

IN THE COURT OF APPEAL
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON TUESDAY, 24TH DAY OF APRIL, 2012

Before their lordships:

JIMI OLUKAYODE BADA
HUSSEIN MUKHTAR
EJEMBI EKO

JUSTICE, COURT OF APPEAL
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CA/A/377C/2009

BETWEEN:

- 1. GANIYU OGUNLEYE**
- 2. PROFESSOR PETER UMOH**

APPELLANTS

AND

- 1. INSPECTOR – GENERAL OF POLICE**
- 2. DR. JOE EMERSON**
- 3. INNOCENT ILOZUMBA**
- 4. ADEDAPO AGBOOLA**
- 5. PIUS OBELEKE**

RESPONDENTS

INDEX OF SUBJECT MATTER:

- EVIDENCE** – *Proof of Evidence – Effect of Absence of Prima Facie Evidence – Effect of discountenancing valuable evidence – Duty of court to consider all Exhibits placed before it – Probative value of discountenanced evidence*
- COMPANY LAW** – *Liquidation – the process adopted – Section 425(f) Companies and Allied Matters Act – Section 40(1) and 53(5) Nigeria Deposit Insurance Corporation Act, 2006*
- CRIMINAL LAW AND PROCEDURE** – *Conspiracy – Ingredients of the offence – Nature of – What the prosecution must prove*
- CRIMINAL LAW AND PROCEDURE** – *Charge – Effect of quashing a fundamental charge – prima facie evidence to warrant charging an accused person*

CRIMINAL LAW AND PROCEDURE – Inchoate offences – Nature of – Conditions that must be fulfilled before an inchoate offence is proved – Whether can be prosecuted distinctly or separately

CRIMINAL LAW AND PROCEDURE – Confessional Statement – Ingredients of – Relationship to the offence of conspiracy – effect of not obtaining from accused persons

CRIMINAL LAW AND PROCEDURE – Public Officer – Section 140(2) CPC – when consent of public officer is required – misleading of – sanction of – effect of not obtaining sanction or consent of

WORDS AND PHRASES – “Conspiracy” – Definition of

ISSUES:

The appeal was argued on the following three issues distilled from the four grounds:

1. Whether the offence of conspiracy in Count 1 against the Appellants is cognizable in law when the offences in Counts II and III to which it relates have been quashed by the trial court?

Or differently put:

Whether the trial of the Appellants on Count 1 can be conducted with the quashing of Counts II and III of the Charge? [Grounds I and III]

2. Whether in considering the application to quash the Charge, the trial Court gave full consideration and probative weight and value to and/or made use of all the matters before him particularly Exhibit B attached to the application of the Appellants. [Ground II]
3. Whether the trial of the Appellants on Counts I and IV on proof of evidence annexed will not amount to an abuse of process and a complete negation of well established principles of criminal justice trial and the Constitution of the Federal Republic of Nigeria [Ground IV]

FACTS:

On the 5th May, 2009, the then Inspector General of Police (IGP) filed Information for leave to charge the Defendants (Appellants) at the High Court of the Federal Capital Territory, Abuja under the Penal Code for Several alleged offences involving grant of interest waiver to Nasarawa State Government arising from its indebtedness of ₦1.5 Billion to the defunct Fortune International Bank Plc. The 1st Defendant/Appellant

was the MD/CEO of the Nigeria Deposit Insurance Corporation (NDIC) and the 2nd Defendant/Appellant was the Executive Director, Operations of the NDIC.

The IGP filed a four count Charge against the Defendant/Appellants for offences of conspiracy to give false information or to deceive a public officer. The High Court of the Federal Capital Territory, Abuja quashed Counts II and III which relate to giving false information to a public servant. The Appellants, being dissatisfied with the decision of the lower Court, filed an interlocutory appeal against the ruling of the High Court of the Federal Capital Territory, Abuja Delivered by Hon. Justice Ogakwu on the 24th November, 2009 dismissing the Appellants' application to quash Charge No. CR/37/09 against the Appellants on Counts I and IV after quashing Counts II and III.

Count I relates to an offence of conspiracy to give false information or to deceive a public officer anchored on Counts II and III relating to giving false information and deceiving a public officer respectively, while Count IV relates to depositing money of a failed bank in Fidelity Bank Plc instead of Central Bank of Nigeria.

HELD: (*Unanimously Allowing the Appeal*)

1. *On the Meaning of Conspiracy*

Conspiracy is an agreement between two or more persons to do an unlawful act or a lawful act by unlawful means and, in the latter case, demonstrating such agreement by some overt act towards execution of the agreement by one or more parties thereto.

2. *On the Nature of the offence of Conspiracy*

Conspiracy is inchoate not a substantive offence. The evidence of agreement constituting conspiracy may be by direct evidence or circumstantial evidence deductible from the surrounding circumstances. The lower Court having quashed Counts II and III the substantive offences to which the alleged inchoate offence in Count 1 relates has no more factual basis for circumstantial evidence. The source from which the lower court deduced a *prima facie* evidence of conspiracy was from the alleged confessional statements of the Appellants.

3. On the Effect of Quashing Counts II and III of the Charge

Conspiracy being itself an inchoate offence could not have been attempted which is another inchoate offence. There must be a direct or circumstantial *prima facie* evidence based on the proof of evidence. Where the proof of evidence does not disclose *prima facie* case, all the counts must be quashed just like Counts II and III, because there remained no basis for leaving other Counts to hang on the necks of the Appellants when the basis for circumstantial evidence had been completely knocked off and there was no *prima facie* direct evidence to sustain trial of the Appellants under Count I. There must be direct or circumstantial *prima facie* evidence to warrant the trial of the Appellants on the remaining Counts that were not quashed. The absence of such *prima facie* evidence from the proof of evidence before the lower Court makes it unnecessary to proceed to trial when the basis for so doing is completely absent.

4. On Probative Value of Discountenanced Evidence

It is rather self-contradictory and incredible that a discountenanced piece of evidence could be said to have been ascribed any probative value.

5. On the Need for a Court to Consider all Evidence in Respect of an Application

It behoves the Court below to consider the merits of the application to quash the charges by considering affidavits and counter affidavits and the evidence filed in support or against the application. The refusal to consider relevant pieces of evidence in respect of the application was a clear misdirection in law resulting in failure of justice. The Court does not only have power, but in fact has a duty to safeguard the Appellants from oppression or prejudice. Thus, when the Court entertains an application to quash the Charges, it has to consider the materials placed before it and if it is satisfied that the facts are premised on an abuse or injustice, it should stop the prosecution by quashing the charges. It is pre-eminently the duty of the trial Court to consider and evaluate the evidence placed before it, and where it fails to do so, as in the instant case, its decision is perverse and the Appellate Court's duty to interfere therewith is automatically ignited. [**Ezede v. State** (2004) 14 NWLR, (Part 894) at 504 – 505, paras. G – B]

6. On the Nature of Application to Quash a Criminal Charge

It is pertinent that application to quash a criminal charge is a right which the Appellants have under the law and which accrues to them as soon as they were indicted. Upon the Appellant's application to quash the Charges, the lower Court must consider it dispassionately and rule on it. The best way is to consider the entire proof of evidence alongside the further evidence accompanying and supporting the application to quash the indictment. If at the end of its scrutiny, the Court does not find out a *prima facie* case that is linked with the Appellants, the application to quash the Charges is bound to succeed. [Abacha vs. State (2002) 7 SC (Part 1), 1]

7. On when an Application to Quash Charges may be Refused

An application to quash the Charges could only be refused if there are such facts revealed in the proof of evidence that constitute *prima facie* evidence of an offence known to law. In an offence of conspiracy for example, there must be evidence of an agreement between two or more accused persons to do an unlawful act or a lawful act by unlawful means.

8. On the Legal Liability of Corporations and Companies

A corporation or company is not a natural person and only acts through its officers. There was nothing in the proof of evidence to show that the Appellants acted personally in respect of the loan recovery or processing of interest waiver as applied by the Nasarawa State Government. If what the Appellants did was criminal in nature, then only the Corporation is liable to be prosecuted. [Adeniji v. State (1992) 4 NWLR (Part 234) page 248 at 263 – 264, paras. H – A; Salomon v. Salomon & Co. Limited (1897) A. C., page 22 at 51]

9. On the Corporate Liability of the Nigeria Deposit Insurance Corporation (NDIC)

The Law recognises the corporate liability of the NDIC as a corporate entity. In **Adeniji v. State** (1992) 4 NWLR (Part 234) page 248 at 263 – 264, paras. H – A, the Court per Niki Tobi, JCA (as he then was), aptly observed thus:

*“The law recognises corporate liability of a company in respect of either its criminal acts or conduct or in respect of its civil acts or conduct. This is because a company, being a corporate entity, can sue and be sued in the corporate name. As a matter of law, it has separate existence, identity from the brains, minds, and hands operating it to commercial functionality. The law therefore draws a clear cleavage between the company as the artificial person and the natural persons with life and limb who operate it. The demarcation is so clear and there cannot be generally any flirtation or dabbling of one into or with the exclusive domain or territory of another. The point was made by Lord Macnaghten in the often cited case of **Salomon v. Salomon & Co. Limited** (1897) A. C., page 22 at 51”*

10. On When the Officers of the Corporation could be Held Personally Liable

The Appellants could not be rightly prosecuted for an offence, if any, for which the Corporation is the right culprit under the law. If the Appellants must stand trial, the prosecution has a duty to go a mile further in his proof of evidence to show such facts indicating that it was the Appellants and not the Corporation that were personally liable.

11. On the Personal Criminal Liability of an Employee or Officer of a Corporate Entity

Hussein Mukhtar, JCA citing Niki Tobi, JCA (as he then was) in **Adeniji v. State** (1992) 4 NWLR (Part 234) page 248 at 264, paras. F – G

*“...Where a company is involved in criminality, the burden is on the prosecution to prove that it was not the company which is corporately liable but an employee or officer of the company. And the burden of proof, like in other criminal cases, is beyond reasonable doubt. [See: **Esangbedo v. The State** (1989) 4 NWLR, (Part 113), page 57; **Karimu v. The State** (1989) 1 NWLR, (Part 96) page 124.] And in discharging the burden, it is not enough to merely allege that the Appellant was the person involved in the transaction which resulted in the criminal conduct, but that he was in fact*

and in law the criminal. In other words, he committed the crime as an individual, as distinct and separate from the company.”

Nigerian Cases Referred to in the Judgement:

- Abacha vs. State (2002) 7 SC (Part 1), 1
- Abisi vs. Ekwealor (1993) 6 NWLR, (Part 302) 643 SC
- Adelusola vs. Akinde (2004) 12 NWLR, (Part 887), S. C. 295 at 311, para. E
- Adeniji v. State (1992) 4 NWLR (Part 234) page 248 at 263 – 264, paras. H – A;
- Aituma vs. State (2006) 19 NWLR (Part 989), page 452 at 471 – 472
- Amadi vs. State (1993) 8 NWLR (Part 313) 644 at 677;
- Anaele vs. Anyaso (1993) 5 NWLR (Part 291) 1 SC;
- Artra vs. NACB (1998) 3 SCNJ 97 at 123
- Aruwa vs. The State (1990) 6 NWLR (Part 155) page 125 at 134 and 136
- Atano vs. Attorney-General of Bendel State (1988) 2 NWLR (Pt. 75) 201
- Awoyale vs. Ogunbiyi (1985) 2 NWLR, 861 at 870 – 880;
- Balogun vs. Attorney-General of Ogun State (2002) 6 NWLR (Part 763) at 531 – 532
- Bello vs. State (2007) 10 NWLR (Part 1043) p. 564 at page 582, paras G – H
- Brown vs. Harco (1973) 4 SC, 145
- Bunge vs. Governor of Rivers State (2006) 12 NWLR, (part 995) page 573 at page 629. E – H
- Egbe vs. State (1980) 1 NCLR 341 at 346
- Enekebe vs. Enekebe (1964) 1 All NLR, page 102
- Esangbedo v. The State (1989) 4 NWLR, (Part 113), page 57;
- Ewarami vs. A.C.B. (1978) 4 SC 99 at 108;
- Ezede v. State (2004) 14 NWLR, (Part 894) at 504 – 505, paras. G – B
- Ikomi vs. State (1987) 1QLRN1
- Imah vs. Okogbe (1993) 9 NWLR, (Part 316) 159 SC;
- Karimu v. The State (1989) 1 NWLR, (Part 96) page 124
- Obiakor vs. State (2003) 10 NWLR, (Part 776), 612;
- Ogidi vs. State (2003) 5 NWLR, (Part 918) 286 at 318 – 319, paras. H – F
- Olasope vs. NBN (1985) 3 NWLR, 147 at 153
- State vs. Osoba (2004) 21 WRN, page 113 at 121;
- Unipetrol vs. E.S.B.I.R (2006) All FWLR (Part 317) 413 at 423

Foreign Cases Referred to in the Judgement:

Salomon v. Salomon & Co. Limited (1897) A. C., page 22 at 51

Nigerian Statutes Referred to in the Judgement:

Companies and Allied Matters Act, 1990

Section 425(f)

Constitution of the Federal Republic of Nigeria, 1999

Section 36(12)

Criminal Procedure Code

Section 140(1)(a)

Nigeria Deposit Insurance Corporation Act, 2006

Section 40(1)

Section 53(5)

Penal Code

Section 29

Section 96(1)

Section 96(2)

Section 97(1)

Section 315

Section 139(a)

Section 140(a)

Section 140(b)

APPEARANCE:

O. I. Olorundare, SAN

With: O. D. Emole, Esq.

E. Ekong, Esq., and

Amina Balogun (Miss)

} for the Appellants

John Okoriko

- - for the 1st Respondent

The 2nd and 3rd Respondents were not represented but they were duly served on 20/12/2011