

SUPREME COURT OF NIGERIA
22ND JULY 2004 SC. 77/2001
CORAM:- I. L. KUTIGI, S. U. ONU, A. I. KATSINA-ALU,
U. A. KALGO, S. O. UWAIFO, D. MUSDAPHER,
I. C. PATS-ACHOLONU, JJSC

THE STATE APPELLANT/ CROSS-RESPONDENT

V.

SQN. LEADER O.T.

ONYEUKWU RESPONDENT/ CROSS-APPELLANT

CRIMINAL PROCEDURE - Joint trial - S. 155 of the CPA - Permits joint trial - But there is ambiguity - As to whether it must be one charge sheet - As Obi v. COP seemed to decide (H1)

CRIMINAL PROCEDURE - Joint trial - Procedural Policy of convenience - Makes it more convenient - To trial all accused persons jointly - In one indictment (H2)

CRIMINAL PROCEDURE - Judicial precedents - Per incuriam decisions - Joint trial - S.168 of the CPA - The observations in Arisah's and Obi's case - That declare joint trial on separate indictments a nullity - Are delivered per incuriam (H3)

CRIMINAL PROCEDURE - Joint trial - Of separate indictments - Objection by accused - Ought to be raised at the trial time s. 168 CPA - Where no objection was raised - The proceedings is prima facie not a nullity - But an irregularity (H4)

COURT MARTIAL - Power to convene - Can be delegated by the appropriate superior authority - To a senior officer - As was done in this case (H5)

CRIMINAL PROCEDURE - Evidence of a co-accused - Relevance of - Is not a relevant fact against the accused - Without being corroborated (H6)

CRIMINAL PROCEDURE - Proof - Allegations and counts against respondent - Being not proved by evidence - His conviction is not justified (H7)

FACTS

The respondent was tried by the General Court Martial on a 9 count charge. Although the respondent was arraigned before the Court Martial on a separate indictment (i.e. separate charge sheet), he was jointly tried together with other accused persons in one trial. He did not raise an objection at the point of his trial. He was convicted on seven counts and sentenced to various terms of imprisonment. His appeal to the Court of Appeal, Lagos division was allowed as he was discharged and acquitted. But that Court declared the respondent's trial a nullity on account of his being tried on a separate indictment together with other accused persons.

Being aggrieved with the lower court's decision, the State has now appealed to the Supreme Court. Respondent's cross-appeal was subsequently withdrawn as it was conceded that he has no grievance against the lower court's judgment.

ISSUES FOR DETERMINATION

(i) *Whether the power to convene a General Court Martial, vested in the persons set out in Section 131(1) and (2) of the Armed Forces Decree, 105 of 1993 (as amended) cannot be delegated?*

(ii) *Whether the learned Justices of the Court of Appeal were right in holding (as they did) that the joint trial procedure adopted by the General Court Martial was a curious procedure which occasioned improprieties and unfairness and therefore vitiated the trial of the respondent. Etc. see p.1883*

HELD (Unanimously dismissing the appeal save the issue of nullity per

UWAIFO JSC)***S. 155 of the CPA - Permits joint trial***

1. In the consideration of this Issue, it must be accepted that there can be no dispute that joint trial is permitted under certain circumstances in this country by virtue of Section 155 of the CPA. The circumstances are fully stated in the said section. What that section does not specifically and unambiguously contain is whether the joint trial of separate indictments of persons concerned with the circumstances so stated is prohibited, or that it can be done as it was in the present case. But in *Obi v. Commissioner of Police* (supra), Bairamian, J., in interpreting the said Section 155 of the CPA, said at page 80 that if the court decides to try together two or more accused persons who have committed an offence, they must be charged together and tried together. By this, he meant that there must be one indictment in which the accused persons are jointly charged. He came to this view from the rather ambiguous phrase that "*they may be charged and tried together or separately.*" He expressed the meaning of this thus:

"A - they may be charged and tried together; or

B - They may be charged and tried separately.

The 'or' is disjunctive: it must be either the one course or the other; there cannot be a mixture of the two. If the court decides to try the two together they must be charged together and tried together." (p. 1888 C)

Joint trial - Procedural Policy of convenience

2. Against that, of course, is the advantage of having a joint trial (if possible) which will necessarily take a much shorter time than trying each accused person one at a time. No doubt, in terms of procedural policy of convenience, it is better to charge all accused persons as respects all counts against them, in circumstances which are envisaged and permissible under Section 155 of the CPA, in one indictment and have a single trial rather than have separate indictments for a joint trial. There can be no sensible dispute about that procedural arrangement and practice. But the issue at the moment in this appeal is whether the joint trial of separate indictments resulted in the proceedings being a nullity or whether what was done was just an irregularity. (p. 1892 D)

Per incuriam decisions - Joint trial

3. The West African Court of Appeal in Arisah's case (supra) observed at page 298 inter alia:

B "In the present case there was no joint charge: what was done is that two separate charges to which the accused persons had pleaded separately were then tried together. This case falls therefore, rather within Commissioner of Police v. Amos Fewasmore in which it was held that where the
C appellant had been charged separately but was tried together with two other persons who had also been separately charged the trial was a nullity.

This latter decision would appear to dispose of the case in both aspects of the ground of appeal now under consideration, for there is nothing in the Criminal Procedure Ordinance authorizing the joint trial of persons
D charged separately nor is there any such provision as was referred to in Danquah's case whereby no finding of a court of competent jurisdiction shall be reversed on account of any failure of justice, having regard whether objection could and should have been raised at an earlier stage in the proceedings." [Emphasis mine]
E

The appeal against the convictions and sentences was allowed, the proceedings being declared a nullity, leading the court to conclude that "*the convictions and sentences of both appellants must be set aside and that the
F cases be sent back for trial by a court of competent jurisdiction.*" I must draw attention to the emphasized portion of the above passage from the judgment of the Appeal Court, delivered by Verity, CJ., (of Nigeria). That portion of the observation was probably made per incuriam. I have examined the Criminal Procedure Ordinance (Cap. 43) Laws of Nigeria, 1948
G made effective from June 1, 1945 by Notice 618 in Gazette 33 of 1945. Section 168 thereof is in pari materia with Section 168 of the Criminal Procedure Act (Cap. 80) Laws of the Federation of Nigeria, 1990 also effective from June 1, 1945. The two laws are clearly the same.

H Had the appeal court adverted to the Ordinance as contained in the said Gazette of 1945 at the time judgment was given in Lagos on 27th January, 1948, it would have been bound to apply the provisions of Section 168 following Danquah's case. I would say the same of Obi's case which

was delivered on 2nd February, 1950. (p. 1893 F)

Joint trial - Of separate indictments

4. The appellant in this case had the option to object to the joint trial of the separate indictments. He did not. Section 168 of the CPA, as I understand it, expected him to do so. The said section says that if he failed to do so at the appropriate time, the judgment given against him cannot be reversed merely because the separate indictments were jointly tried. In my judgment, it would be wrong to regard such joint trial as a jurisdictional issue. If there is a joint trial of separate indictments, what is it to be regarded as? The United States cases cited above, which I agree with, regard it as an irregularity. It is also remarkable that in *Obi v. Commissioner of Police* (supra), Bairamian, J., referred rightly, in my view, to such joint trial as irregular, although he subsequently thought it was a nullity, probably because of the mixed procedure taken. I think when there has been a joint trial of separate indictments without objection, prima facie it is an irregularity not a nullity. Section 168 of the C.P.A., makes that conclusion inevitable and defensible in this country, so long as no miscarriage of justice has been shown to have arisen merely because of such joint trial. After all, since joint trial is permitted by Section 155 of the C.P.A., joint trial of separate indictments raises only a technicality, which does not border on jurisdiction. If it had been a jurisdictional issue, it would have been a legal contradiction to permit a waiver or acquiescence of its violation. I am satisfied that the court below was in error to have declared the proceedings of the GCM a nullity. (p. 1895 E)

COURT MARTIAL - Power to convene

5. Issue 1 in this appeal has been answered in the affirmative in the decisions of this court earlier cited in this judgment. The position is that the appropriate superior authority may authorize a relevant senior officer to order a court martial. In the present case, the authorization given to Air Commodore Ajobena by the Chief of Air Staff was proper and I hold that the GCM was validly convened as I am bound by the earlier decisions of this court on the issue. The court below was therefore in error to have held otherwise having failed to consider and apply the import of the provision of

subsection (3) of Section 131 of the Armed Forces Decree No. 105 of 1993 which is that:

“(3) *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.*”

Such appropriate superior authority includes service chiefs of which the Chief of Air Staff is one. (p. 1896 B)

Evidence of a co-accused - Relevance of

6. Issue 3 is about the statement made in Exhibit 13 by the 6th accused person, Sqn. Ldr. Olatunji, in which he alleged that he gave the sum of N400,000.00 to the respondent out of the amount of N10 million said to be stolen from the Nigerian Air Force coffers and shared among some officers, including the respondent. It is true, as held by the court below, that such a confession is not evidence against the respondent in this case but is a relevant fact against only Olatunji the maker by virtue of Section 27(3) of the Evidence Act. However, if the confession was made by a person in the presence of one or more persons with whom he is jointly charged, and such other persons adopted the statement by words or conduct, then it becomes a relevant fact against them: see *Ozaki v. The State* (1990) 1 NWLR (pt. 124) 92. (p. 1896 F)

CRIMINAL PROCEDURE - Proof - Allegations

7. In the same way, there was no evidence in proof of all other allegations made against the respondent. So, counts 2, 3, 5, 6, 7, 8, and 9 were not proved. Actually counts 8 and 9 were wrongly tried along with the other counts because there is no connection between them to justify joint trial under Section 155 of the CPA. In any case, I agree with the court below that the conviction of the respondent was unjustified. I do, however, hold that that court was wrong to declare the proceedings a nullity. I come to the conclusion that this appeal lacks merit and is accordingly dismissed. (p. 1898 H)

NOTABLE POINTS OF INTEREST**UWAIFO JSC**

1. Obi v. COP - May have been decided based a mixed course of procedure

Could it be that Bairamian, J's observation was because of "*this mixed course of procedure*" for which he regarded ??? proceedings as improper and perhaps also a nullity? That is very likely. However, the question may be asked, whether it would be right to insist that the phrase, "*They may be charged and tried together or separately*", as used under the provisions of Section 155 of the CPA is concerned with the manner a charge (or an indictment) is preferred for the purpose of having a joint trial or really that joint trial is permissible so long as the circumstances of the commission of the offences and the nature of those offences as enumerated in that section are appropriate for a joint trial: in this latter situation, the view may be taken that it is only a matter of technicality if compatible indictments drawn up separately are consolidated for a joint trial at the discretion of the court. There are judicial authorities which I shall refer to later in this judgment that will accommodate this view. (p. 1889 C)

PATS-ACHOLONU JSC

2. Proof beyond reasonable doubt - What it connotes

It must be stated and emphasized that proof beyond all reasonable doubt does not mean or import or connote beyond any degree of certainty. The term strictly means that within the bounds of evidence adduced and staring the court in the face, no tribunal of justice worth its salt would convict on it having regard to the nature of the evidence led and the law marshalled out in the case. It can be said that evidence in a criminal trial that is susceptible to doubt cannot be said to have attained the height or standard of proof that can be said to be beyond all reasonable doubt. Regardless of what one might think in a given state of affairs in a given case, neither suspicion nor speculation or intuition can be a substitute for proof beyond all reasonable doubt. It is proof that precludes all reasonable inference or assumption except that which it seeks to support and must have the clarity of proof that

is readily consistent with the guilt of the person. The expression beyond all reasonable doubt should not be susceptible to any ungainly and abstract construction or understanding. A priori, it is a concept founded on reason and rational and critical examination of a state of facts and law rather, than B a fanciful, whimsical or capricious and speculative doubt. (p. 1911 B)

REPRESENTATION

C Alade Agbabiaka, Esq. (with him J. A. Adamu, Esq, Senior Legal Officer), for the Appellant/Cross Respondent.

Alhaji G. Adetola-Kaseem, SAN., (with him, Akin Kejawa, Esq, and Chidiebere Ibe, Esq.), for the Respondent/Cross Appellant.

D CASES REFERRED TO

Ozaki v. The State (1990) 1 NWLR (pt. 124) 92

Nigerian Air Force v. Ex-Wing Commander L. D. James (2002) 12 S.C. (Pt. I) 1, (2002) 18 NWLR (Pt. 798) 295

E Nigeria Air Force v. Ex. Squadron Leader A. Obiosa (2003) 1 S.C. (Pt. II) 145, (2003) 4 NWLR (Pt. 810) 233

Nigerian Air Force v. Ex. Squadron Leader S. I. Olatunji (2003) 14 NWLR (Pt. 839) 138

F R. v. Hadwan and Ingham (1902) 1KB 882 at 888

Rig, v. Payne (1); (1872) LRICC 349

Logan v. United States 144 US 263 (1892)

Obi v. Commissioner of Police (1950) 19 NLR 79

Arisah v. Commissioner of Police (1953) 12 WACA 297

G Crane v. D.P.P. (1921) All ER (Reprint) 19

STATUTES & RULES REFERRED TO

H Armed Forces Decree 105 of 1993 (as amended) ss. 131, 114, 66 (a) & (b), 57 (1)

Evidence Act ss. 27 (3), 11

Criminal Code ss. 422, 98 (2)

Fire Arms Act 1958 s. 28 (1) (a) (i)

Criminal Procedure Act ss. 155, 168

Rules of Procedure (Air Force), 1972 r. 16 (1)

LEAD JUDGMENT BY UWAIFO.JSC

When this case came on for hearing on 29th April, 2004, this court B
was initially faced with two appeals. One is the appeal filed by the State
against the judgment of the Court of Appeal, Lagos Division, given on 22nd
June, 2000, allowing the appeal and discharging and acquitting the present
respondent, Sqn. Ldr. O. T. Onyeukwu, on all the seven counts upon which C
he had been convicted by the General Court Martial (the GCM) together
with the order for restitution as confirmed by the confirming authority. The
other was the cross-appeal by the said Sqn. Ldr.

In the course of argument, the cross-appeal was abandoned and D
withdrawn by Alhaji Adetola-Kaseem, SAN. He conceded that there was no
grievance expressed by the cross-appellant against the judgment of the court
below on which to base the cross-appeal. The cross-appeal was accord-
ingly dismissed. In regard to the appeal, the State, as the appellant, raised six
issues for determination as follows: E

*“(i) Whether the power to convene a General Court Martial, vested
in the persons set out in Section 131(1) and (2) of the Armed Forces Decree,
105 of 1993 (as amended) cannot be delegated?”*

*“(ii) Whether the learned Justices of the Court of Appeal were right in F
holding (as they did) that the joint trial procedure adopted by the General
Court Martial was a curious procedure which occasioned improprieties and
unfairness and therefore vitiated the trial of the respondent.*

*“(iii) Whether on a charge of conspiracy the provisions of Section 27(3) G
of the Evidence Act can be applicable having regard to the Section 11 of the
Evidence Act.*

*“(iv) Whether the Court of Appeal was right in holding that the evi-
dence before the GCM was insufficient to have secured the respondent’s
conviction under count 3.”* H

*“(v) Whether the statement of a person who was not jointly charged with
the respondent and which said statement is against the respondent cannot
suffice to secure his conviction.*

(vi) *Whether the learned Justices of the Court of Appeal were right in setting aside the conviction of and discharging and acquitting the respondent in respect of counts five, six and seven having regard to the evidence adduced before the GCM’.*

B The respondent in reliance on the grounds of appeal filed by the appellant set down five issues for determination. Some of them are reasonably similar to those of the appellant. Having regard to the arguments canvassed, it seems to me that the second issue raised by both parties has deserved my closest attention. That issue deals with the consequence of
C trying separate indictments jointly, as was done in this case. I shall adopt the issues raised by the appellant for the purposes of deciding this appeal. I would like to draw attention to the recent decisions of this court arising from the very judgment of the court below which is also the subject of
D appeal now. These cases are reported as *The Nigerian Air Force v. Ex-Wing Commander L. D. James* (2002) 12 S.C. (Pt. I) 1, (2002) 18 NWLR (Pt. 798) 295; *Nigeria Air Force v. Ex. Squadron Leader A. Obiosa* (2003) 1 S.C. (Pt. II) 145, (2003) 4 NWLR (Pt. 810) 233; *Nigerian Air Force v. Ex. Squadron Leader S. I. Olatunji* (2003) 14 NWLR (Pt. 839) 138.
E

The respondent was charged alone in an indictment containing 9 counts stated as follows:

“*1ST CHARGE : CIVIL OFFENCE CONTRARY TO SEC 114 OF THE ARMED FORCES DECREE, 1993, THAT IS TO SAY, CONSPIRACY
F TO DEFRAUD CONTRARY TO SEC 422 OF THE CRIMINAL CODE IN THAT HE*

*Together with Gp Capt RM Tinglocha (NAF/ 493), Wg Cdr MB Togunloju (NAF/839), Wg Cdr LD James (NAF/909), Wg Cdr TLA Shekete
G (NAF/843), Sqn Ldr MO Kamldeen and Sqn Ldr SI Olatunji (NAP/1217) at HQ NAF DFA/HQ PAG, Lagos between 1-4 Apr 96 conspired to defraud the Nigerian Air Force.*

*2ND CHARGE : STEALING CONTRARY TO SEC 66 (a) OF
H THE ARMED FORCES DECREE, 1993 IN THAT HE*

Together with Gp Capt RM Tinglocha (NAF/ 493), Wg Cdr MB Togunloju (NAF/839), Wg Cdr LD James (NAF/909), Wg Cdr TLA Shekete

(NAF/1040), Sqn Ldr MO Kamldeen (NAF/843) and Sqn Ldr SI Olatunji (NAF/ 1217) at Lagos on or about 2 Apr 96 stole the sum of N10m property of the Nigerian Air Force.

(Alternative 2nd charge) : RECEIVING STOLEN PROPERTY CONTRARY TO SEC 66 (b) OF THE ARMED FORCE DECREE, 1993
IN THAT HE

B

At Lagos on or about 2 Apr 96 received the sum of N0.5m being part of N 10m stolen from the Nigerian Air Force knowing or having reason to believe same to have been stolen.

3RD CHARGE : CIVIL OFFENCE CONTRARY TO SEC 114 OF ARMED FORCES DECREE 93, THAT IS TO SAY, CONSPIRACY TO COMMIT OFFICIAL CORRUPTION CONTRARY TO SEC 98 (2) OF THE CRIMINAL CODE

IN THAT HE

D

conspired with Wg Cdr PE Iven (NAF/840) and Wg Cdr LD James (NAF/909) at Lagos, in Feb 96 to procure the sum of N350,000.00 meant to corrupt the Auditor-General of the Federation.

4TH CHARGE : CIVIL OFFENCE CONTRARY TO SEC 114 OF AFD 93, THAT IS TO SAY, CONSPIRACY TO SEC 98 (2) OF THE CRIMINAL CODE

E

IN THAT HE

Conspired with Wg Cdr PE Iven (NAF/840) and Wg Cdr LD James (NAF/909) at Lagos, in Feb 96 to procure the sum of N500,000.00 meant to corrupt officials of the Federal Ministry of Finance, Abuja.

F

5TH CHARGE : RECEIVING STOLEN PROPERTY CONTRARY TO SEC 66 (b) OF THE ARMED FORCES DECREE, 1993

IN THAT HE

G

At Lagos in Jan 96 received the sum of N250,000.00 knowing or having reason to believe same to have been stolen.

6TH CHARGE : RECEIVING STOLEN PROPERTY CONTRARY TO SEC 66 (b) OF THE ARMED FORCES DECREE, 1993

H

IN THAT HE

At Lagos in Feb 96 received the sum of N250, 000.00 knowing or having reason to believe same to have been stolen

7TH CHARGE : RECEIVING STOLEN PROPERTY CONTRARY TO SEC 66 (b) OF THE ARMED FORCES DECREE, 1993

IN THAT HE

At Lagos in Mar 96 received the sum of N250,000.00 knowing or
B *having reason to believe same to have been stolen*

8TH CHARGE : CIVIL OFFENCE CONTRARY TO SEC 114 OF THE ARMED FORCES DECREE, 1993 THAT IS TO SAY ILLEGAL POSSESSION OF FIRE ARMS CONTRARY TO SECTION 28(1) (A) (1) OF THE FIRE ARMS ACT, 1958

C *IN THAT HE*

At Lagos on or about Apr 96 was found in possession of one single
barreled Cal. 22 LR shot gun with S/No. 062774 and five rounds of live
ammunition.

D *9TH CHARGE : DISOBEDIENCE TO STANDING ORDERS CONTRARY TO SEC 57(1) OF THE ARMED FORCES DECREE 105, 1993 IN THAT HE*

At Lagos on or about Apr 96 engaged in private business which
E *contravened Administration Instruction S/No. 3 dated Feb 76, an order known to him or which he might reasonably be expected to know."*

There were 8 other separate indictments brought against different individuals. Those indictments were consolidated with the respondent's indictment and a joint trial of all 9 accused persons was conducted by the
F GCM held at Ikeja, Lagos. On 21 October, 1996, the GCM found the respondent guilty on counts 2, 3, 5, 6, 7, 8 and 9, convicted him accordingly. Sentences were given as follows: count 2, 2 years' imprisonment; count 3, 7 years; count 5, 2 years; counts 6, 2 years; count 7, 2 years;
G count 8, 2 years; count 9, 2 years. The sentences in counts 2, 3, 5 and 9 were to run consecutively, coming to a total of 13 years. In addition, he was ordered to pay by way of restitution the sum of N900,000.00 together with interest which was put at N 1,350,000.00, making a total of
H N2,250,000.00. The convictions, sentences and order as above were confirmed by the confirming authority. But on 22nd June, 2000, the Court of Appeal allowed the appeal against the decision, set aside the same and discharged and acquitted the respondent.

In this appeal from the judgment of the Court of Appeal, I observe that Issue 2 was not raised in any of the three cases earlier cited above. It is an important issue which I consider should be dealt with first in this appeal. As I have said, at the GCM where the respondent was tried jointly with 8 others, separate indictments had been filed against each of the accused persons. The respondent was the 9th accused and his indictment contained 9 counts. The indictment of each accused person was read to him separately and his plea taken. But all the accused persons were then made to have a joint trial. What now arises for a decision, as raised in issue 2, stems from the observation of the court below per Oguntade, JCA., as follows:

“Still on issue one is the complaint that the GCM had no jurisdiction to have tried jointly nine persons who were separately charged. What happened in the instant case is to say the least scandalous and a clear travesty of justice. It is a blatant departure from all known practices and procedures governing criminal trials. Nine persons were brought on separate charge sheet. However, all of them were jointly tried. The first question to ask is - were all these nine persons co-accused for the purpose of determining how to treat the evidence of each of them which implicated another?”

In the end, that court held that the trial of the respondent, by virtue of the separate indictments having been tried jointly, was a nullity.

The question has been asked by the appellant in issue 2 whether the court below was right. The appellant submits that a joint trial is allowed by virtue of Section 155 of the Criminal Procedure Act (CPA) applicable to this case. That section provides that :

“When more persons than one are accused of the same offence or of different offences committed in the same transaction or when a person is accused of committing an offence and another of abetting or being accessory to or attempting to commit such offence or when a person is accused of an offence of theft, criminal misappropriation, criminal breach of trust and another of receiving or retaining or assisting in the disposal or concealment of the subject matter of such offence, they may be charged and tried together or separately as the court thinks fit.”

The respondent contends that the GCM lacked the jurisdiction to try the nine accused persons, including the respondent, jointly when each of

the said accused persons were charged separately. It further argues that where the prosecution desires to have a joint trial of accused persons by virtue of Section 155 of the CPA, such persons must be charged together in one indictment, citing *Obi v. Commissioner of Police* (1950) 19 NLR 79; *Arisah v. Commissioner of Police* (1953) 12 WACA 297; and the opinion of the learned author of *The Criminal Procedure of Southern States of Nigeria* by Nwadialo at page 104 that:

"It is a prerequisite for a joint trial that all the accused persons should be charged in the same charge sheet as one body. That is, they should all be named as the accused persons on the charge sheet."

In the consideration of this Issue, it must be accepted that there can be no dispute that joint trial is permitted under certain circumstances in this country by virtue of Section 155 of the CPA. The circumstances are fully stated in the said section. What that section does not specifically and unambiguously contain is whether the joint trial of separate indictments of persons concerned with the circumstances so stated is prohibited, or that it can be done as it was in the present case. But in *Obi v. Commissioner of Police* (supra), *Bairamian, J.*, in interpreting the said Section 155 of the CPA, said at page 80 that if the court decides to try together two or more accused persons who have committed an offence, they must be charged together and tried together. By this, he meant that there must be one indictment in which the accused persons are jointly charged. He came to this view from the rather ambiguous phrase that *"they may be charged and tried together or separately."* He expressed the meaning of this thus:

"A - they may be charged and tried together; or B They may be charged and tried separately.

The 'or' is disjunctive: it must be either the one course or the other; there cannot be a mixture of the two. If the court decides to try the two together they must be charged together and tried together."

In the *Obi* case, there were many irregularities. The case began upon a single charge against thirteen accused who pleaded. Later two more accused were added who pleaded. The first thirteen refused to lead evidence

at the close of the prosecution, insisting that their plea ought to be taken again when those two accused were added. The court convicted them and proceeded to take defence of those two. They were also convicted. Upon this scenario, Bairamian, J., said:

“This case was badly handled: as a joint trial it began irregularly, and at the end of the evidence for the prosecution it developed into separate trials.

There is no authority for this mixed course of procedure, and the proceedings must be regarded as an improper trial at any rate, if no also as a nullity, which I rather think they were.”

Could it be that Bairamian, J’s observation was because of “*this mixed course of procedure*” for which he regarded proceedings as improper and perhaps also a nullity? That is very likely. However, the question may be asked, whether it would be right to insist that the phrase, “*They may be charged and tried together or separately*”, as used under the provisions of Section 155 of the CPA is concerned with the manner a charge (or an indictment) is preferred for the purpose of having a joint trial or really that joint trial is permissible so long as the circumstances of the commission of the offences and the nature of those offences as enumerated in that section are appropriate for a joint trial: in this latter situation, the view may be taken that it is only a matter of technicality if compatible indictments drawn up separately are consolidated for a joint trial at the discretion of the court. There are judicial authorities which I shall refer to later in this judgment that will accommodate this view. But in *Arisah v. Commissioner of Police* (supra), the West African Court of Appeal, following its earlier decision in *Commissioner of Police v. Fewasmore WACA*, 27th January, 1942 (unreported), held that where an accused had been charged separately but had 5 been tried together with two other persons, also separately charged, the trial was a nullity.

Let me concede that the cases considered above are entitled to much respect. The two WACA cases above seem to be in line with the House of Lords decision reached earlier in the case of *Crane v. Director of Public Prosecutions* (1921) All ER Reprint 19 even though it was not considered in those cases, nor in *Obi’s* case. In *Crane*, the appellant was in-

dicted for receiving goods knowing them to be stolen and another man was charged in a separate indictment with stealing the goods. The two were tried together and convicted. The House of Lords held that the trial was a nullity. In *R v. Dennis* (1924) 1 KB 867, the Court of Criminal Appeal, applying
B Crane’s case, held that the court has no jurisdiction to try two separate indictments against two defendants at one and the same time, even with the consent of counsel for the prosecution and counsel for the defendants.

In the United States of America, there is a different approach. Reference may be made to *Logan v. United States* 144 US 263 (1892). In that
C case, five indictments were consolidated for trial. There had been consolidation and part de- consolidation at different times. The defendants were convicted. They then raised objection to the joint trial on appeal. Mr. Justice Gray who delivered the opinion of the court said at 297:

D “The record before us shows that the court below at different times made three orders of consolidation.

The only exception taken by the defendants to any of these orders was to the first one, made at October term, 1890, by which four of the
E indictments on which a trial was afterwards had were ordered to be consolidated with five earlier indictments, which included other defendants and different offences.

By the second order of consolidation, made on a subsequent day of
F the same term, the five earlier indictments were ordered to be separated, so that in this respect the case stood as if they had never been consolidated with the four later ones. Two of the defendants in one of these four indictments were ordered to be severed and tried separately; and the former order of consolidation was confirmed as to the four indictments, all of which, as
G they then stood, were charges against the same persons ‘for the same act or transaction,’ or at least ‘for two or more acts or transactions connected together,’ and therefore within the very terms and purpose of the section of the Revised Statutes above quoted, and might perhaps have been ordered, in
H the discretion of the court, to be tried together, independently of any statute upon the subject.....

By the third order of consolidation, indeed, made at February term, 1891, shortly before the trial, a new indictment against different persons for

the same crime was consolidated with the four indictments. But it is unnecessary to consider whether this was open to objection, since none of the defendants objected or excepted to it. They may all have considered it more advantageous or more convenient to have the new indictment tried together with the other four. Having gone to trial, without objection, on the indictments as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after the verdict. “Emphasis mine]

See also *Bucklin v. United States* 159 U. S. 682 at 685 in which identical view on the consequences of failure to object were expressed by the court per Mr. Justice Harlan in similar circumstances. It is clear that such joint trial of separate indictments is not regarded in the United States as leading to a nullity of the proceedings. It seems that if the offences are reasonably of the same genus or are somehow related, and there is connection as to the time and circumstances of commission as envisaged under Section 155 of the CPA, separate indictments drawn against those who are accused of committing them may be justifiably consolidated for a joint trial, unless it is apparent that a miscarriage of justice has been (or will be) occasioned by such consolidation. Such procedure of consolidation is considered to be a matter within the discretion of the court: see *Logan’s case* (supra) at 296.

I wish to return to *Crane’s case*. The two accused persons there had been separately indicted under the Larceny Act, 1861, Section 91 but jointly tried. Lord Atkinson said at pages 26-27:

“When an accused person has pleaded ‘Not Guilty’ to the offences charged against him in an indictment, and another accused person had pleaded “Not Guilty” to the offence or offences charged against him in another separate and independent indictment, it is, I have always understood, elementary in criminal law, that the issues raised by those two pleas cannot be tried together. It is obvious that many inconveniences would arise in practice if they were tried together; one among them would be that in a case where a felony was charged against each the one might by his peremptory challenges put off from the jury the very men by whom the other desired to be tried, whereas had they been indicted jointly and did not join in their

challenges they might have been and probably would have been tried in succession and only those Jurors whom the person on trial objected to would have been peremptorily challenged.”

It is plain to me that it is the procedural inconvenience that might arise in the process of constituting a jury in case there are challenges to some jury men’s service when separate indictments are consolidated for a joint trial that bothered Lord Atkinson. It appears that where there is no jury trial, the reason given in Crane’s case cannot stand. However, it can be imagined that if separate indictments of several counts against a large number of accused persons were to be consolidated for joint trial, it might take a fairly long time reading each indictment, one after the other, against particular accused persons to get the plea of each accused until all the indictments are read and pleaded to.

Against that, of course, is the advantage of having a joint trial (if possible) which will necessarily take a much shorter time than trying each accused person one at a time. No doubt, in terms of procedural policy of convenience, it is better to charge all accused persons as respects all counts against them, in circumstances which are envisaged and permissible under Section 155 of the CPA, in one indictment and have a single trial rather than have separate indictments for a joint trial. There can be no sensible dispute about that procedural arrangement and practice. But the issue at the moment in this appeal is whether the joint trial of separate indictments resulted in the proceedings being a nullity or whether what was done was just an irregularity.

The case of Logan (supra) at 296 shows that there is a law (Revised Statutes Section 1024) which permits of joint trial. It is similar to Section 155 of the CPA as regards its first part. There, Mr. Justice Gray observed thus:

“Congress has enacted that, ‘when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes of offences, may be properly joined, instead of having several indictments the whole may be joined in one indictment in

separate counts; and, if two or more indictments are found in such cases, the court may order them to be consolidated.“ [Emphasis mine]

It is necessary to recall that in Logan’s case, different persons separately indicted were tried jointly. The learned Justice went further to say that even without such legislation for a joint trial, the court has a discretion to consolidate separate indictment for that purpose, when he said:

“Two of the defendants in one of these four Indictments were ordered to be severed and tried separately; and the former order of consolidation was confirmed as to the four indictments, all of which, as they then stood, were charges against the same persons ‘for the same act or transaction, or at least ‘for two or more acts or transactions connected together,’ and therefore within the very terms and purpose of the section of the Revised Statutes above quoted, and might perhaps have been ordered, in the discretion of the court, to be tried together, independently of any statute upon the subject.” [Emphasis mine]

A close study with introspection of these observations of Mr. Justice Gray conveys some reminiscence of the provisions of Section 155 of the CPA as to whether they really foreclose the consolidation of separate indictments; or whether the discretion of the court to have a joint trial is only available when there is a single indictment of persons.

In England, there is no statute, which can be interpreted as providing for or against the consolidation of separate indictments for joint trial. All the relevant judicial authorities on the matter show that it was by the sheer judicial approach that the consolidation of separate indictments was considered a jurisdictional issue which leads to a trial based on it being declared a nullity. The West African Court of Appeal in Arisah’s case (supra) observed at page 298 inter alia:

“In the present case there was no joint charge: what was done is that two separate charges to which the accused persons had pleaded separately were then tried together. This case falls therefore, rather within Commissioner of Police v. Amos Fewasmore in which it was held that where the appellant had been charged separately but was tried together with two other persons who had also been separately charged the trial

was a nullity.

This latter decision would appear to dispose of the case in both aspects of the ground of appeal now under consideration, for there is nothing in the Criminal Procedure Ordinance authorizing the joint trial of persons charged separately nor is there any such provision as was referred to in Danquah's case whereby no finding of a court of competent jurisdiction shall be reversed on account of any failure of justice, having regard whether objection could and should have been raised at an earlier stage in the proceedings." [Emphasis mine]

The appeal against the convictions and sentences was allowed, the proceedings being declared a nullity, leading the court to conclude that *"the convictions and sentences of both appellants must be set aside and that the cases be sent back for trial by a court of competent jurisdiction."* I must draw attention to the emphasized portion of the above passage from the judgment of the Appeal Court, delivered by Verity, C.J., (of Nigeria). That portion of the observation was probably made per incuriam. I have examined the Criminal Procedure Ordinance (Cap. 43) Laws of Nigeria, 1948 made effective from June 1, 1945 by Notice 618 in Gazette 33 of 1945. Section 168 thereof is in pari materia with Section 168 of the Criminal Procedure Act (Cap. 80) Laws of the Federation of Nigeria, 1990 also effective from June 1, 1945. The two laws are clearly the same.

Had the appeal court adverted to the Ordinance as contained in the said Gazette of 1945 at the time judgment was given in Lagos on 27th January, 1948, it would have been bound to apply the provisions of Section 168 following Danquah's case. I would say the same of Obi's case which was delivered on 2nd February, 1950. The relevant aspects of the said provisions read:

"168. No judgment shall be stayed or reversed on the ground of any objection which if stated after the charge was read over to the accused or during the progress of the trial might have been amended by the court nor -....."

(c) because of any objection which might have been stated as a ground of challenge of any juror, nor for any informality in swearing a

juror or witness or any of them.”

It can be seen that objection could have been taken to the separate indictments being tried jointly (a) soon after the charge had been read over to the accused or (b) during the progress of the trial. This is what the United States cases of Logan and Bucklin, earlier cited in this judgment, and also Danquah’s case, decided. As it seems to me, the court in Arisah’s case obviously thought that these provisions above-quoted did not exist, hence it had to say what it said in the passage I have quoted from that judgment with particular reference to the emphasized portion. Para, (c) of Section 168 of the C.P.A., which appears to reecho the inconvenience referred to by Lord Atkinson in Cranes’ case (supra), makes it clear that it is also no ground for reversing a judgment if circumstances which might lead to the challenge of any juror (in case of a jury trial) arose, but no challenge was made. One of such circumstances would be, as Lord Atkinson pointed out, when a joint trial of separate indictments was ordered. Section 168 (c) of the C.P.A., could save the judgment arrived at in such a trial from being reversed if no objection had been taken after plea was taken or during the trial.

The appellant in this case had the option to object to the joint trial of the separate indictments. He did not. Section 168 of the CPA, as I understand it, expected him to do so. The said section says that if he failed to do so at the appropriate time, the judgment given against him cannot be reversed merely because the separate indictments were jointly tried. In my judgment, it would be wrong to regard such joint trial as a jurisdictional issue. If there is a joint trial of separate indictments, what is it to be regarded as? The United States cases cited above, which I agree with, regard it as an irregularity. It is also remarkable that in Obi v. Commissioner of Police (supra), Bairamian, J., referred rightly, in my view, to such joint trial as irregular, although he subsequently thought it was a nullity, probably because of the mixed procedure taken. I think when there has been a joint trial of separate indictments without objection, prima facie it is an irregularity not a nullity. Section 168 of the C.P.A., makes that conclusion inevitable and defensible in this country, so long as no miscarriage of

justice has been shown to have arisen merely because of such joint trial. After all, since joint trial is permitted by Section 155 of the C.P.A., joint trial of separate indictments raises only a technicality, which does not border on jurisdiction. If it had been a jurisdictional issue, it would have been a legal contradiction to permit a waiver or acquiescence of its violation. I am satisfied that the court below was in error to have declared the proceedings of the GCM a nullity.

Issue 1 in this appeal has been answered in the affirmative in the decisions of this court earlier cited in this judgment. The position is that the appropriate superior authority may authorize a relevant senior officer to order a court martial. In the present case, the authorization given to Air Commodore Ajobena by the Chief of Air Staff was proper and I hold that the GCM was validly convened as I am bound by the earlier decisions of this court on the issue. The court below was therefore in error to have held otherwise having failed to consider and apply the import of the provision of subsection (3) of Section 131 of the Armed Forces Decree No. 105 of 1993 which is that:

“(3) 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.”

Such appropriate superior authority includes service chiefs of which the Chief of Air Staff is one.

Issue 3 is about the statement made in Exhibit 13 by the 6th accused person, Sqn. Ldr. Olatunji, in which he alleged that he gave the sum of N400,000.00 to the respondent out of the amount of N10 million said to be stolen from the Nigerian Air Force coffers and shared among some officers, including the respondent. It is true, as held by the court below, that such a confession is not evidence against the respondent in this case but is a relevant fact against only Olatunji the maker by virtue of Section 27(3) of the Evidence Act. However, if the confession was made by a person in the presence of one or more persons with whom he is jointly charged, and such other persons adopted the statement by words or conduct, then it becomes a relevant fact against them: see *Ozaki v. The State* (1990) 1 NWLR

(pt. 124) 92. In the present case, it would appear the police confronted the respondent with the said Exhibit 13 for his reaction. He reacted to the allegation in his statement contained in Exhibit 20 which the court below considered. The court below observed that in the said Exhibit 20, the respondent denied receiving the money. The written statement of the respondent B as per Exhibit 20 does not appear to be an outright denial. I would say it is rather ambivalent. He said:

“Squadron Leader Olatunji claimed he gave me N400, 000.00 (Four Hundred Thousand Naira) out of the said money through warrant officer C Paul in his office.”

Now, when this is read along with what followed next in that statement, it cannot amount to a denial. I think he was merely concerned to deny that he was part of the conspiracy in regard to how the “said money” was D procured and shared, hence he said:

“I do not have any idea how the said money was approved, processed or shared. I was however meant (sic: made) to understand that the money was for office running.” [Emphasis mine]

Did the respondent mean by this written statement that he merely E received the money on the understanding that it was to be used for “office running”? It was in his testimony before the GCM, that he cleared the air when he denied receiving any money.

There was evidence from another witness, Warrant Officer Paul F Tungon (P. W.4), that he was given a bag containing “something” by Olatunji to put in the boot of respondent’s car; he also said he was given the key to the boot. He said he deposited the bag in the boot and returned the key to Olatunji. The GCM took these circumstances into account to accept how G the missing money was distributed, or partially distributed. But the court below reasoned thus:

“The evidence from P.W. 4 that he collected a bag from Olatunji to deposit it in the boot of appellant’s car does not amount to much without H any evidence that the appellant had known in advance that money was to be deposited in the boot of his car and had left the key of his car boot with Olatunji to facilitate the process. If it was possible for Olatunji to possess the key of the car boot of the appellant, it was equally possible for Olatunji

to go back to the boot to remove the bag which P.W. 4 claimed he put there since according to P.W. 4. the key was given back to Olatunji.” [Emphasis mine]

I would imagine that the emphasized portion of the passage quoted above raises the possibility (or even probability) that Olatunji could have got hold of the key to the boot of the car of the respondent (then appellant) unlawfully and used it to play a villainous prank on the P.W. 4 for the purpose of implicating the respondent. In that situation, the question would arise whether the respondent complained of the loss of that key. Whereas, if there were no such insinuation, then the respondent would be required to explain how the key to the boot of his car got to Olatunji. Whichever way the reasoning of the court below is considered, it unduly reflects unfavourably on the respondent. It has not helped matters. In my view, that portion of the passage is patently a non sequitur. In his evidence at the GCM, the respondent was asked questions relevant to the key and he answered. The first question was: “Do you know who gave the 6th accused (Olatunji) the key to your car?” And he answered, “The 6th accused never had the key to my car, sir.” Then the question, “Who drove your car back home that day?” To which he answered, “I drove myself that day, sir.” As I already said, he denied receiving any money. That raised an issue of credibility between him, P.W.4 and Olatunji. In the circumstances, I would say that the evidence of P.W.4 on this issue was without probative value. He did not know who drove the respondent’s car to the paymaster’s office (i.e., Olatunji’s Office); he did not know how Olatunji got the key to the boot of the respondent’s car; he did not know the car plate number. When asked the colour of the car he said it was 504! He did not know how much was contained in the bag he allegedly put in the boot of the car or indeed whether it contained money at all. I cannot see how any tribunal can act on this evidence of P.W. 4. to convict a person in the respondent’s position. It is best simply rejected as having proved nothing. Olatunji being an accused would need a corroboration of his evidence; and that was lacking.

In the same way, there was no evidence in proof of all other allegations made against the respondent. So, counts 2, 3, 5, 6, 7, 8, and 9 were not proved. Actually counts 8 and 9 were wrongly tried

along with the other counts because there is no connection between them to justify joint trial under Section 155 of the CPA. In any case, I agree with the court below that the conviction of the respondent was unjustified. I do, however, hold that that court was wrong to declare the proceedings a nullity. I come to the conclusion that this appeal lacks merit and is accordingly dismissed. B

KUTIGIJSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Uwaifo, JSC. I agree with his reasoning and conclusions. On the issue of whether or not the respondent was properly tried jointly along with others by virtue of Section 155 of the Criminal Procedure Act when each of them was separately charged, I think Section 168 of the same Criminal Procedure Act provides the answer when it says under Objections Cured by Verdict that- D

“168. No judgment shall be stayed or reversed on the ground of any objection which if stated after the charge was read over to the accused or during the progress of the trial might have been amended by the court.....” E

It is clear that in the instant case an objection could have been taken to the separate indictments being tried together jointly soon after the charge had been read or during the progress of the trial. No such objection was ever raised even though the court had discretion to order separate trial or trials as the case may be. Having thus gone through the trial without objection, it seems to me that it was not open to the respondent to take the objection after the verdict. The Court of Appeal therefore erred when on this score it declared the judgment of the Court Martial a nullity. I think the joint trial was in order. But this alone is not sufficient to sustain the appeal, the Appellant/Prosecution having failed to prove its charges beyond reasonable doubt against the Respondent. The appeal must therefore fail. It is accordingly dismissed. F G H

The learned counsel for the cross- appellant in my view rightly and properly withdrew the cross-appeal. The cross-appellant had virtually nothing to complain about in the judgment of the Court of Appeal which had

declared his trial a nullity and consequently discharged and acquitted him. The cross-appeal is hereby also dismissed.

ONU JSC

B

I had the opportunity of reading before now the judgment of my learned brother, Uwaifo, JSC., just delivered. I am in entire agreement with him that the appeal lacks merit.

C

I accordingly dismiss it and affirm the decision of the court below.

KATSINA-ALU JSC

D This appeal is from a decision of the Court of Appeal, Lagos Division given on 22nd June, 2000, allowing the appeal of Sqn. Ldr. O. T. Onyeukwu, the respondent herein. He was acquitted and discharged on all the seven counts upon which he had been convicted by the General Court Martial (the GCM).

E

Although there was a cross-appeal by the said Sqn. Ldr. Onyeukwu, the cross-appeal was abandoned and withdrawn by Alhaji Adetola-Kassem, SAN. He conceded quite rightly that the cross-appellant had no grievance against the judgment of the court below given on 22nd June, 2000.

F

I was privileged to read in draft the judgment delivered by my learned brother, Uwaifo, JSC., and I agree with it. For the reasons he gives, I also would dismiss the appeal, I would however like to comment briefly on two issues only.

G

H The first issue is whether the learned Justices of the Court of Appeal right in holding as they did that the joint trial procedure adopted by the General Court Martial was a curious procedure which occasioned improprieties and unfairness therefore vitiated the trial of the respondent. It would be recalled that the respondent was charged alone in an indictment containing 9 counts. These are set out in the judgment of my learned brother Uwaifo, JSC. There were 8 other separate indictments brought against different persons. Those indictments were consolidated with the respondent's indictment and a joint trial of all 9 accused persons was conducted by the GCM.

At the trial, the indictment of each accused person was read to him separately and his plea taken. But all the accused persons were tried jointly. In this regard, the court below observed, per Oguntade, JCA., (as he then was), as follows:

“Still on issue one is the complaint that the GCM had no jurisdiction to have tried jointly nine persons who were separately charged. What happened in the instant case is to say the least scandalous and a clear travesty of justice. It is a blatant departure from all known practices and procedures governing criminal trials. Nine persons were brought on separate charge sheet. However, all of them were jointly tried. The first question to ask is - were all these nine persons co-accused for the purpose of determining how to treat the evidence of each of them which implicated another?”

The court below proceeded to pronounce the trial a nullity.

My short answer is the provision of Section 168 of the Criminal Procedure Act (Cap. 80) Laws of the Federation of Nigeria 1990. It reads:

“168. No judgment shall be stayed or reversed on the ground of any objection which if stated after the charge was read over to the accused or during the progress of the trial might have been amended by the court nor.....”

(c) because of any objection which might have been stated as a ground of challenge of any juror, nor for any information in swearing a juror or witness or any of them

It can be seen clearly from the above quoted provision that the appellant in this case had the option to object to the joint trial

(a) soon after the charge had been read over to the accused or

(b) during the progress of the trial. He did not. Section 168 of the C.P.A., provides that if he failed to do so at the appropriate time, the judgment given against him cannot be reversed merely because the separate indictments were jointly tried. The court below was clearly in my view in grave error to have declared the proceedings of the GCM a nullity.

The second issue upon which I wish to briefly comment is whether the Court of Appeal was right in holding that the evidence before the GCM was insufficient to have secured the respondent's conviction.

In criminal trials, the onus is on the prosecution to prove its case beyond reasonable doubt. I have read the record thoroughly and I must say that I find nothing in the evidence presented by the prosecution to justify a conviction. I agree with the court below that the conviction of the respondent was clearly unjustified. I also come to the conclusion that this appeal lacks merit and is accordingly dismissed.

KALGO JSC

I have had a preview of the judgment of my learned brother, Uwaifo, JSC., just delivered in this appeal. I entirely agree with his reasoning and his conclusions reached therein. I too dismiss the appeal as totally lacking in merit and affirm the decision of the Court of Appeal. I abide by the consequential orders made in the leading judgment.

MUSDAPHER JSC

I have had the opportunity to read the judgment of my Lord, Uwaifo, JSC., just delivered with which I am in total agreement. The respondent herein Sqn. Leader O.T. Onyeukwu was jointly tried with other Nigerian Air force officers. He was charged alone on an indictment containing 9 heads of charge before the General Court Martial. At the end of the trial, before the General Court Marital, he was convicted on seven counts together with an order for restitution and the convictions and the order were confirmed by the confirming authority in accordance with the provisions of the Armed Forces Decree No. 105 of 1993 as amended. The Court of Appeal Lagos Division on the 22/6/2000 allowed his appeal and he was discharged and acquitted of all the counts. The State appealed to this court against the discharge and acquittal of the respondent, the respondent also cross-appealed, but at the hearing before this court, the cross-appeal was abandoned and withdrawn by the respondent's counsel. The learned counsel agreed that there was no complaint expressed by the respondent/cross-appellant in the Notice of Cross-appeal against the judgment of the court below to justify any cross-appeal. The cross-appeal was

accordingly dismissed.

In this judgment I only want to comment briefly on two matters. (1) whether the joint trial of respondent along with the other accused persons was vitiated since the accused persons including the respondent herein were jointly tried but on different indictments or information. The court below B held that the procedure adopted was illegal. The court held per Oguntade, JCA., (as he then was), as follows:-

“Still on issue one is the complaint that the GCM had no jurisdiction to have tried jointly nine persons who were separately charged. What happened in the instant case is to say the least scandalous and a clear travesty of justice. It is a blatant departure from all known practices and procedures governing criminal trials. Nine persons were brought on separate charge sheet. However, all of them were jointly tried. The first question to ask is were all these nine persons co-accused for the purpose of determining D how to treat the evidence of each of them which implicated another?”

The lower court, at the end of the day determined that the joint trial of respondent with the other officers under separate indictments as a nullity. It is now an issue before this court whether the lower court was right to E have declared the trial a nullity. There is no dispute whatever that under our criminal jurisprudence, joint trial is allowed under Section 155 of the Criminal Procedure Act (C.P.A), applicable to these proceedings. Section 155 of the C.P.A. reads: -

“When more persons than one are accused of the same offence or of F different offences committed in the same transaction or when a person is accused of committing an offence and another of abetting or being accessory to or attempting to commit such offence or when a person is accused of G an offence of theft, criminal misappropriation, criminal breach of trust and another of receiving or retaining or assisting in the disposal or concealment of the subject matter of such offence, they may be charged and tried together or separately as the court thinks fit.”

The lower court held that the GMC had no jurisdiction to try the H nine accused persons, including the respondent herein, when each of the said accused persons were charged separately. It was also held that where the court desires to have a joint trial within the purview of Section 155 of

the CPA, all the accused persons must be charged under one indictment or charge sheet. Vide. *Obi v. Commissioner of Police* (1950) 19 NLR 79, *Arisah v. Commissioner of Police* (1953) 12 WACA 297. *Crane v. D.P.P.* (1921) All ER (Reprint) 19. *R. v. Dennis* (1924) 1 KB 867. In all these cases the joint trial of the accused persons in different indictments was held to be a nullity. I have no doubt that these decisions would be different if the attention of the courts was drawn to the provisions of Section 168 of the Criminal Procedure Act, Cap. 80 of the LFN, 1990, which clearly came into force from 1/6/1945. Section 168 reads:-

“168. No judgment shall be stayed or reversed on the ground of any objection which if stated after the charge was read over to the accused or during the progress of the trial might have been amended by the court nor-

It can be seen that the respondent could have objected to the trial soon after the charge was read or during the trial and the court could have ordered for a separate trial or the court could have ordered for the joint trial under one indictment. The respondent did not object at the appropriate time and since he has failed to object, the judgment given against him cannot be reversed merely because the separate indictments were jointly tried. I am of the view that the joint trial of the separate indictments only amounted to a mere irregularity and has nothing to do with jurisdictional issue. And I cannot find any failure or miscarriage of justice in this matter. I accordingly agree with the appellant that the lower court was wrong to have declared the entire trial as a nullity. It is settled law that any person who has acquiesced to an irregular procedure without objecting at the appropriate time has lost his right to complain on appeal.

2. On the facts, I am also of the view that there was no sufficient evidence adduced by the prosecution to prove the allegations contained in the charges levelled against the respondent. It is for the above and for the fuller reasons contained in the aforesaid judgment of my Lord, Uwaifo, JSC., that I too, hold that the Court of Appeal was in error to have declared the trial a nullity, but on the facts, the Court of Appeal was right in discharging and acquitting the respondent. This means that the appeal is in the main without merit and same is also dismissed by me.

PATS-ACHOLONU JSC

I have read the judgment of my learned brother, Uwaifo, JSC., and I would say that I agree with him on all the issues some of which I would comment tritely upon. B

In this case, the State has appealed to this court against the acquittal by the Court of Appeal of the appellant who was charged, tried and convicted (with nine (9) other Air Force officers) of theft and other allied offences of a sum of N10,000,000 which it was said they shared amongst C themselves. They were all charged separately, i.e., not in the same charge sheet, but were tried jointly. The Court of Appeal on a proper consideration of the case made a very poignant point which is that the joint trial of all the accused persons who were separately charged led to a miscarriage of justice and therefore the trial was a nullity, whereupon that court allowed D the appeal of the respondent (the appellant) in that court.

The two parties filed their briefs in this case and their arguments in some of the issues have been well articulated in the lead judgment from my own stand point. I now seek to comment on issue 2 of the appellants' brief, E which is as to the validity of the separate charge sheet but joint trials. The appellant had raised an objection to the comment of the lower court about the nature of the trial which it said was null and void and had relied on two (2) old cases of R v. Tizard (1962) 2 QB 608 and Obi v. Commissioner of F Police (1950) 19 NLR.79. In its judgment, the court below per Oguntade, JCA., (as he then was), said in the lead judgment;

“What happened in the instant case is to say the least scandalous and a clear travesty of justice. It is a blatant departure from all known G practices and procedures governing criminal trials. Nine persons were brought before the GCM. Each of them was brought on a separate charge sheet. However, all of them were jointly tried. The first question to ask is were all these nine persons co-accused for the purpose of determining how to treat H the evidence of each of them which implicated another? For instance, in the instant case, the extra judicial statements of the 3rd and 6th accused persons which implicated the appellant would appear to have been relied upon against the appellant although the appellant had not adopted the

statements of each of these. If the trials had been separate as the charges were, it would have been easy for the prosecution to determine whether or not it was wise to call either of 3rd and 6th accused persons as prosecution witnesses against the appellant who was implicated by aspects of their statements. By the curious procedure adopted by the prosecution a lot of improprieties and unfairness were injected into the proceedings. When I come to consider each of the charges brought against the appellant, I shall discuss the implications of the reliance placed on the extrajudicial statements of some co-accused to convict the appellant but it suffices for now to say that the procedure adopted completely vitiates the trial".

The appellant was obviously peeved by the opinion of the lower court on the issue of joint trial. It is the view held by the Court of Appeal that the so-called curious and scandalous procedure resulted in a miscarriage of justice. I believe that the word scandalous in the context it was used was rather harsh. The procedure adopted might not have lent itself to approval by an appellate court, but I am of the view that if the respondent who was incidentally favoured in the court below had protested ab initio as to the ungainly and seeming strange perhaps highly irregular procedure which had the potential to lead to a miscarriage of justice in the trial court, i.e., the General Martial Court who knows how that court would have reacted.

Now Rule 16(1) of the Rules of Procedure (Air Force), 1972 dies as follows;

"Any number of accused may be charged in the same charge-sheet with offences alleged to have been committed by them separately if the acts on which the charges are founded are so connected that it is in the interest of justice that they be tried together."

Section 155 of the Criminal Procedure Act states as follows:

"When more person than one is being accused of the same offence or of different offences committed in the same transaction or when a person is accused of committing an offence and another of abetting or being accessory to or attempting to commit such offence or when a person is accused of any offence of theft, criminal misappropriation, criminal breach of trust and another of receiving or retaining or assisting in the disposal of concealment of the subject matter of such offence, they may be charged

and tried together or separately as the court thinks fit"

Sadly, neither Section 155 as stated above nor the subsidiary legislation, to wit, Rules of Procedure (Air Force), 1972 is explicit in the ramifications of the provision contained in these laws as they are all silent on cases where the various accused persons are charged separately and tried together. I believe that the important thing in a matter of this nature is which procedure or method adopted would produce real justice. In other words, the fear expressed by joint trial may well be that the appellant's case may be compromised and not secure the required justice when the court below unwittingly proceeded to try the persons separately charged together merely because they are affected or connected to the same offences which they are charged. In the old case of *Arisah and Ors. v. Commissioner of Police* 12 WACA 297 at 298, the court held as follows;

"Moreover, examination of the evidence shows that while each appellant is alleged to have made the same demand and upon the same ground, there is nothing in the evidence, save the similarity of the demands, to show that there was at any time any connection between the two appellants or that these several demands were in pursuance of a common design. These facts distinguish this case from that of Commissioner of Police v. Danquah (1) WACA., 27th June, 1946 (unreported). In which case although the two accused persons were served with separate summons it was found that they were jointly charged before the Magistrate and pleaded to a joint charge. The court in that case, following the decision in the matter of The Stipendiary Magistrate. Brighton (2) 9 T.L.R. 522. And in view of the provisions of Section 333 of the Criminal Procedure Code of the Gold Coast, affirmed the conviction. In the present case there was no joint charge: what was done is that two separate charges to which the accused persons had pleaded separately were then tried together. This case falls, therefore, rather within the ruling of this court in the case of Commissioner of Police v. Amos Fewasmore (3) WACA. 27th January, 1942 (unreported). In which it was held that where the appellant had been charged separately but was tried together with two other persons who had also been separately charged the trial was a nullity".

In that case, there was really no complaint of the joint trial having

resulted in a miscarriage of justice in the Magistrate Court from where the case emanated. In this light, I wish to refer to the position adopted by the English courts. In the case of R v. Dennis and also R. v. Parker (1924) 1 KB 867, where a joint trial took place in the court even though the accused persons were charged separately on separate sheets. On appeal to the appellate court, the court relying in the case of Rex v. Crane (infra) held;

“This appears as a jurisdiction and not a question of regularity or irregularity. No criminal court has jurisdiction to try two separate indictments of one at the same time and therefore the consent given to such a trial cannot give jurisdiction”.

In R v. Crane (1921) 2 AC 321 Lord Atkinson said;

“When an accused person has pleaded not guilty to the offences charged against him in an indictment, and another accused person has pleaded not guilty to the offences charged against him in another separate and independent indictment, it is, I have always understood elementary in criminal law, that the issues raised by those pleas cannot be tried together”.

In other words, from English procedural point of view, joint trials must be based on a joint charge. It is trite law that our criminal procedural law to a great extent mirrors what is obtainable in English courts. Where such a joint trial of separate charges does not show a miscarriage of justice, prudence and judicial Progressivism should affect the minds of the court to be elastic in the consideration of the matter and I dare say a liberal attitude be shown to such issue under consideration.

In a subtitle of “*Consolidated or Separate Trials*” the authors of Vol. 24 of the 2nd Edition of Corpus Juris Secundum state as follows;

“Consolidation of indictments or information against accused with indictments or information against others, or of separate indictments or information against accused, cannot be objected to for the first time on appeal. Likewise, accused cannot complain on appeal that he was unduly prejudiced by being tried with a co-defendant, in the absence of a timely request for a severance; and in the absence of a showing to the trial court as to how he would be prejudiced by a joint trial, accused cannot complain on appeal of the denial by the trial court of a severance. Even where a motion for severance was made, accused, if he intended to rely on the motion,

should have called it to the attention of the trial court before the trial started and asked the court to rule on it. Conversely, where accused raised no objection thereto, and was unable to show wherein he was harmed thereby, he cannot complain of an order granting a severance as to a co-defendant”.

For this view they referred to numerous cases in their restatement of the law. B

(1) Bucklin v. U.S.S. CT. 182, 159 US. 680

(2) US. v. Cindrich C.A.P a 241 F. 2nd 54

(3) Wynn v. U. S. 275 F. 2 d 648 C

(4) People v. Watt 44 N. E 2d 580

(5) State v. Tulenko 41A 2d 331, 23 N. J. Misc. 249 affirmed 44 A. 2d 350

On the other hand Section 168 of the Criminal Procedure Act states; D
“No judgment shall be stayed or reversed on the ground of any objection which if stated after the charge was read over to the accused or during the progress of the trial might have been amended by the court”.

Although in the cases of D. P. P. v. Crane, and also R. v. Dennis and R. v. Parker, Supra, it was held that no court has the jurisdiction to try persons separately charged or under separate indictment jointly, it seems to me that with such a stand where there is no manifest injustice and where equally too neither the prosecution nor the accused raised an objection at the earliest opportunity, this court should lower the tempo of such a hard stance and temporize the method adopted as a mere aberration in the procedural law and show more robust understanding in determining any complaint arising from there. F

In this case there is a complaint that by the joint procedure used manifest injustice resulted. But, it must be said that, there was no complaint made initially and a prompting by a counsel representing any of the parties that the court should first rule on the objection raised. There was nothing like that in this case. The appellant must show how it has been adversely affected by the method adopted by the General Martial Court. The respondent’s conviction which was later quashed by the Court of Appeal must be related to the alleged seeming unorthodox procedure which led to G H

what the appellant has daubed or described as a manifest miscarriage of justice.

The learned counsel for the respondent had referred this court to Rules 39 of Air Force Rules which enjoins the court to consider the desirability of an application by accused persons for separate trials where they are jointly charged. I still believe that the bottom line is whether the procedure has led to a miscarriage of justice and whether the party affected had protested at any early date and requested or insisted on the court ruling on an objection. This was not done. That being the case, the trial is not a nullity.

Having disposed of issue 2, let me comment on issue No.3. In this connection I would examine carefully the evidence proffered against the respondent in the court. Now one Olatunji was equally accused by the prosecution for the same like offence for which the respondent was charged and prosecuted. He made a statement which sought to incriminate the respondents. It is long settled that a statement of a co-accused cannot be used as evidence against a fellow accused, without any corroboration. His statement and evidence sought to incriminate the respondent/cross appellant. Although the respondent by his evasiveness to statements against him was not direct in his answer, it cannot be said that his prevarication should prove fatal to his case. In *R. v. Hadwan and Ingham* (1902) IKB 882 at 888, the two were charged together with various offences upon an indictment. In the witness box, while each gave evidence seeking to exculpate himself but equally sought to incriminate the other, the Court of Criminal Appeal, per Wright, J., said;

“The only question is whether the evidence of one co-defendant given in self-defence is evidence which is legally admissible to inculpate the other defendant, because, if it is, it necessarily follows that the latter should be allowed to cross-examine. I can find nothing in the Act except S.1(f) (iii), which tends to abrogate the ordinary common law rule-see Reg. v. Payne (1); (1872) LRICC 349 Allen v. Allen (2) (1894) o. 248 at 253... that the evidence of one defendant cannot on a criminal trial be received as evidence either for or against another defendant, the reason being that otherwise there would be a great danger that one defendant would be tempted to

exculpate himself at the expense of his co-defendant”.

The evidence of a co-accused not corroborated goes to no issue. In fact it could be said that neither any evasiveness nor his telling brazen falsehood would be an excuse for the prosecution to assume that the case has been proved beyond all reasonable doubt. See the State v. Okpere (1971) B 1 ANLR P1 at 5.

It must be stated and emphasized that proof beyond all reasonable doubt does not mean or import or connote beyond any degree of certainty. The term strictly means that within the bounds of evidence adduced and staring the court in the face, no tribunal of justice worth its salt would convict on it having regard to the nature of the evidence led and the law marshalled out in the case. It can be said that evidence in a criminal trial that is susceptible to doubt cannot be said to have attained the height or standard of proof that can be said to be beyond all reasonable doubt. Regardless of what one might think in a given state of affairs in a given case, neither suspicion nor speculation or intuition can be a substitute for proof beyond all reasonable doubt. It is proof that precludes all reasonable inference or assumption except that which it seeks to support and must have the clarity of proof that is readily consistent with the guilt of the person. The expression beyond all reasonable doubt should not be susceptible to any ungainly and abstract construction or understanding. A priori, it is a concept founded on reason and rational and critical examination of a state of facts and law rather, than a fanciful, whimsical or capricious and speculative doubt.

I have carefully read the lengthy evidence of Olatunji and there is nothing contained therein that any reasonable tribunal of justice can feel satisfied that the prosecution’s case has been proved beyond all reasonable doubt.

This witness, right from the word go, denied that he knew that there was something illegal or that constituted an offence with regard to the N10 million later distributed to some officers. He never sought even to incriminate the respondent. Care must be taken that the court should not be bamboozled in taking a course of action that produces miscarriage of justice. In a criminal case every item of evidence must be scrupulously examined, analyzed and weighed to assess the substantiality of the testimony and state-

ments proffered and made.

From the evidence led in this case regardless of any private opinion one might have, the evidence of Olatunji does not seem to me to be strong and substantial enough that with an application of a caution and prudent examination of facts when subjected to merciless scrutiny, one could say there has been proof beyond all reasonable doubt. Much as issue No. 2 succeeds the bottom line is whether the prosecution did prove its case beyond all reasonable doubt. I think not.

C I dismiss the appeal and affirm the judgment of the lower court. I abide by all the consequential orders in the lead judgment.

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