

SUPREME COURT OF NIGERIA
FRIDAY 28TH JUNE, 2002. SC. 11/2001
CORAM:- M. L. UWAISS C.J.N, I. L. KUTIGI,
M. E. OGUNDARE, U. A. KALGO, A. O. EJIWUNMI, JJSC

OREOLUWA ONAKOYA APPELLANT
V.
FEDERAL REPUBLIC OF NIGERIA RESPONDENT

CHARGES - Joinder of offences - Propriety - It is improper to charge two distinct offences in single charge - And amendment was needed to correct such error (H1)

CHARGES - Duplicity - Effect on conviction - A conviction will not be quashed - Merely on the ground of duplicity of charge - Unless a miscarriage of justice has occurred (H2)

JUDGMENTS - Court - Perverse finding - Effect - Court of Appeal rightly held that the finding did not result in miscarriage of justice - To necessitate the judgment being set aside (H3)

BANKING - Tribunal - Evidence - Preference for - Propriety - In the presence of principal characters - The tribunal needed not to have bothered with Exhibits C1 C2 D & H (H4)

CHARGES - Conviction - Propriety - Appellant was not convicted for offence for which he was not charged - But was rightly convicted for approving the overdraft facility of N14 million (H5)

BANKING - Tribunal - Documents - Interpretation of - The trial tribunal rightly interpreted paragraph 3 of Exhibits C1 C2 D & H - And Court of Appeal rightly confirmed same (H6)

FACTS

Prosecution/respondent's case is that accused/appellant (an Executive Director of Savannah Bank Plc.) unlawfully gave approval for an over-draft credit facility to the tune of N14 million naira to Alhaji Gajimi Ibrahim i.e. PW6 (customer of the said bank). Respondent

alleged that appellant gave oral approval by asking that the over-draft be granted against security to be lodged by PW3 (Kano Area Manager of the Bank). Respondent maintained that appellant had thus contravened the embargo placed on lending by the bank at the material time.

Consequently, appellant was charged at Failed Banks Tribunal, Lagos with a felony to wit approving and granting of the aforesaid over-draft credit facility to PW6 without lawful authority and in violation of lending rules and regulations of the said bank. At the trial, respondent called seven witnesses while appellant testified in his defence and called one witness. In his defence, appellant contended that he only lawfully approved the sum of N1.4 million and that it was PW3 and PW4 that conspired with PW6 to give an over-draft credit facility of N14 million to PW6. At the end of trial, the court found appellant guilty as charged and sentenced him to three months imprisonment. Appellant being dissatisfied, filed appeal at the Court of Appeal, Lagos. The court dismissed the appeal and appellant has thus appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Was the Court of Appeal right in holding that the trial Court was right in coming to the conclusion that the case against the Appellant was established beyond reasonable doubt based on the evidence before the trial court?

2. Was the Court of Appeal right in confirming the interpretation of paragraph 3 of Exhibits C1, C2, D and H by the trial court to the effect that the endorsement by the appellant on the Exhibits was confirmation of an earlier oral approval of credit facility granted to the customer on the 24th of May, 1996?

3. Was the Court of Appeal right in holding that even though the charge against the appellant was not properly drafted, his conviction could still stand when this would in fact amount to him being convicted for an offence for which he was never charged?

HELD (Dismissing the appeal per lead judgment of KUTIGI JSC, OGUNDARE & EJIWUNMI JJSC dissenting)

CHARGES - Joinder of offences - Propriety

1. Clearly therefore the appellant was charged with two distinct

offences in one single charge. This is wrong and improper. And it is evident from the record that that much was realized by learned counsel on both sides in their addresses at the Tribunal. The best thing that the prosecution would have done at that stage, which was before judgment, was to have applied to the court to have the charge amended. The court may also amend the charge as well at that stage. This was never done.

(p. 1909 B)

CHARGES - Duplicity - Effect on conviction

2. In cases of this nature, the guiding principle is whether the accused is misled, embarrassed or prejudiced by the charge as framed. If he is misled by the charge then it follows that he is equally misled in his defence. And if he is misled in his defence, it is my respectful view that there must as a result be a failure or a miscarriage of justice. That is not the position here. Reading through the record there is no iota of evidence whatsoever that the appellant was misled or prejudiced or embarrassed in any way. Rather the record shows that he appeared to have appreciated the charge in all its ramifications. In other words although the charge herein is bad for duplicity, it is not in my view fatal to the conviction of the appellant who was not prejudiced in any way, and where no miscarriage or failure of justice is shown to have occurred bearing in mind the fact that he was only convicted on one count only. A conviction will certainly not be quashed or a trial declared a nullity merely on the ground of a patent duplicity in a charge unless a miscarriage or failure of justice has occurred thereby. (p. 1910 A)

Court - Perverse finding - Effect

3. The Court of Appeal had this to say on the point in its lead judgment on page 294 of the record -

“However, the issue is, what is the effect of this perverse finding on the judgment of the trial court?

It is trite law that it is not all errors committed by a trial judge that will lead to a setting aside of the judgment. In the present appeal the learned trial judge had already come to the conclusion that the appellant approved the sum of N14 Million instead of N1.4 Million he claimed before making

the finding complained of. In fact, the said finding is at the last but two paragraphs of the judgment at page 154 of the record. In other words, I am of the firm view that despite the said finding there is sufficient evidence to support the finding by the learned trial judge that what the appellant approved for PW.6 is N14 Million and not N1.4 Million. That being the case, it is my view that the said finding has not resulted in a miscarriage of justice to necessitate the judgment of the Court being set aside on that ground alone.”

C I think the Court of Appeal is right. (p. 1910 G)

Courts - Evidence - Preference for - Propriety

4. *“I do not agree with the submission of learned counsel for the appellant that the issue of the amount approved by the appellant could only be proved by the production of the original fax message in view of the findings made by the learned trial judge.*

Both parties are agreed that the court did find as a fact that the principal characters in the drama are PW.3, PW.4, PW.6 and the appellant. Following the absence of the original fax approved, the only way to resolve the issue was by examining the evidence of these witnesses and deciding on who to believe after watching them testify. The essential issue before the Tribunal is whether the appellant approved N14 Million or N1.4 Million and resolving it the learned trial judge believed the evidence of the prosecution witnesses and disbelieved that of the appellant. I am of the firm view that the trial judge is right in so doing having regard to the state of the law as stated in many cases including SUGH v. THE STATE (1988) 2 NWLR (pt. 77) 475.”

G I think the Court of Appeal is again right. The fact was that PW.3 who wrote the fax message told the Tribunal that he destroyed the original. Again, the beneficiary of the credit facility PW.6 has told the Tribunal that appellant approved N14 Million for him which he collected from the Maiduguri Branch of the Bank and which he had since paid back. In the presence of the principal characters in the person of PW.3, PW.4 and PW.6, the Tribunal needed not to have bothered with Exhibits C1, C2, D & H which were exactly the same

except for the figure “N14M” in Exhibit D to make it appear that the sum approved was N1.4 Million instead of N14 Million in others. (p. 1911 D)

Conviction - Propriety

5. I am unable to find anything on the record which suggests that the appellant was convicted for an offence for which he was not charged. Rather the evidence galore that the appellant was properly and rightly convicted for the offence of approving the overdraft facility of N14M. He was never convicted of granting or disbursing the loan itself, even though the Tribunal erroneously recorded on page 154 this: **“Accused person convicted as charged.”** This is wrong because the Tribunal had held earlier on page 153 of the record that it agreed with Mr. Gana for the Respondent that the Appellant was not being charged with disbursing the sum of N14M. I think that was proper. You may say this is not the proper way to amend a charge, and you will be right. Issues (1) & (3) are therefore resolved against the appellant. (p. 1912 D)

Documents - Interpretation of

6. I think the Tribunal was right in its interpretation of paragraph 3 of Exhibits C1, C2, D & H above, and the Court of Appeal was equally right in confirming that interpretation. That is what the evidence before the tribunal demanded. I have no reason to interfere. Issue (2) is therefore resolved against the appellant. (p. 1914 B)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC (Dissenting)

1. Validity of charges

The case here is made worse in that the one count charged the appellant under all the three paragraphs together. And to make matters still worse, the charge does not contain the mens rea. The offences created in section 19(1) are not strict offences because the lawmaker provided the required mens rea by the deliberate use of the words “knowingly” “recklessly”, “negligently”, “willfully” and “or otherwise”. And by the use of the word “or” in the subsection, the words of mens rea are disjunctive and it is the one that is applicable the facts that

must be used in the charge. That was not done in this case. In my respectful view, the charge here is not only bad for duplicity: it is bad for uncertainty and lacking in essential particulars. And it is no argument that the Appellant was not embarrassed. The charge, ex facie, creates the embarrassment because it is clearly uncertain what the Appellant was being charged for. (p. 1929 D)

2. Duplicity in charge does not always embarrass accused

Begho J allowing the appeal and quashing the conviction, held at p. 261, and I agree with him:

“I hold that it is not in every case of ‘duplicity’ that the court has to ask itself whether the accused was embarrassed by the duplicity or uncertainty of the charge the mere fact that an accused gave evidence is not an indication that he was not embarrassed. There is no yardstick for measuring ‘embarrassment’ due to duplicity or uncertainty of a charge.” (p. 1934 A)

REPRESENTATION

Prof. B. Kasumu, SAN with Miss O. Salami, for the Appellant
Garba M. Gana, Esq. for the Respondent

CASES REFERRED TO

Okeke v. Commissioner of Police (1948) 12 W.A.C.A. 363
R. v. Osakwe 12 W.A.C.A. 366
R. v. Kalle 3 W.A.C.A. 197
R. v. Thompson 9 C.A.R. 252
Sugh v. The State (1988) 2 NWLR (pt. 77) 475
Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (pt. 135) 688
Obakpolor v. State (1991) 1 NWLR (pt. 165) 113
Ogbebor v. Police (1950) 13 W.A.C.A. 22
R. v. Aniemeke (1961) 1 All NLR 43
E. Orumah v. Medical Officer of health (1967) NMLR 258
R. v. Archie 12 W.A.C.A. 209
R. v. Greenfield (1973) 57 Cr. App. R. 849
R. v. Robertson (1936) 25 Cr. App. R. 208
Onasile v. Sani & Anor (1962) 1 All NLR 272
Orumah v. Medical Officer of Health (1967) NMLR 258

STATUTES REFERRED TO

Failed Banks (Recovery of Debts) & Financial Malpractices in Banks Decree No. 18 1994 s. 19(1)(a)(b), s. 20(1)(a)
Interpretation Act Cap. 192 LFN 1990, s. 18(3)
Criminal Procedure Act Cap 80 LFN 1990, s. 156

LEAD JUDGMENT BY KUTIGI JSC

The accused at the Failed Banks Tribunal, Lagos Zone V, pleaded not guilty to the following charge:-

“That you Oreoluwa Sylvester Adedeji Onakoya (male) while being a Director of Savanna Bank of Nigeria Plc in Lagos, between 20th May, 1996 and 28th May, 1996 did commit a felony to wit, you approved the granting and granted credit facility of N14M (Fourteen Million Naira) to one Alhaji Gajimi Ibrahim, a customer of the Maiduguri Branch of the Savannah bank of Nigeria Plc without lawful authority and in violation of lending rules and regulations in force at the time in Savannah Bank of Nigeria Plc, particularly memorandum 119. You thereby committed an offence contrary to Sections 19(1)(a)(b) & (c) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 as amended (hereinafter referred to as the Decree) and punishable under Section 20(1)(a) of the same Decree.”

During trial at the Tribunal, the prosecution called seven witnesses while the accused testified in his own defence and called one other witness. Thereafter counsel filed and exchanged written addresses which were adopted at the hearing and judgment reserved. In a considered judgment delivered on the 2nd day of February, 1999, the learned trial judge after a review of both oral and documentary evidence before the Tribunal found the accused guilty and convicted him as charged. He was sentenced to three months imprisonment.

Aggrieved by the decision of the Tribunal, the accused now appellant, appealed to the Court of Appeal holden at Lagos. In a unanimous judgment delivered on the 11th day of July, 2000, the appeal was dismissed.

Still dissatisfied with the judgment of the Court of Appeal, the appellant has further appealed to this court. In obedience to the Rules of Court, the parties filed and exchanged briefs of argument.

These were adopted and relied upon during oral argument at the hearing.

Learned counsel for the appellant, professor A. B. Kasunmu S.A.N., has formulated three issues in the appellant's brief for the determination of this Court. The issues read as follows-

B "1. Was the Court of Appeal right in holding that the trial Court was right in coming to the conclusion that the case against the Appellant was established beyond reasonable doubt based on the evidence before the trial court?

C 2. Was the Court of Appeal right in confirming the interpretation of paragraph 3 of Exhibits C1, C2, D and H by the trial court to the effect that the endorsement by the appellant on the Exhibits was confirmation of an earlier oral approval of credit facility granted to the customer on the 24th of May, 1996?

D 3. Was the Court of Appeal right in holding that even though the charge against the appellant was not properly drafted, his conviction could still stand when this would in fact amount to him being convicted for an offence for which he was never charged?

E Before delving into these issues, I think it will be proper to state the facts of the case albeit briefly, as follows-

F The case for the prosecution is that the appellant who was then an Executive Director of Savannah Bank of Nigeria Plc, in charge of Operations was alleged to have approved the granting of an overdraft facility of N14 Million in favour of one Alhaji Gajimi Ibrahim (PW 6), a customer of the Maiduguri branch of the Bank. It was the prosecution's case that P.W.6 travelled to Lagos where he met the appellant in his office and requested for the overdraft facility. It was alleged that the appellant gave oral approval of the facility and thereafter telephoned P.W.3 and P.W.4, the Area Manager in Kano and the Branch Manager in Maiduguri respectively, asking that the overdraft facility be granted against security to be lodged by P.W.6. Later P.W.3 was said to have reduced into writing his discussion with the appellant and faxed same to him in Lagos for a written confirmation. It was the case of the prosecution that the Appellant had no power to lend any amount as there was an embargo on lending by the Bank at the time under its Credit Policy memorandum 119.

H On the other hand, the Appellant maintained that although P.W.6 visited him in Lagos and made a request for an overdraft facility,

no specific amount was discussed as he was unable to communicate with P.W.6 due to language barrier. That he directed P.W.6 to his Branch and that it was P.W.3 and P.W.4 who later communicated to him on telephone the request made by P.W.6, and which request he asked to be put in writing to him. This was done via a fax memo dated 24th May, 1996 from P.W.3 to the appellant. The appellant B endorsed an approval on the fax message and returned same to P.W.3. There was then the issue of whether the fax message from P.W.3 to the appellant was a request for N14 (fourteen) Million or N1.4 (one point four) million, and secondly whether the endorsement of the C appellant on the fax message sent by him on 27th May, 1996 was for a written confirmation of the overdraft he was alleged to have given orally on 24th May, 1996.

Finally the appellant said his authority to lend was conferred by a Board resolution and that he had a lending limit of N1 million D (unsecured) and N2.5 million (secured). That in the instant case he approved the sum of N1.4 (one point four) million overdraft facility for P.W.6 and directed that security be obtained for this facility. It was his case that P.W.3 and P.W.4 conspired with P.W.6 to give an overdraft facility of N14 Million to P.W.6 and that the disbursement E was in fact made before he approved any sum at all to P.W.6.

As stated above, the learned trial judge reviewed the evidence before the Tribunal, believed the prosecution witnesses and disbelieved the appellant who was consequently convicted as "charged." F His appeal to the Court of Appeal was dismissed and he is now before this Court. I shall now proceed to deal with the three issues submitted for resolution in the appellant's brief reproduced above. Issues (1) and (3) will be taken together while issue (2) will be treated separately. G

Issues (1) & (3)

The two issues question the propriety or validity of the charge against the appellant and whether or not the lower courts were right in holding that the case against him was established beyond reasonable H doubt.

As for the charge, Professor Kasunmu S.A.N submitted that section 19 of Decree No. 18 of 1994 under which the Appellant was charged created four distinct offences as follows-

(a) Grants

- (b) Approves the grant
- (c) Is connected with the grant
- (d) Is connected with the approval

He said the charge against the appellant is not in accordance with offences created because instead of charging him with two distinct and separate offences, he was charged with two offences in a single charge i.e. "approving the grant and granting." That for the charge to have succeeded, the prosecution must have established that it was the appellant who approved the grant and who also granted or disbursed the sum of N14 Million to the customer. He said the evidence before the Tribunal does not show that the grant or disbursement was made in accordance with the alleged approval of the Appellant, and it was therefore wrong to have convicted him as charged i.e. for approving and granting. That it was a serious misdirection by the Tribunal when it stated on page 153 of the record that-

"Now in his address, Mr. Gana submitted and I agree with him, that it is important to note that the accused person is not being charged with disbursing the sum of N14 Million to P.W.6. The charge is that of approval which was done between 20th May, 1996 and 28th May, 1996. It is therefore immaterial whether the money was actually disbursed or not."

Counsel also referred to page 297 of the record wherein the Court of Appeal confirmed the decision of the Tribunal above and submitted that it was wrong for the Court below to have confirmed the conviction for approving and granting or disbursing. He said the conviction was illogical and wrong and should not be allowed to stand.

Learned counsel further submitted that although the Court of Appeal confirmed the findings of fact by the Tribunal except the finding that the appellant admitted that he approved N14 Million, the court below still went on to hold wrongly that there was sufficient evidence to support the finding that the appellant approved N14 Million to P. W. 6 and not N1.4 Million. He said it was illogical for the court below to conclude that the finding of the Tribunal that the appellant admitted the charge when in fact he did not, did not occasion a miscarriage of justice. That there was no way the Tribunal could not have been influenced by the fact of an assumed admission

in evaluating the evidence led in the case. He referred to pages 293 and 294 of the record.

It was also submitted that having agreed that the appellant did not confess that he approved N14 Million to P.W.6, the question of what amount the appellant approved is not one which should have been determined by reference to credibility and demeanour of witnesses. Because the approval was in writing the lower courts should have been more concerned with the instruments of approval, namely Exhibits C1, C2, D & H. He said the original of the document was never produced by the prosecution and that it was not sufficient for P. W. 3 to have stated that it was he who destroyed the original without stating his reasons for doing so. That the lower courts should have taken this into consideration in deciding whether the prosecution proved its case beyond reasonable doubt and whether it was N14 Million or N1.4 Million that was approved. He said Exhibits C1, C2, D & H are unreliable and should not have been used as the basis in coming to the conclusion that the appellant approved N14 Million and not N1.4 Million. It was contended that the court of appeal erred in holding that it could not review the findings based on these exhibits but must confirm the finding of facts of the Tribunal based on the credibility and demeanour of witnesses when these issues that cannot be determined on credibility and demeanour of witnesses.

Mr. Gana learned counsel for the Respondent in his brief began by first making an apology to the lower courts for his erroneous submissions in those courts that the appellant admitted the charge. He conceded that the appellant never at any time anywhere admitted the charge. That it was never his intention to mislead the lower courts in any way as the error was not deliberate.

It was then submitted that the erroneous submission that the appellant admitted the charge did not occasion a miscarriage of justice because the appellant was never convicted by the Tribunal on the strength of any admission of the charge, and that the Court of Appeal was right when it said further that it is trite that "not all errors committed by a trial judge will lead to setting aside of the judgment." He referred to page 294 of the record. He said the evidence against the appellant is overwhelming apart from the alleged admission. That the Tribunal believed the prosecution witnesses and disbelieved the appellant and this resulted in his conviction. It was also submitted

that the fundamental purpose of a charge is to inform an accused person of the offence or offences against him, so that he knows what case he is to meet and to enable him prepare his defence. That it is evident from the conduct of the appellant in the lower courts that he had no doubt whatsoever in his mind of the offence for which he stood trial and upon which he was convicted. That the appellant did not complain anywhere that he was confused or misled by the charge. On the contrary he defended himself very well. He said the appellant was properly convicted for the offence with which he was charged. It was contended that the appellant has failed to show any special circumstance which would induce this court to interfere with the concurrent decisions of the lower courts.

Now, I have already reproduced the charge against the Appellant above. Section 19 of Decree No. 18 of 1994 under which the charge was laid provides as follows:-

“19(1) Any director, manager, officer or employee of a bank who

(a) Knowingly, recklessly, negligently, willfully or otherwise grants, approves the grant, or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person

(i) without adequate security or collateral, contrary to the accepted practice or the bank’s regulation; or

(ii) with no security or collateral where such security or collateral is normally required in accordance with the bank’s regulations; or

(iii) with a defective security or collateral, or

(iv) without perfecting, through his negligence or otherwise, a security or collateral obtained; or is guilty of an offence under this Decree.”

On a careful reading of the provisions of the Decree above, I have no hesitation in agreeing with Professor Kasunmu S.A.N that four distinct offences are created by the above enactment to wit:

(1) grant

(2) approves the grant

(3) connected with the grant

(4) connected with the approval

The charge against the appellant above reads in part -

“That you... did commit a felony to wit, you approved the granting and granted credit facility of N14M (Fourteen Million) to one Alhaji Gajimi Ibrahim...”

Clearly therefore the appellant was charged with two distinct offences in one single charge. This is wrong and improper. And it is evident from the record that that much was realized by learned counsel on both sides in their addresses at the Tribunal. The best thing that the prosecution would have done at that stage, which was before judgment, was to have applied to the court to have the charge amended. The court may also amend the charge as well at that stage. This was never done. And in its judgment, the Tribunal on page 153 held thus -

“Now, in his address, Mr. Gana submitted and I agree with him that it is important to note that the accused person is not being charged with disbursing the sum of N14 Million to P.W.6. The charge is that of approval which was done between 20th May, 1996 and 28th May, 1996. It is therefore immaterial whether the money was actually disbursed or not... As Mr. Gana rightly submitted the mere fact that you approve the grant constitutes the offence whether the sum approved was actually disbursed or not.”

The Court of Appeal agreed with what the Tribunal said above when it stated in its lead judgment on page 297 of the record that;

“I am of the firm view that even though the appellant is charged with “granting and approving the grant” as one, even though they constitute two distinct offences under the Decree, if the prosecution as in this case, proves one of the offences under the Decree against the appellant, he can be convicted for that offence. In the present appeal, the lower court rightly held that the offence of approving the grant of credit facility of N14 Million to P.W.6 was proved against the appellant and that it is immaterial whether the sum so approved was disbursed or not. I am of the view that the appellant was not misled by the charge neither has any miscarriage of justice occurred.”

I agree completely.

In cases of this nature, the guiding principle is whether the accused is misled, embarrassed or prejudiced by the charge as framed. If he is misled by the charge then it follows that he is equally misled in his defence. And if he is misled in his defence, it is my respectful view

that there must as a result be a failure or a miscarriage of justice. That is not the position here. Reading through the record there is no iota of evidence whatsoever that the appellant was misled or prejudiced or embarrassed in any way. Rather the record shows that he appeared to have appreciated the charge in all its ramifications. In other words although the charge herein is bad for duplicity, it is not in my view fatal to the conviction of the appellant who was not prejudiced in any way, and where no miscarriage or failure of justice is shown to have occurred bearing in mind the fact that he was only convicted on one count only. A conviction will certainly not be quashed or a trial declared a nullity merely on the ground of a patent duplicity in a charge unless a miscarriage or failure of justice has occurred thereby. See for example R. v. Asiegbu 3 W.A.C.A. 142, R. v. Kalle 3 W.A.C.A. 197, Okeke v. Police 12 W.A.C.A. 363, R. v. Osakwe 12 W.A.C.A. 366; R. v. Thompson 9 C.A.R. 252). I have said enough.

On whether or not the case against the Appellant was proved beyond reasonable doubt, the main grouse here is that the Court of Appeal having agreed that the appellant never admitted during trial that he approved N14 Million for PW.6, and that the Tribunal was in error in so holding, the court of appeal wrongly concluded that the finding did not occasion a miscarriage of justice.

I have already referred to the apology offered above by learned counsel for the Respondent regarding the alleged admission. I have myself read through the record in this case and I am inclined to agree with the court of appeal that the Tribunal never relied on the alleged admission in arriving at its conclusion to convict the appellant. The Court of Appeal had this to say on the point in its lead judgment on page 294 of the record -

“However, the issue is what is the effect of this perverse finding on the judgment of the trial court?”

It is trite law that it is not all errors committed by a trial judge that will lead to a setting aside of the judgment. In the present appeal the learned trial judge had already come to the conclusion that the appellant approved the sum of N14 Million instead of N1.4 Million he claimed before making the finding complained of. In fact, the said finding is at the last but two paragraphs of the judgment at page 154 of the record. In other words, I am of the firm view that despite the

said finding there is sufficient evidence to support the finding by the learned trial judge that what the appellant approved for PW.6 is N14 Million and not N1.4 Million. That being the case, it is my view that the said finding has not resulted in a miscarriage of justice to necessitate the judgment of the Court being set aside on that ground alone.”

I think the Court of Appeal is right.

The other point raised is whether in the absence of the original fax copy of Exhibits C1, C2, D & H (photocopies), the Tribunal could have properly proceeded to rely on the testimonies of PW.3, P. W. 4 and PW.6 to found that the appellant approved N14 Million and not N1.4 Million. Again on this point the Court below said -

“I do not agree with the submission of learned counsel for the appellant that the issue of the amount approved by the appellant could only be proved by the production of the original fax message in view of the findings made by the learned trial judge.

Both parties are agreed that the court did find as a fact that the principal characters in the drama are PW.3, PW.4, PW.6 and the appellant. Following the absence of the original fax message and in view of the discrepancy in the figure of the loan approved, the only way to resolve the issue was by examining the evidence of these witnesses and deciding on who to believe after watching them testify. The essential issue before the Tribunal is whether the appellant approved N14 Million or N1.4 Million and resolving it the learned trial judge believed the evidence of the prosecution witnesses and disbelieved that of the appellant. I am of the firm view that the trial judge is right in so doing having regard to the state of the law as stated in many cases including SUGH v. THE STATE (1988) 2 NWLR (pt. 77) 475.”

I think the Court of Appeal is again right. The fact was that PW.3 who wrote the fax message told the Tribunal that he destroyed the original. Again, the beneficiary of the credit facility PW.6 has told the Tribunal that appellant approved N14 Million for him which he collected from the Maiduguri Branch of the Bank and which he had since paid back. In the presence of the principal characters in the person of PW.3, PW.4 and PW.6, the Tribunal needed not to have

bothered with Exhibits C1, C2, D & H which were exactly the same except for the figure “N14 M” in Exhibit D to make it appear that the sum approved was N1.4 Million instead of N14 Million in others.

I therefore resolve that the Court of Appeal was right in holding that although the charge against the appellant was bad for duplicity his conviction was proper. The Court of Appeal was also right in holding that the tribunal was right in coming to the conclusion that the case against the appellant was proved beyond reasonable doubt. I am unable to find anything on the record which suggests that the appellant was convicted for an offence for which he was not charged. Rather the evidence galore that the appellant was properly and rightly convicted for the offence of approving the overdraft facility of N14M. He was never convicted of granting or disbursing the loan itself, even though the Tribunal erroneously recorded on page 154 this: **“Accused person convicted as charged.”** This is wrong because the Tribunal had held earlier on page 153 of the record that it agreed with Mr. Gana for the Respondent that the Appellant was not being charged with disbursing the sum of N14M. I think that was proper. You may say this is not the proper way to amend a charge, and you will be right. Issues (1) & (3) are therefore resolved against the appellant.

ISSUE (2)

The complaint here is whether or not the Court of Appeal was right in confirming the interpretation of paragraph 3 of Exhibits C1, C2, D & H by the Tribunal to the effect that the endorsement by the Appellant on the Exhibits was a confirmation of an earlier oral approval of credit facility granted to the customer (P.W.6) on 24th May, 1996.

The fax message in these Exhibits reads as follows -

“TOD of N14M to Alh. G. Ibrahim Maiduguri Branch.

We discussed the TOD request of Alhaji Gajimi Ibrahim of our Maiduguri Branch

2. The Branch Manager, has confirmed the receipt of two title documents, one of his personal house and the second his live horse. They are worth more than the exposure. I have asked him to obtain his personal guarantee in addition.

3. Please confirm your action in approving this TOD of N14 M for a week, payable by 30th May, 1996.

4. Regards Alhaji S. Allah-Kaye 24/5/96.

The endorsement by the accused reads as follows -

“CC: AGM [N]

Approved for three days effective today

ORE ONAKOYA

Executive Director

27/5/96”

I must have already answered this question in my consideration of issues (1) and (3) above, particularly in relation to the crucial effect of the evidence of star prosecution witnesses P.W.3, P.W.4 and P.W.6 which the learned trial judge accepted and heavily relied upon.

The learned trial judge found as a fact that the approval given by the appellant was for N14 Million and not N1.4 Million and that the approval by the appellant though dated 27/5/96 was to confirm the oral approval he gave on 24/5/96. This finding was based on the evidence of the prosecution witnesses and not on any alleged admission by the appellant.

The Court of Appeal on page 297 of the record said -

“It must be noted that the learned trial judge had believed the evidence of the prosecution witnesses as against that of the appellant. The believed evidence of prosecution witnesses include the evidence of oral approval proceeding the written one (meaning the endorsement above). I agree with the trial judge that the words “Please confirm your action” (see paragraph 3 above) refers to the oral approval earlier given. So the Court’s finding cannot be said to be perverse.” (Words in bracket supplied by me)

The Tribunal had earlier on page 151 of its judgment held thus-

“Contrary to the submissions of learned counsel for the accused person, it is evidently clear from the 3rd paragraph of Exhibits C1, C2, D & H which reads “Please confirm your action in approving this TOD of N14M (or N1.4M) for a week payable by 30th May, 1996,” that P.W.3 was asking for a written approval to cover an earlier approval on the telephone from the accused person. I have also critically examined Exhibits C1, C2, D & H and I have no doubt whatsoever in my mind, that a dot was clearly inserted between 1 and 4 (in Exhibit D) to make it appear that the sum approved was N1.4 Million.”

I entirely agree.

I think the Tribunal was right in its interpretation of paragraph 3 of Exhibits C1, C2, D & H above, and the Court of Appeal was equally right in confirming that interpretation. That is what the evidence before the tribunal demanded. I have no reason to interfere.

B Issue (2) is therefore resolved against the appellant.

All the issues having been resolved against the appellant, the appeal fails. It is accordingly dismissed. Conviction and sentence are hereby further confirmed.

C _____

UWAIS CJN

D I have had the opportunity of reading in draft the judgment read by my learned brother Kutigi, JSC. I entirely agree with his reasoning and conclusion. However, I wish to express my opinion on the question of the duplicity of the charge to which the appellant was convicted by the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal (Augie, J).

E Section 19 subsection 1(a), (b) and (c) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree, No. 18 of 1994, as amended, provides as follows:-

“19.(1) Any director, manager, officer or employee of a bank who

F (a) knowingly, recklessly, negligently, willfully or otherwise grants, approves the grant, or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person

(i) without adequate security or collateral, contrary to the accepted practice or the bank’s regulations, or

G (ii) with no security or collateral where such security or collateral is normally required in accordance with the bank’s regulations, or

(iii) with a defective security or collateral, or

(iv) without perfecting, through his negligence or otherwise, a security or collateral obtained; or

H (b) grants, approves the grants, or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility which is above his limit as laid down by law

or any other regulatory authority or the bank’s regulations; or

(c) grants, approves the grant, or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility to any person in contravention of any law for the time being in force, any regulation, circular, or procedure as laid down, from time to time, by the regulatory authorities or by the bank ...” B

C It is clear from the provisions that under paragraph (a), the bank official concerned must act either “knowingly, recklessly, negligently, willfully or otherwise” in connection with granting or approving the grant of “a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person” before he will be liable under section 19 subsection (1) (a) of the Decree. This is not enough, however, as the official must have done the act in one of four ways, namely -

(i) Without adequate security or collateral, contrary to the D accepted practice of the bank concerned or the bank’s regulations.

(ii) With no security or collateral where such security or collateral is normally required in accordance with the bank’s regulation.

(iii) With defective security or collateral.

(iv) Without perfecting, through his negligence or otherwise E a security or collateral obtained.

F Under paragraph (b) the bank official concerned must have granted or approved the grant or is otherwise connected with the grant or approval of a loan an advance, a guarantee or any other credit facility which is above his limit as laid down by law or any other regulatory authority or the bank’s regulation. It is significant to note that under this paragraph the official need not act either “knowingly, recklessly, negligently, willfully or otherwise” because the offences under paragraphs (a), (b) and (c) of section 19 subsection (1) of the G Decree are disjunctive by reason of the semi-colons and the word “or” at the end of each paragraph - see section 18 subsection (3) of the Interpretation Act, Cap. 192 of the Laws of the Federation of Nigeria, 1990, which provides as follows:-

H “18 (3) The word “or” and the word “other” shall, in any enactment, be construed disjunctively and not implying similarity.”

Under paragraph (c) the bank official concerned must have granted or approved the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other

credit facility to any person in contravention of any law for the time being in force, any regulation, circular, or procedure as laid down, from time to time, by the regulatory authorities or by the bank.

One common thread through all the different offences created under paragraphs (a) (b) and (c) is that the official of the bank concerned must be connected one way or the other with the granting or approving the grant or otherwise connected with the approval of a loan, an advance, a guarantee or any other credit facility.

The Appellant here was charged before the Tribunal as follows:

“That you Oreoluwa Sylvester Adedeji Onakoya, male, while being a Director of Savannah Bank of Nigeria Plc, in Lagos between 20th May 1996 and 18th May 1996 committed a felony to wit: you approved the granting and granted credit facility of N14 Million (Fourteen Million Naira) to one Alhaji Gajimi Ibrahim a customer of the Maiduguri Branch of Savannah Bank of Nigeria Plc particularly Memorandum 119. You thereby committed an offence contrary to sections 19(1)(a), (b) and (c) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 as amended and punishable under section 20(1)(a) of the same Decree.”

Now, it is clear, as contended, by Professor Kasunmu, learned Senior Advocate, for the Appellant, that the appellant was charged with both approving the grant of the loan of N14 million to Alhaji Gajimi Ibrahim and granting the loan. These are two distinctive offences under section 19 subsection (1) of Decree No. 18 of 1994. Learned counsel submitted that the appellant should have been charged of two separate counts, one count dealing with the approval and the other with the granting of the loan. In other words the charge was bad for duplicity.

The charge also stated that the appellant “committed an offence contrary to sections 19(1)(a)(b) and (c) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 as amended...” In effect the appellant was said to have committed the two distinct offences under paragraphs (a), (b) and (c) of subsection 1 of section 19. But we are not here concerned with this aspect of the case because at no time did the appellant complain about this particular duplicity and we are inhibited from making a case for him. His sole complaint is about the allegation of approving

the grant and the granting of the loan in question. Neither in the appellant’s brief of argument nor in his counsel’s oral argument was this point raised. I am bound, therefore, not to say more on the point.

Again the appellant has not complained about the charge being uncertain or having been embarrassed by the duplicity. This is borne out by the third issue for determination formulated in the appellant’s brief of argument as follows:-

“(iii) Was the court of Appeal right in holding that even though the charge against the appellant was not properly drafted, his conviction could still stand, when this would in fact amount to him being convicted for an offence for which he was never charged.”

Now on the issue of duplicity it is settled that where there is a duplicity of charge an Appeal Court will not interfere with the finding of the trial court unless there is a substantial miscarriage of justice - See *R. v. Kalle* 3 W.A.C.A 197; *Ogbebor v. Commissioner of Police* 13 W.A.C.A. 22 and *Guduf v. Commissioner of Police* 1960 NRNLR 69. Section 156 of the Criminal procedure Act, Cap. 80 of the Laws of the Federation of Nigeria, 1990 provides:-

“156. For every distinct offence with which any person is accused there shall be a separate charge and every such charge shall be tried separately except in cases mentioned in sections 157 to 161 of this Act.”

Commenting on the effect of misjoinder contrary to the provisions of this section, the learned authors of the work - *The Criminal Law and procedure of the Six southern States of Nigeria*, 2nd Edition, state as follows on page 310 thereof:-

“...On the other hand, duplicity in a single charge or count though equally forbidden by section 156, has not invariably been treated as fatal to a conviction where no miscarriage of justice has occurred: See Section 322. The distinction seems to be that an improper joinder of charges is absolutely prohibited, whereas the inclusion in one charge or count of two or more offences for which separate charges or counts might properly be joined is no more than an irregular way of achieving a permissible result.”

I quite agree. The learned authors also stated on pp. 321 - 322 as follows:-

“If objection is not taken to a charge on the ground of duplicity, and no miscarriage of justice has occurred, a conviction will

not be quashed merely on the ground of duplicity: *Okeke v. Police* (1948) 12 W.A.C.A. 363; *R. v. Osakwe* (1948) 12 W.A.C.A. 366. The same applies to an objection for vagueness: *Omisade and others* (1964) N.M.L.R. 67; (1964) 1 All N.L.R. 233. The decision in *R. v. Achie* (1947) 12 W.A.C.A. 209, that where a charge is bad for duplicity the trial is a nullity has not been followed in subsequent cases and is inconsistent with the earlier decisions in *R. v. Asiegbu* (1937) 3 W.A.C.A. 142, and *R. v. Kalle* (1937) 3 W.A.C.A. 197. Where, however, the judge fails to direct his mind to the several issues involved and to give separate consideration to each, the conviction may be quashed notwithstanding section 168; *R. v. Aniemake* (1961) 1 All N.L.R. 43. Where the accused was charged with obtaining money by false pretences and the evidence showed that he obtained a cheque, it was held that as he did not object to the charge, the objection was cured: *Macaulay v. Police* (1954) 14 W.A.C.A. 546. On a charge alleging that the accused did demand or accept a reward, contrary to section 99 of the Criminal Code, it was held that the words “demand or,” which do not appear in the section creating the offence, might be treated as superfluous: *R. v. Osakwe, supra.*”

In the present case, throughout the trial before the Tribunal, the Appellant, as accused person, had presented his defence on the basis that he did not approve the loan in question beyond his authority. He admitted in his testimony that he approved the request for N1.4 million. The learned trial judge observed as follows on p. 114 of the record of appeal -

“There is equally no dispute as to the fact that the accused person approved the grant of a credit facility to P.W.6, what is in dispute however is - how much was approved by the Accused person?”

At the end of the trial the learned trial judge found the appellant guilty as follows:-

“I am therefore satisfied from the totality of the evidence before me that the prosecution has established the case against the accused person and proved beyond reasonable doubt that the accused person approved a credit facility of N14 Million to one Alhaji Gajimi Ibrahim without lawful authority and also in contravention of the lending rules and regulations in force at the time in Savannah Bank. Consequently, I find the accused person guilty as charged and convict him accordingly. That is the judgment of this Tribunal.”

It can be seen that although the charge alleged approval of granting of loan and the grant of loan, as complained by the appellant, the conviction was based on approving grant of the loan and not the grant. The defence of the appellant was purely against the charge that he approved the loan. In the circumstances, I am satisfied that the appellant was not misled by the duplicity of the charge and he was not convicted of an offence of which he was not sure nor failed to meet at the trial. I am convinced that no miscarriage of justice had been occasioned in this case.

Accordingly, I too will dismiss the appeal and affirm the decision of the Court of Appeal which had confirmed that of the trial court.

KALGO JSC

I have had the opportunity of reading in draft the judgment of my learned brother Kutigi JSC in this appeal. I entirely agree with his reasoning and conclusions. I find no merit in this appeal and I dismiss it.

The issues which arose for determination in this appeal are:-

(i) “Was the Court of Appeal right in holding that the trial court was right in coming to the conclusion that the case against the appellant was established beyond reasonable doubt based on the evidence before the trial court.

(ii) Was the Court of Appeal right in confirming the interpretation of paragraph 3 of Exhibit C1, C2, D and H by the trial court to the effect that the endorsement by the appellant on the Exhibits was confirmation of an earlier oral approval of credit facility granted to the customer on the 24th of May 1996.

(iii) Was the court of appeal right holding that even though the charge against the appellant was not properly drafted, his conviction could still stand when this would in fact amount to him being convicted for an offence for which he has never charged”.

Issues (i) and (ii) pertain to whether the case against the appellant based on the evidence before the trial court was established or proved beyond reasonable doubt. My learned brother Kutigi JSC has exhaustively dealt with these issues in the leading judgment and I do not think that there is anything useful I can add to that. I have

read the proceedings of the trial court and it appears to me clearly that the evidence therein fully supported the conviction of the appellant.

Issue (iii) alleged that the charge against the appellant was not properly drafted so much so that if the conviction was allowed to stand it would amount to the appellant being convicted for an offence for which he was never charged. This issue, in my respectful view, is not saying that the appellant was charged with so many offences in an inelegant charge or charges rather it was saying that the appellant was convicted of an offence for which he was never charged. But the arguments of learned counsel for the appellant in support of this issue, in his brief, clearly pointed to the issue of the appellant having been charged with two distinct offences in one charges. Learned counsel earlier set out the provisions of Section 18 of Decree No. 18 of 1994 under which the charge was laid and said on page 12 of the brief:-

“The first point to observe is that by framing the charge as above, the charge is not in accordance with the offence created, for instead of charging him of two distinct offences, he is being charged with one i.e. approving the grant and granting”.

The ground of appeal number 4 in to appellant’s notice of appeal to this court, from which this issue was distilled, is clearly in support of the charge being defective in that it charged the appellant of “approving the grant and granting”, the alleged facility. This constituted two separate offences being charged in one count, and conviction of the appellant by the trial court as confirmed by the Court of Appeal, according to the learned counsel for the appellant, cannot stand.

What the learned counsel for the appellant is saying even though he did not say so specifically is in ordinary legal parlance referred to as duplicity in the charge. A charge which contains two or more separate offences lumped together, is bad for duplicity and a conviction on such a charge cannot ordinarily stand. See *E. Orumah v. Medical Officer of Health* (1967) NMLR 258; *R. v. Archie* (1947) 12 W.A.C.A. 209. But this general rule has its exceptions and limitations, depending on the circumstances of each particular case.

The charge under which the appellant was tried and convicted reads:-

“That you Oreoluwa Sylvester Adedeji Onakoya (male) while being a Director of Savannah Bank of Nigeria Plc in Lagos, between

20th may 1996 and 28th May 1996 did commit a felony to wit you approved the granting and granted credit facility of N14M (fourteen Million naira) to one Alhaji Gajimi Ibrahim a customer of the Maiduguri branch of the Savannah Bank of Nigeria Plc without Lawful authority and in violation of lending Rules and regulations in force at the time in Savannah Bank of Nigeria Plc particularly memorandum 119. You thereby committed an offence contrary to sections 19(1) (a)(b) and (c) of the Failed Banks (Recovery of Debts) and Financial Mal-practices in banks Decree No. 18 of 1994 as amended and punishable under Section 20(1)(a) of the same decree.”

Section 19 of the Failed Bank (Recovery of Debts) and Financial Mal-practices in Banks Decree No, 18 of 1994 as amended (hereinafter referred to as the Failed Bank Decree) provides:-

“19(1) Any Director, Manager, officer or Employee of a bank who

(a) knowingly, recklessly, negligently, willfully, or otherwise grants, approves the grant, or is otherwise connected with the grant of approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person

(i) without adequate security or collateral, contrary to the accepted practice or the bank’s regulations, or

(ii) with no security or collateral where such security or collateral is normally required in accordance with the bank’s regulations or

(iii) with a defective security or collateral, or

(iv) without perfecting, through his negligence or otherwise, security or collateral obtained or

(b) grants, approves the grant, or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility which is above his limit as laid down by law or any other regulatory authority or the bank’s regulations or

(c) grants, approves the grant, or is otherwise connected with the grant or approval of a loan an advance a guarantee or any other credit facility to any person in contravention of any law for the time being in force, any regulation, circular, or procedure as laid down, from time to time, by the regulatory authority or by the bank is guilty of an offence under this decree”.

From the provisions of Section 19 above, it is very clear that

it was subdivided into 3 parts: (a), (b) and (c) and each part creates the offences of -

- i. granting
- ii. approving the grant;
- iii. being connected with the grant;

B iv. being connected with the approval of a loan, advance, or guarantee or any other credit facility or financial accommodation.

C It is however important to note that it is only in respect of the first part i.e. Section 19 (1) (a) that the mode of committing the offence was described as “Knowingly, recklessly, negligently or willfully”. These words are not applicable to Section 19(1)(b) or (c). This is because, as is also clear from the wording of Section 19, each of part (a), (b) or (c) is a separate compartment divided or separated by the word “or”. This means that each and every part of (a), (b) or (c) stands by itself.

D I now return to the charge set out earlier in this judgment. There is no doubt that the appellant was charged with having committed “an offence” contrary to Sections 19 (a), (b) and (c) of the Failed Bank Decree. And although the prosecution referred to this as one offence, there are in fact 12 offences involved but the body of the charge clearly indicated that the appellant was charged with only two offences of “approving and granting” the credit facility. This charge comes within the provisions of Section 19 (b) of the said Decree as I shall explain later in this judgment.

F On page 44 of the record, the charge was read and explained to the appellant in the presence and consent of his counsel, and the appellant said:

“I understand the meaning of the fresh charge read and explained to me and I plead not guilty”.

G The trial proceeded and at the end of it all, the learned trial judge Augie J. found the appellant guilty of the charge and convicted him accordingly. This was confirmed by the Court of Appeal after which the appellant came here.

H From the evidence produced at the trial and the findings of the learned trial judge in her judgment which was upheld by the Court of Appeal, it is abundantly clear that the appellant as an Executive Director of a Bank - the Savannah Bank, did approve a credit facility of N14 million to P.W. 6 customer of the bank without lawful

authority and in contravention of the lending rules and regulations of the said bank at the material time. This fact has not been successfully challenged in the trial court or the Court of Appeal and in this court I see no substantial reason to interfere with it, having regard to the evidence on the record.

At the end of her judgment the learned trial judge had this B to say:-

“I am therefore satisfied from the totality of the evidence before me that the prosecution has established the case against the accused person and proved beyond reasonable doubt that the ac- C cused person approved a credit facility of N14 million to one Alhaji Gajimi Ibrahim without lawful authority and also in contravention of the lending rules and regulations in force at the time in Savannah bank”.

Now, with the classification of the offences under Section D 19 *ibid* which I made earlier and having regard to the evidence of the prosecutions and the findings of the learned trial judge. I have no doubt in my mind that the offence of the appellant as proved, comes within the provisions of part (b) of Section 19 *ibid*. This deals E with credit facility which is above his limit as laid down by Exhibit A the bank’s regulations. See Exhibit A (memorandum 119) and the evidence of P.W. s 1 and 2. Under Section 19(1)(b) there is no requirement to allege “Knowingly, recklessly, negligently or willfully” in the charge. None of them is contained in the charge under consid- F eration. But it is true to say that of the 4 offences created by S. 19(1) (b), the charge against the appellant contained 2 of them. And as each of them constitutes a distinct and separate offence, the charge may be bad for duplicity. But as I said earlier in this judgment, it is not always or in all criminal cases that a conviction on a charge which G contains two or more charges will be set aside or quashed, unless it can clearly be shown that the accused or the person convicted was prejudiced, embarrassed or misled by the defect in the charge and the conviction has occasioned a miscarriage of justice. See *Onasile v. Sani & Anor* (962) 1 All NLR 272, *Okeke v. Commissioner of Police* H (1948) 12 W.A.C.A. 363; *R. v. Thompson* 9 Crim - App. R. 252; *R. v. Robertson* (1936) 25 Cr. App. R. 208.

I have earlier referred to page 44 of the record where the charge was read out and explained to the appellant and he said he

understood its meaning before he pleaded not guilty. The charge was read with the approval of his counsel who was in court throughout the trial and did not raise any objection to the charge although he is not bound to do so. The appellant has also fully defended himself by testifying himself and calling one witness in his support. He was fully apprehensive of the charge against him and from the nature of his defence, he was not embarrassed or misled in any way by the charge. The charge was simple; it was for “approving and granting” the loan facility to P.W.6 and the appellant’s defence was to the effect that he only approved N1.4 million and not N14M to P.W. 6 and that he did not disburse or grant the money to him. So the question of misleading him or embarrassing him by the charge did not arise. The only question is whether his conviction on the charge as it is can stand having regard to the provisions of Section 156 of Criminal Procedure Act which prohibits the lumping of two or more distinct offences in one charge.

In the instant case, the two offences lumped together in the charge are “approving and granting” the credit facility N14 million to P.W.6. There is ample evidence which was accepted by the trial judge to the effect that the appellant approved the credit facility of N14 million against the bank regulations, and found accordingly. And the Court of Appeal per Onnoghen JCA and concurred by Oguntade and Aderemi JJCA said:

“I am of the view that even though the appellant is charged with ‘granting and approving the grant’ as one even though they constitute two distinct offences under the Decree, if the prosecution as in this case, proves one of the offences under the Decree against the appellant, he can be convicted for that offence. In the present appeal, the lower court rightly held that the offence of approving the grant of credit facility of N14 million to P.W. 6 was proved against the appellant and that it is immaterial whether the sum so approved was disbursed or not. I am of the view that the appellant was not misled by the charge neither has any miscarriage of justice occurred”.

I entirely agree with the court of appeal in the circumstances of this case. I am satisfied that from the evidence in this case as accepted and believed by the learned trial judge and the nature of the charge under the Failed Bank Decree and considering the aims and objectives of the Decree itself, there is no miscarriage of justice arising

from the conviction of the appellant in this case. It is also my view that to interfere with the conviction on the ground that the charge is bad for duplicity will amount to technical justice. This court has moved away from justice on grounds of technicality and has settled this in many decided cases.

Duplicity is a matter of procedure or form and not evidence. See *R. v. Greenfield* (1973) 57 Cr. App. R. 849. It is covered by Section 156 of the Criminal Procedure Act which provides in part:

“For every distinct offence with which any person is accused there shall be a separate charge ...”

It is therefore a matter of procedure and not law. This court in the case of *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (pt. 135) 688 at 717 had this to say:-

“As we have stated several times, the days when parties pick their way in this court though naked technical rules of procedure the breach of which does not occasion a miscarriage of justice are fast sinking into the limbo of forgotten things. The court now takes the view that not every slip is fatal to the cause of justice. Judges are not omniscient robots which never deviate from a programmed course. They sometime slip. But only those slips that have been shown to have affected the decision appealed against will amount to a substantial misdirection which will result in the appeal being allowed. See on this *Onojobi v. Olanipekun* (1985) 11 SC (pt. 11) 156 at 163; also *Jude Ezeoke & Moses Nwagbo & Anr* (1988) 1 NWLR (pt. 72) 616 at 626”.

Also in the case of *Obakpolor v. State* (1991) 1 NWLR (pt. 165) 113 in an appeal against the conviction for murder this court dealt with the question of the failure of the magistrate who conducted the preliminary inquiry in the case and committed the appellant for trial to comply with Section 314(1) of the C.P.A., and held that even though there was procedural irregularity in not complying with the said section there was no miscarriage of justice and the appeal was dismissed. On page 129 of the report, Akpata JSC who wrote the leading judgment said:-

“That there was procedural irregularity is not in doubt. It is however an irregularity which has not led to a miscarriage of justice... It is the paramount duty of courts to do justice and not cling to technicalities arising from statutory provisions or technicalities inherent

in rules of court. So long as the law or rule has been substantially complied with and the object of the provisions of the statute or rule is not defeated and failure to comply fully has not occasioned a miscarriage of justice; the proceedings will not be nullified”.

B I adopt these dicta and apply them to this case. I find that no miscarriage of justice has been shown in this case and that the appellant was not prejudiced, misled or embarrassed by the charge of which he was convicted, to justify allowing the appeal and quashing the conviction.

C For what I have said above and the more detailed reasons given by my learned brother Kutigi JSC in his judgment, I find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal upholding that of the trial judge.

D _____
OGUNDARE JSC (DISSENTING)

E I have read in advance the judgment of my learned brother Kutigi J.S.C. just delivered. I regret I am unable to accede to the conclusion he has reached that this appeal be dismissed.

The appeal raises the question of the effect of a charge that is bad for duplicity.

F The Appellant at all times material to this case was an Executive Director in the Savannah Bank of Nigeria Plc. He was tried before the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal on a one-count charge which read:

G “That you Oreoluwa Sylvester Adedeji Onakoya (Male) while being a Director of Savannah Bank of Nigeria Plc. in Lagos, between 20th May 1996 and 28th may 1996 did commit a felony to wit you approved the granting and granted credit facility of N14m (Fourteen million naira) to one Alhaji Gajimi Ibrahim a customer of the Maiduguri branch of the Savannah Bank of Nigeria Plc without lawful authority and in violation of lending rules and regulations in force at the time in Savannah Bank of Nigeria Plc particularly memorandum 119. You thereby committed an offence contrary to sections
H 19(1)(a)(b) and (c) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 as amended and punishable under section 20(1)(a) of the same decree.”

It was contended in the Court of Appeal that the charge was bad for duplicity and should be struck out. The Court of Appeal, per Onnoghen JCA, opined-

“It is clear from the facts of this case and the findings of the lower court that though the appellant was charged with two offences as one, the prosecution proved one of the offences and failed to prove the other. B

Now section 19(1) of Decree No. 18 of 1994 as amended, under which the appellant was charged provides that any director, manager, officer, or employee of a bank, who knowingly, recklessly, negligently, wilfully or otherwise grants, approves the grant, or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person in any of the circumstances specified under subsections (i) to (iv) of section 19(1)(c) of the said Decree is guilty of an offence under that Decree. D

E I am of the firm view that even though the appellant is charged with ‘granting and approving the grant’ as one even though they constitute two distinct offences under the Decree, if the prosecution as in this case, proves one of the offences under the Decree against the appellant, he can be convicted for that offence. In the present appeal, the lower court rightly held that the offence of approving the grant of credit facility of N14 million to P.W.6 was proved against the appellant and that it is immaterial whether the sum so approved was disbursed or not. I am of the view that the appellant was not misled by the charged (sic) neither has any miscarriage of justice occurred, (sic)” F

The same issue has now been raised before this court.

Now, section 19(1)(a)(b) and (c) of the Decree No. 18 of 1994 under which the charge was laid provide: G

“19. (1) Any director, manager, officer or employee of a bank who

(a) knowingly, recklessly, negligently, wilfully or otherwise grants, approves, the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person H

(i) without adequate security or collateral, contrary to the accepted practice or the bank’s regulations, or

(ii) with no security or collateral where such security or collateral is normally required in accordance with the bank's regulations, or

(iii) with a defective security or collateral, or

(iv) without perfecting, through his negligence or otherwise, a security or collateral obtained, or

(b) grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility which is above his limit as laid down by law or any regulatory authority or the bank's regulations; or

(c) grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility to any person in contravention of any law for the time being in force, any regulation, circular, or procedure as laid down, from time to time, by the regulatory authorities or by the bank; or is guilty of an offence under this Decree."

And section 20 (1) which provides for punishment reads:

"20 (1) A person who commits an offence under section 19 of this Decree is liable on conviction, subject to subsection (4) of this section, in the case of an offence.

(a) under subsection (1)(a), (b) or (c) of that section, to imprisonment for a term not exceeding 5 years without an option of a fine:

(b) under subsection (1)(d) or (e) of that section, to imprisonment for a term not exceeding 3 years without an option of a fine.

(c) under subsection (2) of that section, to imprisonment for a term not exceeding 3 years without an option of a fine."

In examining the provisions of section 19(1) it will be observed that paragraph (a) creates several distinct offences of knowingly, recklessly, negligently, willfully or otherwise grants, approves the grant, otherwise connected with the grant, otherwise connected with the approval of (a) a loan; (b) an advance, (c) a guarantee, or (d) any other credit facility or financial accommodation, to any person -

1. without adequate security or collateral...,

2. with no security or collateral...,

3. with a defective security or collateral; or

4. without perfecting... a security or collateral obtained.

There are at least 50 separate and distinct offences created

by this paragraph alone. It is a serious violation of section 156 of the Criminal Procedure Act, Cap 80 Laws of the Federation of Nigeria, 1990 (applicable to the proceedings before the Tribunal) to charge a defendant in one count with all these offences, as was done in this case.

Each of paragraphs (b) and (c) also creates several distinct offences. It is equally wrong to charge a defendant with all those offences in one charge.

The case here is made worse in that the one count charged the appellant under all the three paragraphs together. And to make matters still worse, the charge does not contain the mens rea. The offences created in section 19(1) are not strict offences because the lawmaker provided the required mens rea by the deliberate use of the words "knowingly" "recklessly", "negligently", "willfully" and "or otherwise". And by the use of the word "or" in the subsection, the words of mens rea are disjunctive and it is the one that is applicable to the facts that must be used in the charge. That was not done in this case. In my respectful view, the charge here is not only bad for duplicity; it is bad for uncertainty and lacking in essential particulars. And it is no argument that the Appellant was not embarrassed. The charge, ex facie, creates the embarrassment because it is clearly uncertain what the Appellant was being charged for.

Section 156 of the Criminal Procedure Act provides:

"For every distinct offence with which any person is accused there shall be a separate charge..."

This section prohibits the charging of two or more distinct offences in one count. Where this is done the charge is said to be bad for duplicity. There are Nigerian cases that point to the conclusion that it is not every case of duplicity that leads to the quashing of a conviction. In *R. v. Asiegbu*, 3 W.A.C.A 142, the West African Court of Appeal, per Kingdon CJ (Nigeria) declared:

"...but does lead us to be completely satisfied that the appellant was not prejudiced in any way and that no miscarriage of justice has resulted. The case appears to be on all fours with that of *Rex v. Thompson* (9 Cr. App. Rep. 252) in which the Court of Criminal Appeal in England acted upon the provisions of the English law corresponding to the proviso upon which we are now asked to act."

In *R. v. Kalle* 3 W.A.C.A. 197, on the other hand, the same

West African Court of Appeal quashed conviction. The facts appear in the judgment which, *inter alia*, reads:

“The statement of offence in the first count charges the appellant with having committed two separate offences under different subsections of section 438 of the Criminal Code and then proceeds B in the particulars to set out various specific offences each of which should have been included in a separate count. The plea was taken to a single count including these separate offences. This conviction cannot be supported: though the point was not taken till after verdict C the conviction must be quashed (*R. v. Wilmot* 24 C.A.R. 63).”

In *R. v. Thompson*, 9 Crim. Appeal Reports 252, the facts as appearing in the judgment of Lord Isaac, the Lord Chief justice of England run like this: The Appellant was convicted under the punishment of Incest Act, 1908 (8 Ed. VII. c. 45), of misdemeanors committed with his daughter, who had not, at the date of trial, attained D the age of sixteen years.

The first count in the indictment charged him with having committed the offences “on divers days between the month of January, 1909, and the 4th day of October, 1910”, the girl then being under the age of thirteen years.

E The second count charged him with having committed offences “on divers days between the 4th day of October, 1910, and the end of February, 1913”.

F He appealed upon the ground that the indictment was bad for duplicity, or, in other words, that more than one offence was charged in each of the aforesaid two counts of the indictment. The Lord Chief Justice observed at pages 259-260 of the Report:

“It was urged before us that a prisoner was entitled to have sufficient notice of each offence charged against him, and that the effect of grouping a number of different offences in one count and G charging the accused with having committed them ‘on divers days’ between certain periods was an objection not merely of form, but one of substance, because it might prejudice the fair trial of the prisoner, but that even if it was only an objection of form it must prevail. In this case, as we have already stated, the prisoner was not in any way embarrassed or prejudiced, and we are of opinion that although H very high authorities have in the past expressed the opinion that, as a matter of law, even two offences of felony could be charged in the

same count (see *Castro v. The Queen*, L.R. 6 App. Cas. (1881), per Lord Blackburn at pp.244 and 245), the practice is uniform and well established, that several offences should not be charged in the same count, and the indictment in this case was irregular for that reason.

We are of opinion that there being a defect on the fact of the indictment, the objection should in strictness be taken before plea, B and therefore the technicality raised by the defence could be met by a technicality raised by the Crown, but this Court will always be very reluctant to lay down any hard and fast rule which would prevent the defence raising any objection based on an irregularity or defect in C the proceedings at any time. We do not, therefore, decide that the objection may not be taken at a later period and even after verdict.

The appellant contended that he could take the objection at any time, and could on such an indictment move in arrest of judgment after verdict. No case was cited as an authority for this proposition, D and there are observations to the contrary in *Nash v. The Queen*, 33 L. J. M. C. 94, at p. 97; and 4B & S. 935, at p. 945. It is, however, unnecessary for us definitely to determine this point in view of the conclusion announced by us at the hearing of the appeal.

E We dismissed this appeal on the ground that, even assuming that the objection raised after plea to the defect in the form of indictment was not taken too late, and that the appellant could have moved in arrest of judgment, no substantial miscarriage of justice had occurred, and that we were therefore bound to give effect to F the proviso in sect. 4, sub-sect. 1 of the Criminal Appeal Act, 1907, which is as follows: ‘Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.’ If we G had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form, we should have felt bound to quash the conviction, whatever our views might be as to the merits of the case.”

H The doubt expressed by the Court of Criminal Appeal (England) in the case that -

“We are of opinion that there being a defect on the face of the indictment, the objection should in strictness be taken before plea, and therefore the technicality raised by the defence could be

met by a technicality raised by the Crown, but this Court will always be very reluctant to lay down any hard and fast rule which would prevent the defence raising any objection based on an irregularity or defect in the proceedings at any time. We do not, therefore, decide that the objection may not be taken at a later period and even after verdict.”

has been laid to rest in *R. v. Molloy* 15 Cr. App R. 170; (1921) 2 KB 364. See also *R. v. Asiegbu* (supra) where Kingdon CJ said:

“The fact that no objection was made in the lower court does not preclude an objection being taken here...”

In *R. v. Molloy*, the court of criminal appeal quashed the conviction on the ground that the indictment was bad for duplicity. See also *R. v. Wilmot* 24 Cr. App R 63 where the conviction was quashed because the charge was bad for duplicity, and the numerous cases cited therein illustrating the same view- point. *R. v. Wilmot* was followed by the West African Court of Appeal in *R. v. Kalle* (supra). See also *Ware v. Fox* (1967) 1 All ER 100. The position now in English law is that where a charge is bad for duplicity, the conviction will be quashed as it is said that the issue goes to jurisdiction. And this appears to be now the Nigerian law too. See the dictum of Aniagolu JSC in *Ikomi & Ors v. The State* (1986) 1 NSCC 730, 750 to the effect that -

“FIRSTLY, that the stage at which the motion to quash the indictment in this case was brought, was the proper time to apply to quash, before plea. The obvious reason for this would inevitable end in futility by reason of the fact that, on appeal, the appeal court is bound to hold that a conviction based on such a bad indictment cannot stand. In some cases the entire exercise may founder on a lack of jurisdiction in the trial court.”

In *R. v. Okeke*, 12 WACA 363, the West African Court of Appeal found that there was no embarrassment or prejudice caused to the appellant in the case and dismissed his appeal notwithstanding that the charge was bad for duplicity. In *R. v. Osakwe* 12 W.A.C.A. 366 the Court did not find that the charge was duplicitous.

Perhaps the strongest Nigerian case on the effect of the charge being bad for duplicity is *R. v. Achie* 12 W.A.C.A. 209 where the appellants were charged with two murders in one count. The West African Court of Appeal held at page 211 of the report:

“We are, therefore, of the opinion that in the present case the joinder of two charges of murder in one statement of offence is contrary to the provisions of the Ordinance, that the charge is bad for duplicity, that there was no charge properly before the Court to which the appellants could be called upon to plead and upon which they could be tried. The proceedings were therefore a nullity, and in exercise of the powers conferred upon this Court by section 11(5) of the West African Court of Appeal Ordinance we direct that the appellant be tried by a court of competent jurisdiction. The conviction in the present proceedings are quashed and the sentences set aside.”

In so far as *R. v. Asiegbu* (supra) was decided following *R. v. Thompson* (supra) which no longer represents the law in England I think it should no longer be followed. One difference in the law in England and the law in Nigeria is that whereas in England a charge that is bad for duplicity is an infringement of the Indictment Rules, in Nigeria it is a breach of a statutory provision - section 156 of the Criminal procedure Act and similar provisions in the State Laws. This makes such a breach to have more stringent consequences in Nigeria.

The case that appears to be on all fours with the case on hand in *Orumah v. The Medical Officer of Health* (1967) NMLR 258, a case in the High Court of Mid-West (*Begho J*) (as he then was) where the appellant was charged and convicted in the magistrate’s court on a single count charging him with several offences in section 6(a), (b), (d) and (m) of the Public Health Law 1957. On appeal to the High Court, it was held that it was not in every case of “duplicity” that the court had to ask itself whether the accused was embarrassed by the duplicity or uncertainty of the charge and that the mere fact that an accused gave evidence is not an indication that he was not embarrassed. It was also held that apart from creating duplicity or uncertainty, lumping of several subsections in a single count offends against section 156 of the Criminal procedure Act.

Begho J allowing the appeal and quashing the conviction, held at p. 261, and I agree with him:

“I hold that it is not in every case of ‘duplicity’ that the court has to ask itself whether the accused was embarrassed by the duplicity or uncertainty of the charge the mere fact that an accused gave evidence is not an indication that he was not embarrassed. There

is no yardstick for measuring ‘embarrassment’ due to duplicity or uncertainty of a charge.”

The learned Judge referred to *Ogbebor v. Commissioner of Police* 13 W.A.C.A. 22 where the West African Court of Appeal held there was duplicity but as it had occasioned no miscarriage of justice it was not fatal. Verity CJ (Nigeria) who delivered the judgment of the Court in the latter case had observed that-

“We would further observe that it does not necessarily follow that in every case in which the charge is bad for duplicity there can be no miscarriage of justice and care should be observed by those who institute criminal proceedings to see that charges are properly laid. Such a misjoinder may in other circumstances cause a grave miscarriage of justice.”

The case on hand presents a glaring example of uncertainty in the charge. As I have stated earlier, it lumps in one count the over 60 offences created in subsection (1)(a), (b) and (c) of section 19 of the Decree. To bring home the effect of the uncertainty created in this case, the charge specifically mentioned the Bank’s Memorandum 119 which is Exhibit A in the proceedings. The evidence of PW. 1 (Oluyemi Kuforiji) was that Exhibit A was not applicable to the appellant - an Executive Director. Nor was there evidence of breach of the terms of approval given by the Central bank of Nigeria (the regulatory body) in Exhibit B2. Next, the Respondent fell back on Exhibit D3-D, the lending limits laid down by the board of the bank which shows a lending limit of N2.5 million for secured loans and N1 million for unsecured loans which an Executive Director could approve at the time. If the case for the prosecution was that Appellant approved the grant of a loan without security, he would come under section 19(1) (a). But if the case was that he approved the grant of a loan which was above his limit, he would come under section 19(1)(b). And if it was the case that he approved the grant of the loan in contravention of any circular etc., he would come under section 19(1)(c). But he was charged under section 19(1)(a), (b) and (c) together. The trial Tribunal in its judgment has this to say:

“Section 19(1) of the Decree provides that any director, manager, officer, or employee of a bank, who knowingly, recklessly, negligently, willfully or otherwise grants, approves the grant, or is otherwise connected with the grant or approval of a loan, an advance,

a guarantee or any other credit facility or financial accommodation to any person, in any of the circumstances specified in subsections (i) to (iv) to Section 19(1) of the Decree, is guilty of an offence under the decree. As Mr. Gana rightly submitted, the mere fact that you approve the grant constitutes the offence, whether the sum approved was actually disbursed or not.”

After giving the meanings of the words “knowingly”, “knowingly and willfully”, “recklessly”, “negligently” and “willfully” as set out in Black’s Law Dictionary 6th Ed. the judgment continued:

“The accused person under cross-examination, admitted that he was misled by P. W. 3 & P. W. 4 on the position of the account of PW. 6, in approving the grant of N14 Million. From the totality of the evidence before the Tribunal, there is no doubt whatsoever that whether the accused person was misled or not the fact still remains that the accused person had no lawful authority to approve a credit facility of N14 Million to any person. From the above definition of the words, knowingly, recklessly, negligently, & willfully, it is easy to agree with learned counsel for the prosecution that it was a reckless thing for the accused person as Executive Director to do”.

If a person is misled by someone else into doing something he cannot be said to have acted recklessly as the trial Tribunal seemed to have found. “Reckless” as defined in Black’s Law Dictionary and as set out in the judgment means:

“A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”

There is no scintilla of evidence on record to support the finding that the Appellant acted recklessly in the manner defined above.

In any event, it is not enough to have acted recklessly, for which he was not charged in the only court it must be in the circumstances specified in paragraphs (i) to (iv) of section 19(1)(a). This the Tribunal admitted as much but did not apply its mind to in coming

to the conclusion just quoted above.

It is all this scenario that brings home vividly the confusion into which the trial Tribunal was led by the uncertainty nature of the charge.

The trial Tribunal has not helped the situation either. For in its judgment, it adjudged as follows-

"I am therefore (satisfied) from the totality of the evidence before me that the prosecution has established the case against the accused person and proved beyond reasonable doubt that the accused person approved a credit facility of N14 million to one Alhaji Gajimi Ibrahim without lawful authority and also in contravention of the lending rules and regulations in force at the time in Savannah Bank. Consequently, I find the accused person guilty as charged and convict him accordingly."

Thus the Tribunal convicted the Appellant of all the offences created in Section 19(1)(a), (b) and (c) of the Decree! It is the grave miscarriage of justice occasioned by the defective and uncertain charge that had led the Tribunal into giving this bizarre verdict. By the clause used in the judgment, that is, "without authority and also in contravention of the lending rules and regulations in force at the time in Savannah bank", the Tribunal found in section 19(1)(b) and (c) - all in one count! There was no finding against the Appellant in section 19(1)(a) but was yet convicted under it. What a grave miscarriage of justice!

There is yet another observation. The one count charged the Appellant of a felony. But the Decree did not create a felony. The charge is not only bad for duplicity it is uncertain, it is lacking in essential particulars, that is, the required mens rea and it charges for a felony not created by the Decree. The charge is not just bad, it is incurably bad. This is not a proper case where the court can apply section 26 of the Supreme court act now section 166 of the Criminal Procedure Act.

The net result of all I have been saying above is that I resolve issue (1) in favour of the Appellant. And this is sufficient to decide this appeal. To charge a defendant, in one count, of the offences in section 19(1)(a), (b) and (c) must necessarily prejudice the defendant. I do not consider it necessary to go in detail into the other issues raised in this appeal. I need only say that, like in all criminal cases,

the onus on the prosecution is to prove the guilt of a defendant beyond reasonable doubt. The main issue in dispute in the case on hand was whether the Appellant approved a facility of N14 M (fourteen million Naira) as contended by the prosecution or N1 4M (one million and four hundred thousand Naira) as contended by the defence. The three vital exhibits, C1, C2 and D tendered and said to be copies of the original fax message sent to the Appellant do not tally. Exhibits C1 and C2 gave the figure N14m. but Exhibit D gave the figure N1.4m. The original document which would have been the best evidence to resolve the issue was said to have been destroyed by one of the prosecution witnesses. And yet, the trial tribunal accepted the viva voce of the prosecution witnesses and rejected the evidence of the Appellant and found that the sum approved was N14m. The Court below affirmed this finding. In the absence of the original from which Exhibits C1, C2 and D emanated I would have thought that a tribunal would be circumspect in acting on the viva voce of the relevant prosecution witnesses who were either charged along with the Appellant or detained together before being all left off the hook leaving the appellant alone to face the music. I would be reluctant to say that the case for the prosecution was free of reasonable doubt. A facility of N1.4m. would be within the power of the appellant to approve but not N14m. And the only document to resolve the issue - the original fax message was destroyed by a prosecution witness. Exhibits C1, C2 and D have other differences which only that destroyed document could have resolved. The failure to produce that vital document should have been held against the prosecution that was responsible for its destruction. But it was the defence that, in the end, suffered for its non-production by having the case resolved on "I believe X", "I do not believe Y" syndrome. The defence having been put at a disadvantage in not being able to rely on the destroyed document I would not say that the guilt of the appellant has been proved beyond reasonable doubt. I need also point to a serious misdirection on the part of the trial tribunal. In a passage from its judgment I earlier quoted in this judgment wherein it was stated:

"The accused person under cross-examination, admitted that he was misled by P.W.3 and P.W.4 on the position of the account of P.W.6, in approving the grant of N14 million —"

Appellant made no such admission that he approved the grant of N14 million. Learned counsel for the Respondent conceded as much that the trial tribunal was in error in this regard. I admire learned counsel's forthrightness. Surely, this is a serious misdirection that must have operated in the mind of the Tribunal. For if there was such an admission by the Appellant that would be the end of the defence on the merit. No doubt this misdirection must have prejudiced the Appellant. For it was impossible to say with any degree of certainty that without the misdirection the trial Tribunal must inevitably have come to the same conclusion. In the circumstance, it will be unsafe to allow the verdict of the Tribunal to stand. See *Queen v. Olubunmi Thomas*, 3 FSC 8 where Nageon de Lestang, Ag. FCJ at p. 10 of the report observed:

"The question which must be posed therefore is, would the learned trial judge have reached the same decision if the inadmissible evidence had not been admitted? It is impossible for us to say what effect that evidence may have had on the mind of the learned trial Judge and although we think that there was sufficient evidence without the inadmissible evidence to convict the appellant, we cannot say with certainty that the learned trial Judge must inevitably have come to the same conclusion. That being so we have no alternative but to allow this appeal, quash the conviction and sentence and order a verdict of acquittal to be entered."

I would have considered an order of retrial. In view, however, of my observations on the validity of the charge and proof beyond reasonable doubt, I think the proper course is not to make such an order.

In conclusion, if this appeal rests with me I would allow it and set aside the judgments of the two courts below. I quash the conviction of, and the sentence passed on the Appellant and order that the charge against him be struck out.

EJIWUNMI JSC (DISSENTING)

I have had the opportunity of reading before now, the judgment just delivered by my learned brother Kutigi, JSC. After due consideration of this judgment, it is with regret that I am unable to subscribe my agreement to the said judgment.

In my humble view the principal question raised in this appeal

is, whether the appellant, an Executive Director of Savannah Bank of Nigeria Plc. (who was at all times material to this offence) was properly convicted upon the charge preferred against him at his trial. This is because it is my view that the charge was bad for duplicity. The one count charge for which he was tried and convicted by the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal, read thus:

"That you Oreoluwa Sylvester Adedeji Onakoya (male) while a Director of Savannah bank of Nigeria Plc in Lagos, between 20th May, 1996 and 28th May, 1996 did commit a felony to wit you approved the granting and granted credit facility of N14m (fourteen million naira) to one Alhaji Gajimi Ibrahim a Customer of the Maiduguri branch of the Savannah bank of Nigeria Plc without lawful authority and in violation of lending rules and regulations in force at the time in Savannah bank of Nigeria Plc, particularly memorandum 119."

The provisions of section 19(1)(a)(b) and (c) of decree No. 18 of 1994 under which the appellant was charged read thus:-

"19(1) Any director, manager, officer or employee of a bank who

(a) knowingly, recklessly, negligently, willfully or otherwise grants, approves, the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person

(i) without adequate security or collateral, contrary to the accepted practice or the bank's regulations, or

(ii) with no security or collateral where such security or collateral is normally required in accordance with the bank's regulations, or

(iii) with a defective security or collateral, or

(iv) without perfecting, through his negligence or otherwise, a security or collateral obtained, or

(b) grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility which is above his limit as laid down bylaw or any regulatory authority or the bank's regulations, or

(c) grant, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility to any person in contravention of any law for the time

being in force, any regulation, circular, or procedure as laid down, from time to time, by the regulatory authorities or by the bank, or is guilty of an offence under this Decree.”

A cursory reading of the above provisions of section 19(1) of Decree 18 of 1994 clearly reveals that by the said provisions several offences were created. I must therefore observe that the lawmaker intended to cover as much as possible in a single legislation, offences that could be committed by those involved with the running of a bank. It is of course not in dispute that the legislation was brought into being to deal with the malpractices that were perceived in the operations of Banks. But it is right to also observe that through out the length and breadth of the Decree, there is nothing to suggest that the ordinary laws that deal with the prosecution of criminal offences, such as the Evidence Act and the Criminal Procedure Act would not be applicable with regard to the prosecution of offences created by the Decree.

Having made that preliminary point, I will now consider the merits of this appeal. At the trial, the prosecution called seven witnesses, who in the course of their evidence tendered documentary exhibits to establish the case against the appellant. The appellant was found guilty by the Chairman of the Tribunal for the offence charged and sentenced accordingly. The appellant thereafter appealed to the Court below, and he lost the appeal to that court. Hence the further appeal to this court.

In this Court, the issues identified for the determination of the appeal are as follows:-

“(i) Was the Court of Appeal right in holding that the trial court was right in coming to the conclusion that the case against the appellant was established beyond reasonable doubt based on the evidence before the trial court.

(ii) Was the Court of Appeal right in confirming the interpretation of paragraph 3 of Exhibits C1, C2, D & H by the trial court to the effect that the endorsement by the Appellant on the Exhibits was a confirmation of an earlier oral approval of credit facility granted to the customer on the 24th of May, 1996.

(iii) Was the Court of Appeal right in holding that even though the charge against the appellant was not properly drafted, his conviction could still stand when this would in fact amount to him being

convicted for an offence for which he was never charged.”

In this judgment, it is to the issue 3 raised above for the appellant that I intend to consider first. In the appellant’s brief, it is contended for the appellant that four distinct offences were created by section 19(1) of decree No. 18 under which the charge was laid. These distinct offences he identified as (a) Grants, (b) Approves the grant, (c) is connected with the grant and (d) is connected with the approval. It is therefore the view of the learned counsel for the appellant that the charge against the appellant was not in accordance with the offence created, for instead of charging him with two distinct offences, he was charged with one, i.e. approving the grant and granting. Accordingly, it was submitted to the Tribunal that to succeed and to secure a conviction, the prosecutor must establish that it was the accused who approved the grant and also granted the sum of N14 million to the customer. That submission was rejected by the Tribunal as the appellant was convicted. That conviction was affirmed by the court below.

The contention now made in this appeal for the appellant is that it was a serious misdirection for the tribunal to have convicted the appellant in the first place, and the court below was wrong to have affirmed his conviction.

In order to appreciate this contention, reference must be made to the relevant portion of the judgment of the tribunal on the point it reads:-

“Now in his address, Mr. Gana submitted and I agree with him, that it is important to note that the accused person is not being charged with disbursing the sum of N14 million to PW.6. The charge is that of approval which was done between 20th May, 1996 and 28th May, 1996. It is therefore immaterial whether the money was actually disbursed or not. Section 19(1) of the Decree provides that any director, manager, officer or employee of a bank, who knowingly, recklessly, negligently, willfully or otherwise grants, approves the grant, or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial contribution to any person, in any of the circumstances specified in subsections (i) to (iv) to section 19(c) of the decree, is guilty of an offence under the Decree. As Mr. Gana rightly submitted, the mere fact that you approve the grant constitutes the offence, whether the

sum approved was actually disbursed or not.”

It is certainly clear from the above passage that the prosecutor and the learned Chairman of the Tribunal, agreed with him that the offence for which the appellant was charged had to do with the approval he granted for the loan of N14 million that was subsequently disbursed to P.W.6 by another official of the Bank. It is also manifest from the judgment of the Tribunal that the appellant was convicted upon the basis that he unlawfully approved the loan. This is made manifest by that part of the judgment of the learned Chairman of the Tribunal, which reads:-

“ The accused person under cross-examination admitted that he was misled by P.W.3 and P.W.4 on the position of the account of P.W.6, in approving the grant of N14 million from the totality of the evidence before the tribunal. There is no doubt whatsoever that whether the accused person was misled or not, the fact still remains that the accused person had no lawfully authority to approve a credit facility of N14 million to any person. From the above definition of the words, knowingly, recklessly, negligently, and willfully, it is easy to agree with learned counsel for the prosecution that it was a reckless thing for the accused person as Executive Director to do.

I am therefore from the totality of the evidence before me that the prosecution has established the case against the accused person and proved beyond reasonable doubt that the accused person approved a credit facility of N14million to one Alhaji Gajimi Ibrahim without lawful authority and also in contravention of the lending rules and regulations in force at the time in Savannah bank. Consequently, I find the accused person guilty as charged and convict him accordingly.”

It is obvious that from the conclusion of the learned chairman quoted above, the consideration that led to the conviction of the appellant was based on the approval he gave for the credit facilities of the sum of N14 million and not its disbursement to the customer of the bank. But it is evident that the appellant was convicted upon the charge wherein two offences of granting approval for the loan and for disbursing same. The learned Chairman did not consider that aspect of disbursing of the loan and also whether the charge is not bad for duplicity before she convicted the appellant upon the charge with the two distinct offences thereon. This question was raised apparently

before the court below. In affirming the conviction of the appellant, the court below per Onnoghen, said inter alia as follows:-

“It is clear from the facts of this case and the findings of the lower court that though the appellant was charged with two offences as one, the prosecution proved one of the offences and failed to prove the other... I am of the firm view that even though the appellant is charged with granting and approving the grant as one even though they constitute two distinct offences under the Decree, if the prosecution as in this case, proves one of the offences under the Decree against the appellant, he can be convicted for that offence. In the present appeal, the lower court rightly held that the offence of approving the grant of credit facility of N14 million to P.W.6 was proved against the appellant and that it is immaterial whether the sum so approved was disbursed or not. I am of the view that the appellant was not misled by the charge neither has any miscarriage of justice occurred.”

Thus, the court below felt able to affirm the conviction of the appellant upon a charge, which the court itself recognized as constituting two offences, namely, “granting and approving the grant.” The court said approvingly that “if the prosecution as in this case, proves one of the offences under the Decree against the appellant, he can be convicted for that offence.”

It seems to me that this view of the court below that a conviction of the appellant for one of the offences is not affected by the fact that the second offence in the same charge was not established cannot be right. In my humble view, the court below would appear to be saying that two separate and distinct offences in a single charge is not bad for duplicity. It is in my view erroneous to so hold having regard to the provisions of section 156 of the Criminal Procedure Act which states that:-

“For every distinct offence with which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 157-161.”

There is of course no suggestion that the instant appeal falls within the exceptions mentioned above. Therefore, the appellant should have been charged separately for the offence of approving the loan. See *Ogbebor v. Police* (1950) 13 W.A.C.A. 22; *R. v. Aniameke* (1961) 1 All NLR 43.

It is noted that in this appeal, the conviction of the appellant was affirmed on the ground that the court below considered that there no miscarriage of justice occurred by the joinder of two offences in the one charge. But it is my respectful view that though it is available to the Court to uphold a conviction of a charge, which is bad for duplicity upon that premise, the circumstances of this case are different. Clearly, the case against the appellant was established on the ground that he gave the approval for the credit facilities, but it was not established that he was concerned with its disbursement. It is therefore my view that the learned Chairman of the Tribunal was wrong to have convicted the appellant on the charge as laid by the prosecutor. The appellant was simply convicted for two offences in the same charge. One was proved while the other was not established. It is not available to the court below to hold that in such circumstances no miscarriage of justice has occurred, having regard also to all the facts in the case.

For all the reasons given above, I must with due respect dissent from the leading judgment of my brother Kutigi JSC. I will therefore quash the conviction of the appellant. The charge against him is hereby directed to be struck out.

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