

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN
ON FRIDAY 6TH DAY OF NOVEMBER, 2015
BEFORE THE HONOURABLE JUSTICE A.O. FAJI
JUDGE

SUIT NO: FHC/IL/25C/2013

BETWEEN

FEDERAL REPUBLIC OF NIGERIA...COMPLAINANT

AND

HENRY OYEWOLE OSCAR A.K.A
ONUIGWE ONYEDIKA NWABUEZE....DEFENDANT

JUDGMENT

The Defendant pleaded not guilty to a two count amended charge filed on 25th November 2013 in the following terms:

Count 1:

That you Henry Oyewole Oscar A.K.A.

Onuigwe Onyedika Nwabueze, Male, Adult,

sometimes in the month of July 2013 at Ilorin, Kwara State, within the jurisdiction of this Honourable Court conspired with one Afam Onuigwe and Natalie Hill (both now at large) to import 1.7. kilogrammes of cocaine into Nigeria and you thereby committed an offence contrary to and punishable under **Section 14(b) of the National Drug Law Enforcement Agency Act Cap N30 Laws of the Federation of Nigeria 2004.**

Count 2:

That you Henry Oyewole Oscar A.K.A. Onuigwe Onyedika Nwabueze, Male, Adult on or about the 1st day of July 2013 at the General Post Office Ilorin, Kwara State within the jurisdiction of this Honourable Court without lawful authority imported 1.7. kilogrammes of

cocaine and you thereby committed an offence contrary to and punishable under **Section 11(a) of the National Drug Law Enforcement Agency Act Cap N30 Laws of the Federation of Nigeria 2004.**

The prosecution called 9 witnesses and tendered **Exhibits A-U.** The Defendant was the sole witness for the defence. Trial was between 26th November 2013 and 6th May 2015.

Both the Defence and the prosecution reviewed the evidence in their respective addresses.

PW1 was Ahmed Suleiman, the exhibit keeper at Kwara State Command of NDLEA. In the course of his testimony, Defence Counsel observed that PW1 was reading from a piece of paper. The said paper was admitted in evidence and marked **Exhibit A.** He also tendered **Exhibits B1-B5** ie a brown

envelope addressed to Henry Oyewole Oscar containing a face-cap, portrait, ash-tray and T-shirt.

Exhibits C1 and C2 are two International passports both in the name Onuigwe Onyedika Nwabueze with numbers A03336254 and A1803530 and with expiry dates of 11/10/16 and 27/2/08 respectively. Two black nokia phones were admitted and marked

Exhibits D1 and D2. Exhibit E is an identity card bearing the name Henry Oyewole Oscar. Exhibit F is a Guarantee Trust Bank Plc deposit receipt number 031987282. Exhibits G1 and G2 are Diamond Bank deposit slip numbers 6171346 and 9024323 with the name Oscar as the depositor.

Exhibits H1 and H2 are two Hotel Receipts dated 4th and 5th March 2010 in the name Onuigwe Oscar.

Wedding invitation with inscription: 'OSCAR 2011' is Exhibit J. Exhibit K is a bill board bearing the

inscription Oscardo Ventures (Nigeria) (a division of Oscar Nigeria Ltd) Exhibits L1 and L2 are two search endorsements. Certificates of Test Analysis, packing of substance form and request for scientific aid forms are Exhibits M,N and O. The drug analysis report and brown envelope are Exhibits P and Q.

PW2 was Femi Johnson Osifuye. He is a Chief Superintendent of Narcotics. He supervised the special operation. PW3 was Emmanuel Christopher, an Assistant Commander of Narcotics in the Forensic/Chemical Monitoring Unit NDLEA. He analysed the drug exhibit. With leave of Court, PW3 opened the brown envelope – Exhibit Q and brought out a transparent evidence pouch which was admitted in evidence as Exhibit R. PW4 was OBAKACHI VICTOR, a Superintendent of

Narcotics and the Liason Officer in the Forensic Unit of the NDLEA. PW5 was Paul Oche Ogboji – a deputy Superintendent of Narcotics now of NDLEA Ondo Command. He was part of Femi Johnson’s (PW2) team. PW6 was Mohammed Ali – a Deputy Superintendent of Narcotics of the Special Enforcement team NDLEA, formerly of the Joint Task Force. He described the concept of controlled delivery. He guided the Defendant in making his statement as well as his additional statement. PW6 tendered letter dated 1/7/13 addressed to the Area Postal Manager, NIPOST, Kwara State Territory as **Exhibit S**. He also tendered without objection the statements of the defendant dated 2/7/13 and 17/7/13 and they were respectively admitted in evidence and marked **Exhibits T and T1**. PW7 was Hamza Umar – Commander NDLEA, Murtala Mohammed

International Airport, Ikeja, Lagos. He received the parcel from the Captain of a British Airways flight on June 21st 2013. He did not know either the name of the Captain or the contents of the parcel. PW8 was OKWUNJOR EDACHE AUGUSTINE – the exhibit keeper at Murtala Mohammed Airport Command of the NDLEA. PW8 tendered **Exhibit U** – letter of acknowledgement of receipt of the parcel from him by Femi Osifuye dated 24th June 2013. PW9 was SUNDAY DRAMBI ZIRANGEY – a Commander of Narcotics and Commander Special Enforcement Team, NDLEA. At all material times, PW9 was the Commander of the Joint Task Force NDLEA. The Joint Task Force is in charge of the International Operations of the NDLEA. The prosecution closed its case on 14th April 2015. The Defence opened on 6th May 2015.

DW1 and sole defence witness was the Defendant himself – Onuigwe Onyedika Nwabueze. He denied counts 1 and 2 and gave his own version of the events.

Defence Counsel indentified two issues for determination which he argued as follows: On whether there was a valid controlled delivery of **Exhibit B** in this case, Counsel answered in the negative. Counsel described controlled delivery as a technique used when a consignment of illicit drug is detected and allowed to go forward under the control and supervision of law enforcement officers in order to secure evidence against the organizer of such illicit drug traffic. It does not involve entrapment and is regulated by International Convention but its application depends on the particular legal administration provision in the country concerned.

Counsel referred to article 1(g) of the United Nations Convention Against illicit traffic in Narcotic drugs and psychotropic substances 1988 and Article 2(1) of the United Nations Convention against Transnational Organised Crime 2000. The testimonies of PW5, PW6, PW8 and PW9 however show that the requirements of controlled delivery were not fulfilled as it was shown that the British Airways Pilot who delivered the parcel from the United Kingdom is not a member of the then Serious Organized Crime Agency of the United Kingdom. The prosecution went beyond having knowledge of and supervising delivery of the parcel to actually taking over the parcel.

It was also not established that the Defendant had knowledge of the contents of the parcel.

Counsel referred to the testimony of PW1 as well as

the Defendant's statement, Exhibits T1 and T2.

The prosecution neither investigated the sender of the parcel nor Defendants brother in London – Afam Onuigwe. The parcel is not also from the United Kingdom but from Trinidad and Tobago and there is no evidence of consultation with Serious Organised Crime Agency in the United Kingdom.

Furthermore, the parcel was never delivered into Defendant's hand and he did not sign for it. The Defendant must also open the parcel. The details of investigation and steps taken in relation to the parcel must also accompany it. The parcel which was delivered by a British Airways Pilot was not even accompanied by documentation from the British partner (Serious Organised Crime Agency) or even a search warrant for taking possession of the parcel in the first place. The particulars of the Pilot are also

not known, no Postal Officer took part in the delivery of the parcel. Counsel submitted that the procedure utilized in the instant case was to entrap the Defendant. The prosecution having therefore failed to prove controlled delivery the charge is itself without basis.

Counsel submitted further that the prosecution did not prove its case beyond reasonable doubt. The Defendant is not to prove his innocence. As regards the count of conspiracy, there is no proof of an agreement between the Defendant, Afam Onuigwe and Natalie Hill. A person cannot commit conspiracy without others. There is no nexus between Defendant and Natalie Hill. There is nothing to show that **Exhibit B1** was sent by NCA (United Kingdom) nor the investigations conducted by NCA before the parcel was sent. In the absence

of the tag accompanying the parcel from United Kingdom as per the evidence of PW8 Exhibit B1 is not the parcel allegedly received from the British Airways Pilot. Counsel concluded that no parcel was sent from the United Kingdom. There is no evidence of investigation carried out by the prosecution on Natalie Hill and Afam Onuigwe. Their investigation did not also disclose prior communication by Defendant with Natalie Hill. There were no documents in Defendant's house relating to Exhibit B1. There is also no evidence that the Defendant participated in the conspiracy, if any. He did not voluntarily collect the parcel or at all.

On Count 2, there is no evidence of importation which means bringing something in across a national border. He did not authorize the importation. The

best that has been contended is that Defendant tried to collect the parcel. There is also no name in the importer's column of Exhibit B1. Having visited Defendant's shop before the arrest, they had enough details of him to be able to procure Exhibit E. Exhibit E was also reflected in Exhibit L1 as having been recovered from Defendant's house after the arrest. This contradicts the evidence of PW2, PW5 and PW6 and knocks off the case for the prosecution. Since the Defendant cannot be linked with Exhibit B1, the Court must not speculate but resolve this doubt in favour of the Defendant. The parcel was also not given to the Defendant. Exhibit E was also shown to the Defendant after his house had been searched. The Defendant did not also sign for the parcel.

The evidence of the prosecution shows Exhibit B1 was from the United Kingdom. The exhibit however states it was from Trinidad and Tobago and it bears that Country's stamp. The flight on which it came was a direct flight from the United Kingdom. The identity of the Pilot who handed over Exhibit B series is not known. There was no reference document accompanying the parcel. There is no communication between NCA and NDLEA tendered in evidence. There is no link between **Exhibit B1** and the United Kingdom.

The Defendant also made Exhibits T1 and T2 under an unstable condition. Counsel relied on ONWUMERE-V-STATE (1991) 4 NWLR (PART 186) 428. Ex facie, the statement could not have been made by the Defendant in view of his oral testimony.

On whether or not the substance is cocaine, Counsel submitted that the remaining part (apart from that sent for analysis) of the substance is still in the portrait. The Court was also not shown the substance in the pouch – Exhibit R. The A1 and A2 was also not tendered. The Court was urged to resolve this in favour of the Defendant. The evidence also implies that the substance was tampered with between United Kingdom and Lagos. There was no control or supervision of the substance. There were no proper records of safe-keeping of the substance. There was no tag on the parcel in Ilorin. The sender also indicated that the parcel was checked and does not contain narcotics.

Even if it is conceded that the Defendant imported the substance, he did not do so willfully as

he did not know it contained cocaine. There is thus no mens rea.

Counsel urged the Court to discharge and acquit the Defendant.

In his oral argument, Counsel submitted that there is a break in the chain of custody between Trinidad and the United Kingdom. The defendant can only be expected to prove lawful authority after the prosecution has established a case against him. Otherwise, the Defendant is being called to prove his innocence.

If the offence is strict liability then there can be no conspiracy which involves an intention. The Court was also urged to read Exhibits T1 and T2 along with Defendant's oral testimony in order to find out the truth.

The Learned Director of Prosecution NDLEA submitted that the charge of conspiracy has been proved because there is evidence that the Defendant is popularly known as Oscar which is one of the names on Exhibit B1. The Defendant's telephone number 08033568242 was written on Exhibit B1 by the Consignor-Natalie Hill. Defendant's brother confirmed by phone to him that the parcel was meant for the Defendant. Sequel to this, the Defendant printed an identity card bearing the name on the parcel – Henry Oyewole Oscar and went to the Post Office to collect same identifying himself by Exhibit E. Counsel relied on Exhibits T & T1 as well as B1-B5 and Exhibit E.

There is no need to prove direct communication between or amongst the conspirators. The Defendant is not exculpated even if the conspiracy

was hatched earlier by Afam Onuigwe and Natalie Hill, now at large. Counsel relied on **Section 8(1) Evidence Act 2011**. The act of producing **Exhibit E** and presenting it at the Post Office to collect **Exhibits B1 - B5** are criminal acts done in furtherance of the conspiracy and are all acts of the conspirators. Conspiracy is generally a matter of inference as proof of the actual agreement is usually hard to come by. The mens rea is usually buried in secrecy.

Counsel submitted that the offence in Count 2 under **Section 11(a) of the NDLEA Act** is one of strict liability. Counsel submitted that the ingredients of the offence have been established.

There was importation by way of controlled delivery from Trinidad and Tobago with Ilorin Post Office as destination. The parcel was detected by

NCA and allowed to go forward to the consignee under the control and surveillance of the NCA and the NDLEA.

The Defendant was a party to the importation as his phone number was on the parcel, his brother in London confirmed to the Defendant, who proceeded to procure an identity card which he presented at the Post Office in order to take delivery of **Exhibits B1-B5.**

The Court was urged to rely on the Defendants extra-judicial statement as the Court would not attach credence to testimony if Defendant fails to show that the extra-judicial statement could not be correct.

Counsel also submitted that the evidence shows that the substance was cocaine since it went through the various stages of analysis. There was also no

break in the chain. Counsel referred to **Exhibits R and P and Section 55(1) of the Evidence Act**. The forensic expert was also called as a witness – PW3 – and was cross-examined. The ingredients of the offence having been proved, the onus to prove lawful authority to import cocaine into Nigeria is now placed on the Defendant by virtue of **Section 140 of the Evidence Act** as the Defendant is to show that he falls within the exceptions.

Counsel submitted that there are no contradictions in the prosecution's case and even if there were they are not so material as to cast reasonable doubt.

There was also a valid controlled delivery which concept can be stretched to include the possibility of substitution. There are no hard and fast rules. Prosecution witnesses have given unimpeached

evidence on controlled delivery. A mere denial or retraction of a voluntary confessional statement is not sufficient especially where as in this case, the Defendant's testimony was impeached under cross-examination. **Exhibits T1 and T2** were admitted without objection and its denial will only affect the weight to be attached to it. The timing of the retraction is also material. The Defendant did not raise the issue when cross-examining PW6. The prosecution does not have the onus to prove beyond all doubt, or all shadow of doubt. The Defendant has not created any doubt, not with his inconsistent and discredited testimony. Counsel urged the Court to convict as charged.

Learned Prosecutor also referred to **Section 3(1) (f) (g) and (p) of NDLEA Act** on the authority to resort to controlled delivery. Counsel also submitted

that the material part is when NDLEA got involved and gave evidence of the chain of custody until when Defendant presented himself for collection. Counsel submitted further that the weight of the substance is immaterial as it only affects sentence.

The Defendant is also not a witness of truth. Absence of lawful authority is a fact within the special knowledge of the Defendant. The reply on points of law also includes reference to fact as Counsel gave evidence therein.

To my mind, the greater portion of the reply on points of law is either a discussion of the facts are a rehash of the law. The proper reply relates to distinguishing Sections 55(1) and 140 of the Evidence Act and also pointing out that it is not for the defence to create a doubt but for the prosecution to prove beyond reasonable doubt.

Those were the submissions of Counsel.

I think a convenient starting point is Exhibits T and T1. Defence Counsel did not object to Exhibits T and T1 when they were tendered. There was thus no challenge to their admissibility. The prosecution has contended that Exhibits T and T1 are evidence of the guilt of the Defendant. In other words, they constitute admissions or in a criminal trial, confessions.

In TANKO-V-STATE (2008) 16 NWLR part 1114 597 at 627 the Court of Appeal per Omoleye JCA quoting from ISAH-V-STATE stated:

‘Now, a confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime, and like any other evidence, it is the duty of the trial Court to consider the

circumstances under which it was made and decide what weight to attach to the confession.

This two count charge relates to: Conspiracy to import 1.7 kilogrammes of cocaine into Nigeria and importing 1.7 kilogrammes of cocaine into Nigeria without lawful authority.

The alleged conspiracy involves the Defendant, his brother (Afam Onuigwe) and one Natalie Hill. The two other persons are at large. The gist of **Exhibits T and T1** is that Defendants' brother in London told him that a friend of his would send a letter to the friend's family through Defendant. That friend asked that Defendant should get an identity card in the name Henry Oyewole Oscar – a name which Defendant says is not his own. The purpose of the identity card was to enable Defendant collect the letter which was sent to Defendant in that name.

There is no mention of the contents of the letter a fortiori that it contains cocaine. The name of the friend is not stated.

In **KABIRU-V-AG OGUN STATE (2009) 5 NWLR (part 1134) 209 the Court of Appeal stated at 224-225.**

‘Once an accused person makes a statement under caution saying or admitting the charge or creating the impression that he committed the offence charged, the statement becomes confessional.

A confessional statement so long as it is free and voluntary, direct, positive and properly proved is enough to sustain a conviction.

It is my view that from the contents of **Exhibits T and T1** it is clear that they do not constitute confessions of conspiracy to import cocaine. There

is no mention of cocaine being in the letter to be sent to the Defendant. The name of Natalie Hill is not even mentioned in the exhibits. As regards importing cocaine without lawful authority, there is no indication in **Exhibits T and T1** that the letter was coming from outside Nigeria. There is no indication of where the letter was coming from . There is also no indication of the contents of the letter.

I will now consider the issue of controlled delivery. I think it is a matter of international collaboration as emphasized in **Section 3 of the NDLEA Act**. The description of the concept by PW6 shows some flexibility in its application which is also subject to local circumstances. In essence it is resorted to in trans border trafficking in narcostics where the agencies intend that the ultimate recipient

gets the consignment so as to be able to prosecute both sender and receiver. So the various countries of contact keep a watch over the parcel and allow it to cross their border (where they so wish). It is controlled so as to ensure the integrity of the parcel and to ensure an unbroken or seamless transmission. In the instant case, **Exhibit B1** originated from Trinidad and Tobago. Indeed it was posted there as there are stamps of Trinidad and Tobago on it. This is not in controversy. The next one hears is that an unnamed British Airways Pilot handed over the parcel to PW7 – the airport commander in Lagos. It is not disputed that the flight was a direct one from the United Kingdom.

There was intelligence from Serious Organized Crime Agency about the controlled delivery though no written communication was tendered. No written

communication accompanied Exhibit B1 to Lagos. Not even the name of the Pilot is stated. Surely there must be some channel conveying the journey of the parcel up to the United Kingdom and up till when it got to the British Airways Pilot. I think this is a yawning gap in the chain of custody.

On the other hand, there is some evidence, even if not satisfactory to the defence of how the parcel moved from PW7 down to Ilorin up till when the Defendant tendered his identity card to collect same. My thinking is that there is a doubt as to whether or not Exhibit B1 was in all respects what was sent from Trinidad and Tobago, allegedly by Natalie Hill. There is nothing to show its 'controlled movement' from Trinidad to the United kingdom. There is definitely a break in the chain. There is some integrity in the chain from the Airport to the Post

Office in Ilorin, though not entirely satisfactory.

There is however nothing about what happened to the package before it was handed over to PW7 by the Airline Pilot. One would have expected some documentation forwarding same to the NDLEA from NCA through British Airways. Even at that, the involvement of British Airways is a definite break in the chain. British Airways is not a crime agency.

My finding therefore is that there was a definite break in the chain of custody. I have my doubts as to whether what the Defendant was expecting was what was presented to him in Ilorin. I also have my doubts as to whether Exhibit B1 was what Natalie Hill actually sent (if indeed it was sent) to Defendant from Trinidad.

There is nothing before me to show Defendant knew what was to be sent to him was cocaine. There

is no mention of Natalie Hill in Exhibits T and T1.

There is no mention in Exhibits T and T1 that what was being sent was cocaine. There was no agreement to send cocaine to Nigeria from abroad.

There is no indication from Exhibits T and T1 that cocaine was being sent neither is Natalie Hill mentioned as the sender. Defendant did not therefore know the letter would contain cocaine.

Exhibit B1 itself though it came from the United Kingdom, is suspect. How did a parcel sent by Afam Onuigwe's friend get to a British Airways Pilot particularly when the parcel states it was sent from Trinidad. I do not see the ingredients of an agreement to import cocaine. I must therefore discharge and acquit the Defendant on Count 1. I so order.

I do not also see proof of importation of cocaine without lawful authority. The issue of how the British Airways Pilot came about a parcel that was sent by Post still looms large, even if it was under controlled delivery. Who supervised Exhibit B1 between Trinidad and the United Kingdom. We are not told. How did it get to the United Kingdom from Trinidad? Yet the parcel was allegedly posted in Trinidad for delivery in Ilorin, Nigeria. One has a doubt as to whether what was sent by Natalie Hill was what was eventually taken to Ilorin Post Office. The chain of transmission or custody is very important. I think it snapped between Trinidad and the United Kingdom. Having so snapped, it cannot be tied again. I must therefore find that there is no evidence of importation of Exhibit B1 which expressed itself as coming from Trinidad. It has not

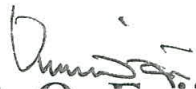
been contended that Exhibit B1 started its journey from the United Kingdom. Even if it is so contended, there is no explanation for how it got to the Pilot of a commercial airline, without any forwarding documentation. Not even the name of the Pilot was disclosed.

I note that Learned Prosecutor stated in his oral address that the NDLEA was only involved in what took place in Nigeria. I however think that this matter involves more than that.

I do not see any evidence of importation as the prosecution's case on that issue is doubtful. That doubt must be resolved in favour of the Defendant. The issue of lawful authority does not therefore arise.

The Defendant is therefore hereby discharged and acquitted on Count 2.

On the whole, the Defendant is hereby discharged and acquitted on this two count charge which is hereby dismissed.


A.O. Faji
Judge
6/11/15

Counsel:

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