

**SUPREME COURT OF NIGERIA**

FRIDAY 18TH MARCH, 2016. SC. 447/2011

**CORAM:- W. S. N. ONNOGHEN, C. B. OGUNBIYI, K. B. AKA'AH, K. M. O. KEKERE-EKUN, C. C. NWEZE, JJSC**

JULIUS BAYODE AYENI ..... APPELLANT  
V.  
STATE ..... RESPONDENT

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APPEALS - Concurrent findings - Appellate court will not ordinarily interfere with findings made by trial court on credibility of witnesses - Unless it is shown that such findings are perverse (H1)

EVIDENCE - Evaluation - Crime - Where there is uncontradicted evidence - Trial court still has a duty to evaluate it - And be satisfied that it is credible and sufficient to sustain a claim (H2)

**FACTS**

This case was commenced against accused/appellant at the High Court of Ekiti State, where he was arraigned for stealing. Appellant pleaded not guilty to the charge. Prosecution/respondent called four witnesses and appellant's statement was admitted as Exhibit 'A'. Appellant testified in person and tendered some letters which were received in evidence as Exhibits "D" "E" "F" and "G". He did not call any person to testify on his behalf.

At the conclusion of evidence, the court delivered its judgment. In the judgment, appellant was found guilty of stealing and was sentenced to three years imprisonment without an option of fine. Aggrieved, appellant appealed to the Court of Appeal. The appeal was dismissed. Following the dismissal, appellant has further appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*"Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the appellant by the learned trial Judge when the prosecution failed to prove the case against the appellant beyond reasonable doubt as required by Section 138 of the Evidence Act"*

# **HELD** (Unanimously dismissing the appeal per

**AKA' AHS JSC)**

*APPEALS - Concurrent findings*

**1. The learned trial Judge found that even if the Union had been dealing with Black Arrow Ventures, the cocoa which he was given to deliver was not meant for Black Arrow Ventures but for the Co-operative Akure. Having analysed the circumstances surrounding the sale of the cocoa to Black Arrow Ventures, the learned trial judge came to the inevitable conclusion that he sold the cocoa fraudulently against the policy or practice of the Union. This finding was upheld by the Court below when it stated at page 155 that:-**

***“...the learned trial judge painstakingly performed that duty of evaluating the totality of the evidence adduced at the trial and came to the irresistible conclusion that the appellant committed the offence which he was charged and tried.”***

**An appellate Court will not ordinarily interfere with the findings of facts made by a trial Court on credibility of witnesses unless it is shown that such findings are perverse or are not the result of proper evaluation of the evidence.**

**(p. 2299 G)**

*EVIDENCE - Evaluation - Crime*

**2. Learned counsel for the appellant submitted in the brief of argument that the appellant's testimony which absolved him of stealing was uncontroverted and never challenged by way of cross-examination and therefore should be accorded a probative value above the evidence adduced by the respondent's witnesses. This argument was countered by the respondent who argued that any testimony whether controverted or not must still be reviewed, scrutinised, evaluated and analysed by the trial Court. I agree that where the evidence adduced before the trial Court is unchallenged and Uncontradicted, a trial Court still has a duty to evaluate it and be satisfied that it is credible and sufficient to sustain the claim. (p. 2300 D)**

**REPRESENTATION**

O. O. Ojitalayo, Esq. with I. O. Akinfenwa, Esq., for the Appellant  
 Owoseni Ajayi, Esq. (Attorney-General, Ekiti State) with him, L. B.  
 Ojo. (Solicitor-General), Gbemiga Adaramola, (DPP), S. B. J. Bamise,  
 (DCL) and Femi Onipede, (PLO), for the Respondent

**CASES REFERRED TO**

Sanyaolu v. State (1976) 5 SC 37  
 Rabi v. State (1980) 8-11 SC 130  
 Adelumola v. State (1988) 1 NWLR (pt. 73) 683  
 Sugh v. State (1988) 2 NWLR (pt. 77) 475  
 State v. Nnolim (1994) 5 NWLR (pt. 345) 394  
 Onogwu v. State (1993) 6 NWLR (pt. 401) 276  
 Awosiko v. State (2010) 9 NWLR (pt. 1198) 49  
 Nwaturuocha v. State (2011) 6 NWLR (pt. 1242) 170  
 Akinyemi v. State (1999) 6 NWLR (pt. 607) 499  
 Awoyoola v. Aro (2006) 4 FWLR (pt. 308) 1319  
 Adejobi v. State (2011) 12 NWLR (pt. 1261) 347  
 Oshinye v. C.O.P. (1960) 5 SC 105  
 Chianugo v. State (2002) 2 NWLR (pt. 750) 225  
 Oyebanji v. State (2015) 14 NWLR (pt. 1479) 270  
 Muhammed v. State (2000) FWLR (pt. 30) 2623

**STATUTES REFERRED TO**

Criminal Code Law Cap. 30 vol. 11 Laws of Ondo State of Nigeria  
 1978, s. 390(a)  
 Evidence Act, s. 138(1)

**LEAD JUDGMENT BY AKA'AH'S JSC**

The Appellant was charged before the Ekiti State High Court, Ikole Ekiti on a two count charge of stealing which was amended. The amended charge read as follows:

**COUNT ONE: STATEMENT OF OFFENCE**

STEALING, contrary to Section 390(a) of the Criminal Code Law Cap. 30 Vol. 11 Laws of Ondo State of Nigeria 1978 as applicable in Ekiti State.

**PARTICULARS OF OFFENCE**

Julius Bayode Ayeni (M) sometime in November, 1997 at Ikole

Ekiti in Ikole judicial Division did steal ten (10) metric tonnes of graded cocoa valued at about one million, one hundred and eighty thousand Naira (N1,180,000.00) property of Cooperative Multipurpose Ikole Ekiti.

COUNT TWO: STATEMENT OF OFFENCE

B STEALING, contrary to Section 390(a) of the Criminal Code Law Cap. 30 Vol. Laws of Ondo State of Nigeria 1978 as applicable an Ekiti State.

PARTICULARS OF OFFENCE

C Julius Bayode Ayeni (M) sometimes in 1996 at Ikote Ekiti did steal the sum of One Million, two hundred thousand Naria (N1,200,000.00) property of Co-operative Multipurpose Union Ikole Ekiti.

On 14th February, 2005, the accused/appellant was arraigned D before the Ekiti state High Court in Ikole Ekiti and he pleaded not guilty to the amended charge. The prosecution called four witnesses and the accused/appellants statement was admitted as Exhibit 'A'. The appellant testified in person and tendered some letters which were received in evidence as Exhibits "D" "E" "F" and "G". He did E not call any person to testify on his behalf. At the conclusion of evidence the parties filed written addresses. On 25th September 2007 judgment was delivered by the Ekiti State High Court. The accused was found guilty of stealing on the 1st count and sentenced to three years imprisonment without an option of fine. He was however F acquitted and discharged on the 2nd count.

Aggrieved by this decision, the Appellant appealed to Court of Appeal, Ado-Ekiti which dismissed the appeal on the 7th July, 2011 in appeal No. CA/AE/C27/2010.

G The Appellant was further dissatisfied with the judgment of the Court of Appeal Ado-Ekiti (hereinafter referred to as the "lower Court" or Court below) and appealed on the omnibus ground the Notice of Appeal dated 22nd July, 2011. An amended Notice of appeal containing two grounds of appeal was later filed with leave of this Court. H It was deemed filed on 26th March, 2014.

From the two grounds in the Amended Notice the appellant formulated a lone issue for determination namely:-

*'Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the appellant by the learned trial*

*Judge when the prosecution failed to prove the case against the appellant beyond reasonable doubt as required by Section 138 of the Evidence Act”*

The respondent adopted the issue as formulated by the appellant.

Arguing the appeal learned Counsel for the appellant contended that from the totality of the evidence proffered at the trial, the prosecution failed to prove the offence of stealing against the appellant beyond reasonable doubt and that the evidence showed clearly that the appellant was carrying out his assignment as a manager when the allegation of stealing was leveled against him. He argued that there was no iota of evidence to show that the appellant had any fraudulent Intention deprive his employers of the proceeds of the business; on the contrary the evidence of the prosecution witnesses only showed wrong judgment on the part of the appellant. Since he had authority to buy and sell cocoa for the Union, it was based on that implied authority that he dealt with Black Arrow Ventures by selling the contentious ten (10) tons of cocoa to that Company after the Co-operative Cocoa Company Akure had refused to take delivery because of the fall in the price of cocoa. He submitted that if the evidence adduced by the prosecution suggests only a possibility and not a certainty that the accused committed the offence, he must be discharged or given the benefit of the doubt relying on Solomon Ogunshowobo and Ors v. I. G. P. {1958} WRNLR 29.

Learned counsel for the respondent enumerated the elements that constitute stealing namely taking, conversion and fraudulent intention and submitted that the prosecution succeed in establishing the three elements of the offence by the evidence of eye witnesses pointing to the evidence of PW 1, PW 2 and PW 3.

Learned counsel for the appellant has maintained that the concurrent findings of both the lower Court and the Court of first instance that the prosecution proved its case against the appellant beyond reasonable doubt is perverse and therefore should be set aside PW1, PW2 and PW3 testified that the Co-operative Cocoa Company Akure paid N1,180,000.00 to the Egbeoba Multipurpose Co-operative Union Ikole Ekiti for 10 metric tonnes of cocoa at the rate of N1,180,000.00 per ton. The Cooperative Union shared out the money to its agents who bought the commodity and took it to the

premises of the union. There it was graded and the appellant who was the Manager of the Union was mandated to deliver the cocoa to the Company. The Union was not aware that the appellant did not deliver the cocoa as instructed until some staff of the Company complained to the Union two weeks later. PW1 was sent to Akure to find out what happened and he confirmed the non delivery of the cocoa. The Management of the Union summoned the guarantors of the appellant. At that time the appellant was nowhere to be found. The case was reported to the Police. This led to the detention of the guarantors and they had to fish the appellant out of his hideout. When the appellant surfaced, he admitted stealing the cocoa and later refunded N150,000.00 out of the money and gave an undertaking to pay back the balance. The appellant testified as DW1 and this is what he said:-

*"Later we started another operative and we collected money from Co-operative for ten tons of cocoa which was disbursed to our Trade Secretaries and private buyers... When the cocoa was gathered the Co-op that gave us advance for the ten tons was equally not willing to carry the cocoa because of the drop in the agreed price. But the representative of Black Arrow who had been our customer was willing to buy at profit margin. The cocoa was sold to the company as approved by the President. The Black Arrows did not pay fully for the 10 tonnes but paid first the sum of N150,000.00 which was paid to the Union."*

Earlier PW3 who was the Chairman of Egbeoba Co-operative Union denied under cross-examination that one Aroso was the President at the time of the incident and maintained that he was the President. While admitting that the prices of cocoa do fluctuate he denied the suggestion made to him that the appellant had the authority to look for an alternative buyer even if the price of cocoa dropped and he received clear directive that he was to deliver the cocoa to those who had deposited money with the Co-operative union.

The learned trial Judge evaluated the evidence adduced at the trial and found that at all times material to this case the accused person was the manager of the complainant, the Egbe-Oba Co-operative Cocoa Union and the Co-operative Cocoa Products Akure one of the customers of the Union ordered for 10 metric tonnes of Co-

coa in 1997 which they paid for by cheque in the sum of N1,180,000.00 which was cashed and the money was distributed among some of their Secretaries who used the money to purchase the ten tons of cocoa. The cocoa was graded and the accused was asked to deliver same to the Co-op Akure who had paid for it. The accused however did not deliver the cocoa to the Co-op Akure as directed but instead sold it to Black Arrow Ventures and disappeared with the proceeds until his sureties were apprehended after which he surfaced. He found that the prosecution had made out a case of fraudulent conversion of the cocoa by the accused and disbelieved the defence put up by him. B  
C

Learned counsel for the appellant submitted before this Court as he did in the Court below that the prosecution did not prove the offence of stealing against the appellant beyond reasonable doubt.

The evaluation in the Court of trial can be seen at pages 78-81 of the records where the learned trial Judge stated:- D

*"It is no longer congesture (sic) that the accused was authorised to take possession of the cocoa and as well he was given the instruction to deliver same to Co-op Akure. But according to the evidence of the accused person himself, both in his extra judicial statement exhibit A and in his oral testimony before this Court, he sold the whole 10 metric tonnes to either one Segun Fatoki or Black Arrow Ventures. According to him it was his own uncle, one Chief Olajide Awe who pressurized him to sell to Black Arrow Ventures Limited or segun Fatoki its agent who showed him some dollars, which he asked Fatoki to change to the Nigerian currency. The most astonishing thing is the fact that he sold this cocoa to Fatoki or Black Arrow Ventures, none of whom he himself knew and he even sold it on credit. When his sin found him, having fled after the fraudulent sale of the product to a party other than Co op Akure, he voluntarily gave undertakings to pay the value of the goods to the owners, the Union. See exhibits B1, B2 and by exhibits C1 and C2 he made a part payment of, the sum of N150,000.00 as confirmation of the voluntariness of the undertakings he gave to the police. I am of the opinion that the accused did not give these voluntary undertakings without admitting his guilt. With all these established facts this Court accepts that the prosecution has proved its case against the accused."* E  
F  
G  
H

The learned trial Judge then considered the defence put for-

ward by the accused:-

*"According to the accused, he sold the Cocoa to Black Arrow Ventures with the knowledge of the President of the Union and tried to give a reason for doing so. The accused also made some efforts to say that it was not the first time that the Union was dealing with Black Arrows ventures And this time around, he sold the cocoa to Black Arrow because the Co-op Akure complained of a fall in price of cocoa. Straight away this Court will say it finds it difficult to be persuaded by these reasons given by the accused person who acted contrary to the instruction that he was given. Firstly, it is not true that the accused sold the cocoa to whoever he sold it with the consent of any of the Presidents mentioned, either by him or by the Prosecution or with the knowledge of the Union's Management. No one need be taken aback as to why the accused said that he obtained the consent of Aroso, who he claimed falsely to be the president of the Union at that material time. Aroso had died and so it was easier for him to say it was Aroso who gave him a counter instruction to that of the management because no one can call a dead man to come to Court to give evidence. This Court cannot be taken in by such half-clever falsehood. There are enough facts on the record that have proved that indeed PW3 was the President at the material time..."*

*"However, common sense dictates that if he sold the cocoa to someone else at the instance of any of the presidents mentioned, he would not have fled after the failure of the transaction. But I also bear In mind that none of PW1, PW2 and PW3 who were all part of the Union or part of the Union Management knew who Segun Fatoki or the Black arrow was. I am emboldened in this opinion by the evidence of the accused person himself who said that Segun Fatoki was introduced to him by his uncle, Chief Awe, who asked him to go to Fatoki's place at Ajegbaju. But from the picture that he himself painted he did not know either the Black Arrow or its agent Mr. Segun Fatoki. I then wonder how the Management of the Union could have known any of these strangers. Indeed as he said he too was searching for the address of Black arrow ventures Limited in Lagos. The accused fed this Court with tissues of lies. Or how come the accused person himself as Manager of the Union did not know the address of Black Arrow venture who he claimed the Union had been having dealings with in the past one of its customers? Surely the accused*



*person never intended this Court to believe his stories. Most of these stories are after thoughts since they are not contained in his extra judicial statement to the police. They are make-up stories. They are worth nothing in terms of defence to this a allegation made against him, the accused. It was his uncle Chief Olajide Awe who knew these rogues. He himself did not know them. He was so blinded by the secret profit to be made out of the secret transaction that he sold the goods to these strangers on credit. But he did not tell this Court that it was customary of the Union to sell on credit”.*

The elements of stealing consist of taking, converting and fraudulent intention.

Section 383(i) Criminal Code Law Vol. Laws of Ondo State 1978 as applicable to Ekiti State provides as follows:-

*“383(i) A person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or to the use of any other person anything capable of being stolen is said to steal that thing”.*

PW1, PW2 and PW3 gave consistent evidence at the trial to the effect that the Co-operative Cocoa Productions, Akure gave the sum of N1,180,000.00 to Egbeoba Co-operative Multipurpose Union to buy 10 metric tonnes of cocoa on their behalf and after the cocoa had been purchased, it was graded and the accused now was asked to deliver the cocoa to the Company that gave the money but instead of doing so he diverted the cocoa and sold it to Black Arrow Ventures.

Learned Counsel for the respondent argued in his brief that the four prosecution witnesses led cogent, credible and uncontroverted evidence to show that the appellant intentionally and unlawfully diverted the ten tons meant for the Cocoa product Limited, Akure without the consent and knowledge of the Union; hence the taking and diversion of the cocoa was done with fraudulently intention.

***The learned trial Judge found that even if the Union had been dealing with Black Arrow Ventures, the cocoa which he was given to deliver was not meant for Black Arrow Ventures but for the Co-operative Akure. Having analysed the circumstances surrounding the sale of the cocoa to Black Arrow Ventures, the learned trial judge came to the inevitable con-***

**clusion that he sold the cocoa fraudulently against the policy or practice of the Union. This finding was upheld by the Court below when it stated at page 155 that:-**

**“...the learned trial judge painstakingly performed that duty of evaluating the totality of the evidence adduced at the trial and came to the irresistible conclusion that the appellant committed the offence which he was charged and tried.”**

**An appellate Court will not ordinarily interfere with the findings of facts made by a trial Court on credibility of witnesses unless it is shown that such findings are perverse or are not the result of proper evaluation of the evidence.** See Sanyaolu v. State (1976) 5 SC 37; Rabiu v. State (1980) 8-11 SC 130; Adelumola v State (1988) 1 NWLR (pt. 73) 683; Sugh v State (1988) 2 NWLR (pt. 77) 475 and State v Nnolim (1994) 5 NWLR (Pt. 345) 394.

**Learned counsel for the appellant submitted in the brief of argument that the appellant's testimony which absolved him of stealing was uncontroverted and never challenged by way of cross-examination and therefore should be accorded a probative value above the evidence adduced by the respondent's witnesses. This argument was countered by the respondent who argued that any testimony whether controverted or not must still be reviewed, scrutinised, evaluated and analysed by the trial Court. I agree that where the evidence adduced before the trial Court is unchallenged and Uncontradicted, a trial Court still has a duty to evaluate it and be satisfied that it is credible and sufficient to sustain the claim.** See: Gonzee (Nig.) Ltd v Nigerian Educational Research and Development Council (2005) 13 NWLR (pt.943) 634.

The accused in his effort to justify his action selling the cocoa to Black Arrow Ventures contrary to the directive he was given to deliver the cocoa to the Co-operative product Limited Akure claimed that the Company refused to take delivery of the cocoa because of the drop in the price of cocoa and he took the decision with the knowledge of the President of the Union. The learned trial Judge found it difficult to be persuaded by these reasons given by the accused person who acted contrary to the instruction he was given reasoned that the accused was carried away by the allure of making

some quick secret profits for himself and his friends which backfired when payment was not forthcoming. He further concluded that if the accused person sold the cocoa to someone else at the instance of any of the Presidents mentioned, he would not have fled after the failure of the transaction. After x-raying the evidence given by the accused the learned trial judge came to the same conclusion he had arrived at when he considered the evidence of the prosecution witnesses i.e. that all the ingredients needed to be a case of fraudulent conversion had been established. He considered the disappearance of the accused after the sale as clear evidence of his guilt. The Court below accepted the evaluation made by the trial Judge and the conclusion that the appellant committed the offence. B C

The findings made by the learned trial Judge and affirmed by the Court below were made on sound footing. There is no reason whatsoever for this Court to interfere with those findings. The Court below was therefore right in confirming the conviction of the appellant since he was entrusted with the 10 metric tonnes of cocoa to deliver to the Co-operative Cocoa Products Akure and instead of carrying out the directive, he diverted the cocoa and sold it to Black Arrows Ventures for a profit. The fraudulent intent by the appellant was clearly manifested when he disappeared after selling the cocoa to Black Arrow Ventures. The entire evidence adduced in the case did not suggest only a possibility but a certainty that the appellant committed the offence. D E

I find no merit in the appeal whatsoever and it is accordingly dismissed. The conviction and sentence passed on the appellant by the Ekiti State High Court and which was affirmed by the Court of Appeal Ado-Ekiti on 7th July, 2011 in appeal No. CA/AE/C.27/2010 is further affirmed by me. F

Appeal is hereby dismissed. G

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### **ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother AKA'AHs JSC just delivered. H

I agree with his reasoning and conclusion of that the appeal lacks merit and should be dismissed.

The appeal is against the concurrent findings of fact by the

lower Courts as evidenced in the sole issue formulated by learned Counsel for the appellant brief deemed filed and served on the 26th day of March 2014. The issue is:

“Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the Appellant by the learned Trial Judge when the prosecution failed to prove the case against the Appellant beyond reasonable doubt as required by S.138 of the Evidence Act”.

Appellant was charged with the offence of stealing contrary to and punishable under Section 390(9) of the Criminal Code Law Cap.20 Vol. 9, Laws of Ondo State of Nigeria as applicable to Ekiti State. The facts of the case have been stated in detail in the lead judgment of my learned brother and I do not intend to repeat them herein except as may be needed for the point(s) being made.

However, in a charge of stealing as the instant case, it is the duty of the prosecution to prove the charge beyond reasonable doubt by the production of relevant evidence

The intention is to prove that the person charged has taken or converted anything capable of being stolen fraudulently with the Intent at:

“(a) Permanently to deprive the owner of the thing in question;

(b) Permanently to deprive any person who has any special property in the thing or such property;

(c) In the case of money, an intent to use to at the will of the person who takes or converts it although he may intend afterwards to repay the amount to the owner - see *Awosika v. State* (2010) 9 NWLR (pt 1198)49 at 52 *Nwaturuocha v. State* (2011) 6 NWLR (pt 1242) 170 at 174 Section 383(1) of the Criminal Code Law, Laws of Ondo State of Nigeria, 1978, as applicable to Ekiti State.”

In short the prosecution must prove the:

“(i) taking

(ii) converting and

(iii) fraudulent intention if the taking and/or converting of the subject matter of the stealing/charge.”

The trial Court heard evidence from both parties, evaluated and ascribed probative value to the said evidence before arriving at its conclusion. In short, the trial judge believed the evidence of the

prosecution as against that of the appellant.

It is settled law that the evaluation of evidence and ascription of probative value is in the province of trial Court, which had the opportunity of hearing the testimony of witnesses and observing their demeanor and that an appellate Court would not generally interfere with the findings of a trial Court in this regard unless same is shown to be perverse - see *Onogwu v. State* (1993)6 NWLR (PT. 401) 276 at 552. B

It follows, therefore, that the issue for determination in this appeal being on facts arising from the evidence before the trial Court on the oath of the prosecution against the oath of the accused/appellant, the said findings of fact can only be interfered with by an appellate Court (which includes this Court) only if the findings are demonstrated by appellant to be perverse, which appellant has woefully failed to do in the instant case. C

There is evidence, accepted by the trial Court and affirmed by the lower Court, that appellant diverted the 10 tons of dry cocoa already paid for, from the true owner and sold same to someone else and collected the money which he failed/neglected to pay to his employers and the after his arrest, he refunded part of the money he collected, promising to pay the balance, which he failed and/or neglected to do. D

I hold the considered view that the circumstances in which this Court could have interfered with the concurrent findings of fact by the lower Courts have not been established in this case thereby making it impossible for the Court to interfere. E

It is for the above reasons and the detailed reasons given in the lead judgment of my learned brother that I too find no merit in the appeal which is accordingly dismissed by me. F

Appeal dismissed. G

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### **OGUNBIYI JSC**

The appeal is against the decision of the Court of Appeals, Ado Ekiti Division contained in the judgment of the lower Court delivered on the 7th July, 2011. By the said judgment the Court below affirmed the conviction and sentence of the appellant by the Ekiti state High Court on the 25th September, 2007, for the offence of steal- H

ing.

The facts and genesis of the case are well stated in the lead judgment of my learned brother Aka'ahs JSC. The appeal before us is against a concurrent judgment of the two lower Courts. The lone issue raised for determination is:

B *“Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the appellant by the learned trial judge when the Prosecution failed to prove the case against the appellant beyond reasonable doubt as required by S.138 of the Evidence Act.”*

C The same issue was adopted by the respondent.

The law is trite and established per Section 138(1) of the Evidence Act that the onus is on the prosecution to prove the offence of stealing alleged against the appellant beyond reasonable doubt.

D In order to discharge this burden therefore, the respondent has to adduce cogent credible and compelling evidence to substantiate or prove the three mandatory elements of the offence of stealing which are:-

*“i) Taking*

E *ii) Converting; and*

*iii) Fraudulent intention.”*

See Section 383(1) of the Criminal Code Law, Laws of Ondo State 1978 as applicable to Ekiti State See also the cases of Awosiko v. State (2010) 9 NWLR (pt.1198) P49 at 52, Fabian Nwaturuocha v. The State (2011) 6 NWLR (pt.1242) 170 at 174 and Akinoyemi v. State (1999) 6 NWLR (pt.607) 499.

G From the circumstance of this case as rightly submitted by the respondent's counsel, the entire conclusion reveal that the only inference that can be drawn from the facts as borne out by the evidence is that the appellant, with fraudulent intention diverted the cocoa produce meant for co-operative cocoa Products Limited, Akure, without the consent and knowledge of any other member of his Egbeobo CMU this has amounted to fraudulent conversion in violation of Section 383 (1) of the Criminal Code. See again Fabian Nwaturuocha v. The State (supra). The evidence of the witnesses PW1, PW2, PW3, and PW3 are very apt and found to be credible.

It is on record that the trial Court did evaluate properly the evidence adduced by prosecution witnesses as well as that of the

appellant before rejecting the defence of the appellant. The Court of Appeal did not also fault the evaluation of the evidence or the ascribing of probative values to the prosecution evidence over and above that of the appellant. The law is trite and it is not open for this court to tamper with the concurrent findings of the two lower Courts, as a matter of course. See *Awoyoola v. Aro* (2006) A FWLR (pt. 308) B 1319.

The learned Court of Appeal justices had painstakingly considered the issues in contention before affirming the judgment of the trial Court. In other words, the appellant has not shown any convincing reason why the concurrent judgments of the two lower Courts should be set aside. C

With the few words of mine and more particularly on the fuller reasons by my learned brother Aka'ahs JSC, I also dismiss this appeal and endorse the judgment of the lower Court which affirms the view held by the trial Court. D

Appeal is hereby dismissed.

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### **KEKERE-EKUN JSC**

This is an appeal against the judgment of the Court of Appeal, Ekiti Division delivered on 7/7/2011 affirming the judgment of the High Court of Ekiti State sitting at Ikole Ekiti delivered on 25/9/2007 convicting the appellant of stealing and sentencing him to three years imprisonment. F

My learned brother, AKA'AHs, JSC has obliged me with a copy of the judgment just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

The appellant herein was the manager of a co-operative society known as Egbe Oba Co-operative Union. The Union collects money from specific organisations to purchase graded cocoa on their behalf. The Union collected the sum of N1,180,000.00 (One million, One Hundred and Eighty Thousand Naira) only from Cooperative Cocoa Products, Akure for the purchase of 10 tons of cocoa. H The cocoa was duly purchased and the appellant was mandated by the Union (his employer) to deliver it to the said organisation. He failed to do so, rather, he sold it to a different company, Black Arrow Ventures and failed to account for the proceeds. The Union reported

the matter to the police. The appellant was arrested and he gave written undertakings (Exhibits B1 & B2) to refund the money. He refunded only N150,000.00 out of N1,180,000.00.

In his defence, the appellant denied stealing the 10 tons of graded cocoa and claimed that he sold the cocoa to Black Arrow Ventures when Co-operative Cocoa products, Akure, refused to take delivery thereof due to the fall in the price of cocoa. He also contended that he sold the cocoa to Black Arrow Ventures on the instructions of the president of the Egbe Oba Multi-purpose Co-operative union - one Mr. Aroso. He was charged with two counts of stealing contrary to and punishable under Section 390 of the Criminal Code Law, Cap 30 Vol. II, Laws of Ondo State of Nigeria applicable in Ekiti State. At the conclusion of the trial, he was discharged and acquitted on the second count wherein he was charged with stealing another sum of N1,200,000.00. He was however convicted of the first count of stealing 10 tons of cocoa from the Union and sentenced to three years' imprisonment.

He appealed against his conviction and sentence to the Court below. On 7/7/2011, the lower Court dismissed the appeal and affirmed the judgment of the trial Court. Still dissatisfied, he has further appealed to this Court.

The sole issue for determination formulated by the appellant and adopted by the respondent is;

*"Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the appellant by the learned trial Judge when the prosecution failed to prove the case against the appellant beyond reasonable doubt as required by Section 138 of the Evidence Act."*

A person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or to the use of any other person anything capable of being stolen is said to steal that thing.

The ingredients of the offence of stealing, which must be proved beyond reasonable doubt are:

- (i) *The ownership of the thing stolen*
- (ii) *That the thing stolen is capable of being stolen*
- (iii) *The fraudulent taking or conversion."*

See Adejobi v. The State (2011) 12 NWLR (Pt. 1261) 347 @



377 C - E, Oshinye v. C.O.P . (1960) 5 SC 105: Chianugo V. The State (2002) 2 NWLR (Pt.750) 225.

In the case of: Kenneth Clark & Anor, V. The State (1986) 4 NWLR (Pt.35) 381, it was held that a person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents: B

*“(i) An intention permanently to deprive the owner of the thing of it;*

*(ii) An intention to permanently deprive any person who has any special property in the thing of such property; and*

*(iii) in The case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.”* C

See also: Oyebanji V. The State (2015) 14 NWLR (Pt.1479) 270 & Muhammed V. The State (2000) FWLR (Pt.30) 2623 @ 2626. D

The appellant’s main contention in this appeal is that the prosecution failed to prove fraudulent intent on his part and also failed to call two witnesses whom he considered vital to establish the said fraudulent intent. It was argued on his behalf that the omission ought to have been resolved in his favour. E

It is pertinent to state that there is no duty on the prosecution to call a host of witnesses in order to prove its case. Its duty is to call only material witnesses. Once it is able to produce credible and convincing evidence of the commission of the offence by the accused to a level beyond reasonable doubt, the onus is discharged. What is important is the degree of proof and not the number of witnesses called. One credible witness, if believed, is enough. See: Chukwu V. The State (1992) 1 NWLR (Pt. 217) 255 @ 263 - 264 H - A; Theophilus v. The State (1996) 1 NWLR (Pt. 423) 139 @ 151 C - D; Odunlami V. The Nigerian Navy (2013) LPELR - SC 328/2011; Alonge V. I.G.P . (1959) SCNLR 516. F

After considering the testimony of PWs 1, 2, 3 & 4 called by the prosecution, the appellant’s extra judicial statement Exhibit A and his evidence in his defence, the trial Court at pages 78 - 79 of the record held as follows: H

*“I would reiterate that I have severally highlighted the facts given in evidence by both the prosecution and the defence, especially facts on which the parties are in agreement and which facts this*

*Court is bound to accept as established. These facts this Court has accepted contain all the ingredients needed to be proved in a case for fraudulent conversion. It is now no longer a congeature (sic) that the accused was authorised to take possession of the cocoa and as well he was given the instruction to deliver same to Co-op., Akure.*

*B But according to the evidence of the accused person himself/both in his extra judicial statement, exhibit A and in his oral testimony before this Court. He sold the whole 10 metric tonnes to either one Segun Fatoki or Black Arrow Ventures. According to him it was his own uncle, one Chief Olajide Awe who pressurized him to sell to Black*

*C Arrow Ventures Limited or Segun Fatoki its agent, who showed him some dollars, which he asked Fatoki to change to the Nigerian currency. The most astonishing thing is the fact that he sold this cocoa to Fatoki or Black Arrow Ventures, none of whom he himself knew and*

*D he even sold it on credit, When his sin found him, having fled after the fraudulent sale of the product to a party other than Coop. Akure, he voluntarily gave undertakings to pay the value of the goods to the owners, the Union. See exhibits B1, B2 and by exhibits C1 and C2 he made apart-payment of the sum of N150,000 as confirmation of*

*E the voluntariness of the undertakings he gave to the Police. I am of the opinion that the accused did not give these voluntary undertakings without he admitting his guilt with all these established facts this Court accepts that the Prosecution has proved its case against the accused. However, the accused in volte face has put forward some*

*F kind of defence or explanation for his conduct. According to the accused, he sold the cocoa to Black Arrow Ventures with the knowledge of the President of the Union, and tried to give a reason for doing so. The accused also made some efforts to say that it was not*

*G the first time that the Union was dealing with Black Arrow ventures. And this time around, he sold the cocoa to Black Arrow because the coop. Akure complained of a fall in the price of cocoa, Straightforwardly this Court will say it finds it difficult to be persuaded by these reasons given by the accused person who acted contrary to the in-*

*H struction that he was given. I think that it is better to think that he was carried away by the allure of making some quick secret profits for himself and his friends, being his uncle and Segun Fatoki. The plan backfired. .... However, common sense dictates that if he sold the cocoa to someone else at the instance of any of the*

*Presidents mentioned, he would not have fled after the failure of the transaction.”*

The Court went on, at pages 81 - 84 of the record to debunk every one of the defences put up by the appellant and concluded thus at page 84:

*“In all, I prefer the evidence of the prosecution to that of the accused for the various reasons already adduced. I hold that the prosecution has proved the case against the accused person beyond any reasonable doubt. The accused is hereby found guilty as charged,”*

After a thorough review of the evidence and the findings of the trial Court, the lower Court held at page 155 of the record:

*“It is clear from the record of this appeal that the learned trial Judge painstakingly performed that duty of evaluating the totality of the evidence adduced at the trial and came to the irresistible conclusion that the appellant committed the offence of stealing for which he was charged and tried, I had held earlier when resolving this issue that I do not see anything perverse in the findings of the learned trial Judge’ The findings of the learned trial judge, in my view are on sound footing and was done in Proper exercise of his judicial duty, I see no reason to interfere with those findings. Consequently I resolve this issue in favour of the respondent.”*

In my view, the above finding of the Court below cannot be faulted. It is settled law that it is the primary duty of the trial Court to evaluate the evidence and ascribe probative value thereto. The trial Court has the unique advantage of listening to the witnesses testify and observing their demeanor. See: Okoye v. Obiaso & Ors . (2010) 8 NWLR (Pt.1195) 145; Amadi v. F.R.N . (2008) 12 SC (Pt. III) 55. Where a trial Judge has unquestionably evaluated the evidence and properly appraised the facts of the case, an appellate Court would not interfere to substitute its own views for the views of the trial Court See Gbadamosi V. Dairo (2007) 3 NWLR (Pt.1021) 282; Mogaji V. Odofin (1978) 4 SC 91 Odofin V. Ayoola (1984) 11 SC 72.

I agree entirely that the learned trial judge did a very commendable job of evaluating all the evidence before him and ascribing probative value thereto. The fraudulent intention of the appellant was not only evident in his diversion of the cocoa to a different company from the one that had paid for the product, he pocketed the proceeds and only admitted what he had done after the owners of

the product reported that the cocoa had not been delivered to them and a search was conducted to find him. Notwithstanding his written undertaking to refund the money, he refunded a mere N150,000.00 out of the total sum of N1,180,000.00. There is no doubt that he breached the trust reposed in him by his employer, the Egbe Oba Co-operative Union and also breached the trust of the Union's patrons. There is also no doubt that the appellant fraudulently converted the sum of N1,180,000.00 entrusted to him by the Union to his own use. The appellant has failed to advance any cogent reason warrant interference by this Court with the concurrent findings fact by the two lower Courts.

For these and the more detailed reasons contained in the lead judgment, I also find no merit in the appeal. It is accordingly dismissed.

I affirm the judgment of the Court below which affirmed the judgment of the trial Court.

### NWEZE JSC

I had the advantage of reading the draft of the leading judgment which my Lord, Aka'ahs, JSC, just delivered now. I, entirely, agree with His Lordship that this appeal is unmeritorious and should be dismissed.

The Criminal Code Law, Vol 11, Laws of Ondo State, applicable to Ekiti State, defines the offence of stealing in Section 383(1). The section is couched thus:

*"(1) A person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or to the use of any other person, anything of capable of being stolen/ is said to steal that thing."*

The drafts person of the Code proceeds to outline the mental element or the requisite intent [that is, what is known in English law as "mens rea" of the offence in Subsections (2) (3) and (4) in these words:

*"(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents:*

*(a) an intent permanently to deprive the owner of the thing of*

it;

(b) an intent permanently deprive any person who any special property In the thing of such property;

(c) an intent to use the thing as a pledge or security;

(d) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform; B

(e) intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(f) In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner. C

(3) The taking or conversion may be fraudulent, although it is effected without secrecy or attempt at concealment.

(4) In the case of conversion, it is immaterial whether the thing converted is taken for the purpose of conversion or whether it is at the time of the conversion in the possession of the person who converts it. It is also immaterial that the person who converts the property is holder of a power of attorney for the disposition of it, or it is authorised to dispose of the property.” E

Case law has condensed the above requirements into the following ingredients only, namely,

“(i) that the thing stolen is being capable of being stolen;

(ii) that the accused person has the intention of permanently depriving the owner of the things stolen; F

(iii) that he was dishonest and

(iv) that he had unlawfully appropriated the thing stolen to his own use, Oyebanji v. State (2015) LPELR -24751 (SC) 16 -17; Mohammed v. The State [2000] FWLR (pt.30) 2623, 2626; Adejobi v. The State [2011] 12 NWLR (pt 1261) 347, 377; Oshinye v. COP [1960] 5 SC 105) Chianugo v. The state [2002] 2 NWLR (pt.750) 225. G

As, demonstrably, shown in the leading judgment, the Prosecution, successfully, proved these ingredients. The trial Court’s impeccable findings at pages 78 -79 of the record were affirmed by the lower Court at page 155: concurrent findings which the appellant has not shown were either perverse or took into account irrelevant or extraneous matters. H

In the circumstance, I am loathe to interfere with them, *Princent and Anor v. The State* [2002] 12 SC (pt. 1) 137; [2002] 12 SCNJ 280, 300; *Ubani and Ors v. The State* [2003] 12 SC (pt. II) 1; [2003] 12 SCNJ 111, 127-128; *Ogunbayo v. State* [2007] 3 SC (pt 11) 1, 27.

B        It is for these, and the more elaborate, reasons in the leading judgment that I, too, shall dismiss this appeal as lacking in merit. I abide by the consequential orders in the leading judgment.

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