

SUPREME COURT OF NIGERIA
19TH MARCH, 2010 SC. 199/2009
CORAM:- N. TOBI, I. F. OGBUAGU, J. O. OGEBE,
J. A. FABIYI, O. O. ADEKEYE, JJSC

ILIASU SUBERU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - No case submission - When to uphold - It is to be upheld where either there is no evidence - Connecting accused to alleged offence - Or the evidence is manifestly unreliable (H1)

CRIMINAL PROCEDURE - No case submission - Meaning of - It means there is nothing in the evidence - That would persuade court to compel accused to put up his defence (H2)

CRIMINAL PROCEDURE - Extrajudicial statement - Or evidence by co-accused - There is a difference between the two - An extra judicial statement remains a statement - Binding only the maker - And is not same as evidence given by co-accused at trial (H3)

CRIMINAL PROCEDURE - Evidence - Extrajudicial statement to Police - By co-accused, Exhibit 1 - Admissibility against appellant - It is inadmissible against him - Since he had no opportunity of reacting to it - As he ought to - If it was to be used against him (H4)

EVIDENCE - Admissibility - Relevancy - Whether the sole determinant factor - Relevancy is not the only yardstick for admissibility - For a document may be relevant - And still be made inadmissible by statute (H4)

FACTS

The appellant was the third accused person among four accused persons charged with the offences of criminal conspiracy and armed robbery contrary to sections 97(1) and 298 (c) of the Penal Code at the High Court of Kogi State, sitting at Okene. The prosecu-

tion called three witnesses in proof of its case and closed. None of the three witnesses of the prosecution connected appellant to the commission of the offence. However, in exhibit 1 - the extrajudicial statement of the 4th accused person - recorded by P. W. 3, the investigating police officer, mention was made of appellants' name by the accused person though it was not stated what role was played by appellant.

At the close of prosecution's case, a no case submission was made on behalf of appellant. Though the prosecution agreed on record with the no case submission, the learned trial judge overruled the submission. Aggrieved, appellant appealed to Court of Appeal but the appeal was dismissed as the court relied on exhibit 1 in particular to hold that there was a prima facie case against appellant. Still dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal. It is his contention that exhibit 1 was inadmissible against him.

ISSUE FOR DETERMINATION

“Whether the learned justices of the Court of Appeal were right to hold that a prima facie case had been established against the appellant.”

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

No case submission - When to uphold

1. It is certain that a submission that there is no-case to answer should only be upheld if any of the two situations stated hereunder prevails at the end of the prosecution's case:-

(1) When there has been no evidence connecting the accused person with the alleged offence(s).

(2) 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.

(p. 1360 G)

No case submission - Meaning of

2. A no-case submission only means that there is nothing in the evidence adduced by the prosecution that would persuade the court to compel the accused to put up his defence. (p. 1361 A)

Extrajudicial statement - Evidence by co-accused - Difference

3. The two courts below clung tenaciously to the contents of Exhibit 1, the extra-judicial statement of the 4th accused person. The said exhibit is a statement made by a co-accused.

It is imperative to state it that the court below wrongly treated Exhibit 1 as if it were evidence given by a co-accused at the trial. There is a gulf of difference between an extra judicial statement made by a co-accused which is governed by section 27(3) of the Evidence Act and evidence given by a co-accused on oath which is governed by section 178(2) of the Evidence Act. An extra judicial statement by a co-accused remains a statement and not his evidence. It is binding on the maker only. (pp. 1361 H/ 1362 D)

Extrajudicial statement to Police - By co-accused

4. The Criminal Procedure (Statement to Police Officers) Rules, 1960 which is applicable to Kogi State regulates the manner in which Police Officers are to record extra-judicial statements made by accused persons. Rule 7 (1) provides as follows:-

“When a police officer has decided to make the same complaint against two or more persons and their statements are taken separately, the police officer shall not read such statement to the other person or persons, but each of such persons shall be given a copy of such statements and nothing shall be said or done by the police to invite a reply.”

It is not on record that P.W.3 gave the appellant opportunity to react to the statement of the 4th accused – Exhibit 1. If the prosecution intended to employ Exhibit 1 against the appellant, a copy of same should have been made available to him. Since it was not made available to him, it ought not to have been used against him. Exhibit 1, in the prevailing circumstance is not a legally admissible evidence against the appellant when considering his case. (p. 1362 G)

Admissibility - Relevancy - Whether sole determinant factor

5. The court below held that Exhibit 1 was admissible against the appellant because it was relevant. With due respect, relevancy is not the only yardstick or test for admissibility. A document may be relevant and still be excluded if there is in existence a law, like the provision of section 27(3) of the Evidence Act, which renders Exhibit 1

inadmissible as against the appellant. It is akin to a deed of conveyance which though relevant in an action for declaration of title and yet may be excluded because it had not been registered. This is not a 'spurious correlation'; if I may employ the Economist's terminology. I am of the considered opinion that the court below goofed in the stance taken by it in this respect. (p. 1363 C)

NOTABLE POINT OF INTEREST

ADEKEYE JSC

1. Parties must be consistent in their case at trial and on appeal
Before considering the solitary issue raised in this appeal, I cannot overlook the nature of the case of the respondent at the trial court and before the Court of Appeal. The stance of the respondent before the lower court was a total departure from his case at the trial court. The prosecution agreed with the no-case submission of the learned counsel for the 3rd accused at the trial court but the same submission was vehemently opposed before the lower court. It is a rudimentary principle of procedure that parties must be consistent in their case at the trial court and on appeal. A party cannot be allowed to approbate and re-probate over the same issue. (p. 1371 H)

REPRESENTATION

Appellant not represented by counsel.
Y. Mahmood Esq., for the Respondent.

CASES REFERRED TO

Ngige v. Obi (2006) 14 NWLR pt. 999 pg. 1
Bozin v. State (1985) 2 NWLR pt. 8 pg. 465
Akpa v. Itodo (1997) 5 NWLR pt. 506 pg. 589
Aituma v. State (2007) 5 NWLR pt. 1028 pg. 466
Igabele v. State (2004) 15 NWLR pt. 896 pg. 314
Ojo-Osagie v. Adonri (1994) 6 NWLR (Pt.349) 131
Okoro v. The State (1988) 5 NWLR (pt. 94) 255, 285
Kankia v. Maigemu (2003) 6 NWLR (Pt. 817) 496 at 518
Adelumola v. The State (1988) 1 NWLR (Pt.73) 683 @ 693
Ozaki & Anr. v. The State (1990) All NLR pg. 94 at 116 - 117
Chukwueke v. The State (1991) 7 NWLR (pt. 205) 604 at 616
Olorunfemi v. Ors. v. Asho & Ors. (1999) 1 NWLR (Pt. 585) 1at 9

Chianugo v. The State (2002) 2 NWLR (Pt 750) 225 at 233 - 234
Gabriel Aituma v. The State (2006) 10 NWLR (Pt. 989) 452 at 473
Sunny Tongo & Anr. v. Police (2007) 12 NWLR (Pt. 1049) 525 at 539

STATUTE & RULE REFERRED TO

Evidence Act, Cap E14 L.F.N. 2004, ss. 27 (3) & 178 (2)
Criminal Procedure (Statement to Police Officers) Rules 1960, Rule 7(1)

LEAD JUDGMENT BY FABIYI JSC

This is an appeal against the judgment of the Court of Appeal, Abuja Division (hereafter referred to as 'the court below') delivered on 30th April, 2009 which upheld the decision of Olusiya, J. of the High Court of Justice, Okene, Kogi State on 28th May, 2007.

The appellant was charged along with three (3) other accused persons with the offences of criminal conspiracy and armed robbery contrary to sections 97 (1) and 298 (C) of the Penal Code. The prosecution called three (3) witnesses and closed its case. A no-case submission was made on behalf of the appellant. The trial judge overruled it. The appellant appealed to the court below which dismissed same. The appellant has further appealed to this court.

It is apt to state the facts of this matter briefly. P. W. 1 came from Port Harcourt to visit his family in Okene on 30th April, 2003. At about 11.00 pm, he heard a noise on the deck of his house. When he opened the door to find out the source of the noise, he was confronted by the 2nd accused who had a gun with him. The 2nd accused ordered P. W. 1 to produce the money he had on him. P.W.1 said he gave him N25,000.00 which he said was not enough. He further gave the 2nd accused N15,000.00. When the 2nd accused left, P. W. 1 said he raised an alarm with P.W.2 and neighbours came to sympathize with him. P. W. 1 said the 2nd accused fell into a well in his premises from which he was brought out with a rope. The 2nd accused told P.W.1 that it was the 1st accused who led him to the house of P.W.1 to rob. P. W. 1 did not see the appellant who was the 3rd accused at the time of the commission of the crime. The P.W.2, the sister-in-law of P.W.1 did not say anything about the 3rd accused. Under cross-examination, she agreed that she did not see the 3rd

accused. The PW.3, the Investigating Police Officer (IPO) recorded the statement of the 4th Accused, to wit, Exhibit 1. He did not state any role played by the appellant.

B Based on the above evidence, Mr. Aliyu, learned counsel for the appellant made a no-case submission on behalf of the appellant in that no evidence connected him to the offence. He submitted that by Section 27 (3) of the Evidence Act, Exhibit 1 is not evidence against the 3rd accused who denied committing the offence. He urged that the 3rd accused be discharged.

C Mr. Jamil, the Chief Legal Officer for the prosecution, at page 46 lines 6-7 of the transcript record of appeal commendably stated thus:-

“We agree with the no-case submission of learned counsel for the 3 accused.”

D On 28/5/2007, the learned trial judge, in his ruling, overruled the no-case submission relying particularly on Exhibit ‘1’ statement of the 4th accused person wherein the name of the 3rd accused was mentioned.

E As stated earlier on in this judgment, the court below dismissed the appellant’s appeal. It placed reliance on the evidence adduced by the prosecution; especially Exhibit ‘1’.

F In the appeal before this court, briefs of argument were filed and exchanged. On 28th January, 2010, learned counsel for the parties adopted their respective brief of argument. The sole issue formulated on page 3 of the appellant’s brief reads as follow:-

“Whether the learned justices of the Court of Appeal were right to hold that a prima facie case had been established against the appellant.”

G Learned counsel for the respondent adopted the issue decoded by the appellant as reproduced above.

H Learned counsel for the appellant submitted that there is no evidence which linked the appellant with the offences, alleged against him from the totality of the evidence adduced by the three witnesses called by the prosecution. He asserted with force that since Exhibit 1 is a statement made by the 4th accused, such a confessional statement of a co-accused is no evidence against the appellant who did not adopt the statement. He referred to section 27 (3) of the Evidence Act, Cap E 14 LFN 2004, as well as Rule 7 (1) of the Criminal

Procedure (Statement to Police Officers) Rules, 1960 and cited the cases of *R. v. Afose & Ors.* (1934) 2 WACA 118; *Ozaki & Anr. v. The State* (1990) All NLR 94 at 116 - 117; *Yongo v. C. O. P* (1992) 8 NWLR (Pt. 257) 36 at 58-59.

Learned counsel submitted that the court below wrongly treated Exhibit 1 as if it were evidence given by a co-accused which is governed by section 178 (2) of the Evidence Act as against an extra judicial statement as herein made by a co-accused which is governed by section 27 (3) of the Evidence Act. He felt that a statement of a co-accused remains a statement and not his evidence. He Cited *Ogiri & Anr v. The State* (1978) NNLR 1 at 5; *Chukwueke v. The State* (1991) 7 NWLR (pt. 205) 604 at 616. B
C

Further, learned counsel observed that the court below held that Exhibit '1' was admissible against the appellant because it was relevant. He submitted, with respect to the court below, that relevancy is not the only test for admissibility as a document may be relevant and still be excluded if there is in existence a law that renders it inadmissible. He gave an example of a deed of conveyance which may be relevant in an action for declaration of title and yet, excluded because it had not been registered. D
E

Learned counsel also observed that the court below held that it was premature for the appellant to have contended that Exhibit '1' could not be used against him at the stage of no-case submission. Again, he submitted, with respect, that such is not correct law. He felt that at the stage of a no case submission, the court is called upon to consider the case against an accused person and determine whether a prima facie case had been made out against him and as at that stage, the court can only act on legally admissible evidence. He cited *Chianugo v. The State* (2002) 2 NWLR (Pt. 750) 225 at 233 - 234, *G* *Emedo v. The State* (2002) 15 NWLR (Pt. 789) 196 at 205; *Kankia v. Maigemu* (2003) 6 NWLR (Pt. 817) 496 at 518. F

Learned counsel submitted that if the evidence is inadmissible, the court cannot make use of it at any stage and that it is even so where no objection has been raised against it at the trial. He cited *Alade v. Olukade* (1976) 2 FNR 10 at 13. He urged the court to hold that Exhibit 1 is inadmissible against the appellant and that it should be excluded from the consideration of the case preferred against the appellant by the prosecution. H

Learned counsel noted it that the court below, on page 108 of the record, made reference to the confessional statement allegedly made by the appellant. He felt that since it was not tendered at the trial court, it could not be considered by the court below as it was not an exhibit in the case. He urged that same be disregarded as it only
 B formed part of the proof of evidence which was not tendered by the prosecution.

Finally, learned counsel submitted that since none of the prosecution witnesses gave evidence incriminating the appellant and Exhibit 1 was not legally admissible against the appellant, there is no
 C evidence linking him with the commission of any crime alleged against him. He urged that the appeal be allowed and that the appellant should be discharged.

On behalf of the respondent, learned counsel cited the cases
 D of Ibeziako v. Police (1963) SCNLR 99 and Gabriel Aituma v. The State (2006) 10 NWLR (Pt. 989) 452 at 473. He observed that a no-case submission means no more than that there is nothing in the evidence adduced by the prosecution that would persuade the court to compel the accused to put up his defence. He felt that the question whether the court believes or does not believe the evidence
 E adduced does not arise at that stage.

On the meaning of a prima facie case, learned counsel cited Fidelis Ubanatu v. COP (1999) 10 NWLR (Pt. 611) 512; Sunny Tongo & Anr. v. Police (2007) 12 NWLR (Pt. 1049) 525 at 539; 548.
 F

Learned counsel submitted that the trial court did not say that the appellant should prove his innocence but that there is uncontradicted evidence that is sufficient which link him with the offence(s) charged. He observed that the appellant did not cross-examine P.W.3
 G when he tendered Exhibit 1 - the confessional statement of the 4th accused. He finally submitted that the court below was right in dismissing the appellant's appeal.

***It is certain that a submission that there is no-case to answer should only be upheld if any of the two situations stated
 H hereunder prevails at the end of the prosecution's case:-***

(1) When there has been no evidence connecting the accused person with the alleged offence(s).

(2) 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 above is as pronounced by this court in Ibeziako v. Police (supra). See also Gabriel Aituma v. The State (2006) 10 NWLR (Pt. 989) (supra) at page 473. **A no-case submission only means that there is nothing in the evidence adduced by the prosecution that would persuade the court to compel the accused to put up his defence.**

In this appeal it is apt that a no-case submission was made on behalf of the appellant after the close of the prosecution's case. The learned trial judge, in overruling the no-case submission, had this to say at page 47 lines 13-17 of the record of appeal:-

"After carefully considering the evidence adduced by the prosecution, particularly exhibit 1 wherein the name of the 3^d accused was mentioned, I am satisfied that a prima facie case has been made out against the 3^d accused person."

The appellant appealed to the court below. In dismissing the appeal, the court below at pages 102 - 103 of the record stated as follows:-

"Having considered all I have before us including the evidence of the prosecution, the documents especially Exhibit '1' the statement of the co-accused and finally the Ruling or Decision of the trial judge, and bearing in mind that at this stage the less said, the better in order not to jeopardize the trial which is still with the possibility of being on-going. I see nothing before me upon which I can place disagreement in the decision of the trial judge which conclusion I am satisfied was properly reached. Therefore the trial in the court below ought not to be further delayed as I am of the same mind that indeed the prosecution has made as prima facie case for which the appellant as 3rd accused should be called to defend the charge against him."

I need to point it out here without any equivocation that none of the three witnesses called by the prosecution said anything negative against the appellant. None of them mentioned his name to connect him with the commission of the offences. **The two courts below clung tenaciously to the contents of Exhibit 1, the extra judicial statement of the 4th accused person. The said exhibit is a statement made by a co-accused.** Section 27(3) of the Evidence Act in respect of same provides as follows:-

“27(3) - Where more persons than one are charged jointly with a criminal offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence the court, or a jury where the trial is one with jury, shall not take such statement into consideration as against any
 B *of such other persons in whose presence it was made unless he adopted the said statement by words or conduct.”*

In this matter, P.W.3 - the Investigating Police Officer (IPO) did not say that Exhibit 1 was made in the presence of the appellant. As
 C well, P.W.3 did not say that when the statement was made by the 4th accused, the appellant adopted it by words or conduct. In a similar situation in the case of *The State v. Onyeukwu* (2004) 7 SCNJ 1, this court held that the confession of Olatunji is not evidence against the respondent (co-accused) in that case but is a relevant fact against
 D only Olatunji, the maker, by virtue of section 27(3) of the Evidence Act. It is therefore clear to me that Exhibit 1, the statement of the 4th accused, cannot therefore be taken into account against the appellant when his no-case submission was considered.

It is imperative to state it that the court below wrongly
 E ***treated Exhibit 1 as if it were evidence given by a co-accused at the trial. There is a gulf of difference between an extra judicial statement made by a co-accused which is governed by section 27(3) of the Evidence Act and evidence given by a co-accused on oath which is governed by section 178(2) of the***
 F ***Evidence Act. An extra judicial statement by a co-accused remains a statement and not his evidence. It is binding on the maker only.*** See: *Ogiri & Anr. v. The State* (supra) at page 5; *Chukwueke v. The State* (supra) at page 616 both cited by learned
 G counsel for the appellant.

The above is still not the end in respect of the said Exhibit 1 under fire. ***The Criminal Procedure (Statement to Police Officers) Rules, 1960 which is applicable to Kogi State regulates the manner in which Police Officers are to record extra judicial statements made by accused persons. Rule 7 (1) provides as follows:-***
 H

“When a police officer has decided to make the same complaint against two or more persons and their statements are taken separately, the police officer shall not read such

statement to the other person or persons, but each of such persons shall be given a copy of such statements and nothing shall be said or done by the police to invite a reply.”

It is not on record that P. W. 3 gave the appellant opportunity to react to the statement of the 4th accused – Exhibit 1. If the prosecution intended to employ Exhibit 1 against the appellant, a copy of same should /have been made available to him. Since it was not made available to him, it ought not to have been used against him. Exhibit 1, in the prevailing circumstance is not a legally admissible evidence against the appellant when considering his case. The case of R. v. Afose & Ors. (supra), Ozaki & Anr v. The State (supra) and Yongo v. COP (supra) are all in point here.

The court below held that Exhibit 1 was admissible against the appellant because it was relevant. With due respect, relevancy is not the only yardstick or test for admissibility. A document may be relevant and still be excluded if there is in existence a law, like the provision of section 27(3) of the Evidence Act, which renders Exhibit 1 inadmissible as against the appellant. It is akin to a deed of conveyance which though relevant in an action for declaration of title and yet may be excluded because it had not been registered. This is not a 'spurious correlation'; if I may employ the Economist's terminology. I am of the considered opinion that the court below goofed in the stance taken by it in this respect.

The court below also held that it was premature for the appellant to have contended that Exhibit 1 could not be used against him at the stage of a no-case submission. I feel that such is not correct. This is because at that stage, the court is called upon to consider the evidence on ground and determine whether a prima facie case had been made out against the appellant. The court, at that stage can only act on legally admissible evidence. See: Chianugo v. The State (supra) at 233 and Emedo v. The State (supra) at 205.

It is the law that if evidence is inadmissible, the court cannot make use of it at any stage. This is even so where no objection has been raised against it at the trial. See: Alade v. Olukade (supra) at page 13; (1976) 10 NSCC 34. The court below ought to have discountenanced Exhibit 1. It is hereby excluded from the consider-

ation of the case preferred against the appellant by the prosecution. After all, a court is expected in all proceedings before it to act only on evidence which is admissible in law.

At page 108 of the record of appeal, the court below made reference to the confessional statement allegedly made by the appellant. That statement was not tendered at the trial. It was not an exhibit in the case. The prosecution did not make out such a case both at the trial court and at the court below. A court should not set up for parties a case different from the one set up by the parties themselves. See: *Oniah v. Onyiah* (1989) 1 NWLR (Pt. 99) 514; *Ojo-Osagie v. Adonri* (1994) 6 NWLR (Pt. 349) 131.

Not only that. It appears as if the point was raised suo-motu without hearing from the appellant's counsel. A judge should not descend into the arena. A court has no duty to bridge the yawning gap in the case of a party. This is more so since this is a criminal matter. Refer to *Ajuwon v. Akanni* (1993) 9 NWLR (Pt. 316) 182; *Salubi v. Nwariaku* (1997) 5 NWLR (Pt. 505) 442; *Olorunfemi v. Ors. v. Asho & Ors.* (1999) 1 NWLR (Pt. 585) 1 at 9.

I strongly feel that since none of the prosecution witnesses gave any evidence incriminating the appellant and since Exhibit 1 was not legally admissible against him, there is no evidence sinking him with the commission of any crime. I have no iota of doubt in my mind that the appellant is entitled to a discharge order. For the above reasons, I answer the only issue Formulated in this appeal in the negative.

In conclusion, I find that the appeal is very meritorious. It is hereby allowed. The judgment of the court below is hereby set aside. I order that the appellant is hereby discharged as the no-case submission made on his behalf is rooted on a rock.

TOBI JSC

I have read in draft the judgment of my learned brother Fabiyi JSC that this appeal has merit and should be allowed. I entirely agree to the conclusion of my learned brother Fabiyi, JSC and, I discharge the appellant on the no case submission.

OGBUAGU JSC

This is an appeal against the Judgment of the Court of Appeal, Abuja Division (hereinafter called “the court below”) delivered on 30th April, 2009 upholding the RULING of Olusiyi, J. of the High Court of Kogi State sitting at Okene delivered on 28th May, 2007 B overruling the No-Case submission of the learned counsel for the Appellant.

Dissatisfied with the said Judgment, the Appellant has appealed to this Court on four (4) grounds of appeal. I note that the 3rd ground C of appeal which was/is one of the grounds from which the lone issue of the Appellant was/is formulated and adopted by the Respondent, is lifted from the Contribution of one of the Justices of the court below - i.e. that of Aboki, JCA at page 108 of the Records. For the avoidance of doubt, the said ground, reads as follows: D

“The learned Justices of the Court of Appeal misdirected themselves in law when they held that:

In the present case, there is the confessional statement of the appellant himself Exhibit C on page 18 of the Record where the Appellant gave a narrative of his participation in the offence he in E being charged.

Evidence of Prosecution witnesses especially PW2 and Exhibit 1 the confessional statement of the 4th accused person who fell into a well while trying to escape from the scene of the crime all tied the Appellant to the offence he was being charged with”. F

The lone issue formulated by the Appellant and adopted by the Respondent, is;

“Whether the learned Justices of the Court of Appeal were right to hold that a prima facie case had been established against the G appellant? (Grounds 2, 3 and 4)

The case leading to the instant appeal, in my respectful view, is intriguing in some respects. Three (3) witnesses testified for the prosecution. It is submitted in the Respondent’s Brief at page 4 in paragraph 1.05 of the Records as follows: H

“PW3 testified on the 20th of November, 2006 and the Prosecution (Respondent) made an undertaking to call its last witness on the next adjourned date which was 23rd January, 2007, and when it could not produce the witness the trial High Court Judge Forced it to

close its case”.

[the underlining mine]

I note that as far back as 3rd December, 2003 when the prosecution sought leave to prefer charges of criminal conspiracy and armed robbery under Sections 97(1) and 298 (c) of the Penal Code, the prosecution was not ready. It felled to include the statements of the accused persons. On 8th March, 2004, the leave was granted. The accused persons were arraigned in court on 6th April, 2004 when they took their plea. From 27th May, 2004, up to 23rd January, 2007, most of the adjournments, were at the instance of the prosecution. On that 23rd January, 2007, the prosecution again as on 20th November, 2006 gave an undertaking to produce this time, their last witness. The case was adjourned to 13th March, 2007 in order to give the prosecution “the last opportunity” to produce their last witness. So, on 13th March, 2007 when the prosecution again asked for an adjournment and to give him again the last opportunity and stated “I have made efforts to get him (i.e. the last unnamed witness) to court but to no avail”, the learned trial Judge for an unassailable reason that appears in the Record, refused the application for an adjournment.

When the learned counsel therefore, proceeded to make his No Case submission and urged the court to discharge the Appellant, I note that at page 46 of the Records, the learned Chief Legal Officer for the Prosecution - I. A. Jamil, Esqr., thereafter, stated as follows:

“We agree with the no-case submission of learned counsel for the 3rd accused”. (i.e.. the Appellant).

I also note that at page 45 thereof, when the learned counsel for the 2nd accused - J. U. Barrah, Esq, indicated to the court that he intended to make a No-case submission on behalf of his client, the learned trial Judge stated as follows:

“Court: No case submission for the 2nd accused will be a Waste of time since his name was mentioned”.

Mr. Barrah took the hint and withdrew his application to make a No-case submission.

On 28th May, 2007, the learned trial Judge, surprisingly to me, in his said Ruling, stated inter alia, as follows:

“After carefully considering the evidence adduced by the prosecution, particularly exhibit ‘1’ wherein the name of the 3rd accused

was mentioned, I am satisfied that a prima facie case has been made out against the 3rd accused person. No-case submission is hereby overruled”.

I note that none of the prosecution witnesses including the PW3 who tendered Exhibit 1, mentioned the name of the Appellant. There is no evidence from the said witnesses, linking the Appellant with the said offence. The alleged confessional statement of the Appellant, was never tendered in evidence as an exhibit as erroneously with respect, stated by Aboki, JCA in his concurring Judgment. Page 18 of the Records, does not support the assertion. It is not even therein/thereon, marked as an exhibit. The person who recorded the said statement of the Appellant, was never called as a witness. The name of the person who recorded it, is not stated therein. There is no evidence that, Exhibit 1, was even brought to the attention of the Appellant by any Police Officer or that the Appellant was present when Exhibit 1 was made by the 4th accused person who is not shown as a witness for the prosecution. What is more, Exhibit “1” to all intents and purposes is an inadmissible evidence against the Appellant under Section 27(3) of the Evidence Act or Rule 7(1) of the Criminal Procedure (Statement to Police Officers) Rule, 1960 applicable to Kogi State which regulates or guides the manner in which Police Officers, are to record extra judicial statements of accused persons.

In any case, it is settled that a statement of an accused person to the Police, is evidence of the fact that it was made, but being an extra judicial statement, it is not evidence of the truth of its contents. See the cases of Sanusi v. The State (1984) 10 S.C. 166 @ 198 - 199, (1984) NSCC Vol. 15 pg. 659 and Adelumola v. The State (1988)1 NWLR (Pt. 73) 683 @ 693; (1988)3 SCNJ. 68.

Now to the law proper. Section 27(3) of the Evidence Act, provides as follows:

“Where more persons than one are charged jointly with criminal offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, the court, or a jury where the trial is one with a jury, shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the statement by words or conduct.”

[the underlining mine]

The above is clear and unambiguous. As I had stated in this Judgment, there is no evidence that Exhibit 1 was ever made in the presence of the Appellant how much more to talk that he the Appellant, adopted it by words or conduct. It is therefore, very disturbing to me, how the trial court and the court below, heavily and unjustifiably with respect, relied on Exhibit 1 on the ground that it was “relevant”. Relevant for what or how? I or one may ask. Let me stop here. I can only say mildly too, that the two lower courts with respect, seriously, were in grave error both in law and in fact, to have so held that Exhibit 1, was relevant and on that basis, used it to hold that a prima facie case had been made against the Appellant. It is more disturbing or even worrisome to me that the very prosecution who supported the No Case submission unequivocally, made U-turn so to speak, to file a Brief in opposition of the appeal at the court below and in this Court. Wonders it is said, shall never end. Exhibit 1, with the greatest respect to the two lower courts, should have not been taken into account against the Appellant when considering his case. I so hold. I therefore answer the lone issue in the Negative. On this ground alone, this appeal succeeds and it is allowed by me.

As a matter of fact, it is settled that where a No- Case submission is made out against an accused person, asking him to answer the charge against him, is a reversal of the Constitutional provision of presumption of innocence by asking him to establish his innocence. So said Karibi -Whyte, JSC at page 277 in the case of *Okoro v. The State* (1988) 5 NWLR (pt. 94) 255, 285; (1988) 12 SCNJ. (Pt. 2) 191 @ 207 citing the case of *Mumini & 13 ors. v. The State* (1975) 6 S. C. 79 @ 109 (it is also reported in (1975) 6 S.C. (Reprint) 66 and *Daboh & anor. v. The State* (1977) 5 S.C. 197; (it is also reported in (1977) 5 S.C. (Reprint) 122 @ 131. In other words, where at the close of the prosecution’s case, there is a No Case submission for the accused person to answer, he should be discharged. Overruling a No Case submission it that circumstance (as happened in this case in the trial court and affirmed by the court below), is tantamount to asking the accused person, to prove his innocence which is wrong and unconstitutional. So said this Court in the case of *Chukwu & ors. v. The State* (1988) 7 SCNJ. (Pt. II) 262, (1988) 1 NWLR (Pt. 72) 539. The case of *Mumuni v. The State* (supra), was also referred to.

When a No-case submission can be made and upheld, have been stated and restated in the cases of *R v. Coker* (1953) 20 NLR 62; *R v. Abbot* (1955) 39 *CAR.* 144; *Ajidadgba & anor. v. Inspector-General of Police* (1958) 3 FSC 5 @ 6; (1958) SCNLR 60; *Ibeziako v. Commissioner of Police* (1963) 1 ANLR 61-69 (1963) 1 SCNJR 99; *Atano & anor. v. Attorney-General of Bendel State* (1988) 2 B NWLR (Pt. 75) 201 and *Adeyemi v. The State* (1991) NWLR (Pt. 195) 1; (1991) 7 SCNJ. 131 just to mention but a few.

In the case of *Ajidadgba v. Inspector-General of Police* (supra) Abbot, F.J. stated inter alia as follows:

“We have been at some pains to find a definition of the term “prima facie case” The term, so far as we can find has not been defined either in the English or in the Nigerian Courts ”

A decision to discharge an accused person on the ground that a prima facie case has not been made out 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”.

Iguh, JSC in the case of *Ajiboye & anor. v. The State* (1995) 9 E SCNJ. 242 @ 252-257 in his contribution, stated inter alia, as follows:

“..... But a prima facie case must be distinguished from proof of the guilt of an accused which is determined at the end of the case when the court has to find out whether such an accused is guilty or not guilty of the offence charged..... In a no case submission therefore, whether or not the evidence of the prosecution is believed is, at that stage of the proceedings irrelevant and immaterial as the credibility of the witnesses is neither in issue then nor does it arise”. [the underlining mine].

It is from the foregoing and the fuller lead Judgment of my learned brother, Fabiyi, JSC just delivered and which I had the privilege of reading before now and which I agree with his reasoning and conclusion, that I maintain that this appeal, is meritorious. I too, hereby set aside the Judgment of the court below and I also discharge the Appellant.

OGEBE JSC

I had a preview of the lead judgment of my learned brother Fabiyi, JSC just delivered and I agree with his reasoning and conclusion.

B At the conclusion of the case for the persecution, there was no proper evidence linking the appellant with the offence charged. The trial court ought to have upheld the no case, submission made by the appellant's counsel and conceded by the prosecuting counsel.

C It is surprising that the State which conceded that there was no case made out against the appellant at the close of its case chose to somersault and oppose the appeals in the Court of Appeal and this Court. This shows a serious inconsistency on the part of the State and is reprehensible.

D I allow the appeal and set aside the judgments of the two lower courts. The appellant is discharged of the charge preferred against him.

ADEKEYE JSC

E I had read before now the judgment just delivered by my learned brother, J. A. Fabiyi JSC. The appellant and three others were arrested on the 1st of May 2003 and arraigned before the High Court of Kogi State, Okene Judicial Division for the offence of criminal conspiracy and arm robbery contrary to Sections 97 (1) and 298 (c) of the Penal Code respectively. The case proceeded to trial. At the hearing on the 13th of March 2007, the prosecution was directed to close its case by court for not being able to produce a witness after
F the case had suffered a number of adjournments for this purpose. I
G intend to lift a portion from the court proceedings for that day which reads:-

H Court - Based on the undertaking given by the learned chief legal officer, for the prosecution on the last adjourned date, and his failure to produce his witness in court today, the only option open to me is to order and I hereby order the prosecution to close her case. Application for adjournment is refused.

Aliyu - We shall make a no case submission for the 3rd accused person.

Court - No case submission for the 2nd accused will be a waste of time since his name was mentioned.

Barrah - I take the list (sic) and withdraw my application to make a no-case submission.

Aliyu - I submit that no prima facie case has been made out against the 3rd accused person. There is no evidence whatsoever linking the 3rd accused with the alleged offence. PW1 never said anything about the 3rd accused person while PW2 agreed under cross-examination that he did not see 3rd accused. By Section 27 (3) of the Evidence Act, exhibit "I" is not evidence against the 3rd accused. The 3rd accused denied committing the offence. I urge my Lord to discharge him.

Jamil - We agreed (sic) with the no-case submission of learned counsel.

At the stage of making the no-case submission, Mr. Barrah counsel for the 2nd accused and the Chief Legal Officer, Mr. Jamil appearing for the prosecution did not oppose the submission of Mr. Aliyu counsel for the 3rd accused.

In his ruling over the submission, the learned trial judge held-
"After carefully considering the evidence adduced by the prosecution, particularly exhibit "1" wherein the name of the 3^d accused was mentioned, I am satisfied that a prima facie case has been made out against the 3^d accused person. No case submission is hereby overruled."

The 3rd accused appealed to the Court of Appeal, Abuja Division. The Court of Appeal dismissed the appeal holding to the evidence adduced by the prosecution especially exhibit "I" and the evidence of PW2 to conclude that the decision of the learned trial judge was properly reached. The appellant made a further appeal to this court.

The sole issue raised by the appellant reads as follows: -

"Whether the learned Justices of the Court of Appeal were right to hold that a prima facie case has been established against the appellant".

The respondent adopter the foregoing issue raised by the appellant.

Before considering the solitary issue raised in this appeal, I cannot overlook the nature of the case of the respondent at the trial court and before the Court of Appeal. The stance of the respondent

before the lower court was a total departure from his case at the trial court. The prosecution agreed with the no case submission of the learned counsel for the 3rd accused at the trial court but the same submission was vehemently opposed before the lower court. It is a rudimentary principle of procedure that parties must be consistent in their case at the trial court and on appeal. A party cannot be allowed to approbate and re-probate over the same issue.

Akpa v. Itodo (1997) 5 NWLR pt. 506 pg. 589.

Ngige v. Obi (2006) 14 NWLR pt. 999 pg. 1

Oredyin v. Arowolo (1989) 4 NWLR pt. 114 pg. 172.

Ajide v. Kelani (1985) 3 NWLR pt. 12 pg. 248.

Agidigba v. Agidigba & 2 Ors. (1996) 6 SCNJ pg. 105.

An appeal is not a new action but a continuation of the original suit which is the subject-matter of the appeal. It is only a complaint against a decision.

On the vital question raised in this appeal - I am obliged to give an insight into the essence of a no case submission and its effect in a criminal trial. At the close of a case for the prosecution, a submission of no prima facie case to answer made on behalf of the accused person postulates one or two things or both of them namely: -

(a) That there is no legally admissible evidence linking an accused with the commission of the offence with which he had been charged which would necessitate his being called upon for his defence.

(b) That the evidence adduced has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable court or tribunal can act on it as establishing the criminal guilt in the accused person concerned,

The purport of a no case submission when made on behalf of an accused person is that the trial court is not called upon at that stage to express any opinion on the evidence before it. The court is only called upon to take note and to rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence with which he is charged.

Aituma v. State (2007) 5 NWLR pt. 1028 pg. 466.

Igbele v. State (2004) 15 NWLR pt. 896 pg. 314.

Akwa v. C. O. P. (2003) 4 NWLR pt. 811 pg. 461.

Aminu v. State (2005) 2 NWLR pt. 909 pg. 108.

Akinyemi v. State (1999) 6 NWLR pt. 909 pg. 108.

Ibeziako v. Police (1963) SCNLR pg. 99.

Rose Nwankwo v. Shitta-Bey (1999) 10 NWLR pt. 612 pg.

75.

In relating the foregoing to the facts of this case at the close of the case for the prosecution – besides the statement “Exhibit 1” - which is the extra judicial statement of the 4th accused incriminating the 3rd accused - there was no other evidence linking the 3rd accused with the robbery. B

The evidence of PW1 who was the victim of the robbery and the complainant, on page 22 of the Record did not refer to the 3rd accused. PW2 who was an eye witness disclosed in her evidence that she did not see the 3rd and 4th accused persons during the incident (pages 33- 34 of the Record.) C

The PW3 at pg 43 of the Record gave evidence of how he obtained the statement of the 4th accused “exhibit I”. This witness did not give evidence of his investigation in connection with the incident of robbery. D

The trial court and the lower court placed substantial reliance on “Exhibit 1” the extra judicial statement of the 4th accused when considering the no case submission of the appellant. E

This brings into limelight the evidential value of “Exhibit I” the extra judicial statement of a co-accused in the process of diagnosing the guilt of an accused.

Section 27 (3) of the Evidence Act deals with the use to which the statement of a co-accused can be put when considering the case of another co-accused. F

Section 27 (3) provides as follows: -

“Where more persons than one are charged jointly with a criminal offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence the court or a jury where the trial is one With a jury, shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct.” G H

It is trite that a statement of a co-accused is different and distinguishable from his evidence in court. A statement made by an accused remains his statement, and not his evidence, and it is binding

on him only. Where the prosecution intends to use the statement against the co-accused, a copy of the incriminating statement must be Made available to him.

Ozaki & Anor. v. The State (1990) ALL NLR pg. 94.

Ogiri & Anor. v. The State (1978) NNLR pg. 1

B On gleaning through in the evidence available before the trial court there was no legally admissible evidence to link the 3rd accused with the essential elements the offences of criminal conspiracy and robbery with which he is now charged.

C The ingredients of armed robbery are-

(a) That there was a robbery or series of robbery.

(b) That the robbery or each robbery was an armed robbery or robberies.

(c) That the accused took part in the armed robberies.

D Ani v. State (2003) 11 NWLR pt. 830 pg. 145.

Bozin v. State (1985) 2 NWLR pt. 8 pg. 465.

Okosi v. A-G Bendel State (1989) 1 NWLR pt. 100 pg. 442.

Nwachukwu v. State (1985) 1 NWLR pt 11 pg. 218.

E There is no evidence directly linking the appellant with the robbery - which no doubt was an armed robbery, while "Exhibit I" relied upon by the two lower courts has no evidential value in the proof of his guilt. With the fuller reasons given in the leading judgment of my learned brother J. A. Fabiyi, JSC, I agree that the appeal be allowed and it is hereby allowed. The submission of no case is sustained while
F the decisions of the two lower courts are set aside.

G

H