

SUPREME COURT OF NIGERIA
THURSDAY 11TH JULY, 2002. SC. 290/2001
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,
A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC

ALHAJI MOHAMMED SANI
ABACHA APPELLANT
AND
HAMZA AL'MUSTAPHA
& ORS
V.
THE STATE RESPONDENT

CHARGES - Preferment - Application for - Grant - There must be clear particulars and facts in the proof of evidence - To justify grant of the application - As trial is not automatic (H1)

COURTS - Discretion - Exercise of - Challenge to - Judge's discretion is not absolute - As same can be challenged by aggrieved party - So as to show that the discretion was not judiciously exercised (H2)

COURTS - Processes - Abuse - Prevention of - Courts have inherent power - To prevent abuse of their processes - By any of the parties (H3)

COURTS - Issues - Settlement of - Courts are vested with power to settle issues between parties - And they must ensure that genuine issues are settled (H4)

CRIMINAL PROCEDURE - Prima facie case - CPL ss. 72, 77 & 340 - Challenge - The sections can be challenged - Especially where no prima facie case - Is manifest against an accused (H5)

CRIMINAL PROCEDURE - Indictment - Application to quash - Determination - Depositions made by potential witnesses and accused must be read - So as to find if there was prima facie case - For accused to answer (H6)

CRIMINAL PROCEDURE - “Prima facie” - Meaning - The phrase may refer to facts clearly revealing a crime - And the crime links the accused (H7)

MURDER - Accessory after the fact - Proof - Where an accessory is tried alone - There must be proof that murder was committed - By the principal offender (H8)

CHARGES - Indictment - Need for clarity - The charge must be clear - So that accused will understand the complaint against him (H9)

CRIMINAL PROCEDURE - Suspicion - Effect - Suspicion however well placed - Does not amount to prima facie evidence - As prosecution must be wary of being accused of persecution - Rather than prosecution (H10)

FACTS

The deceased i.e. Kudirat Abiola (wife of Late Chief M. K. O. Abiola) was sometime in 1996 on an Ikeja Street - Lagos, tragically shot dead in her car. Three years later, accused/appellant i.e. Mohammed Abacha and three others (now respondents) were arrested for her murder. They were arraigned before the High Court of Lagos State, Ikeja based on information filed on behalf of the Attorney-General by the Director of Public Prosecution. They were thus charged on four count charge of conspiracy to commit murder, murder and accessory after the fact of murder contrary to sections 324, 319(1) and 322 of the Criminal Code Cap 32 Laws of Lagos State 1994, respectively. Counts 3 and 4 particularly relate to appellant.

Thereafter, appellant brought an application pursuant to sections 167 and 340(3) Criminal Procedure Code Law Cap 33 Laws of Lagos State 1994, seeking inter alia, for an order quashing the four count charge on the ground that a prima facie case is not made out against him. After hearing the application, the court dismissed same. Being dissatisfied, appellant filed an appeal at the Court of Appeal, Lagos division. The court dismissed the appeal and affirmed the judgment of the trial court. Appellant was further dissatisfied. Hence, he appealed to Supreme Court.

ISSUES FOR DETERMINATION

“5.1 Whether the negative preliminary comments by the Court of Appeal on the desirability of the appellant’s recourse to the established procedure for quashing a defective information was correct in law and whether such comments did not foreordain the fate of the appeal regardless of the merits thereof?”

5.2 Whether the appellant’s right to have a fair hearing in the sense of having the issues raised by him given a full and dispassionate consideration by the Court of Appeal was not violated when the court determined the appeal without any consideration of the specific complaint made against the rations of the Lagos State High Court in coming to the conclusion that the appellant was linked to the offences in the information, regard being had to the standard set by law.?”

5.3 Whether the Court of Appeal was correct in finding as the lower court had done that there were sufficient facts and inferences in the proof of evidence upon which the appellant could be said “prima facie” to be linked to the offences of conspiracy to murder and murder charged in the said information.?”

5.4 Whether the Court of Appeal was correct in law to have forged a nexus between the appellant’s statement to the police wherein he assisted 2 of his father’s former employees among many others to resettle themselves and his state of mind when he released his car and security driver on different unrelated occasions to the self-confessed killer of Kudirat Abiola so as to reach the conclusion that he was linked to the offences charged.

5.5 Whether the Court of Appeal was correct in law when it affirmed the decision of the Lagos State High Court that it had jurisdiction to try the offence of accessory after the fact of murder as charged herein and that a prima facie case had been made out against the appellant on the twin counts of accessory after the fact of murder, regard being had to the contents of the information and proof of evidence.”

HELD (Allowing the appeal per **BELGORE JSC**,

EJIWUNMI, JSC Dissenting)

CHARGES - Preferment - Application for - Grant

1. The procedure whereby a trial on indictable offence will be

initiated by an application whether in judge's chambers or in open court, the application is made ex parte, thus at the back of the person to be tried, is asking for a discretion, not an absolute right. There must be clear particulars and facts to justify the exercise of the discretion. It is not the law, neither is it the justice, to say once the application is made on information, and all necessary documents are attached, without more, the application to prefer charge must be granted. It is never the practice in England to take filing of an information as an absolute right to have the indictment asked for automatically tried. There must be facts in the proofs of evidence to justify the grant of the application. Otherwise, indictments will always be allowed to be tried where enough particulars are absent in the proofs of evidence. I must not be understood to hold that guilt of the accused must be established before approving the information to file the indictment, far from it. There must be prima facie case to be tried and the accused must be sufficiently linked to be in a situation where an explanation is necessary from him at the trial. (p. 2042 A)

E

COURTS - Discretion - Exercise of

2. Court of Appeal was of the view that the appellant had taken a premature step of challenging the indictment when he could await the time for no case submission to move that he had no case to answer. In all judicial acts, whether administrative or adjudicative, where discretion of the judge is required to do or to omit to do anything, that discretion when exercised is not absolute, it can be challenged if a party feels injured by it or it will affect a person's right to freedom so as to show that the discretion has not been judiciously exercised. (p. 2043 G)

G

COURTS - Processes - Abuse - Prevention of

3. It is the view of Court of Appeal that the ruling of the trial court should be as brief as possible so as not to invade the real issue in the main trial and prejudge it. The court below opined that such challenge to quash an information should not be encouraged. With the greatest respect, in a democratic setting, as we now are, with no legislative ouster of court's

H

jurisdiction, all perceived abuses should be avoided if confidence is to be preserved for courts as final arbiter in people's rights. The courts have inherent power, to prevent abuse of their process by any of the parties, whether plaintiff or defendant, prosecution or defence, so that as long as democratic process exists, nobody will have his rights curtailed.

B

(p. 2043 H)

COURTS - Issues - Settlement of

4. All power to settle issues between parties is vested in courts and court must be vigilant that genuine issues and controversies are settled so that no accused person will be oppressed either directly or indirectly through act of prosecution; if not we shall have persecution in place of prosecution. It is for this reason that an accused person, despite the power to file indictment on an information, should not be indicted to face trial that from the outset it was clear he should not face it.

C

D

(p. 2044 C)

CRIMINAL PROCEDURE - Prima facie case

E

5. The procedure, once in the Criminal Procedure Law of Lagos, as in many of the states in the former Eastern, Western and Mid-Western Regions of Nigeria and in former Lagos Capital Territory (as in Laws of Federation of Nigeria 1958, is Constitutional) but certainly subject to due process so that sections 72, 77 and 340 of Criminal Procedure Law should not be read as absolute and unchallengeable. In them, one cannot read that they cannot be challenged. They can be quashed for good reasons, especially where no prima facie case manifests against an accused.

F

G

(p. 2044 E)

CRIMINAL PROCEDURE - Indictment - Application to quash

6. It is true the main plank of lower court's decision is its frowning at making use of procedure to quash the indictment on the information; it is a right that the law creating filing of information clearly confers, and it is conferred to be applied when a party is accused of any indictable offence to take advantage of. It is therefore necessary when the application is

H

made to quash indictment on the information for the trial judge to attend to such an application dispassionately and rule on it. The best way to do this is to read all the depositions made by potential witnesses and accused persons so as to find if there was a prima facie case for the accused to answer.

B (p. 2045 A)

CRIMINAL PROCEDURE - "Prima facie" - Meaning

7. But what is prima facie. Prima facie is difficult to define precisely but some vital ingredients are clear. Facts that are clearly revealing a crime and the crime links an accused person may be prima facie evidence that the accused has something to explain at the trial. But that is not always the whole that is needed as circumstances must indicate. It is even very difficult in the face of dearth of precise definition of prima facie. (p. 2045 C)

MURDER - Accessory after the fact - Proof

8. In this indictment the appellant was charged for being an accessory after the fact to murder under S. 322 of the Criminal Code. The two counts mentioned Mohammed Abdul (a.k.a. Katako) and Mohammed Aminu respectively as having committed the murder to which appellant became accessory after the fact. Neither of the two is charged with murder. The practice was either to charge the accessory along with the main offender or charge them separately. But before the accessory after an offence can be tried, if charged alone, there must be proof that indeed a murder was indeed committed by the person the appellant is said to be accessory after the fact. Nobody can be an accessory to offence not proved. (p. 2057 D)

CHARGES - Indictment - Need for clarity

9. Every charge on an indictment must be clear so that the person to be tried will understand the complaint against him. In civil cases, the pleadings must be clear as to what the other party is to face on trial. A fortiori, in criminal matters the accused must not be left in doubt as to what he is to face on trial, the more so when criminal trial involves liberty of the

citizen being indicted. There is no need to speculate on what is not on the face of indictment. (p. 2057 G)

CRIMINAL PROCEDURE - Suspicion - Effect

10. The court below as well as the trial court erred in finding prima facie case for the appellant to answer. At best, what is in the proofs of evidence amounts to serious suspicions that the appellant knows more than he adverts to. Suspicion however well placed does not amount to prima facie evidence, more facts than are now in the printed record will be needed to nail the appellant to his being required to explain. The prosecution must be wary of being accused of persecution rather than prosecution. (p. 2058 H)

NOTABLE POINTS OF INTEREST

EJIWUNMI JSC (Dissenting)

1. Prosecution does not infer defences to be raised by accused at trial

This court must resist the temptation to discuss in greater length than is required the purpose on hand the question whether the contents of the proof of evidence could sustain or lead to the conviction of the appellant. I reproduced earlier in this judgment an excerpt of the statement of the appellant in which he explained how he offered monetary assistance to Katako and Aminu Mohammed to flee the country. Whether or not there is enough in the statement to show that the appellant know these two persons had committed the crime of murder before offering them assistance must wait the trial. It suffices to say that it is not the law that the prosecution must as in the preparation of its case and assemblage of material for trial first make divination as to what possible defences an accused may have to a charge and seek to eliminate such defences in advance of their being raised. (p. 2140 E)

2. An accessory after the fact can be tried before trial of principal offender

I am not also aware that it is the law that an accused person on an offence of accessory after the fact cannot be tried unless the principal

offender has first been tried. Certainly the case cited by the appellant to advance that proposition - The State v. Majekwu [1974] ECSIR 171 at 173 as not an authority for that proposition. In the final result this appeal fails. It is dismissed. (p. 2140 H)

B 3. Appellant has case to answer in view of the overwhelming evidence

Even from the statement of the appellant, I think the Courts below were right to have held that a prima facie case was established against him calling upon him to face his trial. The same goes for the charge of murder. From, the statements of Aminu and Katako, and the admissions made by the appellant himself in his statements to the Police, I cannot see how the appellant would not be called upon to explain his conduct with regard to counts 3 & 4. He readily admitted that he gave ten thousand U.S. dollars to each of them to flee the country and escape justice. Is that the conduct of a person who had nothing to hide? Surely, it cannot be right to say that he has no explanation to make in respect of that conduct. Moreso that the murder of Kudirat Abiola is a well-known fact in this country and beyond. (p. 2143 C)

REPRESENTATION

J. B. Daudu S.A.N. with A. B. Mahmoud S.A.N, M. Kalima Ali, M. Bulama, Aliyu Usman, Ibrahim Adamu, K. T. Turaki, S. T. Ologunorisha, S. Amobeda, Z. Y. Umar and D. Daudu for the appellant

Prof. O. Osinbajo with him, Mrs. Ogunshesan, ADPP and H. Yusuf S. C. for the respondent

G STATUTES REFERRED TO

Criminal Code Cap 32 Laws of Lagos State 1994, ss. 319(1), 322 and 324

Criminal Procedure Code Law Cap 33 Laws of Lagos State 1994, ss. 72, 77, 167 and 340(3)

LEAD JUDGMENT BY BELGORE JSC

The Attorney-General of Lagos State, through the Director of Public Prosecutions by a letter to the Chief Registrar, High Court of Lagos State wrote inter alia as follows:-

“The State
V.

1. Hamza Al’Mustapha (m)
2. Mohammed Rabo Lawal (m)
3. Mohammed Sani Abacha (m)
4. Alhaji Lateef Shofolahan (m)

B

“Pursuant to section 211(1) of the Constitution of the Federal Republic of Nigeria 1999, I intend to file the Attached information against the above mentioned Accused persons.

Kindly cause same to be filed in court. Attached herewith are 8 copies of the information and proofs of evidence “one copy of each of which is for service on the accused persons.”

C

“M. N. Mofunanya (Mrs.)
Director of Public Prosecutions
Lagos State”

D

At the next page to the letter it is indicated the Director of Public Prosecution wrote the letter for Hon. Attorney-General and Commissioner for Justice, Lagos State. It is noteworthy that S. 211 of the Constitution relates to power of State Attorney-General to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a Court-martial in respect of any offence created by or under any law of the House of Assembly. Certainly S.221(1)(a) of the Constitution empowers the Attorney-General of a State to institute criminal prosecution as stated above, but that is just constitutional provision as to powers of the Attorney-General. The enabling statute is the Criminal Procedure Law of Lagos State (Cap. 33, Laws of Lagos State of Nigeria, 1994. Lagos State Criminal Procedure Law which provides in S. 77 as follows:-

E

F

“77. Subject to the provisions of any other enactment criminal proceedings may in accordance with the provisions of this Law be instituted -

(b) in the High Court

(i) by information of the Attorney-General Lagos State in accordance with the provisions of S. 72

H

(iii) by information filed in the court after the accused has been committed for trial by a magistrate under provisions of Part 36”

It must be stated, however, that though S. 77(b)(iii) alludes to Part 36 of Cap. 33, Law No. 1 of 1999 has repealed the relevant Part

36 under Chapter 5 of the Criminal Procedure Law of Lagos State. But the main problem with laying an information is that the law has not set out the clear procedure for laying the information. All that S. 340(2)(b) Criminal Procedure Law provides is for filing an information by direction or with the consent of a judge (See R. V. Zik's Press Ltd. XII W.A.C.A. 202). There is nothing in either S. 77 (supra) or 277 CAL as regards summary trial that precludes a High Court from entertaining a complaint that relates solely to a non-indictable offence. Thus it seems that no format has been devised in states of the Federation governed by Criminal Procedure Law for laying an information and a simple letter is enough insofar as it is accompanied by proofs of evidence and the charges containing the counts. It is a different procedure in the states applying criminal Procedure Code Law e.g. Kaduna or Plateau State, where Rules are specifically made for application to prefer charges under S. 185 Criminal Procedure Law (See Procedure (Application to prefer a charge in the High Court) Rules). Suffice however that wrong method, if letter writing is such, will not vitiate the application once it is clear what the intendment of the Attorney-General is. The confusion in the Criminal Procedure Law especially in sections 72, 77, 340 particularly with regard to absence of procedure is due to reference in section 72 to practice in England. The administration of Justice (Miscellaneous Provisions) Act 1933 of England which should be resorted to is of little relevance in England now due to subsequent legislations and attendant rules.

On the information, the following charges were framed:-

'THE STATE

VERSUS

1. HAMZA AL-MUSTAPHA (M)

2. MOHAMMED RABO LAWAL (M)

3. MOHAMMED SANI ABACHA (M)

Charge No: ID/43c/99

THE ... DAY OF ... 1999

At the Criminal Division of the High Court of Lagos State holden at Ikeja on the ... day of ... 1999 the court is informed by the Attorney-General on behalf of the State that:-

1. HAMZA AL-MUSTAPHA (M)

2. MOHAMMED RABO LAWAL (M)

3. MOHAMMED SANI ABACHA (M)

4. ALHAJI LATEEF SHOFOLAHAN (M)

Are charged with the following offences:-

STATEMENT OF OFFENCE - 1st COUNT

Conspiracy to commit murder contrary to Section 324 of the Criminal Code Cap 32 Laws of Lagos State 1994.

PARTICULARS OF OFFENCE

Hamza Al-Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha, Lateef Shofolahan between 1995 and June 1996 at Ikeja in the Ikeja Judicial Division conspired to murder Kudirat Abiola.

STATEMENT OF OFFENCE – 2nd COUNT

Murder contrary to Section 319(1) of the Criminal Code Cap 32 Laws of Lagos State 1994.

PARTICULARS OF OFFENCE

Hamza Al-Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha, Alhaji Lateef Shofolahan on or about the 4th day of June, 1996 along Lagos/Ibadan Expressway opposite Cargo Vision, Ikeja in the Ikeja Judicial Division conspired to murder one Kudirat Abiola.

STATEMENT OF OFFENCE - 3rd COUNT

Accessory after the fact to murder contrary to Section 322 of the Criminal Code Cap 32 Laws of Lagos State 1994.

PARTICULARS OF OFFENCE

Mohammed Sani Abacha, sometime in 1999 knowing Mohammed Abdul (a.k.a. Katako) to have murdered Kudirat Abiola in the Ikeja Judicial Division gave various sums of money with intent to facilitate their escape from arrest and prosecution.

STATEMENT OF OFFENCE - 4th COUNT

Accessory after the fact to murder contrary to Section 322 of the Criminal Code Cap 32 Laws of Lagos State 1994.

PARTICULARS OF OFFENCE

Mohammed Sani Abacha sometime in 1999 knowing Aminu Mohammed to have murdered Kudirat Abiola in the Ikeja Judicial Division gave various sums of money with intent to facilitate their escape from arrest and prosecution.

DATED ... THIS DAY OF ... 1999

(SGD)

Director of Public Prosecutions

For: Hon. Attorney-General & Commissioner for Justice Lagos

State.”

Attached to the information are the proofs of evidence running to about 150 pages. When the matter (indictment) finally got before Kekere-Ekun, J. The appellant moved that the indictment against him be quashed. The reasons for the application are clearly set out as follows:-

“MOTION ON NOTICE

(BROUGHT PURSUANT TO SECTIONS 167, 340(3) CRIMINAL PROCEDURE LAW CAP. 33 LAGOS STATE 1994 AND UNDER THE INHERENT JURISDICTION OF THE COURT)

TAKE NOTICE that this Honourable Court will be moved on 15th day December, 1999 at the hour of 9 O’ clock in the forenoon or so soon thereafter as counsel on behalf of the defendant/appellant can be heard praying for the following orders:

1. An Order quashing all the 4 Counts and Statements of offences in the information referred to as charge No. ID/43C/99 purportedly filed before this Honourable Court against Mohammed Sani Abacha the third defendant in the said charge.

The grounds (not exhaustive) upon, which this application is brought are as follows:-

i. The proof of evidence does not disclose a prima facie case against the third accused/applicant requiring him to stand trial before this High Court of Justice or any other court of law on any of the 4 counts described herein above.

ii. When the charges are compared and contrasted with the proof of evidence, the ingredients of all the alleged offences and the list of witnesses, the result is that the entire information is an abuse of process.

iii. All the 4 counts in the statement of offences are prejudicial to the third defendant’s right to fair hearing.

2. And for such further or other orders as this Honourable Court may deem fit to make in the circumstance. Dated at Lagos this 10th day of December, 1999.”

The application was supported by an eight paragraph affidavit. It must be pointed out that the matter was first before Segun, C. J. who for some reasons had to disqualify himself from the matter and assigned it to Kekere-Ekun, J. The appellant is the third accused on the indictment and he is charged under four counts including

conspiracy to commit murder, murder - accessory after the fact to murder, (facilitating escape from arrest after murder). He was charged jointly with others for conspiracy to commits murder and alone for being accessory after the fact to murder. Those charged along with him are -

1. Hamza Al'Mustapha
2. Mohammed Rabo Lawal
3. Alhaji Lateef Shofolahan.

The appellant is the sole accused on two counts of accessory after the fact to murder. Learned trial judge in a considered ruling refused the application to quash the indictment. Her reasons for so doing are based inter alia on the requirement of S. 340 Criminal Procedure Law in subsection 3 thereof and the proviso there-under. Her contention seems to be that any information without procedural defect cannot be quashed. This will be a far-reaching proposition not in the intendment of the section and other enabling sections of the law. Looking at section 340 its purport is not shrouded in doubt, it says inter alia:-

"Subject to the provisions of this section an information charging any person with an indictable offence may be preferred by any person before the High Court."

It is clear this section covers any person who brings an information, not the Attorney-General solely exercising his powers under S. 211 of the Constitution. The Attorney-General's power to bring an information is under section 72 and S. 77(b)(i) Criminal Procedure Law. I earlier alluded to provisions in the law to be guided by what powers the Attorney-General for England can do insofar as our own rules in Lagos High Court will admit. Section 72 of Criminal Procedure Law reads:-

"72(1) Notwithstanding anything in this law contained the Attorney-General of the Lagos State may exhibit to the High Court information for all purposes for which the Attorney-General for England may exhibit information in the High Court of Justice in England."

72(2) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar information filed by the Attorney-General for England so far as the circumstances of the case and the practice and procedure of the High Court will

admit.”

The procedure whereby a trial on indictable offence will be initiated by an application whether in judge’s chambers or in open court, the application is made ex parte, thus at the back of the person to be tried, is asking for a discretion, not an absolute right. There must be clear particulars and facts to justify the exercise of the discretion. It is not the law, neither is it the justice, to say once the application is made on information, and all necessary documents are attached, without more, the application to prefer charge must be granted. It is never the practice in England to take filing of an information as an absolute right to have the indictment asked for automatically tried. There must be facts in the proofs of evidence to justify the grant of the application. Otherwise, indictments will always be allowed to be tried where enough particulars are absent in the proofs of evidence. I must not be understood to hold that guilt of the accused must be established before approving the information to file the indictment, far from it. There must be prima facie case to be tried and the accused must be sufficiently linked to be in a situation where an explanation is necessary from him at the trial.

A good example is the case of Ikomi & Ors. v. The State [1986] 1 N.S.C.C. Vol. 17, 730. The first accused on the information taken before Chief Judge of former Bendel State has several statements, as proofs of evidence, attached to the proposed indictment. The first accused in that case was a judge of the High Court. The victim of murder was a policeman, who in a pool of his blood, was found at the gate of the judge’s house. The judge and two other persons were the only persons in the house except the victim who was guarding the gate. There was no fact of any breach of the fence. It was held by this court that the Chief Judge was right to approve the indictment on the information.

The Court of Appeal, however, upheld the decision of trial court. Thus this appeal. On the grounds of appeal filed, the appellant formulated the following issues for determination:-

“5.1 *Whether the negative preliminary comments by the Court of Appeal on the desirability of the appellant’s recourse to the established procedure for quashing a defective information was correct in law and whether such comments did not foreordain the fate of the*

appeal regardless of the merits thereof?

5.2 *Whether the appellant's right to have a fair hearing in the sense of having the issues raised by him given a full and dispassionate consideration by the Court of Appeal was not violated when the court determined the appeal without any consideration of the specific complaint made against the rationes of the Lagos State High Court in coming to the conclusion that the appellant was linked to the offences in the information, regard being had to the standard set by law.?* ^B

5.3 *Whether the Court of Appeal was correct in finding as the lower court had done that there were sufficient facts and inferences in the proof of evidence upon which the appellant could be said "prima facie" to be linked to the offences of conspiracy to murder and murder charged in the said information.?* ^C

5.4 *Whether the Court of Appeal was correct in law to have forged a nexus between the appellant's statement to the police wherein he assisted 2 of his father's former employees among many others to resettle themselves and his state of mind when he released his car and security driver on different unrelated occasions to the self-confessed killer of Kudirat Abiola so as to reach the conclusion that he was linked to the offences charged.* ^D

5.5 *Whether the Court of Appeal was correct in law when it affirmed the decision of the Lagos State High Court that it had jurisdiction to try the offence of accessory after the fact of murder as charged herein and that a prima facie case had been made out against the appellant on the twin counts of accessory after the fact of murder, regard being had to the contents of the information and proof of evidence."* ^F

Court of Appeal was of the view that the appellant had taken a premature step of challenging the indictment when he could await the time for no case submission to move that he had no case to answer. In all judicial acts, whether administrative or adjudicative, where discretion of the judge is required to do or to omit to do anything, that discretion when exercised is not absolute, it can be challenged if a party feels injured by it or it will affect a person's right to freedom so as to show that the discretion has not been judiciously exercised. It is the view of Court of Appeal that the ruling of the trial ^G ^H

court should be as brief as possible so as not to invade the real issue in the main trial and prejudice it. The court below opined that such challenge to quash an information should not be encouraged. With the greatest respect, in a democratic setting, as we now are, with no legislative ouster of court's
 B *jurisdiction, all perceived abuses should be avoided if confidence is to be preserved for courts as final arbiter in people's rights. The courts have inherent power, to prevent abuse of their process by any of the parties, whether plaintiff or defendant, prosecution or defence, so that as long as democratic*
 C *process exists nobody will have his rights curtailed.*

All power to settle issues between parties is vested in courts and court must be vigilant that genuine issues and controversies are settled so that no accused person will be op-
 D *pressed either directly or indirectly through act of prosecution; if not we shall have persecution in place of prosecution. It is for this reason that an accused person, despite the power to file indictment on an information, should not be indicted to face trial that from the outset it was clear he should not face*
 E *it.* (Ikomi v. The State [1986] 3 NWLR (pt. 28) 314, 356; Egbe v. The State [1980] 1 NCR., ALR 341; Okoli v. The State [1992] 6 NWLR (pt. 247) 381; Emma v. The State NWLR (pt. 479) 115, 121, 122). *The procedure, once in the Criminal Procedure Law of*
 F *Lagos, as in many of the states in the former Eastern, Western and Mid-Western Regions of Nigeria and in former Lagos Capital Territory (as in Laws of Federation of Nigeria 1958, is Constitutional) but certainly subject to due process so that sections 72, 77 and 340 of Criminal Procedure Law should not*
 G *be read as absolute and unchallengeable. In them, one cannot read that they cannot be challenged. They can be quashed for good reasons, especially where no prima facie case manifests against an accused.*

H It is argued in issue 2 that the court below failed to consider the specific complaint of the appellant. The Court of Appeal did not advert to comment of trial High Court on alleged conspiracy. It was alleged that because the appellant was in the office of Al'Mustapha, the first accused, who as Chief Security Officer to late General Sani Abacha, the Head of State at the time of the murder of Kudirat Abiola,

when two guns were given to Sgt. Jabila a.k.a. Sergeant Rogers for security, he must be privy to the conspiracy to kill Mrs. Kudirat Abiola.

It is true the main plank of lower court's decision is its frowning at making use of procedure to quash the indictment on the information; it is a right that the law creating filing of information clearly confers, and it is conferred to be applied when a party is accused of any indictable offence to take advantage of. It is therefore necessary when the application is made to quash indictment on the information for the trial judge to attend to such an application dispassionately and rule on it. The best way to do this is to read all the depositions made by potential witnesses and accused persons so as to find if there was a prima facie case for the accused to answer.

But what is prima facie. Prima facie is difficult to define precisely but some vital ingredients are clear. Facts that are clearly revealing a crime and the crime links an accused person may be prima facie evidence that the accused has something to explain at the trial. But that is not always the whole that is needed as circumstances must indicate. It is even very difficult in the face of dearth of precise definition of prima facie. The best definition is the one proffered in an Indian case of *Sher Singh v. Jitend-dranthen* [1931] 1 L.R. 59 Calc. 275 quoted with approval by Federal Supreme Court in *Ajidagba v. Inspector-General of Police* [1958] SCNLR. 60 as follows:-

"The term so far as we can find has not been defined either in the English or in Nigerian Courts. In an Indian case, however, we find the following dicta!"

What is meant by prima facie (case)? It only means that there is ground for proceeding... But a 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,... and the evidence discloses a prima facie case when it is such that if un-contradicted and if believed it will be sufficient to prove the case against the accused."

Thus, if the facts in a deposition whether on oath in preliminary investigation or not on oath in mere statements attached to an information do not disclose a prima facie case the indictment must be quashed. (See *Ajidagba v. Inspector-General of Police* (supra), *Okoro v. The State* [1988] 12 SCNJ; [1988] 5 NWLR (pt. 94) 255. There-

fore, the statements in this matter must be read by the trial court and Court of Appeal carefully to know if there was a prima facie case for the appellant to answer.

First, as regards the offence of murder I set out the statement made by Sergeant Jabila (a.k.a. Rogers)

B THE NIGERIA POLICE Police D 19
STATEMENT OF WITNESS/ACCUSED

FORCE CID..... STATION: ABUJA Province

Name: BARNABAS JABILA: Nationality/

C Tribe: NIGERIAN/MAGI

Aged: 29 YRS

Occupation: SOLDERING

Religion: Christianity

Address: TRH WING State House Abuja

D In the case of an accused person the formal caution will be given and the fact recorded before in manuscript.

"I, BARNABAS JABILA (Male/Female) having been duly cautioned in English Language that I am not obliged to say anything unless I wish to do so but whatever I say shall be taken down in writing and may be given in evidence, voluntarily elect to state as follows :-

(Sgd) 29/9/99

Further to my statements which I made to the Police some time in May 1999 which we denied all the alleged allegations against us. I wish to now make a detailed statements concerning KUDIRAT ABIOLA on the 4th of June, 1996, Major Mustapha ordered that the woman must be eliminated at all costs, so before then we met Major Mustapha's informant in Abiola's house by name Alhaji Lateef, was also to tell us the itinerary of the woman. On the 4th June, 1996, we followed her to Abiola's house in the morning we followed her there immediately we reach there she came out of Abiola Crescent with White Mecerdes Benz beast in which they are four in number so we traced her to Allen Avenue Round about where she dropped one small girl that was in the car. Then we followed her again to secretariat Alausa Ikeja, then to express road on her way to Lagos, then we came closer and leveled up with her, then I fired at the car several shots then we drove off which later the shots killed her. I used UZI, SMG and 9mm rounds with silence. We used Peugeot 504 Saloon

Car dark blue, Major Ado car. I initially we are 6 (six) who went for the operation who are Samaila Shuaibu, Barnabas Jabila, Sani Garba, Sukanga Bello, Mohammed Kpatako. Who went for the operation. But on the 4/6/96, it was only myself and Mohammed Katako that went because the other listed above and Mohammed Aminu said they are tired and were with girls which we don't want the girls to understand what we are doing because there fire arm are with them, and also we when out surveillance the previous night, it was Kpatako who drove the car. Major Mustapha is one that gave us the weapon and Ammunition. After the operation he gave us, N50,000 which Sukwanga Bello was the one that travel to Abuja to collect for us, which we share ourselves equally because the woman died.

(Sgd)

Signature Mark/of Witness/Accused

Interpreted by me: Signed

(Sgd.) 29/9... 1999

This statement was taken in English language and read over and translated to the Accused/Witness in English language in my presence and hearing. Recorded by: BARNABAS JABILA

9/9/1999

Time taking of statement commenced 1540 HRS.

Time taking of statement completed 1625 HRS.

In addition to the statement I wrote initially, I have not used any weapon that is not using 9mm. The weapon I used was UZI using silencer and the sound can be heard, but not much. And it is not possible that the shell of the round I fired to be found I - target car Because I fired by all means to make sure that I did not go out of the car window while firing, so the shell where mostly falling inside the car. Also the UZI that I used looks like MP5 SMG with curved magazine. After the operation, when we come back to Abuja, the weapon was returned back to Major Mustapha through L/Cpt. Ayo Gadzama his orderly who came to me and said the Major Mustapha said I should give him in which I did give him and I confirm it to be true that Major Mustapha send him to collect it from me by going to him Major Mustapha which he said he did sent Kyari. The weapon are numbered two (2) with about (10-15) ten to fifteen packet of 50 rounds each of 9mm linger.

(Sgd)

Barnabas Jabila

12/11/99"

Then the relevant part of statement of Mohammed Abdul (a.k.a. Katako):

B *"The three of them - Rogers Lawal and Aminu dropped from the vehicle while they asked us to move forwards after a while they came and met us and we went back home. The following day, they called Alhaji Mohammed Sani Abacha on phone and told him that they wanted a vehicle. Alhaji told them he wanted to speak with me on phone. They then called me to Lawal's room.*

C *Signed*

Mohammed Abdul alias KATAKO

19/9/1999 he told me to meet Alhaji Hamman to give us the key to the Mercedes 190 and we went and collected the car in the morning. Throughout this period, they said I should not come or I should wait until they called me because one of their Master's was coming from Abuja. We went back to LATT's residence in Mercedes 190 and a Peugeot 504 car. He took us to IGBO SERE and showed them an office. He also told them the type of Vehicle the man uses.

E *It is either Mercedes 200 or 230. We went back home and left the Mercedes 190 there. We then took the Peugeot 504 and went back to IGBO SERE and we saw the Mercedes 200/230. Aminu told Rogers that they should go back and pick up the Mercedes 190. He said they should wait there until the Mercedes owner came drove away the car and Rogers directed that they should follow the Mercedes 200 or 230. As the vehicle was nearing Obalande - just close to SURA I heard gun shots. When we returned home, I heard the ADESANYA ABRAHAM was shot. I then said that this firing must be the hand-*

F *work of Rogers.*

G *After two days, they went back to Abuja. I was never told the nature of the job I was going to do, but after their discussions. Alhaji Mohammed my master will then say you (me) to follow Rogers and others to Lagos.*

H *Signed*

Mohammed Abdul Alias KATAKO

19/9/1999

Then Rogers and other once told me that they wanted to give me something, but that my master told them that they should

not bother as I am his boy. After they had left for some days, I also went to Abuja. We came to Lagos together in a private Aircraft at night - The owner was one DANILO. We went to Lati's house in the morning and Lati took us to one house ABIOLA's house. That day we used a Peugeot 505 with Reg. No. CVU and another 504. I did not know where they got these vehicles. The 504 vehicle was faulty. B

When we returned home, Rogers borrowed his friend's car - GRAND CHIROKE JEEP and we then went back to ABIOLA's house. In the morning of the following day, Rogers said that we should drive out. We then went to Ikeja. Lati had already told them the type of Vehicle they were watching out for. He said we should follow that vehicle it was a Mercedes Benz and there were three or four people inside the car. As we approached Maryland Junction, Rogers started firing at the Mercedes and continued firing until we drove pass the car (Mercedes) after we returned home, I heard that KUDIRAT ABIOLA was the one shot at the scene. I then know that she. (KUDIRAT ABIOLA) was the one killed. This is all I know. C

Signed

Mohammed Abdul

Alias KATAKO 19/9/1999 E

The nature of the relationship between Major Mustapha and Alhaji Mohammed Sani Abacha is not quite clear to me. This is because I do not know much about them. All that I know is that we used to go to his (Mohammed) house or to his office I can't say what they do or say together. All these events happened in 1996 and the early part of 1997. At most close to the Handing over Day, I was given pass and was on my way to Agare. I then went to see my friend SALE and I saw Alhaji and he asked me whether I was aware of what Rogers has said about the job that we used to do. Then I guessed that Alhaji may say I should go and call the others, because he (Alhaji) will provide them with the means to leave the country and that they can return to the country after a while (that is after thing have cooled down). F

When I went to Abuja and Aminu and told him he said they should look for the others and when they saw Rogers, he said he was going nowhere. We looked for Lawal, Rabo but did not see him. I went back to Kano. Aminu drove his car and he gave us ten thousand dollars (\$10.000). We went to Niger Republic. We did not know G H

anyone. After three days we decide to return to Nigeria because it was not reasonable to leave our families and our work. After we returned Aminu saw us and asked why we returned to Nigeria. I told him that we would be going back to Niger Republic. He said that if we liked we could go back and that if we are arrested he will have nothing to do with us. Aminu then went to Abuja and I returned to my work in Lagos.

Signed
Mohammed Abdul
alias KATAKO
19/9/1999"

That is all there is to the appellant. The issue of an accessory after the fact will be dealt with in the course of this judgment. The only linkages are what can be found in the statements the appellant made.

"I was sitting in Major Mustapha's office when Sgt. Rogers and a couple of Body Guards were asked to come into the office. I was in the office purely on a visit which I usually do. The boys and Sgt. Rogers were asked to come into the office, then Major Mustapha told Rogers that he was sending them on an assignment. We then asked Rogers to bring a bag from a corner of his office which after it was opened by Rogers contained about two or more Machine guns. Major Mustapha then whispered to Rogers. I believe the details of the assignment before they were all asked to go. I believe to the best of my memory that it is the extent of what I witnessed in Major Mustapha's office that day before I left myself. On a particular occasion, Mr. Rogers came to my house (residence) then in the villa and asked to see me I promptly made myself available, it was there he expressed his fears about the allegations on him that they were being pointed to as Kudirat killers. My reaction was that of surprise and shock because what he said confirmed a lot of the allegations said about the issue in the pages of Newspapers etc. to my confusion and shock I immediately told him to go and report this to your boss Major Mustapha, then Mr. Rogers left. I still wonder why Mr. Rogers came to tell me what he told me seeing the fact that I was not his boss and that he had a boss Major Mustapha. May be Mr. Rogers thought he needed to speak to some one close to advise him on what to do. But the issue was sensitive and I did not want to believe what my ears heard from Rogers. I

didn't see Rogers again but I expected to hear from him what transpired between him and his boss.

Major Mustapha, also never spoke to me about the issue so really I don't even know it may be Rogers had second thoughts about what he told me. About Alhaja Kudirat death and then decided to keep about it afterwards. Conversely, Major Mustapha never told me, that Rogers had approached him and discussed such an issue with him. I remained confused on the matter. Mohammed Katako used to be the Driver of my late brother Ibrahim's security detail. He started working for me after my late brother passed on. While Katako was in Lagos in my house Mr. Rogers phoned my boys and wanted to speak to me. I answered the phone call. He indicated he was in Lagos on assignment he was calling from my house and that he needed the service of a driver. I asked who or which one of the drivers was there and he affirmed to me that there was Mohammed Katako I said okay you can use him and that was the end of that phone call.

On another occasion Mr. Rogers phoned from Lagos to request for the use of one of my cars. I asked why he needed a car and he answered that their car had broken down, and that they had requested one from Major Ado the o/c state house Lagos and that he couldn't provide them any because he didn't have a serviceable car at his disposal. Since I had left Lagos for a very long time I did not know which of the cars was anyway I asked them to check for a good car and ask the house boy to give them my old Mercedes Benz 190E I got and called back to let me know that the car was not very serviceable but that the boys said they would manage the car like that.

On a particular weekend, in 1999 I don't know precisely when Mohammed Katako came to my family residence at Gidado Road and told me that Major Ado and himself had come from Lagos for the weekend and that Major Ado wanted to see me to discuss some vital issues and that he didn't want to come to the house because we didn't want to be seen at the house.

(Sgd)

Signature Mark/of Witness/Accused

06/10/1999

Interpreted by me:

Signed... 19...

This statement was taken in... language in my presence and

hearing. Recorded by Mohammed Abacha.

Time taking of statement commenced 10.30 pm

Time taking if statement completed 11.45 pm

THE NIGERIA POLICE

Police D 19

STATEMENT OF WITNESS/ACCUSED

B STATION:

Name: MOHAMMED ABACHA

Nationality/Tribe

Age: 32 Occupation:..... Religion: Islam

C Address: No. 8, Gidado Road, Nassarawa Kano

I then told Mohammed Katako to tell him that I will come and see him in the night, and that Mohammed Katako should come and take me to his house in Kano City because I didn't know where he lived.

D Mohammed Katako came at about 12 midnight and we went to Major Ado's house in the City. As we got there he wasn't around. Mohammed located him from the neighbourhood. He invited me into his home we sat down and got talking. The basic theme of the discussion, was that there were a lot of questions being asked about
E the killing of Kudirat, the live attempts on Mr. Alex Ibru and Mr. Abraham Adesanya. During the talks he expressed a lot of fear about it. That he believed that since the boys are around they should immediately be resettled somewhere before additional measures should be
F taken. It was then resolved that Mohammed and Aminu should be taken care of first before the others were located. It was suggested that they be given at least ten thousand dollars or so to take care of them for some time before the additional measures could be put in place.

G On the issue of Rabo Lawal. One former body guard and Mohammed Katako told me about his wife's delivery of a baby and that he wasn't there to look after her. They then requested something for his wife I gave N50,000 to take of her needs. It was during this encounter with the B. G. and Mohammed that they informed
H me of Lawal's detention or so. Back to Major Ado discussion. It was then we agreed that the boys should be looked for and spoke to leave the country. Major Ado had to go back to Lagos for his duties. We then asked Mohammed Katako to locate the other and ask them to come to Kano and see me. This was also possible because

Mohammed Katako had some engagements to do in Abuja. Eventually Aminu and Katako came to see me at Gidado Road in Kano where I instructed my Accountant Ibrahim Aminu to source ten thousand dollars each of both for them which he confirmed to me he had given and they had collected from him.

Regarding the aircraft issue. The company Name of the Airline is Premium Air Shuttle and it is owned by one Mr. Daranillo resident in Lagos. I was in Major Mustapha's office when I heard him requesting for an aircraft to Lagos from the Presidential Fleet which they said was not available. I quickly remained him O. K. look for Danillo's we has aircraft, I looked through my diary for Mr. Danillo's Number and tried to get him. I think eventually we either got him or his lady assistant. I cannot remember precisely whom out of them but an Aircraft was sent to Abuja. I left Major Mustapha's Office after the phone call. So really I cannot say precisely who the Aircraft was meant to carry to Lagos and what was the reason for traveling to Lagos."

To start with, Sergeant Jabila (a.k.a. Rogers) said nothing against the appellant rather he confessed fully stalking Mrs. Abiola's car up to the point when he pulled the trigger and shot at her several times to kill her. The short conclusion is that he was the principal murderer of Mrs. Kudirat Abiola; he is not among the present accused persons. He said nothing against or about the present appellant. The appellant, in normal matter of course visited First Accused, Al'Mustapha not in course of any business. He saw Al' Mustapha whispering to Jabila (a.k.a. Rogers) but not knowing what they discussed. He saw two guns taken out of a bag and given to Jabila. Al'Mustapha was Chief Security Officer and Jabila worked with him. Certainly he would not know what the mission was. Soldiers and guns are not unusual even if there was no military regime. There must be some linkage in the mission and the appellant. Suspicion is no prima facie, some linkage must be shown that the appellant knew what was being planned by what he did or said at the occasion. It is noteworthy that Jabila never remembered to mention the appellant was solicited to lend a car, but Mohammed Abdul (a.k.a. Katako) did mention it but the car available, a Mercedes 190 make, was not found in good condition and was not used. But he "Katako" drove to the scene with Jabila and others where the unfortunate and gruesome murder was committed by Jabila, at least on his own confession of firing the shots at

Mrs. Abiola. The lower court ought to look at these statements to determine whether a prima facie case against the appellant had been made out, see *Ikomi v. The State* (supra). As D. O. Coker, J.S.C., said in *Ikomi's* case.

B *"It is the suspicion, which leads to investigation and discovery of evidence against the suspect. Suspicion alone is not enough to justify preferring a charge against a person, there must be evidence linking the suspect with the offence. There ought to be some evidence however remote, which calls for some explanation from the suspect. At a stage of deciding whether to prefer charge the prosecutor is not obliged to decide, as a trial judge should, whether the available evidence is cogent enough to justify a conviction. But there must be evidence to meet all the essential elements of that offence. It is my view that if on a proper appraisal of the available evidence there is*
C *absence of any necessary ingredient of the offence the judge who is requested to give his consent to preferment of the information should decline."*
D

The respondent's brief raised the following issues:-

E *"1. Whether the Introductory comments made in the judgment of the Court of Appeal highlighting the undesirability of the appellant bringing an application of this nature to quash the information were correct in law and not prejudicial to the appeal of the appellant.*

F *2. Whether the Court of Appeal in the determination of the appeal gave the appellant a fair hearing by giving a full and dispassionate consideration to the appellant's specific complaints in respect of the judgment of the Lagos State High Court.*

G *3. Whether the Court of Appeal was right to uphold the judgment of the trial court to the effect that the respondent had provided sufficient facts and inferences in the proof of evidence to establish a prima facie case against the appellant warranting an explanation by him in respect of the counts of conspiracy to murder and murder respectively.*

H *4. Whether the Court of Appeal was correct in law to have drawn inferences and a nexus between the appellants' statement to the police to the effect that he helped two of his employees to resettle outside the country and his state of mind when he released his car and driver to the group that killed Kudirat Abiola thereafter reaching*

the conclusion that he was linked to the offences charged.

5. *Whether the Court of Appeal was correct in law to uphold the judgment of the trial court that it had jurisdiction to try the offence of accessory after the fact of murder and that a prima facie case had been made out against the appellant in respect of the two counts of being an accessory after the fact of murder.*" B

The learned justice of Court of Appeal might have stated his opinion which has nothing to do with the issues before that court, I believe the opinion remains an obiter and nothing more. The law allows for an application to be brought to quash an information and that is what the appellant took advantage of. I do not believe it has a strong bearing on the decision of that court. I also find no reason to believe the appellant was not given fair hearing. C

However, in deciding whether a prima facie case exists for the accused to answer in an information for indictment, the authorizing judge, or the judge before whom the indictment is placed, must look at the proofs of evidence attached to the information in totality and not to pick words out of context. The idea to indict through an information is to save time in prosecution by obviating the necessity for a preliminary investigation before a magistrate. The magistrate after hearing at the preliminary investigation will decide on the evidence before him whether there is a prima facie case for the accused to answer and thus commit for trial in the High Court. Preliminary investigation by a magistrate has been deleted from Criminal Procedure Law of Lagos State (L.S.L.N. No. 1 and 4 of 1979 and No. 1 of 197.) D E F

What a magistrate was to decide under Preliminary Investigation was whether there was a prima facie case for the accused to answer if committed for trial in the High Court. I have indicated earlier what a prima facie case is. The entire proof of evidence, i.e. statement from relevant persons and perhaps also the suspect must be read and considered. It is now more so when there is no more provision for preliminary investigation by a magistrate. It is not a mere formality to accept the information without considering the proofs of evidence. To face a trial is not a matter to be treated with levity, a trial somehow infringes on the liberty of the subject, most especially when it involves a serious offence punishable by death or life imprisonment. (Ikomi v. The State (1986) 3 N.W.L.R. (pt. 28) 314, 316; Egbe G H

v. The State (1980) 1 NCR, A.L.R. 341; Adeyemi v. The State (1991) 6 N.W.L.R. (pt. 195) 1, 35). What the information must disclose is certainly not the guilt of the accused but a prima facie case for the accused to answer. There is illusion to circumstantial evidence that may not appear on the face of the proofs of evidence attached to the information and that must be in the mind of the court. I believe this is a misconception because nothing must be read into an information which will amount to failure of information on what facts or evidence the accused will face at the trial. It is true cross-examination may bring out new facts during trial, but the prosecution must submit along the information for indictment all the facts that will reveal not only an offence but a prima facie connection between that offence and the accused whereby the accused has an explanation to make at a trial. (R. V. Coker & Others 20 NLR. 62). In many cases on an information, only proofs of evidence by potential witnesses are attached, but when the statement of the suspect is also attached it gives the authorizing judge proper scope to decide if there is a prima facie case against him.

In the matter now at hand, there is nothing linking the appellant with the crimes on the indictment than suspicion. To say members of armed forces and the police are on an operation other than war or control of riot and in that capacity carry fire arm is not strange. It is not right to presume that going on an operation is a prima facie evidence of embarking on criminal act; that is not only wrong but it is unjust. Otherwise every soldier or policemen carrying arms will be committing an offence. The appellant was in the office of Al'Mustapha casually and Sgt. Jabila (alias Rogers) happened to meet him there; he never heard what the two whispered before guns were given to Sgt. Jabila. Both "Rogers" and Al'Mustapha never adverted to this in their own statements. In fact there is not enough indication of the precise date. I therefore find great merit in the appeal. The giving of the guns may be for an entirely different operation.

As for the accessory after the fact for which the appellant was charged it is to be observed that the two charges read as follows:-

STATEMENT OF OFFENCE - 3rd COUNT

Accessory after the fact to murder contrary to Section 322 of the Criminal Code Cap 32, Laws of Lagos State 1994.

PARTICULARS OF OFFENCE

Mohammed Sani Abacha, sometime in 1999 knowing Mohammed Abdul (a.k.a. Katako) to have murdered Kudirat Abiola in the Ikeja Judicial Division gave various sums of money with intent to facilitate their escape from arrest and prosecution.

STATEMENT OF OFFENCES - 4th COUNT

Accessory after the fact to murder contrary to Section 322 of the Criminal Code Cap 32 Laws of Lagos State 1994. B

PARTICULARS OF OFFENCE

Mohammed Sani Abacha, sometime in 1999 knowing Aminu Mohammed to have murdered Kudirat Abiola in the Ikeja Judicial Division gave various sums of money with intent to facilitate their escape from arrest and prosecution. C

Criminal Code Law of Lagos State defines in section 10 the offence of Accessory after the fact as -

“A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him escape punishment is said to become an accessory after the fact to the offence” D

In this indictment the appellant was charged for being an accessory after the fact to murder under S. 322 of the Criminal Code. The two counts mentioned Mohammed Abdul (a.k.a. Katako) and Mohammed Aminu respectively as having committed the murder to which appellant became accessory after the fact. Neither of the two is charged with murder. The practice was either to charge the accessory along with the main offender or charge them separately. But before the accessory after an offence can be tried, if charged alone, there must be proof that indeed a murder was indeed committed by the person the appellant is said to be accessory after the fact. Nobody can be an accessory to offence not proved. Every charge on an indictment must be clear so that the person to be tried will understand the complaint against him. In civil cases, the pleadings must be clear as to what the other party is to face on trial. A fortiori, in criminal matters the accused must not be left in doubt as to what he is to face on trial, the more so when criminal trial involves liberty of the citizen being indicted. There is no need to speculate on what is not on the face of indictment. E
F
G
H
 Court of Appeal by holding:-

“Whilst it is a correct statement of law that Accessory after the

fact of murder is a separate and distinct offence to that of murder; it is understandable that the prosecution in this case was making the point that the arrangement by the appellant to get Mohammed Katako and Aminu Mohammed to flee the country was a part of a plan to cover the track of those who had murdered Kudirat Abiola. Viewed from that angle it is easy to understand that the offences of accessory after the fact of murder laid in counts 3 and 4 are so connected with the offence of murder which is as provided under Section 64(c) of the Criminal Procedure Act.”

Was in error to speculate what the prosecution meant or wanted by the charges of accessory after the fact. Surely other persons were charged with the murder of Mrs. Abiola, but not Mohammed Abdul (a.k.a. Katako) and Mohammed Aminu. It is the duty of the Attorney-General to prosecute any offence as provided in laws made by Lagos State legislature as provided in S. 211 of the Constitution of 1999; it is equally his discretion to charge some offenders and decline to charge others. This power is to be exercised having regard “to public interest, interest of justice and the need to prevent abuse of legal process.” (S. 211(3) Constitution of Federal Republic of Nigeria 1999). This power can be exercised only by Attorney-General and he holds ministerial responsibility for it, not collective executive responsibility. In English Common Law, which found its way into our practice, an accomplice can be made a witness for the prosecution and this is done where without the evidence of that accomplice conviction cannot be achieved in the trial. This is a different case and a peculiar one for that matter. Sgt. Jabila (a.k.a. Rogers) gave a graphic description of his involvement that if voluntary must amount to confession. He has not been charged with any offence. The charges relating to “accessory after the fact” are clear - murder of Mrs. Abiola by Mohammed Abdul (a.k.a. Katako) and Mohammed Aminu - but the alleged criminals have not been charged. At any rate the giving of money to these two persons has not amounted to screening them from justice on the facts in the proofs of evidence attached to the information.

The court below as well as the trial court erred in finding prima facie case for the appellant to answer. At best, what is in the proofs of evidence amounts to serious suspicions that the appellant knows more than he adverts to. Suspicion how-

ever well placed does not amount to prima facie evidence, more facts than are now in the printed record will be needed to nail the appellant to his being required to explain. The prosecution must be wary of being accused of persecution rather than prosecution.

I find great merit in this appeal and I allow it. I enter a verdict of quashing the information. B

KUTIGI JSC

In the High Court of Lagos State holden at Ikeja, the appellant with three other co-accused persons were charged on a 4-count information as follows:- C

“STATEMENT OF OFFENCE - 1st COUNT

Conspiracy to commit murder contrary to Section 324 of the Criminal Code Cap 32, Laws of Lagos State 1994. D

PARTICULARS OF OFFENCE

Hamza Al’Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha, Alhaji Lateef Shofolahan between 1995 and June 1996 at Ikeja Judicial Division conspired to murder Kudirat Abiola (f). E

STATEMENT OF OFFENCE - 2nd COUNT

Murder contrary to Section 319(1) of the Criminal Code Cap 32 Laws of Lagos State 1994.

PARTICULARS OF OFFENCE

Hamza Al’Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha, Alhaji Lateef Shofolahan on or about the 4th day of June, 1996 along Lagos/Ibadan Expressway opposite Cargo Vision, Ikeja in the Ikeja Judicial Division conspired to murder one Kudirat Abiola (f). F

STATEMENT OF OFFENCES - 3rd COUNT

Accessory after the fact to murder contrary to Section 322 of the Criminal Code Cap 32 Laws of Lagos State 1994.

PARTICULARS OF OFFENCE

Mohammed Sani Abacha, sometime in 1999 knowing Mohammed Abdul (a.k.a. Katako) to have murdered Kudirat Abiola (f) in the Ikeja Judicial Division gave various sums of money with intent to facilitate their escape from arrest and prosecution. G

STATEMENT OF OFFENCES - 4th COUNT

Accessories before the fact to murder contrary to Section 323 of the Criminal Code Cap 32 Laws of Lagos State 1994. H

Accessory after the fact to murder contrary to Section 322 of the Criminal Code Cap 32 Laws of Lagos State 1994.

PARTICULARS OF OFFENCE

Mohammed Sani Abacha sometime in 1999 knowing Aminu Mohammed to have murdered Kudirat Abiola (f) in the Ikeja Judicial Division gave various sums of money with intent to facilitate their escape from arrest and prosecution.”

Pursuant to Sections 167 and 340(3) of the Criminal Procedure Law, Cap. 33 Laws of Lagos State, 1994 and under the inherent jurisdiction of the court, the accused/appellant filed an application to quash the above information on the ground amongst others that there was no link between him and the charges, in other words and in the lawyers’ language, the proofs of evidence do not disclose a prima facie case against him.

The application was refused by the learned trial judge saying amongst others that any information without a procedural or formal defect cannot be quashed. I agree. We shall soon see whether or not the information was defective. The appellant then appealed to the Court of Appeal holden at Lagos. In a unanimous judgment the appeal was dismissed. Still aggrieved by the judgment of the Court of Appeal the appellant has now further appealed to this court.

Both sides filed and exchanged briefs of argument as provided under the Rules of Court. The briefs were adopted by learned counsel at the hearing and oral submissions were also made.

In the appellant’s brief five issues were submitted as arising for determination in the appeal. It is however my view that the most important and crucial issue is issue (3) which reads thus -

“Whether the Court of Appeal was right to uphold the judgment of the trial court to the effect that the respondent had provided sufficient facts and inferences in the proof of evidence to establish a prima facie case against the appellant warranting an explanation by him in respect of the counts of conspiracy to murder and murder respectively.”

I therefore intend to confine myself if it becomes necessary to the above issue only because as indicated above I will have to examine the information very carefully first to see whether or not it is defective. I also realize that the appeal before us being in the nature of an interlocutory appeal because the case is yet to be tried, care must

be taken not to talk too much or make observations on the facts in the judgment which might appear to pre-judge the main issue or issues in the proceedings relative to the interlocutory ruling or judgment (see for example *EGBE v. ENOGUN* (1972), All N.L.R. (pt. 1) 95; *Ojukwu v. Government of Lagos State* (1986) 3 N.W.L.R. (pt. 26) 350. I will therefore be brief. B

Now, added to the inherent jurisdiction of the court the appellant also relied on Sections 167 and 340 of the Criminal Procedure Law of Lagos State which read -

“Objection to charge to be taken at plea. C

167. Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later.

“Proceedings preliminary to trial Procedure on information of offenders - Provisions antecedent to preferring information - Information liable to be quashed. D

340(1) Subject to the provisions of this section an information charging any person with an indictable offence may be preferred by any person before the High Court charging any person with an indictable offence for which that person may lawfully be indicted and wherever an information has been so preferred the registrar shall, if he is satisfied that the requirements of the next following section have been complied with, file the information and it shall thereupon be proceeded with accordingly: Provided that if the registrar shall refuse to file an information, a judge, if satisfied that the said requirements have been complied with, may, on the application of the prosecutor or on his own motion, direct the registrar to file the information and it shall be filed accordingly. E F

(2) Subject as hereinafter provided no information charging any person with an indictable offence shall be preferred unless either - G

- (a) the person charged has been committed for trial, or
- (b) the information is preferred by the direction or with consent of a judge or pursuant to an order made under Part 31 to prosecute the person charged for perjury: H

Provided that-

- (i) Where the person charged has been committed for trial, the information against him may include, either in substitution for or

in addition to the counts for charging the offence for which he was committed, any counts found on facts or evidence disclosed in any examination or deposition taken before a magistrate in his presence, being counts which may lawfully be joined in the same information.

(ii) A charge of a previous conviction of an offence or of being an habitual criminal or of being an habitual drunkard may, notwithstanding that it was not included in the committal or in any such direction or consent as aforesaid, be included in the information.

(3) If an information preferred otherwise than in accordance with the provisions of the last foregoing subsection has been filed by the registrar the information shall be liable to be quashed: Provided that -

(a) if the information contains several counts, and the said provisions have been complied with as respect one or more of them, those counts only that were wrongly included shall be quashed under this section, and

(b) Where a person who has been committed for trial is convicted on any information or any count of an information, that information or count shall not be quashed under this section in any proceedings or appeal, unless application was made at the trial that it should be so quashed.”

In the light of those provisions of the law, I believe the application was properly made at the trial court. I shall now proceed to examine the 4-count charge one after the other to see whether or not there is any defect therein.

1. Conspiracy to commit murder - 1st Count

The accused persons are -

1. Hamza Al'Mustapha
2. Mohammed Rabo Lawal
3. Mohammed Sani Abacha
4. Alhaji Lateef Shofolahan

2. Murder of Kudirat Abiola (f) - 2nd Count

Accused persons again are -

1. Hamza Al'Mustapha
2. Mohammed Rabo Lawal
3. Mohammed Sani Abacha
4. Alhaji Lateef Shofolahan

3. Accessory after the fact to murder of Kudirat Abiola (f) by

Mohammed Abdul a.k.a. Katako 3rd Count

The only accused person here is Mohammed Sani Abacha.

4. Accessory after the fact to murder of Kudirat Abiola (f) by Aminu Mohammed - 4th Count

Again the only accused person is Mohammed Sani Abacha. From the above analysis or summary of the charge, the following observations emerge -

(a) Mohammed Sani Abacha, the appellant herein, is charged with 3 others in counts 1 & 2 for the conspiracy to murder and murder of Kudirat Abiola (f)

(b) Only Mohammed Sani Abacha, the appellant herein, is charged in count 3 as an accessory after the fact for the murder of Kudirat Abiola (f) by Mohammed Abdul a.k.a. Katako.

(c) Only Mohammed Sani Abacha, the appellant herein, is charged in count 4 as an accessory after the fact for the murder of Kudirat Abiola (f) by Aminu Mohammed.

(d) Abiola Kudirat (f) was killed three times. First by Mohammed Sani Abacha and his 3 co-accused; secondly she was killed by Mohammed Abdul a.k.a. Katako, and thirdly she was also killed by Aminu Mohammed. Was there a resurrection? Two resurrections of Abiola Kudirat (f) it appears to be! Can you explain it? I certainly cannot.

So the pertinent question to ask now is - who murdered Kudirat Abiola (f)?

i. Is it Mohammed Sani Abacha, the appellant, and his 3 co-accused persons as alleged in counts 1 & 2 above?

ii. Is it Mohammed Abdul a.k.a. Katako as alleged in count 3?

iii. Is it Aminu Mohammed as stated in count 4?

The information as laid is therefore to my mind very defective indeed. It is a muddle, a confusion. The information as laid I repeat is inherently defective and bad in material particulars. Whoever drafted it must have been in a confused state of mind. Without looking at or reading the proofs of evidence one can easily come to the irresistible conclusion that the prosecution or the respondent is gambling. It does not appear to know who committed the murder and who to charge in this case. And if it does, the information does not point to that direction. Mere suspicion is insufficient to put a man on trial. That appears to me to be clearly the position here. If you disagree with me

then, how do you explain the situation where the respondent charged the appellant and 3 other co-accused persons with the conspiracy to murder and murder of Kudirat Abiola in counts 1 & 2 and then immediately thereafter proceeded in the same information to charge only the appellant as an accessory after the fact of the murder of the same Kudirat Abiola (f) committed by two different persons namely Mohammed Abdul a.k.a. Katako and Aminu Mohammed in counts 3 & 4 respectively? The information is clearly embarrassing and indeed misleading. The respondent must not be allowed to gamble. Prosecution is not a game of chess! If I may ask, where are these Mohammed Abdul a.k.a. Katako and Aminu Mohammed? If they exist, have they been charged in a court of law? There is no indication anywhere. There is no doubt that they could among others be the murderers of Kudirat Abiola (f) as stated in counts 3 & 4? Joinder of all the 4-counts in a single information is not proper being offences committed individually by three sets of people that have nothing to do with one another.

If it were only the appellant that is mentioned in each and every count, one would have been tempted to act under proviso (a) of Section 340(3) of the Criminal Procedure Law above and would have quashed counts 3 & 4 straight away. But in counts 1 & 2 the appellant and 3 other accused persons are charged jointly and not just the appellant alone. There will therefore be no justification to sustain any of the 4-count charge. The information is clearly misleading, embarrassing as well as uncertain to say the least. It must therefore not be allowed to stand. How could the appellant herein be expected to defend the murder charge against him as well as those murders committed by other people not charged in the information or any information at all? I have no answer. The information is without any doubt very bad. It is incurably bad. The 4 counts in my view cannot be joined and tried together in a single information as explained above.

I have therefore no hesitation in quashing the information preferred against the appellant herein. The appeal to my mind is meritorious. It therefore succeeds and I accordingly allow it.

There is no need for me to consider the only issue (3) above as I indicated at the beginning of the judgment.

It is for above reasons that I agree with the conclusion in the

lead judgment of my learned brother, Belgore, J.S.C. to quash the 4 count information herein. I hereby quash the 4 count information. It is ordered that the appellant be released from custody forthwith.

ONU JSC

This is an appeal against the judgment of the Lagos Division of the Court of Appeal delivered by Oguntade, J.C.A., on the 11th of December, 2000 and concurred in by Chukwuma-Eneh and Sanusi, JJ.C.A., which unfortunately carries only the leading judgment and the opinion of A. Sanusi J.C.A. The appellant as can be seen from the record, was jointly charged along with the respondents to this appeal before the High Court of Lagos State sitting at Ikeja on a four-count information wherein it was alleged that they, inter alia, conspired between 1995/96 at Ikeja to murder one Kudirat Abiola contrary to section 324, of the Criminal Code Cap. 32, Laws of Lagos State and section 319 of same. The 2nd count charges them for jointly murdering the said Kudirat Abiola (hereinafter in the rest of this judgment referred to as the deceased). The last 2 counts charged the appellant alone and accused him of assisting 2 persons, Mohammed Abdul and Mohammed Aminu to murder the deceased, and later providing them with various sums of money with intent to facilitate their escape from justice contrary to section 322 of the Criminal Code, Volume 2, Laws of Lagos State. Annexed to the information was the proof of evidence which contained copies of the statements of some of the witnesses intended to be called by the prosecution and on which the filing of the information was hinged.

The Appellant filed an application by aid of his counsel to quash the said information against him on the ground that there was no link between the charges and him. The refusal of this application by the learned trial judge, Kekere-Ekun, J. led to this appeal but not before it went on a further appeal to the Court of Appeal sitting in Lagos to which I had hereinbefore referred. For the sake of brevity and conciseness, I shall henceforth call that court the court below i.e. before which the further appeal was extensively argued but could not persuade it to agree with the appellant. It therefore dismissed the appeal. Being further dissatisfied, the appellants has appealed to this court, initially on six grounds of law (see pages 500-509 of the printed

record) and with leave granted on the 7th of February, 2002, three additional grounds of appeal which were added to an amended notice of appeal filed on 13th February, 2002. The issues formulated from these nine grounds of appeal form the pivot upon which the appellant's brief of argument revolves. The briefs of both sides were
B exchanged; they were each adopted and argued before us with zest and fervour.

The brief facts of the case are as ably and dexterously reviewed in the leading judgment of my learned brother, Alfa Belgore. J.S.C.,
C with which I am in complete agreement. It is for the reasons he has so clearly stated therein and the conclusions arrived thereat, that I too, with the due humility and clear conviction, allow the appeal and proceed to quash the proceedings accordingly without fear or favour, affection or ill-will.

D In expatiating on the matter it is pertinent, in my view, to set out seriatim the five issues which arise for our determination. They ask as follows:

ISSUES FOR DETERMINATION

E 5.1 Whether the negative preliminary comments by the Court of Appeal on the desirability of the appellant's recourse to the established procedure for quashing a defective information was correct in law and whether such comments did not foreordain the fate of the appeal regardless of the merits thereof?

F 5.2 Whether the appellant's right to have a fair hearing in the sense of having the issues raised by him given a full and dispassionate consideration by the Court of Appeal was not violated when the court determined the appeal without any consideration of the specific complaint made against the rationes of the Lagos State High Court in
G coming to the conclusion that the appellant was linked to the offences in the information, regard being had to the standard set by law?

H 5.3 Whether the Court of Appeal was correct in finding as the lower court had done that there were sufficient facts and inferences in the proof of evidence upon which the appellant could be said 'prima facie' against the appellant warranting an explanation by him in respect of the counts of conspiracy to murder and murder respectively.

5.4 Whether the Court of Appeal was correct in law to have

forged a nexus between the appellant's statement to the police wherein he assisted 2 of his father's former employees among many others to resettle themselves and his state of mind when he released his car and security driver on different unrelated occasions to the self-confessed killer of Kudirat Abiola so as to reach the conclusion that he was linked to the offences charged? B

5.5 Whether the Court of Appeal was correct in law when it affirmed the decision of the Lagos State High Court that it had jurisdiction to try the offence of accessory after the fact of murder as charged herein and that a prima facie case had been made out against the appellant on the twin counts of accessory after the fact of murder, regard being had to the contents of the information and proof of evidence? C

Before I commence my consideration of the appellant's issues I have set out above and which the respondent more or less adopted because they indeed do overlap themselves, let me comment briefly on the case from the point of view of my modest understanding of it. The respondent's brief as filed by the learned Honourable Attorney-General of Lagos State, to borrow the words of learned Senior Advocate for the appellant, "demonstrates a fundamental misconception of the rather basic but fundamental issues that hold sway over applications of this nature. Put specifically, the respondent appears to have chosen willfully to ignore the fact that it is not the number or quantity of inoffensive events that the appellant can be associated with that qualifies (sic) him for trial, it is the ability to point to at least one act of an accused person, which if not contradicted, would amount to a prima facie case of the offence or offences charged." D E F

I will pause here to make a brief reference to the case of Donald O. Ikomi & Ors. v. The State (1986) 3 N.W.L.R. (pt. 26) 340, wherein this court at the end of the day and upon tracing the historical evolution of trial on information as imported into this country and as handed down on appeal by per Karibi-Whyte, J.S.C., (in a matter I consider distinguishable from the one now being considered) thus: G

"In the exercise of this quasi-judicial duty, it is necessary that a prima facie case of the commission of the offence should be made out against the persons named in the information in respect to which the persons named could be linked. H

Where the information discloses the commission of an of-

fence, as in this case, and the deposition supports the indictment, it is not sufficient to quash the indictment because the accused person may not be convicted on trial. All that is required at this stage is that the evidence on the deposition should support the charge as laid in the information and link the accused persons.

B As I have already stated, appellants are linked to the commission of the offence by the fact that they more than any other person on the evidence before the consenting learned Chief Judge had the opportunity to commit the offence.

C The searchlight of suspicion which is still flickering was clearly brighter when focused on the appellants than on any other persons. The question whether it will finally flare on them will be determined at the end of the trial when they have denied the allegations against them and the court has had the opportunity of testing their version
D of the incident.

“In my opinion there is a right not to be tried only when no offence is disclosed on the information. There is such right when an offence is disclosed on the information and the accused persons are linked with its commission. There was therefore on the deposition
E sufficient evidence to enable the Chief Judge give consent to the filing of the information against the appellants.”

Per Aniagolu, J.S.C:

“*It would appear convenient for me to recall the history behind the filing of information in England from where that aspect of
F our law was introduced into our country. But before then it is necessary to point out that the procedure generally for prosecuting criminal proceedings by information in the High Court in Bendel State, takes two forms namely:*

G (a) *by preliminary inquiry under Chapter 5 part 36 of the Criminal Procedure Law, Vol. II Laws of the Bendel State of Nigeria and*

(b) *by consent of a Judge under section 340 of that Law. In either case, the principle involved is that no citizen should be put to the rigours of trial, in a criminal proceeding, unless available evidence
H points, prima facie, to his complicity in the commission of a crime. In the protection of a citizen's right not to be unnecessarily harassed by criminal prosecution, the law enjoins a Magistrate in a preliminary inquiry, or a Judge consenting under section 340 to a summary trial of art indictable offence, to be satisfied that the evidence there estab-*

lishes a prima facie case against the citizen. This inquiry, by the Magistrate or the judge, has its origins, in historical retrospect, in the ancient Grand Jury System in England starting with the Assize of Clarendon in 1166, in which not less than twelve and not more than twenty-three freeholders of a country were returned by the Sheriff to Sessions of the Peace, and Commissions of Oyer, Terminer and General Goal Delivery, with the instruction, contained in the Articles of their inquiry, as framed in a charge by the judge, to hear evidence from the prosecution in the nature of an inquiry or accusation, and determine, upon their oaths, whether there was sufficient cause to call upon the person accused to answer it.” B
C

If after hearing evidence and deliberation on the evidence they thought the accusation was groundless, they indorsed upon the bill of indictment the words:

“*NOT A TRUE BILL*” D

OR

“*NOT FOUND*”

and thereupon, the Bill was thrown out and the person accused discharged; but if they were satisfied of the truth of the accusation, they endorsed a “*TRUE BILL*” on the Bill of Indictment, meaning that the indictment was then found and that the party stood indicted. E

It was an exercise designed to find if there was sufficient evidence to justify the case going for trial. It was not in itself the trial and the fact that the person accused could have a good defence to the indictment when it came for trial, would not justify the grand jurors in not returning a “true Bill”. So much for the historical perspective. (Underlined quotation above is mine for emphasis). F

The facts leading to the appeal herein are derived from the proofs of evidence annexed to the information, the application to quash the said information, arguments thereon, the ruling of Kekere-Ekun, J., and the proceedings before the Court of Appeal. In the first place, the purpose of serving proofs of evidence upon an accused, it may pertinently be pointed out, is to give him (the accused) the opportunity of knowing what the prosecution witnesses will state in court against him. See *Ede v. The State* [1977] 1 F.C.A. 95 at 115. G
H

Secondly, under our Criminal Procedure and Practice, it was at all times the province of the Law Officers of the Crown (now State)

to decide, in the light of what the public interest requires in any particular case, who shall be charged and with what offence. See the Federal Supreme Court case of Shittu Layiwola & 3 Ors. v. The Queen 4 F.S.C. 119/120.

Thus, in cases of the nature now before this court on appeal, the entire proofs of evidence must be looked at as a whole before a court can safely conclude that a prima facie case of the offences if charged has been made out against the accused person. Secondly, only facts of events relevant to the charge which took place before or contemporaneous to the time of the death of the deceased are relevant and permissible for consideration of the counts of conspiracy to murder and murder charged. Be it noted that in the instant case the killing of the deceased took place in June, 1996 but the inception of the investigation of appellant's case was after General Abacha's death in 1998 i.e. in 1999.

In advertng to the way and manner as well as to how the deceased met her death in the instant case, it is one Dr. Mark Adesina in his proofs of evidence (see pages 11-61 of the printed record) who gave graphic details of the family squabbles of the Abiola family and how she met her death through the hands of hoodlums at Ikeja on the 4th day of June, 1996. Reference was next made to the vital and most important statement made by one Sergeant Barnabas Jabila a.k.a Rogers at pages 99 to 101 of the printed records, excerpts which are reproduced hereunder thus:

"On the 4th of June, we followed her to Abiola's house, in the morning. We followed her there, immediately we reached there, she came out of Abiola Crescent with White Mercedes Benz Beast, in which they are 4 in number, so we trail (sic) her to Allen Avenue roundabout where she dropped one small girl that was in the car with her. Then we followed her again to the Secretariat Alausa Ikeja, then to express road on her way to Lagos, then we come closer and level up with her, then I fired at the car several shots, then we drove off which later the shots killed her. I used UZI's MG 9 mm rounds with silencer. We used Peugeot 504 Saloon car dark blue, Major Ado's Car."

The "we" referred to in the above excerpt clearly mentions nothing about the appellant - as my views below would concretely confirm and crystallize later. The incident narrated in the appellant's

brief above assumed a different colouration and complexion in the respondent's brief at page 3 thereof by a resort to engaging in misrepresenting and distorting agreed undisputed facts thus:

"It is pertinent to mention at this stage that the main proposed witness for the prosecution Barnabas Jabila a.k.a. Rogers who actually shot the victim of the murder charge Mrs. Kudirat Abiola dead in her Mercedes Benz car from another Peugeot 504 Saloon car belonging to the appellant and driven by his driver was not charged." (Underlining for emphasis).

I agree with the appellant that this attack consummated in respondent's desire to have the appellant tried at all costs and which act is mostly unjustified. The proof of evidence in respect of the above underlined excerpt did not anywhere as much as hint that the said vehicle belonged to the appellant nor that it was driven by his (appellant's) driver. It is also noteworthy that nowhere in Jabila's statement did he say that the appellant was privy to the murder of the deceased, either at conception (if there was any) or in the execution stage. Even granted that the he was appellant's driver how has the nexus of appellant as participes criminis been established? Appellant was not shown to be in the car from which the gun was fired at the deceased. At page 87 of the printed record Major Ado in his statement in the printed record said:

"The issue of the vehicle they used was collected from our office."

At page 100 Barnabas Jabila himself said:

"We used (sic) Peugeot 504 Saloon car dark blue, Major Ado's car".

At page 431 - 432 of the printed record the appellant justifiably, in my view, had cause to complain to the court below about the incessant prevarication of the prosecution. Be it noted that it is trite that where the prosecutor acts as a persecutor as glaringly brought out above, the court has always been quick to condemn such action. See *Odofin Bello v. The State* [1966] 1 All N.L.R. (Reprint) 217 at 226.

Another instance of misrepresentation by the Attorney-General to the appellant's detriment can be gleaned from page 23, lines 3 - 7 of respondent's brief thus:

"Furthermore, that by his own admission in his statement to

police, the appellant was in the office of the 2nd respondent and a co-accused person in the substantive trial, Major Hamza Al'Mustapha, who actually ordered the killing of the deceased by Barnabas Jabilla, when a bag containing one or two guns were handed over to Barnabas Jabilla".

B I agree with appellant's submission that there is nowhere in the printed record where the appellant admitted in his statement that he was present (and with his connivance) when Major Al'Mustapha gave the orders for the killing of the deceased and gave him a bag containing machine guns for that purpose. I also agree with the appellant's submission that such embellishments and unnecessary padding are manifestly unfair and contrary to the ethics of the legal profession. Facts which are sacred must be put before the court in as accurate a manner as possible and must then equally be matched with comments which are unbiased and free. Where for instance, counsel is drawing inferences he must make it clear that such inferences are his.

Thus, where it can be inferred that the appellant witnessed the handing down of such orders or that they were ever made at all, the submission by the respondent to the effect that:

E "*The appellant in his own statements also attached to the proofs of evidence which can be found at pages 74-83 of the record also gave a very revealing account of his relationship and involvement with other co-accused person as well as numerous implicating actions vis-à-vis the murder of Kudirat Abiola.*" can at best be regarded as far-fetched, false, improbable as well as strained outpouring to establish a prima facie case. Thus, where a person is innocent he is free and ought not to be put on trial. See *Egbe v. The State* [1980] 1 N.C.R. 341 at 346 and *Conelly v. D.P.P.* [1964] A.C. 1254 at 1301; 1302, 1310 and 1311. Therefore, I agree with the submission of the appellant that the statements of Dr. Falomo, Major Hamza Al'Mustapha, Major S. Ado, Aminu Mohammed, Mohammed Katako and Mohammed Rabo Lawal, nowhere implicated the appellant in the murder of the deceased. Even the statements of the appellant themselves which the prosecution has erroneously described as confessional did not implicate him in the cold-blooded murder of the deceased. The end result, in my opinion, is that there are no facts in the proofs of evidence which prima facie link the appellant with the offences charged save the respondent's submission that there is cir-

cumstantial evidence from statements which appellant himself made as well as inferences from which the respondent's case may be remotely said to have been made *prima facie* in the instant case where there is the direct statement of Barnabas Jabila alias Rogers who is the self-confessed killer of the deceased and in which he makes no mention of the Appellant, it is most uncharitable to forge a link between the deceased's death and the Appellant where none existed at all either directly or by inference. B

On the appellant's part, it was submitted by his counsel that the applicant was brought partly on statutory provisions and essentially on the inherent powers of the court pursuant to section 6(6)(a) of the 1999 Constitution. The court was referred to the *locus classicus* on the subject matter *vide* *Ikomi v. The State* (*supra*) at 336, adding that a *prima facie* case had not been made out against the appellant. After reference was made to a host of judicial authorities it was submitted that the first two counts must require the existence of *mens rea* that the proof of evidence must show the positive part played by the appellant in the perpetration of the offence. On the last two counts dealing with the assistance given by the appellant to persons (Mohammed Abdul and Mohammed Aminu) who allegedly aided in killing the deceased, it was submitted in the first place that the Lagos State High Court lacked the jurisdiction to try the two counts of accessory after the fact of murder since the alleged assistance was provided in Kano. It was further contended that since the offence of accessory after the fact of death of the deceased was a distinct offence on its own, the fact of the death of the deceased did not amount to an initial element of the offence. And on whether a *prima facie* case of accessory after the fact of murder had been made out in the proof of evidence against the appellant, it was submitted on behalf of the appellant that no such case was made out because the two persons allegedly assisted were not charged with the offence they allegedly committed. It was well nigh impossible, it was further maintained, for the appellant to have assisted them with the guilty mind of facilitating their escape from justice when he did not know who committed the offence for which he is charged while living away in far away Kano. This is why the lower court should have quashed the charges, we were finally urged. I cannot agree more. C D E F G H

The prosecution initiated by the learned Attorney-General, it

was further submitted, was brought under the wrong law. Further, it was submitted, having regard to certain events such as the handing over of guns in a military environment by Major Al' Mustapha to Sergeant Rogers, the request for the use of appellant's vehicle for purposes unrelated to the crime by the said Sergeant Rogers and the assistance rendered to 2 of appellant's father's former body guards at their request, all these were indicative of a prima facie case against the appellant which at least required an explanation from him. The prosecution further submitted that the appellant could rightly be described as one who aided or counseled the offence of murder because he gave his driver and vehicle to some one who eventually killed the deceased. The allegation is not that the vehicle or the driver was employed contemporaneously by the appellant to kill the deceased. Rather, it is that a third party who requested for them. Vide section 7 of the Criminal Code used them. There has been no basis for all the above speculative submissions as I shall further seek to show below.

On the issue of whether there was evidence in the proof of evidence from which conspiracy could be inferred, the learned Attorney-General made his famous statement to the effect that:

"The existence of a conspiracy cannot be proved without calling evidence, to attempt to so find at this stage is precipitate".

This, in my view, is non-sequitur because the appellant at pages 74-83 of the printed record made several statements regarding Major Al' Mustapha about the latter's request for the use of his (Appellant's) driver and car, which request did not materialize because the cars from inquiries, were all bad; of Rogers, Mohammed Katako, Mohammed Lawal, Rabo Lawal, Major Ado and 'the boys' etc, his giving of ten thousand Dollars to two of his father's former bodyguards to enable them leave Nigeria and the talk in his presence of a decision to use one Mr. Danilo's aircraft to take some unidentified people to Lagos - are to me, decisions of daily human conduct devoid of criminality. As none of these would-be witnesses neither confirmed nor denied in their own statements the things said by the appellant, to say that the appellant would be called upon to explain himself in a would-be trial, is uncalled for over any imaginary conspiracy.

Furthermore, the appellant's statements extending from pages

74-83 (supra) in the printed record form, in my humble view, one innocuous, innocent, clean-breasted and complete story of what he knew of the case - all of which go to make me to say that he was not linked to the murder of the deceased to warrant his being asked to say what he knows for him to be put on trial except to say that these statements constitute nothing but at the highest suspicion. See Kenneth Clark v. The State [1986] C - A (pt. 11) 314 at 235 where Kolawole, J.C.A. put it admirably thus:

“Suspicion may be many and sometimes grave, yet they will amount each to suspicion and no further. Combining them do not elevate them beyond the realms of suspicion. They will remain suspicion.”

That in the instant case I am aborting a trial that never will see the light of day because it is founded on suspicion (see Idapu Emine & Ors. v. The State [1992] 7 N.W.L.R. (pt. 204) 480-496) is as well in a democratic society since the liberty of a citizen ought not to be taken for granted. For three consecutive years on end the flimsy allegation has been to mess up the appellant's fate with soldiers' just for the sheer reason that a dog must be given a bad name in order to hang it.

Compare this case with the Ikomi case (supra) where, after the deceased police man had arrived at 1st appellant's house on guard duty, the gate thereto was locked and the key taken up into his (1st appellant's) apartment upstairs before the killing of the police officer whose voice rang out several times: “Oga don kill me.” There, the first appellant and his 2 co-accused were definitely required to explain what transpired at the killing of the deceased moreso that none entered his locked compound through the iron-gate until the following morning when the deceased's corpse was found lying on the ground therein in a pool of his own blood.

It is little wonder then that irked with interrogation on to boredom and tedium, the appellant in the instant case ended his series of statements when he said:

“Eventually Aminu and Katakò came to see me at Gidado Road in Kano where I instructed my Accountant Ibrahim Aminu to source ten thousand dollars each for both of them which he confirmed to me he had given and they had collected from him.

Regarding the aircraft issue. The company name of the Airline

is *Premium Air Shuttle* and it is owned by one Mr. Danillo resident in Lagos. I was in Major Mustapha's office when I heard him requesting for an aircraft to Lagos from the Presidential Fleet which they said was not available. I quickly reminded (sic) him O.K. look for Danillo we has (sic) aircraft. I looked through my dairy for Mr. Danillo's Number and tried to get him. I think eventually we either got him or his lady assistant I cannot remember precisely whom out of them but an Aircraft was sent to Abuja. I left Major Mustapha's office after the phone call. So really I cannot say precisely who the Aircraft was meant to carry to Lagos and what was the reason for traveling to Lagos".

On the counts relating to accessory after the fact of murder, it was the respondent's submission that the Lagos High Court possessed jurisdiction to hear the counts since the actual murder took place in Ikeja and not in Kano where they and some of the proposed witnesses lived. Having globally examined the case herein on appeal, I now wish to comment briefly on the issue submitted as arising for determination before concluding, which as I earlier pointed out, overlap on either side of the fence.

APPELLANT'S ISSUE NO. 1 VIS-À-VIS RESPONDENT'S ISSUE NO.1

To appreciate the reasoning of the court below in this issue, I think it is pertinent and indeed desirable to set out the passage that led to it vide pages 478 - 479 of the printed record thus:

"I ought to say by way of preface to this judgment that I do not consider it a desirable procedure for an accused person on being served with proof of evidence depositions, upon an information to bring an application that the charge or charges be quashed except as provided for under Section 340(3) of the Criminal Procedure Law Cap.33, Laws of Lagos State. It is undesirable because:

(1) It enables the court to make preliminary pronouncements as to whether a charge has merits or not based upon statements of witnesses, which have not been formally presented to the court by way of evidence.

(2) It, apart from being speculative in nature is needlessly prejudicial to an accused person because it offers to the court an opportunity to comment before trial on the weakness of the prosecution case which then affords the prosecution the chance to improve upon or cover loopholes identified in the evidence.

(3) It is needless waste of time considering that an opportunity is still available to the accused person to make a no case submission to the court at the close of the prosecution's case. In this case for instance, it would still be open to the appellant's counsel to make a no-case submission to the court or more or less the same ground as is relied upon in the application that the evidence called has not disclosed a prima facie case against the appellant. I am not unaware that the procedure has been followed in some cases in recent times. But I think it should be discontinued. On the other hand, if it is thought that an accused be allowed to test the waters by bringing such an application, I think the ruling thereupon should be in a few sentences and as skeletal as possible with an eye on the need to refrain from commenting on the observed weakness or even strength of the prosecution's case."

On a careful reading of the above excerpt, I hold the view that even though the Honourable Attorney-General endeavoured in vain to justify these prejudicial remarks made by the court below on the ground that the application had occasioned a delay of at least 2 years then with the other co-accused persons languishing in jail, that they were so languishing in jail or not standing trial was the doing or handiwork of the prosecutor himself as the offence(s) charged carry the death penalty. The appellant as with any other persons is entitled to raise such befitting objection not only in his own interest but in the overall interest of justice. Moreso at page 517 of the printed record where, Oguntade J.C.A., in granting a stay of proceedings in favour of the appellant, expressly limited the order to the latter alone. The Honourable Attorney-General was not interested in prosecuting the other accused persons or the trigger puller. He appears only to be interested in prosecuting the appellant, hence the other accused persons are languishing in prison - the delay being the prosecutor's choice, perhaps, more the outcome of a decision as Commissioner for Justice than as Attorney-General.

Besides, the Honourable Attorney-General has in the instant case tried, unsuccessfully as I shall respectfully contend, to say that the Supreme Court in *Union Bank Ltd. v. Alhaji Bisi Edionsieri* [1988] 1 N.S.C.C. 603 at 612 is not relevant to the instant appeal on the ground that the Supreme Court frowned on a court making a pronouncement where there is no list between the parties. In the instant

case where the respondent had contended that there was a pending controversy between the parties it was argued that such a view was erroneous moreso where there was no dispute between the parties as to the desirability or otherwise of the procedure of quashing charges on the ground that the proof of evidence discloses no evidence or link with the accused person. That is the area, it was further contended, that the court below, uninvited had made the pronouncement that is the subject matter of the issue under consideration. Further reliance was placed on the case of Ikomi v. The State (supra) at page 10 of his brief as technically legal. Such categorization as engaged in by the Attorney-General submitted by the appellant, is wrong as it is not a minor issue for an accused person standing trial in a murder case to highlight the fact that the entire process of his arraignment is an abuse of court process. That further still, on the issue, I share the appellant's view that those findings, the subject matter of the issue herein, prejudiced the mind of the court below against the appellant, such that it could not consider specific complaints made against the judgment of the lower court.

ISSUES NOS. 2 AND 3 CONSIDERED TOGETHER

In these two issues considered together the appellant's grouse is that the court below in their treatment thereof failed to deal with the specific issues contained therein. The most important of specific arguments ignored by the court below was given as the statement credited to the Attorney-General to the effect that:

"The existence of a conspiracy cannot be proved without calling evidence, to attempt to so find is precipitate."

It was next contended that notwithstanding the learned Attorney-General's spirited effort to disclaim the above statement or give it another interpretation given to it by the appellant is not only reasonable but the outcome of plain and unbiased understanding of the Attorney-General's submission. The learned Attorney-General in making the statement was there dealings with the difficulty of establishing a prima facie case in relation to the offence of conspiracy. One wonders therefore why the Honourable Attorney-General is wasting his time trying to recant from a statement he earlier affirmed in his respondent's brief in the court below which same issue was dealt with at page 345 thereof and which same issue was also dealt within the appellant's reply brief set out in that court's record at page

435 to wit:

“In paragraph 4.4 of the respondent’s brief their counsel in relation to a request for a car and driver by Barnabas Jabilla posed several rhetorical academic questions. Indeed he asked; ‘the question here was whether these facts were merely coincidental? If not were they sequences of a planned occurrence prefaced by a conspiracy. However, the prosecution epitomized by the Honourable Attorney-General literally shot itself in the foot when it provided the following answer. But the answer to this question is not apparent from the proof of evidence. It is the position of the prosecution that these were acts in furtherance of a previous agreement if not, the appellant is the only one who can say so.’”

Thus, the respondent, in my view, can no longer be heard to say that the appellant quoted him out of context. The truth of the matter, going by the respondent’s reasoning, is that he expects the court and indeed the appellant to accept as prima facie evidence of conspiracy, the bland innocuous incidents referred to above which are devoid of any iota of criminality. He then expects the onus to automatically shift to the appellant to explain why he gave a car, which was not used for any crime to a bodyguard who requested for it. Happily, Nigerian Criminal system does not operate this way; the onus is always on the prosecution to prove its case. See *Lori v. The State* [1980] 2 N.C.R. 225. The learned Attorney-General, in my view, seems to be at a loss as to how to support the judgment of the court below on this issue. He referred to two passages which he says dealt with the issue of conspiracy. The learned Attorney-General would appear to be at a loss as to which of the two passages from the judgment of the court below dealing with the issue of conspiracy to support. Be it noted that the specific complaint before the court below was that the respondent had wittingly or unwittingly conceded to the fact that there was no prima facie evidence of conspiracy in the printed record. Whether that was the correct position or not the appellant had a constitutional right to receive an answer on that point. All the authorities cited in support of the point are agreed that it is no use to pretend that the point was not raised and to therefore proceed to sidetrack its consideration. Nor has reliance been placed on circumstantial evidence which has no relevance where the killer of the deceased with his own mouth so confessed. See his (Jabilla’s) confes-

sional statement at pages 99 and 100 of the printed record:

“I, BARNABAS JABILLA (Male/Female) having been duly cautioned in English language that I am not obliged to say anything unless I wish to do so but whatever I say shall be taken down in writing and may be given in evidence, voluntarily elect to state as follows:

(Sgt) 29/9/99

Further to my statements which I made to the police some time in May, 1999 which we denied all the alleged allegations against us. I wish to now make a detailed statements concerning KUDIRAT ABIOLA on the 4th of June, 1996, Major Mustapha ordered that the woman must be eliminated at all cost, so before then we met Major Mustapha’s informant in Abiola’s house by name Alhaji Lateef, was also to tell us the itinerary of the woman. On the 4th June, 1996, we followed her to Abiola’s house in the morning we followed her there immediately we reach there she came out of Abiola Crescent with White Mercedes Benz beast in which they are four in number so we traced her to Allen Avenue Roundabout where she dropped one small girl that was in the car with her. Then we followed her again to secretariat Alausa Ikeja, then to express road on her way to Lagos, then we came closer and levelled up with her, then I fired at the car several shots then we drove off which later the shots killed her. I used UZI, SMG and 9mm rounds with silence. We use Peugeot 504 Saloon car dark blue, Major Ado’s car. I initially we are 6 (six) who went for the operation who are Samaila Shuaibu, Barnabas Jabilla, Sani Garba, Sukanga Bello, Mohammed Kpatako. But on the 4/6/96, it was only myself and Mohammed Katako that went because the other listed above and Mohammed Aminu said they are tired and were with girls which we don’t want the girls to understand what we are doing because there fire arm are with them, and also we went out surveillance the previous night. It was Kpatako who drove the car. Major Mustapha is one that gave us the weapon and Ammunition. After the operation he gave us, N50,000 which Sukwanga Bello was the one that travel to Abuja to collect for us, which we share among ourselves equally because the woman died.

(Sgd) Signature/Mark of Witness/Accused

Interpreted by me:

Signed (Sgd)

29/9/1999"

The word "operation" permeates Jabilla's statement of soldiers. The appellant being no soldier never came up for mention as such in it. Hence, his name would be of no moment in it. It is as well.

Curiously and most unacceptably, the respondent has raised another point not considered worthy of consideration in any of the two lower courts. In any event, the respondent did not raise it at the trial court, neither did the court below use it to find that a prima facie case had been made out against the appellant. The offending submission is to be found at page 23 of the respondent's brief thus: B

"The accused used his connection to get aircraft from Danillo for the use of the 1st accused when the latter could not get one from the presidential fleet. Rogers (Barnabas Jabilla), Katako other members of the team "the boys" also came to Lagos in the private aircraft owned by Danillo when the (sic) came for assignment to execute the deceased" C

I am satisfied from the above quotation that this is another glaring instance of distortion by the Honourable Attorney-General. For, nowhere did the appellant use his connection to get an aircraft for the 1st accused person or where did 1st accused say so. It would have been more convincing if the prosecutor as any diligent prosecutor would have done, to have obtained a statement from Danillo showing that the appellant organized the charter of the aircraft, the manifest showed the list of the passengers on that day as including the said boys, receipt of payment in appellant's name and statements of someone who heard appellant discussing how the deceased would be eliminated. Even if these facts were present, it will still be a Herculean task to link the appellant with the killing of the deceased. At any rate, the Danillo statements not having been made part of the proceedings in the two lower courts cannot now be raised and countenanced. The allusion to it is to be likened to playing Hamlet without the Prince and savours of a frantic action worthy of condemnation for being aimed at securing prosecution/conviction at all costs. E

Finally, the best evidence of conspiracy is usually obtained from one of the conspirators or from inferences. See this court's remarks in the case of Patrick Njovens & Ors. v. The State [1973] N.N.L.R. 76 at page 95: F

"When it is proposed to give evidence of the happenings in- H

side hell it is only a matter of common sense to call one of the inmates of that place or one whose business is carried out in reasonable propinquity to hell and it must be surprising indeed to find even a lone angel fit and qualified for the assignment. Indeed, it would be preposterous to look for such evidence in other directions...

B *The overt act or omission which evidence conspiracy is the actus reus and the actus reus of each and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius Caesar, were seen together*
C *coming out of the same place at the same time and indeed conspirators need not know each other. See R. v. Meyrick & Ribuff [1929] 21 C.A.R. 94. They need not all have started the conspiracy at the same time for a conspiracy started by some persons may be joined at a*
D *later stage or later stages by others. The gist of the offence of conspiracy is the meeting of the mind of the conspirators. This is hardly capable of direct proof to do the act or make the omission complained about. Hence, conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an*
E *apparent criminal purpose in common between them and in proof of conspiracy the acts or omissions (and or commissions) of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the*
F *conspirators. It is therefore, the duty of the court in every case of conspiracy to ascertain as best as it could the evidence of the complexity of any of those charged with that offence."*

As none of the proposed witness/co-accused persons e.g. Hamza Al'Mustapha, Mohammed Abdul (a.k.a. Katako), Mohammed
G Aminu and Jabilla made statements implicating the appellant in the commission of the act of murdering the deceased on 4th June, 1996, the application before us to have it quashed has great merit moreso that the case initiated against the appellant appears to me to be an abuse of legal process.

H To call upon the appellant to defend himself in the instant case therefore, in my firm view, will amount to an abuse of the process of court.

ISSUE NO 4

As nothing has been said by the respondent to warrant a

reply here, nothing needs be said in furtherance thereof.

ISSUE NO 5

While it is well said that section 211(1)(a) of the 1999 Constitution empowers the Attorney-General of Lagos State to charge any person to court, section 211(3) thereof empowers him to have regard to the public interest, the interest of justice and the need to prevent the abuse of legal process. Counts 3 and 4 are in clear breach of the foregoing provisions. It is settled law that for the charge to be valid, the person assisted must both be jointly charged and convicted before the appellant can be charged for the offence vide the learned authors of ARCHBOLD, Pleading Evidence and Practice in Criminal Cases 34th Edition paragraph 4158 at page 1555 which states:

“But a person who knowingly comforts or receives a traitor so far partakes of the nature of an accessory that he cannot be tried till the principal is convicted. So in offences less than felony there are no accessories after the fact.”

Further at page 1557 the learned authors said:

“The prosecution must first prove the commission of the principle felony by A. B., and then prove the offence of the accessory.”

This has not been done in the instant case and the giving of money to Mohammed Abdul (a.k.a. Katako) and Mohammed Aminu has not amounted to screening them from justice on the facts shown in the proofs of evidence attached to the information.

For all that I have been saying and the more overwhelming reasons assigned in the leading judgment of my learned brother, Belgore, J.S.C., with which I had expressed my concurrence, I too allow this appeal in its entirety, and enter a verdict of quashing. The information preferred against the appellant is accordingly quashed by me.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Belgore, J.S.C., I entirely agree with his reasoning and conclusion and I also would allow the appeal. I only wish to add a few observations of my own for emphasis. I shall, in this regard, limit my comments to appellant’s issues 3 and 4.

Before I begin a consideration of these issues, let me say this.

Kudirat Abiola, wife of Chief M. K. O. Abiola was, sometime in 1996 on an Ikeja Street Lagos, tragically shot dead in her car. Three years later, that is, in 1999 after the death of the then Head of State General Sani Abacha and the demise of his regime and that of his successor General Abdulsalami Abubakar, the appellant Mohammed Abacha and three others were arrested for her murder. They have been in detention ever since. Sergeant Rogers her confessed killer has turned a witness for the prosecution, living comparatively a life of luxury on taxpayers' money.

I now return to issues 3 and 4. I deal first with the third issue which states:

“Whether the Court of Appeal was correct in finding as the lower court had done that there were sufficient facts and inferences in the proof of evidence upon which the appellant could said ‘prima facie’ to be limited to the offences of conspiracy to murder and murder charged in the said information?”

The courts below had pinpointed certain events, which in their view linked the appellant with the commission of the offence of conspiracy to murder. These incidents are: (a) the release of appellant's car to Barnabas Jabilla a.k.a. Sergeant Rogers (b) the release of his security driver Mohammed Abdul a.k.a. Katako to Sergeant Rogers and (c) the presence of the appellant in the office of Major Al'Mustapha Chief Security Officer to the late Head of State General Sani Abacha when a bag containing one or two machine guns were given to Sergeant Rogers.

In the course of its judgment the court below said:

“It is clear from the proof of evidence that the appellant on one occasion gave his car to Rogers who ultimately killed Kudirat Abiola. There was evidence that the appellant allowed his driver by Mohammed Katako to drive Rogers; and the said Rogers fired and killed Kudirat while being driven by Mohammed Katako. The appellant had seen Al'Mustapha, the first accused hand over machine guns to Rogers and his boys. It is odd that the appellant who did not serve in the army witnessed the handing over of machine guns to Rogers and his boys by Al'Mustapha. Why was it also necessary for the appellant to release his private car and driver for operations which were rather unclear?”

It is the contention of the appellant that all these events re-

ferred to above when taken separately or collectively do not raise the inference that the appellant was part of a conspiracy to murder the deceased, because in each of those instances the necessary intent, prima facie was absent. It was also contended on the issue of criminal liability that a man cannot be made liable for an offence involving mens rea which is committed by somebody else in his control or service unless he can be said to have guilty mind in respect of the offence or has to some extent participated in it. B

In order to keep a sense of perspective, it is necessary to read the relevant proofs of evidence. I start with Sergeant Rogers. Rogers C made a statement under caution on 29/9/99. It reads:

“Further to my statements which I made to the police some time in May, 1999 which we denied all the alleged allegations against us. I wish to now make a detailed statements concerning KUDIRAT ABIOLA on the 4th of June, 1996, Major Mustapha ordered that D the woman must be eliminated at all cost, so before then met Major Mustapha’s informant in Abiola’s house by name Alhaji Lateef, was also to tell us the Itinary of the woman. On the 1st June, 1996, we followed her to Abiola’s house in the morning we followed her there immediately we reach there she came out of Abiola Crescent with E White Mercedes Benz beast in which they are four in number so we traced her to Allen Avenue Round about where she dropped one small girl that was in the car with her. Then we followed her again to secretariat Alausa Ikeja, then to express road on her way to Lagos, F then we came closer and levelled up with her, then I fired at the car several shots then we drove off which latter the shots killed her. I used UZI, SMG and 9mm rounds with silence. We use Peugeot 504 Saloon car dark blue, Major Ado car. I initially we are 6 (six) who went for the operation who are Samaila Shuaibu, Barnabas Jabilla, G Sani Garba, Sukanga Bello, Mohammed Katako. But on the 4/6/96, it was only myself and Mohammed Katako that went because the other listed above and Mohammed Aminu said they are tired and were with girls which we don’t want the girls to understand what we are doing because there firearm are with them, and also we went out H surveillance the previous night. It was Katako who drove the car. Major Mustapha is one that gave us the weapon and ammunition. After the operation he gave us, N50,000 which Sukwanga Bello was the one that travel to Abuja to collect for us, which we share among

ourselves equally because the woman died.”

The next person is Major Al-Mustapha. His statement was made on 13/10/99. He states in part as follows:

“Further to my previous statements I have now been shown a hand written statement by Barnabas Jabilla dated 29th September, 1999. As stated earlier on 23/9/99 I reaffirm that I did not send Barnabas Jabilla to kill late Kudirat Abiola on the 4th of June, 1996. There was no way any contact I made with Alhaji Lateef prior to this date other than when he (Alhaji Lateef) was introduced to me by Alhaji Sarkin Sasa here in Abuja. I did not send anybody to Alhaji Lateef either regarding to the late Kudirat Abiola. The arms and ammunition (i.e.) UZI, SMG with 9mm rounds with silencer) did come from me. Though Barnabas Jabila had earlier on said that Alhaji Mohammed Abacha was around when I gave him my personal arms, it could be true that I should showed him my arms for cleaning, which used to be my pattern of clearing any arms whenever we come back from range exercise. But certainly, I did not give him my personal arms and ammunition to kill Kudirat Abiola with. I did not send the sum N50,000 through Sukwanga Bello to Barnabas Jabila as claimed after he shot Kudirat Abiola. I have now been shown a copy of Alhaji Mohammed Abacha’s written statement dated 6/10/99 and wish to state as follows. That I did not give my arms to Barnabas Jabila to shoot anybody. As stated above, it must be for cleaning of arms Barnabas Jabilla is an instructor and so he was in the Presidency then. Entrusting arms to him for cleaning is normal. As mentioned by Alhaji Mohammed Abacha there was never a time Barnabas Jabila came to discuss late Kudirat Abiola issues as being published in the newspapers or the accusations being made against him in the media Alhaji Mohammed Abacha also did not discuss the same with me. I did not send Barnabas Jabila to Alhaji Mohammed Abacha to request for a car or driver for assignment in Lagos.”

The appellant Mohammed Abacha also made a statement to the police. It was on 6 October, 1999. He states inter alia as follows:

“I was sitting in Major Mustapha’s office when Sgt. Rogers and a couple of body guards were asked to come into the office. I was in the office purely on a visit which I usually do. The boys and Sgt. Rogers were asked to come into the office, the Major Mustapha told Rogers that he was sending them on an assignment. He then asked

Rogers to bring a bag from a corner of his office which after it was opened by Rogers contained about two or more machine guns. Major Mustapha then whispered to Rogers. I believe the details of the assignment before they were all asked to go. I believe to the best of my memory that it is the extent of what I witnessed in Major Mustapha's office that day before I left myself. B

On a particular occasion, Mr. Rogers came to my house (residence) then in the villa and asked to see me I promptly made myself available. It was there he expressed his fears about the allegations on him that they were being pointed to as Kudirat killers. My reaction was that of surprise and shock because what he said confirmed a lot of the allegations said about the issue in the pages of Newspapers etc to my confusion and shock I immediately told him to go and report this to your Major Mustapha. Then Mr. Rogers left. I still wonder why Mr. Rogers came to tell me what he told me seeing the fact that I was not his boss and that he had a boss Major Mustapha. May be Mr. Rogers thought he needed to speak to someone close to advise him what to do. But the issue was sensitive and I did not want to believe what my ears heard from Rogers. I didn't see Rogers again but I expected to hear from him what transpired between him and his boss. Major Mustapha, also never spoke to me about the issue so really I don't even know it may be Rogers had second thoughts about what he told me. About Alhaja Kudirat death and then decided to keep about it afterwards. Conversely, Major Mustapha never told me, that Rogers had approached him and discussed such an issue with him. I remained confused on the matter. C D E F

Mohammed Katako used to be the driver of my late brother Ibrahim's security detail. He started working for me after my late brother passed on. While Katako was in Lagos in my house Mr. Rogers phoned my boys and wanted to speak to me. I answered the phone call. He indicated he was in Lagos on assignment he was called from my house and that he needed the service of a driver. I asked who or which one of the drivers was there and he affirmed to me that there was Mohammed Katako I said okay you can use him and that was the end of that phone call. G H

On another occasion Mr. Rogers phoned from Lagos to request for the use of one of my cars. I asked why he needed a car and he answered that their car had broken down, and that they had

requested one from Major Ado the o/c state house Lagos and that he couldn't provide them any because he didn't have a serviceable car at his disposal. Since I had left Lagos for a very long time I did not know which of the cars anyway I asked them to check for a good car and ask the house boy to give them my old Mercedes Benz 190E I
 B *got and called back to let them know that the car was not very serviceable but that the boys said they would manage the car like that".*

Mohammed Abdul alias Katako in his statement made on 19/9/99 stated clearly that:

C *"I was never told the nature of the job I was going to do"*
 In the morning of the following day, Rogers said that we should drive out. We then went to Ikeja. Lati had already told them the type of vehicle they were watching out for. He said we should follow that vehicle it was a Mercedes Benz and there were three or four people
 D *inside the car. As we approached Maryland Junction, Rogers started firing until we drove pass the car (Mercedes). After we returned home, I heard that Kudirat Abiola was the one shot at the scene. I then knew that she (Kudirat Abiola) was the one killed. That is all I knew."*

E I shall now consider the events said to have linked the appellant with the death of Kudirat vis-à-vis the facts contained in the proofs of evidence.

The presence of the appellant in the office of Major Al'Mustapha

F From the statements of Major Al'Mustapha it is clear and indeed it is common knowledge that he was the Chief Security Officer to the late Head of State and Rogers and the others were bodyguards to the late Commander-in-Chief. Their operational base was the Aso Rock villa. It goes without argument that firearms would be
 G seen with and exchanged between these military men for a variety of reasons. At any rate Major Al'Mustapha says that the guns were issued out for cleaning. This has not been faulted. The Court of Appeal questions why the appellant should witness the handing over of guns by Major-Al'Mustapha to Sgt. Rogers. I think this is most ludicrous.
 H The giving of guns to Sgt. Rogers would have been witnessed by anyone who was at the material time in Major Al'Mustapha's office. In any event the appellant said he was in the office purely on a visit which he from time to time did. Major Al'Mustapha who was given a copy of the appellant's statement did not deny this. More

importantly to show that the appellant was not privy to what went on between Rogers and Al-Mustapha is the fact that Major Mustapha whispered to Rogers. Surely even a person with half a brain would know that this is not the behaviour or actions of persons who had a common purpose, common intent. The only rational explanation that can be read into this is that Major Al-Mustapha did not want the appellant to know the purpose for which he handed over the guns to Sgt. Rogers. It is I think most cruel on the part of the prosecution to read an inference of conspiracy in the circumstances. The appellant could not, on the basis of these facts have been a part of the conspiracy to murder Kudirat.

Release of appellant's car to Rogers.

The appellant in his statement, which has already been reproduced, I revealed that Rogers phoned him from Lagos and requested for the use of one of his cars. He asked Rogers why he needed a car. Rogers informed him that their car had broken down and that Major Ado the officer in charge of the State House Lagos did not have a serviceable car to give them. The appellant then obliged. The release of the appellant's car to Sgt. Rogers is not a crime by itself. More so the car was never used for the commission of a crime. The car used for the commission of this offence belonged to Major S. Ado. It is instructive to note that Rogers did not contradict the appellant's statement which is proof that the only reason for releasing the car was as stated in his statement.

Permission given to Rogers for the use of appellant's security driver Mohammed Abdul a.k.a. Katako.

Katako was the appellant's security driver. He was in the appellant's house in Lagos at the material time. When Rogers phoned the appellant and asked for a driver, the appellant asked Rogers which of the drivers was available. Rogers answered and said that Katako was around. It was then the appellant told Rogers to use Katako.

Katako did not say in his statements that the appellant directed him to drive Rogers around for the purpose of killing Kudirat Abiola. Additionally, Katako did not say that Rogers told him that their mission was to kill Kudirat. In fact he intimated in his statement that he did not know about the plan to kill Kudirat. Moreover it is the law that no man can be made liable for an offence involving mens rea which is committed by another person.

It can be seen clearly that no prima facie case has been made against the appellant on the fact of these proofs of evidence. Rogers was the principal actor. He confessed to killing Kudirat. His statement is replete with facts as to how he went about it he mentioned names of those who were privy to the commission of this offence. He did not in any way whatsoever implicate the appellant. Neither did Major Al-Mustapha nor Katako or any other witness for that matter speak of a design to kill Kudirat in which the appellant was privy to. I therefore find it rather intriguing that the State is striving and straining to put the appellant on trial. The courts work on facts. Even if the State knows more than it is prepared to say, that will not advance their case. We are no mind readers unless we are acting God. I must say that even God, the Almighty God, would not punish a person for the sins of others.

The events relied upon by the court below as raising the inference of conspiracy against the appellant do not link the appellant with the murder of Kudirat Abiola. The proofs of evidence in this case clearly do not disclose an offence against the appellant and I do think that his trial will amount to an abuse of process. In that case the information will be quashed. It is a matter of great joy that the courts have inherent jurisdiction to prevent abuse of their process. It must be emphasized here that the judicial power which is conferred on the courts is intended to be used in deciding issues in genuine cases or controversies. In *Ikomi & Ors. v. The State* [1986] 1 N.S.C.C. 730 at 739 this court per Nnamani, J.S.C. said:

“This power of courts to prevent abuse of process includes the power to safeguard an accused person from oppression and prejudice such as would result if he is sent to trial pursuant to an information which discloses no offence with which he is in any way linked.”

He continued as follows at p. 742 of the report:

“A Court of Appeal ought in my view to examine the statements and depositions in order to determine whether there was enough material on which the exercise of the trial judges discretion was based. If that court is not satisfied on this it ought to quash the consent order.”

See also the case of *Egbe v. The State* [1980] N.L.R. 341. In the circumstances I answer issue No. 3 in the negative.

Issue No. 4 states as follows:

“Whether the Court of Appeal was correct in law to have forged a nexus between the appellant’s statement to the police wherein he assisted 2 of his father’s former employees among many others to resettle themselves and his state of mind when he released his car and security driver on different unrelated occasions to the self-confessed killer of Kudirat Abiola so as to reach the conclusion that he was linked to the offences charged.” B

I have earlier on in this judgment set out the statement of the appellant, among others. Aminu Mohammed also made a statement. It was on 7/10/99. The relevant part of his statement reads as follows: C

“Just about two days Rogers came and wake me up in the morning and told me I should follow him to somewhere at Ikeja when we arrived he should drive straight to where Alhaji Lateef show us the other day immediately when we stop I asked him what is the matter he told me that we are going to trace Abiola’s wife, because there’s report that she wanted to travel out of the country... But before I even started my car 504 to follow her she were already disappear from the scene. Immediately Rogers say we should drive back to Dodan barracks. Since from that incident he never ever invited me to follow any where he is going. After about later I had Abiola’s wife was killed then I ask my second Sukanga Bello and he told me I should keep quiet... After about three months ago Katako came and meet me in Abuja and told me that he have seen Alhaji Mohammed Abacha (Abacha) and they discuss with him that because of the resent condition because the present Government wanted to arrest people that were Abacha Government because that as the time when the Tell published Rogers picture and say he is the man who kill for Abacha, so because of that he had discussion Alhaji Mohammed to assist us with money to travel out of the country.” F

But the following day I saw Katako then we went and meet Alhaji Mohammed along highway to Mosque after seeing him and Katako refill what he told early that the man should assist us we want to travel then the man ask why then Katako told him that we just decide to leave, but I told him I myself I don’t want leave this country then Alhaji intervener I told us to go settle within the two of us, then Katako told him that we are ready to leave then he say he will help us because anybody that work with his father he is ready to help him... immediately the following day we proceed to Niger where we lodge G

in one hotel... we spend about five to six day... and we came back."

The State prevaricates. Aminu and Katako have not been charged with the offence of murder. It may be argued that this is not a pre-condition for preferring a charge on an offence of accessory after the fact. This may be so. But this is not a blanket proposition. To sustain a charge under section 322 of the Criminal Code, it must be established that the person assisted is guilty of an offence, in this case, the offence of murder. But there is clearly no evidence on record that Aminu and Katako had murdered Kudirat Abiola. Neither is there evidence that they were privy to her murder.

Knowledge of or belief in the guilt of the person assisted is an essential ingredient on a charge of contravening section 322 of the Criminal Code, Cap. 32 Laws of Lagos State 1994. An accessory after the fact is defined in "The Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria" by Brett and Mclean as follows:

"A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact of the offence."

Thus in the case of *R. V. Ukpe* [1938] 4 WACA. 141 three men came to the appellant's house, told him that they had killed a man and left a bicycle with him. On the following day he went with these men to where the body was lying, when it was dismembered and buried. The court held that these facts constituted him an accessory after the fact.

In the present case Aminu and Katako did not tell the appellant that they killed the deceased nor did they tell him that they were privy to her killing. It is also not on record that any other witness had intimated the appellant that Aminu and Katako were implicated in the killing of Kudirat. A careful reading would have revealed that the charges under section 322 of the Criminal Code were not made out. For this reason I will answer issue No. 4 also in the negative.

One last point. This case is not a case in which the resolution hinges on circumstantial evidence. Sgt. Rogers has confessed to killing Kudirat Abiola. He did not remotely implicate the appellant in his statement. No other witness spoke of a plot to kill Kudirat to which the appellant was privy. It is wrong to subject him to the rigours of a trial. The information must therefore be quashed.

For the foregoing reasons and for the fuller reasons given by

my learned brother, Belgore, J.S.C. I also would allow the appeal and quash the information.

EJIWUNMI JSC (DISSENTING)

This appeal is against the judgment of the Court below. By that judgment, the Court below affirmed the ruling of the learned trial judge, Kekere-Ekun, J, sitting in the Ikeja Judicial Division of the High Court of Lagos State. B

Before that court, the appellant, with three others described as respondents above were charged upon an information filed by the Director of Public Prosecutions, on behalf of the Hon. Attorney-General of Lagos State for the following offences: C

“Statement of Offence - 1st Count.

Conspiracy to commit murder contrary to section 324 of the Criminal Code, Cap 32, Laws of Lagos State 1994. D

Particulars of Offence.

Hamza Al’Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha, Lateef Shofolahan, between 1995 and June, 1996 at Ikeja in the Ikeja Judicial Division conspired to murder Kudirat Abiola (f) E

Statement of Offence - 2nd Count

Murder, contrary to section 319(1) of the Criminal Code, Cap 32, Laws of Lagos State 1994.

Particulars of Offence. F

Hamza Al-Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha, Lateef Shofolahan on or about the 4th day of June, 1996 along Lagos/Ibadan Expressway opposite Cargo Vision, Ikeja in the Ikeja Judicial Division murdered one Kudirat Abiola (f) G

Statement of Offence - 3rd Count

Accessory after the fact to murder contrary to section 322 of the Criminal Code, Cap 32, Laws of Lagos State 1994.

Particulars of Offence

Mohammed Sani Abacha sometime in 1999 knowing Mohammed Abdul (a.k.a. Katako) to have murdered Kudirat Abiola (f) in the Ikeja Judicial Division gave various sums of money with intent to facilitate their escape from arrest and prosecution. H

Statement of Offence - 4th Count.

Accessory after the fact to murder contrary to section 322 of the Criminal Code, Cap 32, Laws of Lagos State.

Particulars of Offence

Mohammed Sani Abacha sometime in 1999 knowing Aminu Mohammed to have murdered Kudirat Abiola (f) in the Ikeja Judicial Division gave him various sums of money with intent to facilitate their (sic) escape from arrest and prosecution.”

Before the filing of this information, an application was made to the Chief Judge of Lagos State for his consent to prosecute the accused persons upon the proofs of evidence, which was forwarded with the said application. The Hon. Chief Judge, upon the said proofs of evidence, apparently granted the consent to prosecute. The accused persons upon the information forwarded to the Chief Judge of Lagos State, were eventually arraigned to face their trial. But before then, the appellant had brought an application pursuant to sections 167 and 340(3) Criminal Procedure Code Law, Cap. 33 Lagos State 1994 and under the inherent jurisdiction for the following orders:-

“I. An order quashing all the 4 Counts and Statements of Offences in the information referred to as charge No. ID/43 c/99 purportedly filed before this Honourable Court against Mohammed Sani Abacha the third defendant in the said charge.

The grounds (not exhaustive) upon which this application is brought are as follows: -

(i) The proof of evidence does not disclose a prima facie case against the third applicant/applicant requiring him to stand trial before this High Court of justice or any other Court of Law on any of the 4 Counts described herein above.

(ii) When the charges are compared and contrasted with the proof of evidence, the ingredients of all the alleged offences and the list of witnesses, the result is that the entire information is an abuse of process.

(iii) All the 4 Counts in the Statement of Offences are prejudicial to the third defendant’s right to fair hearing.

2. And for such further or other orders as this Honourable Court may deem fit to make in the circumstances.”

The trial Court was therefore obliged to take the application as soon as the case came before the learned trial judge. Following the addresses of learned counsel for the parties, the learned trial judge

delivered a considered ruling on the 1st Feb, 2000. By the said ruling, the application to quash all 4 counts of the information was refused and the application dismissed accordingly. As the appellant was dissatisfied with the ruling of the trial Court, he appealed to the Court below. With the affirmation of the ruling of the trial Court by the Court below, the appellant has now appealed to this Court. B

I do not consider it necessary to set out the grounds of appeal filed by the appellant pursuant to his appeal. This is because the issues identified in the appellant's brief sufficiently reflect his complaints against the judgment of the Court below. I must here note that apart from the appellant's brief, a reply brief was also filed for the appellant upon being served with the respondent's brief. At the hearing, J. B. Daudu, S.A.N., who led other Senior Advocates of Nigeria and other learned counsel adopted and placed reliance upon the briefs filed for the Appellant. He also addressed the court fully by explaining further the several arguments in the briefs in support of the case for the appellant. Similarly, Professor Yemi Osinbajo, the Hon. Attorney-General for Lagos State, who appeared for the State, adopted and placed reliance on the brief filed by him on behalf of the State. He also addressed the Court further on the arguments in the brief. In the appellant's brief, the following are the issues considered necessary for the determination of the appeal. They read: C D E

"5.1 Whether the negative preliminary comments by the Court of Appeal on the desirability of the appellant's recourse to the established procedure for quashing a defective information was correct in law and whether such comments did not foreordain the fate of the appeal regardless of the merits thereof?" F

5.2 Whether the appellant's right to have a fair hearing in the sense of having the issues raised by him given a full and dispassionate consideration by the Court of Appeal was not violated when the court determined the appeal without any consideration of the specific complaint made against the rationes of the Lagos State High Court in coming to the conclusion that the appellant was linked to the offences in the information, regard being had to the standard set by law H

5.3 Whether the Court of Appeal was correct in finding as the lower court had done that there were sufficient facts and inferences in the proof of evidence upon which the appellant could be said

‘prima facie’ to be linked to the offences of conspiracy to murder and murder charged in the said information.

5.4 *Whether the Court of Appeal was correct in law to have forged a nexus between the appellant’s statement to the police wherein he assisted 2 of his father’s former employees among many others to
B* *resettle themselves and his state of mind when he released his car and security driver on different unrelated occasions to the self-confessed killer of Kudirat Abiola so as to reach the conclusion that he was linked to the offences charged?*

5.5 *Whether the Court of Appeal was correct in law when it affirmed the decision of the Lagos State High Court that it had jurisdiction to try the offence of accessory after the fact of murder as charged herein and that a prima facie case had been made out against the appellant on the twin counts of accessory after the fact of murder,
C* *regard being had to the contents of the information and proof of evidence?”*

The respondent also had five issues identified in the brief for the determination of this appeal. Though, there are subtle differences in emphasis, the issues are not manifestly different from the
E issues set down in the appellant’s brief. However for completeness, they would be reproduced. They are: -

“(1) *Whether the introductory comments made in the judgment of the Court of Appeal highlighting the undesirability of the appellant bringing an application of this nature to quash the information were correct in law and not prejudicial to the appeal of the appellant.*
F

(2) *Whether the Court of Appeal in the determination of the appeal gave the appellant a fair hearing by giving a full and dispassionate consideration to the appellant’s specific complaints in respect of the judgment of the Lagos State High Court.*
G

(3) *Whether the Court of Appeal was right to uphold the judgment of the trial Court to the effect that the respondent had provided sufficient facts and inferences in the proof of evidence to establish a prima facie case against the appellant warranting an explanation by him in respect of the counts of conspiracy to murder and murder respectively.*
H

(4) *Whether the Court of Appeal was correct in law to have drawn inferences and a nexus between the appellant’s statements to*

the police to the effect that he helped two of his employers to resettle outside the country and his state of mind when he released his car and driver to the group that killed Kudirat Abiola thereafter reaching the conclusion that he was linked to the offences charged.

(5) Whether the Court of Appeal was correct in law to uphold the judgment of the trial court that it had jurisdiction to try the offence of accessory after the fact of murder and that a prima facie case had been made out against the appellant in respect of the two counts of being an accessory after the fact of murder.”

Though the issues set down in their briefs for the determination of this appeal by the parties have all been reproduced as above, I will however consider the merits of this appeal mainly upon the issues identified in the appellant’s brief. However important as the complaint of the appellant is in respect of issue 1, I think it will be better to consider issues 2, 3, 4 before dealing with the appellant’s complaints in his issues 1 and 5. This is because in my respectful view, issues 2, 3 and 4 deal with the main reasons that led to their proceedings. Whichever way they are examined, the main complaint of the appellant is revealed in those issues. And this is the contention, that the proofs of evidence upon which the prosecution obtained consent to prosecute him for all the 4 offences in the information, are deficient as he was not linked by the said proof of evidence with the commission of the offence.

In the brief of argument filed for the appellant and in his oral argument before us, J. B. Daudu, S.A.N., elaborated on this complaint. The first point taken by learned counsel for the appellant, is that in the Court of Appeal, it was argued that the following findings of the trial court with regard to certain events, such as the release of the appellant’s car to Barnabas Jabila, the permission given to the said Jabila a.k.a. Sergeant Rogers for the use of the appellant’s security driver Mohammed a.k.a. Katako, and the presence of the appellant in the office of Major Al-Mustapha, Chief Security Officer to late Head of State (appellant’s father) when a bag containing one or two machine guns was given to Sergeant Rogers as linking the appellant with the commission of the offence was erroneous. This is because all those events when taken alone or collectively do not raise the inference that the appellant was part of a conspiracy to murder the deceased, because in each of those instances the necessary intent, prima

facie was absent.

The learned Senior Advocate then went on to contend that the court below failed to deal specifically with the appellant's complaint. Moreso where in the appellant's brief, appellant's counsel had argued that it is an arbitrary trial and abuse of process to put a citizen on trial when no offence is disclosed on the information or where there is no link with the person charged. It is further argued for the appellant, that the failure of the Court below to consider every issue raised before it by the appellant was a denial of the constitutional right of the appellant to fair hearing. For that submission, the following cases were cited: Afolayan v. Ogunrinde [1990] 1 N.W.L.R. (Pt. 127) 369 at 383; Atanda v. Ajani [1989] 3 N.W.L.R. (Pt. 111) 511 at 539; Katto v. Central Bank of Nigeria [1999] 6 N.W.L.R. (Pt. 607) 390.

In furtherance of the position taken for the appellant, upon whether the appellant could be properly prosecuted for the charges on the information, learned Senior Advocate submits thus in the appellant's brief:

"When the prosecution made the submission that it had no evidence on the proof of evidence to link the appellant to conspiracy and would only supply such evidence at the trial. It was an admission that it had not met the standard obligated by law. That standard is a prima facie case of the offence charged from the facts contained in the proof of evidence. It is submitted that the evidence sufficient to put the appellant on trial is that, which if left uncontradicted would raise a probable presumption of his guilt. See Ikomi v. The State [1986] 3 N.W.L.R. (Pt. 28) pg. 314 at 360 and Adeyemi v. The State [1991] 6 N.W.L.R. (Pt. 195) 1 at 35."

He therefore submitted that upon the authorities cited above, the events relied upon by the Court below, as raising the inference of conspiracy against the appellant cannot stand the test referred to above. He then made copious references to some of the statements contained in the proofs of evidence to support his submission that Katako did not say in his statements that the appellant directed him to drive Rogers around for the purpose of killing Kudirat Abiola. He cited Mandilas and Karaberis Ltd. v. IGP [1958] S.C.N.L.R. 335 at 340 in support of his submission that a man cannot be convicted of an offence involving mens rea except in respect of his own acts and

omissions or where he is personally implicated. In respect of this issue, learned Senior Advocate then sought to distinguish the instant case from the opinion expressed by Aniagolu J.S.C. in Ikomi's case (*supra*), by submitting that we are here not dealing with a situation in which the resolution hinges on circumstantial evidence.

I will now give as briefly as possible the response of the learned Attorney-General of Lagos State to the several arguments reviewed above for the appellant. In this regard, I will also review the arguments proffered in respect of Issues 2 & 3 together as I had done when reviewing the arguments for the appellant. The first point taken for the respondent to the question whether the Court of Appeal in the determination of the appeal gave the appellant a fair hearing, by giving a fair and dispassionate consideration to appellant's specific complaint in respect of the judgment of the Lagos State High Court. It is also the Court of Appeal's decision to have upheld the judgment of the trial court to the effect that the respondent provided sufficient facts and inferences in the proof of evidence to establish a *prima facie* case against the appellant warranting an explanation by him in respect of the counts of conspiracy to murder and murder respectively.

In respect of these two issues, the complaints of the appellant as can gathered from the brief are two fold. The first is whether the Court of Appeal in the determination of the appeal, gave the appellant fair hearing by giving a full and dispassionate consideration to the appellant's specific complaint respect of the judgment of the Lagos State High Court. The other question raised is whether the Court of Appeal was right to have upheld the judgment of the trial court, to the fact that the respondent had provided sufficient facts and inferences in the proof of evidence to establish a *prima facie* case against the appellant, warranting an explanation by him in respect of the counts of conspiracy to murder and murder respectively. It is the contention of the respondent, that the Court of Appeal indeed given a full and dispassionate consideration to all specific complaints raised by the appellant.

One of the specific complaints of the appellant against the judgment of the Court of Appeal, is that the Court of Appeal did not advert to or resolve in the course of its judgment, the statement made by the Attorney-General of Lagos State at page 21 of the Record of appeal which reads:-

“The existence of a conspiracy cannot be proved without calling evidence, to attempt to so find at this stage is precipitate.”

The contention made for the respondent in this regard, is that the appellant erroneously interpreted what was said in the statement to the above quoted to be an admission of the part of the prosecution that the proof of evidence on its own without more, did not disclose a prima facie case against the appellant according to the standard required by law. The respondent then invited the Court to note that the Court of Appeal was not misled by this erroneous interpretation and the totally incorrect way and manner in which the appellant quoted the Attorney-General. It is the further submission of the respondent that in any event, that statement was completely quoted out of context. In the view of the respondent, the appellant would appear to have misconceived the law requiring proof of evidence to establish a prima facie case, to mean that an accused person can more or less be tried on the face of the proof of evidence alone without a full blown trial. In support of that contention, he cited the case of *Ikomi & Ors v. The State* (supra). It is further argued for the respondent, that the Court of Appeal duly considered the principles of evidence before it disclosed a prima facie evidence against the appellant.

The next submission relates to the contention of the appellant that the Court of Appeal would appear to have upheld the view of the trial judge with regard to the principle of mens rea, which is, whether a person can be made liable for an offence involving mens rea committed by another. Respondent then submitted that the submission of the appellant in this regard is obviously erroneous. Learned counsel for the respondent, then invited the court to note that the Court of Appeal recognized in the consideration of the various issues, that prima facie case, as required by our law does not entail a prosecution proving and the court making pronouncements of guilt at that stage of the proceedings.

On the question as to whether or not the Court of Appeal did not address all the issues raised by the appellant, it is submitted that that would not necessarily lead to overturning the decision of the Court of Appeal. Such a decision can only be overturned if the failure to consider the said issue occasioned a miscarriage of justice. Learned counsel then submitted that in the case in question, there is

no question of a miscarriage of justice for the Court to warrant the reversal of the decision of the Court below. In support of that submission, reference was made to the case of *State v. Ajie* [2000] 11 N.W.L.R. (pt. 678) page 434 at 447.

It seems from a careful review of the brief for the respondent that the thrust of the argument for the respondent is that the appellant totally misconstrued the actual meaning of “prima facie case”. For that reason, copious references were made to such cases as *R v. Ikomi & Ors* (supra); *Ajidagba & Ors v. I.G.P.* [1958] 3 F.S.C. pages 5 at 6 for the principles to guide the Court in the determination of whether a prima facie case was made out against an accused person upon the proofs of evidence filed in support of the information charging the accused of any offence or offences. Learned counsel for the respondent then reviewed relevant proof of evidence filed in support of the information before concluding his submission that the Court of Appeal was right to have upheld the ruling of the trial court.

Learned counsel for the respondent also drew our attention to the case of *Paul Onochie v. The Republic* [1966] N.M.L.R. 307 in support of the principle that it is open to the trial court to infer a conspiracy from the fact of doing things towards a common end.

On Issue 4, which is, whether the Court of Appeal was correct in law to have drawn inferences and a nexus between the appellants’ statement to the police to the effect that he helped two of his employees to resettle outside the country and his state of mind when he released his car and driver to the group that killed Kudirat Abiola, to establish that the appellant was linked to the offences charged, the contention of learned counsel for. The respondent in respect of this question, is that the Court of Appeal in upholding the ruling of the trial Court, was right to have looked at the proofs of evidence, including the statement made by the appellant to reach the conclusion that a prima facie case of conspiracy has been made against the appellant. Reference was again made to the case of *Ikomi v. The State* (supra). Learned counsel then went on to distinguish the case of *Emeka v. The State* [1998] 7 N.W.L.R. (pt. 559) 556 at 579 which the appellant had argued was on all fours with the instant case. Learned counsel for the respondent then invited the Court to hold that the appellant formed an erroneous view of that case and that the Court below had properly held that the facts of this case are not the same as

those of *Emeka v. The State* (supra). The point was further made that the instant case is also different from the *Emeka's* case (supra) because in *Emeka's* case, evidence had been led at the trial, whereas in the case under consideration, the Court is only invited to look at or consider the proofs of evidence filed in support of the information.

B It is, I think, convenient to examine immediately the submission of learned Senior Advocate with regard to what *Oguntade, J.C.A.* said in *Emeka v. The State* (supra). In that case, the appellant was prosecuted with four other persons for four offences, which included culpable homicide punishable under section 22 of the Penal Code and that he agreed to do an illegal act with four other persons and thereby committed an offence punishable under section 97(1) of the Penal Code. At the trial, the appellants were all convicted for the offences as charged. On appeal, the question that agitated the Court, C was, whether the 2nd and 3rd accused persons were properly convicted for the offences for which they were charged. It is in the course of considering that, that *Oguntade, J.C.A.* said thus:

"True it was, that when the 2nd and 3rd appellants met 6th P.W. on 16/1/86 they asked 6th P.W. to help them procure a gun with which to kill a person so as to remove that person's eyes, a request that led to the making of the agreements Exhibits 1 and 2 the lower court should have borne in mind that the intention of 2nd and 3rd appellants as manifested on 16/1/86 could not be made to relate back to a time before 14/1/86 "when Salamatu Mohammed was killed. It seems to me that the lower court should have concerned itself with the agreement, if any, reached by 1st 2nd and 3rd appellants before the killing of the deceased on 14/1/86 rather than what 2nd and 3rd appellants did on 16/1/86. If as the evidence revealed the deceased had been killed on 14/1/86 and the 2nd and 3rd appellants had been parties to her killing and removal of her eyes, why would they be looking for guns to kill somebody from whom to pluck two eyes on 16/1/86?"

H Now, that case in my respectful view is clearly distinguishable from the case under consideration for the following reasons: -

(1) In the *Emeka* case, the Court was there dealing with evidence which had been heard and considered by the trial Court.

(2) There is no evidence that the 2nd or 3rd appellants were linked with or did anything in furtherance of the commission of the

offence which took place on 14/1/86. The 1st appellant was proved to have done that alone.

(3) The evidence available against the 2nd and 3rd appellants was the agreement between them and 6th P.W. to procure a gun to kill a person (not the particular victim killed by the 1st appellant) so as to remove the person's eyes was reached two days after the victim had been killed. B

It would appear that Oguntade, J.C.A. was in that case stressing that there was no connection between the death of the victim on 14/1/86 and the subsequent agreement reached between the 2nd and 3rd and 6th P.W. to warrant their conviction for the offence that had occurred on 14/1/86. C

Whereas in the instant case, there is evidence of the involvement of the appellant prior to the killing of the deceased Kudirat Abiola, in that he was present when guns were issued to the killers, D he provided his own driver to drive those who committed the offence. When they had difficulties, with what car to use during the operations, he readily instructed his driver where to get a car. After Kudirat Abiola was killed, it was to him that his boys went, and he provided the sum of \$10,000 U.S. dollars each to two of them to flee E the country. It must again be stressed that, unlike in the Emeka's case, evidence has not been led in open Court in proof of all these linkages of the appellant with the offences. It is after evidence had been led in a trial Court, that submissions may be made to show that F the appellant was in fact proved to be linked with the commission of the offences for which he was charged. It therefore would conclude that the reference to Emeka's case (supra) is inappropriate at this stage of this matter.

From the review of the arguments of the parties in this appeal, G dispute between them clearly centers on whether the appellant should, or should not be made to face his trial upon the proofs of evidence filed in support of the information charging him for the offences named therein. Also interwoven with the above question, is, whether the proof of evidence closed prima facie that Kudirat Abiola was killed H and that the appellant was linked with the commission of the offence. For the resolution of this question, the case of Ikomi v. The State [1986] 3 N.W.L.R. 340 which both parties have referred to in the course of their arguments is relevant That is only, right as that case

has become the locus classics on the question posed above.

B Briefly, the facts of Ikomi's case as disclosed by the proofs of evidence are as follows: The appellant Ikomi was at the time of the offence a judge of the High Court of the then Bendel State. He was at the time resident in Benin. As like all judges, he had a policeman attached to his residence for guard duties. Also living with him in the residence were two other persons. It transpired that on the night of the incident, the police constable was apparently murdered. The very next morning, Ikomi went to his Chief Judge to report the incident. C Following police investigations into this matter, Ikomi was charged with those other two persons in his residence with the murder of the constable on guard duty in his quarters. In order to initiate his prosecution, the D.P.P. of the State compiled proofs of evidence in support of the information for the consent of the Chief Judge of the D State. The requisite consent was granted by the Chief Judge. However before the trial commenced, the appellants filed a motion to quash the information on the ground that no offence was disclosed in the proofs of evidence before the Chief Judge and that the information was an abuse of the process of the court. A situation not E dissimilar to what is under consideration in the instant appeal. In the Ikomi case, the High Court refused to quash the information and on appeal, the refusal was confirmed by the court of Appeal sitting in its Benin Division. The matter was taken further to this Court. The kernel of the decision in this Court can be summed up in the diction of F Nnamani, J.S.C. who at page 355 said thus:

"It is pertinent at this stage to mention that subsection 3 of Section 340 provides that -

'if an information preferred otherwise than in accordance with the provisions of the last foregoing subsection has been filed by G the registrar the information shall be liable to be quashed.....'

These provisions are analogous to the provisions relating to a bill of indictment in England which can only be preferred with the consent of a High Court Judge pursuant to Section 2(2) of the Administration of Justice (Miscellaneous) Provisions Act, 1933 as amended by the Criminal Appeal Act, 1964. Both under English law and our law the procedure for applying for consent is as laid down in H the Indictment (Procedure) Rules 1971 made under Section 2 of the Administration of Justice (Miscellaneous) Provisions Act 1933. It is

settled that if an information is preferred by leave of a Judge criminal proceedings will be said to have been properly instituted See R. v. Zik's Press Ltd. [1947] 12 W.A. C.A. 202. It seems to me that the first, and indeed a fundamental principle, is that before granting consent a Judge must be satisfied that the depositions disclose an offence and that the trial will not amount to abuse of process. If the reverse is the case then of course the information will be quashed. The courts have inherent jurisdiction to prevent abuse of their process. The judicial power which is conferred on the court is intended to be used in deciding issues in genuine cases or controversies. This power of courts to prevent abuse of process includes the power to safeguard an accused person from oppression and prejudice such as would result if he is sent to trial pursuant to an information which discloses no offence with which he is in any way linked."

With regard to the requirement that the offences must be linked with the accused, Nnamani, J.S.C. at pps. 358 - 359 discussed the applicable principles thus: -

"The next principle is of course that even if the depositions and statements attached to the information disclose an offence, an accused person should not be put on his trial if there is no link between him and that offence. If the Judge grants consent to prefer an information in the absence of such link such information is bound to be quashed. The controversy in this case has centered around the question whether that link existed judging solely from the evidence contained in the depositions and statements, in the circumstances of this case in which there is no dispute that they do disclose an offence - murder."

In Atanda v. Attorney-General Western Nigeria [1965] N.M.L.R. 225, another case on which the appellants placed so much reliance, this Court held that although a Judge has power under Section 340(2) of the Criminal Procedure Act to consent to an information being preferred without a committal for trial, the power should be exercised with discretion. It further held that as the need for the consent is to prevent a vexatious prosecution or one that will serve no useful purpose, it is only when there is a clear case on the deposition that the Judge gives his consent."

As Bairamian, J.S.C. put it -

"We are sorry to think that the four co-defendants were put on

trial; there had been a preliminary inquiry at the end of which they were discharged by the inquiring Magistrate; they were put on trial without any material evidence against them, and they were entitled to ignore it. We are sorry to think that the 4 co-defendants were put on the trial in the company of Jimoh Atanda, and the trial came on in June, 1964; we wonder how long these four men were in custody to no purpose. We think it is a case worth the consideration of the Attorney-General of Western Nigeria, and shall direct a copy of this judgment to be sent to him. We do not know what happened before the application for leave to file an information was made; all we can say is this: that when the inquiring Magistrate declines to commit for trial, it is worth consulting the highest authority and considering the material with care before any such application is made - to avoid the unfortunate mistake that occurred in this case in regard to the four co-defendants. We have to add that although a Judge has power under Section 340 of the Criminal Procedure Act to consent to an information being preferred without a committal for trial, the power should be exercised with discretion, the more so as the exercise of the discretion will not be inquired into on appeal from conviction: (See Rothfield 26 CR. App. R. 103, 106). The Magistrate had refused to commit the four co-defendants for trial with Adisa inspite of Jimoh's deposition against them, but no application was made to a Judge for consent to have them tried with Adisa, which was all the more reason for not granting the application to have them tried with Jimoh; who could not now be called by the prosecution to testify against them. As Rothfield's case shows, it is only when there is a clear case on the deposition that the Judge gives his consent the need for the consent is to prevent a vexatious prosecution or one that will serve no useful purpose."

It would appear from the quotation above, that it was held in Atanda's case, that it is only where there is a clear case of disposition that the Judge ought to give his consent for the prosecution of the accused person. This is the argument which was put forward by Chief Williams in the Atanda's case (supra). That argument, it would appear, is now being put forward in respect of the instant case. Nnamani JSC in the course of his judgment in the Ikomi case rejected that contention. It is further desirable to set out his reasoning for rejecting

that contention. For that I refer to the relevant portion of his judgment at pages 359 to 361 where he said thus:

“Naturally as already indicated, Chief Williams for the appellants relied on Atanda’s case, but I must say that the requirement of a ‘clear case on the deposition’ before consent can be granted is rather putting it too high. In fact this is almost the same as saying that consent should not be granted if on the evidence in the depositions a trial would not lead to conviction. Such a postulation is certainly not in accord with the authorities.

See R v. Chairman of London Sessions ex parte Dowries (1954) 1 Q.B. 1; 37 Cr. App. R. 148; Also R. v. McDonnell (1965) 1 Q.B. 233 (1966) 50 Cr. App. R. 5. It is my view that Atanda’s case must be limited to the circumstances of that case. The requirement for a clear case may well have been justified against the background of the case. Two murder trials were involved. In the first one Atanda, though I previously charged, was later used as a prosecution witness. His four co-defendants were discharged. In the second murder charge Atanda was now charged with the same 4 co-defendants but he could not be called as a witness against them. There was therefore no evidence to justify the trial of those 4 co-defendants. Besides, an inquiry Magistrate had refused to commit the accused persons for trial before leave to file an information was granted. The Supreme Court in Atanda’s case quoted with approval the decision of the Court of Criminal Appeal in England in Rothfield’s case in which it decided that once a court clothed with jurisdiction grants consent, a Court of Appeal cannot interfere with the exercise of discretion by the Judge. See Sampson Gali v. The State (1974) 5 S.C. 67. If therefore the Supreme Court in Atanda’s case insisted on a clear case, it is understandable. The view of that court was coloured by the following circumstances:

(a) that there was no material evidence against the appellants
(b) that an Inquiring Magistrate had refused to commit the appellants for trial

(c) following Rothfield’s case, the exercise of the Judge’s discretion in granting consent to prefer an information will not be inquired into on appeal following conviction once the court had jurisdiction.

In the course of argument, Chief Williams seems to have conceded this point for his definition of clear case as -

‘where there is on the deposition evidence connecting the

accused with the offence alleged in the information' appears to me to be nearer to what I conceive to be the standard a Judge granting consent ought to look for. It is needless to add that the evidence may be direct or circumstantial. In my view, however, it is not necessary to get involved in such terms as clear case. It is sufficient if the depositions and statements attached to the information disclose a prima facie case against the accused persons. The question ought to be this. From these depositions, is it probable that the accused persons are linked with the offence in the information? Section 324 of the Criminal Procedure Act, although more relevant to committal proceedings, gives some assistance as to what is a prima facie case. It provides that

'where there is a conflict of evidence the Magistrate shall consider the evidence to be sufficient to put the accused on his trial if the evidence against him is such as, if uncontradicted, would raise a probable presumption of his guilt.'

In *R. v. Rutland and Sorrell* [1945] 1 All E.R. 85, 87, P and S were charged with having conspired to acquire, and having acquired goods (viz, silk stocking) without surrendering the appropriate number of coupons in contravention of the Consumer Rationing (Consolidation) Order, 1944. It was submitted on their behalf that there was no case to go to the jury because there was no evidence in regard to non-surrender of coupons. Humphrey's J. held that the prosecution only had to establish a prima facie case. He said at p. 87,

'The view we take of the onus of proof in such a case is this: we are not prepared to hold that the prosecution is bound to prove by evidence that in fact there was no surrender of coupons, because in many cases that would be quite impossible. But we do think that the prosecution, in making charges against persons of having contravened this order, must give some prima facie evidence to the jury upon which the jury would be entitled as reasonable people to find as a fact that there was no surrender of coupons. When the prosecution have done that, there is, in our opinion, not a change in the onus of proof, but there is a case against the defendants upon which the jury may convict them, unless they can upset the prima facie case which has been made against them. We are very far from saying that that means that the defendant must prove in the first instance anything at all.'

His Lordship Nnamani J.S.C., then continued at pages 361 to 362 thus:

'Before returning to the circumstances of the instant appeal, there are 2 matters which I would wish to touch briefly. First, it was contended that the application to quash the information in this case was a non-starter because once the trial Judge had exercised his discretion to grant consent to prefer information and his court is shown to have jurisdiction an appeal court would not interfere. There is no doubt based on the decision of the Court of Criminal Appeal in England in Rothfield to which I had earlier made reference. Of course the basis of this decision is that once a discretion has been exercised judicially it would not be upset because an appellate court would have exercised it differently. But in my view, that is precisely the point, for as Chief Williams rightly submitted, if the discretion has been arbitrarily exercised it has to be set aside. A judge, said Chief Williams does not have power to grant consent if there is nothing on which a trial can be based. I do not think that Rothfield represents the law on this point in this country. A Court of Appeal ought in my view to examine the statements and depositions in order to determine whether there was enough material on which the exercise of the trial Judge's discretion was based. If that Court is not satisfied on this it ought to quash the consent order. I am strengthened in my conviction that that ought to be proper course by the further realization, as indeed pointed out by Chief Williams, that the application for consent to prefer information is usually ex-parte and is therefore taken as it were behind the accused person's back.

The second point relates to the nature of the evidence in this case, i.e. the evidence disclosed in the statements and depositions attached to the information. It is not in dispute that it is circumstantial, it has been settled that where what is in issue is conviction, circumstantial evidence which is considered adequate is that which leads irresistibly to the conclusion that the accused person, and no one else is guilty. (See Ukora v. The State [1977] 4 S.C. 167; Adie v. State [1980] 1-2 S.C. 116; Lori and Anor. v. The State [1980] 8-11 S.C. 80) or as has been stated, that before drawing inference of the accused's guilt from circumstantial evidence, there are no other co-existing circumstances which would weaken or destroy the inference. At the stage of considering an application for consent, how does circum-

stantial evidence fit into prima facie case? Chief Williams in argument defined the circumstantial evidence sufficient at this stage “as evidence which can lead to the inference that the suspect, and no other person, could have committed the offence”. I would say that that is putting it at the stand required for conviction. In my view, once there
 B *are circumstances from which it can be justly inferred that an accused person could have committed the offence, he should be put on his trial. Whether there are other co-existing circumstances which would weaken that inference, or whether the evidence leads irresistibly to*
 C *accused person’s guilt, can be determined at the trial.”*

Also in the Ikomi’s case Aniagolu, J.S.C. in his judgment said thus at pages 370 to 372;

“FIRSTLY, that the stage at which the motion to quash the indictment in this case was brought, was the proper time to apply to
 D quash, before the plea. The obvious reason for this would be that where an indictment is bad, a trial on such bad indictment would inevitably end in futility by reason of the fact that, on appeal, the Appeal Court is bound to hold that a conviction based on such a bad indictment cannot stand. In some cases the entire exercise may
 E founder on a lack of jurisdiction in the trial Court. An example of the latter is to be found in *R. v. Maywhort* [1955] 1 W.L.R. 848; 39 Cr. App. R. 107 in which the accused was indicted on three separate counts of fraudulent conversion contrary to S.21 of the Larceny Act, 1916, in that, being a trustee of certain property, he fraudulently
 F converted it to his own use. The defence moved to quash the indictment relying on S. 43(2) of the same Act, which provided that

‘No person shall be liable to be convicted of any offence against section 6, section 7(1), section 20, section 21 and section 22 of this
 G *Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such an act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit or proceeding which has been bona fide instituted by any person ag-*
 H *grieved.’*

Delivering the judgment, at the Welsh Circuit quashing the indictment, SELLERS, J. remarked, in the course of that judgment, that:

‘The procedure for bringing before the court the reliance on

section 43(2) was discussed by counsel for the prosecution and for the defence, and it seemed to me appropriate, although there is no clear precedent to which I have been referred, that a motion to quash could and should be taken before plea and at the outset of the case, because, if the submission that section 43(2) applies is correct, the court would have no jurisdiction to try the case. If the case were tried, the trial would be a nullity if the submission later succeeded.' B

'An early example on the former is the 892 case, of the Crown Cases Reserved, of *REG. V. CHAPPLE AND BOLINGBROKE* 17 COX 455 in which Chapple was charged with committing certain offences under the debtors Act, 1869 and the Bankruptcy Act, 1890 and Bolingbroke with aiding and abetting him therein. Hawkins, J, delivering the judgment to which the other four Judges (Wills, Charles, Lawrence and Wright, JJ) concurred, stated that 'Although it is not necessary that an objection to indictment should in every case be taken before plea is pleaded, yet both convenience and justice demand that the matter of the indictment which the defendant must answer should be settled. In this case the objection to the indictment was not made until the conclusion of the trial, and was therefore, in my opinion made too late.' C D E

SECONDLY, a distinction must be drawn between the quashing of a consent granted for the preferment of an indictment or information, and the making of a defence to the indictment. Consent is an alternative to committal although the Judge in a consent' is allowed a freer hand since in committal proceedings the accused is present and can cross-examine the witnesses. A judge granting 'consent' ought to be satisfied that a prima facie case has been established and a challenge of the 'consent' can only be successfully established by showing that a prima facie case could have been made on the proof of evidence put forward before the Judge. The issue is not whether the evidence is sufficient to ground a conviction. All that is necessary is whether the evidence discloses a prima facie case, even weak, against the accused person. F G

'Prima facie' means 'on the face of it. The true meaning of a prima facie case has been explained by Hubbard, J, in his judgment in *REGINA v. COKER and Others* [1952] 20 N.L.R. 62 where he held that a submission that there is no case to answer meant that there was no evidence on which Court could convict 'even if the H

Court believed the evidence given.”

But even in that case, he singled out cases of circumstantial evidence as standing on a special footing. He stated that:

‘There may, of course, be cases of circumstantial evidence where there, may reasonably be arguments as to whether the circumstantial
 B evidence does amount to evidence on which the Court could convict, if it believed it; and there might conceivably be cases where there was some doubt as to what exactly were the elements the prosecution had to prove. In such cases Counsel for the defence would
 C naturally have to address the Court at some length. In other words, in cases of circumstantial evidence, Counsel would be facing an uphill task in convincing the Court to discharge the accused on a plea of no case to answer, since in such a case all aspects of the evidence for the prosecution and the defence, if any, would have to be examined
 D and the surrounding circumstances thoroughly studied, in the context of natural human conduct, in order to determine whether the accused person did commit, or could have committed, the offence; and THIRDLY, in the instant case, there was no doubt an offence had been committed. A policeman had been killed in circumstances in
 E which it was clearly murder. The case of *Egbe v. The State* [1980] N.C.R. 341 has been referred to us with a plea that we should follow it. I agree that *EGBE* was rightly decided on its own particular facts. It could have been applied in the instant case, the alleged murdered
 F policeman was found alive somewhere, in which case no suggestion that murder had been committed could be made shall return to *EGBE* later in his judgment. Having dealt with these facts, it would appear convenient for me to recall the history behind the filing of information in England from where that aspect of our law was introduced
 G into our country. But before then it is necessary to point out that the procedure generally for prosecuting criminal proceedings by information in the High Court in Bendel State, takes two forms, namely,

- (a) by preliminary inquiry under Chapter 5 part 36 of the Criminal Procedure Law, Vol. II Laws of the Bendel State of Nigeria and
- H (b) by consent of a Judge under section 340 of that Law. In either case, the principle involved is that no citizen should be put to the rigours of trial, in a criminal proceeding, unless available evidence points, *prima facie*, to his complicity in the commission of a crime. In the protection of a citizen’s right not to be unnecessarily harassed by

criminal prosecution, the law enjoins a Magistrate in a preliminary inquiry, or a Judge consenting under S. 340 to a summary trial of an indictable offence, to be satisfied that the evidence there establishes a prima facie case against the citizen.

Then on p. 373 he stated thus:

“If after hearing evidence and deliberating on the evidence^B they thought the accusation was groundless, they indorsed upon the bill of indictment the words: ‘NOT A TRUE BILL’ OR ‘NOT FOUND’ and thereupon, the Bill was thrown out and the person accused discharged; but if they were satisfied of the truth of the accusation, they^C indorsed a ‘TRUE BILL’ on the Bill of Indictment, meaning that the indictment was then found and that the party stood indicted.

It was an exercise designed to find if there was sufficient evidence to justify the case going for trial. It was not in itself the trial and the fact that the person accused could have a good defence to the^D indictment when it came for trial, would not justify the grand jurors in not returning a “true bill”.

Having dealt with a short part of the history, I now return to EGBE (supra). As I said before, that case is entirely different. It was a case in which the prosecution alleged in the charge that Mr. Egbe^E stole some money belonging to ‘Y’ - an American Company. But ‘Y’ came round and gave evidence that it lost no money; that Mr. Egbe did not steal any money from them. Surely, that is different from the present case. In EGBE the proof of evidence showed, totally, that no^F offence had been committed and that no allegation of an offence would have been made. The present case could only be compared with EGBE if, for instance, the dead policeman, UANLIE AGBEDE, was found somewhere, alive. In that case there would be a total lack of evidence that murder had been committed.”^G

It has been argued in the instant case, as if circumstantial evidence is not to be considered in the determination of whether the prosecution had by the proof of evidence supplied enough evidence in the consideration of the Court to suggest that the applicant stands charged on circumstantial evidence. I will, in order to make for clarity^H and the principle that circumstantial evidence may be available to the prosecution to establish an offence make reference to the comment of ANIAGOLU, J.S.C. at p. 373 to 374 on this point:

“The case of the prosecution rested upon circumstantial evi-

dence, namely: that the gate of the compound was securely locked during the night; that apart from the children of the 1st Appellant, the three Appellants were the persons who spent the night with the deceased police constable within the compound that night. I shall completely discard the evidence of Mr. And Mrs. Vincent Ehiagwina, including the “Oga don kill me o” evidence testified to by them, which was not placed before the Chief Judge and which the said Chief Judge could not, and did not, take into consideration in deciding whether or not he should grant his consent for information to be filed without a committal.

A judge ought to be satisfied, before giving his consent, that a prima facie case has been established on the evidence. Where a consent has been given, it can be successfully challenged if it be shown that no prima facie case could have been made on the proof of evidence. It must be emphasized, once again that what we are dealing with, in the instant appeal, is circumstantial evidence and not evidence which irresistibly leads to conviction. Therefore, it would be a wrong approach for this Court, or any Appeal court for that matter, to conduct a mental trial of the appellant and convince itself of the guilt of the appellant before it can say that the consent given was correctly given. I have all along been using the term “prima facie case”.

In Jimoh Atanda v. Attorney-General of Western Nigeria [1965] N.M.L.R. 225 at 228 the term used was a “clear case”. But that phrase requires clarification. The term “clear case” should not be taken to mean a case justifying a conviction, because the grant of consent by the judge is not tantamount to a verdict of guilty. The “clear case” there must not be put higher than “an arguable case”. But I believe that the best applicable phrase is a “prima facie case”.

Let me now look at a few English authorities for a comparative study. Our section 340 of the Criminal Procedure Law of Bendel State is in pari material with the English s.2(2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 amended by the Criminal Appeal Act, 1964, section 5, Schedule II. Decisions of the Courts of England will therefore be of help. It is said that a Court must have power at Common Law to quash an indictment if satisfied from perusal of the depositions that there must be an acquittal in the end. It was, however, held that a court is not entitled to quash an indictment

on the grounds that the evidence as disclosed in the depositions does not appear to be sufficient to justify a conviction. In *R.V. CHAIRMAN OF LONDON COUNTY SESSIONS ex parte DOWNES* [1954] 37 Cr. App. R. 148 it was held (per Goddard, L.CJ.) at p.150, that

‘No member of this Court has ever known or heard of a court quashing an indictment in such circumstances nor can authority be found to support it. The circumstance is one in which the Court thought that sufficient evidence to ground a conviction was lacking.’

In the same vein, in a Divisional Court case of *R. V. DEPUTY CHAIRMAN OF INNER LONDON QUARTER SESSION ex parte METROPOLITAN POLICE COMMISSIONER* [1969] 54 Cr. App. R. 49, the Lord Chief Justice, sitting with Ashworth and Cantley, J. J held, upon a demurrer to the indictment, that a Court is not entitled to quash an indictment because an examination of the depositions or statements in lieu of depositions has led it to the conclusion that the prosecution would not succeed on any count.”

And at pages 374 to 375 he said further thus:

“It is true that the Court must prevent oppression against an accused on the principle laid down in CONNELLY v. D.P.P. [1964] A.C. 1254 and R. v. RIEBOLD [1967] 1 W.L.R. 674 and that circumstances can exist which would justify the quashing of an indictment, such as in Egbe (supra) or in REGINA v. MCDONNELL [1966] 1 Q.B. 233. The process of the Court must not be made to oppress a citizen so that to charge a citizen with an offence with a view to harassing him will be an abuse of the process of the Court. The principle, however, remains basic that an indictment may not be quashed merely on the ground that a doubt exists on whether the prosecution could secure a conviction - which is not the same thing as in Egbe (supra) where there is a total non-existence of evidence of crime. Where, the Judge has exercised his discretion in granting his consent the doubt aforementioned notwithstanding, an Appeal Court should not interfere with the said discretion provided that he acted within jurisdiction (R. V. ROTHFIELD 26 Cr. App. R. 103 at 106) unless, as stated in R.V. FLYNN [1961] 45 Cr. App. R. 268 at 277, the Appellate Court feels satisfied either that he exercised the discretion on wrong principles or that he had failed to give weight to matters which he should have had in mind when exercising the discretion”.

COKER, J.S.C. in the Ikomi case (supra) had this to say on

the issues raised at pages 376 to 377. It reads thus:

"I have had some serious doubts as to the true dividing line between the concept of "suspecting a person" for committing an offence on the one hand and "prima facie evidence against that person" for the offence. A person might be suspected for committing an offence even though there is no evidence - direct or circumstantial - whatsoever against him. In such a case further investigation leading to possible evidence of the person's involvement becomes necessary before he could be charged with offence. A prima facie case is made against a person where on the face of the available evidence an offence has been committed and there is evidence which could possibly ground convicting the suspect. It is the suspicion which leads to investigation and discovery of evidence against the suspect. Suspicion alone is not enough to justify preferring a charge against a person, there must be evidence linking the suspect with the offence. There ought to be some evidence however remote which calls for some explanation from the suspect. At the stage of deciding whether to prefer charge the prosecutor is not obliged to decide, as a trial judge should, whether the available evidence is cogent enough to justify a conviction. But there must be evidence to meet all the essential elements of that offence. It is my view that if on a proper appraisal of the available evidence there is absence of any necessary ingredient of the offence, the judge who is requested to give his consent to preferment of the information should decline. I have carefully read all the statements of persons attached to the application of the Attorney-General, Bendel State, for consent to prefer information against the three appellants for the offence of murder. Even though the quality of the evidence extremely seem tenuous and might possibly lead to the discharge of the accused persons if no further evidence is adduced at the trial I am however unable to say that his discretion in granting consent was not judicially exercised. His duty at the stage was not to appraise the evidence in the statements of proposed witnesses. His duty was to decide, whether there was reasonable material before him on which the suspect could reasonably be called to stand trial for the offence. An Attorney-General is not a judge of the case but a prosecutor of the charge. His responsibility was not to decide the merit of the case but to ensure that the charge is not preferred irresponsibly, solely to embarrass, harass or persecute. It is

immaterial and not enough to say that if the judge himself were the Attorney-General he would not have advised preferment of the information on those materials.

I have come to the conclusion that the material in this case before the Chief Judge at the time he gave his consent was sufficient however slight to support the information even though another judge given the same statements as the Chief Judge could, equally with justification, have refused to give his consent. The line between the two is very thin and not one in which a court of appeal should interfere. It would be otherwise if no offence is disclosed or the suspect is not remotely connected with the offence.

As regards the submission of breach of rule of natural justice, I agree that the Chief Judge, having regard to his foreknowledge of the incident, his previous statement to the police and the likelihood of being called as a witness ought advisedly to have declined to deal with the application for consent to prefer the information against the appellants. He could with candour, have requested that the application should be directed to another judge in order that justice will not only have been done but seen to have been done. I also share the view that having regard to the facts and circumstances of this case there has been no miscarriage of justice. In the result, I see no reason to disturb the decision of the lower Court. I will dismiss the appeal and further affirm the ruling of Maidoh, J. delivered on 21st January, 1986."

KARIBI-WHYTE J.S.C. in his own judgment at pages 381 to 382 said as follows:

"The judge may give consent to the filing of an information even after a magistrate had refused to commit an accused person for trial - see R. v. Fadina (supra). Thus a consent may even be granted in a case where the evidence was insufficient to support a committal. The accused is strict to sensu not entitled to a hearing before the Judge considering consent. However a Judge giving consent is expected to do so where the offence in the information is supported by the depositions in support. In Atanda v. Attorney-General for Western Region [1965] N.M.L.R. 225, 223 and Egbe v. The State [1980] 1 N.C.R. 341, where no offences were disclosed on the depositions it was held that the information were liable to be quashed. An indictment is liable to be quashed where

(a) the Court has no jurisdiction (b) the deposition does not disclose the commission of an offence (c) the consent was given in circumstances amounting to an abuse of the courts process or contrary to S. 340 (3) of the Criminal Procedure Act. Where the information discloses the commission of an offence, as in this case, and the deposition supports the indictment, it is not sufficient to quash the indictment because the accused persons may not be convicted on trial. All that is required at this stage is that the evidence on the deposition should support the charge as laid in the information and link the accused persons.”

As I have already stated, appellants are linked to the commission of the offence by the fact that they are more than any other persons on the evidence before the consenting learned Chief Judge had the opportunity to commit the offence. The search light of suspicion which is still flickering was clearly brighter when focused on the appellants than on any other person. The question whether it will finally flare on them will be determined at the end of the trial when they have denied the allegations against them and the court has had the opportunity of testing their version of the incident. In the old English case of *Omichund v. Barker* [1744] Wilkes, 533. at p. 550 Lord Hardwicke said “*The judges and sages of the law have laid it down that there is one general evidence, the best that the nature of the case will allow.*” This is no doubt a view which has been accepted ever since. It is well settled that circumstantial evidence if positive and direct will be sufficient to support a conviction, - see *Ukorah v. The State* [1977] S.C. 167. I cannot conceive therefore why on the same principle circumstantial evidence will not be sufficient to enable a Judge give consent to the filing of an information and send the accused to trial. In my opinion there is a right not to be tried only when no offence is disclosed on the information. There is no such right when an offence is disclosed on the information and the accused persons are linked with its commission. There was therefore on the depositions sufficient evidence to enable the Chief Judge give consent to the filing of the information against the appellants”.

KAWU, J.S.C. in the course of his judgment had this to say on the issues raised at p. 385:

“With regard to the second question for determination, it is pertinent to state that the first duty of a Judge when considering the

application for the grant of consent, is to satisfy himself that on the proof of evidence filed in support of the application an offence known to law, is disclosed. See *Egbe v. The State* [1980] 1 N.C.R. 341 and *Atanda v. Attorney-General for Western Region* [1965] N.M.L.R. 225. In this case it is not in dispute that P. C. Agbede was murdered in the compound of the 1st appellant and/or about the 4th day of July, 1985. P. C. Agbede reported for duty at the compound of the 1st Appellant. The following morning his dead body was found lying on the ground in the Compound. The medical report certified the cause of death to be due to “multiple injuries (strangulation and hemorrhage)” Secondly, there must be some evidence linking the appellants with the offence disclosed in order to justify their being put on trial. In this case, it is not in dispute that after the deceased had reported for duty on that fateful night, the two exit doors were locked and the keys to the entrance were kept by the 2nd and 3rd appellants. Only the appellants knew where the keys were kept. It is also not in dispute that the only persons in the 1st appellant’s compound that night were the appellants, the 1st appellant’s two daughters and the deceased. There is no evidence that any other person or persons came to the compound after the deceased had reported for duty. In the circumstances, is it not reasonable to conclude that the appellants were indirectly linked with the murder of the P. C. Agbede? It is pertinent to point out that at this stage the question is not whether the appellants admitted the time, but whether they could have done so. All that is required when a Judge grants consent is some *prima facie* evidence which connects the suspect with the crime. Now the question may be asked: what is *prima facie* evidence. It is defined in *The Dictionary of English Law* by Earl Jowitt as:

‘that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such degree of probability in its favour that it must prevail if believed by the jury unless rebutted or the contrary proved; conclusive evidence, on the other hand, is that which excludes or at least tends to exclude the possibility of the truth of any other hypothesis than the one attempted to be established.’ Having given very careful consideration to the statements filed before the learned Chief Judge in support of the application for the grant of consent (excluding the statements of Mr. Vincent Ehiawigna and Mrs. Mabel Ehiawigna), I have firmly come to the conclusion that a *prima*

facie case has been established against the appellants which requires some explanation from them. In my view therefore, the Chief Judge was right in giving consent to the filing of the information against the appellants."

In view of the arguments, which had preceded on the meaning of "*prima facie*", I thought I should refer to some cases where this phrase had been considered. Now, what are the facts in this case? Basically, the case of the prosecution may be put thus: Alhaji Kudirat Abiola was on the 4th of June murdered by a gang of people who gunned her down as she was being driven in her car at Ikeja and that the people who gunned her down were those who have been charged for the offence of murder. The prosecution has also sought to show that there was a conspiracy which involved the appellant and others in the commission of this offence and also the appellant apparently aided and abetted the commission of this offence. Not only did he aid and abet the commission of the offence, but also appeared that he gave money to some of the perpetrators of this offence to escape from Nigeria following the commission of the offence.

The above in a nut shell constitute the basic facts of this offence, but in order to identify clearly the link of the appellant to this offence, the statements as to be gathered from the proof of evidence of the witnesses and that of the appellant will now be given.

MOHAMMED ABACHA

"I was sitting in Major Mustapha's office when Sgt Rogers and a couple of Body Guards were asked to come into the office. I was in the office purely on a visit which I usually do. The boys and Sgt. Rogers were asked to come into the office, then Major Mustapha told Rogers that he was sending them on an assignment. We then asked Rogers to bring a bag from a corner of his office which after it was opened by Rogers contained about two or more machine guns. Major Mustapha then whispered to Rogers. I believe the details of the assignment before they were all asked to go. I believe to the best of my memory that it is the extent of what I witnessed in Major Mustapha's office that day before I left myself. On a particular occasion, Mr. Rogers came to my house (residence) then in the villa and asked to see me I promptly made myself available, it was there he expressed his fears about the allegations on him that they were being pointed to as Kudirat killers. My reaction was that of surprise and shock because what he

said confirmed a lot of the allegations said about the issue in the pages of Newspapers etc to my confusion and shock I immediately told him to go and report this to your boss Major Mustapha. Then Mr. Rogers left. I still wonder why Mr. Rogers came to tell me that he told me seeing the fact that I was not his boss and that he had a boss Major Mustapha. May be Mr. Rogers thought he needed to speak to some one close to advise him on what to do. But the issue was sensitive and I did not want to believe what my ears heard from Rogers. I didn't see Rogers again but I expected to hear from what transpired between him and his boss. Major Mustapha, also never spoke to me about the issue so really I don't even know it may be Rogers had second thought about what he told me. About Alhaja Kudirat death and the decided to keeps (sic) about it afterwards. Conversely, Major Mustapha never told me, that Rogers had approached him and discussed such an issue with him. I remined (sic) confused on the matter. Mohammed Katako used to be Driver of my late brother Ibrahim's security detail. We started working for me after my late brother passed on. While Katako was in Lagos in my house Mr. Rogers phoned my boys and wanted to speak to me. I answered the phone call, he indicated he was in Lagos on assignment he was calling from my house and that he needed the service of a driver. I asked who or which one of the drivers was there and he affirmed to me that there was Mohammed Katako I said okay you can used him and was the end of that phone call.

On another occasion Mr. Rogers phoned from Lagos to request for the use of my cars. I asked why he needed a car and he answered that there (sic) car has broken down, and that they had requested one from Major Ado the o/c State House, Lagos and that he couldn't provide them any because he didn't have a serviceable car at his disposal. Since I had left Lagos for a very long time I did know which of the cars was anyway I asked them to check for a good car and ask the house boy to give them my old Mercedes Benz 190E I got and called back to let me know that the car was not very serviceable but that the boys said they would manage the car like that. On a particular weekend in 1999 I don't know precisely when Mohammed Katako came to my family residence at Gidado Road and told me that Major Ado and himself had come from Lagos for the weekend and that Major Ado wanted to see me (sic) to discuss some vital issues

and that he didn't want to come to the house because we didn't want to be seen at the house I then told Mohammed Katako to tell him that I will come and see him in the night and that Mohammed Katako should come and take me to his house in Kano City because I didn't know where he lived. Mohammed Katako came at about 12 midnight and we went to Major Ado's house in the city. As we got there he wasn't around. Mohammed located him from the neighborhood. He invited me into his home we sat down and got talking the basic theme of the discussion, was that there were a lot of questions being asked about the killing of Kudirat, the live attempts on Mr. Alex Ibru and Mr. Abraham Adesanya. During his talks he expressed a lot of fear about it.

That he believed that since the boys are around they should immediately be resettled somewhere before additional measures should be taken. It was then resolved that Mohammed and Aminu should be taken care of first before the others were located. It was suggested that they be given at least ten thousand dollars or so to take care of them for some time before additional measures could be put in place. On issue of Rabo Lawal. One former bodyguard and Mohammed Katako told me about his wife's delivery a baby and that he wasn't there to look after her. They then requested something for his wife which I gave N50,000 to take care of her needs. It was during this encounter with the G. G. and Mohammed that they informed me of Lawal's detention or so. Back to Major Ado discussion. It was then we agreed that the boys should be looked for and spoke to leave the country. Major Ado had to go back to Lagos for his duties. We then asked Mohammed Katako to locate the other and ask them to come to Kano to see me. This was also possible because Mohammed Katako had some engagements to do in Abuja. Eventually Aminu and Katako came to see me at Gidado Road in Kano where I instructed my Accountant Ibrahim Aminu to source ten thousand dollars each of both for them which he confirmed to me he had given and they had collected from him. Regarding the aircraft issue. The company name of the Airline is Premium Air Shuttle and it is owned by one Mr. Danillo resident in Lagos. I was in Major Mustapha's office when I heard him requesting for an aircraft to Lagos from the Presidential Fleet which they said was not available I quickly reminded him O.K. look for Danillo we has (sic) aircraft. I looked through my

diary for Mr. Danillo's number and tried to get him. I think eventually we either got him or his lady assistant I cannot remember precisely whom out of them but an Aircraft was sent to Abuja. I left Major Mustapha's office after the phone call. So really I cannot say precisely who the Aircraft was meant to carry to Lagos and what was the reason for traveling to Lagos." B

AMINU MOHAMMED

"The second trip that took me out from Abuja was an advances party to Lagos, when arrived they told us the C-in-C is not coming we spend over three week for the period of that three weeks I was picked by ROGERS and some other soldier from 26 we went to the D.M.I, house where he briefed us that we are going to travel to Benin Republic to get General Akinrinade and some other NADECO member because they are sabotages the Abacha Government, we waited for a while then we saw one man came in and told us that he is the one to lead us there, we were four in numbers including the man five. When we arrived at Nigeria house there towards evening the man took us to the beach were he said that is the place they use to relaxed. We were there for one day and half but in the evening we were told that they had gone to America. Then the same evening they drove us both to leases we arrived Lagos around 9pm. But before our departure to Cotonou we went to D.S., where we were seven 200 dollar traveled Sheave as hour R.C.A. The vehicle was 505 with diplomatic number. The vehicle was drove by the person who introduced himself as a masothe also say he was one of the staff of the embassy in Cotonou. The incident it was also in 1996 when I returned I disclosed where I went to the rest of my friend they told too they went to other place. It was sarcula that told me that. Then we returned to Abuja after one week. After about two or three month we went back on advance party to lease but the head of State did not come, when we were returning one evening, one man came inside and went to Rogers room later Rogers introduce the man to us as Alhaji Lateef he is the one always assisted them with vital information. All of us were watching television in the sitting in the officers guest house, Dodan Barracks. After about two days Alhaji Lateef came back and tell that he is going to show us Abiola house and his house too. We drove from Dodan barracks to Ikeja where he showed us this Abiola house and take to the opposite where it was one water park." C
D
E
F
G
H

After the finish their discussion with Rogers we drive later to Ojo Alagbe that is where Alhaji Lateef said we should park our car and went for then the went inside he and Rogers not less than 20 minutes. Rogers came back and we drove straight to Dodan barracks. I don't know the reason why they show Abiola house at that time. Just about two
B *days Rogers came and wake me up in the morning and told me I should follow him to some where in Ikeja when we arrived he should drive straight to where Alhaji Lateef show us the other day immediately when we stop I asked him what is the matter he told me that we*
C *are going to trace Abiola wife because there's interest effort that she wants to traveled out of the country. And there some SSS personnel which they are suspecting her, but went she got to revise she order the bodyguard to finished them he is just telling story he just cut and*
D *told me to follow that white Mercedes car that came out from that compound. But before I even started my car 504 to follow her she were already disappear from the scene, immediately Rogers say we should drive back to Dodan barracks. Since from that incident he never invited me to follow anywhere he is going. After about letter I had Abiola wife was kill then I ask my second Sukanga Bello and he*
E *told me I should keep quiet. When Roger say we should trace the Abiola wife I did ask for such that because as a soldier I don't supposed to ask where the got that order. After that when I had about the dead about thereto douis, Rogers and Sukanga Bello to Abuja to come and collect money because our money has finished. Umen*
F *letter Sukanga Bello came along with money from Abuja. We stay in Lagos about five to six day before returning to Abuja. I can still remember we went to Lagos but I cannot remember the month the day we were sitting in the sitting room Alhaji Lateef came and had a*
G *discussion with Rogers then later he told us to go with Alhaji Lati and show us Senator Abraham Adesanya Chamber. After seeing the place we went back to Dodan barracks. The following I and Katako with Rogers we went to the place on inside one white 504 when the car is not in even good condition, immediately we reached the front of the*
H *chamber we saw the man wanted to drive out, then Rogers order Katako to shoot him but we cannot meet him because he is driven Mercedes then. I saw Rogers pulling out the Uzi and firing Adesanya vehicle when I asked why he said he wanted to fire in tire. Rogers told us that Mr. Adesanya was NADECO he wanted to arrest him and*

get some information, I asked him why as you fire his tyre and he stop why you didn't arrest him, he just said that he wanted to scare him an that all then we drive back to Dodan barracks then he tells us to come back to Abuja after about four days. After three month ago Katako came and meet me in Abuja and told me that he have seen Alhaji Mohammed Abuena and they discuss with him that because of the recent condition because the present Government wanted to arrest people that were Abacha Government because that as the time when the tell published Rogers picture and say he is the man who kill for Abacha, so because of that he had discussion Alhaji Mohammed to assist us with money to traveled out of the country. Want he told that I told him that why is be feared is that because he went to some again with Rogers. You are that one that excuse those they men non he say no. But the following day I decided to follow him I reached Kano around 1pm luckily when I enter the compound I say Katako when we went and meet Alhaji Mohammed along his way to mosque after seeing him and Katako refill what he told early that the man should assist us we want to traveled out then the man asked why then Katako told him that we just decide to leave, but I told him I myself I don't want leave this country then Alhaji intervened I told us to go settle within the two of us, then Katako told him that we are ready to leave then he say he will help us because anybody that work with his father he is ready to help him unless he didn't even told that we want to go Niger Republic, immediately the following day we proceed to Niger where we lodged in one hotel at Damogram where we spend about five to six days. Then I and Katako that we better return to Niger in so that we can make use of that money because were from poor family. When I gave him some example I told that you see that Niger is very poor country and the authority in Niger they knew their number all. And you know that Niger Government was not recognized by Nigeria in case if we were declare wanted these people will arrest us and took us back to Nigeria so that Nigerian Government recognize them. I still reminded him that look I don't want to leave the army just like that because I am not sure whether Alhaji will give me any work in the future and beside I don't want to loose my school when I am on it now he later agree with and we came back."

BARNABAS JABILA

“Further to my statements which I made to the police some-time in May 1999 In which we denied all the alleged allegations against us. I wish to now make a detailed statements concerning KUDIRAT ABIOLA on the 4th of June ’96, Major Mustapha ordered that the woman must be eliminated at all cost, so before then we met Major
B *Mustapha’s informant in Abacha’s house by name Alhaji Lateef, was also to tell us the itinary of the woman. On the 4th June 1996, we followed her to Abiola’s house in the morning we followed her there immediately we reach there she came out of Abiola Crescent with*
C *white Mercedes benz beast in which they are four in number so we traced her to Allen Avenue round about where she dropped one small girl that was in the car with her. Then we followed her again to secretariat Alausa Ikeja, then to express road on her way to Lagos, then we come closer and level up with her, then I fired at the car*
D *several shots then we drove off which later the shots killed her. I used UZI, SMG and 9mm rounds with silence. We use Peugeot 504 saloon car dark blue, Major Ado car. I initially we are 6 (six) who went for the operation who are Samaila Shuaibu, Barnabas Jabila, Sani Garba, Sukanga Bello, Mohammed Katako. Who went for the operation.*
E *But on the 4/6/99 it was only myself and Mohammed Katako that went because the other listed above and Mohammed Aminu said they are tired and are with girls which we don’t want the girls to understand what we are doing because there firearm are with them and also we when out surveillance the previous night. It was Katako*
F *who drove the car. Major Mustapha is one that gave us the weapon and ammunition. After the operation he gave us N50,000 which Sukanga Bello was the one that travel to Abuja to collect for us, which we share among ourselves equally because the woman died. In addition to the statement I wrote initially, I have not used any weapon*
G *that is not using 9mm. The weapon I used was UZI using silencer and the sound can be heard, but not much. And it is not possible that the shell of the round I fire to be found 1- target car. Because I fired by all means to make sure that 1 did not go out of the car window while*
H *firing, so the shell where mostly falling inside the car. Also the UZI that I used looks like MP5 SMG with curved magazine, after the operation, when we come back to Abuja, the weapon was returned back to Major Mustapha through L/Cpt. Ayo Gadzama his orderly who came to me and said Major Mustapha said I should give him in which*

I did give him and I confirm it to be true that Major Mustapha send him to collect it from me by going to him Major Mustapha which he said he did send Kyari. The weapon are numbered two (2) with about (10-15) ten to fifteen packet of 50 rounds each of 9mm linger."

MOHAMMED ABDUL INKIYA KATAKO

"I Mohammed Abdul Inkiya KATAKO was born in Agase on 9th December 1975. I did my primary school between 1980 to 1986; my post primary school between 1986 to 1988. I came to Lagos in 1992. I started work as a driver and I was driving the employee's (sic) of Ibrahim Sani Abacha after his (Abacha) death in 1996. After the eight day prayers, I came back to Lagos. His brothers relocated to Abuja. Alhaji Mohammed Sani Abacha told me to continue with my work as a driver. Before I went back to Abuja there were some workers from Abuja who came to work in Lagos. He said I should drive Lawal Rabo, Rogers, Samailu Shuaibu, Aminu Mohammed and Sani Garba. I did not know the person (driver) who brought them from the Airport. I only came and met them in their vehicle. After a while, we went to Obalende to eat, after which we went to their lodge - late Abacha's house where I usually reside. The following day came and met me and we went to their lodge. They told me that they came for work. But wherever we went, I was telling someone that these people will kill me. We first looked for Alhaji Lateef. After we met him at the National Theatre then we went to his (Lati) house in Surulere. Then he said we should go to the National Theatre. After we met him (Lati), he took us to a house in Festac Town. He left us there and went away in his car. We went with our own car - Peugeot 504. When it was night, we went back with the two vehicles (504 and 505). After that they said Samaila Shuaibu and myself should go and park the vehicles. They siphoned a gallon of petrol and went away. After they came back said we should go. Before we came back the following, I cannot say what they did. In the morning we went to one Lt. Col. YAKUBU's together. They withdrew aside and he was given a parcel. Rogers collected it and put it in his car. From there, we went to Federal Palace Hotel - that is Lawal and Rogers - while myself Samaila went and drove round. Later they said we should go. Samaila was leading while Rogers and myself were following. As we were about reaching Falomo Bridge, Rogers told me to drive and pass them and I did. At the Falomo Roundabout the other vehicle went

straight while our vehicle turned to Kingsway Road Rogers started firing at a vehicle and he (Rogers) directed me to take him home. After I had returned home, I heard that Alex IBRU was shot and it talked (sic) with the period when Rogers fired at Falomo. After two days, they went back to Abuja. When they returned from Abuja, B lodged at No. 70-76 Alexander, Ikoyi. They came and met and we went to Alhaji Lati. Then he said we should meet at the National Theatre, in the evening. He then took us to OSOBA's House at Dolphin Estate and pointed at a house to us. The following day Rogers, C Lawal and myself went to the house and they asked me to find out if the owner of the was in, when I asked whether I know LADI's house in Dolphin Estate. We went there and one of them asked the guard but they said she was not in this was General AKINRINADE's house. The following day, we went back to LATI and he told us to meet at D the usual venue. In the afternoon, we went and started waiting. When Lati came, he took us to Anthony Village. He showed them a company - GANI CHAMBERS. We just drove pass. During this outing, Sani Garba did not come with them. Lati went away while we went back home. The three of them - Rogers Lawal Aminu dropped from E the vehicle while they asked us to move forwards after a while they came and met us and we went back home. The following day, they called Alhaji Mohammed Sani ABACHA on phone and told him that they wanted a Vehicle. Alhaji told them he wanted to speak with me on phone. They then called me to Lawal's room. He told me to meet F Alhaji Hamman to give us the key to Mercedes 190 and we went and collected the car in the morning. Throughout this period, they said I should not come or I should wait until they called me because one of the Master's was coming to Abuja.

G We went back to Lati's residence in Mercedes 190 and a Peugeot 504 car. He took us to IGBOSERE and showed them an office. He also told them the type of vehicle the man uses. It is either Mercedes 200 or 230. We went back home and left the Mercedes 190 there. We then took the *Peugeot 504* and went back to H IGBOSERE and we saw the Mercedes 200/230. Aminu told Rogers that they should go back and pick up the Mercedes 190. He said they should wait there until the Mercedes owner came and drove away the car and Rogers directed that they should follow the Mercedes 200 or 230. As the vehicle was nearing Obalende - just close to SURA

I heard gun shots. When we returned home, I heard the ADESANYA ABRAHAM was shot. I then said that this firing must be the hand-work of Rogers. After two days, they went back to Abuja. I was never told the nature of the job I was going to do, but after their discussions. Alhaji Mohammed my master will then say you (me) to follow Rogers and others to Lagos. They (Rogers and other) once told me that they wanted to give me something, but that my master told them that they should not bother as I am his boy. After they had left for some days, I also went to Abuja. We came to Lagos together in a private Aircraft at night - the owner was one DANILO. We went to Lati's house in the morning and Lati took us to one house - Abiola's house. That day we used a Peugeot 505 with Reg. No. CVU and another 504. I did not know where they got these vehicles. The 504 was faulty. When we returned home, Rogers borrowed his friend's car GRAND CHIROKE JEEP and we then went back to ABIOLA's house. In the morning of the following day, Rogers said that we should drive out. We then went to Ikeja. Lati had already told them the type of vehicle they were watching out for. He said we should follow that vehicle it was a Mercedes Benz and there were three or four people inside the car. As we approached Maryland Junction, Rogers strided (sic) firing at the Mercedes and continued firing until we drove pass the car (Mercedes) after we returned home, I heard that KUDIRAT ABIOLA was the one shot at the scene. I then know that she (KUDIRAT ABIOLA) was the one killed. This is all I know. The nature of the relationship between Major Mustapha and Alhaji Mohammed Sani Abacha is not quite clear to me. This is because I do not know much about them. All that I know is that we used to go to his (Mohammed) house or to his office I can't say what they do or say together. All these events happened in 1996 and the early part of 1997. All most close to the handing over day. I was given pass and was on my way to Agare. I then went to see my friend SALE and I saw Alhaji and he asked me whether I was aware of what Rogers has said about the job that we used to do. Then I guessed that Alhaji may say I should go and call the others, because he (Alhaji) will provide them with the means to leave the country and that they can return to the country after a while (that is after thing have cooled down). When I went to Abuja and Aminu and told him he said they should look for the others and when they saw Rogers, he said he was going nowhere.

We looked for Lawal, Rabo but did not see him. I went back to Kano. Aminu drove his car and he gave us ten thousand dollars (\$10,000). We went to Niger Republic. We did not know anyone. After three days we decide to return to Nigeria because it was not reasonable to leave our families and our work. After we returned Aminu saw us
 B *and asked why we returned to Nigeria. I told him that we would be going back to Niger Republic. He said that if we liked we could go back and that if we are arrested he will have nothing to do with us, Aminu then went to Abuja and I returned to my work in Lagos.”*

C I will now set out those facts, which emanate from the statements given above to show the linkage of the appellant with the commission of is offence.

(1) Appellant was in Major’s office when Rogers came in and was instructed to bring a bag from the corner of the room. The bag
 D was opened in the presence of the appellant and it revealed that guns were in the bag. He heard that they were going on assignment.

(2) Katako was the appellant’s personal driver.

(3) Appellant instructed Katako to go to Lagos to drive Rogers to anywhere he wanted to go.

E (4) Katako did drive Rogers and the gang who appellant described as “*his boys*” and as stated in his statement.

(5) That when the gang (otherwise his boys) needed a car for their mission, Rogers contracted appellant who directed that his driver
 F Katako be put on the line. Katako then spoke to appellant and was instructed to take one of his vehicles. Katako duly collected the vehicle with which he drove the gang around fulfilling the assignment (mission).

(6) That it was during the execution of the assignment that
 G Kudirat Abiola was killed by Rogers.

(7) Subsequently, Rogers started “singing” i.e. telling the story of the event. Revealing or giving evidence (information) concerning the event. Katako and others became apprehensive of the possibility of their being arrested for the murder of Kudirat Abiola.

H (8) They contacted the appellant who had a midnight meeting in Kano in the house of X.

(9) Appellant agreed at that meeting to make money available to them to escape to Niger Republic so as to avoid their being arrested. Appellant instructed his Accountant to give Katako and X the

sum of 10,000 U.S. dollars each.

(10) The Accountant duly paid the money to them.

(11) Katakoto and X upon receipt of the money fled to Niger Republic though they returned later to Nigeria.

On those facts, the learned trial judge, Kekere-Ekun, J. in her ruling on application to quash the information said. B

“The only way to determine whether the information amounts to an abuse of the court process or not is by looking at the prove of evidence (the statements and depositions) in support thereof, as this cannot be determined on the face of the information alone. Even though Ikomi’s (supra) and Egbe’s case (supra) were cases in respect of which the consent procedure was applicable. I am of the view that the principles enumerated therein are relevant for the determination of the issue now before the court. In the court’s consideration of the statements and depositions contained in the proof of evidence, what is the standard of proof required to warrant the quashing of the information? Learned counsel to the applicant relying on Ikomi’s case (supra) at pages 360-361 was of the opinion that the statements and depositions, if uncontradicted, must raise a probable presumption of guilt of the accused while the learned Attorney-General also relying on Ikomi’s case submitted that all that requires some explanation. Having considered Ikomi’s case critically, the requirements that can be deduced therefrom are that C

(a) The information must be evidence connecting the accused with F

(b) There must be evidence connecting the accused with the offence alleged in the information.”

It was held by Nnamani, J.S.C. at page 360 paragraph F that it is sufficient if the depositions and statements disclose a prima facie case against the accused. He conceded the fact that evidence may be direct or circumstantial see page 363 paragraph F. The standard of proof at this stage is not such as would lend to a conviction. See page 374 paragraph C. With regard to count 1 of the charge - conspiracy to commit murder - the applicant does not dispute the fact that the offence of conspiracy to commit murder is disclosed on the information. His contention is that the statements and depositions in support of the information do not link him to the commission of this offence. Learned counsel to the applicant referred particularly to the state- H

ments of the 1st, 2nd and 4th accused and the depositions of Barnabas Jabila alias Rogers, Major Saminu Ado and Mohammed Abdul alias Katako and submitted there is no evidence from which the inference can be drawn that there was an agreement between the 3rd accused and the other accused to commit the offence. He also referred to the statement of the 3rd accused himself. It is well settled that conspiracy is generally a matter of inference from the collateral circumstances of the case: see *Erin v. The State* [1994] 5 N.W.L.R. (346) 525. It was held in that case at page 534 paragraphs A-D per Ogwuegbu, JCA that the offence of conspiracy is complete the moment two or more persons have agreed that they will do immediately or at some future time, certain things, and it is not necessary in order to complete the offence that any one thing should be done beyond the agreement reached. Sometime there may be no direct evidence of an agreement between the accused persons. In such circumstances that inference of conspiracy can only be made from the facts and circumstances of the commission of the substantive offence; see *Onochie v. Republic* (1966) All NLR 82. With regard to the submission of the learned S.A.N regarding evidence of the agreement, it was held in the case of *Clark & Anor Vs. The State* [1986] 4 NWLR (3) 381 that in proving conspiracy it is not necessary to prove that the accused persons not to connect the scheme to commit the felony as even a person who joins a conspiracy after it is formed will be guilty of the offence. Applying these principles of the statements and depositions in proof of evidence, in the statement of Barnabas Jabila, he stated that initially six of them were scheduled to go for the operation (to kill Kudirat Abiola). Among those named was Mohammed Katako. He stated that on the day the offence was actually committed it was he and Katako who went for the operation and that it was Katako who drive (sic) the car from which he fired at the victim. Mohammed Katako in his statement stated that he became the 3rd accused's driver after the death of his former boss, late Ibrahim Abacha. He stated that the 3rd accused had instructed him to drive Rogers and the other persons named by Rogers as the persons originally scheduled to take part in the operation. He stated that he had been instructed by the 3rd accused to drive Rogers on several occasions and states that he drove Rogers on the day he allegedly shot Kudirat Abiola. The 3rd accused in his own stated that he was in

the office of the first accused, Major Al-Mustapher, when people he described as “*the boys*” and Sergeant Rogers were called and told they were to be sent on assignment, and that he was also present when a bag containing “one or two” machine guns was given to Sergeant Rogers. He confirmed that Rogers had called his house requesting a car and driver and that he told him he could use Katako. B
He also authorized the release of car keys to him. From the above stated facts it is clear that the 3rd accused has been linked with the commission of the offence charged in count of the information. The various statements referred to above are such that require at least some explanation. Nnamani J.S.C. in Ikomi’s case (supra) at page C
362 paragraph F stated thus *‘in my view, once there are circumstances from which it can be justly inferred that an accused could have committed the offence he should be put on his trial whether there are other co-existing circumstances which would weaken that D inference or whether the evidence leads irresistibly to the accused persons guilt can only be determined at the trial.’*

I subscribe to this view in the present case. I hold that the statements and deposition in the proof of evidence do establish a prima facie case against the accused requiring some explanation in respect E
of count 1 of the charge. With regard to count 2 - the charge of murder - the issue in contention is whether the 3rd accused can be charged as a principal offender regarding the commission of the offence. Section 7(b) of the Criminal Code provides as follows:

*‘When an offence is committed each of the following persons F
is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say; every person who does or omits to do any act*

*(c) for the purpose of enabling or aiding another person to G
commit the offence’.*

*I am of the view that the facts already referred to above are sufficient to bring the 3rd accused within the ambit of section 7(b) for the purpose of proffering an information against him. I have considered the various authorities referred to by the learned Senior Advocate. I am of the view that it would be premature at this stage to H
embark on an extensive consideration of what constitutes common intention. At this stage all that is required is that prima facie case be established. The standard of proof at this stage is not such as would*

lead to conviction. The application to quash count 2 of the information is therefore refused.

With regards to counts 3 and 4 of the information - accessory after the fact of murder - it was contended on behalf of the applicant that for section 10 of the criminal code to be applicable it must be shown that the 3rd accused knew of the guilt of the person he is alleged to have assisted. Section 10 of the Criminal Code provides as follow: ‘A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after ‘the fact to the offence. ‘It is contended that there is nothing in the proof of evidence to show that money given to Mohammed Katako and Aminu Mohammed was given to them to facilitate their escape from justice or that he assisted those actually charged with the commission of the offence. In his statement, the 3rd accused stated that sometime in 1999, Mohammed Katako came to him at home and said that he and Major Ado had some vital issues to discuss with him but did not want to be seen at his house. He stated that he told Mohammed Katako to come and take him to Major Ado’s house and that they went there at midnight. He stated that it was agreed that “the boys” should leave, the country. He also stated that Katako and Aminu came to see him at Gidado Road in Kano and that he instructed his accountant to give them U.S. \$10,000.00 each. Mohammed Katako in his statement confirmed receiving \$10,000.00 He also admitted driving the vehicle from which Barnabas Jabila (a.k.a. Sgt. Rogers) shot at Kudirat Abiola. The 3rd accused confirmed his statement that he instructed Mohammed Katako to drive Rogers. Those are facts which require some explanation. The facts as they stand suggest that the 3rd accused was aware that the persons he assisted were involved in the commission of the offence. Mr. Daudu, S.A.N. submitted that having regard to the wording of section 10 of the Criminal Code, particularly the use of the word “guilty” no conviction can be based thereon. With due respect to the learned Senior Advocate, the court is not called upon at this stage to determine whether the jurisdiction would be able to secure a conviction. Only a prima facie case need be established and I hold that the proof of evidence satisfies this requirement. With regard to the court jurisdiction to try counts 3 and 4 of the information having regard to the facts that the money allegedly

given to certain persons to assist their escape from justice was given in Kano, I refer to section 64(c) of the Criminal Procedure Law of Lagos State. The offence of accessory after the fact to murder is an offence by reason of its relation to the offence of murder itself. To that extent as the offence of murder is triable by the High Court of Lagos State, this Honourable Court also has jurisdiction to try the offence of accessory after the fact to murder. The application to quash counts 3 and 4 of the information is therefore refused. In conclusion the application to quash all 4 counts of the information is refused and accordingly dismissed. I so rule."

On appeal to the Court of Appeal, the learned Justice of that Court Affirmed the findings of the learned trial judge that the proofs of evidence disclosed "prima facie" evidence calling for explanation at the trial. Oguntade, JCA who delivered the lead judgment said inter alia, thus: -

"The gist of the offence of conspiracy is the meeting of the mind of the conspirators. This is hardly capable of direct proof for the offence is complete by the agreement to do the act or make the omission complained about. Hence conspiracy is a matter of reference from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common between them and in proof of conspiracy the acts or omission of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators. It is therefore the duty of the court in every case of conspiracy to ascertain as best as it could the evidence of complicity of any of these charged with the offence."

Similarly in Onochie v. Republic [1996] 1 All N.L.R., it was held that a court could infer conspiracy from the fact of doing things towards a common end. The lower court in its ruling against which this appeal has been brought at pages 281-282 of the record of proceedings said: 'applying these principles to the statements and depositions in the proof of evidence in the statements of Barnabas Jabila, he stated that initially six of them were scheduled to go for the operation (to kill Kudirat Abiola). Among these named was Mohammed Katako who drive (sic) the car from which he fired at the victim. Mohammed Katako in his statement stated that he became the 3rd accused's driver after the death of his former boss late Ibrahim Abacha.

He stated that the 3rd accused had instructed him to drive Rogers and the other persons named by Rogers as the persons originally scheduled to take part in the operation. He stated that he had been instructed by the 3rd accused to drive Rogers on several occasions and states (sic) that he drove Rogers on the day he allegedly shot
 B Kudirat Abiola. The 3rd accused in his own statement stated that he was in the office of the first accused Major Al-Mustapha; when people he described as “the boys” and Sergeant Rogers were called and told they were to be sent on an assignment and that he was also present
 C when a bag containing one or two machine guns was given to Sergeant Rogers. He confirmed that Rogers had called his house requesting a car and driver and that he told him he could use Katako. He also authorized the release of car keys to him.

From the above dated facts it is clear that the 3rd accused has
 D been linked with the commission of the offences charge in Court of the information.

The above passage was seriously criticized by appellant’s counsel in his brief. Counsel argued that the matters referred to in the passage by the lower Court above do not amount to showing prima
 E facie evidence of murder. With respect to the appellant’s counsel, I think he overlooked the fact that the proof of conspiracy is often done by way of inference to be drawn from the proven facts. It is clear from the proof of evidence that the appellant on one occasion
 F gave his car to Rogers who ultimately killed Kudirat Abiola. There was evidence that the appellant allowed his driver Mohammed Katako to drive Rogers; and that the said Rogers fired and killed Kudirat while being driven by Mohammed Katako. The appellant had seen
 G Al-Mustapha, the first accused hand over machine guns to Rogers and his boys. It is odd that the appellant who did not serve in the army witnessed the handing over of machine guns to Rogers and his boys by Al-Mustapha. Why was it also necessary for the appellant to release his private car and driver for operations which were rather unclear? But more than all these the statement of the appellant concerning the discussion he had with Major Ado in Ado’s house is very
 H revealing. The appellant said:

‘...the basic theme of the discussion was that there were a lot of questions being asked about the killing of Kudirat, the live attempt on Mr. Alex Ibru and Mr. Abraham Adesanya during the talks he

expressed a lot of fear about the issues and that something should be done about it. That he believed that since the boys were around they should immediately be resettled somewhere before additional measures were taken. It was then resolved that Mohammed and Aminu should be taken care of first before others were located. It was suggested that they should be given ten thousand dollars so to take care of them for sometime before additional measures could be put in place. On the issue of Rabo Lawal, one former bodyguard and Mohammed told me about his wife's delivery a baby and that he wasn't there to look after her. They then released something for his wife which I gave N50,000 to take care of her needs. It was during this encounter with the B.G. and Mohammed that they informed me of Lawal's detention or so. Back to Major Ado discussion, it was then we agreed that the boys should be looked for and spoken to leave the country. Major Ado had to go back Lagos (sic) for his duties. We then asked Mohammed Katako to locate the other and ask them to come to Kano and see me. This was also possible because Mohammed Katako had engagements to (sic) in Abuja. Eventually Aminu and Katako came to see me at Gidado Road in Kano when I instructed my accountant Ibrahim Aminu to source ten thousand dollars each of both for them which he confirmed to me he had given and they had collected from him.'

I do not want to comment on the above except of the appellant's statement. It suffices to say that it serves to throw some light into the state of mind of the appellant when he released his car and driver to Rogers and "the boys". I am not unaware that as at the time the appellant gave money to Mohammed Katako and Aminu to facilitate their journey out of Nigeria that Kudirat Abiola had been killed. But it seems to me that the fact that the appellant wanted the boys out of the country would at least show if at the time he gave his car and driver to Rogers he had done so innocently without knowing what Rogers and his boys were doing. The question was - did he know or not? Appellant's counsel has placed reliance on what I said in *Emeka v. State* [1998] 7 N.W.L.R. (pt. 559) 556 for the argument that what the appellant did in relation to the flight of Mohammed Katako and Aminu from the country could not be seen as promoting a conspiracy to murder Kudirat Abiola who has been killed earlier on 4/6/96. In that case I said at page 579:

I think I ought to say that whatever 2nd and 3rd appellant did on 16/1/86 upwards could not have been in furtherance of any plan to kill Salamatu, the deceased as she had in fact been killed on 14/11/86.'

And at pages 583-584, I said:

B *'True it was, that when the 2nd and 3rd appellants met the 6th P.W. 16/1/86 they asked 6th P.W. to help them procure a gun with which to kill a person so as to remove that person's eyes, in request that led to the making of the agreements exhibits 1 and 2, the lower court should have borne in mind that the intention of 2nd and 3rd appellants as manifested on 16/1/86 could not be made to relate back to a time when Salamatu Mohammed was killed. It seems to me that the lower court should have concerned itself with the agreement, if any, reached by the 1st, 2nd and 3rd appellants before the*
 C *killing of the deceased on 14/1/86 rather than what 2nd and 3rd appellants did on 16/1/86. If as the evidence revealed the deceased had been killed on 14/1/86 and the 2nd and 3rd appellants had been parties to her killing and removal of her eyes, why would they be looking for guns to kill somebody from whom to pluck two eyes*
 D *on 16/1/86.'*
 E

The reliance placed on what I said in the above case is mistaken and inapt. In that case, the 2nd and 3rd appellants had been said to be looking for a gun on 16/1/86 to kill someone who had been killed on 14/1/86. In the instance reliance was being placed on
 F the statement of the appellant the excerpts of which I reproduced earlier to show that acts which had seemed equally consistent with innocence as well as guilt had in fact been done to promote the commission of the murder. The application to quash the charges as
 G brought in this case could not be based on sufficiency or insufficiency of the evidence it could only be brought if there was no evidence which the judge could have relied upon in granting the consent to file the information. The position would have been different if the proof of evidence only revealed that the appellant was engaged subsequent
 H to the killing of Kudirat Abiola on 6/6/96 in an attempt to procure guns for her killing. My conclusion is that the lower court was right to have refused to quash the charges against the appellant. The issue is the contention of the appellant's counsel that the proper venue for the trial of the appellant on counts 3 and 4 of the charge is Kano

State High Court. It was argued that the offence of accessory after the fact of murder is a distinct offence of its own and not a lesser one to the offence of murder. Counsel relied on *B v. Lstubesun* [1937] W.A.C.A. 184; *Yakubu Mohammed & Anor v. State* [1980] 1 W.L.R. 140; *R. v. Andrews and Cray* [1962] All E.R. 961 and *R. v. Ajayi Shodipo* 12 W.A.C.A 374 at 375/376. B

The lower court in its ruling in rejecting the submission of appellant's counsel that the Lagos State High Court had no jurisdiction to try the appellant said:

'The offence of accessory after the fact to murder is an offence by reason of its relation to the offence of murder itself. To that extent as the offence of murder is triable by the High Court of Lagos, this honourable Court also has jurisdiction to try the offence of accessory after the fact of murder.' It is apparent that the reasoning of the trial judge in the above passages draws its strength from section 64(c) of the Criminal Procedure Act which provides: C D

(d) When an act is an offence by reason of its relation to any other act which is also an offence, a charge of the first mentioned offence may be tried or inquired into by a court having jurisdiction in the division or district either in which it happened or in which the offence with which it was so connected happened. E

In *Francis Tete Lawson & Ors v. The State* [1975] 4 S.C. 115, the 2nd Appellant who had been found in possession at Abeokuta of two bags containing Indian Hemp was charged for the offence in Lagos. Her counsel raised an objection as to the venue of trial as appellant's counsel in this case has done. The Supreme Court overruling the objection said: F

'Next it was contended that in as much as the 5th count directed against the 2nd appellant only states that the possession of the hemp was at Abeokuta, the appellant could not and should not have been tried in Lagos. We do not accept this contention and we think that short answer to it is contained in Section 64(c) of the Criminal Procedure Act, Cap. 43. The learned trial judge took the view which we also take, that the quantity of Indian Hemp in Exhibits 43 and 44 were only part of a larger consignment always in the possession of the 2nd appellant and from which she had freely drawn on the morning of the 3rd November, 1973, Section 64 (c) of the Criminal Procedure Act provides as follows: G H

We are satisfied that the offence charged in the 5th count is related to the other offences with which the 2nd appellant was charged and which later offences are indisputably triable by the learned trial judge who had tried this case.'

Whilst it is a correct statement of law that accessory after the fact of murder is a separate and distinct offence to that of murder it is understandable that the prosecution in this case was making the point that the arrangement by the appellant to get Mohammed Katako and Aminu Mohammed to flee the country was a part of a plan to cover the tract of these who had murdered Kudirat Abiola. Viewed from that angle it is easy to understand that the offence of accessory after the fact of murder laid in counts 3 and 4 are so connected with the offence of murder which is as provided under section 64 (c) of the Criminal Procedure Act. The appellant's 4th and last issue is the contention that at the time the appellant gave Mohammed Katako and Aminu Mohammed monetary assistance to enable them flee Nigeria, nothing on the proof of evidence indicated that the appellant had known that they killed Kudirat Abiola. At page 25 of the appellant's brief that argument is projected in these words:

'My Lords, it is our submission that the people assisted could not be said to have killed Kudirat Abiola because they were not charged for the offence in the information.'

This court must resist the temptation to discuss in greater length than is required the purpose on hand the question whether the contents of the proof of evidence could sustain or lead to the conviction of the appellant. I reproduced earlier in this judgment an excerpt of the statement of the appellant in which he explained how he offered monetary assistance to Katako and Aminu Mohammed to flee the country. Whether or not there is enough in the statement to show that the appellant knew these two persons had committed the crime of murder before offering them assistance must wait the trial. It suffices to say that it is not the law that the prosecution must as in the preparation of its case and assemblage of material for trial first make divination as to what possible defences an accused may have to a charge and seek to eliminate such defences in advance of their being raised. I am not also aware that it is the law that an accused person on an offence of accessory after the fact cannot be tried unless the principal offender has first been tried. Certainly the case cited by the

appellant to advance that proposition - The State v. Mojekwu [1974] ECLSR 171 at 173 as not an authority for that proposition. In the final result this appeal fails. It is dismissed.

And Sanusi, J.C.A. had this to say:

I have had the benefit of reading before now judgment of my learned brother, Oguntade, J.C.A. just delivered. My lord has lucidly and painstakingly dealt with all the salient issues raised in this appeal. I shall however make these few comments. The facts which gave rise to this appeal are simply thus: -

The 3rd accused and the appellant in this case was along with these others charged before the Lagos High Court with the offences of conspiracy; murder of Kudirat Abiola and of being accessory after the murder of Kudirat Abiola. The 3rd accused person filed a motion on notice contending that the proof of evidence filed along with the charge failed to disclose any prima facie case for each of the four offences. It was therefore contended that the information amount to abuse of court process and as such should be quashed by the court. The trial court refused the application and struck it out. The applicant became aggrieved and filed this appeal. An information can be quashed where it failed to disclose prima facie case. In a plethora of decided authorities the phrase "prima facie case" has been defined by the superior courts of record to mean - that there is "ground for proceeding". See *Ajidagba v. IGP* [1958] 3 FSC. 5 or as "on the first appearance" see *Duru vs. Nwosu* [1989] 1 N.W.L.R (pt. 113) 24 and *Ajiboye vs. The State* [1994] 8 N.W.L.R. (pt. 364) 587 at 597. In all the decided cases the phrase "prima facie" is not to be taken as "proof".

From the definition given by courts of the meaning of the phrase I think the trial court is correct in holding that going by the contents of the revelation by various witnesses as shown in the proof of evidence there had been disclosed a prima facie case and thus refusing the application argued before her. Thus, it is for this and other elaborate reasons contained in the lead judgment of my learned brother Oguntade, J.C.A., which I adopt as mine, that I also dismiss the appeal. I also endorse all the orders made in the lead judgment."

It is against the decision of the Courts below that appellant has further appealed to this Court. Bearing in mind the various dicta of their Lordships in *Ikomi's case* (supra) and the attitude of this Court

to concurrent findings of the trial Court and affirmed by the Court of Appeal. It must be made clear that this is not the stage to determine whether the case of the prosecution would succeed. All that is required at this stage is to determine whether there is anything disclosed in the proofs of evidence that calls for an explanation from the appellant on the charges laid against him. On this same point as to the proof of conspiracy, I had this to say in case of *Oduneye v. The State* [2001] NWLR (pt. 697) 311 at page 322, part of the argument of the appellant is that the prosecution has not fixed the action or the inaction of the accused with the death of the deceased.

"In other words he is apparently complaining that the settled principle that the guilt of an accused must be established beyond reasonable doubt has not been followed in the instant case. Before addressing that contention, it is necessary to refer to the principles that ought to guide a court when considering a charge of conspiracy laid against an accused."

Also Willes J. in *Mulcahy v. R.* [1868] 3 H.L. at 317 stated the principle thus:

"A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced "if lawful, punishable if for a criminal object or for the use of criminal means."

In *Njovens & Ors v. The State* [1973] N.S.C.C, 280 Coker J.S.C. thus:

"The overt act or omission which evidence conspiracy is the actus reus and the actus reus of each and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius Caesar, were seen together coming out of the same place at the same time and indeed conspirators need not know each other. See R. v. Meyrick & Ribuff [1929] 21 C.A.R. 94. They need not all have started the conspiracy at the same time for a conspiracy started by some persons may be joined at a later stage by others. The gist of the offence of conspiracy is the meeting

of the mind of the conspirators. This is hardly capable of direct proof for the offence of conspiracy is complete by the agreement to do the act or make the omission complained about. Hence, conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common between them and in proof of conspiracy the acts or omissions (and or Commissions) of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators. It is therefore, the duty of the court in every case of conspiracy to ascertain as best as it could the evidence of the complexity of any of those charged with that offence."

Even from the statement of the appellant, I think the Courts below were right to have held that a prima facie case was established against him calling upon him to face his trial. The same goes for the charge of murder. From, the statements of Aminu and Katako, and the admissions made by the appellant himself in his statements to the Police, I cannot see how the appellant would not be called upon to explain his conduct with regard to counts 3 & 4. He readily admitted that he gave ten thousand U.S. dollars to each of them to flee the country and escape justice. Is that the conduct of a person who had nothing to hide? Surely, it cannot be right to say that he has no explanation to make in respect of that conduct. Moreso that the murder of Kudirat Abiola is a well-known fact in this country and beyond. It is for the reasons given herein that I am unable to go along with my learned brothers to allow the appeal. On the facts here except *Ikomi v. State* (supra) is not being followed, the proper order to make here is to dismiss the appeal. The facts here are glaringly much stronger than in *Ikomi* (supra) where this Court refused to quash the information and ruled that *Ikomi* must face his trial. To hold otherwise, is, in my respectful view, to submit to the tyranny of the majority in its capricious interpretation of settled principles laid down in *Ikomi v. The State* (supra).

I have before now set out the facts in this case and went on to identify the specific facts which in my humble view linked the appellant to the offence. Apart from all that, the statement of the appellant must also be considered in the determination of whether or not he should be called upon to face the offences for which he has been

charged. From the proofs which I have discussed in this case, including the proof of the offence of conspiracy, I think the Courts below were right to have held that prima facie case was established against the appellant that should lead to his facing his trial for the offence of conspiracy and murder.

- B For the avoidance of doubt, I wish to restate that I am unable to subscribe to the majority decision of my brethren in this matter. I will therefore dismiss the appeal in its entirety and it is dismissed accordingly. I do not consider that it is proper in all the circumstances to
- C take the view that the appellant should not face his trial with the other persons for the offences for which he was charged in the information before the trial Court.

D

E

F

G

H