

SUPREME COURT OF NIGERIA
FRIDAY 13TH DECEMBER, 2013. SC. 180/2012
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, J. A. FABIYI, N. S. NGWUTA,
K. B. AKA'AH, JJSC**

CHIEF OLABODE GEORGE APPELLANT
V.
FEDERAL REPUBLIC OF NIGERIA RESPONDENT

CHARGES - Competence - Offence unknown to law - Charges filed under CC s. 203 for contract splitting cannot stand - Since by virtue of 1999 Constitution s. 36 (12) - The conduct was unknown to any law at the material time (H1)

CRIMINAL PROCEDURE - Intention to defraud - Proof - Having made the phrase element of contract splitting - Prosecution must prove same - And cannot be heard to say that it is not an element in statute creating the offence (H2)

JUDICIAL PRECEDENTS - Stare decisis - Purpose - Point of law that has been settled by superior court - Should be followed by lower court - In order to avoid confusion (H3)

CRIMINAL PROCEDURE - Consistency in - Prosecution should be consistent in prosecuting his case at trial court as well as on appeal - As there should be no somersault (H4)

FACTS

Accused/appellant was arraigned along with others before the High Court of Lagos State Ikeja on initial 163 count charge that was later amended and pruned down to 68 count charge. Appellant pleaded not guilty to the charge. Appellant was a former Chairman of the Board of Directors of Nigeria Ports Authority (NPA). The other persons were the Board members of the NPA. Prosecution/respondent's case is that appellant and the others had during their tenure at the NPA did among other things split contracts and inflated prices of same, disobeyed law order and abused their offices. Re-

spondent called 10 witnesses to prove his case against appellant and the others.

Appellant testified on behalf of the others. He stated that Exhibit D4 (NPA 1999 guidelines) was the guidelines in use as at when they assumed office at the NPA. Appellant denied any collusion among themselves to split or inflate contract. Appellant rather stated that all contracts originated from appraisal officers who normally did carry out market survey to ascertain the actual sum for each contract. The learned trial Judge considered evidence adduced in the matter and at the end discharged and acquitted appellant and others on counts 1-7. However, he found them guilty of conspiracy to disobey lawful order. In respect of counts 9-57, they were convicted for disobedience of lawful order contrary to section 203 of the Criminal Code. Appellant and the others were also convicted for offences relating to abuse of office contrary to section 104 of the said Code. Dissatisfied, appellant appealed to the Court of Appeal. The court heard and dismissed the appeal which prompted appellant to file appeal in Supreme Court.

ISSUES FOR DETERMINATION

Whether, having made intention to defraud an element of the offences charged, the prosecution was bound to prove that element in the light of the decision of the Supreme Court in AGUMADU V. THE QUEEN (1963) 1 ALL NLR 203 to the effect that the onus is upon the prosecution to prove the offence as charged irrespective of the provisions of the statute creating the offence and if so whether their Lordships of the court below were wrong in holding that because the statute creating the various offences did not make intention to defraud an element of the offences charged, the prosecution was not bound to prove that element even though it was made an element of the offences charged and in spite of the fact that the appellants were thereby gravely prejudiced.

Whether the learned Justices of the Court below erred in law in affirming the decision of the learned trial Judge that the prosecution had proved, beyond reasonable doubt, the allegations contained in counts 59, 60, 61, 64, 65 and 67 of the amended information that the appellants abused the authority of their offices by splitting contracts in spite of the fact that virtually all the prosecution witnesses testified either that no contracts were split or that if contracts were

split at all they were not split by the appellants as the contracts all originated from the Management of the Authority and were awarded exactly in the form in which they were presented.

HELD (Unanimously allowing the appeal per **FABIYI JSC**)

CHARGES - Competence

1. It is clear from the reproduced portion of Exhibit P3, as above, that it contains guideline which forbids splitting of contracts by any officer. It stipulates that breach of same shall be met with disciplinary action. This may be in form of administrative action against an officer who breaches the rules. Disobeying Exhibit P3 is not made an offence by any Act of the National Assembly or law of a State House of Assembly or even the contents of Exhibit P3 itself. Even then, disobedience of Exhibit P3 is nowhere penalized in a written law. Any conduct that must be sanctioned must be expressly stated in a written law to wit: an Act by the National Assembly. That is what section 36 (12) of the 1999 Constitution provides. Such conduct should not be left to conjecture. As well, it cannot be inferred by the court. It occurs to me that section 203 of the Criminal Code is not in tune with the dictate of section 36 (12) of the 1999 Constitution. That being the position, the charges filed under section 203 of the said Code ostensibly for splitting contract in disobedience of lawful order by constituted authority cannot stand.

I say it with utmost confidence that the same position applies to the provision of section 104 of the said Criminal Code acts said to have constituted arbitrary acts resulting in abuse of office are splitting of contracts which were not offences known to law at the material time. The alleged conduct of 'splitting of contract' was not only outside any written law but in fact, not an offence at the material time. The same goes for conspiracy to split contract. It occurs to me that the entire proceedings ran foul of the provisions of section 36 (8) of the 1999 Constitution. (p. 4247 C)

CRIMINAL PROCEDURE - Intention to defraud - Proof

2. In response, learned counsel for the respondent maintained that the cases cited on behalf of the appellant were quoted completely out of context. He further maintained that it is only the essential elements of the offence as charged that must be proved by the prosecution. He maintained that the prosecution never mentioned intention to defraud as the act which constituted the offence. He said the prosecution relied on the splitting contracts and disobedience to Exhibit P3 as acts that constituted the offences and the prosecution proved those acts.

It should be stressed that the correct statement of the law as pronounced by this court in *Agumadu v. The State* (supra) is that the prosecution must prove the offence as charged irrespective of the provisions of the statute creating the offence. Once the prosecution made intention to defraud an element of the offence, they must prove same. They cannot be heard to say that it is not an element in the statute creating the offence.

In this respect, the points raked up on behalf of the respondent failed to hit the mark. Intention to defraud was made an element of the offence charged. Yet learned counsel for the respondent said the evidence in respect of same was 'neither here nor there'. The prosecution knew that the evidence on same was far fetched. They inserted the odious phrase to demean the appellant. From the word go, it must be presumed that when the appellants were put on trial it was on the basis that there was a prima facie case which showed intention to defraud. If that was not evident, the case ought not to proceed to trial.

I must state it in clear terms that I fail to see how intention to defraud was proved as affirmed by the court below. In reality, it was not proved. It was an element or ingredient of the offence as charged which needed proof beyond reasonable doubt. Where such a vital element was not proved as herein, the prosecution's case must fail. (pp. 4249 D/4250 C/4252 A)

JUDICIAL PRECEDENTS - Stare decisis - Purpose

3. The rule of stare decisis signifies that a point of law that has been settled by a superior court should be followed. There is sense in it to avoid confusion.

It is not proper to refuse to follow the decision of a superior court. A lower court should tow the line. (p. 4250 A) B

CRIMINAL PROCEDURE - Consistency in

4. Even then, before this court, learned counsel for the respondent attempted to support the view of the court below on intention to defraud. This is despite the fact that at the trial court, he maintained that the evidence in respect of the point is 'neither here nor there'. He needs to be enlightened that there should be consistency in prosecuting his case at the trial court as well as on appeal. There should be no somersault. (p. 4251 A) C D

NOTABLE POINT OF INTEREST

FABIYI JSC

1. Trial courts verdicts must be through analytical reasoning E

In *Nwosu v. The State* (1986) 4 NWLR (Pt. 35) 348 at 359 this court held that trial courts must arrive at their verdicts through a process of reasoning which is analytical and not only command confidence but is punctuated with logical thinking based on cogent and admissible evidence and in which facts leading to the conviction of the accused are clearly found and legal inference clearly drawn. (p. 4251 C) F

REPRESENTATION

Kanu Agabi, SAN with Udoka Owie (Mrs.); John Ochogwu; P.K. Obi (Mrs.); Linus Akwaji; Peter Erivwode; Kehinde Wilkey; Edidiong Usnuguraa; Ofem Obeten; Akinola Afolarin; Aiseosa Osaghae (Miss); Elvis Utulu; Batholomew Oluohu; Priscilla Omang (Miss); Uchenna Ugwueze (Miss) and Nkiru Melifonwu (Miss) for the 1st Appellant Festus Kayamo with B. N. Obinye and John Anieter, for the Respondent H

CASES REFERRED TO

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

- Asake v. Nigerian Army Council (2007) All FWLR (pt. 396) 731
 FRN v. Ifegwu (2003) 15 NWLR (pt. 842) 113
 Ogbomor v. State (1985) 1 NWLR (pt. 2) 223
 Amadi v. State (1993) 8 NWLR (pt. 314) 644
 Atolagbe v. Awuni (1997) 7 SCNJ 1
 B Ajijagba v. IGP (1958) SCNLR 60
 Ndidi v. State (2007) 5 SC 175
 Ajide v. Kelani (1985) 3 NWLR (pt. 12) 248
 Nwosu v. State (1986) 4 NWLR (pt. 35) 348
 C Odunsi v. State (1969) 6 NSCC 418
 Omouga v. State (2006) 14 NWLR (pt. 1000) 532
 Ubani v. State (2003) 16 NSCQR 265
 Aliyu v. State (2007) All FWLR (pt. 388) 1123
 Macfoy v. UAC Ltd. (1962) AC 150

D

STATUTES REFERRED TO

- Corrupt Practices & Other Related Offences Act 2000
 Criminal Code Cap. 32 Vol. 2 Laws of Lagos State of Nigeria 1994,
 ss. 104, 203, 517
 E Constitution of the Federal Republic of Nigeria 1999, s. 36(8)(12)

LEAD JUDGMENT BY FABIYI JSC

- This is an appeal by the appellant against the judgment of the
 F Court of Appeal, Lagos Division ('the court below' for short) delivered on 21st January, 2011 wherein the conviction and sentence of the appellant by the High Court of Lagos State, Ikeja Division ('the trial court' for short) on 26th October, 2009 was affirmed.

- It is apt to state briefly the relevant facts of the matter culmi-
 G nating to this appeal. The appellant was at all material times, the Chairman of the Board of Directors of Nigeria Ports Authority ('the Authority' for short). He was charged before the trial court along with the Managing Director of the Authority and four available members of the Board as well as others said to be at large. They all held
 H office from 2001-2003.

On 8th August, 2008, the appellant along with five others and those said to be at large were arraigned on 163 count information. The appellant pleaded not guilty to all the counts. The Attorney-General of the Federation amended the information dated 24th Oc-

tober, 2008 in which the counts were pruned down to 68. The appellant again, pleaded not guilty to the new counts.

In sum total, the appellant along with others were alleged to have exceeded the limit set to their authority to award contracts and contrived to bring the contracts within their limits by splitting them while also inflating their prices. The evidence adduced on behalf of the prosecution point at the direction that the contracts awarded were appraised by experts employed by the Authority. The said experts recommended the contractors to whom the contracts were subsequently awarded. The prices indicated by the experts or the contractors recommended by them were never rejected by the Board. The experts were not interviewed in the course of the investigations. They were not called as witnesses and were not charged with any of the alleged offences. All counts upon which the appellant was convicted, alleged that he committed same with intent to defraud the Authority. Evidence proffered by the prosecution showed that the appellant derived no gain whatsoever from what was done and did not set out to do so.

The prosecution called 10 witnesses in a bid to establish the 68 counts which can be grouped as follows:-

1. Counts 1-7 - Offences under the Corrupt Practices and Other Related Offences Act, 2000; relating to inflation of contract prices.

2. Count 8 - Conspiracy to disobey lawful order issued by a constituted Authority contrary to section 517 of the Criminal Code Cap. 32 Vol. 2 Laws of Lagos State of Nigeria 1994.

3. Counts 9-57 - Disobedience of Lawful Order contrary to section 203 of the said Criminal Code.

4. Counts 58-68 - Abuse of Office contrary to section 104 of the said Criminal Code.

The appellant herein testified on behalf of the other Board members who were put on trial. He identified Exhibit D4 as the guidelines in use at the time of their assumption of office. He denied any collusion among the appellants to split or inflate any contract brought before the Board for approval by the Management. He denied that he and the other appellants conspired to disobey lawful orders. He stressed that P.W.4 only brought a photocopy of a Circular - Exhibit P3 to the Board meeting of 12th November, 2002 which he ordered should be cleared with the Minister of Transport. But it was not done

by the Secretary to the Board. He said PW.4, the representative of the Minister who was always present at most Board Meetings never opposed decisions reached by the Board.

B He asserted that all contracts originated from below the Board level where Appraisal Officers carried out market survey and price intelligence before advising on the sum for which contracts should be awarded. He felt that if the contents of Exhibit P3 had been adhered to at that time, port activities would have been crippled.

C The appellant admitted that the Board continued to use the 1999 guidelines pending the time the Minister replied the letter of the Board; as he was obliged to do. He said he did not know if contracts were split or inflated by Management and that there were professionals below the Board level who had the responsibility to appraise contracts. The Board was only to approve if satisfied with Management D proposals.

The learned trial judge strenuously garnered evidence adduced by the parties and was duly addressed by an array of senior counsel/ counsel on both sides of the divide. In his judgment delivered on 26th E October, 2009 he discharged and acquitted the appellant and others on counts 1-7 relating to inflation of contracts. He found the appellant along with others guilty of conspiracy to disobey lawful order issued by constituted Authority. In respect of counts 9-57 which are similar in tone and purport, he convicted them on 40 counts touching on disobedience of lawful order contrary to section 203 of the F Criminal Code. As well, he convicted the appellant and others in respect of five similar counts relating to abuse of office contrary to section 104 of the said Code.

G The appellant felt dissatisfied and appealed to the court below against his conviction and sentence on the 28th day of October, 2009 on grounds which were later amended. The court below heard the appeal and on 21st January, 2011, it delivered its judgment wherein it dismissed the appeal by the appellant and others.

H The appellant felt irked by the stance of the court below and has appealed to this court. Briefs of argument were duly filed on behalf of the parties. On 26th September, 2013 when the appeal was heard, learned senior counsel for the appellant adopted and relied on the brief and Reply brief filed on his behalf. The respondent's brief was also relied upon by counsel. As well, each of them made

oral submissions to clear some salient points.

In the brief of argument filed on behalf of the appellant on 30th April, 2012, eight (8) issues were couched for determination of the appeal. They read as follows:-

“Issues for Determination

1. *Whether, having made intention to defraud an element of the offences charged, the prosecution was bound to prove that element in the light of the decision of the Supreme Court in AGUMADU V. THE QUEEN (1963) 1 ALL NLR 203 to the effect that the onus is upon the prosecution to prove the offence as charged irrespective of the provisions of the statute creating the offence and if so whether their Lordships of the court below were wrong in holding that because the statute creating the various offences did not make intention to defraud an element of the offences charged, the prosecution was not bound to prove that element even though it was made an element of the offences charged and in spite of the fact that the appellants were thereby gravely prejudiced. (Arising from Ground 1 of the Grounds of Appeal)* ^B

2. *Whether their Lordships of the court below failed to consider at all or to consider adequately the defence of the appellants and numerous fundamental contradictions in the case of the prosecution which cast grave doubt on the guilt of the appellants and showed that the case of the prosecution had not been proved beyond reasonable doubt. (Arising from Ground 2 of the Grounds of Appeal)* ^E

3. *Whether the learned Justices of the Court below erred in law when they affirmed the decision of the learned trial Judge to the effect that the prosecution proved beyond reasonable doubt, the allegation of conspiracy to disobey lawful orders contained in count 8 of the amended information in spite of the fact that there was no evidence whatsoever that the appellants had met to achieve a criminal objective and in spite of the failure of the prosecution to prove the elements of that offence as charged. (Arising from Ground 2 of the Grounds of Appeal)* ^G

4. *Whether the learned Justice of the Court below erred in law when they affirmed the decision of the learned trial Judge to the effect that the prosecution proved, beyond reasonable doubt, the charge of disobedience of lawful orders made on counts 9, 10, 11,* ^H

12, 15, 16, 19, 20 - 29, 32 -44, 46, 49 and 50-57 of the amended information, in spite of the fact that the counts disclosed no offences known to law and in spite of the fact that the ingredients of the offences charged were not proved. (Arising from Grounds 5, 6 and 8 of the Grounds of Appeal)

B 5. Whether the learned Justices of the Court below erred in law in affirming the decision of the learned trial Judge that the prosecution had proved, beyond reasonable doubt, the allegations contained in counts 59, 60, 61, 64, 65 and 67 of the amended information that the appellants abused the authority of their offices by splitting contracts in spite of the fact that virtually all the prosecution witnesses testified either that no contracts were split or that if contracts were split at all they were not split by the appellants as the contracts all originated from the Management of the Authority and were
C
D awarded exactly in the form in which they were presented. (Arising from Ground 4 of the Grounds of Appeal)

6. Whether the learned Justices of the Court below erred in law when they affirmed the decision of the learned trial Judge in relying on section 7 of the Criminal Code to convict the appellants.
E (Arising from Ground 3 of the Grounds of Appeal)

7. Whether the learned Justices of the Court below erred in law when they held that the trial Judge has jurisdiction to try the appellants on the charges on which they were convicted in spite of the fact that the charges were laid under the wrong law. (Arising from
F Grounds 9 and 10 of the Grounds of Appeal)

8. Whether the learned Justices of the Court of Appeal erred in law in holding that there was a valid delegation of prosecutorial powers from the Attorney-General of Lagos State to the Attorney-General of Federation and the Economic and Financial Crimes Commission who in turn were alleged to have delegated their authority to Festus Keyamo, a private Legal Practitioner to take over and continue the prosecution initiated by the Attorney-General of the Federation. (Arising from Grounds 11, 12, 13, 14, 15 and 16 of the
G
H Grounds of Appeal)”

On behalf of the respondent, three issues were decoded for determination. They read as follows:-

“Issues for determination

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, 14, 15 and 16 of the Appellant's Notice of Appeal)

2. Whether the concurrent findings of facts of the two courts below in this case are so perverse and unsupportable by evidence so as to warrant interference by the Supreme Court, (Grounds 1, 2, 4, 6, 7 and 8 of the Appellant's Notice of Appeal)

3. Whether the Court of Appeal was wrong to have relied on Section 7 of the Criminal Code, Cap. C17, Laws of Lagos State, 2003 to uphold the conviction of the appellant. (Ground 3 of the Appellant's Notice of Appeal)"

It is apt to start the consideration of this appeal with the determination of the Constitutional point raised in issue No. 5 on behalf of the appellant. It was submitted on behalf of the appellant that contract splitting which formed the basis of the offences charged is unknown to law at the material time. It is not an offence defined in, and for which penalty is provided for in a statute. Senior counsel for the appellant submitted that counts 59, 60, 61, 64, 65 and 67 constitute a gross violation of section 36(12) of the 1999 Constitution of the Federal Republic of Nigeria. He maintained that contract splitting is a specific act not mentioned in section 104 of the Criminal Code. Senior counsel observed that having charged the appellant with disobedience of lawful orders under section 203 of the Criminal Code, it was duplicitous to charge them separately with splitting contract since that was only the method by which it was alleged that the appellant and others carried out their acts of disobedience. He opined that the counts alleging disobedience of lawful orders should simply have stated that the appellant disobeyed lawful orders by splitting contracts in order to bring them within their approval limits.

On behalf of the respondent, learned counsel maintained that the provision of section 36(12) of the 1999 Constitution only mentions that the offence and penalty thereof must be written. He maintained that it does not say that the acts constituting the offence must also be written. He felt that it is for the court to interpret the particular acts constituting the offence.

Exhibit P3 is the circular dated 27th June, 2001 which is a Federal Executive Council Guideline. Item 2 (viii) on page 4 which deals with Tender splitting reads as follows:- “(viii) *TENDER SPLITTING*

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

Put briefly, the appellant was found guilty and convicted as follows:-

B (1) Abuse of office by splitting contracts contrary to section 104 of the Criminal Code Laws of Lagos State, 1994 on counts 59, 60, 61, 64, 65 and 67.

C (2) Disobedience to lawful orders (by splitting contracts) contrary to section 203 of the Criminal Code Laws of Lagos State, 1994 (in respect of 40 counts).

(3) Conspiracy to disobey lawful order (by splitting contracts) contrary to section 517 of the Criminal Code Laws of Lagos State, 1994 (in respect of count 8). ”

D The three sections of the Criminal Code, Lagos State of Nigeria employed by the respondent read as follows:-

“104 Abuse of Office

E Any person who, being employed in the public services, does or directs to be done in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour and is liable to imprisonment for two years. If the act is done or directed to be done for purpose of gain, he is guilty of a felony, and is liable to imprisonment for three years. The offender cannot be arrested without warrant. A prosecution for any offence under this or F any of the last three preceding sections shall not be instituted except by or with the consent of a law officer.

G 203. Disobedience to lawful order issued by Constituted Authority. Any person who, without lawful excuse the proof of which lies on him, disobeys any lawful order issued by any person authorized by any Order, Act, Law, or Statute, to make the order, is guilty of a misdemeanour, unless some mode of proceedings against him for such disobedience is expressly provided by Order, Act, Law, or Statute and is intended to be exclusive of all other punishment.

H 517. Conspiracy to commit offence. Any person who conspires with another to commit any offence which is not a felony, or to do any act in any part of the world, which if done in Nigeria would be an offence but not a felony, and which is an offence under the law in force in the place where it is proposed to be done, is guilty of a

misdeemeanour and is liable to imprisonment for two years. The offender cannot be arrested without warrant."

It is also of moment to quote section 36 (12) of the 1999 Constitution. It provides as follows:-

"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 therefore is prescribed in a written law; and in this subsection 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."

It is clear from the reproduced portion of Exhibit P3, as above, that it contains guideline which forbids splitting of contracts by any officer. It stipulates that breach of same shall be met with disciplinary action. This may be in form of administrative action against an officer who breaches the rules. Disobeying Exhibit P3 is not made an offence by any Act of the National Assembly or law of a State House of Assembly or even the contents of Exhibit P3 itself. Even then, disobedience of Exhibit P3 is nowhere penalized in a written law. Any conduct that must be sanctioned must be expressly stated in a written law to wit: an Act by the National Assembly. That is what section 36 (12) of the 1999 Constitution provides. Such conduct should not be left to conjecture. As well, it cannot be inferred by the court. It occurs to me that section 203 of the Criminal Code is not in tune with the dictate of section 36 (12) of the 1999 Constitution. That being the position, the charges filed under section 203 of the said Code ostensibly for splitting contract in disobedience of lawful order by constituted authority cannot stand. I maintained the same stance when faced with a similar scenario in *Asake v. Nigerian Army Council* (2007) All FWLR (Pt. 396) 731 at 746 - 747. With due sense of purpose and humility, I stand by it.

I say it with utmost confidence that the same position applies to the provision of section 104 of the said Criminal Code acts said to have constituted arbitrary acts resulting in abuse of office are splitting of contracts which were not offences known to law at the material time. The alleged conduct of 'splitting of contract' was not only outside any written law

but in fact, not an offence at the material time. The same goes for conspiracy to split contract. It occurs to me that the entire proceedings ran foul of the provisions of section 36 (8) of the 1999 Constitution which provides that:-

B *“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.”*

C The respondent, in a way, appreciates the above salient points by its own action in putting in place the Public Procurement Act 2007 on the 1st June, 2007 which contains in it’s section 58 penal sanctions for splitting of tenders. The law was not made with retrospective effect. It could not have been so in the face of the clear provision of D section 36 (8) of the 1999 Constitution. This court, as the guardian of the Constitution, will not allow such to happen. See: FRN v. Ifegwu (2003) 15 NWLR (Pt. 842) 113.

E In view of the constitutional infraction the entire trial, conviction and sentence of the appellant remain a nullity and must be set aside, anon. See: Ogbomor v. The State (1985) 1 NWLR (Pt.2) 223 at page 233.

I feel tempted to further consider issue No. 1 formulated on behalf of the appellant. It reads as follows:-

F *“Whether, having made intention to defraud an element of the offences charged, the Prosecution was bound to prove that element in the light of the decision of the Supreme Court in Agumadu v. The Queen (1963) 1 All NLR 203 to the effect that the onus is upon the Prosecution to prove the offence as charged irrespective of the provisions of the statute creating the offence and if so whether their Lordships of the court below were wrong in holding that because the statute creating the various offence did not make intention to defraud an element of the offences charged, the Prosecution was not bound to prove that element even though it was made an element of the offences charged and in spite of the fact that the appellants were thereby gravely prejudiced. (Arising from Ground 1 of the Grounds of Appeal)”*

On behalf of the appellant, Senior Counsel maintained that the appellants were charged with committing all (sic) the offences

with intent to defraud (same only contained in counts 8 to 62, both inclusive). It was observed that no attempt was made to prove this intention. It was contended that the essential ingredient of the offences charged not having been proved the appellants were entitled to be acquitted. The Prosecution replied that intention to defraud was not necessary to prove that element. Senior counsel maintained that learned counsel for the respondent, before the trial court, conceded that there was no evidence indicative of any intention on the part of the appellants to defraud. He observed that the court below agreed with learned counsel for the respondent that proof of intention to defraud was unnecessary. He felt that such view does not represent a correct statement of the law in view of the decision of this court in *Agumadu v. The Queen* (1963) 1 All NLR 203, 205 to the effect that the Prosecution must prove the offence as charged irrespective of the provisions of the statute creating the offence. He further cited *Ofuani v. Nigerian Navy* (2007) 8 NWLR (Pt. 1037) 470 at 472; *Amadi v. The State* (1993) 8 NWLR (Pt. 314) 644 at 664.

In response, learned counsel for the respondent maintained that the cases cited on behalf of the appellant were quoted completely out of context. He further maintained that it is only the essential elements of the offence as charged that must be proved by the prosecution. He maintained that the prosecution never mentioned intention to defraud as the act which constituted the offence. He said the prosecution relied on the splitting contracts and disobedience to Exhibit P3 as acts that constituted the offences and the prosecution proved those acts.

It should be stressed that the correct statement of the law as pronounced by this court in *Agumadu v. The State* (supra) is that the prosecution must prove the offence as charged irrespective of the provisions of the statute creating the offence. Once the prosecution made intention to defraud an element of the offence, they must prove same. They cannot be heard to say that it is not an element in the statute creating the offence. The court below, to its credit, in *Ofuani v. Nigerian Navy* (supra) followed the decision in *Agumadu v. The State* (supra). This court maintained the same stance in *Amadi v. The State* (supra).

Senior counsel asserted that under the rules of judicial disci-

pline otherwise called the rules of precedent, the decision in *Agumadu v. The Queen* (supra) was binding on the court below and their Lordships should have followed it.

The rule of stare decisis signifies that a point of law that has been settled by a superior court should be followed. There is sense in it to avoid confusion. See: *Royal Exchange Assurance Nig. Ltd. v. Aswani Textiles Ind. Ltd.* (1991) 2 NWLR (Pt. 176) 639 at 672. ***It is not proper to refuse to follow the decision of a superior court. A lower court should tow the line.*** See *Atolagbe v. Awuni & Ors.* (1997) 7 SCNJ 1 at paragraph 20, 24 and 35.

In this respect, the points raked up on behalf of the respondent failed to hit the mark. Intention to defraud was made an element of the offence charged. Yet learned counsel for the respondent said the evidence in respect of same was 'neither here nor there'. The prosecution knew that the evidence on same was far fetched. They inserted the odious phrase to demean the appellant. From the word go, it must be presumed that when the appellants were put on trial it was on the basis that there was a prima facie case which showed intention to defraud. If that was not evident, the case ought not to proceed to trial. In *Ajijagba v. IGP* (1958) SCNLR 60 it was held as follows:-

"...thus if the facts in a deposition whether on oath in a preliminary investigation or not on oath in a mere statement attached to an information do not disclose a prima facie case, the indictment must be quashed."

It should be noted that before the trial court, learned counsel for the respondent maintained that evidence in respect of intention to defraud 'was neither here nor there'. Senior counsel on behalf of the appellant asserted that in an effort to shore up the case of the prosecution their Lordships of the court below proceeded to imply or suggest even remotely that intention to defraud had been proved. He observed that their Lordships said -

"The submission by the appellant in the light of evidence of PW5 and PW6, as well as, the Exhibits of the Board Meetings clearly shows that the arguments on the absence of intention does not hold."

This sort of stance cannot be supported. This court forbade same in *Ndidi v. The State* (2007) 5 SC 175 at 198. Such action does

not reflect well on our jurisprudence. A court of law should be wary of such a practice.

Even then, before this court, learned counsel for the respondent attempted to support the view of the court below on intention to defraud. This is despite the fact that at the trial court, he maintained that the evidence in respect of the point is ‘neither here nor there’. He needs to be enlightened that there should be consistency in prosecuting his case at the trial court as well as on appeal. There should be no somersault. See: Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248.

Let me state it in passing that their Lordships of the court below, with due diffidence, did not indicate the process of reasoning by which they implied that intention to defraud had been proved. In *Nwosu v. The State* (1986) 4 NWLR (Pt. 35) 348 at 359 this court held that trial courts must arrive at their verdicts through a process of reasoning which is analytical and not only command confidence but is punctuated with logical thinking based on cogent and admissible evidence and in which facts leading to the conviction of the accused are clearly found and legal inference clearly drawn.

Senior counsel for the appellant maintained that there was no shred of evidence by PW5 and PW6 that pointed at intention to defraud. It is extant in the record that PW6 testified that all contracts awarded by the appellants originated from the user departments of the Authority and not the Board. He testified that there were no resolutions of the Board splitting or inflating contracts. He asserted that due to the absence of a due process team in the Authority it was impossible for him to identify the stage in the process when contract splitting and inflation occurred. PW4 as well as PW5 testified that the Minister of Transport was of the same view with them that implementation of Exhibit P3 would cripple the ports. The appellant and others were not shown to have benefited from any contract awarded and none of the companies to which contracts were awarded belonged to the appellant and members of his team. This evidence came from PW1. There was no evidence of any shortage whatsoever. In *Odunsi v. The State* (1969) 6 NSCC 418 at 420 cited by senior counsel for the appellant, it was held per Ademola, CJN that:-

“In effect as the learned trial Judge did not accept evidence relating to stealing and the prosecution did not prove material short-

age, it was certainly wrong for the trial Judge to find there was intent to defraud or that the appellant was trying to cover up the shortages."

I must state it in clear terms that I fail to see how intention to defraud was proved as affirmed by the court below. In reality, it was not proved. It was an element or ingredient of the offence as charged which needed proof beyond reasonable doubt. Where such a vital element was not proved as herein, the prosecution's case must fail. See: Omouga v. The State (2006) 14 NWLR (Pt. 1000) 532; Ubani v. The State (2003) 16 NSCQR 265; and Aliyu v. The State (2007) All FWLR (Pt. 388) 1123 at 1148.

It has been established that the case of the respondent rests on shifting sand. The charges framed against the appellant in respect of splitting of contracts and disobedience of guideline in Exhibit P3 is unknown to any written law at the material time. They rest on nothing in the face of the provisions of section 36(8) and (12) of the 1999 Constitution. They cannot stand as they fall flat. See: Macfoy v. UAC Ltd. (1962) AC 150 at 160. And to cap it, the Prosecution laced the extant charges with intention to defraud, an extra element of the charge which was not proved beyond reasonable doubt. It was a complete mistrial by the lower courts.

I must stop here as nothing useful will be served in moving forward in respect of other issues. The appeal is allowed as same is, no doubt, meritorious. The judgment of the court below is accordingly set aside. The appellant is hereby acquitted and discharged forthwith.

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MOHAMMED JSC

I have had the opportunity before today of reading the judgment of my learned brother Fabiyi, JSC which has just been delivered. I share the same view with him that this appeal ought to be allowed and I hereby allow it.

From the very bulky records of this appeal, it is quite plain that the Appellant was convicted for the offences under Sections 203, 104 and 517 of the Criminal Code of Lagos State 1994, solely for the failure of the Board of the Nigerian Ports Authority, over which

the Appellant presided as the Chairman between 2001 and 2003, to obey or comply with the Federal Government Policy Circular Exhibit P3, issued by the Federal Ministry of Finance on 27th June, 2001. Since the same circular Exhibit P3 had already made provisions of penalty for its breach in paragraph 2(viii) thereof, to again charge the Appellant with Criminal Offences for disobeying the same circular, certainly cannot find any support in the Constitution of the Federal Republic of Nigeria or any other law. In otherwords, at the time the Appellant was tried and convicted for the offences under the Criminal Code Law of Lagos State 1994, it was not an offence under any Law in force to disobey the provisions of the Federal Government Policy Circular issued to its Federal Ministries and Parastatals. The Appellant therefore who was under the full protection of the provisions of Section 36(8) and (12) of the Constitution of the Federal Republic of Nigeria 1999, is entitled to have his conviction as sentence by the trial Court and affirmed by the Court below, set aside. I accordingly also set aside the Appellant's conviction and sentence and the Appellant is hereby discharged and acquitted.

MUNTAKA-COOMASSIE JSC

I read in advanced the lead judgment of my learned brother Fabiyi JSC, I entirely agree that the appeal has merit same is hereby allowed. The conviction and sentence by the trial court and affirmed by the court below are hereby set aside. The Appellant herein is discharged and acquitted.

NGWUTA JSC

Can it be said that the prosecution proved its case beyond reasonable doubt? The answer is in the negative. The prosecution deliberately made "intent to defraud" an element of the offences charged and it had a duty to establish that element beyond reasonable doubt, irrespective of the fact that the section of the law creating the offences did not include "intent to defraud" as an element of the offences with which the appellant was charged. The prosecution is bound to prove what it averred. See *Agumadu v. The Queen* (1963) 1 All NLR 203 relied on by the appellant.

The Circular, Exhibit P3, which the prosecution claimed the appellant disobeyed without excuse and which alleged disobedience was charged as a criminal offence is no more and no less than an administrative direction disobedience of which can be treated administratively. Conviction of the appellant for disobedience to Exhibit P3 is in breach of Section 36 (12) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which provides as follows:

“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 thereof 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.”

Exhibit P3 though made by a competent authority, is not an Act of the National Assembly, a law of a State or a subsidiary legislation or instrument under the provision of a law.

The counts of splitting contract if in fact any contract was split relate to the control and management of a Federal Government Agency, the Nigerian Ports Authority over which the Federal High Court has exclusive jurisdiction. See Section 251 of the 1999 Constitution (*supra*) (as amended).

The Lagos State High Court had no jurisdiction to try the appellant and his trial, conviction and sentence must be declared null and void and I so declare.

In any case, prosecution witnesses swore that no contract was split and the appellant ought not to have been convicted as the evidence varied with the charge. My learned brother, Fabiyi, JSC, obliged me a draft of his lead judgment. Having read it, I entirely agree that the appeal has merits and ought to be allowed.

Based on the remarks above and the fuller reasons in the lead judgment, I also allow the appeal and set aside the conviction and sentence passed on the appellant and in place thereof, I acquit and discharge the appellant.

Appeal allowed. Conviction and sentences set aside. Appellant acquitted and discharged.

AKA'AHS JSC

My Lord, Fabiyi JSC made available to me in draft his judgment which I find very elucidating. I am in complete agreement that the appeal has merit and it is hereby allowed.

The star prosecution witness, PW4 was not convinced that the contents of Exhibit P3 would assist in the operations of the Nigeria Ports Authority. I cannot fathom the evidence the learned trial Judge relied on to convict the appellant nor the reasoning by the lower court in failing to find that since the dishonest intent to defraud was not proved, the appellant could not be found guilty of committing any offence for this and the more comprehensive reasons contained in the leading judgment of Fabiyi, JSC which I adopt as mine, I too allow the appeal. The conviction and sentence imposed on the appellant by the trial Judge which were affirmed by the court below are hereby set aside. The appellant is hereby acquitted and discharged.

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