

SUPREME COURT OF NIGERIA
FRIDAY 22ND FEBRUARY, 2013. SC. 237/2010
CORAM:- I. T. MUHAMMAD, J. A. FABIYI, O. ARIWOOLA,
M. D. MUHAMMAD, K. B. AKA'AH, JJSC

FEDERAL REPUBLIC OF NIGERIA APPELLANT
V.
1. SENATOR ADOLPHUS N. WABARA
2. SENATOR IBRAHIM ABDULAZEEZ RESPONDENTS
3. PROFESSOR FABIAN OSUJI

CHARGES - Preferment - Application for leave - By CPC s. 185(b)
- Annexure of witnesses' statements is not vital - As appellant is only
required to show court - Why respondent should be put to trial (H1)

COURTS - Issues - Determination - Limit - Courts do not determine
academic issues - That are far removed from the real issues - In con-
troversy between the parties (H2)

FACTS

At the High Court of the FCT Abuja, following its application, appellant was granted leave to prefer a charge against respondents and four others. Attached to the application are a fifteen count charge against accused/respondents, names and addresses of witnesses and proof of evidence of twenty one witnesses. 1st and 2nd respondents were alleged to have demanded the sum of fifty million naira from 3rd respondent (the then Minister of Education) to secure the easy passage of the 2005 budgetary allocation of 3rd respondent's ministry. 2nd respondent was alleged to have received a further sum of five million naira for facilitating the understanding between both sides. Thereafter, respondents having pleaded not guilty were admitted to bail.

Subsequently, respondents applied to the court through their counsel, praying that the leave granted appellant to prefer the charge against them be set-aside and also that the charge be quashed. They further urge that they be discharged on the grounds, inter alia, that the proof of evidence attached to appellant's application does not disclose any prima facie case against them and that some of the of-

fences in the counts are not defined or provided for by any written law. Their applications were opposed by appellant. In its ruling, the court dismissed respondents' applications. Dissatisfied, respondents appealed to the Court of Appeal, Abuja. The court allowed the appeal. Aggrieved, appellant filed appeal in Supreme Court.

ISSUE FOR DETERMINATION

Whether the court below is right in its finding that the trial court had wrongly granted leave to the appellant herein to prefer charges against the respondents.

HELD (Unanimously allowing the appeal per **M. D. MUHAMMAD JSC**)

CHARGES - Preferment - Application for leave

1. A community reading of the clear and unambiguous provisions of section 185 (b) of the criminal Procedure code and order 3 rules (1) and (2) (a) and (b) reveals clearly that the appellant herein has complied with the criteria an applicant is required to fulfill to be entitled to the leave he seeks. Nowhere in the applicable rules has the annexure of the witnesses' statements to the application for leave been made a necessary requirement.

The leave granted the appellant by the trial court, it must be appreciated, is on the basis of appellant's ex parte application to the court. Respondents are not put on notice. The extant procedure put in place only require the appellant to provide the court with adequate materials from which to infer whether or not it is just to put the respondents on trial. This Court has insisted that it is oppressive and unconstitutional to put a person on trial unless the court approached to grant the leave is satisfied that the materials accompanying the application disclose enough facts to warrant a trial. Learned counsel for the respondents' contention that there is the necessity to attach statements of witnesses and serve same on the respondents is therefore misconceived. (p. 368 B/H)

COURTS - Issues - Determination - Limit

2. It becomes incumbent at this stage to restate that courts do not waste their precious time in determining academic or hypothetical questions that are either totally unconnected or far removed from the real issues in controversy between the parties. An examination of all the other issues parties here assert are relevant to the determination of the appeal discloses that they are irrelevant, diversionary or at best constitute defences or matters best raised and dealt with at trial. The lots are hereby discountenanced. (p. 372 B)

NOTABLE POINT OF INTEREST

I. T. MUHAMMAD

1. Charges – Supporting documents for application for leave

By way of summary, the applicant for leave to prefer a charge, is mandated by the rules to comply with the rule by supporting his application with the following:

- (a) the charge in respect of which leave is sought
 - (b) affidavit by the applicant (if not an Attorney-General or his representative) that the statements contained in the application are true
 - (c) a statement on whether or not any application has previously been made under these Rules.
 - (d) a statement on whether or not any proceedings have been under taken under chapter XVII of the CPC, and
 - (e) the result of such applications or proceedings, if any.
- (p. 374 B)

REPRESENTATION

Pastor John Olushola Baiyeshee SAN, with Dr. Akin Onigbinde, Samuel Ipinlaye, Prof. Mohammed M. Akambi, Richard Baiyeshea, Adedeji Adeyemi, for the Appellant

K. C. Nwufu Esq. with I. S. Orjih-Wilson, Ugo Nwofor

Chief E. K. Ashikaa with A. C. Mato, Victor Iorshenge, A. A. Dodo, Adewale Adegboyega, Gordy Uche with Isaac Nwachukwu, Chudy Maduka, Bulama Bashir and Adanna Komuanya, for the Respondents

CASES REFERRED TO

- Gaji v. The State (1975) NMLR 98
 Clidiak v. Laguda (1964) NMLR 123
 Ohwovoriolè v. FRN (2003) 1 SCNJ 484
 B Ezeadukwa v. Maduka (1997) 8 NWLR (pt. 518) 635
 Nnonye v. Anyichie (2005) 2 FWLR (pt. 268) 1213
 Ntiero v. NPA (2008) 10 NWLR (pt. 1094) 129
 Oniah v. Onyia (1989) 1 NWLR (pt. 99) 514
 C Adebayo v. Babalola (1995) 7 NWLR (pt. 408) 383
 Abogede v. The State (1996) 4 SCNJ 223

STATUTE & RULES REFERRED TO

- Criminal Procedure Code, ss. 122, 185(b), 340(2)(a)(b)
 D Criminal Procedure Rules 1970, O. 3 r. 2(a)(b)

LEAD JUDGMENT BY M. D. MUHAMMAD JSC

This is an appeal against the judgment of the Abuja Division of the Court of Appeal, hereinafter referred to as the court below, in
 E appeal No. CA/A/7/C/2006 delivered on the 1st day of June, 2010 allowing the appeal of the respondents herein against the decision of the High Court of the Federal Capital Territory Abuja, hereinafter referred to as the trial court, in suit No. FCT/HC/CR/37/2005. Being
 F dissatisfied with the judgment, the respondent at the court below, now appellant herein, has appealed to this Court on a Notice of appeal containing eight grounds.

I shall summarise at once the facts of the case that brought about the appeal. At the trial court, following its application, the ap-
 G appellant was granted leave to prefer a charge against the respondents and four others. Attached to the application are (a) a fifteen count charge against the accused (2) Names and addresses of witnesses and (3) proof of evidence of twenty one witnesses.

The 1st, 2nd respondents and others are alleged to have de-
 H manded the sum of fifty million naira from the 3rd respondent, the then Minister of Education, to secure the easy passage of the 2005 budgetary allocation of 3rd respondent's ministry in the same way the respondents assisted in passing the 2004 allocation. The 2nd respondent is alleged to have received a further sum of five million

naira for facilitating the understanding between both sides. The trial court obliged the appellant the leave on the 12th of April, 2005. Thereafter, the respondents having pleaded not guilty were admitted to bail. By 13th May, 2005, the accused persons through their respective counsel, applied to the trial court praying that the leave granted the appellant to prefer the charge against them be set-aside and the charge preferred against them quashed. They further urge that they be discharged on the grounds, inter alia, that since they had been tried and convicted by the President of the Federal Republic of Nigeria for the same offences it would be unjust to retry them for same; that the proof of evidence attached to the appellant's application does not disclose any prima facie case against them and that some of the offences in the counts are not defined or provided for by any written law. The applications were stoutly opposed by the appellant through its various counter affidavits. In a well considered ruling, the trial court in dismissing the respondents' consolidated applications, concluded at pages 385 to 386 thus:-

"It is clear for the foregoing appraisal that the provision of rule 3 (2) (a) of the 1970 Rules were complied with in bringing or preferring the charges against the accused persons/applicants. Failure to state a material ingredient of an offence is certainly fatal to the prosecution but that has to be taken at the trial not at the stage of preferring a charge and it is so held. The same reasoning goes for possibility of duplicity. It is also an issue that could be taken as part of the defence of the accused persons at the trial.

The 7th accused person having been brought along with the 1st - 6th accused persons could be tried with them. There is no law that forbids such a composition.

If section 53 (1) is unconstitutional, it could as well be challenged on that ground at the trial or even address. It is not a matter having to do with referral of charge(s) against the accused persons/applicant. By these reasoning the accused persons herein have been properly and duly arraigned and it is so held. The applications of all the accused persons/applicants fail on these grounds and are accordingly hereby dismissed."

Five of the seven accused persons whose applications are dismissed by the trial court appealed against the court's ruling to the court below. Of the five, two, Senator Emmanuel Okpede and Sena-

tor Badamasi Maccido, have died. The appeals of the surviving three, the respondents before us, were consolidated. In allowing the appeal, the court, inter-alia, made the following findings:-

(a) That the trial court is wrong to have granted the appellant leave to prefer a charge against the respondent when the application is not accompanied by statements on oath disclosing sufficient evidence of the commission of any offence.

(b) The application is not supported by statements of “star witnesses” such as Senator Chris Adigbije whose three statements are not attached to the application.

(c) The accused had not in any way been implicated in the proofs of evidence accompanying the application.

(d) That there was intention to prejudice the minds of the public including the judge to whom the National broadcast of the President was particularly directed at.

(e) That in addition to the broadcast, the EFCC Interim Report on the basis of which the appellant herein sought and obtained leave to prosecute the respondents were made without giving the respondents a hearing.

(f) That the trial court did not consider each of appellant’s thereby breaching respondents’ right to fair hearing, and

(g) That the trial court is wrong to have granted the leave in spite of the different and wrong date the 3rd respondent is alleged to have committed the offence, a lapse which cannot be rectified at trial.

Aggrieved particularly by the foregoing findings, the respondent at the court below has appealed to this Court on eight grounds. At the hearing of the appeal, parties identified, adopted and relied on their various briefs, including appellant’s reply brief to 1st and 3rd respondents, brief, as arguments for or against the appeal.

The seven issues distilled in the appellant’s brief are as follows:-

“1. *Whether the learned Justices of the Court of Appeal were right in holding that “for an information preferred by consent of a Judge of the High Court pursuant to Section 340(2)(a) and (b) of the Criminal Procedure Code to be presumed to have been properly instituted, application for the consent must; (a) be accompanied by statements on oath or otherwise disclosing sufficient evidence of*

the commission of an offence”: ground one (b) be supported by the statement of “star witnesses” ground two.

2. Whether the learned Justices of the Court of Appeal misdirected themselves when held that “the star witness” made three statements which were not attached to the application for leave to prefer a charge: ground six. B

3. Whether the learned Justices of the Court of Appeal were right in holding that the national broadcast of the President of Nigeria was a communication to the learned trial Judge by a person in command influence over him and that the broadcast was clear example of the manipulation of the judiciary and judicial process by the executive: ground three. C

4. Whether the learned Justices of the Court of Appeal misdirected themselves when they held that the EFCC Interim Report and the national broadcast of the President of Nigeria were made “without a hearing from the accused”: ground seven. D

5. Whether the learned Justices of the Court of Appeal were right in holding that the error in stating a wrong date for the commission of the offence by the 3rd respondent was so fundamental that it could not be amended at the trial: ground five. E

6. Whether the learned Justices of the Court of Appeal misdirected themselves when they held that the learned Judge did not consider each of the applications before him and that fair hearing rights of the respondents herein were compromised: ground four. F

7. Whether the learned Justices of the Court of Appeal erred in law when they held that the accused persons had not “in any way been implicated in the proofs of evidence supplied with the application for consent”: ground eight.”

The issues formulated by each of the respondents are a mere replica of the appellant’s issues set out above. It will amount to unnecessary repetition to reproduce all the issues by each of the respondents. I think it will suffice if I reproduce the issues formulated by the 1st respondent to cover the remaining respondents. They are as follows:- H

“(i) Whether the Learned Justices of the Court of Appeal were right in holding that the Application for leave to prefer a charge must be accompanied by Statement of witnesses?

(ii) Whether the learned Justices of the Court of Appeal misdi-

rected themselves when they held that the star witness made three, rather than two, statements which were not attached to the Application for leave to prefer a charge?

B *(iii) Whether the Learned Justices of the Court of Appeal were right in holding that the national broadcast of the President of Nigeria was a communication to the learned trial judge by a person in command influence over him and that the broadcast was a clear example of the manipulation of the judiciary and judicial process by the executive?*

C *(iv) Whether the learned Justices of the Court of Appeal misdirected themselves when they held that the EFCC's Interim Report and the National Broadcast of the President of Nigeria were made without fair hearing from the Accused Persons?*

D *(v) Whether the learned Justices of the Court of Appeal were right in holding that the error in stating a wrong date for the commission of the offence by the 3rd Respondent/Appellant was so fundamental when there was no rectification of the date even after objection thereto by the accused persons?*

E *(vi) Whether the learned Justices of the Court of appeal were wrong when they held that the learned trial judge was wrong in not considering each of the Applications before him and that the fair hearing rights to the Respondents were compromised?*

F *(vii) Whether the learned Justices of the Court of Appeal erred in law when they held that the accused persons had not been implicated in the proofs of the evidence supplied with Application for consent without the Statements of the witnesses?"*

In the case at hand, the real issue is controversy between the parties is-

G Whether the court below is right in its finding that the trial court had wrongly granted leave to the appellant herein to prefer charges against the respondents.

H The appellant's dissatisfaction with that finding is as contained in grounds 2 and 6 in appellant's amended Notice of appeal. It is from these grounds that the appellant distilled its 1st and 2nd issues for the determination of the appeal. The 1st and 2nd similar issues of all the three respondents also draw from these grounds. For now, appellant's 1st and 2nd issues will jointly be considered vis-à-vis those distilled and argued by the respondents in relation to them. Thereaf-

ter, if the need still persists, the other issues raised in the appeal would then be looked into.

In arguing the two issues, Mr. Oshe learned senior counsel for the appellant referred to the lower court's finding at pages 232 - 233 of the record and submitted that the finding is erroneous for at least two reasons. Firstly, S. 340 (2) (a) and (b) of the Criminal Procedure Code the court purportedly relied upon in setting aside the trial court's ruling is not the applicable law on the matter. Having applied the wrong law and criteria, counsel further submitted, the court necessarily arrived at a perverse decision. The criminal Procedure (Application for leave to prefer a charge in the High court) Rules 1970 stipulates the procedure that should inform a court in the exercise of its powers under S. 185 (b) of the Criminal Procedure Code to grant or refuse an applicant's leave to prefer a charge against an accused. In the instant case, learned counsel contended, the trial court that had complied with all the requirements of the rules could not be said to have exercised its discretion wrongly.

On appellant's 2nd issue, learned senior counsel submitted that the lower court is wrong in its finding that Senator Chris Adighije is a star witness and that the Senator had made a third statement with the view to protecting certain interests. The proof of evidence attached to appellant's application, learned senior counsel submitted, does not support the lower court's findings in this regard. The court, learned senior counsel submitted, is bound by the record before it and where it incorrectly summarises the facts before its inference, being a misdirection, the inference has to be set-aside on appeal. Relying on *R. O. Gaji V. The State* (1975) NMLR 98 and *Wahid Cliadiak V. A. K. J. Laguda* (1964) NMLR 123 at 125 in support of his arguments, learned senior counsel urged us to resolve the two issues in appellant's favour. In any event the exclusion of the motive behind the statement of any witness is not a criteria for the grant of the leave the appellant sought.

Responding, learned counsel to all the respondents made similar submissions that where a statute has laid down a particular procedure for doing any act, there should be no other method of doing that same act. Section 185 (b) of the Criminal Procedure Code read along with Order 3 rule 2 (a) (b) of the 1970 rules stipulate the conditions which must exist before the court grants leave to the ap-

pellant. The provisions, counsel for the respondents unanimously submitted, make it mandatory for the applicant to attach the written statements of witnesses to the application. Since the appellant had failed to annex the written statements of the witnesses as required, counsel submit, the court below is right to have set-aside the per-
 B verse ruling of the trial court that held otherwise. In particular, learned counsel hammered on appellant's omission to make the three contradictory statements of Chris Adighije whom they tagged "the star witness" available. Relying on this court's decisions in MILTON P.
 C OHWOVORIOLE V. FR.N & 3 Ors (2003) 1 SCNJ 484 at 492 and Ezeadukwa V. Maduka (1997) 8 NWLR (part 518) 635 at 656, counsel insist that not only are the decisions in Gaji v. The State (supra) and Chidiak v. Laguda (supra) unavailing to the appellant, the extant rules
 D of court on appellant's application vindicates the lower court's position on the matter. The lower court's decision setting aside the wrong exercise of discretion of the trial court remains unassailable.

Now, both sides in the instant matter have agreed and correctly too that the trial court's power to grant the appellant the leave it sought to prefer a charge against the respondents is provided for
 E by section 185 (b) of the Criminal Procedure Code hereunder set out for ease of reference:-

"No person shall be tried by the High Court unless:-

(b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a judge of the High Court."
 F

Order 3 (1) and (2) (a) and (b) of the Criminal procedure (applications for leave to prefer a charge in the High court) Rules 1970 specify what conditions an applicant shall fulfill to entitle him to the leave he seeks.

G The order and rule provide:-

"3. (1) Every application, other than an application made under rule 2, shall be in writing signed by the applicant or his counsel and,

(a) shall be accompanied by the charge in respect of which leave is sought and, unless the application is made by or on behalf of the Attorney-General, shall also be accompanied by an affidavit by the applicant that the statement contained in the application are, to the best of the deponent's knowledge information and belief true; and
 H

(b) shall state whether or not any application has previously been made under these rules and whether or not any proceedings have been taken under Chapter XVII of the Criminal Procedure Code, and the result of any such applications or proceedings.

(2) Where no proceedings have been taken under Chapter XVII of the Criminal Procedure Code, the application shall state the reason why it is desired to prefer a charge without such proceedings having been taken and;

(a) there shall accompany the application proofs of the evidence of the witnesses whom it is proposed to call in support of the charge and

(b) the application shall include a statement that the evidence shown in the proofs will be evidence which will be available at the trial and that the case disclosed by the proofs is, to the best of the knowledge information and belief of the applicant, a true case.”

Learned counsel to the respondents are indeed on a firm terrain in their submission that where a statute provides for the manner of doing a particular act only the manner specified by the statute will suffice. See *Nnonye V. Anyichie* (2005) 2 FWLR (part 268) 1213 and *Ntiero V. NPA* (2008) 10 NWLR (part 1094) 129. The respondents’ appeal to the court below has been the assertion, and same has been upheld by the court, that since the appellants have not met the criteria stipulated under order 3 rules (1) and (2) of the relevant rules of the trial court regarding its application, the leave necessary for the preferment of the charges against the respondents is improperly acquired. Competent proceedings against the respondents are impossible as both the improperly acquired leave and the illegally preferred charges against them must be quashed. But do facts on record sustain respondents’ contention? I think not. Learned respondents’ counsel appears to downplay the purpose behind the extant rules of court.

In the case at hand, see page 106 of Vol. 1 of the record of appeal, the appellant attached to its application the following:-

(1) A copy of the fifteen count charge against the respondents and others in respect of which leave was sought;

(2) Names and addresses of witnesses;

(3) Proof of evidence, which shall be relied upon at the trial and a statement that neither had a similar application been previ-

ously made nor was a preliminary investigation on going in any magistrate court pursuant chapter XVII of the Criminal procedure Code.

The records, therefore, bears out the respondents that the witnesses' statements have not been attached to appellant's application for leave. But this fact does not mean that learned counsel are correct in supporting the lower court's finding that appellant's failure to annex the statement of the witnesses is fatal.

A community reading of the clear and unambiguous provisions of section 185 (b) of the criminal Procedure code and order 3 rules (1) and (2) (a) and (b) reveals clearly that the appellant herein has complied with the criteria an applicant is required to fulfill to be entitled to the leave he seeks. Nowhere in the applicable rules has the annexure of the witnesses' statements to the application for leave been made a necessary requirement. The court below initially seems to appreciate the essence of the adjectival provisions when it states at pages 229 -230 of volume 2 of the record of appeal:-

"The procedure whereby a trial on indictable offence will be initiated by an application whether in the Judge's chambers or in open, demands that the application be made ex-parte, at the back of the person to be tried, and this seeks discretion not an absolute right. There must be clear particulars and facts to justify the exercise of the discretion. Therefore it is not the law, neither is it justice, to say that once the application is made on information and all necessary documents are attached, without more the application to prefer a charge must be granted. There must be facts in the proofs of evidence to justify the grant of the application. Otherwise, indictments would be allowed to be tried where enough particulars are absent in the proofs of evidence.

However an accused person should not be indicted to face trial which from the outset he should not face. The Supreme Court in Abacha V. The State (2002) 11 NWLR (pt. 779) 437; Ikomi V. The State (1986) 3 NWLR (pt. 28) 340; Egbe V. The State (1980) 1 NCR 341; Okoli V. The State (1997) 1 NWLR (pt. 479) 115."

The leave granted the appellant by the trial court, it must be appreciated, is on the basis of appellant's ex parte application to the court. Respondents are not put on notice. The extant procedure put in place only require the appellant to

provide the court with adequate materials from which to infer whether or not it is just to put the respondents on trial. This Court has insisted that it is oppressive and unconstitutional to put a person on trial unless the court approached to grant the leave is satisfied that the materials accompanying the application disclose enough facts to warrant a trial. Learned counsel for the respondents' contention that there is the necessity to attach statements of witnesses and serve same on the respondents is therefore misconceived. B

It is worth the while to know that proofs of evidence are not the same as the statements of the witnesses the appellant would call at the trial. Proofs of evidence are summaries of the statements of those witnesses to be called at trial by the appellant. It is for that reason that the rules require an affirmation from the applicant that the evidence against the respondents as summarized in the proofs of evidence prepared by the appellant will be the evidence against the respondents in respect of whose trial the court is urged to grant the leave to prefer a charge. Even at the trial, the respondents, on the authorities, are only entitled access to the statements of the prosecution's witnesses on the fulfillment of certain conditions. In the case at hand where trial is yet to commence, indeed its competency is being challenged by the respondents; it is premature for respondents to assert any entitlement to the statements of witnesses. The affirmation of respondent's entitlement to the witnesses' statements by the court below depicts a sad misunderstanding of the decisions of this court, inter alia, in *Gaji v. State* (supra), *Milton P. Ohwovoriole v. FRN* (supra) and *Ikomi v. The State* (supra). It is, therefore, necessarily rewarding to remind learned respondents' counsel the decision of this court in these cases on this core issue which the instant appeal raises. C D E F G

In *Gaji's* case, on being appraised of the leave granted the respondent to prefer a charge for his summary trial, the appellant by a motion on notice urged the trial High Court for an order, inter alia, that he be supplied with the proofs of statements of the witnesses attached to respondent's ex parte application for the leave to prefer the charge against him. Appellant's application was refused. The appellant in that case neither urged the trial High Court nor this Court that the leave granted the respondent to prefer a charge for his sum- H

mary trial be set-aside following the trial court's perverse exercise of its discretion in the grant of the leave. Appellant however renewed his application several times for the supply of the statements of prosecution witnesses to him which the trial court persistently refused and dismissed by virtue of Section 122 of the CPC. The trial court held
 B that appellant did not bring the applications within the exceptions to the general rule under the Section 122 of the C.P.C which disentitled him to the supply of those statements.

At page 65 of the law report, this Court, in relation to the trial
 C court's refusal to oblige the appellant the supply of the witnesses statements attached to the application for leave to prefer a charge against him pursuant to Section 185 (b) of the Criminal Procedure Code, remarked at page 64 of the report thus:-

*"It was not argued before us that in seeking the leave of the
 D judge as stated, the appellant should be put on notice and therefore there cannot be any force in any argument that that should have been the case and that at that stage the appellant should be supplied with the proofs of the evidence to be given by the witnesses."*

The court proceeded to observe obiter that its decision on the
 E point that had not arisen before it through of considerable importance in an appropriate case, was of little or no effect "on the fortunes of the appellant before it". It is in respect of appellant's subsequent application during trial that this court's decision has some utility. The court at page 75 of the report remarked as follows:-

*"Learned counsel instanced the failure to serve the appellant
 F with copies of the deposition of the prosecution witnesses since there was no preliminary investigation proceeding his committal for trial at the High Court. We have already dealt with the issue and we are of
 G the view that although it would be far more desirable that judges who exercise the powers of granting leave under the provisions of Section 185 (b) of the Criminal procedure code should ask for and insist on seeing the proofs of evidence which it is intended to urge in support of the prosecution, it is not open at that stage to an accused
 H person to be invited into the scene and moreover to be supplied with copies of the statements of potential witnesses."*

The foregoing obiter remarks have since become the principle on the point in this court's subsequent decisions. Now, the proofs of evidence, the statements of the accused persons and other relevant

exhibits and documents to be tendered by the appellant, all of which are annexed to the application for leave, are at pages 118 - 187 of Vol. 1 of the record of appeal. An examination of these discloses sufficient materials on the basis of which the trial court has exercised its discretion judiciously and judicially.

Learned respondents' counsel and indeed the court below appear either not to have understood or are unimpressed by the decisions of this court in both *Gaji v. The State* (supra) and *Milton P. Ohwovoriole v. FRN* (supra). In the latter case *Kalgo, JSC* at pages 194 - 195 of the law report restated the decision of this court on the issue at hand as follows:-

"I have earlier held in this judgment that I find no evidence linking the appellant with the offence charged against him and therefore no prima facie case has been established justifying the proceeding of the criminal trial against him. In the Ikomi V. State (supra) this court clearly said that "no citizen should be put to the rigours of trial, in a criminal proceeding, unless available evidence points, prima facie, to his complicity in the commission of a crime".

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

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

From the foregoing, it is thus not the decision of this Court in the two cases that leave pursuant to an application under and by virtue of Section 185 of the Criminal Procedure Code and Order 3 rules (1) and (2) (a) and (b) of the 1970 rules succeeds only where, in addition to the other requirements, the applicant has annexed to the application the statements of the prosecution witnesses. The court only insists that before the leave is granted, the judge to whom the

application is made must ensure that the materials before him justify putting the person in respect of whose prosecution the leave is being sought to trial. In the case at hand, from the proof of evidence and the cautionary statements of the respondents the appellant annexed to its application, it must be re-iterated, the applicant has fulfilled the conditions the law places on it. The judgment of the court below to the contrary is perverse.

It is for these reasons that I resolve the only real core in this appeal in favour of the appellant.

It becomes incumbent at this stage to restate that courts do not waste their precious time in determining academic or hypothetical questions that are either totally unconnected or far removed from the real issues in controversy between the parties. An examination of all the other issues parties here assert are relevant to the determination of the appeal discloses that they are irrelevant, diversionary or at best constitute defences or matters best raised and dealt with at trial. The lots are hereby discountenanced. See Oniah v. Onyia (1989) 1 NWLR (pt. 99) 514 & Adebayo v. Babalola (1995) 7 NWLR (pt. 408) 383.

On the whole, I hereby allow the meritorious appeal, set-aside the judgment of the court below, restore the trial court's decision and remit the case to the court for the trial of the respondents to be conducted and concluded expeditiously.

I. T. MUHAMMAD JSC

My learned brother, M. D. Muhammad, JSC, had made a copy of the judgment just delivered available to me. I am in agreement with him that the appeal has merit and it should be allowed.

My learned brother has, in his judgment, set out clearly the facts and the issues for determination. I need not repeat same here except to say that the first issue formulated by the learned counsel for the appellant is very apt in treating this appeal. The appeal essentially is on the consent of a trial judge for the prosecution to prefer a charge against an accused person or persons.

Where an offence has been committed or is alleged to have been committed in the Northern states of Nigeria or any part including the Federal Capital Territory, Abuja, the governing law is the Crimi-

nal procedure Code (CPC) and not the CPA which is applicable in the other parts of the country. Section 185 (b) of the CPC provides:

“No person shall be tried by the High Court unless -

(b) a charge is preferred against him without the holding of a preliminary inquiry by LEAVE OF A JUDGE of the High Court.”

Whenever and wherever leave of a Judge is to be sought, it means, in my humble understanding, that the statute has conferred on the judge some discretionary powers. Discretion which can hardly be altered. Rules for the procedure to obtain leave from a judge of a High Court to prefer a charge (Preliminary Inquiry excluded) against a person suspected to have committed a crime have been provided by the criminal Procedure (Application for leave to prefer a charge in the High Court) Rules, 1970. Sub-rule 3 (3) stipulates as follows:

“(1) Every application, other than application made under rule 2, shall be in writing signed by the applicant or his counsel and,

(a) shall be accompanied by the charge in respect of which leave is sought and, unless the application is made by or on behalf of the Attorney-General, shall also be accompanied by an affidavit by the applicant that the statement contained in the application are, to the best of the deponent’s knowledge, information and belief, true

(b) shall state whether or not any application has previously been made under chapter XVII of the Criminal Procedure Code, and the result of any such applications or proceedings.

(2) Where no proceedings have been taken under chapter XVII of the Criminal Procedure Code the application shall state the reason why it is desired to prefer a charge without such proceedings having been taken, and

(a) there shall accompany the application proofs of the evidence of the witness whom it is proposed to call in support of the charge; and

(b) the application shall include a statement that the Evidence shown in the proofs will be evidence which will be available at the trial and that the case disclosed by the proofs, to the best of the knowledge, information and belief of the applicant, a true case.

(3) where proceedings have been taken under chapter XVII of the Criminal Procedure Code and the magistrate has refused to commit the accused for trial, the application shall be accompanied by

(a) a copy of the depositions, and

(b) *proofs of any evidence which it is proposed to call in support of the charges so far as that evidence is not contained in the depositions, and the application shall include a statement that the evidence shown by the proofs and the evidence shown by the depositions will be available at the trial and that the case disclosed by the dispositions and proofs, is, to the best of the knowledge, information and belief of the applicant, a true case”.*

By way of summary, the applicant for leave to prefer a charge, is mandated by the rules to comply with the rule by supporting his application with the following:

- (a) the charge in respect of which leave is sought
- (b) affidavit by applicant (if not an Attorney-General or his representative) that the statements contained in application are true
- (c) a statement on whether or not any application has previously been made under these Rules.
- (d) a statement on whether or not any proceedings have been taken under chapter XVII of the CPC, and
- (e) the result of such applications or proceedings, if any.

The learned trial judge made the following findings:

“It is clear for the foregoing appraisal that the provision of Rule 3 (2) (a) of the 1970 Rules were complied with in bringing or preferring the charges against the accused persons/applicants. Failure to state a material ingredient of an offence is certainly fatal to the prosecution but that has to be taken at the trial not at the stage of preferring a charge and it is so held. The same reasoning goes for possibility of duplicity. It is also an issue that could be taken as part of the defence of the accused persons at the trial.”

Except where stronger reasons prevail or that the findings of a learned trial judge are found to be perverse, the exercise of his discretion is never brought to question by a higher court. It is the holding of this court in *GAJI V. THE STATE* (1975) NNLR 98 at page 112 as reprinted (1975) 5 SC 61 at page 83, inter alia, that:

“Judges who exercise the powers of granting leave under the provisions of section 185 (b) at the Criminal Procedure Code should ask for and insist on seeing the proofs of evidence which it is intended to urge in supplied of the prosecution: it is not open at that stage to an accused person to be invited into the scene and moreover to be supported with copies of the statements of potential witnesses.”

This holding by the learned trial judge was done (and rightly too), in consonance with the provision of the Criminal Procedure (Application for leave to prefer a charge in the High Court) Rules, 1970 as set out about. It however, beats my imagination to discover from the Record of Appeal that the court below found it difficult to agree with the trial court's holding. The court below, held, among other things:

"It is difficult for me to go along with his reasoning's since the procedures to be followed were by-passed substantially by the prosecution who ought to attach in proofs (sic) of evidence the statements of the witnesses and of the accused and the prosecution failed to do so. Also present were a lot of lapses which can be interpreted to mean that the provisions of the Criminal Procedure (Applications for leave to prefer a charge in the High Court) Rule 1970 had not been complied with and brought into being what the Supreme Court had variously warned against that of pushing the accused into speculating on what he was faced with.

Also cannot be ignored (sic) is the fact that not considering each of the applications even if briefly but separately within the Ruling was akin to denying the each appellant (sic) the right of being heard. That is a situation of a grave nature (sic) that cannot be waved aside (sic). These infractions happening to each of the appellants, each application to have the charge quashed ought to have been favourably considered."

With due respect to the court below, a court of law only decides on facts and the law presented before it and not on sentiments. The facts and the laws applicable in support of the application were properly placed before the trial court. The learned trial judge exercised his discretion based on his understanding of the facts and the law. It is not for the appeal court to substitute its views for that of the learned trial judge when it comes to exercise of discretion. See: OYEYEMI V. IREWOLE LOCAL GOVERNMENT (1913) 1 NWLR (part 270); SOLANKE V. AJIBOLA (1969) 1 NLR 259; HADMOR PRODUCTIONS LIMITED V. HAMILTON (1983) 1 A.C. 191.

I fail to see where the learned trial judge went wrong either on the side of the facts or the law placed before him. His decision, to me is unassailable which, with all due respect, I have no cause to fault or alter. I, accordingly, in line with the well-reasoned judgment of my

learned brother, M. D. Muhammad, do hereby allow the appeal by setting aside the judgment of the court below while I restore and affirm the decision of the trial court. I abide by other consequential orders made in the lead judgment.

B

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - M. D. Muhammad, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal has merit and should be allowed.

I desire to chip in a few words of my own only to depict oneness of purpose and support. The respondents, along with others were arraigned before the trial court for offering and receiving gratification. Thereat, they raised preliminary objection to the charge and their arraignment. The trial court overruled same. They appealed to the Court of Appeal, Abuja Division which found in their favour. The appellant has decided to appeal to this court.

The applicable law in this matter is section 185 (b) of the Criminal Procedure Code (CPC, for short). It provides that:-

“No person shall be tried by the High Court unless;

(b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a judge of the High Court.”

Vide Order 3 (2) (a) and (b) of the Criminal procedure (Applications for leave to prefer a charge in the High Court) Rules, 1970, the application must be accompanied by proof of the evidence of the witnesses whom it is proposed to call in support of the charges. As well, the application shall include a statement ‘that evidence shown in the proofs will be evidence which will be available at the trial and that the case disclosed by the proofs is, to the best of the knowledge, information and belief of the applicant, a true case.’

It has been variously held by this court that proof of evidence should only disclose prima facie case which literally means evidence on its face value. See: the cases of Abogede v. The State (1996) 4 SCNJ 223 at 233; Ajidagba V. I.G.P. 3 FSC 5 at page 6. The proof of evidence and the statements of the respondents annexed to the application constitute prima facie case as dictated by the law, read along with the applicable rules stated earlier on in this write up.

The respondents touted the idea of branding a proposed witness as a ‘tainted witness.’ Let me say it in passing that a person cannot be declared as a tainted witness until he has testified and duly cross-examined. In sum, we are not there yet.

For the above reasons and the fuller ones ably set out in the judgment of my learned brother, I, too, feel that the appeal should be allowed. I order accordingly and endorse all the consequential orders contained in the lead judgment. B

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment just delivered by my learned brother, Dattijo Muhammad, JSC. I am in total agreement with the reasoning therein and the conclusion arrived thereat. I also agree that the appeal is meritorious and deserves to succeed and be allowed. It is therefore allowed by me. D

I abide by the consequential orders made in the lead judgment.

AKA’AHS JSC

My learned brother M. D. Muhammad JSC made available to me in draft his judgment. I agree with his treatment of issues arising in this appeal.

The production of witnesses’ statements, if at all necessary, is for the inspection of the trial Judge to assist him in determining whether to grant leave to the prosecution to prefer a charge under section 185 (b) CPC in the High Court without first conducting a preliminary investigation. See *Gaji V. State* (1975) ALL NLR 268. F

It is not a right that the statements be made available to the accused, failing which the charge or charges which the accused is facing must be quashed. The lower court was wrong in setting aside the ruling by the learned trial Judge on the issue. It is for this reason and the more comprehensive reasons contained in the leading judgment that I too will allow the appeal and remit the case to the trial court for the expeditious hearing of the case. G H