

COURT OF APPEAL BENIN CITY  
27TH FEBRUARY, 1979 FCA/B/34/77  
CORAM:- O. EBOH, A. G. O. AGBAJE, P. NNAEMEKA-  
AGU, JJCA.

THE STATE .....	APPELLANT.
V.	
MARGARET AMECHI (F)	
JACOB ORIAHI (M) .....	RESPONDENT

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**CRIMINAL LAW** - Conspiracy and stealing - Where the prosecution adduced evidence in proof of all the essential ingredients of the offences of conspiracy and stealing - It is sufficient to sustain a prima facie case.

**CRIMINAL PROCEDURE** - Trial - Statements Obtained from accused persons by the police in the course of their investigations - And are admitted during trial - Constitute evidence which the court will take account of - In considering whether or not a prima facie case has been made out by the prosecution.

**CRIMINAL PROCEDURE** - Prima facie case - Under s.286 Criminal Procedure Act - It was the duty of the trial judge at the close of prosecution's case - To consider expressly whether a "prima facie" case was made out - On the evidence tendered by the prosecution.

**CRIMINAL PROCEDURE** - Trial - Where the trial judge called for "Address" - Instead of calling upon the respondents for their defence as required under section 287(1) (a) and (b) of the Criminal Procedure Act - This constitutes a serious irregularity which greatly impaired the conduct of the trial.

**CRIMINAL PROCEDURE** - Appeals - Where because of the erroneous procedure adopted by court - It cannot be said that the evidence led by Prosecution was properly considered - A Court of Appeal will set aside or

*reverse the judgment.*

**JUDGMENTS** - Order - Retrial - *The interest of justice required that this is an appropriate case - In which a retrial should be ordered.*

**PRACTICE & PROCEDURE** - Adjournment - Refusal of the application - Without just cause or reason - Amounted to a wrong exercise of judicial discretion.

**PRACTICE & PROCEDURE** - Criminal Procedure Act - Provisions of sections 286 and 287 - Failure to comply with them - And the other irregularities - Have seriously impaired the trial - That the judgment ought not to stand.

**WORDS AND PHRASES** - "No case" or "no prima facie case" - What it means.

### **FACTS**

Before the High Court holden in Benin City the accused persons were charged under 4 counts of conspiracy to steal, stealing, forgery and uttering. The prosecution after calling (13) witnesses in support of its case against the respondents asked for an adjournment to call a witness and also called additional evidence. Counsel for the 1st respondent opposed the request for adjournment and the learned trial judge refused same. Thereafter, the learned trial judge called for and received addresses by counsel for both respondents. He adjourned the case to a date for judgment. In his reserved judgment he found the accused persons not guilty on each count. The prosecution being dissatisfied appealed to the Court of Appeal, Benin Division.

### **ISSUE FOR DETERMINATION**

*Whether the learned trial Judge erred in discharging and acquitting the accused persons when the prosecution had proved all the essential ingredients of each of the offences.*

**HELD** (Unanimously allowing the appeal per judgment of **EBOH JCA**)  
***Criminal Procedure - Trial***

1. In the trial of Criminal Cases, statements obtained from accused persons by the police in the course of their investigations which are voluntarily made and signed by them after they have been duly cautioned are admissible in evidence during trial and form part of the prosecutions case against the accused person who made the statement. As such, the contents of statements so admitted constitute evidence which the court will take account of in considering whether or not a prima facie case has been made out by the prosecution. (p. 112 H)

***Criminal Law - Conspiracy and Stealing***

2. The evidence adduced by the prosecution in this case was sufficient to sustain a prima facie case on the charge of conspiracy and stealing made against the 1st and 2nd respondents and we hold that the prosecution adduced evidence in support or proof of all the essential ingredients of the offences of conspiracy and stealing. (p. 116 C)

***Criminal Procedure - Prima Facie case***

3. It is clear that it was the duty of the Judge, "at the close of the evidence in support of the charge," to discharge both or any of the two respondents if a prima facie case was not made out against both or any of them under Section 286. By implication, it means that it was his duty, at the close of the prosecution case, to consider expressly whether a "prima facie" case was, on the evidence tendered by the prosecution, made out against both or any of them on the charge of conspiracy and stealing and this he failed to do. (p. 118 B)

***Trial - Where the trial judge called for address***

4. Even if the learned trial Judge had expressly found that a prima "facie case" was made against the respondents, he acted contrary to the law by calling for "Address" instead of calling upon the respondents for their defence or upon their counsel to proceed with their defence as required under Section 287(1) (a) and (b) of the Criminal Procedure Act. Failure

on the part of the learned trial Judge to comply with the provisions of Section 286 or section 287 of the Criminal Procedure Act in this case, in our view, constitutes a serious irregularity which has greatly impaired the conduct of the trial. (p. 118 D)

B

***Criminal Procedure - Appeals***

5. The erroneous procedure adopted by the trial Judge had the effect of depriving him of the opportunity of exercising his mind on what amounts to a "prima facie" case and to that extent it cannot be said that the evidence led by the prosecution in support of the charge was properly considered. It cannot be gainsaid that the prosecution, like any accused person, is entitled to have its case properly considered by the trial Judge, and where it can be shown that the trial Judge erred in considering it or has not properly done so, a court of appeal will set aside or reverse the judgment or conclusion arrived at therein. (p. 119 A)

***Words & Phrases - "No case"***

6. The meaning of a submission of "no case" or "no prima facie case" is made against an accused is that the prosecution has led no evidence in support of the charge on which, even if believed by the court, it can convict the accused. The question whether or not the court does believe the evidence does not arise, nor is the credibility of the witnesses in issue, at that stage. See R v. Coker (1952) 20 N.L.R. 62 and Ajidagba v. Police (1958) 3 F.S.C. 5. (p. 119 H)

***Practice & Procedure - Adjournment***

7. We have therefore come to the conclusion that the learned trial Judge, in all fairness and as he had earlier granted an application for adjournment made by the counsel for the 1st respondent, ought to have granted the adjournment sought for by the prosecuting counsel , even for a short period as might appear to him fit. In the circumstance, we hold that his refusal of the application apparently without just cause or reason amounted to a wrong exercise of his judicial discretion especially since it is part of the duty of a Court to allow either side in a matter before it to present its

entire case and not merely a part thereof. (p. 125 A)

***Practice & Procedure - Criminal Procedure act***

8. We are satisfied and hold that all the errors taken together do not amount to more than mere irregularities; in other words, their cumulative effect is not such as will make the entire proceedings in this case a nullity because in our view, none of them taken singly goes to nor does their cumulative effect impugn the competence of the learned trial Judge or the jurisdiction of the court to adjudicate upon the matter involving the two respondents. However, we have considered the effect of failure on the part of the learned trial Judge to comply with the provisions of sections 286 and 287 of the Criminal Procedure Act and we are satisfied that this and the other irregularities have so seriously impaired the trial that, in the circumstances of this case, the judgment and order made by the trial court ought not to be allowed to stand. (p. 127 A)

***Judgments - Order***

9. We have read the case of Abodundu (supra) which learned counsel for the 2nd respondent called our attention to. After giving careful consideration to the principles laid down therein and having regard to the particular facts and circumstances of this case, we are of the opinion that the interests of justice requires that this is an appropriate case in which a retrial should be ordered and in doing so we find support in the case of Arua Eme (supra) in which Onyeama, J.S.C., delivering the judgment of the Supreme Court said, inter alia:-

"(3) over-ruling *Oladimeji v. The King*

(1) failure to comply with section 287

(1) (a) does not per se vitiate or nullify the trial, the proper course is to consider the effect of failure to comply with it, without importing into it any implication from section 288."

"(4) applying the principle in Atunde v. Police (3), failure to comply with section 287 (1) (a) of the Criminal Procedure Act, although an irregularity does not render the trial null; the effect of such failure must depend on the circumstances of the particular case, and the appel-

*late court is at liberty to allow the appeal and order an acquittal or a retrial, or dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."* (p. 128 B)

**B NOTABLE POINTS OF INTEREST**

**EBOH JCA**

*1. Novel procedure adopted by trial judge occasioned a miscarriage of justice*

C If counsel for 1st respondent was right that the learned trial Judge should be taken as having passed the stage of Section 287 of Criminal Procedure Act, then he (the learned trial Judge) erred by failing to rule expressly that a "prima facie" case was made out against both respondents and by, at the same time calling on them for "Address" instead of their  
D defence". If on the other hand, the learned trial Judge had not reached the stage of Section 286 or section 287 of the Criminal Procedure Act, then he was in error to proceed to deal with the matter in the way he did by deciding on issues of the credibility of the evidence tendered. In other  
E words his making of findings of fact in the case at that stage was premature, unwarranted, and contrary to law and such findings therefore lack any legal efficacy and need not be faulted by the learned counsel for the appellant. Looked at from either side, the procedure adopted by the trial  
F Judge was novel, without any legal foundation, and tended to complicate the case from the point of view of knowing how much of the contents of the statements made by either of the two respondents to the police was legally receivable as evidence or what reliance to place thereon since  
G apparently both respondents could not be cross-examined and/or confronted with part of the contents of the said statements as the court never called upon them for their defence and so they did not testify in this case. We are therefore of the view that the order of discharge and acquittal made in the judgment of the learned trial Judge in this case  
H occasioned a miscarriage of justice in respect of the case for the prosecution. (p. 120 E)

## 2. Procedure for closing a case

It is necessary to observe that although the law does not set out a formal procedure for closing a case nor does it state specifically how and by whom a case is to be closed, it is our view that for the purpose of sections 286 and 287 of Criminal Procedure Act in a Criminal trial a case is closed when it is so stated by the prosecutor or the prosecuting counsel or when the trial Judge, for sufficient cause or reason as may appear to him proper, closes the case. In either case, the record of proceedings must contain some indication that the prosecution case is duly closed. It is, in our view after such closure of the prosecution case, as contemplated under sections 286 and 287 of the Criminal Procedure Act, that a Judge can properly proceed to consider whether or not a "prima facie" case is made out against an accused person. (p. 125 E)

## 3. Failure to close case - Implication of.

We have to observe that since we were satisfied that the prosecution, even on the basis of the evidence so far tendered against both respondents, had made a "prima facie" case against both respondents on both counts of conspiracy and stealing and they (both respondents) gave no evidence in rebuttal thereof (for they merely) rested their cases on the prosecution evidence), we would have had no hesitation in entering a conviction against each of both respondents in respect of the said 1st and 2nd counts of the charge had the case for the prosecution been closed as required by sections 286 and 287 of the Criminal Procedure Act and had the proceedings not been affected by defects arising from the serious procedural errors recounted above. However, we refrain from doing so (although this was requested for by the learned counsel for the appellant) because the case for the prosecution was never closed either by the prosecution or by the learned trial Judge and because we are not unmindful of the rule that a Court of Appeal will not substitute its own views for those of the trial court nor is it allowed to make findings which the trial court was in duty bound to make but which it had omitted or failed to do. (p. 127 E)

**REPRESENTATION**

G.O.U. Okungbowa, Legal adviser, Ministry of Justice, Bendel State ...  
for the Appellant.

Debo Akande ..... Counsel for 1st Respondent

B P.C.E. Dunkwu .... Counsel for the 2nd Respondent.

**CASES REFERRED TO**

Mbam Iboko & ors. vs. Commissioner of Police (1965) N.M.L.R. 384

C R. v. Apietu & ors 11 W.A.C.A. 24 at 25.

Godwin Daboh v. The State (1977) 5 SC 222

Arua Eme .v. The State (1965) N.M.L.R. 62,

Oladimeji v. The King 13 W.A.C.A 171)

Yesufu Abodundu v. The Queen 4 F.S.C. 70 at 73.

D R .v. Coker (1952) 20 N.L.R. 62 and

Ajidagba v. Police (1958) 3 F.S.C. 5.

Titus Oyediran v. The Republic (1967) N.M.L.R. 122.

The State v. Margret Amechi and Jacob Oriahi,

E

**STATUTES REFERRED TO**

Criminal Code cap.28, Vol. 1 ss. 331(8), 401,402,443.

Criminal Procedure Act, ss. 286, 287 and 288 and 241.

F

**LEAD JUDGMENT BY EBOH JCA**

This is an appeal by the prosecution against the judgment of a  
High Court in Benin City delivered on 30th July 1976 whereby the re-  
spondents - Margaret Amechi and Jacob Oriahi, were discharged and  
acquitted in respect of the offences preferred against them in an informa-  
tion which reads as follows:-

G

**"STATEMENT OF OFFENCE - 1ST COUNT**

*Conspiracy to commit felony, punishable under Section 443 of  
H the Criminal Code Cap. 28, Vol. 1, Laws o of the former Western State  
of Nigeria 1959, applicable in the Bendel State of Nigeria.*

**PARTICULARS OF OFFENCE**

*Margaret Amechi (f) and Jacob Oriahi (m) in the month of March*

1975 at Benin City, in the Benin Judicial Division conspired together with other persons unknown to commit felony to wit: Stealing.

"STATEMENT OF OFFENCE - 2ND COUNT

Stealing, punishable under Section 331(8) of the Criminal Code, Cap. 28, Vol. 1, Laws, of the former Western State of Nigeria 1959, B applicable in the Bendel State of Nigeria.

PARTICULARS OF OFFENCE

Margaret Amechi (f) and Jacob Oriahi (m) in the month of March, 1975 at Benin City, in the Benin Judicial Division stole the sum of seven thousand, six hundred and fifty naira (N7,650), property of Midwest Hotels C Board.

STATEMENT OF OFFENCE - 3RD COUNT

Forgery, punishable under Section 40 1 of the Criminal Code, Cap. 28, Vol. 1, Laws of the former Western State of Nigeria, 1959, D applicable in Bendel State of Nigeria.

PARTICULARS OF OFFENCE

Margaret Amechi (F) in the month of March 1975 at Benin City, in the Benin Judicial Division, forged a letter dated the 19th day of E March 1975 purporting it to have been written by Mrs. M. E. Momodu (F).

STATEMENT OF OFFENCE - 4TH COUNT

Uttering a false document, punishable under Section 402 of the F Criminal Code, Cap. 28, vol. 1 Laws of the former Western State of Nigeria, 1959, applicable in the Bendel State of Nigeria.

PARTICULARS OF OFFENCE

Margaret Amechi (F) in the month of March 1975 at Benin City, in the Benin Judicial Division knowingly and fraudulently uttered a cer- G tain forged letter dated the 19th day of March 1975 purporting to be letter written by Mrs. M. E. Momodu (F)".

The prosecution, after calling thirteen (13) witnesses in support of its case against both respondents, asked for an adjournment to call as H a witness one Mr. A. O. Imagesegie to tender copy of a letter he wrote forwarding to the Assistant Inspector General of Police the documents which the P.W. 9 (the hand-writing analyst) said was sent from the State

C.I.D. Benin for analysis and to call some additional evidence as to a cheque. Counsel for the 1st respondent (Margaret Amechi) opposed the request for adjournment and the learned trial Judge refused same. Thereafter, as the record shows, the learned trial Judge called for and received addresses by counsel for both respondents and he adjourned the case to a date for judgment to be delivered. What transpired in court, as contained in the record, is as follows:-

*"Court: The request for adjournment is refused.*

*(Sgd.) E. A. Ekeruche*  
*Judge*

Address:

Note: Mr. Akande says he rests the case of the 1st accused on the prosecution evidence.

Akande submits: Refer to the charge as against the 1st accused. ....

Dunkwu address: Says 2nd accused rests his case on prosecution evidence. ....

Edokpayi: (State Counsel) I do not intend to reply.

Court: Adjourned to 30/7/76 for judgment."

The learned trial Judge, in his reserved judgment, concluded as follows:-

*"I find each of the accused persons not guilty on each count on which he or she has been charged in the information, and each of them is acquitted and discharged on each of the said counts."*

The prosecution, being dissatisfied with the above mentioned judgment and conclusion, has appealed to this court on the following grounds:-

*"(1) That the learned trial Judge erred in law in discharging and acquitting the accused persons when the prosecution had proved all the essential ingredients of each of the offences with which the accused persons were charged.*

*(2) That the learned trial Judge erred in law in closing the case for the prosecution in spite of the fact that the prosecution openly indicated to the court that it still had vital witnesses who were willing to testify to be called*

*(3) That the decision is altogether unwarranted, unreasonable and cannot be supported having regard to the weight of evidence."*

When the appeal came up for hearing in this court on 19th June, 1978, counsel for the 1st respondent took a preliminary objection, notice of which he had duly given to the other side, to grounds 1 and 3 as stated above. He submitted that ground 3 should be struck out because it was not properly framed with the offending words "weight of" being included therein and since it was not a ground of law. He added that a prosecutor in a matter of this nature was allowed to appeal on a ground of law only and referred us to the Supreme Court decision in Mbam Iboko & ors. vs. Commissioner of Police (1965) N.M.L.R. 384 - 386. We agreed with his submission since counsel for the appellant gave no satisfactory reply thereto and that ground of appeal was struck out. He further submitted that ground 1 was vague and should be struck out because the particulars of the ingredients alleged to have been proved were not specifically set out therein nor was each of the counts of the charge separately treated under a distinct ground of appeal. He also submitted that ground 1 was not a ground of law and referred to the case of R. v. Apietu & ors 11 W.A.C.A. 24 at 25. Counsel for the appellant, in reply, said that ground 1 was properly worded, not vague, was a ground of law and in respect of all the four counts of the charge. In the case of R. v. Apietu and ors referred to by counsel for 1st respondent, the ground of appeal complained of was worded thus:-

*"1. The learned trial Judge misdirected the jury on the whole case. In particular, he misdirected them on the following points:-*

*(a) By failing to bring to their notice points which told in favour of the appellants.*

*(b) By failing to put to the jury entirely or adequately the case made for the defence."*

No particulars were given of points which favoured the appellants or of the case made for the defence and so, it seems obvious that the above is very different from the way in which ground 1 of this appeal is worded. As it was a ground which alleged misdirections it was necessary for the information of all concerned. In that case however, in the interest of justice the Court granted an adjournment and permitted the appellants to file affidavits and additional grounds of appeal setting out more particu-

larly the necessary detail. Because we were satisfied that ground 1 was not vague, contained sufficient particulars and was a ground of law, the objection was overruled.

Arguing the appeal, learned counsel for the appellant stated that he was not pressing the appeal in respect of the 3rd and 4th counts which dealt with the offences of forgery and uttering respectively. This approach was, in our view, inevitable because the evidence of the P.W. 9 (Mr. A. Oguaputaezi) the hand-writing analyst was that it was the P.W. 2 (Nathaniel Offor) and not the 1st respondent who forged Exh. 2. He, however, submitted with great force that the learned trial Judge erred in law by discharging and acquitting both respondents when the prosecution had proved all the ingredients of the offences of conspiracy and stealing which formed the 1st and 2nd counts of the charge laid against both respondents. He painstakingly referred us to the evidence of the material witnesses who testified for the prosecution and the relevant portions of their evidence in the record of proceedings that went in proof of the ingredients of the offences of conspiracy and stealing. He also referred to the exhibits which were tendered in the case including statements which the police obtained from both respondents in the course of their investigation of the alleged crime. Counsel for both respondents did not contend the existence of the evidence, facts, and exhibits referred to by the counsel for the appellant as this was, in the main, a matter of record. The submissions of the learned counsel for the 1st respondent, with which the learned counsel for the 2nd respondent associated himself, are that the learned trial Judge was right in discharging and acquitting the 1st respondent because the 1st respondent rested her case on the prosecution evidence, there was no proof that any amount was passed to the 1st respondent; that the ingredients of the offences of conspiracy and stealing were not established because the Judge did not find as acceptable the evidence of the prosecution witnesses. Learned counsel for the 2nd respondent on his part finally agreed that there was sufficient evidence on record to sustain a prima facie case against him (2nd respondent).

We have carefully considered the submissions of all the counsel

and upon perusing the record of proceedings in this appeal, we are satisfied that there was evidence adduced by the prosecution to the following effects:-

1. that the sum of N7,650.00, subject matter of 2nd count, was the property of the Mid West Hotels Board; B

2. that the 1st respondent was at the material time the chairman of the said Board whilst the 2nd respondent was a contractor resident at Agbor;

3. that the 1st respondent caused a letter dated 2/8/74, 1d z now Exhibit 9, to be prepared and addressed to the 2nd respondent purporting to have awarded to him a contract job involving repairs to doors, cracked walls and roofs and the painting of two chalets at the Mid West Hotels Auch; C

4. that the 1st respondents went to the office of the 2nd respondent at Agbor and there got his clerk P.W.8 (J. O. Ehiedo) whilst his master was absent to type out and sign a letter Exh. 3 dated 18/3/75 in accordance with what she dictated to him from a draft she brought with her; D E

5. that the 1st respondent took both the letter Exh. 3 and the draft away and that she later used Exh. 9 and Exh. 3 to cause a payment voucher for N7,650.00 to be raised in favour of the 2nd respondent as payment for contract services rendered by him at the catering Rest House, Auch, in respect of:- F

(i) Repairs to doors and cracked walls.

(ii) Repainting of Chalets 1D and 2D.

(iii) Repairs to the roofs of the building etc.

6. that pursuant to the said payment voucher, a cheque for N7,650.00 was made in favour of the 2nd respondent and that the ultimately cashed the cheque and took the money; G

7. that the 2nd respondent, during investigation by the police said:- H

(i) that in consequence of the discussion that transpired between him and the 1st respondent, he handed the sum of N7,650.00 to her;

(ii) that as a matter of fact, he never rendered any contract ser-

vices whatsoever and at anytime at the Catering Rest House, Auchu for the Mid-West Hotels Board;

(iii) that when the Board demanded the refund of the money from him, then he demanded it from the 1st respondent who agreed and B promised to refund it to him;

(iv) that he took steps to refund the money by issuing a cheque in favour of the Board but that the effects of the cheque could not be cleared because the 1st respondent failed to refund the N7,650 to him within the few days she promised;

C 8. that the P.W. 3 (P. I. Nwakor) said that after he had read the letter (Id. SI now Exh. 22) dated 1/9/75 demanding the refund of the money from the 2nd respondent to him, he accompanied him to Benin to see the 1st respondent who agreed to refund the money to the 2nd respondent and told the 2nd respondent to make a refund of the money to D the Board in the meantime;

9. that the P.W.7 - Marcellina Momodu, the supervisor of Mid-west (now Bendel) Hotels at Auchu said that she had never seen or known E the 2nd respondent at Auchu or anywhere before that day; that the 2nd respondent at no time carried out any form of repairs work in the Catering Rest House at Auchu for the Midwest Hotels Board, and that she never wrote or signed Exh. 2 purporting that he did any repairs for the F Midwest Hotels Board at Auchu.

10. that P.W. 10 (M. B. Jibunoh) as Secretary/Accountant gave evidence of how 1st respondent instructed him to come from their office to her house with the cheque Book; that he met 2nd respondent with her in her house and she instructed him to prepared a voucher and issue a G cheque as payment for the contract work already performed to the 2nd respondent; that he (P.W. 10) was unwilling to and did not do so until some days later when a letter issuing the contract to the 2nd respondent and a certificate of completion of the contract were delivered to him; that H 1st respondent pressed him for the cheque and that he delivered it to her finally and that she never signed the cheques-delivery-book for it.

Quite apart from the above, we are of the view that **in the trial of Criminal Cases, statements obtained from accused persons by**

the police in the course of their investigations which are voluntarily made and signed by them after they have been duly cautioned are admissible in evidence during trial and form part of the prosecutions case against the accused person who made the statement. As such, the contents of statements so admitted constitute evidence which the court will take account of in considering whether or not a prima facie case has been made out by the prosecution. Therefore, since the issue to be resolved here is whether the prosecution had made out a prima facie case against the two respondents and since conspiracy (the 1st count) is a fact to be inferred from all the available evidence in the absence direct or confessional evidence, we deem it necessary to set out the contents of the statements of the 1st and 2nd respondents which were tendered, admitted, and marked as Exhibits in this case. They are as follows:-

*"Exh. 8 made on 22/10/75 by the 2nd respondent (Jacob Oriahi) ..... She told me that the financial year is getting to an end and she wanted to exhurst the remaining money with - her so as to get more money in the coming Financial year. She said that she wanted to spend the remaining money with her to start the job because it will take long time before more money would be made available by the Government in the next financial Year. She then requested me to meet her in her office in Benin the next day. After about three days, I went to her in her office, she called the Secretary to bring the cheque for N7,650.00. The Secretary brought out the cheque which was already signed and handed it to me. The cheque was written in my name. I endorsed the cheque. But as a matter of fact she was the person who took the money. She prepared a Contract letter and other correspondence as a cover for the amount. She gave me a copy of the letter for the contract award. She drafted a letter purported to have been written by me for the amount of N7,650 been cost of labour and materials which my clerk Mr. J.O. Ehiedu signed for me. On the first of September 1975 I received a letter from the Mid-West Hotels Board requesting me to refund the said sum of N7,650 paid to me for the alleged contract job at Mid-West Hotels Board Auchii." ..... "She then advised me to issue a cheque for the amount and pay it to the*

Government and promised that in two days time she will pay back the money to me. I then went and pay in a cheque for N7,650 to the Mid-West Hotels account in New-Nigeria Bank Benin City. After the two days had expired I went to her to demand the money as promised. She then  
 B told me that she will be paying me instalmentally. I stopped the cheque because I was afraid it would bounce because I had expected by the time the cheque would be cleared she must have paid me the amount to meet the clearance of the cheque. I did not do any job at Auchi Mid-West  
 C Hotels. There is no need to go to Auchi with the Police." Exhibits 8A and 8B were the statements also made by the 2nd respondent.

"Exh. 14: made on 29/10/75 by the 1st respondent (Margaret Amechi)

"I as the Chairman Mid-West Hotel Board Benin awarded the contract for the repairs to doors and cracked walls, repairs to chalets and  
 D repairs to the roofs of the buildings Mid-West Hotel Auchi to Chief J.O. Oriahi of Agbor. Chief J.O. Oriahi as one of the Board's Contractor. I have no cause to doubt him because he has done a lot of jobs for the Board and he is still doing some job for the Board. When the job was  
 E said to be completed he has come for the payment and demanded for his payment. Until about March this year when the Secretary/Accountant Mr. Mike Jibunoh brought the completion letter confirming that the job has been satisfactorily executed. I instructed that the money should be  
 F paid which was the normal procedure. The payment was made, I and the Secretary/Accountant signed the cheque for the amount of N7,650.00 being cost of the job. The Secretary/Accountant advised a contract award letter be prepared for Chief J.O. Oriahi for record purposes when he could not trace the original letter of award of the contract. This was  
 G sometime in March 1975."

Exhibit 14 A was another statement made by the 1st respondent. From the above it becomes plain that the 1st respondent was involved in the crime:-

H (a) by the evidence of P.W. 8 who said she procured him to type out Exh.3 and sign same as a letter written by his master (the 2nd respondent) demanding payment for contract work already performed at Auch;

(b) by the evidence of P.W. 7 who said that no contract work was performed at Auchi and that she (P.W. 70) signed no letter or certificate to that effect;

(c) by the production of 1d. z now Exh. 9 being a letter written and signed by the 1st respondent to the 2nd respondent purporting to have thereby awarded to him (the 2nd respondent) a contract job to be performed at Auchi;

(d) by the evidence of P.W. 10 and P.W. 2 who said that a cheque for N7,650 was prepared in favour of the 2nd respondent on the basis of Exhibits 3 and 9 and that it was handed to the 1st respondent;

(e) the evidence of P.W. 3 that 1st respondent agreed to return the money (N7,650) to the 2nd respondent when he accompanied him (2nd respondent) from Agbor to Benin City to meet the 1st respondent, when the Board demanded refund of the N7,650 from the 2nd respondent; and that the 1st respondent agreed to refund the money to the 2nd respondent but later failed to do so.

The admissions contained in the statements made to the police by the 2nd respondent (which statements are, of course, evidence against the 2nd respondent alone) show his involvement in the crime; to wit:-

(i) that the 1st respondent at no time awarded a contract job to him to be performed at Auchi;

(ii) that he at no time went to Auchi and that he carried out no repairs to the doors, walls and roofs of the Bendel Hotels Board at Auchi;

(iii) that following certain discussions he had with the 1st respondent, a cheque for N7,650 was issued by the Bendel Hotels Board in his name which he later paid into his bank account;

(iv) that he subsequently gave the whole amount of N7,650 to the 1st respondent who failed to refund same to him despite her promise so to do, when the Board demanded from him the refund of their money. On the premises of the foregoing, we agree with counsel for the appellant that the prosecution had established facts from which it could be held that the 1st and 2nd respondents had taken away N7,650 property of the Mid West (now Bendel) Hotels Ltd., that the taking of the money was done in a fraudulent manner by both of them; that both of them had

converted the said money to their own use unlawfully; that in the circumstances of this case, there was evidence from which it could be inferred that the 1st and 2nd respondents conspired together and with other persons unknown to steal the said money which was the property of Mid West (now Bendel) Hotels Ltd. We must add that it should be obvious from the available evidence that without the part allegedly played by the 1st respondent, It would be well -Nigh impossible for the 2nd respondent to have access to the Board's N7,650, which was the subject matter of the theft. See Godwin Daboh v. The State (1977) 5. S.C. at 222 and 223. In view of the above, we agree with the submission of counsel for the appellant that **the evidence adduced by the prosecution in this case was sufficient to sustain a prima facie case on the charge of conspiracy and stealing made against the 1st and 2nd respondents and we hold that the prosecution adduced evidence in support or proof of all the essential ingredients of the offences of conspiracy and stealing.**

Having held, as we have done above, that the essential ingredients of the offences of conspiracy and stealing were proved, we have to observe that this is not and cannot be the end to ground 1 of the appeal because the learned trial Judge, in fact, never said or ruled that the prosecution failed to establish a prima facie case against both respondents. What he did, which we now have to consider, was that at a stage during the proceedings when he had refused an application for adjournment made to him by the counsel for the prosecution, and without making any ruling as to whether or not a prima facie case was made out against the respondent, he as it were called for "address." (See the relevant portion of the proceedings as already reproduced above). Both counsel for the two respondents then addressed the court and later on, a reserved judgment was delivered on 30/7/76. It is significant to note that in the process (i) both respondents did not give evidence in their defence as their counsel had respectively "rested the cases of the 1st and 2nd accused upon the prosecution evidence"; and (2) the learned trial Judge had dealt at great length with the evidence of the witnesses for the prosecution some of whom he had disbelieved and others he discredited. It needs

hardly be pointed out that there is a great difference between the trial Judge "either calling upon the defendant for his defence or calling upon the accused's legal practitioner to proceed with the defence" and his calling for "address".

It now remains for us to consider whether the procedure adopted by the learned trial Judge in the conduct of the trial is in conformity with the provisions of the relevant law - that is, Sections 286, 287 and 288 of the Criminal Procedure Act as set out hereunder:-

*"Section 286. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the defendant sufficiently to require him to make a defence the court shall, as to that particular charge discharge him."*

*"Section 287. (1) At the close of the evidence in support of the charge if it appears to the court that a prima facie case is made out against the defendant sufficiently to require him to make a defence the court shall call upon him for his defence and -*

*"(a) if the defendant is not represented by a legal practitioner, the court shall inform him that he has three alternatives open to him, namely -*

*(i) he may make a statement, without being sworn, from the place where he then is; in which case he will not be liable to cross-examination;*

*OR*

*(ii) he may give evidence in the witness box, after being sworn as a witness; in which case he will be liable to cross-examination, OR*

*(iii) he need say nothing at all if he so wishes, and in addition the court shall ask him if he has any witnesses to examine or other evidence to adduce in his defence and the court shall then hear the defendant and his witnesses and other evidence, if any ;*

*AND*

*(b) if the defendant is represented by a legal practitioner, the court shall call upon the legal practitioner to proceed with the defence.*

*(2) If the defendant or his legal practitioner states that he has witnesses to call but that they are not present, the court may, in the cir-*

*cumstances set forth in sections 186 to 193 take the steps therein mentioned to compel their attendance.*

Section 288. *Failure to comply with the requirements of paragraph (a) in section 287 shall not of itself vitiate the trial provided that the court called upon the defendant for his defence and asked him if he had any witnesses and heard the defendant and his witnesses and other evidence, if any."*

The above quoted provisions are mandatory and so, it is clear that it was the duty of the Judge, "at the close of the evidence in support of the charge," to discharge both or any of the two respondents if a prima facie case was not made out against both or any of them under Section 286. By implication, it means that it was his duty, at the close of the prosecution case, to consider expressly whether a "prima facie" case was, on the evidence tendered by the prosecution, made out against both or any of them on the charge of conspiracy and stealing and this he failed to do.

Even if the learned trial Judge had expressly found that a prima facie case" was made against the respondents, he acted contrary to the law by calling for "Address" instead of calling upon the respondents for their defence or upon their counsel to proceed with their defence as required under Section 287(1) (a) and (b) of the Criminal Procedure Act. Failure on the part of the learned trial Judge to comply with the provisions of Section 286 or section 287 of the Criminal Procedure Act in this case, in our view, constitutes a serious irregularity which has greatly impaired the conduct of the trial. In the case of Arua Eme .v. The State (1965) N.M.L.R. 62, the Supreme Court, per Onyeama J.S.C. held (over-ruling the previous decision in Oladimeji v. The King 13 W.A.C.A 171) that:-

*"Failure to comply with Section 287(1) (a) of the Criminal procedure Act, although an irregularity, does not render the trial null; the effect of such failure must depend on the circumstances of the particular case and the appellate court is at liberty to allow the appeal and order an acquittal or a retrial, or dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."*

In this case, **the erroneous procedure adopted by the trial Judge had the effect of depriving him of the opportunity of exercising his mind on what amounts to a "prima facie" case and to that extent it cannot be said that the evidence led by the prosecution in support of the charge was properly considered. It cannot be gainsaid that the prosecution, like any accused person, is entitled to have its case properly considered by the trial Judge, and where it can be shown that the trial Judge erred in considering it or has not properly done so, a court of appeal will set aside or reverse the judgment or conclusion arrived at therein.**

It is part of the submission of the learned counsel for the 1st respondent that in view of the provisions of section 286 and section 287 of Criminal Procedure Act, and since the learned trial Judge called for and took "Address" of counsel in the case and thereafter proceeded to judgment it means - and it should be so taken by this court - that he had passed the stage of section 286; in other words, he had acted under section 287 and held that a "prima facie" case was made out against both respondents. He further submitted that the learned trial Judge was then entitled to consider the entire case - i.e. the prosecution's case and the defence of the respondents and was therefore competent to disbelieve the prosecution witnesses and make findings of fact as he did. He said that since counsel for the appellant had not faulted any of the findings so made, the court should hold that the learned trial Judge was right in discharging and acquitting the appellants. We cannot subscribe to the proposition by counsel for the 1st respondent which in effect means that this court should read into the record what is not patently on it or read from it what it does not contain or manifestly reflect. There is nothing on the record to show that the learned trial Judge during the proceedings ever adverted his mind to a consideration of whether a "prima facie" case was made out against the respondents under section 286 or section 287 of the Criminal Procedure Act which the relevant law enjoins him to do mandatorily only at the close of the evidence tendered in support of the charge - a point we propose to deal with hereinafter. It is now trite law that **the meaning of a submission of "no case" or "no prima facie**

case" is made against an accused is that the prosecution has led no evidence in support of the charge on which, even if believed by the court, it can convict the accused. The question whether or not the court does believe the evidence does not arise, nor is the credibility of the witnesses in issue, at that stage. See R v. Coker (1952) 20 N.L.R. 62 and Ajidagba v. Police (1958) 3 F.S.C. 5. Since we have held that all the essential ingredients of the charge of conspiracy and stealing were proved and that "a prima facie case" was made against the respondents, and since both were not called upon by the Judge to and did not give evidence in their defence, we are of the view that the learned trial Judge, in the particular circumstances of this case, had no materials before him which falsified or cast reasonable doubt upon the evidence adduced by the prosecution in support of the charge against the two respondents. There was therefore no legal or valid basis for the learned Judge's disbelief of the witnesses for the prosecution especially as there was nothing in the record to show that the testimony of any of them was shaken or adversely affected by or during cross-examination. In the circumstances of the above, it follows that if counsel for 1st respondent was right that the learned trial Judge should be taken as having passed the stage of Section 287 of Criminal Procedure Act, then he (the learned trial Judge) erred by failing to rule expressly that a "prima facie" case was made out against both respondents and by, at the same time calling on them for "Address" instead of their defence". If on the other hand, the learned trial Judge had not reached the stage of Section 286 or section 287 of the Criminal Procedure Act, then he was in error to proceed to deal with the matter in the way he did by deciding on issues of the credibility of the evidence tendered. In other words his making of findings of fact in the case at that stage was premature, unwarranted, and contrary to law and such findings therefore lack any legal efficacy and need not be faulted by the learned counsel for the appellant. Looked at from either side, the procedure adopted by the trial Judge was novel, without any legal foundation, and tended to complicate the case from the point of view of knowing how much of the contents of the statements made by either of the two respondents to the police was legally receivable as evi-

dence or what reliance to place thereon since apparently both respondents could not be cross-examined and/or confronted with part of the contents of the said statements as the court never called upon them for their defence and so they did not testify in this case. We are therefore of the view that the order of discharge and acquittal made in the judgment B of the learned trial Judge in this case occasioned a miscarriage of justice in respect of the case for the prosecution. Counsel for the appellant therefore has satisfied us that the point he took under ground 1 of this appeal was well taken in respect of the 1st and 2nd counts which relate C to the offences of conspiracy and stealing. This ground of appeal therefore succeeds.

Counsel for the appellant, as an alternative ground, next attacked the judgment appealed from by submitting that the learned trial Judge was wrong in closing the prosecution's case and proceeding with the D hearing in the way he did after refusing to grant the adjournment prayed for by the prosecuting counsel. Asked by the court if there was anything in the record to show that the learned trial Judge did close the prosecution case, he answered in the negative. He submitted that what the learned E trial Judge did, as shown in the record, was an error in law. However, he did not show us what specific law the Judge thereby infringed apart from referring to section 241 of the Criminal Procedure Act which deals with the right of the accused or the legal practitioner representing him to F address the court after the case for the defence has been closed. He submitted that the prosecuting counsel had not concluded the prosecution case, that he gave the indication that he intended to tender more evidence, and applied for an adjournment to call as a witness a senior G police officer who was not present in court. He urged the court to hold that the trial Judge was wrong in the exercise of his discretion by refusing to grant the adjournment prayed for. In reply, the learned counsel for the 1st respondent submitted that the counsel for the appellant had not H shown what law the learned trial Judge breached by refusing the adjournment prayed for by the prosecuting counsel in the court below. He submitted that the learned trial Judge was acting properly by refusing the application for adjournment on the authority of Ortese Yaner v. The State

(1965) N.M.L.R. 337 at 341 which deals with the conditions on which a court will grant an adjournment. When the court asked counsel for the 1st respondent whether there was anything on record to show whether the prosecution case was closed by the prosecution itself or by the Judge, B he replied that point was not part of ground 2 and that as the counsel for the appellant did not obtain leave to argue it as an additional ground of appeal, the court should disregard all he (counsel for the appellant) had said thereunder. As we considered the point raised in the question as C important in determining the propriety of the procedure adopted by the learned trial Judge in this case and as it appeared to us to be a point of law, we heard legal arguments from both counsel on the point. Counsel for the 1st respondent submitted that there is no rule of court which D states that the prosecution must formally announce that it has closed its case. He referred to section 285 (4), 286, and 287 of the Criminal Procedure Act and submitted that the court does not have to formally close the prosecution case before it calls for the defence of the accused persons. He added that the fact that the defence of the accused was in fact E given - that is, the stage of Section 287 of Criminal Procedure Act has been reached - is proof that it appeared to the learned trial Judge that observance of Section 286 was unnecessary. He said that if the court did not accept the views he expressed on the procedure adopted by the learned F trial Judge, we should hold that such error was not substantial and as such cannot vitiate the proceedings. He finally submitted, in the alternative, that since a court of appeal is loathe to interfere with findings of facts, the court should uphold the findings of fact which were properly made by the learned trial Judge as counsel for the appellant had not faulted G any of them. In his own reply learned counsel for the 2nd respondent submitted that there was no evidence of a conspiracy with the 1st respondent against the 2nd respondent but conceded that there was a prima facie case of stealing made out against him. He agreed that the record H showed that the case against both accused persons had not been closed and that the learned trial Judge did not show on the record that he had considered whether a "prima facie" case was made against the accused as required under section 286 of Criminal Procedure Act. He referred to

section 288 of Criminal Procedure Act and the effect of its proviso and submitted that since that proviso was not made applicable to the second arm of section 287, then non-compliance with it will vitiate the proceedings. He submitted that in the circumstances of the above, the trial of both respondents in the court below was irregular and amounted to a nullity; that the Court of Appeal cannot perfect an imperfect trial as was held in Titus Oyediran v. The Republic (1967) N.M.L.R. 122. Finally he pleaded that should the court hold that the trial was a nullity, a retrial should not be ordered as it will not be apt to do so in view of the decision in Yesufu Abodundu v. The Queen 4 F.S.C. 70 at 73. For a proper consideration of this ground of appeal, it is desirable to set out the relevant part of the record of proceedings:-

*"P.W. 13 Re- XD By Edokpayi*

*Note: The prosecution is asked to call his next witness. He says the witness is not here. Says the witness is one A. O. Imagesegie an Assistant Superintendent of Police. Says the witness is to come and tender copy of a letter he wrote forwarding to Assistant Inspector General of Police the documents P.W. 9 said was sent from State C.I.D. Benin for analysis. Says he wants an adjournment to be able call this witness. Says he also want to call some additional evidence as to a cheque.*

*Debo Akande:- The request for adjournment is opposed. Says no proof of the evidence of this witness and the court has been kind enough to ask him to recall P.W. 9 to tender the letter but he has not accepted the offer.*

*Court to Edokpayi: Where is the witness you want to call.*

*Edokpayi : I do not know where he is, all I can say is that he is not in Benin now.*

*Court: The request for adjournment is refused.*

(Sgd.) E. A. Ekeruche

Judge

Address:

*Note: Mr. Akande says he rest the case on the 1st accused on the prosecution evidence.*

*Akande Submits: Refer to the charge as against 1st accused. Says no evidence to support counts 3 and 4. Asks that the 1st accused be dis-*

*charged in the said counts."*

A careful perusal of the record of proceedings shows the following:-

5/7/76: 1st respondent present for the first time in court with the 2nd respondent; both are arraigned and charged, plea taken, and case adjourned to 13/7/76 at the instance of 1st respondent's counsel;

13/7/76: Six witnesses gave evidence in support of the charge; case adjourned to 14/7/76;

14/7/76: P.W. 1 recalled; P.W.s. 7, 8 and 9 gave evidence in support of the charge; case adjourned to 15/7/76;

15/7/76: P.W.s. 10, 11, 12 and 13 gave evidence; prosecuting counsel's application for adjournment in order to call Mr. A.O. Imaguesegie, Assistant Superintendent of police as a witness and to tender more evidence in support of the charge was refused; Judge calls for "Address"; both counsel rested the cases of both accused on prosecution evidence; they addressed the court; case adjourned 30/7/76 for Judgment;

30/7/76: Judgment was delivered and both 1st and 2nd respondents were discharged and acquitted.

From the above, it becomes obvious how proper and helpful the submissions of counsel for the 2nd respondent were. After a careful consideration of all the submissions made on this ground, we have to say that whilst we agree with counsel for the 1st respondent that the counsel for the appellant has not shown what specific law the Judge infringed, we are satisfied that the point to be really considered is whether the learned trial Judge was right in refusing the application for adjournment as he did for this concerns his judicial exercise of a discretionary power which, no doubt, is a point of law. It is significant that he gave no reason for the refusal of the application and that the trial had progressed satisfactorily as regard speed in that during the three successive days it had lasted, thirteen witnesses had testified in support of the charge. It is also significant that the application for adjournment was the first of such application to be made by the counsel for the prosecution and it was made to enable him to produce further evidence in support of the prosecution case. We have read the decision in Ortese Yanor case (supra) and cannot see anything in the record of proceedings to suggest that the learned trial Judge

refused the application because he believed that the prosecuting counsel could not satisfy the conditions necessary for the granting of an adjournment. **We have therefore come to the conclusion that the learned trial Judge, in all fairness and as he had earlier granted an application for adjournment made by the counsel for the 1st respondent, ought to have granted the adjournment sought for by the prosecuting counsel, even for a short period as might appear to him fit. In the circumstance, we hold that his refusal of the application apparently without just cause or reason amounted to a wrong exercise of his judicial discretion especially since it is part of the duty of a Court to allow either side in a matter before it to present its entire case and not merely a part thereof.**

Whilst still on this ground of appeal, we consider it meet and proper to consider the point as to whether the case for the prosecution was, as a matter of fact and/or law, ever closed as it is our considered view that the provisions of sections 286 and 287 of the Criminal Procedure Act (as earlier reproduced above) are mandatory and by their wording and necessary implication postulate that the case for the prosecution will have been closed before the learned trial Judge proceeds to consider whether or not a "prima facie" case - as already dealt with hereinbefore - is made out. It is necessary to observe that although the law does not set out a formal procedure for closing a case nor does it state specifically how and by whom a case is to be closed, it is our view that for the purpose of sections 286 and 287 of Criminal Procedure Act in a Criminal trial a case is closed when it is so stated by the prosecutor or the prosecuting counsel or when the trial Judge, for sufficient cause or reason as may appear to him proper, closes the case. In either case, the record of proceedings must contain some indication that the prosecution case is duly closed. It is, in our view after such closure of the prosecution case, as contemplated under sections 286 and 287 of the Criminal Procedure Act, that a Judge can properly proceed to consider whether or not a "prima facie" case is made out against an accused person. In the instant case, it is clear that the prosecuting counsel did not close the prosecution case against the 1st and 2nd respondents. Far from that, he indi-

cated that he had further evidence to tender in support of the charge against them and then he applied for adjournment to call a senior police officer as a witness. The court refused his application for adjournment and we have held that, in the circumstances of this case, the learned trial Judge was wrong in the exercise of his discretion by such a refusal. The excerpts reproduced above from the relevant portion of the record of proceedings show that neither the prosecuting counsel nor the learned trial Judge closed the prosecution case and so it was incorrect to suggest, as the counsel for the appellant did in the ground of appeal under consideration, that the learned trial Judge erred in law in closing the case for the prosecution. To our minds, the real error on the part of the learned trial Judge lay in his not ensuring that the prosecution case was in fact, actually closed and also in not considering whether or not a *prima facie* case was made out before proceeding further with the trial of both application for adjournment. Such a failure was a serious irregularity. The appeal on this ground therefore substantially succeeds.

In the conduct of the trial in this case, we are satisfied that the learned trial Judge erred in the following particulars:-

1. by failing to exercise his discretion properly in refusing the prosecutor's application for adjournment in the way he did;
2. by failing to ensure that the prosecution case was "closed" before proceeding further with the trial after he had refused the application for adjournment;
3. by failing to consider, as required under section 286 or section 287 of the Criminal Procedure Act whether or not a "prima facie" case was made out against either or both respondents;
4. by failing to call either or both respondents or their counsel to make a defence;
5. by failing to ensure that the respondents had made their defence or rested their case on the prosecution evidence before calling for and receiving "Address".

No doubt, each of these errors is an irregularity which, by itself alone, does not render the trial a nullity. We have therefore given considerable thought to the cumulative effect that all such errors may have on the trial.

We are satisfied and hold that all the errors taken together do not amount to more than mere irregularities; in other words, their cumulative effect is not such as will make the entire proceedings in this case a nullity because in our view, none of them taken singly goes to nor does their cumulative effect impugn the competence of the learned trial Judge or the jurisdiction of the court to adjudicate upon the matter involving the two respondents. However, we have considered the effect of failure on the part of the learned trial Judge to comply with the provisions of sections 286 and 287 of the Criminal Procedure Act and we are satisfied that this and the other irregularities have so seriously impaired the trial that, in the circumstances of this case, the judgment and order made by the trial court ought not to be allowed to stand.

Because of all we have said above, the judgment and order of discharge and acquittal made by the learned trial Judge at the High Court, Benin City, on 30th July, 1976 in respect of counts 1 and 2 (conspiracy and stealing respectively) in charge No.B/10C/76: The State v. Margret Amechi and Jacob Oriahi, are here set aside and annulled. We have to observe that since we were satisfied that the prosecution, even on the basis of the evidence so far tendered against both respondents, had made a "prima facie" case against both respondents on both counts of conspiracy and stealing and they (both respondents) gave no evidence in rebuttal thereof (for they merely) rested their cases on the prosecution evidence), we would have had no hesitation in entering a conviction against each of both respondents in respect of the said 1st and 2nd counts of the charge had the case for the prosecution been closed as required by sections 286 and 287 of the Criminal Procedure Act and had the proceedings not been affected by defects arising from the serious procedural errors recounted above. However, we refrain from doing so (although this was requested for by the learned counsel for the appellant) because the case for the prosecution was never closed either by the prosecution or by the learned trial Judge and because we are not unmindful of the rule that a Court of Appeal will not substitute its own views for those of the trial court nor is it allowed to make findings which the trial court was in duty

bound to make but which it had omitted or failed to do.

It now remains to consider the ultimate order which we will make in this matter for the learned counsel for the appellant had requested, as an alternative to entering a conviction, that this court should order a  
B retrial in this case whilst the learned counsel for the 2nd respondent, in his balanced approach and well considered submissions, replied that a retrial will be inapt. **We have read the case of Abodundu (supra) which learned counsel for the 2nd respondent called our attention  
C to. After giving careful consideration to the principles laid down therein and having regard to the particular facts and circumstances of this case, we are of the opinion that the interests of justice requires that this is an appropriate case in which a retrial should be ordered and in doing so we find support in the case of Arua Eme  
D (supra) in which Onyeama, J.S.C., delivering the judgment of the Supreme Court said, inter alia:-**

*"(3) over-ruling Oladimeji v. The King*

*(1) failure to comply with section 287*

E *(1) (a) does not per se vitiate or nullify the trial, the proper course is to consider the effect of failure to comply with it, without importing into it any implication from section 288."*

F *"(4) applying the principle in Atunde v. Police (3), failure to comply with section 287 (1) (a) of the Criminal Procedure Act, although an irregularity does not render the trial null; the effect of such failure must depend on the circumstances of the particular case, and the appellate court is at liberty to allow the appeal and order an acquittal or a retrial, or dismiss the appeal if it considers that no substantial  
G miscarriage of justice has occurred."*

In view of all the foregoing, this appeal is allowed; the said judgment and order of discharge and acquittal are set aside and annulled and it is hereby ordered that the 1st and 2nd respondents in this appeal shall  
H stand trial again in respect of the offences of conspiracy and stealing which formed the 1st and 2nd counts of the charge concerned in a High Court in Benin City presided over by another Judge.