

SUPREME COURT OF NIGERIA

2nd MARCH, 2007 SC. 147/2005

**CORAM:- A. I. KATSINA-ALU, U. A. KALGO, G. A. OGUNTADE,
M. MOHAMMED, F. F. TABAI, JJSC**

AMINU MOHAMMED APPELLANT
V
THE STATE RESPONDENT

CRIMINAL PROCEDURE - No case submission - Appeals - Trial de novo - Mere fact of need to begin the trial afresh - Will not invalidate pending appeal - Which if it succeeds will terminate the trial de novo (H1)

CRIMINAL PROCEDURE - Prima facie case - Consideration of - Court is bound to confine itself - To evidence tendered in court - And not statements contained in the proof of evidence (H2)

CRIMINAL PROCEDURE - Prima facie case - No case submission - There is sufficient evidence in this case - To justify lower court's finding - That prima facie case is made out against appellant (H3)

FACTS

Appellant and another were charged before the Lagos State High Court with conspiracy to commit murder and attempted murder. The prosecution called 5 witnesses and tendered 6 Exhibits. At the close of the prosecution's case counsel for appellant and 2nd accused each made a no case submission. In his ruling on the 4-3-2003, the trial judge held that the prosecution established a prima facie case against both accused persons and overruled the no case submission.

Appeal to the Court of Appeal against the trial court's judgment was rightly dismissed, but based on a wrong principal. Being dissatisfied appellant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

whether the Court below was right to affirm the Ruling of the trial court rejecting the no case submission.

HELD (Unanimously dismissing the appeal per **TABAI JSC**)

No case submission - Appeals

1. It does not matter whether the Appellant is already being tried de novo or shall be subjected to trial de novo by another Judge. The question is whether, in the circumstances, the appeal is useless for all practical purposes. The totality of the evidence of the prosecution up to the end of its case is contained in the record. The address of counsel in support of the no case submission is also in the record.

This Court is being urged in this appeal to reverse the decisions of the two courts below and to substitute therewith a ruling that at the close of the prosecution's case it established no prima facie case against the Appellant. It is my respectful view therefore that if this Court sustains the no case submission and substitutes therewith, a ruling discharging the Appellant, he can no longer be tried de novo by Ogunmekan J or any other Judge of the High Court of Lagos State. A plea of *autrefois acquit* would then be successfully raised to terminate the trial de novo.

In the light of the foregoing, I hold that the Appellant is at liberty to pursue this appeal. The result is that the preliminary objection is misconceived and it struck out for lack of merit. (p. 1388 A/ E)

Prima facie case - Consideration of

2. In coming to the conclusion that there was a prima facie case against the Appellant the Lower Court adopted the principle in the Indian Case of *SHERSINAGH V JITEND - v DRANTHEN* (1931) 1 LR 59 call 275 and *AJIDAGBA v INSPECTOR-GENERAL OF POLICE* (1958) SCNLR 60 and relied on statements contained in the proof of evidence. I think there is substance in the complaint of the Appellant in this regard. Section 286 of the Criminal Procedure Act earlier reproduced above states amply of the evidence in support of the charge. And evidence in section 286 of the Criminal Procedure Act means no less than that tendered in court and

tested or liable to be tested in cross-examination and is quite distinct from statements contained in the proof of evidence. I am persuaded by learned counsel for the Appellant that in considering whether or not there was a prima facie case against the Appellant, the Court below was bound to confine itself to the evidence, strictly so called, tendered in court.
(p. 1391 B)

Prima facie case - No case submission

3. However I am of the view that apart from the extraneous evidence complained of, there is sufficient evidence to justify a finding of they're being a prima facie case. The totality of the evidence shows that the Appellant traveled with others from Abuja by air to Lagos went to several places in Lagos in a vehicle and finally to the spot where the gun shots were fired at Senator Abraham Adesanya. There were no doubts some discrepancies which details I shall not highlight now. The ease is being or to be tried de novo at/the Lagos State High Court by another Judge. A detailed discussion on the evidence and all the issues raised by learned counsel for the Appellant might be prejudicial to the fair trial of the Appellant in the trial de novo and I shall, therefore, refrain from doing so. Suffice it to hold, in the circumstances, that there was prima facie case against the Appellant. (p. 1391 F)

REPRESENTATION

James Ocholi with him Charles Chimeji for the Appellant.

Mrs. Olaide Olayinka Solicitor-General Lagos State with Mrs. J. Gbadebo, D.P.P and Mrs. M.O. Asumah, Chief State Counsel for the Respondent.

CASES REFERRED TO

Gmbh & anor v Al-Shark Contracting and Trading Co. Ltd (2001) 3 W.R.N. 22 at 29

Global Transport Oceanic S.A. & anor v Free Enterprises Nigeria Ltd (2001) 12 W.R.N. 136 at 152

Iweka v Scoa (2000) 3 Sc 21 at 29

Engineer Raphael Jimoh & Ors v Chief Rex Kola Olawoye (2003) 10

N.W.L.R. (Part 828) 307 at 332

Nwali v Inspector-General of Police (1956) 1 ERMLR 1

Inspector-General of Police v Marke 2 FSC 5

R v Coker 20 NLR 62

B Duru V Nwosu (1989) 1 NWLR (Part 113) 24 at 43

Ubanatu v Commissioner of Police (2000) 1 SC 133 at 37

Igbi v State (2000) 3 NWLR (Part 648) 109

Onagoruwa v the State (1993) 7 NWLR (Part 203) 149

C Oduneye v the Sate (2001) 2 NWLR

Shersinagh v Jitend v Dranthen (1931) 1 LR 59 Call 275

Ajidagba v Inspector-General of Police (1958) SCNLR 60

STATUTE REFERRED TO

D Criminal Procedure Act Cap. C41 LFN 2004, s. 286

LEAD JUDGMENT BY TABAI JSC

The Appellant and one other person were charged at the Lagos State High Court for conspiracy to commit murder and attempted murder. The prosecution called five witnesses and tendered 6 Exhibits all of which were statement of witnesses and the 2nd accused person At the close of the prosecution's case learned counsel for the Appellant and the 2nd accused each made a no case submission and the learned counsel for the prosecution replied. On the 4/3/2003 the learned trial Judge Bode Rhodes-Vivour J (as he then was) held that the prosecution established a prima facie case against each of the Appellant and 2nd accused. The no case submission was therefore overruled. In the ruling the learned trial Judge said:

"Evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused person."

H The appeal against the above to the Court below was dismissed by its judgment of the 12/7/2004. This appeal is against that judgment. Before this Court, briefs of argument have been filed and exchanged. Ocholi James prepared the Appellants Brief and it was filed on the 15/9/05. He

also prepared and filed The Appellant's Reply Brief on the 1/12/2006. The Respondent's Amended Brief of Argument was prepared by Olaide Olayinka (Mrs.) learned Solicitor-General Lagos State. It was filed on the 27/11/06. Embodied therein is a Notice of Preliminary Objection.

Let me deal first with the preliminary objection. The facts based thereon are not in the record of appeal. They however represent a factual situation, which cannot be ignored. The factual situation is that the learned trial Judge Bode-Rhodes-Vivour J (as he then was) heard the case up to the end of the prosecution's case. Upon the no case submission presented by learned counsel for each of the two accused persons, he decided that there is prima facie case against each of the appellant, and the other accused person and called on each of them to defend himself. Meanwhile, when the appeal was pending, the learned trial Judge was appointed a Justice of the Court of Appeal and has since resumed there.

Consequent thereupon, the case has been reassigned to another Judge, Ogunmekan J for trial de novo which, according to the learned Solicitor-General has since begun. The submission of the learned Solicitor-General is that in the face of the trial before Ogunmekan J, all the proceedings before Hon. Justice Rhodes-Vivour including the no case submission and the Ruling thereon have abated and therefore that the appeal before this Court is a mere academic exercise having been overtaken by events. The learned Solicitor-General cited GMBH & ANOR v AL-SHARK CONTRACTING AND TRADING CO. LTD (2001) 3 W.R.N. 22 at 29; GLOBAL TRANSPORT OCEANIC S.A. & ANOR v FREE ENTERPRISES NIGERIA LTD (2001) 12 W.R.N. 136 at 152; IWEKA v SCOA (2000) 3 SC 21 at 29 on the meaning of trial de novo and on the duty of courts to refrain from embarking on academic exercise.

Ocholi James in the Appellant's Reply Brief argued that the issue of this appeal being a mere academic exercise does not emanate from the record of appeal and relied on ENGINEER RAPHAEL JIMOH & ORS v CHIEF REX KOLA OLAWOYE (2003) 10 N.W.L.R. (Part 828) 307 at 332.

I have carefully considered the submission of both counsel and it

appears to me that both of them missed the little but tricky point being raised in this objection. **It does not matter whether the Appellant is already being tried de novo or shall be subjected to trial de novo by another Judge. The question is whether, in the circumstances, the appeal is useless for all practical purposes. The totality of the evidence of the prosecution up to the end of its case is contained in the record. The address of counsel in support of the no case submission is also in the record. This Court is being urged in this appeal to reverse the decisions of the two courts below and to substitute there-with a ruling that at the close of the prosecution's case it established no prima facie case against the Appellant.** The relevant provision is section 286 of the Criminal Procedure Act Cap. C41 Laws of the Federation of Nigeria 2004 it says: -

"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 defense the court shall, as to that particular charge, discharge him."

And a discharge following a no case submission under this section has been held to be tantamount to an acquittal See *NWALI v INSPECTOR-GENERAL OF POLICE* (1956) 1 ERMLR 1; *INSPECTOR-GENERAL OF POLICE v MARKE* 2 FSC 5. **It is my respectful view therefore that if this Court sustains the no case submission and substitutes therewith, a ruling discharging the Appellant, he can no longer be tried de novo by Ogunmekan J or any other Judge of the High Court of Lagos State. A plea of *autrefois acquit* would then be successfully raised to terminate the trial de novo**

In the light of the foregoing, I hold that the Appellant is at liberty to pursue this appeal. The result is that the preliminary objection is misconceived and it struck out for lack of merit.

On the appeal itself, Ocholi James formulated five issues for determination. They are: -

1. Whether the Lower Court was correct when it decided to resort to the Statement of PW2 and PW4 in the proof of evidence to determine whether the trial court was right in holding that there was a prima facie

case for the Appellant.

2. Whether the Lower Court was right in relying on the Statement credited to the PW2 when it was not part of the evidence before the trial court and whether by so doing, it had occasioned a substantial miscarriage of justice.

B

3. Whether the Lower Court was right in affirming the decision of the trial court dismissing the no case submission of the Appellant.

4. Whether the evidence relied upon by the Lower Court in its judgment, which was lifted from, the Respondent's brief of argument was not outright distortion and framed contrary to the evidence proffered on the record of the trial court.

C

OR

Whether the Lower Court was not wrong in relying on evidence not borne out from the transcript record from the trial courts.

D

5. Whether the Lower Court was right in considering only the issues canvassed by the 2nd accused when the Appellant appeal was not consolidated with the 2nd accused's appeal.

For the Respondent the learned Solicitor-General formulated only E a single issue for determination. It is:

Whether from the totality of evidence for the prosecution the learned Justices of the Court of Appeal were right in overruling the no case submission made by the Appellant/1st accused.

F

In my consideration the Appellant's issue 3 and the Respondent's only issue can accommodate all the issues in the appeal. It is whether the Court below was right to affirm the Ruling of the trial court rejecting the no case submission.

G

It was the submission of learned counsel for the Appellant that the Court below erred when it considered and relied on the Statements of the PW2 and PW4 in the proof of evidence but which were not tendered in Court. Counsel referred to the English Practice Note issued by the Queen's Bench Division of the High Court of England contained in (1962) All ER 448; (1962) 1 WLR 227 (which has become part of our Criminal Procedure Law because of its frequent adaptation and use in our Courts of Law) and submitted that the prosecution failed to establish a prima facie H

case and the Appellant was entitled to be discharged. He relied on R v COKER 20 NLR 62; DURU v NWOSU (1989) 1 NWLR (Part 113) 24 at 43; UBANATU v COMMISSIONER OF POLICE (2000) 1 SC 133 at 37 AND OTHERS. He referred to parts of the evidence of the PW2 and PW4 and submitted that there was no evidence of conspiracy against the Appellant and that evidence of the two witnesses was even contradictory and manifestly unreliable. He relied on IGBI v STATE (2000) 3 NWLR (Part 648) 109; ONAGORUWA v THE STATE (1993) 7 NWLR (Part 203) 149.

On the 2nd count of attempted murder counsel again referred to portions of the evidence of the PW2 and PW4 and submitted that there was no evidence of participation against the Appellant. He also referred to section 7 of the Criminal Code and submitted that the mere presence of the Appellant in the vehicle was not sufficient to establish a prima facie case against him.

In her submission the learned Solicitor-General tried to justify the judgment of the Lower Court. She relied on section 11 of the Evidence Act and ODUNEYE v THE SATE (2001) 2 NWLR and submitted that there was prima facie case of conspiracy against the Appellant. As respects the second count of attempted murder she referred to the evidence of the PW2 and PW4 and submitted that there was sufficient involvement of the Appellant in the offence to warrant the conclusion of they're being a prima facie case. She urged that the appeal be dismissed.

For reasons, which I shall state hereinafter, I shall be brief in my judgment. The English Practice Note of the Queen's Bench Division at the High Court of England (supra) states:

"..... without attempting to lay down any principle of law.... as a matter of practice justices should be guided by the following considerations: A submission of no case may properly be upheld (a) when there has been no evidence to prove an essential element of the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination, or is manifestly unreliable, that no reasonable tribunal could safely convict on it. The decision to uphold or reject the submission should not depend upon whether the ad-

judicating tribunal (if compelled to do so) would at that stage convict or acquit, but upon whether the evidence is such that a reasonable tribunal convict.”

Learned counsel for the Appellant made detailed submission to show that the case of the prosecution was rendered manifestly unreliable under cross-examination. The submissions were, no doubt, quite powerful. **In coming to the conclusion that there was a prima facie case against the Appellant the Lower Court adopted the principle in the Indian Case of SHERSINAGH V JITEND - v DRANTHEN (1931) 1 LR 59 call 275 and AJIDAGBA v INSPECTOR-GENERAL OF POLICE (1958) SCNLR 60 and relied on statements contained in the proof of evidence. I think there is substance in the complaint of the Appellant in this regard. Section 286 of the Criminal Procedure Act earlier reproduced above states amply of the evidence in support of the charge. And evidence in section 286 of the Criminal Procedure Act means no less than that tendered in court and tested or liable to be tested in cross-examination and is quite distinct from statements contained in the proof of evidence. I am persuaded by learned counsel for the Appellant that in considering whether or not there was a prima facie case against the Appellant, the Court below was bound to confine itself to the evidence, strictly so called, tendered in court.**

However I am of the view that apart from the extraneous evidence complained of, there is sufficient evidence to justify a finding of they're being a prima facie case. The totality of the evidence shows that the Appellant traveled with others from Abuja by air to Lagos went to several places in Lagos in a vehicle and finally to the spot where the gun shots were fired at Senator Abraham Adesanya. There were no doubts some discrepancies which details I shall not highlight now. The ease is being or to be tried de novo at/the Lagos State High Court by another Judge. A detailed discussion on the evidence and all the issues raised by learned counsel for the Appellant might be prejudicial to the fair trial of the Appellant in the trial de novo and I shall, therefore, refrain from doing so. Suffice it

to hold, in the circumstances, that there was prima facie case against the Appellant.

The result is that the appeal lacks merit and is accordingly dismissed..

B _____

KATSINA-ALU JSC

C I have had the advantage of reading in draft the judgment of my learned brother Tabai JSC. in this appeal. I entirely agree and, for the reasons he gives I too would dismiss the appeal.

KALGO JSC

D I have had the benefit of reading in advance the judgment of my learned brother Tabai JSC, in this appeal and I entirely agree with his reasoning and conclusions reached therein. I also find no merit in the appeal and I accordingly dismisses it.

E _____

OGUNTADE JSC

F I have had a preview of the lead Judgment of my learned brother Tabai JSC just delivered. I agree that the appeal has no merit. I will also dismiss it.

MOHAMMED JSC

G I read the judgment just delivered by my learned brother Tabai, JSC in this appeal in draft before today. I agree with the reasoning and conclusion in dismissing the appeal. I also dismiss the appeal and affirm the judgment of the Court below.

H _____