

IN THE COURT OF APPEAL
HOLDEN AT LAGOS
ON WEDNESDAY THE 9TH DAY OF JUNE, 2004
BEFORE THEIR LORDSHIPS

<u>JAMES OGENYI OGEBE</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>PIUS OLAYIWOLA ADEREMI</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>MUSA DATTIJO MUHAMMAD</u>	<u>JUSTICE, COURT OF APPEAL</u>

CA/L/370/2003

BETWEEN

1. GABRIEL EZEZE)	
2. AZUBUIKE EZEZE)	APPELLANTS

AND

THE STATE

RESPONDENT

JUDGMENT

(DELIVERED BY P. O. ADEREMI, J.C.A)

This is an appeal against the ruling of the High Court of Lagos State, Ikeja Division delivered on the 14th July, 2003 in Charge No. ID/38C/2003. The appellants who were the 7th and 8th accused persons in the court below were charged along with others with criminal offences. In particular, the appellants were charged with the offence of perversion of court of justice contrary to Section 126 (1) of the Criminal Code Law, Cap 32 Volume 2, Laws of Lagos State 1994. Proofs of evidence were laid before the court below. Suffice it to say that the 1st to 6th accused persons were charged with

the offence of murder. Before the trial of the accused persons commenced, the learned counsel for the appellants (there as the 7th and 8th accused persons) brought, on behalf of his clients, a motion on notice praying for an order quashing the preferment of information, counts of charges, trial, production or reproduction warrants and every other process in the above charge and information against the appellants. In the alternative, an order that they be stayed pending the determination of the judicial review in Suit No ID/70M/2003: Chief Gabriel Ezeze and Azubuike Ezeze versus (1) Inspector General of Police (2) The Attorney-General of Lagos State and (3) D.P.P. of Lagos State pending before the Administrative Judge of the Ikeja Judicial Division. The application was fixed for hearing on the 16th of June 2003 on which day the accused persons were absent from court. Although the counsel to the appellants manifested his readiness to move the application despite the absence of his clients from court the prosecuting counsel requested for time to enable him respond to the application. The trial judge acceded to this request. And by the endorsement in the record, the case was adjourned to 14th July 2003 for mention. When the case again came up on the 14th of July 2003 all the accused persons were recorded by the trial judge as ‘‘not produced’’ The learned counsel for the appellants asked for a date to move the motion to quash or stay. The learned prosecuting counsel still not having reacted to the motion prayed for an adjournment to a date when the accused would be produced in court. The defence counsel opposed the application of the prosecuting counsel for an adjournment to a date when the accused persons would be present, submitting that the accused need not be in court when their application to quash would be taken. In ruling on the submissions of counsel, the learned trial judge adjourned the case to 7th October 2003 for trial. Dissatisfied with the said ruling, the 7th and 8th

accused persons (now the appellants) appealed to this court contending that the fixing of the charge for trial was wrong in law having regard to the fact that the motion on notice dated 9th June 2003 to quash or stay the charge was still pending. The said Notice of Appeal dated and filed on 15th July 2003 carries three grounds. Distilled therefrom are originally, four issues for determination by this court when the appeal came before us on the 20th of April 2004 for argument, learned counsel sought the leave of this court to abandon the third issue and the arguments thereon contained in the brief of his clients. Thus the remaining three issues as could be gleaned from the said brief are in the following terms:-

- (1) Should the lower court have fixed the criminal matter for trial when the appellants (sic) above motion to quash the charge and other processes against them or for stay of same had not yet been taken or heard?
- (2) Should the lower court have fixed the criminal matter for trial when there was no application before it for the case to proceed to trial?
- (3) Is the physical presence of an accused person in court mandatory before a motion to quash filed before trial on behalf of such an accused can be heard or taken by the court before trial?

The issues conceived by the respondent for determination as arising from the grounds of appeal set out in their brief are as follows: -

- (1) Whether the trial judge was right to have fixed the criminal matter for trial when the appellant's motion to quash the charge was still pending?

- (2) Whether the trial judge had jurisdiction to fix the criminal matter for trial as at the 14th day of July 2003 when it made the order?
- (3) Whether the physical presence of an accused person in court is mandatory before a motion to quash the charge filed can be heard.

I have had a close examination of the issues identified by both sides. I am of the humble view that issues Nos 1 and 2 set out on the appellant's brief can be taken together with issues, Nos 1 and 2 in the respondent's brief. I shall so do in this judgment. I shall thereafter take issue No 3 on the appellant's brief along with issue No 3 on the respondent's: both of which are materially similar.

On issue No 1 in his brief, the appellant submitted that the court below was wrong, in law, to have set the case for trial when it had not yet disposed of the motion brought by the appellants praying the court to quash or alternatively stay all the processes before it pending the determination of the judicial review proceedings challenging the finding of culpability against them on which the charge against them was predicated.

In support of this submission, it was contended that the appellants ha a right, in law, to move the court to quash or stay before their arraignment in the court of law or before any or all of the incidents of the commencement of trial are embarked upon, reference was made to (1) ARCHBOLD-CRIMINAL PLEADING, EVIDENCE AND PRACTICE (1997) Paragraph 4 – 4 at pages 320 to 321 , (2) R versus CHAIRMAN OF LONDON COUNTY SESSIONS EX-Parte DOWNES (1954) 1 Q.B.1 (3) CONELLY VS. D.P.P. (1964) A.C. 1254 and (4) IKOMI & ORS VS. THE STATE (1986) 3 NWLR (PT 28) 340. It was further argued that by the rule in the

practice and procedure in our courts, that all applications pending before a court of law must be treated before embarking on the substantive case; support for this contention was found in the decisions in *AYANBOYE & ORS VS. BALOGUN* (1990) 5 NWLR (PT151) 392 and (2) *WOLUCHEM VS. WOKOMA* (1974) ALL N.L.R. 543 For their part, the respondent submitted that the trial judge was right to have fixed the original matter for hearing when the appellant's motion was still pending reference was made to the definition of the word "TRIAL" in *BLACK'S LAW DICTIONARY* 5th Edition page 1348. It was also argued that trial in criminal cases commences with the arraignment of the accused person while citing *ASAKITIKPI VS. THE STATE* (1993)5 NWLR (PT. 269)641 and Section 353 of the Criminal Procedure Law Cap. 33 Volume 2 Laws of Lagos State 1994. It was further contended that an objection to a charge for any formal defect must be taken only immediately after the charge has been read over to the accused but not later; reliance for this submission was placed on Section 167 of the Criminal Procedure Law Cap. 33 Volume 2 Laws of Lagos State 1994 and *ABACHA VS THE STATE* (2002)11 NWLR (PT 779)437 AT 502. On issue No. 2, relying on the decisions on *SHELL PETROLEUM DEVELOPMENT CO. (NIG.) LTD VS. ISAIAH* (2001)11 NWLR (PT. 723)168 AND *EZE VS. OKOLONJI* (1997)7 NWLR (PT 513)515 and *AJAGUNGBADE III vs. ADEYELU* (2001)16 NWLR (PT. 738) 126, it was submitted that the court below had jurisdiction to entertain the original matter.

In *ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE* (2000), the following statement, on general principles as they relate to arraignment of an accused are found in paragraphs 4 – 47 they are as follows;

Para 4 – 47

Once an indictment is before the court the accused must be arraigned and tried unless; (a) on a motion to quash it is held defective in substance or form (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused (c) a nolle prosequi is entered by the Attorney General which cannot be done before the indictment is found; or (d) the indictment discloses an offence which a particular court has no jurisdiction”

The above general principle extracted from ARCHBOLD derives its support from R. vs. CHAIRMAN OF LONDON COUNTRY SESSIONS EX PARTE DOWNES (1954)1 Q. B. 1. A fifth ground on the list of the exceptions to proceeding to the arraignment of an accused once an indictment is before the court was added by Lord DEVLIN in CONNELLY vs. D.P.P. (1964) A. C. 1254 where he said that if particular criminal proceedings constitute an abuse of the court process that will bare the arraignment of the accused until that issue is disposed of. The list of what constitutes valid objection to an indictment can therefore be summarized as follows;-

- (1) If the indictment has been preferred otherwise than in accordance with the provisions of the law
- (2) If it is drafted otherwise than in accordance with the law e.g. if it is insufficiently or incorrectly particularized or if it charges more than one offence in one court.
- (3) If it has not been preferred within the time allowed by the law.
- (4) If it has not been signed in accordance with the dictates of the law.
- (5) If the time limits for the beginning of trials have not been

complied with

- (6) If it charges an offence that is unknown to law
- (7) If it charges any offence in respect of which necessary consents to the institution or confirmation of the prosecution have not been obtained
- (8) If it charges an offence in respect of which any relevant limitation period had expired before the commencement of the prosecution.
- (9) If it charges the accused of an offence of which he had already been convicted or acquitted or pardoned
- (10) If it charges a person who is immune from prosecution or whose acts at the relevant time are not susceptible to the jurisdiction of the court either by reason of age or being incapable, in law, of committing the offence charged or
- (11) It charges a person who has been extradicted from abroad with an offence that was not covered by the extradition proceedings

see (1) R. vs. CENTRAL CRIMINAL COURT & NADIR Ex Parte DIRECTOR OF SERIOUS FRAUD OFFICE, 96 CR. APP R. 248 and FAWEHINMI vs. A-G., LAGOS STATE (No. 1) (1989)3 NWLR (PT. 112)707. I have had a close study of the grounds upon which the application was founded. Issues Nos. 1 and 2 on the appellant's brief are answered in the negative and 1 also answer Issues Nos. 1 and 2 in the respondent's brief in the negative.

On the 3rd issue on the appellant's brief which issue poses the question as to whether the physical presence of an accused person in

court is mandatory before a motion to quash filed before trial on behalf of such an accused person can be heard or taken by the court before trial, it was submitted that such physical presence was unnecessary, by virtue of Section 210 of the Criminal Procedure Law Cap 33 Laws of Lagos State since the trial of the accused at that stage would not have commenced. Support for this submission was found in the decisions in (1) FAWAHINMI VS A-G. LAGOS STATE (NO. 1) (1989) 3 NWLR (PT. 112) 707, (2) ASAKITIPI VS THE STATE (1993)5 NWLR (PT. 296)641 and KAJUBO vs. THE STATE (1988) 1 NWLR (PT. 73) 721. The respondent, on the other hand, argued that by the combined effect of Section 353(1) of the Criminal Procedure Law, Sections 215 and 210 of the same law the physical presence of the accused in the court room, was mandatory before the application to quash could be taken Section 210 of Criminal Procedure Law provides:

“Every accused person shall subject to the provisions of Section 100 and of sub-section (2) of Section 223, be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable”.

Section 100 stipulates that the physical presence of the accused may be dispensed with if the punishment that the offence carries does not exceed ₦100 or more than six months, while section 223 (2) says that an accused person’s presence in the court may be dispensed with if he is of unsound mind and consequently prone to disturbing the proceedings. None of these two provisions are applicable to the instant case. Suffice it to say however that both sections 100 and 223

(2) provide exceptional circumstances that do justify proceeding with the trial in the absence of the accused. Let it be said, however, that the reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity of answering it. However such presence to be meaningful does not mean physical attendance but in actual fact it must carry along with it real capability of the accused person understanding the nature of the proceedings see *V. vs. LEE KUN* (1916)1 K.B.. 337. Indeed, it is very crucial that the physical presence of a mentally alert person is sought and obtained at the time the arraignment of the accused is to take place and thereafter during the proceedings. The question then to ask is what constitutes a valid arraignment in law? A study of the case law on this point reveals the guidelines to be adhered to as follows:-

- (1) the accused person who is to be tried shall be physically placed before the trial court unfettered
- and (2) the charge preferred against him shall be read and explained to him in the language he understands to the satisfaction of the judex by the registrar of the court or any other designated officer of the court
- and (3) and the accused shall then be called upon to plead instantly to the charge
- and (4) the plea of the accused shall also be instantly recorded by the judex

see (1) *RUFAl VS. THE STATE* (2001) 13 NWLR (PT 731) 718 and (2) *BARMO VS. THE STATE* (2000) 1 NWLR (PT 641) 424. The grounds upon which the appellants sought to quash or stay the proceedings are *ex facie*, that the charge constitutes an abuse of court process and/or capable of prejudicing the accused or inflicting

oppression on them. As was decided in several cases, the power of the court inherent in its jurisdiction to prevent abuses of its process and control its own procedure will, in a criminal court, include the power to safeguard an accused person from oppression or prejudice. The court will be failing in its fundamental duty if, in the face of a defective or bad charge, it refuses to entertain the application to quash and hastily proceeds to set the criminal case down for trial. It does not matter that the accused/applicant was not physically present in the court when his application to quash the proceedings was entertained. Indeed, such an application would have been supported by at least an affidavit evidence. In *FAWEHINMI vs. A.-G. LAGOS STATE* (No. 1) (Supra) this court per the judgment of Ogwuegbu J.C.A. (as he then was) observed at page 739 thus:-

“It is my view that the Court has the power and a duty to stop a prosecution which on the facts creates abuse and injusticeIf the information was defective it was immaterial whether the respondents were, present in court or not”

Following the principles articulated by the judicial authorities that I have referred to above I say without any equivocation that the presence of the appellant in court was not mandatory before his motion to quash could be heard or taken. Issue 3 on the appellant’s brief and issue 3 on the respondent brief both of which are identical, are answered in the negative.

All the issues having been resolved in favour of the appellants it is therefore my judgment that this appeal is meritorious. The appeal is thus allowed. The order of the court below made on the 14th July, 2003 fixing the charge for trial is hereby set aside. It is hereby ordered that the motion of the accused / appellants dated 9th June, 2003 for an order that the charge preferred against them be quashed or

stayed. This case is hereby remitted to the Chief Judge of the High Court of Lagos State for re-assignment to another judge.

P. O. ADEREMI,
JUSTICE, COURT OF APPEAL

Mr. Nwabu A. Okoye for the Apellant with him Mr. F. Anekwu
Mrs. S. J. Oke, Senior State Counsel for the Respondent.