IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

CRIMINAL APPEAL
NO: J3/4/2017

DATE: 26TH JULY, 2017

MICHAEL ASAMOAH & ANOR. ..... PLAINTIFF

VRS

THE REPUBLIC ..... RESPONDENT

J U D G M E N T

ADINYIRA (MRS), JSC:-

Your ladyship and your Lordships permit me to preface my opinion with the dictum of Lamer CJ in the Canadian case of **R v P (MB) [1994] 1 SCR 555** on submission of no case:

> *"Perhaps the single most important organizing principle in criminal law is the right of the accused not to be forced into assisting in his or her own prosecution. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her."*

This case came before us by way of an appeal from the judgment of the Court of Appeal delivered on14 July 2016 in which the Court of Appeal affirmed the decision of the High Court (Financial Division One) Accra to call upon the Appellants to open their defence after the close of prosecution's case.

BRIEF FACTS

On the 27th of June, 2013 personnel from the CID Headquarters Accra, in collaboration with officials of the Telecom Service Providers embarked on an operation to clamp down on the activities of illegal SIM box operators. The operation led to the arrest of the first Appellants Michael Asamoah, (1st Appellant), who the police have monitored for some time as one of the operators of SIM box fraud.

Upon his arrest, the team escorted the 1st Appellant to a shop at Abossey Okai where the alleged illegal activities take place. The shop was forced open and five GOIP SIM box equipments and its accessories, four heavy duty batteries, three UPS and one power inverter were found. The equipments had been activated and running to terminate international calls. The first Appellant disclosed that the SIM boxes and other equipments and accessories belong to Anthony Ogunsawo (2nd Appellant) a Nigerian resident in Madina, Accra. Investigations revealed that the 2nd Appellant engaged the services of the 1st Appellant and he installed the internet link which facilitates the termination of calls by the SIM boxes.

Upon his arrest, the 2nd Appellants disclosed that the illegal SIM box was initiated by himself and two others at large, namely Zimi and Forster. And he engaged the 1st Appellant to render technical services and manage the operations of the SIM box.

The 2nd Appellant disclosed that he received payment from his principals in the U.S.A. ranging from $20,000 to $30,000 on monthly basis. Out of these payments, he paid the f1st Appellant an amount of USD 2,800 depending on the internet services he provided; and an amount of USD 560 per month for the management of the SIM boxes.

Based upon these facts the Appellants were arraigned before the High Court on three counts of:

1. Conspiracy to commit crime namely, providing electronic communication service without licence contrary to S23(1) of the Criminal Offences Act 1960, Act 29 and S3(1) of the Electronic Communication Act 2008, Act 775,
2. Providing electronic communication service without licence contrary to S3(1) and S73 (1) of Act 775

3. Knowingly obstructing and interfering with the sending, transmission, delivery and reception of communication contrary to S73 (1) (e) of Act 775

The prosecution called 3 witnesses and at the close of the prosecution's case the learned trial judge invited the Appellants to enter their defence to the charges against them.

The Appellants being dissatisfied with the decision of the trial court appealed to the Court of Appeal but the appeal was dismissed. Therefore, the Appellants filed this instant appeal on one ground of appeal, namely:

The Court of Appeal erred when it affirmed the decision of the trial Judge inviting the Appellants to open their defence when no case was established by the Prosecution against them.

The relevant sections of the statutes contrary to which the Appellants were charged are set out as follows:

S23 (1) of Act 29: Conspiracy

Where two or more persons agree to act together with a common purpose for or in committing or abetting a criminal offence, whether with or without a previous concert or deliberation, each of them commits a conspiracy to commit or abet the criminal offence.

S3 (1) of Act 775: Requirement for a licence for public electronic communications service

Except as otherwise provided under this Act a person shall not operate a public electronic communications service or network or provide a voice telephony service without a licence granted by the Authority.

S73 (1) (e) of Act 775: Offences

A person who knowingly obstructs or interferes with the sending, transmission, delivery or reception of communication, commits an offence and is liable on summary conviction to a fine of not more than three thousand penalty units or to a term of imprisonment of not more than five years or to both.

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Case for the Appellants

Counsel submits that the trial judge has a duty to ascertain from the evidence whether a prima facie case has been made against the accused. He contends that the essential ingredients of the offences charged against the Appellants have not been established by the prosecution. Thus the Court of Appeal erred in affirming the trial judge's warrant calling on the appellants to open their defence. Counsel submits further that the issue as to whether or not there is no evidence to establish the guilt of the accused is a question of law and the trial judge is duty bound to consider it even if no 'submission of no case' is made by the defence. The Appellants also complained that the trial judge did not give an opportunity for them to make a submission of no case to answer, though they did not raise it as a ground of appeal. A number of authorities were cited by Counsel in support of his submissions. **The State v Ali Kassena (1962)1 GLR 144; Apaloo v The Republic [1975] 1GLR 156 C.A; Gyabaah v The Republic [1984-86] 2GLR 461 C.A. Kofi Buffalo v The Republic [1987-88] 1 GLR 250; Moshie Alias Adama v The Republic [1977] 1 GLR 186-190**

Case for the Respondent

The respondent agrees with the Appellant on the circumstances under which a submission of no case to answer may be upheld as held in the **Ali Kassena,** ***supra*** and **Gyabaah,** ***supra***. But as regards the standard of proof, the Respondent argues that it cannot be proof beyond a reasonable doubt in a submission of no case, as held in the case of **Tsatsu Tsikata v The Republic [2003-2004] SCGLR 1068**. The Respondent contends that at this stage, the issue is whether the prosecution has made out a sufficient case to warrant the calling on appellants to open their defence. The Respondent went through the evidence of three prosecution witnesses to demonstrate that the prosecution at the close of its case had led sufficient evidence to establish a prima facie for the Appellants to be called upon to answer.

Consideration of the Ground of Appeal as to whether the Trial Judge Erred in Calling Upon the Appellants to Open Their Defence at the Close of the Prosecution's Case

The Law on Submission of no Case

Though the principle of 'submission of no case to answer' is a time honored practice, it is governed by statute; the Criminal and Other Offences (Procedure) Act, 1960 (Act 30). In summary trials, it is governed by sections 173 and 174 (1) of the Act 30 while in trials on indictment, it is by section 271.Since this is a summary trial our concern is with Sections 173 and 174 (1) of Act 30 which provide:

Sections 173 **Acquittal of accused when no case to answer**

"Where 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

Section 174 **The defence**

(1) At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused sufficiently to require the accused to make a defence, the Court shall call on the accused to make the defence and shall remind him the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement.

The underlying factor behind the principle of submission of no case to answer is that an accused should be relieved of the responsibility of defending himself when there is no evidence upon which he may be convicted. The grounds under which a trial court may uphold a submission of no case as enunciated in many landmark cases whether under a summary trial or trial by indictment may be restated as follows:

a) there had been no evidence to prove an essential element in the crime;
b) the evidence adduced by the prosecution had been so discredited as a result of cross-examination; or
c) The evidence was so manifestly unreliable that no reasonable tribunal could safely convict upon it.
d) The evidence was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt, and one with innocence.

See **Tsatsu Tsikata v The Republic [2003-2004] SCGLR; Kofi alias Buffalo v The Republic [1987-88] 1 GLR 250; Gyabaah v The Republic [1984-86] 461 C.A Moshie Alias Adama v The Republic [1977] 1 GLR 186-190; Apaloo v The Republic [1975] 1GLR 156 C.A.**

In the course of his written submission Counsel for the Appellants complained the trial judge erred by not giving him a chance to make a submission of no case; this statement cannot pass without any comment.

There is no statutory provision or any hard and fast rule of procedure that an accused person has an automatic right to make a submission of no case through his counsel at the close of the prosecution's case. In terms of summary trials, where either Sections 173 or 174(1) of Act 30 is applicable as the circumstances may be, the accused does not have a right to make a submission of no case because in such cases, the judge is

the trier of both law and facts and it is in the discretion of the trial judge to decide, based on the evidence adduced by the prosecution, whether or not the evidence is sufficient to make out a prima facie case for the defence to answer. In the teeth of direct cogent evidence implicating an accused in the crime charged, a trial judge should not waste time to invite a counsel to make a submission of no case. Furthermore the standard of proof borne by the prosecution at this stage cannot be proof beyond a reasonable doubt, as held in the case of **Tsatsu Tsikata v The Republic [2003-2004] SCGLR 1068.**

Counsel cannot use the trial judge's failure to invite him to make a submission of no case to as a ground to anchor his appeal. What is essential on appeal is for the appellate court to ascertain whether at the close of the evidence in support of the charge a case was made out against the Appellants sufficiently to require the Appellants to make a defence. This is exactly what their lordships at the appellate court set out to do.

We wish to refrain from commenting on the evidence led so far by the prosecution as the issue of whether the court believes the evidence led does not arise at this stage as the case is not yet concluded. However, it is legitimate to comment that anyone looking at the evidence cannot deny that the evidence led so far links the 1st and 2nd Appellants to the offences for which they have been charged.

The evidence led by the prosecution witnesses, PW1, PW2, and PW3 shows that the Appellants were in possession of five GOIP SIM box equipments and accessories, 80 sim cards, four heavy duty batteries, three UPS and one power inverter in a shop at Abossey Okai. The 1st appellant was running the equipments on behalf of the 2nd Appellant. He worked under the instructions of the second Appellant and received remuneration for such services. These exhibits can hardly be believed to be for private use. These boxes are devises used to bypass international call and terminating them in Ghana as local calls and thereby deprive the government of Ghana tariffs chargeable on international calls .It was also testified that upon inspection the equipments were found to be active and running at the time they were seized with 80 sim cards inserted in them. There was also evidence that the Appellants were not licensed by the National Communication Authority [NCA] to bring in international traffic.

We will refer in particular to the evidence of Ogunkole Michael, PW2, and Fraud Manager at GLO Mobile Ltd. who testified that the SIM boxes were being used for the bypass of international traffic on GLO network. He said there was an on-going forensic analysis of all data traffic on GLO network to identify abnormal pattern; and through that they were able to identify those sim cards involved in illegal abnormal traffic. Those

sim cards were traced to the location where they were recovered from the shop at Abossey Okai. He said during cross-examination that he can vouch that the SIM boxes that were seized from the Appellant were being used for the bypass of international traffic on the GLO network. He also said there is a record of each of the transaction detailing the location of the base station or the mast where the traffic is coming from. It is based on this information that the police traced and arrested the Appellants.

The case for the prosecution in our opinion provides a prima facie evidence of the commission of the offences charged. Accordingly we conclude that the Appellants have a case to answer in respect of all the three counts.

The appeal is therefore dismissed. The judgment of the Court of Appeal is hereby upheld.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

V. J. M DOTSE
(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

V. AKOTO-BAMFO (MRS)
(JUSTICE OF THE SUPREME COURT)

COUNSEL

AUGUSTINE OBOUR FOR THE APPELLANT.
EVELYN KEELSON, CHIEF STATE ATTORNEY FOR THE RESPONDENT.