Institution of Criminal Proceedings by Information – The Role of Proof of Evidence – This article is published in (2002) VOL. 6 NO. 2 NLPJ P. 218

*Nasiru Tijani**

Introduction

There are various methods of instituting criminal proceedings in Nigeria. It could be by way of complaint, preferring a charge or information against an accused person. The methods used in a particular case will depend on the court in which the proceedings is initiated.

Preferring a charge is the commonest method or instituting criminal proceedings in Magistrates Courts in Southern Nigeria. Such a charge is usually signed by a Police Officer[1] or by a law officer if he is the one prosecuting. Section 78(b) of the Criminal Procedure Act Cap. 80 Laws of the Federation of Nigeria, 1990 provides:-

> *Where proceedings are instituted in a Magistrate's Court they may be instituted in either of the following ways:*
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> *(b) by bringing a person arrested without a warrant before the Court upon a charge contained in a charge sheet specifying the name and occupation of the person charged, the charge against him and the time and place where the offence is alleged to have been committed. The charge sheet shall be signed by the Police Officer in a charge of the case[2].*

Apart from the Magistrates' Courts, in the Federal High Court, the mode of instituting criminal proceedings is by preferring a charge as distinct from an information in the States High Courts. This is because criminal trials before the Federal High Court are summary trials[3].

Another mode of instituting criminal proceedings is by laying a complaint. A complaint is an allegation made before a magistrate that any named person has committed an offence for the purpose of moving the Magistrate to issue a process[4]. Complaint can be

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* **LL.M. (Hons), LL.M. (Lagos), B.L., Barrister and Notary Public, Lecturer, Department of Litigation. Nigerian Law School, Abuja.**

1 **Police officer is defined in Section 2 of the Criminal Procedure Act includes any member of the Police Force established by the Police Act. See also Section 1, Criminal Procedure Code. It therefore does not draw a distinction as to rank of the person to sign the charge. Under the Police Act Section 2 also defines a police officer as member of the force.**

2 **Contrast the position in the North where charge in the Magistrate Court will be framed by the Magistrate where an offence appears to have been committed – See Section 160, Criminal Procedure Code.**

3 **See Section 99(2), Federal High Court Act Cap. 134 Laws of the Federation of Nigeria, 1990**

4 **See Section 2 Criminal Procedure Act and Section 1, Criminal Procedure Code. The latter excludes a Police report as constituting a complaint. It is noteworthy that although Section 1,**

laid before a Magistrate Court or a State High Court, whether on oath or not, Complaints before Magistrates Courts are usually laid by police officers, although a private person may lawfully lay a complaint before the magistrate.

In the High Court in the South, it is by way of complaint that a solely non-indictable offence can be brought before the High Court by a law officer[5]. In such a case, the consent or leave of court is unnecessary before the Compliant can be laid before the High Court Judge unlike where an information is to be preferred. Secondly, where it is impossible to obtain the consent of a judge of the High Court to prefer an information, one may bring a complaint to the judge as this does not require consent.

In the High Court in the Southern states, criminal proceedings may be instituted by way of information filed against any person alleged to have committed an indictable offence. Before such information can be filed, the consent or leave of a judge of the High Court must be sought and obtained.

Sections 72 and 77(b)(ii) of the Criminal Procedure Act confer on the Attorney-General of a State (and this would include the officers of his Department) power to institute criminal proceedings by way of information in circumstances where the Attorney-General for England may also file an information[6].

It is noteworthy that section 211(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999 also empowers the Attorney-General of the State to institute and undertake criminal proceedings against any person before ay court of law in Nigeria other than a court marital in respect of any offence created by or under any law of the House of Assembly.

Although both sections 72 and 77 of the Criminal Procedure Act Cap. 80 Laws of the Federation of Nigeria, 1990 empowers the Attorney-General to institute criminal proceedings by way of information, before the information cm be filed, the consent or leave of the judge must be sought and obtained. Where the prosecution fails to obtain the requisite consent before filing the information, such information is liable to be quashed and where a trial is predicated on such information it will be treated as a nullity.

This paper will examine the requirement for consent to prefer an information, the procedure for obtaining the consent and the duty of the court to examine the proof of

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Criminal Procedure Code expressly states that the allegation could be made orally or in writing, the omission of this in the Criminal Procedure Act would not exclude a Complaint which must be in writing, it states so expressly: see far example Section 23, Criminal Procedure Act which states that a warrant of arrest can only be issued on complaint made on oath. *Ikonne v. Commissioner of Police and Annanna Wachukwu (1986) 4 N.W.L.R. (Pt. 36) 473.* **In fact in Section 77(a), Criminal Procedure Act, it is stated that in the Magistrate's Court, the Complaint could be made whether on oath or not on oath.**

5 **In** *Aluko v. D.P.P. Western Nigeria (1963) ALL N.L.R. (Reprint) 404,* **See also Section 77(b)(iv), 277(a) & (b) Criminal Procedure Act on the jurisdiction of the High Court to entertain a complaint and conduct a summary trial and the case of** *Abacha v. The State (2002) 11 N.W.L.R. (Pt. 779) 437 at 478 H.*

6 *See R v. Zik's Press Ltrd. (1947) XII W.A.C.A. 202; A.G. (Federation) v. Dr. Clement (1986) 1 Q.L.R.N. 75; Onuokafor v. The State (1976) 5 S.C. 13.*

evidence attached to the information before granting consent, It will be argued that the Supreme Court in its recent majority decision in *Abacha v. The State*[7] has not followed the principles stated in earlier cases on what a proof of evidence should disclose before the court can hold that a prima facie case has been disclosed.

How May Consent to Prefer an Information be Obtained?

There is no specific provision in the South as to the procedure for obtaining consent to prefer an information. It is submitted that recourse can be had to sections 72 and 363, Criminal Procedure Act so as to adopt the practice and procedure in England. It would seem that the procedure relating to obtaining consent in England is governed by the Indictments (Procedure) Rules of 1971[8], which came into operation on 1st January, 1972. The Rules were made pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1933[9].

In practice, in Lagos State for instance, the leave of court is usually obtained by a letter directed to the Chief Registrar of the High Court seeking leave of court to file the attached information (containing the counts) against the named accused person or persons. Apart from the information, it will also he accompanied by proof of evidence. The Registrar takes it before a judge (usually one in the Criminal Division). If the judge is satisfied that the proof of evidence discloses a *prima facie* case he gives his consent and the information will be filed by the Registrar[10].

Before the Prosecution can obtain consent to prefer an information, the application must be accompanied by the proposed information and the proof of evidence which disclose a *prima facie* against the accused person or persons.

What is proof of evidence?

The proof of evidence consists of the entire gamut of evidence, especially documentary evidence, which the prosecution intends to rely on at the trial. This would include the statements of accused person or persons (suspects) made to the Police and those of witnesses to be called at the trial. If the trial involves the opinion of experts, the report of such experts and if laboratory analysis are undertaken, for instance in cases involving hard

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7 *[2002] 11 N.W.L.R. (Pt. 779) 437*

8 *Ikomi & Ors. v. the State [1986] 3 N.W.L.R. (Pt. 28) 340 at 355; (1986) 5 S.C.. 313; (1986) 1 N.S.C.C. Vol. 17, 730*

9 **The Administration of Justice (Miscellaneous Provisions) Act, 1933 of England under which the English Indictment (Procedure) Rules, 1971 were made is no longer in force, By Section 363 of the Criminal Procedure Act, it is the practice and procedure for the time being in force in the High Court of Justice in England that is applicable in criminal trials in the South (Lagos State). Therefore the views expressed by Belgore, J.S.C. in Abacha v. The State (op. cit) at pages 478 - 479 on the inapplicability of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of England is most valid. However, in Ikomi v. The State, Nnamani, J.S.C. at page 355 expressly stated that both under English law and our law the procedure for applying for consent is as laid down in the Indictment (Procedure) Rules 1971. In both cases the application was ex-parte.**

10 **The position in the North where the Criminal Procedure Code is applicable is different. Rules are specifically made for application to prefer charges under section 185 of the Criminal Procedure Code – see The Criminal Procedure Preferment of Charges in the High Court Rules, 1979.**

drugs or counterfeit and fake drugs, the report of the laboratory analysis[11] should form part of the proof of evidence. The proof of evidence should also have the list of witnesses, which the prosecution intends to call[12].

The proof evidence must be served on the accused person and on each of them if there are more than one accused person. The purpose of such service is to give the accused the opportunity of knowing what the prosecution witness or witnesses intend to state in court against him[13].

A court in granting leave will consider the proof of evidence as a whole to determine whether a *prima facie* case of the offences charged has been made out to enable him exercise his discretion to grant leave to prefer the information. If no *prima facie* case is made out the application will be refused[14].

According to Uthman Mohammed, J.C.A. (as he then was) in *Egbe v. The State*[15],

> *The essence of referring proof of evidence and information to a Judge for his consent is because such consent is not expected to be given if the said proof of evidence does not disclose the offence charged. A Judge must not give his consent without reviewing the proof of evidence adduced. It is lame reasoning to submit that some statements and documents will be given later This to my mind clearly indicates that the Prosecution is either not ready or is fishing for material with which to prosecute.*

What is a Prima Facie Case?

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11 **The offences under the National Drug Law Enforcement Agency Act Cap. 253 Laws of the Federation of Nigeria, 1990 or the Counterfeit and Fake Drugs and Unwholesome Process Foods Miscellaneous Provisions Act, 1999 and the Foods Drugs and Related (Registration) Act, 1993; National Agency for Food and Drugs Administration and Control Act, 1993.**

12 **It is now settled that the prosecution is not under obligation to call all the witnesses so listed. It is sufficient if it calls the number of witnesses, even a single witness, that can sustain the charge.** See *Adme v. The State* [1979] 6 - 9 *S.C. 18; Ali v. The State (1988) 1 S.C.N.J. 17; Jammal v. The State (19991) 2 N.W.L.R. (Pt. 632) 582; L. Akolonu v. The State (2000) 2 N.W.L.R. (Pt. 643); Joshua v. The State* [20001 5 *N.W.L.R. (Pt. 658) 591.*

13 *Abacha v. The State (op. cit) at page 511 and Ede v. The State* [1977] 2 *F.C.A. 95 at 115*; **see also section 36(1) of Constitution of the Federal Republic of Nigeria, 1999.**

14 **It should be emphasised that the refusal of leave to prefer an information by a judge would not deprive the prosecution from making a similar application to another judge of the same High Court. The prosecutor can make the application before other judges until the application is granted. Also, once a court grants consent, an appellate court will not interfere except the discretion is arbitrarily exercised, see** *Gali v. The State (1974) 5 SC 67* **approved in** *Ikomi v. The State (1986) 1 N.S.C.C. 730.*

15 *(1980) 1 N.C.R. 341 at 344.*

A prima facie case is incapable of a precise meaning. This was so recognised by the Supreme Court in the recent case of *Abacha v. the State* where the Court per Belgore, J.S.C. stated[16]:

> *Prima facie is difficult to define precisely and sonic vital ingredients are clear Facts that are clearly revealing a crime and the crime links an accused person may he prima facie evidence that the accused had something to explain at the trial. But that is not always the whole that is needed as circumstances must indicate. It is even very difficult in the face of dearth of precise definition of prima facie.*

The Court went on to adopt the definition preferred in the case of *Ajidagba v. Inspector-General of Police*[17] which had followed the Indian case of *Sher Singh v. Jitendranthsen*[18].

In *Ajidagha v. Inspector-General of Police*, the Supreme Court stated as follows:-

> *"The terms, so far as we can find has not been defined either in the English or in the Nigerian Courts. In an Indian case, however Sizer Singh v. Jitendranthsen (1931) 1 L.R. 59 CaIc. 275 we find the following dicta:*
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> > *What is meant by a prima facie (case)? It only means that there is ground of proceeding .... But a prima facie is not the same as proof which comes later when the court has to find whether the Accused is guilty or not guilty" (per Grose, J) and "the evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused[19]".*

It can therefore be said from the above analysis that a prima facie case although not the same as proof of the offences charged, it must link the accused to such an extent as to enable the court to proceed to hear evidence or a case for accused to answer. The question of proof will come later. There must be a link between the offences alleged and the accused that can be deduced from the proof of evidence. The court must relate the proof of evidence to the offences charged.

Can Suspicion or Circumstantial Evidence Show a Prima Facie Case

It is trite law that suspicion however well placed will not amount to *prima facie* case. Therefore where the evidence disclosed by the proof of evidence only amounts to suspicion, leave of court to prefer the charge should not be granted[20].

Circumstantial evidence on the other hand, may be sufficient to enable the court hold that a prima facie case has been made out. Once there are circumstances from which it

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16 **Op. cit at page 486**

17 *[1958] S.C.N.L.R. 601; (1958) 3 F.S.C. 55*

18 *[1931] 1 L.R. 59 Calc. 275*

19 *(1958) 3 F.S.C. 5 at p. 6*

20 See *Abacha v. The State op. cit. at page 500*

can be justly inferred that an accused person could have committed the offence, he should be put on trial[21]. Whether there are other co-existing circumstances which would weaken that inference or whether the evidence leads irresistibly to accused person's guilt can only be determined at the trial. The circumstantial evidence must not fix the accused with the commission of the offence with mathematical accuracy as to lead to conviction at the stage of seeking leave.

According to Aniagolu, J.S.C. in Ikomi v. The State[22]

> *It must be emphasized, once again that what we are dealing with, in the instant appeal, is circumstantial evidence and not evidence, which irresistibly leads to conviction. Therefore, it would be a wrong approach for this court, or any Appeal Court for that matter to conduct a mental trial of the Appellant and convince itself of the guilt of the Appellant before it can say that the consent given was correctly given.*

In apparent appreciation of the difficulty in deciding whether suspicion can show a prima facie case, Coker, J.S.C. in *Ikomi v. The State* stated as follows:-

> I have had some serious doubts as to the true dividing line between the concept of "suspecting a person" of committing an offence on the one hand and "prima facie" evidence against that person "for the offence. A person might be suspected of committing an offence even though there is no evidence — direct or circumstantial whatsoever against him. In such a case further investigation leading to possible evidence of the person's involvement becomes necessary before he could be charged with the offence. A prima facie case is made against a person where on the face of the available evidence an offence has been committed and there is evidence which could possibly ground conviction of the suspect.
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> It is the suspicion which leads to investigation and discovery of evidence against the suspect Suspicion alone is not enough to justify preferring a charge against a person, there must be evidence linking the suspect with the offence. There ought to be some evidence however remote which calls for some explanation from the suspect. At the stage of deciding whether to prefer a charge the Prosecutor is not obliged to decide, as a trial Judge should whether the available evidence is cogent enough to justify a conviction. But there must be evidence to meet all the essential elements of that offence. it is my view that if on a proper appraisal of the available evidence there is absence of any necessary ingredient of the offence, the Judge who is requested to give his consent to preferment of the information should decline[23].

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21 *Womi v. The State op. cit.* Per Aniagolu, J.S.C. *at page 753; Abacha v. The State op. cit. at page 558.*

22 *Op. cit. at p. 753.*

23 *Op. cit at page 755.*

It is submitted that it is the absence of a clear cut definition of what constitutes "prima facie case" that has resulted in a fluid situation, if not contradictory, on when a court will quash an information under section 340(3) of the Criminal Procedure Act for failure of the proof of evidence disclose a prima facie case especially were only circumstantial evidence exists.

Some of these cases will be considered. In *Egbe v. The State*[24], the Appellant was charged in the High Court of Lagos State with obtaining money by false pretences contrary to section 419 of the Criminal Code and with stealing contrary to section 39 of the Criminal Code. The charge alleged that the Appellant had obtained the sum of ₦450,000.00 from American International Insurance Company (Nigeria) Limited by falsely pretending that he was authorised by Maiyegun Estate Limited to execute the Mortgage of their property at No. 14. Waring Road, Ikoyi, Lagos. It was also alleged that the Appellant stole the said sum of ₦450,000.00, the property of American International Insurance Company (Nigeria) Limited.

Before the trial, the Appellant brought a motion under section 340(3) of the Criminal Procedure Law seeking to quash the information preferred by the Director of Public prosecutions on the grounds:-

> *That neither of the two offences charged is disclosed by the statement of the witnesses and there has been no committal for trial for any one of the two offences.*

In arguing the motion to quash the information, the appellant contended that the court could look beyond the face of the information to the depositions and statements and that since these did not disclose the offences charged or even a complaint regarding the transaction in question the information should be quashed. The state contended that as there was further evidence to be produced at the trial the information should not be quashed. The High Court held that it could look at the statements and depositions but agreed with the contentions of the state and dismissed the application. The appellant appealed to the Court of Appeal.

The Court of Appeal allowed the appeal. It held inter alia that:

(1) Since this was a motion to quash the information on the ground that the depositions and statements did not disclose the offences charged, the trial Judge was right to look at those statements and documents.

(2) A judge must not give his consent to prefer an information without reviewing the proof of evidence adduced. It will also be wrong to agree that other statements and documents would be tendered later as done by the trial judge.

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24 *(1980) 1 N.C.R. 341.*

(3) The court must compare the proof of evidence with the offence charged to see whether an offence under the section had been disclosed. In this case, there was nothing in the proof of evidence such as a statement from Maiyegun Estates Limited, or any incriminating statement from American International Insurance Company (Nigeria) Limited, complaining about parting with their money through the appellant's trick or fraud.

Uthman Mohammed, J.C.A. (as he then was) held as follows[25]:

> *"I do agree that if there was a statement either from Maiyegun Estate Limited which is a legal person (Salomon v. Salomon or from the American International Insurance Company (Nigeria) Limited, the mortgagee and the mortgagor respectively, complaining that the ₦450,000.00 mortgage loan was not used for the purpose intended, then section 385 of the Criminal Code would be relevant. The striking aspect of this matter is that both the mortgagee and the mortgagor reported that nothing had in fact happened which was contrary to their business transactions. I wonder who was complaining here and what in reality is being complained about. Surely one cannot report that another person's property has been stolen when the owner of the property has made a statement that nothing has been stolen from him? I still cannot comprehend why the learned trial Judge refused to attach any weight to the letter written by the Managing Director of the American International Insurance Company (Nigeria) Limited to the Appellant*".

From an analysis of this case, it is clear that the learned Justice of the Court of Appeal was of the opinion that there must be a link or nexus between the offence alleged and the proof of evidence. The offence alleged will be seen in the charge sheet, in this case obtaining money by false pretenses and stealing. It will be no defence to an application that at the trial of the matter such missing link will be supplied. According to the learned justice of the Court of Appeal, if the matter were to wait till trial, "it indicates that the prosecution is either not ready or is fishing for material with which to prosecute". Since there was a letter addressed to appellant indicating that nothing was obtained by false pretences from the "Complainant", there is no basis for the charge. The Court of Appeal was therefore right in holding that no prima facie case was disclosed against the appellant.

In *Ikomi v. The State*[26], the appellant, D. O. Ikomi was a judge of the High Court of the then Bendel State and at the material time, he was the Chairman of the Bendel State Armed Robbery and Fire Arms Tribunal, Benin. The 2nd Accused was a Clerical Officer in the Bendel State Ministry of Justice, though he lived in the Judge's quarters and ran errands for him. The 3rd Accused was the judge's cook/steward. He also had a policeman attached to his residence for guard duties. Also living with him in the residence were two other

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25 **Op. cit. p. 346. This statement was approved by the Supreme Court in** *Ikomi v. The State at p.* 743.

26 *(1986) 1 N.S.C.C. 730.*

persons. It transpired that on the night of the incident the gates to the house were locked and the body of the Police constable in a poo1 of blood was found in the compound of the accused/appellant. He was apparently murdered. The very next morning, Justice Ikomi went to the Chief Judge to report the incident. Following police investigations into the mater, Justice Ikomi was charged with the murder of the constable on guard duty in his quarters.

In order to initiate the prosecution, the Attorney General of Bendel State addressed an application under section 340(2)(b) of the Criminal Procedure Law Cap. 49 of Bendel State and the Indictment (Procedure) Rules, 1971 to the Chief Judge asking for the consent to prefer the information. Consent was granted by the Chief Judge.

However, before the trial commenced the Appellant filed a motion pursuant to the inherent jurisdiction of court and sections 340(3) and 363 of the Criminal Procedure Law to quash the information on the grounds that: (1) the offence alleged in the information is not disclosed by the statements and/or proof of evidence before the trial court and (2) the said information is an abuse of process of the court. The High Court refused to quash the information and on appeal, that refusal was confirmed by the Court of Appeal. A further appeal to the Supreme Court was dismissed.

This case which has become a locus classicus on this subject established the following principles:

(1) the requirement of "a clear case on the deposition" before consent can be granted as postulated in *Atanda v. Attorney General, Western Nigeria*[27] is rather putting it too high. "In fact this is almost the same as saying that consent should not be granted if on the evidence in the depositions a trial would not lead to conviction. Such a postulation is certainly not in accord with the authorities. A court will not quash an indictment because an examination of the depositions has led it to the conclusion that the prosecution will not succeed".

(2) It is sufficient if the depositions and statements attached to the information disclose a prima facie case against the accused persons. The question ought to be. From the depositions, is it probable that the accused person(s) are linked with the offence on the information[28]?

(3) 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 the offence. If the judge grants

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27 *(1965) N.M.L.R. 225.*

28 *Ikomi v, State op. cit. at p. 740.* Aniagolu, J.S.C. at p. 753 was of the opinion that, "a clear case" must not be put higher than an arguable case". The best applicable phrase is a "prima facie" case.

consent to prefer an information in the absence of such link such information is bound to be quashed[29].

(4) Where a trial court grants consent to prefer an information, an appellate court can interfere with the exercise of discretion if the discretion had been exercised arbitrarily. The Court of Appeal ought to examine the statements of depositions in order to determine whether there was enough material on which the exercise of the trial judge discretion was based. If the court is not satisfied on this, it ought to quash the consent order. This is particularly so as the application for consent to prefer information is usually ex-parte and is therefore taken behind the accused person's back[30]. The English case of *R v. Rothfield* does not represent the position of law in Nigeria[31].

(5) On how circumstantial evidence fit into the prima facie case at the stage of considering an application for consent, the court held that once there are circumstances from which it can be justly inferred that an accused person could have committed the offence, he should be put on his trial. Whether there are other co-existing circumstances which would weaken that inference, or whether the evidence leads irresistibly to accused person's guilt, can only be determined at the trial. The argument of counsel for the accused/appellant who defined the circumstantial evidence sufficient at the stage of granting consent "as evidence which can lead to the inference that the suspect, and no other person, could have committed the offence" was rejected as this would be putting it at the standard required for conviction[32].

All that is required at the point when a judge grants consent to prefer information is that there be evidence against the accused which requires some explanation[33].

In *Abacha v. The State*[34]34 the facts showed that on 4th June, 1996, Kudirat Abiola, wife of Chief M. K. O. Abiola was murdered somewhere in Ikeja, Lagos State. Sometime in 1999, the Attorney General of Lagos State, through the Director of Public Prosecutions by a letter to the Chief Registrar, High Court of Lagos State sought consent to file an information against 4 accused persons namely: Hamza Al'Mustapha, Mohammed Rabo Lawal, Mohammed Sani Abacha and Alhaji Lateef Shofolahan respectively. Attached to the letter were the information and proofs of evidence which contained the statements of the accused persons and witnesses which the prosecution intended to call. The information contained 4 counts of conspiracy to commit murder, murder accessory after the fact of murder against all the four accused persons. The 3rd and 4th counts of accessory after the fact of murder was against the 3rd Accused — Mohammed Sani Abacha — alone.

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29 **Op. cit. page 741.**

30 **Op. cit. page 739.**

31 **26. Cr. App. R. 103, op. cit. p. 742**

32 **Op. cit. p. 742. It would seen that this standard which was rejected in this case was required in the later case of *Abacha v. The State ibid*.**

33 **Op. cit. p. 746**

34 *(2002) 11 N.W.L.R. (Pt. 690) 35.*

The 3rd accused person — Mohammed Sani Abacha subsequently brought an application dated 10th December, 1999 under sections 167, 340(3), Criminal Procedure Law Cap. 33 of Lagos State and the inherent jurisdiction of the Court for an order quashing all the 4 counts and statements of offences in the information. The grounds for the application were *inter alia*:

i. The proof of evidence does not disclose a *prima facie* case against the third accused/applicant requiring him to stand trial before this High Court of justice or any other court of law on any of the 4 counts described above.

ii. When the charges are compared and contrasted with the proof of evidence, the ingredients of all the alleged offences and the list of witnesses, the result is that the entire information is an abuse of process.

iii. All the 4 counts in the statement of offences are prejudicial to the third Defendant's right to fair hearing.

The Learned trial judge in a considered ruling refused the application to quash the indictment on the grounds *inter alia* that an information without procedural defect cannot be quashed.

The accused/applicant's appeal to the Court of Appeal was dismissed[35]. The accused further appealed to the Supreme Court. The Appeal was allowed by the majority[36].

In allowing the appeal, the Supreme Court held *inter alia* that it is not necessary at the stage of seeking leave to prefer an information to establish the guilt of the accused. All that is required is to show that there is a *prima facie* case to be tried and the accused is sufficiently linked to be in a situation where an explanation is necessary from him at the trial. Reliance was placed on *Ikomi v. The State*[37]. The Court went on to hold that suspicion alone is not enough to justify preferring a charge against a person. There must be evidence linking the suspect with the offence and there ought to be some evident however remote, which call for some explanation from the suspect.

However, in the instant case, the Court held that the charge against the accused/ appellant was based on suspicion as no linkage was shown that the Appellant knew what was being planned by what he did or said at the relevant occasion. The court therefore held that the proof of evidence did not disclose a prima facie case against the accused. The appeal was allowed and the information quashed.

It is pertinent to observe that the statement by the Appellant showed that he was present at Major Al-Mustapha's office when guns were given to Sergeant Rogers. Sergeant Rogers was the self confessed killer of Alhaja Kudirat Abiola. The Appellant also said

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35 **Reported in (2001) 3 N.W.L.R. (Pt. 690) 35.**

36 **Coram, Belgore, Kutigi, Onu, Katsina-Alu, JJ.S.C., Ejiwunmi, J.S.C. dissented.**

37 *(1986) 1 N.S.C.C. 730.*

Sergeant Rogers on an occasion came to his house and "he promptly made himself available". Sergeant Rogers had occasion to phone one Mohammed Katuko one of his boys and requested to use him as his driver. Even Sergeant Rogers requested to use his car, a car was made available to him. Even Major Ado, the Officer in Charge, State House, Lagos held a meeting with him to discuss the issue of the killing of Alhaja Kudirat Abiola and the live attempts on Mr. Alex Ibru and Mr. Abraham Adesanya. He even gave Ten Thousand U.S. Dollars each to Mohammed Katako and Aminu Mohammed (accomplices) to settle outside the country. This was confirmed by Aminu Mohammed and Mohammed Katako in their respective statements.

The questions that arise are:

(1) Why did both Aminu Mohammed and Mohammed Katako have to go to the accused when the "heat" was on?

(2) Why did the appellant release his driver to Sergeant Rogers? In fact Katako the driver, did drive Sergeant Rogers on the said date.

(3) Why did the accused release Ten thousand U.S. dollars each to both Mohammed Katako and Aminu Mohammed to facilitate their escape? In fact the escape to Niger Republic?

(4) Why would a solider — Sergeant Rogers - be asking for his assistance anytime he was in Lagos when there is nothing pointing to earlier friendship or professional relationship?

In view of the above questions, can it truly be said that the Accused is not sufficiently connected with the crime? It is submitted that the above raise enough questions – prima facie case – to be answered at the trial. They raise sufficient grounds for placing the Accused on trial. However the majority at the Supreme Court were of the opinion that no *prima facie* case was made against the Accused. It would seem that the Supreme Court has again elevated a requirement of "prima facie case" to "a clear case" in the face of pertinent questions, which require answers that can only be given in a full trial. This requirement of a clear case in *Atanda v. A.G. Western Nigeria* was rejected in *Ikomi v. The State*. It was therefore wrong for the majority of the Justices to go back to establishing "a clear case" before consent can be given to prefer an information. It is my opinion that the minority judgment by Ejiwunmi, J.S.C. meets the requirements by *prima facie* case.

Ejiwunmi, J.S.C. in his dissenting judgment set out the following facts which emanated from the statements made by Mohammed Abacha, (the appellant), Aminu Mohammed, Barnabas labita alias Rogers and Mohammed Abdul Inkiya Katako to the police:

(1) Appellant was in Major's office when Sergeant Rogers came in and was instructed to bring a bag from the corner of the room. The bag was opened in the presence of the appellant and it revealed guns. He heard that they were going on assignment.

(2) Katako was the appellant's personal driver.

(3) Appellant instructed Katako to go to Lagos to drive Rogers to anywhere I wanted to go.

(4) Katako did drive Sergeant Rogers and the gang who Appellant described "his boys" and as stated in his statement.

(5) That when the gang (otherwise his boys) needed a car for their missions, Sergeant Rogers contacted Appellant who directed that his driver Katako put on the line. Katako duly collected the vehicle with which he drove the gang around fulfilling the assignment (mission).

(6) That it was during the execution of the assignment that Kudirat Abiola killed by Sergeant Rogers.

(7) Subsequently, Sergeant Rogers started "singing" i.e. telling the story event. Revealing or giving evidence (information) concerning the event. Katako and others became apprehensive of the possibility of their being arrested for the murder of Kudirat Abiola.

(8) They contacted the Appellant who has a midnight meeting in Kano in the house of X.

(9) Appellant agreed at the meeting to make money available to them to escape to Niger Republic so as to avoid their being arrested. Appellant instructed his Accountant to give Katako and X the sum of 10,000 U.S. Dollars each.

(10) The Accountant duly paid the money to them.

(11) Katako and X upon receipt of the money fled to Niger Republic though they returned later to Nigeria[38].

He thereafter concluded:

> *Even from the statement of the Appellant, I think the Courts below were right to have held that a prima facie case was established against him calling upon him to face his trial. The same goes for the charge of murder. From the statements of Aminu and Katako, and the admissions made by the appellant himself in his statements to the Police, I cannot see how the appellant would not be called upon to explain his conduct with regard to counts 3 & 4. He readily admitted that he gave ten thousand U.S. dollars to each of them to flee the country and escape justice. Is that the conduct of a person who had nothing to hide? Surely, it cannot be right to say that he had no explanation to make in respect of that conduct. Moreso that the murder of Kudirat Abiola is a well-known fact in this country and beyond[39].*

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38 **Op. cit. p. 578.**

39 **Op. cit. p. 737.**

Quashing an Information for Failure of the Proof of Evidence to Disclose a Prima Facie Case

By section 340(3) of the Criminal Procedure Act Cap. 80 Laws of the Federation of Nigeria, 1990, if an information preferred otherwise than in accordance with the provisions of the last foregoing subsection has been filed by the registrar, the information shall be liable to be quashed.

Before a court grants consent to prefer an information, the judge must be satisfied that the depositions disclose an offence and that the trial will not amount to abuse of process. If the reverse is the case, then the information will be quashed. The courts do have inherent powers to prevent abuse of its process especially — criminal cases involving the liberty of citizens. The accused person must be protected from oppression.

In *Ikomi v. The State*, Nnamani, J.S.C. said:

> *The Courts have inherent jurisdiction to prevent abuse of their process. The judicial power which is conferred on the Courts is intended to be used in deciding issues in genuine cases or controversies. This power of courts to prevent abuse of process includes the power to safeguard an accused 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*[40].

The stage at which to make an application to quash the information is before the plea of the accused person is taken. This is because where the information does not disclose a prima facie case, a trial based on it would not stand. The court will have no jurisdiction to try the information[41].

However a court is not entitled to quash an information because sufficient evidence to ground a conviction was lacking. Once the proof of evidence discloses a link or nexus, even if circumstantial, between the accused and the offence, then a *prima facie* case has been made out and the information ought not to be quashed. This is the basis of our objection to the decision of the Supreme Court in *Abacha v. State*. There was certainly on the proof of evidence a prima facie case against the accused.

Conclusion

Proof of evidence is an essential part of an information. The proof of evidence must disclose a prima facie case against an accused person otherwise an application to quash such information will be granted by the court. The requirement of "prima facie case" is different from "a clear case" which the prosecution is required to make out at the trial. Therefore any requirement that a proof of evidence should disclose "a clear case" is tantamount to requiring the prosecution to prove its case at the stage of preferring an information. The decision of the majority in *Abacha v. The State* therefore is a movement backwards

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40 **Op. cit. p. 737.**

41 **Op. cit. p. 737. See also Aniagolu, J.S.C. at p. 752, 754.**

requiring of the prosecution to make out a clear case in its proof of evidence. It is hoped that this standard would not be followed in subsequent cases and that the strict *"prima facie"* rule would be followed as enunciated in the case of *Ikomi v. the State*.

The need for strict adherence to settled principles cannot be over-emphasised. This is the beauty of judicial precedent. It is hoped that another opportunity will present itself to the Supreme Court to once again reconsider the far reaching pronouncements in the case of *Abacha v. The State*.