

**SUPREME COURT OF NIGERIA**  
18TH SEPTEMBER, 1998. SC. 175/1997  
**CORAM: S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,**  
**E. O. OGWUEGBU, S. U. ONU, JJSC**

KAYODE IDOWU ..... ACCUSED/APPELLANT  
V.  
THE STATE ..... RESPONDENT

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**CRIMINAL LAW** - Forgery - Essential ingredient - In such a charge an essential ingredient to be Proved - Is that the accused person forged the documents in question.

**CRIMINAL LAW** - Forgery - Failure to detect the alterations of the cash balances in the cash sheet - Cannot be a proper ground for finding the appellant guilty of the offence.

**CRIMINAL LAW** - Stealing - Conviction - Based on the finding that the property owned by the appellant is over and above his income - Is clearly untenable.

**CRIMINAL PROCEDURE** - Evidence - Finding of fact - Must be based on credible evidence - Or reasonable inference drawn from facts presented by the prosecution.

**CRIMINAL PROCEDURE** - Charges that are defective - Charges for offences committed during and after appellant's employment with the complainant - Are fatally defective.

**CRIMINAL PROCEDURE** - Counts - Duplicity - Forgeries occurring at different dates - Failure to make each forgery subject of a separate count and proved separately - The counts are bad for duplicity.

**CRIMINAL PROCEDURE** - Forgery - Falsification of accounts - Are

*not in all cases forgeries.*

### **FACTS**

Before the High Court holden at Ilesa, the appellant along with one other person were charged with conspiracy, forgery and stealing. The particulars of offence in all the three counts of the charge stated that the offences were committed at different times between the months of May 1988 and January, 1990. They pleaded not guilty. The case for the prosecution was that the appellant was employed as an accounts clerk in September, 1987, by the complainant S.A. Oguntimehin Enterprises Limited. His job schedule includes coordinating all the accounts in the company and checking the cash sheets (Exhibit 2) of the cashier. The cashier was the other accused person. The appellant also deposits money collected by the cashier in the bank every Monday. The appellant left the services of the company in August, 1989. Some time in 1990 the Managing Director of the company (P.W.1) said he observed some alterations in the cash sheets kept and maintained by the other accused person. The Auditors were called in and they discovered that N117,870.50 money of the complainant/company were missing. A complaint was lodged with the police. The appellant and his co-accused were arrested. The appellant in his statements as well as evidence before the court denied the charges.

The learned trial judge in a reserved judgment found the appellant and the co-accused guilty as charged and sentenced them accordingly. Aggrieved, the appellant appealed to the Court of Appeal, Ibadan Division which unanimously dismissed the appeal. Still aggrieved the appellant has further appealed to the Supreme Court raising five issues but issue (1) was considered sufficient to dispose of the appeal.

### **ISSUE FOR DETERMINATION**

*"Whether the Justices of the Court of Appeal were right in law when they agreed with the learned trial judge holding that the prosecution has proved the appellant's guilt beyond reasonable doubt."*

**HELD** (Unanimously allowing the appeal per lead judgment of **KUTIGI JSC**)

***Criminal Procedure - Evidence - Finding of fact***

1 A finding of fact must be based on credible evidence or reasonable inference drawn from facts presented by the prosecution in the case. In a criminal trial, it is unsafe to base a conviction on speculative findings based not on what the appellant did but on what he ought to have done (see AMADI V. THE STATE (1993) 8 NWLR (Part 314) 644).

(p. 2243 G)

***Forgery - Essential ingredient***

2. In a charge of forgery, an essential ingredient to be proved is that the accused person forged the documents in question. In the instant case the trial judge was clearly in error when he proceeded to convict the appellant without such evidence (see ALAKE V. THE STATE (1992) 9 NWLR (Part 265) 260. (p. 2243 H)

***Forgery - Failure to detect the alterations***

3. It is clear from the findings of the High Court above, that it was the 1st accused or co-accused of the appellant who carried out the alterations or entered the incorrect cash balances as a cashier, single handedly. That much was admitted by the 1st accused himself. Merely failing to detect the alterations or wrong arithmetical entries of the cash balances in the cash sheets by the appellant cannot in my view be a proper ground for finding him guilty of the offence of forgery along with the co-accused.

(p. 2244 D)

***Criminal Law - Stealing***

4. As regards conviction for the charge of stealing which as shown above was based merely on the finding by the High Court that "the property owned by the appellant is over and above his income" and that "he therefore shared the money with the 1st accused or co-accused" is clearly untenable. I am not aware of any law that says people who owned property above their incomes are necessarily suspects who must have

got their monies or properties from particular unauthorized or illegal sources.

(p. 2245 A)

**B Criminal Procedure - Defective Charges**

5. It must have been clear by now that the three charges against the appellant are necessarily fundamentally and fatally defective as well. He was being charged with offences committed both during his employment and after his employment had ceased with the company and he was convicted as such. He could only have been properly charged and convicted of offences committed during his tenure. That was not the case.

(p. 2245 H)

**D Criminal Procedure - Counts - Duplicity**

6. The 15 "alterations" or "forgeries" occurred on different dates, months and even years. Each alteration or forgery should have been a subject of a separate count or charge and proved separately. That was not done!

E This is intolerable. The counts are therefore bad for duplicity to say the least. (see R. V. ANIEMEKE (1961) 1 ALL NLR 43; R. V. ACHIE 12 WACA. 209). (p. 2246 A)

**F Forgery - Falsification of accounts**

7. There was no iota of evidence that the appellant made any false entry in the cash sheets. I hasten to say that the wrong entries of cash balances made in this case are properly instances of fraudulent false accounting or falsification of account for short, which are not in all cases

G forgeries. (See RE ARTON (NO. 2) (1996) 1 QB. 509 at 517). I must also add that proof of fraudulent false accounting does not necessarily mean that the suspect is even the thief. (see R. V. QUAN (1944) 10 WACA. 14. (p. 2246 C)

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**NOTABLE POINTS OF INTEREST**

**ONUJSC**

1. *Standard of proof in criminal trials*

I agree with the learned counsel for the appellant in the instant case which is on all fours with the Amadi case (supra) that once the standard of proof required in criminal trials is not attained by the prosecution, the court should, instead of suo motu fishing for facts, resolve the point of doubt in favour of the accused. (p. 2250 A)

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## 2. *Confession of co-accused - How treated.*

Clearly, the conviction of the Appellant by the trial court which the court below confirmed, must be founded on suspicion. It is settled law that suspicion no matter how grave it may be, cannot found a conviction. See Igboji Abieke v. The State (1975)1 All NLR (Part 11) 57; (1980) 9-11 SC.8 at 9. Onah v. The State (1985) 3 NWLR (part 12) 236 at 244; Nor can the confession of the co-accused upon which he (co-accused) was convicted for stealing be the basis for finding the Appellant guilty of the same offence. Indeed, voluntary confessions are deemed to be relevant facts as against only the persons who make them. See Section 27(2) of the Evidence Act Cap. 112 Laws of the Federation 1990. See also Saidu v. The State (1982)13 NSCC 70 at 78. They are not ordinarily evidence against co-accused persons. See Otufale v. The State (1968) NMLR 261; Ohuka v. The State (No.2) (1988)2 NWLR (Part 86) 36 at 51. Where, however, a confession is made by one out of the persons charged jointly with a criminal offence in the presence of the others implicating them and any of such other persons adopted the said statement by words or conduct, the court shall take such statement into consideration as against any such other persons. See Section 27 (3) Evidence Act (ibid) and Enitan v. The State (1986)3 NWLR 604 at 611. In the instant case, the Appellant neither adopted the co-accused's statement implicating him in the commission of the offence charged by words nor by conduct. (p. 2254 H)

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## **REPRESENTATION**

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Chief E. L. Akpofure for appellant.

Isiaka O. Adeleke Senior State Counsel, Osun State for respondent.

**CASES REFERRED TO**

- Amadi v. The State (1993) 8 NWLR (Part 314) 644).  
Alake v. The State (1992) 9 NWLR (Part 265) 260.  
B R. v. Aniemeké (1961) 1 ALL NLR 43  
R. v. Achie 12 WACA. 209).  
R. v. Quan (1944) 10 WACA. 14.  
Igboji Abieke v. The State (1975)1 All NLR (Part 11) 57; (1980) 9-11 SC.8 at 9.  
C Onah v. The State (1985) 3 NWLR (part 12) 236 at 244  
Emine v. The State (1992)7 NWLR (part 204) 480 at 495-496  
Ubochi v. The State (1993)8 NWLR (part 314) 697 at 712  
Saidu v. The State (1982)13 NSCC 70 at 78.  
D Otufale v. The State (1968) NMLR 261  
Ohuka v. The State (No.2) (1988)2 NWLR (Part 86) 36 at 51.  
Enitan v. The State (1986)3 NWLR 604 at 611

E **STATUTES REFERRED TO**

Criminal Code, cap. 30 Laws of Oyo State of Nigeria, 1978 ss.7b, 383(2) 390 (9), 465, 467 and 516.  
Evidence Act, cap 112 Laws of the Federation of Nigeria, s. 138(1)

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**LEAD JUDGMENT BY KUTIGI JSC**

In the High Court holden at Ilesa, Oyo State, the appellant along with one other person were charged with the offences of ;-

- (1) Conspiracy to commit a felony, contrary to and punishable  
G under section 516 of the Criminal Code, Cap. 30, Laws of Oyo State of Nigeria 1978;  
(2) forgery, contrary to section 465 and punishable under section 467 of the Criminal Code Cap. 30, Laws of Oyo State of Nigeria  
H 1978; and  
(3) stealing, contrary to and punishable under section 390 (9) of the Criminal Code, Cap. 30, Laws of Oyo State of Nigeria 1978.  
The particulars of offence in all the three counts of charge stated

that the offences were committed

*"at different times between the months of May, 1988 and January, 1990."*

They pleaded not guilty. I will have something to say on these dates later on in the judgment. B

At the trial, three witnesses testified for the prosecution. The two accused persons each testified in his own defence but called no witnesses.

The case for the prosecution was simply that the appellant was employed as an accounts clerk in September, 1987, by the complainant, S. A. Oguntimehin Enterprises Limited, a fish distributor. As an accounts clerk the appellant co-ordinated all the counts in the company and checked the cash sheets (Exhibit 2) of the cashier. The cashier happened to be the other accused person. It was also part of the duty of the appellant to deposit money collected by the cashier in the bank every Monday. This he did together with the Managing Director of the company, Mr. Samuel Adegbite Oguntimehin who testified as PW. 1 at the trial. The appellant left the services of the company in August, 1989. Sometime in 1990 the Managing Director of the Company (PW.1) said he observed some alterations in the cash sheets kept and maintained by the other accused person. He raised an alarm. The Auditors, a firm of Chartered Accountants, Z. O. Ososanya & Co. Were called in. They submitted a report (Exhibit A). They discovered that N117,870.50 money of the complainant/company were missing. A complaint was lodged with the police and the appellant and his co-accused were arrested. The appellant in the course of police investigation made statements, Exhibits F - F. 4, to the police. Some items were also recovered from the house of the appellant as per Exhibit H in the proceedings. C  
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The appellant in his statements as well as evidence before the court denied that he conspired with the co-accused or anyone at all to commit forgery or to steal the sum of N117,870.50 as alleged. H

The learned trial judge in a reserved judgment found the appellant and the co-accused guilty as charged and sentenced them accordingly.

Aggrieved by the decision of the trial High Court, the appellant appealed to the Court of Appeal holden at Ibadan. Only the appellant filed his brief of argument wherein seven issues were formulated for determination by that court. In a considered judgment the Court of Appeal B unanimously dismissed the appeal.

Still aggrieved by the decision of the Court of Appeal, the appellant has further appealed to this Court. Parties filed and exchanged briefs of argument as provided by the Rules of Court. These were adopted and relied upon at the hearing of the appeal. Additional oral submissions were C also made by the parties.

In the appellant's brief Chief Akpofure, learned counsel for the appellant submitted five issues as arising for determination in the appeal. But the most important single issue which in my view needs to be considered is issue (1) which reads:- D

*"Whether the Justices of the Court of Appeal were right in law when they agreed with the learned trial judge holding that the prosecution has proved the appellant's guilt beyond reasonable doubt."*

E The learned trial judge in his judgment on page 46 of the record said:-

*"Before embarking upon the appraisal of the evidence proffered in this case in respect of each count with which the accused are charged and for purposes of clarity it will be better to set out at this stage the F primary facts which are not in dispute. For the purposes of this case, 1st accused was employed in the establishment of S.A Oguntimehin Enterprises Ltd. as a cashier. He is responsible for the writing out of sales invoices and collection of money from customers. He also prepares the cash sheets. The 2nd accused (meaning appellant herein) is employed in the same establishment as an accounts clerk. He Co-ordinated all the accounts in the office and checks the cash sheets of the 1st accused as an internal auditor. In other words the 2nd accused's (appellant) duty prima G facie is to uncover any wrong entry or addition made by the 1st accused."*

Later on in the judgment he said on page 49:-

*"The question that comes to mind is - Can the various fraudulent alterations be successful if the 2nd accused (appellant) had per-*

formed according to expectation? ..... Has the 2nd accused (appellant) not acquiesced in this fraudulent alterations?"

The judgment concluded on page 51 of the record as follows:-

*"Exhibit A shows clearly 15 instances of alterations. ..... I hold the view that acquiescence of the 2nd accused (appellant) in the defrauding exercise of the 1st accused in this case amounts to conspiracy. Their common end is to defraud the company and misappropriate its fund. I am satisfied that the offence of conspiracy levelled against the two accused persons have been proved beyond reasonable doubt. As for stealing, it is conceded that 2nd accused (appellant) does not handle cash ..... Having regard to the surrounding circumstances of this case, one can draw the inference that the property owned by the 2nd accused (appellant) is over and above his income. The irresistible inference is that the 2nd accused (appellant) was sharing the fraudulent money with the 1st accused .....*

*In the circumstances, I find the two accused guilty as charged and I convict them for the three offences accordingly."*

It is clear to me from the excerpts of the judgment above that the appellant was convicted for the offences of conspiracy and forgery, not because there was evidence of conspiracy but because he failed or was unable to detect the alleged 15 instances of alterations set out in Exhibit A (Auditor's Report). He was also convicted of stealing not because there was evidence that he stole, and not because the 1st accused said that they shared it together with the appellant, but simply because the "property owned by the appellant is over and above his income." Could the High Court have been right in its conclusions? My answer is certainly in the negative. **A finding of fact must be based on credible evidence or reasonable inference drawn from facts presented by the prosecution in the case. In a criminal trial, it is unsafe to base a conviction on speculative findings based not on what the appellant did but on what he ought to have done (see AMADI V. THE STATE (1993) 8 NWLR (Part 314) 644). In a charge of forgery, an essential ingredient to be proved is that the accused person forged the documents in question. In the instant case the trial judge was**

**clearly in error when he proceeded to convict the appellant without such evidence (see ALAKE V. THE STATE (1992) 9 NWLR (Part 265) 260.**

I have read the record and the exhibits in this case. In the first place it is clear that the 15 "alterations", were "alterations" of the cash balances only in the cash sheets at the close of business on the respective 15 days. In other words all other cash entries in the cash sheets are correct except the cash balances for the 15 days respectively. One is even not sure whether these can in fact be called "alterations" of any thing because they represent direct entries of wrong or incorrect cash balance figures as they appeared on the cash sheets. All that the Auditors succeeded in doing I think was that the cash balances for the respective dates were wrong or incorrect, being less than the actual balances when properly added together.

Secondly, **it is clear from the findings of the High Court above, that it was the 1st accused or co-accused of the appellant who carried out the alterations or entered the incorrect cash balances as a cashier, single handedly. That much was admitted by the 1st accused himself. Merely failing to detect the alterations or wrong arithmetical entries of the cash balances in the cash sheets by the appellant cannot in my view be a proper ground for finding him guilty of the offence of forgery along with the co-accused.** This would largely have depended on the kind of tools or materials or instruments made available to the appellant by the company for detecting such wrong arithmetical mistakes or entries and of which there was no evidence here. In addition there was no evidence of when the "alterations", if any, were actually made. It was only presumed that they were made on each day after the close of business. The Managing Director himself testifying as PW.1 said he only observed some alterations in the cash sheets sometime in 1990. Exhibit A shows that the first alteration was carried out on 4/5/88. The appellant had left the company far back in August, 1989. The alterations were thus never detected during the employment of the appellant. One therefore finds it hard to understand why and how the appellant could have been held responsible even for alter-

ations or wrong entries made up to and including 20/1/90 after he had left the company.

**As regards conviction for the charge of stealing which as shown above was based merely on the finding by the High Court that "the property owned by the appellant is over and above his income" and that "he therefore shared the money with the 1st accused or co-accused" is clearly untenable. I am not aware of any law that says people who owned property above their incomes are necessarily suspects who must have got their monies or properties from particular unauthorized or illegal sources.** Even if the appellant owned properties above his income, the conclusion that it was his former employer's money that he misappropriated is to me unsupportable. What was required was evidence of how the appellant acquired each of his properties as well as evidence of all other jobs or works that he did apart from his employment with the company complainant herein. There was no such evidence in this case. Again, I cannot also understand how the appellant could have been found guilty of stealing monies which were said to have been stolen by the co-accused up to and including 20/1/90 after the appellant had left the company in August, 1989.

I must add that the Chartered Accountant, Mr. Adeleke who tendered the Auditor's Report (Exhibit A) never explained in his evidence how he arrived at the gross sum of N117,870.50 allegedly stolen to allow for cross-examination. Neither did he explain how he came to the conclusion that the various cash balances were forged or altered, talkless of who forged or altered them. The entries which had not been the subject of oral evidence or examination in court, were not in evidence and the defect had not been cured by an examination of the cash sheets by the Chartered Accountant (PW.2) outside the court and behind the appellant (see DURIMINIYA v. COMMISSIONER OF POLICE (1961) NNLR 70; R. v. WILCOX 000000(1961) 1 ALL NLR 631).

**It must have been clear by now that the three charges against the appellant are necessarily fundamentally and fatally defective as well. He was being charged with offences committed both during his employment and after his employment had ceased with**

the company and he was convicted as such. He could only have been properly charged and convicted of offences committed during his tenure. That was not the case!

Further, the 15 "alterations" or "forgeries" occurred on different dates, months and even years. Each alteration or forgery should have been a subject of a separate count or charge and proved separately. That was not done! This is intolerable. The counts are therefore bad for duplicity to say the least. (see R. V. ANIEMEKE (1961) 1 ALL NLR 43; R. V. ACHIE 12 WACA. 209). As I said above there was no iota of evidence that the appellant made any false entry in the cash sheets. I hasten to say that the wrong entries of cash balances made in this case are properly instances of fraudulent false accounting or falsification of account for short, which are not in all cases forgeries. (See RE ARTON (NO. 2) (1996) 1 QB. 509 at 517). I must also add that proof of fraudulent false accounting does not necessarily mean that the suspect is even the thief. (See R. V. QUAN (1944) 10 WACA. 14.

From the totality of what I have been saying above, it is clear to me that the prosecution had failed totally to prove its case against the appellant beyond reasonable doubt. The High Court was therefore completely wrong to have convicted the appellant as charged. The Court of Appeal also erred in confirming the judgment of the High Court.

The appeal therefore succeeds and it is hereby allowed. The judgments of the lower courts are set aside. The appellant is discharged and acquitted.

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### BELGORE JSC

In all criminal prosecutions, except in cases of negative averment, the onus is always on the prosecution to prove its case beyond reasonable doubt. Barring some allegations based on suspicion against the appellant, no evidence was advanced to prove he committed any crime or that he was involved in forgery and stealing. Rather the appellant who should have been commended for his diligence became an ac-

cused, an unfortunate turn of events. There is nothing proved against him; for suspicion, a mechanism of human imagination, is no substitute for concrete proof of criminality. The appellant is certainly not guilty of any crime and for fuller reasons in the judgment of Kutigi, JSC, I also allow this appeal. I set aside the conviction and sentence of the lower courts, and in their stead I enter a verdict of discharge and acquittal. B

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**WALI JSC**

I have the privilege of reading in advance the lead judgment of my learned brother Kutigi, JSC and for the same reasons ably stated therein for allowing the appeal which I hereby adopt, I also allow the appeal. I adopt the consequential orders made in the lead judgment. C

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**OGWUEGBU JSC**

I had the advantage of reading in draft the judgment just delivered by my learned brother Kutigi, J.S.C, and I agree with his reasoning and conclusions. I adopt them as mine. The appeal is allowed by me. D

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The conviction and sentence are hereby quashed. The appellant is acquitted and discharged.

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**ONU JSC**

I had the privilege of a preview of the judgment of my learned brother Kutigi, JSC just delivered. I am in entire agreement therewith that the appeal is meritorious and ought therefore to succeed. G

I do not intend to review the facts of this case which have been amply taken care of in the leading judgment of my learned brother. It was suffice to say that of the five issues submitted by the Appellant as arising for our determination in this appeal (the Respondent proffered six), I deem an expatiation on only issue 1 as enough to dispose of the appeal. This is because all three offences viz conspiracy, forgery and stealing for which the Appellant stood trial culminating in this appeal H

must all be proved beyond reasonable doubt to sustain Appellant's conviction on them.

ISSUE NO. 1:

The issue questions whether the Justices of the Court of Appeal B (hereinafter referred to shortly as the court below) was right in law when it agreed with the learned trial Judge who held that the prosecution had proved the Appellant's guilt beyond reasonable doubt. The learned counsel for the Appellant both in his written brief and in oral argument of this issue relied on the proposition of law contained in Section 7 (b) of the C Criminal Code which provides that:-

*"When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to D say:-*

(a) .....

(b) *Every person who does or omits to do any act for the purpose to commit the offence."*

E The above which was confirmed by the court below is, in my respectful view, erroneous in as much as there was no scintilla of evidence to the effect that the Appellant aided the person he was tried together with (hereinafter referred to as co-accused) to commit the conspiracy, forgery and stealing of the property (money) belonging to 1st P.W.'s company, S. A. Oguntimehin Enterprises Limited. I agree with learned counsel for the Appellant that to found a conviction for these offences, the prosecution must beside discharging the onus placed on it, go further to F prove by a critical ascertainment, both the mental and physical elements/ ingredients (actus and mens rea) of the offence/offences charged before arriving at a conclusion that it or they were committed by the Appellant. G This court took a similar view before allowing the appeals of the appellants in N. O. Amadi & 2 ors. v. The State (1993) 8 NWLR (Part 314) H 644, a case whose facts were as follows:-

The appellants together with five other persons were arraigned at the High Court of Lagos State on 20 counts for offences of stealing, forgery, uttering a false document and inducing delivery of money by

false pretences.

The prosecution's case was that six United Bank for Africa (U.B.A.) cheques belonging to the National Electric Power Authority (N.E.P.A.) were stolen from the Authority's premises; the cheques were later forged and fraudulently uttered to the U.B.A. which was induced to deliver the cheques to the Bank of India, Lagos, with the pretence that a company known as Sadayan Overseas Industrial Company Limited was the owner of the various sums of money expressed on the six cheques, to wit:

N375,750; N367,570.76; N200,083.76; N125,500.55; N325,657.57 and N375.250.75.

After the conclusion of hearing and evidence, the trial judge in a considered judgment found that all the cheques had been forged and large sums of money stolen. He found the appellants and one other accused person guilty and sentenced them to various terms of imprisonment. Two of the accused persons died before the conclusion of the trial while the remaining two were found not guilty at all and were discharged and acquitted. The first appellant was found guilty of conspiracy to commit a felony and of stealing; the 2nd appellant was found guilty of conspiracy to steal, conspiracy to forge a cheque and inducing delivery of money by false pretences; while the 3rd appellant was found guilty only of conspiracy to steal, conspiracy to commit forgery and inducing delivery of money by false pretences.

The conviction of the appellants was based largely on the evidence of P.W2 who was an accomplice. In his judgment, the trial Judge stated inter alia that P.W.2 gave both relevant and irrelevant testimonies and he would only accept that part of his evidence which was corroborated.

The appellants' appeals to the Court of Appeal were dismissed and they appealed to this court which held among other things that before a conclusion can be arrived at that an offence had been committed by an accused person, the court must look for the ingredients of the offence and ascertain critically that the acts of the accused person come within the confines of the particulars of the offence/offences charged. It

was further held that in order to succeed in any criminal trial, the onus is on the prosecution to prove its case beyond reasonable doubt. I agree with the learned counsel for the appellant in the instant case which is on all fours with the Amadi case (supra) that once the standard of proof required in criminal trials is not attained by the prosecution, the court should, instead of suo motu fishing for facts, resolve the point of doubt in favour of the accused.

Applying the above enunciated principles to the instant appeal, it is manifest that the trial court and the court below erred in law on the following grounds:

(a) In respect of the Appellant's conviction for forgery, whilst it is patent that the prosecution failed to prove the necessary knowledge and criminal intent for the proof of forgery against the Appellant, the learned trial Judge and the Justices of the court below instead of so holding and discharging and acquitting him for the offence, sought and relied upon unavailable facts, by speculating and drawing wrong inferences that the Appellant colluded with the co-accused to omit to audit the account books. Thus, in his judgment the learned trial Judge held as follows:-

*"2nd accused's omission to raise an alarm in respect of the above deal where 1st accused realized a sum of N10,000.00 and as 2nd accused's duty is primarily to check the recordings of the 1st accused, such omission ..... brings him under section 7(b) of our Criminal Code. ...."*

The Appellant during examination in chief gave evidence to the effect that as at the time he checked Exhibit E - a bundle of cash sheets produced by the prosecution with the exception of pages 12 and 13 thereof, there were no alterations in the figures appearing thereon. The only irresistible inference that could be drawn from the foregoing is that the alleged alterations took place after the Appellant had already checked Exhibit "E". It is pertinent to point out that this piece of evidence of the Appellant remained unshaken and was indeed corroborated by the co-accused in Exhibit 'D' (his statement) wherein he said among other things:

*"My account is always checked by Mr. Kayode Idowu before I*

altered it." (Underlining is mine for emphasis).

Furthermore, in his defence, the co-accused testified on oath in the following extracts which indicate that he and he alone, altered Exhibit "E" and took the difference between the actual amounts and the lesser sums he recorded. Said he:

(i) "I remember 24/12/88, on 24/12/88 I went to collect money from George Aluko at Ife. The amount is N17,748.00. I took the money to the safe at Ilesa as the Bank had closed before I got to Osu that day. I later prepared a receipt for the money I collected from George Aluko on 24/12/88. I keep a cash sheet for my own record. I recorded N7,000.00 instead of N17,000.00. I paid in N17,000.00 to the bank."

(ii) "Cross-examined by the State - Leye Adepoju S.L. O. In the receipt issued to Mr. Aluko, I recorded N17,748.00 I recorded N17,748.00 in the cash book. It is at page 11 of Exhibit E.

At page 1 of Exhibit E. I agreed that I alter the total of N93,802.58 to N83,802.58.

At page 3 of Exhibit E, I agree that the sum total should be N116,289.12 but I altered it to N106,289.12.

At page 5 of Exhibit E the correct sub-total is N167,743.82 but I wrote N162,743.82.

At page 8 of Exhibit E the difference between my own figure and that of the Auditor is a sum of N3,250.10.

At page 12 of Exhibit "E" I recorded N162,916. 32 whereas the Auditor's figure is N167, 916.32- The difference is N5,000.00.

At page 13 and 14 N156,129.02, I recorded N152,129.02 -a difference of N7,000.00.

At page 18 of Exhibit E, I agree that the total is N219,016.12 but I wrote N212,016.12 making a difference of N7,000.00.

At page 19 of Exhibit E, I agree that the correct figure is N167,566.00 but it is altered to N162,566.42 making a difference of N5,000.00 .

At page 21 of Exhibit E, the loss is N2,000.00 -the auditor's figure is N175,254.00 and my own figure is N175,254.42.

At page 23 of Exhibit "E" the auditor's figure is N194,306.12

*but I altered it to N174,306.12 but I altered it to N174,306.00. Originally, I first got N194,306.12."*

Be it noted that at no where in his alternation of Exhibit "E" did the co-accused say in the plural "we altered." Thus, the co-accused being joined  
 B by the Appellant to alter Exhibit 'E' or any other document for that matter, does not arise. A fortiori, there can be no successful charge of forgery that can be laid against the Appellant, let alone the charge of conspiracy. The necessary fraudulent intent as required under Section 383(2) of the  
 C Criminal Code was not proved against the Appellant. It is further clear as daylight that the prosecution failed to prove separately the specific sums of money alleged to be stolen by the Appellant whereas, the conviction of the appellant for forgery, conspiracy and stealing was based on entries in  
 D entries was made at different times and dates, the prosecution must prove individually and separately that the Appellant as an accomplice, forged the items in the entries in Exhibit E and stole specific amount/s on a specific date/s. See the case of Onagoruwa v. The State (1993)7 NWLR  
 E (part 303) 49 at page 91 paragraph D in which the Court of Appeal held, allowing the appeal, that where specific sums were allegedly stolen on specific dates, the prosecution must prove that the various sums for which the accused was charged actually got into his hands before he  
 F could be properly convicted. This case being similar to the one in hand, I accordingly adopt same as apposite in militating in the discharge and acquittal of the Appellant for the offence of stealing money amounting in all to N720,000.00 contrary to section 390 (a) of the Criminal Code Law, Cap.31, Laws of Lagos State. See also Gbolarumi v. C.O.P. (1971)  
 G NMLR 69.

In Muhammadu Duruminiya v. C.O.P. (1961) NRNLR 70, an appeal from the Magistrate Court to the High Court of Northern Region of Nigeria sitting on appeal in a trial upon charges of fraudulent false  
 H accounting and stealing in which the prosecution put the appellant's books of account in evidence, but only a few out of numerous entries in the books were brought to notice in court by oral evidence or examination of the books in court, it was held (allowing the appeal):

*"The entries which had not been the subject of oral evidence or examined in court were not in evidence, and the defect had not been cured by an examination of the books by the trial magistrate outside court disclosing things that, at least, must have been not iced in court."* What the learned trial Judge did in relating to Exhibit "E" and which the court below confirmed, is what in the Duruminiya case, the magistrate court therein did in relation to the books of account in accepting entries thereon as proved against the appellant but the High Court of Appeal disallowed and in consequence, allowed the appellant's appeal.

Indeed, the totality of the evidence before the trial court was to the effect that the Appellant herein never handled cash belonging to S.A. Oguntimehin Enterprises Limited as exemplified in the testimony of the co-accused wherein for instance he (co-accused) admitted under cross-examination thus:

(i) *"It is not the primary duty of the 2nd accused to handle cash paid into the company. 2nd Accused goes with me on Mondays to deposit money into the bank."*

(ii) *"I did not share the money with any of my staff except the one stolen from my cage but I suspected Mr. Kayode Idowu where I kept the money because he used to assist me anytime when counting of money is beyond my power in order to meet the bank before they close. On Exhibit D1 he did."*

(iii) *"..... On 20/6/89 on cash sheet 3459, the different (sic) was N3,371.50. I cannot account on how I spent it. On 22/6/89 on cash sheet 3450 the different (sic) there was N5,000.00. I altered the figure there from N167,534.32 to N162,534.32. I did not spend for anything but don't know how the money got missed. On 24/3/89 on cash sheet 3741 I altered the figure there the different (sic) there was N5,000.00. I cannot remember what I spent the money for."*

From the foregoing, I am satisfied that the prosecution had failed to prove the guilt of the Appellant beyond reasonable doubt as provided in Section 138(1) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria. Thus, as the learned trial Judge erroneously convicted the Appellant for the offences of conspiracy, forgery and stealing, basing the

same on wrong inferences, suspicion and circumstantial evidence, the court below wrongly affirmed that conviction. For instance, the Appellant in his testimony said inter alia that:-

"*Apart from my salary, I also draw between N80.00 and N100.00 from the drivers every week,*" but in its judgment, the trial court referred to the same evidence and said of it. "*2nd accused also stated that he has no other source of income except occasional tips of N10.00 per trip from company drivers.*"

As the Appellant never said what was attributed to him, these words amounted not only to wrong inferences but a misdirection (see Asuquo Williams v. The State (1975) 1 All NLR (Part 11)77; Saka Atuyeye v. Emmanuel Asamu (1987)1 NWLR (Part 49) 267 at 279; R. Lauwers Import-Export v. Jozebson Industries Co. Ltd. (1988)2 NWLR 429 at 442 and Amajideogu & 7 ors. v. O. Ononaku & ors. (1988) 2 NWLR (Part 78) 614).

The misdirection and wrong inferences made by the trial court and confirmed by the court below cumulatively occasioned a miscarriage of justice. See A.F. Sonekan v. P.G. Smith (1967)1 All NLR 329 at 333; Chungwa Kim v. The State (1992) 4 NWLR (Part 233)17 and University of Lagos & 1 or. v. Aigoro (1985) 1 NWLR 143. Expatiating on what constitute the wrong inferences and misdirection arrived at towards the tail of his judgment, the learned trial Judge had this to say:-

"..... Within a period of two years, 2nd accused was able to purchase a volkswagen car registration number OY 7880 Ab. A list of article recovered by the Police from the house of 2nd accused is attached to Exhibit H. 2nd accused also stated that he has no other source of income except occasional tips of N10.00 per trip from company drivers. Having regard to the surrounding circumstances of this case, one can draw the inference that the property owned by the 2nd accused is over and above his income. The irresistible inference is that the 2nd accused was sharing the fraudulent money with the 1st accused. Let me quickly say that 1st accused had already confessed to the offence of stealing." (Underlining is mine for emphasis).

Clearly, the conviction of the Appellant by the trial court which the court

below confirmed, must be founded on suspicion. It is settled law that suspicion no matter how grave it may be, cannot found a conviction. See Igboji Abieke v. The State (1975)1 All NLR (Part 11) 57; (1980) 9-11 SC.8 at 9. Onah v. The State (1985) 3 NWLR (part 12) 236 at 244; Idapu Emine v. The State (1992)7 NWLR (part 204) 480 at 495-496 and Ubochi v. The State (1993)8 NWLR (part 314) 697 at 712 paragraph H. Nor can the confession of the co-accused upon which he (co-accused) was convicted for stealing be the basis for finding the Appellant guilty of the same offence. Indeed, voluntary confessions are deemed to be relevant facts as against only the persons who make them. See Section 27(2) of the Evidence Act Cap. 112 Laws of the Federation 1990. See also Saidu v. The State (1982)13 NSCC 70 at 78. They are not ordinarily evidence against co-accused persons. See Otufale v. The State (1968) NMLR 261; Ohuka v. The State (No.2) (1988)2 NWLR (Part 86) 36 at 51. Where, however, a confession is made by one out of the persons charged jointly with a criminal offence in the presence of the others implicating them and any of such other persons adopted the said statement by words or conduct, the court shall take such statement into consideration as against any such other persons. See Section 27 (3) Evidence Act (ibid) and Enitan v. The State (1986)3 NWLR 604 at 611. In the instant case, the Appellant neither adopted the co-accused's statement implicating him in the commission of the offence charged by words nor by conduct. In relation to circumstantial evidence to the count of stealing, this in law, can only ground a conviction if and only if :-

(i) It irresistibly and unequivocally leads to the guilt of the Appellant.

(ii) No other reasonable inference could be drawn from it, and

(iii) There are no co-existing circumstances which could weaken the inference. See Phillip Omogodo v. The State (supra); Lori v. The State (1980) 8-11 SC.81 and Yongo v. C.O.P. (1992)8 NWLR (Part 257) 36.

In the case in hand, the inference drawn by the trial court which was affirmed by the court below to the effect that the Appellant who was on a salary of N400.00 per month could never have afforded to buy a sec-

ond-hand volkswagen bettle car, was clearly wrong. This, as well as other inferences, which the prosecution left the trial court to speculate on included:

(i) at what price the Appellant bought the car.

B (ii) the price of the car when it was new etc and whether the Appellant could afford it. These were left unconsidered by both the trial court and the court below which ought to have resolved the doubt cast in favour of the appellant. Having failed to do so but they rather held in concurrence that he bought the car whose price was beyond his income, C they arrived at a wrong conclusion which ought to be set aside.

One last word on the charges laid. In the three offences contained in the charge, they are stated to have been committed between the months of May, 1988 and January, 1990. However, it was elicited during D the cross-examination of 1st P.W. that the Appellant left the service of his (P.W. 1's) company in September, 1989. In answer to one of our questions during the oral hearing of this appeal on 25th June, 1989, learned Senior State Counsel admitted as much. Thus, all the entries in Exhibit E "E" between 1st October, 1989 and January, 1990 would have no bearing on the Appellant's acts relative to these offences framed for the period.

In the instant case, as the prosecution indeed led no evidence, direct or circumstantial, to substantiate its allegations of conspiracy, forgery and stealing contrary to and punishable under Sections 516, 465 and F 390(9) of the criminal Code, Cap. 30, I have no hesitation in resolving this issue in favour of the Appellant.

For these reasons I have given above and the fuller ones contained in the leading judgment of my learned brother Kutigi, JSC I, too, G allow this appeal and set aside the decisions of the two courts below.

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