, no reason to interfere with the conclusion arrived at by the courts below. In conclusion, I am of the view that the decisions of the three lower courts constitute concurrent findings of facts which admit of no interference in that they are neither perverse nor have they resulted in any miscarriage of justice. Since no special circumstances have therefore been shown to warrant such an interference, I will decline to do so in the instant case. (p. 1272 F)

NOTABLE POINT OF INTEREST

ONU JSC

1. When to require proof of evidence will be idle

It will be idle to require evidence to prove that as cashier, it was her duty to pay her employer’s money to its customers on demand or that the money she paid out on the fateful day without observing the procedures required of before such payments, was not her money but that of her employer she collected for disbursement to those customers. This is the moreso, when evidence adduced at the trial court showed palpably that the payees of the amount in question were fictitious and as such were not her employer’s customers. (p. 1270 D)

REPRESENTATION

Chief S. M. Olakunri, S.A.N. with E.A. Adesma, J.S. Nkanta and G. Agboola
Esq. for the Appellant

A. P. Echobu, Prin. Legal Officer, Benue State, for the Respondent

CASES REFERRED TO

Oredoyin v. Arowolo (1989) 4 NWLR (Part 114) 172 at page 211
Ogu v. The Queen (1963) NSCC 191 at 192
Zonkwa v. Commissioner of Police (1968) N.M.L.R. 11,
Nnagbo v Commissioner of Police (1976) N.M.L.R. 150
Okabichi v. The State (1975) 3 S.C. 135 11975) 9 NSCC 124 B
Ejowhomu v. Edok-Eter Mandilas Limited (1986) 9 S.C 41 at page 57
Begu v. Emperor (1925) A.L.R. 130
Singh v. The King Emperor (1937) L.R.I. A 134
Ugwumba v. The State (1993) 5 N.W.L. R. (Part 296) 600 at p. 671
Osayemo v. The State (1966) 6 S.C 37 C
Wankey v. The State (1993) 5 N W L R (Part 295) 342 at p. 552

STATUTES REFERRED TO

Penal Code ss. 314, 97(2). 364. 289. 312. 286. 221, 95, 366, 95, 312, 286, 221
Criminal procedure Code ss. 217. 216
High Court Law of Plateau State s 48
Court of Appeal Act Cap 75 LFN 1900 s 21(2)
Supreme Court Act s. 26

BOOK REFERRED TO

Criminal Procedure Code in the Northern State of Nigeria p. 137 - Jones

LEAD JUDGMENT BY ONU JSC

This is an appeal against the decision of the Court of Appeal sitting in Jos, which on 5th June, 1991, upheld the conviction of the appellant imposed on her by the High Court of Appeal, Makurdi, Benue State, for the offence of criminal breach of trust punishable under Section 314 of the Penal Code.

The appellant, who was a cashier with the Bank of the North Limited, Makurdi, was on 17th December, 1984 arraigned along with one Michael Ogwuche as well as one Davies Shaibu as 1st, 2nd, and 3rd accused persons respectively, before the Chief Magistrate Court presided over by Mr. S.O. Ochimana (as he then was) on a First Information Report alleging criminal Conspiracy, forgery and theft of N50,500.00 offences punishable under Sections 97(2), 364 and 289 of the Penal Code. After taking the oral evidence of all ten prosecution witnesses, the learned Chief Magistrate, upon discharging the 3rd accused for lack of connecting evidence, framed a two-count charge, the first being that of conspiracy against both 1st and 2nd accused and the second count being for theft against the 1st accused alone.

After each of the two accused persons had pleaded not guilty to the

charge, they were each put on their defence. The learned Chief Magistrate in a considered judgment of 29th November, 1985, convicted both the 1st and 2nd accused of the offence of criminal conspiracy jointly and the 1st accused alone of the offence of theft as charged. While they were each sentenced to four months imprisonment with a fine of N100 on the first count, the 1st accused (hereinafter the rest of this judgment referred to simply as appellant)

B was separately sentenced to three years imprisonment, with all the sentences against her being made to run concurrently without an option of a fine.

Aggrieved by this decision, the appellant appealed to the High Court of Benue State sitting in Makurdi. In its appellate jurisdiction, the High Court reviewed the case, wherein the learned State Counsel was recorded as saying C on behalf of the State/respondent that the sentence passed on the appellant was excessive and further that

"I concede that the theft was not the proper charge but criminal breach of Trust under Section 314 Penal Code. I refer to Section 217 of the Criminal Procedure Code and urge your Lordships to alter the charge accordingly."

D Thereupon, the High Court of Appeal proceeded to dismiss the appellant's appeal, substituted a conviction for criminal breach of trust for that of theft, though reducing the sentence from three years to one year imprisonment, purporting to act pursuant to section 217 of the Criminal Procedure Code.

E Sequel to the above, the High Court concluded by saying:
"...Taking the totality of these into consideration, we substitute in place of the three year term of imprisonment, a term of imprisonment of one year under Section 314 of the Penal Code and, in addition, a fine of N100. The sentence of four month under the conviction for conspiracy and this one reduced to one year imprisonment with a fine of N100 shall run concurrent"

F Upon a further appeal by the appellant to the Court of Appeal, Jos (hereinafter in the rest of this judgment referred to as the court below), that court on 5th June, 1991, allowed the appeal against the conviction for criminal conspiracy but dismissed it against the conviction of criminal breach of trust, having been satisfied with the finding of fact by the appellate High Court that G the evidence disclosed an offence of that description and particulars. The court below albeit reduced the sentence of one year to that of six months imprisonment.

H It is against this conviction that the appellant through her counsel. Chief S.M. Olakurin, SAN has further appealed to this court premised on a Notice and Ground of Appeal containing one ground of appeal which with leave, was later substituted with seven grounds (grounds 2 and 7 which are identical and certainly overlap). The appellant, also through learned Senior Advocate subsequently filed and served her brief of argument on the respondent. In it, the appellant submitted the following six questions for our determination, to wit:

1. Is there any evidence on record to justify any case against the appellant for conspiracy, for theft or indeed for criminal breach of trust'?

2. Upon the High Court's acceptance of the submission of the learned State Counsel that

"..... theft was not the proper charge.....(See page 80 of the Record)

B

should not the appellate court have acquitted and discharged the successful appellant against theft'?

3. Is it fair for the appellate court to convict and impose a fine on a charge that was not formally preferred against appellant. Particularly as the appellant was not given an opportunity to put her mind to such a charge and defend it?

C

4. Can the appellant really be said to have been entrusted with the Bank's money so as to place proposed charge and conviction for the criminal breach of trust, just like the cognate charge of theft?

5. Assuming that the appellant failed to follow "*laid down*" procedure (which has not been established before the Court by acceptable evidence), can such dereliction of duty without evidence of "*dishonest intention*" amount to a criminal breach of trust? Even then, has the ownership of the property in the money paid out been sufficiently established in the lower court?

D

6. Just as the Court of Appeal rightly discharged the appellant from the charge of conspiracy (see page 160, lines 1 to 3 of the Record) is it not right on the facts for the Court of Appeal to reject the High Court's conviction of the appellant for criminal breach of trust contrary to S. 314 of the Penal Code.?

E

On the 16th day of March 1995, the date fixed for the hearing of this appeal.

F

learned Principal Legal Officer, Mr. A.P. Echobu, sought and obtained extension of time to file the respondent's brief. Three issues had been formulated as arising therein for our determination, to wit:

1. Whether the appellant's right to fair hearing was infringed by the Court of Appeal Jos, when it upheld the substitution of the conviction of the appellant for the offence of theft with that of criminal breach of trust by the Benue State High court sitting on appeal.

G

2. Whether the Court of Appeal sitting at Jos was right in law in affirming the decision of the appellate High Court, Makurdi convicting the appellant for the offence of criminal breach of trust contrary to S. 314 of the Penal Code in substitution for a conviction for theft contrary to S. 289 of the Penal Code.

H

3. Whether upon a careful consideration on the available evidence before the trial Chief Magistrate Court, Makurdi and concurrently relied upon

by the appellate High Court and the Court of Appeal, the Court of Appeal, Jos was right in holding that the case of criminal breach of trust was proved against the appellant.

B At the hearing of the appeal learned Senior Advocate for the appellant after adopting his brief made an oral submission in which he submitted that he did not agree with the affirmation by the court below of the two counts of the charge the High Court of Appeal, Benue State, substituted for those upon which the learned Chief Magistrate convicted the appellant on the ground of cognateness. He urged us without any further elucidation on the brief to discharge and acquit the appellant. Learned Principal Legal Officer for his part, relied on the respondent's brief and urged upon us that the appeal be dismissed.

D Before embarking upon the consideration of the issues it is pertinent to point out that appellant's issues 3 and 4 being in form and substance complaints against the decision of the appellate High Court do not lie direct to this Court. The two issues thus formulated therein are therefore, in my view incompetent and are both accordingly struck out. It is in this wise that when objectively considered. I prefer the three issues formulated by the respondent as more compact and to the point as well as being capable of disposing of the appeal herein than would the four remaining appellant's issues, viz issue 1, 2, 5 and 6 respectively.

E As in the appellant's brief her issues 1,2 and 3 (the latter having been struck out by me as incompetent) are distilled from grounds 1 and 2 and issues 5, 6 and 4 (the latter also having been similarly struck out) emanate from substituted grounds 3, 4 and 5 to which they are concomitant, the consideration of the respondent's issues 1 and 2 together and then issue 3 separately, would, in my view broadly dispose of the appeal herein.

F I will now proceed to consider the three issues submitted by the respondent in the following order of sequence and the gravamen of whose complaint as I perceive it revolves on whether the substitution of appellant's conviction for the offence of theft contrary to section 289 of the Penal Code with that of criminal breach of trust contrary to section 314 of the Penal Code, by resorting to Section 217 of the Criminal Procedure Code, did not infringe on the appellant's right to fair hearing and whether there was proof of the case against her thereof.

ISSUES 1 and 2:

H These issues question firstly, whether the court below was right in law in affirming the decision of the appellate High Court, Makurdi which convicted the appellant of the offence of criminal breach of trust contrary to section 314 of the Penal Code in substitution for a conviction for theft contrary to S. 289 of the Penal Code. It relates to grounds 1, 5, 6 and 7 of the grounds of appeal.

Now, Section 314 of the Penal Code of the Northern States, applicable in Benue State, provides as follows:-

“S.314. Whoever, being a clerk or servant or employed as a clerk or servant and being in any manner entrusted in such capacity with property or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine.”

In order to procure a conviction for the above offence, the prosecution must prove or establish the following ingredients:

(a) That the accused was the clerk or servant of the person reposing trust in him.

(b) That he was in such capacity entrusted with the property in question or with dominion over it.

(c) That he committed breach of trust in respect of it. See practice notes under S. 314 of “The Notes on Penal Code Law” 3rd Edition by S.S. Richardson.

Evidence adduced before the trial Chief Magistrate showed that the appropriate offence with which he should have charged the appellant was criminal breach of trust and not theft. The question then arises, was there any evidence on record to justify the appellant’s conviction for theft or indeed criminal breach of trust? There appears to me abundant evidence adduced through P.W. 1 (Ilemobayo Akinwomoju), P.W.2 (Ali Dan Yaro Saidu) P.W.3 (Paul Owoicho Agweye) P.W.4 (Moses Onje) and the appellant herself, from which to come to that conclusion. P.W.1, a banker with the Bank of the North, Makurdi testified as follows:-

“The 1st accused was one of the bank’s Cashiers while the 3rd accused was one of our customers. On 1st July, 1983 while the 1st accused was a cashier, she came to me at about 2.30 p.m. in the Machine Room with two cheques and asked if I were aware of those two cheques. I asked her how? She told me she wasn’t sure of the genuineness of my signature on them. I asked her, after you had paid them out before you came to ask me? Then she told me that there was another cheque which she had also paid out the money. Then I asked her who controlled those cheques before she paid them out? Who identified the customers? What of their photographs? It was then she told me that she only knew of the customers who benefited from the said cheques Further led in examination-in-chief the witness elaborated as follows:-

“The bank has many cashiers. Some pay between one naira to five hundred naira and no more; while others e.g. Cashier one pays an amount above five hundred naira. That 1st accused belongs to Cashier one ground. According to our procedure anybody drawing more than five hundred naira must be photographed but in this case she did not take photograph of the persons who benefited from the three cheques. Also the beneficiaries ought to have been identified but she did not insist on this in respect of the three

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cheques in question. The 1st accused knew all these procedure but ignored them in respect of the three cheques."

P.W.2. a cash officer with the Bank of the North, Makurdi testified inter alia thus:

"The 1st accused was my cashier while the 3rd accused was the bank's customer. I was the 1st accused's head of department. On 1-7-83 she paid three
B cheques which according to the Bank's procedure, she did not follow it correctly. Some irregularities were found on the cheques. After the end of business for the day the Bank Manager called me to his office and showed me the cheques and told me that the 1st accused said she paid out the three cheques and wanted to know whether I knew anything about them. The 1st accused was herself present. I took the cheques to
C examine them. I discovered that the 1st accused did not follow the procedure. The beneficiaries were not identified. I asked 1st accused if she took photographs of the beneficiaries and she replied no. I asked her why she overlooked the procedures but she did not give me any satisfactory answer. We reported the matter to the C.I.D. The total amount involved in the three cheques was fifty thousand five hundred naira (N50,500.00). The three cheques. I think bear N18,000, N17,500.00 and N15,000.00
D each

Noteworthy and of profound significance is part of the testimony of P.W.3 clerk of the Bank of the North Ltd. which I consider pertinent to set down hereunder. He said, inter alia -

"The following day, that was on 30th June, 1983. I went to 1st accused's cage again and collected the token numbers 495 and 497 were not seen. On 29/6/83
E token numbers 495 and 497 were not returned to me. Token No. 496 was still with the 1st accused as at 30/6/83. I worked with the token numbers with me until I left the counter for another new department. I did not report to anybody that the 1st accused did not hand over token numbers 495, 496 and 497 to me. It is the responsibility of the 1st accused to keep the token numbers in her cage. On 1/7/83. I was taken to a new
F department known as Movement department. I was in the new department on the day the incident happened. On that 1st July, 1983, I returned from break to hear that three fake cheques were paid but I did not see the cheques until I was called to give an account before I saw the three cheques. I observed that token Nos. 495, 496 and 497 which were earlier missing were written on the cheques. The signature on the cheques was not mine..... I can also see three other cheques Nos. MK 173724 for N18,000.00
G against Token No. 495. It is dated 1/7/83 and cheque No. MK 173722 for N 17,500.00 against Token No. 497. It is dated 1/7/83. The 3rd cheque number is MK 173720 for N15,000.00 and dated 1/7/83 against token No. 496.

Subjected to cross-examination, this witness said among others that -

"I used to collect the token numbers from the 1st accused daily. I
H was the only one who arranged token numbers I collected from the 1st accused on 30/6/83, before I found Token Nos. 495 and 497 missing. I was alone when the 1st accused told me that the cheque she gave me to control belonged to her husband.....I told the police that 1st accused did not give me Token No. 495 and 497 on 30/6/83."

P.W.4. counter control clerk of the Bank of the North, Makurdi, gave

evidence which corroborated the testimonies of P.W.1, P.W.2 and P.W.3 in all material particulars,

The appellant, after testifying as 2nd D.W. in self defence denying the charge said under cross-examination, inter alia, as follows:-

“The procedure should have been that any customer drawing any amount from N1,000.00 upwards should be photographed but in this case I did not take the photograph of the person I paid the N15,000.00. I did not photograph the person because the Manager had signed the cheque. It is the procedure that where the Manager has signed the Cheque taking of photograph should be ignored. I had paid out other cheques more than the amount on the 3 cheques in question that day but no photograph was taken. The token number on the cheque for N15,000.00 was 495. I did not take any precaution..... I heard P. W.3 tell the Court that Token Nos. 495-7 were with me until 1-7-83. I know P.W.8. He gave evidence on oath in this case. My statement which I wrote myself was tendered and admitted in evidence in this case. I did say in my statement that I could identify one of the three people I paid on 1/7/83. I was influenced by P.W.8 to state in my statement that the man brought from Jos was the person I paid the cheque for N 17,500.00 and N 18,000.00 to P.W.2 since I took the one for N 15,000.00 to him and he asked me to pay. I did not also take the photograph of the people who claimed the amounts on the cheques in questions “ (Italics above is mine for emphasis.)

In the face of the overwhelming evidence adduced by the prosecution through all the ten witnesses called by the prosecution and the damaging admission inherent in the defence evidence which was weak, tenuous and thus punctured, it is little wonder that the High Court sitting on appeal from the decision of the Chief Magistrate arrived at the following pungent and unimpeachable conclusion and which the court below upheld thus:

“The news about the presence of these three cheques originated from the appellant: the suspicion as to their genuiness originated from the appellant: the refusal to insist on identification, contrary to the practice of the bank, was the handiwork of the appellant: and the refusal to take photographs of the payees for those cheques, contrary to the bank’s practice, was also the handiwork of the appellant. If the appellant could be meticulous in demanding an identification for payment of a sum of N1,000 on 30/6/83, but on the following day, i.e. ignored to insist on identification for payments of N18,000, N17,500 and N15,000, then it will be extremely difficult for one to swallow a story that it was due to negligence of any such thing.”

The question the Defence has at this juncture posed is that prior to the above conclusion wherein the learned State counsel had submitted that “theft was not the proper charge” ought not the appellate court to have thereupon acquitted and discharged the appellant? My answer is in the negative. This is because upon a careful perusal of the evidence presented before the trial Chief Magistrate, excerpts of which I have hereinbefore exemplified and adverted to, no reasonable appellate court would have drawn any better

or other irresistible conclusion and arrived at a fairer decision than the appellate High Court holden in Makurdi did and was rightly in my view, upheld by the court below. It would have been otherwise if it was shown that the available evidence did not disclose any punishable offence against the appellant. The totality of the evidence adduced at the trial portions of which I have adverted in this judgment clearly disclose the offence of criminal breach of trust. Evidence abounds from the testimonies of P.W.1, P.W.2, P.W.3, P.W.4 and the appellant herself that she (appellant) was Cashier 1 at the Bank of the North, Makurdi; that as servant, the Bank reposed trust in her; that in that capacity she was entrusted with the property in question, to wit: N50,500.00 and that she committed breach of trust in respect of that amount.

- C In this regard, it is trite law that what is admitted or not challenged needs no further proof. See *Okparaeké v. Egbuonu* (1941) 7 WACA 53 and *Owosho v. Dada* (1984) 7 SC 149 at 163-164. It is incontestable that appellant was cashier 1 and that while performing her duty on 1st July 1983, she paid out a total of N50,500 to persons not entitled thereto. The appellant in her testimony, an extract of which I have quoted elsewhere in this judgment as well as in her statements (Exhs. 1 & 2), said that much.
- D It will be idle to require evidence to prove that as cashier, it was her duty to pay her employer's money to its customers on demand or that the money she paid out on the fateful day without observing the procedures required of her before such payments, was not her money but that of her employer she collected for disbursement to those customers. This is the moreso when evidence adduced at the trial court showed palpably that the payees of the amount in question were fictitious and as such were not her employer's customers.

As to whether the court below was therefore right in law in affirming the decision of the appellate High Court Makurdi, it is pertinent to refer to what this Court said in *Lawrence Oredoyin & Ors. V. Chief Akala Arowolo & Ors.* (1989) 4 NWLR (Pt. 114) 172 at page 211 where Oputa, J.S.C. opined:

- F *"An appeal is not the inception of a new case. No, far from that. An appeal is generally regarded as a continuation of the original suit rather than as an inception of a new action. That being so, an appeal should normally and generally be confined to consideration of the record which came from the court below with no new testimony taken or new issues raised in the appellate Court. This is the broad view of an appeal.*
- G *An appeal to the Court of Appeal should be a complaint against the decision of the trial court. An appeal is an invitation to a higher court to find out whether on proper consideration of the facts placed before it and the applicable law, that court arrived at a correct decision."*

In the light of the above, when therefore, the appellate High Court sitting in Makurdi upon its own prompting, followed by the concession of the learned State H counsel, who said:

"I concede that theft was not the proper charge but criminal breach of trust under Section 314 of the Penal Code,"

that court was right, being statutorily bound, to review the case and where necessary as in the instant case to proceed to hold:

“Therefore she could properly be convicted of the offence of Criminal breach of trust under S. 314 by the trial court even though she was not charged with it. We can do on this appeal what the trial court ought to have done.”

The Court below was accordingly justified to affirm the decision. Appellate courts it must be borne in mind have from the inception of judicial and legal set ups in this country to wit, from the early days of the received English laws, performed similar roles. See Ogu v. The Queen (1963) NSCC 191 at 192: (1963) 2 SCNLR 74 at 76 where the Supreme Court substituted a conviction for stealing with that of obtaining by false pretences contrary to Section 419 of the Criminal Code. In Garba Zonkwa v. Commissioner of Police (1968) NMLR 11, the High Court of Northern States sitting in its appellate jurisdiction, substituted a conviction of abetment punishable under section 92(1) instead of dishonestly using as genuine a forged document punishable under section 366 of the Penal Code. In Nnagho v. Commissioner of Police (1976) NMLR 150, the High Court of Appeal of Plateau State invoking powers conferred on it by S. 48 of the High Court Law, substituted the offence of attempt to commit criminal breach of trust under section 95 with that under section 312 of the Penal Code, maintaining the sentence in place of theft under section 286 of the Penal Code.

Finally, in Alhaji Jibrin Okahbichi & Ors v. The State (1975) 3 SC 135: (1975) 9 NSCC 124, this court, following a Privy Council decision from an Indian case, substituted the conviction of the appellants for culpable homicide punishable with death contrary to section 221 of the Penal Code with that of screening an offender punishable under section 167 of the Penal Code.

In the instant case, had the appellate High Court not invoked the provisions of section 48 of the High Court Law to substitute the offence of criminal breach of trust in place of that of theft, as indeed was disclosed, the Court below would equally have risen to the occasion in doing the same thing by applying Section 21 (2) of the Court of Appeal Act, Cap. 75 Laws of the Federation of Nigeria, 1990. So also is this Court empowered by Section 26 of the Supreme Court Act Cap. 424 Laws of the Federation to substitute an appropriate punishment for that imposed by the lower court should it have been appropriately called upon to do so. And by analogy see also the case of Chief P.U. Ejowhomu v. Edok-Eter Mandilas Limited (1986) 9 SC 41 at page 57: (1986) 5 NWLR (Pt. 39) 1, where Aniagolu. J.S.C. affirmed that the Court of Appeal “*possesses the powers of a Court of first instance when determining an appeal.*” From the foregoing, I do not see any justification for saying that the court below relied on circumstantial evidence of “*entrustment*” to confirm the appellant’s conviction by the appellate High Court. Neither can it be expressly alleged nor impliedly insinuated that in performing its statutory duty to substitute a conviction of one offence for the other, the appellate High Court relied upon no evidence to base such a substitution or that the court below erroneously confirmed such order.

To say that the appellate High Court thereby breached the appellants right to fair hearing as enshrined in S. 33(4) and 33(6)(a)-(e) of the Consti

tution of the Federal Republic of Nigeria, 1979, is therefore not only a fallacious assumption but a complete misconception. Equally is it incorrect to argue that by applying section 217 of the C.P.C. in the instant appeal, the appellant was thereby denied her fundamental right of fair hearing. Neither would it be right to say in the instant case where there was abundant evidence, that the court below relied on circumstantial evidence of “entrustment” etc. to confirm the conviction of the appellant. I need finally to set out what section 217 of Criminal Procedure Code provides to nail home the point as to when to order a substitution. The section postulates:

“217. If in the case mentioned in section 216 the accused is charged with one offence and it appears in evidence that he committed a different offence with which he might have been charged under the provisions of the section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.”

In making illustration of the above section in the Criminal Procedure Code in the Northern States of Nigeria by Jones under (b), the learned author at page 137 of the Book stated thus:

“(b) A is charged with stealing a wireless set and it is proved in evidence that he obtained the wireless set by means of a criminal breach of trust. A may be convicted of criminal breach of trust although he was not charged with that offence.”

These issues considered together are accordingly resolved against the appellant.

Issue 3:

This issue relates to Ground 2 of the appeal grounds which is more or less the omnibus ground. The consideration of issues 1 and 2 adequately answers this issue except to add that there was, on the totality of evidence adduced, no reason to interfere with the conclusion arrived at by the courts below. In conclusion, I am of the view that the decisions of the three lower courts constitute concurrent findings of facts which admit of no interference in that they are neither perverse nor have they resulted in any miscarriage of justice. Since no special circumstances have therefore been shown to warrant such an interference, I will decline to do so in the instant case. See *Ojomu v. Ajao* (1983) 9 SC 22 at 53; *Nwangwu v. Okonkwo* (1987) 3 NWLR (Pt. 60) 314 at 321; *Lokoyi v. Olojo* (1983) 8 SC 61 at 73; (1983) 2 SCNLR 127; *Nwuzoke v. The State* (1988) 2 SCNJ 344 at 346; (1988) 1 NWLR (Pt. 72) 529 and *Adimora v. Ajufo* (1988) 3 NWLR (Pt. 80) 1; (1988) 1 NSCC 1005 at 1016.

This issue is also resolved against the appellant. The result of all I have been saying is that this appeal lacks merit and it is accordingly dismissed. I affirm the decision of the court below. The appellant shall be arrested forthwith to be taken to Prison to serve the remaining portion of the six months

KUTIGI JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Onu J.S.C. I completely agree with him that this appeal lacks merit. It therefore fails and is dismissed accordingly. I abide by the consequential order made in the lead judgment.

OGWUEGBU JSC

I have had a preview in draft of the judgment just delivered by my learned brother Onu, J.S.C. and I agree with his reasoning and conclusion. The facts and the circumstances of the case have been fully set out in the said judgment and no useful purpose will be served in repeating them here.

The appellate High Court sitting in Makurdi substituted the conviction of the appellant for theft with that of criminal breach of trust contrary to section 314 of the Penal Code. That court acted under Section 217 of the Criminal Procedure Code Cap. 30, Laws of Northern Nigeria, 1963 which should be read in conjunction with Section 216 thereof.

Sections 216 and 217 provide:

“216. If a single act or series of acts is of such a nature that it is doubtful which of several different offences the facts which can be proved will constitute, the accused may be charged in the alternative with having committed some one or other of the said offences.”

“217. If in the case mentioned in Section 216 the accused is charged with one offence and it appears in evidence that he committed a different offence with which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.”

The appellate High Court held as follows:

“The offence of theft, criminal misappropriation and criminal breach of trust are cognate offences of which if evidence in a case give notice of any of the said offences to the accused he or she can be convicted of that offence proved but not charged. In the present case, it is quite clear from the evidence that the appellant was entrusted by the Bank with the money she paid out across the counter to the people who were not entitled to it: evidence showed that there was a dishonest conversion of this money to the case of those she paid it; and that appellant did so as a servant of the Bank. All these facts were proved in evidence and the appellant had notice of them. Therefore she could properly be convicted of the offence of criminal breach of trust under Section 314 by the trial court even though she was not charged with

it. We can do on this appeal what the trial court ought to have done. That being the case, we substitute the conviction of the appellant under Section 314 of the Penal code in place of the conviction for theft under Section 287 of the same code." (the italics is for emphasis only).

B The court below endorsed the above procedure and dismissed the appeal. It was right in doing so.

The appellant cannot complain of absence of fair hearing in the exercise by the appellate High Court of the powers conferred on it in Section 217 of the Criminal Procedure Code having regard to the evidence adduced before the learned trial Magistrate which gave notice of criminal breach of trust to the
C appellant.

If the appellate High Court had not exercised its powers under Section 217 of the Criminal Procedure Code, the Court of Appeal could have done so under Section 21(2) of the Court of Appeal Act Cap. 75 Laws of the Federation of Nigeria, 1990 which provides:

D "21 (2) *Where an appellant has been convicted of an offence and the court which tried him could on the information or charge have found him guilty of some other offence, and on the finding of the trial court. it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence. The Court of Appeal may instead of*
E *allowing or dismissing the appeal, substitute for the verdict found by such court, a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.*"

Whereas Section 216 authorises the charging of an accused person
F with as many different offences as the facts of the case may disclose, either as having committed all, or as being charged on one in the alternative of the other. Section 217 permits the court to apply the facts proved against an accused person in convicting of any offence which those facts could support even though he had not been charged for a different offence.

However, the offence of which the accused is found guilty must be
G such that he might have been charged under the provisions of Section 216. Therefore the conviction of the appellant under Section 314 of the Penal Code which was triable under the same facts as the offence under 287 of the same Code was proper. See *Begu & Ors v. Emperor (1925) A.L.R. 130* and *Mangal Singh v. The King Emperor (1937) L.R.I.A. 134*. The former case went on ap-
H peal to the Privy Council from the High Court of Lahore which has statutory provisions similar to Sections 216 and 217 of the Criminal Procedure Code. The Privy Council held that a conviction for some other offence triable on the same facts was proper.

In the course of its judgment, it referred to Sections 236 and 237 of the Indian Code of Criminal Procedure which are in pari materia with Sections 216 and 217 and observed:

“If in the case mentioned in Section 236 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.” B

The Privy Council took the same course in the latter case. The appellant was charged with an offence under Section 201 of the Indian Penal Code. At his trial, the court found that there was sufficient evidence to warrant his conviction for another offence under Section 302 of the Indian Penal Code and although he was not charged with the latter offence under that section. He was convicted of that offence by virtue of the powers conferred on the court by Sections 236 and 237 of the Indian Code of Criminal Procedure. C

The Privy Council upheld the conviction and emphasised the requirement that the offence of which the appellant is convicted should be one of which he could have been charged by virtue of the provision of the earlier of the two sections. D

For the above reasons and the more detailed reasons contained in the leading judgment of my brother, Onu J.S.C. I, too, agree that the appeal has no merit. I accordingly dismiss it. I affirm the decision of the court below and endorse the consequential orders contained in the judgment of Onu, J.S.C. E

MOHAMMED JSC

I have had the advantage of reading the judgment of my learned brother, Onu JSC in draft and I agree with it. For the reasons given therein I too would dismiss this appeal. I would only contribute my opinion in support of the decision of my learned brother in the lead judgment in respect of issue 3. The learned Senior Advocate for the appellant questioned, in that issue thus: F

“(3) Is it a fair trial for the appellate Court to convict and impose a fine on a charge that was not formally preferred against an Appellant, particularly as the Appellant was not given an opportunity to put her mind to such a charge and defend it?” G

The learned SAN., Chief Olakunri, argued, in support of issue 3, that the Court of Appeal had erred in confirming the High Court’s decision convicting the appellant under a charge of Criminal Breach of Trust, contrary to Section 314 of the Penal Code. Learned counsel submitted that there was no evidence on record to support a proof beyond reasonable doubt of a charge under Section 314 of the Penal Code. Secondly, there has been no trial of the H

appellant for the offence of criminal breach of trust contrary to section 314 of the Penal Code. Also there was no formal charge of the offence, no details of it were given, her plea was not taken and she was not given an opportunity to defend herself against the charge.

In the above submission the learned counsel seemed to have some misconception of the applicable law. This provision in the Criminal Procedure code of Northern Nigeria which is applicable to Benue State, had been contested before this Court in a number of cases. One of them is Alhaji Jibrin Okabichi and Others v. The State (1975) 1 All N.L.R. 71. In that case this Court referred to an Indian case of Begu and Ors. v. Emperor (1925) A.L.R. 130 which was decided in the same way as this case. In that case the Privy Council referred to Section 236 and 237 of the Indian Code of Criminal Procedure and observed:

"If in the case mentioned in Section 236, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of the section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

This court held that Section 236 and 237 respectively of the Indian Code of Criminal Procedure were in pari materia with Sections 216 and 217 respectively of the Criminal Procedure Code Cap. 30 (Laws of Northern Nigeria, 1963). Criminal Procedure Code of Northern Nigeria has been based upon Sudan and Indian Codes of Criminal Procedure. The Privy Council had accepted that an accused could be convicted of an offence although he was not charged with it, once the evidence showed that he might have been charged of that offence.

It is not only the Criminal Procedure Code of Northern Nigeria that has this provision. Under the English Criminal Appeal Act 1968, Section 3, where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity.

In the case in hand, the appellant being a cashier in the bank was, in such capacity, entrusted with the money of the bank. The offence she committed was therefore criminal breach of trust and not theft. The Court of Appeal was quite right in affirming the conviction of the appellant under Section 314 of the Penal Code which was done by the High Court of Benue State, sitting in its appellate jurisdiction, in substitution of the offence of theft which

the trial magistrate had earlier convicted the appellant.

For the above reasons and the fuller reasons in the lead judgment, this appeal fails and it is dismissed. I abide by the consequential order made in the lead judgment.

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IGUHJSC

I have had the advantage of reading in draft the lead judgment just delivered by my learned brother Onu J.S.C and I agree entirely with him that this appeal is totally devoid of substance and should be dismissed.

The appellant with one Michael Ogwuche was at the Chief Magistrate's Court, Makurdi tried and, convicted for the offences of Criminal Conspiracy and theft contrary to Section 97(2) and 289 respectively of the Penal Code. She was sentenced to a fine of N100.00 or four months imprisonment in default on the first count and three years imprisonment on the second count, sentences to run concurrently. Her appeal to the Benue State High Court was dismissed. However, acting under the provisions of Section 217 of the Criminal Procedure Code, a conviction for criminal breach of trust was substituted by the appellant High Court for that of theft and her sentence was reduced from three to one year imprisonment.

Upon a further appeal by the appellant to the Court of Appeal Jos Division, her appeal on the 5th day of June, 1991 was allowed and dismissed in parts. The appeal against her conviction for criminal conspiracy was allowed but the appeal against her conviction for criminal breach of trust contrary to Section 314 of the Penal Code was dismissed. The court below, however, reduced her sentence of one year to six months imprisonment. It is against this conviction that the appellant has further appealed to this court.

Put shortly, the case for the prosecution is that the appellant, a servant or cashier with the Bank of the North, Makurdi Branch, having been entrusted in that capacity with the funds of the Bank, purportedly paid out on the 1st July, 1983 by three spurious cheques, various sum of money, to wit, N18,000.00, N17,000.00 and N15,000.00. The total sum involved was N50,000.00. The prosecution's case is that the appellant allegedly made these payments to unknown persons without due or appropriate clearance and in total and flagrant defiance of the Bank's prescribed rules, regulations and procedure in respect of the authentication of cheques before they are cashed. These prescribed rules and regulations, on the evidence before the court, were well known to the appellant and they are fully set out in the lead judgment of my learned brother it is unnecessary to repeat them all over again in this judgment.

It suffices to say that the learned trial Chief Magistrate, S. O. Ochimana Esq., as he then was, at the conclusion of trial and in convicting the appellant

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reasoned inter alia as follows:-

B *"The irregularities and the procedure not followed by the 1st accused before she paid the money are so glaring and important that she could not claim that the failure on her part to take account of the irregularities and follow the laid down procedure was in good faith. Her whole conduct was very dishonest and there is no way she can escape from blame. The 1st accused, by her conduct took a total sum of N50,500.00 being movable property from the Bank of the North thereby causing wrongful gain to herself and wrongful loss to the bank. I have said so because evidence available shows that the 1st accused took the amount for herself on the pretext that she paid to the fictitious persons on the cheques. I believe that it is because the*
 C *drawees are fictitious that the 1st accused ignored the procedure and pre conditions for the payment of cheques, more importantly the identification of the drawees".*

On appeal, the Appellate High Court of Makurdi, summarised the matter thus -

D *'The news about the presence of these three cheques originated from the appellant; the suspicion as to their genuineness originated from the appellant; the refusal to insist on identification, contrary to the practice of the bank, was the handiwork of the appellant; and the refusal to take photographs of the payees for those cheques, contrary to the bank's practice*
 E *was also the handiwork of the appellant. If the appellant could be meticulous in demanding an identification for payment of a sum of N1,000.00 on 30/6/83 but on the following day. i.e. 1/7/83 ignored to insist on identification for payments of N18,000.00, N17,500.00 and N15,000.00 then it will be extremely difficult for one to swallow a story that it was due to negligence or*
 F *any such thing."*

A little later in its judgment, the Appellate High Court further stated:-

G *"In the present case. it is quite clear from evidence that the appellant was entrusted by the Bank with the money she paid out across the counter to the people who were not entitled to it; evidence showed that there was a dishonest conversion of this money to the case of those she paid it; and that appellant did so as a servant of the Bank. All these facts were proved in evidence and appellant had notice of them. Therefore she could properly be convicted of the offence of criminal breach of trust under Section 314 by the trial court even though she was not charged with it. We can do on this appeal what the trial court ought to have done. That being the case, we*
 H *substitute the conviction of the appellant under Section 314 of the Penal Code in place of the conviction for theft under Section 287 of the same code. On this we pronounce that the appeal of the appellant against her conviction is dismissed on all the grounds."*

Upon a further appeal by the appellant to the Court of Appeal Jos

Division Mukhtar, J.C.A. in her lead judgment with which Ndoma-Egba J.C.A. and Adio J.C.A., (as he then was) agreed observed as follows:-

“All the appellant’s conduct and advertent omission, of flouting the bank’s regulations, in the form of preventing the cheques from being controlled, together with failure to photograph the beneficiaries of the cheques points that the appellant carefully and calculatedly contrived to misappropriate the N50,500, and executed the plan when she thought she had completely covered her tracks.” B

I need hardly state that the above findings and observations of the trial court, the Appellate High Court and the Court of Appeal are fully supported by ample evidence before the trial court.

This court will not normally interfere with the concurrent findings of the lower courts unless they are perverse or unsupported by evidence or there is a miscarriage of justice or a violation of some principles of law or procedure. See Ugwumha v. The State (1993) 5 N.W.L.R. (Pt. 296) 660 at p. 671; Osayeme v. The State (1966) 6 S.C. 37; Wankey v. The State (1993) 5 NWLR (Pt. 295) 542 at p. 552. C

I have myself closely studied the entire evidence led at the trial and find no reason whatever to interfere with the decision of the Court of Appeal which affirmed the judgment of the Appellate High Court of Benue State substituting a conviction for criminal breach of trust in place of the trial court’s conviction of the appellant for theft. D

It is for the above and the more elaborate reasons contained in the lead judgment of my learned brother, Onu, J.S.C., that I, too, dismiss this appeal as totally devoid of substance. I affirm the decision of the Court below and hereby order that the appellant who, hitherto, has been on bail shall be arrested forthwith and taken into custody at the Jos Prison to serve the six months term of imprisonment imposed on her by the court below. E F

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