

The Common Law as a Source of Nigerian Law of Evidence — Need for a Review

O. A. Adegoke (Mrs.)

Mrs. Oluremi Adegoke, LL.B. (Hons) (Ife), Barrister-at-Law, is a Lecturer at the Nigerian Law School, Bwari, Abuja.

Introduction

The Evidence Act Cap 112 Laws of the Federation of Nigeria 1990 is the main source of Nigerian Law of Evidence, being the singular statutory authority for our general Law of Evidence in Nigeria. By virtue of Section 5(a) Evidence Act¹ the English Common Law of Evidence or any relevant Local Statute in Nigeria may be resorted to, to supplement the provisions of the Act where the need arises.

The History of Nigerian Law of Evidence

Before the colonisation of the Region now known as Nigeria, the Courts which were in operation were the customary courts presided over by traditional rulers or chiefs as it obtained in the Southern areas, while Islamic courts presided over by Islamic Clerics operated in the Northern areas. Upon the colonisation of Nigeria came the establishment of British courts in Nigeria. The rules of evidence applicable in the British courts established in Nigeria were based on the English Common Law of Evidence, alongside the rules of evidence as contained in the various applicable English Statutes. The English rules of evidence applicable in English were in operation in Nigeria up till 1945 when the Nigerian Evidence Ordinance was brought into operation. The Evidence Ordinance which later came into operation as the Evidence Act of 1945 was first passed in 1943.

Before 1945, various enactments made possible the application of the British rules of evidence in Nigeria. Section 10 of the Provincial Ordinance of 1914 provided that subject to the terms of that or other ordinance, the common law of English should be as far as applicable, in force in the colony and Protectorate of Nigeria.² Section 12 of the "Protectorate Courts Ordinance of 1933"³ Section 14 of the Supreme Court Ordinance⁴ and Magistrate Courts Ordinance⁵ were some of such

enactments which gave credence to the application of the English rules of Evidence in Nigeria. In 1960, when Nigeria became a sovereign State and by statutory adaptation, the Evidence Ordinance became the Evidence Act as a Federal Legislation.⁶ The Evidence Act Cap 112 L.F.R.N. 1990 is still an off-shoot of the 1945 Legislation. The provisions of the 1945 Evidence Ordinance were taken mainly from the Digest of the Law of Evidence by Sir James Fitzgerald Stephen.⁷ Suffice it to say that Sir Stephen's Digest of the Law of Evidence were based on extracts from the common law of Evidence.

Section 5(A) Evidence Act

Section 5(a) of the Evidence Act states:

"Nothing in this Act shall prejudice the admissibility of any evidence which would apart from the provisions of this Act be admissible"

Section 5(a) is in the same terms as section 6(a) of the English Evidence Act 1938.⁹ From all intents and purposes, Section 5(a) was promulgated for the possible importation of the rules of evidence under the English Common Law. The evidence which would have been admissible apart from the provisions of the Evidence Act is evidence admissible under the common law or under any Nigerian Statute. This is made possible because the English common law on Evidence was applicable before the coming into operation of the Evidence Ordinance of 1945. Section 5(a) is essential where the Evidence Act does not provide for the admissibility of a matter but such matter is admissible under a common law rule. The provision of section 5(a) has enabled the common law rules on Evidence to have a sweeping effect on our law of Evidence in view of the fact that our Evidence Act was taken from the Digest of Sir James Fitzgerald Stephen.

Effect of English Common Law on our Law of Evidence

There is a tendency to view the effect of the Common Law rules on our law of Evidence as being a matter of interpretation, but the clear effects of the application of these Common Law rules on our law of evidence cannot be overlooked. Especially since this section allows the admissibility of evidence which would have been admissible had the Act not been passed, that is, under the evidence rules as they existed before June 1, 1945. This on its own creates the parameters for criticisms. Howbeit, the effect of the common law rules on our Law of Evidence can either be negative or positive.

R. v. Itule (1961) 1 All N.L.R. 462

The Federal Supreme Court had to consider whether part of a confession which tells in an accused person's favour is evidence of the facts alleged. In considering this, the Court resorted to the Common Law Principle on this matter which states that it is a general rule that the whole of the account which a party gives of a transaction must be taken together and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to him. The rule that a statement admissible as a confession must be taken as a whole is based on principle of logic and justice under the Common Law. The Federal Supreme Court resorted to this common law principle on confession since our Evidence Act¹⁰ in its section 27-32 does not deal with it. Section 27 of the Act defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime, and this is admissible in evidence. Whatever the accused says in his favour is not part of a confession in terms of the definition under the Act.

Itule's case found antecedent in *Onyeawusi v. Okupara*¹¹ where it was held, "it is the Evidence Act, or if it is silent, the Common Law of England that applies in the High Court." The rationale behind the stance of the Courts in both *Onyeawusi v. Okupara* and *R. V. Itule* is explainable by reason of their timing. What is arguable now is whether our Courts, considering the evolvement of the Law of Evidence in Nigeria, should continue to apply the Common rules and principles despite the provisions of the Evidence Act.

In *R. V. Agwuna and others*,¹² it was held... "There is no provision in the Act which allows any evidence to be rejected as inadmissible save as provided in the Act itself." The implication of Agwuna's case is such that no evidence allowed by the Act can be excluded on the basis of common law rules on Evidence. Our evidence law was codified since 1943 and came into force in June 1945, it seems thereby burying the common law rules of evidence. Nonetheless the same very common law rules seem like the forms of action, to be ruling us still from the grave.¹³ It is the Evidence Act which states which fact is relevant and how it should be proved. The rationale for section 5(a) of the Act in admitting rules of evidence under the common law, is now proving to be doubtful.

The Common Law Principle of Res-Gestae vis-a-vis Section 7 Evidence Act

Res Gestae is a common law principle recognised and applied by Nigerian Courts by virtue of Section 5(a) of the Act. Res Gestae has been described as a "phrase adopted to provide a respectable cloak for a variety

of courses to which no formula of precision can be applied". Under the common law, the principle of *res gestae* creates an exception to the rules against hearsay evidence. A fact which is so connected with a fact in issue as to form part of the same transaction and which "occurred at the same time and place" as the fact in issue forms part of *res gestae*. It is essential that this fact fulfils the cardinal prerequisite for admissibility as *res gestae* must be contemporaneous with the facts in issue.

Section 7 of the Evidence Act¹⁵ states:

"Facts which, though not in issue are connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places."

Lord Tomlin in *Homes v. Newman*¹⁶ stated that "It is essential that the fact should be so associated with the action or event which it accompanies in time, place and circumstances that they are part of the thing being done." Certain cases explain the criteria under the Common Law for the admissibility of a statement with regards to its relevance to the facts in issue.

In *R. Bedingfield*¹⁷ a woman who had been in the same room with the accused staggered from the room, with her throat cut and exclaiming! "See what X has done to me?" It was held that this was no more than a narration of a transaction which was completed and it was not admissible as forming part of the *res gestae*. In *R. V. Christie*,¹⁸ a child made a statement to his mother a few minutes after an alleged assault, describing the circumstances of such an event. It was held that the statement did not form part of *res gestae*. The court arrived at this decision because it viewed the child's statement as not having been made whilst the offence was being committed or immediately thereafter. And that it was not immediately connected with the act of assault as to form part of the *res gestae*. The decision in *R. V. Bedingfield*¹⁹ was a subject of criticism to the effect that it could not have been possible for the woman under those circumstances to have concocted the situation described in this case.

Suffice it to say that the West African Court of Appeal in 1943 followed the earlier English decisions on this matter in the case of *R. V. Bang Weyeku*.²⁰ The deceased in this case after he had been stabbed said "Bang has shot me" and this formed the principal evidence against the accused person. On appeal, it was held that the evidence was inadmissible as a dying declaration because there was no evidence that the deceased was in danger of death, also evidence was held inadmissible as forming part of *res gestae* because it was made after the actual wound was inflicted. However,

in *Okokor v. State*²¹ in the night of the incident in question, the deceased was heard by witness living close by shouting "Ovuororienor has killed me!" "Ovuororienor has dealt machet blows on me...". The deceased was found in a pool of blood outside his house while the accused was a few yards away trying to run away. The statements were held as dying declarations and as forming part of *res gestae*.

In a more recent English decision, there appeared to be a change in the criteria for admissibility of a statement in this regard. In *Ratten v. R.*,²² the accused was charged with the murder of his wife. His defence was that she was accidentally shot while he had been cleaning his gun in the kitchen of their house. The important evidence in question was of a telephone operator who stated that, about the time the wife was shot by the accused, a telephone call was made from the accused's house by a woman in a hysterical state who said "Get me the Police please." The Privy Council in dismissing the appeal stated that the evidence was not hearsay but that even if it were, it would be nonetheless admissible as part of the *res gestae* since there was ample evidence of a close connection, the telephone message ("Get me the Police, please!") and the shooting which occurred shortly afterwards. The Privy Council stated that the telephone message helped in explaining the fact in issue of the case which is the murder of the deceased.

Under the Common Law, the expression '*res gestae*' may sum up the criteria for the admissibility of a statement under discussion. In the Nigerian case of *Sunday Akpan v. State*,²³ where the only witness called for the prosecution was a 12 year old boy who testified that he was in bed on the night of the incident. He heard his mother shout "Sunday has killed me". The boy ran out only to meet his father, the accused, cutting his mother with a machet. The statement of the deceased as narrated by the boy, 'Sunday has killed me' was held both as dying declaration and as part of *res gestae*. This decision followed the English case of *Ratten v. R.*²⁴ Suffice it to say that in many areas of our Legal systems, the British Legislations and Common Law principles have been taken hook line and sinker without taking account of our local statutes and certain peculiarities, which are present with us in Nigeria. Section 5(a) of the Evidence Act is said to be essentially useful where the Act does not provide for the admissibility of a matter but such matter is admissible under a common law rule. Under section 7 of the Evidence Act, the criteria for admissibility of evidence in connection with facts in issue have been clearly provided for. Under our Evidence Act, and by virtue of section 7 statements which are spontaneous and by so doing negating the possibility of a concoction are admissible. Since they together with the facts in issue took place the same time and place, thereby fulfilling the requirement for contemporaneity. In the same token, statements of facts which though did

occur at different times and places with facts in issue are equally admissible provided such statements explain the event or facts in issue or lend credence to it to such a magnitude that the true nature and circumstances of the event become clearer. Crucial to the development of our Law of Evidence in Nigeria has been the application of 5(a) of the Evidence Act²⁵ as demonstrated in *R. V. Itule* and the imbibing of the Common Law principle of *Res Gestae* despite the existence of the Evidence Act.

Section 7 of the Evidence Act²⁶ embraces the common law principles of *res gestae* but goes further by making admissible, facts which occur "at different times, and places" as facts in issue, the scope of section 7 acclaimed wider than the Common Law principle. Under the provisions of the Evidence Act and in consideration of a re-statement on criteria for admissibility of a statement as seen in *Ratten's* case. The cases of *R. V. Bedingfield*²⁷ and *R V Christie*²⁸ ought to have undergone a review, and the decision in *Sunday Akpan v. State*²⁹ has proved quite instructive in this regard.

Conclusion

It is important to remind ourselves that the Evidence Ordinance of 1943³⁰ which came into operation in June 1945 was based on the Digest on Evidence of Sir James Fitzgerald Stephen which on its part was in every sense based on Common Law Principles on Evidence. This is quite understandable and tolerable. What is hard to absolve now is the rationale for having to import any available common law principle on Law of Evidence despite the existence of our Evidence Act. There seems to be not too many Nigerian cases following the decision in *R. V. Itule*. It may very well be said that this legal position has become latent as far as our courts are concerned.

The scope of Section 7³¹ of our law is wider than the principle of *res gestae* as provided for under the common law. This suggests that the common law stance has outlived its usefulness as far as admissibility of a statement relating to fact in issue is concerned. Our law of Evidence has evolved over the years and the years and the Evidence Act has undergone a lot of adjustments, a few suggestions at this stage would not be inimical to its development. The followings are my suggestions for possible review of certain sections of the Evidence Act.

1. Section 5(a)³² should be amended to read that nothing in the Act shall prejudice the admissibility of any evidence which would have been admissible under any local statute apart from the Act. This would prevent the possibility of our importing any common law principle

whether or not provided for under our law. More importantly the Act only provides for non-admissibility of any piece of evidence. Section 7 of the Act³³ is quite explicit and there is no reason for bringing the Common Law principle of *res gestae*.

2. Sections 27-32 of the Act³⁴ should be amended to reflect in the definition of a Confession, the inclusion of part of the accused's statement which is favourable unto him.

NOTES

1. Cap 112 Law of the Federation of Nigeria 1990
2. Aguda: Law of Evidence 3rd Ed. page 4
3. Ordinance No. 45 1943
4. Ordinance No. 23 of 1943
5. Ordinance No. 24 of 1943
6. Aguda: Law of Evidence (Supra) page 4
7. Nwadialo: Modern Law of Evidence page 7
8. Supra
9. Aguda (Supra) page 7
10. Supra
11. (1953) 14 WACA 311
12. (1949) 12 W.A.C.A. 456 at 458
13. C.O. Anah: Evidence Law in Action page 74
14. Supra
15. Supra
16. (1931) 2 Ch. 112
17. (1874) 14 Cox C.C. 341; 70 L.T. 867
18. (1914) A.C. 545
19. Supra
20. (1943) 9 W.A.C.A. 195
21. (1969) N. M. L. R. 18 9
22. (1972) A. C. 378
23. (1967) N.M.L.R. 185
24. Supra
25. Supra
26. Supra
27. Supra
28. Supra
29. Supra
30. Supra
31. Evidence Act (Supra)
32. Evidence Act (Supra)
33. Evidence Act (Supra)
34. Evidence Act (Supra)