

**SUPREME COURT OF NIGERIA**

23<sup>rd</sup> FEBRUARY, 2007 SC. 75/2001

**CORAM:- I. L. KUTIGI CJN, U. A. KALGO, D. MUSDAPHER, A.  
M. MUKHTAR, F. F. TABAI, JJSC**

THE NIGERIA AIR FORCE ..... APPELLANT  
AND  
EX-SQN LEADER M. O. KAMALDEEN ..... RESPONDENT

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COURT MARTIAL - Competence - Convening order - Was signed on behalf of the appropriate authority - In line with s. 286 Armed Forces Decree (H1)

CRIMINAL PROCEDURE - Acquittal - Court Martial - Where trial is declared a nullity by Court of Appeal - Based on lack of jurisdiction - Only to discharge the accused is the proper verdict (H2)

CRIMINAL PROCEDURE - Exemption - Proof - Accused that is charged with an offence - Has the burden of proving any exception (H3)

CRIMINAL PROCEDURE - Conspiracy - Stealing - Respondent was properly convicted - As he failed to show authorization - To handle the money the way he did (H4)

CRIMINAL PROCEDURE - Conviction - For lesser offence - Limitation - Duplicity - For such conviction to be proper - The ingredients of the offences - Must be similar (H5)

CRIMINAL LAW - Forgery - Intention - Where respondent knew about the fraudulent intention - Behind the cheque in issue - Mere fact of the signatories being proper - Does not make the deal genuine (H6)

CRIMINAL LAW - Cheque - Forgery & uttering of - Where respondent know the fraud and deceit - And joined in sharing the amount cashed -

Contrary to its purpose - His conviction was proper (H7)

CRIMINAL LAW - Uttering - Documents - Where respondent knowingly processed forged exhibits - He is guilty of the offence of uttering (H8)

CRIMINAL PROCEDURE - Restitution - Court Martial - Order of restitution against respondent - Was properly made by the Court Martial (H9)

### **FACTS**

Before the General Court Martial, respondent was charged on an 11 count charge. He was tried along with 8 other Air Force officers and was found guilty of 10 of the 11 Count charge. He was sentenced to a total of 35 years imprisonment. He was also ordered to restitute the sum of N2,375,000.00 to the Nigerian Air Force as compensation. Respondent was a Squadron Leader with the NAF, attached to pay and Accounting Group in the Directorate of Finance and Accounts. The case against him was that about April, 1996, he in concert with 8 other NAF officers conspired to use their positions to defraud the NAF. Respondent was stated to have used his position as a cashier to procure the forgery and issuance of cheque No. 15499 by which the sum of N10 million was withdrawn from NAF bank account and distributed among himself and his co-conspirators. He was charged with conspiracy, stealing, receiving stolen property, forgery, disobedience to standing orders, etc.

In his defence, respondent testified that he was a subordinate officer who merely acted on the directives passed to him by superior officers. He therefore claimed the defence of justification. Respondent was convicted and sentenced as stated above. His appeal to the Court of Appeal was successful. Being dissatisfied, the appellant has now appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

*“ 1. Whether the Court of Appeal was right in holding that the GCM lacked the jurisdiction to adjudicate over and or try the respondent for the offences.*

2. Assuming [without conceding] that the Court of Appeal was right in holding that the GCM lacked jurisdiction to hear the case, was the Court of Appeal right in ordering an acquittal of the respondent for which offences the respondent was charged?

3. *Whether the burden of proof was properly placed upon the appellant to prove that the Outgoing Chief of Air Staff [CAS] did not authorize the withdrawal of N10m belonging to the Nigeria Air Force, whether to be used as welfare gifts or at all.*

4. *Whether the Court of Appeal was right in holding that the GCM was wrong to have substituted the offences in counts 3, 4 and 5 with the offence of conduct to the prejudice of service discipline under section 103[1] of the Decree, and then proceeding to convict the respondent therefore.*

5. *Whether their Lordships of the Court of Appeal were right in their conclusion that there is no evidence that cheque No. 15499 was either uttered or forged, merely because the appropriate signatories had appended their signatures thereto.*

6. *Whether Exhibits 9A, 9B and 9C were forged or uttered for which reason the respondent should be made a party and found to have committed an offence under section 112 of the Decree.*

7. *Whether the Court of Appeal was right in setting aside the orders of restitution made against the respondent to pay back the sum of N2,375,000.00 or other.”*

**HELD** (Unanimously allowing the appeal per **MUSDAPHER JSC**)

***COURT MARTIAL - Competence - Convening order***

1. In my view, having regard to section 286 of the Armed Forces Decree, Air Commodore Ajobena merely signed the convening order issued by the Chief of Air Staff the resultant effect is that the convening order was issued by the Chief of Air Staff. It is common ground and there is no dispute about it, that the Chief of Air Staff is an appropriate authority to issue a convening order to establish a GCM. (p. 990 B)

***Acquittal - Court Martial - Where trial is declared a nullity***

2. On the question of whether the Court of Appeal, having held the trial a nullity because the GCM was illegally constituted, was right to proceed to acquit the respondent of all charges. It is elementary law, that an acquittal of an accused person in a verdict can only be returned on the consideration of the case on the merits. Where a trial has been declared a nullity because, the trial court or tribunal, has no jurisdiction to adjudicate on the matter, the proper verdict to return is only to discharge the accused. The Court of Appeal was therefore wrong to have returned a verdict of acquittal on the respondent. (p. 990 D)

***Accused that is charged - Has the burden of proving any exception***

3. It is settled law, that where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption to the law lay within the accused. In the instant case huge amounts of money were taken out from the Nigerian Airforce and the money was shared amongst the officers who caused and participated in the withdrawal. If they had the authority to do so, the burden is clearly on them to prove the same, more so when the purpose of withdrawing the money was defeated. (p. 992 H)

***Conspiracy - Stealing - Respondent was properly convicted***

4. It is very instructive when in the instant case the respondent in his statement admitted that one of the purposes of the money was for bribing the staff of the Central Bank. The Court of Appeal made a decision on this point that welfare gifts are normal in the Air Force, they may be normal, but certainly not for the purposes of giving a bribe. In the case of PIUS NWAOGU VS. THE STATE (supra), it was held, inter alia, that a “soldier is responsible to Military and Civil Law and it is monstrous to suppose that a soldier could be protected when the order is grossly and manifestly illegal. Of course, there is the other proposition that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly lawful.”

It should be emphasized, that it was not the case of appellant, that

the CAS authorized or refused to authorized the withdrawal of the money. The case of the appellant was that the respondent and his other colleagues conspired and stole the amount and shared it among themselves. It was the respondent and his other colleagues who asserted that it was the CAS who authorized them to withdraw the money. In my view, clearly the GCM was right to have found the respondent guilty of counts 1 and 2 when respondent failed to establish the authorization. (p. 993 B)

**Conviction - For lesser offence**

5. The Court of Appeal held:-

*“Before an accused can be convicted for a lesser offence under Section 142 (1) above, the ingredients of the offences charged and the lesser offence must be similar. This is because the law postulates a consideration of circumstances under which the offence charged and the offence of which he is to be convicted. It cannot be invoked where the two offences have no similarities in their ingredients or circumstances of their commission. In this case, the appellant (respondent herein) has been charged with the forgery. He was however found guilty of an offence under Section 103 which deals with service indiscipline. What is the relationship or similarity between both offences? Clearly none.”*

In my view, the Court of Appeal was right. While section 142(1) permits the GCM to find an accused guilty of a lesser offence, the lesser offence under our criminal jurisprudence must be subsumed in the original charge, that is to say the ingredients of the lesser offence or the circumstances and the fact must be similar to those contained in the original charge. Besides by the provisions of Section 103 (2) duplicity of the charges is frowned at, and it is a “defence to a charge under sub-section (1) of this section that the conduct or neglect of the accused had already been charged under sections 45 to 102 and Sections 104 to 114 of this Decree.” The point being made is that the respondent was already charged with offence of forgery under Section 112 (a) of the Decree, it is therefore a defence in favour of the respondent for another charge under section 103 (a), for an offence “guilty of conduct or neglect to the prejudice of good order and service discipline.” It was therefore im-

proper for the GCM to proceed to find the respondent guilty of the offences under Section 103 (1) when the GCM found the respondent not guilty of the offences under the indictment in counts 3, 4 and 5. Having found the respondent not guilty, the GCM should return a verdict of  
B discharge and acquittal.

In any event for the provisions of Sections 142 (a) to apply to enable the GCM to convict for lesser offences, it must be shown that the particulars and the fact and the circumstances of the original offence charged are the same or similar to the lesser offence.  
C

Under our criminal jurisprudence the power of a court exercising criminal jurisdiction to convict for an alternative offences or lesser offences is limited and cannot be exercised outside the limits laid down by law. I entirely agree with the Court of Appeal, that the GCM in the instant  
D case was wrong to find the respondent guilty of the “lesser offences” under section 103(1) of prejudicial conduct affecting discipline, when it found the respondent not guilty of the offence of forgery. (p. 994 B/ 995 D)

E  
***Forgery - Intention***

6. Now, the respondent under cross-examination attested to his involvement in the preparation of the cheque. Among other things he was responsible for ensuring that all requisite approvals were obtained on form  
F 1487 [Exhibit 9A - 9C]. In addition he was responsible for procuring all relevant signatures [including his], after he has completed all the necessary verification. He admitted cashing the cheque, it was he who presented the cheque to the CBN [that as the cheque was] genuine. But he  
G was aware of the purposes for which the N10m cheque was purportedly raised. He knew that there was no intention ab initio to apply the proceeds of the cheque for the purposes for which it was supposedly raised. The mere fact that the signatories on the cheque [including the respondent]  
H are the normal persons designated to sign the cheque, does not make it genuine, when right from the beginning there was intent to defraud. It has been held it is forgery for a registrar of a court to issue a writ to the effect that an order was made for the sale of a judgment

debtor's property when no such order was made. See ETIM VS. THE QUEEN 1964 1 ALL NLR 38. (p. 996 E)

***Cheque - Forgery & uttering of***

7. In the instant case, the respondent ab initio knew the fraud and the deceit from the time he signed the cheque to the time the money was shared by himself and his other colleagues contrary to the purported purpose for which the cheque was issued. He knew that AVM Femi John Femi the erstwhile CAS was no longer in the Air Force and as such he had no authority to order the withdrawal of the funds of the Air Force.

In the result, I hold that the offences of forgery and uttering were proved and respondent was properly convicted by the GCM on counts 6 and 10. I resolve issue 5 against the respondent in favour of the appellant.

***Where respondent knowingly processed forged exhibits***

8. This issue is concerned with counts 7, 8 and 9 in relation to the documents forming the basis upon which cheque No. 15499 was issued. These documents are Exhibits 9A - 9C. The Court of Appeal in setting aside the decision of the GCM held that the respondent had no hand in the origination or processing the forms 1487 and he could not therefore be found liable to counts 7, 8 and 9. Having regard to what I said above under issue 5 and the extensive quotation of the judgment in JAME'S case, I do not need to repeat myself. Suffice it for me to hold that the respondent was very much involved in the fraudulent uttering of Exhibits 9A - 9C which were clearly forged documents and these documents were not only processed to him but were also processed through him vide BABALOLA's case supra that being so, the respondent is just as guilty of the offences of uttering the exhibits as the other accused person see Section 7(b) of the Criminal Code. I accordingly resolve the issue in favour of the appellant and accordingly set aside the decision of the Court below in relation to counts 7, 8 and 9.

***Restitution - Court Martial***

9. Now, as indicated above, the court below set aside the orders as to restitution made by GCM after having found that the respondent was not guilty of the offences brought against him and also because the proceedings were a nullity in the absence of jurisdiction. As I have earlier resolved issues pointing that the respondent was substantially guilty of charges and that the trial was not a nullity, it goes without necessary saying it, that the GCM had the powers under Section 174 to order compensation. I therefore affirm the order to pay the compensation as ordered by the GCM but subject to the deduction of the payment made voluntarily by the respondent and also the salaries of the respondent withheld by the appellant. (p. 999 B)

**D REPRESENTATION**

Yusuf A. Ali SAN, with him O. A. Ojo, for the Appellant.  
K. K. Eleja, E. Ona, S. A. Oke, M. T. Adekilekin, Miss, B. M. Kawu, Miss. V. Udenze for the Respondent.

E

**CASES REFERRED TO**

- Etim vs. the Queen 1964 1 All NLR 38  
Nigeria Air force vs. James [2002] 18 NWLR (Pt 798) 295 at 318  
Nigeria Air force vs. Obiosa [2003] 4 NWLR (Pt 810), 233  
Nigeria Air force vs. Wing Commander Iyen  
Subramaniam vs. Public Prosecutor [1965] 1 WLR 965 State vs. Aibangbee [1988] 2 NSCC 192  
Nwaogu vs. the State [1972] All NLR 153  
Enahoro vs. the Queen (1965) 1 All NLR 125  
A. G. vs. Chanrai (1965) 1 All NLR 323  
Okwuwa vs. the State (1964) 1 All NLR 366  
Babalola vs. the State [1989] 4 NWLR (Pt. 115) 264 At 277  
George Abel Ayo Scott vs. the King 13 WACA 25  
R. vs. Hodge 6 NLR 56

**STATUTES REFERRED TO**



Armed Force Decree 1993 (as amended) ss. 131(2),(3), 128(1), 168, 169, 286, 103, 142(a), 112(a), 142(1), 103(1) & (2), 174

Evidence Act s. 141(1)

Criminal Code s. 7(b)

B

**LEAD JUDGMENT BY MUSDAPHER JSC**

This is an appeal against the decision of the Court of Appeal, Lagos Division, wherein the Court of Appeal set aside the decision of the General Court Martial (hereinafter referred to simply as GCM) whereby the respondent, Squadron Leader M. O. Kamaldeen was arraigned before the GCM on an 11 count charge. He was tried along with eight other Air force officers and was found guilty on 10 of the 11 counts of the afore-said charge. He was sentenced to a total of 35 years imprisonment. There was also an order to pay N2,375,000.00 to the Nigerian Air Force as compensation.

Dissatisfied with his conviction and sentences, the respondent who was the 5<sup>th</sup> accused before the GCM, appealed to the Court of Appeal. After its considerations of all the issues raised for the determination of the appeal, the Court of Appeal set aside the decision of the GCM and proceeded to discharge and acquit the respondent on all the counts preferred against him before the GCM. The appellant, the Nigerian Air Force, felt unhappy with the situation and has now appealed to this court on an Amended Notice of Appeal containing 7 grounds of appeal. Before the consideration of the Grounds of Appeal and the issues distilled therefrom for the determination of the appeal, it is necessary at this stage to set out the background facts.

The respondent was a Squadron Leader with the Nigerian Air Force [NAF] and he was attached to PAY AND ACCOUNTING GROUP [PAG] in the DIRECTORATE OF FINANCE AND ACCOUNTS [DAF] as a cashier. The case against him was that sometimes on or about April, 1996, he in concert with 8 other officers of the Nigerian Air Force conspired to use their positions to defraud the NAF. In particular, the respondent was stated to have used his position as a cashier in the PAG, to procure and facilitate the forgery and issuance of cheque No. 15499 by

which the sum of N10,000,000.00 was withdrawn from NAF bank account and distributed among himself and his co-conspirators. He was also stated to have knowingly uttered the forged documents [Forms 1487, Exhibit 9A - C] upon which the cheque was issued. He was accordingly charged and arraigned before the GCM on an 11 count charge of conspiracy, stealing, receiving stolen property, forgery, disobedience to standing orders etc.

In his defence, the respondent testified that he was a subordinate officer who merely acted on the directives passed to him by superior officers. He therefore claimed the defence of justification. He stated further that he did not raise Exhibits 9A - 9C, but merely certified that the documents passed through the proper channels. He accordingly claimed ignorance of the fraud. He further claimed that if at all an offence or offences have been committed in the transaction, there was nothing to link him with culpability for the commissions thereof. As mentioned above, the GCM found the respondent guilty and sentenced him to terms of imprisonment and also ordered him to refund the Nigerian Air Force certain amount of money.

In its consideration of the appeal before it by the respondent, the Court of Appeal considered the following issues:-

*"1. Whether the Court Martial is competent to assume jurisdiction as it did in trying and convicting the appellant when it was not properly convened in accordance with Section 131 of the Armed Forces Decree, 1993.*

*2. Whether the appellant was afforded a fair hearing.*

*3. Whether having regards to the evidence before the court, the prosecution had proved their case against the appellant beyond reasonable doubt in respect of the 10 counts for which the appellant was convicted.*

*4. Whether in view of the dissimilarities of the elements of charges 3, 4 and 5, the Court Martial was right in convicting and sentencing the appellant on the alternative charges.*

*5. Whether in view of Exhibits 1, 2 and 3H the Court Martial was right in making an order of restitution of N2,375,000.00.*

6. *Whether the sentences handed down on the appellant were justified and reasonable taking into consideration the entire trial and the evidence before it.*”

In its judgment delivered on the 31/7/2001, the Court of Appeal allowed in its entirety the appeal of the respondent. On the point of jurisdiction, it held that the GCM lacked jurisdiction ab initio to try the respondent as it was irregularly convened since it was convened by an officer lacking in the requisite authority to constitute it. According to the court, the Chief of Air Staff is not empowered to delegate the power to constitute the Court Martial. Counts 1 and 2 of the charges were dismissed on the grounds of no proper proof. The respondent was also discharged and acquitted on counts 3, 4 and 5 on the grounds of the provisions of sections 103 and 142(a) of the aforesaid Armed Forces Decree 1996. On the 6<sup>th</sup> count, the respondent was also acquitted on the ground that there was no evidence of forgery. Counts 7, 8, 9 were also dismissed for lack of evidence. The court also held that there was no basis for the order of restitution and set it aside.

Now, in his brief for the appellant, the learned counsel has identified formulated and submitted 7 issues arising for the determination of the appeal. The issues are:-

“ 1. *Whether the Court of Appeal was right in holding that the GCM lacked the jurisdiction to adjudicate over and or try the respondent for the offences.*”

2. Assuming [without conceding] that the Court of Appeal was right in holding that the GCM lacked jurisdiction to hear the case, was the Court of Appeal right in ordering an acquittal of the respondent for which offences the respondent was charged?

3. *Whether the burden of proof was properly placed upon the appellant to prove that the Outgoing Chief of Air Staff [CAS] did not authorize the withdrawal of N10m belonging to the Nigeria Air Force, whether to be used as welfare gifts or at all.*

4. *Whether the Court of Appeal was right in holding that the GCM was wrong to have substituted the offences in counts 3, 4 and 5 with the offence of conduct to the prejudice of service discipline under section*

*103[1] of the Decree, and then proceeding to convict the respondent therefore.*

5. *Whether their Lordships of the Court of Appeal were right in their conclusion that there is no evidence that cheque No. 15499 was either uttered or forged, merely because the appropriate signatories had appended their signatures thereto.*

6. *Whether Exhibits 9A, 9B and 9C were forged or uttered for which reason the respondent should be made a party and found to have committed an offence under section 112 of the Decree.*

7. *Whether the Court of Appeal was right in setting aside the orders of restitution made against the respondent to pay back the sum of N2,375,000.00 or other.”*

The learned counsel for the respondent on the other hand has identified, formulated and submitted three issues arising for the determination of the appeal. The issues are:-

“1. *Whether the Court of Appeal was not right having regard to the circumstances, in holding that the GCM lacked jurisdiction to try the respondent and thereby made an order of acquittal in favour of the respondent?*

2. *Whether the Court of Appeal was not right to have placed the burden of dislodging the evidence of the respondent on the instruction of the outgoing CAS on the withdrawal of the N10,000,000.00 on prosecution.*

3. *Whether the Court of Appeal was not right in setting aside the conviction of the respondent on counts 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 on which he was convicted by the GCM and in setting aside the order of restitution of N2,375,000.00 made against the respondent by the GCM?”*

In my consideration of this appeal, I will adopt the issues as formulated by the appellant as they are apt and adequately cover the grounds of appeal.

Issue one and two together

It is firstly submitted that the Court of Appeal was in error to have held that section 131 (2) of the Armed Forces Decree 1993 (as amended) (hereinafter referred to as the Decree) did not give the Chief of Air Staff

the power to delegate the authority to any person to convene the General Court Martial [GCM]. The Court therefore erroneously held that the GCM as convened ab initio lacked jurisdiction to entertain the indictment preferred against the respondent and the other Air Force Officers charged along with him. It is argued that by the provisions of section 31 (3) it is provided that “*the senior officer of a detached unit or squadron may be authorized by the appropriate superior authority to order a Court Martial in special circumstances*” [underline mine].

The Court of Appeal noted that the GCM in the instant case was convened by the then Director of Personnel of the Nigeria Air Force, Air Commodore Ajobena. There was unchallenged evidence that the power to convene the GCM was delegated to Air Commodore Ajobena by the Chief of Air Staff [CAS]. Indeed Exhibit A1, the instrument by which the delegation of authority was made was confirmed by CAS. The Court of Appeal noted this in its judgment. It is further argued that by section 131(3) CAS was qualified as an appropriate authority.

It is again submitted that if the court below considered the import of sections 131(3) and 128(1), they would have found that the GCM had the necessary jurisdiction to adjudicate on the matter. It is further argued that this court decided the same issue in the cases of NIGERIAAIRFORCE VS. JAMES [2002] 18 NWLR (Pt 798) 295 at 318, NIGERIAAIRFORCE VS. OBIOSA [2003] 4 NWLR (Pt 810), 233.

On the secondary issue 2 whether the lower court was right or wrong in discharging and acquitting the respondent, when the Court held that the GCM had no jurisdiction to try the respondent and the other Air force officers. It is submitted that the lower court was in error to have entered a verdict of acquittal on the respondent. It is argued that it is only when there is a proper trial on the merits that a verdict of acquittal may be entered. Learned Counsel referred to R. VS. HODGE 6 NLR 56. See also NIGERIAAIRFORCE VS. WING COMMANDER IYEN. Unreported decision of this court in suit No. SC.21/7/2000, delivered 28/1/2005.

The learned counsel for the respondent on the other hand argued that, the convening order with which the respondent herein was tried along with others, was signed by Air Commodore F. O. Ajobena who

was purporting to act for the Chief of Air Staff [CAS]. The letter of Chief of Staff purporting to delegate the authority was written 14 days after GCM had commenced sitting. It is argued that by Section 131(2) of the Decree, the GCM was irregularly convened and consequently it had no jurisdiction to try the respondent. It is submitted that the provisions of Section 131 are clear and unambiguous and there was no power reserved for the designated officers to delegate the power to convene a court martial.

It is again submitted that the power to delegate can only be exercised if there are special circumstances and in the instant case there were no special circumstances which would have warranted the Chief of Air Staff to have delegated his power to convene the GCM. The letter written by the Chief of Air Staff purportedly delegating his authority to convene the GCM was written 14 days after the convening of the GCM and did not state any special circumstances warranting the delegation of the power to convene. It is further argued that the cases of NIGERIA AIRFORCE VS. JAMES and OBIOSA’S case supra are distinguishable from the present case in that in those cases, the officers concerned were no more in the force when the GCM was convened. It is submitted that in these two cases Sections 168 and 169 of the Armed Forces Decree applied. It is finally submitted that section 128 (2) (1) referred to by the appellant is not relevant to the issue of convening a GCM and is therefore inapplicable.

On the issue of order of acquittal made by the Court of Appeal, it is submitted that the case of R vs. HODGE supra was quoted out of context and the issue of the invocation of the plea of autrefois acquit is not the issue here and under the peculiar fact and circumstances of the case the order of acquittal made in the instant case was proper and did not lead to any miscarriage of justice.

Now, the case of OBIOSA supra, this court per EJIWUNMI, JSC at page 268 has decided this issue thus:-

*“I must point out that the case was concerned with whether the General Court Martial was properly convened. I do not therefore consider that it is helpful to refer to how a Special Court Martial could be*

*convened and by whom. And on this point I need not say anymore. However, what is relevant for consideration in this appeal is whether Air Commodore F. O. Ajobena was properly delegated to convene the General Court Martial that tried the respondent. It is clear that following the convening of the General Court Martial, and it had started sitting, the Chief of Air Staff, AVM N. E. Eduok authorized the holding of the General Court Martial with this Letter admitted in evidence with exhibit A.I. It reads:-*

*“AUTHORITY TO SIGN THE CONVENING ORDER FOR THE TRIAL OF*

*1. I write to confirm that I had duly authorized Air Commodore F. O. Ajobena [Director of Personnel HQ. NAF] to sign the Convening Order, Charge sheets and other Documents relating to the above Court Martial.*

*2. The directives are verbal and perfectly normal and I hereby confirm that.”*

It is the argument of the respondent however, that this authority cannot, given the circumstances give validity to the convening order that was wrongly signed by Air Commodore F. O. Ajobena. Two reasons were advanced for this contention. The first is that the letter of authority written by AVM N. E. Eduok and dated 6<sup>th</sup> August, 1996 was sent to the General Court Martial two days after objection was raised to its jurisdiction and 13 days after the General Court Martial was convened. The second is that as there is no provision for the delegation of the authority to convene a General Court Martial in the Armed Forces Decree, the delegation to convene it given to Air Commodore F. O. Ajobena was illegal in the circumstances. The earlier reason would first be considered. It is clear that the letter of authority was sent to the General Court Martial 13 days after it started its work. In the determination of the question raised as to the validity of the General Court Martial, I have carefully considered the submission made on behalf of the respondent by his Learned Counsel, and the authorities cited in support thereof. It is however my view that the submission so made is of no assistance in the resolution of the question raised. Based on the assumption that the General Court

Martial was improperly constituted; in my humble view, the determination of the question depends on whether the sending of the letter of the authority to the General Court Martial 13 days after it had commenced its sitting gave validity to it, and if it did give validity to it, can it then be said  
B that the respondent suffered a miscarriage of justice in the circumstances.

*The second reason will now be considered. This is, that there is no power to delegate the power to convene A General Court Martial. In my view, this question has to be considered in the context of the provisions of*  
C *Section 286 of the Armed Forces Decree which reads:*

“S.286. An order or a determination by an officer Of the Armed Forces or service authority may, unless otherwise prescribed by rules or regulations made under this Decree, *be signified under the hand of an officer authorized in that behalf, and an instrument signifying the order*  
D *or determination and purporting to be signed by an officer stated therein to be so authorized shall, unless the contrary is proved, be accepted by all courts and persons as sufficient evidence accordingly.*” [Italicizing mine]

A careful reading of the above provisions of S. 286 of Armed  
E Forces Decree appear to have provisions for an Officer of the Armed Forces to delegate his orders under the Decree, provided such orders are not prescribed by rules or regulations made under the Decree. There are however two conditions to be fulfilled. There are (1) that the order or  
F a determination by an officer of the Armed Forces or service authority must be signified under the hand of an officer authorized in that behalf; (2) that an instrument signifying the order or determination must be purportedly signed by an officer stated therein. It would appear that with these conditions satisfied, and there are no rules or regulations prescribing  
G the issuance of such orders, then the orders so made, unless the contrary is proved, become acceptable by all courts and persons as sufficient evidence accordingly.

The letter of authority would now be considered in the light of the  
H above provisions of S. 286 of the Armed Forces Decree. From the evidence on record, it is manifest that AVM N. E. Eduok, the Chief of Air Staff instructed Air Commodore F. O. Ajobena to convene the General Court Martial, and it was accordingly. Then after the General Court Mar-



tial had commenced sitting, the Chief of Air Staff issued Letter of Authority signed by him confirming his earlier instruction or order he gave to Air Commodore F. O. Ajobena. It is also clear that the contents of the said Letter of Authority are in accordance with his earlier instruction to Air Commodore F. O. Ajobena in the absence of any rules or regulations in the Decree that the Chief of Air Staff AVM N. E. Eduok cannot signify his order to Air Commodore Ajobena to convene the General Court Martial, any Court as provided by S. 286 (supra), be taken as properly issued by the said AVM Eduok moreso, where in the instant case, there is no contrary evidence to challenge the order so made.

From all I have said above, it is my firm resolve that the Letter of Authority was properly issued by the Officer who had the right and authority to order Air Commodore F. O. Ajobena to convene the General Court Martial and which was duly convened accordingly. Furthermore, it has been for the respondent to show that he suffered a miscarriage of justice on account of how the General Court Martial was convened. This he has not done and I do not think that in all the circumstances, it can be said that his trial was adversely affected as a result. It is also my view that the trial and conviction of the appellant cannot be declared as null and void as urged in the respondent's brief."

Similarly in the case of JAMES supra this court per Onu JSC said at page 330:

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

Now, the convening order Exhibit A1 was merely signed on behalf of the Chief of Air Staff by Air Commodore Ajobena. It reads in part thus:-

*"In pursuance of the powers conferred on me as Chief of Air Staff,*

*Nigeria Air Force, by section 131 (2) (c) of the Armed Forces Decree No. 105 S 1993 [as amended], I AVM N.E. EDOUK (NAF/340], hereby orders that a General Court Martial as composed in paragraph 2 below, Assemble at Joint Officers Mess, Ikeja on the 26<sup>th</sup> July, 1996 to try the officers named in paragraph 6 below and any other accused person brought before the court.”*

**In my view, having regard to section 286 of the Armed Forces Decree, Air Commodore Ajobena merely signed the convening order issued by the Chief of Air Staff the resultant effect is that the convening order was issued by the Chief of Air Staff. It is common ground and there is no dispute about it, that the Chief of Air Staff is an appropriate authority to issue a convening order to establish a GCM.**

**On the question of whether the Court of Appeal, having held the trial a nullity because the GCM was illegally constituted, was right to proceed to acquit the respondent of all charges. It is elementary law, that an acquittal of an accused person in a verdict can only be returned on the consideration of the case on the merits. Where a trial has been declared a nullity because, the trial court or tribunal, has no jurisdiction to adjudicate on the matter, the proper verdict to return is only to discharge the accused. The Court of Appeal was therefore wrong to have returned a verdict of acquittal on the respondent.**

In the result Issues 1 and 2 are resolved in favour of the appellant.  
ISSUE 3

In the defence of the allegations labeled against him on counts 1 and 2 (conspiracy and stealing), the respondent testified that he acted on the alleged instructions passed down the line to the respondent from the retiring CAS through DFA, that a total of N10m out of the proceeds covered by Exhibits 9A - C should be shared as welfare gifts by officers in the account department. Relying on the ipse dixit of the respondent, the court below held that a burden lay on the appellant to prove otherwise, by calling either the then Director of Finance, Wing Commander Iyen or the retired CAS to testify to deny what the respondent said.

It is submitted by the appellant, that it was the respondent who raised the defence of authorization by the CAS and it was the duty of the respondent to prove that the CAS authorized the sharing of the money. Learned Counsel referred to section 141 (1) of the Evidence Act and the case of SAIDU VS. STATE [1982] 4 SC 41, NIGERIA AIRFORCE VS. JAMES supra. It is further argued, that at the time of the alleged approval i.e. 2/4/1996, CAS had retired from service and had no authority to approve any welfare gifts. It is further argued that the testimony of the respondent in proof of the authorization was nothing other than hearsay as the evidence was what he heard from somebody. See SUBRAMANIAM VS. PUBLIC PROSECUTOR [1965] 1 WLR 965, STATE VS. AIBANGBEE [1988] 2 NSCC 192.

It is further argued, that the Court of Appeal was in error to have held that the defence of the respondent that he merely acted on the instructions of superior officers availed the respondent without first establishing that the instructions were legal. A soldier is only bound to obey lawful instructions and orders of superiors see NWAOGU VS. THE STATE [1972] ALL NLR 153.

The learned counsel for the respondent on the other hand argued that the Court of Appeal discussed “in broad outlines the nature of the case brought against all the accused persons including the appellant [i.e. the respondent herein] before the GCM. The case of the prosecution was vaguely prosecuted.” The Court of Appeal also found on a number of issues, that the GCM was wrong to have convicted the respondent because of the failure of the prosecution to prove their case against the respondent.

It is submitted that there is no appeal against the specific findings of fact. Specifically, the Court of Appeal found with reference to the respondent at page 25 of the record thus-

*“The role ascribed to the appellant [respondent herein] was not clearly stated in the evidence of the prosecution witness.”*

It is argued that this finding was neither appealed against nor impeached by the appellant. It is further submitted that in the consideration of counts 1 and 2 the Court of Appeal properly considered Exhibits 7,

9A, 9B, 9C and 12 and came to the correct conclusion that counts 1 and 2 had not been proved. It is further submitted that in a criminal trial, the duty imposed on an accused person is purely evidential in raising a defence and the respondent has discharged the burden in his statement  
 B Exhibit 12, that he was merely obeying instructions from his superior officers and that the giving and taking of welfare gifts is a common occurrence within the Nigerian Air Force. It is submitted that the respondent was not duty bound to prove his innocence beyond reasonable doubt. It is further submitted that it was not manifestly illegal or willful for the  
 C Chief of Air Staff to make the order of the sharing of the welfare gifts.

Now, it is clear and beyond any dispute that the respondent herein was the cashier at the PAG, Ikeja and a signatory to the cheque in question. There is no dispute that the respondent and other designated signa-  
 D tories signed the cheque for N10 million. When the proceeds was collected, it was handed over to the 6<sup>th</sup> accused person who was the GROUP PAYMASTER. The money was later shared amongst the Air Force Of- ficers including the respondent. It is also manifest that the sharing of the  
 E money amongst the officers including the respondent was directly contrary to the purposes and a departure from what was stated in Exhibits 9A, 9B and 9C as the reason why the money was taken out.

In any event, the GCM made the following findings of fact in relation to the whole case based on the evidence adduced before it. AVM  
 F Femi John Femi the mentioned CAS was retired from the Air Force as at 2<sup>nd</sup> April 1996, he therefore lacked the authority power and competence to order the taking out of money as gift to serving officers. It was also found as a fact, that the other units of the Air Force such as pilots,  
 G logisticians, personnel and the various commands could not legitimately be ignored and that only the PAY GROUP would be given welfare for loyalty and service. It was also found as a fact, that AVM Femi John Femi never gave the order as claimed by the respondent and the other  
 H officers involved. If the respondent or any of the other officers wanted to call AVM Femi John Femi to CAS, it was their duty to call him to establish the defence, that it was he who authorized the withdrawal of the money. See ENAHORO VS. THE QUEEN (1965) 1 ALL NLR 125. It

is settled law, that where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption to the law lay within the accused. In the instant case huge amounts of money were taken out from the Nigerian Airforce and the money was shared amongst the officers who caused and participated in the withdrawal. If they had the authority to do so, the burden is clearly on them to prove the same, more so when the purpose of withdrawing the money was defeated. It is very instructive when in the instant case the respondent in his statement admitted that one of the purposes of the money was for bribing the staff of the Central Bank. The Court of Appeal made a decision on this point that welfare gifts are normal in the Air Force, they may be normal, but certainly not for the purposes of giving a bribe. In the case of PIUS NWAOGU VS. THE STATE (supra), it was held, inter alia, that a “soldier is responsible to Military and Civil Law and it is monstrous to suppose that a soldier could be protected when the order is grossly and manifestly illegal. Of course, there is the other proposition that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly lawful.”

It should be emphasized, that it was not the case of appellant, that the CAS authorized or refused to authorized the withdrawal of the money. The case of the appellant was that the respondent and his other colleagues conspired and stole the amount and shared it among themselves. It was the respondent and his other colleagues who asserted that it was the CAS who authorized them to withdraw the money. In my view, clearly the GCM was right to have found the respondent guilty of counts 1 and 2 when respondent failed to establish the authorization.

In the result. Issue 3 is resolved in favour of the appellant. The burden was on the respondent to call either the Director of Finance or the CAS to prove proper authorization to withdraw and share the money as welfare gifts.

#### ISSUE 4

*The GCM found the respondent not guilty of counts 3, 4 and 5*

dealing with uttering and acceptance of forged instruments under Section 112 (a) of the Decree. The GCM proceeded to convict the respondent for offences under section 103(1). The Court of Appeal in its judgment discussed the provisions sections 103 (1) and (2) and 142 (1) of the Decree and came to the conclusion that the GCM was wrong to have substituted the counts, the GCM should have discharged and acquitted the respondent on counts 3, 4 and 5.

***The Court of Appeal held:-***

“Before an accused can be convicted for a lesser offence under Section 142 (1) above, the ingredients of the offences charged and the lesser offence must be similar. This is because the law postulates a consideration of circumstances under which the offence charged and the offence of which he is to be convicted. It cannot be invoked where the two offences have no similarities in their ingredients or circumstances of their commission. In this case, the appellant (respondent herein) has been charged with the forgery. He was however found guilty of an offence under Section 103 which deals with service indiscipline. What is the relationship or similarity between both offences? Clearly none.”

In my view, the Court of Appeal was right. While section 142(1) permits the GCM to find an accused guilty of a lesser offence, the lesser offence under our criminal jurisprudence must be subsumed in the original charge, that is to say the ingredients of the lesser offence or the circumstances and the fact must be similar to those contained in the original charge. Besides by the provisions of Section 103 (2) duplicity of the charges is frowned at, and it is a “defence to a charge under sub-section (1) of this section that the conduct or neglect of the accused had already been charged under sections 45 to 102 and Sections 104 to 114 of this Decree.” The point being made is that the respondent was already charged with offence of forgery under Section 112 (a) of the Decree, it is therefore a defence in favour of the respondent for another charge under section 103 (a), for an offence “guilty of conduct or neglect to the prejudice of good order and service discipline.” It was therefore im-

**proper for the GCM to proceed to find the respondent guilty of the offences under Section 103 (1) when the GCM found the respondent not guilty of the offences under the indictment in counts 3, 4 and 5. Having found the respondent not guilty, the GCM should return a verdict of discharge and acquittal. See A. G. VS. CHANRAI (1965) 1 ALL NLR 323.** B

**In any event for the provisions of Sections 142 (a) to apply to enable the GCM to convict for lesser offences, it must be shown that the particulars and the fact and the circumstances of the original offence charged are the same or similar to the lesser offence. See OKWUWA VS. THE STATE (1964) 1 ALL NLR 366 where this court stated in a passage thus:-** C

*“The lesser offence is a combination of some of the several particulars making up one offence charged, in other words the particulars constituting the lesser offence are carved out of the particulars of the offence charged.”* D

**Under our criminal jurisprudence the power of a court exercising criminal jurisdiction to convict for an alternative offences or lesser offences is limited and cannot be exercised outside the limits laid down by law. I entirely agree with the Court of Appeal, that the GCM in the instant case was wrong to find the respondent guilty of the “lesser offences” under section 103(1) of prejudicial conduct affecting discipline, when it found the respondent not guilty of the offence of forgery. I resolve issue 4 in favour of the respondent against the appellant.** E F

#### ISSUE 5

**This issue deals with the question whether the court below is right in holding that since cheque No. 15499 was signed by those three signatories who normally sign cheques, the cheque was therefore not forged and that since it was not forged it could not be uttered. It is submitted that the court below was in error to have held the respondent not guilty of counts 6 and 10. It is submitted that the concept of forgery under the Nigerian criminal law is wider in scope than under the English criminal law. See the case of BABALOLA VS. THE STATE [1989] 4 NWLR (Pt. G**

115) 264 at 277. The case of MORRISON VS. LONDON COUNTY [1914] 3 KB 356 relied upon by the Court of Appeal should be read advisedly and subject to the Nigerian law. Learned Counsel also referred to NIGERIA AIRFORCE VS. JAMES [supra]. It is argued, that since the cheque was signed with a view to deceive; it is under our law forged. Since it is forged, it can be uttered and indeed it was uttered. It is submitted that the respondent was not only involved in the forgery of the cheque No. 15499, but also in uttering the cheque. The Court of Appeal clearly applied wrong indices in coming to their conclusions.

The learned counsel for the respondent on the other hand argued that the cheque No. 15499 was regularly issued and that the allegation against the respondent and his colleagues was only in the misapplication of the proceeds, so the offences of forgery and uttering could not under the fact be said to have been committed by the respondent. Learned counsel referred to the English cases of R. VS. BATEMAN [1845] 1 COX 186. MORRISON'S case supra. Learned counsel also referred to the case of GEORGE ABELAYO SCOTT VS. THE KING 13 WACA 25. Since the cheque was not forged, it could not be uttered.

**Now, the respondent under cross-examination attested to his involvement in the preparation of the cheque. Among other things he was responsible for ensuring that all requisite approvals were obtained on form 1487 [Exhibit 9A - 9C]. In addition he was responsible for procuring all relevant signatures [including his], after he has completed all the necessary verification. He admitted cashing the cheque, it was he who presented the cheque to the CBN [that as the cheque was] genuine. But he was aware of the purposes for which the N10m cheque was purportedly raised. He knew that there was no intention ab initio to apply the proceeds of the cheque for the purposes for which it was supposedly raised. The mere fact that the signatories on the cheque [including the respondent] are the normal persons designated to sign the cheque, does not make it genuine, when right from the beginning there was intent to defraud. It has been held it is forgery for a registrar of a court to issue a writ to the effect that an order was made for the sale of a**



**judgment debtor's property when no such order was made. See ETIM VS. THE QUEEN 1964 1 ALL NLR 38.** In the BABALOLA'S case supra, this court per Nnaemeka-Agu, JSC said at 277 thus:-

*“xxxxxxxxx Thus, unlike under English law, it [forgery] includes a document which tell a lie about itself, xxxxxxxxxxxx Also, the definition in Section 399 includes document made with intent to defraud - again unlike England xxxxx forgery is defined as making a false document.”* B

**In the instant case, the respondent ab initio knew the fraud and the deceit from the time he signed the cheque to the time the money was shared by himself and his other colleagues contrary to the purported purpose for which the cheque was issued. He knew that AVM Femi John Femi the erstwhile CAS was no longer in the Air Force and as such he had no authority to order the withdrawal of the funds of the Air Force.** C D

In the case of NIGERIA AIRFORCE VS. JAMES Supra with reference to this issue, this court per Onu JSC at page 322 said:-

*“With utmost due respect, the above finding of fact cannot be correct because firstly it was not the case of the respondent nor of any of the other accused that the retired CAS instructed them to convert money for salaries to another purpose. Secondly the respondent's defence was that the retired CAS had approved the sum of N10 million to accused persons as welfare gift. Thirdly, the court below failed to take cognizance of the fact that the expressed purpose for exhibits 9A - 9C did not exist as no finding was made on this. Fourthly, contrary to the speculative findings of the court below, the reality of the matter is that Exhibits 9A - 9C were demonstrated to be false representations with the intention to defraud on the part of the conspirators. It is irrelevant to contend xxxxxxxxxxxx that the forms were prepared by the officers whose duty it was to prepare them in the ordinarily course of duty there could be no offence committed. As each document was in itself telling a lie about itself and the lie was exposed and confirmed thus culminating in the sharing of the money by the accused persons, the respondent, inclusive, what further proof of forgery was needed? See the case of BABALOLA VS. THE STATE [1989] 4 NWLR (Pt 115) 264.* E F G H

I respectfully agree. **In the result, I hold that the offences of forgery and uttering were proved and respondent was properly convicted by the GCM on counts 6 and 10. I resolve issue 5 against the respondent in favour of the appellant.**

ISSUE 6

B

**This issue is concerned with counts 7, 8 and 9 in relation to the documents forming the basis upon which cheque No. 15499 was issued. These documents are Exhibits 9A - 9C. The Court of Appeal in setting aside the decision of the GCM held that the respondent**

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**had no hand in the origination or processing the forms 1487 and he could not therefore be found liable to counts 7, 8 and 9. Having regard to what I said above under issue 5 and the extensive quotation of the judgment in JAME'S case, I do not need to repeat myself.**

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**Suffice it for me to hold that the respondent was very much involved in the fraudulent uttering of Exhibits 9A - 9C which were clearly forged documents and these documents were not only processed to him but were also processed through him vide**

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**BABALOLA's case supra that being so, the respondent is just as guilty of the offences of uttering the exhibits as the other accused person see Section 7(b) of the Criminal Code. I accordingly resolve the issue in favour of the appellant and accordingly set aside the decision of the Court below in relation to counts 7, 8 and 9.**

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ISSUE 7

**This issue is concerned with the order of restitution made against the respondent by GCM. The Court of Appeal held that having discharged and acquitted the respondent, he was not liable to pay any compensation.**

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**It also held, even if the respondent was guilty as charged, the GCM was duty bound to have had conducted a special hearing in order to determine the exact amount to be paid by the respondent as compensation or restitution.**

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**It is submitted that the GCM made proper enquiry and reached its decision on the amount the respondent should pay as restitution in accordance with the parameters defined under section 174. It is further submitted that the GCM was right to order compensation when the respon-**

dent admitted benefiting from the fraud.

It is submitted by the learned counsel for the respondent, that the Court of Appeal was right when it held that the GCM did not explain how it came to the amount of N2,375,000.00 as compensation or how it arrived at the figure of N1,425,000.00 ordered to be paid as interest. These issues are said to be pertinent when the respondent was made to pay N600,000.00 even before the trial and as per Exhibits H1, H2 and H3 the respondent's salaries were confiscated by the appellant.

**Now, as indicated above, the court below set aside the orders as to restitution made by GCM after having found that the respondent was not guilty of the offences brought against him and also because the proceedings were a nullity in the absence of jurisdiction. As I have earlier resolved issues pointing that the respondent was substantially guilty of charges and that the trial was not a nullity, it goes without necessary saying it, that the GCM had the powers under Section 174 to order compensation. I therefore affirm the order to pay the compensation as ordered by the GCM but subject to the deduction of the payment made voluntarily by the respondent and also the salaries of the respondent withheld by the appellant.**

In the result except for counts 3, 4 and 5 for which the respondent is discharged and acquitted, the respondent's convictions and sentences on all the other counts are restored and affirmed. The amount ordered to be paid by way of restitution is reduced by the amounts the respondent had paid and those sums withheld by the appellant as salaries for which the respondent was entitled.

Appeal succeeds.

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### KUTIGI CJN

I read in draft the judgment just delivered by my learned brother Musdapher, JSC. I agree with his reasoning and conclusions. The appeal clearly has merit. It succeeds and it is accordingly allowed. The judgment of the Court of Appeal is set aside while that of the General Court

**KALGO JSC**

B I have had a preview of the judgment just delivered by my learned  
brother Musdapher JSC and I entirely agree with him that the appeal is  
meritorious and ought to be allowed. All the seven issues raised by the  
appellant in his brief of argument have been meticulously and painstakingly  
C considered in the said judgment and I fully adopt the reasoning and  
conclusions reached therein. I have nothing useful to add. I therefore  
allow the appeal in part, set aside the decision of the Court of Appeal and  
restore that of the General Court Marshall in respect of Counts 1, 2, 6, 7,  
8, 9 and 10. The appellant is discharged and acquitted in respect of counts  
D 3, 4 and 5. I endorse the order made in respect of restitution.

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**MUKHTAR JSC**

E I have had the opportunity of reading in advance the lead judgment  
delivered by my learned brother Musdapher, JSC. I am in full agreement  
with him that the appeal is meritorious and deserves to succeed. The  
defence put up by the respondent before the GCM was not only weak, it  
was not proved. That the Chief of Air staff authorized the withdrawal  
F and sharing of the 10 million could have been proved by calling the Chief  
of Air staff himself, considering the gravity of the offence and the sen-  
tence that it attracted. Section 141 (1) of the Evidence Act, Cap 112  
Laws of the Federation of Nigeria, places a burden on an accused who  
G raises a defence, as follows:-

*"141 (1) Where a person is accused of any offence the burden of  
proving the existence of circumstances bringing the case within any ex-  
ception or exemption from, or qualification to, the operation of the law  
H creating the offence with which he is charged is upon such person."*

It is instructive to note that the respondent did not discharge the  
burden placed on him by the above law, hence there was no way the  
GCM could have placed premium on the defence. The GCM was there-

fore right to have found the defence not tenable. The respondent's convictions and sentences are to my mind correct and the lower court was in error to have interfered with them. I also allow the appeal.

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**TABAI JSC**

I had a preview of the leading judgment of my learned brother Musdapher JSC and agree that although the Respondent is entitled to a discharge and acquittal in respect of counts 3, 4 and 5, the appeal succeeds and is accordingly allowed. I also abide by the consequential orders contained in the leading judgment.

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