Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.28, 2014

The Supreme Court of Nigeria Decision in Lufadeju Vs Johnson (2007) 8 NWLR (PT 1037) P. 535: Whither the Unconstitutionality of Holding Charges in Nigeria?

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Abstract
Pre – trial freedom is indispensable to individual citizens of the world. Nigeria has guaranteed the freedom to liberty as enshrined under section 35 of the Constitution of the Federal Republic of Nigeria 1999. Lagos State of Nigeria in 1994 enacted the Criminal Procedure Law and in the case of Lufadeju vs. Johnson, section 236 (3) of the law which seeks to give powers to the magistrate courts in that State to order for the remand of suspects and or accused persons to prison custody pending when the police would complete their investigations or proper arraignment, came up for interpretation before the Supreme Court of Nigeria and the said law was validated by the court. This paper examines the said decision within the context of whether it has withered the unconstitutionality of holding charges in Nigeria's criminal justice system and the policy implication of the said decision and concludes that the far reaching pronouncements made by the court are capable of affecting the long aged established rule of the unconstitutionality of holding charges in Nigeria thence perpetuating the incarceration of accused persons in prison custody even where the police are not willing to prosecute which is against the spirit and letters of the Constitution of the Federal Republic of Nigeria 1999.
Keywords: Holding Charges, Unconstitutionality, Remand, Jurisdiction.

1. Background

In Nigeria, the powers of the police to detain suspects are restricted by law to specific number of days. The highest is two days where there is no court within a radius of forty kilometers. They are therefore required within the period to bring a suspect before a court of competent jurisdiction for the purposes of trial. But in practice, the police before completion of investigation and even afterwards, arraign suspects before the Magistrate Courts in respect of offences for which the Magistrate Court has no jurisdiction to entertain merely for the court to take cognizance of the offence/s and obtain an order for remand in prison custody which is in other words referred to as holding charges and for which the courts in Nigeria have declared to be unconstitutional. However, Lagos State of Nigeria have appeared to have found a way out in ensuring that suspects are remanded in prison custody even before the completion of police investigations via an order of court with the promulgation of 236(3) of the Criminal Procedure Law of Lagos State 1994 which was validated by the Supreme Court of Nigeria in the case of LUFADEJU VS JOHNSON (2007) 8 NWLR (PT 1037) P. 535.

1.1 Research Problem

Lagos state of Nigeria in 1994 enacted the Criminal Procedure Law[1] and in the case of Lufadeju vs. Johnson[2], section 236 (3) of the law came up for interpretation before the Supreme Court of Nigeria. In determining the appeal, the Supreme Court of Nigeria considered the following relevant provisions viz sections 78(b), 215 and 236(3) of the Criminal Procedure Law of Lagos State 1994 and section 32(1) (c) of the 1979 Constitution[3] and made far reaching pronouncements capable of affecting the long aged established rule of the unconstitutionality of holding charges in Nigeria more especially that some States High Court judges are readily taken advantage of the said decision in applying same to validate holding charges by Magistrate Courts in Nigeria thence perpetuating the incarceration of accused persons in prison custody even where the police are not willing to prosecute which is against the spirit and letters of the Constitution of the Federal Republic of Nigeria 1999. Being the decision of the highest court of the land, the decision still subsists until set aside by the same Supreme Court that delivered the said decision.

[1] Cap 33, Vol. 2 Laws of Lagos State 1994.
[2] (2007) 8 NWLR (PT. 1037) p. 535.
[3] The equivalence of the said section is section 35(1) (c) of the Constitution of the Federal Republic of Nigeria 1999.

1.2 Objective

This paper therefore seeks to look at the implications of the Supreme Court of Nigeria decision in Lufadeju vs. Johnson on the Constitutional Right to Liberty of citizens, distinguish same from its applicability to some parts of the states in Nigerian aside from Lagos or other states that have no similar provisions to section 236 (3) of the Criminal Procedure Law of Lagos State 1994 and to generally analyze whether the said decision has withered the constitutionality of holding charges in Nigeria's criminal justice system.

1.3 Methodology

The research methodology employed in the writing of this article is the doctrinal research method for the purposes of identification and analysis. The primary data are obtained through the adoption of doctrinal methodology. Doctrinal research method is to a large extent library oriented with reliance fully placed on relevant literatures. Reliance was equally placed on primary sources of data which involved a consideration of various types of domestic legislation in the area of Constitutional Right to Liberty as well as case laws and judicial decisions. Finally, originality is exhibited in making analysis and recommendations.

2. Facts of the Case

Evangelist Bayo Johnson (the Respondent) was arrested on the 12th of January 1997 for conspiracy to commit treason and the commission of treasonable felony. He was taken along with eleven (11) others before Mrs. E. A. Lufadeju, a Chief Magistrate Grade 1 on the 12th of March 1997 in Lagos. The charges were read but the pleas of the accused persons were not taken. An oral application for bail was made on the same day. Mrs. E.A. Lufadeju (1st Appellant) refused the application on the ground that she lacked the powers to entertain and consider a bail application in respect of a capital offence such as treason. The Respondent and others were remanded in custody at the Force C.I.D Alagbon, Lagos. The plea of Evangelist Bayo Johnson was not taken although the charges were read to him. As a result of the refusal of bail and the remand in prison custody of the Respondent, the Respondent (Evangelist Bayo Johnson) filed as action at the High Court by way of an application under the Fundamental Right (Enforcement Procedure) Rules. He asked for a declaration that his detention prompted by the magistrates order was unconstitutional and urged the court to quash the order. He also claimed N5, 000:000:00 (Five Million Naira Only) as damages for his illegal detention. The High Court dismissed the application. It declared that the magistrate order of 12th March 1997 was a valid order and that the proceedings of that day was a remand proceedings under section 236 (3) of the Criminal Procedure Law of Lagos State.

Evangelist Bayo Johnson was dissatisfied with the decision of the High Court and he appealed to the Court of Appeal which allowed the appeal. It held that Section 236 (3) of the Criminal Procedure Law conflicts with the constitution. Both the order of the magistrate and that of the High Court were set aside. Mrs. E.A Lufadeju and her co- appellants were dissatisfied with the judgment and they appealed to the Supreme Court of Nigeria. The argument of the Appellants in the main was that the proceedings before the Magistrate were remand proceedings and not arraignment. The Respondent countered that the proceedings were arraignment and not remand proceedings.

The Supreme Court of Nigeria considered Sections 78 (b), 215, 118 (11) and 236 (3) of the Criminal Procedure Law of Lagos State 1994, Sections 32 (1) (c), 33 (4), 33 (5) and 6 of the 1979 Constitution, section 35 of the Criminal Code Cap 30, Vol. 2, Laws of Lagos State of Nigeria 1994, section 215 Criminal Procedure Law Cap 49 laws of former Bendel State of Nigeria 1976, Articles 7(I) (b) and (d) of the African Charter on Human and Peoples Right 1979 as well as Order 1 Rule 2 (b) and (3) of the Fundamental Rights (Enforcement Procedure Rules) 1979[1] and at Page 573 Paragraph A-B of the report where the case was reported, the Supreme Court validated the incarceration of Evangelist Bayo Johnson without trial in the following wordings:

> "… Section 236(3) of the Criminal Procedure Law is not unconstitutional. Rather it clearly complements the provisions of section 32 of the 1979 Constitution and is designed to aid administration of criminal justice in the country…"

Similarly, at Page 573 Paragraph B-C, the Supreme Court further held as follows:

> "… The court owes it a duty not to toy with an allegation as grave as treasonable felony. Neither should they play down the importance of individual liberty and freedom.

[1] Now amended as the Fundamental Rights (Enforcement Procedure Rules) 2009.

> Therefore what section 236(3) of the Criminal Procedure Law does is to maintain a balance between the two by doing away with the tendency of arbitrary indefinite police detention of suspect without order of court…"

3. Complementing or Conflict?

Section 236(3) of the Criminal Procedure Law of Lagos State which the Supreme Court of Nigeria validated as complementing section 32 of the 1979 Constitution and designed to aid the administration of criminal justice reads as follows:

> "If any person arrested for any indictable offence is brought before any magistrate for remand, such magistrate shall remand such person in custody or where applicable grant bail to him pending the arraignment of such person before the appropriate court or tribunal for trial"

In the case of WUYEP VS WUYEP[1], it was held that territorial jurisdiction of a trial court and the compositions of the courts are both aspects of jurisdiction for the validity of any proceedings before a court. The cases of GOVERNOR OF KWARA STATE VS GAFAR,[2] OKULATE VS AWOSANYA[3] and MESSRS N.V. SHEEP VS THE MV'S ARAZ[4] illustrates that courts are creatures of statutes and it is the statutes that creates a particular court that will also confer on it its jurisdiction. Jurisdiction of the court may be extended, not by the courts but by the legislature for it is part of its interpretative functions of the courts to expound the jurisdiction of the court but not to expand it. Hence, not even the Supreme Court can expand the jurisdiction of courts in Nigeria.

Section 32(1) (c) of the 1979 Constitution and its equivalent provisions under the 1999 Constitution[5] reads thus:

> 32(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following case and in accordance with a procedure permitted by law…
>
> (c) "For the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence or to such extent as may be reasonably necessary to prevent his committing a criminal offence"

In both holding charges and remand proceedings, the charges and or First Information Report[6] are often read to the hearing of the accused persons but plea and or response to the contents are not taken and hence the accused person or suspect is remanded to prison custody by the order of the magistrate who often than not has no requisite jurisdiction to try the offence/s as in Lufadeju Vs Johnsons case supra.

The Supreme Court of Nigeria in Lufadeju Vs Johnson[7] defined remand to mean:

> "…To send to prison or send back to prison from a court of law to be tried later after further inquires have been made; often is the phrase "remanded in custody". It also means to re- commit on trail accused to custody after a preliminary examination"

Any accused person has to be taken to court within a reasonable time[8]. Reasonable time is defined to mean a person who is arrested is expected to be brought to court within a day of his arrest or detention if the place where he is arrested or detained has a court of competent jurisdiction within a radius of 40 kilometers. In other cases, he has to be brought to court within 2 days or any other time considered reasonable by the court[9].

[1] (1997) 10 NWLR (PT 523) 154.
[2] (1997) 7 NWLR (PT 511) 51.
[3] (2000) 1 SC 107.
[4] (2000) 12 SC (PT 1) 164.
[5] 35(1) (c) of the 1999 Constitution.
[6] First Information Report is the document used in arraigning suspects before the magistrate courts in the Northern part of Nigeria.
[7] *Supra* at page 562 paragraphs F-G.
[8] Section 35(4) of the 1999 Constitution.
[9] Section 35(4) (a) & (b) of the 1999 Constitution.

From the above constitutional provisions, the position seems to be that no person should be taken to court unless the charges against him or first information report is settled and the prosecuting authorities are prepared to go on with the trial against him. Under section 36(1) of the 1999 Constitution, a person shall be entitled to a fair hearing within a reasonable time. It is therefore argued that criminal cases when taken to court should be ripe for hearing not for either further investigation and that they are not there on mere suspicion which cannot be regarded as reasonable suspicion as required under section 35(1) (c) of the 1999 Constitution.

In the case of SULEIMAN VS C.O.P PLATEAU STATE[1] the Supreme Court of Nigeria per Tobi JSC held thus:

> "The First Information Report as the name implies, is just a report that an offence is committed. It is no more than a charge in the Southern States. A charge is an allegation or accusation of crime. It is not tantamount to proof of evidence that the crime was committed or likely to have been committed"[2]

There must therefore be something more than imagination or conjecture. It would therefore appear that the practice of preferring a holding charge against an accused person or a remand proceedings as in the case under consideration where the magistrate professed she had no jurisdiction to try treasonable felony pending the completion of investigation by the police or arraignment as the case may be has no place under section 35 (4) and 36 of the 1999 Constitution. These provisions of the Constitution postulates that law enforcement agents have obtained sufficient evidence that would support a prima facie case against an accused for the offence for which he stands charged.

The remand proceedings in Lufadeju's case amounts to taken cognizance of an offence for which the magistrate had no jurisdiction to try and thence any order made therein makes it to be unconstitutional.

In the Supreme Court decision in OBIKOYA VS. REGISTRAR OF COMPANIES[3] the court held thus:

> "… The existence or absent of jurisdiction in the court of trial goes to the root of the matter so as to sustain a nullity the trial judge's decision in respect of the relevant subject matter…"[4]

In the past the accusation has been the unconstitutional detention by the police of suspects. Now by the decision of the Supreme Court of Nigeria in the case under consideration, it appears that it has given credence to the effect that magistrate courts in Lagos can order remand of suspects in prison custody in respect of offences for which they have no jurisdiction to try until the police are ready and willing to arraign them before a court of competent jurisdiction. This is quite contrary to the various pronouncements of the courts that Holding charges are unknown to the Nigeria law as illustrated in the cases of ANAEKWE VS C.O.P[5] , JIMOH VS C.O.P[6], OGORI VS KOLAWOLE[7], ONAGORUWA VS STATE[8], OSHINAYA VS C.O.P[9] and CHIEF PAT ENWERE VS C.O.P[10]. Thence in the case SHAGARI VS C.O.P[11] Sanusi JCA said;

> "Numerous pronouncements of our courts have stated that holding charge has no place in our judicial system. It is in fact unknown in Nigerian Law. Persons detained under an "illegal", "unlawful" and "unconstitutional" document tagged "holding charge" must unhesitatingly be released on bail. There is evidence that appellants were detained or remanded under a holding charge. The continued detention of the appellants by the lower court on a holding charge was not a judicious and judicial exercise of discretion…"[12]

Ogbuagu JCA in the same case held as follows:

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[1] (2008) 21 W.R.N 1.
[2] *Ibid* at p. 32 lines 20 – 40.
[3] (1975) 4 S.C at 34.
[4] *Ibid.*
[5] (1996) 3 NWLR (PT 436) 320.
[6] (2004) 17 NWLR (PT 902) 389.
[7] (1985) 6 NCLR 534.
[8] (1993) 7 NWLR (PT 303) 49.
[9] (2004) 17 NWLR (PT 901) 1.
[10] (1993) 6 NWLR (PT 299) 333.
[11] (2005) 3Q.C.C.R, P. 17.
[12] *Ibid* at p. 36.

> "It is settled law that a "Holding Charge", is unknown to Nigerian Law and any person or an accused person detained under, is entitled to be released on bail within a reasonable time before trial (more so in non – capital offences)…"[1]

The decision rather than complementing merely introduces jurisdictional conflict and or confusion because a person brought on a holding charge or remand proceedings make the proceedings administrative or quasi criminal proceedings.

4. Extending the Applicability of the Decision to the Northern Part of Nigeria: A Possibility?

As opposed to Lagos State of Nigeria where the Criminal Code and the Criminal Procedure Act or Laws are applicable, in the Northern part of Nigeria, it is the Penal Code and the Criminal Procedure Code that are the operational criminal statutes. The Supreme Court of Nigeria decision in Lufadeju's case as highlighted earlier is now been viewed by some judges in the North to justify orders of remand in prison custody been made even in respect of offences for which they have no jurisdiction and for the police, a reason to arraign suspects before magistrate courts which does not have the requite jurisdiction. But can the decision be said to be applicable to the peculiar circumstances where the Penal Code Law and the Criminal Procedure Code Law are operational? To answer this question, it needs to be stated that the Criminal Procedure Code Law has no equivalent provision to section 236 (3) of the Criminal Procedure Law of Lagos State that recognizes remand proceedings.

Section 42 of the Criminal Procedure Code law makes provision for a person not to be detained in custody for an unreasonable period i.e. more than 24 hours. The section provides thus:

> "No police officer shall detain in custody a person arrested without warrant for a longer period than in the circumstance of the case is reasonable and such period shall not, in the absence of an order of a court under section 129 exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the court and of any intervening public holiday"

Section 129 (1) of the Criminal Procedure Code Law reads thus:

> "whenever it appears that an investigation under section 118 cannot be completed within twenty four hours of the arrest of the accused or suspected person at the police station, the police officer in charge of the police station shall release or discharge him under section 340, or send him as soon as practicable to the nearest court competent under chapter xv to take cognizance of the offence"

Section 129(2) of the Criminal Procedure Code reads further:

> "The court may from time to time on the application of the officer in charge of a police station authorize the detention of the person under arrest in such custody as it think fit for a time not exceeding fifteen days and shall record its reasons for so doing"

Under section 129(4) of the Criminal Procedure Code Law, if the police investigation is not completed within 15 days and the court considers it advisable that the accused should be detained in custody pending further investigation, it shall remand the accused as required in Section 255 of the Criminal Procedure Code Law. Under Section 255(2) of the Criminal Procedure Code Law, the magistrate and indeed no court shall remand an accused person to custody for a term exceeding fifteen days at a time.

Magistrate in the North are allowed to take cognizance of an offence[2]. Section 1 of the Criminal Procedure Code defines "take cognizance" to mean "take notice in an official capacity". This however does not by any means mean trial or powers to carryout remand proceedings. The law envisages that the first informational report which is the document of arraignment of an accused must be brought before a court of competent jurisdiction otherwise

[1] *Ibid* at p. 39.
[2] Section 143(d) of the Criminal Procedure Code Law.

it is to be returned to the appropriate court for adjudication. Hence, section 151 (1) of the criminal procedure code reads"

> "If a first information report of a complaint in writing is received by a court which is not competent to take cognizance of the offence, the court shall return the first information report or complaint for presentation to the proper court with an endorsement to that effect"

Section 151(2) of the Criminal Procedure Code Law further provides as follows:

> "If a complaint not in writing is made to a court which is not competent to take cognizance of the offence, the court shall direct the complaint to the proper court"

The proper court here it is argued is the court with the requisite jurisdiction. Thence, offences of treasonable felony or treason or culpable homicide are clearly outside the jurisdiction of the Magistrate Court. This lack of jurisdiction means that it lacks the powers to make remand orders in respect of such offences. The only option left is as provided for under section 151(1) of the Criminal Procedure Code Law. The 1999 Constitution and indeed the Criminal Procedure Code does not provide for a Holding charge to be held against a person like the sword of Damocles.

The practice under the Criminal Procedure Code Law is that the Police should take a person to court after being satisfied that on the facts at their disposal, a prima facie case can be established on the charge against such a person. The Police need to be vigilant so as to act very quickly to see that there is justice done early in respect of every information that reaches them and the Police after completing their investigations are not ready to arraign an accused to court they are expected to release him on bail pending the time he will be taken to a competent court of law for trial of the allegations against him[1].

Therefore the peculiar circumstances of the position of the North do not justify the blanket application of the decision of the Supreme Court of Nigeria in Lufadeju's case. It therefore needs to be distinguished.

5. Conclusion

The Magistrate Court in Lufadeju's case (Supra) acted under section 236 (3) of the Criminal Procedure Law of Lagos State 1994 which gives powers to the magistrate courts to remand and even grant bail in capital offences pending proper arraignment before a competent court of law and that is in matters the magistrate in Lagos State has no jurisdiction to try in the first place and hence the reasoning of the Supreme Court of Nigeria holding that section 236(3) of the law complements the provisions of section 32 of the 1979 Constitution. Section 236(3) makes provision for remand in custody because the law of Lagos State says so. But the remand proceedings in Lagos State is akin to the holding charges in the North because a suspect cannot be taken to court without an information before the magistrate as it is in the information and or charge that the allegation leveled against an accused or suspect would be stated for the information of the court and upon which its orders would be based on. The decision parse under consideration is restrictive in nature as it only applies to Lagos State of Nigeria and has no extra territorial applicability in the North and thence limited in its nature and scope. While the said judgment still subsist, its however hoped that with time, there would be need for the Supreme Court of Nigeria to be urged to declare that decision to be per- incuriam in subsequent appeals before it because rather than enhancing the administration of justice, it has now degenerated to miss use and miss interpretation on the constitutional right to liberty of suspects as well as right to fair hearing that has even transcended on the jurisdiction of the magistrate courts as well as on the validity of statutes that goes contrary to the provisions of the 1999 Constitution. This can as well have the policy implication of withering away the long aged unconstitutionality of holding charges in Nigeria.

[1] Section 17 of the Criminal Procedure Ordinance.

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