IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA – GHANA

CORAM: KANYOKE, JA (PRESIDING)

YAW APPAU, JA.

ACQUAYE, JA.

CRIM. APPEAL
No. H2/5/2008
5TH JUNE 2008

ASTU CHARAN KOLE ... APPELLANT

Versus

THE REPUBLIC ... RESPONDENT

YAW APPAU, J.A.

The appellant in this appeal Astu Charan Kole, was arraigned for trial before the High Court, Sekondi on two counts of falsification of accounts and stealing contrary to sections 140 and 124 (1) of Act 29/60. The prosecution called eight (8) witnesses in support of the charges against the appellant and closed its case on 27/08/2007. The trial court, at the close of the prosecution's case, came to the conclusion that the prosecution had established a prima facie case against the appellant so he had a case to answer, thereby calling on him to open his defence. The moment the Court below announced that the appellant had a case to answer, his counsel got to his feet and informed the judge that he wanted to make a submission of no case since the prosecution could not establish a prima facie case against the appellant at the close of its case. The trial court disagreed with counsel for the appellant that the prosecution could not establish a prima facie case and refused to allow him to make any submissions of no case to answer. The contention of the Court below was that it was of the view that the prosecution had satisfied it with enough evidence for which the appellant should be made to tell his side of the story. The Court below then called on the appellant to open his defence to the charges. The appellant, dissatisfied with that decision, appealed to this Court.

One may ask; what did the appellant appeal against?

The appellant's notice of appeal was filed on 2/10/2007 and it is titled: -

"NOTICE OF APPEAL AGAINST REFUSAL TO MAKE A SUBMISSION OF NO CASE"

The grounds of appeal were three in all. They read:

a. **The trial judge erred in failing to consider the reasons for the submission of no case.**
b. **The trial judge erred in refusing to allow the submission of no case.**
c. **The order made was against the weight of evidence.**

The appellant filed his written submissions in support of the appeal on 12/02/2008 while the respondent filed its submissions on 26/02/2008. Basically the appeal has two dimensions.

The main reason for the appeal, as was clearly captured in the 'Notice of Appeal' filed on 2/10/2007 was the refusal of the Court below to allow counsel for the appellant to make a submission of no case to answer at the close of the prosecution's case. That accounts for ground (b) which reads: - **"The trial judge erred in refusing to allow the submission of no case."**

The other dimension of the appeal was captured by ground (c) of the appeal; i.e. **"The order made was against the weight of evidence".** What the appellant meant by this ground of appeal was that the trial court erred in calling on the appellant to open his defence because the prosecution could not establish a prima facie case against him at the close of its case.

As for the first ground of appeal; i.e. ground (a), which reads: **"The trial judge erred in failing to consider the reasons for the submission of no case**", I do not think it is a relevant ground because the Court below did not allow counsel for the appellant to make any submission at all, having already come to the conclusion that the appellant had a case to answer. There was therefore no opportunity for the appellant to give any reasons in support of a submission of no case, which reasons the Court below failed to consider. That ground therefore, does not arise at all. The only relevant grounds of appeal that I am obliged to consider under the circumstances are grounds (b) and (c) and I do so seriatim.

With regard to ground (b), I have carefully digested the written submissions of the appellant in support of the appeal and I find no where in the said submissions any argument or narration suggesting in the least that the trial court erred in law in not allowing the appellant to make a formal submission of no case to answer before calling on him to make a defence. The whole argument advanced by the appellant in his written submissions was geared

towards ground (c). So in effect, the appellant did not demonstrate in any way that the decision of the trial court to call on him to open his defence without first inviting his counsel to make a formal submission of no case to answer constituted an error in law.

However, this issue once arose as a result of two contrasting decisions given by the High Court per Akainyah, J. and Taylor, J. (as they then were) in 1964 and 1975 respectively on this subject of 'submission of no case to answer'. While Akainyah, J, in the case of **C.O.P. v. OSEI YAW AKOTO [1964] GLR 231, @ 232**, was of the view that an accused person or his legal representative has a right to make a submission of no case at the close of the prosecution's case, Taylor, J in **REPUBLIC v. AKOSAH (No. 2) [1975] 2 GLR 410** thought otherwise.

According to Akainyah, J, it is a fundamental principle of law that a person charged with an offence before a court of law has a duty to make it appear to the court that no charge has sufficiently been made against him to require an answer from him. Such an accused person can only do so through a submission of no case. He described this principle as a 'time-honoured practice', which section 173 of Act 30/60 has not taken away, when that section is given its proper meaning.

From this decision, what Akainyah, J was implying was that it constituted an error of law if a court refuses to give an accused person or his lawyer the opportunity to make a submission of no case to answer where such an accused person or counsel expresses the desire to do so. Taylor, J did not share this view. According to Taylor, the making of a submission of no case to answer could properly be explained as a privilege or concession granted to the defence counsel by the trial judge for the purpose of obtaining assistance in the interest of justice. If a defence counsel therefore applies to make a submission of no case, it is within the discretion of the judge to agree or refuse. If the refusal was in the rightful exercise of the judge's discretion, then it could not be said that the judge had erred in law. The judge only errs in law where the discretion is wrongly exercised.

Though there is wisdom in the position taken by Akainyah, J, I do not agree with his position that a mere refusal by a trial judge to allow an accused person or his legal representative to make a formal submission of no case to answer after the prosecution has announced the closure of its case, amounts to an error of law that is apparent on the face of the record for which an appeal must succeed.

I am of the view that it is inappropriate for a court or a judge to refuse to hear or listen to an accused person or his legal representative who wants to make a submission on any subject at all before the court, including a submission of no case, since the paramount duty of every court is to ensure that justice reigns at the end of the day. The court is fully assisted to achieve this if all parties in litigation, both in criminal and civil trials, are given the opportunity to dilate on the law, at any stage of the proceedings, for the consideration of the court.

However, if the court holds the strongest view that such a submission would serve no useful purpose rather than wasting precious man-hours, the court is not obliged to assume the role of an automaton that acts without conscience, and just sits and listens to porous and worthless arguments that would yield no results. The court always has a discretion to take such decisions and as the principle has always been, discretions are supposed to be exercised judicially and judiciously. It is only when the court has exercised its discretion wrongly that it could be said there is an error on the face of the record.

As Taylor, J rightly decided in the Akosah case cited supra, though the principle of 'submission of no case to answer' is a time honoured practice, it is governed by statute; i.e. Act 30/60. In summary trials, it is governed by section 173 of the Act while in trials by indictment; the relevant provision is section 271. The trial of the appellant in the Court below was a summary one so the applicable section is 173. This section reads:

> **"If at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require him to make a defence, the Court shall, as to that particular charge, acquit him".**

The law places the authority to take the decision on whether to call the accused to open a defence or not at the close of the prosecution's case on the trial court. The trial court is not obliged to consult either the appellant or his/her counsel before coming to that conclusion. It is the prerogative of the trial court. The operative words in the law are; **"if it appears to the trial court…"**

The power or authority granted the courts to take this crucial decision without consulting anybody is without question. It is only appropriate for a court to listen to counsel for an accused person who desires to make a submission of no case to answer at the close of prosecution's case so as to assist the court to arrive at a correct decision, but it is not a legal

'right', the mere refusal of which could derail a trial upon an appeal. The trial judge therefore committed no legal error when he took the decision to call on the appellant to open his defence at the close of the prosecution's case without first hearing submissions from appellant's counsel though it was inappropriate for him to have done so. So long as counsel for the appellant had expressed the desire to make a submission of no case, the trial court should have, as a matter of practice, obliged him and then overrule him afterwards since it is the court that has the final authority to take the ultimate decision. The mere refusal to hear counsel on the submission does not, however, constitute an error of law.

As was held by this Court in **ZORTOVIE v. THE REPUBLIC [1984-86] 2 GLR 1**, a wrong decision on a submission of no case is a misdirection in law. It is therefore the decision to call on the accused to make a defence that could be declared erroneous if it was wrongly exercised. For example, if at the close of the prosecution's case no evidence had been produced to establish an essential element in the alleged offence or that the evidence adduced by the prosecution had been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it, but nevertheless the trial court invited the accused person to open a defence, then that decision would be a wrong exercise of discretion as was held by the Supreme Court in the case of the **STATE v. ALI KASSENA [1962] 1 GLR 144 @ 148** and therefore erroneous, but not necessarily the mere refusal for the submission to be made in the first place.

The relevant and most important ground of Appeal in this case is ground (c). On this ground, the crux of appellant's submission was that P.W.1 who audited the accounts of the complainant's business and made findings against the appellant in a report that was tendered in evidence as Exhibit 'D', arrived at the conclusions he came to without first hearing from him. The submissions made by the appellant only attacked the report and findings of P.W.1 as contained in Exhibit 'D'. According to the appellant, his prosecution at the Court below was based on Exhibit 'D', which he claimed to be one-sided. He quoted portions of the report and challenged some of the figures arrived at in the report. The appellant concluded his submissions as follows: -

> **"From the discussions above, it becomes clear that the non inclusion of the accused person in the audit has seriously affected the outcome. Relying on the figures to prosecute has seriously discredited the evidence of the prosecution. Under the circumstances, we submit that no case has been made by**

the prosecution to warrant the accused person being called to answer".

So as I have already indicated above, the whole of the appellant's submission was directed against the testimony and report of P.W.1, the auditor. However, the evidence that had been produced by the prosecution against the appellant at the close of the prosecution's case was not that of P.W.1 only. Seven other witnesses testified against the appellant on the charges. The appellant made no mention of the testimonies of the remaining seven (7) prosecution witnesses who also testified against him.

From appellant's submissions, his bone of contention was with P.W.1 the auditor and the fact that he was not involved in the preparation of Exhibit 'D'. According to him, P.W.1 made some findings in his report without first hearing his side of the story thus making the findings inconclusive against him. If that was the beef of the appellant, then that was the very reason why the trial court wanted to hear from him before passing judgment.

It has to be noted that a trial court does not have to make findings of fact when deciding on the issue whether to call on the accused to open a defence or not. In this case, the appellant, in his written submissions, did not make any comment at all about the testimonies of the other prosecutions witnesses; i.e. P.W. 2 – P.W. 8, some of whom had made damaging allegations against him for which the trial court required answers from him if he were to escape conviction. The testimonies of P.W.3, 4 and particularly 7, which made mention of some admissions made by the appellant, suggested that the appellant had a case to answer for which the Court below must hear him. I am not therefore convinced that the trial judge erred in law in calling on the appellant to open his defence. In fact, the trial court took the right decision when it called on the appellant to open his defence.

The appeal is accordingly dismissed. Appellant is ordered to go back to the Court below to open his defence to the charges.

(SGD) YAW APPAU
(JUSTICE OF APPEAL)

KANYOKE, J.A.:

I have had the opportunity of reading before hand the judgment just delivered by my brother Yaw Appau J.A. I agree with him that there is no merit whatsoever in this appeal and that it should be dismissed. There is one question that kept on agitating my mind as I read the written submissions of learned counsel for the appellant time and again.

The gist of his submissions particularly with regard to ground (a) of the appeal is that the appellant was denied the opportunity to be heard in the preparation of the Audit Report-Exhibit D by Pw1 and inferentially therefore that the audi alteram partem rule was breached. Assuming without admitting that this is so is that a good ground for contending that the appellant's non-participation in the preparation of that Report renders same so manifestly unreliable that no reasonable tribunal might convict him so he should be acquitted and discharged for that reason without opening his defence. And if the Court rules that he nevertheless has a case to answer and must open his defence as happened in the instant case, is an appeal against that ruling on appropriate remedy in these circumstances? Does his remedy not lie in an application for a quashing order instead of an appeal? Let counsel for the appellant ponder over these questions.

(SGD) S. E. KANYOKE
(JUSTICE OF APPEAL)

I agree

(SGD) K. A. ACQUAYE
(JUSTICE OF APPEAL)

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