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

CASE NO:
APPEAL NO: CRA/46/2011.
DATE: 11TH APRIL, 2014.

BETWEEN:

PAUL EKWENZE & 1 OR.....ACCUSED/APPELLANTS

AND

COMMISSIONER OF POLICE.....COMPLAINANT/RESPONDENT

BEFORE THEIR LORDSHIPS:

1. **HON. JUSTICE M.E. ANENIH..... PRESIDING JUDGE**
2. **HON. JUSTICE S.B. BELGORE..... JUDGE**

JUDGMENT

In the Chief Magistrate Court 1, Holden at Wuse Zone 2, Abuja, the two appellants were arraigned on a First Information Report (FIR) that read simply thus:

> "*Receiving Stolen Property Contrary to Section 317 of Penal Code Law: On 6/12/2010 at about 1420 hrs, one David Omoyele "M" of Latin Security Abuja came to Lugbe Police Station and reported against one Iorvor Deman "m" who stole 25 litres of Diesel and sold it to you Paul Ekwenze and you Kingsley "m" all of Lugbe Abuja. During Police Investigation you*

confessed of buying the 25 litres and were recovered from you, you thereby committed the above mentioned offence"

At the end of the presentation of the prosecution's case, the two appellants made a No Case submission pursuant to section 159(1) & (2) of the Criminal Procedure Code Law. And in a Ruling delivered on the 15th of June, 2011, the learned trial Chief Magistrate of first grade overruled the submission. He then framed a one count charge of receiving stolen property contrary to section 317 of the Penal Code against them.

Dissatisfied with the Ruling of the lower court, coram, Chief Magistrate Oyewunmi O. O. (Mrs), the accused persons have appealed to this court. In the Notice of Appeal filed, three (3) grounds of appeal were enumerated, to wit:

GROUND OF APPEAL

Ground 1. Misdirection in law:

The learned trial Chief Magistrate misdirected himself when he failed in his duty to evaluate the evidence and testimony of the two prosecution witnesses before him but merely stated; "Upon a careful review of all the evidence before the Court, both oral and documentary, it is the view of the Court that the prosecution has produced something upon which the trial can proceed...."

Particular;

1. The trial Chief Magistrate did not evaluate the evidence and testimony of the two prosecution witnesses, that is the PW1 and the PW2, which contradicted each other and were further discredited under Cross Examination to wit;

   Contradictions extracted from the testimony of PW1 under Cross Examination:

(a) That the PW1 is not an eye witness to the alleged offence.

(b) While the F.I.R. has it that David Omoyele "m" of Latin Security Abuja is the nominal complainant, PW1 told the

Honourable Court that Jubril Abdulkareem is the nominal complainant.

(c) That PW1 was asked under cross examination whether he visited the place of work of the two accused persons in the cause of his investigation, he replied that the PW2 called the two accused persons on phone and they came to the Station. While the PW2 when asked same question replied that he visited the place of work of the two accused in company of the PW1.

(d) The PW2 under cross examination said that Jubril Abdulkareem was on duty at the scene of the alleged crime on the day of the alleged offence. While the PW1 replied that Tomen Diemen and three others (i.e. Joseph Igboko, Joseph Chika and Edwin Oniyi) were on duty at the scene of the alleged crime on the day of the alleged offence.

(e) The PW1 did not give evidence in respect of the proper description of the stolen property that was allegedly received by the two accused person.

(f) The PW1 did not give evidence to establish the fact or to prove beyond reasonable doubt that the diesel allegedly recovered from the two accused persons were the very diesel allegedly stolen from Gilmor Company.

Contradictions extracted from the testimony of PW2 under cross Examination:

(a) The PW2 is not an eye witness to the alleged offence.

(b) The PW1 was asked under cross examination whether he visited the place of work of the two accused persons in the cause of his investigation, he replied that the PW2 called the two accused persons on phone and they came to the Station. While the PW2 when asked same question replied

that he visited the place of work of the two accused in company of the PW1.

(c) The PW2 under cross examination said that Jubril Abdulkareem was on duty at the scene of the alleged crime on the day of the alleged offence. While the PW1 replied that Tomen Diemen and three others (i.e. Joseph Igboko, Joseph Chika and Edwin Oniyi) were on duty at the scene of the alleged crime on the day of the alleged offence.

(d) The CSO (Chief Security Office of Gilmor Company) who was also alleged to be the person that reported this case to the Police, did not give proper description of the alleged stolen property, and did not tell the Police, including PW1 and PW2, the quantity and quality of diesel allegedly stolen from the company. (*See page 16 of the CTC of the Record of Proceedings).*

(e) When the PW2 was asked whether the complainant gave any proper description of the stolen property allegedly received by the accused persons, he answered thus; *"the complainant did not give any proper description, but the 1st accused person in the sister case said that he stole 25 litres of diesels to the accused persons before this court".* See pages 16 – 17 of the CTC of record of proceedings). This is a hear say evidence. *It is short of the proof beyond reasonable doubt required in criminal case.*

(f) PW2 when asked whether he found out the source of the 25 litres of diesel allegedly brought to the station by the two accused persons, he answered thus; "*Yes, they said it was the diesel they bought from the 1st accused in the sister case*".

2. The learned trial Chief Magistrate avoided his duty of evaluation by taking refuge in the clouds of, "*Upon a careful*

review of all the evidence before the Court, both oral and documentary, it is the view of the Court that the prosecution has produced something upon which the trial can proceed."

3. The evidence of the two prosecution witnesses did not disclose a prima facie case of receiving stolen property against the two Accused persons.

Ground 2. Error in law:

The learned trial Chief Magistrate erred in law when he overruled the No Case Submission of the 1st and 2nd Accused Persons.

Particulars.

1. The Ruling of learned trial Chief Magistrate overruling the No Case Submission of the 1st and 2nd Accused Persons is manifestly in contradiction with the evidence of PW1 and PW2.
2. The learned trial Chief Magistrate erred in law when he overruled the No Case Submission of the 1st and 2nd Accused Persons without resolving the conflicts in the discredited evidence of the PW1 and PW2.
3. The learned trial Chief Magistrate erred in law when he overruled the No Case Submission of the 1st and 2nd Accused Persons, when there is no evidence before the Court, on the proper description of the alleged stolen property.
4. There is no evidence before the Court, from the owner of the alleged stolen property, establishing theft of his said property.
5. There is no evidence before the Court, establishing a nexus between the 25 litres of diesel allegedly brought to the Police Station by the 2nd Accused person with the diesel allegedly stolen.
6. There is no evidence before the Court, establishing theft of 25 litres of diesel from Latin Security Company.

7. There is no prima facie case of receiving stolen property against the two Accused persons before the Court.

Ground 3. Error in law:

The learned trial Chief Magistrate erred in law when after overruling the two Accused Persons No Case Submission framed a One Count Charge of Receiving Stolen Property, from an unfounded evidence of the complainant, to wit: 25 litres of diesel belonging to Latin Security Company from one Iorvor Demien having reason to believe the same to be stolen property and that you thereby committed an offence punishable under Section 317 of the Penal Code.

Particulars.

1. There is no evidence from Latin Security Company or its representative establishing theft of 25 litres of diesel from the Company.
2. The complaint before the Court as contained in the First Information Report (FIR) did not disclose ownership of alleged stolen 25 litres of diesel.
3. While the PW2 testified, alleging that the 25 litres of diesel received by the two Accused persons were stolen from Gilmor Company, the learned trial Chief Magistrate framed a charge to the effect that the said 25 litres of diesel are property of Latin Security Company.
4. It is not within the jurisdiction of the learned trial Chief Magistrate to frame a charge outside the evidence before the Court.

The appellants and the Respondents i.e. Paul Ekwenze, and Kingsley Okoro and the Commissioner of Police respectively filed brief of arguments.

Mr. I. I. Udeaga, learned counsel to the appellant on the 30/4/12 merely adopted his brief of argument as his argument in this appeal. P. H. Ogbole Esq. for the Respondent adopted the same approach. He proferred no oral argument in court. Mr. Udeaga urged the court to allow the appeal while Mr. Ogbole urged us to dismiss the appeal.

Learned counsel to the appellant in his brief of argument framed four (4) issues for determination. They are;

1. Whether the learned trial Chief Magistrate made a proper evaluation of the evidence and testimony of the two prosecution witnesses before arriving at the ruling that the prosecution has produced something upon which the trial can proceed by requiring the accused persons to enter into their defence.

2. Whether having regard to the conflicts and contradictions in the testimony of the prosecution witnesses, the prosecution could be said to have made a prima facie case of receiving stolen property against the accused persons.

3. Whether the learned trial Chief Magistrate was right when he ruled against the No Case Submission of the accused/appellants' made at the close of the prosecution's case.

4. Whether the learned trial Chief Magistrate was right, when he framed one count charge of receiving stolen property against the Accused Persons, charging the Accused persons of receiving 25 litres of diesel, property of Latin Security

Company, when there was no such evidence before the trial court.

With due respect to the learned counsel to the appellant, there is no need for proliferation of issues. Infact, these four issues listed above are one and the same but differently framed. It is a question of legal gymnastics or semantics.

On the other hand, learned counsel to the Respondent submitted only one issue for determination.

It goes thus:

> *"Whether the learned trial Chief Magistrate made a proper evaluation of the evidence and testimony of the two prosecution witnesses before arriving at the ruling that the prosecution have made out a prima facie case upon which the trial can proceed by requiring the appellants to enter into their defence".*

We think there is just one issue for determination in this appeal. And the all encompassing issue is the number three issue in the appellant's counsel brief of argument. The issue is;

> *"Whether the learned trial Chief Magistrate was right when he ruled against the No Case Submission of the Accused/Appellants' made at the close of the prosecution's case".*

Let us at this juncture, advert summarily to the arguments of both counsel in support of their contentions.

Mr. Udeaga submitted that there is no evidence before the court establishing theft of 25 litres of diesel from Latin Security Company. There is also no evidence that the stolen 25 litres of diesel was received by the Accused/Appellants. Referring to the testimony of the PW2 under cross-examination when asked the source of the 25 litres diesel, learned counsel said his (PW2) answer that they bought the diesel from the 1st accused person in the sister's case should have been followed with a call on that 1st accused person to give evidence in this case. Learned counsel emphasizes the point that there was no evidence before the court that 25 litres of diesel was stolen. He cited *inter alia* cases of **DELE VS STATE (2011)1 NWLR (PT 1229) 508, OGIDI VS STATE (2003) 9 NWLR (PT 824) 1, EKWUNUGO VS FRN (2008)1 MJSC, AL-HASSANI VS STATE (2011) 3 NWLR (PT 254) 277** to buttress his argument and urged the court to uphold the appeal.

As for the Respondent's counsel, he argued that the recorded statement of the appellants at the police station revealed that diesel was bought from some persons. He said it is a confessional statement which is admissible in evidence and upon which a trial court can rely in ascertaining whether or not the accused can stand trial. Learned counsel further argued that there is evidence that the appellants received 25 litres of diesel from certain sources. To that extent, according to Mr. Ogbole, the lower court was right in ruling that the prosecution has made out a prima facie case of receiving stolen property against the appellants. He urged us to dismiss the appeal. He relied inter-alia on the cases of **NWANKWOALA VS STATE (2005) ALL FWLR (PT266)1280, MOSHOOD VS STATE (2005) ALL FWLR (PT277) 964, STATE VS LINUS IKECHUKWU NWACHINEKE & ANOTHER (2008) ALL FWLR (PT 398) 204.**

This appeal to our minds present no complexities. The law in the area of No Case Submission is also well settled.

Section 191 (3) of the Criminal Procedure Code, the adjectival law that provides the frame work and steps for the trial of these two accused persons in this court, provides that;

> *"Notwithstanding the provisions of sub-section (2) of the same Section 191, the Court may after hearing the evidence for the prosecution, if it considers that the evidence against the accused is not sufficient to justify proceeding further with the trial, record a finding of not guilty in respect of such accused without calling upon him to enter his defence. And such an accused shall be discharged."*

The principle behind a No Case Submission is that an accused should be relieved of the responsibility of defending himself when there is no evidence upon which a trial judge could convict. That is the first principle. The other principle is that a No Case Submission essentially postulates that whatever evidence there was, which might have linked the accused person with the offence had been so discredited that no reasonable Court can act on it as to pronounce the guilt of the accused. See **ONAGORUWA VS STATE (1993) 7 NWLR (PT 303) 49; STATE VS AUDU (1972) 6 SC 28; ADEYEMI VS STATE (1991) 6 NWLR (PT 951) 35.**

The inherent logic of force behind this principle is the constitutional provision of presumption of innocence. By virtue of S.36 of the 1999 Constitution (as amended), every person charged with a criminal offence is presumed to be innocent until he is proved guilty. It is therefore the duty of the prosecution to rebut the presumption of innocence constitutionally guaranteed to the accused person. So where a no case had been made out at the end of the presentation

of the prosecution's case, it would amount to asking him to establish his innocence if he is called upon to enter an answer or defence to the charge. See **MUMUNI VS STATE (1975) 6 SC 79; DABOH VS STATE (1979) 5 SC 197.**

In essence, a No Case Submission is available to the accused if at the close of the case for the prosecution, the evidence led fails to meet the essential requirements or elements of the offence charged. In addition, as pointed out by the Supreme Court in **Daboh Vs State** (supra), the case of the prosecution may fail at this stage if the evidence is so manifestly unreliable having been destroyed by cross-examination of the witness that no reasonable tribunal or court will convict on that evidence. See **AITUMA VS STATE (2007) 5 NWLR (PT 1028) 466; AMINA VS STATE (2005) 2 NWLR (PT 909) 108; IGABELE VS STATE (2004) 15 NWLR (PT 896) 314.**

I must state here very quickly that at the point of a no Case Submission, the credibility of the prosecution witnesses is not really in issue. See **AWKA VS COP (2003) 4 NWLR (PT 811) 461**; Aituma's case (supra) and Igabele's case (supra). What is in issue is the availability of that evidence pointing to or attaching to all the ingredients of the offence(s) alleged against the accused person. (See Nigerian Criminal Trial Procedure by Olanrewaju Adesola Onadeko, First Edition, 1989.

It is the above narrated principle and provisions of S.191(3) of the Criminal Procedure Code (CPC) that the appellants' counsel relied upon in this appeal. They relied more or wholly on the first principle.

The road may now shift to the offence of Receiving Stolen Property. This is the offence alleged in the First Information Report against the

two appellants. This offence is codified under S.317 of the Penal Code. Section 317 provides:

> *"whoever dishonestly receives or retains any stolen property knowing or having reason to believe the same to be stolen property shall be punished with imprisonment for a terms which may extend to fourteen years or with fine or with both".*

From the above quoted provision, the offence of receiving stolen property is manifested when:

a) There is proof of theft or stealing of the goods in question.

b) There is proof that the person charged dishonestly received the goods allegedly stolen which is manifested when he either physically received the goods or that they were in the possession of a person over whom he had control and the person charged must have had the thing in his possession whether alone or jointly with another or has actually aided in concealing or disposing of it when he knew that it was stolen.

c) There is evidence of guilty knowledge which in effect means that at the time the person charged received or bought the goods he knew them to be stolen.

See the cases of **OKOROJI VS STATE (2002). ABACHA VS FRN (2006) 4 NWLR (PT 970) 239.** So, clearly the ingredients of the offence of Receiving Stolen Property are:

1. Property in question must be stolen.

2. Dishonesty in the act of receiving it by the person(s) charged.
3. Guilty knowledge.

Furthermore, a knowledge that a property is stolen can be inferred from the following facts namely:

(a) The manner of receipt or delivery of the goods allegedly stolen;
(b) The time of delivery;
(c) The price paid for the property and;
(d) The selling and delivery environment.

See **EKPO VS STATE (2003) 17 NWLR (PT 809) 392, UNUIGBOJE VS: STATE (2001) 11 WRN 170, MARTINS VS STATE (1997) 1 NWLR (PT 481) 355; OKOROJI VS: STATE** (supra).

We now search the record of the lower court. The FIR mentioned that one David Omoyele, Male of Latin Security, Abuja reported at Lugbe Police Station that one Iorvor Deman Stole 25 litres of diesel. He said the said 25 litres of diesel was sold to the two appellants, and that they confessed to buying the 25 litres at Police Stations. Now, many questions would naturally spring up. The questions are, is there any evidence of stealing or theft of the diesel? Is buying the diesel per se wrong in law? What is the price of purchase of the diesel by the appellants? Did the appellants confess to buying a stolen diesel or just buying diesel?

The 2nd accused/appellant in his statement of 7/12/10 denied buying any diesel. 2nd appellant is Kingsley Okoro. In his statement which we have ready thoroughly he said:

"then this one of Gilmor, I am not the one that bought it, it is one Paul and he said is only twenty five litres.....".

The Paul 2nd accused person was referring to is the 1st accused person. And truly, the 1st accused/appellant in his own statement of the same 7/12/10 agreed he bought the diesel from one operator which he doesn't know his name. This is what he said:

"..... sometimes I normally buy in NNPC or any of the filling stations and they normally give us receipts which I don't normally keep the receipt, also I buy in Gilmor Company, Julius Berger, also I normally buy the diesel through the operator which he normally call me in their site and that very day the operator call me in their site and that very day the operator which, I don't know his name call me and I buy twenty five litres.....".

It is therefore clear to us that none of the appellants confessed to buying stolen diesel. It is therefore not correct as posited or submitted by the learned counsel to the prosecution that the appellant confessed to the crime. No. They did not. 1st accused said he bought from an operator, which in our opinion is not a crime, while the 2nd appellant said he didn't buy any diesel at all.

Furthermore, how much did the 1st appellant pay for the diesel? In other words what is the purchase price? We search the record, no evidence of this. So, without evidence of price, whether too low or high, it is practically impossible to impute guilty knowledge.

Again, where is the evidence that the property i.e. diesel was a stolen item? PW1 is the Police Investigation Officer. PW2 is one Sgt Yunusa Garba. These witnesses are not the alleged owners of the 25

litres diesel. They did not report that their diesel was stolen. The person that reported that 25 litres diesel was stolen was one David Omoyele. And the alleged thief was one Iorvor Deman. All these people were not called in evidence. So, we asked, where is the evidence of theft of 25 litres diesel? To us none.

In clear terms, to us, no evidence supporting vital ingredients of the offence of Receiving Stolen property. No evidence of stolen property, no evidence of receiving dishonestly and no evidence of guilty knowledge that what the 1st accused/appellant bought is a stolen item. With due respect to the learned Chief Magistrate, what she said in her ruling on the No Case Submission can not be allowed to stand in view of the state of the law and the lack of available concrete facts. The learned Chief Magistrate said:

> *"Upon a careful review of all the evidence before the court, both oral and documentary, it is the view of the court that the prosecution has produced something upon which the trial can proceed by requiring the accused persons to enter into their defence and state their own side of the case, it is the most expedient thing to do at this stage of proceeding....".*

Haba! What is that "Something" that the prosecution has produced. Certainly not the required evidence. Otherwise, the learned Chief Magistrate would have it stated clearly. And by saying the accused persons should state their own side of the case is turning the adjectival law upside down. That would surely be inquisitorial whereas our criminal procedure is accusatorial.

In conclusion, we find considerable merit in this appeal. The ruling of the learned Chief Magistrate is hereby set aside. In its stead, we

enter a verdict of No case to answer in favour of the two appellants. They are consequently discharged under Section 191(3) of the Criminal Procedure Code.

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HON. JUSTICE M.A. ANENIH	HON. JUSTICE S.B.BELGORE