IN THE COURT OF APPEAL
AKURE JUDICIAL DIVISION
HOLDEN AT AKURE

ON THURSDAY, THE 31ST DAY OF MAY, 2018

BEFORE THEIR LORDSHIPS:

UZO I. NDUKWE-ANYANWU	JUSTICE, COURT OF APPEAL
MOHAMMED A. DANJUMA	JUSTICE, COURT OF APPEAL
FESTUS OBANDE OGBUINYA	JUSTICE, COURT OF APPEAL

APPEAL NO. CA/AK/127CA/2016

BETWEEN:

ADEOYE ADEKUNLE :::::::::::::::::::::::::::: APPELLANT

VS.

THE STATE :::::::::::::::::::::::::::: RESPONDENT

J U D G M E N T

(DELIVERED BY OBANDE FESTUS OGBUINYA, JCA)

This appeal is an offshoot of the decision of the High Court of Osun State, holden at Ile-Ife (hereinafter called "the lower court"), *coram judice*: F. E. Awolalu, J., in suit No.HIF/14C/2007, delivered on 17th December, 2014. Before the lower court, the appellant and the respondent were the accused person and the complainant respectively.

The facts of the case, which metamorphosed into the appeal, are submissive to brevity and simplicity. The Staff Cooperative Investment and Credit Society Limited (the Society) of Obafemi Awolowo University Teaching Hospital Complex (OAUTHC), Ile-Ife had a current account with Skye Bank Plc. The signatures of the signatories to the account were forged in its cheques drawn in favour of certain beneficiaries unconnected with the Society. One Supo Adesakin was employed in the Society as its loan officer, cheque writer and book keeper. The appellant, a staff of the Ministry of Commerce and Industry, was seconded to the Society to oversee its activities. The forgery in the cheques led to the Society being defrauded of the sum of N5, 807, 660 (Five Million, Eight Hundred and Seven Thousand, Sixty Hundred and Sixty Naira) only.

Sequel to that the President of the Society reported the incident to the Area Commander, Nigeria Police, Moore, Ile-Ife which took no action. In consequence, the Society, through its legal solicitor, O. Ogbewe, Esq., wrote a petition which led to the transfer of the case to the office of the Commissioner of Police, Osogbo, Osun State, for action. A team from the latter, in the course of investigation, arrested the appellant, Supo Adesakin and the beneficiaries of those cheques. After investigation, the respondent applied to His Lordship, G. E. Oladoke, J., for consent to prefer information against the culprits under section 340 (2) (b) of the Creminal Procedure Law, Cap 35,

Laws of Osun State of Nigeria. His Lordship, duly, gave his consent as requested.

Following that, the respondent arraigned them in a 4-count information for these offences: conspiracy to commit felony contrary to section 8 of the Advance Fee Fraud and Other Fraud Related Offences Act, Cap A6 Laws of the Federation of Nigeria, 2004; forgery contrary to section 467 of the Criminal Code, Cap 34 vol. II, Laws of Osun State, 2003; obtaining property by false pretence contrary to section 1(2) and (3) of the Advance Fee Fraud and other Frauds Related Offences Act (supra) and stealing contrary to section 390 (9) of the Criminal Code (supra). On 13th January, 2011, the appellant and Adeoye Adekunle took their plea before His Lordship F. E. Awolalu, J., who took over the case, *de novo*, from G. E. Oladoke, J. upon his elevation to the President, Customary Court of Appeal, Osun State. The appellant pleaded not guilty to the four counts in the information.

Flowing from the plea of not guilty, the lower court went into a full-scale determination of the case. In proof of the case, the respondent fielded seven (7) witnesses, PW1-PW7, and tendered tons of documentary evidence. In disproof of the case, the defence called four (4) witnesses, DW1-DW4, and tendered two documents: exhibits R and S. At the closure of evidence, the parties, *qua* counsel, addressed the lower court. In a considered judgment, delivered on 17th December, 2014, found at pages 238-252 of the printed record,

the lower court found the appellant guilty, convicted and sentenced him to terms of imprisonment in counts 1 and 4 of the information.

The appellant was dissatisfied with the decision. Hence, on 15th March, 2016, after obtaining extension of time from this court, the appellant lodged a 15-ground notice of appeal, seen at pages 267-278 of the record, and prayed this court for:

(i) **An order** setting aside the judgment of the State High Court contained in the decision of His Lordship, Hon. Justice F. E. Awolalu J delivered on 17th December, 2014 convicting the Appellants for the offence of conspiracy contrary to Section 8 of Adance Fee Fraud Related Offences Act Cap. A6 LFN 2004 and stealing contrary to Section 390(9) of the Criminal Code Cap. 34 Vol. II Laws of Osun State and sentencing the Appellants to a seven years and two years imprisonment terms respectively without option of fine.

(ii) **AN ORDER** discharging and acquitting the Appellants for the offence of conspiracy and stealing as contained in counts 1 & 4 of the charge before the court.

(iii) Any other order that Court of Appeal may make in the interest of justice.

Thereafter, the parties filed and exchanges their briefs of argument in line with the rules governing the hearing of criminal appeals before this court. The appeal was heard on 21st March, 2018.

During its hearing, learned counsel for the appellant, Otunba O. Bolanle, Esq., adopted the appellant's brief of argument, filed on 21st September, 2016 and deemed properly filed on 21st March, 2013 and the appellant's reply brief, filed on 29th March, 2017, as representing his arguments for the appeal. He urged the court to allow it. Similarly, learned counsel for the respondent, Wole Adejumobi, Esq., adopted the respondent's brief of argument, filed on 20th March, 2017 and deemed properly filed on 21st March, 2017, as forming his reactions against the appeal. He urged the court to dismiss it.

The appellant, in his brief of argument, distilled five issues for determination to wit:

1. **Whether the learned trial Judge rightly assumed jurisdiction over this Charge when there was no evidence of proper compliance with the provisions of Section 340(1) and (2) of the Criminal Procedure Law of Osun State Cap. 25?**
2. **Whether the learned trial Judge (F. E. Awolalu J.) did not err in reply on the evidence of a witness in a proceedings that is not before him in finding the accused person guilty of**

counts 1 and 4 of the offences charged and whether the reliance did not occasion a miscarriage of justice when those witnesses were not called as direct witnesses in the instant criminal trial and allowed to be subjected to cross-examination before the trial court?

3. Whether the learned trial Judge properly convicted the accused person of the charge of stealing upon an incongruous, inconsistent and irreconcilable piece of evidence on record and particularly when the accused person had been discharged and acquitted of the offence of obtaining property by false pretence?
4. Whether the trial at the Court below did not violate the right to fair hearing of the Accused/Appellant when the case for the defence was prematurely closed?
5. Whether the imposition of a 7 years and 2 years jail term for the Accused/Appellant, a first offender was not excessive having regard to the facts and circumstances of this case and the overriding principle of sentencing generally?

Admirably, the respondent adopted the five issues crafted by the appellant.

Arguments on the issues:

Issue one.

Learned counsel submitted that the lower court had no jurisdiction to try the charge. He stated the ingredients of jurisdiction as noted in ***Madukolu v. Nkemdilim*** (1961) NSCC vol. II 374/(20060 2 L.C. 208; ***Umannah v. Attah*** (2006) 17 NWLR (Pt. 1009) 503; ***Usani v. Duke*** (2006) 17 NWLR (Pt. 1009) 610; ***Uzoho v. N.C.P.*** (2007) 10 NWLR (Pt. 1042) 320; ***Action Congress v. INEC*** (2007) 18 NWLR (Pt. 1065) 50. He noted that the respondent lacked the *locus* to prosecute the offences created by the National Assembly and that the charge was not initiated by due process of law. He observed that the respondent applied for consent of the Judge through a letter and not application, supported by affidavit, as required by section 340(1) of the Criminal Procedure Law. He stated the reason for application. He relied on ***Fred Egbe v. The State*** (sic - no citation); ***Atanda v. A. –G. Western Nigeria*** (1965) NMLR 225. He reasoned that the provision should be given its literal meaning. He cited ***Olaolu v. FRN*** (2016) 2 WRN 61. He claimed that the method provided in a statute must be followed. He referred to ***Nwankwo v. Yar' Adua*** vol. 8 EPR 31; ***Akintokun v. LPDC*** (2016) 7 WRN 29.

He posited, in the alternative, that the consent of the Judge raised doubts as it was wrongly given in two dates. He added that the consent was for only two offences forgery and stealing in counts 1 and 4, but did not include the offences in counts 2 and 3. He asserted that the Attorney-General of Ondo State had no *locus* to prosecute the offence in count 1 without delegation of authority from the Attorney-General of the Federation. He relied on ***Ayebe v. State*** (1986) 1 SC. (Reprint) 68; ***Akwule v. The Queen*** (1963) All NLR 193; sections 174 (1) and 211 (1) of the Constitution, as amended.

On behalf of the respondent, learned counsel argued, *per contra*, that the lower court rightly assumed jurisdiction under section 340 (1) and (2) of the Criminal Procedure Law. He stated that the requirement under the provision was complied with by the respondent's application. He referred to the record. He asserted that the consent issued was for the four counts in the information as against two as cancassed by the appellant. He admitted that the Advance Fee Fraud and Other Fraud Related Offences Act was passed by the National Assembly, but of general application to all the states of the Federation. He took the view that the two dates on the consent were mere irregularities which could not vitiate the proceedings.

Issues two and three.

Learned counsel for the appellant submitted that the lower court wrongly admitted and used exhibits A and B, evidence in previous proceedings, when the conditions in section 34 of the Evidence Act,

Cap. 62, Laws of the Federation of Nigeria (LFN) 1990 or section 46 of the Evidence Act, 2011 were not satified. He cited ***Ogunmakunde v. Akinsola*** (2002) FWLR (Pt. 105) 781; ***Eghobamien v. FMBN*** (2002) FWLR (Pt. 121) 1858; ***Afribank Nigeria Plc. v. Shanu*** (1997) 7 NWLR (Pt. 514) 601. He noted that the burden was on the respondent to satisfy the conjunctive conditions in the provision. He referred to ***Okonji v. Njokanma*** (1999) 14 NWLR (Pt. 638); ***Achibong v. Edak*** (2006) 7 NWLR (Pt. 980) 485. He took the view that it was counsel that stated that the witnesses could not be located when address of counsel was not evidence. He referred to ***Ibikunle v. The State*** (2007) 1 SC (Pt. 11) 53. He added that the evidence of the respondent's witnesses were incongruous with yawning gaps which created doubts that should have been resolved in favour of the appellant.

For the respondent, learned counsel contended that the conditions for admission of previous evidence under section 34(1) of the Evidence Act, 1990 were satisfied and those documents, exhibits A and B, were admitted without objection by the appellant.

Issue four.

Learned counsel for the appellant contended that the lower court did not give the appellant fair hearing as required by section 36 (6)(b) and (d) of the Constitution, as amended, when it refused his application for an adjournment to call a *subpoenaed* witness. He highlighted the adjournments granted to each party in the case. He

relied on ***Mpama v. FBN Plc*** (2013) 1-2 SC (Pt. 1) 1. He explained that the lower court should have weighed the age of the case with the appellant's right to call a witness. He cited ***Ogli Oko Memorial Farms Ltd. v. N.A. & C. B. Ltd.*** (2008) 4 SC 95; ***Ariori v. Elemo*** (1983) 1 SC 13. He conceded that grant of adjournment was at the discretion of the lower court, but must be exercised judicially and judiciously. He referred to ***Olumesan v. Ogundepo*** (1996) 2 SCNJ 172. He listed the instances when an appellate court could interfere with exercise of discretion as noted in ***Gbede v. Ramoni*** (2011) 11 WRN 126.

On the side of the respondent, learned counsel submitted that the appellant's right to fair hearing was not breached by his case being prematurely closed. He noted that the witness he intended to call refused to collect *subpoena* from the bailiff of the lower court.

Issue five.

Learned counsel for the appellant argued that sentencing was at the discretion of the court. He posited that an appellate court could reduce sentence. He relied on ***Clark v. State*** (1986) 4 NWLR (Pt. 35) 381. He narrated the reasons for this court to reduce the sentence against the appellant. He referred to ***Fagbemi v. The State*** (1978) 6 F.C.A.; ***Sunday Imoisili v. A. –G., Bendel State*** (1986) 2 CA (Pt. 1) 390; ***Ajayi v. The State*** (unreported) Suit No. FCA/B/145/82 delivered on 19th May, 1983; ***Engr. Kwale v. The State*** (2003) FWLR (Pt. 159) 1504; ***Osayomi v. The State*** (2006) All FWLR (Pt. 342) 1577. He urged the court to allow the appeal on ground of excessive sentence.

For the respondent, learned counsel postulated that the sentences were not excessive because they were the provisions of the statutes creating the offences. He described the appellant's argument as emotional and sentimental which had no place in as law.

Resolution of the issues.

In an abiding loyalty to the injunction of the law, I will settle issue one first. The reason is simple. It orbits within the four walls of jurisdiction. The law compels a court to treat first an issue of jurisdiction where it germinates in any proceeding. Jurisdiction is the authority of a court to determine any dispute tabled before it by contending parties, see ***Dariye v. FRN*** (2015) 10 NWLR (Pt. 1467) 325; ***Mba v. State*** (2014) 10 NWLR (Pt. 1415) 316. A court of law is invested with jurisdiction to hear a matter when: "1. it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; and 2. the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and 3. the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction", see ***Modukolu v. Nkemdilim***(2006) 2 LC 2081961) NSCC (vol. 2) 374 at 379,per Bairamian F. J.; ***Saraki v. FRN*** (2016) 3 NWLR (Pt. 1500) 531; ***Agbiti v. Nigeria Navy*** (2011) 4 NWLR (Pt. 1236) 175; ***Mba v. State*** (supra). The three ingredients must co-exist in order to infuse jurisdiction in a court. Where a court is

derobed of the jurisdiction to handle a matter, the proceedings, no matter the *quantum* of industry, artistry, dexterity or transparency invested in it, will be marooned in the vortex of nullity, see ***Agbiti v. Nigeria Navy*** (2011) 4 NWLR (Pt. 1236) 175; ***Usman v. State*** (2014) 12 NWLR (Pt. 1421) 207; ***Olowu v. Nigerian Navy*** (2011) 18 NWLR (Pt. 1279) 659; ***Ado v. State*** (2017) 15 NWLR (Pt. 0587) 65; ***Saraki v. FRN*** (supra); ***Dariye v. FRN*** (supra). I will pay due obeisance to this legal commandment in order not to insult the law.

Now, the appellant's chief grievance, indeed his trump card, under the issue one is that the Attorney-General of Osun State lacked the *locus standi* to institute the criminal proceedings against him in the lower court for a federal offence without the imprimatur of the Attorney-General of the Federation. Indisputably, by virtue of section 174 (1) (a) of the Constitution, as amended, the Attorney-General of the Federal is imbued/vested with the authority to institute, undertake and discontinue any criminal proceedings against any person before any court of law in Nigeria, save a court-martial, with respect to any offence created by or under any Act of the National Assembly, see ***FRN v. Osahon*** (2006) 5 NWLR (Pt. 973) 831; ***Ezekiel v. A. –G. Fed.*** (2017) 12 NWLR (Pt. 1578) 1. Again, it admits of no argument, that the Advance Fee Fraud and Other Fraud Related Offences, Act, Cap. A6, Laws of the Federation of Nigeria, LFN, 2004, is a legislative product of the bicameral Nigerian National Assembly pursuant to the powers allocated to it by section 4(1) of the Constitution, as amended.

Indubitably, the offence of conspiracy to commit felony, for which the appellant was convicted, traces its paternity to section 8 of the Act. The import of this is plain. It comes within the wide perimeter of a federal offence.

To start with, it is the Constitution, the *fons et origo* of all laws or statues, that allots jurisdiction to adjudicate a matter, civil or criminal, to a court of law, see ***Saraki v. FRN*** (supra). Here the provision of section 14 of the Act comes in handy. To this end, I will pluck out the provision, where it is ingrained in the Act, *ipsissima verba*, as follows:

> **14. Jurisdiction to try offences, etc.**
> **The Federal High Court or the High Court of the Federal Capital Territory and the High Court of the State shall have jurisdiction to try offences and impose penalties under this Act.**

Thus, the provision donates jurisdiction to the lower court to hear offences arising from the Act. It is a concurrent jurisdiction which it shares with the Federal High Court and the High Court of the Federal Capital Territory. In sum, the lower court is one of the *fora competens* for the prosecution of the appellant on the alleged crime of conspiracy to commit felony punishable under section 8 of the Act.

Besides, and more importantly, the case-law has since equipped the Attorney-General of a state with the authority to institute criminal proceedings over federal crimes. In ***Emelogu v. State*** (1988) 1 NSCC

869/(1988) 2 NWLR (Pt. 78) 524, the apex court held that the Attorney- General of Imo State possessed the *locus standi* to institute the federal offences of armed robbery created under the Robbery and Firearms (Special Provisions) Act. In ***Tanko v. State*** (2009) 4 NELR (Pt. 1131) 430 at 455, Aderemi, JSC, confirmed:

> **From the provisions quoted supra, the only conclusion which must be reached and which I now reach is that not only does a State High Court have the jurisdiction to try cases relating to armed robbery, the official of the Ministry of Justice of a state are eminently qualified to prosecute the offence of armed robbery in any High Court of a State. Let me also add that it will even be incongruous to the concept of federation, which we practice, to contend otherwise.**

See, also, ***Pius v State*** (2016) 9 NWLR (Pt. 1517) 241; ***Mohammed v. State*** (2015) 10 NWLR (Pt. 1468) 496; ***Dariye v. FRN*** (supra); ***Kekong v. State*** (2017) 18 NWLR (Pt. 1596) 108. To my mind, these magisterial pronouncements, engraved in these *ex cathedra* authorities, with due reverence, puncture as well as expose the poverty of the appellant's scintillating argument on this stubborn point. They render his standpoint lame. I, therefore, crown the Attorney-General of Osun State, the respondent, with the toga/crest of *locus*

standi to prosecute the appellant in the lower court without the blessing of the Attorney-General of the Federation.

Another grouse, erected by the appellant, is against the consent granted by the Judge of the lower court under the provision of section 340 (2)(b) of the Criminal Procedure Law, Cap. 38 Laws of Osun State, 2003. The provision requires the procurement of consent of a Judge as a forerunner to arraignment of an accused person with indictable offence. In the eyes of the law, consent denotes agreement or concurrence, see ***Ibrahim v. Ojomo*** (2004) 4 NWLR (Pt. 862) 89; ***Ohaeri v. Yussuf*** (2009) 6 NWLR (Pt. 1137) 207. It is at the discretion of a Judge to volunteer his consent to prefer a charge. However, the discretion must be exercised judicially and judiciously. To actualise that, the Judge uses the proof of evidence and charge/information, usually attached to the application for leave, as the barometer to gauge the presence or absence of *prima facie* case against an accused person. It is only when the facts disclose linkage of the commission of the alleged offence with an accused person that a Judge will grant the application, see ***Ikomi v. State*** (1986) 3 NWLR (Pt. 28) 340; ***Akwuobi v. State*** (2017) 2 NWLR (Pt. 1550) 421; ***Oko v. State*** (2017) 17 NWLR (Pt. 1593) 24; ***Ibrahim v. State*** (2018)1 NWLR (Pt. 1600) 279. Historically, *prima facie*, which has been disobedient to a single definition, traces paternity of its significance to the Indian case of ***Sher Singh v. Jitend-dranthen*** (supra) which was adopted by the Nigerian Supreme Court in ***Ajidagba v. IGP*** (1958)

SCNLR 60. It denotes the existence of ground(s) for proceeding in a matter. It is not coterminous with proof which comes at the twilight of a proceeding when a court will decide the fate of a culprit. A piece of evidence discloses a *prima facie* case when it is such that, if unrefuted and believed, it will be enough to prove the case against an accused person, see ***Abacha v. State*** (2002) 11 NWLR (Pt. 779) 437; ***Ubanatu v. State*** (2000) 1 SCNQ 89; ***Abogede v. State*** (1996) 4 SCNJ 223; ***Uzoagba v. C.O.P*** (2014) 5 NWLR (Pt. 140) 441; ***Okafor v. State*** (2016) 4 NWLR (Pt. 1502) 248; ***C.O.P. v. Amuta*** (2017) 4 NWLR (Pt. 1556) 376; ***Oko v. State*** (supra).

The appellant chastised the respondent's procedure for beseeching the lower court for its consent. The respondent's application is encased in page 4 of the record. At the risk of verbosity, but borne out necessity, I will extract its salient portions viz:

> **His Lordship,**
> **Hon. Justice G. E. Oladoke,**
> **High Court of Justice,**
> **Ile-Ife.**
>
> **APPLICATION FOR CONSENT UNDER SECTION 340(2) (B) OF THE CRIMINAL PROCEDURE LAW, CAP, 35, LAWS OF OSUN STATE OF NIGERIA**
>
> **THE STATE**
>
> **VERSUS**
>
> **SUPO ADESAKIN & 4 ORS.**

I am respectively making an application under section 340(2) (b) of the Criminal Procedure Laws Cap. 35, Laws of Osun State of Nigeria, 2003 to prefer an Information against the above named of which is attached herewith....

3. I attached herewith the proof of Evidence which represents the statement of witnesses the prosecution intends to call in support of the charge. The evidence shown by the proof is to the best of my knowledge, information and belief substantially a true case.

An application signifies "A request for an order....", see Bryan A. Garner *etal* (eds.) *Black's Law Dictionary*, 7th Edition (USA: West Group, St. Paul, MINN, (1999) page 96. Incontestably, the respondent's application is, totally, divorced from a formal motion which has been the prevalent mode of supplication for order of court. Nevertheless, the respondent's method furnished the lower court with all the materials it needed to exercise its discretion. As a matter of fact, the application, including the charge, proofs of evidence and extra-judicial statements of accused persons, colonises pages 4-32 of the record. It is a substantial compliance with the requirements of the provision of section 340 (1) and (2) of the Criminal Procedure Law (supra). In this wise, I am fortified by the rationale behind criminal procedure law. Its object is to aid in the smooth, fair and just

administration of justice. It is never aimed to defeat the ends of justice, see ***Eze v. FRN*** (2017) 15 NWLR (Pt. 1589) 433; ***Adamu v. State*** (2017) 16 NWLR (Pt. 1592) 353. To accede to the appellant's request, nullification of the consent, will demolish the *raison d' etre* for the promulgation of criminal procedure law. It will smell of judicial sacrilege to do that. This point, like the earlier one, cannot fly.

In a spirited bid to castrate the consent, granted by the lower court, the appellant invented other strictures against its content. For easy of reference and comprehension, the consent, which occupies page 33 of the record, reads:

CONSENT.

I, Honourable Justice Gloria Erhieyovwe Oladoke – Judge of the High Court of Justice, Ile-Ife Judicial Division Today 22nd day of October, 2007 hereby give my consent to prefer an Information or FORGERY AND STEALING AGAINST: SUPO ADESAKIN & 4 ORS. Give (sic) under my hand today 24th day of October, 2007.

JUDGE

Firstly, the appellant derided the consent for its restriction to forgery and stealing. I have given a clinical examination to the 4-count charge/information slammed against the appellant. It is located at pages 5-6 and 35-36 of the record. It does not harbour any ambiguity.

A holistic overview of the information, amply, reveals that the main offences levelled against the appellant were forgery and stealing. The count 1 deals with conspiracy to commit felony. The felonies are forgery, obtaining properly by false pretence and stealing as show cased in the particulars of the offence. The particulars elucidated the statement of offence. In my humble view, the lower court did not erode /infringe on the provision of section 340 of the Criminal Procedure Law on its confinement of the consent to forgery and stealing.

Secondly, the appellant criticised the consent for hosting two irreconcilable dates: 22nd and 24th October, 2007. It is trite, that non-dating of a notice of appeal taints it with incompetence, see ***Adamu v. State*** (2017) 10 NWLR (Pt. 1574) 463. But, wrong dating of a judgment is a curable irregularity, see ***Japhet v. State*** (2016) 6 NWLR (Pt. 1509) 602. The law recognises date of filing a process than date of signature, see ***Eke v. Ogbonda*** (2006) 18 NWLR (Pt. 1012) 506; ***Oyeyemi v. Owoeye*** (2017) 12 NWLR (Pt. 1580) 364. It is decipherable from the *corpus* of the consent, displayed above, that the *Judex* of the lower court gave its consent on 22nd October, 2007. However, he endorsed it, perhaps after it was drawn up by the registrar, on 24th October, 2007. In other words, the 22nd October, 2007 and 24th October, 2007 qualify as the granting and signing dates of the consent respectively. In ***APC v. INEC*** (2015) 8 NWLR (Pt. 1462) 531 at 567, I.T. Muhammad JSC, speaking for the Supreme Court, incisively and decisively, opined:

> Thirdly it stands to reason that where a document has been signed and in it is provided a specific date of commencement or date when effect is to be given to or action to be taken, that date must be taken to be the 'effective' or commencement date irrespective of the date when the officer signing the document on behalf of the authority appended his signature. That specific date of commencement can be with retrospective effect, it may commence immediately after or on the date of signing or it may even be in the future.

It is crystal clear, taking shelter under the sanctuary of this golden pronouncement, that the existence of two dates in a document does not necessarily offend the law. In essence, the presence of two different dates, which is explainable, does not, in the least, vitiate the potency of the consent.

My noble Lords, I must, for the sake of completeness place on record that all the attacks, on the mode of application and body of the consent, rained on it come within the wide four walls of irregularity. It is not on record, the bible of the appeal, that the appellant greeted those irregularities with objection in the lower court. The court and the parties are bound by the record. Neither of them can factor into a

record what is not there nor subtract from its content, see ***Udo v. State*** (2006) 15 NWLR (Pt. 1001) 179; ***Bassey v. State*** (2012) 12 NWLR (Pt. 1314) 209; ***Osung v. State*** (2012) 18 NWLR (Pt. 1332) 256; ***Mohammed v. State*** (2015) 13 NWLR (Pt. 1476) 276. Having not registered an opposition to those irregularities, the law, in its wisdom, forecloses his right to raise objection to them on appeal, see ***Baalo v. FRN*** (2016) 13 NWLR (Pt. 1530) 400; ***Oko v. State*** (supra). I considered them on the footing of *ex abundanti cautela*.

At any rate, the appellant's protestations against them are, to my mind, hedged on technicality as they border on forms. The court are now enjoined to administer substantial justice because the "spirit of justice does not reside in form and formalities, nor in technicalities", see ***Bello v. A. –G., Oyo State*** (1986) 5 NWLR (Pt. 45) 828 at 886, per Oputa, JSC; ***Adamu v. State*** (supra); ***Eze v. FRN*** (supra). The two terms are arch-enemies in adjudication as there is no confluence point between them. In their protracted battle on which to win and arrest the prime attention of the court, the case-law intervened. It slaughtered technicality and buried it, deeply, under the temple of substantial justice. This court, an apostle of substantial justice cannot resurrect technicality on the prompting of the appellant.

In the light of this expansive juridical survey, done in due consultation with the law, the lower court was not drained of the jurisdiction to hear the case. Put differently, it was, properly, clothed with *vires* to try it. On this score, all the strictures, which the appellant

poured against its assumption of jurisdiction over the case, peter into insignificance. It did not fracture the law to warrant the intervention of this court. In the end, I have no option than to resolve issue one against the appellant and in favour of the respondent.

Having dispensed with issue one, I proceed to attend to issue two. It falls within a narrow compass. It quarrels with the lower court's admission of the previous evidence of two witnesses, as exhibits A and B, in contravention of the provision of section 34(1) of the defunct Evidence Act, 2004. The provision, which is *in pari materia* with the provision of section 46 (a) of the Evidence Act, 2011, reads:

> **(1) Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is admissible for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding the truth of the facts which it states, when the witness cannot be called for any of the reasons specified in section 39, or is kept out of the way by the adverse party: Provided that-**
>
> **(a) the proceeding was between the same parties or their representatives in interest;**

(b) the adverse party in the proceeding had the right and opportunity to cross examine; and

(c) the questions in issue were substantially the same in the first as in the second proceeding.

(2) A criminal trial or inquiry shall be deemed to be proceeding between the prosecutor and the defendant within the meaning of this section.

For a party, who tenders evidence given by a witness in previous proceeding, to take a benefit under the canopy of the provision, all the conditions stated therein, both in its main and proviso, must be peremptorily complied with. Such a party must show that the witness is dead or unfounded or incapable of giving evidence or restrained by opponent or his presence will entail an unreasonable delay or expenses. It must be further proved that the parties in the proceeding were the same, the adverse party in the earlier proceeding had the right and opportunity to cross-examine the witness and the issues in both proceedings were the same. The Supreme Court has given its approbation to absolute compliance with the conditions in the provision in a flurry of judicial authorities. Thus, in ***Ikenyi v. Ofune*** (1985) 2 NWLR (Pt. 5) 1 at 7 and 8, Kawu, JSC, restated the position as follows:

> **Before the evidence given in a previous case can be received as substantive evidence of the truth of what it states, all the conditions laid down in the sub-section must be complied....**

See, also, ***Shanu v. Afribank (Nig.) Plc.*** (2002) 17 NWLR (Pt. 795) 185; ***Alade v. Aborishade*** (1960) 5 FSC (Vol. V) 167; ***Elegushi v. Oseni*** (2005) 14 NWLR (Pt. 945) 348; ***Sanyaolu v. Coker*** (1983) 14 NSCC 119/(1983)/SCNLR 168; ***Ayorinde v. Sogunro*** (2012) 11 NWLR (Pt. 1312) 460.

The previous evidence, which the appellant seeks to expel from the appeal, are exhibits A and B given before G. E. Olagoke, J. (now PCCA) by Adeniyi Omoniyi and Adebayo Olusanya, on 31st March, 2009 and 25th January, 2010 as PW1 and PW5 respectively. The parties are *consensus ad idem* on the point. At the stage of tendering the documents, the defence counsel, Mr. Amole, said: "I am not objecting to the tendering of the document." The appellant's non-oppositional stance, *qua* counsel, is fraught with far-reaching consequence on his case. It is settled adjectival law, that a party who fails to reap/harness his right of objection to admissibility of a document during trial will forfeit that right on appeal, see ***Alarape v. State*** (2001) 5 NWLR (Pt. 705) 79/(2001) FWLR (Pt. 41) 1872; ***Oseni v. State*** (2012) 5 NWLR (Pt. 1293) 351; ***Igri v. State*** (2012) 16 NWLR (Pt. 1327) 522; ***Dibia v. State*** (2017) 12 NWLR (Pt. 1579) 196;

Muhammad v. State (2017) 13 NWLR (Pt. 1583) 386; ***John v. State*** (2017) 16 NWLR (Pt. 1591) 304. The age long procedural law rule is elastic. In other words, it admits of an exception. The recognised rider, sanctioned by case-law, is where the law specifically declares the document inherently inadmissible, ***John v. State*** (supra); ***Natsaha v. State*** (2017) 18 NWLR (Pt. 1596) 38; ***Oseni v. State*** (2012) 5 NWLR (Pt. 1293) 351; ***Igri v. State*** (2012) 16 NWLR (Pt. 1327) 522.

As already noted, the two documents are admissible subject to the satisfaction of the conditions enshrined in section 46(1) (a)-(c) of the Evidence Act, 2011. This feature, fulfillment of conditions for their admission, takes them out of the purview/ambit of the exception x-rayed above. The net effect is obvious. The appellant's failure, in his infinite wisdom, to register any opposition to the admission of the documents drains/divests him of the right to object to their admissibility before this court. This constitute a serious *coup de grace* in the appellant's view point on the issue. I, therefore, decline the appellant's enticing invitation to ostracise the documents from the appeal on account of inadmissibility. Contrariwise, in total allegiance to the law, I endorse, *in toto*, the lower court's usage of them as I welcome them to the appeal. As a result, I will not hesitate to resolve issue two against the appellant and in favour of the respondent.

That brings me to the treatment of issue three. It queries the lower court's conviction of the appellant based on incongruous, inconsistent and irreconcilable evidence on record. Put simply, the

appellant's grouse is that the respondent's evidence were infested with contradictions which the lower court ought not to have acted upon.

Etymologically, contradiction, like most legal terminologies, derives its lexical roots from the Latin word, "*contradictum*", an amalgam of *"contra"* and *"dictum"*, which denotes "to say the opposite". Two pieces of evidence of a witness or witnesses are contradictory when they are diametrically opposed and one affirms the opposite of the other. Indisputably, the law frowns upon witness contradicting themselves by giving divergent views on a point. However, for contradiction to be fatal to any case, it must be so material to the extent that it casts serious doubts on the entire case presented by a party against whom it is raised. Put the other way round, collateral contradiction will not constitute dents on a party's case, see ***Ebeinwe v. State*** (supra); ***Attah v. State*** (supra); ***Olayinka v. State*** (2007) 9 NWLR (Pt.1040) 561; ***Akpa v. State*** (2008) 14 NWLR (Pt. 1106) 72; ***Eke v. State*** (2011) 3 NWLR (Pt. 1235) 589; ***Babarinde v. State*** (2011) 3 NWLR (Pt. 1235) 568; ***Olatinwo v. State*** (2013) 8 NWLR (Pt. 1355) 126; ***Mohammed v. State*** (2014) 12 NWLR (pt. 1421) 387; ***Emeka v. State*** (2014) 13 NWLR (Pt. 1425) 614; ***Okanlawon v. State*** (2015) 17 NWLR (Pt. 1489) 445; ***Mohammed v. State*** (2014) 12 NWLR (Pt. 1421) 3871.

In the first place, the appellant was very stingy in his argument on the issue. Hence, he, for reasons personal to him, starved this

court on the areas of contradictions in the testimonies of the respondent's witnesses. It is not part of the bounden duty of this court to do a surgical operation on the evidence of the respondent's witnesses to sift/sieve out the inconsistent ones. That will be an affront to the adversarial system of criminal adjudication. Nonetheless, I perused the entire record, the touchstone of the appeal, especially at the residence of the respondent's parol evidence wrapped between pages 79-126 of the record. I have situated them with the harmful incidents of contradiction showcased above. The reason for the comparison is not far-fetched. It is to ascertain if the evidence are trapped in the intractable vortex of contradiction. Incidentally, I am unable to fish out, even with the eagle eye of a court, where the evidence of the respondent's witnesses are in conflict with the essential ingredients of the offences the appellant was convicted of. On this premise, I dishonour the appellant's weak invitation to emasculate the lower court's decision on the footing of contradiction.

To top it all, the appellant made extra-judicial statements which were admitted as exhibits H and H1. Curiously, he confessed to the commission of the offences in the exhibits. The provision of section 28 of the Evidence Act, 2011 states:

> **A confession is an admission made at anytime by a person charged with a crime stating or suggesting he inference that the committed that crime.**

Once a confession is relevant, it is admissible against an accused who made it save it is excluded in the manner decreed by the provision of the section 29(2) of the Evidence Act, 2011. Unarguably, it is within the perimeter of the law for a court to base conviction on free, cogent and positive confession, see ***Sule v. State*** (2009) 17 NWLR (Pt. 1169) 33; ***Omogu v. FRN*** (2008) 9 NWLR (Pt. 1055) 381; ***Shalla v. State*** (2007) 18 NWLR (Pt. 1168) 240; ***Dibia v. State*** (2017) 12 NWLR (Pt. 1579) 196; ***Egharevba v. State*** (2016) 8 NWLR (Pt. 1515) 433; ***Oko v. State*** (2016) 10 NWLR (Pt. 1521) 455; ***Lawal v. State*** (2016) 14 NWLR (Pt. 1531) 67; ***Akinrinlola v. State*** (2016) 16 NWLR (Pt. 1537) 73; ***Awuobi v. State*** (2017) 2 NWLR (Pt. 1550) 421; ***Kolo v. COP*** (2017) 9 NWLR (Pt. 1569) 118; ***FRN v. Barminas*** (2017) 15 NWLR (Pt. 1588) 177; ***Muhammad v. State*** (supra); ***John v. State*** (2017) 16 NWLR (Pt. 1591) 304; ***Agagua v. State*** (2017) 10 NWLR (Pt. 1573) 254.

When those pre-trial statements were admitted as exhibits H and H1, even though the appellant was their owner, they deserted the defence and metamorphosed into the respondent's case, see ***Egboghonome v. State*** (1993) 7 NWLR (Pt. 306) 385; ***Musa v. State*** (2013) 9 NWLR (Pt. 1359) 214. It flows, that their contents became part and parcel of the respondent's case. When those extra-judicial statements were tendered for admission in evidence, the appellant did not greet them with any opposition to their admissibility. The implication is plain. They were voluntarily made. In those exhibits, the

appellant made an undiluted admission of commission of the alleged offences.

Indeed, the kingly position of confession in criminal jurisprudence cannot be overemphasised. In our adjectival law, confession has been classified as the best and strongest evidence, stronger than that of an eye witness, see ***Smart v. State*** (supra); ***Asuquo v. State*** (supra); ***Okashetu v. State*** (supra); ***Dibia v. State*** (2017) 12 NWLR (Pt. 1579) 196; ***FRN v. Barminas*** (2017) 15 NWLR (Pt. 1588) 177; ***Akpan v. State*** (2008) 14 NWLR (Pt. 1106) 72. By a confession, an accused surrenders himself to the law and becomes his own accuser, see ***Adeleke v. State*** (2013) 16 NWLR (Pt. 1381) 556. The appellant's confessional statements, exhibits H and H1, drown his right to presumption of innocence, which is enshrined in section 36(5) of the 1999 Constitution, as amended, as well as make him the undoubted owner of the requisite *mens rea* and *actus reus* in relation to offence preferred against him. All in all, I have no choice than to resolve issue three against the appellant and in favour of the respondent.

I proceed to handle issue four. The kernel of the issue is clear. It accuses the lower court of denial of fair hearing to the appellant by its premature closure of his case. Fair hearing connotes a trial which is conducted in accordance with all the legal rules formulated to ensure that justice is done out to parties to the cause, see ***Eze c. FRN*** (2017) 15 NWLR (Pt. 1589) 433. Due to its Olympian status in the issue, it is

germane to display some of the notable features of fair hearing-a mantra which, nowadays, competes with jurisdiction for prominence in adjudications.

The ancient doctrine of fair hearing its descent to divinity. In ***R. V. Chancellor of Cambridge*** (1723) 1 Str. 557 at 567, Fortescue, J., opined: "The laws of God and man both gave the opportunity to make his defence if he has any". Its divine genesis was re-echoed in ***Oyeyemi v. Commissioner for L. G. Kwara State*** (1992) 2 NWLR (Pt. 226) 661. Its evolution has its base in common law predicated on the two twin concrete pillars of natural justice: *audi alteram partem*, hear the other side, and *nemo judex* in *causa sua* – no one should be a judge in his own cause. It has metamorphosed into our jurisprudence and, firmly, rooted in section 36 of the Constitution, as amended. Fair hearing, which is coterminous with fair trial, entails giving parties to a case equal opportunity to present their cases. It flows that fair hearing is, totally, divorced from correctness of a decision. It is one of the foremost fundamental rights. Its litmus test is that a fair-minded person who watched a proceeding should conclude that the court was fair in dishing out justice to the parties. Where a person's right to fair hearing is curtailed, no matter the *quantum* of dexterity, artistry, transparency or objectivity invested in such a proceeding, it will be caught in the web of nullity. For these attributes of fair hearing, see ***Kim v. State*** (1992) 4 NWLR (Pt. 233) 17; ***Effiom v. State*** (1995) 1 NWLR (Pt. 373) 507; ***Ogugu v. State*** (1994) 9

NWLR (Pt. 366) 1; ***Uguru v. State*** (2002) 9 NWLR (Pt. 771) 90; ***FRN v. Akubueze*** (2010) 17 NWLR (Pt. 1223) 830; ***Ogunsanya v. State*** (2011) 12 NWLR (Pt. 1261) 401; ***Agbiti v. Nigerian Navy*** (2011) 4 NWLR (Pt. 1236) 175; ***Nigeria Navy v. Labanjo*** (2012) 17 NWLR (Pt. 1328) 56; ***Audu v. FRN*** (2013) 5 NWLR (Pt. 1348) 397; ***Adisa v. State*** (2015) 4 NWLR (Pt. 1450) 475.

The apex court, in ***Baba v. Civil Aviation*** (1991) 7 SCNJ (Pt. 1) 1 at 24/(1991) 5 NWLR (Pt. 192) 388 at 423, per Nnaemeka-Agu, JSC, evolved the parameters to guide the court to ensure fair hearing to include the right of the person to be affected:

> **(i) to be present all through the proceedings and hear all the evidence against him;**
>
> **(ii) to cross-examine or otherwise confront or contradict all the witnesses that testify against him;**
>
> **(iii) to have read before him all the documents tendered in evidence at the hearing;**
>
> **(iv) to have disclosed to him the nature of all relevant material evidence, including documentary and real evidence, prejudicial to the party, save in recognised exceptions;**
>
> **(v) to know the case he has to meet at the hearing and have adequate opportunity to prepare for his defence; and**

(vi) to give evidence by himself, call witnesses if he likes, and make oral submissions either personally or through a counsel of his choice.

See, also, ***JSC, Cross River Statev. Young*** (2013) 11 NWLR (Pt. 1364) 1; ***Eze v. FRN*** (supra).

Now, the meat of the appellant's grouch can be pigeonholed in the provision of section 36 (6) (b) and (d) of the Constitution, as amended, which states:

(6) Every person who is charged with a criminal offence shall be entitle to-

(b) to be given adequate time and facilities for the preparation of his defence;

(d) to examine in person or by his legal practitioner the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out examination of witnesses to testify on his behalf before the court or the same conditions as those applying to the witnesses called by the prosecution;

The heart of the appellant's complaint is that the lower court did not allow him call his witness. For a dispassionate consideration, it is imperative to scoup out, in a précis and paraphrased form, what

transpired in court after the evidence of DW4. The happenings monopolise pages 188-191 of the record. On 12th February, 2014, after the testimony of DW4, appellant's counsel informed the lower court that they had a witness to call through *subpoena*. The lower court granted the adjournment on the ground that it was to be the last and if they failed they could be called on to close their case. On the next resumed date, 12th March, 2014, the appellant's counsel notified the court that they "were informed that the witness turned down the subpoena" and prayed for a further adjournment. The respondent's counsel vehemently objected to the application. The lower court sustained the objection, refused the adjournment and ruled that the appellant's counsel "Mr. Amole is to close its case accordingly ". The appellant's counsel closed the case of the defence.

It is discernible from the events/proceedings, chronicled above, that the lower court accorded the appellant the right to call his last witness. It was, from the *ipse dixit* of the appellant's counsel, the witness they intended to field that refused to attend court by turning down the *subpoena*. The bounden duty of a court *vis-à-vis* fair hearing is to provide the clement environment for parties to ventilate their grievances. Once a court offers that even playing ground or opportunity to parties to present their cases, it cannot be rightly accused of denial of fair hearing to a party. Infact, in such a situation, the party, who has failed to avail himself/itself of the opportunity, is, in the eyes of the law, taken as having waived his right to fair hearing,

see ***Odunlami v. N. A.*** (2013) 12 NWLR (Pt. 1367) 20; ***Eze v. FRN*** (supra); ***Nweke v. State*** (2017) NWLR (Pt. 1587), ***Ado v. State*** (supra). The appellant's case, to my mind, is a classic exemplification of waiver of fair hearing. The lower court, having furnished the congenial atmosphere for him to call his witness, cannot compel the appellant to take advantage of the opportunity, see ***NewWatch Comm. Ltd. v. Atta*** (2006) 12 NWLR (Pt. 993) 144; In ***Adebayo v. A.-G., Ogun State*** (2008) 7 NWLR (Pt. 1085) 201 at 221 and 222 the apex court, per Tobi, JSC, admonished:

> **...The fair hearing provision in the constitution is the machinery or locomotive of justice; not a spare part to propel or invigorate the case of the user. It is not a casual principle of law available to a party to be picked up at will in case and force the court to apply it to his advantage. On the contrary, it is a formidable and fundamental constitutional provision available to a party who is really denied fair hearing because he was not heard or that he was not properly heard in the case.**

In effect, the appellant's inviolable/inalienable right to fair hearing was not eroded/curtailed by the lower court. Fair hearing, therefore, is not available to the appellant and he cannot harness from the sanctuary of

the beneficent provision of section 36(6) (b) and (d) of the Constitution, as amended.

That is not all. There exists another dent on the appellant's stand. While applying for the last adjournment, on 12th March, 2014, the appellant's counsel recognised, at page 190 of the record, that: "The record of the court bounds (sic) parties especially with the age of the case". The lower court, in declining the application for adjournment, at the foot of page 190, noted: "This is a 2007 criminal matter in which there is expectation.... that it be disposed off expeditiously." In the aggregate, both the parties and the lower court were, rightly, worried over the protracted age of the case in the latter's docket, and the necessity to conclude it timeously. Their anxiety finds, deep, anchorage in the sacrosanct provision of section 36 (4) of the Constitution, as amended, that: "Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to fair hearing in public within a reasonable time by a court or tribunal." The provision is a benevolent one to the accused person such as the appellant. Its import is simple: that any charge against an accused person shall be concluded within a reasonable, see ***Mohammed v. State*** (2015) 13 NWLR (Pt. 1476) 276; ***Dariye v. FRN*** (supra); ***Eze v. FRN*** (supra); In ***Ariori v. Elemo*** (1983) 1 SC 13 at 24/(1981)/ SCNLR 1 at 24, Obaseki JSC, incisively, intoned:

> **Reasonable time, must mean the period of time which, in the search for justice does not**

> **wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done.**

The lower court's desire to fast track the determination of the case was in total fidelity to the above provision and in favour of the appellant. Admirably, the citizens, local and international, frown on delay in cases; *a fortiori* the one like the instant case that, borders on corruption. In ***Allen v. Sir Alfred Mcalpine & Sons Ltd.*** (1968) 2 Q.B. 229 at 245, the global judicial icon, Lord Denning, intoned.

> **All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time. Dickens tells how it exhausts finance, patience, courage, hope.**

See, also, ***Usikaro v. Itskiri*** (1991) 25 SCNJ 75 at 94. The provision of subsections (4) and 6(b) and (d) of section 36 of the Constitution, as amended, which are, deeply, rooted in fair hearing are at par and run pari passau in administration of criminal justice. This is more so when the parity of constitutional provisions, in equal strength and constitutionality, has been confirmed by the Supreme Court in ***Skye Bank Plc. v. Iwu*** (2017) 16 NWLR (Pt. 1590) 24; ***INEC v. Musa*** (2003) 3 NWLR (Pt. 806) 72. The lower court's payment of tacit

obeisance to the sacred provision of section 36(4) of the Constitution, as amended, perforates/deflates the appellant's allegation of denial of fair hearing. Given the foregoing, the lower court's refusal to grant another adjournment was not, in the least, an injudicious act, or hostile to the law for this court to tinker with it. In consequence, I resolve issue four against the appellant and in favour of the respondent.

Lastly, I will thrash out issue five. It falls within a very slim scope. It decries the lower court's sentence passed on the appellant, on the two offences for which he was convicted, as excessive. For a balanced determination, it is germane to extract the punishment provisions for the offences. Count 1 was conspiracy to commit felony under section 8 of the Act. The provision fixes the punishment for the conspiracy with that of the main offence. It follows, that the relevant provision is section 1 (3) of the Act. It reads:

> **(3) Any person who commits an offence under section (1) or (2) of this section is liable to conviction to imprisonment for a term of not more than 20 years and not less than 7 years without the option of fine.**

As regards count 4, the provision of section 390 (9) of the Criminal Code, Cap. 34 Laws of Osun State is of note. It says:

(9) If the thing stolen is of the value of one thousand naira or upwards, the offender is liable to imprisonment for seven years.

These provisions are comprehension-friendly. In this regard, the law commands the court to give them their ordinary grammatical meanings without any interpolations, see ***Amoshima v. State*** (2011) 14 NWLR (Pt. 1268) 530. The crimes in question are not capital offences that attract the highest magnitude of punishment of death. Unarguably, based on the punishments, years of imprisonment reserved for them in the provisions, both are felonies. In ***Tanko v. State*** (2009) 1 – 2 (SC (Pt. 1) 198/(2009) 4 NWLR (Pt. 1131) 430 at 457, Aderemi, JSC, confirmed:

> **Where the sentence prescribed upon conviction in a criminal charge is a term of years of imprisonment, then some extenuating factors such as the age of the convict, whether is a first offender etc, can be taken into consideration by the trial judge in passing the sentence on the convict. Indeed, the trial judge, in my humble view, has the discretion to employ these factors to reduce the years of sentence.**

See, also, ***Amoshima v. State*** **(supra)**; ***State v. John*** (2013) 12 NWLR (Pt. 1368) 337. It stems from the above, that sentencing, where

the offence is not a capital one, is at the discretion of the court. It has to exercise the discretion judicially and judiciously, see ***Ezekiel v. A. – G. Fed.*** (2017) 12 NWLR (Pt. 1578) 1. To act judicially denotes ". . . discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances". See ***Babatunde v. P.A.S. & T.A. Ltd.*** (2007) 13 NWLR (Pt. 1050) 113, at 149 and 150, Per Muhammad, JSC. On the other hand, "Acting judiciously . . . is said to import the consideration of the interest of both sides and weighing them in order to arrive at a just or fair decision", see ***Babatunde v. P.A.S. & T.A. Ltd*** (supra), at 164, Per Ogbuagu, JSC.

In the twilight of the lower court's judgment, at page 252 of the record, it ordered:

> **1st and 2nd Accused persons Supo Adesakin [the appellant] and Adeoye Adekunle are hereby sentenced to 7 years imprisonment on court (sic) 1 without option of fine and 2 years imprisonment on court (sic) 4 both to run concurrently.**

I have married the sentences passed against the appellant with the positions of the law x-rayed above. The essence of the comparison is not a second guess. It is to discover if the former

debased the latter. The punishment allotted for the offence in count 1 fluctuates between 7 years and 20 years imprisonment without an option of fine. The lower court sentenced the appellant to 7 years imprisonment which is the minimum penalty conserved for the offence. For count 4, stealing, the lower court sentenced the appellant to 2 years imprisonment out of the 7 years decreed by the provision of section 390(9) of the Criminal Code. It cannot be gainsaid, that 2 years is at the very base of the pyramid of 7 years ordained by the provision. Perhaps, it was persuaded by the *allocutus* availed it by the appellant, *qua* counsel. It flows, that the lower court did not go outside the prescription of the statutory provisions on the punishments even as it considered the appellant's interest by giving him the least terms of imprisonment. Put simply, the lower court, eminently, exercised its discretion on the sentences judicially and judiciously. I am, therefore, not armed with any legal justification to tamper with the manner the lower court exercised its discretion which is personal to it and not amenable to *stare decisis*, see ***Ezekiel v. A. –G., Fed***. (supra). I dare say, the lower court paid due obeisance to the law in the imposition of the sentences on the appellant. In the result, I resolve issue five against the appellant and in favour of the respondent.

On the whole, having resolved the five issues against the appellant, the destiny of the appeal is not in doubt. It has no bubble of merit and deserves the penalty of dismissal. Consequently, I dismiss

the appeal. Accordingly, I affirm the decision of the lower court delivered on 17th December, 2014.

OBANDE FESTUS OGBUINYA
JUSTICE, COURT OF APPEAL

COUNSEL:

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