

SUPREME COURT OF NIGERIA

14TH JANUARY, 2000. SC. 69/1999

**CORAM:- A. B. WALI, E. O. OGWUEGBU, U. A.
KALGO, S. O. UWAIFO, E. O. AYOOLA, JJSC**

FIDELIS UBANATU APPELLANT
V.
COMMISSIONER OF POLICE RESPONDENT

CRIMINAL LAW - *Threat to kills. 323 CC - Prosecution must prove 3 essential elements - Including the fact that the contents of the letter amount to threat to kill.*

CRIMINAL PROCEDURE - *No case submission - Where prosecution fails to prove an essential element in the charge - Trial court ought to uphold the submission.*

CRIMINAL PROCEDURE - *Prima face case - In a charge of threat to kill - Contents of exhibits 1 and 3 being friendly advice and warning - Cannot be construed to amount to threat to kill.*

NO CASE SUBMISSION - *Criminal procedure - Threat to kill - Failure of the prosecution to make out a prima facie case - The lower courts were in error - To have overruled the no case submission.*

FACTS

The appellant was arraigned before the Warri Magistrate's Court, Delta State. He was charged with the offence of knowingly causing one David Moroh to receive letters threatening to kill him under s. 323 of the Criminal Code, Cap. 48, Vol. II, Laws of defunct Bendel State of Nigeria, 1976, applicable in Delta State. The appellant pleaded not guilty to the charge. The prosecution called 6 witnesses and closed its case. Appellant's counsel made a no case submission to which counsel for the prosecution replied. It is the appellant's contention that the prosecution did not prove the essential ingredients of the

offence charged. The trial Chief magistrate overruled the submission. Appellant's appeal to the High Court and the Court of Appeal were all dismissed. Being dissatisfied, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal considered the contents and interpretation of Exhibits 1 and 3 before upholding the overruling of no case submission of both the Magistrate Court and the High Court, Warri.

2. Whether the essential ingredients of the offence contained in Section 323 of the Criminal Code applicable in Delta State were exhaustively enunciated by the Court of Appeal.

HELD (Unanimously allowing the appeal per lead judgment of OGWUEGBU JSC)

Where prosecution fails to prove an essential element in the charge

I. At the close of the prosecution's case, a trial court should consider whether there is evidence which will suffice to support the allegation made in the charge and whether such evidence will stand unless the accused produces no evidence to rebut it. If at the close of the case till the prosecution there is no proof of an essential element in the said charge and a submission of no case is made, a trial court ought to uphold the submission. (p. 98 E)

S. 323 CC - *Prosecution must prove 3 essential elements*

2. In a charge under section 323 of the Criminal Code, the prosecution must prove that:

- (i) the accused sent or delivered the letter,
 - (ii) knew the contents of the letter,
 - (iii) the contents of the letter amount to treat to kill or murder
- (p. 98 F)

Prima facie case - In a charge of threat to kill

3. When considering whether a “Prima facie case” had been made. Exhibits “1” and “3” were before the learned Chief Magistrate and it was for him to determine whether the contents of Exhibit “1” or “3” or both amounted to a threat to kill or murder P.W.1 as provided in

section 323 of the Criminal Code. He should have construed the two exhibits. There is no way Exhibit “1” or “3” can be construed to amount to a threat to kill. The contents of both exhibits are friendly advice, warning and suggestions to P.W.1 as to how to protect himself from Francis Obuninta (P.W.2) who was planning to kill him (p.98H)

Failure of the prosecution to make out a prima facie case

4. Based on Exhibits “1” and “3” as well as the oral evidence adduced by the prosecution, it is my view that an essential ingredient of the offence charged, which is, threat to kill or murder P.W.1 was not proved. The prosecution could not be said to have made out a prima facie case requiring any explanation from the appellant. See Ajidagba & 4Ors. v. Inspector General of Police (1958) 3 F.S.C. 5 and The Queen v. Ogucha (1959) 4 F.S.C.64. The most that can be said of the conduct of the appellant is that he was effecting a public mischief, which offence, does not exist in our criminal law. The learned trial Chief Magistrate was in error to have overruled the no case submission made by counsel. The High Court and the court below equally erred when they affirmed the ruling of the learned Magistrate to the effect that a prima facie case was made out by the persecution. (p. 99 G)

NOTABLE POINTS OF INTEREST

OGWUEGBUJSC

1. Prima facie case defined

It will be appropriate at this stage to define the expression “prima facie case”. The courts and authors have defined it in various ways. It is defined in Osborn’s Concise Law Dictionary, 8th ed. by Rutterford and Bone, at page 259 as:

“A case in which there is evidence which will suffice to support the allegation made in it, and which will stand unless there is evidence to rebut the allegation. When a case is being heard in court, the party on whom, the burden of proof rests must make out a prima facie case, otherwise the other party will be able to submit that there is no case to answer, and if he is successful, the case will be dismissed.”(p. 96 E)

WALIJSC

2. Failure of evidence to reveal any mens rea

The evidence in this case does not reveal any mens rea, directly or

indirectly by the appellant in writing Exhibits 1 and 3, or a threat to kill any person by him either directly or indirectly. A submission of no case to answer can succeed where there has been no evidence to prove an essential element of the offence. (p. 104 A)

B KALGOJSC

3. The exhibits do not contain any threat to kill

What they contained was a warning that Mr. Obuninta wanted to eliminate the said David Moroh and an advice on what to do to avoid this. In fact Exhibits 1 and 3 did not contain a threat to kill David Moroh or a threat by the appellant to kill David Moroh. They only contained a warning and not a threat and as advice and not a threat. I cannot see therefore how the act of the appellant by sending Exhibit 1 and 3, could in anyway amount to sending a threat to kill any person.
D (p. 107 H)

4. No case submission - Court to be brief in its ruling

It is trite law that on a submission of “no case to answer” it is wiser for a judge or magistrate to be brief in his ruling and make no remarks or observations on the facts. See R. V. EKANEM 13 WACA 108. This is because in a ruling of an inordinate length, too much might be said which at the end of the case might fetter the discretion of the judge or magistrate see ODOFIN BELLO V THE STATE (1967) NWLR 1, R. V. COKER & ORS 20 NLR 62; AKINPELU AJANI V. QUEEN 3 WACA 3. (p. 108 D)

UWAIFOJSC

5. Proper import of s. 323 CC

Now, the difficult aspect of the provision is whether it says or is meant to say that any Person who know of the contents of such writing (even if he is not the person offering the threat) makes the writing available to any person would be guilty under that section. That cannot be right otherwise a person who, for instance, after reading a threatening letter which he picked from the ground apprises the police by causing it to be received by them becomes a criminal under that section. It appears that the section is aimed at a person who prepares (or causes to be prepared) any writing threatening to kill any other person and

makes that letter available directly or indirectly to any person. Whatever it is, the writing must contain and be the threat offered. (p. 112 D)

6 Prima facie case - How established

It thus means that it is when all the ingredients of an offence have been laid out in evidence by the prosecution and that evidence adduced has not been so discredited as a result of cross-examination or is not so manifestly unreliable that any reasonable tribunal could safely convict on it that a prima facie case can be said to be made out requiring the accused for some explanation. To put it another way, a submission of no case to answer may be properly made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; or (b) even when evidence has been adduced on the essential elements, the evidence 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. 115 G)

REPRESENTATION

L.O. Akhidenor Esq. for the appellant

C.O. Emifoniye Esq. Asst. Chief Legal Officer, Delta State, for the respondent

CASES REFERRED TO

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

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

R.V. Ekanem 13 WACA 108

Ajidaygba v. Inspector-General of Police (1958) 3 FSC 5 at 6

Duru v. Nwosu (1989) 1 N.W.L.R. (pt. 113) 24 at 43

Ikomi v. The State (1986) 3 N.W.L.R. (pt. 28) 340 at 366

Ibeziako v. Commissioner of Police (1963) 1 All N.L.R. 61

Atano v. Attorney-General, Bendel State (1988) 2 N.W.L.R (pt. 75) 201

L. v. Boucher 4. C. & P. 562 (172 E.R 826)

STATUTE REFERRED TO

- B Criminal Code Cap. 48 vol. II Laws of Bendel State 1976 s.323
- Offences against the Person Act 1861 s. 16
- Criminal Procedure Law Cap. 49 Vol II Laws of Bendel State 1976
- s. 301

C

LEAD JUDGMENT BY OGWUEGBU JSC

On 4th October, 1999 this appeal came before us. After hearing counsel for the appellant and the respondent, I allowed the appeal and indicated that I would give my reasons for allowing the appeal today. I now give my reasons for the judgment.

The appellant was arraigned on a two count charge in the Warri Magistrate's Court, Delta State of the following offences:

- E **"COUNT1:** *What you, Fidelis Ubanatu "alias David Ekemute"*
- (m) *between the 7th day of November, 1992 and 12th day of November, 1992 at Warri in the Warri Magisterial District, knowingly caused 'avid Moroh (m) of Dowel! Schlumberger (Nig.) Limited, P.O.Box 344, Warri to received a latter threatening to kill him and thereby committed an offence punishable under Section 323 of the Criminal Code, Cap. 48, Vol. 11, Laws of defunct Bendel State of Nigeria, 1976 applicable in Delta State.*
- F

- G **COUNT2:** *That you, Fidelis Ubanatu "alias David Ekemute"*
- (m) *between the 10th day of August, 1994 and the month of September, 1994 at Warri in the Warri Magisterial District, knowingly caused one David Moroh (m) of Dowell Schlumberger (Nig) Limited P.O. Box 344, Warri to receive a letter threatening to Kill him and thereby committed an offence punishable under section 323 of the Criminal Code, Cap. 48, 1, Laws of the defunct Bendel State of Nigeria, 1976 as applicable in Delta State".*
- H

He pleaded not guilty. The prosecution called six witnesses. At the close of the prosecution's case, appellant's counsel made a no case

submission to which counsel for the prosecution replied. The learned Chief Magistrate, Kofi, Esqr. overruled the submission. The appellant was dissatisfied with the ruling and appealed to the High Court of Delta State, Warri Judicial Division. Narebor, J. in his appellate jurisdiction, dismissed the appeal and ordered the appellant to appear before the Magistrate's Court to defend himself. He was still not satisfied and appealed to the Court of Appeal, Benin Division. The court below dismissed his appeal and affirmed the decision of Narebor, J. hence the further appeal to this court. B

Briefs of argument were duly filed. The appellant identified C the following issues in his brief for our determination:

"1. Whether the Court of Appeal considered the contents and interpretation of Exhibits 1 and 3 before upholding the overruling of no case submission of both the Magistrate Court and the High Court, Warn D

2. Whether the essential ingredients of the offence contained in Section 323 of the Criminal Code applicable in Delta State were exhaustively enunciated by the Court of Appeal. E

3. Whether the ingredients of actus reus and mens rea are not embedded in section 323 of the Criminal Code applicable in Delta State or in other words, whether section 323 of the Criminal Code under consideration was one of strict liability. F

Two issues were formulated in the respondent's brief, namely:

"1. Whether this appeal from the decision of the Court of Appeal is valid. G

2. Whether the Court of Appeal was right in affirming the decision of the High Court dismissing the no case submission. H

I agree with the learned respondent's counsel that Issue No. 3 is not covered by any of the two grounds of appeal filed. It is incompetent and it is accordingly struck out. I am, however, unable to hold that the first two issues do not arise from the grounds of appeal in spite of the short-comings of the brief. I will therefore consider the appeal on the

appellant's Issue numbers (1) and (2) which embrace the remaining issues identified in the respondent's brief.

The charge is based on Exhibits "1" and "3" which are letters written to PW.1 (David Moroh) by the appellant in pseudo names. For a better appreciation of issues involved in the appeal, I will reproduced the two exhibits in full.

Exhibit "1" reads as follows:-

"77, Emebiren Street,
Okumagba Layout Warri,
7th November, 1992.

Mr. David Moroh,
Dowell Schlumberger (Nig) Ltd.
P.O.Box 344, Warri.

Dear Mr. Moroh,

BEWARE OF MR. FRANCIS OBUNINTA:

I am a friend of Mr. Francis Obuninta, one of your Mechanics in Dowell Schlumberger. Warri. Obuninta and I have been very close friends for a long time now that there is no secrets (sic) between us.

I am compelled to write to warn you against Obuninta for two reasons:

I, Mr. Obuninta hates you and wants to eliminate you by all means.

As a born again Christian, I would not like to see anybody and a fellow Christian for that matter, die prematurely due to the inordinate ambition of a subordinate staff.

Mr. Obuninta complains bitterly and frequently about you, saying you are blocking his way job-wise. He has been consulting very powerful and notorious native doctors to use diabolical means to kill you, He even swore to use hired killers to eliminate you if his diabolical means completely fail him.

I have been warning Mr. Obuninta to desist from his evil machinations against you but he has refused to heed my advice. He is inordinately ambitious and can go any length to achieve his ambition. As a Christian, all these have made me to part ways with him.

In word own best interest, I would suggest that you take either of the following two actions against Obuninta to forestall his evil plans against you:

(1) Relieve him of his job whenever he commits ANY offence no

matter how light the offence might be.

(2) Transfer him to Port-Harcourt as Soon as possible.

You may have other more effective means to deal with him severely.

NOT TO HEED MY ADVICE/WARNING AND SUGGESTED
ACTIONS TO DEAL WITH MR. OBUNINTA MIGHT BE TOO
DANGEROUS SO ACT SWIFTLY AND DECISIVELY TO SAVE
YOUR LIFE AND JOB. B

Yours faithfully,

(sgd) DAVID EKEMUTE.” C

Exhibit “3” reads:

Warri. D

10th August, 1994.

Mr. David Moroh,

Dowell Schlumberger (Nig.) Limited, E

P O. BOX 344, Warri

Dear David,

OBUNINTA’S PLOT TO MURDER YOU!! F

You will recollect that sometime last year I wrote to warn you
that Mr. Francis Obuninta, your colleague in Dowell Schlumberger,
was planning to hire some people to kill you. I then advised you in
the letter to either work for his transfer to Port Harcourt or terminate
his appointment with the Company without delay. G

You seemed to have down-played my friendly and christianly
advice.

I am sorry to learn that some hired killers attempted your life
recently. I thank Almighty God that you narrowly survived that
dastardly act. It was Mr. Francis Obuninta’s handwork. He is still
plotting to eliminate you, vowing that you will definitely not survive
this second onslaught. H

Life is too precious to allow an over-ambitious man like Obunmta o have his way, thereby leaving your beloved family to suffer your loss. God forbid (sic) Eliminate Obuninta by all means before he eliminates you!

other evidence. *Pacific Telephone & Telegraph Co. v. Wallace*, 158 Or. 219 750.2d.942,937. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded. “

The expression “prima facie case” has also received numerous definitions by our courts. In *Ajidadgba v. Inspector-General of Police* (1958) 3 FSC 5 at 6, Abott, F.J. attempted to find a definition for the expression. He said:

“We have been at some pains to find a 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) 1. L.R. 50 Calc. 275, we find the following dicta:-

“What is meant by a *prima facie* (case)? It only means that there is a ground for proceedingBut *prima facie* case is not the same as proof which comes later when the Court has to find whether the accused is guilty or not guilty”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.*”

In *Dum v. Nwosu* (1989) 1 N.W.L.R. (pt. 113) 24 at43, F Nnamani, J.S.C said:

“It seems to me the Simplest definition is that which says that “there is ground for proceedings.” In other words, that something has been produced to make it worthwhile to continue with the proceeding. On the face of it, “suggests that the evidence produced so far indicates (hat there is something worth looking at.”

See also *Ikomi v. The State* (1986) 3 N.W.L.R. (pt. 28) 340 at 366 and G sections 286 and 287 (1) of the Criminal Procedure Law, Cap. 49 Laws of Bendel State, 1976 which provide for situations where the persecution failed to establish a *prima facie* case, (section 286) and (section 287 (1), the converse.

“I will also refer to the English Practice Note issued by Parker, L.C.J. contained in (1962) 1 All E.R. 448 as to when a no case to

answer can properly be made and upheld. The Circumstances are:

*(a) When there has been no evidence in the alleged offence;
(b) 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 also Ibeziako v. Commissioner of Police (1963) 1 All N.L.R. 61 and Atano v. Attorney-General, Bendel State (1988) 2 N.W.L.R (pt. 75) 201.

Having regard to the above definitions of the expression, "prima facie case", can it be said that the learned trial Chief Magistrate rightly overruled the no case submission made by the learned appellant's counsel? One should not go outside the evidence (oral and documentary) tendered by the prosecution in coming to the conclusion. Exhibits "I" and "3" form part of that evidence.

Section 323 of the Criminal Code under which the appellant was charged provides as follows:

"323. Any person who, knowing the contents thereof, directly or indirectly causes any person to receive any writing threatening to kill and person is guilty of a felony, and is liable to imprisonment for seven years."

- E ***At the close of the prosecution's case, a trial court should consider whether there is evidence which will suffice to support the allegation made in the charge and whether such evidence will stand unless the accused produces no evidence to rebut it. If at the close of the case for the prosecution there***
F ***is no proof of an essential element in the said charge and a submission of no case is made, It trial court ought to uphold the submission.***

In a charge under section 323 of the Criminal Code, the prosecution must prove that:

- G (i) ***the accused sent or delivered the letter,***
(ii) ***knew the contents of the letter,***
(iii) ***the contents of the letter amount to treat to kill or murder***

- H See L. v. Boucher 4. C. & P. 562 (172 E.R 826) and R. v. Tylek & Or. 1 Mood. 428 (168 E.R. 1330). In this case, the appellant admitted writing Exhibits "I" and "3". (See Exhibit 9). ***When considering whether "Prima facie case" had been made, Exhibits "1" and***

“3” were before the learned Chief Magistrate and it was for him to determine whether the contents of Exhibits. “1” or “3” or both amounted to a threat to kill or murder P. W. 1 as provided in section 323 of the Criminal Code. He should have construed the two exhibits.

There is no way Exhibit “1” or “3” can be construed to amount to a threat to kill. The contents of both exhibits are friendly advice, warning and suggestions to P. W. 1 as to how to protect himself from Francis Obuninta (P.W.2) who was planning to kill him. Part of Exhibit “1” reads:-

“I have been warning Obuninta to desist from his evil machinations against you but he has refused to heed my advice. He is inordinately ambitious and can go any length to achieve his ambition. As a Christian, all these have made me to part ways with him.

In your own best interest, I would suggest that you take either of the following actions against Obuninta to forestall his evil plans against you.....”

Part of Exhibit “3” reads:

“You will recollect that sometime last year I wrote to warn you that Francis Obuninta. Your colleague in Dowell Schlumberger, was planning to kill you. I then advised you in the letter to either work for his transfer to Port Harcourt or terminate his appointment with the Company Without delay. You seemed to have down-played my friendly and christianly advise. I am sorry to learned that some hired killers attempted your life recently. I thank almighty God that you narrowly survived that dastardly act. It was Mr. Francis Obuninta’s handwork. He is still plotting to eliminate you..... “

Based on Exhibits “1” and “3” as well as the oral evidence adduced by the persecution, it is my view that an essential ingredient of the offence charged, which is, threat to kill or murder P.W 1 was not proved. The prosecution could not

be said to have made out a prima facie case requiring any explanation from the appellant. See Ajidagba & 4 Ors. v. Inspector General of Police (1958) 3 F.S.C. 5 and The Queen v. Ogucha (1959) 4 F.S.C. 64. The most that can be said of the conduct of the appellant
 B *is that he was effecting a public mischief, which offence, does not exist in our criminal law.*

The learned trial Chief Magistrate was in error to have overruled the no case submission made by counsel. The High Court
 C *and the court below equally erred when they affirmed the ruling of the learned Magistrate to the effect that a prima facie case was made out by the persecution.*

The submission of no case to answer should have been upheld by the
 D learned Chief Magistrate. I will therefore allow the appeal and set aside the decision of the court below date 8-3-99. The appellant is accordingly acquitted and discharged

E

WALI JSC

On the 21st day of October, 1999, I allowed this appeal discharged
 F the appellant on each of the two counts he was charged with and reserved my reasons for doing so today which I now proceed to do.

I have had the privilege of reading before now the lead Reasons For
 Judgment of my learned brother Ogwuegbu JSC and I entirely agree with
 G him.

The appellant was charged on two counts, with offences committed
 unders. 323 of the Criminal Code, Cap 48 Laws of the defunct Bendel State
 of Nigeria, 1976, now applicable in Delta State, to wit: knowingly causing
 H one David Moroh to receive a letter dated 7th November 1992 threatening his life, and also knowingly causing the same David Moroh to receive another letter dated 10th August, 1994 threatening his life.

The appellant was arraigned, before J.E.O. Kofi, Esq, Chief Magis-

trate Grade I sitting in Warri. He pleaded not guilty to the two charges. The trial proceeded during which the prosecution called 6 witnesses and some exhibits, prominent amongst which are Exhibits 1 and 3, the letters dated 7th November, 1992 and 10th August 1994 respectively, written by the appellant to David Moroh were tendered and admitted in evidence. At the conclusion of the persecution's case, counsel for the appellant made a no-case submission on behalf of the appellant and the learned Chief Magistrate in line with decided cases, delivered a brief ruling in which he overruled the submission and called upon the appellant to enter his defence. The appellant's appeals to the High Court Delta State and subsequently to the Court of Appeal Benin Division against the ruling were both unsuccessful; hence the appeal to this Court.

Parties filed and exchanged briefs of argument, In the brief filed by the respondent a preliminary objection was raised against the competency of the appeal in that the issues formulated by the appellant do not fall within the scope of the two grounds of appeal filed. Learned Counsel also complained against the appellant formulating 3 issues which numbered more than the two grounds of appeal filed.

I have considered those points raised and I am of the view that though the brief filed is scanty, it argued the 3 issues together and that these issues are within the two grounds of appeal. I therefore overrule the objection. I find the appeal competent.

In the appellant's brief of argument the following 3 issues have been raised:

1. *Whether the Court of Appeal properly considered the contents and interpretation of Exhibits 1 and 3 before upholding the overruling of no case submission of both the Magistrate Court and the High Court, Warri.*
2. *Whether the essential ingredients of the offence contained in Section 323 of the Criminal Code applicable in Delta State were exhaustively enunciated by the Court of Appeal.*
3. *Whether the ingredients of actus reus and mens rea are not embedded in*

Section 323 of the Criminal code applicable in Delta State or in order words, whether section 323 of the Criminal Code under consideration was one of strict liability."

On the part of the respondent two issues are raised in the brief of B argument filed on his behalf to wit:

1. *Whether this appeal from the decision of the Court of Appeal valid.*
2. *Whether the Court of Appeal was right in affirming the decision of the High Court dismissing the no case submission".*

C I have already dealt with issue two raised in the respondent's brief. Issue I has been adequately covered by the issues formulated by the appellant and therefore for the purpose of resolving the appeal I shall adopt the issues in the appellant's brief.

D It was the submission of learned counsel for the appellant that one of the essential elements to wit: mens rea, was not proved by the prosecution and to that extent both the trial court and the two appellate courts were wrong in over-ruling the no - case submission. He cited and relied on E IBEZIAKO AND ORS V THE STATE (1989) 1 CLRN 123 at 139 and OMOBORIOWO AND ANR V AJASIN (1983) 10 SC 178 at 225. He submitted that the contents of both Exhibits 1 and 3 were nothing more than forewarning David Moroh (PW 1) of the pending possible danger to his life F and that they did not contain threat by the appellant to kill him. He urged that the appeal be allowed.

In reply learned counsel for the respondent submitted that the persecution had made out a prima facie case against the appellant and G therefore both the trial court and the two lower appellate courts were right in calling upon the appellant to put in his defence. Learned counsel argued that a ruling in a no - case submission is not concerned with whether or not the appellant on the evidence led is guilty of the offence charged, but H whether a prima facie case has been made out against the accused. Learned counsel cited and relied on several decisions of this court in support of his submission and urged that the appeal be dismissed.

Now section 323 of the Criminal Code Cap 48 of Laws of the defunct Bendel State of Nigeria 1976 as applicable in Delta State reads as follows:-

“323. Any person who knowing the contents thereof, directly or indirectly causes any person to receive any writing threatening to kill”, person is guilty of a felony and is liable to imprisonment for seven years”. The provision of this section is based on S. 16 of the offences against the Person Act, 1861 which enacted thus

“Whosoever shall maliciously send, deliver or utter, or directly or indirectly cause to be received, knowing the contents thereof any letter or writing threatening to kill or murder any person, shall be guilty of an offence and being convicted thereof shall be liable... to imprisonment for any term not exceeding ten years’.

To constitute an offence under s. 16 of the Offences *Against* the Person Act, 1861 the following three elements are essential:-

- (a) Malice,
- (b) knowledge of contents of the letter; and
- (c) Threat to kill.

S. 16 of the Offences Against the Person Act though differently worded from S. 323 of the Criminal Code of the defunct Bendel State but the purport and the mischief aimed at by both sections are the same. S. 16 (supra) contains the words “maliciously”, and “utter” which are absent in S. 323 of the criminal code (supra).

The word “knowing” in the context of s. 323 of the criminal code will include improper motive. Both Exhibits 1 and 3 from their contents, could neither be said nor construed to have been sent by the appellant to PW1 the recipient, with improper motive. The appellant was trying to alert Mr. David Moroh with the evil machinations of Mr. Obunuta (PW2) against him so that he could be on his guard. The evidence led by the prosecution did not establish that the appellant was trying to gain or derive any advantage by writing Exhibits 1 and 3, in other words it could not be implied from the contents of the two exhibits that he was trying properly to secure some advantage to which he was not legally entitled. The threat to kill contained in Exhibits 1 and 3 was not to be executed by the appellant either directly or indirectly. In the English decisions of *R. v. Syme* 6 Cr. App. Rpt 257, *R. v. Johnson* 9 Cr. App Rpt 57 and *R. Solanke* 54 Cr. App. Rpt 30, the threat to kill was to be executed by the appellant in each case, but not an information that some one else was threatening to kill. The contents of Exhibits 1 and 3 did not show that the appellant was threatening to kill David

Morah, either alone or in connivance with PW2. And as rightly commented upon by Durobo Nanebor the learned judge of the Delta State High Court sitting in appellate jurisdiction, there is dearth of authorities on the construction and application of S. 323 of the defunct Bendel State Criminal Code.

The evidence in this case does not reveal any mens rea, directly or indirectly by the appellant in writing Exhibits 1 and 3, or a threat to kill any person by him either directly or indirectly. A submission of no-case to answer can succeed where there has been no evidence to prove an essential element of the offence. Learned counsel for the respondent Mr. Oligilore, a senior legal officer even conceded before the appellate High Court that both Exhibits 1 and 3 did not contain on their face a threat to kill PW2 by the appellant. This could have been the end of the matter.

A submission of no-case to answer will succeed where there has been no evidence to prove an essential element of the offence. See IBIZIAKO V COMPOL (1963) 1 SCNLR 101. There is no evidence of clement of mens rea in this case as I have shown above. The submission of no case to answer ought to have succeeded.

It is for these and the fuller reasons contained in the lead Reasons for Judgment by my learned brother Ogwuegbu JSC that I allowed the appeal on 21st October, 1999.

F **KALGO JSC**

On 21st of October, 1999 when this appeal was heard in court, I allowed the appeal, acquitted and discharged the appellant and indicated that I shall give my reasons for doing so, today. I now do so.

I have read in advance the reasons given by my learned brother Ogwuegbu, JSC for allowing the appeal and I entirely agree with his conclusions. I now wish to state my own reasons for allowing the appeal

The appellant was charged before a Chief Magistrate in Warri on two identical counts with the offence of “threatening to kill” one David Moroh contrary to Section 323 of the Criminal Code (cap. 48 Laws of former Bendel State applicable to Delta State). The learned Chief Magistrate heard 6 witnesses for the prosecution at the end of

which the counsel for the appellant made a “no case” submission. The Chief Magistrate overruled the no case submission and called upon the appellant to defend himself. The appellant appealed to the High Court Warri, which heard the appeal and dismissed it. The appellant further appealed to the Court of Appeal, Benin which also affirmed the decision of the High Court Warri and dismissed the appeal. He now appeals to this court. He filed 3 grounds of appeal which without particulars read:-

1. *That the lower Courts misdirected themselves in law when (they interpreted the two letters Exhibit 1 and 3 to mean that the appellant threatened to kill the complainant in the said letters.*
2. *The judgment of the Court of Appeal was against the evidence before it.*
3. *The learned Justices of the Court of Appeal erred in law in dismissing the appeal when they failed to consider whether mens rea formed an essential ingredient of S. 323 of the Criminal Code applicable in Delta State.*

The appellant also formulated 3 issues for determination in the appeal which are:-

1. *Whether the Court of Appeal properly considered the contents and interpretation of Exhibits 1 and 3 before upholding the overruling of no case submission of both the Magistrate Court and the High Court Warri.*
2. *Whether the essential ingredients of the offence contained in S. 323 of the Criminal Code applicable in Delta State were exhaustively enunciated by the Court of Appeal.*
3. *Whether the ingredients of actus reus and mens rea are not embodied in S. 323 of the Criminal Code applicable in Delta State or in other words, whether section 323 of the Criminal Code under consideration was one of strict liability”*

The respondent’s counsel filed his brief with leave of the court on the day the appeal was heard, framed only two issue which are:-

1. *Whether this appeal from the decision of the Court of Appeal is valid.*
2. *Whether the Court of Appeal was right in affirming the decision of*

the High Court dismissing the no case submission”.

Let me deal with the respondent’s first issue which pertained to the jurisdiction of this court to entertain the appeal. The respondent did not file a cross-appeal but it is an issue of jurisdiction an issue of law, which the respondent could raise at any stage on appeal. SEE
B AFRICAN NEWSPAPER OF NIGERIA LTD V FEDERAL REPUBLIC OF NIGERIA (1985) 2 NWLR (pt. 6) 137 at 161.

The first ground of objection argued in the brief by the respondent was that the issue for determination formulated by the
C appellant did not arise from the grounds of appeal filed. The second ground was that the appellant did not argue issues 1 and 2 in his brief and are therefore deemed to be abandoned. The third ground of objection was that appellant’s issue 3 has no bearing on the ground of appeal and is therefore irrelevant. The learned counsel for the
D respondent cited many cases in support of his submissions in the brief.

It is very clear that on pages 99A, the notice of appeal disclosed that the appellant filed three grounds of appeal. He also formulated 3 issues for determination as can be seen on pages 1 and 2 of his brief. There is no doubt that issue 1 is clearly related to ground of appeal 1,
E and issue 3 is related to ground of appeal 3. It appears to me that there is no issue raised in relation to ground of appeal 2, and issue 2 is closely related to ground of appeal 3. This means that 2 issues would appear to have been raised from ground of appeal 3. This is not usually
F allowed and I think issue 3 is superfluous and irrelevant. I so find. The result is that I shall strike it out and I so do.

On second ground of objection; I find that the learned counsel for the appellant has argued issue one properly in his brief. It is also that he said something about the evidence at the trial when reference was
G made about the contents of Exhibits 1 and 3. I therefore do not with the learned counsel for the respondent that issue 2 is deemed abandoned as no argument was advanced in respect thereof.

On the third ground of objection, I strongly agree with the counsel for the respondent that issue 3 was not related to ground of
H appeal 3, or that it did not arise from the decision of the Court of Ground of appeal 3 together with its particulars is very important in this appeal as it examines the essential parts of S. 323 of the Criminal Code upon which the offence of the appellant can be determined. The arguments in the appellants brief, though brief, on this issue is clear

and relevant.

On the whole, I find that the issues 1 and 2 argued in the appellant's brief related to the grounds of appeal 1 and 3, and are relevant. There is no effective challenge to the validity of the appeal here and I find that the appeal is competent.

I now come to the appeal itself. The learned counsel for the appellant in his brief of argument argued the issues together and not separately I think this is proper in the circumstances because it is difficult to sever argument on issue 1 from that on issue 2. They both deal with the extent of the proper interpretation of the provisions of S. 323 of the Criminal Code applicable to Delta State and the contents of Exhibits 1 and 3.

In this appeal, the appellant admitted and confessed that he wrote Exhibits 1 and 3 to one David Moroh warning him that somebody else was threatening to kill the said David Moroh. In both Exhibits 1 and 3, the appellant did not say that he was going to kill or instigate someone to kill the said David Moroh. There was no iota of evidence to that effect at the trial before the learned Chief Magistrate. And although in Exhibit 1 the appellant deliberately used a fake name of David Ekemute as the signatory of the letter to hide his identity, this conduct did not amount to a threat to kill the said David Moroh by himself Section 323 of the said ('ode under which the appellant was charged provides:-

"Any person who knowing the contents thereof directly causes person to receive and writing threatening to kill any person is guilty of a felony and is liable to imprisonment for seven years." (underlining)

In this case, there is no doubt that the appellant being the writer of Exhibits 1 and 3, knew the contents thereof There is also no doubt that he directly caused the said David Moroh to receive the letters, but surely the letters did not contain any threat to kill the said David Moroh.

What they contained was a warning that Mr. Obuninta wanted to eliminate the said David Moroh and an advice on what to do to avoid this. In fact Exhibits 1 and 3 did not contain a threat to kill David Moroh or a threat by the appellant to kill David Moroh. They only

contained a warning and not a threat and as advice and not a threat. I cannot see therefore how the act of the appellant by sending Exhibit 1 and 3, could in anyway amount to sending a threat to kill any person. The operative words in said S. 323 in my respectful view are “threatening to kill”. In my view those letters are sending a warning rather than a threat for an impending danger. And the fact that shortly after that David Moroh was attacked and shot by some one did not confirm any threat at all; it only vindicated the appellant for the warning which he gave of the impending danger.

It was argued orally by the learned counsel for the respondent that as this is a no case submission it was too early for the lower courts to discuss the evidence against the appellant at that stage, and that the appellant might be discharged when all the evidence in the case was heard.

It is trite law that on a submission of “no Case to answer” it is wiser for a judge or magistrate to be brief in his ruling and make no remarks or observations on the facts. See R. V. EKANEM 13 WACA 108. This is because in a ruling of an inordinate length, too much might be said which at the end of the case might fetter the discretion of the judge or magistrate see ODOFIN BELLO V THE STATE (1967) NWLR 1, R. V. COKER & ORS 20 NLR 62; AKINPELU AJANI V. QUEEN 3 WACA3.

Where a judge or magistrate overrules a no case submission, h must be satisfied that a prima facie case has been made out against the accused. And a prima facie case is said to be made out where there is ground for proceeding with the case and there is ground for proceeding where the evidence before the court is such that if uncontradicted and if believed will be sufficient to prove the case against the accused. See AJIDOGBA V I.G.P (1958) SCNLR 60; 3 FSC 5; IBEZIAKO V. C.O.P (1963) 1 SCNLR 99.

In this appeal, at the stage when the submission of no case was made on behalf of the appellant, the only evidence before the trial court implicating the appellant was Exhibits 1 and 3 and the appellant’s admission or confession that he was the maker and sender. The Section of the law under which he was charged speaks of “threatening to kill” whereas the contents of those letters spoke of warning and advising. None of those letters conveyed a “threat to kill” either by the appellant or by Mr. Obuninra. So that even if the contents of any of

the letters were believed, the appellant could not properly be convicted under Section 323 of the Criminal Code. In the AJIDAGBA CASE (supra), the court held that a decision to discharge an accused person on the grounds that a prima facie case has not been made out against him, must be a decision which upon a calm view of the evidence offered by the prosecution, a rational understanding will suggest. Having regard to what I said earlier in this judgment, I think that in this case, upon a claim view of the only evidence in Exhibits 1 and 3 vis-a-vis the provisions of S. 323 of the Criminal Code a rational understanding of the evidence, without more, will suggest that no prima facie case was made against the appellant and the Chief Magistrate would have discharged him. I am of the view that this is the case here and I am satisfied that the no case submission should have succeeded in favour of the appellant and I so find.

It is well settled that after a successful submission of no case to answer has been made, an accused is no longer to be regarded as charged with that offence of which he was charged and must be discharged on the merits. See ADEYEMIV THE STATE (1991) 6 NWLR (pt. 195) 1 at page 38; POLICE V MARKE (1957) 2 FSC 5. For the above reasons, I also allow this appeal and acquit and discharge the appellant.

UWAIFO JSC

On 21 October, 1999, I allowed this appeal and dismissed the complaint on the merits under s. 301 (l) of the Criminal Procedure Law (Cap. 49) vol. 11 Laws of Bendel State, 1976 (the Law) because no case was made out against the appellant sufficiently to require him to make a defence at his trial. I accordingly discharge him on each of the two counts under s. 286 of the Law, amounting to an acquittal: see I-G Police v. Marke (1957) SCNLR 53. I said then I would give my reasons for the judgment today and I now do so.

At the Warri Magisterial District sitting at Warri, the two-count charge brought against the appellant read:

"That you, Fidelis Ubanatu (m) on the 7th day of November. 1992 at Warri in the Warri Magisterial, District, knowingly caused one David Moroh (m) of Dowel! Schlumberger (Nig.) Limited, P.O. Box

344, Warri to receive a letter threatening to kill him and thereby committed an offence punishable under section 323 of the Criminal Code Cap. -448 vol. 11, Laws of the defunct Bendel State of Nigeria, 1976 as applicable in Delta State.

B COUNT2: That you, Fidelis Ubanatu (m) on the 10th day of August, 1994 at Warri in the Warri Magisterial District, knowingly caused one David Moroh (m) of Do well Schlumberger (Nig.) Limited Po. Box 344, Warri to receive a letter threatening to kill him and thereby committed an offence punishable under section 323 of the Criminal
 C Code Cap. 48 vol. 11 Laws of the defunct Bendel State of Nigeria, 1976 as applicable in Delta State."

Before the Chief Magistrate, J.E.O. Kofi Esq., evidence was led by the prosecution which turned out to be unhelpful to the charge.
 D The alleged threatening letters were found to have been written under cover by the appellant to the said Mr. David Moroh. The one dated 7 November, 1992 which concerns count 1 was written with the name David Ekemute while that of 10 August, 1994 relating to count 2 was
 E under the name concerned Friend. At the close of the prosecution's case, the two letters having been admitted as exhibits 1 and 3 respectively, the learned counsel for the appellant made a no case submission. The submission was that for the prosecution to succeed in establishing the charge, it must prove three elements, namely:
 F (1) That the accused caused the said David Moroh to receive the letters.

(2) That the contents of the letters threatened to kill David Moroh
 (3) That the accused knew the said contents. On 6 April. 1995, the
 G Chief Magistrate in a short ruling in which he said he had carefully considered the evidence and the submission of counsel, simply held that the prosecution had made out a prima facie case against the appellant sufficiently to require him to be called upon to make his
 H defence on both counts.

On appeal against that ruling to the High Court, Warri, presided over by Narebor, J., it was submitted that the letters in question did not contain a threat by the appellant to kill David

Moroh. The learned appellate Judge in deciding on 28 September, 1995 that the trial Chief Magistrate was right to have called on the appellant to defend himself merely observed as follows:

“On a submission of no case to answer, the court is not required to consider whether the evidence so far led by the prosecution is sufficient to justify a conviction.....All that the court has to consider at that stage is whether there is prima facie evidence requiring at least some explanation from the accused person.”

The appeal was therefore dismissed and an order was made for the appellant to appear before the Chief Magistrate to defend himself.

There was a further appeal to the Court of Appeal, Benin Division. That court (coram: Salami, Mohammed and Ba’aba JJSC) accepted as correct the three essential elements earlier proposed on behalf of the accused at the trial that the prosecution must prove in a charge like this. But it went on to repeat, as per the leading judgment of Mahmud Mohammed JCA, what the learned appellate judge said was required of the prosecution. The learned Justice then referred to the evidence of David Moroh in which he regarded the first letter (exhibit 1) as “a letter of threat to my life”. Also considered was a paragraph in exhibit 2 which reads:

“I am sorry to learn that some hired killers attempted your life recently. I thank Almighty God that you narrowly survived that dastardly act. It was Mr. Franais Obuninta’s hand work. He is still plotting to eliminate you, vowing that you will not survive the second onslaught.”

It was then said that the above was the evidence before the trial Chief Magistrate and the appellate High Court Judge who each scrutinized it to rule against the no case submission and the appeal from it respectively. The learned Justice thereafter observed:

“The question now is whether I have any reason to disagree with the two concurrent decisions of the two lower courts on the dismissal of the appellant’s submission of no case to answer having regard to this evidence on record. The answer of course is in the negative because the lower court was quite right in dismissing the appellant’s appeal.”

This appeal to this court from that decision must be decided on

whether the two letters (exhibits 1 and 3) relied on contain a threat to kill he said David Moroh. That is a vital element that must be shown by the prosecution if it may succeed to establish a prima facie case to warrant the appellant to make his defence. Admittedly, section 323 of the Criminal Code Law of Bende¹ State of Nigeria which provides for the offence does not appear to be free from ambiguity. It states:

“323. Any person who, knowing the contents thereof, directly or indirectly causes any person to receive any writing threatening to kill any person is guilty of a felony and is liable to imprisonment for seven years.”

No matter the ambiguity, it is plain that it is the writing itself that must carry the threat. In other words, first and foremost the writing must threaten to kill a person. Secondly, the writing must have been caused by a person directly or indirectly to be received by another. Now, the difficult aspect of the provision is whether it says or is meant to say that any person who know of the contents of such writing (even if he is not the person offering the threat) makes the writing available to any person would be guilty under that section. That cannot be right otherwise a person who, for instance, after reading a threatening letter which he picked from the ground apprises the police by causing it to be received by them becomes a criminal under that section. As observed by Salmon L. J. in R. v. Solanke (1969) 3 All ER 1383 at 1384 when considering s. 16 of the Offences against the Person Act 1861 of England:

“It is perhaps difficult to think of any circumstances in which there could be a lawful excuse for writing a letter threatening to murder and sending it to anyone. It would, of course, be quite different if a person found or received a letter which contained a threat to murder and then took it to the police” [Emphasis added]

It appears that the section is aimed at a person who prepares (or causes to be prepared) any writing threatening to kill any other person and makes that letter available directly or indirectly to any person. Whatever it is, the writing must contain and be the threat offered. The provisions of section 323 of the Criminal Code are based essentially on section 16 of the offences against the Person Act 1861: see the comments thereon in The Criminal Law and Procedure of the

Southern States of Nigeria, 3rd edition, p. 754, para. 1700, popularly known as Brett and McLean. The said s. 16 provides inter alia:

“16. Whosoever shall maliciously send, deliver or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable to imprisonment for any term not exceeding ten years...” B

This obviously ambiguous provision was later put in clearer terms still as s.16 of the Act, as substituted by the Criminal Law Act C 1977, schedule 12 as follows:

“16. A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding D ten years.”

There can be no doubt from the above what the format of a threatening letter would necessarily be. E

The cases based on the earlier legislation which was a foreunder to the said 1861 Act show unmistakably that the letters considered in those cases carried the threat to kill by the writers either expressly or F by necessary implication. In R v. Girdwood (1776) 1 Leach 142; 168 E.R. 173, the threatening letter to one John Edridge read inter alia: “I am sorry to find a gentleman like you would be guilty of taking Mac Allester’s life away.....but it will not be forgot by one who is but just G come home to revenge his cause.....on receiving a letter from Mac Allester before he died, for to seek revenge, I am come to town.” The writer was found guilty of writing a threatening letter to kill. Again, in R. v. Boucher (1831) 4 C. & P. 562; 172 E. R. 826, a letter, whose H writer was identified although he used the false name of “Cut-Throat”, read: “You are a rogue, thief, and vagabond, and, If you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap It, my banker. Have a care, old chap, or you shall disgorge some of your ill-gotten gains, watches, and cash that you

have robbed the widows and fatherless of. Don't make light of this, or I will make light of you and yours. I am your CUT-THROAT." Mr. Justice Patheson held that the letter very plainly Conveyed a threat to kill and that no one who received it could have any doubt as to what the writer meant to threaten.

B

More recently in 1969, S. 16 of the Offences against the Persons Act 1861 as it was before the amendment introduced to it by the Criminal Law Act 1977 was discussed in *R. v. Solanke* (supra). The facts of that case were that for many years the accused had been having trouble with his wife and there had been numerous proceedings between them in the Marylebone Magistrates' court. On 9 September, 1968, a probation officer attached to that court received a letter which admittedly had been sent to him and signed by the accused. The letter was headed: Statement before the Act. It consisted of a long catalogue of complaints against the accused's wife, including a charge of adultery. It ended with these words: "IDO NOT WISH TO TAKEHERLIFE BUT.....The Law will take its course after THEACT, but I hope my children, will be looked after." The learned chairman in summing up told the jury that it was for them to decide whether or not the letter contained a threat to murder. The accused was convicted of maliciously sending a letter in which he threatened to murder his wife. The conviction was affirmed on appeal.

F

In the present case, the appellant wrote two letters to Mr. David Moroh. The first one was dated 7 November, 1992 in which he used till name David Ekemute. In that letter he warned that one Mr. Francis Obuninta who was working with Mr. Moroh planned to kill him despite his entreaties with him not to do so. The letter reads in part: "Mr. Obuninta complains bitterly and frequently about you, saying you are blocking his way job-wise. He has been consulting very powerful and notorious native doctors to use diabolical means to kill you. He even swore to use hired killers to eliminate you if his diabolical means completely fail him. He then advised Mr. Moroh to either relieve Mr. Obuninta of his job on the slightest pretext or transfer him from Warri to Port harcourt.

It would appear that some persons thereafter attempted Mr. Moroh's life. This led to a second letter to Mr. Moroh by the appellant under the name CONCERNED FRIEND. In that letter he recalled the warning he gave in the earlier letter and what he advised should be done, B but that he "down-played my friendly and Christianly advice." He maintained that Mr. Obuninta who was still minded to eliminate him had vowed that Mr. Moroh would not survive "this second onslaught." He then concluded: "Life is too precious to allow an over-ambitious man like Obuninta to have his way, thereby leaving your beloved family to suffer C your loss. God forbid! Eliminate Obuninta by all means before he eliminates you! So, my dear David, a word is certainly enough for the wise."

It cannot be denied that there is some mischief behind these D letters. The extent of that mischief and the reasons for it are not clear and, I would say, are not of assistance in proving the offence charged. In order for the prosecution to make out a case sufficiently to require an accused person to be called upon for his defence in a charge under E s. 323 of the Criminal Code which deals with any writing threatening to kill any person, an essential element is that the letter contains a threat to kill by the writer or at his instance. It follows that a submission that there is no Case to answer may properly be made and upheld when there has been no evidence to prove an essential element in that F alleged offence in the F sense that the appellant did not threaten to kill: See Ibeziako v. Commissioner of Police (1963) NSCC 47 at 53; (1963) 1 SCNLR 99 at 107; Adeyemi v The State (1991) 6 NWLR (pt, 195) I at 35; Ajiboye v The State (1995) 8 NWLR (pt, 414) 408 at 414.

G It thus means that it is when all the ingredients of an offence have been laid out in evidence by the prosecution and that evidence adduced has not been so discredited as a result of cross-examination or is not so manifestly unreliable that any reasonable tribunal could safely convict on it that a prima facie case can be said to be made out H requiring the accused for some explanation. To put it another way, a submission of no case to answer may be properly made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; or (b) even when evidence has been adduced on

the essential elements, the evidence has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. I think the distinction between the two conditions should be noted. I say this because if an essential element is missing the question of discredited evidence through cross-examination will not arise. The evidence establishing a *prima facie* case is not to be such as would justify a conviction. It only means that that evidence has covered the essential elements of the alleged offence and if it remains uncontradicted (and is not thoroughly discredited in cross-examination) a reasonable tribunal may justifiably convict on it; and therefore some explanation is required from the accused person: See Abogede v. The State (1996) 5 NWLR (pt. 448) 270 at 280.

In the present case, each of the three courts below failed to spot the missing essential element that the alleged threatening letters did not contain an offer of threat by the appellant to murder or kill Mr. Moroh. No matter in what sense the appellant may be regarded as mischievous, no case was made against him in respect of the offence with which he was charged. The submission of no case to answer made on his behalf by his counsel ought to have been upheld. That was why I found merit in this appeal and allowed it on 21 October, 1999.

AYOOLA JSC

I have had the privilege of reading in draft the Reasons for Judgment delivered by my learned brother, Ogwuegbu, JSC. I adopt his statement of the essential background facts. This is a straight forward and simple case.

In terms of section 323 of the Criminal code Cap. 48 “Laws of the Bendel State” under which the appellant was charged, the letters which the appellant “knowingly cause one David Moroh to receive” must be” writing threatening to kill” Moroh. The threat must be contained in the letter. A warning by the writer of a letter, even if it is false and mischievous, that a third person is threatening to kill the person to whom the letter is sent, as in this case, is not a “writing threatening to kill”.

The prosecution’s case turned on the contents of the letters admittedly written and sent by the appellant to David Moroh. The

contents of these letters, exhibits 1 and 3, are fully set out in the Reasons for Judgement of my learned brother, Ogwuegbu, JSC. By no construction can these letters be said to be writings “threatening to kill” the recipient, David Moroh. The Magistrates’ Court should have so found and held that a prima facie case has not been made out against the appellant. B

When a charge is brought under section 323 of the Criminal Code (Cap. 48 Laws of Ben del State) the best approach is first to look at the contents of the writing in question. Whether the writing is a “writing threatening to kill” is a matter of construction and, so, of law. C Once the writing cannot be held to be one threatening to kill, other factual enquiries, such as an enquiry whether the accused” knowing the contents thereof, directly or indirectly causes any person to receive” it become unnecessary.

No doubt, section 323, is ambiguously and. too widely worded. D To circumscribe its ambit it must be construed, when such occasion arises, as applying only to a person who made the writing threatening to kill another or to a person who though not the maker, aids and abets the maker by ensuring that the letter is received by the recipient. E Furthermore, viewed purposively, the person who has been caused to receive the letter must be the person threatened .or a person in so proximate F relationship to him as to suffer fear and disturbance of mind by reason of the letter or writing. The mischief aimed at by 323 is the prevention of infliction of pains, fear and disturbance of mind on F the person receiving the letter or writing.

Be that as it may, it suffices for the purpose of the appeal to hold G that since the letters in question did not contain any threat to kill the recipient, no offence had been committed by the appellant under section 123 and that the Magistrates’ Court should have held that a G prima facie case had not been made against him.

It was for these reasons that I allowed the appeal, set aside the decision of the court below and order that the appellant be acquitted and discharged.

H