Confluence Journal

OF JURISPRUDENCE AND INTERNATIONAL LAW VOL. 5 NO. 2 2012

CONTRIBUTORS AND ARTICLES

A Publication of
THE DEPARTMENT OF
JURISPRUDENCE & INTERNATIONAL LAW,
FACULTY OF LAW, KOGI STATE UNIVERSITY, ANYIGBA.

CONFLUENCE JOURNAL OF JURISPRUDENCE AND INTERNATIONAL LAW

VOL.5 NO.2, 2012

This Journal may be cited as
CJJIL Vol.5 No.2, 2012

A PUBLICATION OF
THE DEPARTMENT OF JURISPRUDENCE & INT'L LAW,
FACULTY OF LAW, KOGI STATE UNIVERSITY,
ANYIGBA.

First Published 2008

Published by 08069314000, 07057776388

Note: The contents of the papers published are those of the individual author and do not necessarily reflect the opinion of members of the Editorial Board. While the contents of each article do not necessarily reflect those of the Journal Editors; individual authors are liable for the content of their papers.

ISSN: 2006-6899

The Limit of the Power of the Attorney General of the Federation in Criminal Prosecution

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INTRODUCTION

Nigeria criminal law is a product of her colonial master hence the present relationship between both legal system cannot be over emphasized. Essentially, Nigerian Law criminal Law derives basically from English Common Law. Therefore, the common law has played dominant role in the development of our criminal law. It is to be noted that the English Criminal Law found its sources from the case law; although, considerable references are made to statute.

In Nigeria criminal legal systems, the major sources of our criminal law are found in the statute as opposed to English law where the basic sources are in case law. Some of these enactments are mere skeleton and therefore remain redundant until life is breath into them by Courts of law. Essentially, offences under criminal law in Nigeria are basically two major categories, to wit the Federal and State offences respectively. Because of the peculiar nature of Nigeria, there are basically two major codes which are operating as our Criminal Law and Procedure in Nigeria. They are Criminal Code which is applicable in the Southern part of Nigeria and Penal Code which is applicable in the North. It is to be noted that almost all the states of Nigeria has enacted its own Criminal Law which is fashioned after Criminal Code or Penal Code depending on whether the state is Northern or Southern state of Nigeria.

Prior to the advent of the colonialist, there exists a local form of criminal legal system in each domain or territory of the entity known and called Nigeria. For example, in the Northern part where the larger populations are predominantly Muslim, Shariah law (Islamic Law) was the generally acceptable form of legal system which made adequate provision for criminal law. In fact, Shariah law is well organized in the North. One of the factors responsible for this is that it is codified. In the South, the Criminal Legal System is well managed by the custom of the prevailing community.

Every community has its own ways of life in a prescribed custom which is guided zealously by the appropriate authority within the given community and all these customs of every community make provision for consequences of any criminal act committed by an individual or group on individuals. To this end, Criminal Legal System may not be of relevance today in view of global interaction and technological advancement.

Suffice to say that since Nigeria embraces the British Criminal Legal System, most of the law governing Criminal procedure is fashioned after the British Criminal Legal System. In Nigeria, there are only four institutions or bodies that can institute criminal proceedings in a court established under any law except in court martial. They are:

(a) Attorney-General (Federal and State)
(b) The police
(c) Private persons
(d) Other Officers

Section 174 (1) of the 1999 constitution of the Federal republic of Nigeria (as amended) provides for Attorney General of the Federation thus:

"174 (1) The Attorney-General of the Federation shall have power
(a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly;
(b) To take over and continue any such criminal proceedings that may have been instituted by any authority or person and;
(c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person."

Section 211 (1) of the 1999 constitution provides for State Attorney General as follows:

(a) To institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-martial in respect of any offence created by or under any law of the House of Assembly.
(b) To take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
(c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

It is to be noted that the discretionary powers of the Attorney General of the Federation and State to commence criminal prosecution in their respective jurisdiction cannot be challenged in court. The full panel of Apex Court on the 25th February, 1983 delivered a judgment in the celebrated case of *The State v. Ilori*[1] where Hon. Justice Kayode Eso opined follows

> "The pre-eminent and incontestable position of the Attorney-General, under the common law, as the Chief Law Officer of the state either generally as a legal adviser or specifically in all court proceedings to which the state is a party, has long been recognized by the court. In regard to these powers, and subject only to ultimate control by public opinion and that of parliament or the Legislature, the Attorney General

[1] (1983) 1 SCNLR 92

has, at common law, been a master unto himself, law unto himself and under no control whatsoever, judicial or otherwise, vis-a-is his powers of instituting or discontinuing criminal proceedings. These powers of Attorney General are not confined to cases where the state is a party. In exercise of his powers to discontinue a criminal case or to enter a *nolle prosequi*, he extends this to cases instituted by another authority. This is a power vested in the Attorney-General by the common Law and it is not subject to review by any court of law. It is no doubt, a great ministerial prerogative coupled with grave responsibilities."[2]

Flow from above dictum of the Apex Court, it is the settled principle of law that the power of Attorney-General whether of state or of the Federation in criminal matter cannot be questioned even where it involved prosecution undertaken by private person. The exercise of this power was demonstrated by the then Attorney General of the Federation, Mr. Micheal Aondoaka when he discontinued the criminal proceedings against Orji Uzor Kalu and Jimoh Lawal as well as his refusal to prosecute the suspects in the Willbros, Halliburton and Siemens corruption scandals.

It is to be noted that the power of this Attorney General has been streamlined by the Constitution which empowers them:

(a) To institute and undertake criminal proceedings against any person before any Court of law in Nigeria, other that a court-martial, in respect of any offence created by or under any Act of the National Assembly (Underlined for emphasis)

While sub-section 3 is reproduced thus:

(3) In exercising his powers under this section, the Attorney General of the federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process. (Underlined for emphasis).[3]

Going by the above provisions of the 1999 Constitution as amended, it is a common ground that the power of Attorney –General of the Federation is limited only to offences created by or under an Act of the National Assembly without more. His power to institute, undertake, take over, continue, discontinue etc is only limited to offences created by the Act of the National Assembly.

The pertinent issue therefore is, can one then justify the involvement of Attorney General of the Federation in the case of *Chief Olabode George & Ors v. Federal Republic of Nigeria.*[4]

It is clear that Attorney –General of the Federation acted contrary to the provision of S. 177 (3) of the 1999 Constitution (as amended) which made it mandatory for the Attorney-General of the Federation to prevent abuse of legal process when it granted fiat to festus Keyamo to prosecute the accused persons in the case when the leading to the conviction of the accused persons are state offences.[5]

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[2] At page 106

[3] Section 174 (1) (a) and (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

[4] (2003) 10 NWLR (pt 1254)1

[5] See S. 104, 203 and 517 of Criminal Code, Cap 32 Laws of Lagos State, 1994 and S. 11 High Court Law of Lagos State.

The following points must be noted as a fall out abuse of the power of Attorney-General of the Federation in the case at hand.

(a) The Appellants were all charged under the criminal Code Laws of Lagos 1994.
(b) The charge at the lower Court was initiated by economic and financial crime Commission (EFCC) on the instruction of the Attorney-General of the Federation.
(c) Nigerian Port Authority where the alleged offences were said to have been committed is an agency of Federal Government.

The Appellant through their counsel raised a preliminary objection to the effect that the charges upon which they were convicted by the lower court were defective on the ground that they ought not to be tried under Lagos State Criminal Code but the Appellate Court ruled that the lower trial court has jurisdiction to try the matter and that the Appellants were properly charged and convicted as clearly defined by Lagos State Criminal Code. Further, the Appellants contested the fact that the Attorney-General of the Federation did not concede to the prosecutional powers of his office to the Attorney General of Lagos State bearing in mind that the Nigerian Port Authority is a Federal Government Agency but the Appellate Court held that Federal employers were not immune from the laws of the State they operate.

Furthermore, the Appellate Court ruled on the submission that the Appellants ought to have raised the issue of fiat at the lower court and that it is belated to raise the fact that the prosecutor did not attach fiat given to him by the Attorney-General of the Federation through the Attorney-General of Lagos to prosecute the Appellants.

It is settle law that where any other person other than the Attorney-General of the Federation or of a State is prosecuting a criminal case on behalf of any of the duo, the onus is on such person to show the delegation of authority. In other words, he should file the fiat as it was his obligation at the time the information was filed[6].

Therefore in the instant case, the failure of the prosecution to attach the fiat to the information is fundamental and it goes to the jurisdiction of the Court. It is trite law that the onus of prove in criminal matter is always on the prosecution[7]. If the prosecutor failed to attach the fiat upon which he prosecutes all the accused persons, then the proceeding is a nullity as the Exhibition of fiat of the prosecutor is a condition precedent to the initiation of the criminal proceeding[8]. Perhaps it is necessary to express that the above submission is without regard to the principle of delegatus non-protest delegare (a delegate cannot delegate his power)[9]. If the Attorney General of the federation has delegated his power under S. 174 of the 1999 Constitution (as amended)[9], the Attorney General of Lagos State ought to have prosecuted the accused persons himself as he cannot re-delegate same power to any other person.

The question for determination is if the basis upon which an act is done is faulty, then whatever thing done in pursuance of that act is a nullity and this goes to the jurisdiction of the court. Something cannot be put on nothing and you expect it to

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[6] Mike Amadi v. F.R.N (2008) 18 NWLR (pt. 1119) 259.
[7] S. 138 (1) of the Evidence Act; Duru V. State (1993) 3 NWLR (pt 281)283
[8] Madukolu v. Nkemdillion (1962) ALL NLR 564
[9] Huth v. Clarke (1890) 25 QBD 391

stand,[10] t is submitted that jurisdiction of the court can be questioned at any stage of the proceeding even for the first time on appeal[11].

Assuming without conceding the fact that the prosecution's failure to attach the fiat is not fundamental to the case of the Appellant, can Attorney-General of the Federation prosecute an offender who committed an act within the jurisdiction of the Federal enactment under a Sate enactment? The answer to that question is in the negative. The provision of Sections 174 and 211 of the 1999 Constitution (as amended) are very clear on the extent of the prosecutional powers of the Attorney-General be it Federal or State. The basis for enacting a Federal Statute has been defeated and this may lead to legislative rascality if the trial of an offence committed under Federal Legislation is conducted under the State law. The essence of a federation to my mind is deemed defeated and by provision of Section 150 of the 1999 Constitution (as amended), the Attorney-General of the Federation who is mandatory to be the Chief Law Officer of the federation should not be the one to break the law he has sworn to uphold.

CONCLUSION

The excessive use of power or abuse of the office of the Attorney-General should be checked in the interest of fairness, justice and true Federation. It stem from the fact that if too much power is arrogated into a single hand without check as in the case of Attorney-General's, it can lead to judicial hooliganism. The Attorney General's power or office should be subjected to check by other means otherwise, all the political enemies of the Federal Government in various states may be at the mercy of the Attorney-General of the Federation even where their respective state Government is not ready to prosecute them under their state laws.

Further, the prosecutional powers of the Attorney-General should be subject to judicial review because of the above stated reasons. Better still, the Attorney-General's power to institute or take over or discontinue criminal prosecutions instituted by some other person should only be exercised with the permission of court which, in deciding whether or not to grant permission, shall have regard to the public interest, interest of justice and the need to prevent abuse of legal process. If what is going on in *Bode George v. F.R.N*[12] is allowed to continue, it is definitely going to lead to conflict between the exercise of the power of Attorney General of the Federation and the Attorney General of the State who may want to exercise his/her power of *Nolle Prosequi* whereas the Attorney General of the Federation may be interested in the prosecution of the same accused person.

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[10] McFoy v. U.A.C. (1962) AC 150 AT 160; Skem Consult v. Vkey (1981) 1 SC 6; Oketade v. Adewumi (2010) 2 – 3 SC (PT 1) 140 AT 156

[11] State v. Onagoruwa (1992) 2 SCNJ 1 AT 9;