

SUPREME COURT OF NIGERIA

28TH APRIL, 2006. SC. 41/2003

**CORAM:- U. A. KALGO, N. TOBI, D. MUSDAPHER,
M. MOHAMMED, W. S. N. ONNOGHEN, JJSC**

DR. EDWIN UDEMEGBUNAM ONWUDIWE APPELLANT

V.

FEDERAL REPUBLIC OF NIGERIA RESPONDENT

CRIMINAL LAW - Banking - Failed Banks Tribunal, s. 3(1) of Decree No. 18 1994 - Stealing and allied offences appellant was charged with - Arose out of the business of a bank (H1)

JURISDICTION - Failed Banks Tribunal - Is empowered to try other offences not specified in the Decree - Miscarriage of justice was not occasioned - By appellant not being tried in the usual courts (H2)

BANKING - Failed Banks Tribunal - Jurisdiction - Where appellant falsely represented - That a bank he is chairman of - Has US dollars to sell - The Tribunal has jurisdiction to try him (H3)

CRIMINAL PROCEDURE - Stealing - Conviction - Banking - Concurrent findings of fact - That convicted appellant for conversion - Of money meant for the bank - Is supported by evidence (H4)

CRIMINAL PROCEDURE - Failed Banks Tribunal - Conviction - Confiscation of property of appellant - That was voluntarily surrendered by his counsel - Is no double punishment (H5)

FACTS

The appellant and another were arraigned before the Failed Banks Tribunal Zone IV Lagos, charged with various offences. Appellant was Chairman, while the co-accused was the Managing Director/Chief Executive of the Ivory Merchant Bank Ltd. On or about the 16-8-1994, appellant had a meeting with Mrs. Nwaogu (PW1), an ex-banker, at Aba.

He told PW1 that the Bank has one million US Dollars for sale but that \$345,000 was available for immediate disposal, that if PW1 could find a buyer, she would be entitled to brokerage fees. She eventually secured a buyer - Partnership Investment Ltd - Who drew a cheque for the agreed sum of N16.56 million in the name of Ivory Merchant Bank Ltd, crossed and marked Not Negotiable Account Payee Only. In spite of this endorsement, appellant caused the cheque to be paid into his private account with the Bank and he spent the money, without providing the agreed foreign exchange. On 19-10-1994, in a purported refund of the principal amount of N16.56 million plus interest, he issued a cheque to the said company but the cheque was dishonoured. Investigations carried out revealed that appellant was dubiously acting alone in the transaction. The Ivory Merchant Bank Ltd refused to accept responsibility for the refund or the fraud.

Partnership Investment went to Court and obtained judgment in the sum of N21 million against both the appellant and the bank, levied execution and thereby forced the Bank to refund the sum of N16.56 million. Following the bad publicity generated by this scandalous transaction, the Bank became distressed and eventually went into liquidation leaving the depositors of the Bank in financial losses. The trial Failed Banks Tribunal discharged the co-accused and convicted appellant. Because counsel during allocutus voluntarily released appellant's hospitals which were confiscated, the court was lenient in its sentences against appellant. Appellant's appeal to the Court of Appeal was dismissed. Being dissatisfied, he has further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in holding that the subject matter of the charge brought before the Failed Bank Tribunal was within the jurisdiction of the Failed Bank Tribunal.

2. Whether the Court of Appeal was right when it arrived at the conclusion that the offences of stealing, obtaining by false pretences and corrupt enrichment and failing to secure compliance with section 20(6) of Banks And Other Financial Institutions Decree No. 25 were established at the Tribunal.

3. Whether the Court of Appeal was right in confirming the Order of the Tribunal confiscating the appellant's assets and properties."

HELD (Unanimously dismissing the appeal per **MUSDAPHER JSC**)
CRIMINAL LAW - Banking - Failed Banks Tribunal

1. It was argued that the appellant was arraigned for offences created "under the Criminal Code of stealing, obtaining by false pretences and unjust enrichment. In my view the offences do not relate to banks and banking but clearly relate to the business and operation of a bank. See **AKWULE VS. QUEEN** supra. The transaction leading to the charges arose out of the operation of the business of the Ivory Merchant Bank and it clearly falls within the provision of section 3(1) of Decree No. 18 of 1994. For the sake of clarity I reproduce section 3.

"3. The tribunal shall have power to

(d) try other offences relating to the business or operation of a bank under any enactment

[emphasis mine]

It was not disputed that the appellant was the Chairman of Ivory Merchant Bank Ltd at the time material for the commission of the offences for which he was charged and convicted. It was also not in dispute that he as chairman, according to P.W.1, though he denied it, approached her and solicited her assistance for the sale of US 345,000, Dollars belonging to the bank, in its 'offshore account. The purpose of the sale of the dollars was to "shore up" the capital base of Ivory Merchant Bank. It was also to be done secretly to avoid publicity. Eventually, P.W.1 found a buyer and both the buyer and P.W.1 were convinced that the appellant was acting on behalf of the bank. When the deal was finally struck a bank draft was issued to the Ivory Merchant Bank and was marked "Not negotiable and account payee only." The appellant abused his position and caused the crossed aforesaid bank draft to be paid into his personal account and thereafter used the proceeds for his own use. All these transactions were carried out in the cause of banking business or operation. (p. 1328 G)

JURISDICTION - Failed Banks Tribunal

2. In effect, the provision confers jurisdiction and power on the tribunal to try other offences not specified in the Decree. There is no doubt that where a court or tribunal has no jurisdiction to adjudicate on a matter the trial and conviction by the tribunal lacking jurisdiction is a nullity no matter how well the trial was conducted. But in the instant case, the subject matter before the tribunal was patently within its jurisdiction under the different legislation when the offences were committed in the course of business or operation of a bank by virtue of section 3 (1) (d) of Decree No. 18 of 1994.

In my view, the fact that the procedure under the Tribunal differs from the procedure under the High Court exercising criminal Jurisdiction is of no moment. There was no doubt the legislation was promulgated under the Military rule for the purposes of dealing with the malpractices prevalent at the time. Special courts were set up to deal with such issues and the issue of miscarriage of justice or that the appellant was made to suffer draconian criminal procedure is irrelevant. (p. 1330 B)

E

Where appellant falsely represented - That bank has dollars to sell

3. The facts are very clear, the appellant with animus furandi dubiously induced Partnership Investment Ltd. to part with the sum of N16.56 million. He falsely represented to them that Ivory Merchant Bank had 345,000 US Dollars to sell. The purchase price was in a form of a draft crossed and marked “not negotiable and account payee only” in the name of Ivory merchant Bank, yet the appellant was able to abuse his office as chairman of Ivory Merchant Bank to pay the draft into his personal account and immediately use the money himself. This conduct at the end of the day prejudicially affected Ivory Merchant Bank leading to its liquidation. In my view, the tribunal had the jurisdiction to try the appellant. I accordingly resolve issue No. 1 against the appellant. (p. 1330 F)

H

Stealing - Conviction - Banking

4. Now, this second issue, essentially deals and relates to the findings of fact i.e. whether, the appellant was rightly convicted for the offences of

stealing, obtaining by false pretences, corrupt enrichment and obtaining credit by unlawful means on the evidence adduced. It is evident that these are concurrent findings of fact by the two lower courts and to overturn a concurrent and consistent finding of fact by appeal court, an appellant has an up hill task. There must be exceptional circumstances. B See SOBAKIN VS. THE STATE (1981) 3 - 4 SC 31. The rationale for the view that concurrent findings of facts in two lower courts ought to be invariably accepted in that the courts are presumed to have considered all the facts necessary for their coming to such findings. Thus findings of facts made by High Court in a trial and affirmed on appeal by the Court C of Appeal cannot be reopened in this court in the absence of special circumstances. Unless it is shown that there exists the violation of some principle of law or of procedure and must be such an erroneous proposition of law or of procedure, that if such proposition be corrected the D finding cannot stand. The Supreme Court may only interfere with the concurrent findings of Acts where the circumstances are such the findings of fact are patently erroneous and would amount to a travesty of justice to allow the findings to stand. E

I have myself examined the evidence and have come to the inevitable conclusion, that the prosecution established beyond any dispute that the appellant fraudulently represented to the victims that the bank of which he was the Chairman, had American dollars to sell. He so fraudulently induced the victims to issue a crossed draft in the name of the bank F with the security "not negotiable and account payee only" added to it. The appellant abused his position and caused the cheque to be paid into his personal account and he converted the proceeds to his own use. But G in my view these facts glaringly reveal the offences for which the appellant was convicted. I also find no merit in the complaints in issue No. 2. I resolve it against the appellant. (p. 1334 B)

Conviction - Confiscation of property of appellant

5. Now, there is no doubt that the Tribunal had the jurisdiction to order confiscation of property where an accused was found guilty of an offence under section 20 of Decree No. 19 of 1994 which also sets out the

penalties for conviction under Cap 389 of 1990 LFN as amended. Section 20 (5) of Decree No. 18 provides:-

“5. Where by reason of the confiscation or voluntary surrender of property, under this section, there is full or substantial recovery of the amount involved in the offence, the tribunal may, if it deems it equitable, reduce or decline to impose the penalty specified in subsection (1) of this section.”

It was because of the voluntary surrender made by the appellant that the tribunal was very lenient to him while passing the sentence. Learned trial judge as shown above in this judgment declined to pass any sentence on counts 6 and 8 even though the appellant was found guilty thereof. The Tribunal rightly in my view held:-

“xxxxxx I shall, however, mitigate the sentences passed on the 1st accused/convict having regard to the voluntary surrender of his hospitals at No. 9 Anoko Street, Owerri, Imo State and that No. 28 Ekulu Layout, Enugu in Enugu State, both of which have just been confiscated to Ivory Merchant Bank Ltd. xxxxxxxxx”

In my view, there was no double punishment. As a matter of fact the Tribunal did not impose any sentence on the appellant on counts 6 and 8 for which the appellant was convicted. The Tribunal did not do so in view of the discretion it has under section 20(5) recited above.

It was indeed on the application of his lawyer during allocutus, that the solicitor voluntarily on behalf of the appellant surrendered the properties to the victim of the crime Ivory Merchant Bank Ltd which bank was forced to pay the N16.56 million to Partnership Investment Ltd. As mentioned above, there was no double punishment and I also accordingly find no merit in this complaint, I resolve the issue against the appellant. (p. 1335 F)

NOTABLE POINTS OF INTEREST

H TOBI JSC

1. Jurisdiction - Is determined by reference to the enabling law

Learned counsel for the appellant devoted 11 pages of his 21-page brief hammering on the jurisdiction of the Tribunal. He danced around it for

quite a while; a dance with no commensurate ovation. A party cannot beg or bargain jurisdiction into a matter before a court of law; so too the adverse party cannot beg or bargain jurisdiction outside or out of a matter. Jurisdiction is an exact law that has to be applied exactly to any given case. It is either that a court has jurisdiction in a matter or it has not. B There is no hybrid situation. There is no half way to this straight and unambiguous law.

In the determination of jurisdiction of a court, the enabling law vesting jurisdiction has to be taken in the light of the relief or reliefs C sought. The moment the relief sought comes within the jurisdiction of the court as adumbrated by the facts, the court must assume jurisdiction as it has jurisdiction to do so. Of course, the reverse position is also correct and it is that the moment the relief sought does not come within the jurisdiction of the court, as adumbrated by the facts, the court must D reject jurisdiction as it has no jurisdiction in the matter. To that extent, jurisdiction looks almost like an exact formula in calculus, although it is devoid of actual figures and numbers.

In the light of the above, I am of the firm view that the issue of E jurisdiction raised by learned counsel for the appellant fails. Section 3(1)(d) of Decree No. 18 of 1994 clearly vests jurisdiction on the Tribunal to try the appellant, and I so hold. (p. 1347 H)

2. *Fraud - Definition - When the offence is deemed committed* F

As it is, the offence can only be said to be committed if the taking of the thing capable of being stolen is done fraudulently. Fraud, the noun variant of fraudulently, is (1) an action or a conduct consisting in a knowing G misrepresentation made with the intention that the person receiving that misrepresentation should act on it; (2) the misrepresentation resulting in the action or conduct; (3) an action or a conduct in a representation made recklessly without any belief in its truth, but made with the intention that the person receiving that misrepresentation should act on it and H so on and so forth. See Bryan A. Garner, *A Dictionary of Modern Legal Usage*, Second edition, page 374.

A fraudulent action or conduct conveys an element of deceit to

obtain some advantage for the owner of the fraudulent action or conduct or another person or to cause loss to any other person. In fraud, there must be a deceit or an intention to deceive flowing from the fraudulent action or conduct to the victim of that action or conduct. An offence is said to be committed fraudulently, in the context of the appeal before us, if the action or conduct is a deceit to make, obtain or procure money illegally. By the fraudulent action or conduct, the accused deceives his victim by pretending to have abilities or skills that he does not really have. In one word, he is an impostor. (p. 1349 G)

3. *Case of stealing was proved*

It is clear from the facts of the case that the appellant converted the sum of N16.56 million, a conversion which clearly illustrated to stealing under section 383 of the Criminal Code. The conversion was fraudulent. The N16.56 million is capable of being stolen and it was stolen by the appellant. Upon demand, the appellant neither returned the N16.56 million or the dollar equivalent of US\$345,000. The theft was not on the dollar equivalent because property at the material time had not, or better, did not pass to PW2. The theft was on the N16.56 million. Following the demand and the concomitant refusal to return the N16.56 million, the appellant was caught by section 383(2)(a) of the Criminal Code. This is because of the clear intention of the appellant to deprive the owner, PW2 and his company, the thing, which is N16.56 million; capable of being stolen and was stolen.

It seems from the evidence that the appellant made efforts to refund the money. I do not know whether they were genuine efforts or a caricature of some efforts. But whatever it may be, the action or conduct could fall under section 383(2)(f) of the Criminal Code. Come what may, and in whatever way one looks at the matter, I come to the inescapable conclusion that the prosecution proved the case of stealing and the appellant was rightly convicted. (p. 1350 H)

4. *Obtaining by false pretences - What to prove*

For the offence of obtaining by false pretences to be committed, the

prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen. An inducement on the part of an accused to make his victim part with a thing capable of being stolen or to make his victim deliver a thing capable of being stolen will expose the accused to imprisonment of the offence. B

Learned counsel for the respondent cited profusely the case of *Alake v. The State* (1991) 7 NWLR (Pt. 205) 567, a case that I did in the Court of Appeal. Let me reproduce the ipsissima verba of what I said at page 591:

“Let me deal with the offence as provided for in section 419 of the Criminal Code Law. In order to succeed, the prosecution must prove (1), that there is a pretence; (2) that the pretence emanated from the accused person; (3) and that it was false; (4) that the accused person knew of its falsity or did not believe in its truth; (5) that there was an intention to defraud; (6) that the thing is capable of being stolen; (7) that the accused person induced the owner to transfer his whole interest in the property. The offence could be committed by oral communication, or in writing or even by conduct of the accused person. An honest belief in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence.” C D E

In my view, the above adequately presents the law as in section 419 of the Criminal Code. F

The false pretence on the part of the appellant was very clear. At the time he was in the so-called business conversation with Mrs. Justina Nkechi Nwaogu, he knew that neither the Ivory Merchant Bank Limited nor himself had US\$345,000 to exchange for N16.56 million. And that made the pretence false. (p. 1351 H) G

REPRESENTATIONS

M. A. Agbamuche with him A. J. Osanyande for the Appellant.
S. E. Elema Esq., for the Respondent. H

CASES REFERRED TO

Akosa v. Commissioner of Police (1950) 13 WACA 43

Oshin v. IGP (1961) 1 All NLR 27

Adeyemi v. Commissioner of Police (1961) All NLR 38

SOBAKIN VS. THE STATE (1981) 3 - 4 SC 31

SCHRODER AND COMPANY VS. MAJOR AND CO. NIG. LTD. [1989]

B 2 NWLR (Pt. 101) 1 at 13

AKWULE VS. THE QUEEN [1963] NSCC 157

NWOKEDI & ANOR. VS. COMMISSIONER OF POLICE Vol. 11 NSCC
127

UBANI VS. STATE [2003] 18 NWLR (Pt 851) 224

C ADEWUSI VS. THE QUEEN [1963] ALL NLR 322

MOHAMMEDU TSOFOLO VS. COMMISSIONER OF POLICE [1971]
ALL NLR 339

Nasiru v. Commissioner of Police (1980) 12 NSCC 42

D Sofekun v. Akinyemi (1980) 12 NSC 175

Comptroller of Nigerian Prisons v. Adekanye (1999) 10 NWLR (Pt. 623)
400

Onakoya v. Federal Republic of Nigeria (2002) 11 NWLR (Pt.779) 595

E Akpan v. The State (2002) 12 NWLR (Pt. 780) 204

Epereokun v. The University of Lagos (1986) 4 NWLR (Pt. 34) 162

STATUTES REFERRED TO

F Banks And Other Financial Institutions Decree No. 25 of 1991 ss. 20(6)
and 46(a)

Recovery of Property (Special Military Tribunal) Amendment Decree
No. 33 of 1991

G Failed Banks (Recovery of Debts) & Financial Malpractices in Banks
Decree No. 18 of 1994 ss. 3(1)(d), 46(a)

Criminal Code ss. 390(7) and 419

Constitution of the Federal Republic of Nigeria 1979 s. 35(3)

H LEAD JUDGMENT BY MUSDAPHER JSC

This is an appeal against the judgment of the Court of Appeal
Lagos Division delivered on the 15/1/2003 whereby the appellant's ap-
peal against his convictions and sentences by the failed Bank's Tribunal

Zone IV Lagos, Edokpayi J (as he then was) was dismissed. The appellant and one other were arraigned before the Failed Banks Tribunal Zone IV, Lagos. The appellant was specifically concerned in the amended Charge with the following counts:-

"COUNT 1

That you, DR. EDWIN UDEMEGBUNAM ONWUDIWE and you, JOE BILLY EKWUNIFE while being the chairman and Managing Director/Chief Executive respectively of Ivory MERCHANT BANK LTD on or about the 23/8/1994 at Lagos conspired together to fraudulently convert the proceeds of a CRYSTAL BANK OF AFRICA LTD Bank certified cheque No. 66114 issued in favour of IVORY MERCHANT BANK LTD for the sum of N16.56 Million to the use and benefit of DR. EDWIN UDEMEGBUNAM ONWUDIWE and thereby committed an offence punishable under section 516 of the Criminal Code Act (cap 77 LFN 1990) read in conjunction with section 3(1) (d) of the Failed Banks (Recovery of Debts) AND FINANCIAL MALPRACTICES IN BANKS DECREE " NO. 18 of 1994.

COUNT 3

That you, DR. EDWIN UDEMEGBUNAM ONWUDIWE while being the Chairman of IVORY MERCHANT BANK LTD on or about the 23/8/1994 at Lagos stole by fraudulently converting to your own use and benefit the proceeds of a CRYSTAL BANK OF AFRICA LTD certified cheque No. 66114 issued in favour of IVORY MERCHANT BANK LTD in the sum of N16.56 Million, and thereby committed an offence punishable under section 390 (7) of the Criminal Code Act read in conjunction with section 3(1) (d) of Decree No. 18 of 1994.

COUNT 5

That you, DR. EDWIN UDEMEGBUNAM ONWUDIWE while being the Chairman of IVORY MERCHANT BANK LTD on or about the 23/8/1994 at Lagos with intent to defraud falsely represented to PARTNERSHIP INVESTMENT COMPANY LTD that IVORY MERCHANT BANK LTD had the sum of 345,000 US Dollars available for sale and thereby induced PARTNERSHIP INVESTMENT COMPANY LTD to deliver to you CRYSTAL BANK OF AFRICA LTD certified cheque No.

66114 for the sum of N 16.5 Million issued in favour of IVORY MERCHANT BANK LTD, the proceeds of which you dishonestly obtained and appropriated to your own use and benefit, and thereby committed an offence under section 419 of the Criminal Code Act read together with
B section 3(1) (d) of Decree 18 of 1994.

COUNT 6

That you, DR. EDWIN UDEMEGBUNAM ONWUDIWE while being the Chairman/Director of IVORY MERCHANT BANK LTD on or about the 29/7/1994 at Lagos, failed to take all reasonable steps to secure compliance by IVORY MERCHANT BANK LTD with the requirement of the
C BANKS AND OTHER FINANCIAL INSTITUTIONS DECREE NO. 25 of 1991 by permitting to be outstanding in your account No. 211703008 L operated at-IVORY MERCHANT BANK LTD unsecured advances/loans/
D credit facilities amounting to N2,853,189.33, without prior approval in writing of the Central Bank of Nigeria, and thereby committed an offence contrary to section 20(2)(a) Of THE BANKS AND OTHER FI-
NANCIAL INSTITUTIONS DECREE NO. 25 of 1991 and punishable
E under section 46(a) of the same Decree read together with section 3(1) (c) of Decree No. 18 of 1994.

COUNT 7

That you, DR. EDWIN UDEMEGBUNAM ONWUDIWE and you,
F JOE BILLY EKWUNIFE while being the Chairman and the Managing Director/Chief Executive respectively of IVORY MERCHANT BANK LTD on or about the 23/8/1994 at Lagos conspired together to engage in unlawful activity and corruptly enriched the first accused DR. EDWIN UDEMEGBUNAM ONWUDIWE by fraudulently converting the proceeds
G of CRYSTAL BANK OF AFRICA LTD bank certified cheque No. 66114 issue in favour of IVORY MERCHANT BANK LTD in the sum of N16.56 million to the use and benefit of the 1st accused, thereby committed an offence contrary to section 1 (2) (d) of the RECOVERY OF PUBLIC
H PROPERTY (SPECIAL MILITARY TRIBUNALS) ACT CAP. 389 LFN 1990 and punishable under section 13(1) of the said Act as amended , by the RECOVERY OF PUBLIC PROPERTY (SPECIAL MILITARY TRIBUNALS) AMENDMENT DECREE No 33 of 1991, and read together

with section 3 (1) (d) of Decree No 18 of 1994.

COUNT 8

That you, DR. EDWIN UDEMEGBUNAM ONWUDIWE while being the Chairman of IVORY MERCHANT BANK LTD on or about the 24/8/1994 at Lagos did corruptly enrich yourself and engaged in unlawful activity by converting the proceeds of the said bank certified cheque No 66114 issued in favour of IVORY MERCHANT BANK LTD, to your own use and benefit, and thereby committed an offence punishable under Section 13 (1) (a) of the RECOVERY OF PUBLIC PROPERTY (SPECIAL MILITARY TRIBUNALS) ACT Cap 389, LFN 1990 as amended by the RECOVERY OF PUBLIC PROPERTY (SPECIAL MILITARY TRIBUNALS) AMENDMENT DECREE 1991 and read together with section 3 (1) (d) of Decree No. 18 of 1994.”

The appellant pleaded not guilty to the counts concerning him which I have reproduced above. To establish their case the prosecution called eight witnesses and the appellant testified and called four other witnesses. At the end of the trial and in its judgment, on 11/11/1998 the tribunal found the appellant guilty on counts 3,5,6 and 8, and the tribunal imposed the following sentences against the appellant:-

“Count 3-

1st accused/convict is sentenced to N50,000 as fine, or in the alternative to 18 months imprisonment with hard labour.

Count 5

The 1st accused/convict is hereby sentenced to 2 years imprisonment without the option of a fine.

Count 6

No sentence is imposed.

Count 8

No sentenced is imposed.

The sentences passed are hereby ordered to run concurrently from today.”

The appellant felt unhappy with the decision and appealed to the Court of Appeal. The amended Notice of Appeal contained 16 Grounds

of Appeal out of which the appellant submitted thirteen issues arising for the determination of the appeal.

The Court of Appeal rightly in my view after considering the verbosity and the prolixity of the issues formulated by the parties narrowed the real issues in controversy to 5 and these are:-

“1. *Whether the lower Tribunal has jurisdiction to entertain the offences set out in Counts 3,5, and 8 of the charge which respectively relate to theft, obtaining money by false pretences and corrupt enrichment.*

2. *Whether the prosecution established the offences of-receiving money by false pretences, corrupt enrichment and stealing.*

3. *Whether the appellant is a public officer within the meaning of Recovery of Public -Property (Special Military) Tribunals Decree.*

4. *Whether the entire proceedings together with the judgment and order of the lower Tribunal are null and void.*

5. *Whether the sentences imposed on the appellant are not excessive.*”

After the consideration of the submissions of counsel and the briefs, the Court of Appeal, in its judgment delivered the 15/1/2003, found in favour of the appellant on issue No 3, but in the main, found no merit in the appeal and the appeal was accordingly dismissed and the conviction and sentences imposed by the Tribunal were affirmed. This now, is a further appeal by the appellant to this court. The Notice of appeal contains four Grounds of appeal and bereft of their particulars, they read as follows:-

“1. *The learned justices of the Court of Appeal erred in law when they held that “the instant case, the subject matter of the case in the trial tribunal was patently within the embrace of the different legislations which conferred jurisdiction to try the different offences for which the appellant was convicted.*

2. *The learned justices of the Court of Appeal erred in law when they “arrived at the conclusion that the convictions and sentences based on the offences of stealing, obtaining by false pretences and corrupt*

enrichment were valid when the established facts cannot amount to stealing or obtaining by false pretences or corrupt enrichment in law”.

3. *The learned justices of the Court of Appeal erred in law when they affirmed the judgment of the failed Banks Tribunal convicting the appellant for the offence of failing to take reasonable steps to secure compliance by IVORY MERCHANT BANK LTD with the requirements of BANKS AND OTHER FINANCIAL INSTITUTIONS DECREE NO 25 of 1991 (now Act) Under Section 20(6) and punishable under section 46(a) of the same Decree, as charged in Count 6 of the (information) charge”.*

4. *The learned justices of the Court of Appeal- erred in law in confirming the order of the Failed Banks Tribunal confiscating the appellant’s assets and properties under section 20 of Decree No 18 of 1994 as amended.”*

The reliefs sought by the appellant from this court is for (1) an order setting aside the conviction and sentence of the appellant and to enter instead an Order of discharge and acquittal of the appellant in respect of Counts 3,5,6 and 8. (2) an Order releasing the confiscated assets and properties of the appellant to him.

Before the examination of the issues submitted for the determination of the appeal, it is convenient at this stage to set out the back ground facts of the case. The facts put shortly are that: On or about the 16th of August 1994, the appellant who was at the material time, the Chairman of Ivory Merchant Bank Ltd had a meeting with one Mrs. Nkechi Justina Nwaogu, an ex-banker who was the Managing Director of a company called LIBERAL INVESTMENT LIMITED, the said meeting took place at a restaurant called Ndfia Restaurant, 39, Milverton Road, Aba. The said Mrs Nkechi Justina Nwaogu who testified as P.W.1 told the trial tribunal, that the appellant told her that he was in Aba to look for a buyer for some foreign exchange belonging to the bank in an of shore account. That the bank has one million US Dollars for sale but that what was available for immediate disposal was the sum of \$345,000.00 US Dollars and that .the bank wanted to conduct the transaction discreetly without attracting publicity as the bank was trying to shore up its revenue base.

They agreed that the sum of N16.56 million was the equivalent of the 345,000 US Dollars, the bank wanted to sell. It was further agreed that if P.W.1 could find a buyer for the dollars she would be entitled to brokerage fees. The appellant denied in his evidence that he was representing the IVORY MERCHANT BANK LTD in the matter of the sale of the foreign exchange. He insisted he was acting in his private capacity and the transaction had nothing to do with the bank. P.W.1 initially located an Indian business man in Lagos who was willing to buy the foreign exchange. The Indian made a bank draft for the sum of N16.56 million being the agreed naira equivalent and gave a photocopy of the draft to P.W.1 insisting that the original would only be released after the foreign exchange is credited to his account abroad. The appellant refused and insisted on an immediate payment of the Naira equivalent in the sum of N16.56 million. Thereafter P.W.1 approached Partnership Investment Limited who accepted to pay for the dollars immediately as requested by the appellant. They raised a bank draft issued by CRYSTAL BANK OF AFRICALTD in the sum of N16.56 million in the name of IVORY MERCHANT BANK LTD. The said draft was "*crossed and marked, Not Negotiable Account Payee Only.*" P.W.1 testified further that it was the appellant who requested that the draft be in the name of the Ivory Merchant Bank Ltd and that all the parties were under the impression that they were dealing with the Ivory Merchant Bank Ltd. On the 23/8/1994, P.W.1 and an official of the Partnership Investment Ltd visited the premises of the Ivory Merchant Bank Ltd and there handed to the appellant the draft Exhibit C. Although Exhibit C was in the name of Ivory Merchant Bank, and was crossed and marked "Not Negotiable, Account Payee only" yet it was paid into the private account of the appellant with Ivory Merchant Bank which then had a debit balance. The appellant paid the said draft Exhibit C into his private account together with a letter to the bank indicating how he wanted the said money disbursed. The appellant withdraw the rest of the money from the account and left a debit balance. On the 5/9/1994, when Partnership Investment Limited still did not receive the foreign exchange, it demanded a receipt from the appellant, the appellant obliged by issuing Exhibit G. On the 19/10/994, the appel-

lant in purported refund of the principal amount of N16.56 million plus interest issued a cheque to the aforesaid company, but the cheque was dishonoured. Investigations carried out by the Central Bank of Nigeria, Nigeria Deposit Insurance Cooperation and the Directors Ivory Merchant Bank Ltd on the Petition of Partnership Investment Ltd when they failed B to get the foreign exchange or the refund of their money and interest revealed that the appellant was dubiously acting alone in the transaction. The Ivory Merchant Bank Ltd refused to accept responsibility for the refund and or the fraud.

Partnership Investment Limited went to Court and obtained judgment in the sum of N21 million against both the appellant and Ivory Merchant Bank Ltd. The Company levied execution by way of garnishee proceedings and thereby forced Ivory Merchant Bank Ltd to refund to it the sum of N16.56 million. Following the bad publicity which was generated by this scandalous transaction Ivory Merchant Bank Ltd became distressed and eventually went into liquidation leaving the depositors of the bank in financial losses. C D

Now, in his brief for the appellant, the learned counsel has identified formulated and submitted to this Court the following issues arising for the determination of the appeal:- E

“1. Whether the Court of Appeal was right in holding that the subject matter of the charge brought before the Failed Bank Tribunal was within the jurisdiction of the Failed Bank Tribunal. F

2. Whether the Court of Appeal was right when it arrived at the conclusion that the offences of stealing, obtaining by false pretences and corrupt enrichment and failing to secure compliance with section 20(6) of Banks And Other Financial Institutions Decree No. 25 were established at the Tribunal. G

3. Whether the Court of Appeal was right in confirming the Order of the Tribunal confiscating the appellant’s assets and properties.”

The Learned Counsel for the respondent formulated similar issues H for the determination of the appeal. I shall now deal with the issues serially as they appear in the appellant’s brief.

ISSUE 1

The main complaint in this issuers that the subject matter of the criminal charges was not within the jurisdiction of the Failed Banks Tribunal and by virtue of the decisions in EYOROKOROMO VS. THE STATE [1979] 6/9 SC 3 as approved in ADEOYE VS. THE STATE [1999] 6 B NWLR (Pt. 605) 74 at 871 if the submission is upheld, the trial in this matter is a nullity. See FEDERAL REPUBLIC OF NIGERIA VS. LORD CHIEF IFEAGWU [2003] 15 NWLR (Pt 842) 113 and NASIRU VS. COMMISSIONER OF POLICE [1980] 12 NSCC 42. Where a charge was framed by a Court which has no jurisdiction to try the matter, it was C decided that no matter how well the trial was conducted, the trial was a nullity, see OMALE VS. COMMISSIONER OF POLICE [1969] NMLR, SULE BABA VS. COMMISSIONER OF POLICE [1974] NMLR see EZE VS. FEDERAL REPUBLIC OF NIGERIA [1987] NSCC Vol. 18 D 244. See also EMU VS. STATE [1980] 2 NCR 297.

It is submitted that in the instant case the appellant was charged with the offences set out and punishable under the provisions of the Criminal Code Act Cap 77 of Laws of the Federation and in order to E arraign the appellant before the Failed Banks Tribunal, the charges were read along and together with section 3(1) (d) of the Failed Banks [Recovery of Debts] and Financial Malpractices in Banks Decree No. 18 of 1994. It is submitted that, there was no evidence that the appellant was a F banker or that the transaction was a banking business and consequently the Tribunal had no jurisdiction on the charge on Count No. 6. It is again submitted that since the alleged offences were said to have been committed on the 23/8/1994, the Failed Banks Tribunal was not in existence at the time the offences were alleged to have been committed, the Tribunal G has no jurisdiction to entertain the charge. The Tribunal was established under Decree No. 18 of 1994 on the 9/11/1994. See FRN VS. IFEAGWU supra. See also Section 35(3) of 1979 Constitution. See also SOFEKUN VS. AKINYEMI 1980 NSCC Vol. 12 page 175 at 187.

H It is again argued that the appellant has suffered a grave miscarriage of justice when the Failed Banks Decree No. 18 of 1994 was made to be retrospective in its effect and the right of the appellant to a fair trial in the ordinary Courts of the land was denied him. It is further stressed

that no statute can be construed or constructed to have retrospective operation unless the language of the statute plainly requires such construction and Decree No. 18 of 1994 manifestly was not intended to be retrospective in its operation and application. It is again stressed that the appellant has suffered miscarriage of justice when he was subjected to the draconian and rigid provisions which contains even a presumption of guilt. It is further argued that the Court of Appeal misdirected itself in its appraisal of the evidence and its findings of fact that the appellant approached P.W.1 to source for a buyer of the dollars belonging to the Ivory Merchant Bank. It is submitted that the trial Court found no proof and that the negotiations did not take place in the premises of Ivory Merchant Bank Ltd and that the trial Court has found as a fact that the transaction for which the Crystal Bank cheque for N16.56 million was paid to the appellant was a private business transaction and did not concern the bank. It is again argued that the appellant was not a staff of the Ivory Merchant Bank and the cheque was merely received by the bank in the ordinary course of its business and it merely cleared the cheque and disbursed its proceeds on the instruction of the owner, the appellant. The sum total of these is that no offence particularly in Counts 3 and 8 were committed in the course of the operation of the Ivory Merchant Bank and therefore no stealing was established under Count 3. It was the same evidence used to acquit the 2nd accused, which was used to convict the appellant in counts 3 and 5. See AKPAN & OTHERS VS. THE STATE. [2002] 12 NWLR (PT. 780) AT 240.

It is again submitted that the Failed Banks Tribunal had no jurisdiction to entertain the complaint in Count 8. Learned Counsel referred to the cases of EPEREOKUM & OTHERS VS. UNIVERSITY OF LAGOS [1986] 4 NWLR (Pt. 34) 162 at 184, SCHRODER AND COMPANY VS. MAJOR AND CO. NIG. LTD. [1989] 2 NWLR (Pt. 101) 1 at 13. It is finally submitted that the Banks And Other Financial Institutions Decree [BOFID] No. 25 of 1991 only provided for offences relating to banks and banking business, the alleged offence in Count 6 was not proved at all.

The learned counsel for the respondent on the other hand submit

that both the trial Tribunal and the Court of Appeal were right in holding that the trial Tribunal had the jurisdiction to entertain the matter under section 3(1)(d) of the Failed Banks Decree No. 18 of 1994. Learned Counsel referred to the case of AKWULE VS. THE QUEEN [1963] NSCC B 157. The appellant was tried and convicted on the offences created by the Criminal Code and the Decrees which the tribunal had jurisdiction to try under section 3(1) (d) of Decree No. 18 of 1994.

Similarly the tribunal had the jurisdiction to try and convict for unjust enrichment both under the Criminal Code, and Recovery of Public C Property [special Military Tribunals] Act Cap 389 as amended by Decree No. 33 of 1991.

It is again submitted that the appellant was not tried for offences created at the time of the alleged commission of the offences, he was D tried for offences under the Criminal Code Act and Recovery of Public Property Decree. He was not tried under the offences created by Decree No. 18 of 1994. The Decree merely established the Tribunal to try the offences but did not specifically create the offences for which the appel- E lant was charged and convicted. The other offences for which the appellant was tried were created by BOFID No. 25 of 1991. The appellant committed these offences for which he was arraigned in August 1994 long after the enactments had come into existence. Section 3(1)(d) of F Decree No. 18 of 1994 however specifically gave the tribunals the jurisdiction to try the offences created by other enactments in so far as the transaction had something to do with the business or operation of a bank.

Now, as mentioned above both the Tribunal and the Court of Ap- G peal dealt at length with the issue of the jurisdiction of the tribunal to deal with the Counts brought against the appellant. In the first issue the appel- lant has again raised the issue of the jurisdiction of the tribunal to adjudi- cate on the matter brought before it. **It was argued that the appellant was arraigned for offences created “under the Criminal Code of H stealing, obtaining by false pretences and unjust enrichment. In my view the offences do not relate to banks and banking but clearly relate to the business and operation of a bank. See AKWULE VS. QUEEN supra. The transaction leading to the charges arose out of**

the operation of the business of the Ivory Merchant Bank and it clearly falls within the provision of section 3(1) of Decree No. 18 of 1994. For the sake of clarity I reproduce section 3.

“3. The tribunal shall have power to

(d) try other offences relating to the business or operation of a bank under any enactment

[emphasis mine]

It was not disputed that the appellant was the Chairman of Ivory Merchant Bank Ltd at the time material for the commission of the offences for which he was charged and convicted. It was also not in dispute that he as chairman, according to P.W.1, though he denied it, approached her and solicited her assistance for the sale of US 345,000, Dollars belonging to the bank, in its ‘offshore account. The purpose of the sale of the dollars was to “shore up” the capital base of Ivory Merchant Bank. It was also to be done secretly to avoid publicity. Eventually, P.W.1 found a buyer and both the buyer and P.W.1 were convinced that the appellant was acting on behalf of the bank. When the deal was finally struck a bank draft was issued to the Ivory Merchant Bank and was marked “Not negotiable and account payee only.” The appellant abused his position and caused the crossed aforesaid bank draft to be paid into his personal account and thereafter used the proceeds for his own use. All these transactions were carried out in the cause of banking business or operation. The Court of Appeal was correct when it held in its judgment at page 431 of the record thus:-

“It is obvious from the foregoing that the acts of the appellant were criminal in fact and in deed. A close look at counts 3, 4, 5, 6, 7, 8 and 9 of the charges on which the appellant was arraigned were brought and convicted under section 370(7) of the Criminal Code Act, Section 20(1) (a) of Failed Banks [Recovery of Debts and Financial Malpractices in Banks] Decree No. 18 of 1994, Section 1 (29) (d) of Recovery of Public Property [Special Military Tribunals] Act Cap 389 as amended xxxxxxxx by Decree No. 33 of 1991. All the enumerated laws were exant at the time of the transaction in issue. Each of those Counts stated that

the enabling Legislation is read along with section 3(1) (d) of Decree No. 18 of 1994. The question is: Did the inclusion of section 3(1) (d) of Decree No. 18 of 1994 mean that the appellant was tried and convicted under it? I am of the view that the reference to that provision of Decree No. 18 of 1994 is to stress on the fact that the Failed Banks Tribunal is trying offenders in Financial Institutions under any other enactments such as those already mentioned should be satisfied that those offences relate to business or operation of the bank., xxxxxxxx.”

In effect, the provision confers jurisdiction and power on the tribunal to try other offences not specified in the Decree. There is no doubt that where a court or tribunal has no jurisdiction to adjudicate on a matter the trial and conviction by the tribunal lacking jurisdiction is a nullity no matter how well the trial was conducted.

But in the instant case, the subject matter before the tribunal was patently within its jurisdiction under the different legislation when the offences were committed in the course of business or operation of a bank by virtue of section 3 (1) (d) of Decree No. 18 of 1994.

In my view, the fact that the procedure under the Tribunal differs from the procedure under the High Court exercising criminal Jurisdiction is of no moment. There was no doubt the legislation was promulgated under the Military rule for the purposes of dealing with the malpractices prevalent at the time. Special courts

were set up to deal with such issues and the issue of miscarriage of justice or that the appellant was made to suffer draconian criminal procedure is irrelevant. The facts are very clear, the appellant with

animus furandi dubiously induced Partnership Investment Ltd. to part with the sum of N16.56 million. He falsely represented to them that Ivory Merchant Bank had 345,000 US Dollars to sell. The purchase price was in a form of a draft crossed and marked “not negotiable and account payee only” in the name of Ivory merchant Bank,

yet the appellant was able to abuse his office as chairman of Ivory Merchant Bank to pay the draft into his personal account and immediately use the money himself. This conduct at the end of the day prejudicially affected Ivory Merchant Bank leading to its liqui-

dation. In my view, the tribunal had the jurisdiction to try the appellant. I accordingly resolve issue No. 1 against the appellant.

ISSUE 2

The gravamen of this issue is that the ingredients of the offences convicted were not proved by the evidence adduced at the trial and the Court of Appeal was wrong to have affirmed the convictions. It is submitted that the fundamental element in a charge of stealing under section 390 (7) of the Criminal Code is that the accused is an officer of the company or body cooperate where article is stolen. It is argued that the charge in count 3 was that the appellant fraudulently converted the proceeds of a cheque issued in favour of Ivory Merchant Bank Ltd, while the evidence revealed that the money belonged to Partnership Investment Company Ltd. and not the Ivory Merchant Bank Ltd. It is argued that the appellant even gave a receipt to Partnership Investment Company for the money and that there was no evidence that the appellant fraudulently converted the money, Partnership Investment Company willingly and voluntarily handed the cheque to the appellant. Learned Counsel rely on the cases of EDO AND ANOTHER VS. COMMISSIONER OF POLICE [1962] ALL NLR (Pt. 1) 93, SMART VS. THE STATE [1974] ALL NLR 868.

It is further argued that in a charge of obtaining by false pretences, it must be shown the existence and the nature of the false pretence. It is submitted that vital witnesses who took part in the transaction were not called to throw more light into what actually took place. Learned counsel referred to the cases of STATE VS. GODFREY AJIE [2000] 11 NWLR (Pt 678 434. AKONO VS. THE NIGERIAN ARMY [2000] 14 NWLR (Pt 687) 318 NWOKEDI & ANOR. VS. COMMISSIONER OF POLICE Vol. 11 NSCC 127. UBANI VS. STATE [2003] 18 NWLR (Pt 851) 224.

It is further submitted that the charge on count 8 was defective because it did not state what provision of the law the appellant offended. It is submitted that the appellant in the instant case was only charged and convicted under a punishment section and not under the definition section. It is argued that the appellant was misled vide ABACHA VS. STATE

(2002] 11 NWLR (Pt 779) 427; F.R.N. VS. IFEAGWU [2003] 15 NWLR (Pt 842) 113. at 214. It is again submitted that the offence under section 20(2) (a) of BOFID for which the appellant was charged and convicted, can only be committed by a bank, in this case the Ivory Merchant Bank B and not the appellant. The appellant was convicted for an offence not known to law.

The learned counsel for the respondent on the other argued that both courts were right in holding that the appellant was properly convicted for the offences of stealing, obtaining by false pretences, corrupt C enrichment and obtaining unauthorized credit as defined in the Criminal Code and the other enactments. It is submitted that on the accepted facts, even if, as claimed by the appellant that he was not acting on behalf of Ivory Merchant Bank, but in his own behalf, there was false pretences, D when he represented to P.W.1 and to Partnership Investment Co. Ltd, that he had 345,000 US Dollar for sale. It was not in doubt that at the time of the representation neither the appellant nor the bank had any ‘dollars for sale. Learned Counsel referred to ALAKE & ANOR. VS. E THE STATE [1991] 7 NWLR (Pt. 205) 567 in support of the proof of obtaining by false pretences. The appellant’s claim that he was duped by DR. LACEY was not believed by the lower courts for obvious reasons as P.W.6 Mr. Ahmed Fari Yusuf a police officer testified “*My investigation F showed that one Dr. Lacey referred to by the 1st accused in his statement in Exhibit 1A was a faceless person as he did not exist.*”

On the question of stealing and intention to defraud, it is submitted that evidence was abound, that neither the appellant nor the bank had any dollars to sell when he made the victim to part with N16.5 million naira. G The draft was in the name of Ivory Merchant Bank Ltd and was crossed and marked “*Not negotiable, account payee only*” Yet the appellant caused the draft to be paid into his personal account and quickly issued a covering letter directing how he wanted the proceeds disbursed; and within 24 H hours the appellant had withdrawn &9.5 million. The article stolen was money and it was capable and was indeed stolen as it was not made in favour of the appellant but in favour of Ivory Merchant Bank. It is again submitted that evidence was abound that the appellant unlawfully and

fraudulently caused the owners to part with their money. An offence under section 390 (7) of the Criminal Code read along with section 3(1) (d) of Decree No. 18 has been committed by the appellant. See EKUMA, OGUNTE & ANOR. VS. COMMISSIONER OF POLICE [1963] ALL NLR 290, ADEWUSI VS. THE QUEEN [1963] ALL NLR 322. B

It is again argued that the appellant was equally rightly convicted of the offence of corrupt enrichment under the provisions of section 13(1) (a) of the Recovery of Public Property [Special Military Tribunals] Act Cap 389, LFN 1990 as amended by Decree No. 33 of 1991 read along with section 3(1) (d) of Failed Banks Decree No. 18 of 1994. By C the latter amendment, it was not necessary that an accused person be a public officer, the offence can be committed by a private person such as the appellant who was Chairman of Ivory Merchant Bank Ltd. There was no dispute that the appellant corruptly enriched himself in the trans- D action.

It is further argued that by paying the draft into his account, the appellant as the Director and Chairman of the bank without collateral and without written approval of the Central Bank of Nigeria, settled the debit E balance in his personal viction under Cap 389 of 1990 LFN as amended. Section 20 (5) of Decree 18 provides:-

5. Where by reason of the confiscation or voluntary surrender of property, under this section, there is full or substantial recovery of the F amount involved in the offence, the tribunal may, if it deems it equitable, reduce or decline to impose the penalty specified in subsection (1) of this section."

It was because of the voluntary surrender made by the appellant G that the tribunal was very lenient to him while passing the sentence. Learned trial judge as shown above in this judgment declined to pass any sentence on counts 6 and 8 even though the appellant was found guilty thereof. The Tribunal rightly in my view held:-

"xxxxx I shall, however, mitigate the sentences passed on the 1st H accused/convict having regard to the voluntary surrender of his hospitals at No.9 Anoko Street, Owerri, Imo State and that No. 28 Ekulu Layout, Enugu in Enugu State, both of which have just been confiscated to Ivory

Merchant Bank Ltd. xxxxxxxx"

In my view, there was no double punishment. As a matter of fact the Tribunal did not impose any sentence on the appellant on counts 6 and 8 for account through the unlawful conversion of the draft for which he was not the beneficiary.

Now, this second issue, essentially deals and relates to the findings of fact i.e. whether, the appellant was rightly convicted for the offences of stealing, obtaining by false pretences, corrupt enrichment and obtaining credit by unlawful means on the evidence adduced. It is evident that these are concurrent findings of fact by the two lower courts and to upturn a concurrent and consistent finding of fact by appeal court, an appellant has an up hill task. There must be exceptional circumstances. See SOBAKIN VS. THE STATE (1981) 3 - 4 SC 31. The rationale for the view that concurrent findings of facts in two lower courts ought to be invariably accepted in that the courts are presumed to have considered all the facts necessary for their coming to such findings. Thus findings of facts made by High Court in a trial and affirmed on appeal by the Court of Appeal cannot be reopened in this court in the absence of special circumstances. Unless it is shown that there exists the violation of some principle of law or of procedure and must be such an erroneous proposition of law or of procedure, that if such proposition be corrected the finding cannot stand. The Supreme Court may only interfere with the concurrent findings of Acts where the circumstances are such the findings of fact are patently erroneous and would amount to a travesty of justice to allow the findings to stand.

I have myself examined the evidence and have come to the inevitable conclusion, that the prosecution established beyond any dispute that the appellant fraudulently represented to the victims that the bank of which he was the Chairman, had American dollars to sell. He so fraudulently induced the victims to issue a crossed draft in the name of the bank with the security "not negotiable and account payee only" added to it. The appellant abused his

position and caused the cheque to be paid into his personal account and he converted the proceeds to his own use. But in my view these facts glaringly reveal the offences for which the appellant was convicted. I also find no merit in the complaints in issue No. 2. I resolve it against the appellant.

B

ISSUE NO. 3

This issue is concerned with the validity of the sentences imposed on the appellant, particularly the issue of confiscation of the appellant's properties as affirmed by the Court of Appeal. It is submitted that the lower courts acted erroneously and also contrary to section 25 of the Interpretation Act when the appellant was sentenced and punished twice under the provisions of sections 390(7) and section 419 of the Criminal Code, by imprisonment and forfeiture, 'it is submitted that none of the above sections provides for forfeiture as a form of punishment after conviction. The Court of Appeal acted in error when it confirmed the order of forfeiture made by the learned trial judge. Learned Counsel referred to the case of AKOSA VS. COMMISSIONER OF POLICE 13 WACA 43. It is argued that the sentence of fine and imprisonment under the Criminal Code was sufficient and the order of forfeiture amount to double punishment. It is again argued that since the appellant was not convicted under the provisions of section 19 of Decree No. 18 of 1994, the provisions of section 20 thereof cannot be invoked to order forfeiture. See MOHAMMEDU TSOFOLE VS. COMMISSIONER OF POLICE [1971] ALL NLR 339. The order for forfeiture ought to be set aside since there was no statutory justification for it

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Now, there is no doubt that the Tribunal had the jurisdiction to order confiscation of property where an accused was found guilty of an offence under section 20 of Decree No. 19 of 1994 which also sets out the penalties for conviction under Cap 389 of 1990 LFN as amended. Section 20 (5) of Decree No. 18 provides:-

G

“5. Where by reason of the confiscation or voluntary surrender of property, under this section, there is full or substantial recovery of the amount involved in the offence, the tribunal may, if it deems it equitable, reduce or decline to impose the penalty specified in subsec-

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tion (1) of this section.”

It was because of the voluntary surrender made by the appellant that the tribunal was very lenient to him while passing the sentence. Learned trial judge as shown above in this judgment declined to pass any sentence on counts 6 and 8 even though the appellant was found guilty thereof. The Tribunal rightly in my view held:-

“xxxxxx I shall, however, mitigate the sentences passed on the 1st accused/convict having regard to the voluntary surrender of his hospitals at No. 9 Anoko Street, Owerri, Imo State and that No. 28 Ekulu Layout, Enugu in Enugu State, both of which have just been confiscated to Ivory Merchant Bank Ltd. xxxxxxxxxx”

In my view, there was no double punishment. As a matter of fact the Tribunal did not impose any sentence on the appellant on counts 6 and 8 for which the appellant was convicted. The Tribunal did not do so in view of the discretion it has under section 20(5) recited above.

It was indeed on the application of his lawyer during allocutus, that the solicitor voluntarily on behalf of the appellant surrendered the properties to the victim of the crime Ivory Merchant Bank Ltd which bank was forced to pay the N16.56 million to Partnership Investment Ltd. As mentioned above, there was no double punishment and I also accordingly find no merit in this complaint, I resolve the issue against the appellant.

In the result, all the issues having been resolved against the appellant, this appeal fails and is dismissed by me. I also affirm the convictions and sentences imposed as affirmed by the Court below.

KALGO JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother Musdapher JSC in this appeal. I find myself in full agreement with him that there is no merit in the appeal and it ought to be dismissed. In the appeal, the appellant formulated in his brief, 3 issues for the determination of this court. They read thus:-

“1. Whether the Court of appeal was right in holding that the subject matter of the charge brought before the failed bank tribunal was within the jurisdiction of the failed bank tribunal.

2. Whether the Court of Appeal was right when it arrived at the conclusion that the offences of stealing, obtaining by false pretences and corrupt enrichment and failing to secure compliance with Section 20 (6) of the Banks and other Financial Institution Decree No. 25 was established at the tribunal.

3. Whether the Court of Appeal was right in confirming the order of the tribunal confiscating the appellant’s assets and properties”.

The 3 issues raised by the respondent in the brief are substantially the same except a slight difference in issue 3.

The appellant and one other were jointly charged, tried and convicted by the Failed Bank Tribunal Zone IV Lagos on nine count charges under the Criminal Code Act. Cap. 77 Laws of the Federation 1990, read with Section 3 (1) (d) of the Failed Bank (Recovery of Debts and Financial Malpractices in Banks) Decree No. 18 of 1994 (hereinafter referred to as Decree No. 18 of 1994). The facts giving rise to this appeal were clearly set out in the leading judgment by my learned brother Musdapher JSC and I do not intend to repeat them here.

The grouse of the appellant in issue I, is that the tribunal had no jurisdiction to try him for the offences of stealing and obtaining by false pretences under the Criminal Code as they are not offences relating to bank operations or business created under the Failed Bank Decree, 1994. The appellant also argued that the tribunal had no jurisdiction to try him for the offence of corrupt enrichment under the Recovery of Public Property (Special Military Tribunals) Act Cap. 389 Laws of Federation, 1990, as amended by Decree No. 33 of 1991, because, according to him the tribunal only came into existence in 1994 and had no retroactive application.

There is no doubt that Decree No. 18 of 1994 came into operation on the 9th November 1994. It is very clear from the proceedings at the trial that all the said charges were “ read together” with the provisions of Section

3 (1) (d) of the Decree No. 18 of 1994. I reproduce Section 3 (1) for clear appreciation of the relevant provisions thus:-

“3. (1). *The Tribunal shall have power to -*

(a) *recover in accordance with the provisions of this Decree the debts owed to failed bank arising in the ordinary course of business and which remain outstanding as at the date the bank is closed or declared a failed bank by the Central Bank of Nigeria;*

(b) *try the offences specified in Part II of this Decree;*

(c) *try the offences specified in the Banks and Other Financial Institutions Decree 1991, and the Nigeria Deposit Insurance Corporation Decree 1988; and*

(d) try offences relating to the business or operation of a bank under any enactment”.

(Underlining mine)

This section fully and clearly sets out the various offences which the Failed Bank Tribunal established under the Decree 18 of 1994 has jurisdiction to try. It is very clear from the provisions of the section that the offences of stealing, obtaining by false pretences and corrupt enrichment for which the appellant was tried and convicted did not come under subsection (1) (a)(c) of Section 3 above. But paragraph (d) of subsection (I) of section 3 of the said Decree confers jurisdiction on the tribunal to try “any other offences relating to the business or operation of a bank under any enactment”. This simply means, in my view, that where the facts of a case reveal that the transaction complained of relates or deals with bank business or operation in the ordinary course of events, which constitutes an offence, that offence can be tried by the Failed Bank Tribunal. What is more, the offence needs not have arisen under the Decree No. 18 of 1994; even if it arose or was created under any other enactment (Act or Decree) the tribunal would have jurisdiction to try the offence in so far as it relates to” business or operation of a bank”.

The Court of Appeal in its consideration of this vital issue, had this to say:-

“From the state of evidence before the trial Tribunal, it is obvious that the appellant was an officer, albeit, a director and chairman of

Ivory Merchant Bank Limited at the time material to the offences for which he was convicted. It is also in evidence that he approached the Pw.1 to source for a buyer of US. \$ 345,000 out of the US \$ 1 million which his bank (Ivory Merchant Bank Limited) had for sale. A buyer in the Partnership Investment Limited was found through the connectivity of the P.W.1. Although the negotiations which started outside the premises of Ivory Merchant Bank Limited, subsequently moved into the bank's premises, such negotiations included agreeing on the naira equivalent of US \$ 345,000 which was estimated at N16.56 million. A bank draft to the tune of N16.56 million was drawn in furtherance of the negotiation in the name of Ivory Merchant Bank Limited and with special inscription "not negotiable, account payee only". There is also evidence that on the lodgment of the said draft in Ivory Merchant Bank Limited on 23/8/94, the appellant, being the chairman of Ivory Merchant Bank limited directed that the sum of N16.56 million being the value of the bank draft (exhibit C) be paid into his mortgage account in Ivory Merchant Bank Limited. This was done and on 24/8/94 he further directed the bank officials on how to disburse that amount. The outcome of that disbursement was that his existing indebtedness of N2,853,183.33 was cleared and he withdrew the sum of N9.5 million and eventually put his account back into debit of N788,179.63. All these transactions were obviously carried out in the course of banking business or operations".

I entirely agree with this finding of the Court of Appeal and find that all the 3 charges for which the appellant was convicted, are offences arising from business or operation of a bank pursuant to the provisions of Section 3 (1) (d) of Decree 18 of 1994. The Court of Appeal was therefore right to so find, and I answer issue 1 in the affirmative.

On issues 2 and 3 of the appellant, I adopt as mine, the reasoning and conclusions reached therein by my learned brother Musdapher JSC. In the final analysis, I also find no merit in this appeal and I accordingly dismiss it and affirm the decision of the Court of Appeal.

TOBI JSC

I have read in draft the judgment of my learned brother, Musdapher,

JSC and I agree with him.

The case of the prosecution is as follows. The appellant, the former Chairman of Ivory Merchant Bank Limited, approached PW1, Mrs. Nkechi Justina Nwaogu, who was at the material time the Managing Director of Liberal Investment Limited, for a foreign exchange transaction. The appellant said that the Ivory Merchant Bank had US\$1 million for sale but what was available for immediate sale was US\$345,000. Both the appellant and PW1 arrived at the sum of N16.56 million as the naira equivalent of the sum of US\$345,000. They agreed that PW1 would be entitled to a brokerage fee if she could find a buyer for the foreign exchange.

PW1 initially located an Indian businessman in Lagos. He made a bank draft for the sum of N16.56 million, and gave PW1 a bank draft to show the appellant. Appellant rejected the photocopy, insisting that there must be an immediate payment. The transaction flopped. PW1 approached another company. It is the Partnership Investment Limited. This company raised a Crystal Bank of Africa Limited draft for the sum in the name of Ivory Merchant Bank Limited. The draft was crossed in the name of Ivory Merchant Bank Limited and marked "*Not negotiable, account payee only*". It is the evidence of PW1 that it was the appellant who requested that the draft be made in the name of the bank.

On 23rd August, 1994, PW1, the Managing Director of Liberal Investment Limited and PW2, the General Manager of Partnership Investment Limited, handed over the draft to the appellant in Ivory Merchant Bank Limited. Although the draft was made in the name of Ivory Merchant Bank Limited, and marked "*Not negotiable, account payee only*", it was paid into the private mortgage account of the appellant in Ivory Merchant Bank Limited, which as at 23rd August, 1994 was in debit to the tune of N2,853,189.33.

On 24th August, 1994, a day after the draft was paid into the mortgage account of the appellant, he withdrew the sum of N9.5 million. Subsequently, he withdrew the rest of the money and even put the account back into debit in the sum of N788,179.63.

Although the appellant had received the sum of N16.56 million he failed to supply the foreign exchange of US\$345,000 as agreed. All ef-

forts made to the appellant to supply the foreign exchange failed, as cheque issued by him for the purpose was dishonoured. As Ivory Merchant Bank Limited refused liability, Partnership Investment Limited filed an action against both the bank and the appellant. Partnership Investment Limited obtained judgment and levied execution against Ivory Merchant Bank Limited by way of garnishee proceedings. The Bank paid the sum of N16.56 million before the garnishee order was lifted. Ivory Merchant Bank Limited thereafter became distressed and went into liquidation. It was a sad moment for the Bank, as things fell apart and could not be assembled together. C

Expectedly, the appellant told a different story, not on the nitty-gritty of the transaction in respect of the level of finances, but on the involvement of Ivory Merchant Bank Limited. He said that the entire transaction was a private one, involving Partnership Investment Limited and himself and had nothing to do with Ivory Merchant Bank Limited where he was Chairman. Apart from this twist, the story of the appellant is materially similar to that of the prosecution. The important aspect is that both agreed that the naira value involved in the transaction was N16.56 million and the foreign exchange value was US\$345,000, which was not supplied or given to Partnership Investment Limited as agreed. D E

In the light of the above, the Failed Banks Tribunal, for short, picked up the appellant and one Joe Billy Ekwunife. Both faced a nine-count charge. Joe Billy Ekwunife was lucky. He was discharged and acquitted. The appellant was not that lucky. He was convicted and sentenced. Dissatisfied, he appealed to the Court of Appeal and that court dismissed the appeal. He has come to this court. F

Briefs were filed and exchanged. The appellant formulated the following issues for determination: G

“(1) Whether the Court of Appeal was right in holding that the subject matter of the charge brought before the Failed Bank Tribunal was within the jurisdiction of the ‘Failed Bank Tribunal.’ H

(2) Whether the Court of Appeal was right when it arrived at the conclusion that the offences of stealing, obtaining by false pretences and corrupt enrichment and “failing to secure compliance with section 20(6)

of Banks and Other Financial Institutions Decree No. 25 was established at the Tribunal.

(3) Whether the Court of Appeal was right in confirming the order of the Tribunal confiscating the appellant's assets and properties."

B The respondent formulated the following issues for determination:

"(1) Whether the Tribunal of first instance had jurisdiction to entertain the offences set out in counts 3, 5 and 8 of the charge, which respectively relate to theft, obtaining by false pretences and corrupt enrichment.

C *(2) Whether the prosecution established the offences of receiving money by false pretences, corrupt enrichment and stealing.*

(3) Whether the sentence imposed on the appellant was not excessive."

D Learned counsel for the appellant, Mr. Aghamuche, submitted on Issue No.1 that the Court of Appeal was wrong when it held that the subject matter of the charge brought before the Failed Bank Tribunal was within the jurisdiction of the Tribunal. He submitted that the Tribunal had
E no jurisdiction to hear the charge. He cited *Nasiru v. Commissioner of Police* (1980) 12 NSCC 42; *Eze v. Federal Republic of Nigeria* (1987) 18 NSCC 244; *Emu v. Stale* (1980) 2 NCR 297; *Sofekun v. Akinyemi* (1980) 12 NSC 175; *Comptroller of Nigerian Prisons v. Adekanye* (1999) 10
F NWLR (Pt. 623) 400; *Onakoya v. Federal Republic of Nigeria* (2002) 11 NWLR (Pt.779) 595; *Akpan v. The State* (2002) 12 NWLR (Pt. 780) 204; *Epereokun v. The University of Lagos* (1986) 4 NWLR (Pt. 34) 162. He also examined the provisions of the Failed Banks (Recovery of
G Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, particularly section 3(1) thereof.

On Issue No. 2, learned counsel submitted that the ingredients of the offences charged were not proved by the evidence at the court. Counsel dealt with each offence: charged in the brief and relied on the following
H cases: *Edo v. Commissioner for Police* (1962) All NLR (Pt. 1) 93; *Smart v. The State* (1974) All NLR 868; *The State v. Ajie* (200.0) 11 NWLR (Pt. 675) 434; *Ubani v. The State* (2003) 18 NWLR (Pt. 851) 224; *Abacha v. The State* (2002) 11 NWLR (Pt 779) 437; *Amadi v. The State* (1993) 8

NWLR (Pt. 314) 644 and Federal Republic of Nigeria v. Chief Ifegwu (2003) 15 NWLR (Pt 842) 113. Counsel also examined the Criminal Code, particularly section 419 thereof.

Taking Issue No 3, learned counsel submitted that forfeiture can only be in accordance with the punishment of a charge and a trial court must confine its punishment to those allowed under the sections stated in the charge. He contended that the Court of Appeal was wrong when it did not consider that by virtue of section 25 of the Interpretation Act, a person cannot be punished twice for actions that constitute an offence under two different enactments. He argued that the Court of Appeal ought to have held that the prosecution did not discharge its burden of identifying the appellant's property as property to which the missing funds were converted. He cited *Akosa v. Commissioner of Police* 13 WACA 43. Courts of law have no inherent power to order forfeiture or compensation or confiscation; rather such power is conferred only by statute, counsel contended. He relied on *Tosofoli.v. Commissioner of Police* (1971) All NLR 339. He urged the court to allow the appeal.

Learned counsel for 'he respondent, Mr. Elema, submitted on Issue No. 1 that the Tribunal had jurisdiction under section 3(1)(d) of the Failed Banks Decree to try the appellant and convict him for stealing and obtaining by false pretences; under sections 390(7) and 419 of the Criminal Code. He cited *Federal Republic of Nigeria v. Abubakar, SAT/MO/240/95*; *Attorney-General of the Federation v. Guardian Newspapers Limited* (1999) 9 NWLR (Pt. 618) 187; the *Recovery of Public Property (Special Military Tribunal) Act, Cap. 389*, as amended by Decree No. 33 of 1991; the *Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994*, particularly section 3(1)(d) thereof.

On Issue No. 2, learned counsel submitted that the Tribunal was right in convicting the appellant for the offences of obtaining by false pretences, stealing, corrupt enrichment and obtaining unauthorized credit and that the Court of Appeal was right in upholding the convictions. Relying on *Alake v. The State* (1991) 7 NWLR (Pt. 205) 567, learned counsel dealt with each criminal conduct of the appellant vis-a-vis the offences for which he was charged and convicted. He cited *Ekuma v.*

Commissioner- of Police (1963) All NLR 290 and Adewusi v. The Queen (1963) All NLR 322.

On Issue No. 3, learned counsel submitted that the sentence was not excessive. Relying on *Bello v. Attorney-General of Oyo State* (1986) 5 NWLR (Pt. 45) 828, learned counsel asked the court to do justice in the case. He urged the court to dismiss the appeal.

In his reply brief, learned counsel for the appellant contended that as the respondent did not file a cross-appeal or a respondent's notice, it is bound by the grounds of appeal. He cited *Idika v. Erisi* (1988) 2 NWLR (Pt. 79) 563. He argued that as the respondent's brief has not confined itself to the grounds of appeal, particularly Issue 3, on excessive sentence, the issue is misconceived and therefore inoperative. He cited *Ebo v. Nigerian Television Authority* (1996) 4 NWLR (Pt. 442) 314. He pointed out that a respondent's brief cannot adopt issues formulated by the lower court as its own version of the issues for determination, especially where the grounds of appeal are not necessarily the same in the appeal to the Supreme Court. Apart from distinguishing cases cited by counsel for the respondent from this case in the reply brief, learned counsel for the appellant virtually repeated his arguments in the appellant's brief. As it is not the function of a reply brief to repeat arguments in the appellant's brief, I shall not take the repeated and repetitive arguments here. The function of a reply brief is to refute if any, the arguments in the respondent's brief and dislodge them.

Let me first take the issue of jurisdiction vehemently canvassed by learned counsel for the appellant. In criminal law and the administration of criminal justice, the determination of jurisdiction will be taken in the light of the enabling law setting out the jurisdiction of the court vis-a-vis the charge preferred against the accused. In other words, in order to have jurisdiction, the court must be satisfied that the offence or crime is directly donated by the jurisdiction conferred on the court in the enabling law. Where the offence or crime is outside the enabling law, the court cannot exercise jurisdiction because it lacks jurisdiction to do so.

The gravamen on the issue of jurisdiction is section 3(1)(d) of Decree No 18 of 1994. It reads:

“The Tribunal shall have power to... (d) try other offences relating to the business or operation of a bank under any enactment.”

As it is, sub (d) above anticipates the existence of offences to be tried by the Tribunal; and they are those enumerated under (b) and (c). The operative word in (d) for our purpose is “other”, a word which B means in the context, additional to. It also conveys the second of two things; the first of which has already been mentioned. Reducing the provision to the naked details of jurisdiction, sub (d) vests jurisdiction on the Tribunal apart from 3(a), (b) and (c). The offence must be related to the C business or operation of a bank, and of course, an enactment must provide for it.

The appellant was charged with nine counts. Of the nine, five were under the Criminal Code, while the remaining four were under decrees of the Federal Military Government at the material time. It is my D view that both the Criminal Code and the decrees qualify as enactments within the provision of sub (d).

The next consideration is whether the offences related to the business or operation of a bank. Of the nine counts, the appellant was charged E separately in Counts 3, 5, 6 and 8 in his official capacity as Chairman of Ivory Merchant Bank Limited. He was also jointly charged in Counts 1 and 7 along with Joe Billy Ekwunife who was discharged and acquitted. I have carefully examined the counts and I have no doubt in my mind F whatsoever that the offences the appellant was charged with clearly and unequivocally related to the business or operation of a bank; and the bank is Ivory Merchant Bank Limited. Counts 1, 3, 5, 6, 7, and 8 mention Ivory Merchant Bank Limited.

I should pause here to take a bit of the evidence. In her evidence G in-chief, PW1, Mrs. Justina Nkechi Nwaogu, said that the appellant represented himself as the Chairman of Ivory Merchant Bank. He told her that they needed the naira equivalent of the dollars in order to revitalize the bank. There is also evidence that PW2, the former-General Manager H of Partnership Investment Company, handed over to the appellant, Exhibit C, the draft for the sum of N16.56 million in the name of Ivory Merchant Bank Limited where it was written “*not negotiable, account*

payee only". Exhibit C was handed, over to the appellant by PW2 in his office as Chairman of the bank. What other evidence is needed to confirm that the business was transacted for and on behalf of Ivory Merchant Bank Limited by the appellant?

B The appellant confirmed in his evidence in-chief that Exhibit C was in the name of Ivory Merchant Bank Limited and that he paid it into his personal account. The appellant wrote at the back of the photo-copy of Exhibit C the following:

C *"Received above Crystal Bank draft for N16.56 million. Maturity in 2-3 weeks time."*

He then initialled it. What more evidence is needed, I ask again.

D Appellant said in evidence in-chief that he did not tell PW1 and PW2 that he was representing Ivory Merchant Bank. He said that he was not introduced to PW1 at Aba as the Chairman of Ivory Merchant Bank. He said in his evidence:

E *"It was PW1 who said in Ibo language thus 'O na oburo gi bu Chairman, Ivory Merchant Bank, enkwah?' which was interpreted in English language to mean 'are you not the Chairman of Ivory Merchant Bank?'"*

F The Tribunal did not believe the evidence of the appellant. So too the Court of Appeal. When an accused person tells a lie, he needs many more to retrieve the first one, and in an effort to do so he sees himself telling or falling into more and more lies, all unknown to him, destroy any merit in his defence. I see such a situation in this appeal and it is sad that it is so. As far as the appellant is concerned, it is convenient for him to deny the obvious, but unfortunately he could not succeed.

G The denial of the appellant clearly stood on the head of Exhibit C. He tried his best to explain away the content of the exhibit but he did not succeed. The position of the law on the probative value of an exhibit and evidence, thereafter on it is clear. Apart from the probative strength of H Exhibit C vis-a-vis the parol evidence of the appellant, our adjectival law will regard his evidence as an afterthought. Exhibit C is the real thing. The evidence of the appellant, apart from being unreal, is a fabrication aimed at exonerating or exculpating himself from criminal responsibility.

Courts of law are very much equipped to see through appellant's smartness and gimmick. Judges, by their training and professional calling and by the application of their lenses and their God given thinking faculties, have a way of knowing in most cases when an accused tells a lie and deservingly or deservedly inflict penal sanctions appropriately. The learned B tribunal did just that and I cannot fault Justice Edokpayi, the Chairman of the Failed Bank Tribunal.

Taking further the issue of jurisdiction, learned counsel for the appellant submitted that the constitutional guarantee against retrospective C punishment or retroactive trial and punishment is violated. Citing section 35(3) of the 1979 Constitution, learned counsel submitted that as at 23rd August, 1994 when the offence was allegedly committed in count 6, there was no written law, as Decree No.18 of 1994, under which the appellant was charged, was not promulgated. He relied on section 35(3) D of the 1979 Constitution.

With respect, the submission is thoroughly misplaced. In the first-place, counsel is wrong in relying on section 35(3). The subsection has nothing to do with his submission. The subsection dealt with right to E freedom of religion. I think he meant section 33(8) of the 1979 Constitution. I will therefore take the submission in the light of section 33(8) and not section 35(3).

It is a misconception to say that the appellant was charged under F Decree No. 18 of 1994. As I said earlier, section 3(1)(d) of the Decree vested in the Tribunal power to enforce other existing penal statutes. That resulted in the appellant charged under the Criminal Code, the Recovery of Public Property (Special Military Tribunals) Act, as amended. G Certainly these enactments were promulgated before the appellant was charged on 23rd August, 1994. That was not a violation of section 35(8) of the 1979 Constitution because the act or omission of the appellant which resulted in count 6 or any other count was in respect of existing H penal enactments.

Learned counsel for the appellant devoted 11 pages of his 21-page brief hammering on the jurisdiction of the Tribunal. He danced around it for quite a while; a dance with no commensurate ovation. A party cannot

beg or bargain jurisdiction into a matter before a court of law; so too the adverse party cannot beg or bargain jurisdiction outside or out of a matter. Jurisdiction is an exact law that has to be applied exactly to any given case. It is either that a court has jurisdiction in a matter or it has not.

B There is no hybrid situation. There is no half way to this straight and unambiguous law.

In the determination of jurisdiction of a court, the enabling law vesting jurisdiction has to be taken in the light of the relief or reliefs sought. The moment the relief sought comes within the jurisdiction of the court as adumbrated by the facts, the court must assume jurisdiction as it has jurisdiction to do so. Of course, the reverse position is also correct and it is that the moment the relief sought does not come within the jurisdiction of the court, as adumbrated by the facts, the court must reject jurisdiction as it has no jurisdiction in the matter. To that extent, jurisdiction looks almost like an exact formula in calculus, although it is devoid of actual figures and numbers.

In the light of the above, I am of the firm view that the issue of jurisdiction raised by learned counsel for the appellant fails. Section 3(1)(d) of Decree No. 18 of 1994 clearly vests jurisdiction on the Tribunal to try the appellant, and I so hold.

And that takes me to the issue whether the prosecution proved the offences the appellant was charged. Counsel submitted that the ingredients of the offences were not proved. The appellant was charged with conspiracy to convert, conversion of proceeds of Crystal Bank, stealing and false pretence.

Let me take them in turn. Conversion is both an offence and a tort. I am not concerned here with the tort of conversion but rather with the offence of conversion. Conversion does riot have a life of its own in the Criminal Code but is parasitic (if I may use that expression unguardedly), on the offence of stealing. As a matter of law, the definition of stealing under section 390 of the Criminal Code includes larceny, embezzlement and fraudulent conversion. It is the fraudulent nature that separates it from the tort of conversion.

Section 383(1) and (2) of the Criminal Code provides for the of-

fence of stealing. Let me read the subsections:

“(1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to his own use, or to the use of any other person anything capable of being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents

(a) an intention permanently to deprive the owner of the thing of it;

(b) an intent permanently to deprive any person who has any special property in the thing of such property;

(c) an intent to use the thing as a pledge or security;

(d) an intent to part with it on or condition as to its return which the person taking or converting it may be unable to perform;

(e) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(f) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.”

Although the disjunctive conjunction “or” is not used at the end of each of the sub-items of section 383(2), it is the moaning of the subsection that an offence of stealing is committed if any of the conducts of the sub-items of section 383(2) is committed. In other words, it is not the meaning of section 383(2) that all the sub-items in section 383(2) must be present before an offence of stealing is committed. This is clear from the following opening words of section 383(2): *“if he does so with any of the following intents:”*

As it is, the offence can only be said to be committed if the taking of the thing capable of being stolen is done fraudulently. Fraud, the noun variant of fraudulently, is (1) an action or a conduct consisting in a knowing misrepresentation made with the intention that the person receiving that misrepresentation should act on it; (2) the misrepresentation resulting in the action or conduct; (3) an action or a conduct in a representation

made recklessly without any belief in its truth, but made with the intention that the person receiving that misrepresentation should act on it and so on and so forth. See Bryan A. Garner, *A Dictionary of Modern Legal Usage*, Second edition, page 374.

B A fraudulent action or conduct conveys an element of deceit to obtain some advantage for the owner of the fraudulent action or conduct or another person or to cause loss to any other person. In fraud, there must be a deceit or an intention to deceive flowing from the fraudulent action or conduct to the victim of that action or conduct. See generally
C *Kettlewell v. Watson* (1882) 21 Ch. D. 685 at 685; *R. v. Reigles* (1932) 11 NLR 33; *Welham v. DPP* (1960) 44 Cr. App. R. 124; *R. v. Odiakosa* (1944) 10 WACA 247; *R. v. Bassey* (1931) 22 Cr. App. R. 160. An offence is said to be committed fraudulently, in the context of the appeal
D before us, if the action or conduct is a deceit to make, obtain or procure money illegally. By the fraudulent action or conduct, the accused deceives his victim by pretending to have abilities or skills that he does not really have. In one word, he is an impostor.

E The above exercise in diction and syntax is to lay the foundation to assimilate the factual situation. The appellant was the Chairman of Ivory Merchant Bank Limited. He travelled to Aba. He met his victim, Mrs. Justina Nkechi Nwaogu. The action or conduct of fraud started. He played
F on her. He promised her some good money by way of brokerage fees. It was on a Sunday at a restaurant. They bargained. They arrived at N16.56 million for US\$345,000. That was not a bad bargain for Mrs. Nwaogu. She liked it. She loved it too. She fell. She looked for a customer. The first was; an Indian. God was on his side. He was not a victim of the
G fraud. But PW2, Ernest Omoruyi Fdornioya, the General Manager of Partnership investment Company at the material time became a victim; so too the corporate body of Partnership Investment Company. They parted with the sum of N16.56 million. They waited in anxiety to get the
H foreign exchange of US\$345,000. That was not to come and it has not come up till now. Demands for the sum fell on deaf ears. There were deceptions and deceptions.

It is clear from the facts of the case that the appellant converted

the sum of N16.56 million, a conversion which clearly illustrated to stealing under section 383 of the Criminal Code. The conversion was fraudulent. The N16.56 million is capable of being stolen and it was stolen by the appellant. Upon demand, the appellant neither returned the N16.56 million or the dollar equivalent of US\$345,000. The theft was not on the dollar equivalent because property at the material time had not, or better, did not pass to PW2. The theft was on the N16.56 million. Following the demand and the concomitant refusal to return the N16.56 million, the appellant was caught by section 383(2)(a) of the Criminal Code. This is because of the clear intention of the appellant to deprive the owner, PW2 and his company, the thing, which is N16.56 million; capable of being stolen and was stolen.

It seems from the evidence that the appellant made efforts to refund the money. I do not know whether they were genuine efforts or a caricature of some efforts. But whatever it may be, the action or conduct could fall under section 383(2)(f) of the Criminal Code. Come what may, and in whatever way one looks at the matter, I come to the inescapable conclusion that the prosecution proved the case of stealing and the appellant was rightly convicted. See generally *Clark v. State* (1986) 4 NWLR (Pt. 35) 381; *Babalola v. State* (1989) 4 NWLR (Pt. 115) 264; *Yongo v. Commissioner of Police* (1990) 5 NWLR (Pt. 148) 103; *Shodiya v. State* (1992) 3 NWLR (Pt. 230) 457.

I move to the offence of false pretences. It means knowingly obtaining another person's property by means of a misrepresentation of fact with intent to defraud. See Bryan A. Garner, *A Dictionary of Modern Legal Usage*, Second Edition, page 348. Section 419 of the Criminal Code provides for the offence of obtaining by false pretences. The section provides in part:

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a felony, and is liable to imprisonment for three years.”

For the offence of obtaining by false pretences to be committed,

the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen. An inducement on the part of an accused to make his victim part with a thing capable of being stolen or to make his victim deliver a thing capable of being stolen will expose the accused to imprisonment of the offence.

Learned counsel for the respondent cited profusely the case of *Alake v. The State* (1991) 7 NWLR (Pt. 205) 567, a case that I did in the Court of Appeal. Let me reproduce the ipsissima verba of what I said at page 591:

“Let me deal with the offence as provided for in section 419 of the Criminal Code Law. In order to succeed, the prosecution must prove (1), that there is a pretence; (2) that the pretence emanated from the accused person; (3) and that it was false; (4) that the accused person knew of its falsity or did not believe in its truth; (5) that there was an intention to defraud; (6) that the thing is capable of being stolen; (7) that the accused person induced the owner to transfer his whole interest in the property. The offence could be committed by oral communication, or in writing or even by conduct of the accused person. An honest belief in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence.”

In my view, the above adequately presents the law as in section 419 of the Criminal Code. Learned counsel took time and pains to reduce the principles in *Alake* into seven and attached the relevant evidence to each of the principles. He did that admirably in paragraphs 5.3 to 5.11 of the brief. He did a very good job of the case and I cannot improve on it.

The false pretence on the part of the appellant was very clear. At the time he was in the so-called business conversation with Mrs. Justina Nkechi Nwaogu, he knew that neither the Ivory Merchant Bank Limited nor himself had US\$345,000 to exchange for N16.56 million. And that made the pretence false. And because he had intention to defraud, the appellant kept away from PW1 and PW2 the fact that he had no dollar value or content of the N16.56 million. By his action and conduct, appellant had an intentional perversion of truth for the purpose of inducing

PW1 and PW2 to part with N16.56 million without a dollar. By section 419, the N16.56 million is capable of being stolen and it was stolen by the appellant, the Tribunal held. In my view, the prosecution proved the offence of obtaining by false pretences against the appellant and I so hold. See *Akosa v. Commissioner of Police* (1950) 13 WACA 43; *Oshin v. IGP* B (1961) 1 All NLR 27; *R. v. Adegboyega* (1937) 3 WACA 199; *Adeyemi v. Commissioner of Police* (1961) All NLR 387; *R. v. Logun* (1959) LLR 64.

I think I am full with the two issues I have taken. I shall not deal with the third issue on confiscation. It is sad, very sad indeed, that a person of such height and position in the banking industry and by extension in the society, could behave in this very ugly way and duped the bank in which he held everything in trust and exposed it to public opprobrium and disgrace. And what is more, the sadness becomes more pronounced when his gluttony for money and money exposed him to the glare of the public. I do not think that Mrs. Justina Nkechi Nwaogu will be in a hurry to forget this big duping incident and episode. So too Mr. Ernest Omoruyi Edomioya.

There is the aphorism that money is the root of all evil. I do not agree with this general statement because good money is a source of pride and satisfaction to the earner or owner. It is only bad money that is a root of all evil like the bad money that the appellant acquired.

I think I can stop here. The appeal is dismissed because it lacks merit.

MOHAMMED JSC

The judgment of my learned brother Musdapher JSC which has just been delivered was read by me before today. I am in full agreement with him that this appeal ought to be dismissed and the conviction and sentence of the appellant by the trial Failed Banks Tribunal, affirmed.

In the appellant's appeal in this court, the appellant is questioning his conviction and sentence in three issues distilled from the grounds of appeal in the appellant's brief of argument filed on his behalf by his learned counsel. The issues which are virtually the same as those formulated in

the respondent's brief of argument read -

"1. Whether the Court of Appeal was right in holding that the subject matter of the charge brought before the Failed Bank Tribunal was within the jurisdiction of the Failed Bank Tribunal.

B *2. Whether the Court of Appeal was right when it arrived at the conclusion that the offences of stealing, obtaining by false pretences and corrupt enrichment and failing to secure compliance with section 20(6) of Banks and other Financial Institution Decree No.25 was established at the Tribunal.*

C *3. Whether the Court of Appeal was right in confirming the order of the Tribunal confiscating the appellant's assets and properties."*

D All these issues have been effectively dealt with and resolved in the lead judgment. However I wish to add a few comments on the third issue for determination touching on the order of forfeiture of the appellants assets as part of the sentence for the offences the appellant was convicted by the trial Tribunal and confirmed by the court below.

E In support of this issue it was argued for the appellant that since the order for forfeiture does not form part of the punishment for the offences the appellant was convicted, it was wrong for the trial Tribunal to have ordered the appellant to surrender his properties as part of the
F punishment or sentences and that the court below also fell into the same error in affirming the order. Learned counsel to the appellant further submitted that the prosecution did not lead evidence to connect the appellant's landed properties forfeited on account of the sum of money the appellant was tried and convicted of stealing and that as the result of this and on
G the authority of *Akosa v. Commissioner of Police 13(WACA) 43*, the Court below should have set aside the order of forfeiture.

The reaction of the learned counsel to the respondent on this issue is that the appellant ought to have been grateful to the trial Tribunal for
H imposing very light sentences for the serious offences committed by him. This is particularly so, explained the learned counsel, because it was the appellant who at the end of the trial, even before passing the appropriate sentences on him, on his own volition in order to obtain light sentence

from the Tribunal, voluntarily surrendered his hospitals to the Tribunal. For the appellant to now turn round and complain against the order of forfeiture to which he had virtually agreed, shows that the complaint on this issue is without basis at all and learned counsel urged this court to apply the principles of law contained in the case of Nasiru Bello v. Attorney General Oyo State (1986) 5 NWLR (pt.45) 828, and do justice to the present case.

From the record of this appeal, it is quite clear that the appellant had a fair trial before the Tribunal. There is overwhelming evidence in support of his conviction for all the offences he was charged. This unchallenged evidence is that the appellant received the sum of N16.56 million in bank draft in the name of Ivory Merchant Bank which he directed the bank being its Chairman to pay into his own personal account with the same bank. The appellant withdrew and utilized this sum of money with the full knowledge that the money belong to Partnership Investment Limited which had to recover the same amount from Ivory Merchant Bank on a judgment debt executed against that bank which ultimately led to its liquidation.

The court below in considering this question of sentence which included the order of forfeiture, Ibiyeye JCA observed at page 446 of the record:-

“I am of the opinion that based on the gravity of the offences for which the appellant was convicted, the sentences thereon were not excessive. They shall therefore remain valid.”

I entirely agree with this observation. In the circumstances of this case, I share the same view with the court below that the appellant has no reason whatsoever to complain against the sentence particularly the order of forfeiture which he willingly or voluntarily acceded to before it was made by the trial Tribunal and affirmed by the court below. The issue is accordingly resolved against the appellant.

Finally, it needs to be stressed that this appeal is based on the concurrent findings of fact of the trial Tribunal and the court below on the conviction and sentence passed on the appellant. The attitude of this court in that regard is well settled. It is that this court will not interfere

with the concurrent findings of the lower courts on issues of facts except there is established a miscarriage of justice or a violation of some principle of law or procedure. See *Ubani v. The State* (2003) 18 NWLR (pt.851) 224 at 247. In other words, such concurrent decisions of the lower courts ought not to be disturbed unless they are erroneous or perverse. This being a criminal appeal against conviction and sentence, the relevant cases in support of this principle are *Amusa v. The State* (2003) 4 NWLR (pt.811) 595 at 606; *Ahmed v. The State* (1998) 9 NWLR (pt.566) 389 at 401; *The State v. Idapu Emine & Ors* (1992) 7 NWLR (pt.256) 658; *Bakare v. The State* (1987) 1 NWLR (Pt.52) 579 at 591; and *Adio v. The State* (1986) 2 NWLR (pt.24) 581 at 588. In the present case, these conditions necessitating the interference with such concurrent findings have not been established by the appellant to justify any interference with the decision of the trial Tribunal as affirmed by the court below.

For the above and the more detailed reasons given by my learned brother, Musdapher, JSC, in the leading judgment, I also find no reason whatsoever to interfere with the conviction and sentence passed on the appellant affirmed by the court below. Accordingly I hereby dismiss the appellant's appeal and affirm his conviction and sentence.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother MUSDAPHER, JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

The appellant who was at the material time the Chairman of Ivory Merchant Bank Ltd does not dispute the fact that on the 16th day of August 1994, he held a meeting with PW1, Mrs Nkechi Nwaogu an ex-banker, during which he told PW1 that he was in Aba to look for a buyer of some foreign exchange and commissioned her to source for a buyer of \$345,000.00 US Dollars on Commission. Also not denied is the fact that PW1, as agreed did source for buyers in Partnership Investment Limited who raised a bank draft of Crystal Bank of Africa Ltd in the sum

of N16.56 million in the name of Ivory Merchant Bank Ltd, which draft was crossed and marked “Not Negotiable Account Payee Only.” Appellant however denied that he told PW1 that he was acting on behalf of Ivory Merchant Bank Ltd throughout the transaction, which he described as private or personal though PW1 and others involved in the transaction testified to the contrary. The bank draft for the sum of N16.56 million being the naira equivalent of the \$345,000.00 US Dollars allegedly belonging to Ivory Merchant Bank Ltd was admitted in evidence as exhibit C. There is evidence that the said exhibit C was handed over to the appellant on 23/8/94 by PW1 in company of an official of Partnership Investment Ltd in the premises of Ivory Merchant Bank Ltd.

It is very important also to note that although exhibit C was in the name of Ivory Merchant Bank Ltd, crossed and marked “Not negotiable, Account Payee Only” appellant paid same into his private account with Ivory Merchant Bank Ltd which account was at the material time in the debit. The payment was accompanied by a letter of instructions by the appellant on how he wanted the money disbursed. Finally appellant withdrew the balance leaving the account back in red. Appellant did not deliver the American Dollars and the cheque he issued for the refund with interest of course bounced. Investigations later revealed that appellant was acting on his own, not on behalf of Ivory Merchant Bank Ltd, which he earlier claimed owned the Dollars and wanted to sell same.

The facts clearly show that appellant deliberately set out to dupe and actually succeeded. He knew neither the bank nor himself had foreign currency to sell yet purported to sell same and collected millions in exchange. Now that the chips are down appellant is saying in effect “*I admit I did it but I should not be punished because I did not do it on behalf of Ivory Merchant Bank Ltd.*” He is contending that his conviction by the trial court and the confirmation of same by the lower court is wrong in law and has urged this court to allow the appeal and set him free!! Unfortunately for the appellant the trial court did not believe him and the Court of Appeal confirmed the findings of the trial court. There is therefore concurrent findings of facts by the trial and lower courts and no miscarriage of justice has been established by the appellant to make it

necessary for this court to set aside the said findings the same not haven been demonstrated to be perverse.

I hold the view that it is a misconception for the appellant to still argue on this court his version of the facts leading to his conviction by the trial court since at this stage, there is nothing this court can do on the matter because this court cannot substitute its own findings for those of the trial and lower courts particularly where the Issue is which version of the transaction should be believed. What the appellant ought to do is to argue on the facts as found by the trial and lower courts and submit that despite the findings the conviction cannot be sustained on the grounds that the said findings are perverse or cannot be supported by the admissible evidence on record etc etc.

This court is a court of substantial, not technical justice. It will be a sad day indeed in the administration of justice if people like the appellant are encouraged to use the instruments of law to ruin the collective efforts of this nation at rebuilding confidence in the economy and business transactions particularly in the banking sector. He and his like ought not to be encouraged.

In conclusion, I too find no merit whatsoever in the appeal which is accordingly dismissed. I abide by the consequential orders contained in the lead judgment of my learned brother, MUSDAPHER, JSC

Appeal dismissed.