

SUPREME COURT OF NIGERIA
FRIDAY 10TH JANUARY, 2003. SC. 392/2001
CORAM:- I. L. KUTIGI, U. MOHAMMED, U. A. KALGO,
A. O. EJIWUNMI, E. O. AYOOLA, JJSC

MILTON P. OHWOVORIOLE, SAN APPELLANT
V.

1. FEDERAL REPUBLIC OF NIGERIA
2. ALHAJI MIKA ANACHE
3. CHIEF ADEBIYI OLAFISOYE RESPONDENTS
4. MR. ADEYEMI OMOWUNMI

CHARGES - Preferment - Application - Contents - Under the HC Rules - Application for leave must be accompanied by copy of the charge to be preferred - Names of witnesses - And proof of evidence (H1)

COURTS - Discretion - Charge - Application to prefer - Trial Judge has discretion to grant or refuse leave to prefer charge - But such must be exercised judicially and judiciously (H2)

CRIMINAL PROCEDURE - Charge - Evidence - From the proof of evidence - And statement of accused in the application to prefer the charge - There is no evidence linking appellant with the offence (H3)

COURTS - Discretion - Charge - Trial court wrongly exercised its discretion in granting leave to prefer the charge - As it considered matters which were not before it - And CA wrongly upheld the decision (H4)

APPEALS - Court - Discretion - Interference - Where trial court based its discretion on matters extraneous to issues before it - Or failed to consider relevant facts - Supreme Court can interfere (H5)

APPEALS - Court - Record of proceedings - Non production of - Will not affect the substance of the appeal - As appellant was not hiding anything - Which was not to his advantage (H6)

FACTS

Attorney-General of the Federation (prosecutor/1st respondent) applied to the High Court, Abuja for leave to prefer a charge against accused persons i.e. appellant and 2nd - 4th respondents under section 185(b) of the Criminal Procedure Code of Northern Nigeria. The application which was made ex parte was considered and granted by the trial Judge. The Federal Government of Nigeria had set up a Judicial Commission of Inquiry to investigate the management of the Nigeria Airways Limited. In the course of the investigation, criminal allegation was made against appellant (who is a Senior Advocate of Nigeria and counsel to 4th respondent).

In the said charge, appellant was jointly charged in counts I and II with 3rd and 4th respondents for conspiracy and giving gratification of N3.5 million to 2nd respondent contrary to section 9(1) of the Corrupt Practices & other Related Offences Act 2000. Thereafter appellant filed a motion praying the court to quash the charge preferred against him on the grounds that the offence alleged therein is not disclosed by the statements of witnesses or proof of evidence filed in the court and that the charge is an abuse of the process of court. After considering the application, the court in its ruling held that a prima facie case has been made out against appellant. Hence, appellant's application was dismissed. Appellant appealed unsuccessfully to the Court of Appeal. Appellant has further appealed to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in holding that the discretion of the learned trial Judge in granting leave to prefer the charge against the appellant was exercised in accordance with law."

HELD (Unanimously allowing the appeal per **KALGO JSC**)

CHARGES - Preferment - Application - Contents

1. An application for such leave is made pursuant to the provisions of the Criminal Procedure Code (Application to prefer a charge in the High Court) Rules 1970. Under the said rules the application must be accompanied by a copy of the

charge sought to be preferred, names of witnesses who shall give evidence at the trial and proof of evidence (written statements) which shall be relied upon at the trial. The applicant must also inform the court that no application for such leave has been made previously in the case and that no preliminary inquiry is being conducted in the matter by any magistrate court. By virtue of the said rules, the learned trial Judge had the discretion to grant or refuse the application. (p. 523 A)

COURTS - Discretion - Charge - Application to prefer

2. There is no doubt that the learned trial Judge has the discretion to grant or refuse leave to prefer the charge but the discretion as usual, must be exercised judicially and judiciously. In that exercise, he must ensure that he has taken into consideration all the materials placed before him including the relevant law applicable thereto. (p. 523 H)

Charge - Evidence

3. I have carefully examined the proof of evidence and the statements of the accused persons placed before the trial Judge in the application to prefer the charge on the 22nd of May, 2001 and find that there is no evidence at all implicating or linking the appellant with the offence charged against him. In his statement, the appellant categorically denied the N3.5 Million bribe.

I have earlier held in this judgment that I find no evidence linking the appellant with the offence charged against him and therefore no prima facie case has been established justifying the proceeding of the criminal trial against him. (p. 525 H)

COURTS - Discretion - Charge

4. Therefore, if on the 22nd of May, 2001, when the learned trial Judge granted leave to prefer the charge against the appellant, the evidence per paragraphs 4 and 5 of the counter-affidavit of Mr. Obuotor was not available or placed before the trial court, what was before him would be insufficient, in my view, to link the appellant with the offence and give ground for proceeding against him. It is not the duty of the Court of

Appeal to fish or scuttle around for evidence or to go to the extent of presuming the same when a party fails to produce it.

In the U.B.A. v. GMBH case (supra) this court held that the discretion of court is not an indulgence of a judicial whim but the exercise of judicial judgment based on facts and guidance by law. In the instant case, it is clear to me that the learned trial Judge considered matters which are not before him at the time of exercising his discretion and he therefore exercised his discretion on wrong principles or considerations. This therefore, makes it wrong for the Court of Appeal to uphold the decision of the trial court as it did. (p. 527 B)

Court - Discretion - Interference

5. This appeal clearly touched on the exercise of discretion of the trial Judge as confirmed by the Court of Appeal. This court as an appeal court would very rarely, if at all, normally interfere with such a decision as the court is not entitled to substitute its own discretion for that of the trial court. But where the trial court based its exercise of the discretion on matters extraneous to the issues before him, or failed to take relevant facts into consideration, the exercise of the discretion will not be bona fide and this court will be entitled to interfere. (p. 527 F)

Court - Record of proceedings - Non production of

6. On the issue of non-production of the record of the trial court's proceedings of 22nd May, 2001 by the appellant in the Court of Appeal and the application of section 149(d) of the Evidence Act against the appellant, I do not think that this would in any way affect the substance of this appeal. In fact, the supplementary record was filed in this court on the issue and it confirmed clearly that the learned trial Judge made no effort to call for or inspect the case diary on the matter. The appellant was therefore not hiding anything which was not to his advantage for not producing the said record of proceedings. On the contrary it would be useful to him to produce it. Here again, it is my view, that the Court of Appeal was wrong to presume that the non-production of the record should be

reckoned as being unfavourable to the appellant and affecting the merit of his appeal. (p. 528 F)

REPRESENTATION

Ademola Akinrele. SAN with C. Oghekene, E. O. Ohwovoriole and O. J. Okere, for the Appellant B
C. I. Onuagu [Mrs.] Assistant Director with O. O. Fatunde [Mrs.], Chief Legal Officer, O. Obiakor, Legal Officer I, B. Taiwo, Legal Officer I, Shehu Yahaya, Legal Officer I, George Lawai, Legal Officer II, Yusuf Olatunji, Legal Officer II), for the Respondents C

CASES REFERRED TO

U.B.A. Ltd v. Stahlabau GMBH & Co. KG (1989) 3 NWLR (pt. 110) 374
R. v. Ajidagba (1958) 3 FSC 5 D
Bank of Baroda v. Mercantile Bank (Nig.) Ltd. (1987) 3 NWLR (pt. 60) 233
Bakare v. A.C.B. Ltd. (1986) 3 NWLR (pt. 26) 47
Adejumo v. Ayantegbe (1989) 3 NWLR (pt. 110) 417
Jammal Engrn. Co. Ltd v. Misr Nig. Ltd. (1972) 1 All NLR (pt. 1) 322 E
Abacha v. State (2002) 7 SCNJ 1
Ikomi v. State (1986) 1 NSCC 730
Egbe v. State (1980) 1 NCLR 341
Sher Singh v. Jitendranathsen (1931) I.L.R. 59 Calc. 275 F

STATUTES REFERRED TO

Criminal Procedure Code of Northern Nigeria, ss. 5(2), 121, 122(1)(a), 185(b)
Criminal Procedure Ordinance, s. 286 G
Corrupt Practices & Other Related Offences Act 2000, ss. 9(1), 64
Constitution of the Federal Republic of Nigeria 1999, s. 36
Evidence Act, ss. 149(d), 166

LEAD JUDGMENT BY KALGO JSC

The appellant is a Senior Advocate of Nigeria (SAN). He was counsel for the 4th respondent who is an Insurance Broker and Chairman of Fidelity Bond of Nigeria Limited which was appointed a member of a consortium of 15 brokers that handled the Nigeria Airways H

Insurance Account. The Federal Government set up a Judicial Commission of Inquiry for the investigation of the Management of Nigeria Airways Limited (1983-1999), and it was in the course of the investigation that some criminal allegations were made against the appellant.

B On the 22nd of May, 2001, the Attorney-General of the Federation, for the 1st respondent, applied to the trial court for consent to prefer a charge against the appellant, 2nd, 3rd and 4th respondents under section 185 (b) of the Criminal Procedure Code of Northern Nigeria. The application was accompanied by a copy of the charge, C the names and addresses of witnesses and the proof of evidence which shall be relied upon at the trial. The application which was made ex-parte, was considered and granted by the trial court on the 22nd of May, 2001. In the charge, the appellant was jointly charged D in counts I and II with the 3rd and 4th respondents for conspiracy, and giving gratification of N3.5Million to the 2nd respondent contrary to section 9(1) of the Corrupt Practices and Other Related Offences Act 2000.

E The appellant was the 4th accused person at the trial court and on the 25th of May, 2001, he filed a motion praying the court to quash the charge preferred against him on the grounds that the offence alleged therein is not disclosed by the statements of witnesses or proof of evidence filed in that court and that the charge is an abuse of the process of court. The learned trial Judge heard the application and gave a considered ruling. F

In his ruling dated 1st June, 2001, the learned trial Judge said:

"I wish to state here that when under this process of all application to prefer a direct charge in the High Court the issue is not the same as when evidence has been adduced and the court to decide whether there is prima facie cases(sic). However, the prima facie case here is that which the court is only to be satisfied (sic) that some explanation is required from the accused. See the old cases of Queen v. Ojuwa Ogucha 4 FSC 64; (1959) SCNLR 154. Ajidagba v. Insp. Gen. of Police (1958) 3 FSC 15; (1958) SCNLR 60, where it was held that what is meant by prima facie case, it only means there is ground for proceeding.

In view of the foregoing and having regard to the charge and the written statement of the 4th accused, I have come to the conclu-

sion that there exists that ground to proceed against the 4th accused via a trial."

The application of the appellant was therefore dismissed. He appealed to the Court of Appeal on 3 grounds. On the 5th of June, 2001, the appellant through his counsel, filed an application in the Court of Appeal praying inter alia, for court orders

(i) Granting him leave to use a bundle of documents as the record of appeal,

(ii) Dispensing with the filing of briefs by the parties to the appeal and

(iii) For accelerated hearing of the appeal, under the relevant rules of that court. The Court of Appeal granted these prayers accordingly. The appeal was then immediately heard and by a unanimous decision delivered on the 19th of June, 2001, the Court of Appeal per Oduyemi, JCA (and concurred by Musdapher and Mangaji, JJCA) held:-

"Having held earlier in this judgment that the learned trial Judge was right in holding that there was ground for proceeding with the trial of the appellant herein, I find no merit in this appeal. I dismiss the appeal."

The appellant was displeased with this decision and he appealed to this court on eight grounds. In this court, written briefs were filed and exchanged between the appellant and the 1st respondent. The 2nd, 3rd and 4th respondents, who appear to be nominal parties to this appeal, did not file any briefs. The appellant also filed and exchanged a reply brief.

It is pertinent to observe that both the appellant and the 1st respondent agreed in their respective briefs that there is only one issue which arises for determination of this court in this appeal. The issue as formulated by the appellant reads:-

"Whether the Court of Appeal was right in holding that the discretion of the learned trial Judge in granting leave to prefer the charge against the appellant was exercised in accordance with law."

This issue, as can be read from its wording, deals with the way the learned trial Judge exercised his discretion in granting leave to the prosecution to prefer the charge against the appellant. In the copy of the charge which was attached to the application to prefer a charge under section 185(b) of the Criminal Procedure Code (CPC),

the appellant faced two counts which read:-

Count I

"That you Mr. Adeyemi Omowunmi, Chief Adebisi Olafisoye and Mr. Milton Paul Ohwovoriole (SAN), on or about the 16th day of November, 2000, at Abuja in the Abuja Judicial Division, conspired with one another to give as gratification the sum of N3,500,000.00 (Three Million, Five Hundred Thousand Naira only) to Alhaji Mika Anache, a member of the Judicial Commission of Inquiry for the Investigation of the Management of Nigeria Airways Limited and other members of the said Commission in order to induce the members of the Commission to show favour to Chief Adebisi Olafisoye and his company, Fidelity Bond of Nigeria Limited in the discharge of the official duties of members of the Commission and thereby committed an offence contrary to section 26(1)(c) and punishable under section 9(1) of the Corrupt Practices and Other Related Offences Act 2000."

Count II

"That you Mr. Adeyemi Omowunmi, Chief Adebisi Olafisoye and Mr. Milton Paul Ohwovoriole (SAN) on or about the 16th day of November, 2000 at Abuja in the Abuja Judicial Division, gave as gratification the sum of N3,500,000.00 (Three Million, Five Hundred Thousand Naira Only) to Alhaji Mika Anache a member of the Judicial Commission of Inquiry for the Investigation of the Management of Nigeria Airways Limited and other members of the said Commission, in order to induce members of the Commission to show favour to Chief Adebisi Olafisoye and his company, Fidelity Bond of Nigeria Limited in the discharge of the official duties of the members of the Commission and thereby committed an offence contrary to section 26(1)(c) and punishable under section 9(1) of the Corrupt Practices and Other Related Offences Act 2000."

Count I charges the appellant with conspiracy with the 3rd and 4th respondents to give gratification of N3.5million to the 2nd respondent. Count II charges the appellant with giving gratification of the said amount to the 2nd respondent.

Section 185(b) of the C. P. C provides that -

*"No. person shall be tried by the High Court unless-
(b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a Judge of the High Court".*

An application for such leave is made pursuant to the provisions of the Criminal Procedure Code (Application to prefer a charge in the High Court) Rules 1970. Under the said rules the application must be accompanied by a copy of the charge sought to be preferred, names of witnesses who shall give evidence at the trial and proof of evidence (written statements) which shall be relied upon at the trial. The applicant must also inform the court that no application for such leave has been made previously in the case and that no preliminary inquiry is being conducted in the matter by any magistrate court. By virtue of the said rules, the learned trial Judge had the discretion to grant or refuse the application.

In his ruling on the application, the learned trial Judge said:

"I have considered the application on its merit and I am of the view that it is a proper case in which the court can exercise its discretion in form of the application haven (sic) complied mutatis mutandis with the provisions of section 185 (b) of the C.P.C. To that end leave is hereby granted to the applicant to prefer a direct criminal charge against the following in this court:-

1. Alhaji Mika Anache (M)
2. Chief Adebiyi Olafisoye (M)
3. Mr. Adeyemi Omowunmi (M)
4. Mr. Milton Paul Ohwovoriole (M)".

In this case, the following documents were filed with the application for leave to prefer the charge:-

- (a) A copy of the charge;
- (b) List of prosecution witnesses;
- (c) Proof of evidence (not written statements) of the said witnesses;
- (d) Written statements, under caution of all the accused persons.

It must also be understood that the provisions of section 185(b) of the C.P.C must be read with those contained in the rules governing the application to prefer a charge as in this case, and any application to quash the charge preferred by leave of the High Court must necessarily involve the consideration of those provisions.

There is no doubt that the learned trial Judge has the discretion to grant or refuse leave to prefer the charge but the

discretion as usual, must be exercised judicially and judiciously. In that exercise, he must ensure that he has taken into consideration all the materials placed before him including the relevant law applicable thereto. See *U.B.A. Limited v. Stahlbau GMBH & Co. KG* (1989) 3 NWLR (Pt. 110) 374.

B In the instant case, the relevant materials placed before the trial Judge for the exercise of his discretion are the proofs of evidence and the written caution statements of the accused persons. These are contained in the first volume of the record of appeal from pages 6 - 28. The so-called proof of evidence on pages 6 and 7 of the said record contained the names of 6 witnesses and merely stated what each witness was going to testify at the trial. In none of them was it shown that the appellant was involved in conspiring to offer the alleged bribe of N3.5 million or that he actually gave the said amount as bribe to anybody. Also, on the caution statements of the accused persons including the appellant on pages 9 - 28, none of the 3 accused persons now respondents 2, 3 and 4, said in his statement that the appellant was involved in any discussion or agreement with him to give the N3.5 million bribe or took part in actual giving of the said bribe, to any person as alleged in the charge. It was true that the 3rd respondent stated in his statement that the appellant was their counsel in the matter, and no more. The appellant, in his own statement did not deny that the 3rd respondent was his client in the matter but he vehemently denied that he discussed the issue of the N3.5 Million with any body and his client did not at any time inform him that he gave the said amount to any body in connection with this matter. The appellant also denied discussing the issue of the N3.5 Million with one Chief Adefulu whom he said wanted to tarnish his character and image as the reason for framing him in this matter.

In the proof of evidence attached to the application for leave to prefer the charge, Chief Adefulu was witness No.3 and it was indicated that:-

H *“he will testify as to:- how he came to know about the gift of N3.5 Million naira to members of the Judicial Commission of Inquiry for the Investigation of the Management of Nigeria Airways. He will also testify as to the steps he took”.*

That was all what Chief Adefulu was to say at the trial as his own evidence. There is nothing to show that the appellant or any

body else was going to be involved in the issue of the gift and no explanation of the steps he took following his knowledge of the matter. This must have kept every body in the dark particularly the trial court which cannot properly presume the involvement of any person in the whole matter. And for the court to properly exercise its discretion in this case, it must be provided with clear information as B necessary material to act upon. It cannot be presumed.

Learned Senior Advocate of Nigeria for the appellant submitted that there was no link between the appellant and the crime charged on the materials placed before the learned trial Judge on 22nd May, 2001 including the caution statement of the appellant himself. He C relied on the case of Ikomi v. The State (1986) 3 NWLR (Pt. 28) 340 at 358 where in a similar situation this court held that -

“...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 D prefer an information in the absence of such link, such information is bound to be quashed”.

The learned SAN further submitted that the Court of Appeal was wrong to conclude that the statement of the appellant that he was framed in the commission of the offence by Chief Adefulu linked E the appellant with the charge preferred for which an explanation is required. Learned counsel submitted that the appellant's statement was only a statement in exoneration of the allegations made against him in addition to his denial.

For the 1st respondent, Mrs. Onuogu the learned Assistant F Director submitted that the statement of the appellant acknowledging that he was framed in the commission of the offence by Chief Adefulu raises the presumption that he (appellant) was linked with the offence and that there was something that requires some explanation from him. This, learned counsel further submitted, will amount to “prima facie case” and gives “ground for proceeding” against the G appellant. Learned counsel relied on the cases of Ikomi v. The State (supra) and R. v. Ajidagba (1958) 3 FSC 5; (1958) SCNLR 60.

I have carefully examined the proof of evidence and the H statements of the accused persons placed before the trial Judge in the application to prefer the charge on the 22nd of May, 2001 and find that there is no evidence at all implicating or linking the appellant with the offence charged against him.

In his statement, the appellant categorically denied the N3.5 Million bribe.

In the application to quash the charge framed against the appellant, one Mr. Onome Obuotor, swore to a counter-affidavit on 1/6/2001, in which he stated in paragraphs 4 and 5 thus:-

B *“4. That by virtue of my position, I am aware of a statement made by Chief Adefulu, one of the prosecution witnesses, in which he stated that Mr. Milton Paul Ohwovoriole (SAN) had visited him and informed him that his client Chief Olafisoye had given the sum of N3.5M (Three Million, Five Hundred Thousand Naira) to Mr. Omowunmi to give to Mr. Anache to be shared by members of the*
 C *Judicial Panel Investigating the Management of Nigeria Airways.*

5. That the statement of Chief Adefulu is contained in the case diary.”

D The Court of Appeal relied heavily on these two paragraphs of the counter-affidavit particularly paragraph 5 in coming to the conclusion that the appellant was linked with the offence charged. Oduyemi, JCA who wrote the leading judgment said:-

E *“I cannot ignore paragraph 5 because that paragraph at page 61 of the record forms part of the proceedings in the lower court when the application to quash the consent was being considered - the decision on which is now the subject of this appeal”.*

F With due respect to the learned justice of the Court of Appeal, the fact that the counter-affidavit containing the paragraph 5 forms part of the trial court proceedings on appeal, is not relevant in deciding whether the appellant was linked with the offence or not, because the whole counter-affidavit was filed on 1/6/2001 whereas the consent or leave of the trial Judge to prefer the charge was granted
 G on the 22nd of May, 2001. The evidence in paragraph 5 of the counter-affidavit was not available to the learned trial Judge on the 22nd of May, 2001 when he exercised his discretion to grant leave to prefer the charge.

H It is also my respectful view that the Court of Appeal was misled by the interpretation it gave to section 122(1)(a) of the C.P.C. That subsection entitles a court to call for a case diary in a case before it and inspect it where it considers necessary. It is not automatic in all cases and it was not shown in this case that the learned trial Judge took advantage of the provisions of the sub-section. The Court of

Appeal, in reaching its decision merely presumed that during the time the trial court was considering the application for leave to prefer the charge, he called for and inspected the case diary and must have been satisfied that the evidence of Chief Adefulu therein linked the appellant with the offence charged. This was not the case here and no evidence to support that. In fact, the learned trial Judge said in his ruling that he relied on the statement of the appellant in exercising his discretion to grant the application. B

Therefore, if on the 22nd of May, 2001, when the learned trial Judge granted leave to prefer the charge against the appellant, the evidence per paragraphs 4 and 5 of the counter-affidavit of Mr. Obuotor was not available or placed before the trial court, what was before him would be insufficient, in my view, to link the appellant with the offence and give ground for proceeding against him. It is not the duty of the Court of Appeal to fish or scuttle around for evidence or to go to the extent of presuming the same when a party fails to produce it. C D

In the U.B.A. v. GMBH case (supra) this court held that the discretion of court is not an indulgence of a judicial whim but the exercise of judicial judgment based on facts and guidance by law. In the instant case, it is clear to me that the learned trial Judge considered matters which are not before him at the time of exercising his discretion and he therefore exercised his discretion on wrong principles or considerations. This therefore, makes it wrong for the Court of Appeal to uphold the decision of the trial court as it did. E F

This appeal clearly touched on the exercise of discretion of the trial Judge as confirmed by the Court of Appeal. This court as an appeal court would very rarely, if at all, normally interfere with such a decision as the court is not entitled to substitute its own discretion for that of the trial court. See Bank of Baroda v. Mercantile Bank (Nig.) Ltd. (1987) 3 NWLR (Pt. 60) 233; Bakare v. A.C.B. Ltd. (1986) 3 NWLR (Pt. 26) 47. But where the trial court based its exercise of the discretion on matters extraneous to the issues before him, or failed to take relevant facts into consideration, the exercise of the discretion will not be bona fide and this court will be entitled to interfere. G H

See Adejumo v. Ayantegbe (1989) 3 NWLR (Pt. 110) 417

at 445; Jammal Engineering Co. Limited v. Misr (Nig.) Ltd. (1972) 1 All NLR (Pt. 1) 322.

I have earlier held in this judgment that I find no evidence linking the appellant with the offence charged against him and therefore no prima facie case has been established justifying the proceeding of the criminal trial against him.

In Ikomi v. State (supra) this court clearly said 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”.

And in the recent decision of this court on a similar issue in Abacha v. The State (2002) 7 SCNJ 1 at page 35; (2002) 11 NWLR (Pt. 779) 437 at 499 this court reiterated this principle and, in the leading judgment of Belgore, JSC, in the majority decision of 4 to 1, held that:-

“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 suspicion 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”.

I adopt this statement and the principles involved therein and apply same to this appeal.

On the issue of non-production of the record of the trial court’s proceedings of 22nd May, 2001 by the appellant in the Court of Appeal and the application of section 149(d) of the Evidence Act against the appellant, I do not think that this would in any way affect the substance of this appeal. In fact, the supplementary record was filed in this court on the issue and it confirmed clearly that the learned trial Judge made no effort to call for or inspect the case diary on the matter. The appellant was therefore not hiding anything which was not to his advantage for not producing the said record of proceedings. On the contrary it would be useful to him to produce it. Here again, it is my view, that the Court of Appeal was wrong to presume that the non-production of the record should be

reckoned as being unfavourable to the appellant and affecting the merit of his appeal.

The other issue on the application of section 64 of the Corrupt Practices and Other Related Offences Act 2000 which was raised suo motu by the Court of Appeal does not appear to me to be relevant to the determination of this appeal, particularly if one looks at the provisions of section 5(2) of the C.P.C and the fact that no rules have yet been made regulating the manner or place of investigating, inquiring into trying or otherwise dealing with offences under the said Act. In any case, I consider this to be an academic exercise which does not affect the merit of this appeal and which this court does not normally entertain. For this reason, I would not say anything about it presently as it is not an issue in this appeal. B

In sum, and for all what I have said above, I answer the sole issue in this appeal in the negative. I therefore find that there is merit in this appeal and I allow it. I set aside the decision of the Court of Appeal confirming that of the trial court. I accordingly substitute an order quashing counts I and II of the charge in so far as they are preferred against the appellant in this case. C

E

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Kalgo, JSC. I agree with his conclusion to allow the appeal. The appeal is accordingly allowed. The decisions of both the Court of Appeal and that of the trial High Court are set aside. An order quashing counts I and II of the charge against the appellant is hereby substituted. F

G

MOHAMMED JSC

I entirely agree with my learned brother, Kalgo, JSC, that the proof of evidence and the statements of the accused which were placed before the learned trial Judge in support of the ex-parte application for consent to prefer a charge has provided no link between the appellant and the offence charged. In *Ikomi & Ors v. The State* (1986) 1 NSCC 730; (1986) 3 NWLR (Pt. 28) 340, this court held that the fundamental principle is that before granting a consent, a H

Judge must be satisfied that the depositions placed before him disclose an offence and that the trial would not be an abuse of process. See also *Egbe v. The State* (1980) 1 NCLR 341. It is abundantly clear that the allegation made by Chief Adefulu which was mentioned in Mr. Obuotor's affidavit was not before the learned trial Judge when he granted consent to the prosecution to prefer a charge against the appellant. Thus, at the time the learned trial Judge granted his consent there was no prima facie case established from the proof of evidence warranting the arraignment of the appellant for the offence charged. I therefore agree that the Court of Appeal was in error to hold that the learned trial Judge exercised his discretion in accordance with the law when he granted leave to the prosecution to prefer a charge against the appellant. I also agree that there is merit in this appeal and for that reason it is hereby allowed. I quash the counts I and II of the charge framed in so far as they are preferred against the appellant.

EJIWUNMI JSC

I have had the privilege of reading the draft judgment of my learned brother Kalgo, JSC and I agree that the appeal be allowed. But I wish to add a few words of my own. The proceedings in this appeal was commenced when the Attorney-General of the Federation on behalf of the 1st respondent applied on the 21st of May, 2001 to the trial court for leave to prefer a criminal charge against the appellant, 2nd, 3rd and 4th respondents under section 185(b) of the Criminal Procedure Code of Northern Nigeria. The application, which was accompanied by a copy of the charge, also had with it, the names and addresses of witnesses and the proof of evidence, which shall be relied upon, at the trial. The charge reads: -

"Count I.

That you Mr. Adeyemi Omowunmi, Chief Adebisi Olafisoye and Mr. Milton Paul Ohwovoriole (SAN), on or about the 16th day of November, 2000 at Abuja in the Abuja Judicial Division, conspired with one another to give as gratification the sum of N3,500,000.00 (Three Million, Five Hundred Thousand Naira only) to Alhaji Mika Anache, a member of the Judicial Commission of inquiry for the investigation of the Management of Nigeria Airways Limited and other

members of the said Commission in order to induce the members of the Commission to show favour to Chief Adebisi Olafisoye and his company, Fidelity Bond of Nigeria Limited in the discharge of the official duties of members of the Commission and thereby committed an offence contrary to section 26(1)(c) and punishable under section 9(1) of the Corrupt Practices and Other Related Offences Act ^B *2000.*

Count II.

That you Mr. Adeyemi Omowunmi, Chief Adebisi Olafisoye and Mr. Milton Paul Ohwovoriolè (SAN) on or about the 16th day of November, 2000 at Abuja in the Abuja Judicial Division, gave as gratification the sum of N3,500,000.00 (Three Million, Five Hundred Thousand Naira Only) to Alhaji Mika Anache a member of the Judicial Commission of Inquiry for the Investigation of the Management of Nigeria Airways Limited and other members of the said Commission, in order to induce members of the Commission to show favour to Chief Adebisi Olafisoye and his company, Fidelity Bond of Nigeria Limited in the discharge of the official duties of the members of the Commission and thereby committed an offence contrary to section 9(1)(a) and punishable under section 9(1) of the Corrupt Practices and Other Related Offences Act ^C *2000.* ^D ^E

Count III.

That you Alhaji Mika Anache on or about the 16th day of November, 2000 at Abuja in the Abuja Judicial Division, being a public officer serving as a member of the Judicial Commission of Inquiry for the Investigation of the Management of Nigeria Airways Limited, received as gratification to wit, the sum of N3,500,000.00 (three million, five hundred thousand naira only) from one Mr. Adeyemi Omowunmi for yourself and members of the said Commission as an inducement for members of the Commission to show favour to Chief Adebisi Olafisoye and his company Fidelity Bond of Nigeria Limited, in the discharge of the official duties of the members of the Commission and thereby committed an offence punishable under section 10(a)(ii) of the Corrupt Practices and Other Related Offences Act ^F ^G ^H *2000.*

Count IV.

That you Alhaji Mika Anache on or about the 16th day of November, 2000 at Abuja in the Abuja Judicial Division being a pub-

lic officer serving as a member of the Judicial Commission of Inquiry for the Investigation of the Management of Nigeria Airways Limited, received as gratification to wit, the sum of N3,500,000.00 (three million, five hundred thousand naira only) from one Mr. Adeyemi Omowunmi for yourself and members of the said Commission and failed to report the receipt of the gift to the appropriate authority and thereby committed an offence contrary to section 23(1) and punishable under section 23(3) of the Corrupt Practices and Other Related Offences Act 2000.”

On the application which was heard ex-parte, the learned trial Judge made the following order: -

“Upon hearing C. I. Onuogu (Mrs.) counsel for the applicant seeking this Hon. Court for an order for Direct Criminal Charge under section 185(b) of Criminal Procedure Code against the four accused persons namely

- (1) Alhaji Mika Anache (m)*
- (2) Chief Adebiyi Olafisoye (m)*
- (3) Mr. Adeyemi Omowunmi (m)*
- (4) Mr. Milton Paul Ohwovoriolè (SAN)(m),*

leave is hereby granted to the applicant to prefer a direct criminal charge jointly against the following in the court. (Thereafter listed the accused persons named above).”

Following the order made above, the appellant brought a motion on notice pursuant to section 36 of the Constitution of the Federal Republic of Nigeria, 1999 and section 185(b) of the Criminal Procedure Code and under the inherent jurisdiction of the court, wherein he sought for an order that the charge preferred against him, namely as the 4th accused, be quashed on the grounds that: -

- “(i) The offences alleged therein are not disclosed by the statements and/or proof of evidence before the court and*
- (ii) The said charge is an abuse of the process of this Honourable Court.”*

The application was duly supported by a 12-paragraph affidavit deposed to by one Jitobo Akanike, a legal practitioner. A number of exhibits, marked exhibits A, B, C & D were attached to the said affidavit. Upon being served with the application, the 1st respondent reacted by filing a 6-paragraph counter-affidavit deposed to by one Onome E. Obuotor. He described himself, inter alia, as a legal prac-

tioner and of the Independent Corrupt Practices and Other Related Offences Commission. In paragraph 4 thereof, he deposed thus: -

“That by virtue of my position, I am aware of a statement made by Chief Adefulu one of the prosecution witnesses in which he stated that Mr. Milton Paul Ohwovoriole (SAN) had visited him and informed him that his client, Chief Olafisoye had given the sum of N3.5 Million (Three Million, Five Hundred Thousand Naira) to Mr. Omowunmi to give to Anache to be shared by members of the Judicial Panel investigating the Management of Nigeria Airways.”

And after hearing submissions of counsel for the parties respectively on the motion, the learned trial Judge in his ruling thereon, said, inter alia-

“In the application of the prosecutor for direct trial there is attached the statement of each of the accused and in particular that of the 4th accused. The bone of contention is that there is no reference to the 4th accused in the annexure to the application by any of the co-accused and that the 4th accused also has denied the allegation. Foremost, it is pertinent for (sic) not (sic) here that care has to be taken in reviewing the evidence of each of the accused as contained in their respective statement to the Police so as not the (sic) preempt the substance of the charge itself. However, they form part of what the court should look at. I wish to state here that when under this process of an application to prefer a direct charge in the High Court the issue is not the same as when evidence has been adduced and the court to decide whether there is a prima facie case. However, the prima facie case here is that which the Court is only to be satisfied that some explanation is required from the accused. See the old cases of Queen v. Ojuwa Ogucha (1959) 4 FSC 64; (1959) SCNLR 154; Sher Singh v. Jtendrana Thsen in Gafaria Ajidagba & 4 Ors. v. Insp. Gen. Of Police (1958) 3 FSC 15; (1958) SCNLR 60, where it was held that what is meant by prima facie case, it (sic) only means that there is ground for proceeding. In view of the foregoing and having regard to the charge and the written statement of the 4th accused, I have come to the conclusion that there exists that ground to proceed against the 4th accused via a trial.”

Thereafter the objection of the appellant was overruled by the learned Judge. Being dissatisfied with the ruling and the order made thereby, the appellant was compelled to appeal to the court below.

This appeal was dismissed and he has further appealed to this court. Pursuant thereto, briefs were filed and exchanged. As it is clear from the briefs that the 1st respondent agrees with the sole issue identified in the appellant's brief for the determination of the appeal, and as I also agree with them on this, that issue will not be set down. Therefore he considered to determine the merits of this appeal. And it reads: -

"Whether the Court of Appeal was right in holding that the discretion of the learned trial Judge in granting leave to prefer the charge against the appellant was exercised in accordance with the law."

The thrust of the argument made on his behalf by his learned counsel against the judgment of the Court of Appeal would be better appreciated also by referring to that part of the judgment of the lower court where the judgment of the Court of Appeal per Oduyemi, JCA, who delivered the leading judgment with which Musdapher, JCA (as he then was) and Mangaji, JCA, concurred wherein the court reasoned thus: -

"The further and better affidavit filed on 8th June, 2001 in this court does not contain a certified true copy of the record of proceedings in question. No explanation is in respect of the absence of that record of proceedings in the further and better affidavit in question."

And after referring to the provisions of section 152 of the Criminal Procedure Law, he continued thus: -

"One is bound in the circumstances to ask whether the omission of the record of proceedings of the lower court at its sitting on 22nd May contained any reference to the inspection of the case diary by the Judge of the lower court or some other evidence which, if produced along with the further and better affidavit filed in this court on 8th June, 2001 would be unfavourable to the appellant. See section 149(d) of the Evidence Act, Cap. 112, LFN, 1990. I answer the question in the affirmative. In the event, I am satisfied and I hold that:-

The proceedings for consent of the lower court having been held under the provisions of section 185(b) of the Criminal Procedure Code, the learned Judge of the lower court was satisfied that there was sufficient ground for proceeding before the court caused process (sic) to issue for the attendance of the appellant for the pur-

pose of trying the offences in the charge. I also hold that the learned Judge of the lower court exercised the judicial discretion vested on him judiciously. In the event, I answer the only question for determination in this appeal in favour of the 1st respondent."

It is thus clear from a careful reading of the judgment of the court below, particularly, the above quoted portion from the judgment of Oduyemi, JCA, that the Court upheld the ruling of the lower Court. It being the view of the court that the learned trial Judge exercised his discretion judiciously in acceding to the prayer of the 1st respondent to prosecute the appellant. It is, however, the submission of the appellant that the court below was wrong to have upheld the ruling of the trial court. The contention of the appellant being that the trial Judge wholly failed to exercise his discretion judiciously having regard to the facts and the relevant law. On the other hand, the respondents in the respondents' brief have argued that the court below was right to have upheld the ruling of the trial court. Now it is common ground between the parties that what was before the trial court was an application for leave to prefer a criminal charge under section 185(b) of the Criminal Procedure Code to prefer a criminal charge against four accused persons which included the appellant. The thrust of the argument made out for the appellant in his brief and the oral argument before this court is that the 1st appellant was not linked with the commission of any of the charges laid against him by the 1st respondent. In this regard, the appellant contends that the decision of the trial court and its affirmation by the court below is contrary to the decision of this court in *Ikomi v The State* (1986) 3 NWLR (Pt. 28) 340. It is also the submission of learned counsel for the appellant that as the trial court wrongly based its decision on *Ajidagba & Ors. v. I.G.P.* (1958) 3 FSC 5; (1958) SCNLR 60 the court below also fell into error in affirming that decision of the trial court.

As both parties placed reliance on the above cases to justify their respective contention, I need to consider the principles set down in the two cases. The case of *Ajidagba & Ors. v. I.G.P.* (supra) will be considered first. Briefly, the facts in that case are as follows: -

The appellants were charged in the Magistrate Court for assault and conduct likely to cause a breach of the peace as a result of political disorder at Ijebu-Ode during which persons were assaulted

and beaten. Four out of the six prosecution witnesses who belonged to the political party in power in the Western Region gave evidence implicating the two appellants who belonged to the opposition party. But the other two material witnesses for the prosecution gave no evidence implicating the appellants. The Magistrate at the close of
 B prosecution case upheld the appellants' no case submission under section 286 of the Criminal Procedure Ordinance. The prosecution appealed to the High Court and a new trial was ordered. The appellants then appealed further to the Federal Supreme Court. The issue
 C raised before the Court was whether the learned Magistrate was right in deciding that a case had not been made out sufficiently against the appellants to require each of them to make a defence. The court after due consideration of the question so raised, held as follows: -

"Section 286 of the Criminal Procedure Ordinance reads as follows:

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

E *It is plain from the language of that section (particularly when one looks at the first two lines of the following section) that a Magistrate is under a duty to discharge an accused person if he finds that no prima facie case has been made out against him. We have been at
 F some pains to find a definition of the term "prima facie case".*

The term, so far as we can find has not been defined either in the English or in the Nigerian Courts. In an Indian case, however, *Sher Singh v. Jitendranathsen* (1931) I.L.R. 59 Calc. 275, we find the following dicta:

G *"What is meant by a 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'. (per Grose, J.) and 'the evidence discloses a prima facie case when it is such that if uncontradicted and
 H if believed it will be sufficient to prove the case against the accused.' (Per Lord-Williams, J).*

In the case now before us, it is plain that the evidence of the first four witnesses for the prosecution (sufficient, certainly, if uncontradicted and believed, to prove the case against the appellants) was,

in fact both contradicted by the evidence of the PW.7 and PW.8 and disbelieved by the learned trial Magistrate. A decision to discharge an accused person on the ground that a prima facie case has not been made against him must be a decision which, upon a calm view of the whole evidence offered by the prosecution a rational understanding will suggest, the conscientious hesitation of a mind that is not influenced by party, preoccupied by prejudice or subdued by fear.” B

This principle has been followed in our courts in criminal trials. In this regard, I will also refer to the case of *In Re Maiduguri* (1961) 2 SCNLR 341 at 346; (1961) 1 ALL NLR 673 where at pages 678-679, Ademola, CJF said; C

“At the stage when the prosecution closed its case, the question for the Judge was not whether the amount of evidence against the accused persons was enough to secure convictions, but whether there is evidence given against them - circumstantial or direct - enough to put them on their defence, or requiring some explanations from them. This point was considered in the case of R. v.Coker (1952) 20 MLR 62 at p. 63, and this court has sufficiently dealt with it in the case of R. v. Ogucha (1959) 4 FSC 64 at p. 65 (1959) SCNLR 154.” D

The principles set down in the above cases were with due respect set down deliberately to emphasise that the case relied upon by the learned trial Judge becomes applicable on the trial of criminal cases only when evidence had been led at the trial and when the prosecution had closed its case. At that stage, the defendant may, if he so wishes, make a submission to the effect that the prosecution by the evidence led in support of the charge had not established a prima facie case to call upon him to make a defence to the said charge. The court is then called upon to make a ruling thereon. However, where as in the instant case, the prosecution had not called any evidence and had only filed the various statements in support of the charge seeking leave to prosecute the accused, then different principles apply. Therefore, where as in this case, the defence is contending that the offences alleged in the charge have not disclosed by the statements and for proof of evidence before the court, then the court has to consider the position upon the principle laid in *Ikomi v. The State* (1986) 3 NWLR (Pt. 28) 340. In that case, the appellant was charged with the offence of murder. The prosecution then sought the leave of court to prefer an information against the appellant but the appellant E
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then moved the court to quash it for reasons not dissimilar to that raised in the instant case. On appeal to this court, this court had to consider whether upon the statements and for proofs of evidence filed with the information, the appellant could be made to stand his trial upon the evidence for which he was charged. Nnamani, JSC in the course of this judgment after a review of authorities relevant for the determination of the question, said at p. 358 thus:-

“The next principle is of course that even if the deposition 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.”

See also *Abacha v. State* (2002) 7 SC (Pt. 1) 1; (2002) 11 NWLR (Pt. 779) 437. It is therefore, clear that where the prosecution sought to prosecute a person for an offence with leave of the court, it is manifest that it must be established that

(i) An offence was committed

(ii) It must be shown by the proofs of evidence or statements filed pursuant to the application that the accused person was linked with the offence.

Later in the same judgment, Nnamani, JSC clarified the principle further when his Lordship at page 360, said:-

“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 on the information?” (Italics mine).

In the instant case, therefore, the question that ought to be asked is, whether from the proofs of evidence and statements attached to the application before the trial court, is it probable that the appellant was linked with the commission of the charges laid against him?

The appellant has contended that the proof of evidence and the statements made available to the trial court by the 1st respondent, it was not established that he was linked with any of the charges.

But for the respondent, it was argued that there was such a link between the appellant and the commission of the offences for which he was charged. And it is further submitted for the respondent that the court below was right to have upheld the ruling of the trial court. In this regard, it is pertinent to refer again to the judgment of the court below. It is clear that in the judgment reference was made, and quite properly, to the statement and the proofs of evidence filed by the 1st respondent, pursuant to the application to the trial court. The learned Justice of the Court of Appeal, then made a further reference to paragraph 5 of the counter-affidavit filed by the respondent as part of its response to the application of the appellant to quash the charges against him. The said paragraph 5, reads inter alia:-

“That the statement of Chief Adefulu is contained in the case diary.”

The court below per Oduyemi, JCA, then continued thus: -

“I cannot ignore paragraph 5 of the proceedings in the lower court when the application to quash the consent was being considered - the decision on which is the subject of this appeal.”

After making this statement, he then proceeded to consider the argument as to whether the trial court considered the above statement contained in a diary with the 1st respondent. In the course of its consideration of the position the court ought to take, reference was made to sections 121 and 122 of the Criminal Procedure Code and also to section 64 of the Corrupt Practices and Other Offences Act No.5 of 2000. I do not consider it necessary to refer to sections 121 and 122 of the Criminal Procedure Code but would refer briefly to section 64 of the corrupt practices and other Related Offences Act 2000 for an account of the court below. Observation of the provisions of the said section 64 of the Act reads thus: -

“It is obvious that the section devises a special procedure to protect the identity of informers and of information from the public but that such identity notwithstanding have to be revealed in court to both the trial Judge and the defence lawyer in attendant in any civil, criminal or other proceedings in any court or tribunal.”

Also, in answer to a question from the court as to whether the contents of the diary referred to in the 1st respondent's counter-affidavit formed part of the statements forwarded to the trial court learned counsel for the 1st respondent answered in the negative.

When asked further why it was not sent, learned counsel replied that the 1st respondent was not obliged to do so by virtue of section 64(1) (*supra*). But for my comments on that submission, I will only refer to S.64(1) which reads:-

B *“Subject to sub-section (2), where any complaint made by an officer of the Commission states that the complaint is made in consequence of information received by the officer making the complaint, the information referred to in the complaint and the identity of the person from whom information is received shall be secret between the officer who made the complaint and the person who gave the information, and everything contained in such information, identity of the person who gave the information and all other circumstances relating to the information, including the place where it was given, shall not be disclosed or be ordered or required to be disclosed in public but only to the trial Judge and the defence lawyer in attendance in any civil, criminal or other proceedings in any court or tribunal.”*

Against the contention of learned counsel for the 1st respondent, it is the submission of learned counsel for the appellant that there is nothing novel in the provisions of section 64 of the Corrupt Practices and Other Related Offences Act 2000. This is because section 166 of the Evidence Act makes provisions that are not dissimilar. And it reads: -

F *“No Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no officer employed in or about the business of any branch of the public revenue shall be compelled to say when he got information as to the commission of any offence against the public revenue.”*

G I think that the learned counsel for the appellant is right in his submission that the provisions of section 40 of Corrupt Practices and Other Related Offences Act 2000 is not novel as such in our laws. True enough, the scope of the protection given to those working for the Commission has been increased. Be that as it may, the question H here is, whether in determining whether the appellant should be put to face his trial, the court has to consider only the statements and/or proof of evidence placed before it. It is obvious from the record that the trial court did not have that statement allegedly attributed to a Chief Adefulu before it. I do not consider it proper also for the court

below to have referred to what was not before the trial court to determine the appeal before it. In my view, the duty of the court in such circumstances is to examine the statements and the proofs of evidence filed in support of the application made before the trial court 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. In this regard as the application was heard *ex-parte*, and therefore taken as it were behind the accused person, the court below ought to examine carefully the materials before it, and should not place a greater burden than necessary on the person accused. B
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Having considered all the matters raised in this appeal, it is my view that the statements and proofs of evidence filed pursuant to the application before the trial court did not establish that the appellant was linked with the committing of the offence for which he was charged. I will therefore for all the reasons given above, and the fuller reasons in the judgment of my brother Kalgo, JSC, uphold this appeal and set aside the judgment of the Court of Appeal. It is also ordered that the charges against the appellant be quashed accordingly. D
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AYOOLA JSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother Kalgo, JSC. I find that there is merit in this appeal and I too allow it. I set aside the decision of the Court of Appeal confirming that of the trial court. I also quash counts I and II of the charge as they are preferred against the appellant in this case. Appeal allowed. F
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