IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY, ABUJA
HOLDEN AT ABUJA

ON WEDNESDAY, 16TH DAY OF NOVEMBER, 2022

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

CHARGE NO. FCT/HC/CR/96/2018

BETWEEN

INSPECTOR GENERAL OF POLICE --- COMPLAINANT/ APPLICANT

AND

1. JAME EDEH
2. LINUS NWOBODO } **DEFENDANTS/ RESPONDENTS**

RULING

On 4/4/2019, the defendants were arraigned before the Court on the 2-countcharge filed by the prosecution on 19/12/2018; each of them pleaded not guilty to the 2 counts.

In count 1, defendants are charged with conspiracy to give false information via petition dated 29th January, 2018. In count 2, it is alleged that the defendants at the Force Criminal Intelligence and Investigation Department, FCIID, Abuja did commit an offence to wit: *"giving false information, knowing that the information of Ritualis [sic], Kidnapping, Cultism and Intimidation giving [sic] to police via petition dated 29th day of January 2018 is false and misleading …"*

In proof of the allegations, the prosecution called three witnesses namely: Godwin Ndubuisi Egbo [PW1]; Uwabunkeonye Nwafor [PW2]; and Maryam Simnda [PW3]. The prosecution closed its case on 27/4/2022. Learned defence counsel informed the Court that the defendants intend to make a no case submission.

The Court directed the parties to file written submissions on no case. On 23/5/2022, Uchenna E. Okafor Esq. filed the defendants' written address. On 24/6/2022, F. G. Gabriel Esq. filed the written address of the prosecution.

On the same date [24/6/2022], the prosecution filed *Motion on Notice No. M/8424/2022* seeking the following orders:

1. An order of this Honourable Court granting leave to the complainant/applicant to recall and re-examine Maryam Simnda, one of the IPO's in this case who had testified before this Honourable Court to tender the following documents without which this case may not be decided on a just and logical conclusion, to wit:

    a. Copy of the petition dated 29th January, 2018 written at the prompting and behest of the 1st and 2nd defendants;

    b. Copy of Police Investigation Report;

    c. Statement of Mr. Godwin Ndubuisi Egbo [PW1];

    d. Statement of Mr. Uwabunkeonye Nwafor [PW2]; and

e. The Exhibits which have already been filed and served on the defendants vide proof of evidence attached to the charge sheet dated 17th and filed on 19th day of December, 2017*[sic]*.

2. An order of this Honourable Court deeming the said order as granted and all necessary papers filed and served.

3. And for such other order or orders as this Honourable Court may deem fit to make in the circumstance.

In support of the application, Joshua Kantama, a Police officer attached to the Legal/Prosecution Section, FCIID, Abuja, deposed to a 9-paragraph affidavit. F. G. Gabriel Esq. filed a written address with the motion. In opposition, the 1st defendant/respondent filed a 12-paragraph counter affidavit on 29/6/2022 together with the written address of Uchenna E. Okafor Esq. At the hearing of the application on 19/10/2022, the counsel for the parties adopted their respective processes.

In the affidavit in support of the motion, Joshua Kantama deposed to the following facts based on the information he received from Barrister Francis Gabriel on 10/6/2022, which he verily believed:

i. The documents listed on the motion paper were not tendered in evidence in the course of the prosecution's case.Prosecution intends to re-open its case and tender the said documents without which, this case may not be decided on a just and logical conclusion.

ii. It is necessary for the prosecuting counsel to seek and obtain the leave of the Court to enable him tender the said exhibits.

iii. The said exhibits are essential for the just determination of this case and it is material that these exhibits are tendered.

iv. The tendering of the said exhibits through Maryam Simnda [IPO] would not prejudice the defendants.

In his counter affidavit, the 1st defendant/respondent stated that:

1. After reviewing their counsel's arguments contained in the written address filed in support of their no case submission, the prosecution *"in a bid to patch up their case"*, filed a motion to recall PW3 in order to lead further evidence after she was discharged.

2. On 24/6/2022, he was informed by Uchenna Okafor Esq. of the following facts which he verily believed:

    i. The prosecution's motion to recall witness after the close of its case and after the written address in support of no case submission is aimed at overreaching the position of the defendants as expressed in their written address.

    ii. The prosecution had all the opportunity to present its case, tender all relevant documents and evidence but failed to utilize the opportunity.

iii. The Court does not allow a party who has had the full opportunity of presenting his case to have a second chance just for the purpose of repairing or augmenting a damaged case.

iv. The prosecution has not adduced cogent facts and reasons to show exceptional circumstances that would warrant the exercise of the Court's discretion in its favour.

Submissions of Learned Counsel for the Complainant/Applicant:

In his written address, learned counsel for the complainant/applicant posed one issue for determination, which is whether this Court can grant this application. He relied on section 256 of the Administration of Criminal Justice Act [ACJA], 2015 which provides:

> *The court may, at any stage of a trial, inquiry or other proceedings under this Act, either of its own motion or on application of either party to the proceedings, call a person as a witness or recall and re-examine a person already examined where his evidence appears to the court to be essential to the just decision of the case.*

F. G. Gabriel Esq. submitted that the purpose of this application is for a just decision in this case, given that the exhibits identified on the motion are essential and germane to arrive at a just determination of this case and to *"ensure that the vision of this Honourable Court is not blurred."* He referred to section 6[6][a] of the 1999 Constitution [as amended] to support the view that

the Court has inherent and unfettered powers to grant the prayers. It was further submitted that the grant of this application will not in any way occasion injustice to the defendants or prejudice them.

Submissions of Learned Counsel for the Defendants/Respondents:

Learned counsel for the defendants/respondents alsoformulated one issue for determination, which is whether the applicant has disclosed exceptional circumstances to warrant the grant of the application. He posited that an application for the re-opening of the case of a party already closed and calling of further evidence is to seek the exercise of the discretion of the Court. Such discretion must be exercised judicially and judiciously. The power of the court to re-call witnesses is exercisable *"only in special circumstances given the fact that it may lead to the unpalatable experience of affording a party the opportunity to have a second bite at the cherry."*

Uchenna E. Okafor Esq. relied on**Onuoha & Ors. v. State [1989] LPELR-2704 [SC]**,**Akogwu & Anor. v. State [2000] 12 NWLR [Pt.681]45,**and other casesto support the view that the power of the court to call or recall witnesses should be used with the greatest caution and should not be used to strengthen the case of the prosecution.The respondents' counsel further argued that no evidence has been adduced to enable the court determine whether the evidence of the witness sought to be re-called would be essential to the just determination of the case. He referred to the case of **Igwe v. The People of Lagos State [2021] 7 NWLR [Pt. 1776] 425**.

Mr. Uchenna E. Okafor also urged the Court not to grant the application on the ground that it is aimed at overreaching the defendants/respondents' no case submission. He referred to the submissions in paragraphs 4.8, 4.11 and 4.12 of the written address in support of the defendants' no case submission where he did submit,*inter alia,*that the prosecution witnesses did not tender the alleged petition of the defendants dated 29/1/2018. He contended that the prosecution, having perused the written address of the defendants, has brought this motion solely for the purpose of repairing its case and to undermine the essence of the no case submission. He relied on **NIWA v. SPDC Nig. Ltd. [2008] LPELR-1963 [SC]**for the meaning of *"overreach"*.

Finally, learned counsel for the respondents argued that it would be a mockery of the procedure of no case submission for a court to allow the prosecution to go back to repair its case after sighting the arguments of the defence in support of the no case submission. It would be highly prejudicial to the defendants if the court accedes to *"this extremely unorthodox request"* of the prosecution.

Decision of the Court:

It is correct that the Court has power under section 256 of ACJA, 2015 to grant an application for the recall of a witness that had earlier testified *"where his evidence appears to the court to be essential to the just decision of the case."*This provision is similar to section 200 of the Criminal Procedure Code and section

237[1] of the Criminal Procedure Act [which was in force before the ACJA, 2015].

It must be noted that the application for leave to recall a witness is not granted as a matter of course. The application seeks an exercise of the discretion of the Court. Like every judicial discretion, the discretion must be exercised judicially and judiciously based on the facts of each case. Let me refer to some decisions for guidance on the exercise of the Court's discretion. In **Akogwu & Anor. v. State [supra] @ 252, E-F,***His Lordship, Raphael Olufemi Rowland, JCA* considered the provision of section 200 of the Criminal Procedure Act and held:

> *"I am of the strong view that the power of the court under this section is limited to cases in which the evidence of the witness "appears to the court to be essential to the just decision of the case."*
>
> *It would therefore be a wrong exercise of that power if it would result in injustice to the accused or to his prejudice, or if the exercise is against the spirit of the law.*
>
> *…It must be said also that the exercise of the power of the court to recall witnesses may be made to clear up matters that have arisen ex-improviso during the evidence of the accused persons which could not have been foreseen by the prosecution. It is not for the court to recall witnesses in order to help the prosecution to strengthen its case or to enable a witness purely and simply to tender a statement made by another person. …"*

Also, in**Ezeama v. State [2014] LPELR-22504 [CA],** it was held thatprosecution witness may be recalled where the justice of the case demands. It is not done as a matter of course for the prosecution to build his case where he has fundamentally failed to do that.

The critical question is whether the grant of this application will be prejudicial to the defendants or overreach them. It is not in dispute that this application was filed on 24/6/2022after the defendants had served their written address in support of no case submission on the prosecution on 23/5/2022. In paragraph 4.12 of the written address, learned counsel for the defendants submitted that:

> *"… It is instructive that the alleged petition of the Complainant dated 29th January 2022 and the Statement of the Complainant taken under caution were not tendered in Court for the Court to see whether such a petition and statement exist and who the Petitioner [Complainant] is. It is also worrying that two persons are standing trial: meanwhile, PW3 who is the star witness in this case said a Complainant - meaning one person wrote and brought the alleged petition and a statement under caution was extracted from the Complainant. To crown it all, the PW3 failed to produce and tender any investigation report wherein the Defendants were found to have given false information at the Force Criminal Intelligence and Investigation Department. The particular person who the alleged false information was given to was not mentioned or called to give evidence as to the facts of false information."*

The Court agrees with learned counsel for the defendants that the prosecution has brought this application for the purpose of repairing or strengthening its caseand to undermine the above submissionsof the defendants. The Court also agrees that the grant of this application will overreach or prejudice the defendants and therefore, it will not be in the interest of justice to grantit.

Let me add that there is nothing in the affidavit in support of the application to suggest that the documents to be tendered through PW3 if the application is granted were not available at the time PW3 testified. In the said affidavit, the prosecution did not give any reason why the documents were not tendered before it closed is case.

In conclusion and for the reasons I have given, the application lacks merit. It is refused.

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HON. JUSTICE S. C. ORIJI
[JUDGE]

<u>Appearance of Learned Counsel:</u>

1. Uchenna Okafor Esq. for the defendants.