IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA

THIS TUESDAY THE 30th DAY OF JUNE, 2015.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI -- JUDGE

CHARGE NO: CR/51/14

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA.....COMPLAINANT

AND

1. ABDULLAHI SHEHU
2. ABDULRAUF SALIHU } **.....ACCUSED PERSONS**

JUDGMENT

The accused persons were charged on a two count charge of criminal conspiracy and theft contrary to **Sections 96 and 286(1) of the Penal Code Law** and punishable under **Sections 97 and 287 also of the same Penal Code Law**. The accused persons pleaded not guilty to the two count charge and the case proceeded to trial.

In proof of the case, the prosecution called 4 witnesses. PW1 is Kabiru Muhammad. His evidence is that he works with Nigeria Security and Civil Defence Corps (NSCDC), F.C.T Command, Gudu District, Apo and serving with the National Integrated Power Project (N.I.P.P) Gwagwalada, Abuja. That while on patrol on the 17th February, 2014 along NIPP Tower Lines, by Chelston U-turn, Gwagwalada at about 3.30PM, the two accused persons were arrested with a bag and a wheel barrow containing nuts, washers, bolts and angle iron bars. The seized items and the accused persons were then taken to their FCT Command for further investigation.

Under cross-examination by learned counsel to the Accused Persons, PW1 said he knows the Accused Persons as he arrested them with NIPP

property. That they were arrested along the tower line inside the bush and that cars don't pass there. He stated that the nuts and washers are big and that they belong to NIPP.

PW2 is Ayodele Kehinde Steven, he works with NSCDC, Gwagwalada Division. He stated that on the 17th February, 2014, the two accused persons were brought for further investigation by their men who were on patrol on the day in question around the NIPP power project that comes from Dukpa Power Station and the Tower line that extends to Kubwa at the Chelston U-turn, Gwagwalada. He stated further that their patrol team saw the accused persons pulling out of the bush towards the road and in their possession, they found tower members comprising nuts, washers, bars e.t.c. That the area is not open to all users except people who farm. PW2 stated that the case was assigned to him and he took samples of the recovered properties from Accused Persons and went to NIPP office at Dukpa. That they confirmed that the power project along the Chelston U-turn between tower 021 to 024 has suffered lots of damages. That they also confirmed that the samples he took recovered from the Accused Persons belongs to them. They wrote a letter confirming this position.

He stated also that on returning to the office, he cautioned the accused person but they told him that they cannot write in English and they consented that he should write for them. PW2 stated that the accused narrated to him how they went to pluck cashew nuts and saw a lot of iron materials kept and they agreed to bring a wheel-barrow to pack the materials and that as they were wheeling the items out, the NSDC patrol men arrested them since they could not give reasonable explanation how they got the materials. They also stated that, that day was the first time they saw and picked the materials; they also mentioned the names of Amos and Hamisu as who they intended to take the materials to. PW2 stated that the places of business and abode of Amos and Hamisu were searched. When the Accused Persons were confronted with Amos and Hamisu, they now said that they are only into the business of picking cans which they sell to Amos and Hamisu and that they don't sell the materials under investigation to them.

At the conclusion of investigations, they realised that Amos and Hamisu are not connected with the materials recovered from the accused; they were released.

The following items recovered from Accused Persons were tendered through PW2 as follows:

1. The 7 pieces of Galvanized iron bars were admitted as **Exhibits P1-7.**

2. 45 pieces of bolts were admitted as **Exhibit P2.**

3. 147 pieces of nuts were admitted as **Exhibit P3.**

4. 147 pieces of washers were admitted as **Exhibit P4.**

5. 22 pieces of studs were admitted as **Exhibit P5.**

6. 3 alminium plates were admitted as **Exhibits P6(1-3).**

7. The wheel barrow trolley was admitted as **Exhibit P7.**

8. The statement of the 1st accused dated 17th February, 2014 was admitted as **Exhibit P8.**

Under cross-examination by the learned counsel to the Accused Persons, PW2 said he knew the Accused Persons when they were brought to their office for investigation. That he was not aware of their been beating before they were brought to him but that he knew that they tried to escape and minimal force was used to restrain them. That they carried out investigation by inviting the owners of the items and they confirmed the items belong to them. PW2 stated further that he wasn't aware of any incident of the accused persons climbing the poles so that their pictures were taken. PW2 stated that people obviously farm at the area where Accused Persons were arrested. That bolts and nuts traverse the cable that passes through the area so that if you don't have a sinister motive, you won't be seen with the nuts and bars in that area. PW2 stated that after their arrest, they conducted further investigations and invited the two people mentioned by Accused Persons for questioning who admitted knowing them and buying cans and scraps from them.

PW2 stated that they have never had the Accused Persons on their list of offenders as they (the accused persons) are first offenders. That there is tower material written on the plates; PW2 stated also that the tower as they stand are numbered with plates, the first tower by the right when

entering Gwagwalada are numbered and the plates are attached to it and that if a tower is vandalized, the plate goes with it.

PW2 confirmed that the galvanized iron bars belong exclusively to government as they paid and imported them into the country and if found in the market, it must have been vandalized. That no other person is allowed to import those type of iron bars. That the bolts and nuts clearly fit into the holes of the iron bars. That if any other nuts and bolts fits into the iron bar, then it also is vandalized property.

PW3 is Abubakar H. Aliyu. His evidence is that he is a civil servant and the chief security officer with N.I.P.P. He stated that he was in the office when one Mr. Ayodele Kehinde with 2 officials of N.S.C.D.C came with tower materials for identification and as he saw them, he knew they were removed from transmission line project because they have been experiencing vandalization of their lines. He stated also that when he saw the materials, he asked to be taken to where the materials were recovered between Gwagwalada and Kwakwaba and showed them where each and every tower member was removed because any time it is removed, they have to immediately replace it to avoid collapse of the line. PW3 stated that he asked that the items be handed to him but was told that the items shall be used in court as exhibits. He stated further that on the 20th February, 2014 he brought to the commandant of N.S.C.D.C a letter confirming the vandalized items belongs to N.I.P.P

The following was tendered in evidence through PW3 as follows:

1. The letter dated 20th February, 2014 was admitted as **Exhibit P9.**

Under cross-examination, PW 3 stated that he knew the Accused Persons when he was invited on the 19th February, 2014 to come and see the vandalized items. PW3 stated that he wouldn't know if the accused persons were caught removing the tower members but he knows that they were caught under their lines with the vandalized items.

PW4 is Bala Tanimu, his evidence is that he is an interrogator and interpreter in the Intelligence Department of N.S.C.D.C. F.C.T Command, Abuja. He has been an interpreter for about 7 years. He stated that on the 17th February, 2014, the Accused Persons were brought from Gwagwalada out-post of N.S.C.D.C for investigation and in the process they discovered

that Abdulraufu (2nd Accused) cannot speak or write in English. PW4 stated also that after administering word of caution to the 2nd Accused, he (2nd Accused) authorised PW4 to take down his statement from Hausa to English. PW4 stated further that thereafter, he read the statement to him in Hausa language, PW4 stated that the 2nd Accused agreed it was his statement and he signed it while PW4 counter-signed it too.

The following document was tendered through PW4 thus:

1. The interpreted statement of Abdulraufu Shehu (the 2nd Accused) dated 17th February, 2014 was admitted as **Exhibit P9.**

Under cross-examination, PW4 stated that he did not investigate the matter but only took the statement of the 2nd Accused Person because he (the 2nd Accused) does not understand English while the 1st Accused understands English. He therefore interpreted his statement from Hausa to English.

With the testimony of PW4, the prosecution formally closed its case.

In defence of the action, the two Accused Persons testified in person and called one additional witness. DW1, Abdullahi Shedu is the 1st Accused Person. His evidence is that he is in the business of scavenging (i.e collection of used cans). He stated that he knows why he is in court, that he went to the bush together with his friend, the 2nd Accused to collect cashew nuts; that as they were going in the bush, they passed some high tension wire and saw irons under it and started picking some of them. That after they gathered the irons, they agreed they should go home and bring a wheel barrow and packed the irons into the wheel barrow. As they were pushing the wheel barrow and they got to a junction, the men of N.S.C.D.C stopped them and asked them where they got the irons. DW1 stated also that they told N.S.C.D.C officers that they did not remove the irons but found them on the ground where it was left after usage. DW1 stated further that they told N.S.C.D.C officials that they do not know that it is an offence to pick and pack the irons and that if they knew it was an offence, they won't have picked the irons.

DW1 testified that the N.S.C.D.C officials beat them; that they were telling lies and took them to their office at Gwagwalada and the following day, they were taken to their Gudu office but on the way, they had to stop at the junction where they were arrested as the accused persons were told that

their “oga” is coming. The “oga” came and asked them whether they were the ones removing their bolts and nuts and they told him that they met the irons lying on the ground as they did not loose any iron. DW1 stated that the “oga” promised to release them if they showed him the point where they picked the items and they took him there and that he confirmed that they were not the ones who removed the nuts and bolts. DW1 stated further that the nuts and bolts were brought out of the vehicle and they were told to climb the pole and when the Accused Persons refused, they started beating them and when they could not bear the beating, they climbed the pole and the N.S.C.D.C people started taking their photographs with a camera. DW1 stated that after they came down from the pole, they were asked again how they came into possession of the items and where they sell the iron bars and who are their masters and that if their masters confirm that they have never brought items of that nature to them, they will be released. DW1 stated further that they told them that their “oga” is one Hamisu. The said Hamisu was asked and he told them that they (the Accused persons) had never brought him any stolen iron bars. That investigations were carried out at the place of business of Hamisu and nothing was found at his place.

He testified further that Mallam Hamisu was handcuffed and the three of them were taking to there Gudu office and the following day, they were made to off-load high tension wires from a hilux vehicle, thereafter they were forced to sit on the ground, while they were being shown to newsmen as vandals vandalizing government properties while Hamisu was introduced as the buyer of the vandalized items. That Hamisu was later released after paying some money. Further that at about 5PM, they were asked to bring sureties to bail them and they called their people but they refused to come on the ground that some came earlier for their bail but were arrested and shown on the television as recipient of stolen items. That they then insisted they should be taken to court, but instead of bringing item to court, they were kept in the N.S.C.D.C cell for 29 days with no food and no water for bathing. DW1 stated that the bush path they found the items is a place everybody goes to. DW1 stated also that during the televising by the newsmen, the tension wires they off-loaded which was not part of the items they were found and arrested with was made part of the items they picked. DW1 stated further that Hamisu is their boss who they normally sell items like cans they scavenged to; he was detained and had to pay N30,000 to the officer of N.S.C.D.C for his bail.

Under cross-examination, DW1 stated that he lives at Ungwan dodo (Dodo Street) at Gwagwalada and was arrested at a junction; he does not know the name of the junction is Chelston U-turn. He also stated that he does not know that from Ungwan Dodo to Chelston U-turn will take 5minutes by car since he does not have one. DW1 stated further that they sell their scrap at A.Y.A, Gwagwalada, the place is called "ENBOLA" near a filling station, and close to the junction where they were arrested and that there is also a bridge in between.

DW1 stated that the day he was caught was the first day he went to that bush path and stated that a person has a right to go to wherever he wants to go. DW1 stated that he is not aware that the bush path is a restricted area with the high tension wire; that people go there a lot, so it is not a restricted area. DW1 stated further that he was not there when Mallam Hamisu gave the money to the N.S.C.D.C official but that he told him. That they live in the same house with 2nd Accused.

DW2 is Abdulrauf Salihu. His evidence is that he lives at Gwagwalada; he stated he is in court in respect of their arrest by N.S.C.D.C who brought them to court. He stated that on the day in question, they went to the bush to get cashew nuts. As they were walking, they saw some nuts which they did not count the number under the pole wire; they picked the nuts and they also saw long irons numbering about seven. That he informed the 1st Accused that it is better to go and bring a wheel barrow and they then loaded the items into it. As they got to the junction at Gwagwalada to Zuba Road, the N.S.C.D.C officials stopped them and asked them where they got the items and they replied that they did not remove the items. The N.S.C.D.C officials said it is a lie and started beating them; they were then handcuffed and taken to their office at Gwagwalada were they slept the night and his statement was taken. The following morning they were taken to Gudu. He stated further that on their way to Gudu, they stopped at the same junction where they were arrested. The N.S.C.D.C officials called their "oga" who came and started abusing them that they are the ones loosening these nuts; that he asked them how they got the nuts and they explained just as earlier stated. That he then requested them to take him to the point where they picked the items. The "oga" asked them to carry each iron and climb the pole wire and when they refused, they beat them and when the beating became too much, they were forced to climb the pole and they were then video-taped and their photographs taken.

DW2 further testified that they were asked as to who could testify to their innocence and they mentioned Mallam Hamisu who has a boss by name Amos. The N.S.C.D.C officials brought the two of them to the junction. Hamisu was asked if he knows them (the accused persons) he answered in the affirmative and stated further that the accused used to scavenge from dumping site and sell to him. In respect of the stolen items, Hamisu said that the accused persons have never participated in removing nuts or engaging in any illegality or fighting. He stated further that after investigating Hamisu and Amos, they were ordered to be handcuffed and taken to Gudu office of N.S.C.D.C.

At the Gudu office, they were made to off-load a vehicle containing cables and while off-loading, they were been video-taped and photographed. Thereafter they were detained and the following morning newsmen came and they were introduced as vandals while Hamisu and Amos were introduced as receivers or buyers of the vandalized items. He stated that Amos and Hamisu were given bail and later on they too were given bail but nobody could come forward to bail them because of the way they were treated and shown on television as criminals. He stated further that they spent about 29 days in detention without being fed nor allowed to take their bath.

Under cross-examination, DW2 said he knows the 1st Accused as they live in the same house. He confirmed that they picked the iron and nuts. He stated that they actually went home to get a trolley to pack the items thinking the items are useless. That they used a trolley because they will suffer if they put the items on their head. He stated also that they planned to sell the items to buy food to eat.

DW3 is Hamisu Kabiru. His evidence is that he lives in Gwagwalada. He buys and sells iron at A.Y.A, Gwagwalada. He knows the accused persons; he used to give them money and they do business together buying scraps. He stated that certain items were found with the accused persons and since he does business with the accused persons, he was taken along with the accused persons to Gudu Market office of the N.S.C.D.C. That he and the accused persons were chained. He stated also that they were not informed the reason for being chained. They were locked up and the following day, they were called up and asked whether they had anybody to bail them.

DW3 testified that he does not know why they were arrested but he was shown irons and bolts which was obtained from accused persons. Their pictures was taken with the items and they were then asked to sit on the ground. Thereafter, he was asked to bring money for his release and as he had no money on him, he had to call his business associates who arranged and paid the officer, one James the sum of ₦30,000.00 and was asked to go.

Under cross-examination, DW3 stated that he does not sell galvanized irons and Nepa power parts and that he was arrested because of the Accused Persons. DW3 stated also that one James collected N30,000 as bail sum and that he knows nothing about the theft.

With the evidence of DW3, the defence/accused persons closed their case.

Pursuant to the order of court, the parties exchanged written addresses.

The written address of the accused persons was settled by Esther Udoh dated 31st March, 2015. In the said address, 3 issues were formulated for determination as follows:

1. **Whether from the facts and circumstances of this case, the prosecution has made out a case of criminal conspiracy and theft against the accused persons?**

2. **Has prosecution prove beyond reasonable doubt the offence of theft was committed?**

3. **Has the element of those offences been proven?**

The written address of the prosecution was settled by Evelyn Okougbo Iyanya dated 7th April, 2015 and filed in the Court's Registry on the 9th April, 2015. In the said address, one issue was raised as rising for determination as follows:

1. **Whether the prosecution has discharged the onus of proof placed on it by law.**

I have carefully considered the charge in this matter, the evidence adduced by parties and the written addresses filed by the learned counsel

herein to which I may refer to in the course of this judgment where necessary. It seems to me that the single issue for determination in this matter and which requires the most circumspect of consideration is whether the prosecution has proved the charge against the accused persons beyond reasonable doubt to warrant a conviction for the offences charged.
Now, it is not a matter for dispute that the charge accused persons are facing involves the alleged commission of crimes. Under our criminal justice system and here all parties are in agreement, that the burden or onus is clearly on the prosecution to prove the guilt of the accused persons beyond reasonable doubt. See **Section 135(1) of the Evidence Act.** The position of the law, as provided for by **Section 135(2) and (3) of the Evidence Act,** needs restatement, that the burden of proving that any person has been guilty of a crime or wrongful act is, subject to **Section 139 of the Act,** on the person who asserts it; and that if the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the Accused person(s).

In shedding more light on the statutory responsibility and expectation of the prosecution to prove its case beyond reasonable doubt, the Supreme Court held in **Mufutau Bakare V. The state (1987)3 SC 1 at 32,** per Oputa, JSC (now late) as follows:

"Proof beyond reasonable doubt stems out of a compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt, not beyond the shadow of any doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure including the ministration of criminal justice."
See also **Lortim V. State (1997)2 N.W.L.R (pt.490)711 at 732; Okere V. The State (2001)2 N.W.L.R (pt.697)397 at 415 to 416; Emenegor V. State (2009)31 W.R.N 73; Nwaturuocha V. The State (2011)6 N.W.L.R (pt.1242)170.**

It is also well settled that in a criminal trial, the prosecution could discharge the burden placed on it by the provisions of **Section 135(2) and (3) of the Evidence Act,** to prove the ingredients of an offence, and invariably the guilt of an Accused Person beyond reasonable doubt, in any of the following well established and recognized manners, namely:

1. By the confessional statement of the accused which passes the requirement of the law; or

2. By direct evidence of eye witnesses who saw or witnessed the commission of the crime or offence; or

3. By circumstantial evidence which links the Accused Person and no other person to or with the commission of the crime or offence charged.

See **Lori V. State (1980)8 8-11 SC 18; Emeka V. State (2011)14 N.W.L.R (pt.734)668; Igabele V. State (2006)6 N.W.L.R (pt.975)100.**
Being therefore mindful of the well settled principles as espoused in the authorities cited in the foregoing, I shall proceed to examine the instant charge in the light of the evidence adduced by both the prosecution and the Accused Persons, in order to determine whether or not the prosecution has established the charges against the Accused Persons beyond reasonable doubt.

I consider it apposite here for purposes of clarity and ease of understanding to restate the two counts charge against the Accused Persons thus:

"**1. That you, Abdullahi Shehu M'35 and Abdulrauf Salihu M'25 all of 2nd borehole Angwandodo Gwagwalada, Abuja, on or about the 17th day of February, 2014, at Tower line Chelston U-turn, Gwagwalada, F.C.T Abuja within the jurisdiction of the High Court Abuja conspired to moved iron bars, bolts, nuts, studs, washers, plugs being property of Niger Delta Power Holding Company (NDPHC) thereby committed an offence of conspiracy contrary to Section 96 and punishable under Section 97 of the Penal Code Cap 89 Laws of Northern Nigeria 1963.**

2. That you, Abdullahi Shedu M'35 and Abdulrauf Salihu M' 25 all of 2nd borehole Agwandodo Gwagwalada, Abuja, on or about the 17th day of February 2014, at Tower line Chelston U-turn, Gwagwalada, F.C.T Abuja within the jurisdiction of the High Court Abuja conspired to moved iron bars, bolts, nuts, studs, washers, plugs being property of Niger Delta Power Holding Company (NDPHC) thereby committed an offence of theft contrary to Section 286(1) and punishable under Section 287 of the Penal Code Cap 89 Laws of Northern Nigeria 1963.

I now proceed to determine Count one charging the Accused Persons with the offence of conspiracy.

Now what does criminal conspiracy mean within the purview of the penal code law. We must necessarily take our bearing from the law itself. The provision of **Section 96(1) of the Penal Code Act** defines criminal conspiracy as follows:

"96(1): when two or more persons agree to do or cause to be done:-

(a) An illegal act; or

(b) An action which is not illegal by illegal means, such as agreement is called criminal conspiracy."

The above statutory provision appears to me clear in its import. In the present case, it is not in dispute that the alleged act of theft which count 2 of the charge covers is an illegal act within the contemplation of the penal code law. We are however not concerned with that count now. It is settled principle of law and now of general application that conspiracy to commit an offence is a separate and distinct offence from the offence of the actual commission of the offence to which the conspiracy relates. Each is independent and must therefore be established. See **Atano V. A.G.Bendel State (supra)201** at 232. What the court is concerned with here which is apparent on the face of the above provision is whether there was an "agreement" amongst two or more of the accused persons to commit an offence which is what criminal conspiracy entails. The Court of Appeal succinctly defined conspiracy in **Gabriel Okeke & Anor V. the State (1999)2 N.W.L.R (pt.590)246 at 265-266** to mean the meeting of two or more minds to carry out an unlawful purpose or to carry a lawful purpose in an unlawful way. In effect, the purpose of the meeting of the two or more minds is to commit an offence. See also **Ishola V. The State (1972)10 S.C 63; Upahar V. State (2003)6 N.W.L.R (pt.816)230 at 262; Ikemson V. State (1989)3 N.W.L.R (pt.110)455 at 477.** On the authorities, the following are the salient ingredients that constitutes the offence of criminal conspiracy thus:

1. **That there must be an agreement of two or more persons to do an unlawful or a lawful act by unlawful means;**

2. **That the actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed;**
3. **That the external or overt act of the crime of conspiracy is the concert by which mutual consent to a common purpose is exchanged; and**
4. **That the agreement is an advancement of an intention conceived secretly in the mind of each person. The overt act is the proof of the intention, mutual consultation and agreement.**

See Obiakor V. State (2002)1 NWLR (pt.776)612; Gbadamosi V. State (1991)6 N.W.L.R (pt.196)182; Kaza V. The State (2008)7 NWLR (pt.1085)125; Njovens V. The State (1973)NSCC 257.

It is trite law that in a charge of conspiracy, direct positive evidence of the plot or design or agreement between the co-conspirators is hardly capable of proof. However, the courts have always wisely approached the issue of conspiracy by way of making inferences deducible from the criminal acts or inactions of the parties concerned. The offence of conspiracy therefore, more often than not, is established by circumstantial evidence which is evidence not of the fact in issue but of other facts from which the fact in issue can be inferred.

In succinct terms, the offence of conspiracy is rarely or seldom proved by direct evidence but circumstantial evidence and inferences drawn from certain proved acts or through inferences drawn from surrounding circumstances. See **Obiakor V. State (2002)36 WRN1; State V. Osoba (2004)21 WRN 131; Erim V. State (1994)5 NWLR (pt.340)522 at 534.**

In determining the offence charged in this count, I have carefully related the ingredients or elements to the evidence on record. I had also at the beginning of this Judgment given a deliberately comprehensive restatement of the evidence on both sides as it clearly provides the necessary factual and legal template in resolving the contending issues presented by the case.

Now on the evidence, it is not a matter really in dispute that the two Accused Persons were caught with and or where found in possession of the materials subject of this charge on the 17th February, 2014 along National Integrated Power Project (hereinafter referred to as NIPP) Tower Lines at Gwagwalada. The evidence of PW1 on this point who was part of

the patrol team that effected their arrest is unequivocal and positive. The two Accused Persons both in their oral testimonies before the court and even their extra-judicial statements never at any time denied or joined issues with the fact that they were caught in possession of these items. It is also not a matter in any serious dispute an the evidence that the recovered items, comprising **Exhibits P1-P7 (galvanized iron bars), Exhibit P2 (45 pieces of bolts), Exhibit P3 (147 pieces of nuts), Exhibit P4 (193 pieces of washers), Exhibit P5 (20 pieces of Studs), Exhibit P6 1-3 (aluminum plates)** belong to the Niger Delta Power Holding Company (NDPHC) the owner of the National Integrated Power Projects (NIPP). PW2, who led the investigations confirms that samples of these items were taken to the NIPP office at Dukpa F.C.T which confirmed that the items belong to them and that the items were vandalized at the power project along the Chelston U-turn in Gwagwalada Area Council F.C.T. PW3, the chief security officer of NDPHC corroborated the evidence of PW2 in all material particulars with respect to ownership of the items and that they were removed from their lines. I take liberty to produce a portion of **Exhibit P9** tendered by this witness from their office confirming that they own the items seized from Accused Persons as follows:

" Please refer to the parading of the vandals who were caught in possession of galvanized metals, bolts and nuts to the electronic and print media on 19th February, 2014, at F.C.T Command.

I write to confirm that these items mentioned above belong to the Niger Delta Power Holding Company (NDPHC) Ltd, the owner of the National Integrated Power Projects (NIPP). These items were vandalized from towers 012-025 along Gwaku Road in Gwagwalada Local Government Area of F.C.T. It may interest you to note that these towers (021-025) have suffered several incidents of vandalization in the past ranging from cutting and carting away aluminum high tension cables to loosening and carting away tower members, bolts and nuts..."

As stated earlier, the evidence of the prosecution on the above points was not in any manner significantly challenged. Indeed the evidence of the Accused Persons serves to only buttress the narrative of the prosecution. The evidence of the two Accused Persons is similar in content, tenor and character. The substance of which is that they live together at Gwagwalada and engage in the business of scavenging, to wit, the

business of collecting used cans and disused materials. That on the day in question, they left their abode and went to the bush to get cashew nuts. That on their way, they passed some high tension wires and saw the materials or items under it on the ground and started picking same. After they had gathered the items, they realised that it would be difficult to manually move the items, the 2nd Accused suggested and 1st Accused agreed that it is better he gets a wheel barrow, tendered as **Exhibit P7** to evacuate the items; the 2nd Accused then proceeded to get the wheel barrow which they used to evacuate the items and as they were leaving the bush, they were arrested. They agreed under cross-examination, that they wanted to sell the items for money. The extra judicial statement, **Exhibits P8 and P10** of the Accused Persons is clearly of the same effect as their oral testimonies.

From the above, I am in no doubt that the evidence has without any doubt established a meeting of the minds of the two Accused Persons to commit an offence, to wit; carry or cart away the items or materials which clearly belongs to the Niger Delta Power Holding Company, the owner of the NIPP project without their consent or authority.

As stated earlier, the offence of conspiracy is rarely or seldom proved by direct evidence but from inferences drawn from surrounding circumstances. In this case, it is not in dispute that the Accused Persons found the items which they found lying beneath the high tension power transmission tower. They claim that they only went out to pick cashew nuts but they certainly did not put or place the items there. The items also obviously does not belong to them. Rather than mind their business and go ahead with their stated goal of looking for cashew nuts, they changed their minds and agreed to start picking the items and having realised the obvious difficulty in manually transporting the evacuated items and also perhaps because of the size and number, they agreed to get a wheel barrow to do the job.

The actions of the two Accused Persons here as described above is inculpatory. There is without doubt here an evinced intention and an exchange of mutual consent to achieve a common unlawful purpose.

On the facts and or evidence, the court has been placed in a commanding position to make a clear inference of a plan or concerted calculation by Accused Persons to cart away properties not belonging to them to sell and

I accordingly hold that there is a clear case of conspiracy on the part of Accused Persons, for which they must be held liable.

I note that in the final address of learned counsel to the Accused Persons, it was contended that the offence of conspiracy was not proven relying on the following:

1. That the Accused Persons were not caught at the crime scene and that they claim they found and believed the items to be discarded.

2. That the prosecution prejudiced their case by showing the Accused Persons on television with the wrong items.

3. That the prosecution denied the existence of DW3, who the 1st Accused Persons claim, is a vital witness and that they also failed to declare his bail bond and his statement.

I have carefully evaluated these submissions and I really cannot fit same or locate how it affects the case made by prosecution on conspiracy within the template of the ingredients earlier listed to establish or prove conspiracy. The offence of conspiracy as earlier stated is essentially a function of agreement to cause to be done an illegal act or an act which is not illegal by illegal means. Because of the difficulty in getting direct evidence of conspiracy, inferences of same are drawn from surrounding or collateral circumstances.

In this case, the Accused Persons may not indeed have been caught at the crime scene or seen removing the items from the high tension poles, but the fact is that they admitted they agreed to evacuate the materials where they allegedly found them in the bush to go and sell. The items at the risk of sounding prolix, does not belong to them and they did not put it there. Crucially there is no evidence by the Accused Persons as to who removed and or left the items where they allegedly found them. DW3 their business mentor or master who they claim they work with stated unequivocally in evidence that he does not deal in or sell the items the Accused Persons were caught with. It is from these and other facts that the necessary inferences and conclusions were drawn. I don't see how the fact that they were not caught at the scene of crime or that they don't know of the unlawfulness of what they did, distorts or detracts in any manner from the inferences drawn.

The gist of the offence of conspiracy lies in the bare engagement and association to do an unlawful thing which is contrary to or forbidden by law. It is immaterial whether the Accused Persons had knowledge of its unlawfulness. The key point is a criminal purpose common to all the conspirators. See **Kenneth Clark & Anor. V. The State (1986)4 N.W.L.R (pt.35)381 at 395.**

Conspiracy in law is therefore complete the moment they agreed to do certain things whether immediately or at some future time. The design in this case rested not only in the intention but they put their intentions into action.

The same reasoning equally applies to the second and third points made by learned counsel to the Accused Persons as stated above. The fact of showing the Accused Persons on television with vandalized items are all matters post or made after the arrest of the Accused Persons. This action complained of occurred much, much later and after the arrest. It is a variable that has no place when the meeting of the minds occured earlier on and which the court is concerned with for now. The narrow question here is whether the alleged television coverage which occurred later impacted in any way on the initial agreement to do an illegal act? the answer certainly is in the negative.

Contrary to the submission of learned counsel to the Accused Persons which with respect appear misconceived, whether DW3 was called by the prosecution or not and or whether his bail bond was tendered or not has no relevance to the question of conspiracy. In any event, the Accused Persons called DW3 who gave evidence on their behalf. His evidence which I had earlier alluded to was in no way helpful to the case of the Accused Persons. At the risk of sounding prolix, his evidence is that he does not sell or deal in the items Accused Persons were caught with. It is clear that he may be their master or mentor but clearly his mentoring did not include taking the materials of the type subject of this charge.

There is no law and I have not been referred to any compelling the prosecution to call each and every person as a witness or requiring that the bail bond of any person be supplied in proof of either conspiracy or theft. How the prosecution conducts its case is a matter entirely within their prerogative. All that is required is for the prosecution to produce material

witnesses and evidence necessary to prove the elements of the offences they charged the Accused Person(s) with within the threshold as provided by the law. The quality of the evidence is what the court is concerned with and no more. See **Onofowokan V. State (1987)7 S.C.N.J 233 at 249.**

In totality, with respect to count 1 of the instant charge, I am abundantly satisfied that the prosecution has proved the offence of criminal conspiracy against the Accused Persons beyond reasonable doubt. Accordingly, I hereby find the two Accused Persons guilty on count one of the charge.

With respect to the offence of theft, **Section 286(1) of the Penal Code Law** provides as follows:

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to take it is said to commit theft."

From the above, the vital elements that the prosecution must prove in order to succeed in a charge of theft are:

1. Absence of consent of the owner of the movable property.
2. Movement of the said property.
3. Intention to take the movable property.

The above in a conventional definition of crime can be located in the maxim, ***"Actus non facit reum nisi mens sit rea."*** A person will be responsible for the results of his act(s); a crime in law consists of two elements (1) the *mens rea* and (2) the *Actus reus*.

The *mens rea* being the intention to deprive the owners of the goods while the movement of the goods constitutes the *Actus Reus*. See **Idris Mohammed & Anor. V. the State (2000)1 CLRN 66 at 76-77.** Also apposite here is the definition of **"dishonestly"** provided for by the penal code under **Section 16** as follows:

"A person is said to do a thing "dishonestly" who does that thing with the intention of causing a wrongful gain to himself or another or of causing loss to any other person."

Now relating the above ingredients to the evidence led on record, it is not in dispute that the movable properties or items as comprised in **Exhibits P1-7, P2, P3, P4, P5, P6(1-3),** all belong to the Niger Delta Power Holding Company Ltd (NDPHC) the owner of the Integrated Power Projects (NIPP). The unchallenged evidence of PW2, who investigated the incident and which I had earlier referred to in the course of this judgment attests to this fact especially the verification of the items done at NIPP office at Dukpa, F.C.T. PW3, the chief security officer with NDPHC similarly corroborates this position of ownership of this items and in addition produced **Exhibit P9** which I had earlier referred to in this judgment which is a document from the office of the NDPHC confirming that the items were indeed vandalized from their towers 021-025 along Gwaku Road in Gwagwalada Area Council of the F.C.T. It was around this area on the evidence that the Accused Persons were arrested with the items. This oral and documentary evidence from the prosecution was not in any way challenged and in law the representations made both orally and documentary are deemed to be admitted.

On the evidence, it is equally common ground that both the 1st and 2nd Accused Persons moved the said items without the consent of the NDPHC. Both their own oral evidence and extra judicial statements **Exhibits P8 and P10** are clear to that effect. Indeed **Exhibits P8 and P10** by their very nature constitutes confessional statements which were not in any way challenged at the point of reception. It is settled law that a free and voluntary confession of guilt made by an Accused Person as in this case, if direct and positive, is sufficient to warrant his conviction without any corroborative evidence as long as the court is satisfied of the truth of the confession. See **Yesufu V. State (1976)6 SC 167 at 173; Idowu V. State (2000)7 sc (pt.111)50 at 62-63.**

Even outside of **Exhibits P8 and P10,** the oral narrative of Accused Persons remained consistent with the contents of **Exhibits P8 and P10** to the effect that on their way to pick cashew nuts, they found these items on the ground and starting picking them. Because of the size and quantity of the items, they decided to go and get a wheel barrow tendered as **Exhibit P7** to evacuate the items. They did evacuate the items and on their way out of the bush, they were caught.

Again on the evidence, their case is that they were scavengers and only found the items. That they did not remove the items from the tower(s) or

put the items where they allegedly found same. For me, from the evidence of the Accused Persons, there is a recognition and or acceptance even if tacit that the items clearly do not belong to them and that the items are valuable but they all the same moved same from its location to go and sell to make money. As stated earlier too, their master, Mallam Hamisu DW3, stated clearly that he does not deal with the items the Accused Persons were caught with.

I do not accept the argument canvassed by learned counsel to the Accused Persons that the items found in their possession earlier enumerated were some random pickings in the bush. By the share volume and sizes of the items, comprising galvanized irons, bolts, nuts, aluminum plates, washers etc, it must be obvious to the Accused Persons who have been in the business of scavenging i.e selling of scraps for some time now that these items certainly do not fall within the class of items or scraps they usually collect at dump sites and at random. There is also no evidence before me that where these items were found is a dump site or a scraps yard. The Accused Persons did not also say in evidence that where they found the items was a route they usually pass through as they go about the business of scraps collection. Their case is simply that they went out to collect cashew nuts which gives some indication or insight that they know very well that the area in question where they found the items is not where they usually scavenge or look for scraps.

In the circumstances, I hold that the Accused Persons ought to know and I believe they know from my observance of their countenance and demeanour that such items do not fall from outer space or grow from the surface of the earth. Their mentor or master, DW3 as stated earlier also stated that he does not sell or deal in such items. Since they did not keep the items there, I hold in addition that they are intelligent and discerning enough to know not to have agreed to go home to get a wheel barrow to evacuate what clearly is not theirs and which cannot by any stretch of the imagination be said to be the usual scraps they pick. There is no doubt that on the evidence that the Accused Persons evinced on intention (*mens rea)* to move the items and they did move same (*Actus Reus)* dishonestly without the consent of the owners of the properties or items. The dishonesty here lies in the clear fact that the Accused Persons conceded or agreed that the items does not belong to them and their plan was to sell off these items with the clear intention of causing wrongful gain to themselves

and causing loss to the NDPHC, the owners of the vandalized power projects.

I have noted in evidence the reason given by the Accused Persons for picking the items was that they did not know it is an offence. The theme was not in any way further addressed or explored by their counsel in any precise manner in the final address. Now it is trite law that a court trying a criminal case as here must consider all the defences raised by the accused and all other defences which surfaced in the evidence before court, however slight or minor. See **Ahmed V. State (1999)5 S.C (pt.11)89, (1999)7 N.W.L.R (pt.612)614 at 679D.**

Having taken the point in this regard, the Accused Persons have in evidence stated that they did not know that picking the items was an offence. They appear to consider this reason exculpating or justifying their actions in the circumstances and therefore that they are not criminally responsible. It is however settled that for an accused to avail himself of this defence, he has to satisfy certain conditions under **Section 45 of the Penal Code** which reads thus:

Nothing is an offence which is done by any person who is justified by law, or who by any reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it.

The conditions for the defence of justification to apply arising from the foregoing provisions are:

1. That the criminal Act is justified by law.
2. That the criminal Act was done as a result of mistake of fact not law.
3. That the Act was done in good faith believing same to be justified by law in doing it.

See **Lado V. State (1999)9 N.W.L.R (pt.619)369 at 381; Akalezi V. the State (1993)2 N.W.L.R (pt.273)1 at 14; Kaza V. State (2008)1-2 SC, 151 at 158.**

On the evidence which I have extensively reviewed, I find this excuse as lacking in substance and credibility. The volume, type and nature of the items taken by them and crucially their relative experience in the business

of scraps collection, the affirmation by their master, DW3 that he does not deal in those items in his business shows clearly that the Accused Persons know that the items were not ordinary scraps they usually pick but very valuable items hence the quick decision to go home and get a wheel barrow to pack same. Rather than make a report to the security agencies or at best leave the items were they allegedly found them they elected to take the items to go and sell? They cannot therefore contend that owing to their ignorance of the law, they did not realise that the taking of these valuable items in respect to which the entire nation has suffered continued losses with the attendant dislocations in the electricity chain or network on the peculiar facts of this matter is a crime. After all, entitlement to the defence is rooted in good faith believing same to be justified by law which is not the case here? Clearly therefore, I incline to the view that ignorance of the law as opposed to ignorance of the facts is not such an exculpating factor within the confines of the provisions of the penal code law which we have evaluated above and also the provisions under which the Accused Persons were charged. See **U.D.U V. Kraus Thompson Orgs Ltd (2001)15 N.W.L.R (pt.736)305.**

The claim of ignorance is accordingly discountenanced. It is only necessary as we get to the end of this judgment to state clearly that in discussing the complicity and liability of the Accused Persons in this matter, the law is settled that where persons have embarked on a joint enterprise, each is liable criminally for the act done in pursuance of the joint enterprise and even unusual consequences arising from the execution of the joint enterprise. See **Buje V. State (1991)4 N.W.L.R (pt.185)287; Kaza V. State (supra).**

In rounding up, it is necessary to state that when the law talks about proof beyond reasonable doubt, it does not mean proof beyond the shadow of any doubt. Therefore proof beyond reasonable doubt need not attain degree of absolute certainty but must attain a high degree of probability excluding any other conceivable hypothesis than the guilt of the accused. It is only where the set of facts elicited in evidence is susceptible to either of guilt or innocence that it can be said that doubt has been created which will then inure to the benefit of the accused. See **Mufutau Bakare V. State (1987)3 SC 1 at 32; Mbanengen shande V. State (2005)12 N.W.L.R (pt.939)301.**

On the basis of the foregoing therefore, I have come to the conclusion that the prosecution has crossed the threshold and proved beyond reasonable doubt all the elements in proof of count two of the charge.

In the final analysis, the judgment of the court is that the prosecution has succeeded in proving the charge laid against the Accused Persons in these proceedings and accordingly, I hereby find and pronounce them guilty as charged.

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Hon. Justice A.I. Kutigi

SENTENCE

I have carefully considered the plea in mitigation by the Accused Persons and ably supported by their counsel. I have also considered the submissions by learned counsel to the Prosecution that the Accused are first offenders and that they have never had any problems with them. Now in considering the submissions, I am obviously guided by the clear provisions of the law which provides the punishment for these offences. The punishments under **Section 97 and 287 of the Penal Code Act** range from imprisonment or fine or both. Whatever discretion that may be exercised by court must be such obviously allowed by law. It is trite law that the sentence of a court must be in accordance with that prescribed by the statute creating the offence. The court cannot therefore impose a higher punishment than that prescribed for the offence neither can a court impose a sentence which the statute creating the offence has not provided for. See **Ekpo V. State (1982)1 NCR 34.**

Now my altitude when it comes to sentencing is basically that it must be a rational exercise with certain specific objectives. It could be for retribution, deterrence, reformation etc in the hope that the type of sanction chosen will put the particular objective chosen however roughly into effect. The sentencing objective to be applied and therefore the type of sentence to give may vary depending on the needs of each particular case.

In discharging this no doubt difficult exercise, the court has to decide first on which of the above principles or objective apply better to the facts of a case and then the quantum of punishment that will accord with it.

In this case, if the objective is deterrence and reformation for the young Accused Persons and I presume they are, then the maximum punishment for the two counts as provided for in the penal code appear to me particularly excessive in the light of the facts of this case.

In the same vein, it is a notorious fact that crimes of this nature now appear to be prevalent in our clime and the courts as preventive tools in the criminal justice system must not be seen to encourage criminal acts of this nature by giving light sentences. I am equally mindful of the fact or the general principles that the essence and aim of punishment is not necessarily to ruin or destroy the offender but to reform and deter others who may have like minds.

With the above providing a background, I have here considered the fact as alluded to by counsel to the prosecution that the Accused Persons are first offenders and that they have never had any problems with them or with the law.

I have also considered the fact that the Accused Persons have now spent over a year in prison since their arrest and more importantly, all the vandalized materials or items necessary and vital for the power project in the F.C.T have been recovered from them.

I have carefully noted the notorious fact that the prison system despite improved efficiently is still faced with enormous challenges not only in terms of structural capacity but also its reformatory capabilities. While all the above have clearly weighed on my mind, the basic underlying and indeed the most important variable for me is that a price or consequence must be paid for inappropriate behaviour.

Having weighed all these factors, I incline to the view that a light sentence is most desirable in the circumstances and would achieve the noble goals of deterrence and possibly reforming the Accused Persons towards a pristine part of moral rectitude.

Accordingly with respect to COUNT 1 of the charge, the provision of **Section 97(2) of the Penal Code Act** under which the two offenders were charged and convicted imposes a term of imprisonment not exceeding six(6) months or with fine or with both.

Accordingly, on COUNT 1, I hereby sentence each of the two convicts to a term of one month imprisonment but with an option of fine in the sum of ₦20,000 only.

On COUNT 2 of the charge, the provision of **Section 287 of the Penal Code** under which the two convicts were charged and convicted imposes a term of imprisonment which may extend to five years or with fine or with both.

Accordingly on COUNT 2, I hereby sentence each of the convicts to a term of 5 months imprisonment but with an option of fine in the sum of ₦50,000 only.

The sentences are to run consecutively.

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Hon. Justice A.I. Kutigi

Appearances:

1. **Evelyn O. Iyanya for the Prosecution.**

2. **Esther Udoh for the Accused Persons.**