

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT MAITAMA – ABUJA**

**BEFORE HIS LORDSHIP:            HON. JUSTICE SALISU GARBA  
COURT CLERKS:                    BWALA NATHAN & OTHERS  
COURT NUMBER:                  HIGH COURT FOUR (4)  
CASE NUMBER:                    FCT/HC/CR/49/2007  
DATE:                                FRIDAY 14<sup>TH</sup> FEBRUARY, 2014**

**BETWEEN:**

**FEDERAL REPUBLIC OF NIGERIA                    -            COMPLAINANT**

**AND**

<b>1. MUSA ZAKARI</b>	<b>)</b>	
<b>2. ABIODUN ADESANYA</b>	<b>)</b>	<b>ACCUSED PERSONS</b>
<b>3. EMMANUEL AGBATOR</b>	<b>)</b>	
<b>4. SUNDAY AKOR</b>	<b>)</b>	

Accused Persons in court and they speaks English.

I.S. Azegbeobor (Mrs) for the Prosecution.

Akpama Ekwe for the 1<sup>st</sup> Accused Person.

Chukwuemeka J. Okereke for the 2<sup>nd</sup> Accused Person.

Benson Ibezim for the 3<sup>rd</sup> Accused Person.

Eze Bin Martins for the 4<sup>th</sup> Accused Person.

Prosecution's Counsel – The matter is slated today for judgment and we are ready.

**J U D G M E N T**

The Accused Persons were arraigned before this court on 8/05/2008 on an eight counts Amended Charge of conspiracy, contrary to Section 96 and punishable under Section 97 of the

Penal Code Act Cap 534 LF (Abuja) 1990; theft contrary to Section 286 and punishable under Section 287 of the Penal Code Act, to which they pleaded not guilty.

In proof of the charges against the accused persons, the prosecution called three witnesses (PW1 – PW3) and tendered series of exhibits. The accused persons on their part testified for themselves. At the end of the case of the prosecution all the accused persons entered a No Case Submission.

The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons were discharged on all charges against them except on Count 2 while the 2<sup>nd</sup> accused person was discharged on all charges against him except on Count 5.

As stated earlier, the prosecution called three witnesses. The PW1 Mr. Mohammed Sanusi Aliyu an Assistant Superintendent of Police attached to the EFCC, in his evidence-in-chief stated that sometimes in the year 2006, a petition from the Bureau of Public Enterprises address to the Chairman EFCC in respect of a fraudulent conversion of BPE's Standard Chartered Bank of Nigeria Limited Cheque No. 14566 for the sum of N5,801,1001:00 in favour of one Magaji Garba was assign to him for investigation; that in the cause of investigation the accused persons were interrogated. The said petition dated March 30, 2006 was admitted in evidence as Exhibit A.

PW1 further stated that the cheque was stolen from B.P.E. and they recovered same from the Standard Chartered Bank via a letter the EFCC wrote to them.

It is the evidence of PW1 that in the cause of investigation it was discovered that the cheque was in the custody of the 1<sup>st</sup> accused person and was stolen by him and giving to the 2<sup>nd</sup> accused person; the 2<sup>nd</sup> accused person in turn gave it to the 4<sup>th</sup> accused person and the 4<sup>th</sup> accused person in active connivance with the 3<sup>rd</sup> accused persons, who was a manager in Dominion Building Society Limited converted the cheque and raised a Diamond Bank Manager's Cheque in favour of the 4<sup>th</sup> accused person for the sum of N5,401,101.00 and the 4<sup>th</sup> accused person signed and collected the cheques; the cheque Standard Chartered Bank Cheque No. 01C6599121302 dated 30/5/2003 and Diamond bank Manager's Cheque No. 6217255 dated 31/7/2003 are admitted in evidence as Exhibits B and C respectively.

PW1 stated that in the cause of investigation, he wrote a statement in respect of the action he took; the said statement dated 29/4/2008 was admitted and marked Exhibit D.

PW1 further stated that he recorded the statement of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused persons; the statement of the 2<sup>nd</sup> accused person dated 23/6/2006 was admitted as Exhibit E. The statement of the 1<sup>st</sup> accused person was also admitted in evidence as Exhibit F; the statement of the 3<sup>rd</sup> accused person was admitted as Exhibit G.



Under cross-examination by the 1<sup>st</sup> accused person's counsel, the PW1 stated that he was not informed by the 1<sup>st</sup> accused person that it was a team that was in charge of the cheque but the 1<sup>st</sup> accused person stated in his statement that it was a team that was in charge of the cheque; while the 2<sup>nd</sup> and 4<sup>th</sup> accused person's counsel cross-examined the PW1, he stated that he was the person who recovered the cheque in question. The 4<sup>th</sup> accused presented himself as a staff of Magaji Garba Enterprises. There was no issue of missing cheque of Magaji Garba Enterprises.

The PW1 further stated that after the arrest of the 2<sup>nd</sup> accused person, the 2<sup>nd</sup> accused stated that it was the 1<sup>st</sup> accused that gave him the cheque and he gave same to the 4<sup>th</sup> accused.

On another breath, PW1 stated that the 2<sup>nd</sup> accused person was not arrested; he brought himself to the EFCC's office when he got wind of the matter.

On being cross-examined by the 3<sup>rd</sup> accused person's counsel, PW1 stated that he would not say whether there was a meeting or not by the accused persons before the cheque was stolen. PW1 also stated that the cheque was not paid into the account of the 3<sup>rd</sup> accused person. There was no re-examination. PW1 was accordingly discharged.

The PW2 is one Halima Halilu, a staff of the B.P.E. in her evidence-in-chief, she stated that sometime in 2005 the relatives of Magaji Garba came to B.P.E. to collect the entitlement of Magaji Garba who was a creditor to Savannah Sugar Company; they were

directed to the Enterprise Officer, Musa Zakari (1<sup>st</sup> Accused Person) for payment of the cheque but they could not trace the cheque and all effort to trace it proved abortive. The matter was then referred to the Anti-Corruption and Compliance Unit for investigation. PW2 further stated that they wrote letter of inquiry to the Standard Chartered Bank to verify if the cheque have been cleared and the Bank confirmed that the cheque was cleared through Diamond Bank; they also wrote a similar letter of inquiry to Diamond Bank and the Bank informed them that the cheque was presented from Dominion Building Saving and Loans Limited and the cheque was cleared by Sunday Akor and they have commenced investigation into the matter. PW2 stated that Dominion Building Saving and Loans Limited sent them a letter that they (i.e. Dominion Building Saving & Loans Limited) have reported the matter at Onikan Police Station, Lagos.

PW2 stated that they subsequently reported the matter to EFCC where she made a statement; the said statement of PW2 to the EFCC dated 4/5/06 was admitted in evidence as Exhibit H.

Under cross-examination by the 1<sup>st</sup> accused person counsel, PW2 stated that the payment of the cheques was done by a team not the 1<sup>st</sup> accused person alone. The 1<sup>st</sup> accused person was singled out because he was the Enterprise Officer.

PW2 also stated that she did not see the 1<sup>st</sup> accused person holding any meeting to steal the cheque nor stealing the money; that the 1<sup>st</sup> accused person was brought to court because he was



the Head of the Enterprises of Savannah Sugar Company and the Police Report.

PW2 while being cross-examined by the 2<sup>nd</sup> and 4<sup>th</sup> accused person's counsel stated that the 1<sup>st</sup> accused as an Enterprise Officer is supposed to have in custody all the documents ready for the enterprise. No external person is allowed into the office of the Enterprise Officer and people are checked at the gate before entering the premises; that there are 2 police reports in respect of this matter and the reports are in the office of BPE. The reports were from the Divisional Police Officer Onikan, Lagos.

On being cross-examined by the 3<sup>rd</sup> accused person's counsel, PW2 stated that the sum of N360,000.00 refunded by the Dominion Building Society was part of the proceed of the cheque wrongfully cashed by them.

No re-examination, PW2 was discharged.

The PW3 is one Ajeh Ochochi, a staff of the EFCC. In his evidence-in-chief, he stated that sometimes in April 2006 the management of the Bureau for Public Enterprises reported a case of theft to the EFCC for investigation; he was detailed amongst other officers to investigate the matter; that in the cause of investigation the 4<sup>th</sup> accused was arrested and he volunteered to make a statement; the said statement of the 4<sup>th</sup> accused person was admitted in evidence and marked Exhibit I. PW3 further stated that on 11/10/06 the 1<sup>st</sup> accused person volunteered to make additional

statement, the statement of the 1<sup>st</sup> accused person was admitted in evidence as Exhibit J.

It is the evidence of PW3 that he also wrote a statement in respect of the investigation he conducted; the said PW3's statement was admitted and marked Exhibit K.

PW3 stated that on 20/6/2006 the EFCC wrote to the management of Diamond Bank Plc and on the 4/7/2006 the management of Diamond Bank Plc responded to the letter and provided information suggesting that it was the 1<sup>st</sup> accused person that was the final beneficiary of the cheque; the said letter was rejected in evidence.

Under cross-examination of PW3 by the 1<sup>st</sup> accused person's counsel, the PW3 stated that he did not see the 1<sup>st</sup> accused steal the cheque in question and he also did not see the 1<sup>st</sup> accused person share the proceed of the cheque.

The PW3 while being cross-examined by the 2<sup>nd</sup> and 4<sup>th</sup> accused person's counsel stated that investigation reveals that the 2<sup>nd</sup> accused person collected the cheque from the 1<sup>st</sup> accused person and handed over same to the 4<sup>th</sup> accused person.

It is the evidence of PW3 that the 4<sup>th</sup> accused person was not linked with the stealing of the cheque from the B.P.E. However, the 4<sup>th</sup> accused person changed the name on the cheque to his name.

On being cross-examined by the 3<sup>rd</sup> accused person's counsel, the PW3 stated that the 3<sup>rd</sup> accused person was not part of the plan to steal the cheque but knew that it was stolen.

No re-examination, PW3 was discharged and that is the case of the prosecution.

On 9/7/2012 the accused persons opened their defence in the respective charge being held with.

The DW1 one Mohammed Dikko Abdullahi, a staff of the B.P.E. in his evidence-in-chief stated that the 1<sup>st</sup> accused person had worked under him; that there were times when they paid arrears of staff of Savannah Sugar Company and so also some creditor's claims. When the cheques were brought in they were with the Central Account Unit and there was also a time when the schedule officers were keeping the bags containing the cheques themselves.

DW1 further stated that the 1<sup>st</sup> accused person was staying in his office with other staff and the cheques were kept in the general filing cabinet in the office.

It is also the evidence of DW1 that in the process of making payments the 1<sup>st</sup> accused person travelled to United Kingdom for a course.

Under cross-examination by the 3<sup>rd</sup> accused person's counsel, DW1 stated that he did not know the 3<sup>rd</sup> Defendant and he never



met him in their own premises. He also stated that he does not know the 4<sup>th</sup> Defendant.

No re-examination, DW1 was discharged.

The DW2 is the 2<sup>nd</sup> accused person. In his evidence-in-chief he stated that he did not know that the money (N600,000.00) given by the 1<sup>st</sup> accused person was stolen; that the 1<sup>st</sup> accused person gave him the money for helping him to clear a cheque the 1<sup>st</sup> accused person gave him in 2003.

It is the evidence of the DW2 that the 1<sup>st</sup> accused told him that the cheque belongs to his company and that the DW2 should help him clear it.

DW2 further stated that it was after his arrest in 2005 that the police told him that the cheque was stolen and belong to someone who is late; that he was asked by the police to refund the money given to him and he did refunded same and he was granted bail.

It is the evidence of DW2 that in 2007 he was invited by the EFCC on the same matter; that the police from Lagos wanted to investigate the matter were not called to give evidence in this court; that the police in Lagos informed him that they sent in their report to B.P.E. in Abuja. DW1 stated that it was in the process of privatization of Savannah Sugar Company, Numan, Adamawa State that he met the 1<sup>st</sup> accused person in 2002.

Under cross-examination by the 1<sup>st</sup> accused person's counsel, DW2 stated that it was not wrong to cash a 3<sup>rd</sup> party cheque accorded to the 1<sup>st</sup> accused person.

DW2 also restated that he refunded the sum of N600,000.00 given to him by the 1<sup>st</sup> accused person to the police.

Under cross-examination by the 4<sup>th</sup> accused person's counsel, the DW2 stated that he did not tell the 4<sup>th</sup> accused person that it was a stolen cheque, because he never knew that it was a stolen cheque that he voluntarily gave the sum of N400,000.00 to the 4<sup>th</sup> accused person.

No re-examination, DW2 discharged.

The DW3 is the 3<sup>rd</sup> accused person. In his evidence-in-chief, he stated that sometime in 2003 while he was still the Manager of Dominion Building Society Bank, there was a particular day when he heard argument in the banking hall and he had to step out. Upon enquiry he discovered that it had to do with the 4<sup>th</sup> accused person and his operation staff arguing over the acceptable rate to use in a third party cheque. The cheque was brought by the 4<sup>th</sup> accused person. He intervened and the problem was resolved. That about a month later, the 4<sup>th</sup> accused person came to his office to thank him for intervening the other time and that he the 4<sup>th</sup> accused had a 3<sup>rd</sup> party cheque to cash but the operation staff said they cannot pay across the counter which was the practice of banks.



The 4<sup>th</sup> accused person was advised that the cheque be sent in and go through clearing process and upon clearing the discontnet value will be paid through their commercial bank (Diamond Bank). He the DW3 then left the 4<sup>th</sup> accused person with the operation staff to complete the process.

Under cross-examination by the prosecution's counsel, the DW3 stated that he knew the 4<sup>th</sup> accused person as a customer of the bank; that he is no more working with the bank, he stop working with the bank in 2005 before the issue of this cheques arose.

Under cross-examination by the 2<sup>nd</sup> accused person's counsel, DW3 stated that he did not know the 2<sup>nd</sup> accused person prior to this case.

Under cross-examination by the 4<sup>th</sup> accused person's counsel, DW3 stated that the bank accepted the cheque from the 4<sup>th</sup> accused person because it is a normal procedure to clear 3<sup>rd</sup> party cheque.

Under re-examination, DW3 stated that the commission derived for clearance of cheque is for the bank. DW3 was discharged and that is the case for the defence.

The 1<sup>st</sup> accused person's counsel filed a 9-page written address dated 4/2/2013 wherein counsel formulated an issue for determination, thus:

***"Whether the prosecution has proved beyond reasonable doubt the charge of theft, as countered in Count 2 against the 1<sup>st</sup> accused person".***

On this issue, it is the submission that the prosecution has not proved beyond reasonable doubt the charge of theft against the 1<sup>st</sup> accused person; that to convict an accused person under Section 286 of the Penal Code that, the prosecution must prove beyond reasonable doubt, the following elements of the offence:

- (a) That the property in question is movable property.
- (b) That the property was in the possession of a person.
- (c) That the accused person moved it whilst in the possession of that person.
- (d) That he did so without the consent of that person.
- (e) That he did so in order to take the property out of the possession of that person.
- (f) That he did so with intent to cause wrongful gain to himself or wrongful loss to that person.

It is submitted that none of the three prosecution witnesses gave evidence to prove the above elements; that PW1 read out paragraph 1 on Page 2 of Exhibit F to the effect that the cheque were kept in an open cabinet where other staff apart from the 1<sup>st</sup> accused person had access.

PW1 under cross-examination also told the court that in the course of his investigation, he did not discover any document



incriminating the 1<sup>st</sup> accused apart from the evidence of a co-accused person.

It is the submission that assuming that the 1<sup>st</sup> accused was the head of the team that was assigned to issue cheques as was led in evidence, this Honourable Court cannot hold him responsible for a missing cheque in the face of the uncontroverted evidence before this court that the cheques were issued out by a team of staff, the cheques were kept in an open place where other staff had access to and that the 1<sup>st</sup> accused travelled abroad for a course during the period of the assignment in question.

It is submitted that while PW1 said the 1<sup>st</sup> accused is standing trial for being a leader of the team, PW2 said under cross-examination that the 1<sup>st</sup> accused is standing trial because of a police report. It is worthy of note that the purported police report was never tendered in court neither was the investigating police officer invited to give evidence. Court is urged to invoke Section 149(d) of the Evidence Act. To hold that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. See *EKPOOISONG v STATE* 92009) 1 NWLR (Pt 1122) 354 at 371.

It is submitted that there is nothing in the evidence of the prosecution witnesses to establish a case of theft against the 1<sup>st</sup> accused person; that the only place where the name of the 1<sup>st</sup> accused is mentioned in the whole proceedings is the evidence of the 2<sup>nd</sup> accused person who claimed that the cheque in question was given to him by the 1<sup>st</sup> accused person.

The law is that the evidence of a co-accused person cannot be used to convict the 1<sup>st</sup> accused person. See *OLUSEGUN v THE STATE* (1968) NLR 261 at 767; *FGN v ADUKU & ORS* (2009) 9 NWLR (Pt 1146) 370 at 399.

It is submitted that the uncorroborated evidence of the 2<sup>nd</sup> accused person cannot be used against the 1<sup>st</sup> accused person.

The 2<sup>nd</sup> accused person's counsel filed a 4-page written final address dated 2/5/13 wherein counsel submitted that in a criminal case the burden of proof weighs heavily on the prosecution at a standard of proof of beyond reasonable doubt, without which the court cannot convict the accused. See *UNION BANK NIG. PLC v JASE MOTORS NIG LTD* (1997) 7 NWLR (Pt 513) 387 ratio 6.

It is submitted that the two police reports that was made in Lagos State during investigation of the case, that the prosecution failed to produce to this court are vital to this case and if they were produced before this court, would have proved that the 2<sup>nd</sup> accused person never retained the money but promptly returned the money on realizing that it was stolen money. Court is urged to hold that the non production of the 2 police reports which PW2 admitted existed should be regarded as a fundamental contradiction which has marred the case of the prosecution, and has on itself vindicated the 2<sup>nd</sup> accused person, given the fact that those reports clearly exonerated the 2<sup>nd</sup> accused person of any guilt or liability in this case.



It is submitted that for the prosecution to succeed in his prosecution, there will be need for them to prove the concurrence of the guilty act and the guilty mind. See case of *IJIOFFOR v STATE* (2001) 3 NWLR Pt 699. Court is urged to discharge and acquit the 2<sup>nd</sup> accused person based on the fact that the prosecution has failed to discharge the onus and burden which the law has placed on them.

The 3<sup>rd</sup> accused person counsel filed a 3-page final written address dated 3/5/2013 wherein counsel formulated lone issue, thus: **whether the 3<sup>rd</sup> accused person can be convicted for the offence of theft in the instant case, regard being had to the surrounding circumstances of this case.**

On this lone issue, it is the submission that the element of theft as provided in Section 286 of Penal Code are as follows:

1. That the property in question is a movable property.
2. That the property was in possession of the person.
3. That the accused moved the property while in possession of the person.
4. That the accused did so without the consent of the person.
5. That the accused did so in order to take possession of that person's property.
6. That he did so with the intent to cause wrongful gain to himself or wrongful loss to that person.

It is submitted that at the end of the prosecution case, there is no worth, credible, cogent and reasonable evidence adduced

against the 3<sup>rd</sup> accused person vis-à-vis the charge as the prosecution has failed to prove elements of the offence of theft charge. See OLADOTUN v STATE (2010) 15 NWLR Pt 1217 Pg 499 ratio 8 and 9.

It is submitted that there is no iota of reason from the prosecution's case to link the stealing of the cheque with the 3<sup>rd</sup> accused person. There is no evidence that the 3<sup>rd</sup> accused person came to the premises of B.P.E. It is trite law that a charge that is not supported by credible evidence will collapse. See AITUMA v STATE (2007) 5 NWLR Pt 1028 Pg 466. Court is urged to hold that the prosecution has not proved the required element of theft as charged in count two as against the 3<sup>rd</sup> accused person and court should discharge and acquit the 3<sup>rd</sup> accused person.

The 4<sup>th</sup> Accused person counsel filed a 7-page final written address dated 28/5/2013 wherein counsel formulated an issue for determination, thus:

***"Whether the prosecution has proved against the 4<sup>th</sup> Accused person the commission of the alleged offence of theft of Standard Chartered Bank Cheque with Account No. 14566 for the sum of N5,501,101.00 (Five Million, Five Hundred and One Thousand, One Hundred and One Naira) only from the possession of Bureau of Public Enterprises (BPE) contrary to Section 286 of the Penal Code beyond reasonable doubt".***

On this singular issue, it is the submission that for the prosecution to secure a conviction, all the ingredients/elements of the offence



must be proved beyond reasonable doubt. Accordingly, if and once the prosecution fails to discharge this burden the accused shall be discharged and acquitted. See Section 135 of the Evidence Act 2011 (as amended); TAJUDEEN ALABI v THE STATE (1993) 9 SCNJ (Pt 1) 109; SUNDAY AMALA v THE STATE (2004) 6 SCNJ ratio 1.

It is submitted that to prove the offence of theft the following ingredients must be established by the prosecution.

1. That the property in question is movable.
2. That the property in question was in possession of a person.
3. That the accused person moved the property whilst in the possession of that person.
4. That he did so without the consent of that person.
5. That he did so in order to take that property out of the possession of that person.
6. That he did so with intent to cause wrongful gain to himself or wrongful loss to that person.

It is submitted that the three (3) prosecution witnesses failed to give evidence to prove all the ingredients and elements of the offence as required by the law in the course of testifying to prove the guilt of the 4<sup>th</sup> accused but rather exonerated him during their examination-in-chief and cross-examination.

It is the submission that the fundamental principle of our criminal justice system, an accused person is presumed innocent until proved guilty; the standard of proof in criminal matters is proof

beyond reasonable doubts and not beyond the shadow of doubts, hence the prosecution is duty bound to prove the ingredients and elements of the offence to secure conviction of the 4<sup>th</sup> accused person. As in this case, the prosecution failed to link the 4<sup>th</sup> accused with the theft of the cheque, rather exonerated and absolved him. See cases of HUMBA v STATE (1978) 10 SCC 126; DR. OLU ONAGORUWA v THE STATE (1993) 7 NWLR (Pt 303) Pg 49, ratio 4. Court is urged to discharge and acquit the 4<sup>th</sup> accused person.

The prosecution counsel filed an 11-page final written address dated 17/10/2013 wherein counsel formulated an issue for determination, thus:

***"Whether the prosecution has proved the essential elements of the ingredients of the counts of the offence alleged against the accused persons beyond reasonable doubt to warrant their being found guilty and consequently convicted".***

On this issue, it is the submission that the elements which the prosecution is expected to prove are:

- (i) That the property in question is movable property.
- (ii) That the property was in the possession of a person.
- (iii) That the accused move the property whilst in the possession of that person.
- (iv) That he did so without the consent of the that person.

- (v) That he did so in order to take the property out of the possession of that person.
- (vi) That he did so with the intent to cause a wrongful gain to himself or wrongful loss to a person.

The case of the prosecution against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons is that they took from the possession of the B.P.E. without its consent a Standard Chartered Bank Cheque for the sum of N5,801,101:00 contrary to Section 286 of the Penal Code Act.

It is submitted that in proof of this count, the prosecution called three (3) witnesses. Court is referred to the testimonies of the prosecution witnesses and Exhibits E, F and G especially the statement of the 2<sup>nd</sup> accused person.

It is submitted that the defence of the 1<sup>st</sup> accused person to the effect that the 3<sup>rd</sup> and 4<sup>th</sup> accused persons never set their eyes on him is not a defence. It is not necessary that there is direct contact between each accused person, all that need be established is that the criminal designed alleged is common to all. See *ERIM v STATE* (1994) NWLR Pt 346 at 522 Paras C – D; *OSONDU v FRN* (2000) 12 NWLR Pt 682 Pg 444 – 665 at 501 G – H.

It is submitted that Section 148 of the Evidence Act permits the court to draw reference from the relevant established facts. This evidence lies in the totality of the evidence which by an undersigned coincidence points to the direction of the guilt of the 1<sup>st</sup> accused person. See *UGWU v STATE* (1972) SC 128.



It is further submitted that from the evidence adduced the 3<sup>rd</sup> accused cannot claim not to know anything, or have any connection to the offence. The law is settled that all persons who are ***participes criminis***, whether as principal in the first degree or as accessories before or after the fact to a crime are guilty of the offence and may be charged and convicted with the actual commission of the crime.

It is submitted that the prosecution has adduced sufficient evidence to prove the count of theft against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons and urged the court to convict them accordingly.

With respect to the 2<sup>nd</sup> accused person it is submitted that the elements which the prosecution is expected to prove with regard to Section 317 of the Penal Code are:

- (a) That the property in question is stolen property
- (b) That the accused received or retained such property
- (c) That he did so dishonestly
- (d) That he knew or had reason to believe that the property was stolen.

The case of the prosecution against the 2<sup>nd</sup> accused person is that he retained the sum of Six Hundred Thousand Naira belonging to the BPE having reason to believe that the money was stolen.

It is submitted that the 2<sup>nd</sup> accused person from the totality of his statement knew that the cheque was stolen. Court is referred to the statement of the 2<sup>nd</sup> accused person Exhibit E.

In reply to the submission of learned Defence counsel, it is submitted that in a criminal case the standard of proof is not on the balance of probabilities but proof beyond reasonable doubt. See Section 138(i) Evidence Act, Case of IGBI v STATE (2000) 3 NWLR (Pt 648) 169 SC at 192 Paras E – F; ABDULLAHI v STATE (2008) 17 NWLR (Pt 1115) 203 at 216 – 217 Paras H – C, 221 Paras D – E.

However, this duty of the prosecution to prove beyond reasonable doubt is said to be discharged. If on the entire evidence the trial court is left with no doubt that the offence was committed by the accused person. See BOLANLE v STATE (2009) VOL. 12 MJSC Pt 1 at 24. Also where the evidence conclusively points out that the accused persons as perpetrators of the crime for which they are charged and the evidence is duly tested, scrutinized and accepted by the court, the onus is on the accused to rebut the presumption of guilt or to cast on reasonable doubt on the case of the prosecution by the preponderance of probabilities. See KALU v STATE (1993) 6 NLWR (Pt 300) 385; ALAKE v STATE (1991) 1 NWLR (Pt 205) 567 at 592.

It is submitted that proof beyond reasonable doubt is proof that precludes every reasonable hypothesis except that which it tends to support and it is proof which is wholly consistent with the guilt of the accused and inconsistent with any other rational conclusion once the ingredients of the particular offence with which the accused person are charged are proved that in law constitutes proof beyond reasonable doubt for the accused persons to be entitled to benefit of doubt, the doubt must be a genuine and



reasonable one arising from some evidence before the court. See *IORTIM v STATE* (1997) 2 NWLR (Pt 490) 711 at 732 Paras G – H.

It is submitted that the prosecution has proved all the ingredients of the offence against the accused persons and has discharged the burden beyond reasonable doubt. Court is urged to find them guilty as charged.

The 2<sup>nd</sup> accused person counsel filed a 3-page Reply on Points of law dated 18/11/13 wherein it is submitted that Section 233(c) of Evidence Act provides that the credit of a witness (in this case the prosecution) may be impeached by the party other than the party calling him (accused) to prove that his former statement is inconsistent with any part of his evidence which is liable to be contradicted.

It is submitted that the testimony of the PW2 clearly agrees with the 2<sup>nd</sup> accused defence of innocence to the extent of his involvement in the act of being in possession of stolen property. It is obvious that in the course of this trial the 2<sup>nd</sup> accused gave the prosecution notice to produce the report of the investigation of the men of the Nigeria Police from Lagos who first made thorough investigation into this matter and reported that the 2<sup>nd</sup> accused voluntarily returned the money that was given to him when he discovered that it was stolen money; that in itself shows the innocence and truthfulness of the 2<sup>nd</sup> accused person. This exonerates him, from any liability in this case, as it is clear that if that police report was brought, it would have been in favour of



the 2<sup>nd</sup> accused person. See OTTUKA v THE STATE (No. 2) (1988) Pt 86 at 36.

It is submitted that the prosecution must rely on the strength of its case and not on the weakness of the defence. See UNION BANK NIG. PLC v JASE MOTORS NIG. LTD (1997) 7 NWLR (Pt 513) 387 ratio 6. Court is urged to discharge and acquit the 2<sup>nd</sup> accused person.

The 3<sup>rd</sup> accused person's counsel also filed a 7-page Reply on Points of Law, herein counsel submitted that an accused can only be convicted of a crime when all the elements of the crime are found in his acts.

It is submitted that there are countless and manifest contradictions on the prosecution's case, which are more than weighty to create doubt in the mind of the court of the commission of any crime by the 3<sup>rd</sup> accused person. See AWOPEJO & ORS v STATE (2001) Pg 312 ratio 7.

It is further submitted that the prosecution has not been able to proof any element of the offence of theft against the 3<sup>rd</sup> accused. See the case of ANYANWU v STATE (2012) 16 NWLR Pt 1326 Pg 221 ratio 6. Court is urged to discharge and acquit the 3<sup>rd</sup> accused person.

After a careful consideration of the processes filed, evidence of witnesses and submission of learned counsel on both sides, the sole issue that call for determination is whether the prosecution has proved the essential elements of the ingredients of the counts of the offence alleged against the accused persons beyond

reasonable doubt to warrant their being found guilty and consequently convicted.

It is trite that in criminal case the burden of proof weighs heavily on the prosecution at a standard of proof of beyond reasonable doubt, without which the court cannot convict the accused. See UNION BANK NIG. PLC v JASE MOTORS NIG LTD (Supra).

Now with respect to the 4<sup>th</sup> accused person, it is pertinent to state here that this court on its ruling delivered on 31/1/2011 discharged the 4<sup>th</sup> accused person with respect to Count 1, 4 and 7 and left him with only Count 2 of the Amended Charge Sheet i.e. theft of Standard Chartered Bank cheque with No. 14566 for the sum of N5,801,101:00 only belonging to B.P.E. Abuja.

Section 286(1) of the Penal Code Act provides ***"whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to take it is said to commit theft"***

Having recourse to the charge against the 4<sup>th</sup> accused person, the prosecution is expected to prove or establish the ingredient of the offence of theft as earlier stated in this judgment.

A cursory perusal at the evidence of the prosecution witnesses and the corroborative effect of the DW2 reveals inter alia.

The PW1 in the course of his evidence-in-chief stated thus:

***"...In the course of investigation we discovered that the cheque was in the custody of the 1<sup>st</sup> accused person and was stolen by him..."***

Under cross-examination of PW1 by the 4<sup>th</sup> accused person counsel, the PW1 stated that:

***"...He (2<sup>nd</sup> accused person) mentioned names of the 1<sup>st</sup> and 4<sup>th</sup> accused persons. The 2<sup>nd</sup> accused stated that it was the 1<sup>st</sup> accused that gave him the cheque and he gave same to the 4<sup>th</sup> accused"***

To corroborate these pieces of evidence, the 2<sup>nd</sup> accused person gave evidence as DW2 and stated that he gave the 4<sup>th</sup> accused person the cheque because he knows the bank that can clear 3<sup>rd</sup> party cheque.

Under cross-examination of DW2 by the 4<sup>th</sup> accused person's counsel, he further stated thus:

***"I did not know that the cheque was stolen therefore I did not tell the 4<sup>th</sup> accused person that the cheque was stolen".***

The PW2 in her evidence-in-chief stated that the cheques were in custody of the Enterprise Officer Musa Zakari.

Under cross-examination of PW2 by the 4<sup>th</sup> accused person's counsel, she stated that the 1<sup>st</sup> accused as an Enterprise Officer is suppose to have in custody all the documents ready for the Enterprise. No external person is allowed into the office of the



Enterprise Officer and people are checked at the gate before entering the premises.

The PW3 in his evidence-in-chief stated that on the 4/7/2006 the management of Diamond bank responded to their letter and provided information suggesting that it was the 1<sup>st</sup> accused person that was the final beneficiary of the cheque.

Under cross-examination of PW3 by the 4<sup>th</sup> accused person's counsel, PW3 stated that investigation reveals that the 2<sup>nd</sup> accused person collected the cheque from the 1<sup>st</sup> accused person and handed over same to the 4<sup>th</sup> accused for clearance.

He stated further thus:

***"...The 4<sup>th</sup> accused person was not linked with the stealing of the cheque from the B.P.E.***

In light of the above evidence of PW1, PW2, PW3 and DW2, I am of the firm view that the 4<sup>th</sup> accused person is innocent of the theft of the cheque.

As stated earlier proof in criminal matters is proof beyond reasonable doubts and not beyond the shadow of doubts, hence the prosecution is duty bound to prove the ingredients and elements of the offence to secure conviction of the 4<sup>th</sup> accused person.

In this case, I am of the considered view that the prosecution has failed to link the 4<sup>th</sup> accused person with the theft of the cheque, rather the prosecution exonerated and absolved him.

It is trite law that if there is no sufficient evidence linking the accused person with the statutory elements and ingredients of the offence with which he is charged, a court of trial must, as a matter of law discharge him and it has no business searching and scanting for evidence that is nowhere and therefore could be found. See DR. OLU ONAGORUWA v THE STATE (Supra).

From the above I hold the firm view that the prosecution has not discharged the onus of proof placed on it, accordingly the 4<sup>th</sup> accused person Sunday Ako is hereby discharged and acquitted.

Now with respect to the 3<sup>rd</sup> accused person, he was discharged on Counts 1, 4 and 6 and was called upon to enter his defence on Count 2, by a considered ruling of this court delivered on 18/12/2009.

Count 2 is an offence of theft founded on Section 286 of the Penal Code. A careful perusal of the said Section 286 brings out the core elements/ingredients of theft as earlier adumbrated in this judgment.

To gain conviction of the 3<sup>rd</sup> accused person the prosecution is duty bound to prove its case beyond reasonable doubt.

In the evidence-in-chief, the PW1 testified to the effect that in the course of investigation they discovered that the cheque was in the custody of the 1<sup>st</sup> accused person and was stolen by him and giving to the 2<sup>nd</sup> accused person. The 2<sup>nd</sup> accused person in turn gave it to the 4<sup>th</sup> accused person and the 4<sup>th</sup> accused gave it to the 3<sup>rd</sup> accused person for the purpose of clearing the cheque.



Under cross-examination of PW1 by the 3<sup>rd</sup> accused person's counsel, PW1 stated that the cheque was not paid into the account of the 3<sup>rd</sup> accused person and that he did not find out the 3<sup>rd</sup> accused cleared the cheque for the 3<sup>rd</sup> party.

The PW2 in her evidence-in-chief stated that the cheques were in custody of the Enterprise Officer Musa Zakari (1<sup>st</sup> Accused Person).

Under cross-examination of PW2 by the 2<sup>nd</sup> and 4<sup>th</sup> accused person's counsel, she stated that the 1<sup>st</sup> accused as an Enterprise Officer is supposed to have in custody all the documents ready for the enterprise; no external person is allowed into the office of the Enterprise Officer and people are checked at the gate before entering the premises.

And while being cross-examined by the 3<sup>rd</sup> accused person's counsel, PW2 stated that the sum of N360,000:00 refunded by the Dominion Building Society was part of the proceed of the cheque wrongfully cashed by him.

The PW3 an Investigation Officer with the EFCC, under cross-examination by the 3<sup>rd</sup> accused person's counsel, stated thus:

***"The 3<sup>rd</sup> accused was not part of the plan to steal the cheque..."***

He went further to state that their investigation reveals that what the bank benefitted from the transaction is more than normal.

From the evidence adduced it shows that the 3<sup>rd</sup> accused persons contact with the cheque was in an official capacity and at the

end of the exercise, the people that brought the cheque took the proceeds. There was no shred of evidence that the 3<sup>rd</sup> accused came across the cheque with any intention of having a wrongful gain to himself or wrongful loss to the owner.

The prosecution maintained its case to the effect that it was not the 3<sup>rd</sup> accused that stole the cheque. The 3<sup>rd</sup> accused was never stated to have been to BPE. The prosecution's case is that the 3<sup>rd</sup> accused cleared the cheque Exhibit B. There is no evidence before me that the 3<sup>rd</sup> accused stole the cheque (Exhibit B). It is trite that a charge that is not supported by credible evidence will collapse. See *AITUMA v STATE* (Supra).

On the strength of all stated above, I am of the considered view that the prosecution has not proved the required element of theft as charged in Count two to warrant this court convict the 3<sup>rd</sup> accused person; accordingly the 3<sup>rd</sup> accused person Emmanuel Agbator is hereby discharged and acquitted.

The 2<sup>nd</sup> accused person was charged with Counts 1, 2, 4 and 5 in the Amended Charge Sheet. However, at the considered ruling of this court delivered on 2/5/12, the 2<sup>nd</sup> accused was discharged with respect of Counts 1, 2 and 4 and was called upon to enter his defence on Count 5.

On Count 5, the 2<sup>nd</sup> accused was charged for dishonestly retaining the sum of N600,000:00 belonging to the Bureau of Public Enterprise having reason to believe same to be stolen property.



For the prosecution to gain a conviction against the 2<sup>nd</sup> accused, they must establish the following:

- (a) That the property in question was stolen.
- (b) That the accused received or retained such property.
- (c) That he did so dishonestly
- (d) That he knew or had reason to believe that the property is stolen.

It is the evidence of PW1 that in the course of investigation, they discovered that the cheque was in the custody of the 1<sup>st</sup> accused person and was stolen by him and he subsequently gave it to the 2<sup>nd</sup> accused person. The PW3 under cross-examination by the 2<sup>nd</sup> accused person's counsel corroborated this fact that investigation reveals that the 2<sup>nd</sup> accused person collected the cheque from the 1<sup>st</sup> accused person and handed over same to the 4<sup>th</sup> accused person for clearance.

From the evidence of PW1, PW2 and PW3, there is no iota of evidence that the 2<sup>nd</sup> accused person dishonestly retained the sum of N600,000:00 belonging to the BPE or that he had reason to believe same to be stolen property.

The 2<sup>nd</sup> accused person who testified as DW2 in his evidence-in-chief stated that he did not withhold the sum of N600,000:00; that it was the 1<sup>st</sup> accused person that gave him the money for helping him (1<sup>st</sup> accused) to clear a cheque.

The 2<sup>nd</sup> accused person further stated that he did not know that the money was stolen; that when he was informed by the police in

Lagos that the money was stolen, he immediately refunded the money.

It is instructive to point out here that these piece of evidence was never controverted or challenged by the prosecution. In fact the PW2 gave evidence to the effect that the matter was first reported at Onikan Police Station, Lagos and Police Report was issued. However, the said police report was never produced before this court after even being given notice to produce same.

It is the contention of the 2<sup>nd</sup> accused counsel that the investigative police report which are serious evidence, including the money returned by the 2<sup>nd</sup> accused are very vital to the case and if they were produced before this court, would have proved that the 2<sup>nd</sup> accused person never retained the money but promptly returned the money on realizing that it was stolen money.

Accordingly, I invoke the provision of Section 149 of the Evidence Act and hold that non production of the police reports which PW2 admitted existed would be unfavourable to the prosecution.

From the totality of evidence before this court, I am of the considered view that the prosecution have failed to discharge the onus and burden which the law had placed on them, to warrant this court to convict the 2<sup>nd</sup> accused person; accordingly, the 2<sup>nd</sup> accused person Mr. Abiodun Adesanya is hereby discharged and acquitted.



Now, the 1<sup>st</sup> accused person was charged with Counts 1, 2, 3, 4 and 8. However in a considered ruling of this court delivered on 18/12/09, he was discharged of Counts 1, 3, 4 and 8 and was asked to enter his defence on Count 2. To convict the accused person under section 286 of the Penal Code Act, the prosecution must prove, beyond reasonable doubt the elements/ingredient as earlier adumbrated in this judgment.

The PW1 in his evidence-in-chief stated that in the cause of investigation they discovered that the cheque was in the custody of the 1<sup>st</sup> accused person and was stolen by him. However, under cross-examination, the PW1 stated that it is true that the 1<sup>st</sup> accused stated in his statement that it was a team that was in charge of the cheque. PW1 even claimed to have invited some members of the team even though he could not remember their names. He equally claims not to remember obtaining statements from other members of the team.

The PW1 also under cross-examination by the 1<sup>st</sup> accused person's counsel stated that in the course of his investigation, he did not discover any document implicating the 1<sup>st</sup> accused apart from the evidence of the 2<sup>nd</sup> accused person.

It is also the evidence of PW1 that he was not aware that the police in Lagos investigated this case and found the 1<sup>st</sup> accused not liable.

PW1 further told this court that he was aware that the 1<sup>st</sup> accused travelled abroad but did not know for how long.

The PW2 who is a staff of BPE, in her evidence-in-chief stated that the cheques were in custody of the Enterprise Officer Musa Zakari (the 1<sup>st</sup> accused person) but that they did not find the specific date the cheque was stolen.

Under cross-examination, PW2 stated that the 1<sup>st</sup> Accused person was on trial because he had in his custody the cheques. PW2 also stated that the cheques were done by a team not the 1<sup>st</sup> accused alone. The 1<sup>st</sup> accused was singled out because he was the Enterprise Officer; that the 1<sup>st</sup> accused is not the head of the team; the head of the team is a Deputy Director.

It is the evidence of PW2 that the 1<sup>st</sup> accused person travelled abroad for a course but that she cannot confirm that while the 1<sup>st</sup> accused was away payments were made; that the document they had in their custody will confirm that. However, no such document was produced.

PW1 further stated that the 1<sup>st</sup> accused person's name was only mentioned in the police report. As stated earlier in this judgment, the said police report was never produced before this court.

The PW3 under cross-examination informed this court that the 1<sup>st</sup> accused told him that he shares the cabinet where the cheques are kept with the other persons.

Now from the evidence of PW1, PW2 and PW3, it is clear that the cheques were issued out by a team of staff, the cheques were kept in an open place where other staff had access to and that



the 1<sup>st</sup> accused travelled abroad for a course during the period of the assignment in question.

The prosecution did investigate the claim and even invited some member of the team, but could not produce evidence to contradict the statement of the 1<sup>st</sup> accused.

The PW2 under cross-examination stated that the 1<sup>st</sup> accused is standing trial because of a police report.

As stated earlier in this judgment, the said Police Report which PW1 admitted she saw was never produced to this court inspite of notice given to them to produce same. Accordingly I invoke the provision of Section 149(d) of the Evidence Act and hold that the non production of the said Police Reports would be unfavourable to the prosecution.

The PW3 like other prosecution witnesses told this court that the cheques were issued out by a team and that the 1<sup>st</sup> accused was sharing office with other staff. He testified under cross-examination that he did not see the 1<sup>st</sup> accused person steal the cheque.

In the light of the above, I am of the considered view that there is nothing in the evidence of the prosecution witnesses to establish a case of theft against the 1<sup>st</sup> accused person.

The only place where the name of the 1<sup>st</sup> accused is mentioned in the whole proceedings is in the evidence of the DW2 (2<sup>nd</sup> accused person) who claimed that the cheque in question was

given to him by the 1<sup>st</sup> accused person. The 1<sup>st</sup> accused has denied this allegation in Exhibit F.

In the instant case I toll in the line of caution in favour of the 1<sup>st</sup> accused person for failure of the prosecution to corroborate the evidence of the 2<sup>nd</sup> accused person. In the case of *OLUSEGUN v THE STATE* (Supra), it was held that the statement of an accused person cannot be used against a co-accused person. See also *FGN v ADUKU & ORS* (2009) 9 NWLR (Pt 1146) 370 AT 399.

In conclusion, I am of the considered view that the prosecution has failed to prove the ingredient of theft as against the 1<sup>st</sup> accused person as required by law; accordingly the 1<sup>st</sup> accused person Musa Zakari is hereby discharged and acquitted.

**(SGD)**  
**JUSTICE SALISU GARBA**  
**(PRESIDING JUDGE)**  
**14/02/2014**

Prosecution's counsel – We thank the court for the well-considered judgment.

1<sup>st</sup> Accused Person's Counsel – We appreciate the industry of the court and the sense of justice. We are grateful.

2<sup>nd</sup> Accused Person's Counsel – We thank the court for the judgment and the industry put in.

3<sup>rd</sup> Accused Person's Counsel – We appreciate the court's judgment.



4<sup>th</sup> Accused Person's counsel – We are most grateful for the well-considered judgment of the court.

**(SGD)**  
**JUSTICE SALISU GARBA**  
**(PRESIDING JUDGE)**  
**14/02/2014**