

COURT OF APPEAL CALABAR DIVISION  
MONDAY 4TH FEBRUARY, 2002. CA/C/59/99  
CORAM: D. O. EDOZIE, O. OPENE, S. O. EKPE, JJCA

1. PATRICK AKWA  
2. CHIEF CLEMENT AGBOR  
3. CHIEF EDWIN OGAR  
4. RAPHAEL AKAMO ..... APPELLANTS  
5. ABELEGBE  
6. ABELAIMOR

V.  
COMMISSIONER OF POLICE ..... RESPONDENT

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CRIMINAL PROCEDURE - No case submission - By s.286 CPL - Court shall discharge accused where no case is made out against him - And the submission is made where accused is represented by counsel (H1)

CRIMINAL PROCEDURE - No case submission - Sustainability - The submission may be upheld where prosecution evidence is unreliable - That no reasonable tribunal can convict on it (H2)

JUDGMENTS - Writing - Need for - Magistrate can record briefly his decision with reasons - And subsequently deliver oral judgment (H3)

COURTS - Records - Challenge - A party who wishes to challenge correctness of the records - Must swear affidavit setting out parts of proceedings omitted - Or wrongly stated in the record (H4)

COURTS - Affidavit - Reaction to - Since appellants rightly challenged record of the proceedings - Penalty for failure of Registrar to refer the affidavit to Chief Magistrate - Cannot be visited on appellants (H5)

AFFIDAVITS - Averments - Uncontradicted - Averment not challenged by counter affidavit - Must be accepted and acted upon by court as true (H6)

AFFIDAVITS - Averments - Counter affidavit - Where deposition in affidavit is inadmissible - Respondent need not file counter affidavit to rebut same (H7)

COURTS - Retrial order - Basis - Abodundun v. Queen - The order will be made where inter alia - There was error in proceedings - That did not render trial a nullity (H8)

### **FACTS**

The six accused/appellants were alleged to have while armed with dangerous weapons to wit sticks, broken into the house of PW1 in a broad-day light, carting away several items and attacking the son of PW1 in the process. The incident was promptly reported to the police and after due investigation, appellants were arraigned before the Chief Magistrate court Akamkpa, Cross-River State. They were thus charged on four counts charge of conspiracy, house breaking, stealing and assault contrary to sections 518(6), 411 (1), 390(9) and 351 of the Criminal Code Cap. 31 Vol. 2 Laws of Cross-River State 1983, respectively.

At the end of the case for prosecution/respondent, learned counsel for appellants made a no case submission and rested his case on that of respondent. In his judgment, the learned Chief Magistrate found appellants not guilty on count 2 but guilty on the other counts. They were convicted and sentenced accordingly. Learned counsel for appellants alleged that the learned Chief Magistrate wrote the 9 paged judgment after delivering a short oral judgment contrary to the rules of judgment writing. Hence, appellants filed appeal at the High Court of Cross-River State, Calabar challenging the correctness of the record of proceedings at the Magistrate court. The High Court dismissed the appeal, affirmed the convictions of appellants but varied sentences imposed by the learned Chief Magistrate. Dissatisfied, appellants lodged a further appeal to the Court of Appeal Calabar Division.

### **ISSUES FOR DETERMINATION**

*“1. Whether the lower court was right in proceeding to determine the appeal when the authenticity of the record of proceedings of the trial court has been challenged and not resolved.*

*2. Whether the lower court was right in holding that the trial*

*Chief Magistrate had jurisdiction to try the appellants for the offences charged.*

*3. Whether the lower court was right in upholding the conviction of the appellants when the procedure adopted by the trial Chief Magistrate effectively denied them a fair hearing."*

## **HELD** (Unanimously allowing the appeal per **EDOZIE**

**JCA)**

*CRIMINAL PROCEDURE - No case submission*

**1. In a summary trial of an accused person for an offence, the procedure is regulated by sections 286 and 287 of the Criminal Procedure Law of Cross River State (Cap. 32). By section 286, if at the close of the prosecution's case, it appears to the court that from the evidence adduced to prove a charge, a case is not made out against the accused sufficiently to require him to make a defence, the court should discharge him from that particular charge'. Where an accused is represented by counsel, a 'No Case' submission is often made in that regard. In making the submission, the defence may or may not rely on it or rest its case on that of the prosecution. The submission means that there is no evidence on which the court could convict even if it believes all that the prosecution's witnesses have said and the question whether such witnesses are credible or not whether any weight should be attached to their testimony is not relevant at that stage. (p. 301 G)**

*No case submission - Sustainability*

**2. It is also settled by a chain of authorities that a submission of 'No case' to answer may be properly made and upheld when there has been no evidence to prove an essential element in the alleged offence or 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. After the submission by counsel to the accused person, the prosecutor if he is a lawyer normally replies. Thereafter, the court makes a brief ruling without mak-**

**ing any observation on the facts. If it is overruled because a prima facie case is made out against the accused, sufficiently to require him to make a defence, then by virtue of section 287 Criminal Procedure Law (CPL), the court shall call upon him for his defence.** (p. 302 B)

*JUDGMENTS - Writing - Need for*

**3. In his commentary of a corresponding and identical provision of the Criminal Procedure Act, the learned author of the “The Criminal Law and Procedure of the Southern States of Nigeria”, 3rd Edition at p. 154 commented thus:-**

**“The practice of delivering an oral judgment and filing reasons subsequently is not in accordance with the section; once a Judge or a Magistrate has pronounced judgment, he is functus officio and any judgment reduced into writing or any reasons given subsequently are of no effect and cannot be looked at by the Court of Appeal**

**From the above provision and commentary, it is permissible for a Magistrate to record briefly his decision with reasons where necessary and then deliver an oral judgment but it is not proper for him to deliver an oral judgment and proceed subsequently to reduce his judgment into writing. Such a judgment latter reduced into writing is a nullity.** (p. 304 H)

*COURTS - Records - Challenge*

**4. As can be seen from the above, the appellants’ complaints on the record of proceedings contained in the 3rd appellant’s affidavit, some of the excerpts of which had been reproduced in this judgment have far reaching consequences. The record of proceedings of a court is presumed to be correct until the contrary is proved. And as rightly articulated in the briefs of both parties it is trite that a party who wishes to challenge the correctness or authenticity of the record of proceedings of the court must swear to an affidavit setting out the facts or part of proceedings omitted or wrongly stated in the record. Such affidavit must be served on the trial Judge and/or on the Registrar of the court who would then if he desires to contest the affidavits swear to and file a counter-affidavit.** (p. 305 F)

*COURTS - Affidavit - Reaction to*

**5. With profound respect to the court below, I do not necessarily share the opinion because the affidavit evidence was not served on the learned trial Chief Magistrate it was not proper before the court below. Although the affidavit was not endorsed for service on the trial Chief Magistrate as canvassed by the respondent's counsel, it was obvious that it attacked the proceedings recorded by him and as such he was the appropriate person to react on it. It was the responsibility of the Registrar of the trial Chief Magistrate's Court before whom the affidavit was sworn and who compiled the said record of the trial court to bring to the attention of the Chief Magistrate the affidavit in question. The appellants having taken the proper step to challenge the record of the proceedings of the trial court, the penalty for the Registrar's dereliction of duty in failing to refer the affidavit to the Chief Magistrate for possible reaction cannot be visited on them (the appellants).**

(p. 306 E)

*AFFIDAVITS - Averments - Uncontradicted*

**6. What the learned Judge ought to have done was to direct that the affidavit in question be served on the learned Chief Magistrate. It is only if the affidavit had been served on the Chief Magistrate and he failed to react that the inference of his failure to react may be contemplated. Admittedly, it is sound proposition of law that any averment in an affidavit not challenged or contradicted in counter-affidavit must be accepted and acted upon by the court as true.** (p. 307 A)

*AFFIDAVITS - Averments - Counter-affidavit*

**7. But it is equally the law that a counter-affidavit is not always necessary to rebut the contents of an affidavit. If an affidavit is self-contradictory or the deposition is inadmissible, it would be needless for a respondent to file a counter-affidavit.**

(p. 307 C)

*COURTS - Retrial order - Basis*

**8. I have adverted to the desirability of ordering a retrial. The locus classicus on the principles governing the circumstances when an order of retrial can be made is Federal Supreme Court case of Yusufu Abodundun v. Queen (1959) SCNLR 162 at**  
**B 166 – 167 (1959) 4 FSC 70 at 73-74 where Abbot, F. J. said:**

***“We are of the opinion that before deciding to order a retrial, this court must be satisfied***

***(a) that there has been an error in law (including the observance of the law of evidence) or an irregularity in proceedings of such a character that on the one hand the trial was not rendered a nullity and on the other hand this court is unable to say that there has been no miscarriage of justice and to invoke the provision to section 11 (1) of the ordinance.***  
**C**

***b) That leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant.***  
**D**

***c) That there are no such special circumstances as would render it oppressive to put the appellant on trial a second time***  
**E**

***d) That the offence or offences of which the appellant was convicted or the consequences to the appellants or any other person of the conviction or acquittal of the appellant are not merely trivial.***  
**F**

***e) That to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it.”*** (p. 307 F)

**NOTABLE POINT OF INTEREST**

**G EDOZIE JCA**

***1. Resting of case on that of prosecution – Procedure to adopt***

However, where the defence in making a ‘no case’ submission states that it is resting its case on the prosecution’s case, a different consideration applies. By resting its case on the prosecution’s case, the accused adopts the evidence led by the prosecution in its entirety and declines to give evidence or call witnesses in his defence. Where this procedure is adopted, the accused or the counsel addresses the court on all relevant matters ranging from insufficiency of the evidence to  
**H**

the credibility of the witnesses or weight of their testimony as well as on the applicable law. This procedure is appropriate where the case for the prosecution is apparently weak. The court does not make a ruling in such a case but delivers a final judgment encompassing all aspects of the case. Therefore, whereas an accused who makes a 'no case' submission simpliciter may afterwards call witnesses for his defence if the submission is overruled pursuant to section 287 CPL, the accused who rests his case on the prosecution's case cannot subsequently in the proceedings have an opportunity of calling witnesses. Learned counsel to the appellants has misconceived the legal position when he submitted in his brief of argument that even if the appellants rested their case on the prosecution's case they ought to have been called upon to make their defence upon their 'no case' submission being overruled. If as contended by the learned counsel to the respondent, the appellants in making their no case submission rested on the prosecution's case the learned trial Chief Magistrate acted well within the law when he proceeded as he did in delivering a final judgment based on the 'no case' submission. (p. 302 G)

### **REPRESENTATION**

Victor Ndoma-Egba, Esq. with G. Nneji, Esq. & A. A. Eno, [Mrs.],  
for the Appellants  
Respondent unrepresented

### **STATUTES & RULES REFERRED TO**

Criminal Code Cap. 31 Vol. 2 Laws of Cross-River State 1983, ss. 518(6), 411(1), 390(9) and 351  
Magistrate's Court Law Cap. 71 Laws of Cross Rivers State, s. 22(2)  
Criminal Procedure Law, ss. 286, 287, 304(5)  
High Court of Cross-River State (Civil Procedure) Rules, O. 9 r. 6

### **CASES REFERRED TO**

Waziri v. State (1997) 3 NWLR (Pt. 496) 689  
Mokwe v. Williams (1997) 11 NWLR (Pt. 528) 309  
Ehikioya v. C.O.P (1992) 4 NWLR (Pt. 233) 57  
Igboasonyi v. Onwubuariri (1997) 3 NWLR (Pt. 495) 592  
Ejikeme v. Ibekwe (1997) 7 NWLR (Pt. 514) 592  
Bello v. Eweka (1981) 1 SC 101

- Adegoroye v. Adegoroye (1996) 1 NWLR (Pt. 433) 721  
 Eghuna v. Eghuna (1989) 2 NWLR (Pt. 106) 773  
 Daramola v. A.G. Ondo State (2000) 7 NWLR (Pt. 665) 440  
 Odutola v. Kayode (1994) 2 NWLR (Pt.324) 1  
 Ajuwon & 4 Ors. v. Akanni (1994) 9 NWLR (Pt.316) 182  
 B Arisa v. The State (1988) 3 NWLR (Pt. 83) 386  
 Labiyi v. Anretiola (1992) 8 NWLR (Pt. 258) 139

**BOOK REFERRED TO**

- C Criminal Procedure Law of Southern States of Nigeria 3<sup>rd</sup> Ed., p.128

**LEAD JUDGMENT BY EDOZIE JCA**

- The six appellants as accused persons were on 14/11/95 in charge No. MAK219C/95 at the Chief Magistrate's Court, Akamkpa,  
 D Cross-River State Coram His Worship M. O. Eneji (as he then was) arraigned on a four count charge of conspiracy, house breaking, stealing and assault contrary to sections 518(6), 411 (1), 390(9) and 351 of the Criminal Code, Cap. 31, Vol. 2, Laws of Cross-River State, 1983, respectively. The charge reads as follows:

- E "Court I  
*That you Patrick Akwa, Chief Clement Agbor, Chief Edwin Ogar, Raphael Akamo, Abel Egbe, Abel Aimor and others now at large, on 27th day of December, 1994 at New Ekuri village Akamkpa in the*  
 F *Akamkpa Magisterial District did conspire among yourselves to effect an unlawful purpose to wit, breaking and stealing (sic) and thereby committed an offence punishable under section 518(6) of the Criminal Code, Cap. 31, Vol. 2, Laws of Cross-River State of Nigeria, 1983.*

- Court II  
 G *That you Patrick Akwa, Chief Clement Agbor, Chief Edwin Ogar, Raphael Akamo, Abel Egbe, Abel Aimor and others now at large, on the same date and place in the Magisterial District aforesaid did break and enter into the dwelling house of one Chief Otey Esira with intent to commit felony there in and thereby committed an of-*  
 H *fence punishable under section 411(1) of the Criminal Code, Cap. 31, Vol. 2, Laws of the Cross-River State of Nigeria, 1983.*

Court III

*That you Patrick Akwa, Chief Clement Agbor, Chief Edwin Ogar, Raphael Akamo, Abel Egbe, Abel Aimor and others now at*



*large, on the same date and place in the Magisterial District aforesaid did steal New Ekuri antiquities, such as (1) Emon (2) Okpang (3) Lakondola Obuol (4) Ebolche and (5) Ibangmkpe, valued N500,000.00, kept in the house and custody of Chief Otey Esira property of New Ekuri village and thereby committed an offence punishable under section 390 (9) of the Criminal Code, Cap. 31, Vol. 2, Laws of the Cross River State of Nigeria, 1983".* B

*Count IV*

*That you Patrick Akwa, Chief Clement Agbor, Chief Edwin Ogar, Raphael Akamo, Abel Egbe, Abel Aimor on the same date and place in the Magisterial District aforesaid did unlawfully assault one Mbel Otey by beating him with sticks and gave him fist blows all over his body thereby committed an offence punishable under section 351 of the Criminal Code, Cap. 31, Vol. 2, Laws of the Cross-River State of Nigeria, 1983".* C

Each of the appellants represented by counsel elected summary trial and pleaded not guilty to each of the counts. Thereafter, the prosecuting Police Officer Sergeant Edet Asuquo called four witnesses who testified for the prosecution and were duly cross examined by learned counsel for the appellants. Although the background facts of the case are not material for the purpose of this appeal, it is not out of place to narrate them albeit briefly. As presented by the four witnesses for the prosecution. On 27/12/94, Chief Otey Esira (PW.1) was in his house with some other Chiefs and some members of his household deliberating on some matters in broad daylight when the six appellants and others at large armed with sticks riotously, advanced to them in his house at New Ekuri village, broke into the PW.1's house and started carting away the various items mentioned in the charge. As Mbel Otey, the son of PW.1 emerged at the scene to find out what was happening, the appellants attacked and assaulted him. The incident was promptly reported to the police and after due investigation, the six appellants were charged to court. At the end of the case for the prosecution, on 30/4/96, the case was adjourned for a 'No Case' submission by learned counsel for the appellants. The record of proceedings in the Chief Magistrate's court for 5/6/96 shows that the learned counsel for the appellants at the trial, J. U. Ogban, Esq., applied to make a no case submission and to rest his case on it, but the statement that he intended to rely on the submission is vigor- D  
E  
F  
G  
H

ously disputed.

However, learned counsel addressed the court elaborately in respect of all the counts of the charge and submitted that the prosecution had failed to prove the ingredients of the offences charged. At the conclusion of the 'No Case' submission on 5/6/96, proceedings were adjourned to the next day, that is, 6/6/96 when the learned Chief Magistrate delivered his final judgment in which he found all the accused persons not guilty on count 2 but found them guilty on all the other counts. In sentencing them, he ordered them to produce the items of property removed from the complainant's house on or before 9th June, 1996 and in the alternative they were to serve a term of 2 years imprisonment. Although the judgment of the learned trial Chief Magistrate in the record of proceedings covers 9 pages of the typed script, it is alleged by the appellants that the judgment he delivered in open court did not last two minutes to read and that he had re-written the judgment on being intimidated by counsel for the appellants that he was going on appeal. An appeal was eventually lodged to the High Court, Calabar, on 24/6/96 and on 26/6/96 the 3rd appellant Chief Edwin Ogar on behalf of the others swore to an affidavit challenging the correctness of the record of proceedings having on 18/6/96 procured a copy of the judgment of the learned trial Chief Magistrate. The appellants' appeal was subsequently heard at Calabar High Court by Binang, J. who on 15/4/97 dismissed the appeal affirmed the convictions of the appellants but varied the sentences imposed by the learned Chief Magistrate.

Dissatisfied with the decision of the High Court the appellants have lodged a further appeal to this court. The appeal is predicated on seven grounds of appeal. Briefs of arguments were filed and exchanged. The appellants by their learned counsel subsequently filed an amended brief of argument dated 24th August, 2001 and filed on the same date which their learned counsel adopted and relied upon on 21st November, 2001 when the appeal was heard. The respondent's counsel was not present in court when the appeal was heard but since he had earlier filed his brief dated 25th September, 2000, which was filed on 26th September, 2000, the appeal was deemed argued on that brief. Each brief contains three issues for determination. As identified in the appellants' brief, the issues for determination are as follows:-

*“1. Whether the lower court was right in proceeding to determine the appeal when the authenticity of the record of proceedings of the trial court has been challenged and not resolved.*

*2. Whether the lower court was right in holding that the trial Chief Magistrate had jurisdiction to try appellants for the offences charged.* B

*3. Whether the lower court was right in upholding the conviction of the appellants when the procedure adopted by the trial Chief Magistrate effectively denied them a fair hearing.”*

In the respondent’s brief, the issues are formulated thus:- C

*“1. Whether the lower court properly resolved the issues of the authenticity of the record of proceedings of the trial court.*

*2. Whether the trial court had jurisdiction to try the appellants for the offences charged.*

*3. Whether the procedure adopted by the trial court in delivering a final judgment after learned counsel for the accused persons relied on his no case submission was proper”.* D

The first issue in the appellant’s brief of argument is related to corresponding issue in the respondents’ brief. The issue deals with the authenticity of the record of the proceedings of the trial Chief Magistrate’s Court being the record upon which the appeal before the High Court was decided. In the appellant’s brief of argument reference was made to the affidavit of 14 paragraphs sworn to by Chief Edwin Ogar the 3rd appellant challenging the correctness or authenticity of the said record. Reference was also made to a passage in the judgment of the court below in which it discountenanced the said affidavit after commenting that there was no affidavit of service of the said affidavit on the learned trial Chief Magistrate and referred to Order 9 rule 6 of the High Court (Civil Procedure) Rule which provides that filing of a process has no effect until the process is served or brought to the notice of the other party. It was then submitted that since the affidavit in question was deposed to at the Registry of the trial Chief Magistrates Court and formed part of its compiled record, proof of service of the affidavit on the learned trial Chief Magistrate was not necessary. On the procedure for challenging, the correctness of the record of proceedings the following cases were cited: Waziri v. State (1997) 3 NWLR (Pt. 496) 689; Mokwe v. Williams (1997) 11 NWLR (Pt. 528) 309; Ehikioya v. C.O.P (1992) 4 NWLR (Pt. 233) E F G H

57; in which it was decided that an affidavit challenging such a record must be served on the trial Judge or the Registrar of the court who would then if he decides to contest the affidavit file a counter affidavit. It was argued that the correct procedure was adopted in the instant case and that since no counter affidavit was filed to controvert the depositions in the affidavit, the depositions are deemed to have been admitted. The case of *Igboasonyi v. Onwubuariri* (1997) 3 NWLR (Pt. 495) 592 was cited in support of the proposition that averments in an affidavit which are not challenged and which by their nature are not incredible ought to be accepted and acted upon. The following cases were also cited in support:- *Ejikeme v. Ibekwe* (1997) 7 NWLR (Pt. 514) 592; *Bello v. Eweka* (1981) 1 SC 101; *Adegoroye v. Adegoroye* (1996) 1 NWLR (Pt. 433) 721; *Eghuna v. Eghuna* (1989) 2 NWLR (Pt. 106) 773.

Finally, learned counsel agreed that assuming but not conceding that the Registrar failed to bring the affidavit to the notice of the learned trial Chief Magistrate or that he himself failed to react to comment in the affidavit, the Appellants should not be made to suffer for it and that the lower court ought to have considered the issues raised in the affidavit more so as they also formed the ground of appeal before it. It was urged that this court should hold that the lower court erred in the proceeding to determine the appeal when the question of authenticity of the record of the proceedings of the trial court had been challenged and not adequately resolved and to set aside the judgment of the lower court and discharge and acquit the appellants.

Responding, learned counsel to the respondent contended in his brief that the lower court properly resolved the issue of the authenticity of the record of proceedings of the trial court. He reiterated the principle that a party challenging the correctness of the record of proceedings of a court, must swear to an affidavit to that effect and that such affidavit must be served on the trial Judge vide the case of *Daramola v. A-G Ondo State* (2000) 7 NWLR (Pt. 665) 440 at 462. It was submitted that the service of the affidavit on the trial Judge was a fundamental condition precedent to the exercise of jurisdiction by the court vide the case of *Odutola v. Kayode* (1994) 2 NWLR (Pt. 324) 1, (1994) 14 LRCNX p. at 19. It was pointed out that the affidavit challenging the record of proceedings contains grave allegations touching on the integrity of the learned trial Chief Magistrate and

ought to have been served on him and since there was no affidavit of service in the record of proceedings service was not effected on the learned trial Chief Magistrate. It was argued that the appellants never intended the affidavit to be served on the learned trial Chief Magistrate or the Registrar hence the affidavit did not have any address for service. It was further contended that the reference by the lower court to the provision of Order 9 rule 6 of the High Court Rule does not affect the legal position that the issue of service of process is fundamental in both Civil and Criminal Proceedings and that what the Appeal Court has to decide is whether the decision of the Judge was right and not what his reasons were. The following cases were cited in support of the submission:- *Ajuwon & 4 Ors. v. Akanni* (1994) 9 NWLR (Pt.316) 182, (1993) 14 LRCN 72; *Arisa v. The State* (1988) 3 NWLR (Pt. 83) 386.

The second issue for determination in both appellants' and respondent's brief poses the question as to whether the lower court was right in holding that the trial Chief Magistrate had jurisdiction to try appellants for the offences charged. It is the submission of appellant's counsel that where a court lacks jurisdiction, it lacks the vires to decide issues in the case and that any defect in competence is fatal to the proceedings as they are a nullity however well conducted vide the case of *Labiya v. Anretiola* (1992) 8 NWLR (Pt. 258) 139. Counsel referred to section 22 subsection (2) of Magistrate's Court Law, Cap. 71, Laws of Cross Rivers State which limits the jurisdiction of a chief Magistrate to the offences of burglary, house breaking or stealing involving property of a value not exceeding three thousand Naira. He submitted that count 3 of the charges which alleged the stealing of items of property valued at N500,000.00 an offence punishable under section 390(9) of the Criminal Code was beyond the jurisdiction of the trial Chief Magistrate's Court and that the lower court was in error in ruling that trial Chief Magistrate Court had jurisdiction by virtue of section 304(5) of Criminal Procedure Law. Counsel contended that entire proceedings before the trial court were a nullity because that court lacked the jurisdiction to entertain count 3 of the charge.

In reply, learned counsel to the respondent submitted in his brief of argument that the trial court had the requisite jurisdiction to try the offence of the house breaking and stealing under section 411(1)

and 390(9) of the Criminal Code and in support of submission counsel referred to section 22(1)(c) of the Magistrate's Court Law, Cross River State. It was further argued that though in the charge under consideration the appellants were tried for stealing under section 309(9) of the Criminal Code and the value of the property involved stated to be N500,000, the offence was still within the jurisdiction of the trial Chief Magistrate's Court. References were made to section 179 of the Criminal Procedure Law of Cross Rivers State and the case of *Nwachukwu v. State* (1986) 2 NWLR (Pt. 25) 765 and *Babalola v. State* (1989) 4 NWLR (Pt. 115) 264 at 285-286 in support of the contention that the trial of an offence under section 390 (9) is also a trial under section 390 simpliciter and a conviction can be secured under the latter if the aggravating circumstances under section 390(9) are not proved. Finally, it was argued that even if the trial court lacked the jurisdiction to try the offences of housebreaking and stealing in the charge, its jurisdiction over the offences of conspiracy and assault in counts (1) and (6) under sections 518(6) and 351 of the Criminal Code respectively cannot be questioned. It was therefore argued that the assumption of the jurisdiction by the Chief Magistrate under section 22(1)(b) of the Magistrate's Courts Law of Cross River State vested him with jurisdiction to try all the offences in the charge and that there was no miscarriage of justice in the trial of the appellants.

The third issue for determination as canvassed in the briefs of both parties deals with the delivery of a final judgment after a no case submission made by learned counsel for the appellants. The contention of the appellants' counsel in his brief of argument is that after the submission of a 'No Case' to answer in which counsel submitted that the essential elements in the charge were not proved and that the evidence before the trial Chief Magistrate was manifestly unreliable, the Chief Magistrate made no findings on the issue but rather proceeded to deliver a lengthy judgment dwelling extensively on the credibility of witnesses without calling on the appellants to state their case in breach of the provision of section 287 of the Criminal Procedure Law. Learned counsel referred to the case of *Fawehinmi v. Abacha* (1996) 9 NWLR (Pt. 475) at 710 to submit that no matter how insignificant a point may appear to a court, it is bound to consider it and make a decision on it. Also cited in support are the cases of *Uka v. Irolo* (1996) 4 NWLR (Pt. 441) 218 and *Okonji v. Njokanma*

(1991)7 NWLR (Pt. 202) 131. It was submitted that under the provisions of section 286 of the Criminal Procedure Law, the court is under an obligation at the close of the case for the prosecution and on the application of counsel for the accused or suo motu to consider whether a case has been made out against the accused person and it is irrelevant whether or not counsel to the accused says that he intends to rely on the submission of no case to answer. The following cases are cited *Ibeziako v. Commissioner of Police* (1963) 1 All NLR 61; *Olaniyan v. State* (1987) 2 NWLR (Pt.48) 156; *Adeyemi v. State* (1991) 6 NWLR (Pt. 195) 1. Learned counsel referred to section 287 of the Criminal Procedure Law and the case of *Peters v. The State* (1992) 11-12 SCNJ 168, (1992) 9 NWLR (Pt.265) 323 to submit that it is mandatory for an accused person to be called upon to defend himself if at the close of the case for the prosecution, a prima facie case is made out against him and that a denial of that right to the appellants in the instant case was a gross violation of their constitutional right to fair hearing. In reply to the above submissions, it was contended in the respondent's brief that since the defence rested his case on that of the prosecution and addressed the trial court substantially on all the issues raised in evidence, the trial court rightly proceeded to deliver a final judgment. Reference was made to the book: *"The Criminal Procedure Law of the Southern States of Nigeria"* by Fidelis Nwadiakor p. 128 in support of the submission.

The two dominant questions for consideration in this appeal are firstly, whether the learned trial Chief Magistrate adopted a correct procedure in convicting the appellant after the 'No Case' submission made by learned counsel on their behalf and secondly, whether the judgment of the learned trial Chief Magistrate was properly recorded.

***In a summary trial of an accused person for an offence, the procedure is regulated by sections 286 and 287 of the Criminal Procedure Law of Cross River State (Cap. 32). By section 286, if at the close of the prosecution's case, it appears to the court that from the evidence adduced to prove a charge, a case is not made out against the accused sufficiently to require him to make a defence, the court should discharge him from that particular charge'. Where an accused is represented by counsel, a 'No Case' submission is often made in***

*that regard. In making the submission, the defence may or may not rely on it or rest its case on that of the prosecution. The submission means that there is no evidence on which the court could convict even if it believes all that the prosecution's witnesses have said and the question whether such witnesses are credible or not whether any weight should be attached to their testimony is not relevant at that stage.* The Queen v. Ogucha (1959) SCNLR 158 FSC 58; R v. Coker 20 NLR 103.

*It is also settled by a chain of authorities that a submission of 'No case' to answer may be properly made and upheld when there has been no evidence to prove an essential element in the alleged offence or when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.* See Ibeziako v. C.O.P. (1963) 1 All NLR 61; (1963) 1 SCNLR 95; Ajidagba & Ors. v. I.G.P. (1958) 3 FSC 5, (1958) SCNLR 60; Okoro v. The State (1988) 5 NWLR (pt. 94) 255; Adeyemi v. The State (1991) 6 NWLR (Pt. 170) 1 at 35; Ajiboye v. State (1995) 8 NWLR (Pt. 414) 408 at 415. *After the submission by counsel to the accused person, the prosecutor if he is a lawyer normally replies. Thereafter, the court makes a brief ruling without making any observation on the facts.* Bello v. The State (1966) All NLR 223. If the submission is upheld, the accused must be discharged:- Ajidagba v. I.G.P. (1958) SCNLR 60; Okoro v. State (1988) 5 NWLR (Pt. 94) B 25. *If it is overruled because a prima facie case is made out against the accused, sufficiently to require him to make a defence, then by virtue of section 287 Criminal Procedure Law (CPL), the court shall call upon him for his defence.*

However, where the defence in making a 'no case' submission states that it is resting its case on the prosecution's case, a different consideration applies. By resting its case on the prosecution's case, the accused adopts the evidence led by the prosecution in its entirety and declines to give evidence or call witnesses in his defence. See Peters v. State (1992) 9 NWLR (Pt. 265) 323 at 331. Where this procedure is adopted, the accused or the counsel addresses the court on all relevant matters ranging from insufficiency of the evidence to the credibility of the witnesses or weight of their testimony as well as



on the applicable law. This procedure is appropriate where the case for the prosecution is apparently weak. The court does not make a ruling in such a case but delivers a final judgment encompassing all aspects of the case. Therefore, whereas an accused who makes a 'no case' submission simpliciter may afterwards call witnesses for his defence if the submission is overruled pursuant to section 287 CPL, the accused who rests his case on the prosecution's case cannot subsequently in the proceedings have an opportunity of calling witnesses. Learned counsel to the appellants has misconceived the legal position when he submitted in his brief of argument that even if the appellants rested their case on the prosecution's case they ought to have been called upon to make their defence upon their 'no case' submission being overruled. If as contended by the learned counsel to the respondent, the appellants in making their no case submission rested on the prosecution's case the learned trial Chief Magistrate acted well within the law when he proceeded as he did in delivering a final judgment based on the 'no case' submission. B C D

But the crucial question is whether in fact the appellants rested their case on the case for the prosecution, a question upon which the parties hold divergent views. This brings into focus the correctness of the record of proceedings in the Chief Magistrate's Court. The main thrust of the appellants' appeal is that the record of the proceedings in the trial Chief Magistrate's court is incorrect and that the court below, that is the High Court was in error to base its decision thereon. The affidavit evidence of the 3rd appellant is the platform or lynchpin upon which the said record of proceeding is impugned. For a better appreciation of the nature of the complaint, that is, in what respect the said record of proceeding is inaccurate or defective, I will reproduce the following salient paragraphs: E F G

*"3. that on the 6th day of June, 1996, the trial Chief Magistrate ruled on a 'no case' submission made by our defence counsel in respect of this charge and proceeded to convict as well as sentence all of us immediately.*

*4. That the entire ruling lasted for only two minutes when the learned Chief Magistrate appeared to have read the ruling from a note-book that was before him.*

*5. That we were all standing in the dock and facing the learned trial Chief Magistrate directly as he read from a single page of the said*

note book.

9. That, on our release on bail pending appeal by the Calabar High Court, Calabar on the 18/6/96 we obtained a copy of the court's judgment that was applied for by our solicitor, and we found to our utmost dismay and embarrassment a 7 paged type-written voluminous judgment purported to be on our matter.

10. That, we also found inside the purported judgment several distorted fundamental facts on which the learned trial Chief Magistrate based his findings. Some of the distorted and misrepresented facts are as follows:

a) The judgment falsely stated that defence counsel relied on his address. Our counsel expressly denied this and we verily believe him...

11. That, we fear, believe and are convinced that the judgment on record is an after thought and was written or re-written many days after the oral delivery of the judgment in open court just because our defence counsel promptly alerted the court of our preparedness to challenge the judgment."

The substance of the appellant's complaints on the above affidavit evidence is, firstly, that the learned trial Chief Magistrate delivered an oral judgment which was later reduced into writing and secondly, that the appellants did not rely on their 'no case' submission. These complaints have very serious legal implications touching on the validity of the proceeding before the trial Chief Magistrate. In regard to the first complaint about the manner in which the judgment of the trial Chief Magistrate was recorded, section 245 of the Criminal Procedure Law Cross River State supra enacts:

"245. The Judge or Magistrate shall record his judgment in writing and every such judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed by the Judge or Magistrate at the time of pronouncing it. Provided that in the case of a Magistrate in lieu of writing such judgment, it shall be a sufficient compliance under the section if the Magistrate:-

a) Records briefly in the book his decision and where necessary his reasons for such decision and delivers an oral judgment; or  
b) records such information in a prescribed form."

**In his commentary of a corresponding and identical pro-**

**vision of the Criminal Procedure Act, the learned author of the “The Criminal Law and Procedure of the Southern States of Nigeria”, 3rd Edition at p. 154 commented thus:-**

***“The practice of delivering an oral judgment and filing reasons subsequently is not in accordance with the section; once a Judge or a Magistrate has pronounced judgment, he is functus officio and any judgment reduced into writing or any reasons given subsequently are of no effect and cannot be looked at by the Court of Appeal. Unakalamba v. Police (1958) SCNLR 64, (1958) 3 FSC 7.”***

**From the above provision and commentary, it is permissible for a Magistrate to record briefly his decision with reasons where necessary and then deliver an oral judgment but it is not proper for him to deliver an oral judgment and proceed subsequently to reduce his judgment into writing. Such a judgment latter reduced into writing is a nullity.**

In regard to the second complaint to the effect that appellants did not rely on their ‘no case’ submission, the procedure as noted earlier is that in such a situation, the trial court was bound to rule on the submission and if it is overruled, then by virtue of section 287(1)(b) of the Criminal Procedure Law, if appellants as in instant case were represented by a legal practitioner, the court shall call upon the legal practitioner to proceed with the defence. The trial court could not without ruling on the ‘no case’ submission and without affording the appellants the opportunity to defend themselves proceed to pass judgment against them. Such a procedure which violates the appellant’s constitutional right to fair hearing would amount to a nullity.

***As can be seen from the above, the appellants’ complaints on the record of proceedings contained in the 3rd appellant’s affidavit, some of the excerpts of which had been reproduced in this judgment have far reaching consequences. The record of proceedings of a court is presumed to be correct until the contrary is proved. And as rightly articulated in the briefs of both parties it is trite that a party who wishes to challenge the correctness or authenticity of the record of proceedings of the court must swear to an affidavit setting out the facts or part of proceedings omitted or wrongly stated in the record. Such affidavit must be served on the trial Judge and/***

**or on the Registrar of the court who would then if he desires to contest the affidavits swear to and file a counter-affidavit.**

See Ehikioya v. C.O.P. (1992) 4 NWLR (Pt. 233) 7; Sommer v. F.H.A. (1992) 1 NWLR (Pt. 219) 548; Odje v. Ovien (1992) 7 NWLR (Pt. 253) 305; Waziri v. State (1997) 3 NWLR (Pt. 496); Mokwe v. Williams (1997) 11 NWLR (Pt. 528) 309.

In his appraisal of the affidavit evidence regarding authenticity of the records of the proceedings of the Chief Magistrate, the learned Judge of the court below at 146 of the record reasoned thus:-

*"I have gone through the records. I am unable to find where it is stated that the said affidavit was served on the learned Chief Magistrate. There is also no affidavit of service. If there was, it was not tendered. In the absence of this, it is difficult to believe that the said affidavit was ever served or brought to the notice of the learned trial Chief Magistrate for his reaction. It could be the appellants merely filed the said affidavit and by Order 9 rule 6 of the High Court Rules filing has no effect until it is served on or brought to the notice of the other party since there is nothing to show that the affidavit filed was ever brought to the notice of the learned trial Chief Magistrate, the document is not proper before the court so the court cannot act on it. Having (discountenanced) the said affidavit, there is nothing left to challenge the authenticity and genuineness of the record of the lower court".*

**With profound respect to the court below, I do not necessarily share the opinion because the affidavit evidence was not served on the learned trial Chief Magistrate it was not proper before the court below. Although the affidavit was not endorsed for service on the trial Chief Magistrate as canvassed by the respondent's counsel, it was obvious that it attacked the proceedings recorded by him and as such he was the appropriate person to react on it. It was the responsibility of the Registrar of the trial Chief Magistrate's Court before whom the affidavit was sworn and who compiled the said record of the trial court to bring to the attention of the Chief Magistrate the affidavit in question. The appellants having taken the proper step to challenge the record of the proceedings of the trial court, the penalty for the Registrar's dereliction of duty in failing to refer the affidavit to the Chief Magistrate for possible**

**reaction cannot be visited on them (the appellants).**

***What the learned Judge ought to have done was to direct that the affidavit in question be served on the learned Chief Magistrate. It is only if the affidavit had been served on the Chief Magistrate and he failed to react that the inference of his failure to react may be contemplated. Admittedly, it is sound proposition of law that any averment in an affidavit not challenged or contradicted in counter-affidavit must be accepted and acted upon by the court as true.*** See *Nwanganga v. Government of Imo State* (1987) 3 NWLR (Pt. 59) 185; *Agbaje v. Ibru Sea Food Ltd* (1972) 5 SC 50 at 55; *Egbuna v. Egbuna* (1989) 2 NWLR (Pt. 106) 773; *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688 at 721. ***But it is equally the law that a counter-affidavit is not always necessary to rebut the contents of an affidavit. If an affidavit is self-contradictory or the deposition is inadmissible, it would be needless for a respondent to file a counter-affidavit.*** See *R.E.A.N. v. Aswani Textile Ltd* (1992) 3 NWLR (Pt. 227) 1 at 13; *National Bank v. Are Brothers Ltd.* (1977) 6 SC 97 at 108; *Okeke v. A-G., Anambra State* (1992) 1 NWLR (Pt. 215) 60.

As noted earlier, the consequence of the appellants' complaints as per the affidavit evidence of the 3rd appellant are grave giving rise to doubts as to whether the proceedings before the learned trial Chief Magistrate were a nullity or otherwise. The proceedings being in a criminal matter, the benefit of the doubt should enure in favour of the appellants. Consequently, I will allow the appeal and set aside the convictions and sentences passed on the appellants.

***I have adverted to the desirability of ordering a retrial. The locus classicus on the principles governing the circumstances when an order of retrial can be made is Federal Supreme Court case of Yusufu Abodundun v. Queen* (1959) SCNLR 162 at 166 – 167 (1959) 4 FSC 70 at 73-74 where Abbot, F. J. said:**

***“We are of the opinion that before deciding to order a retrial, this court must be satisfied***

***(a) that there has been an error in law (including the observance of the law of evidence) or an irregularity in proceedings of such a character that on the one hand the trial was not***

***rendered a nullity and on the other hand this court is unable to say that there has been no miscarriage of justice and to invoke the provision to section 11 (1) of the ordinance.***

***b) That leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant.***

***c) That there are no such special circumstances as would render it oppressive to put the appellant on trial a second time***

***d) That the offence or offences of which the appellant was convicted or the consequences to the appellants or any other person of the conviction or acquittal of the appellant are not merely trivial.***

***e) That to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it."***

Discussing the same topic, in the case of Okoduwa v. The State (1988) 2 NWLR (Pt. 76) 333, Nnamani, JSC observed thus:-

***"...matters to be considered included the seriousness and prevalence of the offence, the possible duration and expense of a new trial, the ordeal to be undergone for a second time by the prisoner, the lapse of time of the commission of the offence and its effect on the quality of evidence and the nature of the case of the prosecution against the prisoner as disclosed in the evidence of the first trial whether substantial or not. See also Ankwa v. State (1969) 1 All NLR 133 and Okafor v. State (1976) 5 SC 13". See also Rabbo Damina v. The State (1995) 8 NWLR (Pt. 415) 513 at 534 to 535.***

In the instant case, the events leading to the prosecution of the appellants occurred about seven years ago and although the charges for which they were tried included such serious offence as house-breaking and burglary, the matter arose from a dispute in the community of the appellants and their village head (PW.1) over a concession granted to a wood company to exploit timber in the community's forest. I am of the view that the circumstances of the case do not justify an order of retrial. Having reached this conclusion it served no useful purpose to deal with the second issue for determination regarding the jurisdiction of the trial Chief Magistrate to try the offences preferred against the appellants.

For the reasons stated in this judgment, the appeal succeeds

and is allowed. The convictions and sentences passed on the appellant are hereby set aside and in their stead, the appellants are acquitted and discharged on each count of the charge.

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### **OPENE JCA**

I have had a preview of the judgment just delivered by my learned brother Edozie, JCA. I agreed with him that there is merit in the appeal and that it ought to be allowed. In this case, the appellants at the lower court challenged the authenticity of the records of the trial court by swearing to an affidavit to that effect. This affidavit ought to be served on the trial Chief Magistrate or the Registrar of the court so that the trial Chief Magistrate would be opportune to comment on it. From what has transpired at the lower court, it appears that affidavit was not served on the Chief Magistrate for his comment and that being the case the only option open to the learned Judge when the matter came on an appeal was to have seen that the affidavit was served on the trial Chief Magistrate for his comment and this he has failed to do.

It is pertinent to observe that this is a criminal matter in which the burden of proof is beyond reasonable doubt and where there is a doubt, the accused person is entitled to the benefit of that doubt. No doubt the appellants' complaints in their affidavit raises very serious doubt as to the proceedings before the learned trial Chief Magistrate whether it is a nullity or not and the appellants are of course entitled to the benefit of the doubt and the appeal can be allowed solely on this score alone.

For these and the fuller reasons given in the lead judgment, I will also allow the appeal. Appellants are hereby discharged and acquitted.

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### **EKPE JCA**

I had the privilege of reading in advance the leading judgment just delivered by my learned brother Edozie, JCA allowing the appeal and I agree with him. One of the serious issues in contention in this appeal is the authenticity of the record of proceedings of the trial court. In law, the record of proceedings of a court is presumed to be

correct until the contrary is proved. However, a party who wishes to challenge the correctness of a record of proceedings must swear to an affidavit setting out the facts or part of the proceedings omitted or wrongly stated in the record. Such affidavit must be served on the trial Judge and on the Registrar of the court who would then if he  
 B desires to contest the affidavit swear to and file a counter-affidavit on the matter. See *Ehikioya & Anor v. C.O.P. Bendel State* (1992) 4 NWLR (Pt. 233) 57 at page 70; *Waziri v. The State* (1997) 3 NWLR (Pt. 496) 723; *Mokwe v. Williams* (1997) 11 NWLR (Pt. 528) 309;  
 C *Daramola v. A-G Ondo State* (2000) 7 NWLR (Pt. 665) 440 at page 462. In the instant case, in compliance with the law, the appellants after their trial and conviction at the trial court swore to and filed an affidavit in that court challenging the authenticity of the record of proceedings of the trial court and then proceeded to file an appeal to  
 D the court below, against inter alia the correctness of the record of proceedings of the trial Chief Magistrate.

As can be gleaned from the record of appeal to this court the affidavit was not served on the Chief Magistrate for his reaction. The failure to serve the Chief Magistrate with the said affidavit cannot be  
 E attributed to the appellants whose only duty in the circumstances was to file the sworn affidavit in the court challenging the correctness of the record of proceedings. It was incumbent on the Registrar of the trial court to cause the affidavit to be served on the Chief Magistrate,  
 F the appellants having paid the necessary fee for the service as endorsed on the affidavit by the Registrar. It is equally wrong in my view for the learned trial Judge to have paid slant regard to the appellants' affidavit. He ought to have ordered that the affidavit be served on the Chief Magistrate for his reaction, for a just determination of the issue. This was not done.  
 G

In my considered view, this is a criminal matter and nothing should be done to the prejudice of the appellants who timeously took the proper and legal course to challenge the trial court's record of proceedings. The learned trial Judge did not give proper and adequate consideration to this issue. For the above views and the detailed views in the leading judgment, I also allow the appeal. I abide by the consequential orders made in the leading judgment. Appeal allowed.  
 H