

SUPREME COURT OF NIGERIA

15TH JUNE, 2012. SC. 129/2007

CORAM:- **W. S. N. ONNOGHEN, I. T. MUHAMMAD,
B. RHODES-VIVOUR, N. S. NGWUTA,
M. U. PETER-ODILI, JJSC**

JOHN TIMOTHY APPELLANT
V.
FEDERAL REPUBLIC OF NIGERIA RESPONDENT

LEGISLATION - Existing law - Meaning - Existing law is one that is not repealed - And has been adopted by National Assembly - With modifications - To bring same in conformity with Constitution (H1)

CHARGES - Objection - When to raise - The time to object is immediately the charge was read to accused - As any objection on appeal is waste of time (H2)

CRIMINAL PROCEDURE - Narcotic drug - Proof - Prosecution must prove that the substance is cocaine - And that accused was unlawfully in possession of same (H3)

CRIMINAL PROCEDURE - Confession - Validity - Accused can be solely convicted on his statement - Although some other evidence consistent with the confession may be needed (H4)

CRIMINAL PROCEDURE - Arraignment - Requirements - CPA s. 215 - Accused must be brought to court unfettered - And charge is read and explained to him - With a call on him to plea to same (H5)

MURDER - Plea of guilty - Procedure to adopt - CPA s. 215 - Judge must record a plea of not guilty on behalf of accused - And evidence is led on same (H6)

CRIMINAL PROCEDURE - Lesser offence - Plea of guilty - Procedure to adopt - Accused must personally plea - And a conviction can be based on same - And on evidence before judge (H7)

FACTS

Accused/appellant boarded a KLM plane at Amsterdam's Schipol Airport to Nnamdi Azikiwe International Airport, Abuja. On arrival appellant's luggage was searched by officials of National Drug Law Enforcement Agency (NDLEA) at the Abuja Airport. Nothing was found on him. He was then taken into the Agency's office where he was ordered into the toilet. Therein, he excreted wrapped substances that were subsequently found to be cocaine. Appellant wrote and signed two statements where he also confirmed that the substances were cocaine. Consequently, appellant was arraigned at the Federal High Court Abuja on a one count charge of unlawful possession of 1.5 kilogrammes of cocaine contrary and punishable under section 10(a) NDLEA Act Cap 253 LFN 1990. Appellant initially pleaded not guilty to the charge. Respondent then called a witness and tendered several exhibits to prove the offence. Subsequently however, appellant changed his plea of not guilty to a plea of guilty after the charge was read to him a second time. At the end of trial, the court convicted and sentenced appellant to four years imprisonment. Appellant lodged an appeal at the Court of Appeal, Abuja. The court dismissed the appeal and confirmed the conviction and sentenced passed by the trial court. Aggrieved further, appellant filed appeal at the Supreme Court contending inter alia, that he was not properly convicted on an existing law.

ISSUES FOR DETERMINATION

"1. Whether the charge against the appellant was based on an existing law and whether he can be convicted on such.

2. Whether it can be said that the Exhibit tendered in court (cocaine) has been proved to be the same that was recovered from the appellant?

3. Whether there exists strict compliance with the law when the appellant took his plea to the charge?

HELD (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

LEGISLATION - Existing law - Meaning

1. An Existing Law is a law that has not been repealed, and

has been adopted by the National Assembly as its own Act, or a House of Assembly after necessary modifications, where necessary to bring it into conformity with the Constitution. The National Drug Law Enforcement Agency Act was made by the Federal Military government as a Decree. It came into force on the 29th day of December, 1989. It has been modified by the National Assembly for the sole purpose of bringing it into conformity with the provisions of the Constitution. It is a Law which the National Assembly could make, and it has been adopted by the National Assembly as its Act. It is an existing law. (p. 2200 A)

CHARGES - Objection - When to raise

2. My lords, the issue is whether on the facts in the charge the appellant was misled. To be misled, the defect must be fundamental and misleading. The charge was not bad in law since it described a known offence under the correct Cap 253 Laws of the Federation of Nigeria 1990. Furthermore on 17/12/03 the charge was read to the appellant. He said he understood the charge and pleaded not guilty. After damaging testimony and exhibits were received by the court he changed his plea to guilty on 13/1/05. The time to object to the omission of "Act" in the charge was on 17/12/03 immediately after the charge was read to him and that is, if he was misled by the omission. An objection on appeal is a waste of time, and contrary to the clear provisions of section 167 of the Criminal Procedure Act. The omission of the word "Act" in the charge did not prejudice the appellant as to occasion a miscarriage of justice. The charge against the appellant was based on an existing Law and the conviction was very much in order, since he was convicted under section 10 of the NDLEA Act.

(p. 2201 B)

CRIMINAL PROCEDURE - Narcotic drug - Proof

3. To succeed on the charge the respondent must prove beyond reasonable doubt:

- 1. that the substance is cocaine**
- 2. that the substance was in possession of the appel-**

lant.

3. that the substances (cocaine) was in the appellant's possession to his knowledge and without lawful authority.
(p. 2202 B)

B *CRIMINAL PROCEDURE - Confession - Validity*

4. It is clear from his confessional statement that the substance was in the appellant's possession to his knowledge and without lawful authority. Both statements are confessional statements and the well laid down position of the law is that an accused person can be convicted on his confessional statement alone, though it is desirable but not mandatory that some other evidence consistent with the confession is produced. The confession by the appellant that he ingested well wrapped cocaine and thereafter excreted it was free and voluntary and in itself fully consistent and probable. The inculcating statements were corroborated by exhibits A, B, C, D and the testimony of the forensic expert. The end result is that the confessions were indeed true. A voluntary confession or/and a plea of guilt is the best evidence to rely on to convict on accused person. The appellant made two consistent voluntary confessions and pleaded guilty to being in possession of cocaine which he excreted. On such facts the appeal is dismally devoid of merit. (pp. 2203 B/2204 A)

Arraignment - Requirements

5. I must consider section 215 and 218 of the Criminal Procedure Act and the correct procedure to be followed. At the commencement of a criminal trial there must be strict compliance with the provisions of section 215 of the Criminal Procedure. That is to say:

(a) the accused person must be placed before the court unfettered unless the court otherwise directs, e.g. he may be fettered if the judge is satisfied that the accused shows signs of being violent.

(b) the charge must be read over and explained to the accused person in the language he understands by the Registrar of court or other officer of the court.

(c) the accused person must be called upon to plead to the charge.

The above requirements are mandatory and must be strictly followed. If the charge is amended during trial the procedure must again be complied with. The procedure under section 215 of the Criminal Procedure Act guarantees of fair trial of the accused person. Failure to satisfy any of the above (a) to (c) would render the trial, no matter how well conducted, defective and declared a nullity by an appeal court.
(p. 2204 F)

MURDER - Plea of guilty - Procedure to adopt

6. During trial the appellant decided to change his plea to guilty. In such a situation section 218 of the Criminal Procedure Act becomes applicable. Section 215 of the Criminal Procedure Act confers discretion on the judge on how to proceed when an accused person pleads guilty. If the accused person pleads guilty to murder, a plea of not guilty should be recorded on his behalf. Evidence would then be led as if he entered not guilty plea. (p. 2205 E/H)

CRIMINAL PROCEDURE - Lesser offence - Plea of guilty

7. If on the other hand the accused person pleads guilty to an offence that does not carry the death sentence the mandatory requirements of section 215 of the Criminal Procedure Act no longer apply. What is required is that the accused person must plead himself. If he pleads through his counsel or through some other person the trial is a nullity. After a plea of guilty the trial judge may proceed to convict and sentence the accused person based on the plea of guilty and the evidence before the judge. To my mind the 2nd plea taken by the appellant where he pleaded guilty after the charge was read to him was in strict compliance with section 218 of the Criminal Procedure Act. There was no need for the charge to be explained to him as this was done when he took his first plea. The mandatory requirements of section 215 of the Criminal Procedure Act are no longer applicable after the 2nd plea of guilty was made. (p. 2206 A)

NOTABLE POINT OF INTEREST

ONNOGHEN JSC

1. Fresh issue on appeal – Need to seek and obtain leave

The above scenario is unfortunate. From a single issue put before the lower court for determination we now have three issues! It is very clear from the single ground of appeal and the sole issue formulated therefrom that appellant's Counsel cannot legally end up in this Court with three clear issues without two of those issues being fresh issues which must need the leave of either the lower court or this Court before their being raised for determination. I have gone through the record and there is no such leave granted by either court. The above situation is not permitted and the Court has always frowned upon it and learned Counsel should always guard against it. (p. 2208 G)

REPRESENTATION

Dr. A. Amuda-Kannike, Mrs. F. Abdul, for the Appellant
Mr. Femi A. Oloruntoba (Director Prosecution and Legal Services NDLEA), Mr. J.I. Hernan (Chief Legal Officer), for the Respondent

CASES REFERRED TO

- Ishola v. The State (1969) 1 NWLR 259
Ikemson v. State (1998) ACLR 80
R. v. Kanu (1952) 14 WACA 30
Aremu v. State (1991) 7 NWLR (Pt. 201) 1
Ahmed v. COP (1971) NMLR 409
Osuji v. IGP (1965) LLR 143
Josiah v. State (1985) 1 NWLR (Pt. 1) 125
Eyorokoromo v. State (1979) 12 NSCC 61
Kajubo v. State (1988) 1 NSCC 1988 Vol. 19 NSCC 475
Effiom v. State (1995) 1 NWLR (Pt. 373) 507
R. v. Boyle (1954) 2 QB 292
R. v. Ellis (1973) 57 Cr App R. 571
R. v. K. Mansu (1947) 12 WACA 113

STATUTES REFERRED TO

National Drug Law Enforcement Agency Act Cap 253 LFN 1990, s. 10(a)

Criminal Procedure Act, ss. 167, 215, 218

Constitution of Federal Republic of Nigeria 1999, ss. 36(8)(12), 315(1)

LEAD JUDGMENT BY RHODES-VIVOUR JSC

On the 20th day of November, 2003 the appellant boarded a KLM plane at Amsterdam's Schipol Airport. It was a direct flight to Nnamdi Azikiwe International Airport, Abuja. On arrival the appellant's bag was searched by NDLEA officials at the Airport. Nothing was found on him. He was taken into the NDLEA office where he was ordered into the toilet. Therein, he moved his bowels and excreted well wrapped substances subsequently found to be cocaine. The appellant wrote and signed two statements where he confirmed that the substances were cocaine. After a field test it was confirmed that the substances were cocaine. The substance was packed in his presence and sent to the National Drug Law Enforcement Agency (NDLEA), Drug Laboratory Ikoyi Lagos. A Drug Analysis Report was issued subsequently and the substance recovered from the appellant was confirmed to be cocaine. The appellant was arraigned in the Federal High Court Abuja on a one count charge which read:

"That you JOHN TIMOTHY (Male) on or about the 20th of November, 2003 at the Nnamdi Azikiwe International Airport, during the inward clearance of KLM flight No. KL 557 from Amsterdam imported 1.5 kilogrammes of cocaine a narcotic drug, without lawful authority and thereby committed an offence contrary to and punishable under section 10(a) of the National Drug Law Enforcement Agency Cap 253 Laws of the Federation 1990."

Nyako, J presided. On 17/12/03 the charge was read to the appellant and he pleaded not guilty. The respondent called a witness and tendered documents marked exhibits A, B, C, and D. On 13th day of January, 2005, learned counsel for the appellant, Mrs Aidi informed the court that the appellant intends to change his plea. The charge was again read to the appellant, and he pleaded guilty to the charge. The learned trial judge concluded the hearing of the case in these words:

"In the light of the plea of guilty by the accused, the exhibit tendered and the statement of the accused person including also the recovered drug, I find the accused guilty as charged and by virtue of section 10 of the NDLEA Act convict him. He is accordingly sentence

to a term of 4 years imprisonment from the date of his arrest considering the plea made by counsel...”

The appellant lodged an appeal. The Court of Appeal decided the appeal on the sole issue formulated by the respondent. The issue was similar to the only issue formulated by the appellant. It reads:

B *“Whether the learned trial judge was right in convicting the appellant based on his plea of guilty.”*

In a considered judgment delivered on 21st day of May, 2007 the Court of Appeal confirmed the judgment of the High Court in these words:

C *“After a thorough consideration of the sole issue involved in this appeal, I resolve it in favour of the respondent. I find no just reason to interfere with the decision of the trial court. The appeal therefore lacks merit and it is dismissed accordingly. The judgment of the trial court is hereby affirmed. I also affirm the conviction and sentence of the appellant.”*

This appeal is against that judgment. In accordance with accepted practice and Rules of this court briefs were duly filed and exchanged. The appellant’s brief was filed on the 18th of June 2007, while the respondent’s brief was deemed filed on the 7th of May 2008. Learned counsel for the appellant formulated three issues for determination. They read:

F *“1. Whether the charge against the appellant was based on an existing law and whether he can be convicted on such.*

2. Whether it can be said that the Exhibit tendered in court (cocaine) has been proved to be the same that was recovered from the appellant?

G *3. Whether there exists strict compliance with the law when the appellant took his plea to the charge?*

Learned counsel for the respondent presented two issues for consideration. They are:

1. Whether the appellant can be convicted at all on a non existing Law?

H *2. Whether notwithstanding the plea of guilty by the appellant, the respondent ought not to discharge the burden of proof placed on it by law and whether there exist strict compliance with section 218 of the Criminal Procedure Act when the appellant took his plea.*

For the purpose of this judgment I adopt the three issues raised

in the appellant's brief, and I shall take them serially. At the hearing of the appeal on the 29th day of March, 2012 learned counsel for the appellant, Dr. Amuda-Kannike adopted his brief filed on the 18th of June 2007 and urged this court to allow the appeal. Learned counsel for the respondent, Mr. F.A. Oloruntoba adopted his brief deemed filed and served on the 7th of May 2008, withdrew his Preliminary B objection and urged this court to dismiss the appeal.

ISSUE 1

Whether the charge against the appellant was based on an existing law and whether he can be convicted on such. C

Learned counsel for the appellant observed that the appellant was charged under an unknown Law, to wit: National Drug Law Enforcement Agency Cap 253 Laws of the Federation 1990 instead of under National Drug Law Enforcement Agency Act, Cap 253 Laws of the Federation 1990 instead of under National Drug Law Enforcement Agency Act, Cap. 253 Laws of the Federation 1990. Contending that since the word "Act" was missing from the charge the appellant was convicted on a non-existing Law. Reference was made to sections 36(8) and (12) of the Constitution. He observed that issue number 1 be resolved in favour of the appellant. E

Learned counsel for the respondent observed that the trial judge held: *"I find the accused guilty as charged and by virtue of section 10 of the NDLEA Act convict him"*. Contending that the appellant was convicted on an existing Law and that the omission of the word "Act" F in the charge did not mislead the appellant. Relying on section 167 of the Criminal Procedure Act he argued that it is not every defect in a charge that will lead to a reversal of the judgment on appeal unless it is established that the appellant was in fact misled by such error. He observed that section 36(8) of the Constitution is irrelevant, and that G the appeal should be dismissed on this issue. Section 315 of the Constitution states that:

315(1) subject to the provisions of this Constitution an existing Law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this constitution and H shall be deemed to be-

(a) an Act of the National Assembly to the extent that it is a Law with respect to any matter on which the National Assembly is empowered by the Constitution to make Laws; and

(b) a Law made by a House of Assembly to the extent that it is a Law with respect to any matter on which a House of Assembly is empowered by this Constitution to make Laws.

An Existing Law is a law that has not been repealed, and has been adopted by the National Assembly as its own Act, or
 B **a House of Assembly after necessary modifications, where necessary to bring it into conformity with the Constitution. The National Drug Law Enforcement Agency Act was made by the Federal Military government as a Decree. It came into**
 C **force on the 29th day of December, 1989. It has been modified by the National Assembly for the sole purpose of bringing it into conformity with the provisions of the Constitution. It is a Law which the National Assembly could make, and it has been adopted by the National Assembly as its Act. It is an**
 D **existing law.**

I shall now consider whether the omission of the word “Act” makes it non existing law. The charge against the appellant reads:

“That you JOHN TIMOTHY (Male) on or about the 20th of November, 2003 at the Nnamdi Azikiwe International Airport, during the inward clearance of KLM flight No. KL 557 from Amsterdam
 E *imported 15 kilogrammes of cocaine a narcotic drug, without lawful authority and thereby committed an offence contrary to and punishable under section 10(a) of the National Drug Law Enforcement*
 F *Agency Cap 253 Laws of the Federation 1990.”*

It ought to read “National Drug Law Enforcement Agency Act Cap 253 Laws of the Federation 1990.”

This is what the Court of Appeal had to say on the omission of the word “Act”

“The omission of the word “Act” from the citation of the Law under which the appellant was charged is an irregularity, it is however not fatal so as to void his trial and conviction, I agree with the submission of the learned counsel for the respondent that the irregularity in the charge did not prejudiced the appellant as to occasion a
 H *miscarriage of justice to him...”*

I agree with the Court of Appeal Section 166 of the Criminal Procedure Act states that

“166. No error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or

those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission.”

And section 167 of the Criminal Procedure Act states that:

“167 Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later.”

My lords, the issue is whether on the facts in the charge the appellant was misled. To be misled, the defect must be fundamental and misleading. The charge was not bad in law since it described a known offence under the correct Cap 253 Laws of the Federation of Nigeria 1990. Furthermore on 17/12/03 the charge was read to the appellant. He said he understood the charge and pleaded not guilty. After damaging testimony and exhibits were received by the court he changed his plea to guilty on 13/1/05. The time to object to the omission of “Act” in the charge was on 17/12/03 immediately after the charge was read to him and that is, if he was misled by the omission. An objection on appeal is a waste of time, and contrary to the clear provisions of section 167 of the Criminal Procedure Act. The omission of the word “Act” in the charge did not prejudice the appellant as to occasion a miscarriage of justice. The charge against the appellant was based on an existing Law and the conviction was very much in order, since he was convicted under section 10 of the NDLEA Act. (See page 17 of the Record of Appeal).

ISSUE 2

Whether it can be said that the Exhibit tendered in court (cocaine) has been proved to be the same that was recovered from the appellant. Learned counsel submitted that if it is possible that the exhibit could be tampered with or has been tampered with or that it is possible to substitute it with something else the court ought not to convict the accused on his plea of guilt even though there exist expert evidence to that effect. Relying on *Ishola v. The State* (1969) 1 NWLR 259. He submitted that the expert evidence cannot grant a conviction in absence of absolute certainty that it was the cocaine that was recovered from the accused person. He submitted that 1.5 kilograms of cocaine is not the same as 5 grammes of cocaine. He urged this court to resolve this issue in favour of the appellant.

Learned counsel for the respondent observed that appellant gave a graphic account of how he got involved in the drug business up to the point of his arrest, contending that the confessional statement of the appellant is sufficient proof of the offence. Reliance was placed on Ikemson v. State 1998 ACLR p.80. Concluding he submitted that the case against the appellant was proved beyond reasonable doubt.

To succeed on the charge the respondent must prove beyond reasonable doubt:

- 1. that the substance is cocaine***
- 2. that the substance was in possession of the appellant.***

3. that the substances (cocaine) was in the appellant's possession to his knowledge and without lawful authority.

1. That the substance is Cocaine

Preliminary test conducted on the substance was found to be cocaine see - Exhibit A, B, C, D, The Drug analysis Report from the Drug Laboratory, Ikoyi - Lagos confirmed that the substance was cocaine.

2. Whether the substance was in possession of the appellant.

On the day the appellant arrived in Nigeria. He made a statement. Extracts from that statement made on 20/11/03 was as follows:

"...Today 20/11/03 around 11.57 we arrived Abuja Airport and at Arrival Hall for clearance. I was intercepted by NDLEA staff and after searching my small red traveling bag nothing was recovered from my bag and I was asked to follow them to NDLEA office and in their office my small red traveling bag was searched again and nothing was recovered from it and they now asked me that do I have and I now removed 39 wraps of the thing to them that started disturbing me inside the flight that I could not help it only to go inside the toilet and excrete the wraps of the thing out because this is my first time of swallowing this chemical. The chemical I gave them in the office was field tested immediately in my presence and it proved positive for cocaine. It was later packed and sealed in my presence and I signed all the necessary forms and that is all I have to write for now without any form of force."

The next day, 21/11/03 the appellant wrote another statement.

He said:

“All the total exhibit recovered from me was field tested in my presence and it proved positive for cocaine and it was packed and sealed in my presence... I signed all the necessary forms.”

3. Whether the substance was in the appellant’s possession to his knowledge and without lawful authority. B

It is clear from his confessional statement that the substance was in the appellant’s possession to his knowledge and without lawful authority. Both statements are confessional statements and the well laid down position of the law is that an accused person can be convicted on his confessional statement alone, though it is desirable but not mandatory that some C

other evidence consistent with the confession is produced.

See R. V. Kanu 1952 14 WACA p.30, Aremu v. State 1991 7 NWLR

Pt. 201 p.1. ***The confession by the appellant that he ingested*** D

well wrapped cocaine and thereafter excreted it was free and

voluntary and in itself fully consistent and probable. The incul-

pating statements were corroborated by exhibits A, B, C, D

and the testimony of the forensic expert. The end result is that

the confessions were indeed true. There is a rebuttable presumption E

that the exhibits (cocaine) were kept in safe custody before it was

sent for analysis. Failure of the appellant to prove the contrary makes

the presumption irrebuttable. The suggestion by the appellant that

the exhibits might have been tampered with remains in the realm of F

speculation which is very unreliable evidence. In evidence in court

the officer from the NDLEA forensic Unit said:

“On 5/2/04 I received from the Liaison exhibit officer of the laboratory one wrapping of whitish powdery substance weighing about 5 grams...” G

And in the Drug Analysis Report on page 50 of the Record of Appeal. It reads:

Exhibit ‘A’ One cut wrapping of whitish powdery substance weighing about 5.0 grams enclosed in a heat-sealed transparent evidence pouch. H

Conclusion: Exhibit ‘A’ was found to contain COCAINE. 5 grams of a substance was sent for analysis and 5 grams was examined and found to be cocaine. It is clear to my mind that the substance sent for analysis was not tampered with. The drug sent for analysis was the

same that was recovered from the appellant.

A voluntary confession or/and a plea of guilt is the best evidence to rely on to convict on accused person. The appellant made two consistent voluntary confessions and pleaded guilty to being in possession of cocaine which he excreted.

On such facts the appeal is dismally devoid of merit.

ISSUE 3

Whether there exists strict compliance with the Law when the appellant took his plea to the charge.

Learned counsel for the appellant observed that with respect to the 1st plea there was compliance with section 218 of the Criminal Procedure Act but with respect to the 2nd plea there was non compliance with section 218 of the Criminal Procedure Act because the charge was not explained to the accused person. He argued that failure to record the fact that the charge was read to the accused person/appellant amounts to a miscarriage of justice as the charge is shown not to have been understood by the appellant. Concluding he submitted that the plea and trial was not in compliance with Section 218 of the Criminal Procedure Act. Reliance was placed on Ahmed v. COP 1971 NMLR p.409, Osuji v. IGP 1965 LLR p. 143. He urged this court to resolve issue 3 in favour of the appellant.

Learned counsel for the respondent submitted that the arraignment of the appellant was in compliance with the law, as there was strict compliance with section 218 of the Criminal Procedure Act. He urged this court to dismiss this appeal.

I must consider section 215 and 218 of the Criminal Procedure Act and the correct procedure to be followed. At the commencement of a criminal trial there must be strict compliance with the provisions of section 215 of the Criminal Procedure. That is to say:

(a) the accused person must be placed before the court unfettered unless the court otherwise directs, e.g. he may be fettered if the judge is satisfied that the accused shows signs of being violent.

(b) the charge must be read over and explained to the accused person in the language he understands by the Registrar of court or other officer of the court.

(c) the accused person must be called upon to plead to

the charge.

The above requirements are mandatory and must be strictly followed. If the charge is amended during trial the procedure must again be complied with. The procedure under section 215 of the Criminal Procedure Act guarantees of fair trial of the accused person. Failure to satisfy any of the above (a) to (c) would render the trial, no matter how well conducted, defective and declared a nullity by an appeal court. See Josiah v. State 1985 1 NWLR Pt.1 p.125, Eyorokoromo & anor v. State 1979 Vol. 12 NSCC p.61, Kajubo v. State 1988 1 NSCC 1988 Vol. 19 NSCC P. 475, Effiom v. State 1995 1 NWLR Pt.373 p.507. The appellant was arraigned in the trial court on 17/12/02. Proceedings on that day read: Charge:

“Read to the accused in English, he understands and pleads not guilty to the charge.”

The above proceedings show compliance with section 215 of the Criminal Procedure Act. Learned counsel in his brief on page 14 conceded there was compliance with section 218 of the Criminal Procedure Act. That is wrong. It should be compliance with Section 215 of the Criminal Procedure Act.

During trial the appellant decided to change his plea to guilty. In such a situation section 218 of the Criminal Procedure Act becomes applicable. It reads:

“218. If the accused person pleads guilty to any offence with which he is charged the court shall record his plea as nearly as possible in the words used by him and if satisfied that he intended to admit the truth of all the essentials of the offence of which he has pleaded guilty, the court shall convict him of that offence and pass sentence upon or make an order against him unless there shall be sufficient cause to the contrary.”

On the 13th of January, 2005 extracts from the day’s proceedings reads:

“Mrs. Aidi - Our client intends to change his plea.

Mrs. Alhaji - I apply that the charge be read to the accused for a new plea.

Charge read to accused in English. He pleads guilty to the charge”

Section 215 of the Criminal Procedure Act confers dis-

cretion on the judge on how to proceed when an accused person pleads guilty. If the accused person pleads guilty to murder, a plea of not guilty should be recorded on his behalf. See R. v. K. Mansu 1947 12 WACA p.113. Evidence would then be led as if he entered not guilty plea. **If on the other hand the accused person pleads guilty to an offence that does not carry the death sentence the mandatory requirements of section 215 of the Criminal Procedure Act no longer apply. What is required is that the accused person must plead himself. If he pleads through his counsel or through some other person the trial is a nullity.** See R. v. Boyle 1954 2 QB p.292, R. v. Ellis 1973 57 Cr App R. p.571. **After a plea of guilty the trial judge may proceed to convict and sentence the accused person based on the plea of guilty and the evidence before the judge. To my mind the 2nd plea taken by the appellant where he pleaded guilty after the charge was read to him was in strict compliance with section 218 of the Criminal Procedure Act. There was no need for the charge to be explained to him as this was done when he took his first plea. The mandatory requirements of section 215 of the Criminal Procedure Act are no longer applicable after the 2nd plea of guilty was made.**

This appeal lacks merit and it is hereby dismissed.

F ONNOGHEN JSC

I have had the benefit of reading in draft, the lead Judgment of my learned brother, RHODES-VIVOUR, JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed. The facts of the case have been stated in detail in the said lead judgment and I do not intend to repeat them herein except as may be needed to emphasize the point(s) being made. Appellant was charged with unlawful importation of 1.5 kilograms of cocaine contrary to and punishable under section 10(a) of the National Drug Law Enforcement Agency Cap 253 Laws of the Federation 1990 and he pleaded guilty to the charge. At the conclusion of trial, appellant was convicted and sentenced in the following words:

"I find the accused guilty as charged and by virtue of section

10 of the NDLEA Act convict him. He is accordingly sentenced to a term of 4 years imprisonment from the date of his arrest considering the plea made by counsel. The recovered drug will be destroyed by the NDLEA at the expiration of the appeal periods". See page 13 of the record.

Appellant was dissatisfied with the above judgment and consequently appealed against same to the lower court on a single ground of appeal to wit:

GROUND OF APPEAL

The learned trial judge erred in law in convicting the accused on his plea.

PARTICULARS

- i. Criminal case must be proved beyond reasonable doubt.
- ii. The forensic expert evidence was still not called. See page 18 of the record.

In the appellant's brief filed on 4/7/2005 of pages 51 to 62 of the record, learned Counsel for the appellant, A. AMUDA-KANNIKE ESQ formulated a single issue for determination which is as follows:

"1. Whether the learned Trial Judge ought to have convicted the Appellant on his own plea of guilt. (This issue is distilled from ground No. 1 which is the only ground of Appeal)". See page 55 of the record.

From the above ground of appeal and issue formulated therefrom, it is very clear that the complaint was solely on the trial court basing its decision to convict and sentence appellant on his plea of guilty to the charge. There is no complaint against any defect on the charge pleaded to by appellant. However, in presenting argument on the sole issue, learned Counsel smuggled in the issue of defect in the charge resulting from the omission of the word "Act" thereon - See page 58 of the record where counsel stated, inter alia:

"... With due respect, we equally submit that a close scrutiny of the charge on page 1 of the record of appeal, will show that the word "Act" was missing from the charge and as such the Appellant was convicted on his plea with respect to a non-existent law in that there is no law in our country called "section 10(a) of the National Drug Law Enforcement Agency Cap 253 Laws of the Federation 1990 as contained on the charge but there exist a law and the section of the law called, section 10(a) of the National Law Enforcement Agency

Act, Cap. 253, Laws of the Federation 1990” which is different from what is on the charge. A conviction on a non-existent law is a nullity and we urge my Lords to set the same aside. “

The lower court in resolving the sole issue against appellant stated at page 110 of the record, inter alia, as follows:-

B *“The omission of the word ‘Act’ from the citation of the law under reference which the Appellant was charged is an irregularity. It is however not fatal so as to void his trial and conviction. I agree with the submission of learned counsel for the Respondent that the irregularity in the charge did not prejudice the Appellant as to occasion*
C *a miscarriage of justice to himself...”*

The irregularity is equally curable by the provisions of section 167 of the Criminal Procedure Act which state that:

“No error in stating the offence or the particulars required to
D *be stated in the charge and no omission to state the offence or those particulars shall be regarded of any stage of the case as material unless the accused was in fact misled by such error or omission.”*

It is important to note that it is against the decision of the lower court on the sole issue formulated by learned counsel for appellant
E that the present appeal has arisen and that the same counsel for appellant now has three issues for determination by this Court. The issues are as follows:

“(1) Whether the charge against Appellant was base (sic) on
F *an existing law and whether he can be convicted on such? (This issue was distilled from ground 1 of the grounds of appeal.)*

(2) Whether it can be said that the Exhibit tendered in court (cocaine) has been proved to be the same that was recovered from the Appellant? (This issue was distilled from (sic) ground 2 of the
G *grounds of Appeal).*

(3) Whether there existed strict compliance with the law when Appellant took his plea to the charge? (This issue was distilled from ground 3 of the grounds of appeal).”

The above scenario is unfortunate. From a single issue put
H before the lower court for determination we now have three issues! It is very clear from the single ground of appeal and the sole issue formulated therefrom that appellant’s Counsel cannot legally end up in this Court with three clear issues without two of those issues being fresh issues which must need the leave of either the lower court or

this Court before their being raised for determination. I have gone through the record and there is no such leave granted by either court. The above situation is not permitted and the Court has always frowned upon it and learned Counsel should always guard against it.

However, learned counsel for respondent, FEMI AMOS OOLORUNTOBA ESQ in the respondent's brief deemed filed on 7/5/ 2008 formulated two issues for determination; the issues being:

"1. Whether the Appellant can be convicted of all on a non-existing law?"

"2. Whether notwithstanding plea of guilt by the Appellant, the Respondent ought not to discharge the burden of proof placed on it by law and whether there exist strict compliance with section 218 of the Criminal Procedure Act when Appellant took his plea."

To me the main issue relevant to the appeal is whether appellant, who pleaded to the charge can be convicted on a non existing law. While learned Counsel for appellant has submitted that appellant cannot, counsel for the respondent submitted that the omission of the word "Act" from the charge in question did not occasion a miscarriage of justice nor did it mislead appellant during the trial. Section 167 of the Criminal Procedure Act provides thus:

"No error is stating the offence of the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission."

It is very clear from the above provision that for an appellant to benefit from any defect in a charge, he (she) has the duty/burden to prove to the satisfaction of the Court, at any stage of the case, that the omission was material to the case and that the omission has misled the accused/appellant. If the above ingredients are not established, the omission will be regarded as an irregularity which is not fatal to the proceedings. In the instant case, appellant has failed to prove that he was misled by the omission of the word "Act" in the charge and/or that the omission resulted in miscarriage of justice. At pages 16 - 17 of this record, the lower court found/held that:

"The offence with which the Appellant was charged was known to law and understood by him."

The above finding cannot be faulted based on the facts on record. The lower court went on to hold at p. 110, inter alia, follows:

“The omission of the word “Act” from the citation of the law under which the Appellant was charged is an irregularity. It is however not fatal so as to void his trial and conviction. I agree with the submission of learned Counsel for the Respondent that the irregularity in the charge did not prejudice the Appellant as to occasion a miscarriage of justice to him... “

I hold the considered view that the above holding is sound in law and cannot be faulted. It is for the above reasons and the more detailed ones contained in the lead judgment of learned brother RHODES- VIVOUR, JSC that I too dismiss the appeal for lack of merit and affirm the judgment of the lower court delivered on the 21st day of May, 2007. Appeal dismissed.

MUHAMMAD JSC

My learned brother, Rhodes-Vivour, JSC, afforded me an opportunity to read before now, the judgment just delivered. I adopt his reasoning and conclusion. I dismiss the appeal as lacking in merit.

NGWUTA JSC

I read in draft the lead judgment just delivered by My Lord, Rhodes-Vivour, JSC and I adopt the reasoning and conclusion therein.

Appellant pleaded not guilty to the charge against him on the same being read to him on 17/12/2003. Respondent, upon the appellant joining issues with the State, called a witness and tendered Exhibits A, B, C and D and the matter was adjourned for continuation of hearing. Meanwhile, the appellant acquired religion, as it were and decided to ease his conscience by making a clean breast of the whole thing. As demonstrated in the lead judgment, trial Court complied with the applicable law and rules of Court. Any error in stating the offence or particulars thereof comes within the saving provision of s.166 of the Criminal Procedure Act and the complaint or objection to the charge raised on appeal is belated in view of s.167 of the Act. I entirely agree that the appeal lacks merit and I also dismiss same.