IN THE COURT OF APPEAL
ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU

ON FRIDAY THE 23RD DAY OF JUNE 2017

BEFORE THEIR LORDSHIPS

IGNATIUS IGWE AGUBE	JUSTICE, COURT OF APPEAL
TOM SHAIBU YAKUBU	JUSTICE, COURT OF APPEAL
M. O. BOLAJI-YUSUFF	JUSTICE, COURT OF APPEAL

APPEAL NO: CA/E/6C/2017
CHARGE NO: FHC/AWK/49C/2013

BETWEEN:

MICHEAL EMEKA EKWUNIFE ::: ::: APPELLANT

AND

THE FEDERAL REPUBLIC OF NIGERIA ::: ::: RESPONDENT

JUDGMENT
DELIVERED BY IGNATIUS IGWE AGUBE, JCA

This is an Appeal against the Ruling on a No Case Submission delivered by the Honourable Justice M. L. Abubakar sitting at the Awka Judicial Division of the Federal High Court, Anambra State. In that Ruling which was delivered on the 14th of February, 2017 in ***CHARGE NO. FHC/AWK./49C/2013: FEDERAL REPUBLIC OF NIGERIA VS. MICHAEL EMEKA EKWUNIFE***; the Learned Trial Judge upon a consideration of the totality of the evidence led by the prosecution and the

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addresses of Learned Counsel on both sides on the No case submission held at Pages 6 and 7 of the Ruling as follows:-

> "It should be noted that from the four Count Charge before the Court, the Defendant is not charged with the offence of forgery perse but forgery with intent to defraud.....as per Section 1(2C) of the Miscellaneous Offences Act. From the evidence before the Court, it is clear that the Prosecution has failed to prove the ingredients of the offence because some vital documents of the Defendant at the College were not tendered before this Court. Secondly, the evidence of PW1, PW2 and PW3 have been discredited during Cross-examination and rendered unrealistic by the Defence counsel. It is common knowledge that in criminal trials, any doubt must be resolved in favour of the Defendant.
> However, from the totality of the evidence before this Court, am of the humble opinion that the Defendant can still stand charge of some other offences or offences even though he has not been charged with same.

This is provided under Section 223 of the Administration of Criminal Justice Act, 2015 as follows:

> "Where a Defendant is charged with one offence and it appears in evidence that he committed a different offence with which he might be charged under the provisions of this Act, he may be convicted of the offence, which he is shown to have committed although he was not charged with it."

"In view of the above provisions, it is too early to say that the Defendant has no case to answer at this stage as at the end of the trial he can still be convicted of another offence, although he was not charged with it.

Consequently, the application for no case submission is hereby rejected. This is my decision."

It would be recalled that at the court of Trial; the Appellant as an Accused person was arraigned on a four count Charge of forgery with Intent to defraud, uttering with intent to defraud; Forgery with intent to defraud and uttering with intent to defraud contrary to Section 1(2)(C) of the Miscellaneous Offences Act, Cap M17, Laws of the Federation of Nigeria, 2004 and punishable under Section 1(2) of the same Act.

The particulars of the offences are that in respect of Count One, the Appellant sometime in 1980 at Nsugbe, Anambra State in order to faciciltate his employment as a staff of Nwafor Orizu Collage of Edcuation, Nsugbe, Anambra State, forged a West African Examinations Council Advanced Level General Certificate of Education No. PA 513276.

As for count TWO the Appellant was also alleged to have sometime in 1981 at Nsugbe, Anambra State in order to facilitate his employment as a Staff of Nwafor Orizu College of Education, Nsugbe, Anambra State uttered a forged West African Examinations Council Advanced Level General Certificate of Education No. PA 513276 to the Nwafor Orizu College of Edcuation, Nsugbe, Anambra State.

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In respect of Count three he was alleged in 1982 at Nsugbe, Anambra State in order to facilitate his continued employment and promotion as a Staff of Nwafor Orizu College of Education, Nsugbe, Anambra State, to have forged a University of London Higher diploma Certificate in Public Administration and Management.

Finally, in Count Four, he was alleged to have between 1982 and 2011 at Nsugbe, Anambra State within the jurisdiction of the Federal High Court of Nigeria, in order to facilitate his continued employment and promotion as a staff of Nwafor Orizu College of Education, Nsugbe, Anambra State uttered a forged University of Lohdon Higher Diploma Certificate in Public Administration and Management to the Nwafor Oriizu College of Edcuation, Nsugbe Anambra State. The Appellant pleaded not guilty to the Charge.

In proof of its case, the Prosecution called three (3) Witnesses and tendered 10 (Ten) documents marked Exhibits 1 – 10 and at the close of the Prosecution's case whereof the Learned counsel for the Appellant (then Accused person), made the No Case submission which culminated in the Ruling now on Appeal. Dissatisfied with the Ruling as afore-reproduced, the Appellant by a Notice of Appeal dated the 20th day of February, 2017 and filed same date has now appealed to this Court. For purposes of emphasis the Four (4) Grounds of Appeal are hereunder reproduced without their respective particulars as follows:-

"GROUNDS OF APPEAL

GROUND 1: ERROR IN LAW:

The Learned Trial Judge erred in law and occasioned a miscarriage of Justice when he refused to discharge the Appellant upon his application for no case to answer.

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GROUND II: ERROR IN LAW.

The Learned Trial Judge erred in law and occasioned a miscarriage of Justice when he rejected the Appellant's application for no case submission.

GROUND III: ERROR IN LAW.

The Learned Trial Judge erred in law and occasioned a miscarriage of Justice when he held that the Appellant "Can still stand charge of some other offence or offences even though he has not been charge (sic) with same."

GROUND IV: ERROR IN LAW.

The Learned Trial Judge erred in law when he held as follows:

> *"In view of the above provisions, it is too early to say that the Defendant has no case to answer at this stage as to the end of the trial he can still be convicted of another offence, although he was no charged with it."*

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To set aside the Ruling of the Trial Federal High Court, uphold the no case to answer submission and discharge the Appellant."

Upon the entry of the Appeal to this Court following the transmission of the Record of Appeal from the Trial Court, Briefs of Argument were exchanged by the respective Learned Counsel for the parties. In the Appellant's Brief dated and filed on the 3rd day of March, 2017 and settled by C. B. Anyigbo, Esq. of Ikpeazu Chambers, the Learned Counsel for the Appellant distilled TWO (2) Issues for determination from the Four Grounds of Appeal which are hereunder reproduced:

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"ISSUES FOR DETERMINATION:

1. *Whether having regard to the definite findings that the Prosecution has failed to prove the ingredients of the offence charged and that the evidence of the Prosecution witnesses has been discredited during Cross-examination and rendered unreliable, the Learned Trial Judge was right in refusing to discharge the Appellant upon his no case to answer submission? (GROUNDS 1 AND II).*
2. *Whether the Learned Trial Judge was right when he held that it was too early to say that the Respondent has no case to answer having regard to the circumstances of the Case? (GROUNDS III AND IV)."*

On the other hand, Marshal-Umuokoro Onome, Esq. the Learned Counsel for the Respondent in the Amended Respondent's Brief dated and filed on the 3rd day of April, 2017 but deemed properly filed and served on the 4th day of April, 2017 nominated a Sole Issue as calling for determination in the Appeal as follows:

"WHETHER FROM THE TOTALITY OF EVIDENCE LED BY THE PROSECUTION BEFORE THE TRIAL COURT, THE TRIAL COURT WAS RIGHT IN REJECTING THE NO CASE SUBMISSION BASED ON THE FACT THAT THE APPELLANT/ACCUSED PERSON CAN STILL STAND CHARGED OF SOME OTHER OFFENCE EVEN THOUGH HE HAS NOT BEEN CHAGRED WITH SAME?"

ARGUMENTS OF LEARNED COUNSEL ON THE ISSUES DISTILLED FOR DETERMIANTION:

ISSUE NUMBER I (ONE) OF THE APPELLANT'S BRIEF:

On this Issue, the Learned Counsel for the Appellant enumerated the two conditions under which a no case submission will be sustained and an Accused

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person discharged on the offence(s) with which he is charged at the close of the Prosecution's case in which case once the Accused person shows that any of the above conditions exists, it is said that no prima facie case has been made out against her/him and he/she stands automatically discharged on the offence(s) for which he stands trials.

For the above submissions, the Learned Counsel cited the provisions of Sections 302 and 357 of the Administration of Criminal Justice Act, 2015 and relied on the authorities of ***Aituma v. The State (2007) 5 NWLR (Pt. 1028) 464 at 487 (CA)*** where this Court relied on ***Ibeziako v. COP (1963) 1 SCNLR 99; Mohammed v. The State (2007) 7 NWLR (Pt. 1032) 152, 161 – 162; Emedo v. The State (2002) 15 NWLR (Pt. 789) 196 S.C.; Emedo v. The State (1998) 13 NWLR (Pt. 581) 205 at 262; Ajisogun v. the State (1998) 13 NWLR (Pt. 581) 205 at 262 (CA) Per Ige, JCA; Ajidagba v. I.G.P. (1958) 3 F.S.C.9. (1958) SCNLR 60; OKoro v. The State (1988) 5 NWLR (Pt. 94) 255; Oyebola v. The State (1995) 8 NWLR (Pt. 414) 412 at 415 and Abogede v. the State (1996) 5 NWLR (Pt. 448) 270 at 280.***

He further submitted that to uphold a submission of no case to answer and a discharge of the Accused person, all the conditions for sustaining the submission need not be present as earlier submitted that it is enough if the evidence of the prosecution has been so discredited under Cross examination as to render it unreliable or that the essential elements of the offence as charged have not been established from the evidence so far adduced at the close of the Prosecution's case.

The Learned Counsel for the Appellant in respect of this case specifically referred to the Ruling of the Learned Trial Judge at Page 160 lines 1 – 7 of the Record of Appeal which categorical findings are clear and unambiguous and find

support in many decided cases one of which is ***F.R.N. v. Amah (2017) 3 NWLR (Pt. 1551) 139 at 164, Paras G – H. (CA) Lagos Division*** in submitting that the Learned Trial Judge having found that no prima facie case has been made out against the Appellant he ought to have discharged the Appellant in line with the authority of ***F.R.N. v. Amah (Supra).***

On the duty statutorily imposed on the Trial Court to discharge the Accused person where it finds as it did that no prima facie case has been made out against the Appellant, he referred to the use of the word ***"shall"*** by Section 357 of the Administration of Criminal Justice Act to submit on the authorities of ***Onagoruwa v. The State (1993) 7 NWLR (pt. 303) 40 at 82 Paras. E – F; Ibeziako v. COP (Supra) at 68 – 69; Atano v. Attorney General Bendel State (1988) 2 NWLR (Pt. 75) 201; Ubanatu v. COP (2000) 1 S.C. 31 at 38; Emedo v. The State (Supra) at 196 at 204 Paras B – D and Ekwenugo v. the State (2008) 15 NWLR (Pt. 1111) 630 Paras. A – B.*** On the meaning of a no case submission and the fact that the refusal of the Learned Trial Judge to discharge the Appellant in this case amounts to the Appellant's unconstitutionally being compelled to prove his innocence which is against the law; ***Ikomi v. the State (1986) 3 NWLR (Pt. 28) 340 at 376 as well as Suberu v. The State (2010) 8 NWLR (pt. 1197) (Pt. 1197) 586 at 609 Paras. B – F Per Ogbuagu, JSC***; on the implication of overruling a no case Submission where all the conditions for the Court to so rule in favour of the Appellant have been fulfilled were relied upon to urge us to resolve the Issue (ONE) in favour of the Appellant.

ARGUMENTS ON ISSUE NUMBER 2 (TWO) OF THE APPELLANT.

On this Issue, the Learned Counsel also alluded to the Ruling of the Court that it was too early to hold that the Appellant has no case to answer by reason

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that he would be charged for some other offence or offences though he was yet to be so charged. The Learned Counsel referred us to the provision of Section 223 c. Administration of Criminal Justice Act, 2015 which he reproduced in the Appellant's Brief. He further explained the purport of that provision which according to him, does not deal with whether a prima facie Case (which is the whole essence of no case submission at the close of the evidence of the Prosecution); has been made out against an Accused but that convicting and finding a person guilty of an offence comes at the end of trial after both sides have called evidence or the Defence rests its case on that of the Prosecution (that is at the Judgment Stage whereas Ruling on a no Case Submission is at the interlocutory stage) and the role or duty of a Trial Court at a particular stage cannot be confused with or substituted for another stage.

To come home the point as made above by the Learned Counsel for the Appellant, our attention was drawn to the wordings of Section 257 and 223 of Administration of Criminal Justice, Act, 2015 and explained that it is only when all evidence that can be adduced by both the Prosecution and Defence has been presented to the Court that the Court would be in a position to decide whether the offence before it has been committed by the Defendant or whether a similar offence to the one charged has been committed even though he was not specifically charged with same.

The Learned Counsel also drew our attention to the clear dichotomy between the duty of a Trial Judge at the stage of no case submission and the stage of conclusion of Trial when the guilt or otherwise of an Accused can be determined which would reveal readily the gravity of miscarriage of Justice occasioned by the decision of the Lower Court which applied to interlocutory

stage. He further submitted that at the no case submission stage, the Trial Court was merely required to pronounce on the specific offence for which the Defendant stood trial and that unless the charge was amended the Trial Judge had no power to speculate on offences not yet before him.

He also referred us to the decision in ***Clarke v. The State (1986) 4 NWLR (Pt. 35) 1 at 407 Paras. E – G*** on the purport of what the Learned Trial Judge had done in holding that it was too early to discharge the Appellant as he could still be charged with other offence(s) and contended that it could well have been that it was in apparent recognition of the fact of pronouncing on the guilt of the Defendant coming at the Judgment stage that the Learned Trial Judge did not state the yet-to-be-disclosed offence which he conceived the Appellant may be charged. In the light of the above, he submitted that the Learned Trial Judge misapplied the provisions of Section 223 of the Administration of Justice Act thus occasioning a miscarriage of Justice on the Appellant.

On another score, the Learned Counsel placed reliance on ***Schroder v. Major (1989) 2 NWLR (Pt. 101) 1 at 21 Paras. G – H*** on the cannon of interpretation of statutes which states that where there are two provisions, one general and the other special, the special provisions will prevail, the rationale for this position of the law which was explained by the decision in the above cited case that quoted with approval the decision in ***Bamgboye v. Administrator-General 14 WACA 614***. In the instant case, he explained that Section 223 of the Administration of Criminal Justice Act, 2015, is not only an earlier provisions which deals generally with conviction of an accused person in all criminal trials under the Act while Section 257 thereof is not only a later provision but applies

specifically to instances where at the close of the prosecution case, the Defendant exercises the option of making a no case submission.

Thus, in his view, Section 357 of the Act should override Section 223 which is an earlier provision and that by the Doctrine of Later Provision, it is assumed that the later provisions of Section 357 took into account the former Section (223) and must have contemplated the earlier provision.

The Learned Counsel for the Appellant made a fourth point which he considered very crucial in arguing this Issue which is the constitutional implication of Section 223 of the ACJA, 2015 as done in the case now on appeal. He cited Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) on the presumption of innocence and submitted that if the Court below found as he did that the elements of the offence are not established and the evidence led have been rendered unreliable, then Section 223 of ACJA, 2015 cannot override the presumption of innocence in favour of the Appellant as to allow the matter to proceed to defence will amount to the Appellant being called upon to prove his innocence for an offence yet to be determined.

Further reference was made to Section 36(6)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) to pose the question whether if the Ruling is allowed to stand, the Appellant would have been given his constitutionally guaranteed adequate notice of the offence for which he would be standing trial since the offence is yet not before the Court of trial which question he again answered by contending that the interpretation of Section 223 of the ACJA, 2015 by the Trial Court is violative of the Appellant's right as guaranteed him by Section 36(6)(a) of the Constitution.

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In conclusion, we were urged to allow the Appeal, set aside the ruling of the Learned Trial Judge and discharge the Appellant for the reasons set out in Paragraph 7.01 of the Appellant's Brief.

ARGUMENTS OF LEARNED COUNSEL FOR THE RESPONDENTS.

Responding to the arguments of the Learned Counsel for the Appellant on the Two Issues formulated, the Learned Counsel for the Respondent referred us to Section 303 and 357 of the Administration of Criminal Justice Act, 2015 which provisions he reproduced in Paragraph 2 and 3.0 Pages 2 and 3 of the Respondent's Brief and the reliance placed on Section 223 of the Act by the Learned Trial Judge after considering the totality of the evidence and holding that Appellant could still be charged with some offence(s) even after finding that there was no prima facie case against the Appellant.

Learned Counsel posed the question which he answered in the affirmative whether the Appellant can stand trial for some other offence for which evidence so far led has proven or put differently whether it would be right for Appellant to stand trial for lesser offence which had been proven against the Appellant/Accused person even though the essential element of the greater offence charged had not been proven.

He submitted that it is not out of place for the Learned Trial Judge to have rejected the No Case Submission based on the fact that the evidence so far led has proven a lesser offence than the one for which the Appellant was charged. For this position of the Law, he placed reliance on Section 236 of ACJA, 2015 Sub-Section (1) and (2) thereof which he reproduced and cited John ***Nwachukwu v. The State (1986) LPELR – 2085 (SC), (1986) 2 NWLR)pt. 25) 765. Emmanuel Zacheous v. People of Lagos State (2015) LPELR (CA); Jamiu Adeniyi & Ors. v.***

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Federal Republic of Nigeria (2007) LPELR – 8805 (CA) Muftau Owollabi v. the State (2014) LPELR – 24039 (CA) and Gbadamosi Ebebezer v. the State (2014) LPELR – 23791 (CA) as authorities for contending that the law on conviction for lesser offence has been sanctioned and given judicial blessings in a plethora of authorities.

The Learned Counsel for the Respondent then drew our attention to the charge against the Appellant at the Trial Court which according to him shows that the element of forgery of the educational Certificates is one of the elements that the Respondent/Prosecution has to prove in the lesser offence in order to prove its case beyond reasonable doubt. Posing the question as to what evidence that has been led in relation to the element of forgery, he alluded to the evidence of the PW1 who was the Zonal Coordinator of West African Examinations Council (WAEC) Enugu at time of investigation, those of the PW2 and PW3 whose evidence in relation to the Issue of forgery of the University of London Certificate revealed that the authenticities of the said Certificates were not genuine.

On the contention by the Appellant that since the Respondent has failed to prove that the Appellant used the said forged Certificate to gain employment, he should be discharged and acquitted, the Learned Counsel for the Respondent again submitted that Appellant having conceded that the element of forgery was proved against him and having so conceded that much, it is not out of place or contrary to the law for the trial Court to have rejected the Appellant's No Case Submission and called upon the Appellant to offer explanation to the lesser offence of forgery of the Certificates.

It was the further contention of the Learned counsel for the Respondent that if the elements of forgery had not been proven the Defendant/Appellant

would have made succinct submissions to that effect but he kept silence on that element which according to Counsel amounted to admission of guilt and reinforces the rejection of the Appellant's No Case Submission .

On another note, the Learned counsel also submitted that the Appellant cannot complain or raise the issue of not being given fair hearing in respect of the element of forgery nor adequate time and facilities in respect of fair hearing. He explained the meaning of the concept of fair hearing as a principle which is based on facts and that only the facts of the case can influence and determine the application or applicability of the principle.

According to him, the Appellant had the opportunity to defend himself and challenge every piece of evidence adduced by the PW1 – PW3 on the element of forgery as he was not denied any such opportunity and the Court below gave him opportunity to defend the lesser offence of forgery by rejecting his no case submission as the evidential burden had shifted to him to disprove same. For the above submission, he again cited ***Gbadamosi Ebenezer v. The State (2014) LPELR – 2379 (CA) the dictum of Mukhtar J.C.A***. on the interpretation of Sections 179 and 217 of the Criminal Procedure Code which are similar to 233 and 236 of the ACJA 2015 to assert that from the dicta of the Learned Mukhtar, JCA; as reproduced at Pages 9 and 10 of the Respondent's Brief, it is glaring that lesser offence of forgery is subsumed by the more greater offence charged and the evidence so far led has given the Defendant/Appellant adequate notice so that he has not been misled or prejudiced to stand trial for an offence he knows nothing about.

He therefore maintained that the element of forgery was established by evidence adduced during the case of the prosecution beyond reasonable doubt.

Alluding finally to the decision in *John Nwnachukwu v. The State (Supra)* on the interpretation of Section 179 of the Criminal Procedure Code which is in all fours with Section 236 of the Administration of Criminal Justice Act, 2015; we were urged to dismiss the Appeal, affirm the Ruling of the Learned Trial Judge and call upon the Appellant/Defendant to open his defence.

RESOLUTION OF ISSUES:

In the resolution of the Issues distilled for determination, I shall adopt the Learned Counsel for the Appellant's two Issues and subsume the sole Issue formulated by the Learned Counsel for the Respondent within the said Two Issues of the Appellant.

ISSUE NUMBER 1 (ONE):

"WHETHER, HAVING REGARD TO THE DEFENCE FINDINGS THAT THE PROSECUTION HAS FAILED TO PROVE THE INGREDIENTS OF THE OFFENCE CHARGED AND THAT EVIDENCE OF PROSECUTION WITNESSES HAS BEEN DISCREDITED DURING CROSS-EXAMINATION AND RENDERED UNRELIABLE, THE LEAREND TRIAL JUDGE WAS RIGHT IN REFUSING TO DISCHARGE THE APPELLANT UPON HIS NO CASE TO ANSWER SUBMISSION? (GROUNDS 1 AND II)"

As was rightly noted by the Learned Counsel for the Appellant, the Appellant was arraigned on a Four Count Charge of forgery and uttering of Educational Certificates for the purposes of facilitating his employment, continued employment and promotion as a staff of Nwafor Orizu College of Education, Nsugbe, Anambra State contrary to Section 1(2)(C) of the Miscellaneous Offences Act, CAP M17, Laws of the Federation of Nigeria, 2004 and punishable under Section 1(2) of the same Act. All the offences were said to

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have been motivated by the Appellant's *mens rea* (intent to defraud) the College. The Charge can be found at Pages 4 – 6 of the Records.

I had also earlier reproduced the findings of the Learned Trial Judge on the NO Case Submission made by the Learned Counsel for the Accused Person/Appellant at the close of the Prosecution's case. Upon a calm consideration of the facts of this case vis-a-viz the question posed by this Issue as well as the arguments of Learned Counsel for the parties, I am of the candid view that the resolution of the Issue will turn on the true purports of Sections 302, 303 and 357 of the Administration of Criminal Justice Act, 2015 as well as 223 and 236 of the Act upon which the respective Counsel anchored their submissions to urge us either to allow the Appeal or dismiss same and affirm the Ruling of the Lower Court on the No Case Submission.

Beginning from Section 301 of the Act, it provides thus:

> *"302. The Court may, on its own Motion or on application by the defendant after hearing the evidence for the prosecution, where it considers that the evidence against the defendant or any of several defendants is not sufficient to justify the continuation of the trial, record a finding of not guilty in respect of the defendant without calling on him or them to enter his or their defence and the defendant shall accordingly be discharged and the Court shall then call on the remaining defendant, if any, to enter his defence."*

Section 303 on the other hand stipulates that:

> *"303(1) Where the defendant or his legal practitioner makes a no case submission in accordance with the*

provisions of this Act, the Court shall call on the prosecutor to reply.

(2) The defendant or his legal practitioner has the right to reply to any new point of law raised by the Prosecutor, after which, the Court shall give its ruling.

(3) In considering the application of the defendant under Section 303, the Trial Court shall, in the exercise of its discretion, have regard to whether:

(a) an essential element of the offence has been proved;

(b) there is evidence linking the defendant with the commission of the offence with which he is charged.

(c) the evidence so far led is such that no reasonable Court or tribunal would convict on it; and

(e) any other ground on which the court may find that a prima facie case has not been made out against the defendant for him to be called upon to answer."

As for Section 357 of the Act, it unequivocally and mandatorily provides:

"357. 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 sufficiently to require him to make a defence the Court, shall as to that particular charge, discharge him being guided the provisions of Section 302 of this Act."

Perhaps at this juncture, it is also apt to reproduce the Provisions of Section 358 which is to the effect that:

> ***"358. At the end of the evidence in support of charge, where it appears to the Court that a prima facie case is made out against the Defendant sufficiently to require him to make a defence, the Court shall call on him for his defence:***
>
> ***(a)*** ----------
>
> ***(i)*** ----------
>
> ***(ii)*** ----------
>
> ***(iii)*** ----------
>
> ***(b) Where the defendant is represented by a legal practitioner, the court shall call on the legal practitioner to proceed with the defence."***

From the above reproduced Sections of the Act, adequate provisions have been made for the procedure to be adopted by the Court or by the Defendant or his Legal Practitioner as well as the Prosecution where at the close of the case for the prosecution there is no sufficient evidence against the Accused person(s) to justify the continuation of the trial or if at the end of the evidence in support of the charge (at the close of the prosecution's case) there is prima facie case against the Accused requiring him to make a defence.

For the Court/Judge, in the determination of the crucial question whether a no Case Submission shall succeed or not, he shall be guided by the provisions of Section 303 (3)(a)-(C) of the ACJA, 2015 in the exercise of his discretion to

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discharge or not to discharge the Accused person. Therefore in the exercise of the Trial Court's discretionary powers to discharge the Accused upon a No Case Submission or to call on him to defend himself. Section 357 shall be read together with Section 302 of Act.

It would appear that the provisions of Sections 302, 303, 357 and 358 of the ACJA, 2015 are replications (albeit) with certain embellishments and elaborations), of Sections 286 and 287 of the Old Criminal Procedure Act or Laws of the Federation and Southern States (now repealed by Section 493 of the Administration of Criminal Justice Act, 2015) but the basic contents on No Case Submission are basically the same. In this connection therefore, we shall still be guided by decisions of the apex Court and indeed this Court in the interpretation of the provisions of the ACJA, 2015 in relation to No Case Submission.

As I said in the unreported case of ***Raymond Mbah & 4 Ors. v. Commissioner of Police Enugu State (Appeal No. CA/E/144/2014)*** delivered on.....

It has been held by motley authorities that the purport of making a no case submission is as has been provided in Section 357 of the Act, that there is no evidence from the Prosecution's Witnesses which even if believed by the Trial Court, the Court can convict the Accused person as the question of credibility of witnesses at that juncture or the weight to be attached to such testimonies do not arise nor are they relevant.

Again, the authorities are too numerous to mention to the effect that a submission of a No Case to Answer may be properly upheld by the Trial Court where there is absence of evidence in proof of an essential ingredient of an offence or where the evidence so adduced in proof of the offence by the

prosecution or the Witnesses called have been so discredited under Cross-examination or such evidence is as manifestly unreliable that ne reasonable Tribunal could safely convict on it. For these Statements of the law, See the ***Practice Direction dated February, 1962*** issued by ***the English High Court of Justice by the Queen's Bench Division*** which has been adopted by Nigerian Courts as far back as the 1958, 1963 in ***Ajidagba & Ors. v. IGP (1958) FSC 55; Ibeziako v. COP (1963) 1 ALL NLR 61;*** and followed subsequently in ***Okoro v. The State (1988) 5 NWLR (Pt. 94) 255. Aderemi v. the State (1991) 6 NWLR (Pt. 170) 1 at 35, Ajiboye v. The State (1995) 8 NWLR (Pt. 414) 408 at 415;*** all cited by Edozie, JCA (as he then was) in ***Patrick Akwa & 5 Ors. v. COP (2002) LPELR – 7153 CA at 24 Paras. C – G; 25 Paras A – G and 26 Paras A – F.***

In the instant case, the Learned Counsel for the Appellant has correctly cited some of the cases I had relied upon in my earlier Judgment as cited at Page 19 of the present Judgment including recent decisions like ***Aituma v. the State (2007) (Pt. 1028) 464 at 487*** where this Court relied on ***Ibeziako v. COP (Supra); Mohammed v. The State (2007) 7 NWLR (Pt. 1032) 152; Emedo v. The State (2007) 15 NWLR (Pt. 789) 196 S.C.; Ajisogun v. State (1998) 13 NWLR (Pt. 581) 205 at 262*** Per Ige, JCA who also enumerated the conditions I had stated earlier which ought to be fulfilled before a Trial Court like the Court below, can exercise its discretion to uphold a NO Case Submission. The Learned Counsel was also on very solid pedestal in relying on ***F.R.N. v. Amah (2017) 3 NWLR (pt. 1551) 139 at 164 Paras. G – H; Iyizoba, JCA*** in the very recent decision following ***Adeyemi v. The State (1991) 7 SCNJ (Pt. 1) 31 (1991) 6 NWLR (Pt. 195) 1*** posited rightly in my view that:

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"The law is trite that if any of the essential elements or ingredients of an offence is not established, it means that the Prosecution has failed to make a prima facie case sufficient to require the Accused to make his defence and the Court shall as regards the particular Charge discharge him."

From the above decision, it is correct as contended by the Learned Counsel for the Appellant that to uphold a no case submission and discharge the Accused, all the conditions listed for the sustenance of the submission need not be present as any of them will suffice.

In other words, the three conditions of whether the essential ingredient of the offence has or has not been so proved, whether the witnesses/evidence called/adduced by the prosecution have been so discredited and rendered unreliable by Cross-Examination that it will be unsafe to convict on such evidence and whether the evidence so far led is such that no reasonable Tribunal can convict upon it; need not exist concurrently for the Court to uphold the No Case Submission.

Where, as in this case, the Learned Trial Judge had held at Page 7/160 of the Ruling/Record of Appeal, that from the evidence before the Court, it was clear that the prosecution had failed to prove the ingredients of the Offence because some vital documents of the Defendant at the College were not tendered before the Court and secondly, that the evidence of PW1, PW2 and PW3 have been so discredited during Cross- examination and rendered unreliable by defence Counsel and that it is common knowledge that in criminal trial, any doubt must be resolved in favour of the Defendant, the Appellant had fulfilled the conditions stipulated in Section 303 (3)(a) and (C) of the Administration of Criminal Justice

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Act, 2015 to enable the Learned Trial Judge exercise his discretion as stipulated in Section 302 and 357 of the Act to uphold the No Case Submission and discharge the Appellant on the particular charge for which he was standing trial.

The provisions of Section 357 (as was rightly pointed out by the Learned Counsel for the Appellant) imposes a bounding duty on the Trial Court by the use of the word ***"Shall as to that particular Charge, discharged him".*** It is trite that the word ***"shall"*** when used as in this Section of the ACJA, 2015 by the Legislature brooks of no discretion but that it is mandatory that the court must willy nilly discharge the Appellant in the face of the existence of the conditions for the exercise of his power to so do by upholding the no case submission of the Learned Counsel for the Appellant.

Having refused to discharge the Appellant on the ground that by Section 223 of the Administration of Criminal Justice Act which provides that:

> ***"Where a Defendant is charged with one offence and it appears in the evidence that he committed a different offence with which he might have been charged under the provisions of the Act, he may be convicted of the offence, which he is shown to have committed although he was not charged with it",***

And that it was too early to say that the Defendant has no case to another, the Learned Trial Judge in my humble view as rightly submitted by the Learned Counsel for the Appellant, has confused the provisions of Sections 302, 303 and 357 of Act with Section 223 thereof.

As was rightly submitted by the Learned Counsel for the Appellant, the refusal by the Learned Trial Judge who indeed did not disclose the particular offence with which the Appellant might have been convicted, had not only

unconstitutionally compelled the Appellant to prove his innocence on an undisclosed offence, but has misapplied or mis-applied wrongly invoked the provisions of Section 223 of the Act as shall be demonstrated anon while considering Issue Number 2.

Suffice it however, to state on the authorities of ***Onagoruwa v. The State (1993) 7 NWLR (Pt. 303) 40 at 82 Paras. E – F and Ikomi v. the State (1986) 3 NWLR (Pt. 28) 340 at 376;*** where this Court and the Supreme Court had explained and admonished that a no case submission means what it says which is that from the evidence adduced by the prosecution the Accused has no case to answer and should not therefore be called upon to defend himself and that by a no case submission, the Accused contends that the Prosecution has not established a prima facie case against him and should accordingly not be subjected to the ordeal of defending himself in view of the presumption of innocence which is a Constitutional right as encaplusulated in Section 36(5) of the 1999 Constitution as well as 135(1)(2) and (3) of the Evidence Act, 2011.

See further Per ***Ogbuagu, JSC in Suberu v. The State (2010) 8 NWLR (Pt. 1197) 586 at 609 Paras. B – F*** citing the dictum of Karibi-Wyhte, ***JSC at Page 277 in the case of Okoro v. the State (1988) 5 NWLR (Pt. 94) 2565, 285 (1988) 12 SCNJ (Pt. 2) 191 at 208*** who in turn had cited ***Mumini & 13 Ors. v. The State (1975) 6 S.C. 79 at 109, (1975) 6 SC (Reprint) 66 and Daboh & Anor v. The State (1971) 5 SC 197;*** which facts are on all fours with the present case where their Lordships variously held that:

> ***"As a matter of fact, it is settled that when a No Case Submission is made out against an Accused person, asking him to answer the Charge against him, is a reversal of the Constitutional provisions***

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of presumption of innocence by asking him to establish his innocence.

"In other words, where at the close of the prosecution's case, there is a No Case submission for the accused to answer, he should be discharged. Overruling a NO Case Submission in that circumstance (as happened in this case in the Trial Court affirmed by the Court below), is tantamount to asking the accused person to prove his innocence which is wrong and unconstitutional. So said this Court in the case of Chukwu & Ors. v. The State (1988) 7 SCNJ (P. II) 262, (1988) 1 NWLR (Pt. 72) 539. The case of Mumini v. The State (Supra) also refers to."

See also ***Tongo v. COP (2007) 7 NWLR (Pt. 1049) 525 (2007) LPELR – 3257.***

On the whole the Learned Counsel to the Respondent has no answer to the first Issue formulated by the Learned Counsel for the Appellant as Section 223 and 236 of the ACJA, 2015 were cited out of context by the court below and indeed by the Learned counsel to the Respondent here on Appeal and all his arguments on these provisions go to no Issue.

Issue Number One is therefore resolved in favour of the Appellant.

ISSUE NUMBER 2:

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"WHETHER THE LEARNED TRIAL JUDGE WAS RIGHT WHEN HE HELD THAT IT WAS TOO EARLY TO SAY THAT ACCUSED/APPELLANT HAD NO CASE TO ANSWER HAVING REGARD TO THE CIRCUMSTANCES OF THE CASE? (GROUNDS III AND IV)."

Without mincing words, Sections 223 and 357 of ACJA, 2015 deal with situations where trial had been completed with the prosecution and Accused Persons stating the respective cases and at the Judgment stage the Court discovers that the specific offence charged was not proved but a lesser or kindred offence had been proved in which case the Appellant in this case could have been convicted for a lesser offence or kindred offence charged if the case had been heard to conclusion without the Court below holding that the essential ingredients for a No Case Submission have been established at the close of the Prosecution's case.

See for instance the provisions of Sections 169 – 179 of the repealed Criminal Procedure Act. For instance where stealing is charged but receiving is proved; rape or defilement of a girl under the age of eleven but indecent assault is proved, murder is charged but infanticide is proved. In particular See Section 179 of the CPA and the Commentary thereto at Pages 110-111 of the Text "THE CRIMINAL LAW AND PROCEDURE OF THE SOUTHERN STATES OF NIGERIA" by T. AKINOLA AGUDA of blessed memory Paragraph 336 and the ***Torhumba v. Police (1956) N.R.N.L.R. 87 Woodhall & Wilkes (1972) 12 Cox C.C. 240; R:V. Gutherie (1870) L.R.I.C.C.R. 241; Gubba v. Gwandu N. A. (1947) 12 WACA 141, R. Nta (1946) 12 WACA 54 and R.V. Nwaogugu Agumadu (1963) 1 ALL NLR 203.***

With the greatest respect to the Learned Counsel for the Respondent, the Sections of the ACJA cited by him do not apply to the facts of this case and the

"WHETHER THE LEARNED TRIAL JUDGE WAS RIGHT WHEN HE HELD THAT IT WAS TOO EARLY TO SAY THAT ACCUSED/APPELLANT HAD NO CASE TO ANSWER HAVING REGARD TO THE CIRCUMSTANCES OF THE CASE? (GROUNDS III AND IV)."

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See for instance the provisions of Sections 169 – 179 of the repealed Criminal Procedure Act. For instance where stealing is charged but receiving is proved; rape or defilement of a girl under the age of eleven but indecent assault is proved, murder is charged but infanticide is proved. In particular See Section 179 of the CPA and the Commentary thereto at Pages 110-111 of the Text "THE CRIMINAL LAW AND PROCEDURE OF THE SOUTHERN STATES OF NIGERIA" by T. AKINOLA AGUDA of blessed memory Paragraph 336 and the ***Torhumba v. Police (1956) N.R.N.L.R. 87 Woodhall & Wilkes (1972) 12 Cox C.C. 240; R:V. Gutherie (1870) L.R.I.C.C.R. 241; Gubba v. Gwandu N. A. (1947) 12 WACA 141, R. Nta (1946) 12 WACA 54 and R.V. Nwaogugu Agumadu (1963) 1 ALL NLR 203.***

With the greatest respect to the Learned Counsel for the Respondent, the Sections of the ACJA cited by him do not apply to the facts of this case and the

Court was not right in law to reject the No case Submission having found that the essential ingredients of fraud and uttering have not been proved. No lesser offence of forgery was mentioned either by the Court below or the prosecution at the Trial Court. The no case submission was made at the interlocutory stage (at the close of the prosecution's case) and the Act clearly by Sections 302, 303 and 357 mandatorily provide that where as in the instant case the conditions under Section 303 (a) and (C) of the Act were fulfilled, the Appellant was entitled to a discharge on the particular charge at that stage. Neither the Court nor prosecution who did not deem it at the earliest opportunity to amend the charge before the no case submission, can invoke Sections 223 and 236 of ACJA, 2015 which are only applicable after the conclusion of trial and the evidence of the prosecution Witnesses prove a kindred or lesser offence.

All the cases cited by the Learned Counsel for the Respondent are inapplicable to the circumstances of this case and are cited out of context. Indeed the Learned Counsel for the Respondent had conceded in his argument at Page 6 Paragraph 3.8 of the Respondent's Brief when he submitted that though the trial of the Appellant/Accused has not gotten to the stage of conviction as he is yet to put up a defence and that on the authority of ***Jamik Adeniyi & Ors. v. F.R.N. (2007) LPELR – 8805 (CA)*** that the elements comprising the lesser offence must be contained in the greater offence before conviction. I reiterate here that where the Court below found that the essential ingredients of intent to defraud, forgery and uttering (the entire Charge) have not been proved and that the evidence of the Witnesses for the prosecution have been discredited such that no reasonable tribunal can convict, upon such evidence, all the offences in the charge have collapsed *uno flatu* and there is nothing to salvage by way of lesser offence.

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Accordingly, this Issue is also resolved in favour of the Appellant. This Appeal is therefore meritorious and hereby succeeds. The Ruling of the Lower Court delivered on 14/2/2017 by M. L. Abubakar, J., rejecting the No Case Submission of the Appellant's Counsel is hereby set aside and the No case Submission upheld. The Appellant is hereby discharged.

IGNATIUS IGWE AGUBE,
JUSTICE, COURT OF APPEAL.

APPEARANCES:

DR. ONYECHI IKPEAZU, SAN WITH C. B. ANYIGBO ESQ., FOR THE APPELLANT.

MARSHAL UMUKORO ONOME, ESQ. (LEGAL OFFICER, E.F.C.C.) FOR THE RESPONDENT.

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The facts which led to this appeal, have been adumbrated in the lead judgment, rendered by my learned brother, **HON. JUSTICE IGNATIUS IGWE AGUBE, J.C.A.**

I am in agreement with his Lordship's reasons, to the effect the No case submission raised by the appellant's counsel, at the trial court, was made out and the same ought to have been upheld, by the learned trial judge. Consequently, the ruling delivered on 14th February, 2017, by M. L. Abubakar, J., in re- Charge No. FHC/AWK/49C/2013, is hereby set aside.

In its stead, the appellant's no case submission is upheld and the appellant, is accordingly, discharged.

TOM SHAIBU YAKUBU
JUSTICE, COURT OF APPEAL

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(MISITURA OMODERE BOLAJI-YUSUFF, JCA)

I have had the opportunity of reading in draft the judgment read by my learned brother, **IGNATIUS IGWE AGUBE, JCA**. I agree with his reasoning and conclusion that this appeal has merit and is hereby allowed. I abide by the consequential orders made therein.

MISITURA OMODERE BOLAJI-YUSUFF
JUSTICE, COURT OF APPEAL.

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