

COURT OF APPEAL  
ENUGU DIVISION  
5TH MAY, 1993 CA/E/208/90  
CORAM:- U. ABDULLAHI, F.O. AWOGU, S.A. AKINTAN

DR. COSMAS IKECHUKWU

OKECHUKWU ..... APPELLANT/RESPONDENT

V.

THE STATE ..... RESPONDENT/CROSS-APPELLANT

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APPEALS - Issues - Contention that they were not based on the grounds of appeal - Is unfounded (H1)

CRIMINAL LAW - Proof of material facts - Shall be beyond reasonable doubt - Burden of proving the guilt of the accused - Lies on the prosecution (H2)

CHIEFTAINCY MATTERS - Installation - Government approval - Procedure under Anambra State Law - Is different from that under Chief's Law of Western Nigeria - As selection and installation must be completed - In Anambra State before applying for approval (H3)

CHIEFTAINCY MATTERS - Installation - Of appellant as Oluoha xvi of Ihiala - Without prior government recognition - Was not illegal (H4)

CRIMINAL PROCEDURE - Installation of a chief - Illegality of - Where not proved by the prosecution - Their case will fail (H5)

CRIMINAL PROCEDURE - Wrongful holding out as a chief - Appellant's holding out himself as traditional ruler - Is not wrongful in this case (H6)

CRIMINAL PROCEDURE - Conviction - Without option of fine as stated in Chiefs Law - Terminates court's discretion - To impose fine in lieu of imprisonment (H7)

### **FACTS**

Before the Anambra State High Court sitting at Nnewi, the appellant was tried on a two court information viz wrongful installation of a chief and wrongful holding out as a chief contrary to ss. 18(b) & 19(9) of the Anambra State Traditional Rulers Law of 1981. The appellant pleaded not guilty to both counts. The appellant, a senior lecturer at University of Nigeria Nsukka was invited by the king makers of Ihiala (the “Okparas”), his hometown, to become the traditional ruler of Ihiala in succession to Eze John Mgbekwute Udoji, Oluoha X of Ihiala. He accepted the invitation and was accordingly installed Oluoha XVI of Ihiala on the 21st day of December, 1987.

What led to the king makers move was the disappearance of Eze Udoji from Ihiala between 1982 - 1987. He was later announced to have died in 1987. As he was no longer performing the duties of his office, the king makers deposed him and installed the appellant as their new king. Some people in the Ihiala Community petitioned against the appellant’s appointment and installation. As it seemed their petition failed, they commenced the present proceedings through the Attorney General’s fiat permitting private prosecution. Appellant was found guilty by the trial court and was granted the option of paying fine in lieu of imprisonment. Being dissatisfied, he has now appealed to the Court of Appeal.

### **ISSUES OF DETERMINATION**

*“1. Whether the prosecution proved the case against the accused person beyond reasonable doubt.*

*2. Whether the court considered all the defenses of the appellant.*

*3. Whether in the particular circumstances and on the facts of the case, the appellant committed any offence.”*

**HELD** (Unanimously allowing the appeal per **AKINTAN JCA**)

### **APPEALS - Issues**

1. The respondent raised objection, in the respondent’s brief, to two of the issues formulated by the appellant. It was contended that only issues No.2 is based on ground one of the grounds of appeal. The issues raised

in those two grounds form the basis of the third issue formulated – which is whether on a proper construction of the relevant laws, the appellant had in fact committed any offence. I do not therefore share the view that the third issue is not based on any of the grounds of appeal. The fifth ground of appeal which is the omnibus ground is also covered by the first issue. In the result the objection fails and is accordingly dismissed. (p. 1585 B / 1586 C)

***Proof of material facts - Shall be beyond reasonable doubt***

2. It is settled law that in a criminal case it is essential that proof of material facts should necessarily be beyond reasonable doubt: (See *Obue v. The State* (1976) 2 S.C. 141 per Sowemimo J.S.C.) Also the burden of proving the guilt of the accused in criminal cases lies on the prosecution throughout the trial (See sections 137(2) and 140 of Evidence Act: section 33(5) of the 1979 Constitution; *Queen v. Ogunbiyi* (1961) 1 All N.L.R. 453. (p. 1587 D))

***Installation of chief - Government approval***

3. It is clear from the section that the person presented to the Governor is “*a traditional ruler of a town or community.*” The provision therefore presumes that the person presented must have been selected and installed as a traditional ruler by the community before he is presented to the government for approval. The position is therefore totally different from the provisions under the Chief’s Law 1957 (W.N. No. 20 of 1957) of Western Nigeria. There, the king makers’ role was to recommend candidates to the Government for approval. Installation can therefore be lawful under that Law only after the government’s approval has been given. It is therefore erroneous on the part of the learned trial Judge to have relied on the decision in *Ashekoya v. Olawunmi* (1962 1 All N.L.R. 125, *supra*). This is because the alleged installation in the *Ashekoya*’s case was embarked upon without government approval of the candidature as required under the said Chiefs’ Law 1957 of Western Nigeria whereas the position under the Traditional Rulers Law No. 14 1981 of Anambra State is that selection and installation must be completed before applying for

government approval. (p. 1588 A)

***Installation - Of appellant as Oluoha xvi of Ihiala***

4. Thus in the instance case, since there is no specific legal provision  
 B requiring that government recognition must be obtained before the Okparas  
 could select and install an Oluoha of Ihiala, the want of recognition can-  
 not therefore invalidate or render the installation illegal. It will also not be  
 an offence for the appellant to allow himself to be installed as the Oluoha  
 C XVI of Ihiala by the Okparas. It was not in dispute that the Okparas,  
 who selected and installed the appellant, were in fact the king makers  
 conferred with the powers to carry out the selection and installation of  
 the Oluoha of Ihiala. Article 1,2, 3 and 4 of the Oluoha of ihiala consti-  
 tution confer those powers on the Okparas.Their acts were therefore  
 D lawful. (p. 1588 H)

***Installation of a chief - Illegality of***

5. The onus was definitely on the prosecution to prove that Eze J.M.  
 E Udoji was alive as at the time the appellant was selected and installed as  
 Oluoha. As that burden was strictly placed on the prosecution, failure to  
 discharge it was very vital to the success of the prosecution's case.

The prosecution has therefore failed to prove that the selection  
 F and installation of the appellant as the Oluoha XVI of ihiala by the Okparas  
 of Ihiala were unlawful. (p. 1589 G)

***Wrongful holding out as a chief***

6. As already stated above, the selection and installation of the appellant  
 G were lawfully done by those authorized to perform those functions in  
 Ihiala. All that remained was for the appellant to receive his certificate of  
 recognition from the government. But the position in law is that the fact  
 that a chief duly selected according to the accepted forms of native law  
 H and custom will not have his selection invalidated because of government's  
 failure to recognize: (See Taiwo v. Sarumi (1913:2 N.L.R. 106 supra). It  
 follows that such chief is entitled to continue to hold himself out as a  
 traditional ruler duly and lawfully selected and installed pending the time

the government takes a decision on his recognition. The prosecution has therefore also failed to prove the second count of the information.  
(p. 1590 C)

***Conviction - Without option of fine as stated in Chiefs Law***

7. The question however is whether the inclusion of “without option of fine” should be construed as depriving the court of exercising its discretion to impose a fine in lieu of imprisonment. That is definitely the intention of the law in this respect. It follows therefore that whereas the court is free to impose any term of imprisonment not exceeding two years, it is barred from imposing a fine in lieu of imprisonment. The trial court therefore had no power to give an option of fine as it did in the instant case. But since the conviction and sentence passed on the appellant have, for the reasons already given above, been set aside, there is therefore no need to make any order regarding the cross-appeal.  
(p. 1591 C)

**REPRESENTATION**

Chief A.C. Mogboh S.A.N. (Mr. C.M.C. Nwanya & Miss I.V. Mogboh with him) for appellant.

Chief P.G. Umeadi S.A.N. (with Mr. N.C. Nobis-Elendu) for respondent.

**CASES REFERRED TO**

Western Steel Works v. Iron & Steel Workers (1987) N.W.L.R. (pt.49) 284, 304

Iyayi v. Eyigebe (1987) 3 N.W.L.R. (pt. 61) 523

Ashekoya v. Olawunmi (1962) 1 All N.L.R. 125

Ashake v. Police (1959) W.N.L.R. 174

Taiwo v. Sarumi (1913) 2 N.L.R. 106)

Obue v. The State (1976) 2 S.C. 141

Queen v. Ogunbiyi (1961) 1 NLR 453

Umeh v. The State (1973)

**STATUTES REFERRED TO**

Traditional Rulers Law of Anambra State No. 14 of 1981, ss. 18 (b), 19 (a). 6, 7, 12, 10, 13

Evidence Act: ss. 137 (2), 140

B Constitution of Nigeria 1979 s. 33 (5)

Chiefs Law of Western Nigeria No. 20 of 1957

Criminal Procedure Law s. 382 (1)

**LEAD JUDGMENT BY AKINTAN JCA**

C The appellants. Dr. Cosmas Ikechukwu Okechukwu, was arraigned before Nnewi High Court on a two count information which read thus:

***“STATEMENT OF OFFENCE - COUNT ONE***

*Wrongful installation of a chief contrary to section 18 (b) of the Anambra*

D *State Traditional Rulers Law of 1981.*

*Particulars of Offence*

*Dr. Cosmas Ikechukwu Okechukwu on the 21st day of December, 1986 at Ihiala in the Nnewi Judicial Division, not being a person recognized by*

E *the Governor of Anambra State of Nigeria as the traditional ruler of the Ihiala community unlawfully allowed himself to be installed as the traditional ruler of the Ihiala community, to wit, Oluoha (XVI) and clan Head of Ihiala in the stead of the person so recognized to wit, Eze John*

F *Mgbekwute Udoji, Oluoha (X) of Ihiala.*

*Statement of Offence – Count two*

*Wrongful holding out as a Chief contrary to section 19(a) of the Anambra State Traditional Rulers Law of 1981.*

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*Particulars of Offence*

*Dr. Cosmas Ikechukwu Okechukwu on the 25th day of August, 1987 at Ihiala in Nnewi Judicial Division, not being recognised chief of Ihiala*

H *community held himself out as a recognized chief of Ihiala community, to wit, Oluoha (XVI) and clan Head of Ihiala by signing a letter dated August 25th, 1987 which he wrote to the Director/Manager of Telephone Services in the Onitsha Zonal Office, Onitsha in his application for the*

*installation of a telephone in his residence at Ihiala as the Oluoha (XVI) and clan Head of Ihiala where there was not yet a recognized chief of the said Ihiala community.”*

The appellant pleaded not guilty to both counts of the information and the case thereafter was tried by Chidozie Olike, J. The facts established at the trial were that the appellant, who was a senior Lecturer at the University of Nigeria Nsukka, was in December, 1986 invited by the “Okparas” (the king makers) of Ihiala, his home town, to become the Oluoha of Ihiala –the traditional ruler of Ihiala, I succession to Eze John Mgbekwute Udoji, Oluoha (x) of Ihiala. The appellant accepted the invitation and was accordingly installed on December, 21st 1987. After his installation, some people in the Ihiala community petitioned against his appointment and installation. It seems that when they failed to get their objective through petition, they resorted to instituting private prosecution of the appellant. The information was therefore commenced on the authority (fiat) of the Attorney-General of Anambra State (Exh.A) granted to Mr. P.G.E. Umeadi, S.A.N. to institute the private prosecution of the appellant under section 69(i)(b)(iii) of the High Courts Edit (No. 16 of 1987).

Eze John Mgbekwute Udoji was installed as the Oluoha (x) of Ihiala in 1963. But in 1981, the Anambra State Government enacted the Traditional Rulers Law (No. 14 of 1981). It is a law to provide for the method of selection, appointment, recognition, suspension or withdrawal of recognition etc. of traditional rulers in the State. Section 3 of the law provides for the selection and presentation of traditional rulers. The section provides as follows:

“3(1) Subject to the provisions of section 6 of this Law, where on the date of coming into force of this Law, there is in a town or community a person who is traditional ruler of the town or community such community may, at any time thereafter and in accordance with the provisions of this Law, present such a traditional ruler to the Governor for the purpose of his being recognized by the Governor as the traditional ruler of the town or community in accordance with this Law.

(2) where, on the date of coming into force of this Law, a town or

*community has not selected or appointed any person as traditional ruler, such community or town may at any time thereafter and in accordance with the customary law of that town or community select or appoint a person as the traditional ruler of that community.*

B (3) *At any time after a person is selected or appointed as a traditional ruler of a town or community under subsection (2) of this section, the town or community may in accordance with the provisions of this Law, present such traditional ruler to the Governor for recognition in accordance with this Law.”*

C Section 4 (a) of the same Law sets out some of the conditions that must be met before government recognition is granted. The sub-section provides that:

D “4 The Governor shall not recognize any person as a traditional ruler of a town or community unless the Governor is satisfied that such person –

(a) *was selected or appointed in accordance with the –*  
 i. *customary law of the town or community concerned or*  
 E ii. *town’s or community’s constitution where documented*  
 .....”

*The procedure to be followed when presenting a traditional ruler for recognition is set out in section 5 of the Law. The section read thus:*

F 5. (1) (a) *Subject to the provisions of section 6 of this Law, the presentation of a traditional ruler of a town or community for the purpose of his recognition under this Law shall be carried out on a date and at a place the time fixed by the town or community, such place being a place to which members of the public may have access;*

G (b) *such date, place and time shall be publicized in the traditional manner or otherwise within the town or community;*

(c) *a written notice of a proposed presentation and of the date, place and time of the presentation shall be delivered to the Secretary to*  
 H *the Local Government of the town or community concerned.*

*(2) The traditional ruler of a town or community shall be deemed to be presented to the Governor for the purpose of his recognition under this Law if, on the date and at the place and time publicized and notified*



*in the manner specified in subsection (1) of this section, and in the presence of members of the town or community, such traditional ruler is presented by the town or community to –*

- i. the Commissioner; or*
- ii. the secretary to the Local Government in charge of the town or community concerned; or*
- iii. any other person appointed by the Governor in that behalf.”*

Section 6 of the Law provides for the recognition of a traditional ruler selected or appointed prior to the coming into force of the Law on 22nd December, 1981. Section 7 of the Law provides that:

*“7. Where a traditional ruler of a town or community is presented to the Governor under the provisions of section 5 or section 6 of this Law, the Governor may, in accordance with the provisions of this Law, recognize such a person as traditional ruler of the town or community.”* (Underlining supplied).

On recognition, the government will cause such to be published in the Gazette (Under section 8 of the Law) and a certificate of recognition will be issued to the traditional ruler (under section 9 of the Law). Section 12 of the Law provides that:

*“12 (1) Every town or community whose traditional ruler has been recognized as a traditional ruler by the Governor shall forward to the Secretary to the Local Government in charge of the area of that community –*

- (a) the town or community constitution of that community; and*
- (b) the customary code of conduct existing between the town or community and the traditional ruler and which shall be signed by the traditional ruler.*

*(2) The provisions of section 10 of this Law shall apply to traditional ruler who has subscribed to such code of conduct.”*

Section 10 of the Law referred to in section 12(2) above provides for the suspension and withdrawal of recognition of traditional ruler. The section provides thus:

*“10. Notwithstanding anything in the Law, the Governor may sus-*

*pend or withdraw the recognition of a recognized chief or traditional ruler if the Governor is satisfied that such suspension or withdrawal is –*

*(a) necessary having regard to the code of conduct required by the customary law existing between the traditional ruler or recognized chief and the town or community which he represents; or*

*(b) necessary in the interest of peace, order and good government.”*

What the town or community constitution should contain and its validity are set out as follows in section 13 of the Law:

*“13. (1) The town or community constitution of a town of community shall consist of –*

*(a) a detailed statement of the customary law of the town or community regulating the selection, appointment, suspension, deposition, rights, privileges of the traditional ruler of the town or community;*

*(b) Prerogatives and customary code of conduct existing between the traditional ruler and the town or community concerned and identifying the person in section 11 of this Law.*

*(2) Such town or community constitution after it has been duly forwarded to the Secretary to the Local Government shall not be amended unless the Governor is satisfied as to the reason for such amendment.*

*(3) Such town or community constitution as forwarded or amended shall be deemed to state the customary law of the town or community relating to the selection, appointment and deposition of the traditional ruler and to the matters in respect of which the customary law is stated.*

*(4) The Commissioner shall have custody of all town or community constitutions forwarded under this Law.”*

The Oluoha of Ihiala has a constitution made and filed in accordance with sections 12 and 13 of the Traditional Rulers Law 1981. A copy of it was admitted in evidence at the trial as Exh.E. Under Article 1 of the said constitution, the Oluoha is selected by the Okparas of the seven families named therein. The Constitution was dated 23rd April, 1977 and one of the signatories to it was Eze J.M. Udoji, the then reigning Oluoha. It was also disclosed in Article 1 of the Constitution (Exh.E) that Eze J.M. Udoji was installed the Oluoha on 22nd December, 1963

and that he enjoyed the popularity of Ihiala people.

Article 2 of the Constitution, which deals with the selection of Oluoha, provides inter alia that “the candidate for the stool is selected by the Okparas of the seven families named in Article 1 above.” Also in Article 3 of the same Constitution, it is provided inter alia that “on selection, presentation and acceptance, Oluoha – Designate is installed the Oluoha of Ihiala.” Article 4(1) of the Constitution provides that the coronation of the Oluoha is conducted in the presence of all the okparas of the seven families or their respective accepted representatives, representatives of the executive committee of the Ihiala Progress Union which must include the President-General and the Secretary. Any one or all the 3 named Okparas – i.e. Ezedara/Ogbuehi of Umudara, Dimogbere and Ezikeokpala will perform the capping ceremony by placing the “Ukpu Oku” (red cap) on the head of the Oluoha – Designate.

Article 12 of the Constitution (Exh.E) spells out the tenure of office of a Oluoha. The Article provides inter alia that:

“12. 1 *The Oluoha holds office for life.*

12. 2 *The Oluoha cannot be deposed unless –*

(1) *he commits a serious criminal offence*

(2) *he consistently conducts himself in breach of the oath of office;*

(3) *he commits abuse of his office;*

(4) *he becomes insane or otherwise incapacitated to carry out the duties of his high office or*

(5) *he ceases to be ordinarily resident in Ihiala.”*

Among the facts established at the trial was that the “Okparas” (according to Exh.E) have the sole right to select, install, cap, proclaim and depose an Oluoha. Eze J.M. Udoji, as the Oluoha, was required to be ordinarily resident in Ihiala. But that he had not been seen in Ihiala between 1982 and 1987 when it was announced to the public that he died. During that period, the Eze did not perform any of the functions of his office. Among the functions of his office which he failed to perform are his failure to appear at the “Abamna-Obi” ceremony of 1982; he did not attend the usual Ihiala Progress Union meetings held from 1982 until his

death was announced in 1987. Even when it was announced in 1987 that the Eze died, his corpse was not seen by anybody and the usual traditional ceremony of laying his corpse in state in Ihiala was not performed. Sometime around 1984, the son of the Eze was said to have signed a letter addressed to the Government styling himself as regent.

The mysterious absence or disappearance of Eze J.M. Udoji from his subjects prompted the Okparas to presume that the Eze was either incapacitated to carry out the duties of his office or that he had ceased to be ordinarily resident in Ihiala as required under the Oluoha Constitution (Exh.E). They then proceeded to depose him and thereafter invited the appellant, who was a senior lecturer at the University of Nigeria Nsukka, to be their new Oluoha in succession to Eze J.M. Udoji.

Before the Okparas decided on deposing Eze Udoji, they (Okparas) had petitioned the government on the long absence of their traditional ruler. The learned trial Judge made the following finding of fact that resided in his judgment (on page 83 of the record of appeal);

*“In the instant case, the people of Ihiala petitioned the government on the long absence of their recognized traditional ruler, Eze Udoji Oluoha X, the rumors and uncertainties surrounding his absence for about five years. The response from the government was an ominous silence. The Okparas who selected him proceeded to depose him.....”*

The appellant, after satisfying himself of the fruitless efforts made by the Okparas to locate Eze J.M. Udoji and other steps taken by them, accepted the offer and gave up his university job to be installed as the Oluoha of Ihiala. He was accordingly selected and installed as the Oluoha XVI of Ihiala. His selection and instillation took place at the square and many people attended. Among those who attended the ceremonies were the police, the Sole Administrator of Ihiala Local Government and other Security agents. None of the government agents ever indicated that the government did not approve the steps taken by the Okparas. The government did not object or say anything to the letters of the Okparas in which they indicated their intention to select and install another Oluoha.

As already stated above, the charge against the appellant was not instituted by the government or at the instance of any of the Okparas.

After his selection and installation ceremonies, the appellant applied to the Director/Manager of NITEL Onitsha for telephone in his residence at Ihiala. In the letter (Admitted at the trial as Exh.C) the appellant wrote inter alia that:

*“As the new Oluoha of Ihiala there is an urgent need to install a telephone in my residence.....”* B

The letter was on letter headed paper with the crown crest and on which was printed *“Eze Dr. C.I. Okechukwu, Oluoha XVI of Ihiala, Dioha Royal family, P.O. Box 356, Ihiala.”*

It was the contention of the appellant in his statement to the Police (Exh.B) that shortly after his installation, an action was instituted against him by Ichie Paulim Ubanozie & 3 others and that it was the existence of the case that was delaying the government issuing him with his certificate and recognition. C D

The learned trial Judge held that the Okparas had no power under the law to depose Eze J.M. Udoji. He believed that by doing so, they took the law into their hands. He held thus in this respect:

*“I am of the view that they (the Okparas) have no right under the law to depose him. It was a perilous act; they took law into their hands. While there is no excuse for the government’s inaction to the petitions and representations by the people of Ihiala for 5 years there is no justification for the precipitous step taken by the Okparas. In case I am wrong and the matter is taken up at a higher level, the defendant’s case is that the incumbent Oluoha X was not heard of for about 5 years. The period of 5 years is insufficient to raise the presumption of death/ Section 143(1) of Evidence Act provides for seven years absence. It appears to me that the Okparas were in a haste and presumed him dead or missing after 5 years. They did not allow the governor to withdraw or suspend the recognition of the incumbent Oluoha X and did not allow seven years effusion of time to operate in their favour. They deposed the government recognized Oluoha x and invited the defendant. .... it is part of the defendant’s case that the dead body of the late oluoha x was not laid in state for mourners to pay their respects. It does not alter the fact that he was installed oluoha x was announced nor did the governor withdraw the* E F G H

*recognition of the incumbent before he allowed himself to be installed as the traditional ruler of the town.”*

The learned trial Judge, relying on the Supreme Court decision in *Odumuyi Ashekoya v. Ganiyu Jaiyeola Olawunmi* (1962) 1 All N.L.R. 125, held that section 18 of the Traditional Rulers Law 1981 of Anambra State “*must be interpreted in such a way as to make it an offence to install or allow oneself to be installed a traditional ruler in the stead of a person so recognized by the government.*” He thereafter held that the prosecution had established the offence in count one of the information against the appellant.

As already indicated earlier above, the second count was founded on the letter written by the appellant to NITEL in Onitsha (Exh.C). The learned trial Judge also held in respect of the letter that

“*By the nature and text of the letter, Exh.C, the defendant asserted, portrayed, or held himself out as the new recognized Oluoha XVI and clan head of Ihiala and intended that PW6 and others should regard him as such.....*”

The appellant was accordingly found guilty on the second count. He was fined N10 or one month imprisonment on one count; and N40 or two months imprisonment on count two.

The appellant has appealed to this court against his conviction. To that end, he filed 5 grounds of appeal and formulated the following three issues for determination in the appellant’s brief:-

- “1. *Whether the prosecution proved the case against the accused person beyond reasonable doubt.*
2. *Whether the court considered all the defenses of the appellant.*
3. *Whether in the particular circumstances and on the facts of the case, the appellant committed any offence.*”

The respondent cross-appealed against the sentence passed in respect of count two. A respondent’s brief, which also incorporated the cross-appellant’s brief was filed. In it, the respondent adopted the three issues formulated by the appellant but added two more issues. The two issues added are:

“(a) *Whether the learned trial Judge was right in awarding an*

*option of fine under section 19 of the Traditional Rulers Law No. 14 of 1981 of Anambra State.*

*(b) Whether section 19 of Traditional Rulers Law 1981 has room for accommodating the human sympathies of trial Judges even if they have headaches in course of sentencing.”*

**The respondent raised objection, in the respondent’s brief, to two of the issues formulated by the appellant. It was contended that only issues No.2 is based on ground one of the grounds of appeal. The other grounds of appeal are said not to have any dealing with the issues formulated for determination. It was therefore submitted that arguments based on the issues formulated outside the grounds of appeal were incompetent and should not be considered on the authorities of Western Steel Works v. Iron & Steel Workers (1987) N .W.L.R. (pt.49) 284, 304; and Iyayi v. Eyigebe (1987) 3 N.W.L.R. (pt. 61) 523.**

The five grounds of appeal without their particulars are as follows:

*“1. The learned trial Judge erred in law in that he failed to give any of adequate consideration to the defence of the accused/appellant.*

*2. The learned trial Judge erred in law when in relating the alleged offences of the appellant to the existing and relevant law, he failed to construe the law as contained in the various provisions of the Traditional Rulers Law read in conjunction with the Government approved Ihiala chieftaincy Constitution and Code of Conduct - the latter a statutory instrument validity made under the Traditional Rulers Law.*

*3. That the learned trial Judge erred in Law when in convicting the appellant, he relied on the cases of Ashekoya v. Olawunmi (1962) 1 All N.L.R. 125 and Ashake v. Police (1959) W.N.L.R. 174 when both cases were predicated on legislations which were not in pari material with and created situations which were different from the Anambra State Traditional Rulers Law 1981 read in conjunction with the approved Chieftaincy Constitution and Code of Conduct of Ihiala Community.*

*4. The learned trial Judge erred in Law when he failed to find and distinguish between the power/function of selecting and appointing a traditional head of Community and the recognition of such selected head by the Governor.*

5. *The decision of the learned trial Judge is unreasonable and cannot be supported having regard to the evidence.”*

It was conceded by the respondent that only the second issue is based on the first ground of appeal in which the learned trial Judge was accused of failure to adequately consider the appellant’s defence. But grounds 2, 3 and 4 of the grounds of appeal deal with alleged improper interpretation of the provisions of the relevant laws – i.e. the Traditional Rulers Law 1981; the Oluoha of Ihiala Constitution and application of the principles of law in *Ashekoya v. Olawunmi*, supra, and *Ashake v. Police* (1959) W.N.L.R. 174. **The issues raised in those two grounds form the basis of the third issue formulated – which is whether on a proper construction of the relevant laws, the appellant had in fact committed any offence. I do not therefore share the view that the third issue is not based on any of the grounds of appeal. The fifth ground of appeal which is the omnibus ground is also covered by the first issue. In the result the objection fails and is accordingly dismissed.**

It was the contention of the appellant that to prove an offence under the Traditional Rulers Law 1981, the entire Law has to be construed as a whole as well as the subsidiary legislation made thereunder which, in the instant case, is the Oluoha of Ihiala Constitution (Exh.E). It was submitted that the function of the government in the making of an Oluoha is to accept the person already selected and installed by the community as its traditional head and recognize him under the 1981 Law. This is because it is an accepted rule that Government does not appoint, depose or select a traditional ruler for a community. (See *Taiwo v. Sarumi* (1913) 2 N.L.R. 106). What the Okparas did in the instant case was said to be lawful and within the powers conferred on them by the Oluoha of Ihiala Constitution. The beneficiary of such lawful acts can therefore not be held criminally liable. It was further argued that under the Traditional Rulers Law 1981, the act of recognition by the governor is subsequent to the act of installation.

The contention of the respondent was that what the charges against the appellant sought to prevent is a situation of anarchy and indiscrimi-



nate installation of traditional rulers in a town after the governor has recognized a person as a traditional ruler of the town or community. It was submitted further that once a traditional ruler is recognized by government, “*the question of his suspension, deposition or disappointment*” is no longer governed by the community constitution alone but by virtue of section 10(1) of the Traditional Rulers Law 1981, those rights rest in the governor.

The main determining issue in respect of the first count of the information is whether the prosecution proved that there was still in existence the person recognized as a traditional ruler of Ihiala as at the time of the appellant’s installation as required under section 18 of the Traditional Rulers Law. If so whether the said incumbent had not committed any of the acts set out in Article 12.2 of the Oluoha of Ihiala Constitution; particularly whether he had not become incapacitated to carry out the duties of his office or not cease to be ordinarily resident in Ihiala thereby warranting the inference that such incumbent had ceased to remain in office.

**It is settled law that in a criminal case it is essential that proof of material facts should necessarily be beyond reasonable doubt: (See Obue v. The State (1976) 2 S.C. 141 per Sowemimo J.S.C.) Also the burden of proving the guilt of the accused in criminal cases lies on the prosecution throughout the trial (See sections 137(2) and 140 of Evidence Act: section 33(5) of the 1979 Constitution; Queen v. Ogunbiyi (1961)1 All N.L.R. 453; and Umeh v. The State (1973 2 S.C. 9).**

Thus in the instant case, the appellant was charged, in the first count, for unlawfully allowing himself to be installed as the traditional ruler of Ihiala contrary to section 18(b) of the Traditional Rulers Law 1981. The onus is therefore on the prosecution to prove that the installation which formed the subject matter of the charge was unlawful. In discharging that onus, the prosecution has to establish that the government approval must be obtained before a lawful installation could be performed. It can be seen from the provisions of section 7 of the Traditional Rulers Law, which deals with government recognition of a tradi-

tional ruler, that the section provides that “*where a traditional ruler of a town or community is presented to the Governor under section 5 or section 6 of this Law, the Governor may, in accordance with the provisions of this Law, recognize such a person.*” **It is clear from the section that the person presented to the Governor is “a traditional ruler of a town or community.”** The provision therefore presumes that the person presented must have been selected and installed as a traditional ruler by the community before he is presented to the government for approval. The position is therefore totally different from the provisions under the Chief’s Law 1957 (W.N. No. 20 of 1957) of Western Nigeria. There, the king makers’ role was to recommend candidates to the Government for approval. Installation can therefore be lawful under that Law only after the government’s approval has been given. It is therefore erroneous on the part of the learned trial Judge to have relied on the decision in *Ashekoya v. Olawunmi* (1962 1 All N.L.R. 125, *supra*. This is because the alleged installation in the *Ashekoya*’s case was embarked upon without government approval of the candidature as required under the said Chiefs’ Law 1957 of Western Nigeria whereas the position under the Traditional Rulers Law No. 14 1981 of Anambra State is that selection and installation must be completed before applying for government approval.

The effect of non-recognition by government of a selection and installation of a chief, in the absence of specific legal requirement, was considered by Osborne, C.J. in *Taiwo v. Sarumi* (1913) 2 N.L.R. 106 at 107 as follows:

“We agree with the opinion of the court below that such a recognition was not a matter of native law, and we think that in the absence of specific legislation to the contrary, the want of recognition, however necessary it may be in practice, will not invalidate an election duly made according to active custom.”

**Thus in the instance case, since there is no specific legal provision requiring that government recognition must be obtained before the Okparas could select and install an Oluoha of Ihiala, the**

want of recognition cannot therefore invalidate or render the installation illegal. It will also not be an offence for the appellant to allow himself to be installed as the Oluoha XVI of Ihiala by the Okparas. It was not in dispute that the Okparas, who selected and installed the appellant, were in fact the king makers conferred with the powers to carry out the selection and installation of the Oluoha of ihiala. Article 1,2, 3 and 4 of the Oluoha of ihiala constitution confer those powers on the Okparas. Their acts were therefore lawful.

The next point to be considered is whether the prosecution proved that the Oluoha Eze J.M. Udoji, was alive or had not committed acts which were in breach of his office as set out in Articles 12.2 of the Oluoha of Ihiala Constitution. The evidence adduced by the prosecution in this respect was to the effect that the government had given approval to the installation of Eze J.M. Udoji and that such approval had not been withdrawn as at the time when the appellant was installed. This definitely is not enough.

The case for the defense was that the man had disappeared from the town for not less than five years as a result of which he ceased to perform his traditional duties to the community. Petitions were sent to the authorities to which they received no replies. In 1984 the Eze's son wrote a letter on behalf of his father to the government and signed the letter as regent, a situation that could only arise on the death of a ruler. Eventually when in 1987 the Eze's family announced that the man died, nobody in the community saw his corpse as a result of which the traditional ceremonies which the members of the community have to perform on their traditional ruler's corpse could not be performed.

**The onus was definitely on the prosecution to prove that Eze J.M. Udoji was alive as at the time the appellant was selected and installed as Oluoha. As that burden was strictly placed on the prosecution, failure to discharge it was very vital to the success of the prosecution's case.**

The prosecution has therefore failed to prove that the selection and installation of the appellant as the Oluoha XVI of ihiala by

**the Okparas of Ihiala were unlawful.**

As regards the second count of the information in which the appellant was accused of wrongfully holding himself out as a chief contrary to section 19(a) of the Traditional Rulers Law 1981, it is correct to say that the appellant has, by the contents of the letter he wrote to NITEL (Exh.C), held himself out as the Oluoha of Ihiala. The section speaks of “*whether or not there is a recognized chief in a town or community*”. “*Recognised chief*” is defined in section 2 of the Law as meaning:

“*An Igwe or Obi selected and appointed by a town or community as the town’s or community’s traditional; ruler and recognized as such by the Governor in accordance with the provisions of this law.....*”

**As already stated above, the selection and installation of the appellant were lawfully done by those authorized to perform those functions in Ihiala. All that remained was for the appellant to receive his certificate of recognition from the government. But the position in law is that the fact that a chief duly selected according to the accepted forms of native law and custom will not have his selection invalidated because of government’s failure to recognize: (See Taiwo v. Sarumi (1913:2 N.L.R. 106 supra). It follows that such chief is entitled to continue to hold himself out as a traditional ruler duly and lawfully selected and installed pending the time the government takes a decision on his recognition. The prosecution has therefore also failed to prove the second count of the information.**

The respondent’s cross-appeal is against the sentence of N40 fine or 2 months imprisonment imposed on the appellant in respect of the second count. It was submitted that the learned trial Judge erred in law in that respect because the punishment proscribed under the said section 19(a) of the Traditional Rulers Law 1981, is a mandatory sentence of two years imprisonment without option of fine. The sub-section provides thus:

“*Whether or not there is recognized chief in a town or community, a person not being a recognized chief who - (a) holds himself out, as a recognized chief or that town or community, is guilty of an offence and, on conviction, is liable to imprisonment for two years without option of*

*fine.”*

Section 382(1) of the Criminal Procedure Law gives the courts a general power to impose a fine in lieu of imprisonment. The sub-section provides that:

*“382(1) Subject to the other provisions of this section, where a court has authority under any written law to impose imprisonment for any offence and has not specific authority to impose a fine for that offence, the court may, in its discretion, impose a fine in lieu of imprisonment.”*

There is no doubt that the two years imprisonment prescribed in section 19 of the Traditional Rulers Law is the maximum that a court can impose. (See Udoye v. The State (1967) N.M.L.R., 197). **The question however is whether the inclusion of “without option of fine” should be construed as depriving the court of exercising its discretion to impose a fine in lieu of imprisonment. That is definitely the intention of the law in this respect. It follows therefore that whereas the court is free to impose any term of imprisonment not exceeding two years, it is barred from imposing a fine in lieu of imprisonment. The trial court therefore had no power to give an option of fine as it did in the instant case. But since the conviction and sentence passed on the appellant have, for the reasons already given above, been set aside, there is therefore no need to make any order regarding the cross-appeal.**

In the result the appeal is allowed. The conviction and sentences passed on the appellant by Olike J. on 2nd October, 1990 are hereby set aside. In their place I hereby enter a verdict of not guilty, discharged and acquitted on each count. It is hereby further ordered that fines paid by the appellant should be refunded to him forthwith. The appellant is awarded N1000 costs at the Court below and N1000 in this court. The costs are to be paid by the private prosecutor.

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**U.ABDULLAHI JCA**

I have had the benefit of reading before hand the judgment of my learned brother Akintan J.C.A.

B My learned brother had thoroughly dealt with all the issues that arose in this appeal. I agree with his reasoning and the conclusion he reached. I adopt them as mine.

C I also allow the appeal and set aside the conviction and sentences passed on the appellant by the lower court. I further order a refund to the appellant of the fines he paid forthwith. I abide by the order of cos

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**AWOGU JCA**

D I agree with the judgment just delivered by my brother, Akintan, J.C.A.

The prosecution of the appellant was clearly in bad taste. In the first place, the appellant did not descend from his *‘ivory tower’* at Nsukka Hills to proclaim himself Oluoha XVI of Ihiala. The king-makers invited him and made him one. Secondly, if Oluoha X was still alive when the appellant was being crowned, why was he being *‘hidden’* if he had not gone to his ancestors, only to be pronounced dead after the coronation of the appellant? Even the government of the day was apprised of the absence of Oluoha X for nearly five years: Thus, it was as a trap was being set for the appellant and, once caught, the Oluoha X *‘died’*. Yet, some three years earlier, a complainant in this prosecution had proclaimed himself as *‘Regent’* for the *‘living’* Oluoha X, but committed no criminal offence! It is clear therefore that the prosecution did not prove that Oluoha X was *‘alive’* when the appellant was crowned in December, 1986.

G In the second count, the appellant was alleged to have held himself out as a Chief. But he was a Chief properly selected, the absence of government recognition notwithstanding. There is evidence that soon after his selection, Suit No. HN/38/87 was filed by members of Oluoha X family, challenging the selection. They got an interlocutory injunction

against the appellant to prevent him from parading himself as Oluoha XVI of Ihiala. In the face of this suit, it is understandable that the government of the day did not rush to accord recognition to the appellant. Nor did they, thereafter, prosecute him for any offence as they knew that he had not committed any. It is no wonder that the prosecution had to be by a fiat!. Again, this was in bad taste. Having filed a suit and obtained an interlocutory Injunction, the complainants sought to put away the appellant in limbo by prosecuting him for an alleged contempt of court via the letter he wrote to Nitel. The contempt charge was in fact the third count in the information filed against the appellant, by his private prosecutors, but was struck out by Olike J., following the decision of the Court of Appeal setting aside the interlocutory order. Counts one and two then proceeded to trial, and to conviction. Olike J., with respect, ought to have questioned the '*locus*' of the private prosecutors. If the appellant had committed any offence, either the government of the day or the Ihiala king-makers should have been the complainants, and not the undisclosed '*rival*'s of the appellant. Now the appeal is allowed, the private prosecutors must pay the costs at the lower court and for this appeal. I too acquit and discharge the appellant on both counts and any fines paid should be returned to him.

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