

SUPREME COURT OF NIGERIA
FRIDAY 29TH JANUARY 2016. SC. 843/2014
CORAM:- S. GALADIMA, M. D. MUHAMMAD,
K. M. O. KEKERE-EKUN, J. I. OKORO, A. SANUSI, JJSC

DANIEL OKAFOR APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - No case submission - Issue of whether or not evidence is believed is immaterial at this stage - And all that is required of court is to ascertain if there is evidence linking accused with offence (H1)

CRIMINAL PROCEDURE - Conspiracy - Ingredients - Proof - The offence lies in agreement to do unlawful thing - And conspiracy can be inferred from facts and circumstances of a case (H2)

CRIMINAL LAW - Conspiracy - Attempted offence - In order to constitute attempt to commit an offence - The act must be immediately connected with commission of the particular offence (H3)

KIDNAPPING - Conspiracy - Proof - Case of conspiracy to kidnap and attempted kidnapping is established against appellant - As testimonies of PW3 & 4 sufficiently linked him with the offences (H4)

FACTS

Accused/appellant and one other were arraigned before the High Court of Delta State on a three-count charge of conspiracy to kidnap, attempted kidnapping and attempted murder punishable under sections 516, 509 and 320 respectively of the Criminal Code Cap 21 vol. 1 Laws of Delta State 2006. They pleaded not guilty to each count of the charge. At the trial, prosecution/respondent called four witnesses, tendered some exhibits. At the close of respondent's case, appellant made a no case submission.

In a considered ruling, the learned trial Judge upheld the no case submission made on behalf of appellant's co-accused and dis-

charged and acquitted him of all the charges against him. The court also upheld appellant's no case submission on the third count of attempted murder but overruled the submission in respect of counts 1 and 2 for conspiracy to kidnap and attempted kidnapping. The Court rather held that a prima facie case had been made out against appellant in respect of the two counts. Appellant was therefore called upon to enter his defence. Aggrieved, appellant challenged the ruling of the trial Court on an appeal to the Court of Appeal Benin Division. The Court dismissed the appeal and affirmed the decision of the trial Court. Still aggrieved, appellant has appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court of Appeal was right in overruling the no-case submission made by the appellant and in holding that a prima facie case was established against the appellant in counts I and II of the Information."

HELD (Unanimously dismissing the appeal per **KEKERE-EKUN JSC**)

CRIMINAL PROCEDURE - No case submission

1. Thus, at the stage of a no case submission, the question as to whether or not the evidence is believed is immaterial and does not arise. The credibility of the witnesses is also not in issue. A court is also enjoined to be brief in a ruling on a no case submission and not to make any remarks or observations on the facts in order not to fetter its discretion. All that is required of the court at this stage is to ascertain whether there is any evidence at all, no matter how slight, linking the accused with the offence charged. (p. 195 A)

CRIMINAL PROCEDURE - Conspiracy - Ingredients - Proof

2. With regard to the offence of conspiracy, the law is settled that the essential ingredient of the offence lies in the bare agreement and association to do an unlawful thing, which is contrary to or forbidden by law, whether that thing be criminal or not and whether or not the accused persons had knowledge of its unlawfulness. Evidence of conspiracy is usually a matter

of inference from surrounding facts and circumstances. The trial court may infer conspiracy from the fact of doing things towards a common purpose. (p. 195 D)

CRIMINAL LAW - Conspiracy - Attempted offence

3. It is also trite that in order to constitute an attempt to commit an offence, the act must be immediately connected with the commission of the “particular offence charged and must be something more than preparation for the commission of the offence. (p. 195 F)

CRIMINAL PROCEDURE - Conspiracy - Proof

4. For the offence of conspiracy to be established, the evidence must disclose a meeting of the minds to do an unlawful act or to do a lawful act in an unlawful way, while to prove the attempt to commit the offence the act must be immediately connected with the commission of the offence. PW3 and PW4 have testified as to the investigation they conducted and how they were able to link the appellant with both offences. The probative value of their evidence is not in issue at this stage. I agree with the court below that a prima facie case of conspiracy to kidnap and attempted kidnapping has been sufficiently made out against the appellant to warrant his being called upon for his defence. I am therefore in agreement with the lower court that the trial court rightly overruled the appellant’s no case submission in respect of Counts 1 and 2 of the charge. I am of the view that sufficient facts have been placed before the court to warrant some explanation from the appellant. (p. 196 H)

REPRESENTATION

Dr. E. S. C. Obiorah with J. A. Obiajulu Esq. and C. A. Muozoba Esq. for the Appellant

O. P. Enenmo Esq. (Deputy Director Delta State, Ministry of Justice) for the Respondent

CASES REFERRED TO

Atuma v. State (2007) 5 NWLR (pt. 1028) 466

- Ajidagba v. I.G.P. (1958) 1 N.S.C.C. 2
 Suberu v. State (2010) 8 NWLR (pt. 1197) 586
 Ugwu v. State (2013) 4 NWLR (pt. 1343) 172
 Jegede v. State (2001) 14 NWLR (pt. 733) 264
 Ahmed v. Nigerian Army (2011) 1 NWLR (pt. 1227) 89
 B Sule v. State (2009) 17 NWLR (pt. 1169) 33
 Ibeziako v. C.O.P. (1963) 1 ALL NLR 60
 Atano v. State (2005) ACLR 25
 Omotola v. State (2009) All FWLR (pt. 464) 1490
 C Adejobi v. State (2011) 198 LRCN 41
 Shurumo v. State (2012) Vol. 10 LRCN 1
 Arogundade v. State (2009) All FWLR (pt. 469) 409
 Obasohan v. F.R.N. (2010) 8 LRCN 271
 Akpan v. State (1986) 2 SC

D

STATUTES REFERRED TO

Criminal Code Cap. 21 vol. 1 Laws of Delta State 2006, ss. 516, 509, 320
 Criminal Procedure Act, s. 286

E

LEAD JUDGMENT BY KEKERE-EKUN JSC

This is an appeal against the concurrent decisions of the High Court of Delta State delivered on 30/4/2014 and the Court of Appeal, Benin Division delivered on 5/12/2014 to the effect that the appellant
 F has a case to answer in respect of two of the three count charge against him.

On 25/7/2013 the appellant and one Sunday Okolie Emenike were arraigned before the trial court on a three-count charge of
 G conspiracy to kidnap, attempted kidnapping and attempted murder, with others now at large, of one Chief John Uchechu punishable under Sections 516, 509 and 320 respectively of the Criminal Code Cap 21 Vol. 1 laws of Delta State 2006.

They both pleaded NOT GUILTY to each count of the charge.
 H At the trial, the prosecution called four witnesses, tendered some exhibits and closed its case. The appellant made a no-case submission. In a considered ruling delivered on 30/4/2014, the trial court upheld the no case submission made on behalf of the appellant's co-accused and discharged and acquitted him of all the charges against him. The

court also upheld the appellant's no-case submission on the third count of attempted murder but overruled the submission in respect of counts 1 and 2 for conspiracy to kidnap and attempted kidnapping. The court held that a *prima facie* case had been made out against him in respect of the two counts and called upon him to enter his defence. B

Being dissatisfied with this decision, the appellant appealed to the court below, which on 5/12/2014 dismissed the appeal and affirmed the decision of the trial court. The appellant is unhappy with this decision and has further appealed to this court vide his notice of appeal dated 6/12/2014 containing five grounds of appeal. C

In compliance with the rules of this court, the parties duly filed and exchanged their respective briefs of argument. At the hearing of the appeal on 12/11/2015 DR. E.S.C. OBIORAH, of counsel, adopted and relied on the appellant's brief filed on 28/1/2015 and his Reply D Brief filed on 13/4/2015. He urged the court to allow the appeal, set aside the decision of the court below and discharge and acquit the appellant.

On his part, O.F. ENENMO ESQ. Deputy Director, Ministry of Justice, Delta State adopted and relied on the respondent's brief E filed on 19/3/2015 but deemed properly filed on 6/5/2015. He urged the court to dismiss the appeal.

The appellant distilled a single issue for determination from the five grounds of appeal as follows:

"Whether the Court of Appeal was right in overruling the no-case submission made by the appellant and in holding that a prima facie case was established against the appellant in counts I and II of the Information, particularly when there is no legally admissible evidence that linked the appellant to the said offences charged, when the prosecution witnesses even exculpated the appellant of the offences in the said counts I and II of the Information and when appellants' co-accused was totally discharged of the offences" F G

The respondent also formulated a single issue for determination thus: H

"Whether having regard to the totality of the evidence on record, the lower court was right in dismissing the appellants appeal and upholding the decision of the trial court that the respondent established a prima facie case against the appellant."

I shall adopt the issue formulated by the appellant for the resolution of the appeal with some slight amendment by omitting the portion of the issue that expresses the appellant's views on the merit of the appeal.

The sole issue for determination in this appeal is therefore as follows:

"Whether the Court of Appeal was right in overruling the no-case submission made by the appellant and in holding that a prima facie case was established the appellant in counts I and II of the Information."

In arguing the appeal, learned counsel for the appellant referred to Section 286 of the Criminal Procedure Act which makes provision for a no case submission. He submitted that an accused person shall only be called upon to enter his defence where a prima facie case has been made out against him. He submitted further that in order to make out a prima facie case, the prosecution must produce legally admissible evidence linking him to the commission of the offence charged and that the evidence produced by the prosecution must be such that a reasonable tribunal might convict the defendant on the evidence so far laid before it if no explanation was given by him. He referred to *ATUMA VS THE STATE* (2007) 5 NWLR (Pt. 1028) 466 @ 479.

Citing the case of *AJIDAGBA & ORS. VS I.G.P. (1958) 1 N.S.C.C. 2 @ 21* he submitted that the 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.

He went further to contend that evidence cannot be said to be sufficient to prove the case against the accused unless the evidence is admissible in law. For this proposition he relied on: *SUBERU VS THE STATE* (2010) 8 NWLR (Pt.1197) 586 @ 609. He contended further that the evidence must also prove the essential elements of offence. See: *UGWU VS THE STATE* (2013) 4 NWLR (Pt.1343) 172 @ 188.

He submitted that where the prosecution fails to meet this criteria, the accused person is entitled to be discharged. He argued that failure to discharge an accused person where a prima facie case has not been made out against him amounts to a breach of his fundamental rights of the presumption of innocence guaranteed

under Section 36 (5) of the 1999 Constitution. He referred to Suberu Vs The State (supra) @ 609; Ugwu Vs The State (supra) and Atuma Vs The State (supra).

Learned counsel reviewed the essential elements of the offence of attempt to kidnap punishable under Section 509 of the Criminal Code and submitted that the essential elements are:

i. A physical act by the offender sufficiently proximate to complete the offence; and

II. An intention by the offender to commit the complete offence.

See: JEGEDE VS THE STATE (2001) 14 NWLR (Pt.733) 264 @ 283 - 284.

He submitted that acts that are merely preparatory to the commission of the offence are deemed not sufficiently proximate to constitute an attempt, as the mere intention to commit an offence is not criminal. See: AHMED VS NIGERIAN ARMY (2011) 1 NWLR (Pt.1227) 89 @ 117 - 118.

Learned counsel contended that in the instant case the prosecution failed to link the appellant with the offence and also failed to show the intention on the part of the appellant to commit the offence. He contended further that the prosecution failed to show any physical or overt act by the appellant sufficiently proximate to complete the purported offence of kidnapping. Referring to the evidence of PW1 he contended that PW1 testified that he acceded to the appellant's offer to help track down those who attacked him because he (the appellant) is his neighbour whom he had known for some time. He also pointed out that under cross-examination PW1 stated emphatically that the threatening calls were coming from Ifeanyi and that it was Ifeanyi who shot at him not the appellant.

He noted that PW3 and PW4 were merely the police officers who were involved in the investigation of the case and that they merely restated the confessional statement made by Ifeanyi Iwuno, which had been rejected by the trial court. He submitted that having been tendered and rejected, the said statement, which is the only place where the appellant was mentioned, is of no evidential value. He contended that the only relevant document is Exhibit G, the tape recording of the rejected confessional statement of Ifeanyi Iwuno. He noted that at the time the said tape was admitted in evidence the trial court stated that it was admitted for its relevance as part of the

investigation effort carried out by the Police but could “never” be admissible evidence to prove the appellant’s guilt. He contended that based on this pronouncement, there was no evidence linking the appellant to the offence.

B He maintained that the testimonies of PW3 and PW4 constitute inadmissible hearsay evidence. He cited several authorities on what amounts to hearsay evidence. He contended that the evidence of PW1, PW3 and PW4 in actual fact exonerate the appellant. He argued further that the appellant was shown (by PW1) not to have any connection with the threatening calls for ransom made by Ifeanyi C Iwuno on PW1. He also noted that the 2nd accused was discharged and acquitted of the offence based on the same evidence - the rejected confessional statement of Ifeanyi Iwuno.

D With respect to the first count, learned counsel for the appellant submitted that in order to establish the offence of conspiracy, the prosecution must establish two elements: (i) that there was an agreement between the accused persons to execute an agreed act; and (ii) that the agreed act is unlawful. He relied on *ATUMA VS THE STATE* (supra). He contended that there is no scintilla of evidence of E any agreement between the appellant and any other person to commit the offence of kidnapping. He argued that since his alleged coconspirator was discharged and acquitted on the same evidence, he also should have been acquitted. Relying on the case of: *SULE VS THE STATE* (2009) 17 NWLR (Pt.1169) 33 @ 63, he submitted F that it takes two to conspire and that a person cannot be convicted of conspiracy if his co-accused are acquitted and discharged.

In reaction to the above submissions, learned counsel for the respondent reiterated the circumstances in which a no-case submission G may be properly made and upheld, as stated by learned counsel for the appellant. He relied on: *IBEZIAKO VS C.O.P.* (1963) 1 ALL NLR 60.

Relying on the case of *ATANO VS THE STATE* (2005) ACLR 25 @ 46 lines 20 - 25, he submitted that at this stage the court must H not comment on the facts of the case but must limit itself to determining whether a reasonable tribunal might convict. Applying the above principles to the facts of this case, learned counsel agreed with learned counsel for the appellant on what constitutes the offence of conspiracy. He relied on: *OMOTOLA VS THE STATE* (2009) ALL FWLR (Pt.464)

1490 @ 1600 line 6; ATANO VS THE STATE supra . He submitted that although there is no direct evidence that the appellant conspired with the persons who attempted to kidnap PW1, a prima facie case of conspiracy was made out on the evidence before the court. He referred to page 209 paragraph 2 of the record of appeal wherein PW1 explicitly stated in his evidence that after the failed attempt to kidnap him, he received a call from someone who threatened to kidnap him if he failed to pay N5 million and that the appellant approached him and offered to assist in apprehending the culprits for a fee of N500,000.00, out of which he made a part payment of N50,000.00. He submitted further that this piece of evidence was corroborated by PW4, a member of the investigating team, who stated that the mystery caller who demanded N5 million turned out to be one Ifeanyi Iwuno, who confessed to her that he was sent by the appellant to kill PW1. He noted further that in his statement to the Police, the appellant admitted that he received calls from the said Ifeanyi while he was in Police custody before his escape. He submitted that PW3 also confirmed that several calls were traced from Ifeanyi Iwuno's phone to the appellant, which, in his view, demonstrates the fact that they were acting in concert. He relied on: ADEJOBI VS THE STATE (2011) 198 LRCN 41 @ 72 U-Z, OMOTOLA VS THE STATE.

With respect to the offence of attempted kidnapping, he again agreed with learned counsel for the appellant that the act must be immediately connected with the commission of the offence charged and must be something more than preparation for the commission of the offence. See: SHURUMO VS THE STATE (2012) Vol. 10 LRCN 1 @ 25 A - K. He submitted that the prosecution successfully connected the appellant to the commission of the offence of attempted kidnapping. He referred to the evidence of PW3 to the effect that Ifeanyi Iwuno confessed that he made the attempt to kidnap PW1 having been recruited by the appellant to do so. He also referred to PW3's testimony regarding calls placed to the appellant by Ifeanyi while in custody, which evidence was corroborated by PW4 who testified as to what Ifeanyi admitted to her in the course of her investigation. On what amounts to hearsay, he referred to the case of: AROGUNDADE VS THE STATE (2009) All FWLR (Pt. 469) 409 @ 423 F - H, and urged the court to hold that the evidence of PW3

and PW4 was to establish that the appellant conspired with Ifeanyi Iwuno to kidnap PW1 and did send the said Ifeanyi to kidnap him, and no more.

B He further submitted that at this stage of the trial, all that is required of the prosecution is to establish that there is a prima facie case against the appellant and not to proof beyond reasonable doubt. See: EKWUNUGO VS FRN @ 9 EE (full citation not provided); OBASOHAN & 3 ORS. VS FRN (2010) 8 LRCN 271 @ 287 F - P.

C He set out a number of questions, which in his view, call for some explanation from the appellant. On the manner in which Ifeanyi's statement was obtained, he submitted that what is relevant is not the way and manner in which evidence was procured but whether the evidence is relevant. He relied on: TORTI VS UKPABI (1984) NSCC 141 @ 157. He urged this court to find and hold that D a prima facie case has been made out against the appellant sufficient to warrant his being called upon to enter upon his defence.

E In his reply brief, learned counsel for the appellant submitted that it was not true that PW3 and PW4 testified that Ifeanyi Iwuno confessed to them that the appellant was the brain behind the operation. He maintained that there is no evidence of attempted kidnapping or conspiracy. He contended that it was not correct that the appellant admitted receiving calls from Ifeanyi Iwuno or mentioned him at all in his statement. He also noted that the appellant vehemently F challenged the existence of Ifeanyi Iwuno during the cross-examination of PW3. He argued that even if the appellant has a connection with Ifeanyi Iwuno or if Ifeanyi had been calling his phone, the fact cannot be construed as evidence of conspiracy between the two men. He also asserted that PW3 never testified that several calls G were traced from Ifeanyi's phone to the appellant. He maintained that the evidence of PW3 and PW4 is hearsay and inadmissible. He also submitted that the questions, which learned counsel for the respondent suggested as requiring an explanation by the appellant have no bearing on whether or not the appellant conspired with his H co-accused to commit the offences charged. He postulated that the demand for N500,000.00 from PW1 by the appellant might suggest an attempt to obtain the said sum by false pretences, an offence with which he was not charged, but certainly not conspiracy and attempted kidnapping. He maintained that the respondent has failed to make

out a prima facie case against the appellant and urged the court to allow the appeal.

In order to better appreciate the submissions of learned counsel, I deem it appropriate at this stage to give the brief facts of the case, as presented by the prosecution witnesses, particularly PW1, PW3 and PW4. B

According to the complainant, Chief John Uchechu who testified as PW1, on 16th January 2013, he was intercepted by a group of armed men as he was driving into his premises and they ordered him out of the car. Fortunately, he had not switched off his engine and he sped off on sighting the armed men. He was shot at while he was fleeing and sustained a bullet wound on his hand. He was admitted in hospital where he remained for two months before being discharged. It was his testimony that after his discharge from hospital, Daniel Okafor, the appellant herein, also known as Odogwu Anam, came to him and offered to help to apprehend the person who shot at him. He testified that the appellant asked for N500,000.00 out of which he made a part payment of N50,000.00. It was his evidence that he later began to receive threatening phone calls that he would be kidnapped unless he paid a ransom of N5 million. He made a report to the Police and he was advised to play along. After negotiations, the sum of N700,000.00 was agreed upon as the ransom. A female police officer was detailed to make the drop. One Ifeanyi Iwuno was arrested when he went to pick up the ransom. He attempted to escape and was shot by the Police in the thigh. He was taken to the Police clinic for treatment. PW1 stated that he was later invited to the Police station where he identified him as the person who shot him. C D E F

PW3, one of the investigating Police Officers, testified that while at the clinic the said Ifeanyi had asked one of the police guards to make a phone call on his behalf to one Odogwu Anamaka Chief Daniel Okafor (the appellant herein). As part of the investigation, a woman Police officer (PW4) was detailed to disguise herself as a lawyer and was sent to the police station where Ifeanyi had been taken after his discharge from the clinic. She told Ifeanyi that she had been sent by Odogwu Anam to see him. According to her evidence, they had a conversation wherein Ifeanyi informed her that it was Odogwu G H

Anam alias Chief Daniel Okafor (i.e. the appellant herein) who sent him to attack PW1.

The conversation was secretly recorded on tape. The tape recording was admitted in evidence as Exhibit G. During the conversation, according to PW4, Ifeanyi Iwuno mentioned one B Sunday Okolie (2nd accused) whom he described as his and the appellant's spiritualist. While arrangements were being made to arrest the appellant and Sunday Okolie, Ifeanyi Iwuno escaped from custody and remains at large despite efforts to re-arrest him. An attempt to C tender the statement made by Ifeanyi was opposed. The statement was marked rejected.

Section 286 of the Criminal Procedure Act provides:

"286. 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 D sufficiently to require him to make a defence, the court shall, as to that particular charge, discharge him."

In the well-known case of *IBEZIAKO VS C.O.P. (1963) 1 ALL NLR 60 @ 63 - 64*, this court stated the guidelines for upholding a no case submission. The court held thus:

E *"Submission that there is no case to answer may be properly made and upheld:*

(a) Where there has been no evidence to prove an essential element of the offence charged;

F *(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 tribunal could safely convict upon it. Apart from these two situations, a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the G whole of the evidence, which either side wishes to tender has been placed before it. If however, a submission is made that there is no case to answer, the decision should depend, not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but on whether the evidence is such that a H reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far before it, there is a case to answer."*

See also: *AJIDAGBA VS I.G.P. (1958) SCNLR 60; OHUKA VS THE STATE (1988) 7 SC (Pt.III) 25 @ 26 - 27; UBANATU VS C.O.P. (2000) 1 SC 31 @ 38 - 39; AKPAN VS THE STATE (1986) 2 SC*

(Reprint) 365; TONGO VS C.O.P. (2007) 12 NWLR (Pt.1049) 525; SUBERU VS THE STATE (2010) NWLR (Pt.1197) 586.

Thus, at the stage of a no case submission, the question as to whether or not the evidence is believed is immaterial and does not arise. The credibility of the witnesses is also not in issue. See: ADEYEMI VS THE STATE (1991) 6 NWLR (Pt. 195) ^B
1. A court is also enjoined to be brief in a ruling on a no case submission and not to make any remarks or observations on the facts in order not to fetter its discretion. See: UBANATU VS C.O.P. OMISORE VS THE STATE (2005) VOL. 1 Q.C.C.R. 148 @ ^C 143; ODOFIN BELLO VS The State (1967) 1 NMLR 1. ***All that is required of the court at this stage is to ascertain whether there is any evidence at all, no matter how slight, linking the accused with the offence charged.***

With regard to the offence of conspiracy, the law is settled that the essential ingredient of the offence lies in the bare agreement and association to do an unlawful thing, which is contrary to or forbidden by law, whether that thing be criminal or not and whether or not the accused persons had knowledge of its unlawfulness. Evidence of conspiracy is usually a matter of inference from surrounding facts and circumstances. The trial court may infer conspiracy from the fact of doing things towards a common purpose. See: CLARK VS THE STATE (1986) 4 NWLR (Pt.35) 381; GBADAMOSI VS THE STATE (1991) 6 NWLR (Pt.196) 182; AJE VS THE STATE (2006) 8 NWLR (Pt.982) 345 @ ^F 363 A-C.

It is also trite that in order to constitute an attempt to commit an offence, the act must be immediately connected with the commission of the “particular offence charged and must be something more than preparation for the commission of the offence. See: SHURUMO VS THE STATE (2010) 19 NWLR (Pt.1226) 73; OJIGBO VS C.O.P. (1976) ANLR 109 @ 115. ^G

In considering the offence of conspiracy, the lower court reproduced excerpts from the evidence of PW3 detailing his role in the investigation and how the appellant came to be linked with the commission of the offence through one Ifeanyi Iwuno, who later escaped from Police custody. I have summarized this evidence earlier in the judgment. The evidence of this witness under cross- ^H

examination by learned counsel for the appellant at page 223 of the record is as follows:

“without the confessional statement of Ifeanyi Iwuno implicating the 1st and 3rd accused persons he (sic) would have still arrested the 2 accused persons because of the information we got from the telephone C.D. recovered from the escapee, Ifeanyi Iwuno. Because of the communication between the said escapee and the 2nd Accused persons”

With regard to learned counsel’s submission on the discharge of the appellant’s co-accused, it is noted that the appellant was charged with committing the offences with Sunday Okolie Emenike “and others now at large.”

The lower court also referred to the evidence of PW4, the woman police officer who disguised herself as a lawyer sent to Ifeanyi Iwuno while he was in police custody by Odogwu Anam alias Chief Daniel Okafor (the appellant herein) and the detailed conversation she had with him (also alluded to earlier in this judgment). Part of her evidence at page 226 of the record is as follows:

“I asked him ‘shey you know Chief Daniel Okafor, the Odogwu Anam very well. He answered ‘Yes’ he is my boss... I asked him who sent him to go and shoot Chief John Uchechu. He answered that Chief Daniel Okafor sent him to shoot him but that Daniel Okafor was not aware that he went back to start calling him again. So I asked him why he went back to call the man again without telling Daniel Okafor. He said it (sic) because after shooting Chief John Uchechu, Daniel Okafor did not pay him his balance. That’s why he went back to calling the man PW1.”

PW4 stated further, at page 227 of the record:

“When I returned to the office, the anti kidnapping team went to Owerri to arrest Obiet Sunday Okolie [3rd accused] through the information given to me. Then that same day, Chief Daniel Okafor [the appellant] came to Police headquarters that one Peter Okafor called him that he escaped from Police custody. My OIC in his presence dialed the MTN number that Peter Okafor aka Ifeanyi Iwuno gave me. My OIC asked him whether he knows Peter Okafor. He said yes. That Peter Okafor is his boy.”

For the offence of conspiracy to be established, the evidence must disclose a meeting of the minds to do an unlawful

act or to do a lawful act in an unlawful way, while to prove the attempt to commit the offence the act must be immediately connected with the commission of the offence. PW3 and PW4 have testified as to the investigation they conducted and how they were able to link the appellant with both offences. The probative value of their evidence is not in issue at this stage. I agree with the court below that a prima facie case of conspiracy to kidnap and attempted kidnapping has been sufficiently made out against the appellant to warrant his being called upon for his defence. I am therefore in agreement with the lower court that the trial court rightly overruled the appellant's no case submission in respect of Counts 1 and 2 of the charge. I am of the view that sufficient facts have been placed before the court to warrant some explanation from the appellant.

In light of all that has been stated in the course of this judgment, I hold that this appeal lacks merit. It is accordingly dismissed. I affirm the decision of the court below, which upheld the finding of the trial court that the appellant has a case to answer. It is hereby ordered that the appellant shall enter his defence to the charges against him.

GALADIMA JSC

My learned brother Kekere-Ekun JSC, obliged me a draft of the judgment just delivered. I cannot fault the concurrent decisions of the Delta State High Court and the Court of Appeal, Benin, to the effect that a prima facie case of conspiracy to kidnap and attempted kidnapping against the Appellant has been sufficiently made to warrant his being called upon to enter his defence.

In the case of *IBEZIAKO v. COP* (1963) 1 All NLR @ 63 considered as a locus classicus on the issue of "no case submission" this Court provides some guidelines as follows:

"A submission that there is no case to answer May be properly made and upheld:

(a) *Where there has been no evidence to prove an essential element of the offence charged;*

(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 tribunal could safely convict upon it."

See also Section 286 of the Criminal Act. Applying the above principle to this case at hand, I must say that there is no basis for the learned Counsel for the Appellant to submit that there is no scintilla of evidence to link the Appellant with the offence to warrant his trial. All that the trial court is expected to consider at this stage is whether the prosecution had established a prima facie case requiring the accused to proffer some explanations. The evidence so far put forward before the Court is sufficient to call upon the Appellant for his defence.

For the foregoing remarks and the more detailed reasoning given in the lead judgment of my learned brother KEKERE-EKUN JSC, I too will dismiss the appeal. I abide by orders made in the judgment.

D

MUHAMMAD JSC

On the basis of the preview I had of the lead judgment of my learned brother Kekere-Ekun JSC, I also dismiss the unmeritorious appeal. I abide by the consequential orders made in the lead judgment also.

OKORO JSC

I read before now the judgment of my learned brother, K. M. O. Kekere-Ekun, JSC just delivered with which I am in agreement that this appeal is devoid of merit and deserves an order of dismissal.

Having regard to the totality of evidence led by the prosecution against the appellant at the trial court, which has been well encapsulated in the lead judgment, I am of a well considered opinion that both the trial court and the court of appeal were right to hold that a prima facie case has been made out against the appellant and that he should, in the circumstance enter a defence. At this stage, it is not my duty to analyse the evidence. I rather leave it to the trial court. The court below, in my opinion was right to dismiss the appeal of the appellant.

In sum, I hold that this appeal lacks merit. It is also dismissed by me. The judgment of the lower court is accordingly upheld.

Appellant is ordered to return to the trial court and enter his defence (if any). Appeal dismissed.

SANUSI JSC

This appeal emanates from the judgment of Court of Appeal (the court below) Benin Division delivered on 5/2/2014 which affirmed the ruling of the Delta State High Court (the trial court) of 30/4/2014 on a “Submission of No Case to Answer” made on behalf of the appellant in the two counts charge of conspiracy to kidnap and attempted kidnapping. The appellant was aggrieved by the trial court’s ruling hence he appealed to the court below, albeit unsuccessfully. When the court below dismissed his appeal, he further appealed to this court.

In the Brief of argument filed by the appellant in this court, a lone issue was identified for the determination of the appeal out of the five grounds of appeal, which said lone issue is set out below. It reads thus:-

“Whether the Court of Appeal was right in overruling the No Case submission made by the appellant and holding that a prime facie case was established against the appellant in counts 1 and 2 of the information, particularly when there is no legally admissible evidence that the appellant to the said offences charged, when the prosecution witnesses even exculpated the appellant of the offences in the said counts 1 and 2 of the information and when appellant’s co-accused totally discharged of the offences”.

On its part, the respondent also raised one Issue for determination, thus:

“Whether having regard to the totality of the evidence on G record, the lower court was right in dismissing the appellant’s appeal and upholding the decision of the trial court that the respondent established a prime facie case against the appellant.”

Looking at the two sets of issues for determination, I do not think they differ materially. They, in my view, border on whether from the evidence so far adduced by the prosecution/respondent at the trial court, a prima facie case had been made against the accused person at the trial court to justify the trial court to call upon him to enter his defence.

I think it is apt to stress here, that when during a criminal trial, a ‘submission of no case to answer’ is made on behalf of an accused person, that does not mean the trial court was called upon at that point in time, to express any opinion on the evidence adduced before it. Rather, the trial court is only called upon to bear in mind and note
 B that there is no legally admissible evidence linking the accused person with the commission of the offence he was charged with. If the submission is predicated on discredited evidence, such discredit must be apparent or clear on the face of the record. But if such is not the
 C case, then the submission would be of no moment and shall fail and be overruled and dismissed.

It also must be pointed out that at the stage a ‘No Case Submission is made, all that the trial court is supposed to consider is not whether the evidence so far adduced by the prosecution against
 D the accused is sufficient to justify conviction but simply whether the prosecution had made out prime facie case requiring some explanation from the accused person as regards his conduct or otherwise. See *Duru vs Nwosu* (1989) 4 WLR (pt 113)24; *Ikonu v State* (1986) 3 NWLR (pt 28) 340 at 366 *Onogoruwa v State* (1993)
 E 7 NWLR (pt 303) 49 at 80.

In the instant case, it can be said that the evidence so far adduced against the appellant at the trial court qualify and are material enough, for the trial court to call upon him to give some explanation
 F by way of presenting his defence. At that stage, he is still presumed innocent and it is if his defence is found to be a sham, that the trial court would decide to convict him of the count or counts. The trial court, in my view, is justified in overruling the ‘No Case Submission’ made on his behalf. Similarly, the court below was right to have
 G affirmed the ruling of the trial court rejecting or overruling the No Case.

Thus, for these few comments and the detailed reasons advanced in the lead judgment of my learned brother Kekere-Ekun JSC, I also see no reason to disturb the appeal as I consider it to be
 H devoid of any merit. It is hereby accordingly dismissed by me. I abide by the consequential order made in the lead judgment.