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POLICE PROSECUTION AT THE HIGH COURT NOT CERTAIN: A REVIEW OF *FRN v OSAHON*

OZUO, Izunna Isdore
Ministry of Justice, Kebbi State, Nigeria
and Legal Aid Council of Nigeria, Kebbi State, Nigeria

ABSTRACT

When a legal practitioner is confronted with the question: can the police prosecute a criminal matter at the high court? The answer would certainly be in the positive and the case of *FRN v Osahon* would be cited as an authority. It appears from the decision in *FRN v Osahon* that this answer is certainly wrong. The court considering the Nigerian Jurisprudence never made such decision. In fact, the court decided on another issue not before it if you ask Onnoghen JSC a member of the 7 man panel who sat and concurred with the lead judgment. On the other hand, Pat Acholonu JSC (of the blessed memory) who also sat and concurred with the lead judgment would think that Onnoghen JSC is not abreast with the issue before the court. This contribution seeks to critically examine the decision inherent in the much cited *FRN v Osahon* with a view of determining the true position of the law. It is however argued in the end that whether a police officer can prosecute or not is yet to be stamped with a judicial authority from the apex court. The methodology employed in this work is analysis of the case law as well as examination of relevant statute and cases.

Keywords: High Court, Police, Prosecution, Judicial Authority.

1. INTRODUCTION

From time immemorial, the prosecutorial powers of the Attorney General[1] in inferior and superior courts has been established. The Attorney General is seen as the embodiment of the law in any legal system and he is saddled with the responsibility of instituting and prosecuting criminal cases. The powers expressly conferred on the Attorney General as regards criminal proceeding can be found in section 174 of the Constitution which provides thus: 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; and

[1] The office of the Attorney General of the Federation is rooted firmly in section 150 of the Constitution of Federal Republic of Nigeria 1999(as amended) while that of the state can be found in section 195 of the Constitution.

(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.

(2) The powers conferred upon the Attorney-General of the Federation under subsection (1) of this section may be exercised by him in person or through officers of his department.

From the foregoing, The Attorney General is seized with the power to institute and undertake criminal proceedings. This power to institute criminal proceedings has been explained in plethora of cases which includes *Anyebe v The State*[2]; *Emelogu v The State*.[3] etc. The Criminal Procedure Code[4] and the Criminal Procedure Act[5] further affirmed the powers of the Attorney General to institute criminal proceedings against offenders. Another power conferred on the Attorney General as seen in the foregoing provision is the power to take over and continue criminal proceedings instituted by another prosecutor[6]. Finally, Attorney General is vested with the power to discontinue any criminal proceeding pending before any court. This is traditionally known as the power to enter *nolle prosequi.*[7]

It must be maintained that the powers conferred on the Attorney General can be exercised by him or through officers in his department as provided in section 174(2). However, police officers are not officers in the department of the Attorney General and cannot exercise the powers conferred on the Attorney General by section 174 of the constitution. The obvious implication is that there must be an enabling Act for the police to undertake any criminal proceedings as they are not given such powers in the *grund norm*. In this regard, The Police Act[8] which was an enactment of the National Assemble on the police becomes imperative. The Act did confer on the police the power to prosecute criminal offences in 'any court' and this power is captured in section 23 of the Police Act which provides thus:

> Subject to the provisions of sections 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (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 Power conferred on any police officer to prosecute offences in 'any court' is not in doubt. However, can any court as expressed in the Police Act include superior courts of record? put different, can a police officer extend the prosecutorial powers conferred by the Act to a superior court of record i.e. can a police officer prosecute any criminal matter in a High Court of a state or the Federal High Court considering certain provisions establishing the Superior Courts of Record? The propriety or otherwise of Police prosecuting in the High court was dealt with in the case under review.

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[2] (1986) 1 SC 67

[3] (1988) 2 NWLR (Pt 78) 524

[4] Section 227

[5] Section 77(b)

[6] The exercised of this power came to bare in the case of *Amefule v The State* (1988) 2 NWLR (Pt 75) 156 where the Supreme approved the Attorney General's directive that a matter pending before the magistrate be forwarded to his office

[7] *Nolle Prosequi* has been exercised in *The State v Akor* (1980) 2 NCR 1. This power to discontinue has been held to be unquestionable thus making the Attorney General a law unto himself. see *The State v Ilori* (1983) 2 SC 155

[8] Cap P19 Laws of the Federation of Nigeria 2004

2. AN OVERVIEW OF THE FACTS OF THE CASE IN *FRN v OSAHON*

The Appellant by an amended charge was before the Federal High Court, Lagos Division charging the Respondents with various offences under Miscellaneous Offences Decree (Act) of 1984. The prosecutor was Nuhu Ribadu a police officer. By a Motion on Notice the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants, (now 1st-8th Respondents) prayed for the charge to be quashed upon the following grounds:

(i) Under Section 174(1)(a) of the 1999 Constitution, only the Attorney General of the Federation is empowered to institute and undertake criminal proceedings against the 2nd to the 9th accused persons in respect of offences created under the Miscellaneous Offences Decree (formally Special Miscellaneous Offences Decree) No. 20 of 1984;

(ii) The powers conferred on the Attorney-General of the Federation under Section 174(1)(a) of the 1999 Constitution can only be exercised by him in person or through officers of his department; and

(iii) The prosecutor in these proceedings and/or other persons assisting him are Police Officers and are not officers of the Attorney-General of the Federation's office/department.

(iv) The charges and/or the amended charges herein are an abuse of legal process.

The supporting affidavit pointed out that the Prosecutor, Nuhu Ribadu, was a Police officer in Nigeria Police Force and that all those assisting him to prosecute were police officers also. It was further deposed in the affidavit that it was believed the appropriate authority empowered to institute and undertake criminal proceedings against the Respondents in respect of offences created under Miscellaneous Offences Act is the Attorney-General of the Federation or through officers in his Ministry. As Nuhu Ribadu and other police officers with him now prosecuting were not officers in the Attorney-General's Department and they had no fiat of the Attorney-General to prosecute the matter, the charges should be quashed.

In a Counter-Affidavit sworn to by an Inspector-General of Police, Mr. Paul Okafor, it was deposed that the police did not need the fiat of the Attorney-General of the Federation to prosecute the offences under Miscellaneous Offences Act by virtue of Section 23 of Police Act (Cap. 359 Laws of the Federation of Nigeria 1990). It was further deposed that though the Attorney-General and members of his department could prosecute, the police equally could prosecute under the Act. The trial Court in a considered ruling struck out the application after considering the provisions of the constitution, the police Act and a portion of the Federal High Court Act. Disgruntled with the ruling that the appellant can prosecute the matter, the respondent lodged an appeal at the Court of Appeal. The Court of Appeal found merit in the appeal and held that a police officer cannot prosecute a criminal offence at the Federal High Court. The ruling of the court led to the appeal to the Apex Court in the land.

3. CRITICAL EXAMINATION OF THE ISSUE BEFORE THE COURT

At the Supreme Court, the appellant raised only one issue for determination which is: "Whether the Court of Appeal was right when in interpreting Section 56(1) of the Federal High Court Act, Section *23* of the Police Act and Section 174(1) of the 1999 Constitution, came to the conclusion that *the police officers prosecuting the Respondents*[9] lack the competence to initiate or conduct prosecution before the Federal High Court. It must be conceded that the sole issue before the court is very vague and fuzzy. It is capable of two interpretations and these two interpretations are distinct; that is:

[9] Emphasis mine

- Can any police officer prosecute at the high court? or
- Can any police officer who is a legal practitioner prosecute at the High Court?

The first interpretation is supportable because section 23 of the Police Act which was relied by all the courts in the matter in reaching their decision made no distinction between the police officers who are legal practitioners and those who are not. In essence, reliance on section 23 of the Police as an authority to prosecute offences at the Federal High Court applies to all police officer in the police force and any distinction between police officers who are legal practitioner and those who are not amounts to unwarranted and unmerited discrimination.

On the other hand, the second interpretation is supportable because the police officers prosecuting the applicants/respondents in the instant case are legal practitioners. The presence of the definite article 'the'[10] make it clear that competence or incompetence of the prosecution must be attached to the police officer prosecuting in the instant case as opposed to any other police officer. This appears to be intendment of the appellant who formulated the issue when he asked in his brief to wit: 'can a Police Officer (being a qualified legal practitioner) institute or undertake a criminal prosecution in the Federal High Court without the fiat of the Attorney-General. It must be pointed out quickly that the first interpretation is all inclusive and can accommodate legal practitioners and non legal practitioners whereas the second interpretation is restricted to police officers who are lawyers. The legal implication is that if the answer to the first possible interpretation is in the positive then the second possible interpretation is taken care of. However, any affirmative answer to the second possible interpretation does not answer or dispose of the first question. On the other hand, any answer in the negative disposes of the two questions. A proper understanding of the possible meaning and the answer thereto would be invaluable to our deliberation on *FRN v Osahon*.

The 7 man panel that sat on the case being a matter that borders on constitutional interpretation approached the issue based on their interpretation of the matter. It should be noted that the majority judgment carried the day but it appears the issue was understood differently even by those in the same majority camp. To Pat Acholonu of the blessed memory. The issue is whether a police officer who at the same time is a legal practitioner can prosecute a criminal case whether in the Federal High Court or any other Court without the fiat of the Attorney-General….The question that this Court is called upon to resolve is not whether any police officer as referred to in Section 23 of the Police Act can prosecute but whether a police officer legally qualified can prosecute a matter in the High Court.[11]

The learned Justice's view about the issue before be court as we indicated earlier is supportable and this was the view held by Belgore JSC who gave the lead judgment. On the other hand My Lord Onnoghen JSC who also concurred with the lead judgment had a different view about the issue before the court. To the learned Justice:

> I have carefully gone through the facts as deposed to in the affidavit in support of the motion for an order of certiorari and the counter affidavit thereto and have come to the conclusion that the actual issue before that Court is simply whether a police officer simpliciter has a right to institute criminal proceedings before any Court in Nigeria. The issue is not, with respect to the trial Judge and also the Court of Appeal, "can a Police Officer who is a legal practitioner institute a criminal charge against the

[10] The is used to indicate one as distinct from another: used to refer to one in particular of a number of things or people, identified as distinct from all others by the use of a modifier see Microsoft® Encarta® 2008. © 1993-2007 Microsoft Corporation.

[11] Emphasis mine

> accused persons in the Federal High Court...."[12] as stated by the trial Court and adopted by the Court of Appeal and also argued before this Court by the Respondents.

It is very clear from the foregoing that the issue before the court was understood differently by the court and this resulted in their various pronouncements. Onnoghen JSC reviewed the affidavit and counter affidavit filed by the parties in support of the motion before the Federal High Court and reached his decision that the Trial Court and Court of Appeal did not appreciate the issue before them. Does this mean that the trial court decided on a different issue not before the court? The implication of such is that the judgment would be set outside on appeal as a trial court who raises an issue suo motu must call on the parties to address the court on it.[13] However in the instant case, the trial court never raised an issue *suo motu* but made pronouncement on her understanding of the issue before the court. On the part of the Court of Appeal, the court decided on what was presented before them by the parties without going into what should have been presented. In sum, whether the issue was misunderstood by the learned justices who sat stating from the trial court to the apex court is not our utmost concern but what the court decided.

4. THE DECISION AND THE RATIO

Our interest lies on the decision of the case and the *ratio decidendi* which simply means the reason for the decision. The decision is not the same as the ratio as held in the case of *Adesokan v Adetunji*[14] when the court stated thus: "This reasoning or principle upon which the case is decided is known as the *ratio decidendi*. It constitutes the general reasons for the decisions (as distinct from the decision itself or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rises to the decision."

The *ratio decidendi*[15] in our legal jurisprudence constitute the binding decision of the court and this translates to the legal maxim *stare decisis.* There is thus great need to determine the decision in *FRN v Osahon*. As has been pointed out earlier, the issue before the court requires the attention of seven learned justices of the highest court in the land as it borders of the interpretation of section 174 of the *fons et origo* of our laws: the sacred Constitution of Federal Republic of Nigeria 1999 (as amended).

The court after a due consideration of the relevant laws, namely, section 23 of the police Act on the powers of the police to prosecute, section 174 of the constitution on the overriding powers of the Attorney General on criminal prosecution and section 56 and 57 of the Federal High Court on person that are entitled to appear before the court, could not reach a unanimous decision. Whereas five agreed on 'Police' prosecution at the High court, the remaining two were of the view that such idea is disgusting and should never be allowed to happen. In the lead judgment the court per Belgore JSC made a pronouncement of the law when he reframed the issue in the following words: "However, the big issue is whether a police officer, legally qualified to practice law, in all Courts in the Federation by virtue of his having been called to Nigerian Bar under Legal Practitioners Act, can institute criminal proceedings

[12] Emphasis mine

[13] The principle of law was given credence in the case of *Mojekwu v Iwuchukwu* (2004) 11 NWLR (Pt 883) 196 which was an appeal against the decision in the popular case of *Mojekwu v Mojekwu*(1997) 7 NWLR (Pt 512) 283. In that case the Supreme Court per Uwaifo JSC voided the pronouncement of Niki Tobi JSC on the repugnancy of the Oli-Ekpe Custom of Nnewi as the issue of repugnancy or otherwise of the custom was raised *suo motu* by the court without inviting the parties to address the court on the issue.

[14] [1994] 5 NWLR (Pt. 346) 540

[15] The reason for the decision is one of the elements of a valid judgment. where this element is lacking, it is bound to be upturned at the appeal court see *State v Ajie* (2000) FWLR (pt 16) 2831 at 2844

without the fiat of the Attorney-General of the Federation. To answer this all important question, it is pertinent to refer to the relevant Acts of National Assembly *vis-à-vis* the provisions of the Constitution of Federal Republic of Nigeria 1999." The court having stated the issue he understood to be before the court and after examination of the provisions stated:

> …I allow this appeal and hold that a police officer who is a duly qualified legal practitioner can prosecute by virtue of section 23 of the Police Act, section 56(1) of the Federal High Court Act and section 174 of the Constitution of Federal Republic of Nigeria.

According to the court, The Police force is an authority of the Federal Government and their power to prosecute is accommodated in the constitution when it provides that the Attorney General can take over any case instituted by any authority or person. However, the court went on to say that 'any person' as found in section 174 of the constitution means a legally qualified person. It is the view of the learned Justice that the constitution has not opened the floodgate of litigation to persons who are not qualified to practice law to represent any authority when it comes to superior court. In the words of the court '*any person* presumes as represented by a legal practitioner and for *any other authority* presupposes that the authority will be represented by a legally minded person either in that authority or engaged for the purpose by that authority.'

The direct implication of the reason adduced by the court is that if a person is not legally minded in police force, then such a person cannot prosecute in any superior court. In essence a police officer who is not a legal practitioner cannot prosecute a criminal offence in the high court being a superior court of record. The court per Belgore JSC did not make this bold pronouncement of law but this is the implication of the ratio in *FRN v Osahon*. If this direct implication was expressly stated in the lead judgment, My lord Kutigi, Mahmud and Onnoghen JJSC would have disagreed with judgment. In fact, the lead judgment could have been a minority judgment had the court stated boldly that a police officer who is not a legal practitioner cannot prosecute in the high court. This is so because the concurrent judgments or opinions expressed are totally different. For Kutigi said: It is evident that the following persons have the right to practice in the. Federal High Court -

(1) *All persons admitted as legal practitioners to practice in Nigeria* (subject to the provisions of the Constitution and the Legal Practitioner Act) (see S. 57)
(2) Law Officer (see Section 56(1)
(3) State Counsel (see Section 56(1)
(4) *Any legal practitioner duly authorized* in that behalf by or on behalf of the *Attorney-General* of the Federation (see Section 56(1)
(5) Police Officers (see Section 23 of the Police Act).
(6) Any other authority or person (see Section 174(1)(b) and (c) of the 1999 Constitution).

One can safely say that the people mentioned under (2), (3) and (4) above, must also necessarily be persons admitted as legal practitioners to practice in Nigeria just as it is under (1). *Those under (5) and (6) need not be legal practitioners*[16] at all but if they are, the better. My Lord Kutigi JSC when on to say that: "The only irresistible conclusion I have reached is that Section 56(1) of the Federal High Court Act and Section 23 of the Police Act when read together with Section 174(1)(b), (c) of the Constitution make it clear that *a Police Officer, any Police Officer*, has the power to conduct criminal proceedings before the Federal High Court." Onnoghen JSC is also of this view when he stated in his judgment:

[16] Emphasis mine

"The law being as it stands by virtue of the constitutional provisions which is supreme, I hold the view that any 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… Finally I hold the view that 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 1999 Constitution, it becomes very 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. The fact that such a police officer is a lawyer is a bonus or excess luggage."

The pronouncement of the Justices of the Supreme Court that concurred with the lead judgment save for Pat Acholonu are obviously in direct conflict with the ratio contained in the lead judgment. These various pronouncements by the learned Justices that concurred with the lead judgment are thus used as authority when the issue of any police officer prosecuting a criminal matter in the high court arises. How correct is this?

5. NIGERIAN JURISPRUDENCE ON COURT JUDGMENTS

The judgment of the court is no doubt the decision reached by the court in a particular matter. It is the Court's final determination of the rights of the parties before it.[17] It is the opinion delivered by a judge in a particular matter which has the force of law and is binding on all the lower courts and the court itself in the case of the Supreme Court. It should be noted that where more than a judge or a justice is involved in the determination of a case, as in the case of the Supreme Court and the Court of Appeal, the majority opinion becomes the judgment of the court. This position is fortified by section 294(3) of the Constitution which provides that 'A decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members'[18]. The Constitution in section 294 (2) went further to state the importance of the opinion of the individual justices that sat on a particular matter when it provides that 'Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion'.

The concept of *ratio decidendi* and *obiter dictum* as it relates to the judgment of courts are well defined in the Nigerian Legal system. For clarity *ratio decidendi* remains the reason or reasons for the decision of the court which is binding. In the case of the Supreme Court, their decision is binding on all courts in the land as seen in section 287 of the constitution.[19] The ratio of a case represents the reasoning or principle or ground upon which a case is decided[20].

[17] Blacks Law Dictionary (9th Edn, Minnesota: West Publishing, 2009) p.918

[18] In this regard, the position stated in *Abacha v Fawehimi* becomes imperative. The court stated: 'One may then ask, what is the judgment of the court? Where a single judge presides, the situation does not admit of any difficulty; the judgment of that court is what may be discerned as the *ratio decidendi* or *rationes decidendi* of that case in contrast to the passing remarks, otherwise referred to as obiter dictum or obiter dicta, made by the court in the course of preparing the judgment. The problem, such as the one raised in this appeal, arises when three justices (as is usually the case in the Court of Appeal) or five justices (as is usually the case in the Supreme Court) preside over a case or an appeal wherein one of the justices is assigned the responsibility to write the leading judgment and others, under the mandatory provision of the Constitution, are obliged to render either their concurring or dissenting judgments. In such a situation, it is the leading judgment that is, in legal circles, regarded as the judgment of the court. The other judgments may respectively be a two-word judgment, eg 'I concur' or judgments longer or shorter than the leading judgment'.

[19] The section provides in sub (1) The decisions of the Supreme court shall be enforced in any part of the Federation by all authorities and persons, and by courts with subordinate jurisdiction to that of the Supreme Court. (2) The decisions of the Court of Appeal shall be enforced in any part of the Federation by all authorities and persons, and by courts with subordinate jurisdiction to that of the court of Appeal. (3) The decisions of the Federal High Court, a High Court and of all other courts established by this Constitution shall be enforced in any part of the Federation by all authorities and

On the other hand, Obiter dictum is merely a passing remark. In the words of Edozie JSC 'Obiter simply means in passing, incidental, cursory; obiter dicta reflect, inter alia, the opinions of the Judge, which do not embody the resolution of the court'[21] The court continued that this obiter dictum does not constitute any binding precedence in which a lower court can be relied on. In our legal system, it is pertinent to point out that obiter dictum is much more than a passing remark or a statement that is incidental to the judgment of the court. In fact the whole opinion or reason adduced by a learned justice can be classified as obiter dictum. This shocking observation was made by the Supreme Court in the case of *Abacha v Fawehimni* when the court stated the following principle of law: "The point of jurisprudential interest and of considerable interest in this appeal is the relationship of the bindingness of the ratio decidendi or rationes decidendi contained in the leading judgment on the one hand, and the other concurring judgments, on the other hand. Are they at par or are some superior to others? The jurisprudence and practice of law in this country appears to be tolerably clear: it is the ratio or the rationes contained in the leading judgment that constitutes or constitute the authority for which the case stands."

All other expressions contained in the concurring judgments, particularly those not addressed in the leading judgment are obiter dictum or dicta, obiter dicta in the leading judgment as well as in the concurring judgments may be of persuasive effect in other occasions. From the position clearly stated above, it appears that what we rely on as authority on the prosecutorial powers of a police officer in a superior court of record irrespective of the officer's standing under the Legal Practitioners Act is nothing but a mere obiter which in all respect does not constitute a binding decision[22]. In essence, when we are saddled with the responsibility of decoding the decision of the court as in the instant case, our approach must be restricted to the expressions of Belgore JSC who read out the lead judgment. For avoidance of doubt, the decision of the court in *FRN v Osahon* remains that 'a police officer who is a duly qualified legal practitioner can prosecute…' in a superior court of record. The decision obviously excludes police officers who are not legal practitioner. Any other position ascribed to the court outside the foregoing would indeed be uncharitable. The Supreme Court as far as our laws are concerned never decided on the position of police officers who are not legal practitioners!

The question now is: what happens to the pronouncement of the other learned justices of the court. As observed above, the dicta of other justices of the Supreme Court to the effect that a police officer, who is not trained in the practice of law and duly admitted, can prosecute in any court including the high court is not a statement of law. It cannot be brandished as an authority because it is not. The expressions are not binding and cannot be accepted as a basis for any such police officer to scamper to a superior court with a case file in the name prosecuting an offender.

It must be conceded that the principle of law maintained above is quite unfair to the ebullient justices of the Supreme Court or any court where concurrent opinions are necessary. It is undisputed that the reason(s) adduced by a justice who concurred in a majority may be better and sound both in reasoning and logic than that expressed in the lead judgment. It is not for fun or to add to our collections of obiter dicta that the Constitution in section 294(2) requires each justice, in situation where more than more sat, to reduce his or her opinion in writing. In as much as the opinions expressed by other justices who supported the lead judgment has been held to be obiter, these expressions of wisdom and reason are treated with dignity by all concerned. No wonder the Supreme Court appears to deviate from the above position on the

persons, and by other courts of law with subordinate jurisdiction to that of the Federal High Court, a High Court and those other courts, respectively.

[20] See *A.I.C Limited v Nigeria National Petroleum Corporation* (2005) 1 NWLR (Pt 937) 563

[21] *A.I.C v NNPC* (Supra). see also *Coker v UBA* (1997) 2 NWLR (Pt. 490) 641 at 658

[22] See *African International Bank Limited v Packoplast Nigeria Limited* [2001] 30 WRN 141; *Alhaji Yusuf v Egbe* (1987) 2 NWLR (Pt. 56) 341; *Ferodo Limited v Ibeto Industries Limited* [2004] 5 MJSC 96

effect of a concurrent judgment in the case of *Emeka Nwana v Federal Capital Development Authority.*[23] In that case, the Supreme Court was invited to disregard a concurrent judgment of the court and the court had this to say: "Learned counsel for the appellant made two submissions in respect of the concurring judgment of Karibi-Whyte, JSC. The first one is that being a concurring judgment, this court should not attach much to it. With respect, I am not carried along by counsel in this submission. A concurring judgment, in my humble view, has equal weight with or as a leading judgment."

A concurring judgment complements, edifies and adds to the leading judgment. It could at times be an improvement of the leading judgment when the justices add to it certain aspects which the writer of the leading judgment did not remember to deal with. In so far as a concurring judgment performs some or all the above functions, it has equal force with or as the leading judgment in so far as the principles of stare decisis are concerned. However, a concurring judgment is not expected to deviate from the leading judgment. A concurring judgment as the name implies, must be in agreement with the leading judgment. A concurring judgment, which does its own thing in its own way outside the leading judgment, is not a concurring judgment but a dissenting judgment.

It appears from the foregoing that the Supreme Court is prepared to donate weight to a concurrent judgment and to equate it with the lead judgment. But the facts remains that the concurrent judgment expressed in *FRN v Osahon* in our most honest consideration went outside the lead judgment. The concurrent judgment in actual fact stated what contradicts the ratio in that case because the lead judgment by implication has excluded non legal practitioners as it relates to police prosecution at a superior courts of record. In effect, the learned justices that sat on *Emeka Nwana's case* would most certainly consider the pronouncement contained in the concurrent judgment of Kutigi, Onnoghn and Mahmud JJSC as dissenting and not worthy to enjoy the attention accorded to lead judgment as such would lead to anarchy and chaos in court decisions.

Be that as it may, it must be kept constantly in mind that the expressions contained in the concurrent judgment in *FRN v Osahon* cannot be relegated to the background. These expressions regarded as Obiter in Abacha's case are certainly of persuasive effects[24]. It also enjoys respect among all the courts in the land and cannot be treated with levity. In fact, in certain exceptional instances, the obiter dictum of the Supreme Court has been held to be binding. This arises in circumstances where the obiter has been repeated in several cases with time[25] or where it has been adopted in another case as a ratio.[26] The court in *Ifediorah and others v Ume and others*[27] stretched this position when it held that a Supreme Court decision on an important point of law is binding on lower courts.

Our authority under review cannot enjoy binding effect as it has not been adopted as a ratio from our research so far in any case. It has not also been repeated in number of cases for quite some time as suggested by the Supreme Court in Agbai's case. Finally it submitted that whether the principle covered in *FRN v Osahon* is on an important point of law is a question for another day as what amounts to important point of law is not covered by our contribution.

[23] (2004) 10 CLRN 63

[24] *Ibrahim v Judicial Service Commission* [2001] 37 WRN 114

[25] *MacLean v Inlaks Ltd*. (1980) 8-11 S.C. 1; *Agbai v Okogbue* (1991) 7 NWLR (Pt. 204) *39 Bamgboye v University of Ilorin* (1991) 8 NWLR (Pt. 207) 1

[26] *Chief Munalayefa Aisemo & 2 Ors. v Chief Tari Abraham & Ors*. (1994) 8 NWLR (Pt. 361) page 212

[27] (1988] 1 NSCC 570; according to the court 'it has been held by the House of Lords in England that although what is ordinarily binding in a case is the *ratio decidendi* and not the obiter dictum; yet an *obiter dictum* by the ultimate court on an import-ant point of law is one which is binding on and followed by all the lower courts'

6. CONCLUSION

The affirmative position held by different legal practitioners as regards the powers of the police to prosecute at the high court is quite erroneous. This confirmatory attitude is borne of out innocence misinterpretation of the effect of the pronouncement of various justices that sat on the matter. After all, Onnoghen and Kutigi JJSC said that a police officer can prosecute a criminal case at the high court irrespective of his standing under the Legal Practitioners Act. Be that as it may, the issue is not whether it was said but the effect of such pronouncement. We have seen that the lead judgment which binds all court in Nigeria made no such pronouncement and we cannot rely on the pronouncement of the other justices save to serve as persuasive expressions and arguments in future. The position obtainable in Osahon's case is not peculiar to our legal system. Most foreign jurisdiction follow this practice and never accord police officers the privilege which should be enjoyed by those trained to practice in all court including superior courts of record. For example, in Ghanaian legal system, police officers are restricted to prosecute offenders at the Circuit and magistrate courts[28]. It is only the Attorney General or his officers that can institute a criminal case at a superior court of record.[29] However, a police officer who is also a legal practitioner can prosecute in a superior court with the consent of the Attorney General in Ghana.[30] This position is not the case with our legal system as a police officer who is legally qualified can prosecute in the high court without the consent of the Attorney General.

We await a definite pronouncement of the Supreme Court on whether police officers *simpliciter* can prosecute at the high court. In the main, any of such prosecution kick started or carried on by police officers who are not legal practitioners should be viciously challenged as justice must be procedural as well of substantive. Such action must be condemned by all concerned until an authority in their favour (police officers) comes up.

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[28] 'Judge: Police have no mandate to prosecute' available at http://www.ghanaiantimes.com.gh/judge-police-have-no-mandate-to-prosecute/ accessed on 19th May 2015
[29] The Constitution of the Republic of Ghana 1992, art.88
[30] Judge: Police have no mandate to prosecute' *art cit*.