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O. O. NOEL ESQ. Chief Editor

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CRIMINAL LAW

THE DEFENCE OF HONEST CLAIM OF RIGHT

Stephen Nwakire v. The Commissioner of Police has now provided the Supreme Court an opportunity to fully examine the application of the defence of honest claim of right. In applying the defence lower courts have often been influenced one way or the other by the reasonableness or unreasonableness, the lawfulness or unlawfulness of the defendant's conduct. This has resulted in divergent judicial decisions on the subject.

In this case, the appellant had filed a suit in the High Court claiming ownership of a piece of land. While the suit was pending, the complainant who also claimed ownership of the land erected some poles on it to connect electricity from a generator to his house while he was performing a funeral ceremony. After the ceremony the complainant refused to remove the poles when requested to do so by the appellant. The appellant then removed the poles himself. He was convicted of malicious damage to property by the trial Chief Magistrate. He took the view that if the poles had been tolerated by the appellant for about ten months while they were on the land, he did not tell the court "what was the immediate act of trespass that provoked him into doing the alleged damage". He held that the appellant acted in bad faith.

The appellant's appeal to the High Court failed because in removing the poles "he showed scant respect of law and order."

The Court of Appeal, Enugu Division (Uwaifo JCA dissenting) upheld the decisions of the lower courts. It held that the appellant must have known that the procedure adopted by him was wrong. "Having taken the dispute to court, the appellant should have awaited the result of the litigation and the appropriate order before taking any further step. He had no right to take the matter into his own hands once the court was seized of it".

The appellant's defence failed in all three courts because his conduct was considered either unlawful or unreasonable in the circumstances. Most courts find it difficult to uphold the defence if the defendant's manner of asserting his claim is improper.²

After examining relevant authorities, the Supreme Court (Ogundare JSC read the leading judgment) quashed the appellant's conviction. Ogundare JSC stated that "what is essential is that the appellant believed honestly that he had the right to remove the poles from his land. It is immaterial that he acted in an "uncivilized" way or "unreasonably".³ He concluded that the element of reasonableness "has no place in the defence".⁴

Nnaemeka-Agu JSC recognised that the law "is not in a tidy state"⁵ because of divergent judicial attitude to the question of reasonableness. Having examined the authorities he concluded that reasonableness is not an element of the defence in section 23 of the Criminal Code and the courts should not introduce that element into it.⁶ On the condemna-

2. See e.g. *Ejure v C.O.P* (1964) 1 All NLR 386, *State v Okolo UIIC / 15C/70* (unreported), *C.O.P.v Iffie W/14CA/70* (unreported, Mid-West High Court), *C.O.P. v Okpaku PHC/13CA/72* (unreported.) In doing so they restricted the scope of the defence even though the Supreme Court had previously held in *Dabierin v State* that reasonableness is not an element of the defence of honest claim of right.

3. At p.305

4. *Ibid.*

5 At p.307

6 At p.308-309

tion of the appellant because he restored to self-help the learned Justice warned against extending the defence from criminal liability. It negatives *mens rea* an element of criminal liability which does not apply in civil cases. If the appellant in this case had served the prison term or paid the fine imposed on him and then subsequently established his ownership of the land an absurd consequence will ensue.⁷ Section 23 is designed to avoid such a consequence and it would "be dangerous to apply a reasoning which is suitable to civil cases to a criminal case in which a claim of right made in good faith has been raised".⁸

Uwais and Kawu JJSC concurred with the lead judgment. Kutigi JSC was very cautious although he agreed that section 23 exonerated the appellant. He thought that the appellant should have reported the matter to court rather than resort to self-help by force. There should be no mistake about that.⁹

7 At p.309. See *Ukaegbu v C.O.P. (1972)2 ECSLR 207* in which Aniagolu J (as he then was) stated that "the element of reasonableness would not come into a situation in which the ownership of the land in dispute had been declared to be in the prisoner, for in that case the ownership of the fixtures on the land remain vested in him. He could destroy the entire thing at will". At p.210

8 At p.310

9 At p.311

The principle of this case is quite clear. The defence of honest claim of right is to be applied without any reluctance arising from considerations of the unreasonableness of the defendant's conduct. That his conduct is unlawful or that he resorted to self-help is not a reason for denying him the defence. Lower courts must now face squarely up to this. They must give effect to the full scope of section 23. Once the claim is shown to be honestly (i.e genuinely) asserted, *mens rea* is negated and this is not restored by the fact that the defendant acted unreasonably.¹⁰

It must always be realised that the defendant's civil liability for any damage done by him remains unaffected. Likewise if he is charged with the offence of forcible entry under section 81 of the Criminal Code it is no defence that he was acting under an honest claim of right. Section 23 does not apply to the offence in section 81 of the Criminal Code.

PROFESSOR C.O. OKONKWO, SAN

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¹⁰ See *Ogundare JCA (as he then was) in Ohonbamu v C.O.P. (1990) 6 NWLR (Pt.155) 201, 209*

APPEALS - Concurrent findings of fact - Which were not shown to be in breach of any law or procedure or has otherwise occasioned a miscarriage of justice or is perverse - Will not be interfered with. *Odeniji v. Akinpelu* p. 1259

APPEALS - Court of Appeal Act 1976 - General powers under s. 16 - May be resorted to by the Court of Appeal in dealing with wrongful admission or rejection of evidence - By taking one of three steps. *Okobia v. Ajanya* p. 1277

APPEALS - Dismissal - Of the application for extension of time - Where it amounts to a miscarriage of justice - The exercise of discretion by the Court will be disturbed. *Long-John v. Iboroma* p. 1221

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APPEALS - Further evidence - Exhibits which did not constitute further evidence - The Court of Appeal was wrong to refer to and rely on the exhibits - In arriving at its judgment. *Okpanum v. S.G.E. Nigeria Ltd* p. 1323

APPEALS - Further evidence - Power to grant leave to adduce new evidence - The principles which an appellate Court must take into consideration. *Okpanum v. S.G.E. Nigeria Ltd* p. 1323

APPEALS - Further evidence - Where the Court was irregularly constituted - The exhibits received as additional evidence were irregularly received - And a decision based on them goes to no issue. *Okpanum v. S.G.E. Nigeria Ltd* p. 1323

APPEALS - Further evidence - Where the parties did not join issue - And the proposed further evidence was not pleaded - It goes to no issue. Okpanum v. S.G.E. Nigeria Ltd p. 1323

APPEALS - Ground of appeal - Which shows the trial court erred in law in admitting inadmissible evidence and rejecting admissible evidence - Is proper - And gives the Court of Appeal power to consider the documents that were tendered during trial but rejected. Okobia v. Ajanya p. 1277

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CHIEFTAINCY MATTERS - Traditional evidence - Where the respondents gave convincing traditional evidence as against the contradictory evidence adduced by the appellants - The trial court was perfectly right when it applied the test on traditional evidence as enunciated by the authorities to find for the respondents. Odeniji v. Akinpelu p. 1259

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COURTS - Discretion - Extension of time - The exercise of judicial

discretion - Must depend strictly on the facts and circumstances of a given case - As no one case can be authority for another in matters of discretion. Long-John v. Iboroma p. 1221

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COURT OF APPEAL

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