

## **DELIMITING THE SCOPE OF THE POWERS OF THE ATTORNEY-GENERAL TO RE – CHARGE AN ACCUSED PERSON AFTER A *NOLLE PROSEQUI* HAD BEEN ENTERED\***

It is generally believed that the landmark case of *State v. Ilori*<sup>1</sup> has settled the position of Nigerian Constitutional cum Criminal Law on the power of the Attorney-General over public prosecution. Those who hold this view may change their position if they take another – but this time a thorough look at the case. Such exercise, would no doubt, reveal a curious but neglected aspect of the judgment, which raises fundamental issues seeking to be resolved. The foregoing assertion is a product of my recent excursion into the principles laid down in the case. In the course of this vaulting curiosity I stumbled on an aspect of the reasoning of *Aniagolu JSC* and *Eso JSC*, which gave impetus for this work. In the course of the judgment *Eso JSC* said:

*Indeed if after a nolle prosequi has been entered, and the court has acted upon it, a fresh or further proceedings on the same indictment are commenced, there is nothing to stop the attorney general from entering yet another nolle prosequi. This he can do as many times as the proceedings rear their head.*<sup>2</sup>

Drawing strength and support from the lead judgment of *Eso JSC*, *Aniagolu JSC* said:

*The attorney general may, therefore enter a nolle prosequi for as many times as the occasion demands. It is appreciated that a nolle prosequi is only a temporary proceedings which has the effect only of a stay and not of a quashing of the indictment, which technically may later be presented without a fresh indictment*<sup>3</sup>. *Emphasis added.*

At first sight, these pronouncements<sup>4</sup> did not make much impression on me, I became curious when I placed them alongside the basic constitutional truth that the Attorney General can enter a nolle prosequi<sup>5</sup> as many times as he pleases, at any time before judgment. The question that this readily calls to mind is whether it is the intention of the drafters of the Constitution to give the Attorney General a *carte blanche* of a limitless magnitude to perpetually bound an accused person to criminal prosecution by intermittently terminating and resuscitating the charge whenever he pleases, until he secures judgment? Unfortunately neither in the judgment of the Supreme Court in *Ilori's Case* nor in the enabling provision of the Constitution was the question as to what stage the Attorney General is barred from resuscitating the charge answered.

In this work I shall pursue the inquiry raised above with a view to showing that the Attorney General does not have limitless power to recharge the accused person, 'over and over again', and that the real power to determine whether an accused, whose case

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<sup>1</sup> (1981) 14 NSCC 69 (for the purpose of convenience, this case will sometimes simply be referred to as, *Ilori's Case*)

<sup>2</sup> Ibid at pg 75

<sup>3</sup> Ibid at pg 82

<sup>4</sup> Although, these pronouncements were made obicta, their influence and persuasion cannot be misplaced.

<sup>5</sup> Notwithstanding that no Nigerian Constitution has ever used the term, 'nolle prosequi', it is generally agreed that the common law term is synonymous with the termination of a criminal prosecution by the Attorney General. It shall therefore be used herein to refer to the power granted the Attorney General under *sections 174(1)(c) and 211(1)(c)* of the *Constitution of the Federal Republic of Nigeria 1999*. (hereinafter, *the 1999 Constitution*).

had been terminated by a *nolle* or any other device of the prosecution, can be subjected to another trial on the same charge, lies with the court. That being the case, it is the duty of the court to examine the circumstances of the termination and come to the judicial determination of the order to be made as guided by the constitutional provisions to be considered herein. It shall therefore, be argued in this paper that the susceptibility of an accused person to a subsequent trial on the same facts, after a *nolle* is entered, is dependent on the order made by the judge at the point of termination of the first trial. It shall further be argued that the discretion of a judge in the matter is not absolute in that the judge only has a discretion to exercise where the charge is terminated before the accused is called upon to enter his defence; once the accused has been so called, or has indeed entered his defence, the only option opened to the judge is to acquit him of the charge. To achieve my goal, I shall balance the attorney general's apparently limitless power against the seemingly remote but intricately related sections 36(5) and (9) of the 1999 Constitution.

Suffice it to state that our analyses shall be confined to re - prosecutions after a *nolle* prosequi had been entered, with little or no attention paid to the principles guiding the ways and manners by which the power is exercised - such is clearly outside the purview of this discourse

### **State v. Ilori**

In the case of *State .v. Ilori*<sup>6</sup>, the detailed fact of which is not of much relevance to our present discourse, the Supreme Court was called upon to determine the extent of the power of the Attorney General over public prosecution as encapsulated in *section 191(1)(c) of the Constitution of the Federal Republic of Nigeria, 1979*<sup>7</sup>. The section provides:

- (1) *The Attorney General of a ... shall have power;*
- (a) *...;*
- (b) *..., and*
- (c) *to discontinue at any state before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person;*

In the course of resolving the issues raised in the case, the Supreme Court affirmed the common law powers of the Attorney General and superimposed same on the interpretation of the aforementioned section of the constitution in a manner suggestive of a clear intention to disregard other constitutional provisions germane to the just exercise of the power granted the Attorney General. The result of this approach is the emasculating effect the powers of the Attorney General now seem to have over other related provisions of the constitution. Although, the vexed issue as to the propriety or otherwise of the decision of the court is beyond the pale of this discourse, it suffices however, to state, with respect that the Supreme Court allowed its common law understanding of the Attorney General's power to blur its vision against what the constitution stipulates. I shall now turn to the planks upon which my views are based.

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<sup>6</sup> *Op cit.*

<sup>7</sup> While *section 160 of the 1979 Constitution* spelt out the power of the Federal Attorney General over public prosecution, *section 191* of the same constitution spelt out the power of the State Attorney General. These are now respectively covered by *sections 174 and 211 of the 1999 Constitution*. The wording of the sections are however the same.

## 1. Presumption of Innocence

Section 36(5) of the 1999 constitution provides:

*Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.*

This provision raises in favour of the accused, a presumption of innocence, the undeniable effect of which is the placing of the burden of proving the guilt of the accused person on the prosecution. To accomplish this task, the prosecution does not have the entire gamut of the trial – he is allowed to call evidence in proof of its case only at such time before the accused person is called upon to enter his defence. This is the essence of section 286 of the *Criminal Procedure Act (CPA)*,<sup>8</sup> which allows the accused person to enter a ‘no case submission,’ when at the close of the case of the prosecution, no case had been proved against him. The importance of the foregoing is underscored by the fact that the court has the inherent power *suo motu*, to discharge the accused person at the close of the case of the prosecution if the court is of the view that the evidence so far given lacks the strength to cause the accused to enter his defence<sup>9</sup>. The significance of this rule is that it forestalls a situation where an accused person in respect of whom the prosecution has failed to prove a prima facie case, is allowed to supply the evidence incriminating him in the course of his defence.<sup>10</sup>

Once the court comes to the determination that the accused has no case to answer, the only option opened to him is to acquit him<sup>11</sup>. This is so because at this point the prosecution has exhausted all its opportunity to refute the accused person’s presumption of innocence. By the same token, where the prosecution withdraws the charge after it has closed its case, the court has no choice but to acquit the accused<sup>12</sup>. And as stated above, whatever order the court makes at this point, irrespective of the terminology used, is tantamount to an acquittal and thus a bar to subsequent proceedings<sup>13</sup>. An order of acquittal is necessary under the above circumstance, because the accused, who had testified and called witnesses in his defence, will be prejudiced by a second trial being that the prosecution, will obtain and study the record of proceedings with a view to eliminating the defects in its case at the previous trial and strengthening the present. This situation if allowed to be, would amount to a pathological display of an unflinching determination to convict even an innocent person. This is more so because, an innocent man, would in most cases, not have the stamina and resources to defend subsequent trials; the prosecutor will certainly take advantage of the situation to introduce fresh evidence as well as capitalize on the disclosed and therefore weakened defence of the accused to enhance the chances of his success. This is particularly so because, the sole purpose of the nolle may be to give the prosecution the opportunity to put its house in order; it may also be propelled by the sole motive of

<sup>8</sup> CAP. C.41 Laws of the Federation of Nigeria 2004.

<sup>9</sup> See *Okoro v. The State* (1988) 5 NWLR (PT 94) 255.

<sup>10</sup> *Mumuni v. the State* (1975) 6 S C 79; *Dabou v. the State* (1977) 5 S C 19.

<sup>11</sup> Although, the term prescribed by the said section 286 is, ‘discharge’, Nigerian Courts have persistently held that even when, ‘discharge’, is used, it has the undeniable effect of an acquittal. See *IGP v. Marke*, (1957) 2 FSC 5, *Clement Nwali v. IGP*, 1 ENLR 1, *COP v. Victor Ezeifo & 3 Others*, (1970 – 71) ECLSR 119.

<sup>12</sup> Section 75(1)(b)(iii) of the CPA.

<sup>13</sup> It is important to state that while the court is bound to acquit the accused where the prosecutor withdraws the charge after the accused had been called upon to enter his defence, an order of a mere discharge does not necessarily follow the withdrawal of a charge made before the prosecution closes its case. See the proviso to section 75(1)(b)(i) of the CPA. Also see *COP v. Edward Ogun* (1975) 5 U.I .L.R 152 at 155, where it was held that the court may acquit an accused where the prosecutor withdraws the charge before it closes its case, where the judge is of the view that there is no merit in the prosecution’s case.

avoiding a particular judge, who is not sympathetic to the case of the prosecutor. These possibilities clearly amount to abuse of court process, condemnable to at least, to the Anglo – American criminal justice system, which we practice in Nigeria. In the American case of *Black v. North Carolina*<sup>14</sup>, Frankfurter J. pointed out that:

*A state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favour of the accused merely in order for a prosecutor who has been incompetent or casual or even ineffective to see if he can do better a second time.. emphasis added.*

Unfortunately this situation has on several occasions presented itself in this country. In *Clement Nwali v. IGP*<sup>15</sup>, the appellant was charged before a magistrate court with four offences contrary to section 116(1) of the Criminal Code. The prosecution failed to prove certain of the facts necessary to prove conviction. Upon a no case submission by counsel to the appellant, the magistrate discharged the appellant but stated that the discharge ‘was not on the merit of the case’. Three days later the same charge was preferred against the appellant before the same court. He pleaded *autrefois acquit*. The magistrate rejected the plea and proceeded to trial, thereby giving the prosecution the opportunity to prove the facts that they had omitted to prove at the first trial. The appellant was thereupon convicted.

On appeal, while holding that the plea of *autrefois acquit* should have been allowed, *Ainley Ag. J pronounced:*

*But it might be argued, this does not dispose of section 286 of the C.P.O. It might be argued that this section does not permit a magistrate to make any determination equivalent to an acquittal upon a successful submission of, ‘no case to answer’. Where does this argument leave us? It leads us to this, that if the crown fails to prove a man guilty, and the magistrate does his duty, and refuses to call on the accused for his defence, then the crown may have a second, third, fourth and fifth chance and chances ad infinitum. It means that the crown may continue to prosecute the subject for one and the same offence until they eventually succeed in persuading a magistrate that there is a case to answer.... It is very difficult to believe that such an extraordinary state of affairs was intended by the legislature....<sup>16</sup>*

Citing *Sir Donald Kingdom*, his Lordship continued:

*It is against the first principle of the administration of justice to use the section (section 175 C.P.O., a section which permits the supreme court to remit for further evidence) so as to give the prosecution a second attempt to prove its case”.... It would be against the first principle of the administration of justice to construe sections 185 and*

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<sup>14</sup> (1953) 344 U.S 424 at 429

<sup>15</sup> (1956) LRERN I.

<sup>16</sup> Ibid at pg 4

*286 C.P.O. so as to bring about a like result.... 'It is fundamental that in a criminal trial the onus is on the prosecution to prove all the elements which go to make up the offence charged. If it fails to prove any one of them, the accused is entitled to an acquittal.'*<sup>17</sup>

In *The State v. Christopher Ede & Three Others*,<sup>18</sup> at a previous trial, counsel to the prosecution discontinued the proceedings after the prosecution's evidence and consequent upon which the Judge discharged the accused. Subsequently, another indictment was preferred against the accused on the same facts. At the trial, the defence counsel submitted that the discharge of the accused was a bar to subsequent prosecution against him for the same offence.

In his well considered ruling, *Phil – Ebosie J*, held that a discharge after all the evidence of the prosecution had been led is a bar to subsequent proceedings on the same set of facts. In the course of the ruling, the learned judge said:

*In this case the new information which is exactly similar to the previous one was filed together with a notice of intention to call additional evidence. From this fact, it seems that the previous action was discontinued in order to enable the prosecution call the said additional evidence. This being the case it will be against the principle of law as decided in Nwali's case and other similar decisions.*

The underlining but unspoken reason why the courts to equate a discharge under these circumstances to an acquittal, is to forestall a situation where the prosecution through subtle inventions and evasions, circumvent the accused person's presumption of innocence, which he has been unable to debunk by playing according to the rules. Accordingly, it behooves on the court to be circumspect whenever an accused is to be re - prosecuted on a charge earlier terminated by a nolle, especially, where the accused had entered his defence before the nolle was entered. This is particularly so because the Attorney General is not bound to give any reason at the point of terminating the earlier charge.

## **2. The rule against double jeopardy.**

Section 36(9) of the constitution provides:

*No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall against be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court*

In the history of criminal law, this rule has been described as the most *fundamental or all –pervasive*<sup>19</sup>.

In the words of *Rand J*, of the Supreme Court of Canada:

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<sup>17</sup> Ibid. Also see *I.G.P v. Sydney Marke (1975) 2 FSC 5*

<sup>18</sup> (1964) LREN 60

<sup>19</sup> *Martins L. Friedman*, Double Jeopardy. Oxford: Clarendon Press 1969 p. 3

*At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter....<sup>20</sup>*

The rationale for the rule is the protection of the individual from the oppressive tendencies of the state, which, with its vast resources can perpetually deprive an individual his personal liberty through several frivolous trials. As succinctly stated by *Black J.*, of the Supreme Court of the United States in *Green v. United States*<sup>21</sup>.

*The underlining idea, one which is deeply ingrained in at least the Anglo - American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*

The clear requirement of this plea in Nigeria is that the accused must have been tried and convicted or acquitted by a court of competent jurisdiction for an offence constituted by the same facts upon which he has again been charged<sup>22</sup>. Section 36(9) of the Constitution is fashioned after the common law, wherein the application of the rule is tied to an acquittal or conviction.<sup>23</sup> At common law, the doctrine was limited to crown prosecution for capital felonies; private prosecutions by appeal and crown prosecution for a lesser offence did not invoke the bar<sup>24</sup>. Also, double jeopardy would not apply until final judgment. Indeed English law still retains the rule that jeopardy does not attach before verdict – premature termination is entirely within the discretion of the trial judge and does not constitute a bar to re prosecution<sup>25</sup>. This was predominantly the case in the United States until the 5<sup>th</sup> amendment to the United States Constitution reformulated the rule thus;

*Nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb.*

The wording of this amendment negated the hitherto common law requirement of 'acquittal' or 'conviction', and thus gave judges the absolute discretion and the needed judicial space to determine the stage at which a bar would arise from a previous trial irrespective of lack of finality<sup>26</sup>.

While our provision still follows the common law, it is our contention that, the real power lies in the courts upon which pronouncements the application of the rule is based. Nothing stops a court, upon examining the circumstances in which the nolle is entered, from acquitting the accused of the charges and therefore barring a subsequent

<sup>20</sup> *Cullen v. The King* (1949) SCR 658 at 668

<sup>21</sup> (1957) 355 U.S 184, at 187-8

<sup>22</sup> See the cases of *Umeze v. State* (1973) S.C. 221; *R. v. Edu* 14 WACA, 163

<sup>23</sup> *D.P.P. v. Connelly*, 48 Cr. App. Rep. 183.

<sup>24</sup> See *Blackstone's Commentaries* 335-36 cited in Note, (1964) 77 Harv.L.R 1272 at 1273

<sup>25</sup> See *Archbold*, Pleading, Evidence and Practice in Criminal Cases (35<sup>th</sup> ed) 598, 603

<sup>26</sup> *McCarty v Zerbst* 85 F.2d 640 (10<sup>th</sup> Cir) 299 U.S 610 (1936), In the United States, double jeopardy may arise even after the first witness is sworn. This is in tandem with section 1.09(4) on the 1956 *Draft on Double Jeopardy*. Also in the United States case of *Downum v The U.S* (1963) 372 US 734, the Supreme Court of the United States barred a subsequent prosecution when a jury had been discharged after it was sworn but before any evidence had been heard.

prosecution on that same charge, in the same manner as the court would, when a prosecution withdraws a charge under section 75 of the CPA.

We cannot appreciate this argument unless we appreciate the rationale behind the double jeopardy rule. Several policy considerations underline the global recognition of the rule, and this can be collected from its history – the rule was formulated primarily to prevent the harassment of the accused by a series of aborted criminal proceedings<sup>27</sup>, and of sparing him the financial physical and psychological burdens accompanying re-prosecution<sup>28</sup>. It is also to prevent an unscrupulous prosecutor from avoiding an unwanted judge; to minimise the risk of unjust convictions through repeated trials as well as the diminution of the strain repeated prosecutions place on the judicial system<sup>29</sup>.

I am not unmindful of the fact that terminating the charge with a view to re-prosecution may be for the best interest of the State and its citizenry, if it to ensure that a guilty man does not escape justice due to one negligent slip by the prosecution. For this reason, I slightly subscribe to the view that:

*Articulation of the policies to be served by the double jeopardy provision should not obscure the presence of an important countervailing consideration of the interest of the society in preventing the guilty from going unpunished. While emphasis of this fact may lead to abuse and a deprivation of the rights of the accused in circumstances where the risk of harassment is slight and that of improper acquittal is great, the state's interest in securing conviction should be given considerable weight.*<sup>30</sup>

While that may be so, it should be pointed out however, that any withdrawal, no matter for what purpose, that is not done before the accused enters his defence, should debar any subsequent prosecution. After all, it is better for ninety-nine guilty men to go unpunished than for one innocent man to be unjustly convicted.

It may be convenient to critics of this work to argue that an accused, whose trial was terminated by a nolle, had neither been tried to conviction nor acquittal. That argument may well be true in some cases but certainly not in cases, where the accused had entered his defence. To resolve this issue we must understand what is meant by a 'trial', In *Clarke & Anor. v. Attorney General of Lagos State*<sup>31</sup>, *Johnson CJ*, postulated:

*Experience of the practice and procedure in our courts and in fact in the law under which we practice in this country show that a trial is regarded as a complete trial when both parties are heard on the merits of the issues in dispute between them. It may also amount to a complete trial where a party with full opportunity to present its case fails in the course of the proceedings to do so and abandoned the continuance.*

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<sup>27</sup> *Downum v. The U.S. Op. cit* at 736

<sup>28</sup> *Green v. The U.S.. Op. cit.* 187-88

<sup>29</sup> See *Mayers and Yarbrough*, 'Bix Vexari, New Trials and Successive Prosecutions'.74 Harv. L.R 1960, p 1, 31.

<sup>30</sup> *Notes op cit* at 1274

<sup>31</sup> (1986) 1 QLRN 119.

It is difficult for me to see how an accused person, whose case has, for instance, been reserved for judgment, before a *nolle* is entered, can be said not to have been tried. It is my strong contention that the fact that the Supreme Court has held that the Attorney General has an unbridled power over public prosecution, does not mean that the court, while terminating the case, cannot examine the totality of the case with a view to determining the proper order to be made, nor is the Judge before whom the accused is again arraigned precluded from so doing. Thankfully *Clark's Case* is a touch - bearer in this regard. It was the view of *Johnson CJ* that:

*.... It may well be that in criminal trial, the prosecution calls some of its witnesses and is unable to, fails to call the rest and decides to withdraw from further prosecution or discontinues with the proceedings. In such a situation, the court has to examine the facts and circumstances of the proceedings and the events leading to the determination to determine whether or not an order of discharge amounts to an acquittal<sup>32</sup>.*

The Court should therefore, not abdicate its responsibility to the accused by succumbing to the ploys of the Attorney General. After all, the Supreme Court has held that:

*All powers to settle issues between the parties is vested in courts and courts must be vigilant that genuine issues and controversies are settled so that no accused person will be oppressed either directly or indirectly through acts of persecution in place of prosecution. It is for that reason that the accused person, despite the power to file indictment on an information, should not be indicted to face trial that from the outset, it was clear he should not face<sup>33</sup>.*

The above views crystallised in the case of *The State v. Edeki*<sup>34</sup>, where the accused were charged to the Chief Magistrate Court with the offences of breaking and entry with intent to commit felony contrary to *section 413 and 414* of the Criminal Code of Bendel State respectively. After the prosecution had called some witnesses, it applied to withdraw the case. The Chief Magistrate thereby acquitted the accused under *section 286* of the Criminal Procedure Law of Bendel state. The accused were again charged on the same facts, hence they applied to the High Court for the subsequent charge to be dismissed.

The court held that, it was apparent from the circumstances of the case, that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused had already been subjected to a trial and acquitted in an earlier case based on the facts as the present case, and dismissed the present charge.

Also see *Egbaji Ujah & 5 Others v. Attorney - General of Benue State & Anor*,<sup>35</sup> the facts of which are as follows. On the 18<sup>th</sup> day of January 1980, six applicants in this case, who were accused of conspiracy and culpable homicide were discharged by the Chief Magistrate Makurdi, on the instruction and advice of the Director of Public Prosecution. On 6<sup>th</sup> February 1980, the six applicants were joined by order of court as co – accused to another accused person at the High Court for trial of the same offence

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<sup>32</sup> *Ibid* at 122

<sup>33</sup> Per *Belgore JSC* in *Abacha v. The State* (2002) 11 NWLR (PT779) 437 at 484 –486.

<sup>34</sup> (1989) 1 CLRN 228

<sup>35</sup> (1982) 3NCLR 330.

.The application to join them emanated from the office of the Attorney General. Whereupon the applicants brought an application for a declaration that the defendants, under the Constitution of the Federal Republic of Nigeria 1979, do not have powers to prosecute the them, the first prosecution having been discontinued against them by the 1<sup>st</sup> defendant in the exercise of his powers under section 191(1)(c) of the said Constitution.<sup>36</sup>

Granting the prayers of the prosecution, *Idoko J*,

*The prosecution or withdrawal of prosecution must rest on the honest discretion of an Attorney General. He has his power to exercise under section 191 of the Constitution but a citizen has his right to personal liberty preserved in section 32(4) of the same constitution ....To hold a person to answer to what has not been shown to be more than mere suspicion, conjecture, rumour or empty prosecution for a homicidal or other infamous crimes robs section 32 of the Constitution of its protective efficacy to the ordinary citizen of this country. The Constitution has left the court as a bulwark of our liberties and the bastion to oversee and stave off any dangerous or unwarranted or stealthy encroachments*

The view taken above becomes more meaningful when it is understood that no constitutional provision should be construed in isolation of the other provisions of a constitutional document. After all, it is a basic rule of interpretation that statutory provisions should be construed conjointly rather than disjointly. This serves the end of balancing the various rights and liabilities created in such a statutory document so as to avoid a situation, where a particular provision plays the overlord over the others. This assertion has in no less a degree been stressed by the Court of Appeal, in *Onyewu v. K.S.M.C.*<sup>37</sup>, where the Court stated:

- ....
- (a) *the Constitution is an organic scheme of government to be dealt with as an entirety; a particular provision of the Constitution cannot be severed from the rest of the Constitution;*
  - (b) *the principles upon which the Constitution was established rather than the direct operation or literal meaning of the words used measure the purpose and scope of its provisions;*
  - (c) *words of the Constitution are not to be read with stultifying narrowness;*
  - (d) *constitutional language is to be given a reasonable constructions, and absurd consequences are to be avoided;*
  - (e) *constitutional provisions dealing with the same subject matter are to be construed together;*
  - (f) *seemingly conflicting parts are to be harmonised, if possible, so that effect can be given to all parts of the Constitution;*
  - (g) *the position of an article or clause in a Constitution influences its construction;*
  - (h) *where in their ordinary meaning, the provisions are clear and unambiguous, effect should be given to them without resorting to any external aid;*

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<sup>36</sup> The section is as replicated above.

<sup>37</sup> (2003) 10NWLR., Pt. 827, at 40.

- (i) *words of a Constitution may not be ignored as meaningless; some meaning or effect should be given to all the words used therein if it is possible to do so in conformity with the intention of the framers.*

Following this wise counsel, section 36(5) and (9) being as much Constitutional provisions as much as sections 174(1)(c) and 211(1)(c), cannot be subservient to the latter except the constitution expressly so provides. More importantly, it is clear that the drafters of the 1999 Constitution have the other related provisions of the Constitution at heart, hence they resisted the temptation of inserting a similar provision as that in section 73(3) of the CPA. The drafters of the constitution having so restrained themselves, the courts cannot read section 75(3)<sup>38</sup> of the CPA into sections 174 (1)(c) and 211(1)(c) of the constitution without offending the mandatory section 1(3) of the said Constitution. This view enjoys the support of Phil- Ebosie J, in *The State v. Ede and Ors*<sup>39</sup> where his Lordship said,

*...section 73 of C.P.O which provides for the power to enter a Nolle Prosequi by the Attorney –General specifically provided in subsection 3 of the said section that when a Nolle prosequi is entered the discharge of an accused shall not operate as a bar to any subsequent proceedings against him on account of the same facts. Subsection 1 provides that the Nolle Prosequi may be entered at any stage before the judgment. It follows that even where the Nolle Prosequi was entered after the close of the case for the prosecution a discharge of the accused consequent upon, cannot operate as a bar. Although it is provided in section 49 of the Constitution of Eastern Nigeria that discontinuance can be made any time before judgment, no similar provision as the one in subsection 3 of section 73 of the C.P.O. is made. It seems to me that in the absence of any statutory provision the law as stated in Nwali's case must apply in the case of discontinuance under the Constitution.*

In conclusion, it is of fundamental importance to say that the Attorney General has power to re-charge an accused after a nolle is entered only to the extent that he is permitted by the law and the rules of practice developed by the court. So long as the power he exercises is derived from the constitution, it is the duty of the court to make him respect the rights of an accused under sections 36(5) and (9) through a readiness to ensure that an accused person is not made to face a trial he should not face. More importantly, the court should extricate itself from the shadows of the common law by coming to the full realisation that it is nowhere said in the Constitution that a the termination of a charge by the Attorney General amount to a mere discharge as the Supreme Court would want us to believe in Ilori's Case.

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<sup>38</sup> The section provides that the termination of a charge by the Attorney General shall not operate as a bar to any subsequent proceedings.

<sup>39</sup> *Op. cit* P. 62