Limitations of Police Powers to Prosecute Offenders under Nigerian Law

Njoku, Donatus Ikechukwu
Faculty Of Law, Ebonyi State University,
Abakaliki, Nigeria.
Email: icubed@yahoo.co.uk

Abstract
Section 214 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) created the Nigeria Police Force. Members of the Police Force are endowed with enormous powers of arrest, detention, prosecution among others. These powers of the Police are provided in the Criminal Procedure Laws of every State in Nigeria and the Police Act. The Power to prosecute offenders by the Police is provided in Section 23 of the Police Act. However, of all these powers endowed by the Law to the Police, none is as controversial as the power to prosecute offenders. Before the pronouncement of Courts on the powers to prosecute by the police officers, the custom was that Police Officers are to prosecute offenders in Magistrates and other inferior Courts of record, while the superior Courts were reserved for the office of the Honourable Attorney General, both of the State and the Federation. But the recent pronouncement of our superior courts in the cases of Olusemo Vs. COP (1998) 11 NWLR (Pt. 575) 547, and FRN Vs. Osahon (2006) All FWLR (312) 1975 were to the effect that a Police officer's power to prosecute in all courts are subject to the powers of the Honourable Attorney of the Federation and the State pursuant to sections 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). This work examines these controversies and proffers solutions.

Introduction
The Nigeria Police Force is a creation of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Section 214 of the Constitution which established it stated as follows:

> *There shall be a Police Force for Nigeria which shall be known as the Nigeria Police Force and subject to the provisions of this Section; no other Police force shall be established for the Federation or any part thereof.*

Other Laws which give teeth to Nigeria Police Force are the Police Act and Criminal Procedure Act (S. 40, Cap P. 19 Laws of the Federation 2004 and S. 10 Cap – Laws of the Federation).

It is this constitutional provision that makes the Police in Nigeria a unitary force in a Federal Republic. To clear all possible doubts in that respect, police is provided in item 45, second schedule, in the exclusive legislative list in the said Constitution, implying that, only the Federal Government can legislate on it.

The duties and functions of the Nigeria Police Force are statutorily conferred by section 4 of the Police Act, Section 53 (1) of the Sheriff and Civil Process Act, the Criminal Procedure Act, Cap 41, Laws of the Federation of Nigeria, 2004, and the Criminal Procedure Code, Cap 41, Laws of the Federation of Nigeria, 2004. Additional to these are the various criminal procedure laws of the various states, especially the Southern States. But the provisions of the Criminal Procedure Laws are usually in *Pari-Material* with the provisions of the Criminal Procedure Act (Federal). One of the instances in that respect is the Criminal Procedure Law (CPL) Cap 34, Vol. 2 Laws of Ebonyi State of Nigeria, 2009. Its sections on police duties and functions are in pari-material with the equivalent provisions of the Criminal Procedure Act (Federal).

In the light of the foregoing therefore, the decisions of various courts on the Police, whether in relation to their powers or their liabilities are also laws. The other factor that throws more light on the nature and extent of such laws is the nature and rank of the particular courts which made the decisions.

The constitution, status and judicial precedents are the major sources of the laws that provide for and limit the powers of the police. Police officers must operate within the confines of those laws, otherwise their actions and decisions can be declared *ultra vires* and wrongful, consequent upon which they can be condemned to compensate the aggrieved person(s) in damages.

However, in this work, we are constrained to examine the limitations of the powers of the Police with respect to prosecution of offenders in criminal matters, which has been a matter of serious controversy with respect to performance of that duty in superior court of record.

In light of the above, by virtue of section 23 of the Police Act, Nigeria Police is empowered to conduct criminal prosecution before any court in Nigeria. However, this power is subject to some

limitations as provided for in section 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The Act provides as follows:

> *Subject to the provisions of Section 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (which relate to the Power of the Attorney-General of the Federation and of a State to institute and undertake, take over and continue or discontinue criminal proceedings against any person before any court of law in Nigeria), any police officer may conduct in person all prosecutions before any court, whether or not the information or complaint is laid in his name.*

What this provision means is that the powers of the police to prosecute criminal offences in court in subject only to the powers of the Honourable Attorney General of the Federation and State respectively under Sections 174 and 211 of the 1999 Constitution (as amended). The said sections are in pari-material, except that section 174 is for the Attorney-General of the Federation, while Section 211 is for the Attorney General of a State. Section 174 (1) of the Constitution provides:

> *The Attorney-General of the Federation shall have power. 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; to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and the powers conferred upon the Attorney-General of the Federation under subsection (1) of this section may be exercised by him in person or through officers of his department. In exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.*

The effect of Section 23 of the Police Act by Olusemo's case is that a police officer can conduct prosecution before any court in Nigeria whether or not compliant or information is laid in his name or not. The only limitation or restriction is the constitutional powers of the Attorney General of the Federation or States under Section 174 and 211 of the 1999 Constitution (as amended) respectively, Olusemo vs. COP (1998) 11 NWLR (Pt. 575) (547).

Nasiru (2010:70) criticized this decision. According to him, the interpretation given to section 23 of the Police Act (supra) is too wide. To state that a police officer can appear in any court in Nigeria based on Section 23 of the Police Act alone without recourse to High Court law will be a misdirection.

Again in the case of *Osahon & 5 ors vs. Federal Republic of Nigeria (2003) 16 NWLR (Pt. 845) page 89,* the competence of a Police Officer to prosecute a matter at the Federal High Court was raised. The Court of Appeal again held that, when section 56 (1) of the Federal High Court Act is read together with the section 23 of the Police Act and Section 174 (1) (b) of the Constitution, it is clear that a police officer has the power to initiate criminal proceedings before the Federal High Court without first and foremost obtaining the Attorney's fiat. According to Justice Onnoghen in that court's ruling, "the fact that such a police officer is a lawyer is a bonus or excess luggage',

It can be noted that the Electoral Act provides in part ix, Section 150 (2) that only legal officers of the Commission or any legal practitioner appointed by it can prosecute an Electoral Offences (Electoral Act 2010) (as amended).

In the case of *Federal Republic of Nigeria and 20 ors (2003) 2 FGCLR 119,* it was held that the Police are not competent to prosecute electoral offences. What this means is that the power to prosecute criminal matter by the Police is subject to Electoral Act 2010 (as amended).

It is our view that Section 23 of the Police Act be amended, to include that those Police Officers, who are qualified legal practitioners, shall have audience in a superior court of record. Justice will be sacrificed if every illiterate, uninformed and incompetent are to even handle matters in lower court let alone the superior courts.

Power of Police to Prosecute Offenders and Its Limitations

Subject to the provisions of Sections 174 and 211 of the 1999 constitution of the Federal Republic of Nigeria (as amended), any Police Officer may conduct in person, all prosecutions before any court whether or not the information or complaint is laid in his name (S. 23 of the Police Act, 2004). Sections 174 and 211 of the 1999 Constitution relate to the powers of the Attorney-General of the Federation and of a State respectively, to institute, undertake,

takeover, continue or discontinue criminal proceedings against any person before any court in Nigeria.

In view of the above sections, the power of police to prosecute criminal cases is subject to the discretion of the Attorney-General of the Federation or of a State, as the case may be. He can stop any prosecution being done by a Police Officer, he can take it and he can order the prosecution of a case even if the Police Officer had declined to prosecute. Authorities, especially Supreme Court decisions, have been consistent in emphasizing the preeminence of the Attorney-General over the prosecution of criminal cases.

For instance, in State v. Ilori (1983) 3 S.C., the supreme Court interpreted the proviso to Section 191 (3) of the 1979 Constitution of the Federal Republic of Nigeria, which is equivalent to Section 174 and 211 of 1999 constitution of same, which states that in exercising the power to enter "nolle", the Attorney-General should take into consideration, interest of justice, public interest and to prevent the abuse of legal process. The Supreme Court held that these requirements are not pre-conditions to the Attorney-General's valid exercise of the power in the sense that if he fails to take them into consideration, a court can reject his "nolle". The court further held that those considerations are exercised subjectively by an Attorney-General's, that is, in accordance with his own judgment and that a court cannot reject a nolle on the ground that the Attorney-General failed to take the factors in section 191 (3) of the constitution into account.

It is therefore not in doubt that as far as prosecution of criminal cases is concerned; the Police Act is subject to the control of the Honourable Attorney-General, either of the Federation or of a State, as the case may be. But in practice, police officers prosecute only in Magistrate Courts in the Southern States and in the Magistrate and Area Courts in the Northern States.

The open question however is, whether a Police Officer can prosecute in the High Courts? It is our humble opinion that the tone of section 23 of the Police Act, which confers the power to prosecute on the police, does not restrict same only to the lower courts. The practice whereby police officers prosecute criminal cases only in the Magistrate and Area Courts does not necessarily mean that they cannot legally do same at the High Court. That practice exists basically because cases in the Magistrates and Area Courts are usually less serious, whereas the cases that are prosecuted in the

High Courts are mainly serious felonies, some of which carry life imprisonment or death sentence as the punishment for persons convicted of same.

That being the case, and in order to effectively canvass the legal intricacies in those cases, the State naturally reserves them to be handled before High Courts presided over by experienced judicial officers (judges) and prosecuted by Legal Officers from the Attorney-General's chambers. But in recent times, we have been contending with situations where there are no incumbent Attorney-General because some State Governments' cabinets are dissolved, implying the sacking of the Attorneys-General of those States along with the dissolved cabinets.

In some other states, there are no Cabinets at all and no Attorneys-General. The result is that serious criminal cases, especially felonies punishable with death, which are ripe to be filed in High Court cannot be filed because more disturbing where that situation lingers on for upwards of six-months to one year and the suspects in those cases are languishing in prison custodies awaiting trial; the only reason being that there is no Attorney-General in office to prosecute them. And yet, prosecution by the police is an alternative to prosecution by the Attorney-General or his Legal Officers.

One practical instance of the above hypothesis was Ebonyi State which was created out of Abia and Enugu States. Between October, 1996 and May, 1997, there was no Attorney-General for the State, the High Courts of the State, in practice, declined to hear criminal cases pending in the courts because there was no Attorney-General to authorize the amendment of the cases which still bore the authorities of the Attorney General of either Enugu or Abia State. No new information was filed in the High Courts for the same reason.

The unfortunate consequence of this state of affairs is that the prisons are filled to the brim with awaiting trial suspects who are completely hopeless about their being ever tried. What makes the situation worse is that the government, apparently unaware of the sensitive and important position of the Attorney-General in the scheme of things of any state, is not in a hurry to appoint one.

It is therefore our humble view that the only way to ameliorate the bad situation is to assign such cases to police officers to prosecute in the High Courts. This, the police can do under the

close supervision and guidance of Legal Officers in the Ministry of Justice who should now work from behind the scene. That way, the cases can go on until an Attorney-General comes on board in the state to either continue or discontinue those cases.

Alternatively, and as a long-term measure, the police are enjoined to expose its prosecutors to legal training or employ qualified lawyers as police prosecutors so as to effectively handle the oppositions and challenges of trained lawyers who defend suspects in courts. By that, we would be giving maximum effect to our laws and at the same time reduce the rate at which human rights are violated and prisons congested.

However, even if the police decide to prosecute in the High Courts, they are greatly restricted by criminal procedure rules. It seems that police can only prosecute in such cases where, (a) trials can be conducted in the High Court other than on information (b) Trials can be conducted in the High Court with respect to offences for which it is provided that a trial can be heard in the High Court otherwise than on information and for which no special procedure is provided. The CPL, Ebonyi State of Nigeria Cap 34 Vol. 1 Laws of Ebonyi State of Nigeria 2009 S.164 (a) and (b). Section 334 of the CPL (Ebonyi State) provides for trial on information.

Nevertheless, the rule that is most unfavorable to the idea of police prosecution is section 334 of the CPL (Ebonyi) which requires that trial of offence in the High Court of Ebonyi State shall be by information, signed by the Attorney-General, or by any Law Officer in the public prosecution Divisions of the State Ministry of Justice. This section is however subject to information by private persons.

It does not seem that Police Officers are contemplated by that section, even if there is a requirement in the Criminal Procedure Law, which requires that the Registrar of Court shall receive an information from a private person if "it has endorsed thereon a certificate by the Attorney-General to the effect that he has seen such information and declines to prosecute at the public instance".

In the final analysis therefore, the indispensability of the Attorney-General in criminal prosecution, especially on serious felonies triable only in the High Courts, remains. And so, it is necessary to always ensure that there is an Attorney-General in office at every point in time or to amend section 174 and 211 of the 1999 Constitution, by providing expressly that in the event of the absence of an incumbent in the office of the Attorney-General, Law Officers

under him can go on with all aspects of criminal prosecution as if there is an incumbent. (Supreme Court's decision in A. C. of Kaduna Sate v. Hassan (1985) 2 NWLR (Pt. 8) 483).

Recommendations:

Prosecution of criminal matters especially in superior Court of Record is a herculean task. A lot of technicalities are involved which an ordinary police prosecutor, who is a non lawyer, cannot stand, more especially with respect to the nature of cases that are tried therein. To this extent, we hereby recommend as follows:

1. That Section 23 of the Police Act be amended, to include that those Police Officers, who are qualified legal practitioners, shall have audience in a Superior Court of Record.
2. That the Nigeria Police Force should expose its prosecutors to legal training or employ qualified Lawyer as Police Prosecutors so as to effectively handle the oppositions and challenges of trained lawyers who defend suspects in courts.
3. Again, adequate training and re-training should be given to members of Police Force. The duration of six months is very short for Police training of their constables. At least two years training should be given to the recruits to improve other academic and paramilitary knowledge. The first one year and six months should be devoted to the knowledge of law, psychology, public relations and detective techniques, while about six months should be used to drill them on the use of arms and ammunitions.
4. The minimum entry qualification for a recruit should be Ordinary National Diploma Certificate, obtained from a recognized Higher Institution. This will enhance their academic knowledge of reading and writing investigation, and taking statements from complainants for better prosecution of their cases.

Conclusions:

We have seen that by section 23 of the Police Act, the Police officer of any rank be he a lawyer or a lay man can prosecute criminal matters in any court. The proviso to section 23 of Police Act is sections 174 and 211 of the constitution which are the powers of the Hon. Attorney General of both the state and the Federation being law officers. And also trial by information as provided by section 164

(a) (b) of the criminal procedure law of Ebonyi State of Nigeria (supra) and prosecution of Electoral Offence as provided by Section 150 of the Electoral Act 2010 (as amended).

We say that section 23 of the Police Act be amended to provide as follows any Police Officer who is lawyer shall have the right to prosecute in superior courts of record. This is to avoid a miscarriage of justice as non lawyers may not understand the technicalities of law involved in our superior courts.

References

Nasiru T. (2010): "The Power to Prosecute by Police Officer in Superior Courts in Nigeria". In Journal of Contemporary Legal Issues, Vol. 2.

Civil Procedure Act, Cap 41, Laws of the Federation, 2004.

Criminal Procedure Code, Cap. 42, Laws of the Federation, 2004.

Electoral Act, 2006 (as Amended)

Police Act, Cap P19 Laws of the federation 2004

Olusemo vs. COP (1994) 11 NWLR (Pt. 575)

Sheriff and Process Act, Cap 56 Laws of the Federation of Nigeria (2004).

The Criminal Procedure Law (Ebonyi State) of Nigeria, Cap 34 Vol. 1 Laws of Ebonyi State of Nigeria 2009.