

SUPREME COURT OF NIGERIA
FRIDAY 28TH FEBRUARY, 2003. SC. 206/2001
CORAM:- I. L. KUTIGI, U. MOHAMMED, U. A. KALGO,
A. O. EJIWUNMI, N. TOBI, JJSC

THE STATE APPELLANT
V.
SQUADRON LEADER
S. I. OLATUNJI RESPONDENT

COURT MARTIAL - Convening of - Right to delegate - Chief of Army validly authorized the senior officer - To sign the convening order (H1)

CHARGES - Amendment - Principles - CPA s.164 - Where charge is altered - The new charge must be read to accused - And his plea is recorded thereto (H2)

CRIMINAL PROCEDURE - Arraignment - Correctness of - Respondent was properly arraigned before Court Martial - And his trial commenced within 3 months of his discharge from service (H3)

COURT MARTIAL - Evidence - Material witness - Propriety - By s.143(3) Armed Forces Decree - The retired CAS is not a material witness - And prosecution was not obliged to call him as such (H4)

FACTS

Accused/respondent was a Squadron Leader in the Nigerian Air Force Headquarters in Lagos. He was one of the nine pay Officers of the Pay and Accounting Group (PAG) under the Directorate of Finance and Accounts (DFA) of the Nigerian Air Force, Lagos. All the nine pay officers including the respondent were charged with various criminal offences and arraigned before a General Court Martial ordered by a senior military officer on behalf of the Chief of Air Staff. Respondent pleaded to the charges.

Thereafter, prosecution/appellant applied to amend the earlier charges against respondent. No objection was raised to the application. The charges were amended and read to respondent and his plea

taken thereto. At the end of trial, the court found respondent guilty of all charges against him, convicted and sentenced him to a total of 45 years imprisonment. Dissatisfied, respondent appealed to the Court of Appeal. The court allowed the appeal, set aside the conviction and sentence. Respondent was thus discharged and acquitted. Aggrieved, appellant filed appeal at Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether or not the Chief of Air Staff can legally delegate the power vested in him to convene a General Court Martial under Section 131(2) of the Armed Forces Decree, 1993.

(ii) Whether or not the respondent was a person subject to Service Law as at the 6th of August, 1996 such that the General Court Martial would have had jurisdiction to try him for the offences for which he was charged before the said Court Martial.

(iii) Whether or not the Court of Appeal was right in its decision that in order to show a hand grenade is a firearm under Section 2 of the Fire Arms Act Cap. 142, Laws of the Federation, the prosecution ought to have called expert evidence to prove that fact.

(iv) Whether or not the respondent’s evidence that he acted in the belief that the Chief of Air Staff gave order for the withdrawal and sharing of the N10 Million Naira was sufficient to negative the mental element of the offence of stealing without considering if such belief was reasonable in all the circumstances of the case and if the other requirements of Section 25 of the Criminal Code were satisfied.

(v) Whether or not the prosecution was obliged by law to call the retired Chief of Air Staff as a witness to disprove that the retired Chief of Air Staff gave order for the withdrawal and sharing of the N10 Million Naira.

(vi) Whether or not the Court of Appeal was right in its view that the grounds upon which the General Court Martial held that AVM Femi John Femi was not material to the case were wrong and had no support in the evidence led.

(vii) Whether or not the Court of Appeal was right to disagree with the decision of the General Court Martial that if AVM Femi John Femi gave the order to withdraw the N10 Million Naira, such order would have been illegal”

HELD (Unanimously allowing the appeal per KALGO JSC)

COURT MARTIAL - Convening of - Right to delegate

1. In the first place, it is without dispute that Air Commodore Ajobena is a senior officer, heading the Directorate of Personnel of the Head-quarter NAF which is a separate or detached unit of the Nigerian Air Force. It is also not in dispute that the CAS is an appropriate superior authority to Air Commodore Ajobena as well as the respondent who are officers directly under his command within the meaning of S.128(1) of A.F.D. This therefore means that the CAS could validly authorise Air Commodore Ajobena to sign the convening order as he did in this case.

In this case, there is no controversy that the convening order was in fact signed by Air Commodore Ajobena, and was therefore valid, competent and properly accepted by the GCM.

(pp. 787 H / 788 H)

CHARGES - Amendment - Principles

2. Therefore substitute will have the same meaning and effect with alteration. And according to S.164 of the said Act, where a charge or count is altered all that is required to be done is to read the new charge or count to the accused and record his or her plea thereto. The proceedings are deemed to be continued and not disturbed as a result of the alteration. This in my view, is the correct position in the instant appeal immediately after the original counts were struck out.” (p. 791 E)

Arraignment - Correctness of

3. From the record of appeal, it is abundantly clear that the respondent was arraigned before the GCM and his plea taken on 27th July, 1996. It appears to me therefore whether Exhibit 66 or 67 was relied upon, the respondent was properly arraigned and his trial commenced within 3 months of his discharge from service. Therefore he was subject to service law when his trial commenced on 27th July, 1996 and I so found. (p.792 F)

Evidence - Material witness - Propriety

4. I have also carefully examined the reasons given by the G.C.M. for saying that the retired CAS was not a material witness in this case, and having regard particularly to the provisions of S.143(3) of the A.F.D, I am of the view that the G.C.M. was right in what it said about retired CAS. I therefore find that the retired CAS AVM Femi John
 B Femi was not a material witness in this case and that the prosecution was not obliged to call him as such. (p. 795 C)

NOTABLE POINTS OF INTEREST

C KALGO JSC

1. Statutory interpretation should be wholesome

The fact that S.131(2) is specific on who may convene a G.C.M does not exclude the possibility of a provision in the same law allowing a delegation of the power to convene a G.C.M to any person or body.
 D Therefore, while interpreting the provisions of S.131(2), any other provisions in the same law relevant and related to the powers exercisable under S.131(2) must be read together and be considered as a whole. This is a general principle of interpretation of statutes accepted and followed by the courts in this country. (p. 787 A)

E **2. Proceedings of improperly constituted GCM is a nullity ab initio**

I have taken the trouble to dwell on this issue because of its importance in this appeal. It affects the competence and jurisdiction of the
 F GCM which tried the respondent. Any GCM which is not convened as required by the provisions of the AFD is just like a court or tribunal which is not properly constituted. And if a court or tribunal is not properly constituted, any process issued or trial conducted by it is a complete nullity ab initio. (p. 789 A)

G **3. An honest belief may make an act innocent**

There is no doubt that it is an established principle of criminal law that, an honest and reasonable belief in the existence of circumstances, which if true, would make the act for which the accused is charged an innocent act, has always been held to be a good defence. This is
 H because of the state of his or her mind at the time of the commission or omission of the act which must not only be honest but must also be reasonable in the circumstances. (p. 793 F)

4. Prosecution must not call a host of witnesses in proof of its case

In any event, in criminal law, the prosecution is only bound to call witnesses sufficient in their view to prove the charges against an accused beyond reasonable doubt. No particular number of witnesses must be called to prove a charge unless the law says so, like in case of corroboration in certain cases. But in this particular case where the alleged orders leading to the stealing charges against the respondent and his co-accused were said to be given by the retired CAS, his evidence is very essential in their defence as it may help to exonerate them of the offences charged. The prosecution had no duty to prove that the retired C.A.S. gave the orders, and therefore need not call him as a witness. (p. 795 A)

REPRESENTATION

P. W. A. Okoh, for the Appellant
A. Abayomi, for the Respondent

CASES REFERRED TO

Opulor v. State (1990) 7 NWLR (Pt. 164) 581
Attah v. The State (1993) 7 NWLR (Pt. 305) 257
Osuagwu v. A-G Anambra (1993) 4 NWLR (Pt. 285) 13
Matari v. Dangaladima (1993) 3 NWLR (Pt. 281) 266
Nigerian Air Force v. Ex-Wing Commander L.D. James (2002) 12 S.C (Pt.1) 1

STATUTES REFERRED TO

Armed Forces Decree 1993, s.131(2)(3), 143(3), 169(2), 168(1)
Fire Arms Act Cap 142 LFN 1990, s.2
Criminal Code, s.25
Criminal Procedure Act, s. 164(1)(4)

LEAD JUDGMENT BY KALGO JSC

The respondent was a Squadron Leader in the Nigerian Air Force Headquarters in Lagos. His force No. was NAF/1217. He was one of the nine pay Officers of the Pay and Accounting Group (PAG) under the Directorate of Finance and Accounts (DFA) of the Nigerian Air

Force, Lagos. All the nine pay officers including the respondent were charged with various criminal offences and were tried and convicted by a General Court Martial (GCM) and sentenced to various terms of imprisonment. The respondent was the 6th accused before the G.C.M. and was charged with nine counts of Conspiracy, Stealing, B Receiving Stolen Property, Illegal Possession of Firearm and Disobedience to Standing Order. He, with other eight Officers, were arraigned before the G.C.M on the 26th of July, 1996. The charges against him were read and explained to him and he pleaded not guilty. The case C was then adjourned to 6th August, 1996 for hearing.

On the 6th of August, 1996, the prosecution applied to withdraw the charges to which the appellant pleaded on the 26th of July and substituted them with another 9 count charge. The respondent did not raise any objection to the application and it was granted as prayed. The new charges were then read and explained to the respondent D and he pleaded not guilty to all of them one by one. The trial before the G.C.M proceeded and at the end of it all after the counsel for the prosecution and the defence addressed the G.C.M. at length, the G.C.M. adjourned for judgment.

On the 21st of October, 1996, the G.C.M. in a unanimous decision, E found the respondent guilty of all the charges against him, convicted him and sentenced him to a total of 45 years imprisonment. The respondent appealed to the Court of Appeal against the said decision and that court on the 28th of September, 2000, allowed the appeal, F set aside the convictions and sentences by the G.C.M. and discharged and acquitted the respondent.

The prosecution was not satisfied with this decision and it appealed to this court on 7 grounds of appeal.

The facts giving rise to this case are not very complicated. The respondent was the paymaster HQ. of the P.A.G. at the material time. G His duty then was to pay all bills referred to him and take instructions from Commander, P.A.G. for all payments approved by the commander. On 3rd of April, 1996, the cashier brought to him the sum of N10 million cash with a list of names sent by Commander, P.A.G. On seeing the list, he asked the cashier to explain to him what the money was meant for. The cashier told him to ask the commander H for full instructions. He did and the commander told him that the money was for welfare gift given to the listed officers by the Chief of

Air Staff to be shared, N6 million for HQ, P.A.G. and N4 million for HQ, NAF. The respondent belonged to the headquarter P.A.G. and when the money was shared he collected N600,000.00 for himself. Wing Commander Iyen was the Ag. Director of Finance and Accounts at the material time and was alleged to have given the instructions for the money sharing. B

The respondent was also alleged to be involved in illegally sharing Nigerian Air Force money monthly with other officers. After his arrest and in the course of investigation the respondent was found to be in unlawful possession of firearms. He was also alleged to have acquired shares in a company called Sifor Nigeria Limited thereby engaging in private business in disobedience to the Nigerian Air Force Standing Orders. These gave rise to the seven counts charge made against the respondent and tried in the General Court Martial. C

In this court, the appellant and the respondent filed their respective briefs of argument and exchanged them between themselves. The appellant, in its brief, formulated 7 issues for the determination of this court in this appeal. They are:- D

“(i) Whether or not the Chief of Air Staff can legally delegate the power vested in him to convene a General Court Martial under Section 131(2) of the Armed Forces Decree, 1993. E

(ii) Whether or not the respondent was a person subject to Service Law as at the 6th of August, 1996 such that the General Court Martial would have had jurisdiction to try him for the offences for which he was charged before the said Court Martial. F

(iii) Whether or not the Court of Appeal was right in its decision that in order to show a hand grenade is a firearm under Section 2 of the Fire Arms Act. Cap. 142, Laws of the Federation, the prosecution ought to have called expert evidence to prove that fact. G

(iv) Whether or not the respondent’s evidence that he acted in the belief that the Chief of Air Staff gave order for the withdrawal and sharing of the N10 Million Naira was sufficient to negative the mental element of the offence of stealing without considering if such belief was reasonable in all the circumstances of the case and if the other requirements of Section 25 of the Criminal Code were satisfied. H

(v) Whether or not the prosecution was obliged by law to call the retired Chief of Air Staff as a witness to disprove that the retired Chief of Air Staff gave order for the withdrawal and sharing of the

N10 Million Naira.

(vi) Whether or not the Court of Appeal was right in its view that the grounds upon which the General Court Martial held that AVM Femi John Femi was not material to the case were wrong and had no support in the evidence led.

B (vii) Whether or not the Court of Appeal was right to disagree with the decision of the General Court Martial that if AVM Femi John Femi gave the order to withdraw the N10 Million Naira, such order would have been illegal”

C For the respondent, the following issues for determination were raised:-

“(i) Whether or not power vested in the Chief of Air Staff by Section 131(2) of the Armed Forces Decree, 1993 can be legally delegated;

D (ii) Whether or not the trial court on 6th August, 1996 had jurisdiction to try the respondent who was involuntarily retired with effect from 27th April, 1996 in the light of Section 169(2) of the Armed Forces Decree, 1993;

(iii) Whether or not in the absence of evidence the member of the General Court Martial can rely on their service knowledge to convict respondent of unlawful possession of firearm;

E (iv) Whether or not a case of stealing was established beyond reasonable doubt against the respondent in the light of evidence before the trial court;

F (v) Whether or not the AVM Femi John Femi was a material witness who should have been called by the prosecution to establish the charges against the respondent.”

I have carefully studied the amended Notice of Appeal filed by the appellant and after examining the issues for determination formulated by the appellant, I am satisfied that the issues were properly distilled from the grounds of appeal contained in the said amended notice of appeal. In any case, although they are more in number than those of the respondent, there is not much difference in contents. I will therefore adopt and consider the appellant’s issues in this appeal.

ISSUE 1

H This issue deals with whether the Chief of Air Staff can legally delegate the power vested in him under Section 131 (2) of the Armed Forces Decree, 1993 (A.F.D) to convene a General Court Martial (GCM). Section 131 (2) of the A.F.D. provides:-

"2. A General Court Martial may be convened by -

- (a) The President; or
- (b) The Chief of Defence Staff; or
- (c) The Service Chiefs; or
- (d) A General Officer Commanding or corresponding command; or
- (e) A Brigade Commander or corresponding command."

It is not in dispute that the Chief of Air Staff (CAS) is one of the Service Chiefs who under (c) above can properly convene a G.C.M. In this case the person who signed the convening order and convened the G.C.M. was Air Commodore F. O. Ajobena who was the Director of Personnel, HQ NAF at the material time. There is no doubt that he did not hold any of the offices mentioned in Section 131(2) of the AFD. There is also no doubt that under that section no mention was made of any delegation of the power to convene the G.C.M. by any of the officers mentioned therein. The Court of Appeal considered this situation and concluded that-

"Section 131(2) of the AFD, 1993 which I have produced above cannot be construed as authorizing the Chief of Air Staff to delegate his power to convene a General Court Martial. The CAS cannot delegate the power vested in him qua the office he holds either verbally or in writing.

Since Air Commodore Ajobena did not hold any of the offices listed under S.131(2) of the AFD above, he could not validly convene a General Court Martial."

The learned counsel for the appellant submitted in his brief that the Court of Appeal was wrong in coming to this conclusion by considering the provisions of Section 131(2) of AFD in isolation. He then submitted that the failure of the Court of Appeal to consider the provisions of Section 131(3) together with those of Section 131(2) of A.F.D. led it to the erroneous decision. Learned counsel further submitted that it is a well established principle of interpretation that related provisions in a statute should be construed together in order to arrive at its proper meaning and effect. He relied on the cases of *Matari & Ors v. Dangaladima & Anor.* (1993) 3 NWLR (Pt.281) 266; *Jimoh Odubeku v. Victor Fowler & Anor.* (1993) 7 NWLR (Pt.308) 637; *David-Osuagwu v. A-G Anambra* (1993) 4 NWLR (Pt.285) 13, *Salami v. Chairman LEDB* (1989) 12 S.C. 177; (1989) 5 NWLR (Pt.123) 539.

The learned counsel also explained that the convening order was approved by the CAS as shown in Exhibits 69 and 70, and that by Exhibit 70, the CAS ordered that the convening order should be signed by either the Air Officer Personnel or the Director of Personnel. Counsel further submitted that, that order was confirmed
B later by CAS himself in his letter to the President of the G.C.M. as contained in Exhibit A1. Learned Counsel therefore submitted that by virtue of Section 131(2) read with Section 131(3), the CAS was empowered to delegate his powers to convene the G.C.M, which he
C properly exercised in this case by ordering Air Commodore Ajobena (the Director of Personnel, HQ NAF) to sign the convening order. Counsel finally submitted that the G.C.M. was properly and validly convened in this case and that the trial of the respondent was properly and regularly conducted.

For the respondent, it was submitted by learned counsel in the brief
D that the provisions of Section 131(2) are clear and unambiguous as to who may convene a G.C.M. Learned counsel pointed out without conceding that even if Section 131(3) of the AFD relied upon by the appellant can be used to delegate the power vested in Section
E 131(2), the officer who signed the convening order in this case did not satisfy the requirements of that section, and that the section applies only to a Court Martial and not a General Court Martial. He further submitted that Exhibits 69 and 70 did not in anyway supplement or support the application of the provisions of S. 131(3) of AFD.
F Counsel finally submitted that the CAS had no right to delegate the powers vested in him under S. 131(2) of AFD and that the Court of Appeal was right in so holding.

The convening Order which is Exhibit 1 (Pages 296-298 of Vol. 5 of record of appeal) was clearly signed by Air Commodore F. O. Ajobena "for Chief of the Air Staff" on the 22nd of July, 1996. Section
G 131(2) of the AFD which I set out earlier in this judgment is clearly specific on who may convene a G.C.M. The Chief of Air Staff (CAS) comes under S.131(2) (c) of A.F.D as Service Chief. The fact that S.131(2) is specific on who may convene a G.C.M does not exclude the possibility of a provision in the same law allowing a delegation of the power to convene a G.C.M to any person or body. Therefore,
H while interpreting the provisions of S.131(2), any other provisions in the same law relevant and related to the powers exercisable under

S.131(2) must be read together and be considered as a whole. This is a general principle of interpretation of statutes accepted and followed by the courts in this country. See *Matari v. Dangaladima* (supra) cited by appellant's counsel; *Mobil v. F.B.I.R.* (1977) 3 S.C. 53; *University of Ibadan v. Ademolekun* (1967) 1 All NLR 213.

Section 131(3) of A.F.D is related and very relevant to . 131(2). It provide

“The senior officer of a detached unit, establishment or squadron may be authorized by the appropriate superior authority to order a court martial in special circumstances.” (Underlining mine)

This subsection no doubt deals with the question of delegation of the power to convene a court martial. It provides expressly and without any ambiguity that the “appropriate superior authority” may authorize a “senior officer of a detached unit, establishment or squadron to order a court martial.” If these requirements are satisfied, any convening order signed pursuant to the provisions of Section 131(3) is valid and competent. Who then is the “appropriate superior authority” under the A.F.D.? Section 128(1) of the A.F.D. says:-

“The following persons may act as appropriate superior authority in relation to a person charged with an offence, that is

- (a) the commanding officer; and
- (b) any officer of the rank of Brigadier or above or officer of corresponding rank or those directed to so act under whose command the person is for the time being.”

In the first place, it is without dispute that Air Commodore Ajobena is a senior officer, heading the Directorate of Personnel of the Head-quarter NAF which is a separate or detached unit of the Nigerian Air Force. It is also not in dispute that the CAS is an appropriate superior authority to Air Commodore Ajobena as well as the respondent who are officers directly under his command within the meaning of S.128(1) of A.F.D. This therefore means that the CAS could validly authorise Air Commodore Ajobena to sign the convening order as he did in this case. It is also pertinent to observe that this authorization was fully confirmed and supported by-

- (i) the convening order itself which on page 297 of Vol. 5 of the record reads:-

OFFICER AUTHORISED TO SIGN ON BEHALF OF THE CONVENING OFFICER 8. The DOP, Nigeria Air Force, Air Commodore

F. O. Ajobena (NAF/396) is authorised to sign for, and on behalf of the convening officer any amendments or other matters relating to the court;

(ii) Exhibits 69 and 70 on page 513 of Vol. 5 of the record relating to the draft convening order which after approval was directed to be signed by D.O.P on behalf of the CAS; and

(iii) exhibit A1 on P.300 of Vol. 5 of record which was the written confirmation by the CAS himself that he authorised the D.O.P Air Commodore Ajobena to sign the convening order and it reads:-

“1. I write to confirm that I had duly authorised Air Commodore F. O. Ajobena (Director of Personnel, Headquarter NAF) to sign the convening Order, Charge sheets, and other documents relating to the above Court Martial.”

The above goes to confirm that while the CAS could validly authorise the powers vested in him under S.131(2) of AFD by virtue of the provisions of S. 131(3) of the same Decree, he had in fact and without any iota of doubt authorized Air Commodore Ajobena D.O.P Headquarter NAF to sign the convening order. And by S.286 of the A.FD the convening order as an instrument signed by Air Commodore Ajobena who was duly authorized by CAS to sign it, shall be accepted by all courts and persons as sufficient evidence unless the contrary is proved. In this case, there is no controversy that the convening order was in fact signed by Air Commodore Ajobena, and was therefore valid, competent and properly accepted by the GCM. Therefore I answer this issue in the affirmative.

I have taken the trouble to dwell on this issue because of its importance in this appeal. It affects the competence and jurisdiction of the GCM which tried the respondent. Any GCM which is not convened as required by the provisions of the AFD is just like a court or tribunal which is not properly constituted. And if a court or tribunal is not properly constituted, any process issued or trial conducted by it is a complete nullity ab initio. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 34.

ISSUE II

This issue deals with whether the respondent was a person subject to service law as at 6th August, 1996 for the GCM to have jurisdiction to try him.

By the provisions of Section 168(1) of the AFD, any service officer

who commits any offence triable by a court martial can be arrested, investigated and tried accordingly and the said officer shall continue to be subject to the jurisdiction of the court martial even after he/she ceases to be subject to the service law. And by the provisions of S.169(2) of the AFD, any serving officer who ceases to be subject to service law, but who commits an offence triable by a court martial while in service must be tried within three months after he ceases to be subject to the service law. B

The respondent and the other co-accused persons were brought to the GCM and arraigned on the 26th of July 1996. The charges were read and explained to them one by one, and the respondent pleaded not guilty to all the charges against him. On the 6th of August, 1996, when the trial was to commence on those charges, the prosecution applied under S.162 of the Criminal Procedure Act to amend the charges. The application was not opposed and it was accordingly granted whereby 9 new charges were filed against the respondent. The charges earlier preferred against the respondent on which plea was taken, were withdrawn and struck out. The respondent earlier received his notice in which he was granted terminal leave to commence on 30th April, 1996 and end on 31st May, 1996. This is evidenced by Exhibit 67 on page 510 of Vol. 5 of the record of appeal. And so by Exhibit 67, the service of the respondent in the Nigerian Air Force officially terminated on 31st of May, 1996, and he therefore ceased, with effect from that day, to be subject to service law. C
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The learned counsel for the appellant submitted in his brief that the Court of Appeal was wrong in holding that by the amendment of the charges on the 6th of August, 1996, the trial of the respondent commenced only on that day. Learned counsel argued that the amendment of a charge does not constitute an entirely new charge and the trial of the accused person would be deemed to continue with the amended charge. Counsel relied in support, on S.164(1) and (4) of the Criminal Procedure Act (CPA) and the decision of this court in Attah v. The State (1993) 7 NWLR (Pt.305) 257, and submitted that the valid arraignment of the respondent on earlier charges subsisted and the altered charges relate back to that arraignment. F
G
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Learned counsel further contended that as it was obvious from Exhibit 67 in Vol. 5 of the record of appeal that the respondent with other accused persons was granted terminal leave from 30th April to 31st

May, 1996, his disengagement from the service of the NAF only took effect on the 1st June, 1996 and not the 27th of April as found by the Court of Appeal. Therefore counsel submitted, since the 1st of June to 6th of August, 1996 is less than 3 months the respondent was still subject to service law on the 6th of August, 1996, even if he
B was first arraigned on that day.

Learned counsel for the respondent contended that on the 6th of August, 1996 when the original charges were withdrawn and struck out new ones were substituted. The plea on the new charges was taken
C on the 6th of August, 1996, and according to the learned counsel, the trial of the respondent commenced on that day. Learned counsel submitted that since the original charges were withdrawn and struck out and not amended, S. 164(4) of the C.P.A. and the decision in *Attah v. The State* (supra) did not apply to the situation in this appeal. Learned counsel also submitted that the involuntary retirement of
D the respondent took effect from the 27th April, 1996 as per Exhibit 66, and therefore with his arraignment on the 6th of August, 1996, more than 3 months had elapsed before his trial commenced in the GCM. Therefore his trial was not in compliance with the stipulations contained in Section 169(2) of the A.F.D. and the Court of Appeal
E was right to have found that the GCM was not competent to try the respondent as it did.

I shall deal with the amendment of the charges first. It is not in dispute that the respondent was arraigned before the GCM when he pleaded
F to the original charges against him on the 27th of July, 1996. His trial therefore commenced on that day. On the 6th of August, 1996 when the trial was to proceed, the original charges were struck out and substituted by new ones immediately after the striking out on the application of the prosecution under S.162 of the C.P.A. I have earlier considered this situation in a sister case of *Nigerian Air Force v. Ex-Wing Commander L.D. James* (2002) 12 S.C (Pt.1) 1 (2002) 18 NWLR (Pt.798) 295 at 331-332 where I said:-
G

“S. 168 and S. 163 of the Criminal Procedure Act speak of framing a new charge or adding to or altering the original charge. In the case of *Okwechime v. I.G.P* (1956) FSC 73, it was held that the alteration of a charge under Ss.162 and 163 of the Act includes the framing
H of a new charge in place of the original charge. There the Federal Supreme Court held at page 74 of the report that -

"The learned trial Judge was of opinion that the word "alter" in the context means more than "amend" and includes "substitute", with this view we respectfully agree. In view of the fact that new charges could, under the section, be added to the original one, it would be unreasonable to hold that alteration of the charge cannot be extended to the framing of new charge in place of the original one."

Therefore substitute will have the same meaning and effect with alteration. And according to S.164 of the said Act, where a charge or count is altered all that is required to be done is to read the new charge or count to the accused and record his or her plea thereto. The proceedings are deemed to be continued and not disturbed as a result of the alteration. This in my view, is the correct position in the instant appeal immediately after the original counts were struck out." I repeat the above quotation in respect of this appeal, and also add that a close examination of the new charges show that they are similar to those struck out. Therefore there cannot be any miscarriage of justice in the proceedings as a whole. I have considered all the submissions of the learned counsel for the respondent on this point and I find myself unable to agree with him. I therefore find that the proceedings of the 6th of August, 1996, was a continuation of the trial commenced on 27th April, 1996.

On the question of whether the respondent was subject to service law at the time he was arraigned and his trial commenced, I think Exhibit 66A on page 508 and Exhibit 67 on page 510 of the record of appeal fully explained the situation. Exhibit 66 in part says:-

"THE FOLLOWING OFFRS ARE DISCHARGED FM THE NAF SVC UNDER SVC NO LONGER REQUIRED WEF 27 APR 96..."

This was followed by the names of the officers affected including the respondent. It was a signal and was signed by the commanding officer on the 2/10/96. Exhibit 67 was another signal signed by the commanding officer on the same day with Exhibit 66. It referred to Exhibit 66 and added:-

"OFFRS ARE GRANTED TERMINAL LEAVE W.E.F. 30 APR 1996 TO 31 MAY 1996..."

This means that while Exhibit 66 discharged the respondent and the other officers mentioned therein, with effect from 27th April, 1996, Exhibit 67 granted the same officers terminal leave expiring on 31st May, 1996. This also means that the officers will be regarded as being

in service until after the expiry of their terminal leave.

By Section 169(2) the respondent and other officers shall be subject to service law and liable to be tried by GCM within 3 months after their discharge. If one takes Exhibit 66, and the discharge date of 27th April, 1996, the respondent will be subject to service law up to 27th of July, 1996. If one takes Exhibit 67 and the expiry date of the terminal leave of 31st May, 1996, the respondent will be subject to service law up to 1st August, 1996.

From the record of appeal, it is abundantly clear that the respondent was arraigned before the GCM and his plea taken on 27th July, 1996. It appears to me therefore whether Exhibit 66 or 67 was relied upon, the respondent was properly arraigned and his trial commenced within 3 months of his discharge from service. Therefore he was subject to service law when his trial commenced on 27th July, 1996 and I so found. I accordingly answer issue two in the affirmative.

D ISSUE III

This issue asks the question whether, in order to prove that a hand grenade is a firearm, the evidence of an expert is necessary.

The answer to this issue is very simple as it depends entirely on the definition or the interpretation of “firearm” given in the Fire Arms Act (Cap.146 of Laws of Federation, 1990). S.2 of the Act provides:-
 “2. In this Act, unless the context otherwise requires- “Firearm” means any lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged, and includes a prohibited firearm, a personal firearm and a muzzle-loading firearm of any of the categories referred to in Parts I, II and III respectively of the schedule hereto, and any competent part of any such Firearm.”
 (Underlining mine)

By this definition, a firearm is any lethal barreled weapon of any description and it includes a prohibited firearm of the categories described or referred to in parts I, II and III of the schedule to the Act. Item 4 part I of the said schedule reads:-

“4. Bombs and grenades.”

This clearly shows that a grenade is a prohibited firearm and a lethal weapon within the meaning of the Fire Arms Act and one does not need any evidence of an expert to prove it as it is intrinsic in the Act itself. I answer issue III in the negative.

H ISSUE IV

This issue raises the question whether the respondent's evidence that he acted on the belief that the CAS gave the order to withdraw and share the N10 Million was sufficient to negative the element of stealing on his side, in law.

This issue deals with the criminal liability and the state of mind of the respondent in relation to the money received and shared by him which he was told was a parting or welfare gift on the orders of the CAS. There is no doubt that it is an established principle of criminal law that, an honest and reasonable belief in the existence of circumstances, which if true, would make the act for which the accused is charged an innocent act, has always been held to be a good defence. This is because of the state of his or her mind at the time of the commission or omission of the act which must not only be honest but must also be reasonable in the circumstances. See R. v. Tolson (1889) 23 QBD 168 at 181. Section 25 of the Criminal Code Law of Lagos State dealing with this matter also provides:-

"A person who does or omits to do an act under an honest and reasonable but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any great extent than if the real state of things had been such as he believed to exist" (Underlining mine).

This section emphasises that in order to afford a defence to criminal liability or responsibility the act must be done or omitted to be done honestly and reasonably in the belief of the existence of the state of things which made the act or omission possible.

From the evidence on record, the respondent was the paymaster of HQ, PAG, NAF and fully familiar with all the financial procedures and matters of the NAF. His main duties were to pay staff salaries of both the N.A.F. troops and civilians working with them, and also pay N.A.F. bills and other commitments. He would therefore know, before any one else, whether there is or there is no short payment of salaries in April, 1996. He did not say in his statement, Exhibit 13, that he raised any voucher for short payment of salaries for April, 1996. But he admitted clearly in evidence that he saw the payment vouchers, Exhibits 9A - 9C approved for short payment of salaries, T5 claim, and repair of addressograph machines amounting to N10 Million in favour of PAG, NAF headquarter. Also as paymaster, the respondent was the holder and person in charge of the account from

which this money was raised. When the money was brought to him by the cashier and was told that it was for welfare gift from CAS, he knew that the money could not be transferable to the welfare account since the approval of Exhibits 9A-9C was not for that purpose. And so when he agreed to disregard the financial procedure by sharing the money meant for short payment of salaries etc and shared it as welfare gift with full knowledge of what it was meant for the respondent must be acting dishonestly and unreasonably. His belief in the so called orders of the C.A.S, even if it is true at that time, could not be honest having regard to the circumstances. I find that the respondents alleged belief in the so called orders of the CAS does not entitle him to any defence to the charge of stealing in this case.

ISSUES V and VI and VII

I intend to take these 3 issues together as they each touched on the retired Chief of Air Staff AVM Femi John Femi.

- D The allegation that AVM Femi John Femi the retired CAS ordered the withdrawal and sharing of the N10 Million was only verbal and not in writing. The prosecution has therefore no duty to call upon the retired CAS to prove or disprove this fact. The prosecution was only saying that there was no such order and if the defence said that the order existed, then it is their duty and responsibility to call him. In any event, in criminal law, the prosecution is only bound to call witnesses sufficient in their view to prove the charges against an accused beyond reasonable doubt. No particular number of witnesses must be called to prove a charge unless the law says so, like in case of corroboration in certain cases. But in this particular case where the alleged orders leading to the stealing charges against the respondent and his co-accused were said to be given by the retired CAS, his evidence is very essential in their defence as it may help to exonerate them of the offences charged. The prosecution had no duty to prove that the retired C.A.S. gave the orders, and therefore need not call him as a witness. See *Saidu v. State* (1982) 4 SC. 41; *Udofia v. State* (1981) 11-12 SC. 49; *Opulor v. State* (1990) 7 NWLR (Pt.164) 581. I have also carefully examined the reasons given by the G.C.M. for saying that the retired CAS was not a material witness in this case, and having regard particularly to the provisions of S.143(3) of the A.F.D, I am of the view that the G.C.M. was right in what it said about retired CAS. I therefore find that the retired CAS AVM Femi John

Femi was not a material witness in this case and that the prosecution was not obliged to call him as such.

Lastly, it is very obvious to me and without any further consideration that even if the retired CAS gave the order to withdraw and share the N10 Million as welfare gift instead of what the money was approved for per Exhibits 9A - 9C, such order must definitely be illegal. The G.C.M. was therefore right to so hold particularly relying on the provisions of S. 143(3) of A.F.D. I answer issues V, VI and VII respectively in the negative. B

From all what I have said above, I find that there is merit in this appeal and allow it. I accordingly set aside the decision of the Court of Appeal delivered on 28th September, 2000 and restore the decision of the General Court Martial and the convictions, sentences and orders passed on the respondent. C

D

KUTIGI JSC

I have had a preview of the judgment just rendered by my learned brother, Kalgo, JSC. I agree with him that the appeal is meritorious and deserves to succeed. The appeal is therefore allowed. The judgment of the Court of Appeal is set aside while the one delivered by the General Court Martial is restored; in other words, the convictions, sentences and orders passed on the Accused/Respondent by the General Court Martial are confirmed. E

F

MOHAMMED JSC

G

I have had a preview of the judgment just read by my learned brother, Kalgo, JSC., in draft. I entirely agree with him that there is merit in this appeal. For the reasons given in the lead judgment which I adopt as my own I allow this appeal and set aside the judgment of the Court of Appeal. I restore the decision of the General Court Martial which convicted and sentenced the respondent to terms of imprisonment. I abide by all the consequential orders made by the General Court Martial. H

EJIWUNMI JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Kalgo, JSC. For the reasons
 B given in the said judgment, this appeal is also allowed by me. The decision of the Court of Appeal is set aside and that of the General Court Martial is hereby restored with the convictions, sentences and orders they made against the respondent.

C

TOBI JSC

I have read the judgment of my learned brother, Kalgo, JSC., and I agree with him that this appeal should be allowed.

D The main issue is whether the Chief of Air Staff can legally delegate the power vested in him under Section 131(2) of the Armed Forces Decree No. 105 of 1993, as amended, to convene a General Court Martial (GCM). For the interpretation of the provisions on
 E delegation, it will be unusually restrictive to concentrate on Section 131(2) because the subsection does not delegate such power. In other words, the delegation of power is not in Section 131(2) but in Section 131(3).

The Court of Appeal concentrated on Section 131(2) when
 F the court said:

“Section 131(2) of the AFD 1993 which I have produced above cannot be construed as authorizing the Chief of Air Staff to delegate his power to convene a General Court Martial. The CAS cannot delegate the power vested in him qua the office he holds either verbally or in writing.

G Since Air Commodore Ajebona did not hold any of the offices listed under S. 131(2) of the AFD above, he could not validly convene a General Court Martial.”

With respect, the answer is not in Section 131(2), but in Section 131(3) which provides in the following terms:

H “The senior officer of a detached unit, establishment or squadron may be authorised by the appropriate superior authority to order a court martial in special circumstances.”

In the interpretation of Section 131(3) on the expression “appropriate superior authority”, aid will be obtained from Section 128(1) of the Decree. By the subsection, the following qualify as appropriate superior authority: (a) the commanding officer; and (b) any officer of the rank of Brigadier or above or officer of corresponding ranks or those directed to so act under whose command the person is for the time being. B

There is evidence that Air Commodore Ajebona is a senior officer. He was the Head of the Directorate of Personnel of the Headquarters NAF at the relevant period. It is also clear in Air Force hierarchy that the CAS is, in the language of Section 128(1), an appropriate superior authority to Air Commodore Ajebona. Accordingly, a community reading of the provisions of Section 131(3) and 128(1) of the AFD clearly gives rise to the conclusion that the Chief of Air Staff can legally delegate the power vested in him under Section 131(2) of the Decree to convene a GCM. C

In *The Nigerian Air Force v. Ex-Wing Commander James* (2002) 12 S.C. (Pt.1) 1; (2002) 18 NWLR (Pt.798) 295, this court held that under Section 131(3) of the Armed Forces Decree No. 105 of 1993 as amended, the power to convene a GCM can be delegated to a senior officer of a detached unit, establishment or squadron by the appropriate superior authority. This court specifically held that the CAS can delegate his power to convene GCM to Air Cdr. Ajobena. In his leading judgment, Onu, JSC., said at 318: E

“The court below held that the power to convene a GCM resided in the officers listed in Section 131(2) of the Decree and there was nothing in this section that enabled the officers so listed to delegate that power (to issue a convening order) to Air Cdr. Ajobena in the instant case. By a reading of Section 131(2), parties agreed that the Chief of Air Staff can convene a GCM. However, by virtue of Section 131(3) of the same Decree, the Chief of Air Staff had every power to delegate his power to issue a convening order for a GCM to Air Cdr. Ajobena.” F

Kalgo JSC., in his concurring judgment, said at page 330: H

“There is no doubt that the Chief of Air Staff is such an appropriate superior authority under the provisions of S.131 of the AFD that can order a court martial. However by virtue of the provisions of S.131(3) above, he can properly authorise any senior officer of a

detached unit or squadron under him to order a court martial. Air Commodore Ajobena is a senior officer in charge of the personnel unit of NAF as Director of Personnel and Exhibits 69 and 70 clearly indicated that the Chief of Air Staff had authorised Air Commodore Ajobena to sign the convening order, which he could do pursuant to S.131(3) of AFD.”

The other issue I would like to take is in respect of calling retired Chief of Air Staff, AVM Femi John Femi as a witness. In our criminal justice system, there is no duty foisted on the prosecution to call a particular person as a witness. The duty of the prosecution is to prove the charge against the accused and the moment that duty is discharged, the court can convict the accused person. The choice of witnesses is the discretion of the prosecution, and I dare say, the discretion is unfettered. It is not within the province or power of an accused person to dictate the witness or witnesses to prove the charge against him. After all, the prosecution of the case is not his. And so, he cannot dabble into a business that is not his.

It is for the above reasons and the fuller reasons given by my learned brother, Kalgo JSC., that I allow the appeal. I set aside the judgment of the Court of Appeal and restore the judgment of the General Court Martial and the convictions, sentences and orders passed on the respondent.

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