

SUPREME COURT OF NIGERIA

FRIDAY 23RD NOVEMBER, 2012. SC. 109/2010 & SC.109A/2010

**CORAM:- W. S. N. ONNOGHEN,
C. M. CHUKWUMA-ENEH, B. RHODES-VIVOUR,
M. D. MUHAMMAD, C. B. OGUNBIYI, JJSC**

1. MICHAEL UZOAGBA

2. CAROLINE MICHAEL APPELLANTS

V.

COMMISSIONER OF POLICE RESPONDENT

CRIMINAL PROCEDURE - Proof - Prima facie case - Is found to have been established where prosecution - Has proved the essential elements of the offence - And its evidence has not been discredited (H1)

CRIMINAL PROCEDURE - Trial - Prima facie case - CPC ss. 158 & 159 - As prima facie case is found established against appellants - The case is remitted to the trial Magistrate Court for conclusion (H2)

FACTS

Accused/appellants were arraigned before a Magistrate Court in the Federal Capital Territory Abuja for offences of criminal breach of trust and cheating contrary to sections 312 and 322 of the Penal Code. Prosecution/respondent called three witnesses at the end of whose evidence a no case submission was made by counsel on behalf of appellants. The submission was overruled by the trial court. Dissatisfied, appellants appealed to the High Court of the Federal Capital Territory Abuja. The Court allowed the appeal.

Appellants were therefore discharged of the offences. Aggrieved by the decision of the High Court, respondent appealed to the Court of Appeal, Abuja Division. The Court allowed the appeal and held that respondent has made out prima facie case against which appellants need to respond. The Court therefore set aside the judgment of the appellate High Court and remitted the case to the trial Magistrate Court for conclusion. Being dissatisfied, appellants separately appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the court below was right to have held that the prosecution has established a prima facie case against the 1st appellant which deserves explanation from the 1st appellant.”

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

CRIMINAL PROCEDURE - Proof - Prima facie case

1. It is settled by a seemingly endless chain of authorities, including those alluded to by counsel, that a prima facie case may rightly be found to have been established and no case submission properly overruled where the prosecution has:

(a) led evidence to prove all the essential elements of the offence alleged either directly, circumstantially or inferentially, and

(b) the evidence as so adduced by the prosecution, has neither been so discredited consequent upon cross examination nor is so *ex facie* unreliable that no reasonable tribunal can safely convict on it. (p. 3150 G)

CRIMINAL PROCEDURE - Trial - Prima facie case

2. Now, applying the principles regarding a no case submission earlier recounted in this judgment to the foregoing evidence led by the respondent, can it be said that the lower court is right in its judgment that a prima facie case has been made out against the appellants in the two appeals to justify calling on them to state their own side of the case? In my considered view, the question must be answered affirmatively.

It is evident from the case being made out against both appellants that the three witnesses led by the respondent collectively testified on facts in respect of all the ingredients of the two offences the appellants are arraigned for. Their trial remains on-going and this is neither the stage to pronounce on the credibility of these witnesses nor comment on the facts they testified to. By the combined effect of section 158 and section 159 of the Criminal Procedure Code applicable to criminal trials in the trial court, since the evidence adduced against the

appellants subsists and if uncontradicted would warrant their conviction, the trial magistrate court's finding that a prima facie case has been made out against the appellants and the restoration of that finding by the lower court are beyond reproach. The lone identical issue raised in the two appeals is hereby resolved in favour of the respondent in each of the two appeals and both appeals being unmeritorious, are accordingly dismissed. The case is remitted to the trial Magistrate Court at Jabi for the trial thereat to be concluded. (p. 3154 E)

REPRESENTATION

Samuel Zibiri (with him, Chief Richard Ahonarugbo, Joshua Idoko) - For the Appellant in Appeal No. SC/109/2010
 Godwin Obla (with him, John Alu, Uche Ugonabo (Miss); George Adeyemi; Kester Ekwueme; Awele Brown (Miss) and Segun Fiki) - For the Appellant in Appeal No. SC.109/2010
 Dr. Adewale Olawoyin (with him, Khadijah Okusanya) - For the Respondent in both Appeals

CASES REFERRED TO

Osahon v. FRN (2003) 16 NWLR (pt. 845) 89
 Adelusola v. Akinde (2004) 12 NWLR (pt. 887) 295
 Tongo v. C.O.P. (2007) 12 NWLR (pt. 1046) 525
 Ubanatu v. C.O.P. (2000) 2 NWLR (pt. 643) 115
 Nasiru v. State (1999) 2 NWLR (pt. 589) 87
 Atano v. A-G of Bendel State (1988) 2 NWLR (pt. 75) 201
 Chianugo v. State (2002) 2 NWLR (pt. 750) 225
 Duru v. Nwosu (1989) 4 NWLR (pt. 113) 24
 Ikomi v. State (1986) 3 NWLR (pt. 28) 340
 Ajidagba v. Inspector General of Police (1958) SCNLR 60
 Adeyemi v. State (1991) 6 NWLR (pt. 195) 1
 Aminu Mohammed v. State (2007) 7 NWLR (pt. 1032) 152
 Ajiboye v. State (1995) 8 NWLR (pt. 414) 408
 Akpan v. State (1986) 1 NSCC 686
 Emerehaole v. The Queen (1963) NSCC 75

STATUTES REFERRED TO

Penal Code Law Cap. 89, ss. 311, 312, 322

Criminal Procedure Code, ss. 158, 159

BOOK REFERRED TO

Osborne Concise Law Dictionary 8th Edition, p. 259

(ii)

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LEAD JUDGMENT BY MUHAMMAD JSC

This judgment relates to appeals Nos. SC. 109/2010 and SC. 109A/2010 pursuant to the appellants' respective notices dated and filed on the 21st January 2010 containing two grounds each.

C

The appellants were arraigned before a Magistrate Court in the Federal Capital Territory, Abuja sitting at Jabi for offences of criminal breach of trust and cheating contrary to sections 312 and 322 of the Penal Code. The prosecution called three witnesses at the end of whose evidence a no case submission was made by counsel on behalf of the appellants. The submission was overruled by the trial court. Being dissatisfied, the accused appealed to the High Court of the Federal Capital Territory, Abuja whereat their appeals were allowed. They were also discharged. Not satisfied by the High Court decision, the respondent herein appealed to the Court of Appeal hereinafter referred to as the court below. In allowing the appeals, the court below, see pages 133 - 134 of the records of the instant appeals, held thus:

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"In fact, the more considered from the summation of the appellate High Court the evidence proffered, the more inclined I am of the need to have the version of the respondents stated so that their side of the story and allegations are equally considered and evaluated. What I am trying to put across is that the prosecution threw up questions which deserve answers from the respondents and that cannot be wished away. That is, clearly a prima facie case was made out as rightly found by the trial magistrate and I see no foundation on which the High Court in its appellate jurisdiction could and did rule otherwise. I place reliance on Aminu v. State (2005) All FWLR (Pt. 224) 936, (2005) 2 NWLR (Pt. 909) 180; Ubanatu v. C.O.P. (2000) FWLR (Pt. 1) 138. (2000) 2 NWLR (Pt. 643) 115; Ajidagba v. I.G.P (1958) 3 FSC 5, (1985) SCNLR 60; Duru v. Nwosu (1989) 4 NWLR (Pt. 113) 24; Ibeziako v. C.O.P. (1963) 1 SCNLR 99. On the above stated this appeal is meritorious and I allow it. I set aside the judg-

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ment and orders of the High Court of the FCT in its appellate jurisdiction of 23/10/07. This case is to be sent back to the trial Magistrate of Jabi to conclude the proceedings.”

The two appeals under consideration are against the foregoing decision. Each appellant has distilled a lone and not dissimilar issue for the determination of his/her appeals in his/her brief of argument filed on 3/6/10 and 20/5/10 respectively. In appeal No. SC109/2010, the appellant, Michael Uzoagba has distilled the following issue as arising for the determination of his appeal.

“Whether the court below was right to have held that the prosecution has established a prima facie case against the 1st appellant which deserves explanation from the 1st appellant.”

The issue proposed in Caroline Michaels brief for the determination of her appeal No. SC.109A/2010 reads:

“Whether having regard to the evidence adduced the lower court was right in holding that a prima facie case of criminal breach of trust and cheating has been established against the 2nd appellant”

In addition to adopting the issues formulated in the appellants’ brief for the determination of the respective appeals, the respondent has distilled a second issue he considers equally important for the determination of the appeals. The further issue reads:

“Whether the State is precluded from prosecuting a criminal matter which emanated from a transaction which is purely contractual and civil in nature.”

It is an elementary principle that issues for the determination of appeals must not only draw from the grounds of appeal in the appellant’s notice, the issues must also relate to the decision appealed against. Where an issue proposed for the determination of an appeal does not relate or attack the decision appealed against, it must, being incompetent, necessarily be discountenanced.

The identical grounds in each of the notices of the appellants herein are hereunder reproduced for ease of reference.

“Grounds of Appeal Ground One

The court of Appeal erred in law by holding that the respondent established a prima facie case against the 2nd appellant thereby setting aside the judgment of the appellate High Court.

Particulars of Error

(i) The evidence of PW1 and PW2 did not establish or make

out a prima facie case against the 2nd appellant.

(ii) The transaction between the 2nd appellant and the nominal complainants that gave rise to the criminal proceeding was contractual and purely civil in nature.

Ground Two

B *The Court of Appeal erred in law by dismissing the appellants no case submission when the fundamental elements of criminal breach of trust and cheating contrary to sections 312 and 322 of the Penal Code Law respectively were not proved.*

Particulars of Error

C *The basic ingredients of the offences of criminal breach of trust and cheating were not established by the respondent against the 1st appellant. The evidence adduced before the trial magistrate court fell far below the standard required to establish the offences complained D about."*

An examination of the 2nd issue proposed by the respondent for the determination of the two appeals under consideration, against the background of the foregoing grounds of appeal, as well as the decision the issue purports to challenge, readily belies the respondent's claim of any nexus between the issue and the grounds of appeal and/or the decision. The issue glaringly neither draws from the grounds of appeal nor attacks the judgment appealed against. It remains the law that such an issue and the arguments proffered on it must be and are hereby ignored. See *Osahon v. FRN* (2003) 16 F NWLR (pt. 845) 89 at 114; *Registered Trustees Pentecostal Assemblies of the World Inc. v. The Registered Trustees of the African Apostolic Christ Church* (2002) 15 NWLR (pt. 790) 424 at 450; *Adelusola v. Akinde* (2004) 12 NWLR (pt. 887) 295 and *Asahi v. Dakan* (2006). G In any event, since appellants are the ones aggrieved by the lower court's judgment, the lone identical issue proposed by each of them aptly encapsulates the grievance of each appellant and shall, for that overriding purpose, form the basis of the determination of the two appeals.

H Learned counsel to the appellant in appeal No. SC. 109/2010 Mr. Zibiri adopted and relied on the appellant's brief at the hearing of the appeal. Mr. Obia did same in respect of the appellant's brief in appeal No. SC.109A/2010. Whereas the appellant's brief in appeal No. SC.109/2010 was filed on 31/6/2010, the appellant's brief in

appeal No. 109A/2010 was filed on 20/6/2010.

The respondent's briefs in the two appeals settled by Adewale Olawoyin of Counsel and filed on the 14/6/2010 were similarly adopted and relied upon by counsel in opposing the two appeals.

Learned counsel to the appellants attacked the lower court's finding at pages 133 - 134 of the record of appeal common to both appeals. Both counsels argue that since the respondent has failed, by the testimonies of all its three witnesses, to produce evidence in proof of all the ingredients of the two offences for which appellants are arraigned, the no case submission made on appellants' behalf having succeeded, should have been upheld. Indeed, counsel further contend, the evidence led by the prosecution being afflicted by material contradiction is incapable of disclosing any prima facie case against the appellants. The testimony of PW3, it is submitted, stands in violent conflict with the evidence of PW1 and PW2 who transacted with the appellants and the court below was in no position to pick between the testimonies in arriving at the decision being appealed against.

In particular, learned counsel in appeal No. SC.109/2010 contends that the evidence of PW1 under cross examination, at page 10 of the record of appeal, clearly absolves the appellant.

On his part, learned counsel for the appellant in appeal No. SC.109A/2010 contends in relation to the appellant therein that the entire transaction that led to the arraignment of the appellants being contractual and civil is incapable of sustaining any criminal charges against them.

The lower courts decision which failed to draw from the evidence available to the court, it is argued, is perverse. Counsel variously rely inter alia on the decisions in *Tongo v. C.O.P. (2007) 12 NWLR (Pt. 1046) 525 at 540 - 541*; *Ubanatu v. C.O.P. (2000) 2 NWLR (Pt 643) 115 at 136*; *Nasiru v. State (1999) 2 NWLR (Pt. 589) 87 at 102* and *Atano v. Attorney General of Bendel State (1988) 2 NWLR (Pt. 75) 201* in urging that the appeals be allowed.

Arguing the appeals in respondent's two briefs, Mr. Olawoyin agrees with learned appellants' counsel that a court or tribunal can only dismiss a no case submission where the prosecution provides evidence in proof of all the ingredients of the offences for which the accused persons are arraigned. In the case at hand, learned counsel contends, respondent has led evidence on all the ingredients of the

offences of criminal breach of trust and cheating contrary to sections 312 and 322 of the Penal Code respectively, the appellants are arraigned for. Relying on *Ubanatu v. Commissioner of Police supra* and the definition of a *prima facie* case at page 259 *Osbornes Concise Law Dictionary*, 8th Edition by Rutherford and Bone, learned counsel B submits that appellants' arguments in their appeals are misconceived. The aggregate of the evidence led by the respondent, counsel contends, discloses questions, which the lower court rightly held, the appellants must necessarily answer.

C From the evidence of PW1 and PW2, it is argued, facts abound showing that the appellants had intentionally induced the two to part with their money under the pretence that they had the authority to let out the shop, which authority the appellants clearly knew they did not have. Further relying on *Chianugo v. State* (2002) 2 NWLR (Pt. D 750) 225 at 233-234; *Duru v. Nwosu* (1989) 4 NWLR (Pt. 113) 24 at 43; *Ikomi v. State* (1986) 3 NWLR (Pt. 28) 340; *Ajidagba v. Inspector General of Police* (1958) SCNLR 60; *Adeyemi v. State* (1991) 6 NWLR (Pt. 195) 1 at 35 and *Aminu Mohammed v. State* (2007) 7 NWLR (Pt. 1032) 152, learned *counsel* urges us to take into account E section 79 of the Penal Code in appreciating and affirming the decision of the court below. The unmeritorious appeals, learned Counsel concludes, should be dismissed.

Counsel on both sides and in the two appeals being determined are one, and rightly too, that the question to be answered in F the appeals is whether indeed the court below is right in its finding that from the evidence proffered by the respondent against the appellants, the need has arisen to have the appellants state their version so that their side of the story is equally heard and evaluated. For G short, is the court below right to have concluded that a *prima facie* case has been made out against each of the appellants and in the result overruling the appellants' no case submission?

It is settled by a seemingly endless chain of authorities, including those alluded to by counsel, that a prima facie case H may rightly be found to have been established and no case submission properly overruled where the prosecution has:

(a) led evidence to prove all the essential elements of the offence alleged either directly, circumstantially or inferentially, and

(b) the evidence as so adduced by the prosecution, has neither been so discredited consequent upon cross examination nor is so ex facie unreliable that no reasonable tribunal can safely convict on it.

See Ibeziakor v. Commissioner of Police supra, Ikomi v. State (supra), Ubanatu v. C.O.P (supra): Ajidogba v. I.G.P supra and Adeyemi v. State (1991) 6 NWLR (Pt. 195) 1.

In Ajiboye v. The State (1995) 8 NWLR (Pt. 414) 408 at 413, paras. G-H this court per Kutigi JSC, as he then was, has further stated as follows:

“It must be recognized that at the stage of a no case submission, the trial of the case is not yet concluded. At that stage therefore, the court should not concern itself with the credibility of witnesses or the weight to their evidence even if they are accomplices. The court should also at this stage be brief in its ruling as too much might be said which at the end of the case might fetter the court’s discretion. The court should again at this stage make no observation on the facts. (See for example R.v. Ekanem (1950) 13 WACA 108; Chief Odofin Bello v. The State (1967) NMLR 1; R. v. Coker & Ors 20 NLR 62).”

The court had earlier in Ajidagba & Ors v. I.G.P (1958) Vol. 1 NSCC 20 at 21 (1958) SCNLR 60 cited with approval, the decision in the Indian case of Sher Singh v. Jitendranathsen (1931) 1 L.R. 59 CALC 275 to the effect that a prima facie case only means that there is a ground for proceeding and not the same as proof of the guilt of the accused which comes later when the trial court would be entitled to believe that the uncontradicted evidence before it is sufficient proof of the case against the accused.

In the instant case, both appellants are arraigned for the offences of criminal breach of trust and cheating contrary to sections 311 and 322 of the Penal Code Law, Cap. 89. The elements of the offence of criminal breach of trust are:

“(i) that the accused person was entrusted with property or dominion over it.

(ii) that he misappropriated it, converted it to his own use or disposes of the said property.

(iii) that the accused did so in violation of any direction of law prescribing the mode in which such trust was to be discharged or any legal contract express or implied which he had made concerning the

trust or that he intentionally allowed some other persons to do so, and that he acted dishonestly.

The elements of cheating are:

(i) That the person deceived delivered to someone or consented that some person shall retain certain property;

B *(ii) That the person deceived was induced by the accused to part with the property;*

(iii) That the person acted upon the inducement of the accused: and

C *(iv) That the accused had acted fraudulently or dishonestly when inducing that person.”*

In leading evidence to prove the foregoing elements of the two offences against the appellants, the respondent called three witnesses. Testifying in chief, PW1 stated firstly on page 4 of the record

D thus:

“It was December 2006. So we went to pay for shop. We went to see the 2nd accused for shop at Utako market. We paid the sum of N130,000.00 to the 2nd accused person who issued a receipt and on the receipt was Equity Ventures Public Convenience No. 2 Utako
 E *Modern Market. My husband drew her attention that the receipt the 2nd accused person gave has nothing to do with the shop and the 2nd accused person said the receipt she gave is to show she collected the money from us. My husband said he would like to have the receipt in respect of the shop. The 2nd accused person said they will*
 F *take my husband to the Owner in two days as they are not the Owner. When my husband got there in two days time, she said that the Owner of the shop travelled.”*

The 2nd accused referred to by PW1 is the appellant in appeal
 G No. 109A/2010 whose failure to “take” PW1 and PW2 to the owner of the shop and the latter’s discovery that the very shop having already been rented out was no longer available, made the two to ask the 2nd accused for the refund of the money they paid to her. By May, 2007 and in spite of 2nd accused person’s repeated promise to
 H refund the entire sum, PW1 and her husband PW2, recovered only N50,000.00 (Fifty Thousand Naira) from the N130,000 the appellant allegedly collected from them. PW1 maintained her stance under cross examination and concluded her testimony at page 6 of the record thus:

"We did not start business because we were waiting for the original receipt. No one came in respect of the shop to say that the money for the shop was not given to me (sic). Yes, they gave N50,000.00 as part payment for the N130,000.00. Yes I collected the money after demolition of the market. Yes the shop in question was demolished..." B

Even though PW2's evidence in chief was substantially the same as that of PW1, he spoke in greater details. Part of the details, see page 9 of the record, is to the effect that PW1 his wife, was assaulted by both appellants on the 7th of July, 2007 when they went in a further effort to collect the balance of the money they paid to the appellants. Under cross examination however, PW2 particularly stated at page 10 of the record as follows: C

"Yes, the transaction is specifically between the 2nd accused person and myself. The 1st accused was a witness to the documents. Yes my wife was a witness in this transaction." D

PW3, a police officer, was detailed to investigate the case against the appellants following the report lodged by PW1 and PW2. He interrogated both appellants in the course of his investigation. Testifying in chief, he affirmed what PW1 and PW2 told the court in respect of the appellant in appeal No. 109A/2010, Caroline Michael. At pages 13 - 14 of the record, PW3 in respect of the appellant in appeal No. 109A/2010 states in chief as follows: E

"In the afternoon the same day, the 2nd accused person (sic) came to the police station and asked of his wife then he was questioned by my D.C.O. and the 2nd accused answered that it was true they collected the sum of N130,000.00 which he admitted before my D.C.O. that they have started paying the money ... The 2nd accused person still admitted before my D.C.O. that the 2nd accused person collected the money from nominal complainant and handed it over to his wife - 1st accused person which his wife now issued receipt to The 2nd accused person. I personally asked the 2nd accused person about The additional N10,000 which he said the N10,000 is for the tenancy agreement and his own commission is N5,000 each." F G H

(Italics mine for emphasis)

At page 22 of the record of appeal are some very vital questions counsel to the appellants asked PW3 while cross examining him

and the seemingly revealing answers the witness gave. Please read them:

“Question: You inform the court that it was the 1st accused person that collected this money.

Answer: Yes.

B *Question: Did you find out if the 1st accused person was a party to the transaction.*

Answer: Yes, the 1st accused person is a party to the transaction.

C *Question: The nominal complainant, Mr. Goodman, told court that the 1st accused person was not a party to transaction but only a witness, are you the one telling falsehood, who is telling the court the correct position, you or nominal complainant.*

D *Answer: Actually the 1st accused person is a party to the offence because he admitted before me he collected the money from the nominal complainant and handed over the money to his wife who is the 2nd accused person, from there the 2nd accused person wrote a receipt of collection of that money because the 1st accused person cannot write anything.”(Italics mine for emphasis).*

E ***Now, applying the principles regarding a no case submission earlier recounted in this judgment to the foregoing evidence led by the respondent, can it be said that the lower court is right in its judgment that a prima facie case has been made out against the appellants in the two appeals to justify***
 F ***calling on them to state their own side of the case? In my considered view, the question must be answered affirmatively.***

It is evident from the case being made out against both appellants that the three witnesses led by the respondent collectively testified on facts in respect of all the ingredients of the two offences the appellants are arraigned for. Their trial remains on-going and this is neither the stage to pronounce on the credibility of these witnesses nor comment on the facts they testified to. By the combined effect of section 158 and
 G ***section 159 of the Criminal Procedure Code applicable to criminal trials in the trial court, since the evidence adduced against the appellants subsists and if uncontradicted would warrant their conviction, the trial magistrate court’s finding that a prima facie case has been made out against the appel-***
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lants and the restoration of that finding by the lower court are beyond reproach. The lone identical issue raised in the two appeals is hereby resolved in favour of the respondent in each of the two appeals and both appeals being unmeritorious, are accordingly dismissed. The case is remitted to the trial Magistrate Court at Jabi for the trial thereat to be concluded. B

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother Muhammad, JSC just delivered. C

I agree with his reasoning and conclusion that the appeals are without merit and should be dismissed.

It is very clear from the record that a prima facie case has been made out against appellants making it necessary for them to be called upon to enter their defence by offering some explanations to some of the questions that demand solution. D

I therefore dismiss the appeal and abide by the consequential orders made in the said lead judgment.

Appeal dismissed. E

CHUKWUMA-ENEH JSC

I have read before now the judgment prepared by my learned brother, Muhammad JSC and I agree with him that both appeals have no merit whatsoever and should be dismissed. F

However, I think I should elaborate on the question of the prosecution having made out a prima facie case against the appellants and the onus on the appellants in the circumstances to call evidence in their defence even then based on balance of probability if they so wish bearing in mind that in the instant matters neither has rested on the prosecution's case. See sections 158 and 159 of the Criminal Procedure Code applicable to these matters. The appellants, each of them, have attacked the decision of the lower court on the failure of the prosecution to make a prima facie case, hence the no-case submission. G H

On the back drop of such cases as Akpan v. The State (1986) 1 NSCC 686, (1986) 3 NWLR (Pt. 27) 225 per Oputa JSC,

Emerehaole v. The Queen (1963) NSCC 75, (1963) 1 SCNLR 157; Ekanem v. R (1950) 13 WACA 108 and R. v. Coker (1953) 20 NLR 62 the facts of the instant appeals as per the evidence before the trial court vis-à-vis the submission of no case to answer, what in essence the appellants are saying at the close of the prosecution's case by making a no-case submission in these matters is that given the evidence adduced by the prosecution witnesses (i.e. PW1, PW2 and PW3) at the trial in proof of its case that their evidence having been afflicted with material contradictions is inadequate and unreliable to discharge the onus of proof on the prosecution as it has failed to prove the ingredients of each of the offences as against each of them as charged. And each of them therefore has urged not to be required to answer to the charge by calling evidence as no prima facie case has been made out against each of them.

A prima facie case therefore means that the prosecution's case against an accused person has raised some serious questions linking the accused person to the crime and so calling for some explanation from the accused person and which only the accused person from his personal knowledge can give; this is so even where he is not resting on the prosecution's case as here where the instant accused persons all the same have made a submission of no-case, with respect, for what it is worth.

Before reverting to review the facts of these matters to see if the instant submission of no case has any leg on which to stand, let me observe that having perused the record it is clearly borne out that none of the accused persons has rested their case on that of the prosecution. In such situations, a trial court has to be extremely careful in rendering a ruling to a no case submission not rested upon and has to resist however tempting the temptation of going into the merits and evaluation of the facts of the case at that stage. The trial court has to be rather snappy and circumspect as well as definite in overruling a no-case submission not relied upon. Although this has to be so, the trial court should not therefore be so timorous as not to give cogent reasoning for so overruling the no-case submission as the accused person could after all appeal the same as in these matters even to the apex court.

Even though both accused persons herein have not testified although their statements have been tendered and admitted in evi-

dence and form part of the prosecution's case there are certain questions even then that have arisen in the instant proceedings calling on each of them to explain. And these include the issuance of receipt for the money paid as rent for the shop to Caroline Michael as per receipt No. 0217 of 1/12/2006 by Equity Ventures Ltd. No. 3 Utako Modern Market. Abuja: the double-locking of the rented shop and the presence of signposts bearing the words: "*Shop to let contact Jide Taiwo*" hanging at the premises leading to not delivering possession of the said shop to the complainant and the circumstances surrounding the refund of N50,000 out of N130,000 and the balance of N80,000 said to be outstanding to be to the complainant. These questions amongst others arising from the prosecution's case have clearly linked the accused persons to the instant charges and as a legal requirement in criminal trials the accused persons in such instances as here are required to give some explanation as to critical evidence as alleged by the prosecution linking them to the charges in their defence if they so desire to do. It is trite law that an accused person is not compellable by the court to make his defence in criminal trials.

What is evident from the foregoing unanswered questions is that the prosecution has made out a prima facie case against each of the accused persons that could be left to a jury to decide given a jury trial or a judge sitting alone, that is, in the event that there are no explanations to the questions as here from the accused persons based on the standard of balance of probabilities or even where at that stage the accused persons ultimately have decided at the trial to rest their case on the prosecution's case.

I am satisfied that on the evidence before the trial Court that each of the appellants has a case to answer whether they will decide to call evidence in their defence is left to be seen or decide ultimately to rest their case on the prosecution's case is again left to be seen. It is trite law that the decision to call evidence at the close of the prosecution's case in his defence is entirely that of the accused person or his counsel after all the options open to him at that stage of proceedings have been explained to him by the court particularly so where he is not represented at the trial.

In the result, I see no merit in these appeals which in my view amount to a sheer waste of time of this court. These matters would

have since be disposed of one way or the other long before now, since 24/8/2007 of the judgment of the FCT High Court in these matters, It is, respectfully a shame that they have lasted this long and their counsel shares in this responsibility of without any basis deciding to get to this court. And the accused persons have now to recommence their trial at the Magistrate's Court where it is pending before starting its unnecessary journey to this court.

I too dismiss the appeal and abide by the consequential orders contained in the lead judgment.

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RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment prepared by my learned brother, Muhammad, JSC. I am in full agreement with his Lordships reasoning and conclusions.

I propose to add only a few observations. Both appeals raise the question of whether the Court of Appeal was right to rule that both appellants have a case to answer and that trial presently on hold in the Magistrates court should proceed to conclusion. Both appellants were charged for criminal breach of trust and cheating contrary to sections 312 and 322 of the Penal Code.

The essential elements of the offence of criminal breach of trust are:

- (a) the accused person was entrusted with property.
- (b) the accused person misappropriated it, converted it to his own use or disposed the said property.
- (c) the accused person did (b) in violation of any direction of law prescribing the mode in which such trust was to be discharged or any legal contract expressed or complied which he had made concerning the trust or that he intentionally allowed some other persons to do so, and,

- (d) that the accused person acted dishonestly.

And for Cheating:

- (1) the person deceived delivered to someone or consented that some person shall retain certain property.
- (2) the person deceived was induced by the accused person to part with the property.
- (3) the person deceived acted upon the inducement of the

accused person; and

(4) the accused person acted fraudulently or dishonestly when inducing that person.

PW1 and PW2 are husband and wife. They are Mr. and Mrs. Goodman. In December 2006 both of them went to Utako market in Abuja to pay for a shop. They paid the sum of N130,000 to the 1st B and 2nd appellants who held themselves out as being able to provide a shop for them. A receipt for the sum paid was issued by the appellants to PW1 and PW2. They were never given the shop. PW3 a Police Officer who investigated the case gave evidence and said that both appellants admitted collecting N130,000 from PW1 and PW2 C and that they had commenced repaying the money since they were unable to provide the shop. The Police arrested the appellants and charged both of them to court.

After the prosecution closes its case, the counsel for the accused person has three options. D

1. Rest his case on the prosecution's case. In which case he proceeds to address the court, or
2. call evidence in defence, or
3. make a no case submission. E

A no case submission from the point of view of the defence is that the prosecution has not made out a case for the accused person to answer. In considering whether a case has been made out by the prosecution, the trial Judge should not bother himself with whether he believes the evidence already led or concern himself with the credibility of the witnesses. What the court should do is to examine the charge and see if evidence led by the prosecution establishes a prima facie case. That is to say whether the evidence led seems good, or links the accused person, no matter how slight, with the commission G of the offence. If the evidence led links the accused person with the commission of the offence there is a case to answer and the no-case submission is overruled. The accused person would then be called upon to explain. That is, he is expected to lead evidence to show that he is not guilty of the offence. If on the other hand the prosecution failed to lead evidence to prove an essential element of the offence, or/and the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable H a no-case submission would be upheld and the accused person ac-

quitted of the charge/s and discharged. See: *Ajidagba v. Inspector General of Police* (1958) 3 FSC p. 5, (1958) SCNLR 60; *R v. Ogucha* (1959) 4 FSC p. 64, reported as *Ogucha v. Queen* (1959) SCNLR 154; *R v. Olagunju* (1961) 1 All NLR p. 21, reported as *Olagunju v. Queen* (1961) I SCNLR 32; *Okonofua & Anor v. The State* (1981) NSCC Vol. 12 p. 233. (1981) 6-7 SC 1. The appellants' are charged with criminal breach of trust and cheating contrary to sections 312 and 322 of the Penal Code. The prosecution called three witnesses. PW1 and PW2 gave the appellants' N130,000 for a shop at Utako. The appellants' issued a receipt for the said sum. PW3, the investigating Police Officer said on oath that the appellants admitted collecting N 130,000 from PW1 and PW2 for a shop, which they were unable to provide, and so had since commenced returning the money paid to them.

Evidence led by the prosecution witnesses was not discredited in cross-examination. It becomes clear after examining evidence led and the charge/s, justice demands that the appellants are entitled to give their explanation as to what really transpired. That is to say a prima facie case has been made out against both appellants. The no case submission was correctly overruled by the Court of Appeal.

Before I conclude my observations, I must state that when a judge finds that there is a case to answer, it makes sense to keep the ruling brief. It is permissible for the ruling to simply read:

"There is a case to answer."

Where a judge writes a lengthy ruling there is the likelihood that observations on the facts would be made and that would be wrong. The defence counsel would be correct to appeal on grounds that the judge was biased, or had made up his mind before hearing evidence from the accused person.

For this and the reasoning and conclusions in the leading judgment, both appeals are dismissed. The case shall continue to conclusion at the trial Magistrate Court at Jabi.

H

OGUNBIYI JSC

I have read in draft the lead judgment just delivered by my brother Dattijo Muhammad that the appellants appeal is devoid of any merit and must fail.

Briefly, I would state that with the evidence adduced at the trial court, the judgment of the lower court predicated there upon cannot be faulted. In otherwords, with a prima facie case having been made out against the appellants, the principle of a no case submission would no longer avail in their favour. A case has been made out against the appellants to answer. This does not however imply that the appellants are adjudged guilty of the offence charged. Rather and at this stage it is expected of the appellants to defend themselves before the learned trial magistrate who had so properly ruled and as affirmed by the lower court. In the same vein as the lead judgment, I also dismiss the appeal as lacking in merit. I also make an order that the appellants should be properly arraigned before the trial magistrate court Jabi.

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