

## **Quashing of a charge or information in the High Court: What an applicant must establish**

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### **INTRODUCTION**

Criminal trials in the High courts are mostly on notice, in the sense that the accused person is earlier communicated as to the nature of the charge as well as the quality of evidence he is going to encounter during his trial. The accused person and his counsel, if any, are therefore afforded adequate opportunity to prepare a good defence against the charge.

Most importantly, the accused person at that stage, may, after going through the proof of evidence attached to the information or charge, as the case may be, consider whether he may stand his trial or seek to have the information or charge quashed, before the trial commences.

Trials generally constitute an abridgement of the personal liberty of the accused person. It is therefore essential that an accused person should not be made to go through the rigours of trial, where the proof of evidence attached to the information or charge do not disclose a prima facie case against the accused person.

In the Southern and Northern Nigeria, the position of the law on the subject of this paper is the same, though names attached to the processes in the respective jurisdictions may differ. While the process is known as Information in the South,<sup>1</sup> it is referred to as a charge in Northern Nigeria.<sup>2</sup>

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<sup>1</sup> See section 340(1) Criminal Procedure Act, Cap. C41, Laws of the Federation of Nigeria, 2004. In the South, this Act is *mutatis mutandis* the Criminal Procedure Law of some of the States. eg Lagos and Edo States.

<sup>2</sup> See Section. 185(b) Criminal Procedure Code, Cap. 30, Laws of Northern Nigeria, 1960, applicable to all the States of the former Northern Region. However, some states in the Northern Nigeria now refer to the process also as information. e.g . Adamawa and Taraba States. See the Criminal

This paper is therefore aimed at a critical examination of the circumstances, in which a defendant who is sought to be tried on information or a charge before a High court, may apply to have such charge or information quashed before the commencement of the trial.

Our main concern in this paper, is a situation, where such a charge or information is sought to be quashed on the ground that the proof of evidence attached to the charge or information, do not disclose a prima facie case against the accused person sufficient to put him on his trial.

### **CONSENT OR LEAVE, TO PREFER AN INFORMATION OR A CHARGE IN THE HIGH COURT.**

Section 185(b)<sup>3</sup> provides that:

"No person shall be tried by the High Court unless ... a charge is preferred against him ... by leave of a judge of the High Court."

The application for such leave shall be accompanied by the charge in respect of which leave is sought, proof of evidence of the witnesses whom the prosecution proposes to call at the trial, and if the application is made by a person other than the Attorney-General, a statement by the applicant verifying the truth of the facts in the proof of evidence.<sup>4</sup>

Some states in the former Northern Nigeria have however dispensed with the requirement for such leave in certain circumstances.

In Kwara State for instance, leave to prefer a charge in the High court is no longer required, where such charge is preferred by the Attorney-General of the State.<sup>5</sup>

Also in Kano State, where the Attorney-General or a person authorized by him, intends to prosecute an accused person in the

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Procedure Code(Amendment) Edict No. 8 of 1986 of former Gongola State applicable to the two states.

<sup>3</sup> CPC Laws of Northern Nigeria, 1960.

<sup>4</sup> See Rule 2(a) &(b) of the Criminal Procedure (Application for Leave to Prefer a charge in the High Court ) Rules, 1970, made pursuant to S. 373 CPC.

<sup>5</sup> See S. 185(b) Criminal Procedure Code, Laws of Kwara State, Cap. 39 1994.

High Court, he shall cause the charge together with a summary of evidence to be filed in court without leave of a Judge of a High Court.<sup>6</sup>

Section 340(2) (b)<sup>7</sup> provides as follows:

"... No information charging any person with an indictable offence shall be preferred unless... the information is preferred by the direction or with the consent of a Judge."

The same type of documents accompanying an application for leave in the North are also required to be attached to application for consent to file an information in the south.<sup>8</sup>

The Criminal Procedure Act has been amended to dispense with the requirement of consent of a Judge to prefer information,<sup>9</sup> except where a committal order is required in cases of perjury.<sup>10</sup> Also in some Southern States, by virtue of amendment of their respective Criminal Procedure Laws, consent is no longer needed to prefer an information in the High Court.<sup>11</sup>

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<sup>6</sup> See Rule 2(i) & (ii) Criminal Procedure (Preferment of Charges in the High Court ) Rules, Kano State No. 10, 1979.

<sup>7</sup> Criminal Procedure Act 1958 then applicable to the Southern States.

<sup>8</sup> Proof of evidence of witnesses for the prosecution, the charge and verifying statement etc. See Rules 8(a) & 9 of Indictment Procedure Rules 1971, made pursuant to S. 363 of CPA. See *Enuma v State* [1997]1 NWLR (pt 479) 115 at p. 120.

<sup>9</sup> See s. 340(1) Criminal Procedure Act, Cap. C41, Laws of the Federation of Nigeria,

<sup>10</sup> See ss. 340(2) & 77(b)(ii) CPA, LFN

<sup>11</sup> See c. g. s. 340(1) Criminal Procedure law of Lagos State 1994 & 2004. Also in Anambra and Imo States, for capital and other indictable offences, consent is not required. See Criminal Procedure (Miscellaneous Provisions) Edict no. 19 of the then East-Central State, 1974, applicable to the two States. See also S.340(1), Criminal Procedure Law, Laws of Anambra State, 1986.

The Attorney-General in these areas may therefore prefer information in the High Court, by merely writing to the Registrar of the court and attaching the charge and proofs of evidence.<sup>12</sup>

In both the Northern and Southern States, the application for leave or consent as the case may be, is made *ex parte*,<sup>13</sup> and therefore usually taken behind the accused person. However, the accused person may be put on notice if the Judge deems it fit.<sup>14</sup>

In the states where consent or leave as the case may be is required, failure to obtain same renders the charge or information so preferred and any trial conducted pursuant to it liable to be quashed.<sup>15</sup>

Once an application for leave or consent is made, it is at the discretion of the judge to grant or refuse it. Such discretion shall however be exercised judicially and judiciously. The judge, in deciding whether or not to grant the application, shall consider whether the proof of evidence attached to the charge or information disclosed a *prima facie* case against the accused person.<sup>16</sup>

The judge is therefore not bound to grant the application even though all the necessary documents are attached to it. The Supreme Court confirmed this in the following statement:

"There must be clear particulars and facts to justify the exercise of the discretion. It is not the law, neither is it justice to say once the application is made on information, and all necessary documents are attached, without more, the application to prefer charge must be granted."<sup>17</sup>

<sup>12</sup> See *Abacha v State* [2002] 7 SC (pt. 1) 1 at p. 5.

<sup>13</sup> *Ibid.* at p. 9; also *Ohwovoriole v. Federal Republic of Nigeria* [2003] 1 SC (pt 1) 1 at p. 23.

<sup>14</sup> See Rule 4 Criminal Procedure (Application for Leave to Prefer a Charge in the High Court) Rules 1970.

<sup>15</sup> See *A.G. Federation v Isong* [1986] 1 QLRN 75; also S. 340(3) C.P.L. Bendel State.

<sup>16</sup> See *Enuma v State* (Supra) at p. 121.

<sup>17</sup> *Abacha v State* (Supra) at p. 9 per Belgore JSC.

## WHAT IS PROOF OF EVIDENCE?

Neither the CPC nor the CPA and the rules made there under attempted any definition of the term. However, judicial authorities have shown that proof of evidence shall among other things; contain the unedited written statements of witnesses, whom the prosecution intends to call at the trial.<sup>18</sup>

In practice, however, apart from the statement of the witnesses, the proof of evidence may also contain summary of investigation report and some relevant documents intended to be used at the trial by the prosecution; e. g. autopsy report.

An attempt by some standard textbooks on criminal procedure in Nigeria, to treat the charge sheet as part of the proof of evidence is misleading. As we shall see later in this paper, the proof of evidence is aimed at establishing prima facie case against the accused person in respect of the charge or the information. As rightly pointed out by the Supreme Court:

"... the purpose of serving proof of evidence upon an accused ... is to give him (the accused) the opportunity of knowing what the prosecution witnesses will state in court against him"<sup>19</sup>

## APPLICATION TO QUASH A CHARGE OR INFORMATION.

As stated earlier, an accused person, upon service of a charge or an information on him, may elect to stand his trial and await the verdict of the court at the end. Alternatively, before or at the time of taking his plea, an accused person may apply to the court to quash such charge or information as it relates to him.

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<sup>18</sup> See *Abacha v State* (Supra) at p. 9. In *Kano State*, all the Law Officer is required to attach is a summary of the evidence of the witnesses with or without the names of the prosecution witnesses, provided that such summary is sufficient to put the accused person on notice generally of the case against him.

<sup>19</sup> *Ibid*, per Omu JSC at p. 38. Also *Ede v State* [1977] 1 FCA 95 at p. 115.

The application is usually by motion on notice wherein the applicant states the grounds for his prayer.<sup>20</sup>

Once an application of this nature is made to the trial court, it shall be the duty of the court to first hear the application and determine whether or not the trial of the accused person shall proceed.<sup>21</sup>

An accused person may apply to quash a charge or information on the ground that, among other things, consent or leave of the judge was not obtained before preferring such charge or information.<sup>22</sup> However, this paper is particularly concerned with situations where the ground for applying to quash the charge or information is that the proof of evidence have not made out enough case against the accused person to warrant his being put on trial.

The judge, in determining this type of application, shall have to sift through the statements and depositions of witnesses in the proof of evidence, to determine whether the facts therein are sufficient to put the accused person on his trial.<sup>23</sup>

In the jurisdictions where application for leave or consent to prefer a charge or an information, is still part of their criminal procedure law, the judge in considering an application to quash such charge or information, is restricted to the proof of evidence attached to such application for leave or consent.<sup>24</sup> For other jurisdictions where leave or consent is not applicable, the proof of evidence attached to the information or charge so preferred shall be considered by the judge, upon such an application, to determine whether a *prima facie* case has been disclosed.<sup>25</sup>

Several authorities have been consistent in affirming that, the test as to whether the proof of evidence have disclosed a *prima facie* case against the accused person, and not the existence of proof beyond reasonable doubt therein.

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<sup>20</sup> See *Enuma v State*, Supra at p. 119; also *Ohwovoriole v FRN* (Supra) at p. 3.

<sup>21</sup> See *Abacha v State* (Supra) at pp. 12 & 64.

<sup>22</sup> See s. 185 (b) CPC; S.340 (3) CPL, Laws of former Bendel State, applicable in Delta State. See *A. G. Federation v Isong* [1986] 1 QLRN 75.

<sup>23</sup> See *Abacha v State*, Supra at p. 12.

<sup>24</sup> See *Ohwovoriole v FRN*, Supra at p. 23.

<sup>25</sup> See *Abacha v State*, Supra at p. 12.

It would appear that the *locus classicus* on this point is *Ikomi v The State*.<sup>26</sup> The appellant in that case, Justice Donald Ikomi, was a High Court Judge in the then Bendel State and was resident in Benin City. The offence, the subject matter of the proceedings, was murder and it was committed in the residential premises of the appellant in Benin. A police constable, Uanlie Agbede, was on night guard duty in the appellant's residence and he reported for duty on the night of the incident. The gateman opened the gate for him and he entered the appellant's premises after which the gate were locked. The constable's corpse was found inside the premises the next morning.

The prosecution sought and obtained consent of the Chief Judge of the then Bendel State, to prefer an information for the offence of murder against Justice Ikomi and two other persons, who were in the premises on the night of the incident.

The appellant thereupon brought an application to quash the information, on the grounds that the proof of evidence attached to the information, did not disclose the offence charged, and that the information as preferred was an abuse of court's process.

The appellant lost at the High Court, Court of Appeal and the Supreme Court. In refusing the application, the Supreme Court examined the proof of evidence and came to the conclusion that even though there was no eye witness account of the incident in the proof of evidence; the circumstantial evidence therein was enough to put the accused persons on their trial. The fact that the three accused persons were in the premises during the time of the incident; neither the gates nor the fence of the compound were tampered with; the appellant's dogs did not bark that night and the fact that the medical report indicated that the constable died as a result of strangulation, all raised a *prima facie* case against the accused persons necessitating a trial.

*Egbe v State*<sup>27</sup> is a Court of Appeal decision. Consent was duly obtained in the case, from the High court to prefer an information

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<sup>26</sup> [1986] 1 NSCC 730; [1986] 3 NWLR (pt.28) 340; [1986] 5 SC 513.

<sup>27</sup> [1980] NLR 341.

charging the accused persons with the offence of obtaining money by false pretences. However, the alleged victim, an American company, maintained in the proof evidence that it lost no money to anybody.

In quashing the information, the court held that no prima facie case was disclosed in the proof of evidence as the facts therein did not show that any offence was committed.

In *Milton Ohwovoriole v. Federal Republic of Nigeria & ors*,<sup>28</sup> the appellant, a Senior Advocate of Nigeria and legal adviser to one of the accused persons, was charged with his client and other persons for conspiracy to give some amount of money as gratification and for giving same amount as gratification to public officers.<sup>29</sup> The Attorney-General of the Federation had obtained leave of a Judge of the High Court of Federal Capital Territory, Abuja, to prefer the charges. The appellant applied to quash the charge against him on similar grounds as in *Ikomi v State*.

Having lost at the High Court and the Court of Appeal, he appealed to the Supreme Court. It happened that the proof of evidence attached to the application for leave to prefer the charges, did not contain any fact that the appellant conspired with anybody to give, and or gave the alleged gratification to the public officers. The only facts disclosed in the proof of evidence, which the prosecution relied on to obtain leave to prefer the charge, were that appellant was counsel to one of the accused persons. It was held that the charge was liable to be quashed as no prima facie case was disclosed against the appellant in the proof of evidence.

Another celebrated case on this point which split the apex court is *Mohammed Sani Abacha v The State*.<sup>30</sup> On the 4th of June 1996, along Lagos/Ibadan expressway, Kudirat Abiola was shot dead in her car. By a letter addressed to the Chief Registrar of the High Court of Lagos State, the Attorney –General of Lagos State preferred an information against the appellant and three others, for the offence of murder of Kudirat Abiola among other counts. The appellant applied for the information as it related to him to be quashed on the same grounds of lack of prima facie case and abuse of court's process.

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<sup>28</sup> (2003) 1 SC (pt. 1) 1.

<sup>29</sup> Under the Corrupt Practices and other Related Offences Act, 2000.

<sup>30</sup> (2002) 7 SC (pt. 1) 1.

The Supreme Court, in a majority of four to one, held that no prima facie was disclosed against the appellant in the proof of evidence. Ejjiwunmi JSC dissented and held that the facts in the proof of evidence disclosed prima facie case against the accused.

There was however, unanimity among the Justices as to the applicable principles. But they were divided on whether the facts in the proof of evidence, met the standard of proof needed to establish a prima facie case, sufficient to put the appellant on his trial.

It appears that the standard of the prima facie case which the apex court applied in *Abacha's case* is with greatest respect, higher than that applied in *Ikomi's case*. It is humbly submitted with the greatest respect, that though the lords enunciated and adopted the prima facie case test earlier laid down in *Ikomi's case*, the test applied in the majority judgement in *Abacha's case* appears to be that of a 'clear case'<sup>31</sup> or at best, the prima facie case applicable in a submission of no case to answer.<sup>32</sup>

The duty of a court when considering an application to quash an information or a charge is not to appraise the evidence in the statement of the proposed witnesses for the prosecution. Rather, its duty is to decide whether there was reasonable material before him, on which the suspect could reasonably be called to stand trial for the offence.<sup>33</sup> Thus, once there are circumstances from which it can be inferred that accused person could have committed the offence, he should be put on his trial.<sup>34</sup>

Where the information discloses an offence, and the deposition supports the indictment, it is not sufficient to quash the indictment because the accused person may not be convicted.<sup>35</sup>

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<sup>31</sup> This was the test applied in *Atanda v A. G. Western Nigeria* [1965] NMLR 225; which was subsequently disapproved by the Supreme Court in *Ikomi's case*.

<sup>32</sup> *Infra*.

<sup>33</sup> See *Ikomi v State*, *supra* at p. 740.

<sup>34</sup> *Ibid*, at p. 742-3.

<sup>35</sup> *Ikomi v State*, *supra* at p. 753.

In *Abacha's case*, the information in fact disclosed the offences of murder and accessory after the fact of murder, among others. The only issue was as to whether the appellant was in any way linked with the offences in the information. Such facts in the proof of evidence linking the appellant with the offences charged may be direct or circumstantial.<sup>36</sup>

The appellant admitted in his statement that he among other things, attached his driver (Mohammed Katako), to the group led by Barnabas Jabila (a.k.a Rogers) at the time of the offences; that he gave his car to the group for their use during part of their activities culminating in the commission of the crime; that he held a meeting with his driver and one Major Ado, where they agreed that because of the fear that his driver and other suspects might be arrested in connection with the offences charged, they should be resettled abroad before additional measures should be taken; and that he in fact sourced and disbursed \$10,000 each to his driver and one other suspect to enable them escape to Niger Republic.<sup>37</sup>

These facts in our respectful view, disclosed a prima facie case against the appellant sufficient to put him on his trial, and it is immaterial that such trial may not lead to conviction. We are also humbly in agreement with Ejiwunmi JSC, that the appellant knew that the persons he gave money to escape were involved in the commission of a crime.<sup>38</sup>

The offence of accessory after the fact can still be preferred against a person, though the person he received or assisted has not been charged, and the proof of evidence does not need to establish beyond reasonable doubt, that the person assisted is guilty of the offence, the punishment of which he was seeking to escape from.<sup>39</sup>

Prima facie case needed to sustain a charge or information is one that raises inference that an accused person may have committed the offence charged. It is quite different from a "clear case", which

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<sup>36</sup> In *Ikomi v State*, prima facie case was held to be disclosed by entirely circumstantial evidence in the proof of evidence.

<sup>37</sup> See *Abacha v State* (Supra) at pp. 92 to 94.

<sup>38</sup> Ibid, at p. 107.

<sup>39</sup> Ibid, at pp. 114–115. Such should await the trial of the case.

implies a condition, that a charge or information should be quashed, if on the depositions, a trial may not lead to conviction.<sup>40</sup>

*Jimoh Atanda v A G. Western Nigeria*<sup>41</sup> represented that position. In that case, in the first charge of murder, the appellant, a co-accused, had the charges against him dropped and he was used as a prosecution witness in the trial of the other accused persons. The accused persons were subsequently discharged.

The prosecution later brought the appellant and the earlier discharged accused persons before a magistrate, for committal to the High court for the same offence of murder. The magistrate discharged them after preliminary inquiry; whereupon the prosecution sought and obtained consent of the High Court judge, to prefer an information against them including the appellant.

The Supreme Court held that in the circumstances of the case, the trial judge should not have granted consent unless a clear case was disclosed in the proof of evidence against the accused persons. Given the set of facts in that case, the Supreme Court was justified in placing a very high requirement of a 'clear case' for consent to prefer the information against the accused persons.

Another point to note is that prima facie case must be one disclosed by the proof of evidence attached to the charge or information, when the application for leave or consent is made; or when the charge or information is filed in court. Collateral evidence or future or anticipated testimony of witnesses cannot be relevant in deciding whether a prima facie case is disclosed against the accused person or not. Where therefore relevant evidence emerges subsequent to the filing of the information or charge, such evidence cannot save such information or charge from being quashed, where the proof of

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<sup>40</sup> See *Ikomi v State*, supra at p. 740, where Nnamani JSC held that the requirement of "clear case" should be restricted to the circumstances of the facts in *Atanda* 's case, supra, where from the depositions, it was apparent that the trial would come to nothing.

<sup>41</sup> (1965) NMLR 225.

evidence failed to disclose any prima facie case against the accused person.

In *Ohwovoriole v F.R.N.*<sup>42</sup> where the Court of Appeal relied heavily on the contents of a counter-affidavit filed by the prosecution during the proceedings, to quash the charge, in coming to the conclusion that a prima facie case was made out against the accused person; the Supreme Court, in overruling the Court of Appeal, held that such affidavit was irrelevant in the proceedings, as it was not before the trial judge on the date he exercised his discretion to grant leave to prefer the charge.

The same position was taken by the court in *Egbe v State*<sup>43</sup> where the prosecution argued that apart from the facts in proof of evidence, there was further evidence to be adduced at the trial. While quashing the information, the Court of Appeal held that as the prosecution had nothing in the proof of evidence to establish a prima facie case in support of the offences charged, it would amount to an abuse of court's process to allow the indictment to stand.

Similarly, in *Ikomi v State*, the Supreme Court, while coming to the conclusion that there was a prima facie case disclosed in the proof of evidence, ignored evidence of a couple who were living close to the appellant's house and who deposed that they heard the deceased cry 'oga don kill me o'<sup>44</sup>. The reason for rejecting the evidence was that it was not in the proofs of evidence, which was before the judge at the time he granted consent to prefer the information.

### **WHAT IS A PRIMA FACIE CASE SUFFICIENT TO SUSTAIN A CHARGE OR INFORMATION IN THE HIGH COURT.**

Several attempts have been made by the courts in Nigeria to define or at least explain the term 'prima facie case', which the proof of

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<sup>42</sup> Supra. at pp.8-9.

<sup>43</sup> Supra. at pp. 373-374.

<sup>44</sup> *Ikomi v State*, supra at p. 753. Note however, that Rule 2(iii) of the Criminal Procedure (Preferment of Charges in the High Court) Rules, Kano State 1979, allows the prosecution to adduce further evidence during the trial without serving the accused person further summary of evidence. This provision however, in our humble view, has not altered the general position of the law, as such additional evidence cannot save the charge or information from being quashed, where the proofs of evidence attached thereto do not disclose a prima facie case against the accused person.

evidence must disclose, before an accused person may have an information or charge preferred against him in the high court.

The earliest definition of the term by a Nigerian court is found in the case of *Gafari Ajidagba v I.G.P*<sup>45</sup>, where the Federal Supreme Court defined the term thus:

"What is meant by prima facie case? It only means that there is ground for proceeding, ... and 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"<sup>46</sup>

This definition has also received the approval of the apex court in other cases.<sup>47</sup> These cases however border on 'no case submission'. In other words, the courts in those cases were defining prima facie case, which the prosecution shall establish by evidence in a trial, before an accused person may be called upon to enter his defence.

On the other hand, the prima facie case which the proof of evidence shall disclose, before an information or a charge may be preferred against an accused person, is a condition precedent to the commencement of the trial of the accused person. The issue of calling an accused person to give his defence or offer some explanations has not arisen at that stage of the proceedings. It is only when the charge has been filed after the judge might have satisfied himself that a prima facie case was made out, that the prosecution may be called upon to prove its case.

It is therefore submitted with the greatest respect, that the definition of the term in *Ajidagba v IGP* and other authorities on no case submission, cannot be applicable to cases, where the term is used in

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<sup>45</sup> (1958) 1 NSCC 20.

<sup>46</sup> Ibid. at p. 21. This definition was adopted from an Indian case of *Singh v Triendranatsen* (1931) 1 I.R. 59.

<sup>47</sup> See *Queen v Ogucha* (1959) 1 NSCC 50; *In Re Maiduguri* (1961) 1 ANLR 673; *Ubanatu v. C.O.P.* (2000) 1 S.C. 31. This definition was also adopted in *Abacha v State*, supra at pp. 12-13.

relation to the facts disclosed in the proofs of evidence sufficient to prefer a charge or an information against an accused person. As we shall see later in this paper, different standard of evidence constitute prima facie case in respect of a submission of no case to answer.

Prima facie case sufficient to support the preferment of a charge or information in a High court was explained in *Ikomi v State* in the following words:

"... even if the depositions and statements attached to the information disclose an offence, an accused person should not be put on his trial if there is no link between him and that offence."<sup>48</sup>

In *Ohwovoriole v FRN*, Ejiwunmi JSC, after citing the above statements of Nnamani JSC with approval, further explained the term in the following words:

"It is therefore clear that where the prosecution sought to prosecute a person for an offence with leave of court, it is manifest that it must be established that, (i) an offence was committed, (ii) it must be shown by the proof of evidence or statements filed pursuant to the application, that the accused person was linked with the offence."<sup>49</sup>

From the foregoing, it is clear that at least two conditions must exist in the proof of evidence attached to an information or a charge, for it to be deemed to have disclosed a prima facie case.

The first condition is easier to detect and involves a perusal of the charge or information, and comparing the definition of the offence therein, with the facts as disclosed in the proof of evidence. Where in all the circumstances of the case, no offence is shown by the facts therein to have been committed by the accused person, the charge or information shall be quashed.

The ascertainment of whether or not an offence has been disclosed in the proof of evidence, is the first task of the judge and there is no need to enquire further as to whether or not the accused person is

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<sup>48</sup> At p. 739; Per Nnamani JSC.

<sup>49</sup> *Ohwovoriole v FRN*, supra at p. 20.

linked with the offence charged, once it is discovered that no offence is disclosed in proof of evidence. In *EGBE V. STATE*<sup>50</sup> the company alleged to have been duped deposed in the proof of evidence that it did not lose any money to anybody. The offence of obtaining money by false pretences preferred against the accused person, was therefore not disclosed by the facts in the proof of evidence. The information was therefore quashed.

The proof of evidence may still be held to disclose an offence where the facts therein disclose a lesser offence, for which the accused may be convicted upon the trial of the offence charged. For instance, in a charge of murder, the proof of evidence may be held to have disclosed an offence, where the facts therein apparently disclose the offence of manslaughter, or in a charge of attempted murder, the proof of evidence may disclose the offence of unlawfully doing grievous harm.<sup>51</sup>

Having established that the proof of evidence disclosed an offence, the judge shall then proceed to decide whether from the facts as disclosed in the proof of evidence, the accused person is one way or the other connected with the offence.

The Supreme Court framed the issue in the following words:

"The question ought to be this; from these depositions, is it probable that the accused persons are linked with the offence in the information."<sup>52</sup>

The duty of the judge at this stage is not to evaluate evidence of the proposed witnesses for the prosecution, but to decide whether there is sufficient evidence in the proof of evidence linking the accused person with the offence charged.<sup>53</sup>

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<sup>50</sup> Supra.

<sup>51</sup> See *Maja v State* (1980) INCR 212; *Nwachukwu v State* (1986) 4 S C 378; *Uguru v State* [2002] 9 NWLR (pt. 771) 90.

<sup>52</sup> *Ikomi v State*, supra at p. 741, per Nnamani JSC.

<sup>53</sup> Ibid at p. 740.

Facts in the proof of evidence may be said to link the accused person with an offence charged, where such facts raise a reasonable inference as to the complicity of the accused person in the commission of the offence charged. Where therefore the statements and depositions of the proposed witnesses for the prosecution in the proof of evidence are materially contradictory, there may not be need to put the accused person on his trial at all.<sup>54</sup>

Facts which may be deemed to link the accused person to the offence charged, must be facts which are material in all the circumstances of the case, in the sense that they touch on one or more of the elements of the offence. Facts which are inconsistent with the offence charged or which disclose a very weak or inconsequential link with the offence charged, may not suffice. In *Ohwovoriole v F.R.N.*,<sup>55</sup> the fact that the appellant was shown in the proof of evidence, to be counsel to one of the accused persons at the time the offence was committed, was held not to be sufficient link between the appellant and the offence charged.

### **PRIMA FACIE CASE AND SUSPICION.**

There is a difference between these two concepts even though the dividing line may be thin. In many cases where the courts have had to consider whether or not the proof of evidence attached to a charge or an information disclose a prima facie case, only serious suspicion had been held to be established, where a conclusion is reached that prima facie case has not been established.<sup>56</sup>

While prima facie case is such evidence which may raise probable reasonable inference, as to the complicity of the accused person in the commission of the offence charged, suspicion is a belief, often unsupported by facts, that a person may have committed an offence. It is suspicion that triggers off investigation of a crime, which leads to the discovery of evidence.

Where the facts in the proof of evidence, in the opinion of the court, amounts to only suspicion that the accused person may have committed the offence charged without more, the court is duty bound

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<sup>54</sup> See *Egbe v State*, supra, where the company allegedly duped by the accused person, in fact deposed that it had not lost any money to anybody, and that the accused person did not steal any money from it.

<sup>55</sup> Supra at p. 7.

<sup>56</sup> See *Abacha v State*, supra at p. 27.

not to grant consent or leave to prefer such charge or information; and where it has been preferred already, it shall be quashed upon the necessary application to the court. Coker JSC confirmed this position in the following words:

"Suspicion alone is not enough to justify preferring a charge against a person, there must be evidence linking the suspect with the offence"<sup>57</sup>

And in *Abacha v State*, Belgore JSC said:

"At best, what is in the proof of evidence amounts to serious suspicion that the appellant knows more than he adverts. Suspicion however well placed, does not amount to prima facie case."<sup>58</sup>

### **ABUSE OF COURT'S PROCESS.**

Failure of the proof of evidence to disclose a prima facie case may be regarded by the court as an abuse of its process.

One of the reasons for consent or leave of a high court judge to prefer a charge or information is to enable the court at the onset, to ascertain whether there is necessity for the trial of the accused person. In doing this, the court seeks to prevent a vexatious prosecution or one that will serve no useful purpose.<sup>59</sup> The court is therefore vigilant in ensuring that only genuine issues and controversies are brought before it by the prosecution and that the accused person is not indicted for trial that, from the onset, it was clear he should not face.

Ejiwunmi JSC approved the statement of the law in *Ikomi v State*, in his dissenting judgement in *Abacha v State*:

"The power of the courts to prevent abuse of its process includes the power to safeguard an accused

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<sup>57</sup> See *Ikomi v State*, supra at p. 755.

<sup>58</sup> At p. 27. See also Kalgo JSC in *Nsofor v State* [2004] 18 NWLR (pt. 905) 292 at p. 317.

<sup>59</sup> See *Enuma v State*, supra at p. 121.

person from oppression and prejudice such as would result if he is sent to trial pursuant to an information which discloses no offence with which he is in any way linked"<sup>60</sup>

### INTERFERENCE WITH DISCRETION.

The decision by the judge to grant consent or leave to prefer a charge or an information on the ground that there is a *prima facie* case, is an exercise of discretion which shall be founded on clear particulars and facts disclosed in the proof of evidence. Such discretion must therefore be judicially and judiciously exercised with a view to do justice to all the parties.

Where therefore such exercise of discretion is based on wrong principles of law and or the facts in the proof of evidence are not properly taken cognizance of by the judge, and a miscarriage of justice occurs, an appellate court may interfere with such exercise of discretion.<sup>61</sup>

However, an exercise of discretion shall not generally be interfered with merely because an appellate court would have acted differently, if it were placed in the position of the lower court.<sup>62</sup>

In *Jimoh Atanda v A.G. Western Nigeria*,<sup>63</sup> the Supreme Court approved the principle in the English case of *R v. Rothfield*,<sup>64</sup> to the effect that once a court acting within its jurisdiction grants consent, an appellate court cannot interfere with that exercise of discretion.

However, that position was rejected later by the Supreme Court in *Ikomi v State*,<sup>65</sup> where it was held that Rothfield's case did not represent the law in Nigeria; and that an appellate court ought to examine the proof of evidence, to ascertain whether there was

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<sup>60</sup> *Abacha v State*, supra at p. 74. See also *Okeke v State* [1992] 6 NWLR (pt. 247) 381; *Egbe v State*, supra at p. 346.

<sup>61</sup> See *Enuma v. State*, supra at p. 121; *Ohwovoriole v FRN*, supra at p. 10; *Adejumo v. Avantegbe* [1989] 6 S. C. (pt. I) 76.

<sup>62</sup> See *Bank of Baroda v. Mercantile Bank (Nig) Ltd* [1987] 3 NWLR (pt. 60) 233; *Bakare v. A. C. B. Ltd* [1986] 3 NWLR (pt. 26) 47.

<sup>63</sup> Supra.

<sup>64</sup> 26 CR. APP. R. 103.

<sup>65</sup> Supra at p. 742.

enough material on which the trial judge based his exercise of discretion.

**PRIMA FACIE CASE SUFFICIENT TO GROUND A CHARGE OR INFORMATION  
DISTINGUISHED FROM PRIMA FACIE CASE IN A NO CASE SUBMISSION.**

It is necessary to make a brief comparison of these two instances because of the similarity in the principles of law applicable to both, especially as it relates to the issue of prima facie case, and the fact that judicial authorities on no case submission are usually resorted to in deciding applications to quash a charge or information, for not disclosing a prima facie case.<sup>66</sup>

Section 286 of the CPA,<sup>67</sup> provides as follows:

"If at the close of 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."<sup>68</sup>

A verdict of no case to answer may therefore be entered in favour of an accused person *suo motu* by the court or on his application, where a prima facie case has not been made out by the prosecution for the accused to defend or answer. Unlike the application to quash an information or a charge, the accused person in a no case submission shall wait until the prosecution has called all his witnesses and they have been cross-examined, before making his application.

Prima facie case has an entirely different connotation when used in respect of an application that the accused person has no case to answer. An accused person who applies to be discharged on the ground that he has no case to answer, is saying in effect, that an essential ingredient of the offence has not been proved or that the evidence adduced by the prosecution, even if believed, is so

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<sup>66</sup> See for instance *Abacha v. State* (Supra), *Ohwovoriole v. FRN*, supra.

<sup>67</sup> Cap. C41 Lexis Nexis Butterworth's LFN.

<sup>68</sup> See similar provision in s. 191(3) CPC.

manifestly unreliable or has been substantially discredited by the defence during cross-examination, that no reasonable court could convict on such evidence.<sup>69</sup>

On the other hand, *prima facie* case needed to prefer a charge or information, connotes the disclosure of an offence by the facts in the proof of evidence, as well as a link between the accused person and the offence charged,<sup>70</sup> sufficient enough to put him on his trial.

What then is the standard of evidence required to establish a *prima facie* case in each situation? Put differently, is the standard of proof or evidence needed to establish a *prima facie* case in one higher than that in the other case?

It is our humble submission that the standard of evidence required to establish a *prima facie* case in a no case submission is higher than that needed to prefer a charge or an information. Our view is hinged on two grounds.

First, in an application by an accused person to be discharged on the ground that the prosecution has not made out any case for him to answer, the trial court must discharge him where any of the three conditions is present, as they are disjunctive. One of such conditions is that an essential element of the offence has not been proved. This is a very stringent condition which gives the trial court no room for speculation as to the culpability or otherwise, of the accused person. The court must discharge him.

It follows therefore that even though the trial court ought not to make a finding of fact nor pronounce on the guilt or otherwise of the accused person at that stage of the proceeding,<sup>71</sup> the court nevertheless, at the time of discharging the accused person, presumes that he did not commit the offence charged.

It is therefore obvious that where the court orders the accused person to enter his defence, the only thing that prevents the trial court from convicting the accused person at that stage of the proceedings, is the principle of fair hearing, that is, giving the accused person an

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<sup>69</sup> See *Aminu v. State* [2005] 2 NWLR (pt.909) 180 at 189- 190; *Okoro v. State* [1988] 12 SCNJ (pt.11) 191; *Ubanatu v. C.O.P* [2000] 1 S. C. 31.

<sup>70</sup> See *Ohwovoriele v. FRN*, *supra* at p. 20.

<sup>71</sup> See *R. v. Ekanem* [1950] 13 W.A.C.A. 108.

opportunity to be heard. Where therefore the accused person opts rather to rest his case on the prosecution's case, he will need only a miracle to escape conviction; for it is only his explanation that may operate to neutralize the evidence adduced by prosecution witnesses. Such defence may be in form of provocation, self-defence, defence of property etc.

In *Mohammed Aminu & Anor v State*,<sup>72</sup> appellants were charged with conspiracy to commit attempted murder and attempt to murder Senator Abraham Adesanya. At the end of the prosecution's case, the accused persons made a submission of no case to answer. In holding that a prima facie case was made out, the court had to consider the proof of evidence and evidence of the prosecution witnesses in court and found that a prima facie case was made out, as the prosecution had proved the essential elements of the offence and the witnesses had not been shaken during cross-examination.

On the other hand, in deciding whether a prima facie case is disclosed in the proof of evidence, for purposes of preferring a charge or information, the issue of conviction of the accused person is never contemplated by the judge. The reason being that no evidence has been led by the prosecution or have the testimonies of the witnesses been tested by cross – examination. Once there are circumstances from which it may justly be inferred by the court, that an accused person could have committed the offence charged, a prima facie case has been established for him to be put on his trial. There is no requirement for any element of the offence charged to be proved; and in fact one of the elements of the offence charged, may not have been disclosed by the facts in the proof of evidence.

For instance, in *Ikomi's case*, it would have been difficult for a reasonable tribunal to have convicted the accused persons on the facts as disclosed in the proof of evidence, despite lack of explanation from the accused persons. Though the facts as disclosed in the proof of evidence in that case raised a prima facie case for the purposes of defeating the application to quash the information, it is submitted that a submission of no case to answer would have availed

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<sup>72</sup> Supra at p. 80.

the accused persons, assuming the prosecution were to repeat same evidence in court during trial, without more.

Thus facts which did not raise a prima facie case to warrant the committal of an accused person for trial, may nevertheless be sufficient to prefer a charge or information against such person in the High Court.

In *R. v. Fadina*,<sup>73</sup> the prosecution first arraigned the accused person before a magistrate, who, after preliminary enquiry, discharged him. Subsequently, the prosecution obtained consent of the high court judge to prefer an information against the accused person on the same facts. It was held that a prima facie case was disclosed by the proof of evidence against the accused person and that the consent was justifiably given.

An information or charge may not therefore be quashed merely on the ground that it appears a trial may not result in conviction, or that the evidence in the proof of evidence is weak.

The second reason for stating that the standard of proof for establishing a prima facie case in cases of no case submission is higher, is found in the legal implication of the ruling of the court in each of the applications.

In an application for the accused to be discharged on the ground that he has no case to answer, the prosecution has already given evidence and the witnesses cross – examined. The trial court, bearing in mind that the system of administration of criminal justice in Nigeria is adversary, shall have examined the evidence of the prosecution witnesses critically before coming to the conclusion that a prima facie case has been made out for the accused to answer.

Where the court there fore holds that there is no case for the accused person to answer, the discharge of the accused person in such circumstances is on the merits and operates as an acquittal.<sup>74</sup>

The implication of this is that where the trial court finds that there is a case to answer, the court is sending a silent signal to the accused person to the effect that, short of sufficient and plausible explanation from him, he might be convicted.

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<sup>73</sup> (1958) 1 NSCC 52.

<sup>74</sup> See *Adeyemi v. State* [1991] 7 SCNJ (pt.1) 131

The situation is different where a court holds that a *prima facie* case has not been disclosed in the proof of evidence, sufficient to ground a charge or information in a High Court. The court in this case is not foreclosing the possibility that the accused person may have committed the offence, but it is only inferring from the proof of evidence that he is not linked to the offence charged. The discharge of the accused person upon the quashing of a charge or information is therefore not on the merits and does not operate as an acquittal.

In other words, such a discharge cannot operate as a ground for a plea of *autre fois acquit* and the prosecution may prefer such a charge or information against the same accused person, upon laying their hands on additional evidence.<sup>75</sup>

## CONCLUSION.

Trial courts are not always favourably disposed to applications to quash a charge or an information. From their perspective, such applications tend to question the credibility of the leave or consent [if any], earlier granted to prefer the charge or information; especially where the same judge who granted the leave or consent entertains the application to quash.

Above all, some courts see such applications as deliberate attempts by counsel to the accused persons to delay the trial as best as they could.<sup>76</sup>

Viewed therefore by some courts as a waste of time, it is not therefore surprising as we have seen in this paper, that almost all the applications to quash a charge or information on the ground that *prima facie* case has not been disclosed in the proof of evidence, are dismissed by the trial courts.<sup>77</sup>

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<sup>75</sup> See *Egbe v. State*, supra at p. 346.

<sup>76</sup> In *Abacha v. State*, supra at p. 12, the Court of Appeal's statement to the effect that applications to quash an information (or a charge) should not be encouraged, was strongly criticized by the Supreme Court.

<sup>77</sup> That was the case in *Abacha v. State*, supra, *Ohwovoriole v FRN*, supra; & *Enuma v State*, supra.

It is the primary duty of every counsel who represents an accused person, at the high court to peruse the proofs of evidence attached to the charge or information to see whether the accused person should be advised to apply for such charge or information to be quashed; or to stand his trial.

The reluctance or neglect of counsel for accused persons to bring this type of application has led to dearth of judicial authorities in this area of law until recently, and the judges, faced with this type of application, have had to seek refuge in authorities on no case submission for guidance.

The courts should therefore be less antagonistic to such applications, by giving them dispassionate consideration, and counsel on the other hand, should not shy away from making such applications where necessary, as the law is not usually developed on cordial and friendly arguments only, but also mostly in belligerent and cut-throat legal battles in court.