

**SUPREME COURT OF NIGERIA**  
20TH FEBRUARY, 2009. SC. 336/2002  
**CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,**  
**F. F. TABAI, I. T. MUHAMMAD, J. O. OGEBE, JJSC**

CHIEF (DR.) O. FAJEMIROKUN ..... APPELLANT  
AND  
1. COMMERCIAL BANK NIG. LTD.  
2. MR. DELE ODUNOWO ..... RESPONDENTS

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EVIDENCE - Proof - Burden - It was for the appellant who alleged that he was reported to the police to prove so - But he did not prove it (H1)

APPEALS - Concurrent findings - Attitude of Supreme Court - It is not the duty of the court to interfere with concurrent findings - Unless compelling reasons justify such interference - Which is not the case here (H2)

PARTIES - Joinder - Nonjoinder - Effect - Failure to join the police was fatal to appellant's case - Since he alleged arrest & detention by the police - Police ought to be joined to explain their role (H3)

POLICE - Crime - Duty to report - It is the duty of citizens to report crime to the police - What happens after the report is the responsibility of the police (H4)

**FACTS**

The applicant/appellant brought this action before the High Court of Lagos State for the enforcement of his fundamental rights against the respondents/respondents. The appellant's case was that the respondents reported him to the police which arrested and detained him purportedly for theft.

The appellant did not join the police as a party to the action. After hearing, the learned trial judge held that the appellant did not prove that the respondents infringed his rights. Consequently, the judge struck out the appellant's application. Aggrieved, appellant appealed to the Court of Appeal, which dismissed his appeal. He has brought this further appeal to the Supreme Court.

**ISSUES FOR DETERMINATION.**

1. *“Whether the particulars as contained in the Appellant’s processes have not sufficiently made out a case for the violation of his fundamental human rights.”*

2. *Whether the Appellant was bound to join the Police as a party having identified the Respondents as responsible for the violation of his rights”.*

**HELD** (Unanimously dismissing the appeal per **OGEBE JSC**)

***EVIDENCE - Proof - Burden***

1. It was the duty of the appellant who alleged in his supporting affidavit that he was reported to the Federal Investigations and Intelligent Bureau, Alagbon Ikoyi for theft to prove it especially as he said that he saw the report in the Police entry book. He failed to produce an extract of the police entry book. He also failed to produce an affidavit from the Police to show the reason for his arrest. (p. 318 F)

***APPEALS - Concurrent findings***

2. It is my view that the appellant woefully failed to prove his case before the trial court. The lower court rightly dismissed the appellants appeal and affirmed the findings of facts made by the trial court. It is not the duty of the Supreme Court to interfere with concurrent findings of facts of the High Court and the Court of Appeal unless compelling reasons justify such interference. I see no cause to interfere in the circumstances of this case. (p. 319 A)

***PARTIES - Joinder - Nonjoinder***

3. The learned counsel submitted that the non-joinder of the police ought not to have defeated his case.

I do not agree with this submission. Since the appellant’s case was that the respondents reported him to the Police who then arrested and detained him, it was necessary for him to join the Police for them to explain the reason for the arrest, to show whether there was a reasonable cause for his arrest. (p. 319 C)

***POLICE - Crime - Duty to report***

4. Generally, it is the duty of citizens of this country to report cases of commission of crime to the Police for their investigation and what

happens after such report is entirely the responsibility of the Police. The citizens cannot be held culpable for doing their civic duty unless it is shown that it is done mala fide. (p. 319 E)

### **REPRESENTATION**

Mr. J. O. Odubela for the appellant, with him: Yemi Petan.

Mrs. J. O. Adesina for the respondents, with her: I. Musa Esq; G. Baiye Esq., and S. Oladipo Esq.

### **CASES REFERRED TO**

Iyere V. Duru (1986) 5 NWLR (Pt.44) 665

Ekpu V. A - G of the Federation (1998) 1 HRLRA 447, 453 - 454

Olaniyan V. Odeyoyeni (1996) 7 NWLR (Pt.459) 205 at P 210

Orlue V. Nepa (1998) 7 NWLR (pt 557) at 200 C -D

Ihewuezi V. Ekeanya (1989) 1 NWLR (pt 96) 234

Oyefesor V. Coker (1999) 1 NWLR (pt 588) 654 at p. 660

Afolayan V. Ogunrinde (1990) 1 NWLR (pt127) 369 at p. 394

Dumbell v. Roberts 1944 1 A.E.R. 326

Legal Practitioners Disciplinary Committee V. Fawehinmi (1985) 2 NSCC 988.

### **STATUTE & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979, ss. 32(1) & 42(1) & (3)

Fundamental Rights (Enforcement Procedure) Rules, 1979

Fundamental Rights (Enforcement Procedure) Rules, 2008

### **LEAD JUDGMENT BY OGBE JSC**

The appellant brought an application *ex parte* before the Lagos High Court for the enforcement of his fundamental rights against the respondents. He was granted leave to enforce his fundamental right. When issues were joined between him and the respondents, the trial court listened to the arguments of both sides and struck out the appellant's application. The appellant appealed to the Court of Appeal and the appeal was dismissed. This is a further appeal to the Supreme Court. The learned counsel for the appellant filed a brief of argument on his behalf and formulated two issues for determination as follows:

1. *“Whether the particulars as contained in the Appellant’s processes have not sufficiently made out a case for the violation of his fundamental human rights.”*

2. *“Whether the Appellant was bound to join the Police as a party having identified the Respondents as responsible for the violation of his rights”.*

The respondents also filed a brief and identified two issues for determination as follows:

“1. *Whether from the facts contained in the processes filed by the applicant/appellant, he ever made out against the Respondents, a case for the violation of his fundamental human rights as to entitle him to an order enforcing his rights in that regard (Grounds 1 and 4).*

2. *Whether from the circumstances surrounding the Applicant/Appellant’s claim, the Appellant’s failure to join the police in the case is fatal to his claim (Grounds 2 and 3)”.*

The learned counsel for the appellant submitted that the materials placed before the trial court in the appellant’s affidavit established that his arrest and detention at the instance of the respondents were unconstitutional and a gross violation of his fundamental human rights.

The learned counsel for the respondents submitted that the appellant failed to prove his case before the trial court because his allegation that he was reported to the Police for theft was not established by producing the Police record,

This issue turns entirely on facts. ***It was the duty of the appellant who alleged in his supporting affidavit that he was reported to the Federal Investigations and Intelligent Bureau, Alagbon Ikoyi for theft to prove it especially as he said that he saw the report in the Police entry book. He failed to produce an extract of the police entry book. He also failed to produce an affidavit from the Police to show the reason for his arrest.***

On the other hand, the respondents were able to show from their counter-affidavit that all they did was to report a case of the issuance of dud cheques against Broad Base Mortgage Finance Company Limited which has the appellant as the Chairman of the Board. It was in the course of the investigation that the Police invited the appellant for interrogation.

***It is my view that the appellant woefully failed to prove his case before the trial court. The lower court rightly dismissed the appellants appeal and affirmed the findings of facts made by the trial court. It is not the duty of the Supreme Court to interfere with concurrent findings of facts of the High Court and the Court of Appeal unless compelling reasons justify such interference. I see no cause to interfere in the circumstances of this case*** See the case of Seven-up Bottling Company Limited V Adewale (2004) 4 NWLR (Pt. 862, 183.)

On the second issue the learned counsel for the appellant submitted that the appellant was not bound to join the Police as a party to his suit as he had identified the respondents as being responsible for the violation of his right and ***the learned counsel submitted that the non-joinder of the police ought not to have defeated his case.***

***I do not agree with this submission. Since the appellant's case was that the respondents reported him to the Police who then arrested and detained him, it was necessary for him to join the Police for them to explain the reason for the arrest, to show whether there was a reasonable cause for his arrest. Generally, it is the duty of citizens of this country to report cases of commission of crime to the Police for their investigation and what happens after such report is entirely the responsibility of the Police. The citizens cannot be held culpable for doing their civic duty unless it is shown that it is done mala fide.***

For all I have said in this judgment, I see no merit in this appeal and I hereby dismiss it and affirm the judgment of the two lower courts. The appellant shall pay the costs of N50,000.00 to the respondents for this appeal.

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### KATSINA-ALU JSC

My Lords, I have had the advantage of reading the judgment of my learned brother Ogebe JSC, and for the reasons he gives I also dismiss this appeal with costs as awarded.

### MUKHTAR JSC

The process that culminated into this appeal commenced in the High Court of Lagos State where the appellant filed an application for the enforcement of Fundamental Human Rights, seeking the following reliefs:-

i. *A DECLARATION that the arrest of Chief (Dr.) Oladele Fajemirokun the applicant herein on Thursday 20th July, 1995 at his office at No. 90, Awolowo Road, South-West Ikoyi -Lagos, at the instigation and instance of the 2nd Respondent, acting as Agent of the 1st Respondent, who directed and accompanied an Officer of the Nigerian Police Force, Federal Investigation & Intelligence Bureau (FIIB), Alagbon, Ikoyi -Lagos, based on a baseless and false allegation of theft is illegal, unconstitutional and a gross violation of his fundamental rights.*

ii. *A DECLARATION that the detention of Chief (Dr.) Oladele Fajemirokun following the arrest of Thursday 20th July, 1995 at the instance of the Respondents is unlawful, unconstitutional and a gross violation of his fundamental rights.*

iii. *N10,000,000.00 (ten million naira) damages for unlawful and unconstitutional arrest of the applicant.*

iv. *N10,000,000.00 (ten million naira) damages for unlawful and unconstitutional detention of the applicant.*

v. *N10,000,000.00 (ten million naira) damages for loss of participation and attendance of the business dinner at the Chinese Restaurant of Airport Hotel, Ikeja Lagos in honour of Mr. Gordon Downey by Mobell Holdings Limited which I am the Chairman, Board of Directors and at whose instance the dinner was organized on the fateful Thursday 20 July, 1995.*

vi. *Perpetual injunction restraining the Respondents by themselves, Agents, privies or whomsoever acting through them or for them from further interfering with his fundamental human rights in the illegal and unconstitutional manner.*

vii. *AND for such further Order or other Orders as this Honourable Court may deem fit to make in the circumstances of the case,"*

The ground on which the reliefs were sought were stated as follows:-

*"i. The manner of his arrest by the Respondents through the instruments of the Police was degrading, inhumane and it amounts to a violation of his person as a Nigerian Citizen, a reputable international businessman and this (arrest) is contrary to his fundamental rights enshrined under Sections 31 and 34 of the Constitution of the Federal Republic of Nigeria, 1979 and also in Article 5 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap 10 Laws of Federation of Nigeria, 1990.* B

*His detention is a breach of his fundamental rights under Section 32 of the Constitution of the Federal Republic of Nigeria, 1979 and also Article 6 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of Federation of Nigeria, 1990. His arrest and detention caused him a huge business misfortune as he could not attend a Send Off Dinner organized at the Chinese Restaurant of Airport Hotel, Ikeja - Lagos by Mobell Holdings Limited of which he is the Chairman, Board of Directors at whose instance the Dinner was organized in honour of one Mr. G. Downey a business colleague, and the outgoing Managing Director Chief Executive of Original Box Packaging of John Holt. The Applicant is entitled to remedy in the form of damages against the Respondents jointly and severally for the violations of his constitutional and legal rights."* C D E

Affidavits were filed together with annexures. Learned counsel to both sides addressed the court, and the learned trial judge after a thorough consideration struck out the application for enforcement of fundamental rights, as follows:- F

*"The applicant has therefore not established that his fundamental rights had been infringed by the Respondents more so when he did not even sue the Police who actually detained him."* G

*Consequently therefore the Applicant has not established that his fundamental rights had been breached by the Respondent as is expected of him under Section 135 of the Evidence Act."*

The applicant appealed to the Court of Appeal, Lagos Division on three grounds of appeal. The appeal was dismissed after Sanusi, J.C.A. had painstakingly evaluated and assessed all the materials before the court. H

On a matter like this which I thought the appellant would have been satisfied and let the matter rest at that stage, the appellant started

another process of appeal to this court. Briefs of argument were exchanged, and in the appellant's brief of argument are the following issues for determination:-

B *"1. Whether the particulars as contained in the Appellant's processes have not sufficiently made out a case for the violation of his fundamental human rights*

*2. Whether the Appellant was bound to join the Police as a party having identified the Respondents as responsible for the violation of his rights."*

C The issues raised in the respondents brief of argument are in pari materia with the above issues.

The learned counsel for the appellant has in proffering argument on issue (1) supra submitted that where the constitution gives a right, and facts have been proved which prima facie show an infringement of that right, it is for the person alleged to have infringed that right to justify the infringement and not for the person whose right has been infringed to exclude all circumstances of justification. Indeed Section 42 of the Constitution of the Federal Republic of Nigeria 1979 Cap. 62 Laws of the Federation of Nigeria has given E the appellant the right to seek redress in court by the way of the application he moved in the High Court, for sub section (1) of the said section 42 of the Constitution stipulates thus:-

F *42(1) Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress".* The provisions of the chapter contravened in this case is Section 32 (l)(c) of the Constitution supra.

G Now, what facts did the appellant prove by way of his affidavit in support of his application? The salient depositions are to my mind as follows:-

H *"2. That I am the Chairman, Board of Director of Broad Based Mortgage and a licensed Mortgage Finance Institution although the license was not renewed at a screening exercise of mortgage institutions by the governing body sometimes early this year.*

*6. That as a Chairman, Board of Directors, particularly of Broad Based Mortgage Finance Company Limited my participation in the affairs of the company is limited to making major policies at the Board level for management*



9. *That I did not even know that there was any transaction or relationship between Broad Based Mortgage Finance Company Limited and the 1st Respondent until some times early this year when the 1st Respondent purported to be claiming some money owned by Broad Based Mortgage Finance Company Limited from among others, myself.* B

10. *That I did not care to be particular about this claim against me because I considered it as irregular and as an instrument of black-mail since I was never a party to the transaction nor did I guarantee it.*

13. *That surprisingly the Respondents filed a complaint with the Nigeria Police Force at the Federal Investigations & Intelligence Bureau (FIIB) Alagbon, Ikoyi - Lagos for theft against me in respect of their claim, if any, against Broad Based Mortgage Finance Company Limited.* C D

14. *That on 20th July, 1995 the 2nd Respondent led and directed a plain cloth Police Officer from the Federal Investigations and Intelligence Bureau (FIIB) Alagbon, Ikoyi - Lagos who followed him to my office to arrest me.*

15. *That I was detained for about 4(four) hours at the Federal Investigations and Intelligence Bureau (FIIB) Alagbon,, Ikoyi -Lagos.* E

16. *That I have perused through the entry book of the Police for the day and I say that the complaint by the Respondents for which I was arrested was theft.* F

In a reply to a letter written by the lawyers to the appellant, annexed to the affidavit, the respondents' lawyer stated inter alia thus:-

10. *"We are aware that your client was invited several times to clarify issues with the FIIB, which he refused to honour. However, I accompanied one of the officers of FIIB to your client's office on or about 20th July 1995, with another invitation. On that occasion he was available and was duly notified. Instead of honouring the invitation, peacefully, he decided to overawe the official and intimidate him, so that the invitation could be aborted. This was stoutly resisted....."* G H

**WE ARE NOT AWARE OF ANY ARREST AND DETENTION ON "THE DAY IN QUESTION.**

*Our position is that your client, as the chairman of the Board*

*of Directors of Broad Based Mortgage Finance Limited, and all other directors are responsible for the proper management of the company, and in the event of insolvency must be held liable to explain and resolve the company's debt problem until repayment or the company's liquidation. We therefore will continue to pressurize them*  
 B *for the settlement of the debt".*

In the counter-affidavit of the respondents the following facts were deposed:-

*"29. That I know as a fact the 2nd Respondent only reported a*  
 C *case of issuance of Dud cheques against Broad Based Mortgage Finance Company to the Police.*

*30. That apart from laying before the Police the formal report of issuance of Dud cheques by the 2nd Respondent against Broad Finance Company, the 1st and 2nd Respondents did nothing about*  
 D *the invitation and interrogation of the Applicant by the Police or any other person at all.*

*31. That the Respondent did not arrest the Applicant*

*32. That the Respondents did not detain the Applicant.*

*33. That the Respondents did not instigate, direct or procure*  
 E *the arrest and detention of the Applicant.*

*34. That the Police only invited and interrogated the Applicant and the Applicant was never arrested or detained by the Police to the knowledge of the Respondents.*

*35. That the Respondents have no power to arrest or detain*  
 F *the Applicant or any person at all.*

*36. That I know as a fact that after the Police have interrogated the Applicant about the issuance of Dud cheques by Broad Based Finance Limited and the Applicant has admitted knowledge of same*  
 G *and undertook to ensure that the sums on the Dud cheques are redeemed, he left the office of the Police, FIIB Alagbon Close, Lagos".*

Considering the above reproduced facts deposed by both sides to the Litigation, what are the facts that have been proved in support of the application, or that have shown infringement of the applicant's  
 H right? None, I think. In the first place the claim of the applicant/appellant was premised on unlawful arrest and detention by the police not the respondents (although at the instance of the respondents). Secondly, the assertion that the applicant was alleged to have been detained for theft, was not proved, as the applicant did not exhibit any

document to that effect. Thirdly there was admission of the allegation of indebtedness, which was the cause and root of the whole problem which triggered off the application at the Lagos High Court. It is very clear that series of cheques that bounced were issued by the appellant's company, (acts which were criminal in nature), for which the respondents were at liberty to resort to the police for their intervention, by reporting the matter to them. As citizens of Nigeria they have the choice to exercise their legal rights of placing their grievance before the police, being custodians of law and order, and that is where their own impute stops. Whatever action the police takes thereafter is not solely their responsibility and they are not solely liable. In this vein, the reliefs sought by the applicants against the respondents should not be against them alone if at all they instigated the action. If at all there was 'arrest' and detention, it was not done by the respondents, but the police who had the authority to do so, At most the police should have been joined. The 'arrest', 'invitation', and or detention may have been caused by the steps taken by the respondents, but as I have said earlier on the respondents were exercising their legal rights to seek the police intervention. Indeed no one can deprive any citizen of that right more so when there was good ground for the action taken by the police, as it was not as a result of mere suspicion, but Dud cheques were actually given, as was proved by the annexure to the counter-affidavit. In this regard, I am of the view that the case of *Dumbell v. Roberts* 1944 1 A.E.R. 326 is of assistance. In the circumstances, I resolve the above issues in favour of the respondents, and dismiss the related grounds of appeal.

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Ogebe, JSC. I agree with him that the appeal is devoid of merit and deserves to be dismissed. I also dismiss it, and abide by the orders made in the lead judgment.

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### **TABAI JSC**

This suit was commenced at the High Court of Lagos State by way of an application for the ENFORCEMENT of the Applicant/Appellant's Fundamental Rights under Section 42(3) of the Constitution of the Federal Republic of Nigeria 1979. The reliefs claimed include one for a declaration that his arrest and detention on the

20th of July 1995 was unlawful, unconstitutional and a gross violation of his fundamental rights, N10,000,000.00 (ten million naira) damages for the unlawful and unconstitutional arrest, N10,000,000.00 (ten million naira) damages for unlawful and unconstitutional detention and N10,000,000.00 (ten million naira) damages for loss of participation and attendance at a business dinner on same date organised by and at his instance. He also claim a perpetual injunction.

The application was supported by a 31 paragraph affidavit. The relevant facts deposed to in the affidavit are that the Applicant was the Chairman of the Board of Directors Broad Based Mortgage Finance Company Ltd. and his participation in the company was limited to making major policy decisions of the company. That he was not even aware of any transaction or business relationship between his said company and the 1st Respondent until sometime early 1996 when the 1st Respondent made some money demand on his said company. That he never cared about the money claim because he was neither a party nor a guarantor to any transaction. That surprisingly the Respondents filed a complaint of theft against him in respect of their claim, if any, against Broad Based Mortgage Finance Company Ltd. That on the 20th July 1995 he was arrested under the direction of the 2nd Respondent and was detained for about four hours. He emphasised that he perused through the Police Entry Book and saw that the report to the Police for which he was arrested and detained was theft. And that because of the arrest and detention he could not attend and participate at the business dinner on that day. The Respondents also filed a counter-affidavit of 43 paragraphs wherein some 25 paragraphs of the supporting affidavit were not only denied but categorically stated to be false. They deposed that Broad Based Mortgage Finance Ltd. of which the Applicant/Appellant was the Chairman was, to the knowledge of the Applicant, indebted to the 1st Respondent in the sum of \$42 million. That for the settlement of the aforesaid debt Broad Based Mortgage Finance Ltd. issued two cheques Exhibits "A" and "B" which were however returned unpaid. This was in November 1993. Again in January 1994 two cheques Exhibits "C" and "D" were issued for the same purpose and which were also returned unpaid. Following the failure of Broad Based Mortgage Finance Ltd. to redeem the debt, the 1st Respon-

dent appointed the 2nd Respondent as its agent to recover the debt which had then risen to N2.4 million. Pursuant thereto the 2nd Respondent lodged a complaint about the issuance of Dud cheques to the F.I.I.B. That in the course of its investigations the Police invited both the Managing Director of Broad Based Mortgage Finance Ltd. and the Applicant/Appellant its Chairman. That the invitation of the Applicant by the Police was entirely at Police discretion. That apart from making a formal report about the issuance of Dud cheques against Broad Based Mortgage Finance, the Respondents did nothing about the invitation and interrogation of the Applicant or any other person-

The above represents the salient facts in the application. In his ruling the learned trial Judge held, in substance, that the issuance of Dud Cheques was a criminal offence for which a report was rightly made to the Police and following which report, the Police had the authority, under Sections 20 and 24 of the Police Act, to arrest, search and detain any suspect. The court held, in conclusion that the arrest and interrogation of the Applicant did not infringe his fundamental rights and the application was accordingly dismissed.

The appeal before the court below was dismissed. In its view there was nothing in the affidavit to justify a finding that the Applicant/Appellant's fundamental rights were infringed.

In the first place issuance of Dud Cheques is a criminal offence under Section 1 of the Dishonoured Cheques (Offences) Act Cap D11 Laws of the Federation of Nigeria 2004 and for which the Respondents were entitled to make a report to the Police. To substantiate their allegation they exhibited the alleged Dud Cheques as Exhibit "A", "B", "C" and "D". The Appellant on the other hand alleged that the report made by the 2nd Respondent and for which he was arrested and detained was that of "theft" which allegation, he farther asserted, was recorded in the Police Diary. The said Police Diary was not produced in evidence.

The concurrent decision of the two courts below is that the assertion by the Appellant about his arrest and detention for theft was not proved. I have no cause to interfere with this concurrent finding. Section 2 of the Dishonoured Cheques (offences) act provides:

*"Where any offence under this Act by a body corporate is proved*

*to have been committed with the consent of, or connivance of, or to be attributable to any neglect on the servant or agent of the body corporate (or any person purporting to act in any such capacity) he, as well as the body corporate shall be deemed to be guilty of offence and may be proceeded against and punished in the same manner as individual."*

Paragraphs 25(a) (b) and (c) of the counter affidavit which were not denied shows that the Appellant had held out himself as a person with the capacity to act for and on behalf of Broad Based Mortgage Finance Ltd. and could, at the discretion of the Police, be proceeded against.

On the whole therefore I do not see any reason for any interference with the decisions of the two courts below. I fully agree with the reasoning and conclusion of Ogebe JSC that this appeal lacks merit and I also dismiss it. I abide by the costs as assessed in the lead judgment.

### **MUHAMMAD JSC**

After having been granted leave by the trial court (Lagos State High Court of Justice) to enforce his fundamental rights, the appellant herein and applicant at the trial court, filed on 11th March, 1996, a motion on notice which prayed for the following reliefs:

"i. A DECLARATION that the arrest of Chief (Dr.) Oladele Fajemirokun the applicant herein on Thursday 20th July, 1995 at his office at No. 90, Awolowo Road, South-West, Ikoyi - Lagos, at the instigation and instance of the 2nd Respondent, acting as Agent of the 1st Respondent, who directed and accompanied an Officer of the Nigeria, Police Force. Federal Investigations & Intelligence Bureau (FIIB), Alagbon, Ikoyi - Lagos, based on a baseless and false allegation of theft is illegal, unconstitutional and a gross violation of his fundamental rights.

ii. A DECLARATION that the detention of Chief (Dr.) Oladele Fajemirokun following the arrest of Thursday 20th July, 1995 at the instance of the Respondents is unlawful, unconstitutional and a gross violation of his fundamental rights.

iii. N10,000,000.00 (ten million naira) damages for unlawful and unconstitutional arrest of the applicant.

iv N10,000,000.00 (ten million naira) damages for unlawful and unconstitutional detention of the applicant.

N10,000,000.00 (ten million naira) damages for loss of participation and attendance of the business dinner at the Chinese Restaurant of Airport hotel, Ikeja -Lagos in honour of Mr. Gordon Downey by Mobell Holdings Limited in which the Applicant is the Chairman, Board of Directors and at whose instance the dinner was organized on the fateful Thursday 20th July, 1995.

Perpetual injunction restraining the Respondents by themselves, Agents privies, or whomsoever acting through them or for them from further interfering with his fundamental human rights in the illegal and unconstitutional manner.

AND for such further order or other Orders as this Honourable court may deem fit to make in the circumstances of the case.

The motion was supported by a 31 paragraph affidavit. The respondents filed a counter affidavit of 43 paragraphs. Arguments were proffered by the parties. At the end of hearing, the learned trial judge found as follows:

*“From the above, the following are established, that the applicant was chairman of Broad Based Mortgage Finance Company Limited, that the said company was indebted to the respondent for some N2million that the Company was, unable to pay its indebtedness, that the said company had issued some dud cheques, that the applicant was invited by the Police and interrogated.”*

The learned trial judge held that the applicant had not established that his fundamental rights had been breached by the respondents. He found the motion on notice lacking in merit and he struck it out.

The appellant appealed against the trial court’s decision to the court below. The court below affirmed the trial court’s decision.

This is a further appeal by the appellant to this court. Briefs were filed and exchanged by the parties. Learned counsel for the appellant formulated two issues, vis:

*“1. Whether the particulars as contained in the Appellant’s processes have not sufficiently made out a case for the violation of his fundamental rights.*

*2. Whether the Applicant was bound to join the Police as a party having identified the Respondent as responsible for violation of*

*his rights”*

I think it is pertinent to remind ourselves that chapter four of the 1979 constitution (under which this matter was determined) dealt with provisions relating to fundamental rights. These provisions are now contained in chapter five of the 1999 constitution. Section 42 of the 1979 constitution and now section 46 of the 1999 constitution confers special jurisdiction on a State High Court to have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section where any person alleges that any of the provisions of this chapter, that is, chapter five, has been, is being or likely to be contravened. The High Court has been empowered under the same section to make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any right to which the person who makes the application may be entitled under this chapter. Neither the constitution of 1979 nor that of 1999 has defined the term “fundamental rights”. The Fundamental Rights (Enforcement Procedure) Rules, (The Rules for short), which the Chief Justice of the Federation made, pursuant to the powers conferred upon him by section 42 (3) of 1979 and section 46 (3) of the 1999, assign the following interpretation to the term “Fundamental right”, to mean :

*“any of the Fundamental Rights provided for in chapter four of the constitution”.*

See: Order 1, section 1(2) of the rules. These rules came into force on 1st January, 1980. The new rules which came into force on May, 29, 2008, abrogated the 1979 Rules. These rules expand the interpretation of fundamental Rights to include any of the rights stipulated in the African Charter. See: Order 1(1) (b) thereof.

Thus, the fundamental rights provided by the constitution, to my mind, and upon careful examination, can be classified into two categories for the purpose of their observance and enforcement. Firstly, there are rights which must be observed whenever the occasion for their observance has arisen. They are intrinsic to the occasion and cannot be divorced from the occasion. They are generally procedural rights and are embodiment of a fair trial in courts or tribunals of democratic society, for example right of an accused to defend himself in person or through a legal practitioner of his choice; the right to



an interpreter where the accused does not understand the language of the court. These are intrinsic to the trial and failure to observe such rights is a valid ground of appeal. See: Legal Practitioners Disciplinary Committee V. Fawehinmi (1985) 2 NSCC 988. The second category of the fundamental rights comprises of those rights that are enforceable by the High. Court under section 42 of the constitution. B  
The contention of the appellant before the trial court was that there was infraction on his rights as provided by the 1979 constitution that he was invited by the Police, that is FIIB, Alagbon, Lagos, at the instance of the respondents; that he was arrested and detained on 20th C  
of July, 1995 and that he missed a business dinner, that he was unaware of any transaction between his company that is Broad Based Mortgage Finance company Ltd. of which he was chairman and 1st respondent, that the 2nd respondent led Policemen to his office on 20th July, 1995, and that he was detained for four hours at the FIIB, D  
Alagbon, Ikoyi, Lagos and that the entry in the Police record showed that he was arrested for theft.

The respondents' version is that the appellant was chairman of Broad Based Mortgage Finance Limited, that the said company was indebted to the respondents for the sum of N2 million, that the said E  
company issued series of cheques to pay up the debt but the cheques were returned unpaid. That the 1st respondent appointed the 2nd respondent as agent to recover the said debt, that the 2nd respondent legally lodged a complaint with the FIIB, Alagbon, Ikoyi, Lagos, F  
for the issuance of dud cheques. That it was the Police who invited the applicant/appellant for interrogation and that the appellant admitted knowledge of the debt to the Police. That up to date the debt had not yet been liquidated. The respondents did not report a case of theft to the Police. G

In his submissions before this court as contained in the brief of argument, learned counsel for the appellant, argued that from the reliefs sought by the appellant at the trial court, one could see that what the appellant sought to enforce is his fundamental right of freedom of movement as he sought to declare his arrest and detention H  
by the respondents on a baseless and false allegation of theft as illegal, unconstitutional and a gross violation of his fundamental human rights. In proving that the arrest and detention were unlawful, unconstitutional and a gross violation of his fundamental rights, the ap-

pellant deposed to a 31 paragraph affidavit evidence and clearly showed that both the arrest and detention were unlawful, unconstitutional and a gross violation of his rights. All the particulars relating to the arrest and detention are clearly deposed to in the affidavit and of course what appellant suffered as a result of the arrest and detention was clearly proved in the affidavit and the exhibits attached. Learned counsel for the appellant submitted further that if a person alleges that he was arrested and detained, the burden of proving the legality of both the arrest and detention rests squarely on the respondents. That where the constitution gives a right, and facts have been proved which prima facie showed an infringement of that right, it is for the person alleged to have infringed that right to justify the infringement and not for the person whose right has been infringed to exclude all circumstances of justification. The particulars of allegations of theft, the circumstances under which the arrest without warrant was done and the detention are all contained in the affidavit evidence of the appellant. In support of his application, learned counsel cited several Court of Appeal cases in support of his submission such as; Iyere V. Duru (1986) 5 NWLR (Pt.44) 665; Ekpu V. A - G of the Federation (1998) 1 HRLRA 447, 453 - 454.

Learned counsel for the respondents filed a 43 paragraph counter-affidavit in opposition to the appellant's affidavit in support. He argued that the affirmative assertions contained in the respondents' counter-affidavit which were not challenged by the appellant by way of further affidavit knocked the bottom out of the appellant's claim. He further submits that in all civil cases the standard of proof is in preponderance of evidence and balance of probability and a party who is claiming a relief must adduce credible and relevant evidence in proof of his case. He cited and relied on the case of Olaniyan V. Odeyoyeni (1996) 7 NWLR (Pt.459) 205 at P 210 paragraph 'E'. It is the duty of the court to consider and act on only the evidence produced before it and never to indulge in speculation as to what might have happened. Indeed, a judge should not subject his own supposition for the testimony of witnesses given on oath before him. Learned counsel cited: Orlue V. Nepa (1998) 7 NWLR (pt 557) at 200 C -D; Ihewuezi V. Ekeanya (1989) 1 NWLR (pt 96) 234; among others. Learned counsel argued that it was incumbent on the applicant/appellant that he perused through the Police entry book for the

day to exhibit the extract from the Police entry book showing that the complaint against him was what he alleged. The duty is not on the respondents to do so.

From the claims of the appellant who was the applicant at the trial court, the duty to establish that his fundamental right was breached, rested squarely on the appellant. It is trite law that he who asserts must prove. See: Section 135 - 137 of the Evidence Act which lay down the fundamentals of such proof:

*"135. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

*136. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

*137. In civil cases the burden of first proving the existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings."*

That is the position of the existing law. It would thus amount to re-writing the law, if, as learned counsel for the appellant would want us to believe, that:

*"If a person alleges that he was arrested and detained, the burden of proving the legality of both the arrest and detention rests squarely on the Respondents".*

This, to say the least, is putting the law (up-side down) in a reversed position. Learned counsel for the appellant argued earlier that:

*"From the reliefs sought by the appellant at the trial court, one could see that what the Appellant sought to enforce is his fundamental right of freedom of movement".*

Thus, it is certainly the appellant who would fail if no evidence at all were given on either side. The appellant was therefore, bound to prove the existence of those sets of facts which curtailed or threatened to curtail his right of freedom of movement. Further, appellant claimed that he saw a complaint of theft against him recorded in the Police record book. It is not the duty of the Police to tender the extract of the record book where appellant saw the complaint of theft

written against his name. It is the duty of the appellant to tender such extract in evidence. Throughout the affidavit evidence, that was never exhibited. I believe this burden will not shift from the appellant to the respondent who flatly denied the allegation, except where the appellant had led evidence which reasonably satisfied the trial court that those sets of facts sought to be proved were actually proved. This, the appellant failed to do and the failure deprived him of the right to shift the burden on the respondents. See: Oyefesor V. Coker (1999) 1 NWLR (pt 588) 654 at p. 660. This first issue lacks substance and it fails.

On the second issue, it is the submission of learned counsel for the appellant that the respondents were identified by him as the people that instigated the Police into arresting and detaining him. It follows that it is the same respondents that are responsible for the violation of his rights and against whom he has a claim, and the non-joinder of the Police by the appellant ought not to have defeated his case. He cited and relied on the case of Afolayan V. Ogunrinde (1990) 1 NWLR (pt127) 369 at p. 394 D -E, among other cases cited.

Learned counsel for the respondents submitted on issue two that from the claim of the appellant and his depositions in the affidavit and the positive and affirmative denials of the respondents as contained in their counter-affidavit before the trial court, it became necessary and desirable on the appellant to join the police as a party who would in one way or the other assist the court in arriving at the proof or disproof of the case of the parties before it. Further, the appellant having claimed that the Police arrested and detained him for a charge of theft, it became incumbent on him to join the Police as a party in the case. Learned counsel for the respondents submitted that the appellant deliberately kept the Police away and the entry of theft he alleged was in the Police entry book because if he had brought either of them before the court, the content of the entry book and the evidence of the Police would have been against him and that he would be caught by the provisions of section 149 (d) of Evidence Act. Nonjoinder of the Police defeats the appellant's claim.

As seen earlier, in this judgment, some of the findings of the trial court include the following:

*"That the applicant was chairman of Broad Based Mortgage Finance Company Limited, that the said company was indebted to*

*the respondent for some N2 million, that the company was unable to pay its indebtedness, that the said company had issued some dud cheques, that the applicant was invited by the Police and interrogated. It is the duty of the Police to apprehend an offender upon a complaint that an offence had been committed, the issuance of a dud cheque is an offence under our laws.* B

*During the process of investigation and interrogation, the Police are empowered to arrest, search and detain the suspect. See: sections 20 and 24 of the Police Act. During this period the fundamental rights of the suspect was (sic) not being infringed as it was the normal duty of the Police to arrest, search and detain a suspect. See: sections 20, 24 and 25 of the Police Act as well as sections 3 and 6 of the Criminal Procedure Act.”* C

The court below observed as follows:

*“The appellant who alleges seeing the Police record which reflected the complaint of theft against him did not produce the said Police who effected his alleged arrest as party to his suit at the lower court”* D

The nexus between the appellant, the respondents and the Police has been clearly spelt out by the appellant himself in the following paragraphs of his affidavit in support: E

*“13. That surprisingly the Respondents filed a complaint with the Nigerian Police Force at the Federal Investigations and intelligence Bureau (FIIB), Alagbon, Ikoyi-Lagos for then against me in respect of their claim, if any, against Broad Based Mortgage Finance Company Limited.* F

*14. That on 20th July, 1995 the 2nd Respondent led and directed a plain cloth Police Officer from the Federal Investigations and Intelligence Bureau (FIIB) Alagbon, Ikoyi - Lagos who followed him to my office to arrest me.* G

*15. That I was detained for about 4 (four) hours at the Federal Investigations and Intelligence Bureau (FIIB) Alagbon, Ikoyi -Lagos.*

*16. That I have perused through the entry book of the Police for the day and I saw that the complaint by the Respondents for which I was arrested was theft.* H

*17. That the ADC to Lt. General Oladipo Diya, the Chief of General staff who happened to be at the Federal Investigations and Intelligence Bureau (FIIB), Alagbon Ikoyi - Lagos on that day and*

*moment in respect of a different matter was surprised and shocked to confirm from the entry book/record that I was arrested and detained on charges of alleged theft.*

18. That I am a conscientious Nigerian Businessman and have never been involved in any theft whatsoever.

B “19. That as soon as I was detained, the Police stripped one of my shoes and seized my Mobile Telephone from me to deny and cut me off from any communication,

C 20. That because of this arrest and detention I could not attend the business dinner organized by Mobell Holdings Limited, of which I am the Chairman, Board of Directors in honour of Mr. Gordon Downey the outgoing Managing Director/Chief Executive of Original Box Packaging of John Holt for the same 20th July, 1995.

D 21. That I lost all the business opportunity that was for the dinner of that day and which I had put in considerable time, resources and contact to organize”

The respondents furnished their own side of the facts and as to the involvement of the Police. They stated in their counter-affidavit as follows:

E “8. That the Applicant is the Chairman of the Board Based Mortgage Finance Limited while one Mr. Yomi Ogunnusi is the Managing Director of the Company.

F 9 That Broad Based Mortgage Finance limited is customer of the 1st Respondent Bank at Akoka Branch where it maintains Current Accounts.

10 That the facts deposed to in paragraph 9 above, is with the full knowledge of the Applicant/Dele Fajemirokun.

G 11 That following the aforesaid relationship between the 1st Respondent and Broad Based Mortgage Finance Limited, the latter became indebted to the former to the sum above N2 million.

H 12 That the settlement of the debt. Broad Based Mortgage Finance Limited issued two FSB International bank Limited Cheque No. 10834 dated 11/11/93 and cheque No. 10835 dated 19/11/93 for the sum of N1million each paid in same to the 1st Respondent

13 That the 2 cheques referred to in paragraph 12 above were returned unpaid. Copies of the said cheques are hereby attached and marked Exhibits A & B.

14 That to cover up for the returned cheques aforesaid an-

other two First African Trust Bank limited Cheques Nos. 299915 and 299916 for N400,000.00 and N2 million respectively were issued and paid into the Accounts of Broad Based Mortgage Finance Limited on 31/12/93 with the 1st Respondent at its Akoka branch.

15 That on the 4th of January, 1994, the two cheques referred to in paragraph 14 above were again returned unpaid. Copies of the two cheques are hereby attached and marked Exhibits 'C&D'.<sup>B</sup>

16 That Broad Based Mortgage Finance Limited again issued FSB International Bank Limited Cheque No. 068338 for N2.4 Million which was remitted on 13th 01/94 but was again returned as having bounced on 17/01/94.<sup>C</sup>

17 That after these circles of returned cheques the Account of the company Broad Based Mortgage Finance Limited was debited for the N2.4 Million.

18 That when the company - Broad Based Finance Limited refused and/or failed to redeem the sum contained in the bounced cheques, the 1st Respondent on the 8/07/94 appointed the 2nd Respondent as Agent of Recovery of the debt of N2.4m against the Company. Copy of the said letter is attached hereto and marked Exhibit 'E'.<sup>E</sup>

19 That on instructions, the 2nd Respondent legally lodged a formal complaint at FIIB, Alagbon Close, Lagos State against Broad Based Mortgage Finance Limited for the criminal act of issuance of Dud Cheques.

20 That during the course of the Police investigation into the complaint of issuance of Dud cheques, the Police invited Mr. Yomi Ogunusi, the Managing Director of Broad Based Mortgage Finance Limited for interrogation.<sup>F</sup>

21 That the Police in furtherance of their investigation to the complaint of issuance of Dud cheques laid before it by the 2nd Respondent also invited the applicant who is the Chairman of Broad Based Mortgage Finance Company for interrogation for the complaint of issuance of Dud cheques.<sup>G</sup>

22 That it is the complete discretion of the Police to determine people to be invited for interrogation, arrest or detention while investigating on allegation of crime.<sup>H</sup>

23 That the invitation of the Applicant for interrogation was purely at the discretion of the Police, FIIB, Alagbon, Lagos.

24 That the Applicant on being interrogated by the Police admitted knowledge of the debt for which the company issued the Dud cheques, pleaded for the company and undertook to revert to the Police after ensuring that the sum/sums covered by the Dud cheques are redeemed.

B 25 That the 2nd Respondent informed me and I really believed him as Follows:

C a) That at the FIIB Alagbon Close, Ikoyi, Lagos, the Applicant in the presence of the 2nd Respondent indicated that a Board Committee of Broad Based Mortgage Finance headed by one of its Directors - Mr. Femi Sodipo was working hand in hand with some consultants notably Messrs. Kehinde Osinowo & Co. to recover the debt of the company and to settle the company's creditors including the 1st Respondent Bank,

D b) That at FIIB Alagbon, Close, Lagos, the Applicant stated further that the Committee referred to in paragraph 25(a) above was expected to submit its report to the Board of Directors of the company of which he the Applicant was and still the Chairman on Thursday 24/7/95.

E c) That FIIB Alagbon Close, Lagos in the presence of the 2nd Respondent the applicant promised to revert to the officials of the FIIB Alagbon Close, Lagos after the meeting of the company of the 27/07/95 and submitted a repayment proposal of the sums earned by the Dud cheques.

F 24 That the Applicant on being interrogated by the Police admitted knowledge of the debt for which the company issued the Dud cheques, pleaded for the company and undertook to revert to the Police after ensuring that the sum/sums covered by the Dud cheques are redeemed.

G 25 That the 2nd Respondent informed me and I really believed him as Follows:

H a) That at the FIIB Alagbon Close, Ikoyi, Lagos, the Applicant in the presence of the 2nd Respondent indicated that a Board Committee of Broad Based Mortgage Finance headed by one of its Directors - Mr. Femi Sodipo was working hand in hand with some consultants notably Messrs. Kehinde Osinowo & Co. to recover the debt of the company and to settle the company's creditors including the 1st Respondent Bank,



b) That at FIIB Alagbon, Close, Lagos, the Applicant stated further that the Committee referred to in paragraph 25(a) above was expected to submit its report to the Board of Directors of the company of which he the Applicant was and still the Chairman on Thursday 24/7/95.

c) That FIIB Alagbon Close, Lagos in the presence of the 2nd Respondent the applicant promised to revert to the officials of the FIIB Alagbon Close, Lagos after the meeting of the company of the 27/07/95 and submitted a repayment proposal of the sums earned by the Dud cheques.

26 That I know as a fact that up till now the Applicant has failed and continued to fail to honour his pledge/undertaking.

27 That when the Respondents waited in vain after 27/07/95 given, by the Applicant as enumerated in paragraph 25 ©, the 2nd Respondent on the 4th September, 1995 wrote to the Applicant to honour the undertaking he made to the Police, at FIIB Alagbon Close, Lagos. Copy of the said letter is herewith attached and marked as Exhibit 'F'.

28 That the Applicant never replied the letter referred to in the paragraph above.

29 That I know as a fact that the 2nd Respondent only reported as case of issuance of Dud Cheques against Broad Based Mortgage Finance Company to the Police.

30 That apart from lying before the Police the formal report of issuance of Dud cheques by the 2nd Respondent against Broad Based Mortgage Finance Company, the 1st and 2nd Respondents did nothing about the invitation and interrogation of the Applicant by the Police or any other person at all.

31 That the Respondents did not arrest, the applicant.

32 That the Respondents did not detain the Applicant.

33 That the Respondents did not instigate, direct or procure the arrest and detention of the Applicant.

34 That the Police only invited and interrogated the Applicant and the Applicant was never arrested or detained by the Police to the knowledge of the Respondents.

35 That the Respondents have no power to arrest or detain the Applicant or any person at all.

36 That I know as a fact that after the police have interrogated

*the Applicant about the issuance of Dud cheques by Broad Based Mortgage Limited and the Applicant has admitted knowledge of same and undertook to ensure that the sums on the Dud cheques are redeemed, he left the office of the Police, FIIB, Alagbon Close, Lagos.*

B *37 That the Applicant instead of honouring his undertaken of ensuring payment of the sums on the Dud cheque have resulted into taking this action against the Respondents so that he can frustrate the Respondents from pursuing the complaint of issuance of Dud cheques reported by the Respondents against Broad Based Mortgage Finance Limited.*

C *38 That the Respondents did not report a case of the theft against Broad Based Mortgage Finance and reported no case at all against the Applicant as a person.”*

D From the above, it appears to me that I prefer to go along with the two lower courts in their decisions in holding that the Police is a necessary party. They played a number of key roles which no one would explain better than themselves, for example, the arrest, detention and temporary denial of use and confiscation of the appellant’s mobile telephone. The Police is a necessary party in this case. They E ought to have been made co-defendants in the first instance or be joined as a necessary party in order to enable the court effectively and completely adjudicate upon and settle all the questions involved in the case especially those relating to the Police. See: Akanbi & Ors. V. Fabunmi & anor (1986) 2 SC 431 Failure to make the Police a F party is fatal to the claims of the appellant/applicant.

I have no hesitation in agreeing with my learned brother, Ogebe, JSC, in his reasoning and conclusion that this appeal lacks merit and must fail, I hereby dismiss the appeal. I abide by consequential orders made in the leading judgment of my brother, Ogebe, G JSC, including order as to costs.

H