AN ANALYSIS OF THE CASE OF DR. JOSEPH NWOBIKE, SAN V. FRN[1]

- SARAH JETA ATUMGA[2]

Introduction

The prosecutorial powers of the Economic and Financial Crimes Commission (EFCC) are wide and extend to all financial and economic crimes. The EFCC is empowered to prevent, investigate, prosecute and penalize economic and financial crimes amongst others. The referenced decision of the Supreme Court[3] especially as it relates to the prosecutorial powers of the EFCC has raised a lot of concerns amongst counsel and litigants, some of whom are of the opinion that the Supreme Court has curtailed the powers of the EFCC to prosecute cases. By Section 6(b); 7(1)(a) & (2)(f) and 13(2) of the EFCC Act, the EFCC has the power to investigate, enforce and prosecute offenders for any offence, whether under the Act or any other statute including the Money Laundering Act; the Advance Fee Fraud and Other Related Offences, Act; the Banks and other Financial Institutions Act etc, in so far as the offence relates to commission of economic and financial crime. In addition, Section 46 of the Act defines economic and financial crimes as follows:

> *"Economic and financial crimes means the non-violent criminal and illicit activity committed with the objective of earning wealth either individually or in a group or organized manner thereby violating existing legislation governing economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and* ***any form of corrupt malpractices****, illegal arms deal, smuggling, human trafficking and child labour, foreign exchange malpractice including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc." [Emphasis mine]*

To my mind, the highpoint of the decision of the Supreme Court revolves around the extent of the powers of the EFCC as it relates to the phrase "any form of corrupt malpractices" in Section 46 of the EFCC Act and the constitutionality of Section 97(3) of the Criminal Law of Lagos State. The Court has successfully applied the *ejusdem generis* rule of interpretation after resolving that the application of the literal rule will grant the EFCC vague powers by making every criminal and illicit activity committed, to fall within the scope of "corrupt malpractices" and consequently be regarded as an economic and financial crime, which the EFCC will be empowered to investigate.

Notably, the Court also held, with regards to the constitutionality of Section 97(3)[4] that the said section offends the provisions of and is inconsistent with Section 36(12) of the Constitution as it does not define the offence of perversion of justice for which the Appellant was charged, tried and convicted, unless it is shown that the offence is defined under any other written law, that the aforesaid provision. Interestingly, the Court cautioned that its conclusion on the constitutionality of Section 97(3) CLL was reached based on the peculiar circumstance of the instant appeal as it cannot consider and determine the question on the merit since there is no appeal against the decision of the Trial Court on the constitutionality of Section 97(3).

This article aims to analyze the facts of the decision of the Supreme Court in light of the issues identified above.

Facts of the Case

At the Trial Court, Dr. Nwobike, SAN (appellant) had been charged with the offences of offering gratification to a public officer contrary to Section 64(1) of the Criminal Law of Lagos State (CLL);[5] attempting to pervert the course of justice contrary to Section 97(3) of the CLL;[6] and making false information to an officer of the EFCC contrary to Section 39(2) of the Economic and Financial Crimes Commission (Establishment), Act (EFCC Act). While the Court found the appellant guilty and convicted him of the offence of attempting to pervert the course of justice,[7] the Court discharged and acquitted the appellant of the counts relating to the offences of offering gratification to a public officer and making false information to an officer of the EFCC.[8] The appellant was consequently sentenced to 30 years imprisonment on each count - to run concurrently. On appeal, the Court of Appeal allowed the appeal in part, setting aside the conviction and sentence of the appellant in some counts[9] but also affirmed his conviction in some other counts.[10] The Appellant's conviction was set aside by the Supreme Court.

Analysis of the Supreme Court's Decision

Interpretation of "corrupt malpractices" under Section 46 of the EFCC Act

One of the arguments of the appellant was that the counts which border on attempt to pervert the course of justice relate to a non-financial crime, for which the EFCC has no power to investigate and prosecute. The respondent, on the other hand, contended that the phrase "any form of corrupt malpractices" in Section 46 of the EFCC Act encapsulates acts aimed at subverting or perverting the course of justice, and that the appellant's corrupt malpractice of attempting to pervert justice became an economic and financial crime within the contemplation of the said section when the appellant sent text messages to court officials to influence assignment of his cases.

The respondent's interpretation is rather too wide and convenient as it attempts to broaden the scope of EFCC's jurisdiction. Evidently, the general words that call for interpretation in Section 46 of the EFCC Act are "any form of corrupt malpractices" following the particular words "…embezzlement, bribery, looting." According to the Supreme Court, "any form of corrupt malpractices" must be construed within the context of the specific class which it follows and must be confined to a particular class. This ratio of the apex court was that the natural, ordinary and plain interpretation of the expression "corrupt malpractices" with respect to ascertaining the scope of the expression "any form of corrupt malpractices" will not be effective in discovering the intention of the legislation. In the words of the Court,

> *"if the literal meaning is accepted, it means that the powers of the EFCC will be at large and open ended because by that interpretation, every criminal and illicit activity committed will fall within the scope of "corrupt malpractices" and consequently be regarded as an economic and financial crime, which the EFCC will be empowered to investigate, so doing will make a pigmy of other legislations and render them barren and sterile, this is certainly not the intention of the legislation necessitating the establishment of the EFCC and enacting the Act."*

This view cannot be faulted. To allow even the slightest opportunity for all criminal and illicit activities to fall within EFCC's jurisdiction is tantamount to giving the EFCC general prosecutorial powers. In fact, it will defeat the intention of the legislation as well as EFCC's mandate as a special agency established for purpose operating within the ambit of fighting and eradication of economic and financial crimes.

The criminal conduct or criminal act of an offence is also known as the *actus reus* and this behavioural element is the essential characteristic of any offence.[11] This writer is inclined to agree with the appellant that the test of whether an offence is an economic and financial crime is whether the objective of the act which is alleged to be a crime is geared towards earning wealth illegally. The Court agreed with the counsel for the appellant that the test for ascertaining if a criminal conduct can be regarded as an economic and financial crime is such that must be a non-violent criminal and illicit activity committed with the objective of earning wealth. The Court noted that it has not been shown that the offence was committed with the objective of earning wealth to be regarded as an economic and financial crime, thereby vesting the power to investigate and prosecute in the EFCC.

Constitutionality of Section 97(3) Criminal Law of Lagos State

Furthermore, the appellant had argued that (x) the Court of Appeal lacked the jurisdiction to review, set

aside and/or supplant the definite finding by the Trial Judge against the prosecution that section 97(3) of the CLL does not define the offence of attempt to pervert the course of justice and since the prosecution had failed to appeal against the said finding; (y) as a result, the Court of Appeal acted in error when it held that the offence of attempting to pervert the course of justice is properly defined in Section 97(3) of the CLL and the penalty of 2 years is imposed by the law; and (y) that the Court of Appeal was in error when it imported the reasonable man's test into the interpretation of the said Section.

The said Section 97(3) provides:

> "*Any person who attempts, in any way not specifically defined in this Law, to obstruct, prevent, pervert or defeat the course of justice is guilty of a misdemeanour, and is liable to imprisonment for two years*."

The above provision is vague and does not define a particular offence. Therefore, it will be impossible for a prosecutor to validly secure a conviction of a defendant under the referenced section without breaching such a defendant's right enshrined under Section 36(12) of the Constitution. The universe of what is tantamount to "perversion of justice" is wide and section 97(3) of the Criminal Law of Lagos State as presently couched, does not give fair notice of the specific conduct punishable under the provisions.[12] Additionally, adjudicating over the offence of perversion of justice created by the said provisions will put our Courts in the invidious position of speculating in order to fill the gaps in vague provisions in criminal statutes, which is impermissible.[13]

The Court of Appeal had taken into consideration matters which it ought not to have taken into account in reaching the perverse decision as it misapplied the provisions of Section 36(6)(a) of the Constitution which was never in issue between the parties in the appeal since the appellant's argument had been that the provisions of Section 97(3) did not define the offence thereunder and hence was contrary to Section 36(12) of the 1999 Constitution (as amended). Section 36(12) provides is to the effect that a person shall not convicted of a criminal offence unless that criminal offence and its penalty is defined under a written law.

The fact that an offence is provided for or is known to Nigerian law does not equate it to the offence being defined under the law. Certainly, the Court of Appeal erred when it relied on the decision in Okpa v. State since the decision borders on the principles that misstatement of section under which an accused person is charged is not fatal to the case of the prosecution and does not vitiate any conviction and sentence, in so far as the offence for which the accused person was charged, is known to law. The Courts have consistently held, as it relates to the limits of judicial precedents that a decision is an authority for what it actually decides and judgments should be read in light of the facts on which they were decided.[14] In **Okafor v. Nnaife,**[15] the apex court, per Oputa, JSC, held that *"the ratio of any case should not be pulled by the hair of the head and made willy nilly to apply to cases where surrounding circumstances are different"*. This means that precedents can only be applied on cases that are similar with it.

However, on the propriety or otherwise of the decision of the Court of Appeal to consider and determine the question whether the offence of attempt to pervert the course of justice is defined in the absence of an appeal against the decision of the Trial Court on the point, the Supreme Court noted that the issue formulated by the appellant at the Court of Appeal is different from the issue re-formulated by the Court of Appeal as they both relate to separate complaints and a resolution of one does not necessarily resolve the other. The grouse of the appellant touches on the conclusion reached by the trial court that there was no clear definition of the alleged offence of perverting the course of justice within the four walls of Section 97(3) of the CLL[16] while the issue re-formulated by the Court of Appeal is whether Section 97(3) upon which the appellant was convicted defined the offence he was convicted for and whether the said provision is not contrary to Section 36(12) of the Constitution. The Court reiterated that the trite position of law that a court has the inherent power, in the interest of justice, to reject, modify or reframe issues distilled for determination of a case before it. **However, the exercise of this power must be rooted in the grounds of appeal, the Court must ensure that any issue so modified, or one re-formulated comes within the ambit of the complaint contained in the grounds of appeal.**

Furthermore, the apex Court held that no ground of appeal questions the decision made by the Trial Court to the effect that Section 97(3) of the CLL does not define the manner of perversion of justice upon which the appellant could be tried and convicted. The Court made recourse to the position of the law that when an issue is not placed before the court for discourse, the Court has no business whatsoever delving into it and dealing with it. A court of law has no business whatsoever delving into issues that are not properly placed before it for resolution, a Court of law has no business being over-generous and open-handed, dishing out unsolicited

reliefs, a Court of law is neither father Christmas granting unsolicited reliefs, nor Knight errant looking for skirmishes all about the place, a Court of law as an impartial arbiter must confine its self to the reliefs sought and the issues before it submitted for resolution.[17]

The Court noted that the decision of the Trial Court runs contrary to the position maintained by the Respondent who strenuously and doggedly argued that the provisions of Section 97(3) of the Criminal Law are not only known to law but also expressly define the offence and therefore do not contravene the provisions of Section 36(12) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and stated that ordinarily, a cross-appeal against this part of the decision by the Respondent would have served as stimulus for the Court of Appeal to consider the correctness or otherwise of the decision of the Trial Court on this point.

Since there was no cross-appeal against the decision of the Trial Court that Section 97(3) of the Criminal Law of Lagos State does not define the offence for which the Appellant was charged, tried and convicted, and upon which the lower court could concrete its consideration and determination of the aforesaid issue crafted by the Court, the said decision remains valid, subsisting and binding on the parties and is presumed acceptable by them. The Court referred to the position of the law that where there is an appeal on some points only in a decision, the appeal stands or falls on those points appealed against only while the other points or decisions not appealed against remain valid, subsisting and unchallenged.

Conclusion

By way of concluding, it is pertinent to emphasize that the referenced decision is in no way curtailing the powers of the EFCC to prosecute cases. As seen above, the resolution of the Supreme Court was to the effect that the EFCC does not have the power to prosecute the offences constituted in counts 7 – 17 and that, in the light of the decision of the trial court that Section 97(3) of the CLL does not define the manner of perversion of justice for which the Appellant may be held culpable, hence, it follows that the Appellant cannot be tried and convicted on the aforesaid counts 7 – 11, 13, 15 – 17 and by necessary implication therefore, the conviction of the Appellant cannot be sustained.

Accordingly, the claims that the EFCC does not have the powers to prosecute corruption cases other than those involving the movement of cash from Nigeria to foreign countries and corruption cases being a creation of federal law and that the EFCC has no power to look into the finances of states as a result of the referenced decision amongst others is misconceived and unfounded.

END NOTE

[1] SC/CR/161/2020
[2] LL.B (2nd Class Upper Division), B.L (1st Class); Associate, J-K Gadzama LLP
[3] delivered on 20th December, 2021 by Tijjani Abubakar JSC
[4] Under which the defendant was charged
[5] Counts 1, 2, 4, 5 and 6
[6] 3, 7 to 17
[7] Counts 3, 7 to 17
[8] Counts 1, 2, 4, 5, 6 and 18
[9] counts 3, 12 and 14
[10] counts 7 to 11, 13,15 to 17
[11] https://www.lexisnexis.com/uk/lexispsl/corporatecrime/document/391421/591N-VY01-F188-N2X4-00000-00/Criminal_conduct_overview (accessed 12th September 2022)
[12] https:// punchng.com/dr-nwobike-san-v-frn-concept-of-unconstitutional vagueness/#:~:text=For% 20purposes% 20of% 20clarity%2C%20the,in%20any%20way%20not%20specifically (accessed 9th September 2022)
[13] ibid
[14] Dongtoe v. Civil Service Commission of Plateau State (2001) 9 NWLR pt. 717 pg. 132 @ 155; Ekwunife v. Ngene (2002) 2 NWLR pt. 646 pg.650 @ 667
[15] (1987) 4 NWLR pt. 64 PG. 129
[16] The appellant issue reads: "*whether the learned trial judge was right when, in spite of her own finding that section 97(3) of the Criminal Law of Lagos State, No. 11 of 2011, does not define or describe the manner of perversion sought to be criminalized, she nevertheless proceeded, without jurisdiction, to convict the Appellant of the offences in Counts 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Amended Information which were clearly inconsistent with section 36(12) of the Constitution and therefore null and void. (Arising from Ground 1 of the grounds of appeal).*"
[17] See Ejowhomu v. Edok-Eter Ltd (1986) 5 NWLR (Pt. 39) 1 at 21 and Ossai v. Wakwah (2006) 2 SCNJ 19 at 36

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