

**SUPREME COURT OF NIGERIA**

15TH JUNE, 2012. SC. 113/2008

**CORAM:- W. S. N. ONNOGHEN, I. T. MUHAMMAD,  
O. O. ADEKEYE, N. S. NGWUTA, M. U. PETER-ODILI, JJSC**

OLUWOLE AKINDIPE ..... APPELLANT  
V  
THE STATE ..... RESPONDENT

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APPEALS - Issues - Basis - Issues must be framed from grounds of appeal - And not from assumption of facts - Not pronounced upon in judgment (H1)

EVIDENCE - Appeals - Judgment - Contradictions - Effect - It is only substantial inconsistencies in evidence - That can lead to reversal of judgment (H2)

CRIMINAL PROCEDURE - Proof beyond reasonable doubt - Meaning - It does not mean proof beyond any degree of doubt - It is based on critical examination of facts and law (H3)

EVIDENCE - Words & phrase - “Tainted witness” - Meaning - The phrase refers to an accomplice - Or witness with some personal motives (H4)

EVIDENCE - Presumption - Evidence Act s. 149(d) - Application - The section relates to evidence which could be - And is not produced (H5)

CRIMINAL PROCEDURE - Proof - Number of witness - Prosecution is not bound to call any number of witnesses - As single credible witness - Can prove a crime even in murder charge (H6)

**FACTS**

Accused/appellant was arraigned along with two others before the High court of Oyo State, Ibadan, on three count charge of demanding money with menaces with intention to steal contrary to section 345 of the Criminal Code Cap 28 Vol. 1 Laws of Western

Nigeria 1959 and one count of stealing contrary to 331 (8) of the same Criminal Code. Following a no case submission, the court discharged and acquitted 3<sup>rd</sup> accused person on all four count charge. The court further held that appellant and 2<sup>nd</sup> accused have case to answer in respect of only counts 1 and 3 thereof. Several witnesses testified for the prosecution. Appellant testified in his defence and called one witness. 2<sup>nd</sup> accused testified only in his defence.

At the end of trial, the court discharged and acquitted 2<sup>nd</sup> accused on each of counts 1 and 3 of the information. However, appellant was convicted and sentenced on counts 1 and 3. Appellant was dissatisfied. Hence, he appealed to the Court of Appeal, Ibadan Division. The court dismissed the appeal and affirmed the judgment of the trial court. Appellant further filed appeal at the Supreme Court, alleging that prosecution witnesses were tainted, prosecution failed to call all witnesses and that there are contradictions in evidence of prosecution witnesses.

### **ISSUES FOR DETERMINATION**

*“(a) Whether on the evidence led, the trial court and indeed the Court of Appeal were right in their conclusion that the appellant was guilty of the offence of demanding money with menaces with intent to steal as charged.*

*(b) Whether the prosecution witnesses were tainted witnesses whose evidence required corroboration.”*

**HELD** (Unanimously dismissing the appeal per

**NGWUTA JSC)**

*APPEALS - Issues - Basis*

**1. An issue for determination in an appeal is a question which is so crucial that if it is decided in favour of a party, he is entitled to win the appeal. It follows that for the issue to be crucial in the determination of the appeal it must be framed from grounds of appeal which in turn must arise from the decision appealed against. In this appeal, learned Counsel for the appellant predicated his issue one on a consideration of “the lack of proper evaluation of evidence adduced by both the prosecution and the defence witnesses and in fact the glaring**

***contradictions and inconsistencies in the extra judicial statements and testimonies of the prosecution witnesses.”***

**The preface to issue one reproduced above is not an issue pronounced upon by the trial Court. It is based on assumption by the learned Counsel. Ground one of the grounds of appeal complained of the decision of the trial Court that the evidence of PW1 and PW3 were not materially contradictory to make their testimonies unreliable at law. Arising from ground one would have been an issue questioning the evaluation of the evidence of PW1 and PW3 by the trial Court. The issue as framed assumed as facts, matters not established or pronounced upon in the judgment. Since the trial Court held there was no material contradiction in the evidence of PW1 and PW3, it is not proper for the appellant to predicate any issue on the alleged contradiction and inconsistencies as if the same were proved in the proceeding. He would have queried the evaluation of evidence and ascription of probative value thereto as a substantive issue from ground one. Appellant was tried and convicted for offences under s.345 and 331 (8) of the Criminal Code Cap. 28 Vol. I Laws of Western Nigeria 1959, but learned Counsel for the appellant claimed the said law has become s.405 of the Criminal Code Act Cap C38 LFN 2004. The appeal was heard and dismissed under the State Law under which the appellant was tried, convicted and sentenced to imprisonment, but learned Counsel for the appellant argued his issue one under the Act of 2004 that is alien to the proceedings from which the appeal arose.**

(p. 2058 G)

*Appeals - Judgment - Contradictions - Effect*

**2. Appellant made heavy weather of his perceived contradictions and inconsistencies in the evidence of some prosecution witnesses. I have read the judgment of the learned trial Judge. His Lordship dutifully and comprehensively evaluated the totality of the evidence as a result of which he discharged the 2nd accused and convicted the appellant.**

**Witnesses are human beings and perception and appreciation of what is seen and heard must necessarily vary from**

**one person to another. It is out of touch with reality to expect one hundred per cent accuracy in the recollection of each of two people who observed the same incident simultaneously even a few minutes thereafter. Though there may be some elements of contradictions and inconsistencies in evidence of witnesses at a trial, only those contradictions and inconsistencies shown by the appellant to be substantial and fundamental to the main issue before the Court can lead to a reversal of the judgment appealed against. Minor discrepancy or disparity between a previous written statement and subsequent testimony in court will not destroy the credibility of the witness.** (p. 2060 E)

*CRIMINAL PROCEDURE - Proof beyond reasonable doubt*  
**3. Rather than contesting or explaining away the result of the forensic test on the hands of the appellant, learned Counsel frittered away his energy raising a storm on inconsequential disparities on peripheral issues in the case as if proof beyond reasonable doubt in criminal trials requires proof to mathematical certainty of every minor or peripheral aspect of the case. Proof beyond reasonable doubt does not mean or import or connote proof beyond any degree of doubt. The expression is a concept founded on reason and rational and critical examination of a state of facts and law rather than in fancied whimsical or capricious and speculative doubt. The operative word is “reasonable”.** (p. 2061 D)

*Words & phrase - “Tainted witness” - Meaning*  
**4. The term “tainted witness” refers to and is confined to a person who is either an accomplice or by the evidence he gives maybe or could be regarded as having some purpose of his own to serve or by the evidence he gives (whether as witness for the prosecution or defence) falls into the category of tainted witness.** (p. 2061 G)

*EVIDENCE - Presumption - Evidence Act s. 149(d)*  
**5. Appellant urged us to invoke s.149 (d) of the Evidence Act against the respondent for failing to call, one Miss Mosun and**

**Dr. Oyewole at the trial. The section provides:**

***“149. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the fact of the particular case and in particular the Court may presume:***

***(d) that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withheld it...”***

**With profound respect to him, learned Counsel for the appellant misconstrued the provision he so heavily relied on in his brief. The presumption in s.149 (d) of the Evidence Act reproduced above relates to “evidence which could be, and is not, produced” rather than a witness who could be, and is not, called. There is nothing in the appellant’s brief to show that a particular piece of evidence could only have been adduced by a named witness and that witness was not called to give the said evidence. The emphasis is on the evidence and not on the witness except where it is demonstrated that a piece of material evidence could have been given by a named witness and no other witness and the said witness was not called by the prosecution. (p. 2062 E)**

***CRIMINAL PROCEDURE - Proof - Number of witness***

**6. In any case, in all criminal trials, the prosecution is not obliged to call any number of witnesses to prove its case. A single witness, if believed by the Court, can establish a criminal case even if it is a murder charge. Success or failure in a criminal trial is not a function of the number of witnesses called or not called by the prosecution. What is the decisive factor is the quality of the evidence offered at the trial in the discharge of the burden of proof on the Prosecution. (p. 2063 D)**

## **NOTABLE POINTS OF INTEREST**

### **NGWUTA JSC**

#### ***1. Counsel should exhibit candour in brief writing***

My Lords, before I attempt a resolution of the issues in this appeal, I

feel constrained to comment on the brief settled and filed by the appellant's learned Counsel. In my humble view, it is a sorry excuse for a brief properly so called. In stating the facts in his brief, learned Counsel should exhibit candour by stating the facts unedited. At paragraph 3.4 of his brief, learned counsel for the appellant stated the fact that PW1 took the marked money to the house of the 2nd accused in company of the Police and an Army Officer. He jumped to the fact that the 1st to 3rd accused persons were arrested but deliberately and conveniently withheld the obvious fact that the money exchanged hands between PW1 and the appellant. In stating the facts of the case to guide the Court, a party is bound to state all relevant facts including facts unfavourable to his case. He is at liberty to try to avoid or lessen the impact on his case of the facts unfavourable to him. It is unethical to suppress, by omission, relevant facts in the appeal. (p. 2058 D)

## ***2. Counsel must be guided by professional ethics***

Above all, though learned Counsel has a right and indeed a duty to present his client's case to the best of his ability as Counsel, he has to do so within the bounds of professional ethics. The duty he owes his client is subject to a higher duty he owes to a higher cause - the cause of justice. It is a breach of professional ethics for Counsel to cast aspersion on the integrity and impartiality of a judge without proper foundation and proof. In his brief, learned Counsel for the appellant charged the learned trial Judge with the improper conduct of leaning heavily in favour of the prosecution in his judgment and with ignoring points in evidence favourable to the appellant, thereby denying him benefit of doubt. Worst of all, he claimed that the learned trial Judge "*abdicated his role as an impartial arbiter, descended into the arena and thus became beclouded by the dust generated in the conflict.*" Learned Counsel has practically accused the learned trial Judge of disloyalty to His Lordship's sacred oath "*to do justice without fear or favour*" by casting His Lordship in the role of the prosecutor in the trial. This is not borne out by the record of proceedings. Counsel should be more reticent in hiding under briefs of argument to launch unjustifiable attacks on any Judge; particularly when the Judge is not in a position to answer charges leveled against him. (p. 2059 H)

**REPRESENTATION**

B. Dambo, Esq. and Yakunat Baba, Esq., for the Appellant  
Mutalubi Ojo Adebayo (Attorney-General Oyo State) with S. O.  
Adeoye (DCC Oyo State Ministry of Justice), for the Respondent

**CASES REFERRED TO**

State v. Oladimeji (2003) 14 NWLR (Pt. 839) 57  
Akpabio v. State (1994) 7 NWLR (Pt.359) 635  
Eyo v. Inyans (2001) 8 NWLR (Pt. 715) 304  
Onisaodu v. Elewaju (2006) 13 NWLR (Pt. 998) 517  
Imhanri v. Nigeria Army (2007) 14 NWLR (Pt. 1053) 76  
Clement Nanchi v. The State (1976) 9 & 10 SC 19  
Queen v. Israel Darod & Ors (1950) UNLR 170  
Egwim v. The State (1999) 13 NWLR (Pt. 635) 338  
Alani v. State (1993) 7 NWLR (Pt. 303) 112  
Abosede v. State (1995) 37 LRCN 674  
Gara v. State (1996) 37 LRCN 688  
Ogbodu v. State (1985) 5 NWLR (Pt.41) 294  
Yaruba Mailayi & Anor v. State (1968) 1 All NLR 116  
Ezukwu v. Ukachukwu (2004) 17 NWLR (Pt. 902) 227  
Theophilus v. State (1996) 3 NWLR (pt. 423) 139

**STATUTES REFERRED TO**

Criminal Code Cap 28 vol. 1 Laws of Western Nigeria 1959, ss. 36,  
331(8), 345, 346  
Evidence Act, s. 149(d)

**LEAD JUDGMENT BY NGWUTA JSC**

Appellant, then a Military Police Officer attached to the Special  
Investigation Unit of the Nigerian Army, Ibadan, and two others were  
tried on an information with three counts of demanding money with  
menaces with intention to steal contrary to and punishable under  
s.345 of the Criminal Code Cap. 28 Vol. 1 Laws of Western Nigeria  
1959 and one count of stealing contrary to and punishable under  
s.331 (8) of the same Criminal Code by the High Court, Ibadan.

At the close of the prosecution's case, the trial Court, based on  
a no-case submission, discharged and acquitted the 3rd accused per-  
son on all the four counts of the charge. The appellant and the 2nd

accused person were also discharged and acquitted on each of the 2nd and 4th counts. The Court in its ruling on the no-case submission held that the appellant and the 2nd accused had a case to answer in respect of Counts 1 and 3 of the information. Appellant testified in his defence and called one other witness. 2nd accused testified in his defence but called no other witness. At the end of the trial, the trial Court discharged and acquitted the 2nd accused on each of Counts 1 and 3 of the information. The trial Court convicted the appellant and sentenced him on each of Counts 1 and 3. Appellant appealed his conviction and sentence to the Court of Appeal, Ibadan. The lower Court dismissed the appeal and affirmed the judgment of the trial Court. Appellant has appealed to this Court on two grounds from which two issues were distilled for determination by this Court. The two issues in the appellant's brief are:

D “(a) *Whether considering the lack of proper evaluation of evidence adduced by both the prosecution and defence witnesses and in fact the glaring contradictions and inconsistencies in the extra judicial statements and testimonies of the prosecution witnesses they (the prosecution) were able to prove beyond reasonable doubt that*  
 E *the appellant is guilty of the offence of demanding money with menaces with intent to steal contrary to and punishable under Section 346 of the Criminal Code Cap 28 Vol. 1 Laws of Western Nigeria 1959 (now Section 406 of the Criminal Code Act Cap C38 LFN 2004).*

F (b) *Whether the prosecution witnesses especially PW1 and PW3 were not agent's provocateur and/or tainted witnesses whose evidence would require corroboration, if so whether the conviction and sentence of the appellant on the uncorroborated evidence of the*  
 G *prosecution witnesses did not occasion gross miscarriage of justice.”*

The respondent also presented the following issues for determination:

H “(a) *Whether on the evidence led, the trial court (sic) and indeed the Court of Appeal were right in their conclusion that the appellant was guilty of the offence of demanding money with menaces with intent to steal as charged.*

(b) *Whether the prosecution witnesses were tainted witnesses whose evidence required corroboration.”*

In his argument in issue one in his brief, learned Counsel for



the appellant reproduced s.36 of the Criminal Code Cap 28 Vol. I Laws of Western Nigeria 1959 which he said is now codified in s.406 of the Criminal Code Act Cap C38 LFN 2004 and listed the ingredients the prosecution must prove to secure a conviction under the section as:

“(a) *the accused person made a demand from the complainant;*

*(b) with intent to steal;*

*(c) the demand is accompanied by a threat of any injury or detriment of any kind.”*

He relied on *Ogundowole v. Commissioner of Police* (1971) 1 All NLR page 34 at 34 in his argument that the Court must adopt an objective approach in deciding whether or not the threat, if dry, operated in the mind of the victim. Learned Counsel referred to the evidence before the trial Court and argued that as a result of distortions, contradictions and inconsistencies in the evidence, it cannot be said that the case against the appellant was proved beyond reasonable doubt. He contended that the 1st ingredient of the offence under s.406 of the Criminal Code Act LFN 2004 was not proved beyond reasonable doubt. On the second and third ingredients, Counsel argued that if there is no demand there can be neither intent nor threat of any injury or detriment of any kind. He relied on *Iden v. State* (1994) 8 NWLR (Pt. 305) 719 at 728 for the definition of “*intention*” or “*intent*”. He referred to the evidence before the Court and submitted that the decision of the trial Court was based on speculation and suspicion and not on credible evidence. He relied on *Amadi v. State* (1993) 8 NWLR (Pt. 314) 644 at 663-654; *Udedibia v. State* (1976) 11 SC 133 at 139-139. He argued that the learned trial Judge erred in his judgment by leaning heavily in favour of the prosecution and ignoring points in the evidence favourable to the appellant, thereby denying the appellant the benefit of doubt. He cited *Ibeh v. The State* (1997) 1 NWLR (Pt.484) 632 at 650 in support of his contention that the trial Court cannot choose the evidence to credit or discredit but has to evaluate the totality of the evidence. He said that the learned trial Judge “*abdicated his role as an impartial arbiter, descended into the arena and thus became beclouded by the dust generated in the conflict.*” He relied on *State v. Oladimeji* (2003) 14 NWLR (Pt. 839) 57. He referred to *Akpabio v. State* (1994) 7 NWLR

(Pt.359) 635 at 671 in his argument that a trial Court has a duty to consider the totality of the evidence led at the trial. He urged the Court to invoke s.149 (d) of the Evidence Act 2004 for the failure of the prosecution to call one Miss Mosun who the 2nd accused person said introduced him to the PW1. He relied on Eyo v. Inyans (2001) 8 B NWLR (Pt. 715) 304 at 326; Onisaodu v. Elewaju (2006) 13 NWLR (Pt. 998) 517 at 527 on the procedure for proper evaluation of evidence by the trial Court. He urged the Court to resolve issue one in favour of the appellant and to allow the appeal.

C In issue two, Counsel relied on R v. Omisade & Ors (1964) 1 All NLR 227 on the concept of *"tainted witness"* as a witness who though not an accomplice may have a purpose of his or her own to serve. He cited Imhanri v. Nigeria Army (2007) 14 NWLR (Pt. 1053) 76 at 85 for the meaning of *"accomplice"*, *"as one who knowingly and voluntarily and with common intent unites with the principal offender in the commission of a crime"*. He argued that under s.406 D of the Criminal Code Act 2004 the PW1, PW3 and Dr. A. O. Oyewole (complainants in the case) cannot be accomplices in the case of demanding with menaces because the intent and voluntariness necessary for the commission of the offence were not present. On the other hand, he referred to the case of Clement Nanchi v. The State E (1976) 9 & 10 SC 19 for the principle that *"a person who, under duress, pays money in response to unlawful demand is not an accomplice in the demand..."* Based on the above, he argued that PW1, F PW3 and Dr. Oyewola are not accomplices to the appellant in the offence of demanding with menaces under s.406 of the Criminal Code Act and their evidence is not bound by s.178 of the Evidence Act. Learned Counsel speculated that the charge against the appellant G may have been brought as a result of malice or grudge which the three prosecution witnesses hold against the accused persons, particularly the applicant. In view of this speculation he said that the evidence of the said witnesses should have been treated with utmost caution. He argued that the three witnesses for the prosecution - H PW1, PW3 and Dr. Oyewola - were agent's provocateur within the meaning of the concept in Queen v. Israel Darod & Ors (1950) UNLR 170 at 174. In addition, he expanded the scope of issue two by his contention that PW2, PW4, PW5 and PW6 are also tainted witnesses and agent's provocateur. He urged the Court to resolve issue two in

favour of the appellant. He urged the Court to allow the appeal and set aside the concurrent decisions of the two lower Courts.

Arguing issue one in his brief, learned Counsel for the respondent said that the learned trial Judge carefully evaluated the totality of the evidence led in the case and gave reasons for rejecting the evidence of the defence. He relied on the lower Court's assessment of the evaluation of the evidence by the trial Court to the effect:

*"...that the trial Court's evaluation of the evidence led before it conveyed above is beyond reproach... This Court has no business interfering with such a decision arrived at after the trial Court has dutifully discharged its primary duty of evaluating the evidence before it and ascribing proper value to it."* See Egwim v. The State (1999) 13 NWLR (Pt. 635) 338 at page 118 lines 7-14 of the record. He urged the Court to decline the invitation to interfere with the concurrent findings of the two Courts below. He said that there was no conflict in the evidence of PW1 and PW4 and if there was any contradiction at all, it was not material and did not go to the root of the case and could not have created doubt in the mind of the trial Court. He referred to Alani v. State (1993) 7 NWLR (Pt. 303) 112 at 122; Abosede v. State (1995) 37 LRCN 674 at 677 for the reasoning that *"not every discrepancy between what one witness says at one time and what he says at another that is sufficient to destroy the credibility of the witness altogether..."*

Learned Counsel made the point that the perceived contradiction pales into insignificance when placed side by side with the evidence under forensic examination that the appellant's hands were stained with anthracene powder as shown at pages 35 and 55 of the record. He urged the Court to hold that the perceived contradiction did not occasion a miscarriage of justice. He relied on Abogede v. State (supra); Gara v. State (1996) 37 LRCN 688 in his contention that the prosecution was not bound to call all the witnesses in the world to prove its case. This is in reaction to the assertion that the prosecution ought to, but did not, call one Miss Mosun and Dr. Oyewola to testify in the case. He said that the appellant ought to have invoked S.186 of the Criminal Procedure Laws of Oyo State to call the witnesses to testify. He relied on Ogbodu v. State (1985) 5 NWLR (Pt.41) 294 at 295 in support of his argument that S.149 (d) of the Evidence Act deals with withholding evidence and not failure

to call a particular witness to testify. In issue two, learned Counsel said that the appellant conceded that the prosecution witnesses were neither accomplices nor agents provocateur, rather appellant asked the Court to treat the witnesses as tainted witnesses whose evidence required warning or corroboration before it can be acted upon. He argued that the reference to the prosecution witnesses as tainted witnesses has no basis in law or fact. He relied on *Yaruba Mailayi & Anor v. State* (1968) 1 All NLR 116 at 123; *Ogunlana v. State* (1995) 5 NWLR (Pt. 395) 266 at 284.

He said that case law has admonished that the expression “*tainted witness*” should be confined to one who is either an accomplice or who by the nature of the evidence he gives may be regarded as having some purpose to serve. He urged the Court to resolve the issue against the appellant. In conclusion, he urged the Court to dismiss the appeal and affirm the judgment of the lower Court.

My Lords, before I attempt a resolution of the issues in this appeal, I feel constrained to comment on the brief settled and filed by the appellant’s learned Counsel. In my humble view, it is a sorry excuse for a brief properly so called. In stating the facts in his brief, learned Counsel should exhibit candour by stating the facts unedited. At paragraph 3.4 of his brief, learned counsel for the appellant stated the fact that PW1 took the marked money to the house of the 2nd accused in company of the Police and an Army Officer. He jumped to the fact that the 1st to 3rd accused persons were arrested but deliberately and conveniently withheld the obvious fact that the money exchanged hands between PW1 and the appellant. In stating the facts of the case to guide the Court, a party is bound to state all relevant facts including facts unfavourable to his case. He is at liberty to try to avoid or lessen the impact on his case of the facts unfavourable to him. It is unethical to suppress, by omission, relevant facts in the appeal. ***An issue for determination in an appeal is a question which is so crucial that if it is decided in favour of a party, he is entitled to win the appeal. See Ezukwu v. Ukachukwu (2004) 17 NWLR (Pt. 902) 227 at 249 SC. It follows that for the issue to be crucial in the determination of the appeal it must be framed from grounds of appeal which in turn must arise from the decision appealed against. In this appeal, learned Counsel for the appellant predicated his issue one on a con-***

**sideration of “the lack of proper evaluation of evidence adduced by both the prosecution and the defence witnesses and in fact the glaring contradictions and inconsistencies in the extra judicial statements and testimonies of the prosecution witnesses.”** The preface to issue one reproduced above is not an issue pronounced upon by the trial Court. It is based on assumption by the learned Counsel. Ground one of the grounds of appeal complained of the decision of the trial Court that the evidence of PW1 and PW3 were not materially contradictory to make their testimonies unreliable at law. Arising from ground one would have been an issue questioning the evaluation of the evidence of PW1 and PW3 by the trial Court. The issue as framed assumed as facts, matters not established or pronounced upon in the judgment. Since the trial Court held there was no material contradiction in the evidence of PW1 and PW3, it is not proper for the appellant to predicate any issue on the alleged contradiction and inconsistencies as if the same were proved in the proceeding. He would have queried the evaluation of evidence and ascription of probative value thereto as a substantive issue from ground one. Appellant was tried and convicted for offences under s.345 and 331 (8) of the Criminal Code Cap. 28 Vol. I Laws of Western Nigeria 1959, but learned Counsel for the appellant claimed the said law has become S.405 of the Criminal Code Act Cap C38 LFN 2004. The appeal was heard and dismissed under the State Law under which the appellant was tried, convicted and sentenced to imprisonment, but learned Counsel for the appellant argued his issue one under the Act of 2004 that is alien to the proceedings from which the appeal arose. The two issues were argued separately, yet issue one was argued as issue two and vice-versa. Repetitions abound so much in the brief that one begins to wonder whether repeating an issue a number of times confers on that issue validity and cogency it did not possess in the first place. Above all, though learned Counsel has a right and indeed a duty to present his client’s case to the best of his ability as Counsel, he has to do so within the bounds of professional ethics. The duty he owes his client is subject to a higher duty he owes to a higher cause - the cause of justice. It is a breach of professional ethics for Counsel to

cast aspersion on the integrity and impartiality of a judge without proper foundation and proof. In his brief, learned Counsel for the appellant charged the learned trial Judge with the improper conduct of leaning heavily in favour of the prosecution in his judgment and with ignoring points in evidence favourable to the appellant, thereby denying him benefit of doubt. Worst of all, he claimed that the learned trial Judge “*abdicated his role as an impartial arbiter, descended into the arena and thus became beclouded by the dust generated in the conflict.*” Learned Counsel has practically accused the learned trial Judge of disloyalty to His Lordship’s sacred oath “*to do justice without fear or favour*” by casting His Lordship in the role of the prosecutor in the trial. This is not borne out by the record of proceedings. Counsel should be more reticent in hiding under briefs of argument to launch unjustifiable attacks on any Judge; particularly when the Judge is not in a position to answer charges leveled against him.

I have considered the issues formulated by learned Counsel for the parties. It is my view that the issues raised by the respondent were properly drawn from the two grounds of appeal and are more appropriate to the determination of the appeal than the issues formulated by the appellant. I will therefore determine the appeal on the two issues raised by the respondent.

***Appellant made heavy weather of his perceived contradictions and inconsistencies in the evidence of some prosecution witnesses. I have read the judgment of the learned trial Judge. His Lordship dutifully and comprehensively evaluated the totality of the evidence as a result of which he discharged the 2nd accused and convicted the appellant.***

***Witnesses are human beings and perception and appreciation of what is seen and heard must necessarily vary from one person to another. It is out of touch with reality to expect one hundred per cent accuracy in the recollection of each of two people who observed the same incident simultaneously even a few minutes thereafter. Though there may be some elements of contradictions and inconsistencies in evidence of witnesses at a trial, only those contradictions and inconsistencies shown by the appellant to be substantial and fundamental to the main issue before the Court can lead to a reversal of the judgment appealed against. Minor discrepancy or dispar-***

**ity between a previous written statement and subsequent testimony in court will not destroy the credibility of the witness.**

See Theophilus v. State (1996) 3 NWLR (pt. 423) 139 SC. The main issue in this case is whether or not the appellant made the demand for money with the requisite intent and whether in pursuance to the demand the appellant collected money from the complainant. Once there is clear and consistent evidence on the main issues - and there was in this case as shown by the record of the trial Court - the Court may convict. Minor discrepancies in the recollection of conversation between the appellant and the prosecution witnesses or contradiction in the evidence as to who shook hands with who must be discounted as they do not go to the root of the matter before the trial Court. The money given to the complainants by the police was treated with anthracene powder. The money was given to the appellant who counted same and on forensic examination anthracene powder was present in the palm of the appellant.

**Rather than contesting or explaining away the result of the forensic test on the hands of the appellant, learned Counsel frittered away his energy raising a storm on inconsequential disparities on peripheral issues in the case as if proof beyond reasonable doubt in criminal trials requires proof to mathematical certainty of every minor or peripheral aspect of the case. Proof beyond reasonable doubt does not mean or import or connote proof beyond any degree of doubt. The expression is a concept founded on reason and rational and critical examination of a state of facts and law rather than in fancied whimsical or capricious and speculative doubt.** See State v. Onyeukwu (2004) 14 NWLR (Pt. 813) 340 SC. The operative word is “reasonable”. I resolve issue one against the appellant and in favour of the respondent.

**The term “tainted witness” refers to and is confined to a person who is either an accomplice or by the evidence he gives maybe or could be regarded as having some purpose of his own to serve or by the evidence he gives (whether as witness for the prosecution or defence) falls into the category of tainted witness.** See peter Orisakwe v. State (2004) 12 NWLR (Pt.887) 258 SC; Ishola v. The State (1978) 9/10 SC 81; Azeez Okoro v. The State (1998) 14 NWLR (Pt. 584) 181 SC. In my view, as a

general rule, a witness who testifies in a case has a purpose to serve and that is to see that the side for whom he testifies in the dispute is vindicated. This is why Idigbe, JSC, issued the warning in *Garuba Mailayi & Anor v. The State* (1968) 1 All NLR 116 at 123 which was adopted by Iguh, JSC in *Ogunlana v. State* (1995) 5 NWLR (pt. 395) 266 at 284: “...the expression ‘tainted’ is very loose and if it’s application is not kept within proper bounds, a great deal of confusion will be unleashed in an area of evidence which even now is fraught with difficulties.” By his own showing, the learned Counsel for the appellant demonstrated that the prosecution witnesses are not accomplices in the crime with which his client was charged. The witnesses have a purpose to serve but that purpose is not for their individual pleasure or gratification. It is to see that an infraction of the law is determined to be so and deserving punishment meted to the culprit. This does not make them tainted witnesses as the appellant would want us to hold. The complainants in this case may have their own purpose to serve but that purpose cannot be equated with the purpose of a father whose daughter is raped, and it has been held that the mere fact that the prosecution witness is the father of the prosecutrix in the trial for the offence of rape is not enough to label him a tainted witness. See *Ogubayo v. State* (2007) 8 NWLR (Pt. 1035) 157 SC; *Akulono v. State* (2000) 2 NWLR (Pt. 643) 165 SC.

**Appellant urged us to invoke S.149 (d) of the Evidence Act against the respondent for failing to call, one Miss Mosun and Dr. Oyewole at the trial. The section provides:**

**“149. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the fact of the particular case and in particular the Court may presume:**

**(d) that the evidence which could be and is not produced would, if produced, be unfavourable to the person who withheld it...”**

**With profound respect to him, learned Counsel for the appellant misconstrued the provision he so heavily relied on in his brief. The presumption in S.149 (d) of the Evidence Act reproduced above relates to “evidence which could be, and is not, produced” rather than a witness who could be, and is not,**



***called. There is nothing in the appellant's brief to show that a particular piece of evidence could only have been adduced by a named witness and that witness was not called to give the said evidence. The emphasis is on the evidence and not on the witness except where it is demonstrated that a piece of material evidence could have been given by a named witness and no other witness and the said witness was not called by the prosecution.*** B

In Onwujuba v. Obienu (1991) 4 NWLR (Pt. 183) 15 SC, this Court held that S.148 (d) now S.149 (d) of the Evidence Act deals with the failure to call evidence and not the failure to call a particular witness. It was also held that before the presumption can operate, it must be shown and established that: C

(a) such evidence existed, and

(b) it was the party that withheld it. D

If it was not shown, as in this case, that the evidence is withheld, the question of who withheld it can hardly be relevant. ***In any case, in all criminal trials, the prosecution is not obliged to call any number of witnesses to prove its case. A single witness, if believed by the Court, can establish a criminal case even if it is a murder charge.*** See Effiong v. State (1998) 8 / NWLR (Pt.562) 362 SC. ***Success or failure in a criminal trial is not a function of the number of witnesses called or not called by the prosecution. What is the decisive factor is the quality of the evidence offered at the trial in the discharge of the burden of proof on the Prosecution.*** I resolve issue two also against the appellant and in favour of the respondent. E F

The appellant has not shown that the concurrent findings of the two lower Courts are perverse. The Court cannot disturb the said findings. See Chinwendu v. Mbamali (1980) 3-4 SC 31. G

The two issues having been resolved against the appellant, I hold that the appeal is devoid of merit and it is hereby dismissed. In consequence, I endorse the affirmation by the Court below of the judgment of the trial Court. H

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**ONNOGHEN JSC**

I have had the privilege of reading in draft the lead judgment

of my learned brother NGWUTA, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. However, I want to make my contribution in relation to the issue of tainted witnesses.

Learned counsel for the appellant, BIRIYAI DAMBO ESQ in the appellant brief deemed filed on 29th September, 2010 at page 22, paragraph 6-5 thereof submitted that PW1, PW3 and DR. A.O. OYEWOLE are not accomplices having regards to the facts of the case but witnesses whose evidence must be corroborated because they have an interest to serve in the case, which is to extricate themselves from the police investigation of the loss of the sum of N19, 000.00. It is settled law that the expression “*tainted witness*” is limited to one who is either an accomplice in a crime or who by the nature of evidence he gives either for the prosecution or defence may be regarded as having some purpose to serve. The question is whether there is anything on record from which it can be inferred that PW1, PW3 and Dr. Oyewole are tainted witnesses or have their own purpose to serve? The lower court has held to the contrary. Is the lower court right in so holding?

It is settled law that where the evidence led in a case is reliable and true in fact, the fact that the witness(es) has/have a grouse against the accused person will not weaken the validity or credibility of his evidence; that so long as such evidence has been carefully considered by the trial court and found to be direct, unassailable and true, the mere fact that the witness is the mortal enemy of the accused will not render his evidence unreliable see OGUNLANA V. STATE (1995) 5 NWLR (pt. 395) 266 at 285.

In the instant case, the lower court of page 118 of the record held inter alia, thus:-

*“Finally the evidence of these vital witnesses does not require any corroboration as further argued by Learned Appellant’s Counsel. A tainted witness whose evidence must be corroborated is one who either has an interest to serve or is an accomplice... It must be conceded to the learned Respondent’s Counsel that there is nothing in the record that has given out PW1 and PW3 as serving any purpose of theirs in the course of their testimonies.”*

I have carefully gone through the record and have come to the irresistible conclusion that the lower court is right in the above

finding/holding, which should consequently not be disturbed.

On the issue of evaluation of evidence, the lower court at page 118 of this record held, rightly too, in my view, thus:

*“The trial court’s evaluation of the evidence led before it conveyed above is beyond reproach. It brings out in a thorough manner the facts established by both sides and explains why the story of one side was being preferred to that of the other. Appellant’s Counsel has not shown how and why the trial court’s conclusion from findings is erroneous. This court has no business interfering with such a decision arrived at after the trial court has dutifully discharged its primary duty of evaluating evidence before it and ascribing proper value to it ... “*

From the above it can be seen that there was concurrent findings of fact by the lower courts as regards the relevant facts of this case. That being the case, it is the law that this Court, the Supreme Court of Nigeria, does not make a practice of interfering with the concurrent findings of fact by the lower courts except where the findings are perverse, contrary to substantive law or procedure etc, which circumstances have not been established in the instant case.

In conclusion, I too find no merit in the appeal which is accordingly dismissed by me. Appeal dismissed.

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### **MUHAMMAD JSC**

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Ngwuta, JSC. I am in agreement with him in his conclusion that the appeal lacks merit. I dismiss the appeal and affirm the concurrent judgment of the two lower courts.

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### **ADEKEYE JSC**

I was privileged to read before now the judgment just rendered by my learned brother N. S. Ngwuta JSC. All the legal issues raised in the appeal before this court was exhaustively considered by my learned brother in his lead judgment. I agree with his reasoning and conclusion that the two lower courts rightly convicted and sentenced the appellant for the offences charged. I have nothing to add. I also dismiss the appeal for lacking in substance and merit.