**CHRISTOPHER AREHIA & ANOR**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

29TH APRIL, 1982

SUIT NO. SC 81/1981

**LEX (1982) - SUIT NO. SC 81/1981**

**OTHER CITATIONS**

3PLR/1982/10 (SC)

(1982) 4 SC 78

**BEFORE THEIR LORDSHIPS:**

AYO GABRIEL IRIKEFE, J.S.C.

KAYODE ESO, J.S.C.

ANTHONY NNAEMEKA ANIAGOLU, J.S.C.

MUHAMMWED BELLO, J.S.C.

MOHAMMED LAWAL UWAIS, J.S.C.

**ORIGINATING COURT**

1. FEDERAL COURT OF APPEAL

2. BENDEL STATE HIGH COURT (HOLDEN AT UBIAJA)

**REPRESENTATION**

P.E. OKODE with him S. Osime for the Appellant.

G.E. EDOKPAYI, Deputy Solicitor-General Bendel State for the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW:– Manslaughter – Grievous bodily harm – Driving without licence –How proved

CRIMINAL LAW AND PROCEDURE:- Evidence – Cross-examination of witness who has made a previo us statement in writing - Whether a witness may be cross-examined as to previous statement made by him in writing or reduced into writing by the police or anyone else without such writing being shown to him or being produced – Purpose of such cross-examination - Where the witness admits making the statement – Whether it becomes unnecessary to produce the statement

CRIMINAL LAW AND PROCEDURE:- Evidence of close/blood relatives – Charge of natural bias – Duty of court thereto

CHILDREN AND WOMEN LAW: *Children and Security of Education Centers* – Death of 8 year old on school playground due to vehicle which crashed through school’s bamboo fence – How treated

EDUCATION AND LAW:- *Infrastructure and Security of School Premises* – 8 year old killed in bamboo fenced school premises by vehicle which crashed through the fence – How treated

ETHICS – LEGAL PRACTITIONERS:- Inexperienced legal practitioner/prosecutor – handling sensitive criminal proceedings – Effect – Attitude of court thereto

TRANSPORT AND INFRASTRUCTURE LAW - MOTOR VEHICLE:- Traffic offences - Driving without license – How proved

**PRACTICE AND PRODECURE ISSUES**

EVIDENCE:-Where there are inconsistencies in prosecution witness’ statement with regard to earlier statement – Whether failure of prosecution to treat witness as hostile witness is fatal – Effect – Duty of Court thereto – Whether Court can re-examine witness or disregard testimony as unreliable

INTERPRETATION OF STATUTE: Sections 198, 205 and 208 of the Evidence Act, Cap.62 – it is only when the witness denies making the statement or its contents and it is intended to contradict him by the statement that it is necessary to put the statement in evidence

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

On the 12th May, 1978 the 90 pupils of Class 3 of the Uendova Primary School, Ekpoma were out on their football ground in the premises of the school cutting grass when all of a sudden a car driven by the appellant broke through the bamboo fence of the school meandering in the direction of the pupils. The deceased 8 year old, who was one of the pupils in the field, was knocked down and killed on the spot, while another pupil (P.W.5), who was also knocked down, suffered a fracture of the foot. Eventually the car came to a halt and it was observed that P.W.8 was together with the appellant in the car as a passenger. While the victims were being given first aid, P.W.8 took the ignition key from the appellant and drove the car off by crashing through the fence. He did that on the advice of a teacher who said that if the parents of the affected pupils should turn up at the school they would lynch the driver and set the car ablaze. The appellant also took to his heels.

The vehicle was examined by a Vehicle Inspection Officer, P.W. 71 who testified that he found it mechanically sound and roadworthy. The appellant, who was a member of the National Youth Service Corps serving with Shell Co. Limited as an engineer, gave evidence in his defence which even though rejected by the trial judge found support in the testimony of P.W.8 who said exactly the same thing contradicting, in a vital respect, the evidence of other eye witnesses. However, the court observed that the witness of PW8 in court contradicted with his statement to the Police thereby requiring a resolution by the Court which observed:

“In the case in hand P.W.8 was present with the accused when the incident occurred and saw it all. Nothing was done by the prosecution to suggest that the witness was hostile and I have no basis in the circumstance, on which to accept in part his evidence and to reject the remaining part. In short the prosecution did not complain about his evidence. It is not my duty to proffer explanations why he gave evidence the way he did that is a matter for the prosecution. I have no doubt that the mishandling of this issue was due to the inexperience of the then prosecuting State Counsel at the time but that does not save the situation. If the 8th P.W.s’ evidence was by design, he is left to his conscience and God. I very much regret that the evidence of the 8th P.W. has watered down considerably the prosecution’s case against the accused in Count 1 and I hold in the circumstance that that degree of negligence necessary to sustain a case of manslaughter against the 1st accused person has not been proved beyond reasonable doubt. The 1st accused is therefore acquitted and discharged on Count 1.”

Before the Federal Court of Appeal, it was held that the learned trial judge was in error in the manner in which he dealt with the evidence of P.W.8.

DECISION(S) APPEALED AGAINST

The Federal Court of Appeal stated that the evidence of P.W.8 should have been regarded by the learned trial judge as unreliable and it went on to say (per Okagbue J.C.A.):

“In my view his (trial judge’s) reliance on Onubogu’s case (supra) does not show a complete understanding of the points decided by the case. At least two situations can develop during a trial either of which can be resolved by a recourse to the case of Onubogu which is fast becoming a locus classicus on the admission of evidence.

In the first situation and I believe that is the situation which we are faced with here, Onubogu expends a line of decision which may be traced to Regina v Sokien, (1960) 1 W.LR. 1169 at p. 1172 and a passage from which is referred to in The Queen v Ukpong, (1961) All N.LR. 25. In that passage, Lord Parker C.J. said

‘In the judgment of this Court when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn do not constitute evidence upon which they can act.’

The Federal Court of Appeal having held that the evidence of P.W.8 was unreliable went on to consider the other evidence of the prosecution witnesses, namely prosecution witnesses Nos. 2, 3, 4, 5, 6, 7, 9 and 10 and relied on their testimonies to convict the appellant of manslaughter.

ISSUE(S) FOR DETERMINATION ON APPEAL

*[Appeal was resolved based on the grounds of appeal advanced by the Appellants to wirt:*

1. The learned Justices of the Federal Court of Appeal erred in law when they convicted him by wrongly evaluating and applying the principle in the case of Onubogu & Anor.

2. The learned Justices of the Federal Court of Appeal misdirected themselves in law when they failed to consider the facts apparent on the record of proceedings at the High Court that the learned trial judge failed to warn himself against the danger of relying on the evidence of the witnesses who are members of the same family with the deceased or that it was not safe to convict on the evidence of such witnesses.

DECISION OF [CURRENT] COURT

1. It is to be noted that the duty of the prosecution to treat its witness as hostile is discretionary (see section 206 and 209 of the Evidence Act). In the present case the prosecution was not obliged to treat P.W.8 as a hostile witness because the learned trial judge had by his examination of the witness destroyed any harm that the evidence-in- chief given by P.W.8 would have done to the prosecution’s case.

2. In our view, where a witness has made a statement before trial which is inconsistent with the evidence he gives in court, the court, provided that no cogent reasons are given for the inconsistency, should regard his evidence as unreliable.

3. If the prosecution have information in their possession which shows that the evidence which a witness called for the prosecution has given is in flat contradiction of a previous statement which he has made and so entitles the prosecution to cross-examine they should apply for leave to cross-examine and not leave it to the judge to do so, because it is counsel’s duty to cross-examine in such circumstances. If he has not done so, the judge has to do it. That is not right, because if may look as if the judge is taking sides, but he cannot help intervening in such circumstances, because it is his duty to see that justice is done.

3. The fact that the witnesses were related to the deceased does not mean that they were not competent to testify for the prosecution. Learned counsel for the appellant has not shown them to be biased. Their evidence about how the deceased was knocked down by the car was factual and corroborated by the evidence of the appellant himself who admitted killing the deceased with the car. Further corroboration of their testimony is also available in the evidence of the first prosecution witness, the doctor; second and third prosecution witnesses, who were teachers at the deceased’s school and the Investigating police officer. In those circumstances, the failure of the learned Justices of the Federal Court of Appeal to treat the evidence of the relations of the deceased with caution did not occasion any miscarriage of justice.

**MAIN JUDGMENT**

**UWAIS, J.S.C.** (Delivering the Judgment of the Court):

In a joint trial before the Bendel State High Court sitting at Ubiaja the appellant was charged with three counts, to wit (1) manslaughter contrary to S. 325 of the Criminal Code, Cap 48 (Laws of the Bendel State of Nigeria, 1976) (2) grievous harm contrary to S.335 of the Criminal Code, Cap. 48 and (3) driving without licence contrary to S.13(1) of the Road Traffic Law, Cap. 148 (Laws of Bendel State of Nigeria, 1976). He was discharged and acquitted on all the counts. The prosecution appealed from that judgment to the Federal Court of Appeal. The appeal was allowed and the appellant was convicted of manslaughter for which he was sentenced to three years’ Imprisonment. Consequently the appellant appealed before us. After having heard argument on 4th February, 1982 from Mr. Okotie, learned counsel for the appellant we decided not to hear Mr. Edokpayi, Deputy Solicitor-General, in reply. We dismissed the appeal and confirmed the conviction and sentence passed on the appellant while reserving till today our reasons for doing so. I now give my reasons.

This is a tragic case. Its facts as found by the learned trial judge may be briefly stated as follows. On the 12th May, 1978 the 90 pupils of Class 3 of the Uendova Primary School, Ekpoma were out on their football ground in the premises of the school cutting grass when all of a sudden a car driven by the appellant broke through the bamboo fence of the school meandering in the direction of the pupils. The deceased, Fidelis Ehiemuan, who was one of the pupils in the field, was knocked down and killed on the spot, while another pupil (P.W.5), who was also knocked down, suffered a fracture of the foot. Eventually the car came to a halt and it was observed that Christopher Ighalo, (P.W.8) was together with the appellant in the car as a passenger. The teacher in charge of the pupils and the headmaster of the school rushed to the scene of the accident. While the victims were being given first aid, P.W.8 took the ignition key from the appellant and drove the car off by crashing through the fence. He did that on the advice of a teacher who said that if the parents of the affected pupils should turn up at the school they would lynch the driver and set the car ablaze. The appellant also took to his heels. The victims were conveyed to the General Hospital at Uromi where a postmortem examination was performed on the deceased by a doctor (P.W.1). The examination indicated that the deceased suffered a fracture of the neck and a laceration of the left knee. It also showed that he bled from the mouth, nose and face. In the opinion of the doctor the deceased, who was about 8 years old, died as a result of the injury to his neck and the loss of blood.

Apart from P.W.8 there were numerous eyewitnesses to the incident who testified for the prosecution. P.W.2 who was the teacher under whose care the pupils were cutting grass was one of them, so also Festus Odia, (P.W.5) who was the other victim who sustained fracture of the foot. There was also Lucy lyama, (P.W.9) who said:

“As I stood by the roadside waiting to buy wood to make fire, I saw a vehicle coming on the road and driven in a zigzag manner and so I started to shout ‘wei wei.’ I saw that the car in its struggling manner bounced through the school fence into the school compound. Then I heard the shouts of the school children.”

The vehicle was examined by a Vehicle Inspection Officer, P.W. 71 who testified that he found it mechanically sound and roadworthy. The appellant, who was a member of the National Youth Service Corps serving with Shell Co. Limited as an engineer, gave evidence in his defence and said that he drove the car normally through the school gate when he observed some pupils playing and running about by the gate and in the school premises. He said that it was in his attempt to avoid colliding with any of the pupils that he swerved into the football field and knocked down one of the pupils and after that he ran into the school fence. Although this piece of evidence was rejected by the learned trial judge it found support in the testimony of P.W.8 who said exactly the same thing. It was because the evidence of P.W.8 contradicted, in that respect, the evidence of all the eye witnesses called by the prosecution that the learned trial judge acquitted the appellant on the count of manslaughter [on] the authority of Christopher Onubogu & Anor. v The State, (1974) 1 All N.L.R. (Part II) 5 at p.18.

It is to be pointed out that when P.W.8 gave that evidence in chief and was cross-examined by appellant’s counsel the learned trial judge decided on his own motion to examine the witness before he was reexamined by the prosecution. The nature of the examination by the trial court is as follows:

“By Court: I made a statement to the police after this Incident. It is true that all I told the police on that day was that all of a sudden all that I observed was finding ourselves in the school premises. I did not tell them that we drove smoothly through the gate.”

At the end of that examination the prosecution decided not to re-examine the witness. The trial judge then made the following remarks:

“Court: This witness has given evidence most inconsistent with his earlier statement and is fancifully telling lies to Court. The witness is to be remanded in custody till Thursday the 31st of January, 1980 when I will take a final decision as to what to do with him.”

On the adjourned date a plea was made to the learned trial judge by a counsel on behalf of P.W.8 and the following order was made by the court:

“I have considered the passionate plea of both counsel for the 8th P.W. as well as the 1st accused person (i.e. appellant) whose bail was cancelled. It is sad that the 8th P.W., who calls himself a teacher in a post-primary school, should behave the way he did. I am sure he now knows that he is a disgrace to himself having regard to the type of society this country is trying to build. I do hope he has learnt his lesson by now. The witness Christopher Ighalo is hereby discharged.”

It is necessary to refer in full to the observation made by the learned trial judge in his judgment with regard to the effect which he said the testimony of P.W.8 had on the rest of the evidence adduced by the prosecution. It reads:

“In the case in hand P.W.8 was present with the accused when the incident occurred and saw it all. Nothing was done by the prosecution to suggest that the witness was hostile and I have no basis in the circumstance, on which to accept in part his evidence and to reject the remaining part. In short the prosecution did not complain about his evidence. It is not my duty to proffer explanations why he gave evidence the way he did that is a matter for the prosecution. I have no doubt that the mishandling of this issue was due to the inexperience of the then prosecuting State Counsel at the time but that does not save the situation. If the 8th P.W.s’ evidence was by design, he is left to his conscience and God. I very much regret that the evidence of the 8th P.W. has watered down considerably the prosecution’s case against the accused in Count 1 and I hold in the circumstance that that degree of negligence necessary to sustain a case of manslaughter against the 1st accused person has not been proved beyond reasonable doubt. The 1st accused is therefore acquitted and discharged on Count 1.”

Before the Federal Court of Appeal, it was held that the learned trial judge was in error in the manner in which he dealt with the evidence of P.W.8. The Court stated that the evidence of P.W.8 should have been regarded by the learned trial judge as unreliable and it went on to say (per Okagbue J.C.A.):

“In my view his (trial judge’s) reliance on Onubogu’s case (supra) does not show a complete understanding of the points decided by the case. At least two situations can develop during a trial either of which can be resolved by a recourse to the case of Onubogu which is fast becoming a locus classicus on the admission of evidence.

In the first situation and I believe that is the situation which we are faced with here, Onubogu expends a line of decision which may be traced to Regina v Sokien, (1960) 1 W.LR. 1169 at p. 1172 and a passage from which is referred to in The Queen v Ukpong, (1961) All N.LR. 25. In that passage, Lord Parker C.J. said

‘In the judgment of this Court when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn do not constitute evidence upon which they can act.’

In Onubogu, Fatai-Williams, J.S.C. (as he then was) said:

“In our view where a witness such as the complainant (P.W.4) in the case in hand has made a statement before trial which is inconsistent with the evidence he gives in court, the court, provided that no cogent reasons are given for the inconsistency, should regard his evidence as unreliable.”

In the Instant case the evidence of P.W.8 should have been regarded as unreliable. It was not a question of accepting part of his testimony and rejecting the rest Obiade v The State, (1970) 1 All N.LR. 35 does not apply.

The other situation In Onubogu where one or more prosecution witnesses are discredited while others are accredited at the Instances of the prosecution without foundation being laid for declaring witnesses as hostile does not arise.

It is my view that the testimony of P.W.8 should have been disregarded as unreliable, no cogent reason having been adduced for the Inconsistency between his testimony on oath and his previous statement.”

The Federal Court of Appeal having held that the evidence of P.W.8 was unreliable went on to consider the other evidence of the prosecution witnesses, namely prosecution witnesses Nos. 2, 3, 4, 5, 6, 7, 9 and 10 and relied on their testimonies to convict the appellant of manslaughter.

Before us the appellant complained that

1. The learned Justices of the Federal Court of Appeal erred in law when they convicted him by wrongly evaluating and applying the principle in the case of Onubogu & Anor.

2. The learned Justices of the Federal Court of Appeal misdirected themselves in law when they failed to consider the facts apparent on the record of proceedings at the High Court that the learned trial judge failed to warn himself against the danger of relying on the evidence of the witnesses who are members of the same family with the deceased or that it was not safe to convict on the evidence of such witnesses.

Arguing the first ground learned counsel for the appellant contended that the Federal Court of Appeal was in error in accepting the evidence of prosecution witnesses Nos. 2,3,4,5,6 and 7 to convict the appellant while it was clear that the testimony of P.W.8 was in contradiction with their evidence. He submitted that the Federal Court of Appeal had therefore misapplied the decision in the case of Onubogu & Anor.

In the appellant’s brief in support of the complaint a different line of argument is followed. It is stated that no sufficient evidence was adduced in the High Court to establish that the previous statement made by P.W.8 did in fact contradict his testimony at the trial since the previous statement was not tendered in evidence and admitted as an exhibit. In support of this submission the brief points out that the prosecution failed to treat P.W.8 as a hostile witness.

Now the principle laid down in the case of Onubogu & Anor. is that where there are contradictions in the testimonies of the prosecution witnesses on a material fact and the contradictions are not explained by the prosecution through any of its witnesses, the trial court should not speculate on or proffer the explanation for such contradictions and thereby pick and choose from the evidence of the prosecution witnesses that which it will believe; see Boy Muka & Ors. v The State, (1976) 9& 10 $.C. 305 at p.325. A close examination of the case of Onubogu & Anor will show that all the six witnesses called by the prosecution were each unreliable on their evidence as to how the complainant in that case was injured on the head with a spear. There were contradictions also among them on how the complainant was insured with the spear and was conveyed to the police station from the scene of the incident. There was furthermore, inconsistency among the witnesses as to where the spear was fetched from before and after it was employed in inflicting the wound on the complainant. Most of the contradictions were elicited during the cross-examination of the witnesses. The contradictions could have been explained by the prosecution witnesses during reexamination but this did not happen. The trial judge tried to provide the solution to the contradictions in his own imagination. That was why this Court said he was wrong in doing so.

In the present case the situation is different. It is true that P.W.8 by his evidence contradicted all the eyewitnesses called by the prosecution but the contradiction was not allowed to remain unexplained. Its credibility was destroyed by the examination of P.W.8 conducted by the learned trial judge. So that the evidence was inherently rendered worthless and ineffective. It therefore could not even be regarded as credible and less still as contradictory to the testimonies of the other eyewitnesses.

On the complaint that the previous statement made by P.W.8 to the police had not been put in evidence and that there was therefore no sufficient evidence to show that P.W.8 made the statement; learned counsel for the appellant did not cite any authority in support. It is to be observed that P.W.8 admitted making the statement, and that being so, it is difficult to see why the statement had to be proved and what purpose, if any, that would serve. By the provisions of sections 198, 205 and 208 of the Evidence Act, Cap.62 a witness may be cross-examined as to previous statement made by him In writing or reduced into writing by the police or anyone else without such writing being shown to him or being produced if the purpose of the cross-examination is to shake the credit of the witness or contradict him. Where the witness admits making the statement as in the present case, it becomes unnecessary to produce the statement. But by the provisions of sections 198, 207, 208 and 209(c) of the Evidence Act, Cap.62 it is only when the witness denies making the statement or its contents and it is intended to contradict him by the statement that it is necessary to put the statement in evidence: Adisa v The State, (1964) 1 All N.L.R.200 at p.202

It is to be noted that the duty of the prosecution to treat its witness as hostile is discretionary (see section 206 and 209 of the Evidence Act). In the present case the prosecution was not obliged to treat P.W.8 as a hostile witness because the learned trial judge had by his examination of the witness destroyed any harm that the evidence-in-chief given by P.W.8 would have done to the prosecution’s case. It is indeed necessary and pertinent here to recall the observation of this Court on pp. 16 and 17 in Onubogu & Anor. v The State (supra):

“In our view, where a witness, such as the complainant (P.W.4) in the case in hand has made a statement before trial which is inconsistent with the evidence he gives in court, the court, provided that no cogent reasons are given for the inconsistency, should regard his evidence as unreliable. While on this point we think it is pertinent to refer to the observation of Lord Goddard, L.C.J., in R v. Fraser & Anor., (1957) 40 Cr. App.R. 160 at p. 163 which reads:

“If the prosecution have information in their possession which shows that the evidence which a witness called for the prosecution has given is in flat contradiction of a previous statement which he has made and so entitles the prosecution to cross-examine they should apply for leave to cross-examine and not leave it to the judge to do so, because it is counsel’s duty to cross-examine in such circumstances. If he has not done so, the judge has to do it. That is not right, because if may look as if the judge is taking sides, but he cannot help intervening in such circumstances, because it is his duty to see that justice is done”’

Turning to the second ground of appeal learned counsel for the appellant contended that prosecution witnesses Nos. 4, 5, 6, 7 and 9 who gave evidence as eyewitnesses were blood relations or members of the deceased’s family. He submitted that the learned Justices of the Federal Court of Appeal should have warned themselves against the danger of relying on the evidence of the relations of the deceased who had interest to serve before convicting the appellant and this they failed to do. It is true that the prosecution witnesses in question were related in one way or the other to the deceased and the learned Justices of the Federal Court of Appeal did not advert to that fact.

However the fact that the witnesses were related to the deceased does not mean that they were not competent to testify for the prosecution. Learned counsel for the appellant has not shown them to be biased. Their evidence about how the deceased was knocked down by the car was factual and corroborated by the evidence of the appellant himself who admitted killing the deceased with the car. Further corroboration of their testimony is also available in the evidence of the first prosecution witness, the doctor; second and third prosecution witnesses, who were teachers at the deceased’s school and the Investigating police officer, P.W.10.

I am of the opinion that in those circumstances the failure of the learned Justices of the Federal Court of Appeal to treat the evidence of the relations of the deceased with caution did not occasion any miscarriage of justice.

It was for the foregoing reasons that I agreed that the appeal be dismissed and the conviction and sentence imposed by the Federal Court of Appeal be affirmed.

**IRIKEFE, J.S.C**.:

I was privileged to have a preview of the reasons for judgment just read by my learned brother, Uwais, J.S.C. and I agree entirely with same. I also agree with all the orders made therein.

**BELLO, J.S.C.:**

I have read in advance the reasons for judgment delivered by Uwais, J.S.C. I entirely agree.

**ESO, J.S.C.:**

I have had the privilege of a preview of the reasons given in the judgment just delivered by my learned brother Uwais J.S.C. and I agree that for the reasons given the appeal was dismissed.

**ANIAGOLU, J.S.C.:**

My learned brother, Uwais, J.S.C., had earlier kindly made available to me, in draft, the reasons for judgment, which he has just read, in the above appeal an appeal which we dismissed on 4th February 1982, reserving for today the delivery of the reasons thereof. I am in agreement with his said reasons for the dismissal of the appeal.

Appeal dismissed.