**KRETOV ANDREY**

**V.**

**FEDERAL REPUBLIC OF NIGERIA**

IN THE COURT OF APPEAL OF NIGERIA

THE 31ST DAY OF JANUARY, 2017

CA/L/981CC/2015

**LEX (2017) - CA/L/981CC/2015**

OTHER CITATIONS

2PLR/2017/183 (SC)

(2017) LPELR-42328(CA)

**BEFORE THEIR LORDSHIPS**

JOSEPH SHAGBAOR IKYEGH, J.C.A

TIJJANI ABUBAKAR, J.C.A

BIOBELE ABRAHAM GEORGEWILL, J.C.A

**BETWEEN**

KRETOV ANDREY - Appellant(s)

AND

FEDERAL REPUBLIC OF NIGERIA - Respondent(s)

**ORIGINATING COURT**

FEDERAL HIGH COURT LAGOS

**REPRESENTATION/LAWYERS**

B. KOKU, SAN with C. UGUEJIOFOR, F. FALADE and A. A. OMOKAYE - For Appellant.

AND

I. R OYEDEPO - For Respondent.

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

ADMINISTRATIVE AND GOVERNMENT LAW:- Prosecutorial powers of the E.F.C.C – Legal basis of – Whether deemed shared with the Attorney-General of the Federation under Section 174 of the 1999 Constitution – Implication for Section 3(1) and (4) of the Territorial Waters Act – Whether deemed overridden

ADMIRALTY AND MARITIME/SHIPPING LAW:- Crime committed on the open sea within the territorial waters of Nigeria – Competence of the EFCC to exercise prosecutorial powers in relation thereto – Basis of – Operation of section 3(1) and (4) of the Territorial Waters Act – Whether deemed overridden by Section 174 of the 1999 Constitution

CONSTITUTIONAL LAW – PROSECUTORIAL POWERS:- Section 174(1)(b) and (c) of the 1999 Constitution – Grant of prosecutorial power to "any other authority or person" subject to the overriding powers of the Attorney-General to take over such prosecution and even discontinue it having regard to the public interest, the interest of justice and the need to prevent abuse of legal process vide Section 174(2) of the 1999 Constitution – Implications for exercise of prosecutorial powers by the Economic and Financial Crimes Commission without the fiat of the Attorney-General

CRIMINAL LAW AND PROCEDURE - ECONOMIC AND FINANCIAL CRIMES COMMISSION:- Charge for conspiracy to commit the offences of dealing with petroleum products without lawful or appropriate authority and without licence - Whether the Economic and Financial Crimes Commission can with or without a fiat of the Attorney-General, prosecute cases in any Court in Nigeria

OIL AND GAS LAW:- Offence of dealing with or storing petroleum products without lawful authority or licence – Prosecuting authority – Whether the Economic and Financial Crimes Commission competent to deal with same without fiat of the Attorney-General of the Federation

**PRACTICE AND PROCEDURE ISSUES**

INTERPRETATION OF STATUTE:- Legal presumption that the draftsman bears in mind or takes into contemplation the previous position of an enactment in enacting a new legislation on the same subject matter – Principle that a later legislation may reduce the scope or effect of a previous legislation on the same subject matter – Legal implication for the interpretation of the E.F.C.C. Act, a later legislation, vis a vis the Territorial Waters Act of 1967 even though both are contained in the 2004 Edition of the Laws of the Federation

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant, a foreigner, was charged along with others for conspiracy to commit the offences of dealing in 1,733.087 metric tons of petroleum product without lawful or appropriate authority, and dealing with petroleum product without licence within the jurisdiction of the Federal High Court contrary to Section 19(6) of the Miscellaneous Offences Act, M17, Laws of the Federation of Nigeria 2004 (Miscellaneous Offences Act) and punishable under Section 17 thereof; and also, that the appellant and the others without lawful authority or licence stored 1,500 metric tons of automated Gas Oil and 3,0135 metric tons of Low Pour Fuel Oil (L.P.F.O.) in the tank of MT Anuket Emerald, a ship or vessel, contrary to Section 4 of the Petroleum Act, Cap. P10 Laws of the Federation of Nigeria 2004 (Petroleum Act).

Upon the refusal of the application by the Federal High Court Lagos to quash the charge sheet the appellant filed this appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court made a Ruling, refusing the Appellant’s application to quash the information preferred against him because on the ground that the EFCC did not present a fiat signed by the Attorney General of the Federation to prosecute him. Dissatisfied, the Appellant appealed to the Court of Appeal.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

1. Whether the prior consent of the Attorney General of the Federation is required before a criminal charge is preferred against a Foreigner in respect of offences committed in Nigeria territorial waters regardless of the Laws under which the foreigner is charged.

2. Whether or not the lower Court's jurisdiction to try offences committed within the Executive Economic Zone of Nigeria is unlimited.

3. Whether a Nigerian Court has jurisdiction to try a person for offences committed outside Nigeria."

*BY RESPONDENT:*

"Whether in view of the facts and circumstances of this case, it can be said that the learned trial Court lacks the requisite jurisdiction to entertain Charge No: FHC/209C/15 instituted against the appellant under the provisions of the Miscellaneous Offences Act Cap. M17, Laws of the Federation of Nigeria, 2004 and the provisions of Section 4 of the Petroleum Act, Cap. 10 Laws of the Federation of Nigeria."

DECISION OF THE COURT OF APPEAL

1. Section 174(1)(b) and (c) of the 1999 Constitution, as amended, gives prosecutorial power to "any other authority or person" subject to the overriding powers of the Attorney-General to take over such prosecution and even discontinue it having regard to the public interest, the interest of justice and the need to prevent abuse of legal process vide Section 174(2) of the 1999 Constitution.

2. The E.F.C.C. therefore shares prosecutorial power as "any other authority" with the Attorney-General of the Federation under Section 174 of the 1999 Constitution. Accordingly, Section 174 of the 1999 Constitution overrides Section 3(1) and (4) of the Territorial Waters Act. So even if the alleged crimes were committed on the open sea within the territorial waters of Nigeria, the E.F.C.C. retains the prosecutorial power to maintain and prosecute the counts in the charge sheet in this case.

3. In other words, by the sheer force of Section 174 of the 1999 Constitution (supra), the E.F.C.C. does not require the consent or fiat or certificate of the Attorney-General of the Federation to institute the charge in question against the appellant as the charge sheet deals with Economic and Financial Crimes as defined in Section 46 of the E.F.C.C.

**MAIN JUDGMENT**

**JOSEPH SHAGBAOR IKYEGH, J.C.A.** (DELIVERING THE LEADING JUDGMENT):

The appellant, a foreigner, was charged along with others for conspiracy to commit the offences of dealing in 1,733.087 metric tons of petroleum product without lawful or appropriate authority, and dealing with petroleum product without licence within the jurisdiction of the Federal High Court contrary to Section 19(6) of the Miscellaneous Offences Act, M17, Laws of the Federation of Nigeria 2004 (Miscellaneous Offences Act) and punishable under Section 17 thereof; and also, that the appellant and the others without lawful authority or licence stored 1,500 metric tons of automated Gas Oil and 3,0135 metric tons of Low Pour Fuel Oil (L.P.F.O.) in the tank of MT Anuket Emerald, a ship or vessel, contrary to Section 4 of the Petroleum Act, Cap. P10 Laws of the Federation of Nigeria 2004 (Petroleum Act).

Upon the refusal of the application by the appellant by the Federal High Court Lagos (the Court below) to quash the charge sheet the appellant filed this appeal.

The appellant submitted these issues for determination in his brief of argument filed on 09-11-15 -

1. Whether the prior consent of the Attorney General of the Federation is required before a criminal charge is preferred against a Foreigner in respect of offences committed in Nigeria territorial waters regardless of the Laws under which the foreigner is charged.

2. Whether or not the lower Court's jurisdiction to try offences committed within the Executive Economic Zone of Nigeria is unlimited.

3. Whether a Nigerian Court has jurisdiction to try a person for offences committed outside Nigeria."

After copying counts 1-4 of the charge sheet in the brief of argument, the appellant supplied Section 3(1) and (4) of the Territorial Waters Act, Cap. T5 Laws of the Federation 2004 (Territorial Waters Act) to submit that the charge having been filed by the Economic and Financial Crimes Commission (E.F.C.C.) and endorsed on its behalf by G. K. Latona Esq., its head of legal department; not the Attorney-General of the Federation; the appellant being a foreigner, the failure of the E.F.C.C. to produce in evidence a certificate signifying the consent of the Attorney-General of the Federation for the trial of the appellant as stipulated by Section 3(1) and (4) of the Territorial Waters Act would vitiate the trial and render the proceedings at the Court below incompetent.

It was further submitted that the Court below was wrong to hold that because the prosecution of the appellant was under the Miscellaneous Offences Act and the Petroleum Act, the provisions of the Territorial Waters Act did not apply to the proceedings when the said Act applies to all acts and omissions constituting an offence under any law or enactment in Nigeria vide Sections 2 and 3(6) of the Territorial Waters Act; more so Section 3(6) thereof uses the phrase "shall" which make its implementation mandatory vide Kalamu v. Gunrin (2003) 16 NWLR (Pt. 847) 517.

Consequently, the appellant concluded on issue 1 (supra) that the condition precedent for obtaining leave before filing the said charge against the appellant deprived the Court below of the jurisdiction to entertain the case vide the cases of Atolagbe v. Awuni (1997) 9 NWLR (Pt. 522) 536, Amadi v. N.N.P.C (2000) 10 NWLR (Pt. 674) 76, Madukolu v. Nkemdilim (1962) 2 SCNLR 341, Obada v. Military Governor of Kwara State (1994) 4 NWLR (Pt. 336) 26, Eimskip Ltd. v. Exquisite Industries (Nig) Ltd. (2003) 4 NWLR (Pt. 809) 88, Odofin v. Agu (1992) 3 NWLR (Pt. 299) 350, Bature v. State (1994) 1 NWLR (Pt. 320) 267.

It was argued on issue 2 (supra) that the proofs of evidence does not disclose that the appellant committed any offence within 200 metres of any installation within the Exclusive Economic Zone to vest the Court below with jurisdiction under Section 4 of the Exclusive Economic Zone Act Cap. E17 to try the appellant for the offences charged under the Miscellaneous Offences Act, therefore the Court below was wrong to hold in pages 259-260 of the record of appeal (the record) that it has the jurisdiction to try the appellant.

It was argued on issue 3 (supra) that the appellant was not within the territorial jurisdiction of the Court below and might have been in transit or not intending to land in any Nigerian Port, therefore the Court below lacked the jurisdiction to try the appellant citing in support the cases of Ocean Fisheries Nig. Ltd v. Board of Customs and Excise and Anor. (1986) FHCLR at 95 and A-G, Federation v. A-G, Abia State and Ors. (2001) 11 NWLR (Pt. 725) at 689; upon which the appellant urged that the appeal should be allowed.

In compliance with the order of the Court made during the hearing of the appeal that the respondent's learned counsel, Mr. I. R. Oyedepo should exhibit his N.B.A. stamp and seal or evidence of payment thereof for the current period, the respondent's learned counsel furnished a photocopy of the receipt acknowledging payment for the said period. This is therefore sufficient compliance with the said order of the Court which validates the respondent's brief of argument.

In a brief of argument filed on 16.06.16, but deemed properly filed on 29.06.16, the respondent distilled the following issue for determination -

"Whether in view of the facts and circumstances of this case, it can be said that the learned trial Court lacks the requisite jurisdiction to entertain Charge No: FHC/209C/15 instituted against the appellant under the provisions of the Miscellaneous Offences Act Cap. M17, Laws of the Federation of Nigeria, 2004 and the provisions of Section 4 of the Petroleum Act, Cap. 10 Laws of the Federation of Nigeria."

In arguing the lone issue (supra), the respondent referred to Sections 221 and 396(2) of the Administration of Criminal Justice Act, 2015, (ACJA) to the effect that the preliminary objection to an imperfect or erroneous charge should not have been taken during the trial of the case and that after plea had been taken, any objection to the validity of the charge is to be considered along with the substantive issues and a ruling thereon made at the time of delivery of judgment.

It was also argued that by the tenor of Section 3(2) of the Territorial Waters Act the omission to obtain the fiat of the Attorney-General of the Federation, if any, would not vitiate the trial unless by reason of Section 3(1) thereof the Court is incompetent to proceed with the trial.

The respondent further argued that Section 174(1)(c) of the Constitution of the Federal Republic of Nigeria 1999, as amended, (1999 Constitution) covered the field on the issue of the E.F.C.C. coming under the canopy of "any other authority or person" mentioned in Sub-section C thereof having prosecutorial powers to initiate the criminal proceedings at the Court below without recourse to or fiat from the Attorney General of the Federation exemplified by the cases of Comptroller of Prisons v. Adekanye (2002) 15 NWLR (Pt. 790) 318 at 329, F.R.N. v. Osahon (2006) 5 NWLR (Pt. 973) 361 at 406, 417, Pharma Deko Plc v. N.S.I.T.F.M.B. (2011) 5 NWLR (Pt. 1241) 431 at 450-451, F.R.N. v. Adewunmi (2007) 10 NWLR (Pt. 1042) 399 at 427, Jolly Nyame v. F.R.N. (Pt. 1193) 344 at 403, Amadi v. F.R.N. (2008) 18 NWLR (Pt. 1119) 259 at 275-276, Akingbola v. F.R.N. (2012) 9 NWLR (Pt. 1306) 511 at 532, Sebastine Adigwe v. F.R.N. (2013) 1 BFLR 325 at 339 read with the cases of I.N.E.C. v. Musa (2003) 6 NWLR (Pt. 806) 72 at 158, 203-204 and A-G, Abia State v. A-G, Federation (2002) 6 NWLR (Pt. 763) 264 at 435-436 on the doctrine of covering the field.

The respondent relied on Sections 6(n), 7(2), 13(2) and 42 of the E.F.C.C. Act to submit that being a later enactment to the Territorial Waters Act which was enacted in 1967, it prevails and empowers the E.F.C.C. to initiate and prosecute Economic and Financial Crimes committed by any person including foreigners; that the charge not having been based on the Territorial Waters Act, Section 3(1) of the said Act would not apply to the instant case which is laid under the Miscellaneous Offences Act and the Petroleum Act; all the more so the body of the charge alleged that the offences were committed in Lagos within jurisdiction, not within the Exclusive Economic Zone Act or the Territorial Waters Act.

The respondent also argued that it is not the character or the nature of the evidence in the proofs of evidence that the Court looks at to determine whether it has criminal jurisdiction in a matter vide Onwudiwe v. F.R.N. (2006) 10 NWLR (Pt. 988) 382 at 425, Eze v. F.R.N. (1987) 1 NWLR (Pt. 51) 506 at 519, 520 and 529.

It was further argued that the cases of Ocean Fisheries Nig. Ltd. v. Board of Customs and Excise (supra) and A-G, Abia State and Ors. (supra) are civil cases and inapplicable to the present case and that by Sections 94 and 95 of the ACJA 2015, the Court below has the jurisdiction to hear and determine the charge against the appellant; consequently the appeal should be dismissed.

The appellant's reply brief filed on 28.06.16 distinguished the cases of Comptroller of Prisons v. Adekanye (2002) 15 NWLR (Pt. 790) 318 at 329, F.R.N. v. Osahon (2006) 5 NWLR (Pt. 973) 361 at 406, where Sections 56(1) and 57 of the Federal High Court Act and Section 23 of the Police Act were considered and Jolly Nyame v. F.R.N. (2010) 7 NWLR (Pt. 1193) 344 at 403, Akingbola v. F.R.N. (2012) 9 NWLR (Pt. 1306), Adigwe v. F.R.N. (2013) 1 BFLR 325 at 339, Onwudiwe v. F.R.N. (2006) 10 NWLR (Pt. 988) 388 at 425, Eze v. F.R.N. (1987) 1 NWLR (Pt. 51) 506 at 519, 520 and 529 cited by the respondent from the present case on the grounds that the said cases did not deal with the prosecution of a foreigner for an offence allegedly committed on the open sea within the territorial waters of Nigeria without the Attorney-General of the Federation having issued a certificate to the prosecutor for the prosecution of the foreigner and that no objection to that effect was raised in the said cases; rather the cases cited (supra) by the respondent dealt with the sharing of prosecutorial power by other bodies or agencies with the Attorney-General who has the constitutional power under Section 174 of the 1999 Constitution to take over such cases initiated by the said bodies or agencies showing the Attorney-General's prosecutorial powers are not exclusive.

The appellant referred to the case ofDide v. Seleketimbi (2010) ALL FWLR (Pt. 509) 583 at 609 where 'certificate' is defined as "any document that attests, certifies, vouches, ascertains and verifies the facts therein" to contend that the prosecution of the appellant was commenced without a certificate issued by the Attorney-General of the Federation to the respondent as required by Section 3(1) of the Territorial Waters Act which was enacted in 1967 and is part of the Laws of the Federation contained in the 2004 Volumes of the Laws of the Federation which the legislature was presumed to have in contemplation while enacting the Miscellaneous Offences Act, the Petroleum Act and the E.F.C.C. Act of 2004 and is still good law citing in support the cases of Jones v. Brown 2 Exch 329 and Ibrahim v. Lawal (2015) 17 N.W.L.R. (Pt. 1489) 490.

It is based on the arguments (supra) that the appellant urged that the appeal be allowed as the same is according to the appellant, meritorious.

I have looked at the grounds of appeal. It appears to me the issue formulated by the respondent covers the said grounds of appeal. In that wise, the appeal will be considered having regard to the issue presented by the respondent.

The complaints of the appellant are whether the E.F.C.C. had to seek and obtain prior consent of the Attorney-General of the Federation before laying the charge at the Court below and whether the Court below had the territorial jurisdiction to entertain the charge which do not pertain to the defect in the charge as drafted, therefore Section 221 and 396(2) of the ACJA would not apply to the present case. Nor would Sections 94 and 95 of the ACJA 2015, a procedural law, enlarge the jurisdiction of the Court below beyond what had been provided by substantive law.

Section 174(1)(b) and (c) of the 1999 Constitution, as amended, gives prosecutorial power to "any other authority or person" subject to the overriding powers of the Attorney-General to take over such prosecution and even discontinue it having regard to the public interest, the interest of justice and the need to prevent abuse of legal process vide Section 174(2) of the 1999 Constitution.

The E.F.C.C. therefore shares prosecutorial power as "any other authority" with the Attorney-General of the Federation under Section 174 of the 1999 Constitution. Accordingly, Section 174 of the 1999 Constitution overrides Section 3(1) and (4) of the Territorial Waters Act. So even if the alleged crimes were committed on the open sea within the territorial waters of Nigeria, the E.F.C.C. retains the prosecutorial power to maintain and prosecute the counts in the charge sheet in this case.

In other words, by the sheer force of Section 174 of the 1999 Constitution (supra), the E.F.C.C. does not require the consent or fiat or certificate of the Attorney-General of the Federation to institute the charge in question against the appellant as the charge sheet deals with Economic and Financial Crimes as defined in Section 46 of the E.F.C.C. Act. See also the decision of this Court in Adigwe v. F.R.N. (supra) cited in the respondent's brief prepared by learned counsel for the respondent, Mr. Oyedepo.

In short, in Amadi v. F.R.N. (2008) 18 NWLR (Pt. 1119) 259 at 276-277 the Apex Court held inter alia that -

"Mr. Hassan being a staff of the E.F.C.C. who signed the charge was competent to do so. Any staff of E.F.C.C. can exercise the power delegated to the E.F.C.C. in Exhibit "A" That is why I am in fact in agreement with the learned Justice of the Court of Appeal when in his judgment he stated the following:

"The position in criminal trial is different. In view of the high premium attached to speedy disposal of criminal cases, the Attorneys- General of the States delegate their powers to the various State Commissioners of Police who institute and prosecute criminal matters in the name of such Commissioners of Police. Such powers are also delegated to the Federal Board of Internal Revenue, Nigeria Customs Service and lately E.F.C.C. by the Attorney-General of the Federation. This arrangement is made possible subject to the provisions of Sections 174(1)(b) (c) and 211(1)(b) (c) of the Constitution of the Federal Republic of Nigeria 1999 which provide that the Attorney-General of the Federation or State, as the case may be, shall have power to take over and continue any such criminal proceedings instituted by any other authority or person, and to discontinue at any stage; before judgment is delivered, any such criminal proceedings instituted or undertaken by him, any other authority or person. (Italics mine)

This is the correct position of the law. The learned justice has put it down succinctly and he did not err in doing so."

See also Pharma Deko Plc v. N.S.I.T.F.M.B. (supra) cited by the respondent.

It indicates clearly from the excerpt (supra) that perhaps out of abundance of caution, the general prosecutorial power was delegated to the E.F.C.C. by the Attorney-General of the Federation before 2008 exemplified by Amadi (supra) which was decided by the Supreme Court in 2008, which has put paid to the argument that evidence of the consent or certificate given by the Attorney-General of the Federation to the E.F.C.C. to file the charge and prosecute the appellant at the Court below was needed for the validity of the proceedings.

To show that the office of the Attorney-General of the Federation operates in tandem with the E.F.C.C. in the enforcement of the E.F.C.C. mandate over Economic and Financial Crimes, Section 2(c)(iii) of the E.F.C.C. Act states that a representative of the Federal Ministry of Justice shall be one of the members of the Commission, so had the E.F.C.C. circumvented the office of the Attorney-General of the Federation in filing the charge sheet at the Court below, the representative of the Ministry of Justice in the E.F.C.C. would have alerted the Attorney-General of the Federation of the encroachment on his prosecutorial power for appropriate action by the Attorney-General of the Federation.

I agree with the learned senior counsel for the appellant that the draftsman bears in mind or takes into contemplation the previous position of an enactment in enacting a new legislation on the same subject matter. There is equally force in the contention of the respondent that a later legislation may reduce the scope or effect of a previous legislation on the same subject matter. The E.F.C.C. Act is a later legislation than the Territorial Waters Act of 1967. Although both enactments are contained in the 2004 Edition of the Laws of the Federation, the E.F.C.C. Act first became law in 2002 and is thus later in time than the Territorial Waters Act which became law in 1967.

Having regard to the fact that the E.F.C.C. Act donates prosecutorial power to the E.F.C.C. in Sections 13(2) and 42 of the said Act which was judicially accepted by the Supreme Court, the highest Court of the land, particularly in Jolly Nyame v. F.R.N. (supra) cited by the respondent, and the other series of cases decided by the Court of Appeal of Nigeria, particularly Akingbola (supra) and Adigwe (supra) cited by the respondent, the E.F.C.C. Act does in my modest view, qualify Section 3 of the Territorial Waters Act on the prosecutorial power of the E.F.C.C. and obviates the requirement of obtaining a certificate from the Attorney General of the Federation by the E.F.C.C. for the initiation and prosecution of the appellant for the offences charged at the Court below.

The charge sheet in pages 5-7 of the record disclosed that the alleged offences were committed within the jurisdiction of the Court below. The Territorial Waters Act and the Exclusive Economic Zone Act were not mentioned in the charge sheet. The issue of the territorial jurisdiction of the Court below is a question of fact. It cannot be decided by looking at the provisions of the Territorial Waters Act and the Exclusive Economic Zone Act in isolation from the facts stated in the charge sheet at the Court below.

In the result, I agree with the respondent that the appellant did not establish that the alleged offences were committed outside the territorial jurisdiction of the Court below, nor that the appellant is shielded by the provisions of the Territorial Waters Act and the Exclusive Economic Zone Act with respect to the charge sheet at the Court below.

There is therefore no merit in the appeal. I would dismiss it and affirm the ruling of the Court below.

**TIJJANI ABUBAKAR, J.C.A.:**

My learned brother JOSEPH SHAGBAOR IKYEGH, JCA gave me the privilege of reading in draft the Judgment just prepared and rendered by him.

I am in agreement with the reasoning and conclusion and adopt the Judgment as my own with nothing extra to add.

**BIOBELE ABRAHAM GEORGEWILL, J.C.A.:**

I agree.