

**SUPREME COURT OF NIGERIA**  
FRIDAY 19TH APRIL, 2013. SC. 164/2010  
**CORAM:- M. MOHAMMED, J. A. FABIYI,**  
**B. RHODES-VIVOUR, M. U. PETER-ODILI,**  
**K. B. AKA'AH, JJSC**

1. SUNDAY CHIJIOKE AGBO  
2. AUGUSTINE UGBALLA  
3. OLIVER IKEKWE ..... APPELLANTS  
4. PANTHELIAN OGIDI  
5. STEPHEN UGWU  
6. PETER ADESILENEYA  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - No case submission - Conditions -  
It is upheld where there was no legally admissible evidence - To prove  
essential element of the offence - Or evidence adduced was discred-  
ited as a result of cross examination (H1)

CRIMINAL PROCEDURE - No case submission - Court is not to  
determine - Whether evidence is sufficient to justify conviction - But  
it must be satisfied that there is a prima facie case - Against accused  
(H2)

EVIDENCE - "Prima facie case" - Meaning of - It suggests that evi-  
dence produced so far - Indicates that there is something - Worth  
looking at (H3)

CRIMINAL PROCEDURE - Murder - Doctrine of last seen - As pros-  
ecution established that appellants - Were last seen with the deceased  
- Appellants should explain what happened to him (H4)

**FACTS**

The deceased, Ifeanyi Nnaji and three others while in a Toyota  
car driven by one Chibueze Idah, had skirmish with Mobile police  
officers on special duties at the border between Enugu State and  
Ebonyi State. In the ensuing melee, the driver of the car was shot

dead while the three others, including the deceased sustained injuries on their legs. The three wounded persons were taken to the Police Headquarters, Abakaliki. Thereat, the deceased who had injuries on his leg had discussions with those around including PW.1 and expressed that he was well. Subsequently at the police Headquarters, Abakaliki, the deceased and the two other wounded persons were put inside a pick-up van and taken away by accused/appellants, the mobile police officers.

The next day the dead body of the deceased was found at the Federal Medical Centre Mortuary, Abakaliki and was later certified to have died from gunshot at his skull which led to brain tissue damage. Appellants were arrested and subsequently charged before the High Court of Ebonyi State Abakaliki for the murder of the deceased. The prosecution/respondent called five witnesses and closed its case. Appellants rather than entering their defence, chose to make a no case submission. Their counsel maintained that they are not relying on the said no case submission. The court in its ruling, overruled the no case submission and called on appellants to open their defence. Dissatisfied, appellants lodged an appeal at the Court of Appeal. The appeal was dismissed. Again, appellants felt unhappy and appealed further to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“3.1.1 Whether, on the evidence on record, the learned Justices of the Court of Appeal were right to have applied and/or relied on the principle of doctrine of ‘last seen’ to hold that there was prima facie case against the appellants.*

*3.1.2 Whether the learned Justices of the Court below were right in dismissing the appeal of the appellants and holding that there is prima facie case against the appellants for the murder of Ifeanyi Nnaji when the prosecution failed to prove the essential elements of the offence of murder, or when the evidence of the prosecution witnesses is so manifestly unreliable such that no reasonable tribunal could safely convict on it.”*

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

*CRIMINAL PROCEDURE - No case submission - Conditions*

**1. It is however, certain that a no case submission should only be made and upheld if any of the two situations stated hereunder prevails at the end of the prosecution's case, viz:**

**1. There was no legally admissible evidence to prove an essential element of the alleged offence.**

**2. The evidence adduced has been so discredited as a result of cross-examination or the evidence is so manifestly unreliable that no reasonable tribunal can safely convict on it.**

**However, if a reasonable tribunal can convict on the available evidence, then there is a case to answer. It has been held that however slight evidence linking an accused person with the commission of the offence charged might be, the case ought to proceed for the accused to explain his own side of the matter. (p. 1797 E)**

*CRIMINAL PROCEDURE - No case submission - Procedure*

**2. It is now basic that in considering a submission of no case to answer it is not necessary at that stage to determine whether the evidence is sufficient to justify a conviction. The court only has to be satisfied that there is a prima facie case which requires at least some explanation from the accused person.**

**The purport of a no case submission is that the 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 rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence charged. But if there is legally admissible evidence, however slight, the matter should proceed as there is something to look at.**

**At the stage of no case submission, credibility of prosecution witnesses should not be considered. It is not a stage where a court can believe or disbelieve prosecution witnesses as the defence is yet to present its own witnesses. The court is enjoined to avoid the temptation of being lured to pronounce on the merits or otherwise of the available evidence. A ruling on 'a no case submission' should not be of inordinate length.**

***I dare to say that ‘a no case submission’ should be determined within the narrow compass of the legally admissible evidence produced by the prosecution; and such should be based on its face value.*** (p. 1798 A/F)

- B *EVIDENCE - “Prima facie case” - Meaning of*  
**3. As inferred by Abott, F.J. in *Ajidagba v. IGP* (1958) SC NLR 60, prima facie case is not the same as proof which comes later when the court may find whether the accused is guilty or not. Evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused. On his own part, Nnamani, JSC (of blessed memory) in *Duru v. Nwosu* (1989) 1 NWLR (Pt. 113) 24 at 43 maintained that prima facie case means that ‘there is ground for proceeding.’ In other words, that something has been produced to make it worthwhile to continue with the proceedings. On the face of it (prima facie) ‘suggests that the evidence produced so far indicates that there is something worth looking at.’**  
 E ***It is also apt to state it here that in Black’s Law Dictionary 6th Edition at page 1189-1190, the expression - ‘prima facie case’ has been defined to mean - ‘such as will prevail until contradicted and overcome by the other evidence. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to the contrary is disregarded.’***  
 F ***prima facie evidence is ‘evidence good and sufficient on its face.’*** (p. 1798 B)

- G *Murder - Doctrine of last seen*  
**4. The court below affirmed the stance of the trial court that the prosecution established a prima facie case against the appellants. The prosecution established that the appellants were last seen with the deceased while alive. They should explain what happened to the deceased.**  
 H ***The two lower courts in my considered view, rightly called upon the appellants to volunteer explanation in form of defence to the prima facie case made against them. The concurrent finding by the two lower courts on the real determinant issue in***

***this appeal, rests on a solid foundation. The finding of fact is based on a proper appraisal of the evidence adduced before the trial court and same is not perverse. This court will not interfere.***

***There is circumstantial and inferential evidence against the appellants. Same cannot and should not be brushed aside.*** B  
(p. 1799 E)

## NOTABLE POINT OF INTEREST

### **RHODES-VIVOUR JSC**

#### ***1. Murder – Ingredients***

Now, in Nigeria an accused person can only be convicted for murder if the prosecution is able to satisfy the court that the act of the accused person which caused the death of the deceased is one of the following: D

(1) If the offender intends to cause the death of the person killed, or that of some other person;

(2) If the offender intends to do to the person killed or to some other person some grievous harm;

(3) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life; E

(4) If the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence; F

(5) If death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid; G

(6) If death is caused by willfully stopping the breath of any person for either of such purposes, See Section 3.16 of the Criminal Code. If the act of the accused person which caused the death of the deceased does not fall within one of the six circumstances listed above the accused person cannot be convicted for murder. (p. 1802 C) H

### **REPRESENTATION**

Tochukwu Maduka, for the Appellants

Dr. Ben Igwenyi, Attorney-General Ebonyi State with  
C. M. Ikpor-Ofe AD.PP and O. J. Nnanna, Esq. (Legal Officer), for  
the Respondents

**CASES REFERRED TO**

- B Nwaeze v. State (1996) 2 NWLR (pt. 428) 1
- Peter Igbo v. State (1978) SC 87
- Tegwonor v. State (2008) 1 NWLR (pt. 1069) 630
- The State v. Ogbubunjo (2001) 2 NWLR (pt. 698) 576
- C Enewoh v. State (1994) 4 NWLR (pt. 145) 469
- Lori v. State (1980) 8-11 SC 81
- Ben v. State (2006) 16 NWLR (pt. 1006) 582
- Udosen v. State (2007) 4 NWLR (pt. 1023) 125
- Mumuni v. State (1975) All NLR 295
- D Ibeziako v. C.O.P (1963) 1 All NLR 61
- Ubanatu v. C.O.P (1999) 10 NWLR (pt. 611) 512
- Tongo v. C.O.P (2007) 12 NWLR (pt. 1049) 525
- Duru v. Nwosu (1989) 1 NWLR (pt. 113) 24
- Igabele v. State (2004) 15 NWLR (pt. 596) 314
- E Archibong v. State (2006) 14 NWLR (pt. 1000) 349

**STATUTES REFERRED TO**

- Criminal Procedure Act LFN 2004, s. 286
- F Evidence Act, s. 3(a)(1)

**BOOK REFERRED TO**

Black's Law Dictionary 6th Ed p. 1189-1190

**LEAD JUDGMENT BY FABIYI JSC**

- G This is an appeal against the judgment of the Court of Appeal; Enugu Division (the court below) delivered on the 24th February, 2010. Therein, the court below dismissed the appeal of the appellants against the decision of the High Court of Ebonyi State, “holden
- H at Abakaliki (the trial court) delivered on 11th April, 2008 wherein the no case submission made on behalf of the appellants, was over-ruled.

The appellants were charged before the trial court for the murder of Ifeanyi Nnaji. The prosecution called five witnesses and

closed its case. A no case submission was made on their behalf by their counsel. Same was overruled by the trial court. The appellants lodged an appeal at the court below which was dismissed on 24th February, 2010. The appellants felt unhappy with the stance posed by the court below and have further appealed to this court.

It is apt to assemble briefly the case of the prosecution. The evidence adduced by the witnesses points to the direction that on 23rd August, 2001, the deceased, Ifeanyi Nnaji and three others while in a Toyota car driven by one Chibueze Idah, had skirmish with Mobile police officers on special duties at the border between Enugu State and Ebonyi State. In the ensuing melee, the driver of the car, Chibueze Idah was shot dead while the three others, including Ifeanyi Nnaji sustained injuries on their legs. The three wounded persons were taken to the Police Headquarters, Abakaliki. Thereat, Ifeanyi Nnaji who had injuries on his leg had discussions with those around including the Pw.1 Gabriel Idah and expressed that he was well. Subsequently at the police Headquarters, Abakaliki, Ifeanyi Nnaji and the two other wounded persons were put inside a pick-up van and taken away by the appellants who were then attached to the Surveillance Squad, Police Headquarters, Abakaliki. The next day the dead body of Ifeanyi Nnaji was found at the Federal Medical Centre Mortuary, Abakaliki and was later certified to have died from gunshot at his skull which led to brain tissue damage. At the close of the case for the prosecution, the appellants, instead of entering their defence, elected to make a no case submission. Learned counsel for the defence maintained that they were not relying on the said no case submission. In the considered ruling handed out on 11th April, 2008, the learned trial judge Ogbu, J. overruled the no case submission and called on the appellants to open their defence. The appellants felt unhappy and appealed to the court below which dismissed the appeal. This is a further appeal to this court.

On 31st January, 2013 when the appeal was heard, learned counsel on each side of the divide adopted and relied on the brief of argument duly filed on behalf of his client. Learned counsel for the appellants urged that the appeal be allowed while the learned counsel for the respondent urged that the appeal be dismissed.

The two issues crafted on behalf of the appellants for a proper determination of the appeal read as follows:-

*“3.1.1 Whether, on the evidence on record, the learned Justices of the Court of Appeal were right to have applied and/or relied on the principle of doctrine of ‘last seen’ to hold that there was prima facie case against the appellants (Distilled from Grounds 1 and 3).*

*3.1.2 Whether the learned Justices of the Court below were right in dismissing the appeal of the appellants and holding that there is prima facie case against the appellants for the murder of Ifeanyi Nnaji when the prosecution failed to prove the essential elements of the offence of murder; or when the evidence of the prosecution witnesses is so manifestly unreliable such that no reasonable tribunal could safely convict on it. (Distilled from Ground 2).”*

To balance the equation, so to speak, two issues were also decoded on behalf of the respondent for a proper consideration and determination of the appeal. They read as follows:-

*“3.1 Whether the Court of Appeal was right in dismissing the ‘No case submission’ in respect of the charge against the appellants.*

*3.2 Whether the prosecution proved the essential elements of the offence of murder against the appellants and / or whether the evidence of the prosecution witnesses is infested with contradictions.”*

Arguing issue 3.1.1, learned counsel for the appellants submitted that the court below was wrong when it applied the ‘Last seen’ doctrine. He cited the cases of *Nwaeze v. The State* (1996) 2 NWLR (Pt. 428) 1 and *Peter Igho v. The State* (1978) SC 87. Learned counsel submitted that the doctrine of ‘Last seen’ would not apply in all cases, situation and circumstances. He felt that the doctrine would not apply where there is no evidence or credible evidence to show that the accused was indeed, the last person seen with the deceased alive, or where the cause of death of the deceased was made clear in the evidence before the court.

Learned counsel submitted that there is no evidence or credible evidence on record to show that the appellants were indeed the last persons seen alive with the deceased-Ifeanyi Nnaji. He asserted that the cause of death of the deceased was made clear before the court. He maintained that the evidence of P.W.3, the deceased’s father who said he saw his son, Ifeanyi Nnaji in a vehicle and was calling him ‘pa-pa-pa’ while being carried away along with others by the appellants should not be believed. He maintained that P.W.3’s statement to the Police in Exhibit ‘E’ contradicted his testimony on oath.



Learned counsel maintained that it was wrong for the court below to hold that there is a *prima facie* case against the appellants.

Learned counsel further observed that Sgt. Livinus Ezeka maintained in Exhibit 'G', record in the stalled trial before Ogbuinya, J. that 'the three wounded occupants of the Toyota car, with bullet wounds, including Ifeanyi Nnaji were brought to the Police Headquarters, Abakaliki dead.' He asserted that Sgt. Livinus Ezeka clearly stated the cause of deceased's death and as such, the doctrine of last seen is irrelevant and inapplicable to the facts of the case. B

With respect to issue 3.2.1, learned counsel submitted that the elements of the offence charged were not established. He cited the cases of *Tegwonor v. The State* (2008) 1 NWLR (Pt. 1069) 630 at 65; and *The State v. John Ogbubunjo & Anr.* (2001) 2 NWLR (Pt. 698) 576. Learned counsel maintained that there is no evidence that the body, the subject matter of Exhibits C and D tendered by P.W.2 is indeed the body of Ifeanyi Nnaji as no one identified the body to P.W.2 as that of the deceased; the body having already been labelled before he performed the autopsy. He cited the case of *Enewoh v. The State* (1994) 4 NWLR (Pt. 145) 469 at 478. C

Learned counsel further observed that the cause of death of the deceased was not clearly identified. He cited *Lori v. The State* (1980) 8-11 SC 81 at 95-96 and, *Ben v. The State* (2006) 16 NWLR (Pt. 1006) 582 at 594. Learned counsel submitted that for a charge of murder to be sustained, the prosecution must prove that it was the accused that caused the death of the deceased. He cited *Lori v. The State* (supra); *Udosen v. The State* (2007) 4 NWLR (Pt. 1023) 125 at 146-147. He submitted that there is no evidence on record that it was the appellants who caused the death of Ifeanyi Nnaji. Learned counsel asserted that the Mobile Police caused the death of the deceased. He felt that the evidence of the prosecution was full of contradictions which were not reconciled in any manner. Learned counsel for the appellants asserted that overruling of the no case submission was tantamount to asking the appellants to prove their innocence. He cited *Mumuni & Ors. v. The State* (1975) All NLR 295 at 318. He urged that the appeal be allowed. D

Arguing issue 3.1, learned counsel for the respondent submitted that an accused can, at the close of the case for the prosecution make a 'no case' submission by virtue of section 286 of the E

Criminal Procedure Act (CPA). He alluded to the meaning of 'no case submission' with reference to the case of *Rex v. Coker & Ors.* 20 NLR 62 and *Ibeziako v. C.O.P* (1963) 1 All NLR 61 at 69. Learned counsel observed that when a court is giving consideration to a submission of no case, it is not necessary at that stage of the trial for the court to determine if the evidence is sufficient to justify a conviction. The trial court only has to be satisfied that there is a prima facie case requiring at least some explanation from the accused person. He cited *Ubanatu v. C.O.P* (1999) 10 NWLR (pt. 611) 512. Learned counsel further submitted that when a party in a no case submission indicates intention not to rely on same, what should be considered by the court is not whether the evidence produced by the prosecution against the accused is sufficient to justify conviction, but whether the prosecution has made out a prima facie case against the accused person as regards his conduct or otherwise. If the submission is based on discredited evidence, such evidence must be apparent on the face of the record. If such is not, the submission is bound to fail. He cited the case of *Tongo v. C.O.P* (2007) 12 NWLR (Pt. 1049) 525 at 544.

Learned counsel submitted that it is premature for the court to believe or disbelieve the witness or witnesses, at the stage of 'no case submission' since the defence is yet to present its own witnesses. Learned counsel cited the case of *Duru v. Nwosu* (1989) 1 NWLR (Pt. 113) 24 at 43 wherein prima facie case is defined to mean - 'there is ground for proceeding.' He observed that the two lower courts concurrently found that the prosecution made out a prima facie case against the appellants requiring at least some explanations from them as they are not relying on their no case submission. Learned counsel submitted that there is circumstantial and inferential evidence against the appellants who were last seen with the deceased. Learned counsel cited *Igabele v. The State* (2004) 15 NWLR (pt. 596) 314 and *Archibong v. The State* (2006) 14 NWLR (pt. 1000) 349.

In arguing issue 3.2, learned counsel for the respondent submitted that the evidence of P.W.2, the medical officer and Exhibits C & D, the medical report are sufficient and conclusive proof of the death of Ifeanyi Nnaji. He observed that P.W.3, the father of the deceased identified his son to P.W.2. He maintained that the appellants who were last seen with the deceased should explain what happened

to him.

Learned counsel submitted that if there are discrepancies in the evidence of witnesses, they are not material ones that can benefit the appellants. He cited *Theophilus v. The State* (2000) 3 NWLR (Pt. 643) 13; *Igbi v. The State* (2000) 3 NWLR (Pt. 648) 169 at 172. Learned counsel maintained that Exhibit E which was not signed by PW.3 could not be used to contradict his viva voce evidence. He opined that identity of the deceased was not in doubt. He felt that the case of the prosecution before the trial court is not infested with any apparent or real contradictions. He urged that the appeal be dismissed and the appellants should be called upon to enter their defence.

The applicable law in respect of this matter is section 286 of the Criminal Procedure Act (C.P.A.) Cap 41, Laws of the Federation of Nigeria, 2004 which reads as follows:-

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

It is very common for defence counsel to take umbrage under the above provision of the law to lay claim to what is often referred to as ‘a no case submission’ on behalf of accused persons. ***It is however, certain that a no case submission should only be made and upheld if any of the two situations stated hereunder prevails at the end of the prosecution’s case, viz:***

***1. There was no legally admissible evidence to prove an essential element of the alleged offence.***

***2. The evidence adduced has been so discredited as a result of cross-examination or the evidence is so manifestly unreliable that no reasonable tribunal can safely convict on it.***

***However, if a reasonable tribunal can convict on the available evidence, then there is a case to answer. It has been held that however slight evidence linking an accused person with the commission of the offence charged might be, the case ought to proceed for the accused to explain his own side of the matter.*** See: *Ibeziako v. C.O.P* (1963) 1 All NLR 61; Lord Parker, Lord Chief Justice of England’s Practice Direction in (1962) 1 WRN 227; *Daboh & Anr. v. The State* (1977) 5 SC 197 at 209; *Adeyemi v.*

The State (1991) 7 SC (pt. 11) 1; (1991) NWLR (pt. 193) 1. ***It is now basic that in considering a submission of no case to answer it is not necessary at that stage to determine whether the evidence is sufficient to justify a conviction. The court only has to be satisfied that there is a prima facie case which requires at least some explanation from the accused person.***

***As inferred by Abott, F.J. in Ajidagba v. IGP (1958) SC NLR 60, prima facie case is not the same as proof which comes later when the court may find whether the accused is guilty or not. Evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused. On his own part, Nnamani, JSC (of blessed memory) in Duru v. Nwosu (1989) 1 NWLR (Pt. 113) 24 at 43 maintained that prima facie case means that 'there is ground for proceeding.' In other words, that something has been produced to make it worthwhile to continue with the proceedings. On the face of it (prima facie) 'suggests that the evidence produced so far indicates that there is something worth looking at.'***

***It is also apt to state it here that in Black's Law Dictionary 6th Edition at page 1189-1190, the expression - 'prima facie case' has been defined to mean - 'such as will prevail until contradicted and overcome by the other evidence. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to the contrary is disregarded.' prima facie evidence is 'evidence good and sufficient on its face.'***

***The purport of a no case submission is that the 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 rule accordingly that there is before the court no legally admissible evidence linking the accused person with the commission of the offence charged. But if there is legally admissible evidence, however slight, the matter should proceed as there is something to look at. See: Igabele v. The State (supra); Aituma v. The State (2007) 5 NWLR (Pt. 1028) 466. At the stage of no case submission, credibility of prosecution witnesses should not be considered. It is not a stage where a court can***

**believe or disbelieve prosecution witnesses as the defence is yet to present its own witnesses. The court is enjoined to avoid the temptation of being lured to pronounce on the merits or otherwise of the available evidence. A ruling on ‘a no case submission’ should not be of inordinate length. See Ajiboye v. The State (1995) 9 SCNJ 442. I dare to say that ‘a no case submission’ should be determined within the narrow compass of the legally admissible evidence produced by the prosecution; and such should be based on its face value.**

Based on the available evidence called by the prosecution, without at this stage, expressing an opinion on it, can it be said that there was no evidence connecting the appellants with the alleged crime? The court below answered this poser at page 272 of the record of appeal where Tsamiya, JCA, who delivered the lead judgment, found as follows:-

*“For the foregoing however, I am of the view that there is sufficient evidence to justify a finding of there being a prima facie case. The totality of the evidence of PW3 and PW2, Ifeanyi Nnaji while alive was put inside a Pick-up Van and driven away by the appellants. The next day, Ifeanyi Nnaji was found dead in the Mortuary of the Federal Medical Centre, Abakaliki and certified cause of death to be intra crenel (sic) haemorrhage and brain tissue damage secondary to gun shot. Medical reports Exhibit C and D tendered.”*

**The court below affirmed the stance of the trial court that the prosecution established a prima facie case against the appellants. The prosecution established that the appellants were last seen with the deceased while alive. They should explain what happened to the deceased.** That is the stance of this court in *Igabele v. The State* (supra) and *Archibong v. The State* (supra). **The two lower courts in my considered view, rightly called upon the appellants to volunteer explanation in form of defence to the prima facie case made against them. The concurrent finding by the two lower courts on the real determinant issue in this appeal, rests on a solid foundation. The finding of fact is based on a proper appraisal of the evidence adduced before the trial court and same is not perverse. This court will not interfere.** See: *Echi v. Nnamani & Ors.* (2000) 5 SC 62 at 70. **There is circumstantial and inferential evidence against**

**the appellants. Same cannot and should not be brushed aside.**

In conclusion, the appeal lacks merit and it is hereby dismissed. The judgment of the court below is hereby affirmed. The appellants should proceed to open their defences before the learned trial judge without any further undue delay.

B

### MOHAMMED JSC

The Judgment just delivered by my learned brother Fabiyi, JSC, was read by me in draft before today. I am completely with my learned brother in his lead Judgment in the manner he considered and resolved the issues for determination in this appeal before finally arriving at the conclusion that the appeal must fail.

The Appellants who are members of the Nigerian Police Mobile Force stationed at Abakaliki in Ebonyi State, were standing trial for the offence of murder for causing the death of one Ifeanyi Nnaji who was arrested for an offence and who was in their custody before his corpse was found in a hospital mortuary with bullet wound on his head. At the close of the case for the prosecution, the Appellants on being called upon to enter into their defence, opted to make a no-case submission which was overruled by the trial Court. The Appellants' appeal to the Enugu Division of the Court of Appeal against the dismissal of their no case submission was also dismissed on 10/3/2010. The Appellants are now on a further and final appeal to this Court where their learned Counsel in the Appellants brief of argument raised two issues for the determination of their appeal. These issues are:-

*"1. Whether on the evidence on record the Court of Appeal was right to have applied and relied on the principle or doctrine of 'last seen' to hold that there was prima facie case against the Appellants.*

*2. Whether the Court of Appeal was right in dismissing the Appellants appeal that there was prima facie case disclosed against the Appellants for the murder of Ifeanyi Nnaji when the prosecution failed to prove essential elements of the offence of murder when evidence of prosecution was manifestly unreliable such that no reasonable tribunal could safely convict."*

The two issues to me boil down to not more than one single

issue of whether or not the court below on the evidence adduced by the prosecution is support of the charge against the Appellants on record, was right in dismissing the Appellants appeal. The law is indeed well settled that a no-case submission may be upheld where there is no evidence to prove an essential ingredient of the offence charged, or that the evidence adduced by the prosecution has been so discredited as a result of cross-examination, or that the evidence in support of the case of the prosecution is so manifestly unreliable that no reasonable tribunal or Court can safely convict on it. However if a reasonable tribunal or Court can convict on the evidence adduced by the prosecution then there is a case to answer or that prima facie case has been disclosed against the accused person. In other words however slight is the evidence linking the accused person with the commission of the offence charged, the case ought to proceed in court for the accused to explain his own side of the story on the charge for the offence against him. See *IBEZIAKO V. COMMISSIONER OF POLICE* (1963) 1 All NLR 61 and *ADEYEMI V. THE STATE* (1991) 7 SC (Pt. 11) 1. When prima facie case is said to have been disclosed against an accused person, all that means is that there were grounds for proceeding with the trial. See *DURU V. NWOSU* (1989) 1 NWLR (Pt.113) 24 at 43. In the present case therefore where the evidence shows quite clearly that the Appellants were seen in custody of the deceased whose corpse was later found with a bullet wound in a hospital mortuary, have explanation to make on the evidence on record to justify their being called upon to enter into their own defence.

For the above reasons and fuller ones in the lead Judgment, I also see no merit at all in this appeal which is hereby dismissed. Let the Appellants face their trial in the course of which they could have the opportunity to challenge the medical evidence in the prosecution's case which they are trying to hang upon to succeed in their no-case submission where the determination of credibility of evidence to support conviction has no place.

H

### ***RHODES-VIVOUR JSC***

My lords, for the reasons appearing in the leading judgment of my learned brother, Fabiyi, JSC, I concur in holding that the ap-

peal should be dismissed; I will only make a few observations.

The appellants are Policemen. They are standing trial before on Ebonyi State High Court for murder. It is alleged that they are responsible for the death of Ifeanyi Nnaji (m). The question for determination in this court is whether both courts below were right to rule that the appellants' have a case of murder to answer. The respondent (prosecution) called five witnesses to prove the charge of murder against the appellants' and closed its case. The appellants' decided to exercise their rights under section 286 of the Criminal Procedure Act by making a no case submission.

Now, in Nigeria an accused person can only be convicted for murder if the prosecution is able to satisfy the court that the act of the accused person which caused the death of the deceased is one of the following:

(1) If the offender intends to cause the death of the person killed, or that of some other person;

(2) If the offender intends to do to the person killed or to some other person some grievous harm;

(3) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life;

(4) If the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;

(5) If death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid;

(6) If death is caused by willfully stopping the breath of any person for either of such purposes, See Section 3.16 of the Criminal Code. If the act of the accused person which caused the death of the deceased does not fall within one of the six circumstances listed above the accused person cannot be convicted for murder.

After the respondent called five witnesses and closed its case the facts which were laid bare were that on the 23rd day of August 2001 Ifeanyi Nnaji and three other persons were traveling in a Toyota car. This car was stopped by Mobile Police Officers stationed of the border between Enugu State and Ebonyi State. There was misun-



derstanding between the occupants of the car and the mobile police officer. The driver of the Toyota car was shot dead by the Mobile Police Officers while the others in the Toyota car were taken to the Police Station. At the Police Station Abakaliki the deceased and the other persons that were in the Toyota car were taken away in a van by the appellants. The next day the dead body of the deceased was found at the Federal Medical Centre Mortuary Abakaliki. On these facts the learned trial judge and the Court of Appeal were satisfied that the appellants had a case to answer. The reasoning of both courts appears sound to me. Obviously anyone who was last seen with someone who is found dead is in the best position to explain the circumstance in which the person died. Section 286 of the Criminal procedure Act States that:

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

In considering if the appellants, have a case to answer the judge should not bother himself with whether he believes the evidence red or concern himself with the credibility of the witnesses. Once the judge is satisfied that the prosecution has established a prima facie case, that is to say that there is ground for proceeding, a no case submission would be overruled and the accused person called upon to open his defence. See *Ajidegba v. Police* 1958 3 FSC p. 5, *R. v. Ogucha* 1959 4 FSC p.64. So, a no case submission would be upheld if -

(a) There has been no evidence to prove on essential element in the alleged offence.

(b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable court would safely convict on it.

There can be no doubt after examining evidence led by the respondent of the close of its case that the evidence discloses a prima facie case. There is a case to answer, as the only reasonable course to take would be to call on the appellants’ to explain how the deceased who was in their custody died. On the evidence led by the prosecution both courts below were correct to overrule the no case submission and call on the appellants’ to open their defence.

For this, and the detailed reasoning in the leading judgment the appeal lacks merit. The appellants' should open their defence before the trial court forthwith.

B

**PETER-ODILI JSC**

I agree with the judgment just delivered by J.A. Fabiyi, JSC and I shall make a few comments in support.

This is an appeal against the decision of the Court of Appeal, Enugu Division, Coram: Amiru Sanusi, Mohammed L. Tsamiya and Olukayode Ariwoola, JJCA dated the 24th day of February, 2010 wherein the Court of Appeal dismissed the appeal of the Appellants against the decision of the High court of Ebonyi State holding at Abakaliki which overruled the no case submission made on behalf of the Appellants.

FACTS: The Appellants who are standing trial for the murder of Nnaji Ifeanyi were before the incident of the murder for which they are charged police officers attached to the surveillance squad of the Police Headquarters, Abakaliki of the Ebonyi State Police Command. The prosecution called five witnesses and in compliance with Section 3(a)(1) of the Evidence Act, the PW5, Kenneth Sonde Nweze tendered the previous testimony of Sgt. Ezeaka who testified as pw6 before Obande Ogbuinya J. (as he then was) which was admitted as Exhibit "C" and his statement to the police as Exhibit "H". The previous testimony of Chigbo John Ekechi before that earlier court was admitted as Exhibit "K".

The case as put forward by the prosecution through its witnesses show that on the 23rd day of August, 2011, the deceased, Ifeanyi Nnaji and three of his friends while in a Toyota car driven by one Chibueze Idah had skirmishes with mobile police officers on special duties at the border between Enugu State and Ebonyi State. In the course of the confusion the driver of the car Chibueze Idah was shot dead while the three other occupants including Ifeanyi Nnaji sustained injuries on their legs. The three wounded persons were taken to the Police Headquarters, Abakaliki whereat Ifeanyi Nnaji who had minor injuries on the leg, looking hale and hearty had lively discussions with some acquaintances including PW1, Gabriel Idah. Later at the police Headquarters, Ifeanyi Nnaji and the two other

wounded persons were put inside the police vehicle and driven away by the Appellants. The following day the dead body of Ifeanyi was found at the Federal medical centre Mortuary Abakaliki certified to have died from gunshot at his skull reading to brain tissue damage.

As the prosecution closed its case, the Appellants elected to make a no case submission. The learned trial judge, B.A.N. Ogbu J. overruled the submission and called on the Appellants to open their defence. The Appellants appealed to the Court of Appeal which dismissed the appeal hence, the recourse to the Supreme Court on appeal. At the hearing of the appeal on 31st day of January, 2013, learned counsel for the Appellants adopted their Brief of Argument settled by Anthony Ani Esq. and filed on 26/8/10. In the Brief were raised two questions for the determination of the appeal, viz:-

1. Whether, on the evidence on record, the learned Justices of the Court of Appeal were right to have applied and/or relied on the principle or doctrine of “last seen” to hold that there was prima facie case against the Appellants (Distilled four Grounds 1 and 3).

2. Whether the learned Justices of the Court below were right in dismissing the appeal of the Appellants and holding that there is prima facie case against the Appellants for the murder of Ifeanyi Nnaji when the prosecution failed to prove the essential elements of the offence of murder, or when the evidence of the prosecution witnesses is so manifestly unreliable such that no reasonable tribunal could safely convict on it. (Distilled from Ground 2).

Learned counsel for the Respondent in turn adopted the Brief of Argument of the Respondent settled by Chief Jossy C. Eze and filed on 14/10/10. The Respondent through learned counsel framed two issues for determination, namely:-

1. Whether the Court of Appeal was right in dismissing the “No case submission” in respect of the charge against the Appellants.

2. Whether the prosecution proved the essential elements of the offence of murder against the Appellants and or whether the evidence of the prosecution witnesses is infested with contradictions.

The issues above as distilled by the Respondent seem apt and taken together would sufficiently answer the questions raised in this appeal including those agitating the Appellants. I would therefore utilize them and conjunctively. Learned counsel for the Appellants submitted that the principle or doctrine of “last seen” would not ap-

ply in all cases, situation and circumstances. That the doctrine would not apply as in this instance where there is no evidence or credible evidence to show that the accused was indeed the last person seen with the deceased alive. Also that the cause of death of the deceased was not made clear in evidence before the court.

B Mr. Anthony Ani of counsel contended that in the entire breadth of evidence of the prosecution there was no evidence or credible evidence to show that the Appellants were indeed the last persons seen with the deceased alive. That the testimonies and state-  
C ments of PW3 contradict the testimony of PW3 and make same incredible. That the Exhibit “E” which was PW3’s statement to the police was made about three weeks after the incident. That from that Exhibit “E”, PW3 did not see the deceased Ifeanyi Nnaji with the Appellants alive.

D Learned counsel further stated that the doctrine of last seen operates in the realm of circumstantial evidence when there is no direct evidence as to who caused the death of the deceased, but in this instance where the death of the deceased is clear from the record the doctrine of last seen would not apply. That it was Mobile Police  
E officers who were responsible and the Appellants were not those. He cited *Mbang v. State* (2009) 18 NWLR (Pt. 1172) 140.

Learned counsel for the Appellants went on to further say that the combined effect of Section 241 and 286 of the Criminal  
F Procedure Law Cap. 30 Vol. II, Laws of Eastern Nigeria 1963 applying in Ebonyi State is that in trial by information and summary trial where at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the defendant sufficient to require him to make a defence the court shall discharge  
G the defendant. That another way of saying so is that no prima facie case has been made out by the prosecution or that the accused/defendant has no case to answer. He referred to *Mohammed v. State* (2007) 2 NWLR (Pt. 1032) 152 at 161- 162 (SC).

Learned counsel stated that in the case at hand there has  
H been no evidence to prove the essential elements of the alleged offence or that the evidence of the prosecution witnesses are so manifestly unreliable that no reasonable tribunal could safely convict on it. That the essential elements of the offence of murder in this case are:-

(a) Death of the deceased;

(b) The cause of death of the deceased;

(c) That the accused was responsible for the death of the deceased, and

(d) That the act of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence.

He contended that these elements above enumerated must coexist and none missing before the prosecution could be said to have proved the charge. That in this instance medical evidence is imperative to show that the autopsy conducted to show death was carried out on the body of Ifeanyi Nnaji and none other. That this has not been established. He cited the cases:- *Tegwonor v. State* (2008) 1 NWLR (pt. 1069) 530 at 650; *State v. John Ogbubunjo* (2001) 2 NWLR (pt. 698) 576; *Okoro v. State* (1988) 5 NWLR (Pt.94) 255; *R v. Laoye & Anor* 6 WACA 6; *Okafor v. State* (1955) NMLR 20.

For the Appellants was further canvassed that the prosecution failed to establish a nexus between Appellants and the commission of the alleged offence. Also that the cause of death was nor conclusively proved by a medical expert. He referred to *Lori v. State* (1980) 8 - 11 SC 81 at 95-96, *Ben v State* (2006) 16 NWLR (pt. 1006) 582 at 594 etc. He stated on that there was lacking in the evidence proffered by the prosecution that the act of the accused/appellants which caused the death of the deceased was done intentionally with knowledge that death or grievous bodily harm was its probable consequence. That in totality none of the four ingredients of the charge of murder was proved by the prosecution and so the no case submission should be upheld.

Learned counsel concluded by saying that the evidence of the prosecution witnesses were full of contradictions that they cannot be relied upon by the court to effect a conviction. He placed reliance on *Iteshionwe v. State* (1975) 9 - 11 SC 23 at 37 - 38; *Queen v. Joshua* (1964) 1 All NLR 1 at 3; *Akalonu v. State* (2000) 2 NWLR (pt. 643) 165 at 174; *Onubogu v. State* (1974) 9 SC 1 at 20; *Udosen v. State* (2007) 4 NWLR (Pt.1023) 125 at 147.

Responding, learned counsel for the Respondent stated that by the concurrent finding of both courts below it was shown that the prosecution made out a prima facie case against the Appellants requiring at least some explanations from the Appellants. That in arriv-

ing at the conclusion both courts meticulously and painstakingly assessed and scrutinized the evidence as adduced by the prosecution before the trial court. That the attitude of this Apex court is not to interfere with such concurrent findings so properly arrived at. He referred to *UBA Plc. V. BTL Ind. Ltd* (2006) 19 NWLR (pt. 1013) 61 at 99; *Gbadamosi v. Governor, Oyo State* (2006) 13 NWLR (Pt.997) 263 at 375.

Learned counsel for the Respondent submitted that the prosecution established a prima facie case against the Appellants at the trial court. That the essential ingredient of the offence of murder was established by the prosecution. He said the testimonies of the prosecution witnesses are not tainted with any material contradiction which prosecution witnesses were vital adequately establishing a prima facie case against the Appellants requiring their defence. He cited *Adepetu v. State* (1998) 9 NWLR (pt. 565) 185 at 159; *Ahmed v. State* (1997) 3 NWLR (pt. 525) at 653 at 655; *Adekunle v. State* (1989) 5 NWLR (pt. 123) at 308; *Ogunye v. State* (1995) 8 NWLR (pt.413) 332 at 337 etc.

There is no disputing the right of the Appellants to make a no case submission successfully, the condition however being the existence of certain circumstances which are:-

1. Whether there has been no evidence to prove an essential element in the alleged offence either directly, circumstantially or inferentially.

3. When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal can safely convict on it.

In the prevailing conditions of those factors above, the matter of whether the trial court believed in the evidence adduced by the prosecution does not arise at the stage under discussion. The important factor is that there is a serious need for some explanation from the accused to clarify some grey areas that have cropped up in the course of the presentation of the prosecution's case. See *Rex v. Coker & Ors* 20 NLR 62; *Ibeziako v. COP* (1963) 1 All NLR 61 at 69. Also to be noted is that at this stage of a no case submission what the court takes into consideration is not that the evidence adduced by the prosecution is insufficient to justify a conviction rather what is considered is whether the prosecution has made out a prima facie case against

the accused which calls for some explanation from the accused. In keeping with the above, however, if the submission is based on the fact that the evidence proffered is discredited which position must be apparent or easy to see on the face of the record. What at these translate to is that the situation should be such that there is no need for the continued waste of the time of the court in proceeding to defence when it is glaring that nothing can come out of it in view of the essential elements of the offence not established and the evidence of the prosecution witnesses so thoroughly battered by cross-examination that no reasonable tribunal can safely convict on it. In such a case a no case submission would be made and upheld. See *Tongo v. COP* (2007) 12 NWLR (pt.1049) 525 at 544; *Duru v. Nwosu* (1989) 1 NWLR (pt. 11) 24 at 43. B C

The principles above reiterated, when juxtaposed with the evidence made available by the prosecution the question that has to be answered is if the facts herein fit the bit whether the no case submission should succeed or not. What the prosecution in this case has made available show that when the deceased and three friends were seen in the company of the accused/appellants who took them away, the injury on the deceased was a leg injury and he was alive and talking. The facts further show that when it was established that Ifeanyi Nnaji had died and an autopsy carried out, the medical report showed that the death came from a gunshot wound in the head. Therefore, some explanation is called for from the Appellants who were in the position of those that could rightly be described as those who were last seen in the company of the deceased before his demise. I place reliance on *Igabele v. State* (2006) 6 NWLR (pt. 975); *Archibong v. State* (2006) 14 NWLR (pt. 1000) 349. D E F

This scenario lends support to the concurrent findings of the two courts below who held that a *prima facie* case had been made out against the Appellants requiring some explanation from them. This in keeping with the policy of this court not to jump to interfering with such concurrent findings of fact by the two Courts below without anything justifying such a disturbance as is present in this case where the findings have come from proper appraisal and evaluation of evidence adduced before the trial court and nothing suggesting a perverse undertone therefore, this Court must go along with those findings of fact. See *UBA PLC v. BTL Ltd.* (2006) 19 NWLR (Pt.1013) G H

61 at 99.

From the above and the more detailed reasoning in the read judgment, I dismiss the appeal which has no merit. I abide by the consequential orders made by my learned brother.

B

### AKA'AH S JSC

I had a preview of the judgment of my learned brother, Fabiyi JSC, with which I agree.

C The purpose of this appeal appears to me to be dilatory tactics being employed by the appellants to frustrate the completion of their trial as the facts would show. The appellants were first arraigned before Ogbuinya J. (as he then was) on 22/2/2005 in charge No. HAB/4C/2002 and they pleaded not guilty to it. Between 22/2/2005 D and 27/7/2005, a number of witnesses had testified before the case was transferred from Ogbuinya J. to Ogbu J. who had to commence hearing de novo on 17/1/2007. Between 31/1/2007 and 19/10/2007, the prosecution called 4 witnesses. The 5th prosecution witness gave E evidence on 26/10/2007 and tendered the evidence of Sergeant Livinus Ezeaka as Exhibit "G". He had testified as Pw6 before Ogbuinya J. while the statement he made to the police on 23/8/2001 was admitted as Exhibit "H". The evidence of another witness, Chigbo John Okechi, who had also testified before Ogbuinya J. but F who was reported dead was received in evidence as Exhibit "J" while the statement which he made to the police on 26/11/2001 was put in evidence as Exhibit "K". Thereafter the prosecution closed its case on 16/11/2007. From that time right down to this moment, the accused G have refused to enter into their defence and instead made a no case submission which was overruled by the trial Judge from which they appealed to the Court of Appeal. The appeal was dismissed. This is a further appeal on the no case submission.

H The appellants should be courageous enough to either enter into their defence or rest their case on the prosecution. After all they are not compelled to testify if they don't want to. The prosecution has established a prima facie case against the accused/appellants. The appeal therefore lacks merit and is accordingly dismissed.