

IN THE FEDERAL COURT OF APPEAL
IN THE KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
14TH DAY OF JULY, 1978. FCA/K/3/78

BEFORE THEIR LORDSHIPS

M. NASIR, M. L. UWAIS, A. ADEMOLA, JJCA.

ABDULKADIR A. INDIERIYO APPELLANT

V.

THE STATE RESPONDENT

CRIMINAL LAW - Receiving gratification by a public servant - The nature of the offence - Calls for serious warning and corroboration before conviction.

CRIMINAL PROCEDURE - Identification of marked currency notes - Failure of the prosecution witness to identify them - Without any explanation - Is detrimental to the prosecution's case.

CRIMINAL PROCEDURE - Doubt - Created by lacuna in the prosecution's case and conflict in witnesses' testimonies - Should be resolved in the accused person's favour.

CRIMINAL PROCEDURE - Contradictions - Receiving gratification by a public servant - Failure to establish at what stage the money was received - Coupled with unresolved contradictions show that the conviction was wrong.

CRIMINAL PROCEDURE - Agent provocateur - Giving of gratification to a public servant - The giver in this case is not a victim but an agent provocateur.

CRIMINAL PROCEDURE - *Conviction - Substituting the appellant's conviction under another section of the Code - Cannot be done where the prosecution's evidence is inconclusive.*

EVIDENCE - *Conflict - In the evidence of prosecution witnesses - Explanation should be offered by the prosecution - And not the trial Judge.*

FACTS

Before the High Court Makurdi, the appellant was charged and convicted of the offence of a Public Servant taking gratification in respect of official act contrary to Section 115 of the Penal Code. The appellant was a member of a two-man Area Court before whom the PW1 was arraigned for the offence of stealing a duck. The PW1 claimed he met the appellant at Makurdi market and he asked the PW1 to bring N40.00 in order to avoid being convicted by the Area Court. PW1 reported the matter to the police C.I.D. He was able to raise only N20.00 in N10.00 and N5.00 denominations which were marked by the police. PW1 was accompanied by 4 policemen in mufti to the Area Court where it was alleged the appellant directed him to walk towards a particular road junction. Appellant later gave a newspaper to the PW1 in which the N20.00 was inserted and returned to the appellant.

Appellant was thereafter arrested by the policemen who took the newspaper from him. He was taken to the charge office where he was shown the N20.00 notes with the identification marks and was accused of taking gratification from PW1. The appellant made a statement to the police and denied the charge. The trial court convicted the appellant and sentenced him to 3 years imprisonment. Appellant has now appealed to the Court of Appeal relying on 2 grounds of appeal.

ISSUE FOR DETERMINATION

Whether the prosecution had established its case beyond reasonable doubt seeing that the evidence of the prosecution witnesses were unreliable.

HELD (Unanimously allowing the appeal per judgment delivered by UWAIS JCA)

Identification of marked currency notes

1. Surely the failure of P.W. 1 to identify the currency notes after describing them is detrimental to the prosecution's case. No explanation was given by P.W. 1 as to why he was unable to identify the currency notes. It was open to him to say that he was an illiterate and incapable of identifying or describing the marks placed on the notes but did not say so. (p. 281 G)

Conflict - In the evidence of prosecution witnesses

2. It is well established that where there is conflict in the evidence of prosecution witnesses such conflicts must be explained by the prosecution. There is a line of authorities on this point and Onubogu's case is one of them and this court has re-emphasized the law in a number of cases including Onobere Sunmonu v. The State FCA/K/7/77 and Abu Peter & Anor. v. The State FCA/K/11/77 (Judgments delivered on the 19th April, 1977 and 20th May, 1977 respectively). If a prosecution witness gives conflicting evidence it is the duty of the prosecuting counsel to ask the witness concerned for explanation. In this case had the prosecuting counsel asked p.w. 1 why he could not identify the currency notes he certainly would have proffered an explanation and the possibility exists that such explanation might be different from that which the learned trial judge gave. In our view therefore it is not the function of the trial judge to offer explanation for any discrepancy or contradiction in the evidence of prosecution witnesses. (p.281 H)

Receiving gratification - Calls for serious warning and corroboration

3. Furthermore, the nature of the offence of receiving gratification calls for warning before conviction. There is the need as a matter of practice for corroboration in material respect before a court could convict. (p. 282 D)

Doubt - Created by lacuna in the prosecution's case

4. In the present case, the appellant said he was not shown the money said to have been put in the newspaper until he was taken to the charge office, and even then not immediately on arriving at the charge office. This point was not given sufficient consideration by the learned trial Judge B and the evidence of the prosecution witnesses was silent in that respect. The money said to have been given to the appellant was not identified by the giver despite the identification marks said to have been given to the currency notes. There was an unexplained conflict in the testimony of C the prosecution witnesses (P.W. 1 and P.W. 3). All these put together should in our view have created serious doubt in the mind of the learned trial Judge. We are therefore of the view that the doubt should have been resolved in favour of the appellant and the learned trial judge erred in trying to explain the contradiction in the prosecution's evidence and there- D after convicting the appellant. The second ground of appeal therefore succeeds. (p. 282 E)

Failure to establish at what stage the money was received

E 5. The issue is at what stage was the money given and received by the appellant? Was it before or after he went to the office of the Local School Board? With respect, the point had been missed by the learned trial Judge. The fact that both p.w. 3 and p.w. 6 were close at hand to p.w. 1 most of F the time and attentively watching what was going on or happening should have enable them give the same evidence as p.w.1; but there was no such consistency. The contradiction remained unresolved throughout the trial. We do not therefore see how the appellant could have been rightly con- G victed on the totality of the evidence of the prosecution which is full of contradictions. (p. 283 H)

Agent provocateur - Giving of gratification

H 6. In our opinion although p.w. 1 was put in fear of being convicted of receiving stolen property and losing his job thereafter he could not be regarded as a victim, since the circumstances under which he said he gave the money to the appellant cannot be said to be as a result of the threat. The fear which the threat might have generated in him diminished

with his reporting the matter to the police see Salihu Hong. v. The State (1966) N.M.L.R. 248. He was not a victim, but an agent provocateur and therefore an accomplice R. v. Famugbo (1963) 2 ALL N.L.R. 142. The next question then is: could the evidence of p.w. 3 and p.w. 6 be said to have corroborated his evidence in respect of giving the money to the appellant? We do not think so, in view of the observation we already made in connection with the contradiction in the evidence of p.w. 1 and that of p.w. 3 and p.w. 6. Moreover, the money said to have been put in the envelope was not shown to the appellant on the spot he was said to have received it until he was taken to the police station. (p. 284 D)

Substituting the appellant's conviction

7. Mr. Ogiri asked us in the alternative to exercise our power under s. 20 (1) of the Federal Court of Appeal Decree, 1976 to substitute against the appellant a conviction of the offence of Public Servant receiving valuable things without consideration under s. 119 of the Penal Code. We are unable to do this since the evidence that the appellant received the money is inconclusive in view of the doubt raised by the contradictions in the evidence adduced by the prosecution. In the result the appeal succeeds and it is hereby allowed. (p. 284 H)

REPRESENTATION

M. OSUMAN FOR THE APPELLANT

A. OGIRI, PRINCIPAL STATE COUNSEL BENUE STATE FOR RESPONDENT.

CASES REFERRED TO

Onubogu v. The State (1974) S.C. 1

Summonu v. The State FCA/K/7/77

Idoma v. The State (1972) 1 S.C. 93

Hong v. The State (1966) N.M.L.R. 248

R. V. Famugbo (1963) 2 ALL N.L.R. 142

STATUTES REFERRED TO

Penal Code ss. 115, 119

Federal Court of Appeal Decree 1976 s. 20(1)

JUDGMENT OF THE COURT DELIVERED BY UWAIJCA

B The appellant was at the High Court, Makurdi charged and convicted of the offence of a Public Servant taking gratification in respect of official act, contrary to section 115 of the Penal Code and sentenced to three years imprisonment. He now appeals against the conviction.

C The facts as found by the learned trial Judge may be summarized as follows:- on 24th May, 1976 one Philip Attah (pw 1) saw a man pass by his house on the way to Makurdi Market. The man was holding a duck which he intended to sell. P.W.1 bought the duck from him for N2.50. After the man had disappeared, a woman called Hannah went to D the house of p.w. 1 and claimed the duck as hers. P.W.1 offered to give the duck to her if she would refund to him the amount he bought the duck. Both p.w. 1 and Hannah went to the Police Station to effect the settlement. At the Police Station Hannah said that she had no money to E pay to p.w. 1 but that she would give him the money after getting it from her husband later in the day. The duck was released to Hannah by p.w.1. The agreement reached at the police station was not honoured by Hannah and p.w. 1 went back to the police station to lodge a complaint against F her. Effort by the police to settle them failed and p.w. 1 was advised to report back to the police whenever he came across the man that sold the duck to him.

At about 6 a.m. on 25th May, 1976, p.w. 1 was arrested by the police and was taken before an Area Court, which consisted of two G members. The appellant was one of the members. P.W. 1 was released on bail after a complaint of stealing the duck was made against him. Thereafter p.w. 1 appeared on eight different days before the Area Court without a trial being held. On 17th July, 1976 when the case was still H pending before the Area Court, p.w. 1 by coincidence met the appellant in Makurdi Market. After the appellant bought a cutlass, he was accompanied to his house by p.w. 1 where the appellant said to p.w. 1 that although everyone knew that p.w. 1 was innocent of the offence alleged

against him, it was an offence against the law to buy things except in the open market. The appellant also said that if p.w. 1 got fined he would lose his employment with the Government. He asked p.w. 1 to bring to him N40 in order to avoid that.

On 19th July, 1976 P.W. 1 went to the Area Court at 8 a.m. as the case against him was due for hearing on that day but the court sent him away at 9.30 a.m. and he was threatened that his bail would be revoked. His surety pleaded on his behalf and although the case could have been heard on that day as previously fixed it was further adjourned. P.W. 1 endeavoured to raise the N40 demanded by the appellant. By 20th July, 1976 he was able to get only N20. He went to the C.I.D. and informed them of the demand the appellant made to him. He surrendered the N20 to the Police and the letter "s" was marked on the currency notes which consisted of one N10 and N5 denominations. The numbers on the currency notes were taken down before the notes were returned to him.

On 21st July, 1976 P.W. 1 accompanied by four policemen who were in mufti went to the Area Court. He entered the appellant's chambers. After he was rebuked by the appellant for not reporting on the previous day, P.W. 1 said he was able to raise only N20 instead of the N40 demanded. The appellant asked P.W. 1 to walk along the road leading to the High Court. P.W.1 was followed by the policemen and later the appellant joined him at a junction of the roads leading to the High Court and the Ministry of Justice. The appellant asked p.w. 1 to wait for him there while he (appellant) went to the High Court. Later the appellant came back to the junction along and gave to P.W. 1 a newspaper and asked him to put the N20 in the newspaper. At the material time the policemen were in the neighbourhood. P.W. 1 put the money in the newspaper and handed it back to the appellant, who on receiving the newspaper went to the Local Education Office leaving P.W. 1 at the junction. After sometime the appellant who was followed by a number of people came out of the Local Education Office and returned to where P.W. 1 was waiting. As he was walking away from the place and P.W. 1 was following him with a distance of about 20 feet between them, the policemen arrested the appellant and took from him the newspaper. Ap-

pellant was taken to the charge office where he was shown the N20 with the identification marks and was accused of taking gratification from P.W. 1. The appellant made a statement (exhibit 8) to the Police in which he said:

B *"It was when I was returning from the High Court, Markurdi; that I met the complainant at the junction of Ogiri Oko road and the Ministry of Education, Makurdi. The complainant asked me whether there is any good news in the paper I told the complainant that I have not read it. He then asked me "can I have it to read" I said "Yes" and gave it to him together with the leave forms I obtained from the High Court. I left the complainant and went into the office of the Local Education Board to see the Chairman. I did not see him on seat and I came out. When I came out I met three of my brothers, namely Pius Azongo and two others*
 C *whose names I do not remember. When we reached where the complainant is, he (complainant) handed my paper back to me. I took it and held it in my hand As we reached the tarred road i.e. Ogiri road, one man came and told me that I was under arrest."*
 D

E At the close of the case for the prosecution the appellant testified and denied having any monetary transaction with P.W. 1.

Two grounds of appeal were filed with the notice of appeal and we granted leave to the appellant to file and argue two other additional
 F grounds of appeal. The second original ground and the first additional ground were abandoned by the learned counsel for the appellant so that in effect the following were argued -

1. *"That the decision of Trial Court was unreasonable unwarranted having regard to the evidence adduced before it."*
- G 2. *"The Learned Trial Judge erred in law and on the facts in holding that the prosecution had established its case beyond reasonable doubt when the evidence of P.W. 1 and other prosecution witnesses was clearly unreliable and fall short of the standard required to establish proof of*
 H *guilt in a Criminal Trial."*

Ground of appeal No. 2 was the first to be argued by Mr. Osuman the learned counsel for the appellant. He referred to the testimony of P.W. 1 who said that lines instead of letter "s" were marked on the cur-

rency notes, and who eventually was unable to identify the currency notes (exhibits 3, 4 & 5) which he said he put in the newspaper. Although P.W. 1 said he could identify the newspaper (exhibit 6) he was unable to do so when it was shown to him. P.W. 1 did not say why he was unable to identify either the currency notes or the newspaper. The learned counsel also drew our attention to the evidence of Edwin Aboh, P.W. 3, who said that he marked each of the currency notes with the letter "S" above the water mark and he did this with a blue biro. He therefore submitted that the evidence of P.W.1 is contradictory and also conflicts with the evidence of P.W. 3 and further argued that since no explanation was given for the contradiction and the conflict the learned trial judge was wrong in supplying the explanation. He cited Onubogu v. The State (1974) S.C. 1 at 18 to show that the trial judge erroneously made the remark that "P.W. 1 had already stated his own position as being illiterate; neither being able to read nor write. That he saw the police 'put some identifying lines down below it' is in my view, the nearest and best description of what he saw P.W. 3 do. After all, the writing of the letter "S" is the drawing of lines made either in one single or two separate but linked loops."

In reply Mr. Ogiri, the learned Principal State Counsel conceded that there are contradictions in the evidence of the prosecution witnesses but then contended that the contradictions are not material as they do not go to the root of the case against the appellant. We are unable to agree with the learned Principal State Counsel. The question of giving to the appellant as well as his receiving the money is very important to the case for the prosecution, for they are bound to prove their case beyond any reasonable doubt. **Surely the failure of P.W. 1 to identify the currency notes after describing them is detrimental to the prosecution's case. No explanation was given by P.W. 1 as to why he was unable to identify the currency notes. It was open to him to say that he was an illiterate and incapable of identifying or describing the marks placed on the notes but did not say so.** This brings us to the issue of contradiction between the evidence of p.w.1 and p.w. 3. **It is well established that where there is conflict in the evidence of prosecu-**

tion witnesses such conflicts must be explained by the prosecution. There is a line of authorities on this point and Onubogu's case is one of them and this court has re-emphasized the law in a number of cases including Onobere Sunmonu v. The State FCA/K/7/77 and Abu Peter & Anor. v. The State FCA/K/11/77 (Judgments delivered on the 19th April, 1977 and 20th May, 1977 respectively). If a prosecution witness gives conflicting evidence it is the duty of the prosecuting counsel to ask the witness concerned for explanation. In this case had the prosecuting counsel asked p.w. 1 why he could not identify the currency notes he certainly would have proffered an explanation and the possibility exists that such explanation might be different from that which the learned trial judge gave. In our view therefore it is not the function of the trial judge to offer explanation for any discrepancy or contradiction in the evidence of prosecution witnesses.

Furthermore, the nature of the offence of receiving gratification calls for warning before conviction. There is the need as a matter of practice for corroboration in material respect before a court could convict. In the present case, the appellant said he was not shown the money said to have been put in the newspaper until he was taken to the charge office, and even then not immediately on arriving at the charge office. This point was not given sufficient consideration by the learned trial Judge and the evidence of the prosecution witnesses was silent in that respect. The money said to have been given to the appellant was not identify by the giver despite the identification marks said to have been given to the currency notes. There was an unexplained conflict in the testimony of the prosecution witnesses (P.W. 1 and P.W. 3). All these put together should in our view have created serious doubt in the mind of the learned trial Judge. We are therefore of the view that the doubt should have been resolved in favour of the appellant and the learned trial judge erred in trying to explain the contradiction in the prosecution's evidence and thereafter convicting the appellant. The second ground of appeal therefore succeeds.

With regard to the general ground of appeal, learned counsel for the appellant referred us to a further contradiction between the testimony of P.W.1 on one hand and that of P.W. 3 and P.W. 6 on the other. He pointed out that while p.w.1 said he put the money in the newspaper and gave the newspaper back to the appellant before the appellant went to the Office of Local School Board; p.w. 3 and p.w. 6, who were said to be not far from where p.w. 1 gave the newspaper to the appellant, said that it was after the appellant came out of the office that the money was put in the newspaper and the newspaper handed over to him. In addition P.W 6 even said that one of the currency notes dropped from the newspaper when it was in the possession of p.w. 1 as he was putting the money in the newspaper, p.w. 1 knelt down and picked the note. However, neither p.w. 1 nor p.w. 3 made reference to that incident in their evidence. Mr. Osuman then drew our attention in that respect to the observation made by the learned trial judge where he said as follows:-

"There is one point of contradiction in the evidence of p.w. 3 and p.w. 6 on the one hand and p.w. 1 on the other which I feel deserves mention. While p.w. 3 and p.w. 6 from their respective positions gave an evidence (sic) that accused left exhibit 6 with p.w. 1 to put in it Exhibits 3, 4 and 5 and that accused after going into the L.S.B. office returned to take exhibit 6 with the money in it, p.w. 1 from whom accused took the money deposed that on accused giving his exhibit 6, he put exhibits 3, 4 and 5 into it and accused went along with it into the L.S.B. office and returned soon after to speak to him that he (p.w. 1) should endeavour to produce the balance of N20. of the N40 he had earlier demanded. This conflict in evidence I do not regard as fatal to the case since it is in evidence that a gathering of people of considerable magnitude was at the point of the offence, p.w. 3 was at the commander's Guest House about a pole remove from accused and p.w. 1 while p.w. 6 was also away some distance from them too." (Underlining ours).

The learned counsel for the appellant then submitted that the conflict was not resolved by the learned trial judge. We think there is substance in the submission. **The issue is at what stage was the money given and received by the appellant? Was it before or after he went**

to the office of the Local School Board? With respect, the point had been missed by the learned trial Judge. The fact that both p.w. 3 and p.w. 6 were close at hand to p.w. 1 most of the time and attentively watching what was going on or happening should have enable them give the same evidence as p.w.1; but there was no such consistency. The contradiction remained unresolved throughout the trial. We do not therefore see how the appellant could have been rightly convicted on the totality of the evidence of the prosecution which is full of contradictions.

The point was raised suo motu by us as to whether p.w. 1 was an accomplice and if he was, whether there was corroboration of his evidence. Mr. Ogiri contended that on the authority of Idoma & Anor. v. The State (1972) 1 S.C. 93 he was not an accomplice but a victim, and that if he were an accomplice his evidence was corroborated by that of p.w. 3 and p.w. 6 and exhibits 3, 4, 5 and 6. In our opinion although p.w. 1 was put in fear of being convicted of receiving stolen property and losing his job thereafter he could not be regarded as a victim, since the circumstances under which he said he gave the money to the appellant cannot be said to be as a result of the threat. The fear which the threat might have generated in him diminished with his reporting the matter to the police see Salihu Hong. v. The State (1966) N.M.L.R. 248. He was not a victim, but an agent provocateur and therefore an accomplice R. v. Famugbo (1963) 2 ALLN.L.R. 142. The next question then is: could the evidence of p.w. 3 and p.w. 6 be said to have corroborated his evidence in respect of giving the money to the appellant? We do not think so, in view of the observation we already made in connection with the contradiction in the evidence of p.w. 1 and that of p.w. 3 and p.w. 6. Moreover, the money said to have been put in the envelope was not shown to the appellant on the spot he was said to have received it until he was taken to the police station.

Mr. Ogiri asked us in the alternative to exercise our power under s. 20 (1) of the Federal Court of Appeal Decree, 1976 to substitute against the appellant a conviction of the offence of Public

Servant receiving valuable things without consideration under s. 119 of the Penal Code. We are unable to do this since the evidence that the appellant received the money is inconclusive in view of the doubt raised by the contradictions in the evidence adduced by the prosecution.

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In the result the appeal succeeds and it is hereby allowed.
The appellant is acquitted and discharged.

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