

IN THE FEDERAL COURT OF APPEAL
ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU
15TH JANUARY, 1979. FCA/E/34/78

CORAM:- M. NASIR PCA, B. O. KAZEEM, D. G. DOUGLAS, JJCA

USEN FRIDAY EKPO APPELLANT

V.

FEDERAL REPUBLIC OF NIGERIA RESPONDENT

APPEALS - Evidence that should have been excluded - Appellate court must consider what reliance was placed on that evidence - And whether the trial judge would have come to the same conclusion - If that evidence had not been erroneously put in.

CRIMINAL PROCEDURE - Counterfeit currency - Burden of proof - In an offence under section 5 (2) of the Counterfeit Currency (Special Provisions) Decree 1974 - Shifts where the appellant had ten or more counterfeit notes - And the burden was not discharged in the present case.

CRIMINAL PROCEDURE - Trial - Confessional statement - Objected to as not voluntary - The correct procedure is for the trial judge to hear evidence - To prove the voluntariness or otherwise of the confession.

EVIDENCE - Admissibility - Of confessional statement - Where the appellant was not represented by counsel - A trial judge has a duty to consider the issue of admissibility - But where represented by counsel - Regularity should be presumed - Unless objection is raised by counsel.

FACTS

The appellant was charged in the Federal Revenue Court, Calabar with the offence of uttering two counterfeit Nigerian Bank Notes and being in possession of eighteen counterfeit Nigerian Bank Notes contrary

to section 5(1) (a) and (b) of the Counterfeit Currency (Special Provisions) Decree 1974 - The appellant who was a revenue clerk collected some money as revenue which he paid to the cashier, P.W.2, who after counting the money, took the money to the sub - Treasurer, P.W.1. When P.W.1 was counting the money he pulled out two N10 notes and put them aside. Both P.W.1 and P.W.2 agreed that the two notes were counterfeit, and as a result the appellant was sent for and shown the two counterfeit notes. He agreed they were counterfeit and admitted that it was his fault to accept counterfeit notes.

The matter was subsequently reported to the Police. On receipt of the report the police executed two search warrants in the house of the appellant and that of P.W.2. An open envelope containing eighteen N10 notes (Exhibits "C" - "C17") and some other documents belonging to the treasury were found in the appellant's house. While nothing incriminating was found in the house of P.W.2. On examination of Exhibit "C" - "C17" it was found that they too, were counterfeit and also bore the same number, as exhibit "A" and "A1". At the police station the appellant made a confessional statement. This statement was objected to by learned counsel for the appellant on the ground that it was not voluntary and the appellant was forced to sign it. The court ruled, without holding a trial-within-trial, that the statement was admissible and it was admitted as Exhibit "F". At the trial the defence put up by the appellant was that the money was planted on him by an Ubiom man, the Police, and P.W.1. He was tried and convicted on both counts. Being dissatisfied with the conviction, the appellant appealed to the Court of Appeal, Enugu Division.

ISSUE FOR DETERMINATION

Whether it was proper for the learned trial judge to have admitted Exhibit 'F' - confessional statement - and relied on it in his judgment when it was objected to as not voluntarily made without hearing other evidence to show that it was voluntary.

HELD (Unanimously dismissing the appeal per judgment delivered by **NASIR, PCA**)

Admissibility of confessional statement

1. A trial Judge has a duty to consider the issue of admissibility of a confession particularly where the appellant was not represented by counsel. Where the appellant was represented by counsel regularity should be presumed in respect of a confession which is prima facie admissible unless any objection is raised by counsel. (P. 673 F)

Confession objected to as not voluntary

2. The correct procedure was for the learned trial Judge to consider the objection of learned counsel by hearing whatever evidence was available to prove the voluntariness or otherwise of the confession. (P. 674 G)

Evidence that should have been excluded

3. The procedure followed by the learned trial Judge was improper and the admission of Exhibit "F" was itself improper and without foundation. We therefore hold the view that Exhibit "F" should have been excluded. The issue is what effect the expunging of Exhibit "F" has in this case. In the case of R. v. Onabanjo and R. v. Kassi and Ors. (above) the approach by the court was to consider whether the appellant was prejudiced in the light of the irregularity and the appeal was to be allowed only if there was actual prejudice to the appellant. The question we must however also consider was what reliance the learned trial Judge placed on the expunged evidence and as to whether we can, in the light of the evidence available, conclude that the learned trial Judge must have come to the same conclusion if that evidence had not been erroneously put in. (p. 675 D)

Counterfeit currency - Burden of proof

4. In rejecting this ground of appeal, we would wish to refer to section 5(2) of the Counterfeit Currency (Special Provisions) Decree 1974 (No. 22 of 1974) under which Decree the appellant was charged as to the shifting of the burden of proof where the appellant had ten or more counterfeit notes as in this case. We are of the opinion that the appellant had not discharged this burden in the present case. (p. 677 B)

NOTABLE POINT OF INTEREST

NASIR PCA

1. Statement from the bar in a criminal case.

In a criminal case, statement from the bar even if agreed to by both
B counsel for the prosecution and for the defence, cannot take the place of
evidence to be given by witnesses. (p. 675 B)

REPRESENTATION

C A. Ekong Bassey for appellant
Ben Nwazojie, Federal D.D.P.P for Respondent

CASES REFERRED TO

R. v. Igwe (1960) 5 F.S.C. 55 at 56
D R. v. Onabanjo 3 W.A.C.A. 43
R. v. Kassi 5 W.A.C.A. 154
The Queen v. Igwo (1960) 5 F.S.C. 55
The Queen v. Thomas (1958) 3 F.S.C. 8
E Egbe v. The King XIII W.A.C.A. 105

STATUTES REFERRED TO

Counterfeit Currency (Special Provisions) Decree, 1974 s. 5 (1)(a) and
F (b)
Evidence Act, section 226
Criminal Procedure Act, Section 165

JUDGMENT DELIVERED BY NASIR PCA

G The appellant was charged in the Federal Revenue Court, Calabar, with the offence of:-

(a) Uttering two counterfeit Nigerian Bank Notes (of N10 each)
to Mr. Aniebok, knowing them to be counterfeit, and
H (b) being in possession of eighteen counterfeit Nigerian Bank
Notes (of N10 each) knowing them to be counterfeit

Contrary to section 5(1) (a) and 5(1) (b) respectively of the
counterfeit currency (Special Provisions) Decree 1974.

He was tried and convicted on both counts by Ekukinam Bassey J. on the 5th day of September, 1977. Being dissatisfied with the conviction, the appellant appealed to this Court. The appellant filed one ground of appeal together with his notice of appeal. Learned counsel for the appellant prayed for and was granted leave to argue six additional grounds of appeal which were then renumbered as Nos. 2 to 7. B

The facts in this case are simple and straightforward. The appellant was, in February 1976, a revenue clerk employed in the Ministry of Finance Etinan, Cross River State. On the 11th day of February, 1976 he collected some money as revenue which at the end of the day he paid to the Cashier one Kenneth James Aniebok, P.W.2, who, after counting the money, took the money to the Sub-Treasurer, Okon Etokudo, P.W.1. When Mr. Etokudo was counting the money he pulled out two N10 notes and put them aside. Both Mr. Etokudo and P.W.2 agreed that the two notes were counterfeit, and as a result, the appellant was sent for and shown the two counterfeit notes. He agreed they were counterfeit. He was then asked how the counterfeit notes came into Government Revenue. The appellant said that he collected one N10 note from an Etinam man and thirteen N10 notes from an Ubiom man. The appellant admitted that it was his fault to accept counterfeit notes and asked for permission to run out for genuine notes to replace the bad ones, which he did. The appellant suggested that they should go to trace the Ubiom but the Sub-Treasurer refused and said that it was the work of the Police. He therefore, together with the appellant and P.W.2, went and reported the matter to the Police and handed over the two counterfeit notes (Exhibits "A" and "A1") and the two genuine notes (Exhibits "B" and "B1") to the Police. D E F

On receipt of the report the Police obtained two search warrants (Exhibits "D" and "E") and went to search the house of the appellant and that of P.W.2. The search party, consisting of an Inspector and two constables, entered the room of the appellant. The appellant also went in. In the room an open envelope containing eighteen N10 notes (Exhibits "C" - "C17") and some other documents belonging to the Treasury were found. These were entered on the back of the search warrant (Exhibit "D"). The party then moved to the house of P.W. 2 and using G H

another search warrant (Exhibit "E") the house was searched and nothing incriminating was found. The party then went to the Police Station.

At the Police Station the appellant made a statement which was recorded by a constable Asuquo Johnson. This statement was objected to by learned counsel for the appellant on the ground that it was not voluntary and the appellant was forced to sign it. It was further objected to on the ground that the "only person to testify for the voluntariness of the statement was Asuquo Johnson" who was not called. The Court ruled, without holding a trial-within-trial, that the statement was admissible and it was admitted as Exhibit "F".

On examination of Exhibit "C" - "C17" it was found that they, too, were counterfeit and also bore the same number, DA/70 617431, as exhibit "A" and "A1". Both Exhibits "A" and "A1" and Exhibit "C" - "C17" were parcelled up and sent to the Central Bank of Nigeria, through the Counterfeit Investigation Officer, C.I.D., Lagos. The result of the expert examination was returned on 10th May 1976, (Exhibit "H") and a copy was served on the appellant (Exhibit "H1"). This confirmed that Exhibits "A" and "A1" and "C" - "C17", bearing the same number were all counterfeit.

The appellant's disputed statement, Exhibit "F" included the fact that he accepted the fault of putting Exhibits "A" and "A1" in government revenue as he was the revenue collector and he brought Exhibits "B" and "B1" to replace the counterfeit. In respect of Exhibit "C" - "C17" the appellant said in the statement that: -

"During a search in my house the sum of ten Naira notes numbering eighteen were found in my house. They were all counterfeit I am the owner of the eighteen ten Naira Notes -counterfeit with which the police found in my house."

At the trial the defence put up by the appellant was that he suspected the Ubiom man in respect of Exhibit "A" and "A1". In respect of Exhibit "C" - "C17" he suspected the person who produced the key to his house. He also said that he did not search the police man. He also suspected P.W.1 as he (p.w.1) went away with his car when they were at the Police Station. The defence was that the money was "planted" by

these people he suspected as he had previous quarrels with all of them. The appellant said that in respect of Exhibit "F" what he told the police was that he knew nothing about the things removed from his house but the police wrote differently. He further testified that he was not allowed to read the statement and that he signed the statement under duress in B that he was starved from 11th February to 14th February, 1976. These are the main facts and other facts will be considered where appropriate.

Learned counsel for the appellant abandoned the first ground of appeal. This was the general ground. There was therefore no appeal C against the findings of fact on the evidence. The ground dealing with contradiction in evidence was also not argued. The second ground of appeal reads:-

"2. The Learned Trial Judge erred in law in admitting Exhibit D "F" and relying on it in his judgment when it was not proved affirmatively to the Court that Exhibit "F" was a voluntary statement made b the Defendant."

The submissions made were that when Exhibit "F" was tendered by the prosecution it was objected to on the ground that it was not voluntarily E made by the appellant and this objection should have been considered and decided upon after a trial-within-trial before the admission of the statement in evidence. It was further submitted that, with or without objection from the defence, it was the duty of the Court to consider F whether the statement was admissible or not. Reliance was placed on R. v. Igwe (1960) 5 F.S.C. 55 at 56. We are of the opinion that there is some substance in the submission of learned counsel. We agree that a **trial Judge has a duty to consider the issue of admissibility of a confession particularly where the appellant was not represented by G counsel. Where the appellant was represented by counsel regularity should be presumed in respect of a confession which is prima facie admissible unless any objection is raised by counsel.**

In R. v. Onabanjo, 3 W.A.C.A 43 an objection was taken when the state- H ment made by the appellant was being admitted on the ground of inducement and duress. The trial court did not admit the statement in evidence until after the appellant himself had given evidence. The West African

Court of Appeal said:-

"There can be no doubt that when the question of the admissibility of the statement was raised, the trial Judge should have then, after hearing evidence from both sides upon the point, if tendered, ruled on the admissibility of the statement."

The Court had therefore to consider whether the appeal should be allowed on account of that irregularity."

The Court finally decided that:-

"In all the circumstances this Court is of the opinion that the appellant has suffered no prejudice"

The appeal was not allowed on the irregularity. Again in R. v. Bana Kassi and others 5 W.A.C.A. 154 an objection was made as to the admissibility of certain statements made by some of the appellants. The trial Judge admitted the statements "temporarily pending evidence as to the facts alleged". The West African Court of Appeal held:-

"If on the tendering of any evidence an objection is taken which raised an issue of fact the correct procedure is for the court to resolve that issue of fact before deciding whether the evidence should be admitted or not."

The Court concluded that in the circumstances of the case the appellants were not prejudiced. In an obiter dictum in The Queen v. Nwango Igwo (1960) 5 F.S.C. 55 The Federal Supreme Court held that:-

"It is now too late to question the rule whether voluntariness or otherwise of a confession must be decided by the Judge before its admission even where the Judge of this country have applied that rule for many years."

It seems clear that **the correct procedure was for the learned trial Judge to consider the objection of learned counsel by hearing whatever evidence was available to prove the voluntariness or otherwise of the confession.** The learned trial Judge did consider the issue and gave his ruling after listening to submissions made by counsel on both sides. He ruled that Asuquo Johnson, the constable who actually cautioned and recorded the statement of the appellant had been dismissed and all efforts to trace him had failed. He further ruled that PC Lekan

P.W. 3 was competent to give evidence that the appellant "was cautioned and he volunteered a statement" as p.w. 3 was present throughout when the appellant was cautioned and the statement recorded. We are of the opinion that the learned trial Judge was in error in at least two respects. Firstly, there was no lawful evidence before him that Asuquo Johnson B could not be traced. The only information before him was a statement by learned counsel for the prosecution that the witness could not be traced. In a criminal case, statement from the bar even if agreed to by both counsel for the prosecution and for the defence, cannot take the place of evidence to be given by witnesses. Secondly, whether Asuquo Johnson could not be traced or not was not conclusive as to the issue whether the statement was voluntary or not. Asuquo Johnson was, no doubt, a very important witness on the issue but his absence could not conceivably justify the admission of the statement which was objected to D on the ground of lack of voluntariness without calling other evidence to show that it was voluntary. In the case before us, we are of the opinion that **the procedure followed by the learned trial Judge was improper and the admission of Exhibit "F" was itself improper and without foundation.** We therefore hold the view that **Exhibit "F" should have been excluded.** E

The issue is what effect the expunging of Exhibit "F" has in this case. In the case of R. v. Onabanjo and R. v. Kassi and Ors. F (above) the approach by the court was to consider whether the appellant was prejudiced in the light of the irregularity and the appeal was to be allowed only if there was actual prejudice to the appellant. The question we must however also consider was what reliance the learned trial Judge placed on the expunged evidence and as to G whether we can, in the light of the evidence available, conclude that the learned trial Judge must have come to the same conclusion if that evidence had not been erroneously put in. In The Queen v. Olubunmi Thomas, (1958) 3 FS.C. 8 the conviction of the appellant H was quashed on a previous trial on the ground that inadmissible evidence given by one Mrs. Ademiluyi had been admitted. A retrial was ordered. The second trial court still admitted the evidence of Mrs. Ademiluyi and

it was used by the trial Judge in convicting the appellant. The Federal Supreme Court held in allowing the appeal:-

"The question which must be posed therefore is, would the learned trial judge have reached the same decision if the inadmissible evidence had not been admitted ? It is impossible for us to say what effect the evidence may have had on the mind of the learned trial Judge and although we think that there was sufficient evidence without the inadmissible evidence to convict the appellant, we cannot say with certainty that the learned trial judge must inevitably have come to the same conclusion."

We must consider in the light of the above and in the light of Section 226 of the Evidence Act what effect the offending Exhibit had. The learned trial Judge quoted two passages from Exhibit "F" and compared Exhibit "F" with the evidence of the appellant on oath. He concluded that:-

"I do not believe his evidence in witness box but accept that what he told the police in his statement was the correct version."

It is pertinent to note that before Exhibit "F" was recorded the appellant had already admitted to P.W.1 and P.W. 2 that it was him who handed over Exhibits "A" and "A1" to P.W.2 and that when the appellant's house was searched Exhibits "C" - "C17" were found in his bedroom and in his presence. It was not disputed also that both Exhibits "A" and "A1" and Exhibits "C" - "C17" bore the same number. The confession by the appellant in Exhibit "F" seemed to be only a confirmation of what the appellant had previously admitted or what was in fact found. Unless the finding of fact was challenged and proved wrong, the statement Exhibit "F" could not be said to have added any significant evidence for the prosecution. The coherent evidence given by the prosecution witnesses and accepted by the learned trial Judge leaves us in no doubt that with or without Exhibit "F" the conviction of the appellant would have been the result of the trial. The counterfeit notes found in the Treasury agreed with those found in the house of the appellant. He half-heartedly, and no doubt as an after-thought as found by the learned trial Judge, accused almost everybody who was around with complicity in his effort to justify

an inference that the Ubiom man could have been acting in concert with either P.W.1 or the person who handed over the key of the house. These were people with no possible link whatever. The learned trial Judge had, in our view, taken up all these issues, considered them and concluded that the appellant was a liar and the prosecution had proved the two counts beyond reasonable doubt. **In rejecting this ground of appeal, we would wish to refer to section 5(2) of the Counterfeit Currency (Special Provisions) Decree 1974 (No. 22 of 1974) under which Decree the appellant was charged as to the shifting of the burden of proof where the appellant had ten or more counterfeit notes as in this case. We are of the opinion that the appellant had not discharged this burden in the present case.** This ground of appeal fails.

The third ground of appeal complained that:-

"The learned trial Judge erred in law and in fact when he relied on Exhibits "A: - "A1" and "C" - "C17" as the counterfeit notes sent out for analysis and referred to in Exhibits "H" and "H1".

The particulars of error and the arguments of learned counsel were to the effect that there was a broken chain in the transmission and return of the exhibits from Etinan Police to the Central Bank of Nigeria, Lagos. This submission was because the witness had said that he sent the exhibits to the Central Bank and did not say that he sent them specifically through the C.I.D. Lagos; but from all the exhibits tendered it was clear that Exhibits "A" - "A1" and "C" - "C17" were parcelled and conveyed to Lagos under a covering letter to the Counterfeit Officer, C.I.D. Lagos who in turn wrote his own covering letter and passed the parcel containing the exhibits to the Central Bank. These counterfeit notes had identification numbers and could not have been mixed up with other notes from other places. They were in fact the same notes sent and returned. This ground, in our opinion, has no substance and it fails.

The fourth ground of appeal was that the learned trial Judge failed to hold that the prosecution's case was based on suspicion. The submission was that Exhibit "A" and "A1" could have been put into money collected by the appellant by some other person, such as P.W.1 or P.W.2, and therefore there was no such certainty as required in cases of this

nature. Reliance was placed on Hycienth Egbe v. The King XIII W.A.C.A. 105. We do not think that this case applied. It was a case where the judge himself said that the Criminal law of Evidence was based on probabilities and on these probabilities the appellant in that case was convicted of murder. We are satisfied that in the case in hand, the learned trial Judge assessed the evidence before him and reached his decision on evidence which he rightly found to be beyond reasonable doubt. There was no basis whatever to support this submission.

The fifth ground of appeal was in respect of the leave to amend the charge given to the prosecution after the close of the prosecution's case and after address by learned counsel for the appellant. The complaint was not that leave to amend was given but that the appellant was not asked, as required by section 165 of the Criminal Procedure Act, whether he wishes to recall" any of the prosecution's witnesses and to ask the appellant only whether he wished to "call" witnesses was not enough. We do not think that this ground has any substance. The learned counsel deliberately refused to come to court on the day the order to amend was made but sent in a letter requesting the case to continue. Secondly, we are of the opinion that by asking the appellant whether he wanted to call any witness the appellant could have requested for permission to call or recall any witness if it was his desire to do so. We cannot conceivably see what would have justified the recalling of any witness nor were we told of any such witness who might have been recalled. The purport of the amendment was to correct what had been described as a typographical error by substituting "(a)" for "(b)" and vice versa in the two counts. Not a single word in the wording of in the two counts was altered. We are of the opinion that the appellant was not in the least prejudiced and there was no miscarriage of justice.

The sixth ground of appeal was half-heartedly argued. The main complaint was that Asuquo Johnson was not called and it was he who recorded the statement, Exhibit "F". It was further complained that the Judge was wrong to conclude tat the prosecution was not bound to call all witnesses. This complaint was as mischievous as it was unreasonable. The evidence of Asuquo Johnson would have been, no doubt,

against the appellant. The defence elicited under cross-examination that Asuquo Johnson had been dismissed from the Police because the father of the appellant gave him money to destroy exhibits. The defence were in as much a good position to know why he was not around. This ground fails.

B

Learned counsel said that ground seven had been covered by his argument in the sixth ground. The blunt fact is that this ground which complained of contradictions in evidence could not be substantiated by counsel. It lacks merit and we reject it.

C

In conclusion, we are of the opinion that this appeal must fail and it is hereby dismissed. We affirm the conviction and sentence passed by the learned trial Judge.

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