

SUPREME COURT OF NIGERIA
FRIDAY 23RD NOVEMBER, 2012. SC. 8/2011
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-
ENEH, B. RHODES-VIVOUR, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJSC**

PRINCE ABUBBAKAR AUDU APPELLANT
AND
1. ATTORNEY-GENERAL OF
THE FEDERATION
2. ECONOMIC AND FINANCIAL RESPONDENTS
CRIMES COMMISSION

CONSTITUTIONAL LAW - High Court - Referral to appeal court -
By 1999 Constitution s. 295(2) - Reference can be made by Judge
suo motu - Or by one or both parties - And it is not mandatory that
parties are heard (H2)

FAIR HEARING - Court - Reference - Ex parte application for - As a
Judge does not give an opinion - Or considers civil rights of parties in
making reference - Denial of fair hearing does not arise (H2)

FAIR HEARING - Audi alteram partem - Meaning - 1999 Constitu-
tion s. 36(1) - The maxim denotes fairness and natural justice - As a
Judge must hear both parties before judgment (H3)

WORDS & PHRASES - Proceeding - Meaning - This means the regu-
lar and orderly progression of law suit - Including all acts and events
- Between commencement and entry of judgment (H4)

CRIMINAL PROCEDURE - Proceedings - Commencement - Pro-
ceedings starts with reading of charge to accused - And anything
done thereafter falls within things done in the course of proceedings
(H5)

APPEALS - Record of appeal - Questions arising in proceedings - As
the record shows that proceedings were conducted - And the ques-
tions arose therein - Court of Appeal was wrong in its conclusion

3322 Audu v. A-G Fed (2012) 11-12 KLR (pt. 319) 3321; (2013)
(H6)

APPEALS - Record of appeal - Binding nature - The record is presumed to be correct - Once no complaint is made against it - And appellate court as well as litigants are bound by the contents therein (H7)

CRIMINAL PROCEEDINGS - Nolle prosequi - Entry of - This may be entered at any stage of proceedings by A.G. State or A.G. Federation - By information given to court - And Judge cannot question the decision (H8)

CRIMINAL PROCEEDINGS - Nolle prosequi - Filing - Implication - Appellant ought to be discharged and case struck out - Hence Court of Appeal wrongly considered the questions referred to it for determination (H9)

APPEALS - Entry of - Appeal is entered when Registrar of court from which appeal emanates - Has forwarded to Registrar of appellate court - Complete record of appeal filed by appellant in the registry (H10)

APPEALS - Judgment - Mistake - It is not every error in judgment - That determines appeal in favour of appellant - As appeal court decides if judgment is correct - And not whether the reasons thereof are correct (H11)

FACTS

Before the Kogi State High Court Lokoja, appellant Prince Abubakar Audu (Former Governor of Kogi State) was arraigned on an eighty counts charge. The counts are for offences under the Advance Fee Fraud and the Penal Code. Appellant's oral application for bail was granted and trial fixed for a date. Three days before the trial date, learned counsel for appellant argued an ex parte motion praying inter alia, for an order referring two questions to Court of Appeal. The questions are whether the Advance Fee Fraud Act No. 13 of 1995 takes effect as a State Law and whether the Economic and Financial Crime Commission or the Attorney-General of the Federa-

tion can validly prosecute appellant for offences under the Penal Code Law of Northern Nigeria.

The court, having heard the appellant, referred the questions to Court of Appeal for determination. Subsequently however, the A.G. Kogi State and A.G. Federation filed nolle prosequi to the case. Appellant's counsel contended that it was too late to file nolle prosequi as the aforesaid questions had been entered in the Court of Appeal. At the end, the trial court held that it can suo motu refer the questions to Court of Appeal. Dissatisfied, respondents filed motion in Court of Appeal, seeking to strike out the questions referred. The court held that since the questions referred to it by the trial court did not arise in the course of the proceedings, the reference was not proper. The court consequently struck out the questions. Aggrieved, appellants appealed to Supreme Court.

ISSUE FOR DETERMINATION

“Whether the lower court was right when it held that the questions referred to the Court of Appeal by the trial court as substantial questions of law did not arise in the course of the proceedings before the trial court and proceeded to strike them out.”

HELD (Unanimously dismissing the appeal per

RHODES-VIVOUR JSC)

High Court - Referral to appeal court

1. A careful examination of subsection 2 of section 295 of the Constitution reveals that a reference can be made by the judge suo motu by one of the parties, or both of them. The provision clearly does not make it mandatory that the parties are heard on the question/s for reference. Consequently once the court is satisfied that the question involves a substantial question of law on the interpretation or tie application of tie Constitution tie court is bound to make a reference if the question arose in the proceedings in the High Court and the opinion of the parties if contrary to mat of the court remains irrelevant for all times. (p. 3333 H)

FAIR HEARING - Court - Reference - Ex parte application for

2. I must comment on an application for reference in the absence of the other party.

A judge making a reference under section 295 (2) of the Constitution does not give an opinion on the questions neither are the civil rights and obligations of the parties considered or determined. Clearly the issue of denial of fair hearing does not arise and cannot arise. (p. 3334 B/F)

FAIR HEARING - Audi alteram partem - Meaning

3. Section 36(1) of the Constitution provides for the right to fair hearing. It reads:

“36 (1) In the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”

Audi alteram partem means please hear the other side. It is a maxim denoting basic fairness and also a canon of natural justice. The standard required in court is that the judge should allow both parties to be heard and should listen to the point of view or the case of both sides before judgment. (p. 3334 B)

WORDS & PHRASES - Proceeding - Meaning

4. Now, did the two questions arise in the course of proceedings, what then is the meaning of in the course of proceeding. Proceedings according to Blacks law Dictionary means.

The regular and orderly progression of a Lawsuit, including all acts and events between the time of commencement and the entry of judgment. (p. 3335 H)

CRIMINAL PROCEDURE - Proceedings - Commencement

5. In a criminal trial, proceedings are said to have commenced with the reading of the charge to the accused person. Consequently any filing done by the prosecution, and or defence (e.g. filing of processes, or making applications, taking witnesses)

after the charge is read and the accused person enters his plea falls within the warm embrace of things done in the course of proceedings or arising in the course of proceedings.
(p. 3336 A)

Record of appeal - Questions arising in proceedings

6. In answering the question whether the two questions arose in the course of the proceedings, recourse must be made to the Record of Appeal.

According to the Court of Appeal, there is no record that any proceedings in the High Court had been conducted in the charge apart from the filing of the charge and the motion ex-prate for reference. The Record of Appeal in this appeal is made up of two volumes. Volume 1 and 2.

A diligent examination of the Record of Appeal reveals that the 80 count charge was read to the appellant on the 1st of December 2006. It was on that day that proceedings in charge No: KG/EFCC/1/2006 commenced. After the learned trial judge heard learned counsel for the appellant on the 26th of January 2007, on his motion ex-prate, the learned trial judge referred two questions to the Court of Appeal for determination. The reference was made in the course of proceedings. The Court of Appeal was wrong to conclude that the Record of Appeal shows that no proceedings were conducted except the filing of the charge and the motion ex-prate for reference. On the contrary the Record of Appeal shows that proceedings were indeed conducted and the questions arose in the course of proceedings. (pp. 3336 C//F/3337 A)

Record of appeal - Binding nature

7. The Record of Appeal is a reproduction of me proceedings of the courts from which the case has passed through. Once as in this case there has been no formal complaint before this court by either counsel with respect to the correctness of the Record of Appeal there is thus an irrefutable presumption that the Record of Appeal is correct. That in plain language means that the appellate court and the litigants, counsel are bound by the contents of the Records of Appeal. This is the docu-

ment an appeal court relies heavily on to keep itself abreast of what transpired in the court from which the appeal emanates. An Appeal Court relies solely on the Record of Appeal to determine an appeal. (p. 3336 C)

- B *CRIMINAL PROCEEDINGS - Nolle prosequi - Entry of*
8. At any stage of any criminal proceedings before judgment, the Attorney-General of a State or the Attorney-General of the Federation may enter a nolle prosequi either by stating in court or filing appropriate process to inform the court that the state intends that the proceedings abate. Once this is brought to the notice of the presiding judge the accused person shall be discharged immediately from the charge the nolle prosequi was filed or entered. The judge has no power to question the Attorney-General as to why he filed a nolle prosequi.
 D (p. 3337 G)

- CRIMINAL PROCEEDINGS - Nolle prosequi - Filing - Implication*
9. My lords with the filing of nolle prosequi by the Chief Law Officers of Kogi State and Nigeria on the same day a reference was made to the Court of Appeal for determination, the learned trial judge to have discharged the appellant and struck out the case since the case, i.e charge No: KG/EFCC/1/2006 was no longer in existence. The Court of Appeal was wrong to consider the questions referred to it for determination after being aware from the Records of Appeal that nolle prosequi had been filed. This is so because there is/was nothing before the trial court, so there would be nothing for the Court of Appeal to send back. It amounted to an academic exercise for the Court of Appeal to waste judicial time considering questions from a case that is no longer in existence. There was no longer a live issue to be considered by the Court of Appeal in view of nolle prosequi filed in the trial court. In a long line of cases it has been said over and over again that courts are constituted to determine live issues and not to engage in academic exercise.
 H In view of nolle prosequi filed in High Court, the consideration of the two questions by the Court of Appeal amounted

to an academic exercise. (p.3338 A)

APPEALS - Entry of

10. It is the view of learned counsel for the appellant mat the nolle prosequi was wrongly filed since the appeal had already been An appeal is deemed to have been entered when the Registrar of the Court from which the appeal emanates has forwarded to the Registrar of the appellate court a complete Record of Appeal filed by the appellant in the Registry. The transmission of the Records to the Registrar of the Court of Appeal connotes entry of appeal.

The onus is on the appellant to satisfy this court that at the time nolle prosequi was filed an appeal had already been entered in the Court of Appeal. Since the appellant failed to discharge that burden nolle prosequi filed on the 8th of February 2007 the same day the reference was made was perfectly in order. The Court of Appeal ought to have struck out the questions in view of the fact that a nolle prosequi had been filed in the High Court. (p. 3338 F)

Judgment - Mistake

11. I earlier did say that the Court of Appeal was in error to conclude that the two questions did not arise in the course of the proceedings in charge No: KG/EFCC/1/2006. They did. The Court of Appeal was wrong. It is long settled that it is not every mistake or error in a judgment that would determine an appeal in favour of an appellant or would result in the appeal being allowed. Air appeal court is to decide if the judgment is correct and not whether the reasons for the judgment are correct. (p.3339 B)

REPRESENTATION

Chief Mike Ozekhome SAN with Benson Igbanoi, Haruna Abdullahi, Chief Richard Oma Ahonaruogho, Tony igbanoi, Dominic Ezerioha and Abiakan R. Arinze, for the Appellants.
Godwin Obla with John Alu, Uche Ugonabo (Miss), George Adeyemi, Kestar Ekwueme, Awele Browu (Mrs) and Segun Fiki, for the Respondents.

CASES REFERRED TO

- Gamioba v. Ezezi (1961) 2 SCNLR 237
Alake v. Afejuku (1994) 9 NWLR (pt. 368) 379
Obayogie v. Oyewe (1994) 5 NWLR (pt. 346) 637
B FRN v. Ifegwu (2003) 15 NWLR (pt. 842) 113
Bamaiyi v. A-G Federation (2001) 12 NWLR (pt. 727) 468
F.C.S.C. v. Laoye (1989) 2 NWLR (pt. 106) 652
Akande v. State (1988) 3 NWLR (pt. 85) 681
C Adigun v. A-G Oyo State (1987) 1 NWLR (pt. 53) 678
Bhojwani v. Bhojwani (1996) 6 NWLR (pt. 451) 663
Oyeneye v. Odugbesan (1972) 4 SC 244
Obi-Odu v. Duke (2005) 10 NWLR (pt. 932) 120
Bamgboye v. Unilorin (1999) 10 NWLR (pt. 622) 290
D Ogunremi v. Dada (1962) 1 ANLR 663
Adewoyin v. Adeyeye (1962) 2 ANLR 108
Emelogu v. State (1988) 1 NSCC 869

STATUTES REFERRED TO

- E Advance Fee Fraud (& other related offences) Act, s. 1(3)
Penal Code
Constitution of the Federal Republic of Nigeria 1999, ss. 2(2), 4(6),
36(1), 174, 211, 286, 295(2), 315(1)
F Criminal Procedure Code, s. 253

LEAD JUDGMENT BY RHODES-VIVOUR JSC

- The appellant, Prince Abubakar Audu, a onetime Governor of Kogi State was arraigned on the 1st of December 2006 on an 80
G count charge before a Lokoja High Court. Counts 1 to 58 of the charge alleged offences under the Advance Fee Fraud (and other related offences) Act, while counts 59 to 80 alleged offences under the Penal Code, applicable in Kogi State. The appellant (as accused person) entered a not guilty plea to all the counts. An oral application
H for bail was argued. Ruling was adjourned to the 6th of December 2006. On the 6th of December the appellant was admitted to bail and trial was fixed for the 29th of January 2007.

On the 26th of January 2007, three days before the date fixed for trial learned counsel for the appellant Mr. M. Osuman SAN ar-

gued an ex-parte motion praying for the following:

1. An order referring the questions set out in SCHEDULE A hereto to me Court of Appeal for determination.

2. And for such further Order or Orders as the Honourable Court shall deem fit to make in the circumstances.

The questions in Schedule A for determination by the Court of Appeal are:

1. Whether the Advance Fee Fraud and other Related Offences Act No. 13 of 1995 as Amended and in particular S. 1(3) thereof under which the applicant who is the accused in charge NO.KG/EFCC/1/2006 before the Kogi State High Court in counts 1 to 58 of the charge sheet dated the 30th day of November, 2006 takes effect as State Law within the meaning of Section 315 (1) of the 1999 Federal Constitution having regards to the provisions of Section 2 (2) and 4 (6) of the 1999 Constitution of the Federal Republic of Nigeria.

2. Whether the Economic and Financial Crimes Commission or the Attorney-General of the Federation can validly and constitutionally prosecute the applicant for offences under the Penal Code Law of Northern Nigeria, under which the applicant is charged in Counts 59 to 80 having regards to the provisions of Section 286 of the 1999 Constitution.

After hearing Mr. M.M. Osuman's SAN submissions, the learned trial Judge M.A. Medupin J granted the application and referred both questions to the Court of Appeal for determination. On the 8th of February 2007 the Attorney-General of Kogi State, Dr. J.A.M. Agbonika and the Attorney-General of the Federation, Chief Bayo Ojo, SAN both filed Nolle prosequi. Dr. J.A.M. Agbonika appeared in court on the 8th of February and said:

"In my capacity as A-G of Kogi State in collaboration with the A-G of the Federation and by virtue of the power vested in me by section 211 of the Constitution of the Federal Republic of Nigeria 1999 and section 253 of the CPC and all the powers enabling me in that behalf I Dr. John Alewo Agbonika hereby inform this Court that I no longer intend to continue the prosecution of this case in collaboration with the A-G of the Federation to whom I had given a fiat to prosecute this case. That's all."

Learned Counsel for the appellant informed the court that it was too late to file a nolle prosequi as the questions referred on 26/1/

07 had been entered in the Court of Appeal.

The learned trial judge delivered a Ruling on 9/2/07. His lordship held inter alia that:

"Notwithstanding the request from me accused counsel, this court feels after a thorough consideration of this matter, and by virtue of the provisions of section 295(2) of the Constitution... that it can suo motu refer to the Court of Appeal, for determination of the under mentioned question, that is to say:

(i) Whether, the Attorney-General of a State can legally and validly enter a Nolle Prosequi in respect of a criminal charge wherein, the counts allege violation of federal offences, when a reference in respect of same is already pending in the Court of Appeal."

On the 13th of March 2007 the respondents filed a motion in the Court of Appeal for:

1. An Order striking out the questions referred to the Court of Appeal for determination pursuant to section 295 (2) of the Constitution by Justice M.A. Medupin of the Kogi State High Court in charge No. KG/EFCC/1/2006.

The Court of Appeal, Abuja Division heard the motion and in a considered ruling delivered on the 15th day of December, 2010 found the referral made by the learned trial judge wrong. In the concluding paragraph the Court of Appeal said:

"...In the final result, because the questions referred by the High Court on the 26/1/07 did not arise in the cause off the proceedings in the charge No: KG/EFCC/1/2006 before that court, the reference was not proper under section 295(2) of the Constitution and the Order therefore is hereby set aside. Consequently, the application succeeds and is granted in terms of prayer 1 on the face of the motion paper. The questions referred to this court are struck out. There shall be no order on costs."

This appeal is against that Ruling. In accordance with well laid down rules of this court briefs were duly filed and exchanged, the appellant s brief was deemed filed on the 16th of November 2011, while the respondents brief was filed on the 21st of November, 2011, the appellants reply brief was deemed duly filed on 15/3/12.

In his brief, learned counsel for the appellant, Mr. A. Haruna formulated a sole issue from his three grounds of Appeal. It reads:

"Whether the lower court was right when it held that the ques-

tions referred to the Court of Appeal by the trial court as substantial questions of law did not arise in the course of the proceedings before the trial court and proceeded to strike them out.”

Learned counsel for the respondents’ Mr. R Jacobs also presented a sole issue for determination of this appeal. It reads:

Whether the lower court was right when it struck out the questions referred to it by the trial High Court on the Ground that the questions did not arise in the course of the proceedings before the trial court. B

Both issues ask the same question. There was too much prattle on peripherals, which have no effect on the outcome of the appeal. The live issue in this appeal is whether the reference made by the High Court to the Court of Appeal on 26/1/0 / was properly done and whether the Court of Appeal was right to strike them out. In the circumstances any of the issues formulated would suffice. I shall though resolve this appeal by addressing the issue formulated by the appellant. At the hearing of the appeal on the 27th of September, 2012, learned counsel for the appellant, Chief M. Ozekhome, SAN adopted the appellant’s brief and the appellant’s reply brief deemed duly filed and served on the 16th of November 2011, and the 15th of March 2012 respectively. He urged this court to allow the appeal. Learned counsel for the respondents Mr. G. Obia adopted the respondents’ brief filed on the 21st of November 2011. Relying on *FRN v. Ifegwu* 2003 15 NWLR pt.844 p.113. *Emelogu v. State* 1988 1 NSCC p.869 *Bamaiyi v. AG. Federation* 2001 12 NWLR pt.727 p.468. He urged this court to dismiss the appeal. C D E F

Learned counsel for the appellant submitted that the questions contained in the reference made on the 26th of January 2007 were made in tandem with the Law and the principles outlined in *FRN v. Ifegwu* 2003 15 NWLR pt.842 p.113, contending that the said questions arose from the proceedings in charge No.KG/EFCC/1/2006, and it was properly made under section 295 (2) of the Constitution. Learned counsel for the respondents observed that the Court of Appeal was right in its conclusion to the effect that the question did not arise in the course of the proceedings. G H

On the 25th of January 2007, learned counsel for the appellant filed a motion ex-parte before the trial court. In the motion the learned counsel asked for:

An Order referring the questions set out in “SCHEDULE A” hereto to the Court of Appeal for determination. The motion *ex parte* was brought under section 295 (2) of the Constitution.

The questions for determination by the Court of Appeal in Schedule A reads as follows:

B 1. Whether the Advance Fee Fraud and other Related Offences Act No.13 of 1995 as amended, and in particular section 1 (3) thereof under which the applicant who is the accused in charge No.KG/EFCC/1/2006 before the Kogi State High Court in counts 1 to 58 of the charge sheet dated the 30th day of November, 2006 takes effect as
C state Law within the meaning of section 315 (1) of the 1991 Constitution, Laving regards to the provisions of section 2(2) and 4 (6) of the 1999 Constitution

D 2. Whether the Economic and Financial Crimes Commission or the Attorney -General of the Federation can validly and constitutionally prosecute the applicant for offences under the Penal Code Law of Northern Nigeria, under which the applicant is charged in counts 59 to 80 Laving regards to the provisions of section 286 of the 1999 Constitution.

E Section 295 of the Constitution provides for reference of questions of Law. It reads: 295(1) Where any question as to the Interpretation or application of this Constitution arises in any proceedings in any court of Law in any part of Nigeria (other in the court of the opinion that the question involves a substantial question of law the
F court may, and shall if any of the parties to the proceedings so requests, refer the question to the Federal High Court or a High Court having jurisdiction or the High Court shall.

G (a) If it is opinion that the question involves a substantial question of law, refer the question to the court of Appeal; or

(b) If it is of opinion that the question does not involves a substantial question of law, remit the question to the court that made the reference to be disposed of in accordance with such directions as the Federal High Court or the High Court may think fit to give.

H (2) Where any question as to the interpretation or application of this Constitution arise in any proceedings in the Federal High Court or a High Court, and the court is of opinion that the question involves a substantial question of law, proceedings so requests, refer the question to the Court of Appeal, and where any question is re-

ferred in pursuance of this subsection, the court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.

(3) Where any question as to the interpretation or application of this Constitution arises in any proceedings in the Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate. B

Section 295 (2) of the Constitution in the relevant provision for consideration, since what this court is to decide is whether the referral by the High Court to the Court of Appeal and the handling of it by the Court of Appeal was flawed. C

Now, the following conditions must exist before a reference can be made under section 295 (2) of the Constitution. D

1. The question must involve the interpretation or application of the Constitution. See *Gamioba v. Ezezi* (1961) 2 SCNLR p.237 *Alake v. Afejuku* (1994) 9 NWLR (pt.368) p.379

2. The question for reference must involve a substantial question of law, and it is the duty of the court making the reference to be satisfied that the questions are indeed substantial. See *African Newspapers of Nigeria Ltd v. The Federal Republic of Nigeria* (1985) 2 NWLR (pt. 6) p.137 E

3. The Court making the reference to the higher court must refrain from giving its opinion on the questions. See *Adesanya v. President of the Federal Republic of Nigeria* (1981) 2 NCLR p.3580. F

4. The question as to the interpretation or application of the Constitution must arise in the proceedings in the high Court in connection with an issue before the court making the reference. See *Obayogie v. Oyewe* 1994 5 NWLR pt.346 p.637. *COP (NO.2) 1961* 2 SCNLR p.62. See also *FRN v. Ifegwu* 2003 15 NWLR pt.842 p.113 *Bamaiyi v. AG. Federation* 2001 12 NWLR pt.727 p.468 G

A careful examination of subsection 2 of section 295 of the Constitution reveals that a reference can be made by the judge suo motu by one of the parties, or both of them. The provision clearly does not make it mandatory that the parties are heard on the question/s for reference. Consequently once H

the court is satisfied that the question involves a substantial question of law on the interpretation or tie application of tie Constitution tie court is bound to make a reference if the question arose in the proceedings in the High Court and the opinion of the parties if contrary to mat of the court remains irrelevant for all times.

I must comment on an application for reference in the absence of the other party.

Section 36(1) of the Constitution provides for the right to fair hearing. It reads:

“36 (1) In the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”

Audi alteram partem means please hear the other side. It is a maxim denoting basic fairness and also a canon of natural justice. The standard required in court is that the judge should allow both parties to be heard and should listen to the point of view or the case of both sides before judgment. See F.C.S.C. v. Laoye 1989 2 NWLR pt 106 p.652, Akande v. State 1988 3 NWLR pt.85 p.681, Adigun v. Attorney-General of Oyo State 19871 NWLR pt.53 p.678

A judge making a reference under section 295 (2) of the Constitution does not give an opinion on the questions neither are the civil rights and obligations of the parties considered or determined. Clearly the issue of denial of fair hearing does not arise and cannot arise.

I shall now consider the conditions that must exist before a reference is made under section 295 (2) of the Constitution.

1. Do the question/s involves the interpretation or application of the Constitution?

H The appellant was charged under the Advanced Fee Fraud and other Related Offences Act. Question 1 asks whether the said legislation as it relates to counts 1 - 58 of the charge is state law within the meaning of section 315 (1) of the Constitution having regard to the provisions of section 2(2), 4(6) of the Constitution. To my mind

this has to do with the interpretation or application of the Constitution. Question 2 is similar, but this time a different legislation is considered.

2. Are the questions on a substantial question of Law? A substantial question of Law is one which there are hardly any decided cases. A grey area of the law. Uncharted territory where there are bound to be fluctuating interpretations. I am satisfied that the questions involve a substantial question of the law since the interpretation; and or application of the Constitution would be on an area which is indeed novel. There is a dearth of opinion on the subject.

3. The learned trial judge quite rightly in my view did not give an opinion on the question referred to the Court of Appeal.

4. Did the questions arise in the proceedings in the High Court?

The Court of Appeal struck out both questions referred to it by the High Court because according to Court of Appeal the question did not arise in the course of the proceeding in charge No: KG/EFCC/1/2006. The reasonings of the Court of Appeal runs as follows:

“... As demonstrated from the Record of the reference by the High Court, here there is no record that any proceedings of the High Court had been conducted in the charge apart from the filing of the charge and the motion ex-parte fro reference.”

The Court of Appeal continued:

“As far as the reference made on the 26th of January 2007 by the High Court was concerned the question stated therein did not arise in the course of the proceedings but one which were formulated and submitted to the court by the learned Senior Advocate, ex-parte foe reference and which with “eyes of the ball” the High Court obliged him.

Learned counsel for the appellant by a motion ex-prate prayed the trial High Court to refer two questions to the Court of Appeal for determination. It .being an ex-parte application the respondents were absent and unrepresented at the learning on the 26th of January 2007. By the clear provisions of Section 295 (2) of the Constitution earlier alluded to a referral made in the absence of the other party is very much in order. See F.R.N. v. Ifegwu supra.

Now, did the two questions arise in the course of proceedings, what then is the meaning of in the course of proceeding. Proceedings according to Blacks law Dictionary

means.

The regular and orderly progression of a Lawsuit, including all acts and events between the time of commencement and the entry of judgment. In a criminal trial, proceedings are said to have commenced with the reading of the charge to the accused person. Consequently any filing done by the prosecution, and or defence (e.g. filing of processes, or making applications, taking witnesses) after the charge is read and the accused person enters his plea falls within the warm embrace of things done in the course of proceedings or arising in the course of proceedings.

In answering the question whether the two questions arose in the course of the proceedings, recourse must be made to the Record of Appeal. The Record of Appeal is a reproduction of the proceedings of the courts from which the case has passed through. Once as in this case there has been no formal complaint before this court by either counsel with respect to the correctness of the Record of Appeal there is thus an irrefutable presumption that the Record of Appeal is correct. That in plain language means that the appellate court and the litigants, counsel are bound by the contents of the Records of Appeal. This is the document an appeal court relies heavily on to keep itself abreast of what transpired in the court from which the appeal emanates. An Appeal Court relies solely on the Record of Appeal to determine an appeal. According to the Court of Appeal, there is no record that any proceedings in the High Court had been conducted in the charge apart from the filing of the charge and the motion ex-prate for reference. The Record of Appeal in this appeal is made up of two volumes. Volume 1 and 2. It is clear after examining the Record of Appeal that:

On the 1st of December 2006, an 80 count charged was read to appellant (accused person) and he entered not guilty pleas to all the counts. At the conclusion of the reading of the 80 counts, learned counsel for appellant made an oral application for bail. The learned trial judge heard submissions from counsel and adjourned Ruling for the 6th of December, 2006. On the 6th of December, 2006 the learned trial judge admitted appellant to bail on terms not relevant in this

appeal. The case was adjourned to 29th of January 2007 for hearing.

On the 26th of January 2007 learned counsel for the appellant moved an ex-prate application. It was alter the learned trial judge heard the ex-prate application that he made the referral of two questions to the Court of Appeal. ***A diligent examination of the Record of Appeal reveals that the 80 count charge was read to the appellant on the 1st of December 2006. It was on that day that proceedings in charge No: KG/EFCC/1/2006 commenced. After the learned trial judge heard learned counsel for the appellant on the 26th of January 2007, on his motion ex-prate, the learned trial judge referred two questions to the Court of Appeal for determination. The reference was made in the course of proceedings. The Court of Appeal was wrong to conclude that the Record of Appeal shows that no proceedings were conducted except the filing of the charge and the motion ex-prate for reference. On the contrary the Record of Appeal shows that proceedings were indeed conducted and the questions arose in the course of proceedings.***

Before I say anything further on the consequences of the error made By the Court of Appeal, I must at this stage say what the correct finding ought to have been. The proceedings in the High Court on the 8th of February 2007 is very important. It was on that day that the learned trial judge, Mr. Justice M.A. Medupin granted the application made ex-prate and referred two questions to the Court of Appeal for determination. Thereafter and on the same day the Hon. Attorney-General of Kogi State, Dr. J.A.M. Agbonika, and the Hon. Attorney-General of the Federation Chief Bayo Ojo, SAN, both filed separate Nolle Prosequi. Nolle Prosequi means do not wish to proceed. Both Attorney-Generals acted under section 174 and 211 of the Constitution and section 253 of the Criminal Procedure Code.

At any stage of any criminal proceedings before judgment, the Attorney-General of a State or the Attorney-General of the Federation may enter a nolle prosequi either by stating in court or filing appropriate process to inform the court that the state intends that the proceedings abate. Once this is brought to the notice of the presiding judge the accused person shall be discharged immediately from me charge me nolle prosequi was filed or entered. The judge has no power

to question me Attorney-General as to why he filed a nolle prosequi.

My lords with the filing of nolle prosequi by the Chief Law Officers of Kogi State and Nigeria on the same day a reference was made to the Court of Appeal for determination, the learned trial judge to have discharged the appellant and struck out the case since the case, i.e charge No: KG/EFCC/1/2006 was no longer in existence. The Court of Appeal was wrong to consider the questions referred to it for determination after being aware from the Records of Appeal that nolle prosequi had been filed. This is so because mere is/was nothing before the trial court, so there would be nothing for the Court of Appeal to send back. It amounted to an academic exercise for the Court of Appeal to waste judicial time considering questions from a case that is no longer in existence. There was no longer a live issue to be considered by the Court of Appeal in view of nolle prosequi filed in the trial court. In a long line of cases it has been said over and over again that courts are constituted to determine live issues and not to engage in academic exercise. Bhojwani v. Bhojwani (1996) 6 NWLR (pt.451) 663, Oyeneye v. Odugbesan (1972) 4 SC 244, Obi-Odu v. Duke (2005) 10 NWLR (pt.932) 120, Bamgboye v. Unilorin (1999) 10 NWLR (pt.622) 290.

In view of nolle prosequi filed in High Court, the consideration of the two questions by the Court of Appeal amounted to an academic exercise.

It is the view of learned counsel for the appellant that the nolle prosequi was wrongly filed since the appeal had already been entered when the Registrar of the Court from which the appeal emanates has forwarded to the Registrar of the appellate court a complete Record of Appeal filed by the appellant in the Registry. The transmission of the Records to the Registrar of the Court of Appeal connotes entry of appeal. See Ogunremi v. Dada (1962) 1 ANLR p.663 Adewoyin v. Adeyeye 1962 2 ANLR p.108. *The onus is on the appellant to satisfy this court that at the time nolle prosequi was filed an appeal had already been entered in the Court of Appeal. Since the appellant failed to discharge that*

burden nolle prosequi filed on the 8th of February 2007 the same day the reference was made was perfectly in order. The Court of Appeal ought to have struck out the questions in view of the fact that a nolle prosequi had been filed in the High Court.

I earlier did say that the Court of Appeal was in error to conclude that the two questions did not arise in the course of the proceedings in charge No: KG/EFCC/1/2006. They did. The Court of Appeal was wrong. It is long settled that it is not every mistake or error in a judgment that would determine an appeal in favour of an appellant or would result in the appeal being allowed. Air appeal court is to decide if the judgment is correct and not whether the reasons for the judgment are correct.

After a thorough examination of the Record of Appeal and the law, the Court of Appeal was right to strike out the questions referred to it for determination but for the wrong reasons. The judgment of the Court of Appeal is nevertheless right because the matter would still have been struck out in view of the fact that the nolle prosequi brought the hearing of the case to an end. With the filing of nolle prosequi there was nothing to send back to the trial court. In the light of all that I have been saying this appeal is dismissed.

CHUKWUMA-ENEH JSC

I have read in advance the judgment of my learned brother Bode Rhodes-Vivour JSC in this matter and I agree with him that there is no merit in the appeal.

It is clear that the Attorney General of the Federation and the Attorney General of Kogi State, each of them, have filed the two nolle prosequi (meaning will not prosecute) in this case. This is a voluntary withdrawal by both Attorneys General not to proceed any further with the indictment as preferred against the accused person in this case. They have accordingly put an end to the matter of the prosecution of the accused person although it is not a bar or an acquittal on the merits.

At that stage of the proceedings at the Court of Appeal, that court ought to have put an end to the case by striking it out pre-

emptorily as there is no longer any competent indictment against the accused person before that court. The same consideration ought to have extended to the referral of two questions for the Court of Appeal to answer as there is no longer any *lis extant* upon which the indictment and the referral could be predicated. The appeal filed to this court after the *nolle prosequi* have been duly filed in this matter is strange to say the least. I must hold it totally incompetent, a non-event and of no effect whatsoever. And so, I do not find it necessary to advert any attention to the two questions arising from the referral to the Court of Appeal to answer as that court has lost the jurisdictional competence to entertain the matter from the moment the *nolle prosequi* have been filed. That certainly is the effect of the *nolle prosequi* filed in this matter.

And so, I also strike out this appeal and abide by the orders contained in the lead Ruling.

OGUNBIYI JSC

I have read in draft the lead judgment by my brother Rhodes-Vivour JSC and I agree that the appeal is devoid of any merit and should be dismissed.

Briefly, on the concept of *nolle prosequi*, it is an exercise of the power by the Attorney General of the Federation or state and which can be exercised at any stage of a criminal proceeding. Once the power is invoked, it will not be subject to question either by any person or even the court. As at the date of granting the application by the trial court therefore, the consequential effect of filing of *nolle prosequi* by both Attorney-Generals of the Kogi State and the Federation had automatically abated the criminal proceedings. It is also pertinent to state that any act taken after the notice had been brought would amount to an academic exercise which is akin to a court assuming jurisdiction where none exists but an exercise in futility.

My brother Rhodes - Vivour has adequately dealt with the issues raised in this appeal and I agree with the reasonings and conclusion arrived thereat and also dismiss same in terms of the leading judgment.