

Case Review 2

By

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State v. Cornelius Obasi (1998) 9 NWLR, (Part 567) 686

1. Introduction

The Office of the Attorney-General was created under the 1979 Constitution as the chief law officer of the Federation or the State as the case may be vide sections 160 and 191 of the 1979 Constitution. As part of his constitutionally recognised roles, the Federal Attorney-General exercises powers over all criminal proceedings at the federal level, and the States' Attorneys-General exercise the same powers at the state level.

Section 191 reads as follows:

1. The Attorney-General of a State shall have power—
 - (a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial, in respect of any offence created by or under any act of the National Assembly;
 - (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
 - (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.
2. The powers conferred upon the Attorney-General under sub-section (1) of this section may be exercised by him in person or through officers of his department.
3. In exercising his power under this section, the Attorney-General shall have regard to the public interest, the interest of justice and the need to prevent the abuse of legal process.

The powers as one can glean are very wide and in their exercise the Attorney-General acts absolutely at his discretion. The subsequent section expressly allows his officers in his department to also carry-out his functions.

Even though the office of the Attorney-General is one of constitutional creation, over the last 20 years of military rule resulting in frequent changes of Government, we have had periods of time when the office has remained unfilled for periods of time in one state or the other. These periods of the non-occupation of that office has led to serious questions of law as to what role the Ministry of Justice and its officers can play when there is no Attorney-General in office.

The major purpose of the review of this case is to find out exactly what functions can be carried out by the officers of the Ministry of Justice when there is no incumbent Attorney-General in office.

2. Facts of the Case

In this case under review three persons were charged with murder at the High Court of Enugu State. At the end of the case for the prosecution during the trial, the defence counsel raised an objection questioning the validity of the information on the ground that at the time the information was filed, there was no Attorney-General in Enugu State. He contended that under the 1979 Constitution it is the Attorney-General that is empowered to institute and undertake criminal proceedings and that such powers are personal to the Attorney-General and it is he alone that can delegate the powers.

The trial court ruled that the information filed when there was no state Attorney-General in office is incompetent and invalid and therefore that the case of prosecution was a nullity.

The prosecution, aggrieved by the ruling, brought this appeal.

The main issue for determination in this case is whether the information filed in the High Court by a Deputy Director of Public Prosecutions, an officer in the office of the Attorney-General when there was no incumbent Attorney-General was valid and constitutional.

The Court of Appeal held as follows:

That by virtue of S191 (2) of the 1979 constitution, the powers conferred on the Attorney-General by S191(1) can be exercised by him in person or through officers of his department. That therefore it is of no consequence whether at the time of preferring an information there was somebody holding the office of Attorney-General to do the delegation or not.

3. Review of the Case

The decision in this case is completely at variance with an earlier Supreme Court decision in the case of *Attorney-General of Kaduna State v. Hassan* (1985) 2 NWLR (pt 8) 43. The Court of Appeal in the case under review distinguished this case. The question is, is there really a distinction worth distinguishing?

The facts of *A.G Kaduna State v. Hassan*, are as follows: Following an outbreak of communal violence in Jikamashi village of Kaduna State in which one person died; several persons were arranged before the High Court charged with culpable homicide not punishable with death. During the trial, the Solicitor-General purporting to act under Section 191(1)(c) of the 1979 Constitution filed a *nolle prosequi* thereby bringing the trial to an end.

The father of the deceased initiated civil proceedings questioning the competence of the Solicitor-General to file a *nolle prosequi* on several grounds. The ground that is of concern to us here is the ground that only the Attorney-General can validly exercise the power of discontinuance by way of *nolle prosequi* and therefore that the Solicitor-General can not validly exercise the power of discontinuance. It happened that during this period there was in fact no Attorney-General in office.

The court of first instance, that is the High Court, held that the entry of the *nolle prosequi* by the Solicitor-General was unconstitutional and void. On appeal to the Court of Appeal by the State, the appeal was dismissed by a split decision. There was then a further appeal to the Supreme Court.

The Supreme Court, unanimously dismissing the Appeal, held as follows:

- i. Under Section 191 of the 1979 Constitution, the exercise of the powers of the Attorney-General is personal to him and cannot be exercised by any functionary unless those powers have been delegated to him by the Attorney-General. And also that before such powers can be delegated, there must be an Attorney-General in office who can be the donor of such powers.
- ii. The Solicitor-General has no power to exercise the powers of the Attorney-General under section 191 of the 1979 Constitution.
- iii. The Solicitor-General therefore has no power to discontinue the criminal proceedings on behalf of the State. Any such discontinuance by the Solicitor-General is unconstitutional, ultra vires, null and void.

The trial court and the respondent in *Obasi* heavily and justifiably in my opinion relied on *Hassan*. The Court of Appeal in *Obasi* limited the decision of the Supreme Court to cases only of exercise of the power of discontinuance and not to the other powers of the Attorney-General. As far as we can interpret, the Court of Appeal was playing on words. Our opinion is that either one judgement or the other is right. Both cannot be right at the same time. There is really nothing distinguishing one from the other.

The particular provision both cases had to interpret is section 191 of the 1979 Constitution. The Supreme Court in *Hassan* was emphatic in its interpretation of section 191 as one indivisible whole. It did not limit itself to any particular subsection. In *Obasi* however there was an attempt to limit the Supreme Court's position in *Hassan* to only subsection (1)(c). In fact, the Court of Appeal at page 692 said "*...that the case of Hassan is authority only for the proposition that Solicitor-General has no power to discontinue criminal proceedings on behalf of the State and not that a Director of Public Prosecution or his Deputy cannot institute Criminal Proceedings on behalf of the State.*"

Even if *Hassan* bordered only on subsection (1)(c), the purport of one should be same as that of any of the other subsections. None of the subsections on the face of it carries more power than the other. The application of sub-section (2) to sub-section (1)(c) and subsection (1)(a) should be the same. Both powers under subsections (a) and (c) are either delegable or not where there is an incumbent Attorney-General or neither power can be exercised where there is no Attorney-General in office.

In support of their position the appellants in the case under review pointed out that the Civil Service (Re-organisation) Act, Cap 55 Laws of the Federation, 1990, Schedule II to the Act, sections 11 (3) and 11 (5) also gave powers to Directors-General to deputise for Ministers whenever they were away from office.

Ostensibly the Court of Appeal agreed with this position, but did not make any specific pronouncement on it in the judgement.

Between the two decisions, we are of the opinion that *State v. Obasi* is the correctly decided and that if the case of *Hassan* arises today, it would be decided differently. The dictum of Oputa J.S.C. in *Hassan* at page 521 that "*The question of delegation will arise only where there is someone constitutionally competent to make the delegation*", is in our opinion, with respect to his Lordship not right.

We would rather agree with Akpabio J.C.A in *Obasi* at page 692 that: "*The important thing to note in this case is that the post of Attorney-General is a constitutional post created not by statute but by the Constitution — our Suprema Lex. It was therefore an irrelevant consideration, whether there was an incumbent in office or not.*" (emphasis ours).

Having reached the right decision, the Court of Appeal was at pains to distinguish this case from *Hassan*. We do not agree that the facts of this case were radically different from the facts of *Hassan*. The one issue which both of them had to decide was whether the Attorney-General's powers can be exercised even when there was no incumbent Attorney-General in office.

Conclusion

If the situation of *Hassan* arises again, it is hoped the Supreme Court will be magnanimous enough to overturn itself and come to the right conclusion that by virtue of S191 (2) of the Constitution officers of the Attorney-General's department can exercise his powers and that it is irrelevant whether at the precise point, there is an incumbent Attorney-General in office or not.