

**IN THE HIGH COURT OF THE FEDERAL
CAPITAL TERRITORY, ABUJA
HOLDEN AT MAITAMA, ABUJA**

ON TUESDAY, 25TH DAY OF JANUARY, 2022

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

CHARGE NO. FCT/HC/CR/230/2016

BETWEEN

INSPECTOR GENERAL OF POLICE --- COMPLAINANT

AND

PRINCE JOSHUA ONYEMAUCHE --- DEFENDANT

JUDGMENT

On 4/7/2016, the defendant was arraigned on the 7-count charge filed against him on 21/6/2016. On 25/6/2019, the Court granted leave to the prosecution to amend the charge; the amended charge was filed on 10/4/2018. On that day [25/6/2019], the defendant pleaded not guilty to the 7 counts in the amended charge. The amended charge reads:

COUNT 1

That you Prince Joshua Onyemauche, of 25 Victory Estate, Maiboro, Ogun State, on the 17th day of February 2016, at Gwagwalada Military Check-Point, along Gwagwalada expressway, Abuja, within the jurisdiction of this

Honourable Court, unlawfully had in your possession, one black Lugar pistol and you thereby committed an offence, punishable under Section 2[3] of the Robbery and Firearms [Special Provisions] Act, Cap R. 11, LFN 2004.

COUNT 2

That you Prince Joshua Onyemauche, of 25 Victory Estate, Maiboro, Ogun State, on the 17th day of February, 2016, at Gwagwalada Military Check-Point, along Gwagwalada expressway, Abuja, within the jurisdiction of this Honourable Court, unlawfully had in your possession one AK.47 rifle with Reg No. 3290 and you thereby committed an offence, punishable under Section 2[3] of the Robbery and Firearms Act, Cap R. 11, LFN 2004.

COUNT 3

That you Prince Joshua Onyemauche, of 25 Victory Estate, Maiboro, Ogun State, on the 17th day of February 2016, at Gwagwalada Military Check-Point, Abuja, within the jurisdiction of this Honourable Court, had in your possession twenty-one [21] rounds of 9mm parabellium ammunition without a valid licence and thereby committed an offence contrary to Section 3 but punishable under Section 27[1][a][i] of the Firearms Act, Cap F. 28, LFN 2004.

COUNT 4

That you Prince Joshua Onyemauche of 25 Victory Estate, Maiboro, Ogun State, on the 17th day of February 2016, at Gwagwalada Military Check-Point,

Abuja, within the jurisdiction of this Honourable Court had in your possession one AK 47 Rifle, with registration No. 3290, without a valid licence granted to you by the President of the Federal Republic of Nigeria, and thereby committed an offence contrary to Section 3 but punishable under Section 27[1][a][i] of the Firearms Act, Cap F. 28, LFN 2004.

COUNT 5

That you Prince Joshua Onyemauche of 25 Victory Estate, Maiboro, Ogun State, on the 17th day of February 2016, at Gwagwalada Military Check-Point, Abuja, within the jurisdiction of this Honourable Court had in your possession one C99 Black Lugar Pistol, without a licence issued to you by the President of the Federal Republic of Nigeria and thereby committed an offence contrary to Section 3 but punishable under Section 27[1][a][i] of the Firearms Act, Cap F. 28, LFN 2004.

COUNT 6

That you Prince Joshua Onyemauche of 25 Victory Estate, Maiboro, Ogun State, on the 17th day of February, 2016, at Gwagwalada Military Check-Point, Abuja, within the jurisdiction of this Honourable Court, had in your possession forty-two [42] rounds of 7.62m ammunition without a valid licence. You thereby committed an offence contrary to Section 3 but punishable under Section 27[1][b][ii] of the Firearms Act, Cap. F. 28, LFN 2004.

COUNT 7

That you Prince Joshua Onyemauche of 25 Victory Estate, Maiboro, Ogun State, on the 17th day of February 2016, at Gwagwalada Military Check-Point, Abuja, within the jurisdiction of this Honourable Court, falsely presented yourself as an Army Officer, serving in the Nigerian Army when you introduced yourself as Colonel Okoro, and so attempted to evade being searched by Military officers on duty at the check point and thereby committed an offence contrary to Section 132 of the Penal Code, CAP P.89 LFN 2004.

In proof of the allegations against the defendant, the prosecution called 7 witnesses namely: Sergeant Tukur Isaac [PW1], Corporal Ogunbiyi Adeyemi [PW2], Corporal Philip Jacob [PW3], Captain Naseer Iliyasu Abbah [PW4], Lieutenant Colonel Adebisi Onasanya [PW5], Lieutenant Colonel Ismaila Abdullahi [PW6] and ASP Ogunmuyiwa Saburi [PW7].

At the close of the case of the prosecution on 25/6/2019, the learned defence counsel opted to make a no case submission. The written addresses of the parties in respect of the no case submission were adopted on 17/2/2020. In its Ruling delivered on 6/5/2020, the Court upheld the defendant's no case submission on counts 1 and 2 and discharged him on the two counts. The Court overruled the no case submission on counts 3, 4, 5, 6 and 7. The defendant was called upon to enter his defence on these counts.

In his defence, the defendant testified and called one witness. Ngozi Inneh gave evidence as DW1 while the defendant testified as DW2.

Evidence of the prosecution witnesses:

PW1 - Sergeant Tukur Isaac:

The evidence of PW1 is that sometime in February 2016, he was in Abaji check-point at night. He went to take his rest after his sentry. His Platoon Commander, Captain Abbah, called him and told him that the man inside the vehicle wanted to see the Guards Commander. He[PW1] walked to the man in the vehicle i.e. the defendant; he was the one driving. He greeted the defendant and introduced himself. He asked the defendant if he could know him. The defendant said he is Colonel Okoro. He asked the defendant if he could see his identity card. Defendant replied: *"Do we have Sector Commander here?"* He [PW1] said no and asked the defendant again for his identity card. The defendant then drove out his Tundra vehicle [ash colour with amber light] with speed.

Sergeant Tukur Isaac further testified that his Platoon Commander, Captain Abbah, entered his Hilux and followed the defendant. In April 2016, his Commanding Officer, Lieutenant Colonel Onasanya, called him that his attention was needed at Special Investigation Bureau [SIB] of the Nigerian Army. He went there and they obtained his statement. The statement of PW1 dated 6/4/2016 is Exhibit B.

During cross examination, PW1 stated that apart from the defendant, he saw a Staff Sergeant in the car wearing tatrion [i.e. full green uniform]. It is not

true that when he, Captain Abbah and the others threatened to beat the defendant, he told them to call his brother, Colonel Okoro, to confirm that he is not a criminal. Nobody threatened the defendant.

PW2 -Corporal OgunbiyiAdeyemi:

PW2 testified that in February 2016, he was in Gwagwalada check-point along Teaching Hospital Road. His Platoon Commander, Captain Abbah, called him on phone and said there is a Tundra ash colour with amber light coming from Abaji to Gwagwalada; and that there is a man inside the vehicle wearing Army uniform [tatrion]. Captain Abbah asked him to go and block him along the road. He went there with 4 soldiers. He saw the Tundra vehicle and stopped it. He asked the 2 occupants of the car, i.e. the defendant and the Staff Sergeant, to come down from the vehicle.

The PW2 further stated that after about 5 minutes, Captain Abbah came and asked them to move to the barracks. All of them including the defendant, the Staff Sergeant and Captain Abbah and the Tundra vehicle moved to the barracks. At the barracks, they handed the defendant and the Staff Sergeant to the Commanding Officer, Lieutenant Colonel Onasanya. He asked them to go back to their check-point; and they did. He made a statement in April 2016; his statement dated 6/4/2016 is Exhibit C.

When PW2 was cross examined, he stated that the defendant did not tell him that he is Captain Okoro.

PW3 -Lance Corporal Philip Jacob:

His evidence is that he works at the Headquarters of Nigerian Army School of Education, Ilorin. He knew the defendant at the barracks of Nigeria Army, Ikeja Cantonment. On 16/2/2016, he was in his office and the defendant called him and said he[PW3] will accompany him to his home town [i.e. Alike, Obowo in Imo State]. They went to Oladipo and repaired the siren of the defendant's Tacoma Hilux Car. The defendant withdrew N1,050,000.00 from his company account at Eko Bank, Oladipo. They embarked on the journey. When they got to Asaba, the defendant told him that he received a call to come to Abuja. They changed their route at Asaba to Abuja. At Gwagwalada, they were stopped by Military men. He was wearing a Staff Sergeant rank. At that time, he was a Staff Sergeant before he was demoted to Lance Corporal.

The military men asked him about his identity card and his pass. He told them he lost his identity card and tendered the affidavit of loss to them. He also gave them the pass that expired that day [i.e. 16/2/2016]. He and the defendant were taken to 176 Guards Battalion. The Commanding Officer of that Battalion asked him if he is a serving officer and he said yes. They took him to the guard room and the defendant was left with them. He and the defendant were tortured from Gwagwalada check-point to the Battalion Headquarters. They continued to torture the defendant until he[PW3] was taken to the guard room. After several hours, they brought the defendant to join him.

The PW3 further testified that in the morning, they paraded him and the defendant that they saw AK 47 rifle, one pistol Lugar and some ammunition. The Commanding Officer handed over the pistol Lugar to him to hold and handed over the AK 47 rifle to the defendant to hold. They took a snap shot of both of them. They asked him how they came about the AK47, the pistol and the ammunition. He told them he did not know anything about the items. He and the defendant were taken to the Guards Brigade that morning for interrogation. He was forced to write his statement that day because he told them he did not know anything about the items. They were detained at the Guards Brigade, Military Police guard room for some months.

At this point in the proceedings on 25/1/2017, learned counsel for prosecution [O. M. Atoyebi Esq., now Senior Advocate of Nigeria] sought leave of the Court to declare PW3 a hostile witness because he has given evidence against the interest of the prosecution. Learned prosecuting counsel relied on section 230 of the Evidence Act, 2011. Learned senior defence counsel [Gordy Uche, SAN] opposed the application and argued that there is no basis to declare PW3 a hostile witness. In a Bench Ruling, the Court granted the application.

The further evidence of PW3 [as a hostile witness] is that he wrote statements at Guards Brigade Military Police, SIB [Special Investigation Bureau], SIB office in the Nigeria Police. When he was shown the statement he wrote in Guards Brigade, he said he wrote what they asked him to write. The PW3 confirmed that in his statement to the Guards Brigade, he stated that the

defendant told him that he bought the AK 47 rifle from a Policeman and that he bought the pistol from the USA. The statement of PW3 dated 17/2/2016 made at Nigeria Army Corps of Military Police is Exhibit D. He confirmed that in his statement at the Nigeria Police, he stated that he entered the defendant's house and picked AK 47, extra double magazine of AK 47 rifle and a Lugar pistol and kept them in the safe of the vehicle. The statement of PW3 to the Nigeria Police dated 29/4/2016 was admitted as Exhibit E; while his statement at SIB dated 24/3/2016 was admitted as Exhibit F.

When the matter came up on 1/2/2017 for cross examination of PW3, learned counsel for the prosecution applied that the evidence adduced by PW3 be discredited as he had been declared a hostile witness. He also applied that the evidence of PW3 be expunged and that he be discharged. Mr. O. M. Atoyebi further submitted that there was no need for the PW3 to be cross examined. Learned senior counsel for the defendant opposed the application. In a Bench Ruling, the Court refused the application of learned prosecuting counsel.

During the cross examination of PW3, he stated that on the day he and the defendant were arrested, he was not present when the vehicle was searched. The statements he was tortured to make were to implicate the defendant.

PW4-Captain Naseer Iiyasu Abbah:

The evidence of PW4 is that he was serving at 176 Guards Battalion, Abuja. He was deployed at Abaji/Lokoja expressway as the Platoon Commander. At about mid-night on 17/2/2016, he was seated outside with Guardsman Sampson Operekete while the other sentry man was on the road checking vehicles. The sentry man flagged down a Dangote truck and was doing the normal routine checks. At that point, the defendant, who was driving a Tacoma truck with amber light, parked behind the truck shouting why they were wasting his time. He [the PW4] asked the sentry to park the person disturbing with the horn. The defendant parked off the road. When he met the defendant, he asked him who he was and why he was disturbing them. He went with Sampson Operekete and the sentry. The defendant refused to answer his question but said he wanted to see the Guards Commander.

He looked into the vehicle and noticed that the person inside the vehicle was wearing a military uniform with Staff Sergeant rank. He assumed that the defendant was an officer because he was clean-shaved with proper hair-cut. He then asked: *"Sir, may I know you?"* The defendant insisted on seeing the Guards Commander. He sent Sampson to call the Guards Commander who was in charge of the other side of the road. Sampson called the Guards Commander, Sergeant Tukur Isaac. When Sergeant Isaac came, he saluted the defendant and asked him who he was. The defendant told Sergeant Tukur Isaac in his [PW4] presence that he is Colonel Okoro. Sergeant Isaac saluted him again and asked if he could see his identity card. The defendant

said: *“Even you, do you want to see my ID card after introducing myself; is that how you people are trained? Who is your Sector Commander?”*

PW4 further testified that at that point, he got angry because he knew that the defendant was impersonating as there was nothing like Sector Commander in their deployment there. He became suspicious and asked the defendant to show them his identity card. He asked: *“why are you trying to wawarize us?”* Captain Abbah explained that *“wawarize”* is a military slang; meaning *“why are you trying to fool us?”* The defendant was inside the vehicle and the engine was on. When he insisted to see the identity card, defendant engaged the gear and sped off. He entered their Hilux vehicle with Sampson, the driver and one other soldier and pursued the defendant. He used his phone to call the operations officer and the Commanding Officer to establish a snap check point on the road before the bridge at Gwagwalada.

On their way in pursuit of the defendant, he was informed that the defendant had been apprehended. When he got to the scene, the defendant and the Staff Sergeant were seated on the floor. As he was advancing to meet them, the defendant stood up and said: *“Captain Abbah I am sorry”*; and held his hand. He pushed the defendant away from his body. He asked for the identity card of the Staff Sergeant and his pass. He brought out photocopy of his identity card; he said the identity card was missing. He brought out a pass that had expired the previous month and was meant for Benue State. PW4 narrated how he took defendant and the Staff Sergeant to the barracks. The defendant

said he had N1 million in the vehicle and offered to give him the N1 million but he refused. On their way to the barracks, the defendant offered to give him as much as N4 million and a phone; but he refused.

The further evidence of Captain NaseerIliyasuAbbahis that at the barracks, they met the Commanding Officer,the 2 i/c, Operation Officer,Adjutant and duty clerks. The defendant and the Staff Sergeant were brought out of the vehicle. The Commanding Officer asked them to search the vehicle. They searched the vehicle and saw phones, one Ipad, plenty cheque books, money [i.e. a million plus] and drugs. They opened the glove compartment [pigeon hole] and saw a Lugar pistol, 2015 model. At that point, the defendant came close to beg him and he slapped the defendant. They also saw extra rounds of 9mmparabellium [i.e. the calibre of the ammunition]. When they finished, they started documenting what they recovered from the vehicle. At that point, the Commanding Officer asked if they have properly searched the vehicle and if they searched under the seat. The Operation Officer said they could not raise the back seat.

PW4 said he and the other soldiers forced the seat open. When they raised the seat, they found AK 47 weapon and 4 magazines; 2 bound together in pairs. They also saw the jack and wheel spanner. They documented everything they found in the vehicle. The defendant and the Staff Sergeant were detained. This was about 2 a.m. He left them and went back to his location at Abaji. 2 days later, he made a statement at Guards Brigade Military Police. After oneor two months, he was called at Special Investigation Bureau [Military] to

make statement, which he did. The statements of PW4 dated 19/2/2016 and 22/3/2016 are respectively Exhibits G & H.

During cross examination of PW4, he said he did not torture the defendant; he only slapped him. If he tortured the defendant, he will not be alive. When PW4 was asked if he was permitted by the Nigerian Army to slap civilians, he said the rules of engagement state that he should not use excessive force. He only gave the defendant "*one dirty slap*"; his Commanding Officer then asked him to stop. It is not true that he asked the defendant to give him N1 million for him and his men. The search of the vehicle was carried out in the presence of the defendant, the Staff Sergeant and the Commanding Officer [Lieutenant Colonel I. A. O. Onasanya]. It was when they took the defendant to the barracks that he said he is not Colonel Okoro. The defendant requested him to speak with Colonel Okoro; but he refused.

PW5 - Lieutenant Colonel Adebisi Onasanya:

The evidence of PW5 is that he is the Commanding Officer of 176 Guards Battalion, Gwagwalada, Abuja. In the early hours of 17/2/2016, he was called by his Platoon Commander deployed at Abaji check-point [Captain Abbah] that they just recorded a case of someone evading their check-point and impersonating a Colonel in the Nigerian Army. Captain Abbah requested for permission to order the troops deployed at Gwagwalada check-point to arrest the person by establishing a "*snap road block*". He approved the request and that was done. When he was informed that the man and his accomplice have

been arrested, he ordered them to bring the people to the barracks. Prior to their arrival at his Headquarters, he was already there waiting for them.

When they got to the barracks, they told him what transpired at the check point and he confirmed same from the defendant. The defendant confessed to him that he impersonated as Colonel Okoro and pleaded for mercy. He directed that the vehicle be searched thoroughly. During the search, a pistol was recovered from the glove compartment of the defendant's vehicle. While he was standing there, they told him that they had completed the search. He observed that the search was not thorough enough following the standard prescribed by the Nigerian Army for searching vehicles. This was because the back seat was not raised. He inquired to know why the back seat was not raised and they said it was stiff. He insisted that the procedure must be completed in the presence of everyone that was there including the defendant and the soldier with him [i.e. PW3].

PW5 further testified that when the back seat was forced open, they searched and discovered one AK 47 rifle and some magazines with some rounds of ammunition. During the search, there were other items recovered from the vehicle, i.e. the sum of about N1,011,000, some cheque books and some handsets. He directed his 2^{1/c} to prepare a handover note detailing all the items recovered from the defendant's Hilux vehicle. Subsequently, he sent the defendant and PW3 to Guards Brigade Headquarters for further investigation by the Military Police.

During cross examination, PW5 stated that under Military law, it is an offence for a soldier to travel outside his barracks with an expired pass. When he found that the soldier had an expired pass, he ordered that he should be detained; that was initially and the essence was to separate both of them. There is no place of detention for civilians in his guard room; the defendant was never detained. The soldier and the defendant were not tortured to make any statement. If Captain Abbah slapped anybody on that day, he [PW5] stopped it immediately; that was not torture. He cannot remember defendant signing any inventory of what was recovered on his body or from his vehicle. The defendant admitted knowing Colonel Okoro when it was discovered in his call list. He did not make any attempt to call Colonel Okoro; it is not his work to call Colonel Okoro.

PW6 -Lieutenant Colonel Ismaila Abdullahi:

His testimony is that he was a Major commanding the Presidential Guards Brigade Provost Company when he received this case. The defendant and Staff Sergeant Philip were brought before him for investigation on alleged case of impersonation as an Army officer, illegal possession of arms and ammunition and absence without official leave [AWOL] against the soldier. The arms were AK 47 rifle, Lugar pistol, AK 47 rounds, Lugar pistol rounds and AK 47 magazines. When he interviewed defendant, he used his iPhone 6 that has a recording application and discreetly recorded their conversation. The defendant confessed to the crimes during the interview. After that, he

transferred the audio recording into his Macbook Pro Apple Computer. He burnt the recording into a CD [Compact Disc] using the same computer.

The Compact Disc is Exhibit J. The Certificate of Compliance pursuant to section 84[4] of the Evidence Act, 2011 signed by the PW6 on 29/1/2018 and filed on 30/1/2018 is Exhibit J1. On 12/4/2018, the Compact Disc was played in open Court on the application of the learned counsel for the prosecution.

The further evidence of PW6 is that in the course of his investigation, he took over the items the defendant was found with and documented them. He took the written statement of the defendant; the defendant confessed to the crimes in his statement. The defendant was under his custody while investigation was on-going until they completed their investigation. They also took the statement of the soldier that was arrested with the defendant.

In the course of the evidence of PW6 on 12/4/2018, learned counsel for the prosecution, O. M. Atoyebi Esq. [now Senior Advocate of Nigeria] applied to tender the said statement of the defendant and that of the Staff Sergeant [PW3]. Learned senior counsel for the defendant, Gordy Uche, SAN, objected to the admissibility of the statement of the defendant on the ground that it was obtained under duress and torture. The Court admitted the statement of Staff Sergeant Jacob Philip dated 17/2/2016 as Exhibit K and ordered a trial within trial with respect to the statement of the defendant.

When the case came up on 28/1/2019 for trial within trial, learned counsel for the prosecution [L. B. Tairu Esq.] applied to withdraw the statement of the defendant and noted that the prosecution was no longer interested in the trial within trial. The Court granted leave to the prosecution to withdraw the extra-judicial statement of the defendant dated 17/2/2016.

When PW6 was cross examined, he stated that the defendant was not aware that he was making a confessional statement on the day he [PW6] discreetly recorded his statement which is in the Compact Disc. The defendant was arrested with a serving soldier and the case was complex. That was why the defendant was detained for about one month to enable them get to the bottom of how he got the pistol and the AK 47 rifle.

PW6 said the defendant informed him that he purchased the AK 47 rifle from a Police officer serving in Lagos but he could not confirm the origin of the AK 47 rifle as there were no details of its origin. They discovered that the serial number had been erased from the body of the rifle to conceal its origin. When he asked the defendant how he got the Lugar pistol, he said he bought it from a gun shop in USA with the money he won from a lottery. He disassembled it, put it in fuel tank of a car he purchased in USA, shipped the car to Nigeria, cleared the car from the Port, took the car to a mechanic who removed the fuel tank and he was able to retrieve the pistol from the fuel tank and reassembled it. According to the defendant, the ammunition was bought together with the AK 47 rifle.

PW6 further stated during cross examination that the Staff Sergeant and the defendant were not tortured. The cross examiners suggested to the PW6 that during the period the defendant was in their custody, he spent one week in the Military Hospital for injuries arising from his torture. The answer of PW6 is that the defendant *“went to the Military Hospital because by International best practices applicable to us as members of the Armed Forces, a person in our custody that requires medical attention should be granted same. That was what we did. It had nothing to do with torture.”*

PW7-ASP Ogunmuyiwa Saburi:

His evidence is that he is attached to IGP Intelligence Response Team. On 22/4/2016, a case was transferred from Military Intelligence to the Inspector General of Police; it was assigned to their office for further investigation. The defendant was handed over to them along with some exhibits and he was alleged to be a suspected kidnapper and armed robber. On receipt of the case, the statement of the defendant was recorded under caution. He also obtained statements from witnesses. When he visited the Military Intelligence office to record the statements of the arresting officers, certified true copies of the statements of the arresting officers were obtained and attached to the case file. He obtained statement from Staff Sergeant Philip Jacob who was arrested with the defendant.

ASP Ogunmuyiwa Saburi further stated that he extended his investigation to where the defendant claimed he has an office in Lagos. He also visited the defendant's water factory at Alike, Imo State. The defendant was transferred with a covering letter, which listed the items he received from Military Intelligence. PW7 tendered the following:

- i. The letter of 22/4/2016 signed by A. T. Hamman to Inspector General of Police: Exhibit L.
- ii. Statement of Staff Sergeant Philip Jacob to the Police dated 29/4/2016: Exhibit M.
- iii. The statements of the defendant made to the Police dated 23/4/2016 and 30/4/2016: Exhibits N1 & N2 respectively.
- iv. AK 47 rifle: Exhibit 01.
- v. Lugar pistol: Exhibit 02.
- vi. 4 magazines: Exhibit 03.
- vii. 21 of 9mm life ammunition: Exhibit 04.
- viii. 41 of 7.62mm life ammunition: Exhibit 05.

During cross examination, PW7 stated that defendant said in his statements that the AK 47 was not recovered from him. The rifle [Exhibit 01] is AK 49 rifle. He never saw the Army officers that arrested the defendant and there

was never an opportunity to interrogate them. In the defendant's second statement dated 30/4/2016, he stated that the pistol did not belong to him. From his experience, the rifle [Exhibit 01] has a serial number.

DW1 - Ngozi Inneh

Her evidence is that she is a nurse. She works in the Nursing Department at Guards Brigade Medical Centre, Abuja. In February 2016, the defendant was brought to their medical unit by Military Police with handcuff in his hands and his legs chained. When they brought the defendant, she was the nurse on duty that attended to him. The defendant complained of pains all over his body and he was weeping as she was attending to him. The defendant said he had not been eating. She bought him rice and beans and gave him water. The doctor saw the defendant; one of the tablets the doctor prescribed for him was an analgesic. Subsequently, the defendant came to the hospital with Military men to report sick.

During cross examination, DW1 stated that she did not see any officer beat or torture the defendant.

On 8/12/2020, ASP Ogunmuyiwa Saburi [who testified as the PW7] attended Court pursuant to a *subpoena duces tecum* issued by the Court - on the application of the defendant - and served on the Commander, Intelligence Response Unit, Force Headquarters Abuja. He produced Police investigation report in the case of criminal conspiracy and stealing and a Galaxy Samsung

S7. Learned defence counsel tendered from the Bar the Galaxy Samsung S7 as Exhibit P; and the Police investigation report as Exhibit Q.

DW2-Prince Joshua Onyemauche [the defendant]:

In his evidence, the defendant stated that he is the chairman of Pacific Sprint Ltd., Pacific Unicorn Solutions Ltd., and Pacific Global Clean Energy Ltd. He narrated how he embarked on a journey with his vehicle from Lagos to his Village on Tuesday, 16/2/2016. When he got to Agbor in Delta State, he received a call from one Mr. Jerry concerning a business transaction. He turned from Asaba to come to Abuja. He was with Staff Sergeant Philip Jacob all through the journey. When they stopped at Lokoja to buy fuel, 2 soldiers approached him for "lift" and they said they will stop at their check-point at Abaji. He obliged. When they got to Abaji, he stopped them and continued with the journey. On getting to Gwagwalada, they saw 2 soldiers on the road who asked them to stop. The soldiers said they wanted to search the vehicle and they obliged.

They asked the Staff Sergeant for his identity card. He gave them affidavit showing that he lost his identity card. They also asked the Staff Sergeant if he had a pass and he said yes but that it will expire that day and he will extend it the next day in Abuja. At that point, they said they wanted to search the vehicle. Unknown to them, he had Cobra dash board camera which

automatically records if one steps on the brake pad twice or if one makes an emergency stop. He stepped on the brake pad twice and it started recording. They started searching the vehicle. They saw the money he withdrew from the bank that day [i.e. N1 million] and additional cash he was having. They saw his phones. One of them went by the side and made a call. After about 40 minutes, a vehicle pulled behind them. Somebody came out of the vehicle and asked them about the soldier. They pointed to the Staff Sergeant.

The defendant further testified that later, they said they will take the Staff Sergeant to the barracks to verify if he is a real soldier. When they asked him and the Staff Sergeant to step out of his vehicle, he started recording with his Samsung Edge phone. When they asked the Staff Sergeant if he is a soldier, he [DW2] said he is a real soldier and asked if they can't see his affidavit. Captain Abbah [hereinafter referred to as "*Captain*"] turned and slapped him; and said who asked him to put mouth in their discussion. When Captain slapped him, he [DW2] said he cannot slap him because he has brothers in the Army. Captain ordered his boys to put him inside his [Captain's] vehicle that he came with, which they did. His boys drove his [DW2's] vehicle to where he was later told was 176 Gwagwalada Army barracks. On their way, Captain said the soldier does not have a valid identity card and requested that he [DW2] should give him the money he had to free the Staff Sergeant. He refused because he knew that the Staff Sergeant is a real soldier.

Captain asked him the name of his brother in the Army. He told him his name is Colonel Okoro. He asked if it is Colonel Okoro of Military Police and he said yes. He started calling Colonel Okoro and Captain said there was no need to call him. When they got to the barracks, he [Captain] went out of the vehicle and started discussing with another officer. When one of the soldiers they met at the barracks discovered that he was recording with his phone, he alerted Captain. Captain was so angry and started beating him. He ordered his boys to put him [DW2] in their detention. In the night around 1 a.m., Captain came to the cell. When they brought him out, Captain said they have seen the Staff Sergeant with a pistol. Captain asked if he has considered his offer for him [DW2] to give him the money. He said no.

Around 7 or 8 in the morning, Captain came with his boys, brought him out of the cell and took him to where the Staff Sergeant was standing. Captain asked if the photographer was ready and they said yes. Captain went and brought a long gun. Captain gave him the long gun to hold and asked the photographer to take a picture of him. They gave the Staff Sergeant a very short gun and took a picture. They asked him to enter a vehicle and he was taken to a place they called Guards Brigade. There, he was handed over to Military Police. The officer at Military Police asked him what happened. He told him that the Cobra dash board camera and his Samsung Edge phone have record of all that happened and asked them to play the recording. The officer said he thinks he can put an officer in trouble; and put him in the cell.

In his evidence on 19/3/2021, the defendant narrated that around 4 p.m. on 17/2/2016, he was taken to the cell in Mambilla barracks. On 18/2/2016, they brought a written statement and asked him to copy. He refused. They started beating him and he became unconscious. When he was revived at MRS Hospital in Mambilla barracks, the nurse wanted to give him injection. He said he had not eaten since the night of 16/2/2016. The nurse bought rice and beans for him, which he ate. Later, Lieutenant Colonel Abdullahi came to the hospital with his boys and took him away to their detention despite the fact that the nurse informed him that the doctor said he [DW2] should have bed rest because his BP was very high.

On 19/2/2016, Lieutenant Colonel Abdullahi brought the same statement to him to copy. When he refused, Lieutenant Colonel Abdullahi stabbed him with a jack knife on his shoulder and started beating him. He was rushed to the hospital the second time. He was treated and the nurses advised him to do whatever they asked him to do so that he will not die like others who died in their detention. When he was returned to the cell, he wrote whatever they asked him to write because of the torture he had received. He further narrated his other experiences while in detention until one of the soldiers who did not like what they were doing went to Major General Nze and told him what he [the defendant] was going through. The case was then moved from Guards Brigade to SIB for investigation although he was still detained in Guards Brigade. The matter was later transferred to the Police.

The defendant further testified that on the day he was to be transferred to the Police, Lieutenant Colonel Abdullahi and one Kenneth insisted that he should issue the cheque he refused to issue earlier. He issued the cheques and wrote that they required confirmation. When he was in detention for 2 months and 7 days, he was not allowed to call any of his family members but on that day, they gave him phone to call the bank to confirm the 3 cheques; they are Eco bank and Zenith Bank cheques. When he printed his account statements, he found that they cashed the cheques.

When the case was transferred to the Police, he spoke to his wife. His wife informed him that on 22/2/2016, the Army came to his house and carried his Ford F150, Silverado Chevrolet and 285,000 Dollars. The serial numbers of the Dollars were in his Samsung Edge phone. When Lieutenant Colonel Abdullahi asked him of the picture of the Dollars in his phone, he told him that when they buy Dollars, they take pictures of the serial numbers. He told him that the Dollars were kept in the house due to the nature of his business. He did not know that they will go to his house to take the Dollars.

The defendant further stated that the search of his vehicle was conducted on the road by Gwagwalada check-point and nothing was recovered. The gun he was given on the day he was photographed is different from the rifle, Exhibit O1. When the Police released his phones to him, the one he used to record what happened that night was not given to him. Based on the request of the Police, he gave them the IMEI number of the phone and they traced it

to someone who said he bought it from a soldier serving in Gwagwalada 176 Battalion. The Police issued the report[Exhibit Q]. His Galaxy Edge phone is Exhibit P. When he was released, he sued the Army at the Federal High Court. The Judgment of *Hon. Justice A. I. Chikere* dated 22/10/2018 in *Suit No. FHC/ABJ/CS/454/2017* is Exhibit S.

During cross examination, the defendant stated that 16/2/2016 was not the first date he travelled with Sergeant Philip Jacobs. When asked whether he made any application to the Nigerian Army for the use of Sergeant Philip Jacobs as a security cover, DW1 stated that he did not travel with Sergeant Philip as a security cover; he travelled with him as a friend of his brother, Sergeant Ogbonna. Sergeant Ogbonna introduced him to Sergeant Philip. He maintained that the officers searched his vehicle on the road after talking to the Staff Sergeant and he presented his affidavit of loss of his ID card.

Issues for Determination:

At the end of the trial, Kolawole Olowookere Esq. filed the defendant's final written address on 14/9/2021. Festus Ibude Esq. filed the prosecution's final written address on 12/10/2021. Mr. Olowookere filed the defendant's reply on points of law on 28/10/2021. The final addresses were adopted on 28/10/2021.

In the defendant's final written address, Kolawole Olowookere Esq. distilled four issues for determination, to wit:

1. Whether the investigation carried out by the officers and men of the Nigerian Army and their testimonies against the defendant is *[sic]* valid and not a nullity in law.
2. Whether on the totality of the evidence of the prosecution witnesses vis-à-vis the evidence of the defendant, the prosecution has proved its case against the defendant beyond reasonable doubt on counts 3, 4, 5 and 6 of the amended charge to warrant his conviction for the offences charged.
3. Whether the prosecution has proved a case of impersonation against the defendant beyond reasonable doubt to warrant his conviction on same.
4. Whether this charge and the prosecution is not actuated by malice.

On the other hand, Festus Ibude Esq. formulated one issue for determination, which is:

Whether from the facts and circumstances of this case and in view of the totality of evidence led, the prosecution has discharged the onus of proving the offences for which the defendant is charged beyond reasonable doubt.

By reason of the presumption of innocence of an accused person guaranteed under section 36[5] of the 1999 Constitution [as amended], the prosecution has

the evidential burden or duty to prove the guilt of a person alleged to have committed a criminal offence beyond reasonable doubt. In the instant case, in order to determine whether prosecution has discharged the burden to prove the guilt of the defendant as required by law, the Court is of the view that four issues call for resolution. These are:

1. Whether the investigation carried out by Lieutenant Colonel Ismaila Abdullahi [PW6], an officer of the Nigerian Army, and the testimonies of PW1, PW2, PW4, PW5 and PW6 against the defendant are valid.
2. Whether the alleged confessional statement of the defendant discreetly recorded by the PW6, which is in the Compact Disc [Exhibit J] has any evidential value or weight.
3. Has the prosecution proved beyond reasonable doubt that twenty one rounds of 9mm parabellum ammunition, AK 47 rifle, C99 black Lugar Pistol and forty two rounds of 7.62m ammunition were recovered from defendant at Gwagwalada Military Check-Point Abuja on 17/2/2016?
4. Whether the prosecution has proved the allegation of impersonation against the defendant in count 7.

ISSUE 1

Whether the investigation carried out by Lieutenant Colonel IsmailaAbdullahi [PW6], an officer of the Nigerian Army, and the testimonies of PW1, PW2, PW4, PW5 and PW6 against the defendant are valid.

The argument of learned counsel for the defendant is that the investigation carried out by the officers and men of the Nigerian Army and the testimonies of PW1, PW2, PW4, PW5 & PW6 [who are all Military personnel] are invalid and of no effect. This is because the defendant is not a person subject to service law and therefore cannot be validly investigated by Military officers for the offences charged or any other offence. He relied on sections 122[1] and 123 of the Armed Forces Act, Cap. A20 Laws of the Federation of Nigeria 2004, which provide:

Section 122[1]:

Subject to the provision of subsection 2 of this section, the allegations against a person subject to service law under this Act who is under arrest shall be duly investigated within reasonable time and as soon as may be, either proceedings shall be taken for punishing his offence or he shall be released from arrest within 24 hours.

Section 123:

Before an allegation against a person subject to service law under this Act [in this section referred to as "accused"] that he has committed an offence under a

provision of this Act is further proceeded with, the allegation shall be reported, in the form of a charge, to the commanding officer of the accused and the commanding officer shall investigate the charge in the prescribed manner.

KolawoleOlowookere Esq. submitted that the powers to investigate any person for civil offences are generally vested in the Nigeria Police and not the Military Police whose investigative powers are limited by the provisions of sections 122[1] and 123 of the Armed Forces Act to persons subject to service law or members of the Armed Forces. He relied on the Judgment of *Hon. Justice A. I. Chikere* in Exhibit S in support of his argument and concluded that the investigation carried out by the Military Police and the evidence of PW1, PW2, PW4, PW5 & PW6 are a nullity.

On the other hand, learned counsel for the prosecution submitted that the import of sections 122[1] & 123 of the Armed Forces Act is with regards to Court Martial for Military officers. In this case, the officers of the Nigerian Army only appeared in Court to give evidence of what they know about the case and tendered the statements they made in the course of investigation by the Nigeria Police Force. There is no law which bars Military officers from arresting a civilian suspected of committing a crime, conducting a search on him/her and handing him/her over to the appropriate authorities for possible prosecution. It is not correct that a Military officer cannot be called as a witness to testify before the Court as an eye witness of what he saw and heard in respect of the case against the defendant.

The prosecuting counsel further submitted that the views of the defence counsel can only be valid if the defendant was tried before a Court Martial. He emphasized that the provisions of sections 122[1] and 123 of the Armed Forces Act only state the procedure to be adopted in the prosecution of persons who are subject to Armed Forces laws or service law. The provisions are not in connection with the powers of Military officers to make arrest, investigate, offer statement and give report to the appropriate authorities [in the instant case the Nigeria Police] to prosecute.

With respect to the Judgment in Exhibit S, Mr. Ibude submitted that there is a clear distinction between the case determined by the Federal High Court and the present case. The decision in Exhibit S relied upon by the defence counsel has no nexus or bearing with the case at hand. Exhibit S was in respect of a civil matter for enforcement of fundamental rights while the present case is a criminal case. Learned counsel for the prosecution urged the Court to hold that the investigation by the Nigerian Army and the evidence of the witnesses who are Military officers are valid and not a nullity.

Now, in Exhibit S i.e. the Judgment in *Suit No. FHC/ABJ/CS/454/2017: Prince Joshua Onyemauche Vs. The Nigerian Army & 5 Ors.* delivered on 22/10/2018, His Lordship, Hon. Justice A. I. Chikere held at pages 19-20 thus:

On the issue of the Respondents' right to investigate, I have carefully examined the provisions of the Armed Forces Act, and it will appear to the court that the

Act gave the Respondents investigative powers but only to persons under the service law. In the instant case, the Applicant was alleged to have impersonated a military officer, one "Colonel Okoro". This clearly shows that the Respondents had no right to investigate the Applicant having alleged that he impersonated a military officer because he is not person under the service law. The Agency or statutory body with the right to investigate the said allegation was the Nigeria Police Force ... The Respondent is not vested with the power to investigate those not under service law. See sections 122[1] and 123 of the Armed Forces Act. ...".

Mr. Festus Ibude did argue that the above decision is not applicable to the present case. It is correct that the decision in Exhibit S was in respect of a civil case for the enforcement of fundamental rights. However, the interpretation of sections 122[1] and 123 of the Armed Forces Act is relevant to this case.

I am persuaded by the decision of My Lord, *Hon. Justice A. I. Chikere* and I adopt it as mine. I hold that the Nigeria Police Force is the statutory body with the power and responsibility to investigate the allegations against the defendant and not the Military Police or the Army. In this regard, section 14[1] of the Administration of Criminal Justice Act, 2015 [ACJA] provides that: *"A suspect who is arrested, whether with or without warrant, shall be taken to a Police station, or other place for the reception of suspect, and shall be promptly informed of the allegation against him in the language he understands."*

The Court is in agreement with the submission of the learned defence counsel in the defendant's reply on points of law that upon the defendant's arrest, the Army, having found that he is a person not subject to service law, should have immediately handed him over to the Nigeria Police Force for proper investigation. In my humble opinion, it was wrong for the Army to hand the defendant over to the Military Police for investigation.

For the PW1, PW2, PW4 & PW5, they did not carry out any investigation against the defendant; they only gave evidence of their version of what transpired on the day of the incident. The Court is in agreement with learned counsel for prosecution that there is no law which bars or precludes Military officers from arresting a civilian suspected of committing a crime, conducting a search on him/her, and testifying in the case. As I said earlier, when a Military officer arrests a civilian who is not subject to service law [like the defendant in this case], the Military officer has a duty to immediately hand him or her over to the Nigeria Police Force for investigation.

The decision of the Court on Issue 1 is that the investigation carried out by the PW6 and his evidence in Court are invalid; while the testimonies of the PW1, PW2, PW4 & PW5 are not invalid.

ISSUE 2

Whether the alleged confessional statement of the defendant discreetly recorded by the PW6, which is in the Compact Disc [Exhibit J] has any evidential value or weight.

In his evidence, the PW6 [Lieutenant Colonel Ismaila Abdullahi] stated that when he interviewed the defendant, he used his iPhone 6 that has a recording application and discreetly recorded their conversation; and that defendant confessed to the allegations against him. The CD [Compact Disc] containing their conversation is Exhibit J.

In paragraph 7.47 of the defendant's final written address, Mr. Kolawole Olowookere referred to the evidence of PW6 during cross examination that the defendant was not aware that he was making a confessional statement on the day he [PW6] discreetly recorded his statement contained in Exhibit J. At pages 30-31 thereof, learned defence counsel urged the Court not to attach any probative value to Exhibit J based on the provisions of section 29 of the Evidence Act, 2011. It was further argued that Exhibit J was not in compliance with the provisions of sections 15[4] and 17[1] & [2] of ACJA especially as the alleged confessional statement was obtained in the absence of the defendant's lawyer. He referred to the case of **Akaze v. F.R.N. [2018] LPELR-43922 [CA]**.

For his part, learned counsel for the prosecution urged the Court to rely on the evidence of the PW6 that when the defendant was brought to him, he

confessed orally that he committed the offences he is charged with and he recorded the confession contained in Exhibit J.

In paragraphs 5.0.8 and 5.0.9 of the prosecution's final written address, Mr. Festus Ibudesubmitted that the arguments of the defence counsel that the defendant's confessional statement in Exhibit J was not taken before a legal practitioner and that the defendant was not aware that he was making a confessional statement are "*highly misconceived.*" He said the provisions of sections 15[4] and 17[1] & [2] of ACJA do not imply the mandatory presence of a lawyer at the point a suspect offers to make a statement or a confessional statement. The provisions use the word "*may*", which means that they are not mandatory but merely directory. He referred to the case of **Sheriff v. PDP [2017] 14 NWLR [Pt. 1585] 259** for the definition of the word "*may*".

Now, based on the decision of the Court under Issue 1 that the investigation carried out by the PW6 and his evidence in Court are invalid, Issue 2 ought to be resolved against the prosecution without further ado. However, for the sake of completeness and in the event that the said decision is not correct, it is necessary to specifically consider whether the Court can rely on the alleged confessional statement of the defendant.

First of all, the law is well established that before a court can rely on the confessional statement of an accused person [or a defendant], it must be satisfied that the defendant made the confessional statement voluntarily. See **Omoju v. F.R.N. [2008] LPELR-2647 [SC]**. It seems to me that an important

attribute or feature of a voluntary confessional statement [or a statement] of a suspect is that the suspect must be aware that he is making a confessional statement [or a statement] and he must be given the opportunity or freedom to decide if he wishes to make a statement. This is in line with section 17[1] of ACJA which provides that: *“Where a suspect is arrested on allegation of having committed an offence, his statement shall be taken, if he wishes to make a statement.”*

The words of caution in the statement form of the Nigeria Police for the statement of a suspect, which is in compliance with this provision, read:

“I having been duly cautioned in English language that I am not obliged to say anything in answer to the charge unless I wish to do so , but whatever I say will be taken down in writing and may be given in Evidence, voluntarily elect to say as follows.”

The above could be seen in Exhibit N1, which is the defendant’s statement to the Nigeria Police Force dated 23/4/2016. Similar words of caution are stated in the statement form of the Nigerian Army Corps of Military Police as could be seen in the statement form used by Staff Sergeant Jacob Philip in his statement dated 17/2/2016 [Exhibit D]. PW6 did not caution the defendant before he discreetly recorded his confessional statement in Exhibit J. That being the case, the statement cannot pass the test of voluntariness.

Secondly, it is a fundamental requirement of the law that the confessional statement of a suspect must be in writing. Section 15[4] of ACJA provides: *“Where a suspect who is arrested with or without a warrant volunteers to make a*

confessional statement, the police officer shall ensure that the making and taking of the statement shall be in writing and may be recorded electronically on a retrievable video compact disc or such other audio visual means.” By this provision, it is required that the confessional statement of a suspect shall be in writing. In addition, the confessional statement may be recorded electronically on a retrievable video compact disc, etc. PW6 did not comply with this mandatory provision when he recorded the confessional statement of the defendant.

Thirdly, before the confessional statement of a defendant can be relied upon, the Court must be satisfied that the statement was not made or obtained by torture or oppression of the person who made it. In this regard, section 29[2] of the Evidence Act, 2011 provides:

“If, in any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained -

[a] by oppression of the person who made it; or

[b] in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt

that the confession [notwithstanding that it may be true] was not obtained in a manner contrary to the provisions of this section."

The defendant gave evidence of how he was handed over to the Military Police on 17/2/2016 headed by PW6 and detained at Mambilla barracks. He narrated how he was tortured and oppressed and was taken to the hospital. DW1 confirmed that she attended to the defendant when he was brought to the hospital in handcuff in his hands and leg chain. The Court believes the evidence of the defendant in this regard as corroborated by DW1.

I note that the defendant was detained by the Army on 16/2/2017. From the evidence of PW7, the defendant was transferred to the Nigeria Police Force on 22/4/2016. I am of the humble view that it is reasonable to infer from the detention of the defendant for more than 2 months that he was tortured and oppressed by the Army. If the defendant was not tortured and oppressed by the Army, what was he doing in their custody for more than 2 months? Thus, I hold that the alleged confessional statement of the defendant contained in Exhibit J cannot be adjudged to be voluntarily.

The fourth reason why the said confessional statement cannot be relied upon is the fact that when the prosecution sought to tender the written version of the defendant's confessional statement, the defence raised an objection to its admissibility on the ground that it was obtained under duress and torture. On 28/1/2019, counsel for the prosecution applied to withdraw the statement.

The Court is of the view that the withdrawal of the confessional statement was a tacit admission or acceptance by the prosecution that the statement was not made voluntarily. I hold that the electronic version of the alleged confessional statement in Exhibit J cannot be relied upon by the Court.

For the reasons I have given, I resolve Issue 2 against the prosecution. I hold that the alleged confessional statement of the defendant discreetly recorded by PW6, which is in the Compact Disc [Exhibit J] has no evidential value or weight and cannot be relied upon by the Court.

ISSUE 3

Has the prosecution proved beyond reasonable doubt that twenty one rounds of 9mm parabellium ammunition, AK 47 rifle, C99 black Lugar Pistol and forty two rounds of 7.62m ammunition were recovered from defendant at Gwagwalada Military Check-Point Abuja on 17/2/2016?

Sections 3 and 27[1][a][i] & [b][ii] of the Firearms Act, Cap. F28 Laws of the Federation of Nigeria, 2004, which are relevant to counts 3, 4, 5 & 6 read:

3. *No person shall have in his possession or under his control any firearm of one of the categories specified in Part I of the Schedule hereto (hereinafter referred to as a "prohibited firearm") except in accordance with a licence granted by the President acting in his discretion.*

27[1]. *Any person who contravenes any of the provisions of this Act specified in paragraphs [a], [b] and [c] of this section, is guilty of an offence and liable on conviction –*

[a] as to any offences under any of the following –

[i] section 3 of this Act [which prohibits the possession or control of firearms or certain categories]

.....

to a minimum sentence of ten years.

[b] as to any offence under any of the following –

[i]

[ii] section 8 of this Act, [which restricts the possession or control of ammunition in respect of certain firearms]

.....

to imprisonment for a term not exceeding five years.

In a charge of unlawful/illegal possession of firearms under section 3[1] of the Firearms Act, the prosecution is required to prove the following elements: [i] that the accused person was found in possession of the firearm; [ii] that the firearm is within the meaning of the Act; and [iii] that the accused person has no licence to possess the firearm. See the case of **State v. Olatodun [2011] 10 NWLR [Pt. 1256] 543.**

From pages 15 to 33 of the defendant's final written address, Mr. Kolawole Olowookere reviewed the evidence of the prosecution witnesses and the exhibits they tendered vis-à-vis the evidence of the defendant. In paragraphs 7.66 and 7.67 [at page 33] thereof, learned defence counsel submitted that from the evidence adduced, prosecution has not been able to prove beyond reasonable doubt that the defendant was found in possession of the firearms and ammunition stated in counts 3, 4, 5 & 6, needless to prove lack of licence to possess same. Some of the submissions will be referred to anon.

The learned defence counsel concluded that *"the fundamental lacuna in the evidence of the Prosecution creates serious doubt which must be resolved in the Defendant's favour, because in criminal trial, any material doubt created in the evidence of the prosecution is always resolved in favour of an accused."* He relied on the case of **Oduneye v. State [2001] NSCQLR Volume 5 page 27.**

On the other hand, Festus Ibude Esq. posited that the evidence adduced by the prosecution witnesses on the first ingredient i.e. that the accused person was found or arrested with a prohibited firearms and ammunition was never controverted in the course of trial. He submitted that from the evidence of PW4 & PW5, it is crystal clear that only the defendant and PW3 were in the vehicle where the firearms were recovered. He noted that the Court has the duty to accept and act on the unchallenged evidence of the prosecution witnesses. He cited the case of **Odiba v. Azege [1991] 7 NWLR [Pt. 206] 724.**

The learned counsel for the prosecution further submitted that prosecution has also proved the second ingredient of the offence i.e. that the firearms found in the possession of the defendant were firearms as defined by the Firearms Act. On the third ingredient of the offence, it was submitted that the defendant has no license to possess the said firearms.

Now, the testimonies of PW3, PW4, PW5 and the defendant are material or relevant for the determination of Issue 3. It appears to me that for the Court to resolve whether or not the prosecution proved beyond reasonable doubt that the arms and ammunition in counts 3, 4, 5 & 6 were recovered from the defendant's vehicle, five issues or points are important or critical.

The first is whether the prosecution has proved beyond reasonable doubt that the search of defendant's vehicle was done in the presence of the defendant and PW3. The evidence of PW4 & PW5 is that the search was conducted in the presence of the defendant and PW3 while the evidence of the defendant and the PW3 is that they were not there when the search was conducted.

I note the evidence of PW5 during cross examination that when the defendant and PW3 were brought to him, he spoke with PW3 and asked him about the expired pass. When he found that the soldier [PW3] had an expired pass, he ordered that he should be detained and the essence was to separate him and the defendant. From the evidence of the PW5 that his discussion with PW3 took place when the defendant and PW3 were brought to him, the Court can

safely infer that his order for PW3 to be detained and the detention of PW3 took place before the search of the vehicle. Therefore, it is not probable that PW3 was present during the search of the defendant's vehicle.

I also note the evidence of PW4 & PW5 that after the search of the glove compartment of the vehicle, PW5 inquired why the back seat was not raised and searched and he was informed that the back seat was stiff. The back seat was forced open based on the instruction of PW5 and they found AK47 rifle with some magazines and rounds of ammunition. The question that readily comes to my mind is: if the defendant was present when his vehicle was searched, why did the soldiers need to force the back seat open? To my mind, the natural approach or option was to ask the defendant - who ought to know how to open the back seat of his vehicle - to open the back seat.

From the above, I am of the respectful view that there is reasonable doubt as to whether the search of the said vehicle was conducted in the presence of the defendant and the PW3. Thus, there is reasonable doubt on whether the arms and ammunition were recovered from the defendant's vehicle.

The second point - which is closely related to the first - is that there was/is no inventory of the items allegedly recovered from the defendant's vehicle. In this regard, the defence counsel argued that for the Court to believe that the arms and ammunition were recovered from the defendant, the prosecution ought to provide a link between the items and the defendant by a search properly conducted in his presence and an inventory of the items recovered

duly signed by him. This should have lent credence to the evidence of the prosecution. Mr. Kolawole Olowookere relied on section 149[4] & [5] of ACJA for the procedure for conducting a credible search. The provisions read:

[4]. A search under this Part shall, except the court or Justice of the Peace owing to the nature of the case otherwise directs, be made in the presence of two witnesses and the person to whom the search warrant is addressed may also provide a witness within the neighbourhood.

[5]. A list of all things found on his person and seized shall be drawn up by the person carrying out the search and shall be signed or sealed by the person to whom the search warrant is addressed, the person executing the search warrant, the witnesses and a witnessed copy of the list shall be delivered to the person searched.

The above provisions are clear and unambiguous. Mr. Festus Ibude did not put forward any argument on the effect of the absence of an inventory to the case of the prosecution. In paragraph 7.69 of the defendant's final address, Mr. Olowookere reasoned that the philosophy behind the provisions of section 149[4] & [5] of ACJA is to ensure the integrity of search so that an accused person does not claim that incriminating items were planted on his person. I agree. The Court holds the view that the failure of the Army to comply with the mandatory provisions of section 149[4] & [5] of ACJA casts serious doubt on the allegation that the arms and ammunition in counts 3, 4, 5 & 6 were recovered from the defendant's vehicle.

Thirdly, the place where the alleged firearms and ammunition were found with, or recovered from, the defendant as stated in counts 3, 4, 5 & 6 is at variance with the evidence adduced in support of the said counts.

Learned defence counsel pointed out that the particulars of the charge stated that the place of the alleged unlawful possession of arms and ammunition was at Gwagwalada Military Check-point along Gwagwalada express way, Abuja while the evidence said the recovery was at the Gwagwalada Military barrack. He relied on Oyesanmi J. Akinlemibola v. C.O.P. [1976] SC 10 to support the submission that the difference is fatal to the prosecution's case.

The viewpoint of Festus Ibude Esq. in paragraphs 5.0.1 and 5.0.2 at page 15 of the final address of the prosecution is that the contradiction highlighted by the defence counsel between the charge and the evidence adduced in support is not material to cause doubt in the case of the prosecution. He submitted that there is no significant or material difference between the facts proved and the particulars stated in the charge.

The Court is in agreement with the view of the defence counsel. There is a clear difference or contradiction between the charges in counts 3, 4, 5 & 6 and the evidence of PW4 and PW5 with regards to the place where the arms and ammunition [Exhibits O1-O5] were allegedly recovered from the defendant. I hold that contrary to the argument of the prosecuting counsel, the difference or contradiction is not minor or trivial; it is material. This is because by virtue

of section 196[1] of ACJA, referred to by the defence counsel in the reply on points of law, every charge *“shall contain such particulars as to the time and place of the alleged offence ... as are reasonably sufficient to give the defendant notice of the offence with which he is charged.”*

The Court holds that where the particulars of a charge - with regards to the time and place of the alleged offence - are at variance with the evidence adduced in proof of the charge, it raises doubt in the case of the prosecution as to whether the offence was actually committed by the defendant. The case of **Oyesanmi J. Akinlemibola v. C.O.P. [supra]** supports this view. In that case, the Supreme Court referred to the charge and the evidence adduced in support and held: *“... it seems to us that since the facts proved are different from those stated in the charge, the conviction of the appellant, on this point alone, could not stand.”*

The fourth point is the effect of the evidence of the PW3 on the case of the prosecution. The learned defence counsel stated that PW3, who was an eye witness to the whole incident, testified that the search was conducted at the Gwagwalada Military Check-point and nothing was found. On the other hand, PW4 and PW5 testified that the search was conducted at the Guards Battalion barracks, Gwagwalada where the items, Exhibits O1-O5, were recovered from the defendant's vehicle. He submitted that it is not the duty of the Court to pick and choose between the conflicting testimonies of PW3, PW4 and PW5 who are witnesses for the prosecution.

As I said earlier, in the course of the evidence of PW3 on 25/1/2017, learned counsel for prosecution declare PW3 a hostile witness with the leave of the Court and tendered his previous extra-judicial statements as Exhibits D, E & F. When PW3 was to be cross examined on 1/2/2017, learned counsel for the prosecution applied that his evidence be expunged and PW3 be discharged. The application was rejected by the Court and the PW3 was cross examined. There is no doubt that the evidence of PW3 did not support the case of the prosecution; his evidence is that the arms and ammunitions, Exhibits O1-O5, were not recovered from the defendant's vehicle and that he was not present when the vehicle was searched. He maintained that he was tortured to make Exhibits D, E & F to implicate the defendant.

I must remark that even though PW3 was declared a hostile witness by the prosecution, I am not aware of any law that forbids or precludes the Court from evaluating and relying on the evidence of a witness who was declared hostile; and none was cited by learned counsel for the prosecution. After all, prosecution decided to field PW3 as one of its witnesses. The Court cannot disregard his evidence merely because it is adverse to case of the prosecution. As rightly submitted by the learned defence counsel, the position of the law is that where prosecution witnesses contradict one another on a material point, as in this case, the prosecution cannot be said to have discharged the onus of proving the guilt of the accused person [or defendant] beyond reasonable doubt. It is not for the Court to pick and choose between contradictory

testimonies of witnesses called by a party to a proceeding. See Dokubo v. State [2011] LPELR-4574 [CA]; Onubogu v. The State [1974] 9 SC 1; and Nwafor v. State [2018] LPELR-44637 [CA].

The fifth and final point is the effect of the evidence of PW7 on the case of the prosecution. Kolawole Olowookere Esq. relied on the evidence of PW7 to support his submission that the prosecution failed to prove the allegations in counts 4, 4, 5 & 6 beyond reasonable doubt.

Now, part of the evidence of PW7 is that the defendant was alleged to be a suspected kidnapper and armed robber. During cross examination, PW7 said he never saw the Army officers that arrested the defendant and there was no opportunity to interrogate them. The Court is of the opinion that the effect of this piece of evidence is that the PW7 did not investigate the case of unlawful possession of firearms and ammunition. As it stands, there is no independent evidence of the Investigating Police Officer to support the allegations made against the defendant in counts 3, 4, 5 & 6.

I have also noted the evidence of PW7 that the rifle he tendered as Exhibit O1 is actually AK 49 and not AK 47 allegedly recovered from the defendant. This supports the evidence of the defendant that the rifle given to him on the day he was photographed is different from the rifle tendered as Exhibit O1. This evidence of PW7 creates serious doubt as to whether the rifle, Exhibit O1, was actually recovered from the defendant. Since the rifle was allegedly recovered along with the Lugar pistol [Exhibit O2] and the ammunition

[Exhibits O3, O4 &O5], the doubt raised by the evidence of the PW7 on the rifle [Exhibit O1] also extends to, and adversely affects, Exhibits O2-O5.

The PW7 also testified that the rifle, Exhibit O1, has a serial number. This is contrary to the evidence of PW6 that the serial number of the rifle recovered from the defendant had been erased from the body to conceal its origin. In count 4, it is alleged that the defendant had in his possession “*one AK 47 Rifle, with registration No. 3290 ...*” Mr. Olowookere asked: if the serial number of the AK 47 rifle recovered from the defendant was actually erased as claimed by the PW6, where did the prosecution get the Registration Number 3290 ascribed to the rifle in count 4? The Court holds that the evidence of PW7, like that of PW3, casts reasonable doubt on the case of the prosecution.

In the light of the foregoing, the decision of the Court on Issue 3 is that the prosecution failed to prove beyond reasonable doubt that the arms and ammunition listed in counts 3, 4, 5 and 6 were recovered from the defendant on 17/2/2016.

ISSUE 4

Whether the prosecution has proved the allegation of impersonation against the defendant in count 7.

Section 132 of the Penal Code provides:

Whoever pretends to hold any particular office as a public servant knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

The elements or ingredients of the offence of impersonation are that: [i] the accused person personated a public servant or that he pretended to hold public office as a public servant; [ii] he was not such a public servant, or did not hold the office in question; [iii] he acted falsely or that he knew that he did not hold the office in question; and [iv] he, when assuming the character, did or attempted to do something under the colour of his assumed office.

The learned defence counsel referred to the evidence of PW1 & PW4 that the defendant's impersonation as Colonel Okoro occurred at Abaji Military Check-point and not at Gwagwalada Military Check-point as alleged in the particulars of count 7. He submitted that the testimonies of PW1 & PW4 are at variance with the particulars of the charge and this creates doubt in the case of the prosecution. He also argued that beyond testifying that the defendant introduced himself as Colonel Okoro, PW1 & PW4 did not give any evidence to show that defendant did, or attempted to do, anything under the colour of an Army Colonel. Mr. Kolawole Olowookere concluded that the prosecution failed to prove the ingredients of the offence in count 7.

On the other hand, learned prosecuting counsel posited that the prosecution witnesses gave direct, positive and unequivocal evidence that the defendant introduced himself as a Colonel in the Nigerian Army and upon being asked to identify himself, he drove off. He argued that *“the Defendant impersonated a Colonel in the Nigerian Army so as not to be searched. From the evidence of PW1, PW4, PW5 and PW6, it is clear that the Defendant wanted to pass through the checkpoint without being checked and that necessitated why he impersonated.”* He also argued that the prosecution has proved that the defendant admitted that he is not a Colonel after he was arrested. Mr. Festus Ibude concluded that the prosecution has proved the offence of impersonation against the defendant.

PW1 & PW4 gave evidence that the defendant introduced himself as Colonel Okoro when he was stopped at Abaji Military Check-point. PW3 did not give any evidence in support of this allegation. The defendant testified that when Captain Abbah [PW4] slapped him at Gwagwalada Check-point, he said they cannot slap him because he has brothers in the Army. On their way to 176 Guards Battalion barracks, PW4 inquired of the name of his brother in the Army. He told the PW4 that his name is Colonel Okoro.

The defence counsel is right that the evidence of PW1 & PW4 that defendant said he is Colonel Okoro at Abaji Military Check-point is at variance with, or different from, the allegation in count 7 that he falsely introduced himself as Colonel Okoro at Gwagwalada Military Check-point, Abuja. I adopt my earlier reasoning and decision that this difference is material and raises doubt as to whether the defendant introduced himself as Colonel Okoro as alleged.

I also refer to the evidence of PW7 that the case he investigated was the allegation that the defendant was a suspected kidnapper and armed robber and that he never saw the Army officers who arrested the defendant. This means that the PW7 did not investigate the case of impersonation. So, there is no independent evidence of the Investigating Police Officer to support the charge. The result is that there is no basis for me to believe the evidence of PW1 & PW4 and disbelieve the evidence of the defendant. The result is that the charge has not been proved beyond reasonable doubt.

Even if I believe the evidence of PW1 & PW4, Mr. Olowookere is correct that there is no evidence to prove that when the defendant assumed the character of a Colonel, he did, or attempted to do, something under the colour of his assumed office. I am of the humble view that the submission of Mr. Ibude that the defendant "*impersonated a Colonel in the Nigerian Army so as not to be searched*" does not qualify as proof that he did, or attempted to do, something under the colour of his assumed office. The decision of the Court is that the prosecution failed to prove count 7 beyond reasonable doubt.

Conclusion:

All said and in conclusion, I enter a verdict of not guilty in respect of counts 3, 4, 5, 6 and 7. Accordingly, the defendant, Prince Joshua Onyemauche, is discharged and acquitted.

HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of Counsel: