

SUPREME COURT OF NIGERIA
26TH SEPTEMBER, 1995. SC. 204/1994
CORAM:- M.L.UWAIS, A.B.WALI, I L. KUTIGI,
U. MOHAMMED, A. I. IGUH, JJSC.

1. OLAWALE AJIBOYE
2. TEMPLECITY PROPERTIES LTD ACCUSED/APPELLANTS
v.
THE STATE RESPONDENT

PROCEDURE - No case submission - Appeal - Issues that Border on weight and credibility of evidence - Whether proper issues for determination.

CRIMINAL PROCEDURE - No case submission - Pronouncing on the guilty of a party - Is not proper at this stage.

CRIMINAL PROCEDURE - No case submission - Made by the appellants - Whether prima facie case has been made out.

FACTS

The first appellant, Olawale Ajiboye, was charged at the Lagos High Court with murder in the first count, and with the second appellant, Temple City Properties Ltd., with two counts of stealing. They both pleaded not guilty to all the charges. At the end of the case for the prosecution, learned senior advocate for the two accused made a no case submission in respect of the charges. The trial judge discharged the first appellant on the charge of murder, while holding that a prima facie case had been made out against the appellants as regards the two counts of stealing.

The appellants went on appeal. The Court of Appeal, Lagos, dismissed the appeal and in a long winded judgment seemingly pronounced on the guilt of the appellants. The appellants have now further appealed to the Supreme Court raising four issues [see p. 1827] which the court reduced to a single issue.

ISSUE FOR DETERMINATION

“Whether the Court of Appeal was right in affirming the decision of the High Court dismissing the no case submission in respect of the two (2) counts of stealing.”

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC**)

No case submission - Issues that border on weight

1. It is clear to me that with the exception of issue (c), all the remaining three issues (a), (b) and (d), border on the credibility of a witness or witnesses and or the assessment of their evidence and or the right to I attached to such evidence. Consequently I must rule that issue (a), (b) and (d) are not proper issues for determination in this appeal now. They are premature. It will be proper therefore for me to decline to answer them. This Court ought not to be stampeded into making decisions or pronouncements on live issues before the lower courts have the opportunity to pronounce on the same issues. (p. 1827 H)

Pronouncing on the guilt of a party

2. I have no difficulty whatsoever in saying that was wrong for the learned Justice of the Court of Appeal to have concluded as he did on pages 254 and 256 respectively that the offences of conversion and stealing have been committed. By these premature ejaculations about the guilt of the appellants the learned Justices of the Court of Appeal have unconsciously disqualified themselves from further participation in the case and for ever too. (p. 1830 E)

Whether prima facie case has been made out

3. I agree with the conclusions of lower courts that on the authorities the prosecution has made out a prima facie case of stealing in respect of counts 2 and 3 against the appellants for them to defend, if necessary. (p.1831 G)

NOTABLE POINTS OF INTEREST

KUTIGI JSC

1. No case submission - What court should not be concerned with

It must be recognized that at the stage of a no case submission, the trial of the case is not yet concluded. At that stage therefore, the court should not concern itself with the credibility of witnesses or the weight of their evidence even if they are accomplices. The court should also at this stage be brief in its ruling as too much might be said which at the end of the case might fetter the court's discretion. The court should again at this stage make no observation on the facts. (p. 1827 F)

2. No case submission - When to be properly made

It is also settled by a chain of authorities that a submission of "no case" to answer may be properly made and upheld in the following circumstances as correctly stated by the lower courts:- 1. When there has been no evidence

to prove an essential element in the alleged offence; 2. When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. (p. 1828 H)

IGUH JSC

3. No case submission - What court should consider

A prima facie case must be distinguished from proof of the guilt of an accused which is determined at the end of the case when the court has to find whether such an accused is guilty or not guilty of the offence charged. What has to be considered in a no case submission is not whether the evidence against the accused is sufficient to justify conviction but whether the prosecution has made out a prima facie case requiring at least some explanation from the accused. The evidence discloses a prima facie case when it is that if uncontradicted and if believed, it will be sufficient to prove the case against the accused. In a no case submission, therefore, whether or not the evidence of the prosecution is believed is, as at that stage of the proceedings, irrelevant and immaterial as the credibility of the witnesses is neither in issue then or does it arise. (p. 1833 D)

REPRESENTATION

Prof. A.B. Kasumu. SAN O. K. Kasumu and Olufemi Blaize with him for Appellants

C.E Uwejei (Miss) A.D.P.P. Lagos State, for the Respondent

CASES REFERRED TO

Chief Bello v. The State (1967) NMLR 1

R. v. Ekanem 13 WACA 108.

R. v. Coker 20 NLR 62

Ibeziako v. Commissioner of Police (1963) 1 All NLR 61 (1963) NNLR 88

Okoro v. The State (1988) 5 NWLR (Pt. 94) 285

Adeyemi v. The State (1991) 6 NWLR (Pt. 195) 1

Ohuka v. The State (No.2) (1988) 4 N.W.L.R. (Part 86) 36

Owonikoko v. The State (1990) 7 N.W.L.R. (Part 162) 381 at 388

Queen v. Ogucha (1959) 4 F.S.C. 64

Ajidadgba v. Inspector-General of Police (1958) 3 F.S.C. 5

STATUTE REFERRED TO

Criminal Code, Cap 31, Law of Lagos State, 1973, ss. 383(2)(f), 390(9), 319(1)

LEAD JUDGMENT BY KUTIGI JSC

The appellants were in the Lagos High Court charged as follows:-

STATEMENT OF OFFENCE -1ST COUNT

Murder contrary to section 319(1) of the Criminal Code Cap. 31 Laws of Lagos State 1973.

B PARTICULARS OF OFFENCE

Olawale Ajiboye (m) on or about the 7th day of June, 1991 at No.5A Maria Street, Anthony Village in the Ikeja Judicial Division murdered one Ebimikifa Toby.

STATEMENT OF OFFENCE - 2ND COUNT

C Stealing contrary to Section 390(9) of the Criminal Code cap. 31 Laws of Lagos State 1973.

PARTICULARS OF OFFENCE

Olawale Ajiboye (m) and Temple City Properties Ltd on the 3rd day of June, 1991 at Ikeja in the Ikeja Judicial Division stole the sum of N3.7 D million (Three Million, Seven Hundred Thousand Naira) property of McRoyal Holdings Ltd.

STATEMENT OF OFFENCE - 3RD COUNT

Stealing, contrary to section 390(9) of the Criminal Code cap. 31 Laws of Lagos State 1973.

E PARTICULARS OF OFFENCE

Olawale Ajiboye (m) and Temple City Properties Ltd. on the 3rd day of June 1991 at Ikeja in Ikeja Judicial Division stole the sum of N2 million (Two million Naira) property of McRoyal Holdings Limited)

The 1st appellant pleaded not guilty to all the three charges while F the 2nd appellant pleaded not guilty to the 2nd and 3rd charges.

At the trial the prosecution called a total of eighteen witnesses and closed its case. It was at the close of the case for the prosecution that Professor Kasunmu, learned Senior Counsel for the appellants, made a “no case” submission pursuant to section 286 of the Criminal Procedure Law G of Lagos State. In a reserved ruling delivered on 8th December, 1992 the learned trial Judge, Silva J., after due consideration of the submissions of counsel discharged the 1st appellant of the charge of murder in count one above. He, however, found that a prima facie case had been made out against the two appellants in respect of counts 2 & 3 related to stealing, H and consequently he ordered them to enter their defence if they so wished.

Aggrieved by the decision of the learned trial Judge the appellants appealed to the Court of Appeal. The court in its judgment of 5th September 1994 unanimously dismissed the appeal and affirmed the ruling and orders of the trial High Court.

Still not satisfied with the judgment of the Court of Appeal the appellants have now appealed to this court.

The parties filed and exchanged briefs of argument which were adopted at the hearing. Professor Kasunmu on page 7 of his brief has submitted the following issues for determination in the appeal-

“(a) Is the testimony of the investigating Police Officer as regards B what he saw or discovered during the course of his investigation admissible on that basis alone, without regard to the provisions of our evidence law governing admissibility?

(b) Is the principle of Vicarious Liability applicable in the realm C of our Criminal Law?

(c) Whether the learned Justices of the Court of Appeal could make pronouncement on the guilt of the appellants in a “No Case” sub- mission ruling?

(d) Whether it is a requirement of section 383(2)(f) of the Criminal Code that before a prima facie case of stealing a sum of money is D established, a demand for return of the money must have been made coupled with a failure to return same”?

The above issues appear daunting especially when it is remembered that the single issue submitted for determination in the Court of Appeal was -

“Whether the lower court was right in dismissing the no case sub- E mission in respect of the two (2) counts of stealing”.

I therefore hasten to think that the real issue before this Court is-

“Whether the Court of Appeal was right in affirming the decision of the High Court dismissing the no case submission in respect of the two F (2) counts of stealing.”

But before I delve into the issues I wish to set out a few guiding principles first. It must be recognised that at the stage of a no case sub- mission, the trial of the case is not yet concluded. At that stage therefore, the court should not concern itself with the credibility of witnesses or the weight G to their evidence even if they are accomplices. The court should also at this stage be brief in its ruling as too much might be said which at the end of the case might fetter the court’s discretion. The court should again at this stage make no observation on the facts. (See for example R v. Ekanem (1950) 13 WACA 108, Chief Odojin Bello v. The State (1967) NMLR 1, R. v. Coker & Ors 20 NLR 62). H

It is in the light of these stated principles that I intend to examine and if necessary consider the issues raised above. It is clear to me that with the exception of issue (c), all the remaining three issues (a), (b) & (d), border on the credibility of a witness or witnesses and or the assessment of their

evidence and or the weight to be attached to such evidence. Let me expa-
 tiate. As for issue (a), the relevant prosecution witness (No. 17) had given
 direct oral evidence about what he saw and did in the course of his inves-
 tigation of the case. I repeat that it was direct oral evidence. The appellants
 now contend that Bank Statements of Account ought to have been ten-
 dered as well. That contention at this stage I feel would probably go to
 weight only, an area reserved for the trial court. Issue (b) did not even arise
 in this case. Nobody has been pronounced vicariously liable with another
 in this case. Clearly the appellants are being tried jointly which is nothing
 new. And in joint criminal trials, usually evidence against each accused is
 considered separately, and separate verdicts pronounced separately as well.
 As for issue (d) it suffices to say that the appellants herein are charged
 under section 390(9) of the Criminal Code for stealing while section 383(2)(f)
 of the Criminal Code which is a “deeming” provision states that -
*“383(2) a person who takes or converts anything capable of being stolen is
 deemed to do so fraudulently if he does so with any of the following intents
 -(f) In the case of money, an intent to use it at the will of the person who
 takes or converts it, although he may intend afterwards to repay the amount
 to the owner.”*

The section creates no offence. The evidence here, if believed,
 was that the money had been used or spent not in accordance with the
 purpose for which it was given or intended and that it was yet to be re-
 turned to its owner. I cannot say more than that at this stage. We have to
 await the final verdict of the trial Judge who may decide to use or not to
 use the provision for or against the appellants. Consequently I must rule
 that issues (a), (b) and (d) are not proper issues for determination in this
 appeal now. They are premature. It will be proper therefore for me to
 decline to answer them. This Court ought not to be stampeded into making
 decisions or pronouncements on live issues before the lower courts have the
 opportunity to pronounce on the same issues.

I will now proceed to consider the single general issue framed by me.
 The appellants’ remaining issue (c) will be answered along with that issue.

Now, in the case of *R v. Coker & Ors* (supra) Hubbard, J. said,
*“The meaning of a submission that there is no case for an ac-
 cused person to answer is that there is no evidence on which, even if the
 court believes it, it could convict. The question whether or not the court
 does believe the evidence does not arise, nor is the credibility for the witness
 in issue at this stage.”*

It is also settled by a chain of authorities that a submission of “no
 case” to answer may be properly made and upheld in the following circum-

stances as correctly stated by the lower courts:-

1. When there has been no evidence to prove an essential element in the alleged offence;

2. When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. B

(See *Ibeziako v. Commissioner of Police* (1963) 1 All NLR 61 (1963) NNLR 88; (1963) 1 SCNLR 99; *Ajidagba & Ors v. I.G.P.* (1958) 3 FSC 5; (1958) SCNLR 60; *Okoro v. The State* (1988) 5 NWLR (Pt. 94) 255; *Adeyemi v. The State* (1991) 6 NWLR (Pt. 195) 1.

What then is a “*prima facie*” case? In the case of *Ajidagba & Ors v. I.G.P.* (supra) Abbot F.J. said on page 6 of the report thus -

“We have been at some pains to find the definition of the term “prima facie case”. The term, so far as we can find has not been defined either in the English or in the Nigerian courts. In an Indian case, however, Sher Singh v. Jitendranathsen (1931) L.R. 59 CAL 275 we find the following dicta:- D

“What is meant by a prima facie (case)? It only means that there is a ground for proceeding.s..... .

But a prima facie case is not the same thing as proof which comes later when the court has to find whether the accused is guilty or not guilty “(per Grose J.) and the evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused (Per Lort- Williams, J.)” E

There is no doubt that the above stated principles must be strictly adhered to in order to arrive at a just decision. F

Dealing with the two-count stealing charges, the learned trial Judge said in his ruling on page 23 of the record thus -

“I have given the prosecution’s evidence on the 2nd and 3rd counts very anxious and careful consideration. The facts unequivocally establish a prima facie case of stealing the sums of money charged in each of the 2nd G and 3rd counts of the charge against both accused persons. The first accused by his own personal acts and by his conduct of the business of the 2nd accused person has obtained money from P.W.1 and P.W.2 for the purchase of two properties which have not up to now been conveyed H McRoyal Holdings Limited and the money has not been returned. To my mind, this state of the evidence has established a prima facie case of stealing money belonging to McRoyal Holdings Limited. The two accused persons ought to offer an explanation in their defence if they have any in view of their plea of not guilty.”

The Court of Appeal also on page 258 (per Kalgo J.C.A) observed thus-
"The ruling of the learned trial Judge on the "no case" submission now appealed against, is very commendable. It is short, succinct and to the point, as it is supposed to be (see Bello v. State (1967) 1 All NLR 233 at 227) "and although some evidence was stated in it, the learned trial Judge only discussed law and made no observations implying that any particular facts were proved or established. This is correct approach in this matter (see Atano v. A.G. Bendel State (supra))."

Having read the record of proceedings carefully, I have myself come to the conclusion that the learned trial Judge properly directed himself and came to a correct decision on the "no case" submission before him. The Court of Appeal was also right in affirming the ruling of the learned trial Judge.

I think this is a convenient place to deal with issue (c) of the appellant. While Kalgo J.C.A was commending the learned trial Judge for being brief, succinct and to the point, he was already himself a victim of the same principle. While the learned trial Judge wrote a ruling of 5 pages the Court of Appeal's lead judgment of Kalgo J.CA. (which was concurred by Sulu-Gambari and Uwaifo, JJ.CA., spanned some 22 pages of foolscap size.

The judgment was, in my view, unnecessarily long and it was in the process that conclusions about the guilt of the appellants who are still being tried were erroneously made. I have no difficulty whatsoever in saying that it was wrong for the learned Justice of the Court of Appeal to have concluded as he did on pages 254 and 256 respectively that the offences of conversion and stealing have been committed.

On page 254 of the record, he said -
"By spending the complainant's money for payments other than those intended by the complainant, the appellants have acted in a manner inconsistent with his right. This therefore amounts to conversion and it is immaterial as in this case, the thing converted is, at the time of conversion in the possession of the person who converts it."

Further down on page 256 he also said -
"....although the original taking was done without any fraudulent intent, and the appellants were authorized to dispose of the money in a certain way which they did not, the appellants converted the money to their own use and to the use of others without the consent of the complainants, and although the conversion was open and not in secret, the offence of stealing is still committed since the necessary intention under section 383(2) (f) is proved"

By these premature ejaculations about the guilt of the appellants the learned Justices of the Court of Appeal have unconsciously disqualified

themselves from further participation in the case and for ever too. Amen. In the case of Bello v. The State (supra) Ademola (C.J.N.) delivering the judgment of the court said on page 3 of the report thus -

"Whilst it is not the aim of this Court to discourage a Judge from discussing matters of interest in his judgment, we would like to warn against ruling of inordinate length in a submission of no case to answer as too much might be said as was done in this case, which at the end of the case might fetter the Judge's discretion..... It is wiser to be brief and make no observations on the facts: See R. v Ekanem (1950) 13WACA 108 at 109."

So it is too with this case.

Fortunately in the appeal before us the Court of Appeal was not the court of trial. If it were, the proper order would have been to transfer the case before another panel of justices for trial de novo because the panel herein had apparently made up its mind in advance about the guilt of the appellants. But even then as I said above it would still be improper and wrong for any of the justices to sit on any future panel after the trial would have been concluded and any of the parties finds it necessary to appeal again to the Court of Appeal in respect of this same matter. Issue (c) therefore succeeds.

In conclusion I must say I agree with the Court of Appeal when it said (per Kalgo, J.C.A.) on page 259 of the record thus -

"I therefore agree with the learned trial Judge in his ruling overruling the No Case submission, that the totality of the evidence of the prosecution adduced before him on the stealing charge against the appellants, has established a prima facie case of stealing the money of the complainant and that, the appellants should be called upon to defend (see Ajidagba v. I.G.P. (1958) 3 FSC 5 at 6 (1958) SCNLR 60)."

As I said I have myself read and studied the record in this case. I say again that I agree with the conclusions of lower courts that on the authorities the prosecution has made out a case of stealing in respect of counts 2 and 3 against the appellants for them to defend, if necessary.

Although issue (3) succeeds it is not sufficient to alter the fate of the No Case submission as originally decreed by the lower courts. Consequently this appeal fails and it is hereby dismissed. The decisions and orders of the lower courts are confirmed. For the avoidance of doubt the case is sent back to the High Court for continuation of trial.

UWAIS J SC

I have had the opportunity of reading in draft the judgment read by my learned brother Kutigi, J.S.C. I agree with him. It was wrong and unnecessary for the Court of Appeal to pronounce on the merit of the evidence adduced by the prosecution at the close of their case. Not even the trial court, which heard and saw the prosecution witnesses, could properly do so at that stage of the trial. In the circumstance, the trial Judge should discountenance the pronouncement made by the Court of Appeal and freely come to his own conclusion when the time arrives at the end of the trial for him to consider the merit of the totality of the evidence before him.

In the result I too see no merit in this appeal. It is accordingly dismissed. The case is hereby remitted to the High Court for the trial to continue before Silva, J.

WALI JSC

I am privileged to have a preview in advance of the lead judgment of my learned brother, Kutigi J.S.C., and I entirely agree with his reasoning and conclusion for dismissing the appeal.

The Court of Appeal seemed to have over-stepped its jurisdiction, by considering the credibility and weight of evidence when considering that a prima facie case was made out against the appellants. The court should have been brief in its judgment as the learned trial Judge in his Ruling. In a situation like this one, the approach adopted by the Court of Appeal would have been right if it was upholding the submission that there was no prima facie case. However, this will not affect the final conclusion arrived at by the Court of Appeal since no failure of justice is occasioned.

I agree with the final order of my learned brother that the case be remitted to the trial court for the conclusion of the trial; and in case there is an appeal, the learned Justices, of the Court of Appeal who delivered the judgment now on appeal before this Court, are thereby disqualified from further participating in the case.

MOHAMMED JSC

I agree that the trial High Court Judge, Silva, J., was right in overruling the submission of the appellants in respect of the stealing counts in this “*no case submission*” appeal. The prosecution had adduced enough evidence for the learned trial Judge to hold that a prima facie case had been made out for the accused persons to enter their defence against the 2nd and 3rd counts of the charge.

My learned brother, Kutigi, J.S.C., has considered all the salient issues raised in this appeal, in his judgment and I agree with him that this appeal ought to be dismissed. Accordingly, the appeal is dismissed.

IGUH JSC

I have had a preview of the judgment just delivered by my learned brother, Kutigi, J.S.C. and I agree entirely with the reasoning and conclusions therein. B

The facts of this case have been fully set out in the lead judgment of my learned brother and it is unnecessary to go all over them again. It suffices to state that a no case submission may properly be made and upheld -

(i) When there has been no evidence to prove an essential element in the alleged offence charged or C

(ii) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination, or is so manifestly unreliable, that no reasonable tribunal could safely convict on it.

See Ohuka v. The State (No.2) (1988) 4 NWLR (Pt. 86) 36, Okoro v. The State (1988) 5 NWLR (Pt. 94) 255, Owonikoko v. The State (1990) 7 NWLR (Pt. 162) 381 at 388, Adeyemi v. The State (1991) 6 NWLR (Pt. 195) 1 at 35, Ibeziako v. Commissioner of Police (1963) 1 All NLR 61 at 69; (1963) 1 SCNLR 99. But a prima facie case must be distinguished from proof of the guilt of an accused which is determined at the end of the case when the court has to find whether such an accused is guilty or not guilty of the offence charged. D E

What has to be considered in a no case submission is not whether the evidence against the accused is sufficient to justify conviction but whether the prosecution has made out a prima facie case requiring at least some explanation from the accused. See Queen v. Ojuwa Ogucha (1959) 4 F.S.C. 64; (1959) SCNLR 154. The evidence discloses a prima facie case when it is such that if uncontradicted and if believed, it will be sufficient to prove the case against the accused. See Ajidagba v. Inspector-General of Police (1958) 3 F.S.C. 5; (1958) SCNLR 60; Sher Sing v. Jitendranathsen (1931) 1 LR. 59 Calc. 275. In a no case submission, therefore, whether or not the evidence of the prosecution is believed is, as at the stage of the proceedings, irrelevant and immaterial as the credibility of the witnesses is neither in issue then nor does it arise. F G

In the present case, there can be no doubt that there is abundant evidence on record which, if uncontradicted and if believed, will be sufficient to prove the case of stealing preferred against the appellants. This appeal is totally devoid of merit and it is accordingly dismissed. The case is hereby remitted to the High Court of Lagos State for the continuation of trial before Sylva, J. H