IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA ABUJA

BEFORE THEIR LORDSHIPS:

(1). HON. JUSTICE JUDE O. OKEKE, FICMC

(2). HON. JUSTICE M. A. NASIR

(3). HON. JUSTICE A. B. MOHAMMED

ON THURSDAY THE 10TH DAY OF JANUARY, 2019

SUIT NO: FCT/HC/CR/47/2014

BETWEEN:

COMMISSIONER OF POLICE.....COMPLAINANT

AND

SUNDAY MARCUS.....DEFENDANT

RULING

The Defendant herein was on 12th March 2015 arraigned in the FCT High Court No. 10 on a two count charge of Conspiracy and Armed Robbery which reads thus: -

"COUNT ONE

That you Sunday "M" 24 years old of Area 1, Dagba Forest, FCT Abuja and John Okoro "M" now deceased of No. 8 Apo FCT Abuja on the 10th August 2014 at about 1615hrs along Abuja Game Village FCT, Abuja within Abuja judicial division, Conspired amongst yourselves to commit felony to wit: Armed Robbery. You thereby committed an offence contrary to Section 6(b) of the Robbery and Firearms Special Provisions Act LFN, 2004.

COUNT TWO:

That you Sunday "M" 24 years old of Area 1 Dagba Forest FCT – Abuja and John Chukwuemeka Okoro "M" now deceased of No. 8 Tatari Ali Close, Legislative Quarters, Apo, FCT – Abuja on the 10th August 2014 at about 1615hrs along Abuja Game Village FCT Abuja within Abuja Judicial Division, while armed with revolver locally made pistol snatched a Nissan Sunny Car with registration No. KJR 27 GAA property of Thomas Ekpang from the driver one Olalekan Komolge "M" of Puwayi Village, airport road, FCT High at gun point. You thereby committed an offence contrary to Section 1(1)(2)(a)(b) of the Robbery and Firearms Act (Special Provision) Act LFN 2004".

He pleaded guilty to both Counts of the charge but given the gravity of the offence and the attendant punishment upon conviction, the Court recorded a plea of not guilty for him.

The case was thereafter fixed for trial but following the unexplained absence of the prosecution on 22nd October 2015, the charge was struck out for want of diligent prosecution. It was later on 16th February 2016 upon application by the prosecution relisted. Following absence of legal representation for the Defendant and given the nature of the charge against the Defendant, the Court was constrained to enlist the pro bono services of Mr. E. M. D. Umukoro to defend the Defendant.

Trial commence on 13th February 2017 with the Prosecution calling DSP. Adelegan Obagemi David who testified in support of its case as Pw1. He sought to tender an alleged Confessional Statement of the Defendant but following the Defendants Counsel's objection as to its voluntariness the Court ordered for a trial within trial. At the end of it, the Statement was rejected.

The witness was thereafter cross examined by the learned Defendants Counsel and discharged. Following the repeated failure of the Prosecution to call its next witness, its case was closed.

In the interval, on 10th October 2018 the Hon. Chief Judge of FCT High Court set up and inaugurated a Declogging Panel to fast track the trial of

protracted ordinarily non bailable criminal matters. This case fell within the category and on account of this further hearing in the case continued before the Panel.

On 22nd November 2018, the learned Defence Counsel elected to file a No Case to Answer Submission. Time frames were given to parties to file and exchange their Addresses on it. while the learned Defendant's Counsel filed and served his as directed by the Court, the Prosecution failed.

The Defendant's Counsel same day adopted his Address on the No Case to Answer Submission. This Ruling is in respect of the submission.

I have read and digested the said defence Counsel's No Case to Answer Submission. I have also considered the evidence of the sole Prosecution witness. The cardinal issue that calls for determination is whether or not the prosecution has made out a prima facie case linking the Defendant with the commission of the offence to justify his being called upon to put up his defence to the charge.

The Administration of Criminal Justice Act 2015 ("ACJA") has made provisions which guide No Case to Answer Submission in Sections 302, 303 and 357. Section 302 provides: -

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

In Section 303(1) to (3) it is provided that:-

> *"(1). Where the Defendant or his legal practitioner makes a No Case to Answer Submission in accordance with the provisions of this Act, the Court shall call on the Prosecution to reply.*

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

(3). In considering the application of the Defendant under Section 303, the Court shall in the exercise of its discretion have regard to wither: -

(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

(d). 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."

Section 307 of the Act on its part provide thus: -

> *"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 by the provision of Section 302 of this Act".*

From the above reproduced Sections of the ACJA 2015, it is deducible that the Court is essentially to be guided in determining whether or not to uphold the Defendant's No Case to Answer Submission by the guidelines set out under Section 303(3) of the ACJA. In other words, the Court is to determine whether or not by the evidence adduced by the Prosecution witness(es), can in the exercise of its discretion hold that the evidence discloses or has proved, prima facie: -

(i). An essential element of the offence.

(ii). Link between the Defendant and the commission of the offence.

(iii). The evidence is such that no reasonable Court or tribunal would convict on it; and

(iv). Any other ground upon which it may find that a prima facie case has been made out against the Defendant for him to be called upon to answer.

The above guides were, prior to the coming into effect of the ACJA 2015 laid down in a number of cases which held that a no case to Answer Submission shall be upheld where:

(1). The prosecution has failed to prove an essential element of the alleged offence.

(2). The evidence adduced has been discredited as a result of cross examination; or

(3). The evidence is so manifestly unbelievable that no reasonable tribunal will convict on it.

In ***IBEZIAKO V COMMISSIONER OF POLICE (1996) 1 ALL NLR P. 61,*** the Court held that these conditions are not cumulative. Once any of them exists, the Court on its volition or the defence can validly make or uphold a No Case to Answer. In ***DABOH V STATE (1977) 5 SC P 197,*** the Supreme Court held that at the time of submission of No Case to Answer is made, what the Court considers is whether the Prosecution has made out a prima facie case to which the Defendant would be called to answer. See: ***AKPAN V STATE (1986) 5 SC P. 186***.

The phrase "prima facie" is defined by the Supreme Court on ABACHA V STATE (2002) 7 SNCJ P. 1 thus:-

> *"The evidence discloses a prima facie case when it is such that if uncontroverted and if believed, it will be sufficient to prove the case against the accused".*

In ***ONAGURUWA V STATE (1993) 7 NWLR (PT. 303) P. 49,*** the Court of Appeal explained it in these words: -

"A prima facie case is a case where the prosecution has presented sufficient evidence to render reasonable a conclusion on the evidence that the accused is convictable in the absence of contrary evidence".

Under Section 135 of the Evidence Act 2011, the evidential burden is placed on the prosecution to prove commission of a criminal offence beyond reasonable doubt. In a submission of No Case to Answer however, the Prosecution is not required at that stage of the case to prove the commission of the offence beyond reasonable doubt. Any evidence by it which prima facie links the Defendant with the commission of the offence will suffice for the Defendant to be called upon to put up his defence. See: ***DABOH V STATE*** supra and Section 303 (a) to (d) of ACJA. The Prosecution must however establish each ingredient of the offence vide prima facie evidence against the Defendant failing which the Defendant's No Case to Answer will be upheld. The Court of Appeal in ***RASAKI V STATE (2011) 16 NWLR (PT. 1273) P. 281*** stated this succinctly in these words: -

"Accordingly, where the evidence led by the Prosecution fails to establish a single element the Prosecution would have failed in its duty to prove the offence charged and the accused could be entitled to an acquittal".

Being so guided, the critical question for determination now is whether or not the prosecution has by the evidence adduced by its sole witness established prima facie any ingredient of the offence of conspiracy and armed robbery with which the Defendant has been charged. The Defendant is charged with Conspiracy and Armed Robbery under Section 6(b)(1)(1-2)(a)(b) of the Robbery and Firearms Special Provisions Act. Section 6(b) of the Section provides for punishment of any person who conspires with any person to commit such an offence. Section 1(1-2)(a)(b) provides thus: -

"Any person who commits the offence of robbery shall upon trial and conviction under the Act sentenced to imprisonment for not less than 21 years.

(2). If

(a). Any offender mentioned in subsection (1) of this Section is armed with any firearm or any offensive weapon or is in company with any person so armed; or

(b). At or immediately before or immediately after the time of the robbery the said offender wounds or uses any personal violence to any person, the offender shall be liable upon conviction under this Act to be sentenced to death.

In ***ISIBOR V STATE (2001) FWLR (PT. 78) P. 1077,*** the ingredients of the offence of armed robbery which the prosecution must prove beyond reasonable doubt were set out as follow: -

(i). That there was a robbery or series of robbery.

(ii). Each occasion of the robbery was armed.

(iii). The Defendant took part in the robbery.

As earlier pointed out, at this stage of No Case to answer, the duty of the Court is to determine whether by the evidence adduced by the prosecution it established by prima facie evidence of the ingredients of the offence. These ingredients are as set out above.

Now what is the evidence of the prosecution's sole witness – the Pw1? The Pw1 CSP Adelegan Obafemi David testified inter alia that he is presently the Commandant Special Anti-Robbery Squad, FCT Abuja. He knows the Defendant.

On 10th August 2014, his operations were shared into six axis to cover Abuja. One of the axis is Garki Abuja. Durumi and other areas within Garki fall under that axis. On 10th August 2014, the Team was headed by ASP Mohammed Yusuf. There were two other men in the team whose names were Sgt. Agada Lawrence and Corporal Agada Kenneth.

While they were on patrol an accident occurred at about 4.15am. A man who is a driver by name Olalekan Komolafe was looking for passengers

along the Durumi axis and the Defendant and one other stopped him as if they were passengers. As soon as Olalekan picked them and left the Durumi Area and before the National Hospital area, they brought out a revolver pistol gun and a toy pistol gun. He could not know whether the Defendant held the revolver pistol or the toy pistol. The two of them dispossessed the driver of his Nissan Sunny Car. They pushed the driver out of the car.

As they were going with the car his men in that axis saw Olalekan Komolafe screaming that his car has been snatched at gun point. Without wasting time, the men with Olalekan chased the Defendant and the other person and got them arrested that same day. They brought them, the owner of the vehicle and the gun they used to the SARS office.

The two men who snatched the vehicle were late Chukwuemeka Okoro and the Defendant here.

The two men were brought before him and he interrogated them. He saw the two guns and the owner of the car before he asked his operatives to obtain their statements. He demanded to know from the owner of the vehicle what happened and he told him exactly what he just narrated to the Court.

After this, he asked the two and they confessed they robbed Mr. Olalekan of the vehicles.

While trying to find out more, the two men told him it was the devil that pushed them to snatch the vehicle. He then concluded that they have made confession that they actually snatched the vehicle. He then handed over to his second in command by name DSP John Mashi who now returned to continue investigation.

At about 19.30 hours ie 7.30pm, same day, his $2^{1}/_{C}$ then DSP John Mashi called and told him that the two suspects said there was still another suspect who normally provided them with guns though he was not with them that night.

On hearing this, the Team went in search of the man. At Durumi near Area 1, the other members of the gang had taken their position. On getting to

the place there were shootings from the other members of the gang. Maybe they had pre-knowledge they were coming. The other suspect Chukwuemeka Okoro tried to escape. His men pushed him and when they got him, they discovered he had a bullet wound. They rushed him to the Gwagwalada Teaching Hospital where he was confirmed dead, maybe, as a result of loss of blood on the way to the hospital. The Defendant here was the only one brought back to the SARS office.

Agada Kenneth or Agada Lawrence then recorded his Statement. He was then detained in the cell. The owner of the vehicle also made a Statement which was recorded.

That was all happened on 10th August 2014. Thereafter, after some months following Police practice, all the men who carried out the arrest of the Defendant and late Chukwuemeka Okoro were moved out of SARS to other Division. The other two Policemen are no longer in the Police Force. The team leader was later dismissed over a disciplinary offence. Likewise for Sgt. Agada Lawrence and Corporal Agada Kenneth. DSP John Mashi on his part retired after 35 years of service. He is the only one now who can come and give evidence.

The case file was later forwarded to the Deputy Commissioner of Police in Charge of CIID.

They attempted to tender the Defendants' Statement in evidence. As earlier pointed, objection was taken to its admissibility by the defence Counsel and after a trial within trial proceeding, same was rejected and marked accordingly.

Testifying further after the trial within trial proceeding and rejection of the Defendant's alleged Statement, the Pw1 stated that the deceased suspect was arrested on 10th August 2014 and he led them to where they arrested the Defendant on 18th August 2014. When they arrested the Defendant, they called the owner of the vehicle and he came and identified the Defendant as the second person who snatched the vehicle from him.

Under cross examination by the learned Defendant's Counsel the witness testified inter alia, that he was not a member of the SARS team that heard

the distress call of the victim on the day of the incident. It is not correct that what he told the Court was what was reported to him.

He said he could not confirm if Corporal Agada Lawrence and Agada Kenneth were tried in Police Orderly Room with respect to the killing of late Chukwuemeka Okoro.

He confirmed having made a Statement in the course of investigation. The Statement was admitted as Exhibit A. He admitted it was nowhere stated in Exhibit A that the Defendant was arrested on 18th August 2014. He said he was indisposed. That it was his 2[1]/C who was feeding him with information.

With this, and in the absence of question in re-examination, the witness was discharged.

As aforesaid, following the recurring failure of the Prosecution to call further witness, its case was closed and thereafter the Defendant made the instant No Case to Answer Submission.

The learned Defendant's Counsel did in his submissions extensively contend that the totality of the prosecution's case is predicated on the evidence of the Pw1 which evidence constitutes hearsay the witness having admitted that he was not present when the vehicle was allegedly snatched and that it was his 2[1]/C who supplied him with information. That the 2[1]/C was never called to testified hence the evidence of Pw1 constitutes hearsay. He relied on the provision of Section 37 of the Evidence Act 2011 to urge the Court to hold the evidence as inadmissible and accordingly find that there is no evidence by the prosecution in proof, prima facie, of any ingredient of the offence with which the Defendant is charged.

I have given due consideration to the foregoing contention. The Prosecution did not respond to these in a Reply despite the opportunity it had.

Sections 37 and 38 of the Evidence Act 2011 provides: -

"Hearsay means a statement –

(a). Oral or written made otherwise than by a witness in a proceeding or

(b). Contained or recorded in a book, document or any record whatever proof of which is not admissible under any provision of this Act which is tendered in evidence for the purpose of proving the truth of the matter stated in it.

38. Hearsay evidence is not admissible except as provided in this part or by or under any other provision of this or any other Act".

Now, under Sections 125 and 126 of the Evidence Act 2011 which deal with oral evidence necessary to prove a fact in issue, it is provided thus: -

"125. All facts, except the contents of documents, may be proved by oral evidence.

(126). Subject to the provisions of Part III, oral evidence shall, in all cases whatever, be direct if refers to –

(a). A fact which could be seen it must be the evidence of a witness who says he saw that fact.

(b). To a fact which could be heard, it must be the evidence of a witness who says he heard that fact.

(c). To a fact which could be perceived by any other sense or in any other manner it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;

(d). If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on that ground…."

By the provisions Sections 125 and 126 of the Evidence Act 2011 reproduced above, for oral evidence needed to prove a fact in issue to be admissible, it must be the evidence of a witness who saw or heard or perceived the fact in issue.

Under Sections 37 and 38 of the Act, written statement made for the purpose of proving the truth by a person who did not witness it qualifies as a hearsay and is not admissible to prove a fact in issue.

In this matter, for the prosecution to be said to have proved prima facie, any of the ingredient of the offence with which the Defendant is charged, there must be direct evidence of a witness who saw or witnessed the alleged robbery incidence. As rightly submitted by the learned Defendants' Counsel, all that the prosecution has before the Court is the evidence of the Pw1. The latter did admit under cross examination that he was indisposed and all information regarding the incident was supplied to him by his 2^{1}/C. Reading in between the lines of his evidence in chief, it is deducible to the Court that he was not part of the team who responded to the distress call of the owner of the snatched vehicle who alleged to arrested the Defendant and the deceased Chukwuemeka Okoro. He did testify that the team in charge of Garki axis headed by ASP. Mohammed Yusuf while on patrol. Hearkened to the call of that Olalekan who told them how his vehicle was snatched at gun point. They along with Olalekan chased the alleged robber and arrested them same day. The men were brought to him and he interrogated them.

His testimony both in chief and under cross examination was that of a witness who did not with his eyes see the Defendant and the deceased Chukwuemeka Okoro snatch the vehicle from Mr. Olalekan at gun point. The testimony was based on what the team in charge of the Garki axis told him. Having not witnessed the incident himself, his evidence in the circumstances qualify as hearsay and not admissible under Section 38, 125 and 126 of the Evidence Act 2011. In the circumstances they are discountenanced.

These said, by the records, the prosecution did not call any member of the team who allegedly arrested the Defendant and the deceased Chukwuemeka Okoro to testify as to what they saw or heard on the fateful day. Likewise, Mr. Olalekan whose vehicle was allegedly snatched by the Defendant and the late Chukwuemeka OKoro did not testify as to what transpired between him and them. In the circumstances the Court is left with the disqualified hearsay evidence of the Pw1.

It must be said that given the gravity of the offence with which the Defendant is charged and the severity of the attendant punishment upon conviction and given too the onerous burden placed on the prosecution under Section 135(1) of the Evidence Act 2011, the excuse that the member of team had either left Police service or transferred out could not serve to remove the burden and/or duty on the prosecution to prove the ingredients of the offence in line with the law.

This is particularly so as the said Police Officers are competent and compellable witnesses and being public officers as at the time of the incident, they are duty bound to account for what they did while in service ever after leaving service.

All said, the Court holds there is no evidence placed before the Court by the prosecution in proof of any ingredients of the offence, prima facie. This is fatal to the charge and in sustenance of the Defendant's No Case to Answer Submission.

In the light of this, the Court holds that by the evidence placed before the Court prosecution has not prima facie established any element of the offence or established link between the Defendant and commission of the offence. The evidence being hearsay is so unreliable that no Court or tribunal would convict on it.

By reasons of the foregoing, the Court resolves the sole issue raised above in favour of the Defendant against the Prosecution and placing reliance on Section 357 of ACJA holds there is no bases to call upon the Defendant to put up his defence to the charge. The No Case to Answer Submission succeeds and this being the case, the Defendant is discharged.

Signed
Hon. Judge
10/1/2019

Signed
Hon. Judge
10/1/2019

LEGAL REPRESENTATIONS:

(1). Babajide Olanipekun Esq for the Prosecution

(2). E. M. D. Umukoro Esq for the Defendant.