

SUPREME COURT OF NIGERIA

24TH JUNE, 2011. SC.26/2008

**CORAM:- D. MUSDAPHER, C. M. CHUKWUMA-ENEH, O.
O. ADEKEYE, S. GALADIMA, B. RHODES-VIVOUR, JJSC**

1. WAHABI ADEJOBI

2. STELLA OLUGBENJO APPELLANTS

V.

THE STATE RESPONDENT

JUDGMENTS - Appeals - Failure to appeal - Effect - Party that fails to appeal against the decision of trial Court - Cannot on further appeal to Supreme Court - Seek the setting aside of such decision (H1)

PRACTICE & PROCEDURE - Performance of duties - Regulated by statute - Where a statute under which an issue is to be raised - Has provided a procedure for raising such issues - That procedure and no other must be followed (H2)

CRIMINAL LAW - Stealing - Mens rea - Consists of an intention not only to take away - Property in question from possession of the owner - But also an intention to permanently deprive him of it (H3)

CRIMINAL PROCEDURE - Crime - Proof - It is left to the prosecution to call the number of witnesses required to prove its case - It is immaterial that the customers whose accounts were manipulated were not called as witnesses (H4)

APPEALS - Concurrent findings - Supreme Court does not interfere - Save where the findings are perverse (H5)

FACTS

Defendants/appellants along with one Suleiman Adeyemi (now deceased) were charged with the offence of conspiracy and stealing before the High Court of Oyo State Holden at Ibadan. By Order of the trial court made pursuant to a Motion on Notice, respondent amended the existing charge to include "Fraudulent False

Accounting.” Appellants took fresh plea in respect of the amended charge. At the trial respondent, called three witnesses (PW1, PW2 and PW3) and also relied on the confessional statements made by appellants in respect of the crime. Both appellants gave evidence for their respective selves and called no other witness.

Appellants’ contention is that Trans International Bank is a non-juristic personality whose property cannot be stolen. It is also in contention that respondent failed to call the customers whose accounts were manipulated. At the end of the hearing, learned trial Judge convicted each appellant of the offences of Conspiracy and Stealing. They were individually sentenced to four years imprisonment on each of the counts without an option of fine. Dissatisfied, appellants separately filed Notices of Appeal at Court of Appeal, Ibadan Division. The court unanimously allowed the appeal in part. It confirmed the conviction of appellants but reduced their sentences to 2 years imprisonment without an option of fine on both counts, ordered to run concurrently. Aggrieved further, appellants appealed to Supreme Court and filed separate Notices of Appeal.

ISSUES FOR DETERMINATION

1. ISSUE ONE

Whether, having regard to the totality of the surrounding facts and the evidence adduced by the prosecution, the conviction of the 1st Appellant of the charge of Conspiracy by the trial court is sustainable as to warrant its affirmation by the court below?

2. ISSUE TWO

Whether the lower court was right in affirming the conviction of the 1st Appellant for the offence of stealing N7,000,000.00 (Seven Million Naira), property of “Trans International Bank, Iwo Road Branch, Ibadan” (a non juristic person) and which the learned trial Judge suo motu altered to be a juristic person and therefore unilaterally amended the charge sheet without due process?

HELD (Unanimously dismissing the appeal and confirming the judgment of Court of Appeal per **GALADIMA JSC**)

JUDGMENTS - Appeals - Failure to appeal - Effect

1. The appellants participated actively in the proceedings at the trial court, even after being aware of the amended new charges against them. There was no complaint against the order of the learned trial

judge. It is a settled principle of law that a party who has not appealed against the finding or decision of the trial court cannot on further appeal to this court seek the setting aside of such finding or decision. In short, a decision not appealed against binds all the parties:

It is too late in the day to raise the issue of non-compliance with Sections 340 (2) (b) of the Criminal Procedure Law cap. 39 Laws of Oyo State 2000.

The direction and order given in this case at page 30 by the learned trial Judge clearly set out above fulfilled the requirement of this provision. It cannot be correctly and reasonably argued that the trial of the appellants for the offence of conspiracy was conducted without the consent or direction of the judge. (p. 1625 C)

Performance of duties regulated by statute - Procedure

2. Simply put, the lower court has no jurisdiction to quash any information or count unless there has been an application to quash it at the trial court. It is trite that a question of law and jurisdiction can be raised at any time in the proceedings, but it is not a free for all procedure. Where a statute under which an issue or matter is to be raised, has provided a procedure for raising such issues or matter, that procedure, and no other must be followed

In the case at hand the procedure that must be followed to quash the information or count is as provided under the provision set out above. Failure to apply to quash it at the trial court renders both the grounds of appeal on this point and the issue raised thereon incompetent and I so hold and resolve this issue in favour of the Respondent. (p. 1626 B)

Stealing - Mens rea

3. In the case at hand prosecution has established that the sum of Seven Million Naira stolen through Exhibit H was property of a juristic person, the Bank, holding the said sum in trust for its diverse customers or depositors. Heavy weather was made of the fact that since the Respondent did not add "plc" to "Trans International Bank" in the information, the Bank is not a juristic personality which (sic) property can be stolen. To me this reasoning is puerile. The fact that the Respondent did not add the word "Plc" to Trans International Bank

will not diminish the fact that the Bank is a Public Liability company and indeed a juristic personality. Its property was stolen by the Appellants.

The Respondent is right. In my view, the Appellants are grasping at straws. The fact that “Plc” was not added to Trans International Bank is immaterial. Every case is determined on its own merit, and in this case, the owner of the stolen money is the said Bank, the Appellants were staff of the Bank, and they admitted that they took money from the Bank in an unlawful manner. The mens rea of stealing consists of an intention not only to take away the movable property in question from the possession of the owner but also an intention to permanently deprive him of such property

From the evidence led at the trial, the Respondent was able to prove beyond reasonable doubt, contrary to the impression created by the Appellants in their brief, that the essential ingredients of the offence of stealing were not established.

The lower courts were on firm ground when they held that the pieces of evidence adduced by the prosecution established the guilt of the Appellants. At page 93 lines 10 - 13 of the Record of Proceedings the learned trial court held as follows:

“I wonder what further evidence is required for proof of (sic) the prosecution. Both oral and documentary evidence in this case are quite overwhelming and compelling that this court has no alternative but to find both accused guilty of stealing as charged under count 2. After all the court can convict on the voluntary confession of an accused.”

In this case the 1st Appellant voluntarily confessed that he took the sum of N2,991,368.50 kobo from the vault of Trans International Bank which he shared out to himself and others. The 2nd Appellant, who was the Branch Accountant, also confessed that she took N900,000.00 from the Bank unofficially to give a friend in need. The money she took was not documented, the Branch Manager was not aware of this. Both Appellants could not justify their conduct and action which is illegally motivated. (p. 1630 E)

CRIMINAL PROCEDURE - Crime - Proof

4. The fact that, at the trial, the respondent did not call the customers whose accounts the appellants claimed that they used to defraud

their employer is immaterial. It is not fatal to the Respondent's case. It is left to the prosecution to call the number of witnesses required to prove its case. (p. 1632 A)

APPEALS - Concurrent findings - Interference

5. There are concurrent findings of the courts below that the prosecution proved beyond reasonable doubt that the Appellants conspired together with others to steal and did steal from the vault of their employer. It is now settled that where there are concurrent findings of two lower courts, this Court will not disturb such findings unless the findings were perverse. The Appellants have not shown to this Court any good reasons why the concurrent findings of the trial court and the court below must be disturbed by this court. B
C

In the light of all I have said I hold that this appeal be dismissed and it is accordingly so dismissed for lacking in merit. I affirm the judgment of the lower court delivered on 14/7/2006. (p. 1632 G) D

NOTABLE POINTS OF INTEREST

ADEKEYE JSC

1. Conspiracy - Meaning and purpose E

Conspiracy is a criminal offence not defined in the criminal or Penal Code. It is accepted as an agreement of two or more persons to do an act, which it is an offence to agree to do. As direct positive evidence of the proof between the conspirators is hardly capable of proof, the courts established the offence of conspiracy as a matter of inference to be deduced from certain criminal acts of the parties concerned. The bottom line of the offence is the meeting of the minds of the conspirators to commit an offence and the meeting of the minds need not be physical. (p. 1634 G) F
G

2. Powers of Court to amend charge and take fresh plea

I must point out that Section 208(1) of the Criminal Procedure Code gives the court the discretion to alter, add or frame a new charge at any time before judgment is pronounced. In allowing this, the court is not limited to the facts as alleged in the information. However the court is required to read and explain the new charge to the accused and record a fresh plea for the accused. It is also trite law that where there is an amendment to a charge, there shall be a fresh plea. The H

trial court in this case apparently complied with this procedure when the charge was amended. (p. 1635 F)

REPRESENTATION

Godwin Obla with S. O. Sani Esq. for the Appellants

B S. O. Ade Oye, Director-Legal Drafting, M. O. J. Ibadan, for Respondent

CASES REFERRED TO

- C ONIBU V. AKIBLU (1982) 2 SC 60 at 62-63
 FCDA v NAIBI (1990) 3 NWLR (pt.138) 270
 EWE V. THE STATE (1992)7 SCNJ 15 at 15 – 18
 OKAFOR V. THE STATE (1976) ANLR 307. At 310
 OHWOVORIOLE V. FRN (2003) 1 SC. (Pt. 1) at 10
 D ABACHA V. THE STATE (2002) 7 SC (Pt.1) 1 at 10
 Akinmeju v. The State (200) SCNLR. (pt.1) 90 at 778
 Babalola v. The State (1989) 4 NWLR (pt.115) 254 SC
 OKORO V. THE STATE (1998) 12 S.C. (pt.11) 83 at 89
 ONYIA v. ONYIA (1980) 1 N.W.L.R. (Pt.99) 514, AT 540
 E MADUKOLU V. NKEMDILIM (1962) All NLR. (Pt. 2) 581 at 590
 OYEDIRAN & ORS. V. THE REPUBLIC (1967). NMLR 122 at P:125
 AKAAR JOY V. KUTUKU DOM (1999) 9 NWLR (Pt.620) 538 at 547
 ANYADUBA and Anor v. NIGERIAN RENOWNED TRADING COMPANY LTD. (NRTC) (1992) 5 NWLR (pt.243) 535 at 553
 F

STATUTES REFERRED TO

- Criminal Procedure Law Cap. 31 Laws of Oyo State 1978, Section 240(2) (b)
 G Criminal Procedure Law Cap.39 Laws of Oyo State 2000, ss. 340 (2) (b), 346 (3) (b)
 Criminal Code Cap. 38 LFN 2004, s. 382
 Criminal Code Cap. 80 LFN 1990, s. 390

LEAD JUDGMENT BY GALADIMA JSC

This is further appeal against the judgment of the Ibadan Division of the Court of Appeal delivered on the 14th July, 2006 which allowed the appeal against the decision of the trial High Court in part and confirmed the conviction of the 1st Appellant but reduced his

sentence of 4 years imprisonment without an option of fine to 2 years imprisonment without an option of fine on both counts to run concurrently. The undisputed facts of this case leading to the judgment of the court below are hereunder set out:

By an information presented on 6/4/2000 by the office of the Director of Public Prosecution Oyo State Ministry of Justice, for leave to prefer charges of conspiracy and stealing, the learned trial Judge, M. O. Adio, J, (as he then was) gave consent pursuant to Section 240(2)(b) of the Criminal Procedure Law, Cap 31, Laws of Oyo State 1978, for preferment of a single charge of stealing against the appellants and another accused, one Sulaiman Adeyemi who later died during the trial at the Oyo State High Court.

By an Order of trial court of 23/04/2001, made pursuant to a Motion on Notice dated 20/04/2001, the Respondent amended the existing charge to include a "Fraudulent False Accounting." Thereafter the trial commenced and the Respondent called 3 witnesses (PW1, PW2 and PW3). The 2nd Appellant gave evidence for herself and called no other witness. After listening to the addresses of the respective counsel, the learned trial Judge convicted the 1st appellant of the offences of Conspiracy and Stealing. He was sentenced to 4 years imprisonment on each of the counts without an option of fine. The 2nd Appellant gave evidence for herself and called no other witness. After the address of her counsel the learned trial judge convicted her and was sentenced to 4 years without an option of fine.

Dissatisfied with their conviction, the appellants separately filed a Notice of Appeal to the court below. After the exchange of briefs by both parties to the appeal, the appeal was argued. The lower court delivered its judgment on 14/07/2005 in which it unanimously allowed the appeal in part, confirmed the conviction of the Appellants but reduced their sentences to 2 years without an option of fine on both counts, ordered to run concurrently.

Aggrieved with the judgment of the court below the Appellants appealed further to this Court and filed separate Notices of Appeal. Each contained 7 Grounds of Appeal. Parties filed and exchanged their briefs of argument and same were adopted and relied upon at the hearing of this appeal on 07/04/2011.

From the 7 Grounds of Appeal contained on the 1st appellants' Notice of Appeal the following 2 issues are distilled for the de-

termination of the appeal as follows:

“1. ISSUE ONE

Whether, having regard to the totality of the surrounding facts and the evidence adduced by the prosecution, the conviction of the 1st Appellant of the charge of Conspiracy by the trial court is sustainable as to warrant its affirmation by the court below? (Grounds 1, 2 and 5).

2. ISSUE TWO

Whether the lower court was right in affirming the conviction of the 1st Appellant for the offence of stealing N7,000,000.00 (Seven Million Naira), property of “Trans International Bank, Iwo Road Branch, Ibadan” (a non juristic person) and which the learned trial Judge suo motu altered to be a juristic person and therefore unilaterally amended the charge sheet without due process? (Ground 3).”

On her part, from the 7 Grounds of Appeal the 2nd appellant identified 3 issues for determination of the appeal as follows:-

“1. Whether in law the 2nd Appellant was properly convicted on the offence of conspiracy having regard to the totality of the surrounding facts and the evidence adduced when same was not proved beyond reasonable doubt? (covers grounds 4, 5 and 7).

2. Whether the lower court was right in affirming the conviction of the 2nd Appellant for the offence of stealing N7,000,000.00 property of “Trans International Bank, Iwo Road Branch, Ibadan” (a non-juristic person) which the learned trial Judge suo motu altered to be a juristic person and therefore unilaterally amended the charge sheet without due process? (covers ground 3. In view of the irreconcilable, contradictions and unresolved piece of evidence regarding the actual sum of money allegedly stolen by the 2nd Appellant in this case, whether the lower court was right in affirming his conviction for the offence of stealing N7,000,000.00 when same was not proved beyond reasonable doubt? (covers 4, 5 & 7).”

The Respondent filed brief of argument in respect of the 1st Appellant on 16/03/2011 upon an application for extension of time, its learned counsel, submitted the following 2 issues for determination:

“(i) Whether the 1st Appellant could validly raise an objection against the charge of conspiracy after trial and conviction in the circumstances of this case.

(ii) Whether the 1st Appellant was rightly convicted of the offence of stealing a sum of the property of a juristic person?"

The Respondent also filed a brief of argument in respect of the 2nd Appellant in Which the two issues raised for determination are similar to the two identified by the Respondent in respect of the 1st Appellant herein above. B

This appeal came up for hearing on the 7th day of April, 2011. The counsel for the respective parties identified briefs of argument. The learned counsel for the 1st and 2nd appellants without further amplification on the issues raised by them for determination of the appeal urged this Court to allow the appeal. On his part the Learned Counsel for the Respondent has urged the Court to dismiss the appeal and affirm the judgment of the lower court. C

I have noted with keen interest that the 1st and 2nd Appellants have filed similar notices of Appeal each containing seven grounds. It is instructive to further note that their briefs are word for word identical in content and in terms of the arguments proffered in support of the issues raised therein. D

This trend is replicated by the Respondents. Hence, it is also noted that the 1st and 2nd Respondents have filed identical briefs raising similar issues for determination. E

Now to the issues raised for determination by the parties. It was the submission of the learned counsel for the appellants that the affirmation of the conviction of the appellants by the lower court for the offence of conspiracy was fundamentally erroneous since the said conviction emanated from a charge not before trial court by due process of law. In other words, that the learned trial judge did not give consent as required by law to the Respondent for the preferment of the offence of conspiracy on 23/05/2000 against the Appellants. That it was shown on page 22 of the record that the consent the learned trial judge gave was for the preferment of the offence of stealing only. In other words, until the required statutory leave is granted by the trial court the prosecution of the appellants cannot be said to have been initiated and proper trial held leading to their conviction and sentence. Reliance was placed on OYEDIRAN & ORS. V. THE REPUBLIC (1967). NMLR 122 at P.125; GAJI V. THE STATE (1975) 5 SC 61. OKAFOR V. THE STATE (1976) ANLR 307. At 310; OKORO V. THE POLICE (1953) 14 WACA and EWE V. THE F
G
H

STATE (1992)7 SCNJ 15 at 15 - 18.

Drawing the attention of the court to pages 1 - 21 of the Record of proceedings, learned counsel noted that the Respondent filed an application by way of information for leave to prefer charges of conspiracy and stealing against the 1st Appellant and M. O. ADIO (J) on 23/05/2000 at page 22 gave consent for preferment of a charge of stealing but declined and/or refused to give consent for preferment of the charge of conspiracy. It is therefore submitted that OLAKANMI (J) who took over the trial from ADIO (J) had no jurisdiction whatsoever and or exceeded his jurisdiction by trying, convicting and sentencing the Appellants for the offence of conspiracy which was legally not before him. That since the Respondent did not appeal against the refusal of ADIO (J) to grant the said consent or leave which is within his discretionary power, his decision on 23/05/2000 at page 22 is binding on the learned trial Judge OLAKANMI (J) as such the appellants' subsequent trial conviction and sentence is ultra vires the powers of the said OLAKANMI (J) and the confirmation of the said conviction by the lower court is wrong, being a nullity ab initio which has occasioned a miscarriage of justice. Cited in support of this submission are ABACHA V. THE STATE (2002) 7 SC (Pt.1) 1 at 10; OHWOVORIOLE V. FRN (2003) 1 SC. (Pt. 1) at 10; and MADUKOLU V. NKEMDILIM (1962) All NLR. (Pt. 2) 581 at 590.

It is contended that the mere fact neither the appellants nor their counsel raise any objection at the trial on their being tried for an offence of conspiracy, (a count which was legally not before the trial court as conceded by both the lower court and the Respondent) does not constitute a waiver of their right to challenge the jurisdiction of the said trial court, as this even can be raised in this Court for the first time without leave since the issue of jurisdiction is sacrosanct and fundamental to adjudication.

Learned counsel for the Appellants arguing in the alternative - submitted that going by the nature and quality of the circumstantial evidence required to sustain a charge of an offence of conspiracy, like in this case, all the evidence led by the Respondent at the trial were not positive, cogent, direct and unequivocal enough to justify the conviction of the Appellants for the offence of conspiracy. It is submitted that neither of the Appellants adopted either words or conduct in their confessional statement made in Exhibits 'E' and 'F' re-

spectively during the trial and also in their oral testimonies. That both appellants gave a divergent account of how money was withdrawn or spirited out from the account of some customers of the bank for different and unrelated purposes at different dates as comprehensively reviewed by the lower court shown at pp. 150-153 of the Record of proceedings. That both the trial court and Court of Appeal erred in law to have treated Exhibits 'E' and 'F' as evidence of corroboration against each of the Appellants, the basis upon which they were convicted for the offence of conspiracy, Reliance was placed on the cases of SHODIYA v. STATE (1992) 3 NWLR (PT.230) 457 AT 499; THE STATE v ONYEUKWU (2004) 7 SC (Pt.1) 1 and EMEKA v. STATE (1998) 7 NWLR (559) 555 at 585 and DANLAMI OZAKI & ANOR v. THE STATE (1990) 1 NWLR (PT.124) 92 AT 133. B
C

It is further submitted that the sum of N7,000,000 (Seven Million Naira), which the lower Court found that both Appellants conspired and stole and upheld their conviction was withdrawn with various payment vouchers from the accounts of three customers of the bank who were not called to tender their statements to contradict the confessional statements of the Appellants in Exhibits 'E' and 'F'. D

In the alternative, it is submitted by the appellants that in the absence of the evidence of the three customers of the accounts from which the N7,000,000.00 (Seven Million Naira) was allegedly stolen by the Appellants, their conviction for the offence of conspiracy without the slightest corroborative evidence was wrong relying on ISHOLA v THE STATE (1972) 10 SC 53 at 77; OKORO v. STATE (1998) 14 NWLR (pt.584) 181 at 207. E
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It is further submitted that since neither agreement for common purpose nor common intention, which is the basic element in proof of the offence of conspiracy, was established at the two courts below in relation to the sum of money allegedly stolen by the appellants, conspiring together, and the fact that the 2nd Appellant only admitted being negligent in endorsing the payment vouchers, conviction of the appellants was wrong in law. That it is not permissible to found criminal culpability on mere negligence without more, relying on the cases of AMADI v THE STATE (1993) 8 NWLR (pt.314) 644 at 669; HALSBURY'S LAWS OF ENGLAND VOL.12, 4th Ed. P.81. See also SHODIYA v STATE (supra). G
H

Finally, on this issue relying on the authority of MADUKWE v

C.O.P (1987) 1 CLRN 92 at 100, learned counsel submitted that it is undesirable to charge the offence of conspiracy along with a charge of the substantive offence of stealing which the conspiracy is said to have led to, especially where there is no independent evidence of conspiracy.

B On this first issue, the learned counsel for the Respondent explained the circumstances leading to the charge of conspiracy against the appellants. That the Respondent before the trial of the Appellants filed a motion on Notice supported by a 10 paragraphed Affidavit and an amended charge all dated 20/4/2011. The motion which was
C moved on 23/4/2001 was not opposed by the learned counsel, thereupon the learned trial Judge granted the order.

It is submitted that since there was no objection to the granting of that application and no appeal against it, it therefore binds all the
D parties, relying on ANYADUBA v N. T. R. (1992) 5 NWLR (PT.243) 535. It is submitted that the effect of the amendment is that the old charge of 6/4/2000 has been effectively replaced by the new information preferred on 20/4/2001. That it cannot be validly argued that the trial of the offence of conspiracy was without the consent or
E direction of the learned trial judge. Reliance was placed on Sections 340 (2)(b) and 346 (3)(b) of the criminal procedure Law cap. 39 of Oyo State, 2000, which provide for the procedure that must be followed to quash a count or information. It is contended that failure to
F apply to quash the count or information preferred against Appellants at the trial stage renders both the ground of appeal on this point and the issue raised therefrom incompetent.

May it be noted that the Respondent by motion dated 24/4/2001 sought leave of the trial court to amend the existing charge.
G Alongside the said motion a 10-paragraph Affidavit and "Amended Charge" dated 20/4/2001 were filed. The motion was moved by Mr. S. O. Adeoye the Senior Legal officer for the complainant (respondent therein). All the three Defence counsel (Mr. Boye Sabanjo for the 1st accused; Mr. S. A. Animashaun, for the 2nd accused; and Mr.
H T.A. Abdulwahab for the 3rd accused) who were present did not oppose the application. The trial Judge at page 30 of the Records granted the application and ordered accordingly thus:

"Application for amendment of the charge by the prosecution is hereby granted without objection from the three counsels for the

three accused persons.

It is hereby ordered therefore that is (sic) count of Fraudulent false accounting contrary to section 438 of criminal code Law of Oyo State of Nigeria 1978 be added to the charge. The amended charge as filed now stands as the new charge.

The accused fresh pleas in the circumstances are also hereby to be taken.” B

The new charge was read to the 1st and 2nd accused in English while it was read to the 3rd accused (now deceased) in Yoruba. Fresh pleas on the new charge were taken and the appellants pleaded “not guilty.” C

The appellants participated actively in the proceedings at the trial court, even after being aware of the amended new charges against them. There was no complaint against the order of the learned trial judge. It is a settled principle of law that a party who has not appealed against the finding or decision of the trial court cannot on further appeal to this court seek the setting aside of such finding or decision. In short, a decision not appealed against binds all the parties: (See ANYADUBA and Anor v. NIGERIAN RENOWNED TRADING COMPANY LTD. (NRTC) D
(1992) 5 NWLR (pt.243) 535 at 553; ONIBU V. AKIBLU (1982) 2 SC 60 at 62-63; FCDA v NAIBI (1990) 3 NWLR (pt.138) 270.) ***It is too late in the day to raise the issue of non-compliance with Sections 340 (2) (b) of the criminal Procedure Law cap. 39 Laws of Oyo State 2000*** which provides as follows:- E

“Subject as hereinafter provided no information charging any person with an indictable offence shall be preferred unless either:

(a).....

(b) The information is preferred by the direction or with the consent of a judge...” G

The direction and order given in this case at page 30 by the learned trial Judge clearly set out above fulfilled the requirement of this provision. It cannot be correctly and reasonably argued that the trial of the appellants for the offence of conspiracy was conducted without the consent or direction of the judge. H

As it has been said, it is now too late in the day to raise the issue of non-compliance with the provision of Section 340(2)(b) of the

Criminal Procedure Law Cap. 39 Laws of Oyo State 2000, that provides as follows:

“Where a person who has been committed for trial is convicted on any information or any count of information that information or count shall not be quashed under this section in any proceedings on appeal unless application was made at the trial that it should be so quashed.”

Simply put, the lower court has no jurisdiction to quash any information or count unless there has been an application to quash it at the trial court. It is trite that a question of law and jurisdiction can be raised at any time in the proceedings, but it is not a free for all procedure. Where a statute under which an issue or matter is to be raised, has provided a procedure for raising such issues or matter, that procedure, and no other must be followed (See AKAAER JOY V. KUTUKU DOM (1999) 9 NWLR (Pt.620) 538 at 547)

In the case at hand the procedure that must be followed to quash the information or count is as provided under the provision set out above. Failure to apply to quash it at the trial court renders both the grounds of appeal on this point and the issue raised thereon incompetent and I so hold and resolve this issue in favour of the Respondent.

Issue No. 2 is distilled from Ground 3 of the Appellants’ Notice of Appeal. The pith and substance of this issues is that the ‘TRANS INTERNATIONAL BANK IWO ROAD BRANCH IBADAN as contained in the charge sheet at pages 1 -2 and 27-29 of the Record of Proceedings from which the sum of N7,000,000 (Seven Million Naira) was allegedly stolen by the Appellants is not a juristic person known to law in accordance with the provision of Section 382 of the Criminal Code Cap.38, Laws of the Federation of Nigeria 2004. It is submitted that from the provision of this law, ownership of a thing capable of being stolen like the Seven Million Naira, in the case, it is a vital ingredient of the offence of stealing which has not been established by the prosecution during trial of the Appellants. In other words the Appellants are contending that since the identity of the owner of Seven Million Naira allegedly stolen is not established by the 3 prosecution witnesses, it was not just to base their conviction on that. The sum total of the submission of the Appellants is that their conviction and

sentencing for the offence of stealing Seven Million Naira, the property of a non-juristic person, is fundamentally a travesty of justice and failure to afford the Appellants an opportunity to plea to amended charge is a violation of their constitutional right of hearing as provided in section 36 of the 1999 Constitution, thereby occasioning a miscarriage of justice regardless of the fact that the Appellants did not raise this fundamental issue at the trial court. Relying on the cases of ONYIA v. ONYIA (1980) 1 N.W.L.R. (Pt.99) 514, AT 540; ATTORNEY GENERAL OYO STATE v. FAIRLAKES HOTELS LTD (1988) 5 N.W.L.R (Pt.92) at 59; NDIC v. CBN (2002) 7 N.W.L.R (pt.766) 272 at 293 - 294 and OKORO V. THE STATE (1998) 12 S.C. (pt.11) 83 at 89. B
C

It is the contention of the respondent that both the trial court and the lower court were right in convicting the Appellants for the offence of stealing the sum of Seven Million Naira property of Trans International Bank a juristic person with legal personality. That the bank is a public quoted company registered not only under the company and Allied Matters Act (CAMA) but also with the Nigerian Stock Exchange. That it has capacity to sue and be sued. Relying on the cases of GANI FAWEHINMI v. N.B.A. (1999) 2 N.W.L.R. (part 105) 558 at 595, and ONAGORUWA v. STATE (1993) 7 N.W.L.R. (pt.303) 49 at 86. D
E

It is further observed that the sum of Seven Million Naira established by the prosecution to have been stolen through Exhibit “H” at the trial court was the property of a juristic personality, which held the said amount of money in trust for its diverse depositors. As for the failure on the part of the Respondent to add the word “plc” to the name of the Bank it is observed that the fact that the Respondent did not add that word to the name of the Bank will not diminish the fact that the Bank is a Public Liability Company. F
G

It is submitted that from evidence led at the trial court the Respondent was able to prove beyond reasonable doubt, contrary to the impression created in the 2nd Appellant’s briefs that the three essential elements of the offence of stealing have not been proved. H

It is further submitted that the fact that, at the trial court the respondent did not call the customers whose accounts the 2nd Appellant claimed that they used to defraud their employer is immaterial and neither is it fatal to the case of the Respondent. That it has

called the number of witnesses required to prove its case. What is more, the so called customers' accounts were part and parcel of the account of the Bank and the money belonged to the Bank. It is observed that the 2nd Appellant in Exhibit 'F' admitted that she approached the 1st Appellant; whom she supervised, for assistance and collected the sum of N900,000.00 from him as loan to give to her friend that needed help.

That the manager of that Branch was not aware of the transaction which was carried out unofficially and therefore not documented. It is submitted that the fact that the Appellants resiled from their statement in their defence at the trial will not make it less a confessional statement. That it is trite that free and voluntary confession, if it is direct and positive and satisfactorily proved is sufficient to warrant conviction without any corroborative evidence as long as the court is satisfied of the truth of the confession. (Relying on *ASANYA v. STATE* (1991) 3 N.W.L.R. (pt. 180) 422 at 467 and *AKPAN v. STATE* (1992) 6 N.W.L.R. (pt.248) 444 at 445.) It is observed that the trial court, in this case found corroboration. It is however submitted that the confessional statement of the 1st Appellant was not used to convict the 2nd Appellant as the latter in Exhibit 'F' stated her involvement in the fraud to be N900,000.00. That each of the Appellants in Exhibits 'E' and 'F' stated his and her level of involvement in the fraud. As for the contention of the learned counsel for the Appellants that the 2nd Appellant was only negligent in not cross-checking the vouchers submitted to her by the 1st Appellant, therefore she ought not to have been convicted of the offence of conspiracy and stealing, citing *EMEKA v. STATE* 7 N.W.L.R. (pt.559) 556. Learned counsel for the Respondent observes that the content of Exhibit 'F' shows an agreement to steal and not negligence. That the case of *EMEKA v. STATE* (supra) is not binding on this court, and should be discountenanced.

Finally it is submitted that from the totality of the evidence led at the trial court, by the prosecution, it has been proved beyond reasonable doubt that the Appellants conspired to steal and did steal from the vault of their employer, that is, Trans International Bank Plc. Concluding further, the learned counsel for the Respondent has submitted that there are concurrent findings of the Courts below that the prosecution proved its case. That where there are concurrent findings of the lower courts, the Supreme Court will not disturb such

findings unless they were perverse. Citing BAKARE v. STATE (1997) 1 N.W.L.R. (pt. 52) 597; OVERSEAS CONSTRUCTION LTD v. GREEK ENTERPRISES LTD (1985) 3 N.W.L.R. (pt.13) 407; ONYEJEKWE v. STATE (1992) 8 N.W.L.R. (pt.230) 444 at 447. It is accordingly urged that this appeal be dismissed for lacking in merit.

Issue No. 2 under consideration is distilled from Ground 3 common to both Appellants. It is whether the Appellants were rightly convicted of the offence of stealing a sum the property of juristic person.

The said Ground and its particulars are set out below:

GROUND:

“The learned Justices of the court of Appeal erred in law when they held as follows:-

“On the charge of stealing itself, the Appellants canvassed what I will dismiss off hand as a non-issue, it is their contention that despite the fact that the prosecution described the owner of the alleged N7,000,000.00 as “Trans International Bank plc, Iwo Road, Ibadan” which in law represents a non juristic person, and the fact that P.W. I did not say that the money belonged to Trans International Bank Plc, the lower court still convicted the Appellants for stealing and further erred by “Suo muto adding plc” to the names of the alleged owner of the money...

In my view, the Appellants are grasping at straws. The fact that “Plc” was not added to Trans International Bank is immaterial.”

PARTICULARS

(i) Statutorily, Sec. 390 of the criminal code cap. 80 laws of the Federation of Nigeria 1990 envisages stealing of property belonging to a natural or artificial person with juristic personality.

(ii) The charge of stealing N7,000,000.00 property of Trans International Bank, Iwo Road Branch, by the 2nd Appellant violates the statutory provision of Sec. 390 of the said criminal code.

(iii) Trans International Bank Iwo Road Branch, Ibadan per se is not a juristic person known to law.

(iv) It was not shown to court by evidence that Trans International Bank Iwo Road Branch, Ibadan is the same as T.I.B. Plc.

(v) The learned trial Judge suo motu added “Plc” to the charge in order to clothe the bank with juristic personality and found the accused persons guilty of the offences of conspiracy and stealing.

(vi) The addition of “Plc” to the name of the artificial person in court amounted to an unsolicited amendment of the charge sheet without complying with the mandatory provisions of the criminal Procedure Act.

(vii) Even if evidence reveals that T.I.B. Plc was involved, the trial Judge ought to invite addresses from both the prosecution and the defence before effecting any amendment.

The Respondent has rightly contended that both the trial court and the lower court were right in convicting the 1st Appellant of the offence of stealing the sum of N7,000,000.00 (Seven Million naira), the property of juristic person. It is not in dispute that Trans International Bank Plc is a juristic person with legal personality. It is a public quoted company registered not only under the Company and Allied Matters Act (CAMA) 1990 but also with the Nigerian Stock Exchange. As such the Bank can sue and be sued in its corporate name, ownership, no doubt, is a most vital and indispensable essential ingredient of the offence of stealing. There must be evidence that the property is owned by a person. That person could be known or unknown but the property must be owned or capable of being owned. See ONAGORUWA v. STATE (Supra). ***In the case at hand prosecution has established that the sum of Seven Million Naira stolen through Exhibit ‘H’ was property of a juristic person, the Bank, holding the said sum in trust for its diverse customers or depositors. Heavy weather was made of the fact that since the Respondent did not add “plc” to “Trans International Bank” in the information the Bank is not a juristic personality which property can be stolen. To me this reasoning is puerile. The fact that the Respondent did not add the word “Plc” to Trans International Bank will not diminish the fact that the Bank is a Public Liability company and indeed a juristic personality. Its property was stolen by the Appellants.*** The learned trial judge summing up the whole matter stated as follows:

“From the available evidence in this case, one fact is not in doubt whatsoever, i.e. there was a fraud in the nature of stealing of money at the Iwo Rood Branch of Trans International Bank Plc between the months of June and October, 1999. The requirements for proving a charge of stealing, I consider too trite to necessitate stating same here in this case. It suffices to state that the charge of stealing is

proved once evidence is available pointing to the existence of stolen property belonging to any person be he natural or artificial and that another person stole same against interest of the owner.”

On page 155 of the Record of Proceedings, the court below also made similar crucial findings as follows:-

“The Respondent is right. In my view, the Appellants are grasping at straws; the fact that “Plc” was not added to Trans International Bank is immaterial. Every case is determined on its own merit, and in this case, the owner of the stolen money is the said Bank, the Appellants were staff of the Bank, and they admitted that they took money from the Bank in an unlawful manner. The mens rea of stealing consists of an intention not only to take away the movable property in question from the possession of the owner but also an intention to permanently deprive him of such property – See Babalola v. The State (1989) 4 NWLR (pt.115) 254 SC.”

From the evidence led at the trial, the Respondent was able to prove beyond reasonable doubt, contrary to the impression created by the Appellants in their brief, that the essential ingredients of the offence of stealing were not established.

The lower courts were on firm ground when they held that the pieces of evidence adduced by the prosecution established the guilt of the Appellants. At page 93 lines 10 - 13 of the Record of Proceedings the learned trial court held as follows:

“I wonder what further evidence is required for proof of (sic) the prosecution. Both oral and documentary evidence in this case are quite overwhelming and compelling that this court has no alternative but to find both accused guilty of stealing as charged under count 2. After all the court can convict on the voluntary confession of an accused.”(See Akinmeju v. The State (200) SCNLR. (pt.1) 90 at 778.)

In this case the 1st Appellant voluntarily confessed that he took the sum of N2,991,368.50k from the vault of Trans International Bank which he shared out to himself and others. The 2nd Appellant, who was the Branch Accountant, also confessed that she took N900,000.00 from the Bank unoffi-

cially to give a friend in need. The money she took was not documented, the Branch Manager was not aware of this. Both Appellants could not justify their conduct and action which is illegally motivated.

The fact that, at the trial, the respondent did not call the customers whose accounts the appellants claimed that they used to defraud their employer is immaterial. It is not fatal to the Respondent's case. It is left to the prosecution to call the number of witnesses required to prove its case:

(See ABOGEDE v. STATE (1995) 37 LRCN 674 and GIRA v. STATE (1996) 37 LRCN 668.)

The Appellants have contended that the prosecution did not prove its case beyond reasonable doubt that it was the 1st Appellant that stole the sum of N7,388,602.00. The lower court on this issue held as follows:

"In this case the 1st Appellant confessed that he took N2,991,368. from the bank illegally, and the 2nd Appellant admitted she took N900,000.00. What is left to be resolved is whether the lower court could convict the Appellants for stealing these amounts instead of N7,000,000.00 (Seven Million Naira) charged. The Appellants have argued that it cannot, citing Onogoruwa v. State (Supra). The Supreme Court however, held as follows in Atano v. A. G. Bendel (1988) 2 NWLR (pt. 75) 210 at 224." It is noteworthy that although the Court of Appeal acquitted the Appellants on the account of stealing yet it found that the Appellants stole a large sum of money. I cannot see the true or proper basis for acquittal or discharge of the Appellants by the Court of Appeal on the count of stealing. Even if it is only established that the prosecution proved that the Appellants stole part of the money alleged to have been stolen by them It is trite law that it is unnecessary for the prosecution to prove that all the articles mentioned in the information have been stolen for the charge to be sustained if proved that some of the articles have been stolen."

There are concurrent findings of the courts below that the prosecution proved beyond reasonable doubt that the Appellants conspired together with others to steal and did steal from the vault of their employer. It is now settled that where there are concurrent findings of two lower courts, this

Court will not disturb such findings unless the findings were perverse. The Appellants have not shown to this Court any good reasons why the concurrent findings of the trial court and the court below must be disturbed by this court.

In the light of all I have said I hold that this appeal be dismissed and it is accordingly so dismissed for lacking in merit. I affirm the judgment of the lower court delivered on 14/7/2006.

MUSDAPHER JSC

I have read before now the judgment of my lord Galadima, JSC with which I entirely agree. For the same reasons eloquently set out, which I respectfully adopt as mine, I, too dismiss the appeal and affirm the decision of the court below delivered on 14/7/2006.

CHUKWUMA-ENEH JSC

I have had a preview of the judgment of my learned brother Galadima JSC just delivered with which I agree entirely.

The questions arising from the two issues raised in this appeal have been dealt with satisfactorily in the lead judgment of my learned brother. Underpinning the decision in this appeal is that there is however a concurrent findings of facts by the two lower courts. The law is trite that it is on the appellants who is appealing against the decision as in this case to show that the findings of facts are perverse and has occasioned a miscarriage of justice. And this is about the only poignant ground upon which this court can rightly interfere with the findings of facts here. See Kofi v. Kofi 1 WACA 284. The appellants have not done so hence his appeal cannot succeed.

Therefore, I too dismiss the appeal and abide by the orders in the lead judgment.

ADEKEYE JSC

I have read in draft the judgment just delivered by my learned brother S. Galadima, JSC. The three legal points raised for determination in this appeal were exhaustively considered by my Lord in his

judgment. I however intend to add a few words by way of emphasis.

The first issue is, whether in law the 1st Appellant was properly convicted of the offence of conspiracy, having regard to the quality and paucity of the evidence at trial which conviction the lower court affirmed, particularly in the face of the fundamental omission by the trial court to give consent to the preferment of the count of conspiracy against the appellants.

The contention of the 1st and 2nd appellants is that the lower court was wrong in law to have upheld the conviction of the 1st appellant for an offence of conspiracy, an offence not legally placed before the trial court going by the consent given by Adio J., at page 22 of the Record which conviction had occasioned a miscarriage. There was no cogent, reliable, positive and independent evidence adduced at the trial to justify the conviction and sentencing of the 1st appellant for an offence of conspiracy. The failure of the 1st appellant to raise the issue of his trial and conviction for an offence of conspiracy at the court of first instance is no waiver of his right to raise it on appeal since it is a jurisdictional point of law.

The respondent replied that there was ample evidence to prove beyond reasonable doubt that the 1st appellant did conspire together with others to steal and did steal from the vault of their employer. By way of conclusion, both appellants were properly charged with the offence of conspiracy.

The crux of the argument on this point is whether the appellants can be charged with an offence of conspiracy on an information to which the judge did not consent by virtue of section 340 (2) (b) of the criminal procedure Act. On the 23rd of April, 2001 following an application to amend the existing charge, the learned trial judge amended the charge to reflect counts of conspiracy, stealing and false accounting. The plea of the appellants was taken on the amended charge. A count of conspiracy was properly added to the counts of stealing in the information.

Conspiracy is a criminal offence not defined in the criminal or Penal code. It is accepted as an agreement of two or more persons to do an act, which it is an offence to agree to do. As direct positive evidence of the proof between the conspirators is hardly capable of proof, the courts established the offence of conspiracy as a matter of inference to be deduced from certain criminal acts of the parties con-

cerned. The bottom line of the offence is the meeting of the minds of the conspirators to commit an offence and the meeting of the minds need not be physical. (Nwosu v. The State (2004) 15 NWLR (pt.897) pg.466., Oduneye v. State (2001) 13 WRN pg.88, Obiakor v. State (2002) 10 NWLR (pt'776) pg. 612', Daboh v. State (1997) 5 SC pg.197.)

The offence of conspiracy can be inferred in the instance of this case from the acts of the appellants to steal the property of their employee.

The second issue is whether the lower court was right in affirming the conviction of the 2nd Appellant for the offence of stealing N7,000,000.00 property of Trans International Bank, Iwo Road Branch, Ibadan (a non-juristic person) and therefore unilaterally amended the charge sheet without due process.

The appellants argued that the pith and substance of this issue is that the Trans International Bank, Iwo Road Ibadan, from whom the sum of N7,000,000.00 was allegedly stolen by the 2nd appellant is not a juristic person known to law in accordance with the provisions of section 382 criminal CODE ACT CAP 77 Laws of Nigeria 1990. In the absence of any formal application seeking leave to further amend the existing charge, the learned trial Chief Judge (Olanmi, C. J.) has no jurisdiction to unilaterally amend the charge sheet whereupon he proceeded to convict and sentence the 2nd appellant for the offence of stealing the sum of money as a property of a person not known to law "Trans International Bank, Iwo Road, Ibadan" contrary to the provisions of section 382 of the criminal code Act cap Laws of the Federation of Nigeria, 1990.

I must point out that Section 208(1) of the Criminal Procedure Code gives the court the discretion to alter, add or frame a new charge at any time before judgment is pronounced. In allowing this, the court is not limited to the facts as alleged in the information. However the court is required to read and explain the new charge to the accused and record a fresh plea for the accused. It is also trite law that where there is an amendment to a charge, there shall be a fresh plea. The trial court in this case apparently complied with this procedure when the charge was amended.

(Attah v. State (1993) 7 NWLR (pt.305) pg.257. Vincent v. State (1997) 1 NWLR (pt.480) pg.234)

Section 382 Criminal Code Cap 77, Laws of the Federation of Nigeria, 1990 provides that -

“Every inanimate thing whatever which is the property of a person is capable of been stolen”

A person must be a juristic person going by this definition.

B The trial court found that the appellants stole the sum of N7,000,000.00 the property of a juristic person. The trial court proceeded to hold that Trans-International Bank is a juristic person with legal personality. It is a public quoted company, which is registered not only under the Companies and Allied Matter Act (CAMA) 1990 C but also with the Nigeria Stock Exchange. The bank can sue and be sued in its corporate name. It is licensed to practise universal banking by the Central Bank of Nigeria. The Court of Appeal rightly confirmed the foregoing. Gani Fawehinmi v. N.B.A.(1989) 2 NWLR D (pt.105) pg.558. Onagoruwa v. State (1993) 7 NWLR (pt.303) pg.49.

The mere fact that the words Public Liability Company (PLC) were not added to the name on the charge sheet will not diminish its status as a Pubic Liability Company and as a juristic Personality.

E A person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or to the use of any other person anything capable of being stolen is said to steal that thing. The ingredients of the offence of stealing are as follows -

1. The ownership of the thing stolen.
2. That the thing stolen is capable of being stolen.
- F 3. The fraudulent taking or conversion'

Oshinye v. Commissioner of Police (1960) 5 SC PG.105, Chianugo v. State (2002) 2NWLR (pt.750) pg.325.

G The two lower courts rightly concluded that the respondent proved beyond reasonable doubt that the appellants conspired together with others to steal and did steal money property of their employer.

H With fuller reasons giving by my Lord S. Galadima in the lead judgment, I also dismiss this appeal and affirm the judgment of the lower court.

RHODES-VIVOUR JSC

I read in draft the leading Judgment delivered by my learned brother, Galadima, JSC. I agree with his reasoning and conclusion. I intend to comment on the offence of Conspiracy, and this has to do with whether Counsel can add counts to an information if the Judge before when an application to file Information under 340(2)(b) of the Criminal procedure Act did not give consent. Whether the appellants' conviction for Conspiracy was correct. On 23rd day of May, 2000, Hon. Justice M. O. Adio of an Ibadan High Court, Oyo state gave consent to the State/Respondent to charge the appellants' with stealing. The learned trial judge acted under Section 340(2)(b) of the Criminal Procedure Act. Cap 31 Laws of Oyo State of Nigeria 1978. B

On 23rd day of April, 2001, on an application by learned counsel for the state/Respondent, the learned trial Judge ordered the amendment of the existing charge of stealing by adding a count of fraudulent false accounting contrary to Section 438 of the Criminal Code Law of Oyo State 1978. C

Trial commenced after the amended charge was read to the appellants on 23/4/01. None of the defence counsel opposed the counts which now were conspiracy, stealing and false accounting. The appellants pleaded not guilty to all counts. Trial proceeded to conclusion and conviction without objection to the charge. E

Section 164 of the criminal Procedure Act is mandatory in that once the charge is amended; the accused persons must be called upon to plead to the charge as amended. Failure to call on the accused persons to plead to the new charge renders the whole proceedings a nullity. See *R. v. Eromini* (1953) 14 W.A.C.A. pg.366, *Princent v. State* (2002) 12 SC (Pt.1) pg.137 F

In this case the appellants' pleaded to the charge after it was amended, and so the trial was flawless. There was compliance with section 164 of the criminal Procedure Act. In view of the fact that the appellants' and their counsel participated at trial and there was no appeal against the amended new charge, they cannot appeal to this court. It is too late in the day. They ought to have appealed to the Court of Appeal. In the absence of an appeal to the court of Appeal on that point they hold their peace for ever. G

Finally, during or before trial the need to amend a charge may arise and does arise quite often if the trial is on information the power H

to amend is not curtailed, provided the count to be added is one that can be proved by facts depositions already in the information. In cases where more than one person is charged with stealing, there is usually a strong inference of conspiracy. Conspiracy is usually inferred, and it hardly ever needs independent evidence. In the circumstances
 B a count of conspiracy was properly added to counts of stealing in the information.

Conviction for Conspiracy

The offence of conspiracy is complete when two or more persons agree to do an unlawful act by an unlawful means. Concluded
 C agreements can be inferred by what each person does or does not do in furtherance of the offence of conspiracy. It is immaterial that the persons had not met each other. See *Okosun & ors v. A.G Bendel state* 1985 Vol.16 N.S.C.C. pt.11 pg.1327, *Onochie & Ors v. the*
 D *Republic* 1966 Vol.4 N.S.C.C. pg.73, *Ligali & Anor v. The Queen* 1959 Vol.1 N.S.C.C. pg.4. According to the 2nd appellant, she signed the vouchers brought to her by the 1st appellant without checking them. This may very well amount to Negligence, Carelessness, but
 E collecting the sum of N900,000 from the 1st appellant shows that the act of signing is no longer negligence but a deliberate act with clear motive. A conspiracy is easily inferred. Both appellants conspired to steal and did steal the sums for which they were convicted.

For this, and the reasons given in the leading judgment I would
 F dismiss the appeal, and confirm the judgment of the Court of Appeal.

G

H