

SUPREME COURT OF NIGERIA
FRIDAY 13TH DECEMBER, 2013. SC. 176/2013
CORAM:- M. MOHAMMED, M. S. MUNTAKA-COOMASSIE, J.
A. FABIYI, N. S. NGWUTA,
K. B. AKA'AH, JJSC

ALHAJI ZANNA MAIDERIBE APPELLANTS
V.
FEDERAL REPUBLIC OF NIGERIA RESPONDENTS

CONVICTION - Sustainability - Disobedience to lawful order - Exhibit P3 does not have legal effect - To justify finding appellant guilty under CC s. 203 - For the alleged disobedience (H1)

WORDS & PHRASES - Order - Definition - Blacks Law Dictionary 5th Ed - Order is defined as mandate - Or direction of court entered in writing - And not included in judgment (H2)

CONVICTION - Sustainability - Public servant - Appellant not being a staff of NPA - Cannot come within the definition of person employed by the Authority - To support his conviction for offence in CC s. 104 (H3)

CRIMINAL PROCEDURE - Charges - Contract - Tender splitting - Exhibit P3 subjects erring public officer to disciplinary action under Civil Service Rules - Hence officer who breached provisions of the exhibit - Cannot be criminally prosecuted in court (H4)

CRIMINAL PROCEDURE - Conspiracy - Proof - Conspiracy being agreement between two or more persons - To do or omit to do an act criminally - Has not been disclosed from conduct of appellant - In not complying with exhibit P3 (H5)

CONVICTION - Undisclosed offence - Appellant's alleged disobedience of exhibit P3 - Is not an offence disclosed in CC ss. 203, 104 & 517 - Hence conviction of appellant for same - Violates his right under 1999 Constitution s. 36(8) (H6)

FACTS

Accused/appellant and others were arraigned on 68 counts charge before the High Court of Lagos State Ikeja for offences under sections 104, 203 and 517 of the Criminal Code Law of Lagos State 1994 to wit inflation of contracts, conspiracy, abuse of office, disobedience to lawful order issued by constituted authority. Appellant was a member of the Board of the Nigerian Ports Authority (NPA) which was established by NPA Act Cap N126 LFN 2004. The Board discharged its functions under the Act between 2001 and 2003. At the end of the tenure of the members of the Board, a Contract Review Committee was appointed to examine the contracts awarded by the Board with the view of determining whether or not there had been any impropriety in the discharge of the responsibilities of appellant and other members of the Board. Appellant and the others were indicted of the aforementioned offences.

To prove its case against appellant and the others, prosecution/respondent called 10 witnesses and tendered a number of documents before closing its case. Appellant on his part did not testify in his defence but chose to rely on the evidence of 1st accused - Chief Olabode George (Chairman of the Board). At the end of the trial, the learned trial Judge in his judgment discharged and acquitted appellant and the others of the offences of inflation of contracts among others in counts 1 to 7, 13, 14, 17, 18, 30, 31, 45, 47, 48, 58, 62, 63, 66 and 68 of the amended information but found them guilty as charged in respect of all the remaining counts. They were sentenced to two years imprisonment without an option of fine. Dissatisfied, appellant and the others filed separate notices of appeal at the Court of Appeal. The court dismissed the appeals and affirmed the conviction and sentence passed by the trial court. Aggrieved, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether or not the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge that Exhibit P3, the administrative circular issued by Honourable Minister of Finance on policy guidelines for the procurement and award of contracts in Federal Government Ministries and Parastatals qualifies as a Lawful order under Section 203 of the Criminal Code of Lagos State and does not violate Section 36(12) of the Constitution of the

Federal Republic of Nigeria, 1999 (as amended).”

6. Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge that the 5th Appellant was guilty of the offences of disobedience to lawful orders and abuse of office laid against the 5th Appellant in counts 9, 10, 11, 12, 15, 16, 19, 20 - 29, 31 - 44, 46, 49, 50, 50, 60, 61, 64, 65 and 67 of the amended information having regard to the totality of the evidence before the trial Court and the ingredients of the said offences.”

7. Whether or not the learned Justices of the Court of Appeal were right in law in affirming the decision of the learned trial Judge that the prosecution had established beyond reasonable doubt the case of conspiracy to disobey a lawful order against the 5th Appellant and the other Appellants as laid in count 8 of the amended information having regard to the totality of the evidence as well as the ingredients of the offence of conspiracy.”

HELD (Unanimously allowing the appeal per MOHAMMED JSC)

CONVICTION - Sustainability

1. In the count for the offences of disobedience to lawful order issued by constituted authority authorized by Order, Act, Law or statute under Section 203 of the Criminal Code Law of Lagos State, the question to be determined first is whether the circular Exhibit P3 which the Appellant was alleged to have disobeyed can answer the description of a legal instrument issued under an enabling Order, Act, Law or Statute within the requirement of the Section to justify the conviction and sentence passed on the Appellant and affirmed by the Court below.

By virtue of Section 274(b) of the 1999 Constitution cited and relied upon by the Respondent in support of the argument that the circular Exhibit P3 qualifies as an order or legal instrument, does not support the argument of the Respondent because the circular Exhibit P3 is not contained in a legal notice and therefore cannot qualify as an Order, Act, Law, Statute or legal instrument issued under Sections 147 or 148 of the 1999 Constitution by the Federal Ministry of Finance. In the present case therefore, the circular Exhibit P3 with serial number

F.15775 is no more than a mere administrative document by which the Federal Ministry of Finance conveyed financial instruction on Federal Government new Policy Guidelines for procurement and award of contracts in Federal Government Ministries and Parastatals. Since on the face of the circular, it was not shown to have been issued under an Order, Act, Law or Statute, in the absence of statutory authority as contained in a legal notice, it cannot be said to have any legal effect to justify finding the Appellant guilty of offence under Section 203 of the Criminal Code Law of Lagos State for the alleged disobedience to the said circular Exhibit P3. For the foregoing reasons, I find myself unable to agree with the trial Court and the Court below that the conduct of the Appellant in taking part in the alleged disobedience to the circular Exhibit P3, constituted the offence under Section 203 of the Criminal Code Law of Lagos State. The conviction and sentence passed on the Appellant in this respect must be set aside to pave the way for allowing the Appellant's appeal and his discharge and acquittal. (pp. 4337 G/4338 C/G)

WORDS & PHRASES - Order - Definition

2. An order is defined in Blacks Law Dictionary Fifth Edition at page 988 as a mandate; precept; command or direction authoritatively given, rule or regulation, direction of a Court or Judge made or entered in writing and not included in a judgment. The case of Abubakar v. B. O. & A. P. Ltd. (2007) 18 N.W.L.R. (Pt. 1066) 319 at 384 where this Court said an order contained in a legal notice qualifies as an existing law. (p. 4338 A)

CONVICTION - Sustainability - Public servant

3. Another question raised by learned Counsel to the Appellant and the Respondent in relation to the count under Section 104 of the Criminal Code is whether the Appellant who was undoubtedly a member of the Board of the Nigerian Ports Authority, was a person employed in the Public Service of the Federation of Nigeria, this question is fully answered by Section 318(e) of the 1999 Constitution of the Federal Republic of Nigeria as amended where public service of the Federation is defined as service in any capacity in respect of the Government of the Federation and includes service as;...

“(e.) Staff of any statutory Corporation established by an Act of the National Assembly.”

The Nigerian Ports Authority no doubt is a statutory corporation established by an Act of the National Assembly CAP N126 of 2004. However the Appellant not being a staff of the Authority, cannot come within the definition of a person employed in the service of the Authority to support his conviction for the offence under Section 104 of the Criminal Code Law of Lagos State and for this reason the Appellant’s conviction and Sentence for the offence must be set aside and it is hereby set aside. (p. 4339 F)

Charges - Contract - Tender splitting

4. In any case the conviction of the Appellant under Section 104 of the Criminal Code Law of Lagos State is linked to the allegation of splitting of one contract into two contracts to bring them within the limit of the Appellant’s Nigerian ports Authority Board under the Circular Exhibit P3. However the same circular Exhibit P3 had taken care of Tender Splitting under paragraph 2 (viii) at page 4 thereof where it said -

“TENDER SPLITTING

It shall be regarded as serious offence for an officer to deliberately split contracts of works, purchases, procurement of services in order to circumvent the provision of this circular. Such breach of the rules shall be subject of disciplinary action.

Therefore since the circular itself as far it’s breach in splitting of contracts etc is concerned had taken care of such situation by subjecting any erring public officer to face disciplinary action under the normal Civil Service Rules, there was no justification in law to subject any officer who committed a breach of the provisions of the circular prohibiting splitting of contracts to bring them within the limit of any Government Ministry or Agency to criminal prosecution in Court of Law. Therefore even if the Appellant were a person employed in the public service of the Federation, the breach of the provision of the circular Exhibit P3 regarding alleged splitting of contracts, would not have subjected him to a charge in Court for a criminal offence. (p. 4340 B)

CRIMINAL PROCEDURE - Conspiracy - Proof

5. The offence of conspiracy can only be said to have been established where there is a common criminal design or agreement by two or more persons to do or to omit to do an act criminally. Since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties, it is rarely capable of direct proof.

In the circumstances of the present case, the offence of conspiracy had certainly not been disclosed from the conduct of the Appellant, Chairman and members of the Board of the Nigerian ports Authority in not complying with the provisions of the circular Exhibit P3 in the discharge of their responsibilities between 2001 and 2003. Thus the conviction of the Appellant for the offence of conspiracy under Section 517 of the Criminal Code Law of Lagos State must be set aside and it is hereby set aside. (p. 4341 E)

D CONVICTION - Undisclosed offence

6. I have carefully avoided delving into the issue of jurisdiction raised by the Appellant in this appeal in order to look into the merit of the Appellant's appeal vis-à-vis his conviction and sentence for the offences under Sections 203, 104 and 517 of the Criminal Code Law of Lagos State 1994 for the alleged disobedience to the Federal Ministry of Finance Circular Exhibit P3 by the Board of the Nigerian Ports Authority of which he was a member between 2001 and 2003. This conduct of the alleged disobedience of the circular is certainly not an offence disclosed in Sections 203, 104 and 517 of the Criminal Code Law of Lagos State or any other law in Nigeria for that matter. The conviction of the Appellant for this offence therefore constitutes a gross violation of the Appellant's right under Section 36(8) of the Constitution of the Federal Republic of Nigeria, 1999 which states -

"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed."

For this reason of the gross violation of the Appellant's right under the Constitution in his trial conviction and sentence for offences not defined and the penalty therefor not prescribed in a written law, the entire proceedings remained a nullity and must be set aside

because disobedience of the circular Exhibit P3 by the Board of the Nigerian Ports Authority where the Appellant served as a member between 2001 and 2003, was not an offence under the law in Nigeria at the time the offences were alleged to have been committed.

(p. 4341 H)

B

REPRESENTATION

Olalekan Ojo, for Appellant

Festus Keyamo with him Benedicta N. Obanye (Mrs.) and John Anietor, for Respondent

C

CASES REFERRED TO

Dapialong v. Dariye (2007) 8 NWLR (pt. 1036) 332

Anyanikepele v. Nigerian Army (2000) 13 NWLR (pt. 684) 209

Abubakar v. B. O. & A. P. Ltd. (2007) 18 NWLR (pt. 1066) 319

D

Njovens v. State (1973) 5 SC 17

Dabo v. State (1977) 5 SC 197

Erim v. State (1994) 5 NWLR (pt. 346) 522

Oduneye v. State (2001) 2 NWLR (pt. 697) 311

Agumadu v. The Queen (1963) 1 All NLR 203

E

STATUTES REFERRED TO

NPA Act Cap N126 LFN 2004

Criminal Code Law Cap 32 Laws of Lagos State 1994, ss. 104, 203, 517

F

Constitution of the Federal Republic of Nigeria 1999, ss. 36(8)(12), 147, 148, 274(b), 318(e)

BOOK REFERRED TO

G

Blacks Law Dictionary Fifth Edition at page 988

LEAD JUDGMENT BY MOHAMMED JSC

The Appellant was a member of the Board of the Nigerian Ports Authority Lagos one of the Parastatals under the supervision of the Federal Ministry of Transport. The Authority was established by an Act of the National Assembly, the Nigerian Ports Authority Act Chapter N126 Laws of the Federation of Nigeria 2004. The Board of the Authority under which the Appellant served, discharged its

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functions under the Act between 2001 when the Chairman and members of the Board were appointed and 2003 when the tenure of the Chairman and members of the Board terminated following the dissolution of the Board. At the end of the tenure of the Appellant, the Chairman and other members of the Nigerian Ports Authority Board who served with the Appellant between 2001 and 2003, a Contract Review Committee was appointed to examine the contracts awarded by the Board on which the Appellant served, with the view of determining whether or not there had been any impropriety in the discharge of the responsibilities of the Appellant, the Chairman and other members while serving on the Board during the period of their tenure. Following the indictment of the Appellant, Chairman and members of the Board in the Report of the Contract Review Committee, the Appellant, Chairman and other members were arraigned before the High Court of Justice of Lagos State at Ikeja where they were jointly charged in 68 counts in the Amended Information dated 28th October, 2008.

In counts 1 - 7, the Appellant and his co-accused persons were charged with the offences of inflation of contracts. In count 8, on the other hand the accused persons were charged under Section 517 of the Criminal Code Law of Lagos State 1994 for conspiracy to commit the offences they were also charged with under Sections 104 and 203 of the Criminal Code of Lagos State for abuse of office and disobedience of lawful order issued by constituted authority. In counts 9 - 57 on the other hand the accused persons were charged with the offences of disobedience to lawful order issued by constituted authority under Section 203 of the Criminal Code Law of Lagos State 1994. The last charge against the accused persons in counts 59 - 68, is for the offences of abuse of office under Section 104 of the Criminal Code Law of Lagos State 1994.

In order to prove the offences for which the Appellant and his co-accused persons were charged with in the 68 counts at the trial High Court, the prosecution called 10 witnesses and tendered a number of documents before closing its case. The Appellant on his part did not testify in his defence but chose to rely on the evidence of the first accused person Chief Olabode George who was the Chairman of the Board of the Nigerian Ports Authority where the Appellant served as a member between 2001 and 2003 and was the

only accused person who gave evidence at the trial Court.

At the end of the final addresses of the learned senior Counsel and Counsel to the Appellant and his co-accused persons and the prosecution, the learned trial Judge in the judgment delivered on 26th October, 2009, discharged and acquitted the Appellant and his co-accused persons of the offences of inflation of contracts among others in counts 1 to 7, 13, 14, 17, 18, 30, 31, 45, 47, 48, 58, 62, 63, 66 and 68 of the Amended Information but found the Appellant and his co-accused persons guilty as charged in respect of all the remaining counts.

The Appellant as well as the other co-accused persons were sentenced to 2 years imprisonment without an option of fine. Dissatisfied with this conviction and sentence by the trial Court, the Appellant as well as the other persons convicted along with him, lodged appeals against the judgment on substantially similar grounds of appeal. The Appellant's appeal together with the appeals of the other persons convicted with the Appellant were heard and dismissed by the Court of Appeal Lagos Division in its judgment delivered on 26th October, 2009 in which the conviction and sentence of the Appellant and other persons convicted and sentenced along with him were affirmed. Being dissatisfied with the decision of the Court of Appeal, the Appellant is now on a further and final appeal to this Court against the affirmation of his conviction and sentence by the Court of Appeal.

In line with the requirements of the Supreme Court Practice Directions No. S.1.00 of 15th July, 2013 which made provisions for expeditious administration of criminal appeals arising from corruption related offences, the Appellant's application for extension of time to appeal and extension of time to file the appellants brief of argument and to deem same Notice and Grounds of Appeal and the Appellants brief of argument as properly filed and served to facilitate the hearing of the appeal, were taken on 26th September, 2013 and granted by this Court as the learned Counsel to the Respondent had no objection to the applications. Consequently this appeal was heard on the Appellant's brief of argument deemed filed and served on 26th September, 2013 and the Respondent's brief of argument also deemed properly filed and served the same day as the Appellant's right to file an Appellant's Reply brief was waived by him through

his learned Counsel.

The Appellants brief of argument contains as many as 9 issues for determination distilled from the 16 grounds of appeal filed in the Appellants Notice of Appeal. These issues are -

“ISSUE ONE

- B Whether or not the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge that Exhibit P3, the administrative circular issued by Honourable Minister of Finance on policy guidelines for the procurement and award of contracts in Federal Government Ministries and Parastatals qualifies as a Lawful order under Section 203 of the Criminal Code of Lagos State and does not violate Section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).” This issue is covered by ground 8 of the notice of appeal.

“ISSUE TWO

- D Whether or not the learned Justices of the Court of Appeal were right by not holding that the jurisdiction to try the 5th Appellant for the offences for which the 5th Appellant was tried and Convicted is exclusively vested in the Federal High Court by virtue of the provisions of Sections 251 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.”

This issue is distilled from grounds 9 and 10 of the Notice of Appeal.

“ISSUE THREE

- F Whether or not the learned Justices of the Court of Appeal were right in their decision that the information filed against the 5th Appellant by the Respondent had been properly and competently Initiated and that the 5th Appellant could not raise any objection to the competence of the information after the 5th Appellant had pleaded to the charge.” This issue is distilled from grounds 11, 12, 13, 14 and 15 of the notice of appeal.

“ISSUE FOUR

- H Whether or not the learned Justices of the Court of Appeal were right in affirming the decision of the trial Court that the 5th Appellant had not Established the defence of lawful excuse to the charges laid against the 5th Appellant under Section 203 of the Criminal Code of Lagos State having regard to the totality of the evidence before the trial Court.” This issue is distilled from grounds

5 and 6 of the notice of appeal.

“ISSUE FIVE

Were the learned Justices of the Court of Appeal (sic) were right in holding that the Prosecution did not bear the burden of establishing beyond reasonable doubt the intention to defraud on the part of the 5th Appellant in respect of the offences for which the 5th Appellant was convicted when the Prosecution in laying the Charges made intention to defraud an ingredient of each of the offences in spite of the fact that the statutes creating the offences did not make intention to defraud an ingredient of the offences.” This issue is distilled from Ground one of the grounds of appeal. B C

“ISSUE SIX

Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge that the 5th Appellant was guilty of the offences of disobedience to lawful orders and abuse of office laid against the 5th Appellant in counts 9, 10, 11, 12, 15, 16, 19, 20 - 29, 31 - 44, 46, 49, 50, 50, 60, 61, 64, 65 and 67 of the amended information having regard to the totality of the evidence before the trial Court and the ingredients of the said offences.” This issue is distilled from grounds 4, 5, 6 and 8 of the grounds of appeal. D E

“ISSUE SEVEN

Whether or not the learned Justices of the Court of Appeal were right in law in affirming the decision of the learned trial Judge that the prosecution had established beyond reasonable doubt the case of conspiracy to disobey a lawful order against the 5th Appellant and the other Appellants as laid in count 8 of the amended information having regard to the totality of the evidence as well as the ingredients of the offence of conspiracy.” This issue is distilled from ground 2 of the grounds of appeal. F G

“ISSUE EIGHT

Whether the learned Justices of the Court of Appeal were right in affirming the decision of the learned trial Judge in relying on Section 7 of the Criminal Code to find the 5th Appellant criminally liable for splitting the contracts placed before the Board of the Nigerian Ports Authority of which the 5th Appellant was a member.” This issue is distilled from ground 3 of the grounds of appeal. H

“ISSUE NINE

Whether or not the Justices of the Court of Appeal were right in not considering all the issues raised by the 5th Appellant in his defence to the case of the prosecution before affirming the judgment of the learned trial Judge convicting the 5th Appellant.” This issue is distilled from ground 7 of the grounds of appeal.

B In the Respondent’s brief of argument deemed filed by the Respondent on 26th September, 2013 after the regularization of the Appellant’s appeal by this Court on the day this appeal was heard, the learned Counsel to the Respondent identified only 3 issues for the determination of the appeal from the 16 grounds of appeal filed C in the Appellants Notice of Appeal. The issues are -

“1. Whether the High Court of Lagos State had the requisite jurisdiction to try the Appellants for the offences for which they were convicted. (Grounds 9, 10, 11, 12, 13, 14 & 15 of the Appellants Notice of Appeal).

D 2. Whether the concurrent findings of facts of the two Courts below in this case are so preserve and unsupportable by evidence so as to warrant interference by the Supreme Court (Grounds 1, 2, 3, 4, 5, 6, 7 & 8 of the Appellants Notice of Appeal).

E 3. Whether the Court of Appeal was wrong to have relied on Section 7 of the Criminal Code CAP C.17 Laws of Lagos State, 2003, to uphold the conviction of the Appellant (Ground 3 of the Appellant’s notice of appeal).”

The second issue as identified above in the Respondent’s F brief of argument clearly does not arise from any of the grounds of appeal filed by the Appellant. This is because there is no ground of appeal in the Appellant’s Notice of Appeal complaining of concurrent findings of facts which cannot be disturbed from which the issue could have been distilled. In any case, upon very close examination of the 9 G issues for determination distilled in the Appellant’s brief of argument; it is my view that this appeal can be effectively determined upon the resolution of issues one, six and seven as framed in the Appellant’s brief of argument. I shall therefore proceed to determine this appeal on the 3 issues accordingly to be taken together.

H However, before proceeding to consider the relevant submissions of the learned Counsel on the issues I have chosen, it is also relevant to bring out the 3 counts of the offences of conspiracy, disobedience of lawful order issued by constituted authority and

abuse of office for which the Appellant was tried and convicted under Sections 517, 203 and 104 of the Criminal Code Law 1994 of Lagos State. The offence of conspiracy in count 8 reads -

“Statement of offence - 8th count.

Conspiracy to disobey lawful order issued by constituted authority contrary to Section 517 of the Criminal Code CAP N32 B Vol. 2, Laws of Lagos State of Nigeria, 1994.

PARTICULARS OF OFFENCE

Chief Olabode George, former Chairman Nigerian Ports Authority (NPA), Architect Aminu Dabo, former Managing Director Nigerian Ports Authority (NPA), Captain O. Abidoye, Alhaji Abdullahi Aminu Tafida, Alhaji Zanna Maiden, Engr. Sule Aliyu, Prince Victor Agu (now at large), Engr. B. G. Yakasai (now at large), Emmanuel Omokhomion (now at Large) and Mr. R. S. Anah (now at large) on or about 18th day of October, 2002 at Lagos, within the Ikeja D Judicial Division, with intent to defraud conspired to disobey lawful order issued by a constituted authority to wit the Federal Government of Nigeria through the Federal Ministry of Finance, in Circular No. F15775, dated 27th June, 2001 on policy guidelines for procurement and award of contracts in Government Ministries and parastatals.” E

The offence in the 10th count for disobedience to lawful order on the other hand reads -

“Statement of offence - 10th count. Disobedience to lawful order issued by Constituted Authority contrary to Section 203 of the Criminal Code CAP 32 Vol. 2 laws of Lagos State of Nigeria, 1994. F

PARTICULARS OF OFFENCE

Chief Olabode George, former Chairman, Nigerian Ports Authority (NPA), Architect Aminu Dabo, former Managing Director Nigerian Ports Authority (NPA), Captain O. Abidoye, Alhaji Abdullahi Aminu Tafida, Alhaji Zanna Maiden, Engr. Sule Aliyu, Prince Victor Agu (now at Large), Engr. B. G. Yakasai (now at large), Emmanuel Omokhomion (now at large) and Mr. R. S. Anah (now at large) on or about 6th Day of May, 2003 at Lagos, within the Ikeja Judicial Division, with intent to defraud, conspired to disobey lawful order H issued by a constituted authority to wit; the Federal Government of Nigeria, through the Federal Ministry of Finance, in circular No. F15775, dated 27th June, 2001 on policy guidelines for procurement and award of contracts in Government Ministries and parastatals, by

approving an award of contract for N49, 595,448 Million (Forty Nine Million, Five Hundred and Ninety Five Thousand, Four Hundred and Forty Eight Naira) to Alliance Tech. Limited for the supply and installation of HT Panel and Accessories for Federal Lighter Terminal Onne to the Nigerian Ports Authority (NPA) which was beyond your approved limit as contained in the said circular.”

As for the offence of Abuse of office for which Appellant was charged, tried and convicted in the 58th count, that count reads -

“Statement of offence - 58th Count Abuse of office contrary to Section 104 of the Criminal Code CAP 32 Vol. 2, Laws of Lagos State of Nigeria, 1994.

PARTICULARS OF OFFENCE

Chief Olabode George, former Chairman Nigerian Ports Authority (NPA), Architect Aminu Dabo, former Managing Director Nigerian Ports Authority (NPA), Captain O. Abidoye, Alhaji Abdullahi Aminu Tafida, Alhaji Zanna Maiden, Engr. Sule Aliyu, Prince Victor Agu (now at large), Engr. B. G. Yakassai (now at large), Emmanuel Omokhomion (now at large) and Mr. R. S. Anah (now at large) on or about 8th day of August, 2002 at Lagos, within the Ikeja Judicial Division, while being employed in the public service of the Federation as Board Members of Nigerian Ports Authority (NPA), with intent to defraud abused the authority of your office regarding award of contract by splitting one contract in the sum of N27,075,000.00 (Twenty Seven Million, Seventy-Five Thousand Naira) into two separate contracts; which sum was beyond your approved limit; and subsequently awarded the split contracts to Dockyard Maritime Limited for the supply of three (3) numbers Cylinder Rubber Fenders size 1000/500 x 500 mm to Nigerian Ports Authority (NPA), an act which was arbitrary and prejudicial to the right of the Federal Minister of Transport, being the appropriate authority to award contracts in excess of N20 Million (Twenty Million Naira).”

I have decided to take the three issues 1, 6 and 7 together in the determination of this appeal because the issues were all predicated on the alleged disobedience of the administrative circular No. F15775 dated 27th June, 2001 issued by the Federal Ministry of Finance on policy guidelines for procurement and award of contracts in Federal Government Ministries and Parastatals which featured in all the counts upon which the Appellant was tried convicted and sentenced

to 2 years imprisonment without any option of fine for the offences of conspiracy, disobedience of lawful order issued by constituted authority and abuse of office while employed in the public service of the Federation under Sections 517, 203 and 104 of the Criminal Code Law of Lagos State of Nigeria, 1994.

Learned Counsel to the Appellant opened his argument in support of the issues concerned in the Appellant's brief of argument drew attention to Section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; that this requirement of the Constitution had been restated in several decisions of this Court including the case of *Dapialong & Ors. v. Dariye & Ors.* (2007) 8 N.W.L.R. (Pt. 1036) 332 at 451. Learned Counsel stressed that the counts of conspiracy, disobedience to lawful order and abuse of office laid against the Appellant under Sections 203, 104 and 517 of the Criminal Code Law of Lagos State, were all predicated on the Administrative or Ministerial guidelines contained in Exhibit P3 issued by the Federal Minister of Finance and that all the prosecution did was to incorporate Exhibit P3 into the counts of disobedience to lawful order and abuse of office. It was the stand of the learned Counsel that the circular Exhibit P3 does not qualify as a law properly enacted within the requirement of Section 36(12) of the 1999 Constitution.

On the status of Government circulars like Exhibit P3, learned Counsel relied on the book titled *Administrative Law*, Eighth Edition by Professor W. Wade and C. Forsyth page 851 and submitted that such circulars as Exhibit P. 3 are documents giving guidelines about governmental organization and the exercise of discretionary powers which do not have any legal effect whatsoever in the absence of statutory authority. Learned Counsel emphasized that the law envisaged under Section 36(12) of the 1999 Constitution is a law enacted by the National Assembly, the State House of Assembly or the Legislative House of any Local Government Council and as such the Court below was wrong in affirming the decision of the trial Court that Exhibit P3 qualified as a lawful order under Section 203 of the Criminal Code Law of Lagos State. A decision of the Court of Appeal in the case of *Anyanikepele v. Nigerian Army* (2000) 13 N.W.L.R. (pt.684) 209 at 221- 222, was relied upon by Counsel in support of this submission

and in urging the Court to resolve the issues in favour of the Appellant.

In his reaction to the status of the Federal Ministry of Finance circular number F.15775 of 27th June, 2001 Exhibit P3, the learned Counsel to the Respondent had argued that the circular Exhibit P3 has the force of law within the requirement of Section 36(12) of the 1999 Constitution because that circular having been issued by the Minister of Finance, that document was deemed issued under Sections 147 and 148 of the 1999 Constitution of the Federal Republic of Nigeria in exercise of the powers of the Minister as authorized by the Federal Executive Council; that the Nigerian Ports Authority where the Appellant served as a member of the Board, is a Federal Government Agency which was bound to comply with the directives contained in the circular Exhibit P3 which is a lawful order issued by a constituted authority within the requirement of Sections 203, 104 and 517 of the Criminal Code Law of Lagos State, to justify the conviction of the Appellant as found by the trial Court and affirmed by the Court below; that once it was clear that it is a competent authority that issued the order, then compliance with the order was mandatory as was decided by this Court in the case of *Abubakar v. B. O. & A. P. Ltd.* (2007) 18 N.W.L.R. (Pt. 1066) 319 at 384.

In the resolution of these issues it is important to note that the trial, conviction and ultimate sentence of two years imprisonment passed on the Appellant by the trial High Court and affirmed on appeal by the Court of Appeal on the 3 counts for offences under Sections 203, 104 and 517 of the Criminal Code, Law of Lagos State were predicated principally on the Federal Ministry of Finance circular No. F15775 of 27th June, 2001 which was in evidence at the trial Court as Exhibit P3. The document Exhibit P3 is headed "CIRCULAR" with the number F15775 and specifically addressed to the Chief of Staff to the President, All Permanent Secretaries and other Federal Government Officers including Director-General/Chief Executives of Parastatals, Agencies and Government owned Companies among others. As shown at page 2 of the circular Exhibit P3, it was issued to convey -

"New Policy Guidelines for Procurement and Award of contracts in Government Ministries/Parastatals."

The Nigerian Ports Authority where the Appellant served as a member of the Board between 2001 and 2003, is one of the Federal

Government Parastatals which was established by the Nigerian Ports Authority Act CAP N126 of the Laws of the Federation of Nigeria, 2004 and which was supposed to have received a copy of Exhibit P. 3 from the Federal Ministry of Transport which is the parent Ministry of the Parastatal. However, it is very clear from the evidence of PW4, who was a star witness for the prosecution at the trial of the Appellant that the circular Exhibit P3 was not received at the Federal Ministry of Transport, the parent Ministry of the Nigerian Ports Authority where the witness was also serving as a member of the Board of the Authority representing the Federal Ministry of Transport where the witness was also serving as an officer. It was this witness that drew the attention of the Board of the Nigerian Ports Authority at the 9th Board meeting, of the existence of the circular Exhibit P3, the new approved expenditure guidelines which reduced the capacity of the Board regarding the financial limit of contract award. The witness testified that the Board in which the Appellant and himself were serving as members had refused to acknowledge and comply with Exhibit P3.

In the count for the offences of disobedience to lawful order issued by constituted authority authorized by Order, Act, Law or statute under Section 203 of the Criminal Code Law of Lagos State, the question to be determined first is whether the circular Exhibit P3 which the Appellant was alleged to have disobeyed can answer the description of a legal instrument issued under an enabling Order, Act, Law or Statute within the requirement of the Section to justify the conviction and sentence passed on the Appellant and affirmed by the Court below. An order is defined in Blacks Law Dictionary Fifth Edition at page 988 as a mandate; precept; command or direction authoritatively given, rule or regulation, direction of a Court or Judge made or entered in writing and not included in a judgment. The case of Abubakar v. B. O. & A. P. Ltd. (2007) 18 N.W.L.R. (Pt. 1066) 319 at 384 where this Court said an order contained in a legal notice qualifies as an existing law. By virtue of Section 274(b) of the 1999 Constitution cited and relied upon by the Respondent in support of the argument that the circular Exhibit P3 qualifies as an order or legal instrument, does not support the argument of the Respondent because the circular Exhibit P3 is not contained in a legal notice and therefore cannot qualify as an Order, Act, Law, Statute or legal

instrument issued under Sections 147 or 148 of the 1999 Constitution by the Federal Ministry of Finance.

In Administrative Law Book Eight Edition co-authored by Professor W. Wade and C. Forsyth at page 851 throws light on the status of Departmental Circulars generally. Such circulars are -

B “a common form of administrative document by which instructions are disseminated;... Many such circulars are identified by serial numbers and published and many of them contain general statements of policy;... They are therefore of great importance to the public giving much guidelines about Governmental organization and the exercise of discretionary powers. In themselves they have no legal effect whatsoever, having no statutory authority.”

D In the present case therefore, the circular Exhibit P3 with serial number F.15775 is no more than a mere administrative document by which the Federal Ministry of Finance conveyed financial instruction on Federal Government new Policy Guidelines for procurement and award of contracts in Federal Government Ministries and Parastatals. Since on the face of the circular, it was not shown to have been issued under an Order, Act, Law or Statute, in the absence of statutory authority as contained in a legal notice, it cannot be said to have any legal effect to justify finding the Appellant guilty of offence under Section 203 of the Criminal Code Law of Lagos State for the alleged disobedience to the said circular Exhibit P3. For the foregoing reasons, I find myself unable to agree with the trial Court and the Court below that the conduct of the Appellant in taking part in the alleged disobedience to the circular Exhibit P3, constituted the offence under Section 203 of the Criminal Code Law of Lagos State. The conviction and sentence passed on the Appellant in this respect must be set aside to pave the way for allowing the Appellant’s appeal and his discharge and acquittal.

G Coming to the second count under Section 104 of the Criminal Code Law of Lagos State, the Appellant was convicted and sentenced to two years for the offence of with intent to defraud, the Appellant had abused the authority of his office by splitting one contract into two separate contracts which was beyond the approved limit of the Board of the Appellant, while being employed in the public service of the Federation of Nigeria as Board Member of Nigeria Ports Authority. The conviction of the Appellant for the offence under

Section 104 of the Criminal Code Law of Lagos State also predicated upon the alleged disobedience of the circular Exhibit P.3 which does not have any statutory or legal backing, cannot stand for the same reason as I have found regarding the conviction of the Appellant for the offence under section 203 of the Criminal Code Law of Lagos State. B

Another question raised by learned Counsel to the Appellant and the Respondent in relation to the count under Section 104 of the Criminal Code is whether the Appellant who was undoubtedly a member of the Board of the Nigerian Ports Authority, was a person employed in the Public Service of the Federation of Nigeria, this question is fully answered by Section 318(e) of the 1999 Constitution of the Federal Republic of Nigeria as amended where public service of the Federation is defined as service in any capacity in respect of the Government of the Federation and includes service as;... C D

“(e.) Staff of any statutory Corporation established by an Act of the National Assembly.”

The Nigerian Ports Authority no doubt is a statutory corporation established by an Act of the National Assembly CAP N126 of 2004. However the Appellant not being a staff of the Authority, cannot come within the definition of a person employed in the service of the Authority to support his conviction for the offence under Section 104 of the Criminal Code Law of Lagos State and for this reason the Appellant’s conviction and Sentence for the offence must be set aside and it is hereby set aside. E F

In any case the conviction of the Appellant under Section 104 of the Criminal Code Law of Lagos State is linked to the allegation of splitting of one contract into two contracts to bring them within the limit of the Appellant’s Nigerian ports Authority Board under the Circular Exhibit P.3. However the same circular Exhibit P.3 had taken care of Tender Splitting under paragraph 2 (viii) at page 4 thereof where it said - G

“TENDER SPLITTING

It shall be regarded as serious offence for an officer to deliberately split contracts of works, purchases, procurement of services in order to circumvent the provision of this circular. Such breach of the rules shall be subject of disciplinary action.” H

Therefore since the circular itself as far it's breach in splitting of contracts etc is concerned had taken care of such situation by subjecting any erring public officer to face disciplinary action under the normal Civil Service Rules, there was no justification in law to subject any officer who committed a breach of the provisions of the circular prohibiting splitting of contracts to bring them within the limit of any Government Ministry or Agency to criminal prosecution in Court of Law. Therefore even if the Appellant were a person employed in the public service of the Federation, the breach of the provision of the circular Exhibit P3 regarding alleged splitting of contracts, would not have subjected him to a charge in Court for a criminal offence.

With regard to the count for conspiracy under Section 517 of the Criminal Code Law of Lagos State for which the Appellant was convicted along with the Chairman of the Board and other members, the evidence led by the prosecution does not disclose the existence of such conspiracy taking into consideration the circumstances in which the circular Exhibit P3 was brought at the 9th Meeting of the Board of the Nigerian Ports Authority. Although PW4 was the representative of the Federal Ministry of Transport from which the Management of the Nigerian ports Authority ought to have received the copy of the circular Exhibit P3 that witness could not give satisfactory explanation as to whether or not the circular had in fact been received in the Federal Ministry of Transport. The fact that it was the photocopy of the circular that was received at the Federal Ministry of Water Resources that was brought, seemed to confirm the fact that the copy of the circular received in his own Federal Ministry of Transport could not be traced by him in that Ministry. To compound it all, even on the face of Exhibit P3 which was clearly dated 27th June, 2001, that document was stamped received by the Federal Ministry of Water Resources on 4th July, 2000, more than one year before the circular was issued, had given the circular Exhibit P3 a tremendous doubt which ought to be resolved in favour of the Appellant. This explains why the Appellant, the Chairman and other members of the Board of the Nigerian Ports Authority found it necessary to write to the Ministry of Transport to seek for further clarification on the circular to which no reply was received.

The offence of conspiracy can only be said to have been established where there is a common criminal design or agreement

by two or more persons to do or to omit to do an act criminally. Since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties, it is rarely capable of direct proof. See Patrick Njovens & Ors. v. The State (1973) 5 SC 17, Dabo & Anor. v. The State (1977) 5 SC 197; Erim v. The State (1994) 5 NWLR (pt. 346) 522 and Oduneye v. The State (2001) 2 NWLR (pt. 697) 311 at 325. In the circumstances of the present case, the offence of conspiracy had certainly not been disclosed from the conduct of the Appellant, Chairman and members of the Board of the Nigerian ports Authority in not complying with the provisions of the circular Exhibit P3 in the discharge of their responsibilities between 2001 and 2003. Thus the conviction of the Appellant for the offence of conspiracy under Section 517 of the Criminal Code Law of Lagos State must be set aside and it is hereby set aside.

I have carefully avoided delving into the issue of jurisdiction raised by the Appellant in this appeal in order to look into the merit of the Appellant's appeal vis-à-vis his conviction and sentence for the offences under Sections 203, 104 and 517 of the Criminal Code Law of Lagos State 1994 for the alleged disobedience to the Federal Ministry of Finance Circular Exhibit P3 by the Board of the Nigerian Ports Authority of which he was a member between 2001 and 2003. This conduct of the alleged disobedience of the circular is certainly not an offence disclosed in Sections 203, 104 and 517 of the Criminal Code Law of Lagos State or any other law in Nigeria for that matter. The conviction of the Appellant for this offence therefore constitutes a gross violation of the Appellant's right under Section 36(8) of the Constitution of the Federal Republic of Nigeria, 1999 which states -

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.”

For this reason of the gross violation of the Appellant's right under the Constitution in his trial conviction and sentence for offences not defined and the penalty therefor not prescribed in a written law, the entire proceedings remained a nullity and must be set aside because disobedience of the circular Exhibit P3 by the Board of the Nigerian Ports Authority where the Appellant served as a member

between 2001 and 2003, was not an offence under the law in Nigeria at the time the offences were alleged to have been committed.

In the result, this appeal must succeed and it is hereby allowed.

The conviction and sentence of two years imprisonment passed on the Appellant by the trial High Court on 26th October, 2009 and affirmed
B in the judgment of the Court of Appeal on 21st January, 2011, for the offences under Sections 203, 104 and 517 of the Criminal Code Law of Lagos State, is hereby set aside and the Appellant is hereby acquitted and discharged.

C

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Mohammed, JSC. I agree completely with the lucid
D reasons therein advanced to arrive at the conclusion that the appeal is meritorious and should be allowed.

The respondent laced the counts for which the appellant was charged and convicted with 'intent to defraud'. This was done
E ostensibly to cast damaging slur on his name. I say so since same was not proved at all; talk-less of being proved beyond reasonable doubt. Failure to prove an element not contained in the law creating the offence is fatal to the case of the respondent. The decision of this court in the case of *Agumadu v. The Queen* (1963) 1 All NLR 203
F is here in point.

The crux of the matter is that the respondent attempted to place reliance on the circular, Exhibit P3 which is not in tune with the clear provision of section 36(12) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). As can be traced from Exhibit P3, splitting of contract should merely incur administrative
G discipline. It was not, at the material time, an offence that was defined with penal sanction prescribed in a written law by an Act of National Assembly or a law of the State, subsidiary legislation or instrument under the provision of a law. It is clear to me that the counts touching on conspiracy to disobey and disobedience of the said Exhibit P3 is
H an apparent violation of the appellant's constitutional right. As the counts rest on a non-existent law at the material time, they cannot stand.

Based on the above and the reasons fully adumbrated in the lead judgment, I too feel that the appeal is meritorious and should be allowed. I order accordingly and hereby acquit and discharge the appellant forthwith.

B

NGWUTA JSC

My learned brother, Mohammed, JSC, has dealt extensively and conclusively with all relevant issues in this appeal and arrived at the conclusion that the appeal has merit. I entirely adopt the said reasoning and conclusion and in addition make the following remarks. C

Since prosecutor deemed it fit to make intent to defraud an element of the offence charged, he has a duty to prove the intent beyond reasonable doubt irrespective of the fact that the law creating the offence did not include intent to defraud as an element thereof. See *Agumadu v The Queen* (1963) 1 All NLR 203 cited in the appellant's brief. Failure to prove the said element means that the prosecution has failed to prove its case beyond reasonable doubt. D

The conviction of the appellant in the counts charging him with disobedience of the Circular, Exhibit P3, contravenes section 36 (12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides thus: E

"Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless the offence is defined and the penalty therefor is prescribed in a written law and in this section a written law refers to an Act of National Assembly or a law of a State, any subsidiary legislation or instrument under the provision of a law." F

Exhibit P3 does not fall within the ambit of the provision reproduced above, and the conviction of the appellant for disobedience of the said Exhibit P3 is a violation of the constitutional right of the appellant. G

With respect to the counts charging the appellant with splitting contract, the evidence varied with the charge. See the evidence of PW3, PW4, PW6 and PW7 who said that no contract was split. Also the alleged abuse of office is with reference to a Federal Government Agency, that is, the Nigerian Ports Authority. The Federal High Court has jurisdiction to the exclusion of other Courts in matters concerning H

the Authority.

Based on the above and the fuller reasons in the lead judgment, I also allow the appeal and set aside the judgment of the lower Court which affirmed the judgment of the trial court. In place thereof, I enter judgment acquitting and discharging the appellant.

B Appeal allowed.

AKA' AHS JSC

C I was privileged to read in draft the judgment of my learned brother MAHMUD MOHAMMED JSC. I am in complete agreement with him on the resolution of the issues raised in the appeal. The appeal has merit and it is hereby allowed.

D The charges of disobedience to lawful order issued by constituted authority under section 203: abuse of office under section 104 and conspiracy to disobey lawful order under section 517 Criminal Code Laws of Lagos State 1994 are woven around Exhibit P3. Exhibit P.J was a circular is:

E Ministry of Finance on the new policy guidelines for procurement and award of contracts in Government Ministries/parastatals. Before 2001 there was in existence Exhibit D4 which was the guideline in use for the award of contracts by the Authority until 12th day of November 2002 when PW4 brought Exhibit P3 to the notice of the Board setting out the new limits for the award of contracts by the Board.

F All contracts had already been awarded before the attention of the Board was drawn to Exhibit P3 by PW4. PW4 the representative of the Ministry of Transport on the Board testified that implementation of Exhibit P3 would cripple the activities of the Authority and he participated in the deliberations leading to the decision to seek clarification from the Minister as to purport of Exhibit P3 since it was not issued by the Minister. Exhibit P3 on the face of it was received by the Minister of Water Resources on 4th of July, 2000 whereas it was dated 27th June, 2001 and there was no evidence whatsoever that it had ever been served on the Nigeria Ports Authority in writing. The implication is that the Ministry of Water Resources received Exhibit P3 even before it came into existence.

The Guidelines were enacted into law in 2007 as the Public

Procurement Act and they made contract splitting an offence which was punishable under the law. Exhibit P3 spelt out that -

“it shall be regarded as serious offence for an officer to deliberately split contracts, purchases, procurement of services in order to circumvent this circular. Such breach of the rules shall be subject of disciplinary action” B

The element that would make the Chairman and Board members liable for prosecution will be if they acted dishonestly in carrying out their duties.

Section 36(8) of the 1999 Constitution provides that- C

“36(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed” D

The trial court had acquitted the appellant and his co-accused of the offences of inflation of contracts and when the issue of dishonest intent was raised in the court below, it side - tracked it by holding that it was not necessary to prove that element before the conviction is sustained. If there was no dishonest intention on the part of the appellant, the action in splitting the contract or omission to adhere strictly to the guidelines will therefore not constitute an offence for which the appellant should be subjected to the criminal process. E

There was a suggestion made by learned counsel for the respondent that the action taken was meant to stem corruption. I am inclined to agree with the submission made by learned Senior Counsel for the 1st appellant in SC.180/2012 that this is an instance where suspicion was elevated to the rank of proof and what militated against the appellant and his co - accused was that they were men of rank and position who held high office at a time when men and women like that had come under the suspicion of corruption and whether proven or not they had to be convicted to serve as a lesson to others. I am afraid that is not the best way to tackle corruption. F
Due process must be followed to establish the guilt of an accused. G
The prosecution should not ride rough - shod of the Constitution and it is the sacred duty of the Judges not to bow to public sentiments in finding an accused person guilty. After all we operate the accusatorial H

system of jurisprudence where an accused is presumed innocent until he is proved guilty. I therefore find that the appeal is meritorious and it is hereby allowed. The conviction and sentence imposed on the appellant by the trial court which was affirmed by the court below are hereby set aside. In their place the appellant is acquitted of the charge and accordingly discharged.

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