THE POWER TO PROSECUTE BY POLICE OFFICERS IN SUPERIOR COURTS IN NIGERIA•

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Introduction

Nigeria and the Criminal Procedure Code in the North[1] vest the power to institute or commence criminal proceedings against any person or authority on the following:

(i) The Attorney-General of the Federation and States[2];
(ii) The Police[3];
(iii) Private persons[4];
(iv) Special Prosecutors[5].

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1 Similar provisions exists in the Criminal Procedure Code Act Cap. 491 applicable to the Federal Capital Territory, Abuja.

2 Sections 174(1) and 211(1) Constitution of the Federal Republic of Nigeria, 1999 respectively.

3 Section 23 Police Act Cap. 359 Laws of the Federation of Nigeria, 1990, Section 78(b) Criminal Procedure Act and Sections 118, 119 and 143(b) Criminal Procedure Code of Northern Nigeria which is in *pari materia* with the Criminal Procedure Code Act of the Federal Capital Territory. From these provisions, it is not in doubt that Police Officers can institute criminal proceedings in the Magistrate Courts.

4 Sections 174(1)(b), (c) and 211(1)(b) and (c) Constitution of the Federal Republic of Nigeria, 1999 contemplates a private person instituting criminal proceedings. In Lagos, the authority of a Private Person to institute criminal proceedings by way of information is now limited to the offence of perjury by virtue of amendment to Section 340 (2) of the Criminal Procedure Law Cap. 32 of Lagos Sate by the Administration of justice (Miscellaneous Provisions) Law No. 4 of 1979 and the Criminal Procedure (Amendment) Edict No. 7 1987. See *Akilu v. Fawehinmi (No. 2) (1989) 2 N.W.L.R. (Pt.. 102) 122; (1989) 1 NSCC (Pt. 1) Vol. 20 445 at 473; Atake v. Mene-Afejuku (1996) 3 N.W.L.R. (Pt. 437) 483.* See also Section 143(e) Criminal Procedure Code Cap. 81 and Section 342 Criminal Procedure Act Cap. 80 Laws of the Federation of Nigeria, 1990.

5 These are provided in some statutes. Only those named therein can institute criminal proceedings subject of course, to the overriding constitutional powers of the Attorney-General. Under Section 157(2) of the Customs and Excise Management Act Cap. 84 Laws of the Federation of Nigeria, 1990, Custom Offences can only be prosecuted by the Attorney-General of the Federation. Prosecutions under the Act must be sanctioned by the Board of Customs and Excise. See *Customs and Excise v. Barau (1982) 2 N.C.R. 1.* Also under the Factories Act Cap. 126 Laws of the Federation of Nigeria, 1990; Factory Offences are created and Section 71 thereof vests the institution of criminal proceedings in the Inspector of factories. In revenue cases, the Head of the Ministry, Department or Officer concerned may represent the State. – See Section 81(1), High Court Law of Lagos State Cap. 54 and Section 98(1) High Court of the Federal Capital Territory Act Cap. 510

Although these persons and authorities can institute criminal proceedings in our Courts, such powers are subject to the overriding authority of the Attorney-General of the Federation or States respectively[6].

Furthermore, where any of the above institute a criminal proceeding, they generally have the power to prosecute the charge.

While it is agreed that private persons can only prosecute with the consent or fiat of the Attorney General, the power of the police to prosecute in all Courts is not so clearly defined.

The aim of this paper is to examine the power of the Police to prosecute criminal proceedings in Superior Courts – the High Court, Court of Appeal and Supreme Court. This will be examined in view of the recent Supreme Court decision in *Federal Republic of Nigeria v. George Osahon & 7 Ors*[7]. which is to the effect that Police Officers can prosecute criminal cases in all superior Courts in Nigeria.

We shall also discuss the case of *Sunday Olusegun Olusemo v. Commissioner of Police*[8]. The correctness or otherwise of these decisions will be considered especially in view of the Criminal Justice administration in Nigeria. It will be shown that a construction of the relevant constitutional provisions, the High Court Laws of the States including the Federal Capital Territory, Abuja, the Federal High Court Act and certain specific statutes may exclude the power of the Police to prosecute in certain Courts. Only named persons and authorities can prosecute in such Courts.

Powers of the Police

By virtue of Section 4 of the Police Act[9], the officers of the police force are empowered to prevent crimes, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within or without Nigeria as may be

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6 It is sometimes asserted that judicial officers have the powers to institute criminal proceedings especially in the North based on their powers to frame charges for criminal proceedings in the Magistrate Court or High Court by virtue of Section 160 Criminal Procedure Code and the case of *Ibeziako v. Commissioner of Police (1963) 1 All NLR 61*. See Bob Osamor: Fundamentals of Criminal Procedure in Nigeria, Dee-Sage Nigeria Ltd. 2004 Page 126. It is submitted that this view is erroneous, as the criminal proceedings had commenced by the filling of the First Information Report (F.I.R.) by the Police. The Magistrate only drafts the charge after a prima facie case has been made out.

7 *(2006) All F.W.L.R. (Pt. 312) 1975*

8 *(1998) 11 N.W.L.R. (Pt. 575) 547.* See Opara V. N.: "Police Right of Audience in Nigerian Courts: *Olusemo v. The Commissioner of Police Revisited" (2004) Vol. 4 No. 2 NLPJ 92*

9 Cap. 359 Laws of the Federation of Nigeria, 1990

required by them by, or under the authority of this or any other Act. In Section 23 of the Act, it is provided as follows:

> *"Subject to the provisions of Sections 160 and 191 of the Constitution of the Federal Republic of Nigeria (which relate to the power of the Attorney-General of the Federation and of a State to institute and undertake, take over and continue or discontinue criminal proceedings against any person before any Court of law in Nigeria), any police officer may conduct in person all prosecutions before any Court whether or not the information or complaint is laid in his name".*

The effect of this statutory provisions is that the power of the police to "conduct in person all prosecutions before any Court whether or not the information or complaint is laid in his name" is subject to the overriding powers of the Attorney-General of the Federation and States respectively under Sections 174 and 211 of the 1999 Constitution.

Section 174 of the 1999 Constitution provides:

"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 other authority or person; or

(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".

The officers of the police force have historically been involved in prosecution of criminal matters in Magistrate, Customary and Area Courts. When the Police Act was promulgated in 1943, the Magistrate's Courts were manned by laymen, mostly District Officers and the police had the unfettered powers of prosecutions in all the Magistrate's Courts and later Customary, Native and Area Courts[10].

In view of this historical background, prosecution in superior Courts were undertaken by Law Officers in the Attorney-General's Office. Attempts by

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10 See the dicta of Musdapher, J.S.C. in F.R.N. v. Osahon (op. cit) at Page 2013 D - F

Police Officers to prosecute in the High Courts were usually successfully challenged[11]. Most of the cases never went on appeal.

The case of *Olusemo v. Commissioner of Police*[12] was the first reported case challenging the power of the Police to prosecute criminal matters in superior courts – in this case, at the High Court of the Federal Capital Territory, Abuja. *Sunday Olusegun Olusemo v. Commissioner of Police*

Facts

The Appellant was at all material times the Accountant General of the Federation. He and five others were arraigned on a First Information Report on allegation of the offences of criminal conspiracy, forgery, using as genuine forged documents, attempted theft, criminal breach of trust and causing disappearance of evidence under the Penal Code in Suit No. AB/CMC/237/95 in a Chief Magistrate Court in the Federal Capital Territory, Abuja. The Learned Counsel for the Appellant demanded before the Learned Magistrate the proof of evidence and a list of all the witnesses the state intended to call in proof of their case. Counsel for the Respondent objected to the application on the grounds that it was premature at that stage to do so. The learned Magistrate however ruled that although the Appellant may be entitled to such proof of evidence and the list of the prosecution witnesses, it was too early to make the application at that stage. He refused the application. The Appellant appealed to the Federal Capital Territory (F.C.T.), High Court against the said Ruling. In the High Court, the Appellant raised an objection to the right of Mr. S.G. Ehindero, then a Police Commissioner to represent the State in the proceedings. The High Court after hearing the parties, ruled that the Police Commissioner was entitled to represent the State in the High Court.

On appeal to the Court of Appeal (Abuja Division), the issue that arose for determination was whether a Police Officer can represent the State in the High Court.

The Court held inter-alia that:

1. By the provisions of Section 23 of the Police Act, any police officer may conduct in person all prosecutions before **any Court** in Nigeria, but the power to conduct such prosecutions is subject to the provisions of the Constitution (Sections 160 and 191 of the 1979 Constitution) (now Sections 174 and 211 of the 1999 Constitution).

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11 See Ezerobo, C.O.C.: "Right of Audience in Courts and Prosecution of Cases by Police Officers" Global Press Limited 2004, Page 4

12 Op. cit.

2. By virtue of Section 98(1) of the High Court of the Federal Capital Territory Act, in the case of a prosecution by or on behalf of the State or by a public officer in his official capacity, the State or that Officer may be represented by a Law Officer, Director of Public Prosecutions, State Counsel, Administrative officer, **Police officer** or by a Legal Practitioner or other person duly authorized in that behalf by or on behalf of the Attorney-General or, in revenue cases, authorized by the head of the Department concerned.

The Court held at page 558:

> *"In the instance, the power to prosecute or undertake criminal prosecution is vested on the police officer under Section 23 of the Police Act subject to the exercise of the powers conferred on the Attorney-General by the provision of Section160 of the Constitution. It is very clear and without any doubt that the Attorney-General of the Federation has not exercised his powers under Section 160 of the Constitution in the instant case. Therefore, the Police Officer's powers to prosecute in the criminal proceedings in this case are not limited, restricted or controlled. Mr. Ehindero qua Police Officer is competent to prosecute in these proceedings in any Court in Nigeria including the High Court. A Police Officer is defined in Section 1 of the Police Act to mean any member of the Police Force".*

The effect of Section 23 of the Police Act is by the *Olusemo case*, that any police officer can conduct prosecutions before **any Court** in Nigeria whether or not the Complaint or information is laid in his name, the only limitation or restriction is the Constitutional powers of the Attorney-General of the Federation or State under Sections 174 and 211 of the 1999 Constitution respectively[13].

It is submitted that the interpretation given to this provision is too wide.

To state that a Police Officer can appear in any Court in Nigeria based on Section23 of the Police Act alone without recourse to the High Court Law will be a misdirection.

The Court in interpreting Sections 97 and 98 of the Federal Capital Territory High Court Act held that by Section 97, any Legal Practitioner duly enrolled to practice as a Legal Practitioner in the Supreme Court shall have a

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[13] See *Olusemo v. C.O.P. (supra) at pages 557 – 558*, reference was made by the Court to the Supreme Court decisions in *Tukur v. Government of Gongola State (1989) 4 N.W.L.R. (Pt. 117) 517 at 565* and *Labiyi v. Anretiola (1992) 8 N.W.L.R. (Pt. 258) 139 at 163 – 164* as to implication of the phrase "subject to" in Section 23 Police Act. The only limitation to the powers of the Police to prosecute is e.g. the power of nolle prosequi. See the judgment of Muntaka-Coomassie, J.C.A. (Ibid.) at Page 565.

right to practice in the High Court. Since Mr. Ehindero was a Legal Practitioner duly enrolled, he was entitled to appear and practice in the High Court[14].

In interpreting Section 98 of the Act, the Court held that a Police Officer *simpliciter* does not require any authorization by the Attorney-General to be able to prosecute a criminal case in the Federal Capital Territory High Court. It is irrelevant whether the Police Officer is a Legal Practitioner[15].

In the case of *Osahon & 6 Ors. v. Federal Republic of Nigeria*[16], the case *Olusemo v. C.O.P.* was distinguished and not followed.

In the *Osahon case,* the six Appellants were standing trial before the Federal High Court on a six count charge under the Miscellaneous Offences Decree No. 20 of 1984 (as amended).

The charge was initiated by a Police Officer who also signed as the prosecutor. The prosecution was done by the Police without the fiat or authority of the Attorney General of the Federation.

The Appellants subsequently filed an application before the court seeking to quash the charge preferred against them on the ground that by virtue of Section 174(1)(a) of the 1999 Constitution, it is only the Attorney-General and Officers of his department that can institute and undertake criminal proceedings against them. Since the prosecuting Police Officers do not come within the ambit of (1) Law Officer (2) State Counsel or (3) Legal Practitioners duly authorised by the Attorney General of the Federation as stipulated in Section 56(1) of the Federal High Court Act[17], nor Section 3 of the Law Officers Act, they were incompetent to institute and undertake the Criminal Proceedings. Section 56(1) Federal High Court Act provides:

> "56(1) *In the case of a prosecution by or on behalf of the Government of the Federation or by any public officer in his official capacity the Government of the Federation or that officer may be represented by a law officer, State Counsel, or by any Legal Practitioner duly authorized in that behalf by or on behalf of the Attorney-General of the Federation".*

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14 *Olusemo (supra) at Page 559D.*

15 *Olusemo (supra) at Page 559F.* See also the recent case of *Alhaji Mohammed O. Atta v. Commissioner of Police, Kogi State (2003) 17 N.W.L.R. (Pt. 849) 250,* Where the same Division of the Court of Appeal held that any Police Officer may conduct prosecutions before any Court of Law whether or not the information or complaint is laid in his name.

16 *(2003) 16 N.W.L.R. (Pt. 845) 89,* decided by the Lagos Division of the Court of Appeal.

17 Cap. F12 Laws of the Federation of Nigeria, 1990

Section 3 of the Law Officers Act[18] which provides:

> *"3. Every person appointed as Attorney-General or Solicitor-General of the Federation, the Director of Public Prosecutions of the Federation, Legal Draftsman of the Federation, or State Counsel, shall, so long as he continues to hold such office be deemed to be, and every person who shall have been appointed to any such office shall have been deemed to be, a barrister, advocate and solicitor of the Supreme Court of Nigeria,* ***ex-officio*** *and shall be entitled, to appear as counsel in all Courts in Nigeria in which counsel may appear".*

The trial Judge overruled the objection by the Appellant and held that the Police Officers have power to institute and prosecute the charge in the Federal High Court.

The appellant appealed to the Court of Appeal. In allowing the appeal the court held *inter-alia* as follows:

1. The Police Officers are not law officers under the Attorney-General's Department.
2. By virtue of Section 56(1) of the Federal High Court Act, in the case of a prosecution by or on behalf of the Government of the Federation or by a public officer in his official capacity the Government of the Federation or that Officer may be represented by a Law Officer, State Counsel, or by any Legal Practitioner duly authorized in that behalf by or on behalf of the Attorney-General of the Federation. Accordingly Police Officers, not having been mentioned as persons to represent the State in the Federal High Court, lack the standing to initiate and undertake criminal proceedings before the court.
3. In the instant case, the Police Officers prosecuting the Appellants lack the competence to conduct the proceedings. The case of *Olusemo v. C.O.P.* was distinguished. The State appealed against the judgment of the Court of Appeal[19]. The full Court of the Supreme Court by majority, allowed the appeal and held that:
   (1) A Police Officer *qua* Police Officer can prosecute criminal matters in any court in Nigeria by virtue of Section 23 of the Police Act. They do not need the fiat of the Attorney General of the Federation.

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18 Cap L8 Laws of the Federation of Nigeria, 2004; Awobutu *v. State (1976) All NLR 237 at 253*

19 See the Supreme Court report in *(2006) All FWLR (Pt. 312) 1975.* Justice Katsina-Alu and Musdapher dissented.

(2) Section 174(1)(b) of the 1999 Constitution recognises the right of "any other authority or person" to institute criminal proceedings in Nigeria. A Police Officer is such "person" who can institute criminal proceedings.

(3) A Police Officer, irrespective of the fact that he is a qualified legal practitioner, has the power under Section 23 of the Police Act and Section 174(1)(b) of the 1999 Constitution to institute criminal proceedings in any court in Nigeria.

(4) When Section 56(1) of the Federal High Court Act is read together with Section 23 of the Police Act and Section 174(1)(b) of the 1999 Constitution, it is clear that a Police Officer has the power to initiate criminal proceedings before the Federal High Court without first and foremost obtaining the Attorney General of the Federation's fiat.

According to Justice Onnoghen:

> "The fact that such a Police Officer is a lawyer, is a bonus or excess luggage[20]".

Right of Audience at the High Court

The right of audience of a Police Officer whether a legal practitioner or not should be regulated by the High Court Law of the State. Therefore, where a High Court Law of a State expressly permits the prosecution of a matter before it by a Police Officer, there will be no difficulty, in holding so.

In the High Court Laws of Lagos,[21] the Federal Capital Territory,[22] Eastern Nigeria[23] (applicable to all the States in the Eastern Nigeria), Police Officers are empowered to prosecute in the High Court.

Section 81(1) of the High Court Law of Lagos State provides:

"81(1) *In the case of a prosecution by or on behalf of the State or by any public officer in his official capacity, the State or that officer may be represented by a law officer, state counsel or police officer, or by any legal practitioner or*

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20 Ibid at page 2037.

21 Cap. 60 of 1994.

22 Section 98 High Court of the Federal Capital Territory Act Cap. 510 and the case of *Olusemo v. Commissioner of Police (Supra)*

23 Section 79(1), High Court Law of Eastern Nigeria. Other States in Eastern Nigeria have enacted there own laws. For instance, See Section 81 High Court Law of Cross River State Cap. 51.

other person duly authorised in that behalf by or on behalf of the Attorney-General or, in revenue cases, authorized by the head of the Ministry, department or office concerned".

However, some High Court Laws excludes Police Officers from prosecution of criminal matters on behalf of the State by the failure to mention Police Officers as one of those that can prosecute on behalf of the State[24].

Apart from the High Court Laws, specific statutes also exclude Police Officers from prosecuting in relation to certain offences.

Section 145(2)(a) and (b) of the Electoral Act, 2002 provides:

"Without prejudice to Section 26 subsection 8 of this Act, prosecution under this Act shall be undertaken by –

(a) The Attorney General of the State in which the offence is committed or by a legal officer in the Ministry of Justice of that State; or

(b) The Attorney General of the Federation or by a Legal Officer in the Federal Ministry of Justice if the offence is committed in the Federal Capital Territory, Abuja".

It is clear from the above provisions that only the Attorney-General of the State or the Attorney General of the Federation with respect to the Federal Capital Territory or Law Officers in their respective Ministries can prosecute for electoral offences. No Police Officer, whether a Legal Practitioner or not, can do so.

The competence of the Police Officers to prosecute election cases came up for consideration recently in the case of *Federal Republic of Nigeria v. Jimmy Itaumah Akpan & 20 Ors.*[25].

In that case, the Accused persons were arraigned for various electoral offences under the Electoral Act, 2002 at the Federal High Court sitting at Uyo. The charge was filed by Anyanwu Cosmos, a Police Officer[26] as the Prosecutor. Incidentally, Mr. Anyanwu Cosmos was also a Legal Practitioner.

The court *suo motu* raised the issue of the jurisdiction of the court to entertain the charge and the competence or right of the Police to undertake prosecution of electoral offences.

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24 See Section 56, Federal High Court Act, The Court of Appeal interpreted this provision to exclude Police Officer from prosecution in the Federal High Court in the case of *Osahon v. Federal Republic of Nigeria (op cit.)*

25 *(2003) 2 FHCLR 119*

26 Section 151(1), Electoral Act deals with definition of terms such as the Attorney-General of the Federation to mean, the Chief Law Officer of the Federation.

On the competence of the Police to undertake prosecution of electoral offences, all the accused counsel contended that the prosecutor has no right to prosecute electoral offences in view of the combined effect of Sections 144 and 145 of the Electoral Act, 2002. According to them, it is only the Attorney General of the Federation or of a State or someone authorized by him that can prosecute electoral offences.

The Police prosecutor on the other hand submitted that Section 145(2) of the Electoral Act avails them on the authority of the Attorney General when read in conjunction with Section 151(1) of the Electoral Act and Section 23 of the Police Act[27] which empowers a Police Officer to prosecute criminal matters.

Secondly, as a Legal Practitioner under the Legal Practitioners Act, he has a double qualification which entitles him to prosecute these charges. He relied on the case of *Olusemo v. C.O.P.*[28]

The court held[29] on this point that under Section 145(2)(a) of the Electoral Act, 2002, it is only the Attorney General of the State in which the offence is committed or a legal officer in the Ministry of Justice of that State that is empowered to undertake prosecution under the Act.

It also held that the general powers of the Police to prosecute is apparently in conflict with Section 145(1) and (2) of the Electoral Act. The latter will prevail[30]. Olotu, J. put the position succinctly as follows:

> *"As stated earlier on in this ruling, the Electoral Act is clear in its language about who should prosecute offences under it. It did not leave any room for doubt or any imports. It specifically prescribed that it is the Attorney General of the State in which the offence was committed or a legal officer in the State's Ministry of Justice. The provision cannot be stretched to include a police officer, neither can Section 23 be used to permit a police officer to prosecute electoral offences. The power of the Attorney General to prosecute electoral offences is derived from the Electoral Act in addition to the Constitution, and the power does not accommodate any other officer of Government other than the one prescribed therein to undertake the prosecution nor would it permit a police officer to prosecute under the powers vested in him by Section 23. Section 145(2) appears actually to have ousted the prosecution of electoral offences by a police officer. If the lawmakers had intended the police to prosecute, it is my belief that the Act clearly would have stated so or at the least left room to accommodate them. There is an apparent conflict between Section 23 of the Police Act and Section 145(1) and (2) of the Electoral Act, 2002. It is true that when there is*

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27 Supra

28 Supra

29 See page 132

30 This is in accordance with the well known rule of interpretation of statutes that where there is conflict between two Acts, the latter in time will prevail.

a conflict of this nature between two laws, the latter in time will prevail. The Electoral Act, 2002 is obviously the latter in time and so it will prevail over the Police Act which was enacted in 1943[31]".

The Court did not follow the decision of the Court of Appeal in *Olusemo v. Commissioner of Police.*

By the cannon of interpretation of statute which states that specific mention of persons clearly excludes persons not expressly mentioned - *expressio unius est exclusio alterius* - a Police Officer cannot prosecute in the High Court or under specific statutes where they are not mentioned[32].

Secondly, where there are two enabling provisions, one specific and the other general, the court ought to presume without more that the lawmaker has intended the specific provision to prevail over the general provision so as to govern the matter. This is because, the legislature in making the specific provision is considering the particular case and expressing its will in regard to that case, hence the special provision forms an exception importing the negative - *Generalia specialibus non derogant*[33]. General words do not derogate from special. It is the same principle that where a statute mention specific things or persons, the intention is that those not mentioned are not intended to be included.[34] General provisions of Section 23 of the Police Act ought not to derogate from the specific provisions of the relevant High Court Laws and statutes such as the Electoral Act, Customs and Excise Management Act.

Furthermore, where the words of a statute are clear and unambiguous as is the provisions of the High Court Law and Electoral Act, 2002, it becomes impermissible for the court to embark on the needles exercise of ascribing to the word such other meaning it cannot truly accommodate[35].

The words of the relevant statutes are clear and unambiguous. In fact the provisions of Section 145(2) is mandatory as it uses the word "shall be undertaken by". The import of this is that there must be compliance with the provisions[36]. Where a Police Officer undertakes a prosecution it will be invalid, null and void.

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31 Ibid at page 133 E - F

32 Ibid

33 *Schroeder & Co. v. Major & Co. Nig. Ltd. (1989) 2 NWLR (Pt. 101) 1; FMBN v. Olloh (2002) 9 NWLR (Pt. 773) 475; Ezeadukwu v. Maduka (1997) 8 NWLR (Pt. 518) 635; African Reinsurance Corporation v. JD. P Construction Nig. Ltd. (2003) FWLR (Pt. 176) 667*

34 *Buhari v. Yusuf (2003) 14 NWLR (Pt. 841) 446, (2003) FWLR (Pt. 174) 329*

35 See: *Udeh v. F.R.N. (2001) FWLR (Pt. 61) 1734; Akpan v. Umoh (2002) FWLR (Pt. 110) 1820; Attorney General of Federation v. Attorney General Abia State (2002) FWLR (Pt. 102) 1.*

36 On the use of "shall" to mean mandatory see the following cases: *Ifezue v. Mbaiugha (1984) 5 S.C. 79; (1984) 1 SCNLR 427 Amokeodo v. L.G.P. (2001) FWLR (Pt.. 33) 344 at 364*

The argument of counsel for the appellant in *Osahon's case* and the decision of the Supreme Court that in view of Section 174(1)(b) of the 1999 Constitution a Police Officer can prosecute in Superior Courts is with due respect, erroneous.

A Constitution is a general framework[37]. It cannot contemplate all situations. Therefore where a specific statute tends to limit that general framework but it is not contrary or inconsistent with the constitution, then such a law is valid and effect should be given to its clear provisions.

A Law that regulates the appearance of counsel is not contrary to the Constitution.[38]

Apart from the above conclusion, it would seem that the Supreme Court in *Osahon's case* with due respect, overlooked the possible underlying jurisprudential question as to whether fair administration of criminal justice will not be enhanced by separation of investigative powers of the police from its prosecutorial powers. The question is, if a police officer investigates a crime, naturally he would want to secure conviction at all cost. This is against the tenent in criminal justice administration that the duty of a prosecutor is not to secure conviction at all cost[39]. A prosecutor in the same vein is expected to maintain detachment and fairness. A merger of prosecutorial and investigative powers will most likely make this an illusion. In addition, what impression will be created in the mind of the accused if the same person who investigated the case is also the prosecutor in Court? It is trite that justice must not only be done but be seen to be done. This may be against the presumption of innocence under Section 36(5) of the 1999 Constitution[40].

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37 *Nafiu Rabiu v. The State (1980) 8 – 11S.C. 130 at 148 - 149*

38 See: *Awolowo v. Usman Sarki (1966) 1All NLR 178; Registered Trustees; ECWA Church v. Ijesha (1999) 13 NWLR (Pt. 635) 368*

39 *Enahoro v. The State (1965) 1 All NLR 125, R v. Sugarman (1936) 25 Cr. App. R. 109, Atanda v. A.G. Western Nigeria (9165) NMLR 225 at 232; State v. Duke (2003) 5 NWLR (Pt. 813) 394 at 437; Obiokolie Nathaniel: Police Power of Prosecution Comments on F.R.N. v. Osahon (2007) Volume 8 N.L.P.J. 105 at 108 – 111.*

40 In a recent case at the Chief Magistrate Court, Abuja, the National Chairman of the Police Equipment Foundation and three others, Mr. Kenny Martins, his Deputy Alhaji Ibrahim Dumuje and two Lawyers Mesrrs Joni Icheka and Cosmos Okpara were charged for conspiracy and forgery. A fiat issued by the police to a private legal practitioner (Mr. Festus Keyamo) was voided by the Court on the ground ***inter alia*** that "he had adjudged them guilty of forgery and corruption even before the trial begins contrary to the provisions of Section 36(5) of the 1999 Constitution". Chief Magistrate, Mr. Sunday Ochiminan in his Ruling held that: "though the police have the authority to delegate their powers to prosecute criminal cases to a private law firm or any other person, in the circumstance of this case, they have failed to follow due process. Therefore, the firm of Festus Keyamo & Co. was not 'duly authorised' as required by Section 227 of the Criminal Procedure Code. The principal partner in the said law firm of Festus Keyamo has not concealed his engagement by the nominal complainant since May 6, 2008 when Martins and Dumuje were arraigned. The Court is under a

Right of Audience at the Court of Appeal and Supreme Court

Section 13 of the Court of Appeal Act[41] provides:

> *"Subject to the provisions of any other enactment, in all proceedings before the Court of Appeal, the parties may appear in person or be represented by Legal Practitioner".*

Section 15 of the Supreme Court Act[42] also provides:

> "15(1) *Subject to the provisions of any other enactment, in all proceedings before the Supreme Court the parties may appear in person or be represented by a Legal Practitioner entitled by or under any enactment or rules of Court to practice in that Court.*
>
> (2) *A person entitled to practise in the Supreme Court immediately before the commencement of this Act should be entitled to practice as a Legal Practitioner in the Supreme Court unless he is suspended or prohibited from so practicing by or under the provisions of any enactment or Rules of Court*".

The Right of audience at both the Court of Appeal and the Supreme Court are "subject to the provisions of any other enactment ....".

In the Supreme Court case of *Aqua Ltd. v. Ondo State Sports Council*[43] the expression "subject to" was considered. The Supreme Court held that the expression "subject to" subordinates the provisions of the subject Section to the Section referred to which it is intended not to be affected by the provision of

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duty to ensure that substantial justice is done to both parties and as such, it is required to countenance or discountenance anything that could hamper the achievements of that end. In consideration of the passion and animosity exhibited by the said principal partner of the said law firm on the occasion he appeared in this case against particularly Dumuje and Martins, which animosity is reflected in his letter of acceptance of the nomination of his law office to act as private prosecutor in this case. I am afraid, from the language of the letter, the accused persons' right to the presumption of innocence under Section 35(sic) of the 1999 Constitution is not recognized by him and had adjudged them guilty of forgery and corruption even before the trial begins. Such an individual cannot be an impartial prosecutor who is valuable to justice delivery. Even if the power to prosecute the case was properly delegated to the said private firm, his sense of justice is so beclouded by hate, animosity and passion to see the nominal complainant triumph and the accused persons in prisons (perhaps) that he cannot acts as an objective prosecutor whose value to justice delivery cannot be compromised. In conclusion therefore, I hold that the police have not followed due process in delegating their power for prosecution in this case to the law firm of Festus Keyamo and as such, they are not properly before this Court". **See the VANGUARD online Edition of Monday 09 February, 2009 titled N50bn fraud: Keyamo can't prosecute Martins – Court.**

41 Cap. C36 Laws of the Federation of Nigeria, 1990

42 Cap. S15 Laws of the Federation of Nigeria, 1990

43 *(1988) 4 N.W.L.R. (Pt. 91) 622 at 655D.* See also *Tukur v. Govt. of Gongola State (1989) 4 NWLR (Pt. 117) 517 at 542; Olatunbosun v. NISER Council (1988) 3 NWLR (Pt. 80) 25; Idehen v. Idehen (1991) 6 NWLR (Pt. 198) 382 at 418.*

the former. It was held in the case of *Tukur v. Govt. of Gongola State* that whenever the expression "subject to" is used at the commencement of a statute, it is an expression of limitation. It implies that what the Section or sub-section is "subject to" shall govern, control and prevail over what follows in that Section or sub-section of the enactment.

I submit therefore that the Right of audience of a police officer in the Court of Appeal or Supreme Court is "subject to any enactment" such as the relevant High Court Law or specific Statute such as the Customs and Excise Act and the Electoral Act as Custom Offences or Electoral Offences respectively from which the Criminal proceedings was initiated. If the High Court Law excludes the right of audience of the police officer at the High Court, such Police officer cannot appear at the Court of Appeal or Supreme Court. It will be an incongruous situation where a police officer is denied audience at the High Court and the same officer is given audience at the Court of Appeal and Supreme Court over the same subject matter.

Conclusion

Although a police officer whether a legal practitioner or not can initiate and prosecute criminal proceedings in the Magistrate Court, the right to initiate and prosecute in superior courts is subject to the High Court Laws of the States or relevant specific statutes. Where the High Court Law or statute excludes the police officer from prosecuting in the Court, effect must be given to this specific provision as against the general provision in Section 23 of the Police Act.

Although the Constitution recognizes the power of the Attorney-General to take over such prosecution initiated by the police officer, it does not specifically deal with the right of audience of the police in the Superior Courts – High Court, Court of Appeal or Supreme Court. Recourse must therefore be had to the High Court Laws or the relevant statute creating an offence. Sections 174(1) and 211(1) of the Constitution envisage a situation where the criminal proceedings have been duly initiated. It is submitted that reference to "any authority or person" in the said provisions of the Constitution must be "any person or authority" recognised by the relevant law to initiate and prosecute the criminal matter in the relevant Court. It is our further position that the decision of the Supreme Court in *F.R.N. v. Osahon* is too widely stated and with due respect erroneous for not taking into consideration the specific legislation on the right of audience of police officers in Superior Courts in Nigeria. A Police Officer cannot prosecute in all Superior Courts. The determining factor whether they can prosecute is the specific law regulating appearance in such Courts.