IN THE COURT OF APPEAL OF NIGERIA
IN THE ASABA JUDICIAL DIVISION
HOLDEN AT ASABA

ON THE 16TH DAY OF DECEMBER, 2021

BEFORE THEIR LORDSHIPS;

1. HON. JUSTICE JOSEPH EYO EKANEM- JUSTICE, COURT OF APPEAL
2. HON. JUSTICE A. O. OBASEKI-ADEJUMO- JUSTICE, COURT OF APPEAL
3. HON. JUSTICE MUSLIM SULE HASSAN- JUSTICE, COURT OF APPEAL

CHARGE NO: FHC/WR/36C/2010
APPEAL NO: CA/AS/49C/2019

BETWEEN

PRINCE GOD'STIME OKOJIE - - APPELLANT

AND

FEDERAL REPUBLIC OF NIGERIA - - RESPONDENT

JUDGMENT:

(DELIVERED BY MUSLIM SULE HASSAN, JCA)

This is an Appeal against the Judgment of the Federal High Court, Warri Judicial Division, delivered by His Lordship, Hon. Justice E. A. Obile on the 26th day of September, 2018 in charge No: FHC/WR/36C/2015.

The trial court convicted the Appellant on a 2 Count Charge of conspiracy to vandalize petroleum pipeline under **Section 1(2)(a)(b) of Petroleum Production and Distribution (Anti Sabotage) Act CAP M17 Vol. 13 Laws of the Federation of Nigeria, 2004** and the offence of breaking and damaging Nigeria Petroleum Development Company (NPDC) pipeline for transportation of crude oil products without lawful authority or appropriate license punishable under **Section 7(a)(b) of the Miscellaneous Offences Act CAP Laws of the Federation Nigeria, 2004.**

CTC Fees — ₦1,000.00
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SHERIFAT ADEBAYO ESQ.
PRINCIPAL REGISTRAR 1
DATE: 16/02/2023

In the said Judgment, the Learned Trial Judge convicted the Appellant on both counts of the Charge and sentenced him to 7 years imprisonment.

The two (2) Count Charge preferred against the Appellant at the Trial Court are stated as follows:

Count I

"That you Prince Godstime Okojie (m) and others now at large, on the 2nd day of August, 2015 at Emu-Unor Community, in the Warri Judicial Division, did conspire with others now at large to commit felony to with: Vandalization of Petroleum Pipeline and thereby committed an offence punishable under Section 1(2)(a)(b) of Petroleum Production and Distribution (Anti Sabotage) Act Cap M17, Vol.13 Laws of the Federation of Nigeria, 2004.

Count II

9JUThat you Prince Godstime Okojie (m) and others now at large, on the 2nd day of August, 2015 at Emu-Unor Community in the Warri Judicial Division, did break, damage, Nigeria Petroleum Development Company (NPDC) pipeline for transportation of crude oil product without lawful authority or an appropriate license, and thereby committed an offence punishable under. Section 7(a)(b) of the Miscellaneous Offences Act, Cap M17, Laws of the Federation of Nigeria 2004."

The trial of the Appellant commenced on 16th February, 2016 when the Appellant took his plea and pleaded not guilty to the 2 Count Charge that were duly read in English language and same interpreted in Pidgin English to him.

The Respondent as Prosecution, opened its case on 15th March, 2016 by calling Sgt. Abdul Moshood as PW 1, a Police Officer attached to the Nigeria

Police Force, Zone 5 Headquarters, Benin City. PW 1 testified and was cross examined on same 15th March, 2016. The Respondent in further proof of its case, thereafter on 28th June, 2016 called one Staff Sgt. Hassan Egya (a Soldier man) as PW 2. PW 2 gave evidence and was also cross examined same day.

The Appellant for his Defence, gave evidence as DW 1 on 17th January, 2017 and called no other witness to testify in his favour. The Appellant was also fully cross examined same day.

During the trial, the following were the Exhibits that were admitted viz:

Exhibit 1 - Appellant's Statement at the Nigeria Police Zone 5, Benin City.

Exhibit 2- Pictures of the Appellant's truck - (before and after it was burnt).

Exhibit 3 - Statement of PW 2, Staff Sgt. Hassan Egya.

At the conclusion of the trial, the Learned Trial Judge evaluated the evidence that was before him and convicted the Appellant on the 2 Count Charge on which he was charged.

The Appellant being dissatisfied with the said Judgment has brought this Appeal by a Notice of Appeal dated 13th day of November, 2018.

The following issues were formulated for determination in this case on behalf of the Appellant:

1. **Whether the Learned Trial Judge was right when he convicted the Appellant for the offence of conspiracy to vandalize petroleum pipeline punishable under Section 1(2)(a)(b) of the Petroleum production and distribution (Anti-Sabotage) Act Cap M17 Vol. 13 Laws of the Federation of Nigeria 2004. (Grounds 1&2).**

2. **Whether the Learned Trial Judge was right when he held that the prosecution had proved the charges against the Appellant beyond reasonable doubt and thereby convicted him. (Grounds 3, 4, 5 & 6).**

On issue 1, Appellant's Counsel submitted that the Court below was wrong when it convicted the Appellant for the offence of conspiracy to vandalize petroleum pipeline punishable under **Section 1(2)(a)(b)of the Petroleum Production and Distribution (Anti-Sabotage) Act Cap M17 Vol. 13 Laws of the Federation of Nigeria, 2004.**

Firstly, Counsel submitted that the 1st Count as laid before the trial Court was incurably bad for ambiguity. Counsel stated that **Section 1 (2)(a)(b)** of the Petroleum Production and Distribution (Anti Sabotage) Act provides for alternative ways by which the offence contemplated under the Section may be committed.

Furthermore, Counsel stated that **Section 1(2)(a)(b) of the Act** only provides for alternative ways by which another person may be made to do any of the acts specified in **Section 1(1)(a)(b)(c) of the Act** for the purpose of causing or contributing to any interruption in the production or distribution of Petroleum Produce in any part of Nigeria. Counsel relied on **Section 203(1) of the Administration of Criminal Justice Act (ACJA).**

Counsel submitted that Count 1, as laid before the trial Court, failed to specify the nature and particulars of the manner by which the offence under the section was committed by the Appellant.

According to Counsel, while Section 1(1)(2) of the Act created the offence which may be committed in several ways, Section 2 of the Act created the punishment for the offence created under Section 1.

It is his submission that a cursory look at Count 1 of the Charge as laid before the trial Court shows clearly that the punishment section of the Law was not stated in the Charge.

He therefore submitted that Count 1 under which the Appellant was convicted by the trial Court for conspiracy was not only ambiguous, but incurably bad for ambiguity and totally misleading to the Appellant. On this, Counsel relied on the case of **TIMOTHY V. FEDERAL REPUBLIC OF NIGERIA (2008) ALL FWLR (PT 402) 11361152-1153, (paras H -A).**

It is Counsel's further submission that the said Count 1 was so ambiguous and imprecise that it was difficult to locate the precise offence for which the Appellant was charged. On this, Counsel urged the Court, therefore, to hold that the Accused was misled as to the precise nature of the Charge brought against him in Count 1. Counsel relied on the Supreme Court case of **UMORERA V. C.O.P.(1977) 11 NSCC 395 @ 401 (lines 40 - 45).**

Counsel again urged the Court to hold that the trial Court was wrong when it convicted the Appellant on the said Count 1 which, according to him, was improperly and ambiguously laid.

It was Counsel's contention that assuming without conceding that Count 1 was properly laid, he submits in the alternative that the Learned Trial Judge erred in Law when he convicted the Appellant for the offence of conspiracy purportedly under Section 1(2)(a)(b) of the Act under reference.

Counsel further submitted that there was no evidence before the trial Court tending to prove any of the ingredients of the offence created by Section 1(2)(a)(b) of the Act under which the Charge was brought.

In further submission, Counsel stated that it is settled Law that the ingredients of a Charge must be proved. Reliance was placed inter alia on the case of **DABOH V. THE STATE (1977) 11 NSCC 309 at 319.**

He stated that the commission of the offence created by **Section 1(1)** of the Act is only established when it is proved that an Accused Person commits any of the acts listed in **paragraphs a - c of Sub Section 1 of the Act** and such act of the Accused *"to any significant extent, causes or contributes to any interruption in the production or distribution of petroleum products in any part of Nigeria"*.

Counsel argued that there was no scintilla of evidence before the trial Court that the Appellant aided or incited, counseled or procured any person to do any of the acts criminalized under Section 1(1)(a)(c) of the Act.

He further argued that there was also no factual or circumstantial evidence that the action of another person allegedly aided, incited, counseled or procured by the Appellant had, to any significant extent caused or contributed to any interruption in the production or distribution of petroleum products in any part of Nigeria.

Counsel referred the Court to the evidence of PW2, Sergeant Hassan Egya at pages 56-62 of the Record.

According to Counsel, Sergeant Hassan Egya (PW2) was the soldier who claimed to have seen the tanker belonging to the Appellant in the Ogini oil field. This witness claimed that the said tanker drove into Ogini oil field and drove out of same and later parked at a community called Emu Unor.

Counsel submitted that there was no evidence before the Court that the said tanker had crude oil or petroleum products in it to warrant any reasonable inference that the tanker had gone into Ogini oil field to siphon crude oil or petroleum products.

Counsel referred the Court to his earlier submission that the offence of sabotage under Section 1(1) of the Act could only be committed if the act of an Accused causes or contributes, to any significant extent, to the interruption in the production or distribution of petroleum products in any part of Nigeria. Reliance was placed on Section 4 of the act on definition of Petroleum product.

It is his submission that the Respondent could not have succeeded against the Appellant in the said Count 1 when there was no evidence before the trial Court that the Appellant in conjunction with others disrupted the distribution or production of any of the finished petroleum products listed in the definition in Section 4 of the Act in any part of Nigeria.

Counsel stated that even if the statement of PW2(which he called "highly doubtful") that they saw oil spilled on the ground at Ogini Oil field" was true, Counsel submitted that such bare statement still does not amount to proof of interruption of production or distribution of petroleum products.

It was Counsel's further submission that there was absolutely no evidence before Court of what the nature of the oil stored in the said Ogini Oil field was, and therefore there was no evidence as to whether the said Ogini Oil field is crude oil exploitation site or petroleum products storage site.

Learned Counsel finally submitted on this issue that though the Learned trial Judge wrongly treated the Charge of conspiracy against the Appellant as if same were brought under the general provision for the offence of conspiracy under **Section 516 of the Criminal Code Act**, that he submits nevertheless that there was no evidence of an agreement between the Appellant and any other

person to commit the offence created by Section 1(2)(a)(b) of the Petroleum Production and Distribution (Anti-Sabotage Act. Counsel referred the Court to **HARB V. FRN (2008) All FWLR (Pt 430) 705 @ 724-725 (paras H-A).**

Counsel submitted that in this case, not only is there no evidence of conspiracy, there was indeed no evidence of the inchoate or rudimentary nature of the offence and the meeting of the minds of persons with a common intention and purpose to commit any particular offence.

In the circumstances, this Honourable Court was urged to resolve this issue in favour of the Appellant, to set aside the conviction of the Appellant by the trial Court on Count 1 of the Charge and acquit him accordingly thereof.

On issue 2, it was submitted that the Learned Trial Judge was wrong when he held that the prosecution had proved its case beyond reasonable doubt against the Appellant and thereby convicted him.

Counsel submitted that a close perusal of the 2nd Count will reveal that in one breath the Appellant was charged with conspiracy to interrupt the production and distribution of petroleum product under Section 1(2)(a)(b) of the Petroleum Production and Distribution (Anti sabotage) Act 2004 while in another breath he is charged in Count 2 with a substantive offence different from the one he is accused of having conspired with others to commit.

Counsel stated that the Appellant, simply put, was charged in Count 1 for conspiracy with other persons to commit a certain offence while in Count 2, he was charged of having committed a different offence with the said other persons.

He stated that it was also pertinent to point out that the Miscellaneous Offences Act has no Section 7 as the provisions of the Act ends in Section 5, but however, the offence for which the Appellant was charged purportedly under Section 7(a)(b) of the Miscellaneous Offences Act is provided for under Section 1(7)(a) (b) of the Act.

It was Counsel's submission that aside the discrepancies and uncertainties in the charges, that the Respondent failed woefully to prove any case against the Appellant beyond reasonable doubt as required by law.

Counsel submitted that the only evidence against the Appellant which the Learned Trial Judge relied heavily upon to convict the Appellant is at pages 57 (Paragraph 1) and 59 (paragraphs 1-2) of the Record of proceeding. Counsel stated that PW2 gave evidence that he flashed his security light on the tanker which was parked off the road at Emu - Urior community and the Appellant jumped out of the vehicle and ran into the bush.

Counsel stated that PW2 also testified that the Appellant came to his barracks to ask for his impounded tanker and he arrested him. Counsel submitted that the Learned Trial Judge in his Judgment relied heavily on these two pieces of evidence coupled with the fact that the Appellant did not provide particulars for the investigation of his alibi to convict him.

He submitted that the evidence of PW2 at page 57 aforesaid amounted to evidence of identification which obviously was a very poor identification of the Appellant. Counsel further submitted that the Learned Trial Judge should not have relied upon evidence of PW2 on identification of the Appellant so easily without warning himself of the danger inherent in relying on such poor identification evidence.

It is Counsel's contention that there was no evidence before the trial Court that PW2 had met or known the Appellant before the incident of 2nd August, 2015 when PW2 claimed that he flashed security light on the tanker and the Appellant jumped out of the tanker and ran into the bush.

Counsel further contended that the fact that PW2 had to flash his vehicle security light on the tanker raised a strong suggestion that the incident happened in the night. He stated that it is therefore safe to say that the PW2 by his evidence did not have the opportunity to observe the Appellant so as to know his features and peculiarity as according to PW2, the Appellant jumped out of his tanker and ran into the bush.

According to Counsel, there was no shred of evidence proffered by the prosecution as to how the PW2 came to know that it was the same person that jumped out of the tanker and ran into the bush on 2/8/2015 that came to the barracks looking for his truck on 25/8/2015. Counsel referred the Court to the case of **CHUKWU V. STATE (1996) 7 NWLR [pt. 463] 686 @ 702 (paras C-D).**

Counsel submitted that having regard to the circumstances of the brief encounter between the Appellant and PW2 as claimed by PW2, an identification parade would have been necessary to determine if PW2 actually recognized the person he claimed jumped out of the tanker and ran into the bush on 2/8/2015. Counsel cited the case of **BALOGUN V. AG. OGUN STATE (2002) 6 NWLR (PT 763) 512 @ 535.**

It is his submission that the PW2 obviously met the Appellant for the first time on 25/8/2015 when the Appellant showed up at his barracks.

It was therefore submitted that there was no proper identification of the Appellant before the trial Court to warrant the inference by the Learned Trial Judge that it was the Appellant who jumped out of the vehicle and ran into the bush in the night of 2/8/2015.

Furthermore, Counsel submitted that there was no evidence before the trial Court that the Appellant either alone or in conjunction with other persons broke, damaged, disconnected any pipeline for the transportation of crude oil or otherwise obstructed and interfered with free flow of any crude oil or refined products as alleged in Count 2 of the charge brought against him.

According to Counsel, the only evidence proffered by the prosecution in respect of this charge is that the Appellant's tanker drove into the Ogini oil field and drove out; and the evidence of PW1 and PW2 that when the scene of crime was visited after 25/8/2015, they observed that some knots in the oil rig were loosened or unscrewed and there was oil on the ground.

Learned Counsel submitted that the above evidence without more was not enough to link the Appellant with the commission of the offence as laid in Count 2 of the charge aforesaid.

He stated that firstly, no official of the Nigerian Petroleum Development company (NPDC) was called to testify that their property, an oil rig (not a pipeline) was tampered with, and secondly, there was no evidence as to where the oil allegedly found on the ground by the prosecution witnesses emitted from and there was also no evidence that the tanker which PW2 claimed they set ablaze had any petroleum product or crude oil in it.

Counsel submitted that the Appellant, in his statement to the police, stated that the driver of the tanker vehicle was employed by his manager whose name is **Samson**, that the Appellant also supplied the telephone number of the manager under whose care he left the truck when he travelled.

It was Learned Counsel's submission that the police made no serious attempt to properly investigate the information supplied by the Appellant before charging him to Court.

It was further submitted that the prosecution failed to negative the story of the Appellant that he went to the barracks in search of his truck pursuant to the information given to him by his manager as to what happened to the truck.

It was therefore submitted that the entire evidence proffered by the prosecution against the Appellant was at best founded on circumstantial evidence if not mere suspicion.

He submitted, however, that the circumstances of this case do not irresistibly point to the guilt of the Appellant in this case.

It was also submitted that suspicion, no matter how grave, cannot grant a conviction. On this, Counsel referred the Court to **BOZIN V. STATE (1985) 2NWLR (Pt. 8) 465.**

It was Counsel's contention that the law is settled that for circumstantial evidence to ground the conviction of an accused, such circumstantial evidence must point irresistibly, with mathematical exactitude, to the guilt of the accused and to the exclusion of every reasonable doubt. The Court was referred to **LORI V. STATE (1980) 12 NSCC 269 @ 273.**

It was further submitted that the reliance by the trial Court on the purported inability of the Appellant to prove his alibi was wrong, as the failure to prove alibi by the Appellant does not in any way relieve the prosecution of its duty under the law to prove its case against the Appellant beyond reasonable doubt.

Counsel further contended that Indeed at the close of the prosecution's case, there was no *prima facie* case made out against the Appellant sufficient to have warranted his being called upon to defend the charge against him.

It was therefore submitted by Appellant's Counsel that the call on the Appellant to defend the charge against him at the close of the prosecution's case was unconstitutional as it amounted to his being called upon to prove his innocence. On this, Counsel cited the case of **OKORO V. STATE (1988) 3NSCC (Vol. 19) 275 @ 300**.

In the circumstances, the Court was urged to resolve this Issue in favour of the Appellant and hold that the case against the Appellant was not proved beyond reasonable doubt as required by law.

In conclusion, the Court is respectfully urged to uphold this Appeal, set aside the conviction of the Appellant by the trial court and acquit him accordingly.

On preliminary issues arising from the Appellant's Brief of Argument contained at **paragraphs 3.4, 3.7, 3.8, 3.9, 3.10, 3.11, 4.4-4.7, 4.10 & 4.14-4.16 at pages 3, 4, 8, 9, 10 & 11 of the Brief**, the Respondent filed a Motion on Notice dated 6/9/2021 praying this Honourable Court to dismiss/strike out this Appeal on the grounds of the issues raised by the Appellant that **the Charge/Count are bad for ambiguity, failure to specify the Nature and Particulars of the Charge and the alleged misstatement or error in the punishment Section of Count 2 as well as the issue of identification of the Appellant were never raised nor canvassed at the Trial Court and there are no findings of the Court in that regard to warrant it being raised as a fresh issue or point for the first time before this Honourable Court without leave.**

The Motion was supported by a 7 paragraph Affidavit sworn to at the Court of Appeal registry, Asaba, Judicial Division.

In arguing his case, it was Respondent's Counsel's submission that it is the Law that a Party is not permitted to raise without the Leave of the Court, a fresh issue for the first time at the Court of Appeal where such issue was not canvassed at the Trial Court. Reliance was placed inter alia on the case of **SOBANDE V. IGBOKWE (2015) LPELR-40905 (CA) Page 1.**

Counsel pointed out here that the issue of Count 1 being "bad for ambiguity" as argued by the Learned Appellant Counsel was never raised at the Trial Court and same was not pronounced up upon by the Learned Trial Judge. On this, he urged on their Lordships to discontinuance same.

Counsel contended that there were no such issue raised at the Trial Court where the Appellant complained that he was misled by the omission of the Section of the Miscellaneous Offences Act to warrant his raising same for the first time in this Court as contained in the Learned Appellant's Counsel's arguments at **paragraphs 4.6 to 4.7 at pages 8-9 of the Brief.**

He submitted further that the issues of the charge being "misleading, to the Appellant, imprecise that it is difficult to locate the precise offence for which the Appellant was charged" as contained in **paragraphs 3.9-3.10** of the Appellant's Brief, are also, fresh issues that are being raised for the first time without the Leave of this Honourable Court first sought and obtained. On this, Counsel urged the Court, on the strength of the trite position of the Law, to discountenance the submissions, arguments and the authorities cited therein.

Counsel submitted that ditto with the issues of alleged misstatement or error in the punishment section of Count 2, as well as the issue of identification of the Appellant, there was nowhere, at the trial where these issues were ever raised except now in this Honourable Court and without the requisite leave of Court having been earlier sought and obtained. On this, Counsel again urged their Lordships to discountenance same. Counsel referred the Court to the case of **GABRIEL V. STATE (1989) NWLR (PT 122) 427.**

Counsel therefore urged the Court to resolve the Respondent's preliminary issue in its favour, discountenance same and dismiss this appeal.

On Respondent's response on the merit to Appellant's arguments contained in the Appellant's Brief of Argument, it was Counsel's submission that the Count 1 of the Charge preferred against the Appellant under the said **Section 1(2)(a)(b) of the Petroleum Production and Distribution (Anti Sabotage) Act** is not bad for ambiguity as submitted by Learned Appellant's Counsel.

He further responded that both the Appellant and his Learned Counsel who were present on 16th February, 2016 when the Appellant's plea was taken ought to have timeously raised the issue of alleged ambiguity of the charge (if any) at the time the charge was read to him or shortly after, at the Trial Court having waived his right to object to the charge on the alleged grounds at the Trial court, Learned Counsel to Appellant cannot raise it on appeal when the leave of this Honourable Court was never sought. Counsel referred the Court to the case of **ALAKE V. THE STATE (1991) 7 NWLR (PT 205) PG 567 @ 588-589.**

It was Counsel's response to the Learned Appellant's Counsel submission which borders on the provision of **Section 203(1) of the Administration of Criminal Justice Act, ("ACJA"), 2015**, that the said Section 203(1) is not a mandatory act but discretionary. The said Section 203(1) of the ACJA never made it mandatory that a charge must be in the alternative rather, the word MAY was used to demonstrate the discretionary power of the Prosecution in drafting the Charge.

Counsel submitted in further response that in drafting a Charge, the rule is not cast on a stone as there are bound to be some modifications as may be necessary depending on the circumstances as enjoined by **Section 193 of the ACJA, 2015**.

Counsel also made reference to ***Section 489 of the ACJA.***

Counsel also submitted that for a Charge upon which an accused person is convicted to be held to be defective, ambiguous and bad for duplicity, the accused person must show that he suffered a miscarriage of Justice and that his rights have been breached with the way the Charge was drafted. Counsel relied on the case of **UFUOEGBUNAM & ORS V. FRN (2019) LPELR-47163 (CA) Page 1 @ 23-24. Para A-D of Page 25.**

In response to the Appellant's submission contained in paragraphs 3.7 to 3.11 of the Appellant's Brief, he submitted that the Charge as contained in Count 1 is valid as it is not mandatory on the Prosecution/Respondent to mandatorily state the Charge the way and manner the Appellant desires it. Counsel stated that the said Count 1, did actually contain the nature and particulars of the offence committed when it stated that the Appellant along with others

conspired to vandalize petroleum pipeline on the 2nd of August, 2015 at Emu-Unor Community.

It was Counsel's contention that by the provisions of **Section 195 of the ACJA**, there is a legal presumption that the Charge met the requirements of the Law.

Counsel submitted further that the issues of the Charge being "misleading, to the Appellant", Imprecise that it is difficult to locate the precise offence for which the Appellant was charged, are fresh issues that are being raised for the first time without the Leave of this Honourable Court having been first sought and obtained. Counsel stated that on the strength of the trite position of the Law, he urged us to discontinuance the submissions, arguments and the authorities cited therein. Counsel cited the case of **SOBANDE V. IGBOKWE (Supra).**

In response to the Appellant's submission contained in the Appellant's Brief, Counsel stated that there were sufficient evidence by the Prosecution witnesses especially, PW 2 who gave a blow-by-blow account of how the Appellant "aided", "procured" or "counseled" others now at large when he testified that after the Appellant jumped out of the truck and ran into the bush, he arrested Smart and Dan Bini. Counsel stated that it was also admitted that the truck used belong to the Appellant and like the Learned Trial Judge found as a fact, the truck was driven by a human being and not a robot.

In further reply, Counsel submitted that aside from the evidence of PW 2 who fixed the Appellant to the commission of the offence alongside others, it is not the Law that the Prosecution must provide or establish that the Appellant committed any of the acts listed in Section 1(a)(b) (c) since Section 1(2)(a) (b) of the Petroleum and Distribution (Anti Sabotage) Act which clearly provides *inter alia* that the other suspects procured, who were counseled by the Appellant need not to have even committed the offence.

In further response, he submitted that there were abundant evidence led by the Prosecution Witnesses wherein they testified that they saw oil both on the Appellant's truck and at the Ogini oil field where the destroyed knots and rings were seen on the ground.

Counsel contended that the case of **HARB V. FRN** cited by Appellant is not relevant and applicable to the facts of this case as it was not decided based on the provisions of the said **Section 1(2)(a)(b) of the Petroleum Production and Distribution (Anti Sabotage) Act.**

In response to the Appellant's submissions under his Issue 2, it was Counsel's submission that the Learned Trial Judge rightly convicted the Appellant based on the direct and unshakable evidence of the Respondent witnesses.

Counsel submitted that this Honourable Court should discountenance the Appellant's argument canvassed under his Issue 2 of the Appellant's Brief, where he argued on differences of the two Count Charge on which the Appellant was convicted, on the ground that they are fresh points and issues that are being raised for the first time on appeal since they were never canvassed and argued at the Trial Court.

It was Counsel's further submission that the Appellant having not raised and canvassed at any time before the Trial Court that the alleged ambiguity or error in the punishment Section of Count 2 as well as the issue of identification radically affected his understanding of the 2 Count Charge preferred against him or that his Fundamental Rights has been in any way breached, he cannot be validly heard at this stage more so, the Appellant did not also furnish any reason why he raised these issues this late after the arraignment and even after the trial. Counsel relied on the case of **OBIAKOR V. STATE (2002) LPELR-2168 (SC) PG 10) PARAS. A-B or (2002) 10 NWLR (PT. 776) PG. 612**

In response to the above mentioned issues on the merit, Learned Counsel submitted that a Trial Court and even the Appellate Court, can rightly convict a suspect of an offence where the Prosecution has proved the commission of the offence against the suspect even though the offences were charged under a different or wrong Law. For this proposition, Counsel referred the Court to the case of **OLATUNBOSUN V. STATE (2013) WRN Page 1 @ 30.**

On the alleged Respondent's failure to state the nature and particulars of the Count Charge against the Appellant as canvassed in the Appellant's Brief, it was Counsel's submission that assuming there was a failure to so correctly state

the offence, its punishment or the particulars of the Charge, the failure to so state the nature and particulars of the offence are not material on its face, to nullify or set aside the Appellant's conviction, more so, the failure was not shown by the Appellant to have affected him in anyway or occasioned a miscarriage of Justice. Counsel placed reliance on Sections 200 and 220 of the ACJA and the case of **AUSTIN V. FRN (2018) LPELR-44552 (CA) page 1 at 11-12.**

It was Counsel's further submission that the failure of the Appellant to timeously raise the issues of defect in the Charges against him either at the time the Charges were read and explained to him or at the Trial Court, these issues he now raised in this Appellate Court, are too late to be considered by this Honourable Court. Counsel referred the Court to **ALAKE V. THE STATE (1991) 7 NWLR (PT 205) PG 567 @ 588-589.**

Learned Counsel submitted that where an Appellant did not show or state how he was misled by the alleged ambiguity or the way a charge was drafted, the Appellate Court will not lightly disturb the decision of the Trial Court. The Court was referred to **BOVOA VS. FRN & ANOR (2017) LPELR-43006 (CA).**

It was Counsel's submission that since the Appellant did not complain of the breach of his rights by the error, the error is most immaterial and it cannot vitiate the Judgment.

Counsel submitted that the issue of identification of the Appellant though raised for the first time without Leave of Court, is with the greatest respect, not a strong wicket to rely upon since there was no evidence by PW 2 that the incident of 2nd August, 2015 took place at night. Counsel stated that the flashing of the security light was not stated by PW 2 to be in the night, that more so, the Appellant at the trial, failed to cross-examine PW 2 to elicit any response if he was confused or in doubt as to the time of the incidence. Counsel gave example stating that it is common place to find motorists giving each other light in the day time to draw attention.

In response to the submission in the Appellant's Brief, Counsel submitted that the Respondent did established the guilt of the Appellant and the Learned Trial Court rightly found and convicted him.

Counsel contended that the absence of testimony of any official of the Nigerian Petroleum Development Company (NPDC) to testify as a witness was not fatal to the Respondent's case since the evidence of PW 2 squarely covered the proof of the Charges against the Appellant, that besides, it is not the Law that the prosecution must call all witnesses but only those to establish its case.

Respondent's Brief of Argument was filed on the 9th day of December, 2020, wherein he raised a lone issue for determination from the Appellant's Six (6) Grounds of Appeal to wit:

> **"Whether the Learned Trial Judge was not right to have convicted the Appellant on the 2 Count Charges preferred against him by the Respondent."**(Distilled from Grounds 1, 2, 3, 4, 5 & 6)

On Learned Appellant's Counsel's argument on the lone issue for determination, he submitted that the Learned Trial Judge was right to have convicted the Appellant on the Two (2) Count Charge preferred against the Appellant by the Respondent.

Counsel stated that at the commencement of the trial of the Appellant at the Trial Court, there were clear and undisputed evidence that the Charges were read and explained to the Appellant in the presence of his Learned Counsel and he perfectly understood same before taking his plea of not guilty to both Count charges.

Counsel stated that the Prosecution at the Trial Court called 2 Witnesses to prove its case against the Appellant, and PW 2- Staff Sgt Hassan Egya being the eye witness, gave a vivid picture and account of what he saw, when he first saw the Appellant, what the Appellant told him on phone, the oil, the destroyed rings and knots on the ground at the scene of crime (Ogini oil field) and how the Appellant was arrested, etc.

It was Counsel's submission that under the **Petroleum Production and Distribution (Anti Sabotage) Act**, the offence of conspiracy is deemed to have been committed where ***"Any person-(a) aids another person or (b) incites, counsels or procure any other person, to do any of the things specified in***

Subsection (1) of Section 1(2)(a) (b) Whether or not that other person actually does the thing in question, be guilty of the offence.... Counsel referred the Court to **Section 1 (2)(a)&(b) of the Petroleum Production and Distribution (Anti Sabotage) Act.**

He submitted that the Learned Trial Judge rightly convicted the Appellant of the offence of conspiracy on which Count 1 of the Charge was predicted upon.

Counsel stated that the Respondent duly proved the ingredients of the offence of conspiracy when they established in evidence before the trial Court amongst others through PW 2 that:

1) **PW 2 arrested 2 suspects -Smart and Dan Bini who later escaped.**

2) **Appellant was seen by PW 2 "jumped out of the Vehicle and ran to the bush.**

3) **Appellant was in the truck with the other suspects before jumping down and running into the bush.**

4) **The Appellant is the owner of the truck that was impounded by the PW 2 and his team on 2/8/2015 and burnt some days later.**

Counsel submitted that the Appellant on his part failed to give the particulars of his Manager and driver as well as their addresses or whereabouts to assist the Police to interview/investigate if truly they were not the said Smart and Dan Bini who escaped with the Soldiers handcuffs.

According to Counsel, it was the above pieces of evidence amongst others, that the Learned Trial Judge found as credible and relied upon to convict the Appellant of the offence of conspiracy. Counsel stated that the Trial Court was very lucid in his findings.

Counsel stated that it was necessary for him to also point out here that the salient findings of the Learned Trial Judge were not appealed against by the Appellant. He therefore urged the Court to so hold and affirm the conviction of the Appellant since it is the Law that the findings of fact or the decision of a

Court not appealed against are binding on the Parties and the Court of Appeal can rightly act or affirm same. Counsel submitted that the Supreme Court affirmed this position in the case of **EZIKE & ANOR V. EGBUABA (2019) LPELR-46526 (SC).**

It was also submitted that the evidence of PW 2 (Staff Sgt Hassan Egya) were direct, unequivocal and placed the Appellant on the commission of the offences charged and this Honourable Court as well as the Apex Court have enjoined Trial Courts to rely on direct, firm and unequivocal evidence that links an accused person to the commission of the offence. On this, Counsel referred the Court to the case of **AIGUOREGHIAN & ANOR V. STATE (2005) 4 FWLR (PT. 278) @ PG 1 per ONU JSC.**

Counsel emphasized that these vital pieces of evidence were part of the evidence the Learned Trial Judge relied upon to convict the Appellant.

Counsel stated that PW 2 also testified that he saw the Appellant's truck at the *locus criminis,* scene of crime ie Ogini oil field and from there they chased the truck containing the Appellant from the Ogini oil field to the Emu-Unor community where he saw the Appellant jump down from the vehicle and run into the bush despite their warnings of "don't move or I will fire you".

Counsel argued that PW 2 also demonstrated both orally and with documentary evidence(pictures) to the Trial Court that they saw oil spilled on the ground at the Ogini oil field and also that oil were found before and during the burning of the Appellant's truck. Counsel stated that these were clear, direct and unequivocal piece of evidence that the Trial Court saw and heard before convicting the Appellant.

It was Counsel's submission that evidence of PW 1 corroborated the evidence of the PW 2 on the issue of vandalization of Ogini oil field.

Counsel drew the Court's attention to the undenied and unchallenged evidence of the Appellant's ownership of the oil tanker with colour white, blue and Oxblood with 18 tyres and having a registration no.: **Lagos XY725 EPE** that was used for the operation, that as a matter of fact, the Appellant acknowledged the ownership of same.

Counsel also submitted that PW 1 in his evidence stated unequivocally that the truck no. Lagos XY725 EPE belonged to the Appellant.

It was Counsel's submission that it is trite law that any piece of evidence or findings of a Trial Court not appealed against is deemed admitted and binding on the Parties. Counsel stated that the Supreme Court made a pronouncement on this position in the case of **EZIKE & ANOR V. EGBUABA (2019) LPELR-46526 (SC).**

It was Learned Counsel's submission that where an Appellate Court finds the verdict of the Trial Court as having been well conducted and based on direct and positive evidence of a witness, the Appellate Court will not readily disturb or set aside the verdict.

It was Learned Counsel's position that this instant appeal is one in which the arraignment procedure were well complied with and the evidence of the Prosecution witnesses fixed the Appellant to the commission of the offences and he was rightly convicted by the Trial Court and this appeal is one in which this Honourable Court will not lightly disturb the verdict.

Counsel urged the Court to resolve the Respondent's lone issue in its favour and dismiss this appeal.

In Opposition to Respondent's Motion Dated 6/9/2021, the Appellant filed a 9 paragraph Counter Affidavit and a Written Argument on the 17/9/2021.

Counsel submitted that the Respondent's motion is totally misconceived and should be dismissed.

Firstly, it was submitted that the discrepancies pointed out by the Appellant in the Charges against him were highlighted to show, on the one hand, the incongruity between the Charges and the sections of the Law under which they were brought, and the evidence led by the prosecution in purported proof of the Charges on the other hand.

Counsel submitted, that the Appellant merely exposed the inconsistency and discordant tunes between the ingredients of the Charges as specified by the provisions of the Law under which they were brought and the unharmonious

evidence led by the prosecution (Respondent) in purported but futile proof of the Charges.

It is further submitted that, in so far as the Appellant did not pray that the charges be struck out for lack of competence, the Appellant does not need the leave of this Honourable Court to point out the ambiguity and uncertainties in the charges with a view to demonstrating that the allegations in the charge and the evidence proffered in support thereof were at variance with each other.

Counsel submitted in the alternative, that assuming but without conceding that it was a fresh point as argued by the Respondent, the issue as to the certainty of an allegation laid against an accused touches on the right of an accused person to be fairly heard as provided by **Section 36(1) & (6)(a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)**.

It was submitted therefore that an ambiguous Charge that fails to give notice to the Defendant of the correct descriptions of the Charge against him is a bad Charge as it offends the mandatory provisions of the **Section 36(6)(a) of the 1999 Constitution (as amended)** which requires that the Defendant be given a detailed nature of the offense he is alleged to have committed. Counsel submitted that such detailed nature can only be given in a Charge.

Counsel further submitted that the issue, being a Legal and Constitutional one, could be raised at any time, even for the first time on Appeal.

He submitted that the issue of incompetence of the Charge is a necessary concomitant of the complaint by the Defendant that his conviction was not jus and legal. Counsel stated that this is so as the evidence proffered in support o the Charge became in conflict with the Charge as laid. Counsel referred th Court to the case of **NWOKEDI V. COMMISSIONER OF POLICE (1977) A NLR @ 15**.

Counsel submitted that it is clear in this case that the entire evidence proffere by the Respondent did not in any way prove or support the facts ar ingredients of the Charge as laid against the Appellant, thus the bas requirement that the ingredient of the charge that must be proved was n satisfied.

This Honourable Court was therefore urged to discountenance the Respondent's argument on this point.

Secondly, Counsel submitted that the argument by the Respondent/Applicant that the issue of identification was been raised for the first time is totally misconceived.

Counsel referred to the evidence-in-chief of PW2 at page 55-59 of the Record and submitted that his evidence essentially centers on a purported identification of the Appellant as the person he saw on 2/8/2015 jumping out of a tanker purportedly used in committing the crime in question.

Counsel stated that whereas the offence was allegedly committed on 2/8/2015, the Appellant was arrested on 25/8/2015 by a soldier who claimed that the Appellant was the person who jumped out of the tanker in the night of 2/8/2021.

On the other hand, the Appellant both in his statement and his evidence in defence maintained that he was never at the scene of crime, instead he raised an alibi that he was in Lagos on the day of the crime and that he left the tanker with his manager who employed the driver that was driving the tanker from Asaba to Warri on the day the tanker was seized by soldiers.

Counsel stated that the Learned Counsel to the Appellant argued strenuously in his address at the Court below that the prosecution failed woefully to fix the Appellant with the commission of the offence as alleged.

Counsel submitted therefore that the gravamen of the contention between the Appellant and the Respondent at the Court below centered mainly on whether or not the Appellant was properly identified as the person who allegedly jumped out of the tanker on 2/8/2015.

He submitted further that identification evidence means nothing more than evidence by a person that a Defendant (Accused) was or resembles the person who was seen present at the scene of the crime and participating in the commission thereof.

Counsel argued that it is therefore not necessary that the word identification must be mentioned before the issue of identification is said to have been

raised. He submitted that the issue of identification is sufficiently raised where one person, in his evidence, asserts that the person later arrested and being prosecuted is the person he saw committing the offence on the day the offence was committed.

It was further submitted that by agreeing that the Appellant committed the offence and convicting him in respect thereof, the learned trial Judge clearly resolved the identification of the Appellant in favour of the Respondent.

It was Learned Counsel's submission that the issue of identification was sufficiently raised, contested and resolved in favour of the prosecution (Respondent) by the Learned Trial Judge. Counsel contended that the issue of identification is therefore not a fresh issue being raised for the first time in this Honourable Court.

Counsel urged the Court to resolve this issue in favour of the Appellant.

In the totality of the above, the Court was urged to dismiss the Respondent/Applicant's motion as frivolous and misconceived.

Appellant's reply to Respondent's Brief of Argument dated 7/12/2020, was filed on the 6th day of September, 2021.

According to Appellant's Counsel, the Respondent argued in paragraphs 2.0-3.9 of the Respondent Brief of Argument that the issue of the two (2) charges laid against the Appellant as being ambiguous and misleading was not raised as an issue before the trial court and therefore the Appellant needed leave to raise on Appeal for the first time.

Counsel submitted that while the above argument may be correct as to a general principle of Law, it is however misconceived and misapplied in this occasion having regard to the facts and circumstances of this case.

He submitted that the issue of incompetence of a charge goes to the Jurisdiction of the Court to hear same, the charge having not been initiated in compliance with due process of Law.

It was Counsel's submission that it is trite law that an issue that touches on Jurisdiction of the Court based on the incompetence of a process can be raised for the first time on appeal without leave.

Furthermore, Counsel stated that the purpose of a charge is to give notice to the Defendant of the nature and particulars of the offense that he is accused of. Counsel referred the Court to **Sections 194 & 199 of the ACIA, 2015**.

It was submitted therefore that compliance with the provisions of both sections of the Act are mandatory if the provisions of **Section 36(6)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)** is to be complied with.

It was further submitted that an ambiguous Charge that fails to give notice to the Defendant of the correct description of the Charge against him is a bad Charge as it offends the mandatory provisions of **Section 36(6)(a) of the 1999 Constitution (as amended)** which require that the Defendant be given a detailed nature of the offense he is alleged to have committed. Counsel submitted that such detailed nature can only be given in a Charge.

It was therefore further submitted that the issue being a legal and constitutional one, it could be raised at any time, even on the first time on appeal.

Counsel submitted that the issue of incompetence of the charge is a necessary concomitant of the complaint by the Defendant that his conviction was not just and legal. Counsel stated that this is so as the evidence proffered in support of the Charge became at variance with the charge as laid. Counsel referred the Court to **NWOKEDI V. COMMISSIONER OF POLICE (1977) ALL NLR II @ 15**.

He submitted that it is clear in this case that the entire evidence proffered by the Respondent did not in any way prove or support the facts and ingredients of the Charge as laid against the Appellant, thus the basic requirement that the ingredient of the charge must be proved was not satisfied.

This Honourable Court was therefore urged to discountenance the Respondent's argument on this point.

Counsel submitted that the point raised by the Respondent at paragraphs 4.13 - 4.16 of the Respondent's Brief of Argument is misconceived. Counsel stated that in these paragraphs above referred, the Respondent argued that the finding of the trial Court that the Appellant conspired with other people to commit the offense alleged was not challenged.

Counsel referred to grounds 1 & 2 of the Grounds of Appeal and submitted that the 2 grounds of appeal sufficiently challenged the findings and decision of the learned trial judge as to the involvement or complicity of the Appellant with the alleged offence purportedly contained in the charge of conspiracy.

Furthermore, Counsel submitted that the learned trial Judge never found as a fact that the Appellant drove the truck into the Ogini Oil field. Counsel stated that the issue as to whether the Appellant participated in any conspiracy or not is, sufficiently addressed in the Appellant's brief of argument in line with the issues for determination distilled from the ground of appeal which pointedly attacked the decision of the lower Court on the issue.

Counsel urged the Court to discountenance the Respondent's argument on this issue and allow the appeal.

RESOLUTION ON THE PRELIMINARY OBJECTION

In the determination of this appeal I shall first consider the preliminary objection raised by learned counsel for the Respondent in his motion on notice filed on the 6th of September 2021.

Learned Counsel for the Respondent have argue inter alia that the issue of count one being 'bad for ambiguity' as argued by the Appellant was never raised at the trial Court as well as the issue of alleged misstatement or error in the punishment Section in Count 2 were being raised for the first time without leave been sought and obtained.

The grounds of appeal without their particulars are as follows:

GROUNDS OF APPEAL

Ground one

The learned trial Judge erred in law when he convicted the Appellant for the offence of conspiracy to vandalize petroleum pipeline contrary to Section 1 (2) (a) (b) of the Petroleum Production and Distribution (Anti-Sabotage) Act Cap M17 Vol.13 Laws of the Federation of Nigeria 2004.

Ground Two

The learned trial Judge erred in law when he convicted the Appellant on a purported count of conspiracy as laid in count one of the charge at the trial when the said count was bad for ambiguity and misleading to the Appellant.

Ground Three

The learned trial Judge erred in law when he held that the prosecution had proved the charges against the Appellant beyond reasonable doubt.

Ground Four

The learned trial Judge erred in law when he overruled the Appellant's no case submission and called on him to defend himself when there was no case made out against the Appellant at the close of the prosecution's case.

Ground Five

The learned trial Judge erred in law when he convicted the Appellant upon the case presented by the prosecution which was not properly investigated by the Police.

Ground Six

The decision is unreasonable, unwarranted and cannot be supported having regard to the totality of evidence led.

See pages 107-109 of the record of appeal

A close reading of Ground Two of the Appellant's notice of appeal reproduce above vis-à-vis the Judgment of the court below contained in pages 72-106 clearly show that the issue of ambiguity, failure to specify the nature and particulars of the charge and alleged misstatement or error in the punishment Section of Count 2 was never raised nor canvassed at the trial court and there is no findings of the trial court on those issues. These issues were been raised

by the Appellant for the first time on appeal without leave of this court been sought and obtained. This had denied the learned trial Judge the opportunity to give answers to these issues in his Judgment.

The record of appeal confirms that these points were never issues throughout the trial of the case and consequently there was no consideration thereof in the Judgment.

The appellate Jurisdiction of this Court is statutory and by virtue of the provisions of Sections 240 and 241 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) the Court of Appeal is conferred with Jurisdiction over appeals from decision of the various Courts listed therein and not over matters not decided by those Courts. It therefore becomes a futile exercise for the Court of Appeal to embark on hearing an issue not decided by the trial court as it will lack Jurisdiction over such an issue without leave of Court.

The following cases cited by the Respondent/applicant are relevant to the issues. **In SOBANDE V. IGBOKWE (2015) LPELR-40905 (CA) Page 1 paragraph B. Per OSEJI JCA** (as he then was) stated:

"It is a trite law that an appellant wishing to raise a new or fresh issue on appeal must seek and obtain the leave of the Appellate Court concerned. Thus, a party is not generally allowed to raise and canvass an issue not raised in the court below without leave first being sought and obtained".

In the same vain this Court in **OLAIFA & ORS V. DAVID TANIMOMO & ORS (2017) LPELR-43252 (CA) Page 1 at 10 paragraphs A-B Per DANJUMA JCA** held:

> "It is trite that a Court has no business dealing a fresh issue or point raised on appeal without its leave. Such fresh issue raised without the leave of Court are incompetent and liable to be struck out. See **GARBA V. OMOKHODION (2011) 6 SCNJ 334** and **ONWUKA V. ONONUJU (2009) 5 SCNJ 65."**

In the light of the above I hereby struck out ground two of the Appellant notice of appeal and I discountenance the issues raised by the Appellant's Counsel in his brief of argument in respect of the issues that the charge and count are bad

for ambiguity, failure to specify the nature and particulars of the Charge and that the alleged misstatement or error in the punishment Section of Count 2 as those issues were never canvassed at the Court below and no leave of this Court was sought and obtained to argued the said issues. Those issues have no foundation, it is trite law that you cannot put something on nothing and expect it to stay there, it will collapse. See **MACFOY V. UNITED AFRICA CO. LTD (1961) 3 ALL E.R. 116, UNOKA V. AGILI (2007) 11 NWLR (Pt. 1044) 122 at 147 paragraphs C.**

The preliminary objection of the Respondent succeed in part, grounds 1, 3, 4, 5 and 6 of the Appellant's notice of appeal contained in pages 107-110 of the records are valid while ground two is hereby struck out, the issues canvassed by the Appellant in his brief of argument in respect of the said valid notice of appeal will be consider in determination of this appeal.

RESOLUTION

I will adopt the two issues formulated by the Appellant in resolution of this appeal bearing in mind that the Appellant's counsel argument contained in pages 2-4 paragraphs 3.2-3.11 of his brief have been discountenance by this court in the course of determining the Respondent preliminary objection.

ISSUE ONE

Whether the learned trial Judge was right when he convicted the Appellant for the offence of conspiracy to vandalize petroleum pipeline punishable under Section 1 (2) (a) (b) of the Petroleum Production and Distribution (Anti-Sabotage) Act Cap M17 Vol. 13 Laws of the Federation of Nigeria 2004.

Learned Counsel for the Appellant alternative argument on this issue is to the effect there was no evidence before the trial court tending to prove any of the ingredients of the offence created by Section 1 (2) (a) (b) of the Act under which the charge was brought.

Now Section 1 (2) (a) (b) of the Petroleum Production and Distribution (Anti-Sabotage) Act Cap M17 Volume 13 Laws of the Federation of Nigeria 2004 provides:

"Any person who-

(a) Aids another person; or

(b) Incites, counsels or procures any other person, to do any of the things specified in subsection (1) of this section shall, whether or not that other person actually does the thing in question, be guilty of the offence of sabotage under this Act."

The Apex Court in **NOSIKE IBOJI V. THE STATE (2016) LPELR-40009 (SC) Per OKORO, JSC at pages 9-12 paragraphs D-B** stated.

"The offence of conspiracy is the agreement of two or more Persons to do an unlawful act, or to do a lawful act by unlawful means. In the old case of **NJOVENS V. STATE (1973) 5 SC 12,** also reported in **(1975) LPELR-2042 SC at p. 57 paras. A-F**, this Court held as follows:

> "The overt act or omission which evidences conspiracy is the actus reus and the actus of each and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, those who murdered Julius Ceasar, were seen together coming out of the same place at the same time and indeed conspirators need not know each other. See **R. V. MAYRICK and RIBUFFI (1929) 21 C App. R.94.** They need not all have started the conspiracy at the same time for a conspiracy started by some persons may be joined at a later stage or later stages by others. The gist of the offence of conspiracy is the meeting of the mind of the conspirators. This is hardly capable of direct proof for the offence of conspiracy is complete by the agreement to do the act or make the omission complained about. Hence conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common between them and in proof of conspiracy the acts or omission of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators."

The essential ingredients of the offence of conspiracy lie in the agreement to do an unlawful act which is contrary to or forbidden by law and it does not matter whether or not the accused persons had knowledge of its unlawfulness. See **CLARK V. THE STATE (1986) 4 NWLR (PT.35) 381**. The crime of conspiracy is usually hatched with utmost secrecy and the law recognizes the fact that in such a situation, it might not always be easy to lead direct and distinct evidence to prove it. Thus, it is always open to the trial Judge to infer conspiracy from the facts of the case. Since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties, it is rarely capable of direct proof, it is invariably an offence that is inferentially deduced from the acts of the parties thereto which are focused towards the realization of their common or mutual criminal purpose. See **DR. SEGUN OGUNYE V. THE STATE (2001) 2 NWLR (PT. 697) 311**. In **DABOH V. THE STATE (1977) ALL NLR 146 (1977) 5 SC 122**, the late legal luminary, Lord Justice Udo Udoma, JSC put the matter more succinctly thus:'' It may be stated that where persons are charged with criminal conspiracy, it is usually required that the conspiracy as laid in the charge be proved, and that the persons charged be so proved to have been engaged in it. On the other hand, as it is not always easy to prove the actual agreement, Courts usually consider it sufficient if it be established by evidence the circumstances from which the Court would consider it safe and reasonable to infer or presume the conspiracy.''

In the instant case the evidence of PW2 at pages 56-57 of the record is that he know the accused person (Appellant) that on the 2/8/2015 he was the team leader on patrol over Oil pipeline in Ndokwa Local Government Area, Delta State, while on patrol he received a call from a hidden number that he should patrol close to Ogini Oil Field that a tanker coloured white, blue, oxblood and white, fitted with 18 tyres with registration number XY 725 EPE entered the place (oil field) and moved out, that he mobilized his team of soldiers close to the oil field in question and hid inside the bust and he redeployed the other soldiers to conduct security checks, that after about 20 minutes the tanker in question drove into the oil field, that while observing the tanker position he flashed his touch light on the tanker then the accused (Appellant) jumped out of the vehicle and ran to the bush, he said he met one Smart and Dan Bini on the tanker who later escaped, that

the armed soldiers finally arrived and they searched the whole bush but could not find them. The photograph of the tanker was admitted in evidence as Exhibit 2. The evidence of PW 2 was not impeached under cross-examination see pages 60-62 of the records and as rightly pointed out by the learned trial Judge at page 98 of the record that " it is as a result of the act of conspiracy that the tanker with registration No. Lagos XY 725 EPE was driven to the Ogini oil field. The tanker in question is not a robot that drove itself. It was definitely driven to the Ogini oil field by a human being."

PW2 sighted the Appellant and the two other persons on the Tanker truck at the scene of the crime. PW1 evidence is to the effect that at the scene of the crime, he saw crude oil rings and also found out that it was tampered with because some of the nuts of the rings are no longer there.

From the evidence of PW1 and PW2 the commission of the offence of conspiracy by the Appellant along with one Smart and Dan Bini who escaped with handcuffs with the assistance of the members of the community has been established against the Appellant. Thus issue one is hereby resolved against the Appellant.

Issue two

Whether the learned trial Judge was right when he held that the prosecution had proved the charges against the Appellant beyond reasonable doubt and thereby convicted him

The duty of the prosecution is to prove the charge against an accused person beyond reasonable doubt, prove beyond reasonable doubt is not proof beyond every shadow of doubt but beyond reasonable doubt. See **BONIFACE ADONIKE V. THE STATE (2015) LPELR-24281 SC.**

By the provisions of Section 135 (2) of the Evidence Act 2011, it is the duty of the Prosecution to prove that the Defendant (Appellant) did any of the things prohibited under the Sections of the Statutes pursuant to which the counts in the charge are levied. By the stipulation of Section 135 (1) of the Evidence Act 2011, the standard of the burden on the prosecution to prove that the Defendant did the prohibited things is 'beyond reasonable doubt.' Thus, even where, as in the case of the Defendant, the person charged does

not utter a word in his own defence the prosecution must still fail if it fails to prove its case beyond reasonable doubt. See Section 139 (3) (a) of the Evidence Act 2011. **IGABELE V. STATE (2006) 6 NWLR (Pt. 975) 100 SC; KIM V. STATE (1992) 4 NWLR (Pt. 233) 17**. This burden lies throughout on the prosecution and it is only after the Prosecution has first proved its allegation beyond reasonable doubt that the burden may shift to the Defendant to call witnesses towards proving "reasonable doubt" if he had not already done so through the Prosecution's own witnesses. See Section 135 (3) of the Evidence Act 2011; **AKINFE V. STATE (1988) 3 NWLR (Pt. 85) 729 SC.**

In **SOLOMOND ORODE V. THE STATE (2018) LPELR-43788 (CA) Per Shuaibu, JCA at page 16 paragraphs C-F** Held:

> "It is settled that the prosecution always bears the burden of proof and the standard of proof of a criminal offence is proof beyond reasonable doubt to secure conviction. However, proof beyond reasonable doubt is not proof to the hilt. It is not proof beyond all iota of doubt. Where all the essential ingredients of the offence charged have been proved or established by the prosecution, the charge is proved beyond reasonable doubt. Consequently, proof beyond reasonable should not be stretched beyond reasonable limit."

Section 1 (7) of the Miscellaneous Offences Act provides:

"Any person who willfully or maliciously-

(a) Breaks, damages, disconnects or otherwise tampers with any pipe or pipeline for the transportation of crude oil or refined oil or gas; or
(b) Obstructs, damages, destroys or otherwise tampers or interferes with the free flow of any crude oil or refined petroleum product through any oil pipeline,

Shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life."

The ingredients of an offence are embedded in the words employed by the statute creating the offence, the ingredients of the offence are as follows:

1. The Defendant (s) willfully or maliciously breaks, damages, destroys, disconnects or tempers with any pipe or pipelines for the transportation of crude oil or refined oil or gas;
2. The Defendant knows or had every reason to know that the pipeline is for transportation of crude oil or refined oil or gas;
3. The pipeline is use for transportation of crude oil or refined oil or gas;
4. The Defendant interferes with the free flow of crude oil or refined petroleum product through any pipeline.

I have already reproduced the evidence of PW2 in detail while resolving issue one, there will be no need to reinstate his evidence to avoid repetition but suffice to state that PW2 further told the Court below that:

> "We used digital camera to snap photograph of the image of the tanker, oil spill on the ground at Ogini oil field and before burning, during burning and after burning of the tanker."

The said photograph was admitted in evidence as Exhibit 2.

The relevant portion of the evidence of PW1 at page 100 of the record is reproduced as follows:

> "After the statement, the scene of crime was visited on 4/9/2015 by myself, the accused, and the soldier men at NPDC Ogini oil field, Umu-Unor. At the scene, I saw crude oil rings and I also found out that it was also tampered with because some of the nuts of the rings are no longer there. The soldier men also produced a photograph of a truck with Registration No.XY 725 EPE (Lagos)"

The evidence of PW1 and PW2 remain credible they were not subjected to any regurious cross-examination, I believe them as witnesses of truth.

Learned Counsel for the Appellant had argued inter alia that the reliance by the trial Court on the purported inability of the Appellant to prove his alibi was wrong.

The defence of alibi raised and relied upon by the Appellant at the trial has been defined simply to mean "elsewhere". The duty is on the accused person

not only to raise it at the earliest opportunity but also to give adequate and detail particulars of the alibi to enable the Police investigate it, failing which it would be of no defence if the Police had no detail particulars and therefore, had nothing to investigate in it. See Black's Law Dictionary, 9th Edition at page 8.

In **PATRICK NJOVENS & 8 ORS V. THE STATE (1973) 5 SC 12 AT PAGE 47**, the Supreme Court considered the defence of alibi and had stated emphatically inter alia thus:

> **"There is nothing extraordinary or esoteric in a plea of alibi. Such a plea postulate that the accused person could not have been at the scene of crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disprove the alibi or attempt to do so, there is a flexible and verifiable way of doing this. If the prosecution adduces sufficient evidence to fix the person at the scene of the crime at the material time, surely his alibi is thereby logically and physically demolished."**

In **JAMES BADUNG V. COP PLATEAU STATE COMMAND (2019) LCD-112851** (CA), this Court had stated inter alia that:

"Where an Accused person has unequivocally raised the defence of alibi that he was somewhere else other than the locus delicti at the time of the commission of the offence with which he is charged he must give some facts and circumstances of his where about for the prosecution to be duty bound to investigate the alibi set up, to verify its truthfulness or otherwise....In law, the defence of alibi cannot succeed where an Accused person is miserly in giving particulars of his whereabouts and in whose company he was but merely state that he was not at the scene of the crime. He is bound to give the lead and particulars of his where about at the earliest opportunity which will assist the Prosecution in their investigation of the alibi as the Police is not expected to go on a wild goose chase in order to investigate an alibi."

I am in agreement with the learned trial Judge at pages 94-95 of the record where he stated thus:

"what is more, the accused person who testified as DW1 and the only defence witness did not tell the police in both his statement admitted as Exhibit 1 and his oral testimony the name of the church he went to in Lagos to attend a programme. This is important because there are several or uncountable denominations all over Nigeria and the none disclosure of the church he went to in Lagos to attend a programme means the accused was never elsewhere as claimed by him. It is also instructive to note that the accused person failed or refused to tender in evidence the materials and/or programme of the events he attended in Lagos. He also failed to disclose the date he returned from Lagos. Furthermore he failed to disclose the date his manager called him when he was in Lagos that his tanker had been impounded by the Nigeria Army.

Both the names of his manager and the driver of the tanker were not disclosed by the accused (DW1).....The accused did not tell the police the names of those who were with him in Lagos and of course the name of leader of the church he attended in Lagos."

In the circumstances therefore, the defence of alibi does not avail the Appellant as it was destroyed, did not even exist and was also not made out by the Appellant and thus the trial Court was right to have rejected the afterthought defence of alibi as raised by the Appellant. In law an appellate Court has no business interfering with the correct finding of the Court below, and this would still be so even if the Court below had been wrong in its reasoning once its decision was right, this Court will never interfere. See **ALHAJI NDAYOKO & ORS V. ALHAJI DANTORO & ORS (2004) 13 NWLR (PT. 889) 187 AT PAGE 198; ABAYE V. OFILI (1986) 1 NWLR (PT. 15) 134.**

Learned Counsel for the Appellant had argued that the Appellant was charged in count 1 for conspiracy with other persons to commit a certain offence while in count 2 he is charged of having committed a different offence with the said other persons. This is a fresh issue raised for the first time on appeal since they were never canvassed and argued at the trial Court, I will discountenance this issue since the learned trial Judge was not given opportunity to rule on it and the leave of this Court was not sought and obtain to argue this fresh issue.

In the light of the above issue two is also resolved against the Appellant.

This appeal is hereby dismissed. The Judgment of the lower Court Coram E.A.Obile J delivered on the 26th day of September 2018 in Charge No FHC/WR/36C/2015 is HEREBY AFFIRMED.

MUSLIM S. HASSAN

JUSTICE, COURT OF APPEAL.

APPERANCES:

A. M. Oriakhi with D. O. Ejemhreare for Appellant

E. Onoriode for Respondent

CERTIFIED TRUE COPY
SIGN: .....
SHERIFAT ADEBAYO ESQ.
PRINCIPAL REGISTRAR 1
DATE: 16.02.2023

APPEAL NO: CA/AS/49^{C}/2019

(JOSEPH EYO EKANEM, JCA)

I read before now the lead judgment of my learned Brother, M. S. HASSAN, JCA, which has just been delivered. I agree that the appeal lacks merit and I also dismiss the same.

JOSEPH EYO EKANEM
JUSTICE, COURT OF APPEAL

CERTIFIED TRUE COPY
SIGN: .....
SHERIFAT ADEBAYO ESQ.
PRINCIPAL REGISTRAR 1
DATE: 10/02/2023

ABIMBOLA OSARUGUE OBASEKI – ADEJUMO, JCA

I have had the advantage of reading in draft the judgment delivered by my learned brother **MUSLIM SULE HASSAN, JCA** and I have no hesitation in agreeing with the reasoning and conclusion arrived at by my learned brother, that this appeal lacks merit and is hereby dismissed. The Judgment of the trial Court is hereby affirmed.

ABIMBOLA OSARUGUE OBASEKI-ADEJUMO
JUSTICE, COURT OF APPEAL