IN THE HIGH COURT OF JUSTICE
EDO STATE OF NIGERIA
IN THE BENIN CRIMINAL DIVISION COURT 3
HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP HON. JUSTICE J. U. OYOMIRE – JUDGE
ON WEDNESDAY THE 13TH DAY OF APRIL, 2016

BETWEEN: **CHARGE NO. B/8CA/2014**

COMMISSIONER OF POLICE --- APPELLANT

VS.

HECTOR AWAMBOR --- --- RESPONDENT

JUDGMENT

This is an appeal against the decision of an Oredo Chief Magistrate Court, Benin City delivered on 5/8/2013 wherein the Respondent was discharged and acquitted on a 3 count charge of simple assault contra section 351 and stealing contra section 390(9) of the Criminal Code, Cap 48, Vol.II, Law of the Bendel State of Nigeria 1976 as applicable in Edo State. Dissatisfied with the Judgment, the Prosecution on 23/8/2013 filed Notice of Appeal and Grounds of Appeal. By a motion on notice dated 23/7/2015 and filed on 24/7/2015 additional Grounds of Appeal was filed.

The Respondent through his Learned Counsel – A.I. Omoka Esq. in his Respondent's brief filed on 27/8/2015 raised a preliminary objection. The objection was founded on the fact that the Notice of Appeal did not contain any relief by way of a retrial, order of nullity or verdict of guilty, e.t.c thus making the purported appeal a mere academic exercise.

In its reply, the Appellant posited that a good look at the Appellant's brief show clearly that the Appellant is urging the Court to set aside the judgment of the lower court and return a verdict of guilty on the Respondent in each of the counts. It was contended that the omission to state a relief in

the Notice of Appeal is a mere technicality which the Court should ignore and do substantive justice. The Court was urged not to punish the Appellant for the fault of its counsel. The cases of **Fagunwa V. Adibi (2004) 17 NWLR (pt.903) 544, Kalu V. Uzor (2006) 8 NWLR (pt. 981) 66** and **Geco-Prakla Nig. Ltd. Vs. Ukiri (2004) 1 NWLR (pt. 855) 519** were called in aid.

Throughout the gamut of the Notice of Appeal filed by the Appellant no relief whatsoever was stated. Learned Appellant Counsel admitted this much but termed the omission a mere technicality. I agree with her. It has been stated and restated in a plethora of cases that Courts are to lean towards doing substantive justice in place of technicalities and strict legalism as it will amount to injustice to defeat the course of justice on the altar of mere technicalities.

See **Ogundalu V. Macjob (2006) 7 NWLR (pt. 978) 148** and **State V. Gwonto (1983) 1 SCNLR 142**.

In this instant case, the Appellant gave Notice of its dissatisfaction with the judgment of the Learned Trial Magistrate which was the discharge and acquittal of the Respondent in each of the 3 counts charged against him. Although the Appellant did not state in clear terms that it seeks the reversion of the judgment and a verdict of guilty returned, it will amount to injustice to shut out the Appellant from exercising its constitutionally guaranteed and vested right of appeal.

In the circumstances, the preliminary objection of the Respondent is dismissed as it lacks in merit.

Learned Respondent Counsel has also urged the Court to strike out Grounds 2 and 3 of the Additional Grounds of Appeal. It was submitted that despite being couched as “erred in law” its particulars indicated that the complaint is about the application of the law to fact. It was contended that this makes the two Grounds one of error or misdirection and therefore, incompetent. The cases of **Ezomon V. N.N.B. Plc (2007) All FWLR (pt. 365)**

1032, Nwadike V. Ibekwe (2004) 24 W.R.N. 32 and **Baba V. Tafashiya (1999) 5 NWLR (pt. 603) 468** were urged on the Court.

It was contended that issue one as formulated by the Appellant is vague, imprecise, wide and nebulous because original Grounds 1 and 2 upon which it is framed is a general Ground of Appeal and a challenge to the Trial Court's finding on count one. It was argued that the issue formulated therefore appears so broad and general as it considered the totality of the case which is made up of 3 counts. The Court was urged to strike out issue one.

Learned Appellant Counsel countered that Grounds 2 and 3 complained against contain sufficient and substantial particulars as these are contained in the arguments of issues 3 and 4. It was posited that issue one is not vague, imprecise, wide and nebulous as it meets the characteristics of an issue as defined in the case of **Ogundalu V. Macjob (Supra)** which are precision, brevity and clarity.

The Court was urged to disregard the Respondent's objections, look into the substance of the appeal and overturn the judgment of the lower court by finding the Respondent guilty of the offences charged and convict him accordingly.

The Original Grounds of Appeal filed by the Appellant are as follows:-

GROUNDS OF APPEAL

1. The decision is altogether unwarranted, unreasonable and cannot be supported having regard to the evidence.
2. The Learned Trial Magistrate erred in law when he wrongly discharged and acquitted the Respondent of the offence of assault punishable under section 351 of the Criminal Code Cap 48, Vol.II, Laws of Bendel State of Nigeria 1976 as applicable in Edo State, although the charge was proved beyond reasonable doubt.

PARTICULARS OF ERROR

(a) The vital ingredients of the offence of assault as contained in section 252 of the Criminal Code was proved beyond reasonable doubt.

(b) There is evidence on record that the Accused Person dragged PW1 out of his office, gave him fist blows all over his body and fell him to the ground. The Accused Person and his colleagues also rained blows on PW1 while he was on the ground.

(c) The Evidence on Record about how PW1 was assaulted by the Accused Person was corroborated by that of PW2 and PW3. They gave eye witness accounts.

(d) The evidence of PW4, PW5 and PW6 were also not contradicted.

(e) The evidence adduced at the trial clearly proved the actus reus and Mens rea of the offence of assault.

(f) It is trite law that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. Rather it means such evidence sufficient to prove the ingredients of the offence charged.

3. Further Grounds of Appeal will be filed on the receipt of the Record of Proceedings.

The Additional Grounds of Appeal filed on 24/7/2015 are as hereunder:-

GROUND 1:

The Learned Magistrate erred in law when he invoked section 167(d) of the Evidence Act 2011.

Particulars:

a. The Prosecution is not bound to call a host of witnesses.

b. PW1's evidence on record shows that he was assaulted outside after his 2 staff were locked inside the office.

c. PW2 and 3 corroborated the evidence of PW1 that the staff were locked outside the office.

GROUND 2:

The Learned Magistrate erred in law when he incorrectly appraised the evidence before him.

Particulars:

a. The Magistrate said in his judgment that the Complainant in his examination in chief testified that his two staff witnessed the incident. The Complainant never said this.

b. The Magistrate in his judgment wondered why PW2 and PW3 did not call the Police when the Complainant was being assaulted.

c. The Magistrate in his judgment wondered why the Respondent was not charged for assaulting the Complainant's employees.

GROUND 3:

The Learned Magistrate erred in law when he dismissed the Medical Report.

Particulars:

a. PW4 in his evidence stated that on examining the Complainant, he discovered diffused areas of tenderness, which corroborates the Complainant's claim of assault.

b. Elevated blood pressure is not an ingredient of assault.

GROUND 4:

The Learned Magistrate erred in law when he held that there was underlying malice between the Complainant and the Respondent.

Particulars:

a. The Complainant in his evidence stated that he had taken the Respondent's employer to court because prior to the assault of 23rd November 2009, the Respondent's employer had sealed up his office for three days, illegally and without a valid court order.

b. There is no evidence of malice between the Complainant and the Respondent.

GROUND 5:

The Learned Magistrate erred in law when he held that the Appellant had not proved Count 11 and Count 111 against the Respondent.

Particulars:

a. Apart from the Complainant testifying that he was beaten and then his car was towed away, PW2 and PW3 also testified that they witnessed the assault and the subsequent towing of the Complainant's car.

b. The attack on the Complainant before his car was towed away is proof that he never gave the Respondent consent to take his car away and this act of the Respondent amounts to stealing.

c. When the Complainant's car was recovered at the Respondent's employer's premises, it was discovered that the Complainant's car had been vandalized and the sum of N10,000 had been stolen.

d. The Complainant's money was stolen as a result of his car being stolen by the Respondent.

A good starting point is to find out the principles to be applied to determine whether a ground of appeal raises a question of law or of facts or of mixed law and facts. In this regard, I shall refer to and adopt the illuminating judgment of *Eso JSC* in **Ogbechie V. Onochie (No1) (1986) 2 NWLR (pt. 23) 484 at 490-493** cited with approval in **Nwadike V. Ibekwe (2004) 24 W.R.N 32 at 71 per Naemaka – Agu J.S.C** on the issue.

From these decisions, it appears to me that a ground which complains that the judgment is against the weight of evidence is a ground of fact, findings of fact are matters within the orbit of the Court of trial. Thus in general terms, it can be said that all grounds of appeal which raise facts which warrant some determination either way are grounds of fact.

Where, however, the question raised by the ground is one of law as applied to disputed facts; or the ground raises partly law and partly facts it is a

ground of mixed law and fact. The ground with its particulars ought to be regarded as a whole.

Additional ground two as formulated complained about the incorrect appraisal of evidence. For proper understanding the particulars were:

(a) The Magistrate said in his Judgment that the Complainant in his examination-in-chief testified that his 2 staff witnessed the incident. The Complainant never said this.

(b) The Magistrate in his Judgment wondered why PW2 and PW3 did not call the Police when the Complainant was being assaulted.

(c) The Magistrate in his Judgment wondered why the Respondent was not charged for assaulting the Complainant's employees.

Additional Ground 3 complained that the Learned Trial Magistrate erred in law when he dismissed the medical report. The particulars of the complaint were:-

(a) PW4 in his evidence stated that on examining the Complainant, he discovered diffused areas of tenderness which corroborates the Complainant's claim of assault.

(b) Elevated blood pressure is not an ingredient of assault.

It is my respectful view that these grounds of appeal have the deceptive appearance of ground of facts as the complaints are that there was no evidence or no admissible evidence upon which a finding or decision of the Learned Trial Magistrate was based. Such grounds of appeal complaining that there was no evidence or no admissible evidence upon which the finding of the Learned Trial Magistrate was based has always been regarded as a ground of law. As Eso JSC stated in **Ogbechie V. Onochie (Supra) at 491** if the Tribunal

purports to find a particular event occurred although it is seised of no admissible evidence that the event did infact occur, it is a question of law.

In the circumstances, I hold that Grounds 2 and 3 of the Additional Grounds of Appeal are competent.

Having disposed of the preliminary issues raised by Learned Respondent Counsel – A.I. Omoaka Esq. we now proceed to consider the appeal on its merit. Now what was the evidence before the Learned Trial Magistrate?

The Prosecution's case is this in a nutshell. The PW1 – Godfrey Oribhabhor took an overdraft of the sum of N1.5m from Bank PHB in December 2008. By January 2009, he paid back N1.507m to the bank. The Respondent who was his Account Officer claimed that the PW1 was still indebted to the bank for accrued interest charges. The PW1 insisted on a reconciliation of the account which the Respondent failed to do.

On 23/11/2009, the Respondent led a team of the bank staff on debt recovery exercise to the office of the PW1. They demanded for payment of the sum of N128,000 they claimed was outstanding to the credit of the bank. The PW1 was requested to issue a post-dated cheque for the amount or give the bank a collateral security for the loan. The PW1 insisted that he will do no such thing until the account was reconciled. The Respondent and his team decided to impound the PW1's Mercedez Benz car. The PW1 resisted and in the ensuring commotion, the Respondent dragged the PW1 out of his office. He rained blows all over the body of the PW1 aided by his colleagues. 2 of the PW1's staff were also attacked and assaulted.

The Respondent and his colleagues towed the PW1's car away with a towing van. The matter was reported by PW1 at Oba Market Police Station. The PW6 was detailed to investigate the matter. The car was later recovered by the PW6 through a Court order at the premises of the bank along Airport

road, Benin City. The car had been vandalized and the a purse containing the sum of N10,000 left inside the car by the PW1 was removed.

The case was later transferred to State Criminal Investigation Department. The PW5 who was detailed to investigate the case referred the PW1 to Central Hospital, Benin City. He was subsequently treated by the PW4, a Police Doctor, who issued him a medical report. Under cross examination, the PW1 agreed that he issued a post dated cheque of N2m as collateral for the loan of N1.5m out of which he had paid N1.507m. He also admitted that he took the Respondent and his bank to Court on a Civil suit.

The defence of the Accused Person was a complete denial of the offences of assault and stealing charged against him. He confirmed that the PW1 took a loan facility of N1.5m from his bank and gave a personal guarantee for the repayment of the loan. When the PW1 defaulted in repaying the loan in full on the due date, he was paid a visit by the bank's loan recovery team. When the PW1 was not able to come up with the outstanding amount, he was requested to issue a post dated cheque for the balance as evidence of his willingness to clear the debt.

The PW1 refused to do so claiming that he knew the implication of issuing a dud cheque. He agreed to release his Mercedez Benz car to the team promising to come to the bank on Monday with some funds to collect the car. When the car did not start, a towing van was used to tow the car to the bank premises. Nobody broke into the car or vandalized it and no money was removed from it. The PW1 was not assaulted by anyone at anytime. The PW1 was a senior family friend with a relationship spanning several years.

That same day, the PW1 and the PW6 came to the bank to plead with the Manager for the release of the car to the PW1. They were obliged and the car was duly released to the PW1 even when he was yet to settle his

indebtedness to the bank which is the accrued interest on the loan hence the need for the visit of the team to his office.

Learned Appellant Counsel formulated 6 issues for determination.

These are:-

(1) Whether or not the Appellant proved the case against the Respondent beyond reasonable doubt (original Grounds 1 & 2).

(2) Whether the lower court did not misdirect itself when it invoked section 167(d) of the Evidence Act 2011 (Additional Ground 1).

(3) Whether the lower court did not improperly evaluate the evidence before it (Ground 2).

(4) Whether the lower court was not wrong in law when it disbelieved the medical report (Addition Ground 5).

(5) Whether the lower court was right to have found malice between the Complainant and the Respondent (Additional Ground 4).

(6) Whether the lower court was right to have discharged and acquitted the Respondent on the two counts of stealing (Additional Ground 5).

On his part, Learned Respondent Counsel also formulated 6 issues for determination as follows:-

(1) Whether the trial court was justified in her findings that the Prosecution did not prove the count of assault to the satisfaction of the court (coughed from original Ground 2).

(2) Whether the trial court was entitled to raise a presumption of certain facts having regards to the evidence before it (Additional Ground 1).

(3) Whether the findings by the trial court flows from a proper evaluation of the evidence presented (Additional Ground 2).

(4) Whether the trial court is at liberty to believe or disbelieve a medical report even when there is no nexus between the evidence and the said medical report (Additional Ground 3).

(5) Whether the trial court is justified to make a finding of the existence of malice between the PW1 and the Accused Person in the light of the evidence before the court (Additional Ground 4).

(6) Whether the trial court was justified in her finding that the Prosecution failed to prove the 2 counts of stealing against the Accused Person (Additional Ground 5).

The 2 sets of issues elaborately formulated by Learned Counsel for the contending parties are in all fours with each other as both raised substantially the same questions and also adequately capture, the field of dispute in this appeal. Nevertheless, upon a pain-staking and thorough perusal and consideration of the charge, the totality of the evidence led on record by the Prosecution and the defence before the Learned Trial Magistrate and the submissions and legal arguments of both Learned Counsel for the contending parties, it seems to me that the focal and central issue for determination in this case which invariably subsume all the issues variously formulated by both Learned Counsel can be succinctly distilled as framed in issue one by Learned Appellant Counsel to wit:

> "Whether the Prosecution has proved its case against the Respondent beyond reasonable doubt as required by law to secure a conviction in the 3 count charge."

It is well settled law that under our accusatorial criminal legal system, the burden of proof in criminal cases is placed on the Prosecution. The standard of proof required is proof beyond reasonable doubt. Proof beyond reasonable doubt does not mean proof beyond all doubt or shadow of doubt. It simply means the prosecution establishing the guilt of the Accused Person

with concrete and compelling evidence. It also means the Prosecution leading conclusive evidence that satisfy the essential elements of the offences charged.

See section 135(1) of the Evidence Act 2011 (as amended) and the cases of **Lori V. State (1980) 8-11 S.C 81** and **Ugwuanyi V. F.R.N. (2012) 209 LRCN 100**.

To secure a conviction in count 1 which charged the Respondent with simple assault contra section 351 of the Criminal Code, the Prosecution must prove:-

(a) that the Respondent used fist blows on the complainant all over his body.

(b) that the assault was without the consent of the complainant.

See section 252 of the Criminal Code, Cap 48 Vol.II, Laws of the Bendel State of Nigeria 1976 now applicable to Edo State.

For Counts 2 and 3, the Prosecution must prove

(a) The ownership of the Mercedez Benz 230 car and the N10,000.

(b) That both items are capable of being stolen.

(c) That the 2 items were fraudulently taken or converted with intent to permanently deprive the owner of the two items.

See **Onagoruwa V. State (1998) 1 ACLR 435** and section 383 of the Criminal Code.

Learned Trial Magistrate in her judgment referred to the evidence of the PW1 that his 2 staffs who were in the office with him and witnessed the assault on him were also assaulted by the Respondent and his colleagues. He wondered why they were not called by the Prosecution who fielded the PW2 and PW3 who were not in the office at anytime. She invoked the provisions of section 167(d) of the Evidence Act, 2011 against the Prosecution. In her

evaluation of the evidence before her, Learned Trial Magistrate made the following observations:-

> "The PW3 watched while the Accused Person dragged PW1 out and under cross-examination he said nobody separated the fight as the crowd was too much. Nobody called the Police. The 6 other shops were opened but nobody came to separate them. Why did PW2 and PW3 not call the Police seeing PW1 being assaulted by large number as alleged? Did this happen? I wonder."

Learned Applicant Counsel has criticized this stressing that the Prosecution is not obliged to call a host of witnesses in proof of its case. The case of **AGBI v OGBEH (2006) 11 NWLR (Pt.990) 65** and **SOWEMIMO V STATE (2012) 2 NWLR (Pt. 1284) 372** was called in aid. It was contended that the Prosecution was at liberty to call the PW2 and PW3 and not to call the 2 staffs of the PW1. It was submitted that S.167(d) of the Evidence Act can only be invoked where evidence is withheld and not when a particular witness is not called.

Learned Respondent Counsel in his brief posited that the observations of the Learned Trial Magistrate was unassailable. He conceded that the Prosecution has a liberty to determine who to call and the number of witnesses to be called in proving her case. He argued that in view of the evidence of the PW1 and Exhibit C (the Police Investigation report which showed that the 2 staffs made statements to the Police) the 2 staffs were eye – witnesses and therefore material witnesses.

It was submitted that the failure of the Prosecution to call the 2 staffs amounted to withholding evidence reliance being placed on the cases of **UBN Plc V. Chimaeze (2007) All FWLR (pt. 364) 303, Shobanke V. Sarki (2006) All**

FWLR (pt. 292) 131, Buba V. State (1994) 7 NWLR (pt. 355) 195 and **Onah V. State (1998) 1 ACLR 645**.

It is well settled law that the Prosecution is not obliged to call a host of witnesses in order to secure a conviction. The evidence of one solitary and credible witness if believed given all the surrounding circumstances of the case can establish a criminal case even if it is a capital offence beyond reasonable doubt. See **Alonge V. C.O.P (1959) 4 FSC 203, Onofowokan V. State (1987) 3 NWLR (pt. 61) 538, Okosi V. State (1998) 1 ACLR 281** and **Agbi V. Ogbeh (Supra)**.

It is not the number of witnesses that interests a Court of law but whether the ingredients of the offence are proved. See **Akinyemi V. State (2001) 2 ACLR 32**. The position of the law is that it is the duty of the Prosecution to place before the Court all available relevant evidence. This does not mean, of course, that a village or community of witnesses must be called upon the same point. But it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called. The locus classicus of this principle is the case of **R V. George Kuree (1941) 7 WACA 175 at 177**.

See also the cases of **Opayemi V. State (1985) 6 S.C 347** and **Omogodo V. State (1981) 5 S.C. 5.**

It is also settled law that no particular number of witnesses shall in any case be required for the proof of any fact. See **Oguonzee V. State (1998) 5 NWLR (pt. 551) 521 at 550**.

There is no doubt that the Prosecution had a discretion at the trial whether or not to call the 2 staffs of the PW1 and to depend on the evidence of the PW2 and PW3 for the proof of its case against the Respondent. There is also no doubt that all 4 persons were competent witnesses as the PW1 had claimed that they witnessed aspects of the assault on him. According to the

PW1, he and his 2 staffs were assaulted inside the office while he alone was assaulted outside the office in the presence of the PW2 and PW3.

Therefore, in order to prove the alleged assault on the PW1 inside the office, it was incumbent on the prosecution to call the 2 staffs who witnessed it and were also victims of the alleged assault. In respect of the assault outside the office, the PW2 and PW3 were eminently qualified to testify.

Incidentally, count 1 did not specify which aspect of the assault on the PW1 that the Respondent was charged with. It merely complained about the assault on the PW1 on 23/11/2009. It was, therefore, necessary for the Prosecution to call the persons who witnessed both aspects of the alleged assault.

There is evidence that the 2 staff made statements to the Police during the stage of investigation. They were not called by the Prosecution as witnesses and no reason was given for this failure. The PW5 did not list the PW3 as one of the 3 witnesses he took statement from. The listed persons are Fasasi Isiaka, Friday and Igbie whose surnames are unknown. The PW2 told the Trial Magistrate that he did not make any statement to the Police. Curiously, the PW2 and PW3 who did not make any statement were called and the 2 staff who did were not called.

Learned Trial Magistrate invoked the provisions of section 167(d) of the Evidence Act 2011, (as amended) against the Prosecution. This invocation, has drawn flanks from Learned Appellant Counsel. In her judgment, the Learned Trial Magistrate wondered:-

> "why were the staff of PW1 not called as vital witnesses? Why was the Appellant not also charged for assaulting them if there was any assault as alleged on the said date carried out by the Accused Person? The only presumption I have … is that if the 2 staff were called their evidence

would have been unfavourable to the Prosecution. I, therefore, invoke section 167(d) of the Evidence Act 2011.

Reliance was placed by Learned Trial Magistrate on the case of **Onah V. State (1998) 1 ACLR 645 R.9.**

It is my respectful view that Learned Trial Magistrate was justified in invoking section 167(d) of the Evidence Act 2011 against the Prosecution in the circumstance of this case. In the normal and usual course of events one would have expected the Prosecution to field the 2 staff who made statements to the Police instead of fielding the PW2 and PW3 who did not. This is more so as they are the employees of the PW1 and would be readily available to come to Court to testify. Moreover, the Prosecution has established that they too were victims of the assault. As the Prosecution did not profer any explanation or reason for not fielding them, it was, therefore, right for the Learned Trial Magistrate to wonder why they were not fielded and why the Respondent was not charged for their assault.

All men stamp as probable that which they would have said or done under similar circumstances and as improbable that which they themselves would not have said or done under the same set of circumstances. Things inconsistent with human knowledge and experience are properly rated as improbable. This seems to be the purport and intendment of section 167 of the Evidence Act 2011.

Where, therefore, the principal facts look improbable when considered against the background of their surrounding circumstances, they cannot induce belief. Belief and satisfaction should represent the Court's reaction towards facts and possibilities and probabilities based on those facts. Where, as in this case, the Prosecution failed to field eye witnesses who made statements to the Police and fielded the PW2 and PW3 who did not and also failed to charge the Respondent with the alleged assault on the 2 employees, the evidence before

the Learned Trial Magistrate will be punctured with improbabilities. Moreover, as so many questions remain unanswered and unexplained, the Learned Trial Magistrate was justified in hesitating to accept and belief the evidence of the PW2 and PW3.

The law is trite that if Learned Trial Magistrate was in doubt (a doubt which any impartial view of the evidence in this case should induce) it was her duty to give the benefits of that doubt to the Respondent as she did. See **Ikemson V. State (1998) 1 ACLR 80** and **Bozin V. State (1998) 1 ACLR 1 at 13**.

The PW2 told the Court that the dress worn by the PW1 was torn during the assault on him but the PW1 denied this fact categorically. Under cross examination, he stated that his dress was never torn. His evidence was reinforced by the PW3. Even allowing for the fact that a group of people looking at the same event will each observe different aspects of the incident and notice different things, nevertheless, the salient features of the event will remain constant. In the present case, this is not so. The Prosecuting witnesses are contradicting each other on a material point. In **Onubogu V. State (1974) 9 S.C 1** the Supreme Court laid down the rule that:-

> ". . . where one witness called by the Prosecution in a criminal case contradicts another prosecution witness on a material point. The Prosecution ought to lay some foundation, such as showing that the witness is hostile, before they can ask the Court to reject the testimony of one witness and accept that of another witness in preference for the evidence of the discredited witness. Even if the inconsistency in the testimony of the 2 witnesses can be explained, it is not the function of the trial judge . . . to provide the explanation."

Speaking in the same vein in **Boy Muka V. State (1976) 9-10 S.C 303** it added thus:

> ". . . where no explanation has been furnished by any witness for any inconsistency in the evidence of the witnesses called by the Prosecution, it is not for the Court to pick and choose which witness to believe among such witnesses. It can not accredit one witness and discredit the other in such circumstances."

It has been decided by a plethora of cases that when dealing with the credibility or veracity of a witness, many factors are taken into consideration. These factors include:-

1. The witness' knowledge of the fact to which he testifies
2. The witness' disinterestedness
3. The witness' intergrity
4. Whether the witness' evidence is contradicted by or is contradictory of the surrounding circumstances of the case.

See **Onuoha V. State (1989) 2 NWLR (pt. 101) 23** and **Adelumola V. State (1988) 1 NWLR (pt. 73) 638**.

The Prosecution having offered no explanation for the contradictions in the evidence of the PW1-PW3 as to whether or not the dress worn by the PW1 was torn by the Respondent and team during the alleged assault on the PW1, Learned Trial Magistrate was justified in disbelieving all the Prosecution witnesses and rejecting their evidence.

I have refrained from commenting on the finding of Learned Trial Magistrate in respect of the medical report and the attack on same. This is because medical evidence or report is not required to prove a count of simple assault where no harm has been occasioned. Moreover, the PW4 did not see and examine the PW1 until about 5 weeks after the assault.

Learned Trial Magistrate in her judgment held that there seems to be bad blood or malice between the PW1, the Respondent and his bank. She posited that this malice created a doubt in the Prosecution's case which doubt

she resolved in favour of the Respondent reliance being placed on the case of **State V. Uzor (1973) NWLR 203.** Learned Appellant Counsel has criticized this finding. It was posited that Learned Trial Magistrate was wrong to come to the conclusion that there was malice between the parties because the PW1 had taken a civil action against the Respondent and his bank prior to the event of 23/11/2009. On the other hand, Learned Respondent Counsel contended that Learned Trial Magistrate was justified in her finding. He relied on the definition of malice in Black's law Dictionary.

At page 5 of the record of proceedings, the PW1 had this to say under cross examination:

> "Yes I took the Accused Person and the bank to Court over a civil matter because the Accused Person prior to the incidence of 23/11/2009 had 2 weeks earlier invaded my office, sealed it up illegally without valid court order for a period of 3 days and deprived me and my business the rights and opportunity to income. They also forged a date on my Spring Bank cheque that initially used as a collateral for the loan for the sum of N2m and presented it for payment."

What then is malice? The 9th edition of Black's Law Dictionary defined malice as "a feeling of hatred for somebody that causes a desire to harm them." The New International Webster's Comprehensive Dictionary of the English Language defined it at page 771 as:-

1. a disposition to injure another; evil intent; spite; ill will
2. law – a willfully formed design to do another an injury

The synonyms of malice are enmity and hatred.

The PW1 has complained in his evidence in Chief that he took a civil action against the Respondent and his bank over the illegal invasion and sealing up of his office prior to this case. He complained that he and his

business suffered financial loss as a result of this. He also complained that his cheque was forged by them.

All the above complaints from the PW1 and the Civil action he instituted against the Respondent and his bank are pointers that there is no labour love lost between the parties. They are evidence of bad blood, spite, ill will, enmity and hatred.

In the light of the evidence before Learned Trial Magistrate, she was justified in making a finding of the existence of malice between the PW1, the Respondent and his bank.

In line with the decision in the case of **State V. Macaulay Uzor (1973) NMLR 203** per Oputa J (as he then was) that where there is evidence of underlying malice between the Accused Person and the complainant, the Court must be wary and circumspect in convicting, I hold that Learned Trial Magistrate was justified in resolving the doubts in the Prosecution's case in favour of the Respondent.

Malice is a double edged sword. It may provide a motive for the Respondent to commit the offences charged. It may also provide a reason for the complainant to falsely trump up and fabricate the allegations against the Respondent to settle scores. However be it, the Courts are enjoined to be wary and circumspect in convicting where there is evidence of underlying malice, bad blood and ill will between the complainant and the person accused.

For count 2, there is no dispute that the Mercedez Benz 230 car belonging to the PW1 was removed by the Respondent and his colleague from where it was parked in front of the PW1's office. It was towed to the Respondent's bank premises without the PW1's consent. There was, therefore, asportation.

The only issue in dispute is the intent with which the car was taken away. Was it to permanently deprive the PW1 of the car? Was the intent that the car be kept in the custody of the Bank until the PW1 settle his indebtedness to the bank? Put differently did the Prosecution prove the requisite mens rea in order to secure a conviction in a charge of stealing as required by section 383 of Criminal Code?

My short answer is NO. There is abundant evidence that the PW1 took a loan from the bank and there have been issues between him and the Respondent as to the exact amount remaining unpaid. There is evidence that a demand for payment was made to the PW1 to repay the loan and its accrued interest and that the PW1 refused to do so.

According to the PW1 when told that he was still owing after paying N1,507,000 for a loan of N1,500,000 he took from the bank he insisted on reconciliation of the account before paying. There is also undisputed evidence that the car was impounded by the Bank's loan recovery team led by the Respondent. The PW1 admitted this much when he testified that he was told that the car would be impounded as security for the loan and that the car will be released to him upon payment but that he refused to part with the car. According to him, his refusal led to the fracas wherein he was assaulted. Thus, the PW1 knew why the car was to be impounded and towed away by the Respondent. Where then lies the fraudulent intent? Again, I find justification for the finding by Learned Trial Magistrate that the Prosecution had failed to prove count 2 beyond reasonable doubt as required by law.

For count 3, I agree with Learned Trial Magistrate that there is no iota of credible evidence linking the Respondent with the theft of the N10,000. No one saw him taking the money. The only evidence which seems to link him with the stealing is that he led the team that towed the car from which the N10,000 was alleged to have been stolen from. Therefore, he stole the money.

What kind of reasoning or logic is this? It was like the Biblical missing golden cup of Joseph found in the bag of Benjamin. It was then suspected or assumed that Benjamin stole the cup.

It is well settled law that suspicion no matter how strong cannot take the place of legal proof or ground a conviction. The word "suspicion" which ordinarily means an act of suspecting, state of being suspected or the imagining of something without evidence or on slender evidence cannot be basis for criminal responsibility. Criminal responsibility and guilt are exact human conducts which the law apportions to an Accused Person through evidence and evidence alone. They are not subject to moral speculations or suspicion. They are not based on assumptions but on proved facts and nothing more and nothing less. No criminal law of a civilize legal system ever predicates or premises its crime detection and guilt apartment machinery on mere moral speculations and suspicion.

See **Abieke V. State (1975) 9-11 S.C. 97, Anekwe V. State (1976) 9-10 S.C 255, Babalola V. State (1989) 4 NWLR (pt. 115) 264** and **Nwankwo V. State (1990) 2 NWLR (pt. 134) 627**.

In criminal trials, the Prosecution has a duty to prove its case beyond reasonable doubt. There is no duty on an Accused Person to purge himself of guilt. Where there is lingering doubt, the Accused Person is given the benefit of the doubt. A Court cannot draw an inference of guilt from mere suspicion.

See **Ekpe V. State (1994) SCNJ 131, Namsoh V. State (1993) 6 SCNJ (pt.1) 55, Adeboye V. State (2011) LPELR (091) 1** and **Ogisugo V. State (2015) ALL FWLR (pt. 792) 1602**.

The available evidence before the Learned Trial Magistrate was not of such a quality that will irresistibly compel her to make an inference as to the guilt of the Respondent on the 3 count charge.

In the final result, I am satisfied that the Learned Trial Magistrate was right in returning a verdict of not guilty on the Respondent on the evidence before her. I affirm the discharge and acquittal by Learned Trial Magistrate of the Respondent in each of the 3 counts charge against him. The appeal of the Appellant is hereby dismissed and the judgment of the lower court is affirmed accordingly.

HON. JUSTICE J.U. OYOMIRE
JUDGE
13TH APRIL, 2016

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