A CRITICAL ANALYSIS OF THE APPLICABILITY OF THE RULE IN SMITH .v. SELWYN IN COMMON LAW COUNTRIES: A CASE OF NIGERIA

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Abstract

Nigeria is one of the common law countries that received the bulk of English law into her legal system. One of such laws received in Nigeria is the Rule in Smith v. Selywn through the doctrine of stare decisis. The rule is all about hindering access to court of a citizen to ventilate his grievances in a civil court while a criminal charge is on-going simultaneously in a court of law on the same subject-matter. The application of the English received law is however subject to local circumstances premised upon local values, traditions, beliefs, norms and customs. The aim of this paper is to examine the extent of the applicability of the Rule in Smith v. Selywn vis-à-vis the judicial powers of court as enshrined under the Constitution of the Federal Republic of Nigeria 1999 (as amended). It is also to examine the right vested on a citizen to seek civil relief in court simultaneously as the wrong done him is being prosecuted by the appropriate State apparatus. In Nigeria, it is discovered that the Rule though died and buried in England since 1967 but still rule us from the grave. Citizens are hindered to ventilate their grievances in a civil court while criminal charge is slammed on the accused/suspect Ii is therefore suggested that every citizen should have access to court unhindered and more importantly, the legislatures are commended to enact a law to abolish the Rule in its entirety in our judicial system

Key words

Civil law, Fraud, Contract

I. INTRODUCTION

The intendment of the Rule in Smith v. Selwyn[1] is primarily to avoid the compounding and the concealment of a felony hence it dictates a hold on further proceedings in an action for damages founded on a felonious act alleged to have been committed by the defendant against the plaintiff until the defendant has been prosecuted or a reasonable excuse offered for his non-prosecution.[2] That is to say that the rule forbids concurrent hearing of a civil action as well as a criminal

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[1][1914] 3KB 98

[2]Ibe v. Ibhaze (2016) LPELR-4156 (CA)

prosecution arising from the same incident unless the plaintiff can explain that the delay in prosecution was due to no fault of his[3]

The concept of non-simultaneous prosecution of a criminal charge and a civil suit in respect of the same transaction was introduced into the common law jurisprudence by the English case of *Smith v. Selwyn*. The Rule is founded on public policy which required that the offenders against the law shall be brought to justice and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property or any equivalent or compensation for a felony without suit and off course be allowed to maintain a suit for that purpose.[4]

The history of the question involved in the case of *Smith v. Selwyn* shows that it has at different times by different authorities been resolved in three distinct ways: - namely (i) that the private wrong and injury has been entirely merged and drowned in the public wrong and therefore no cause of action ever arose and could arise (ii) that although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public rights should have been vindicated by prosecution of the felon; and (iii) that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. These three aforementioned ways were enunciated in the cases of *Midland Insurance Co v. Smith*[5] and *Ndibe v. Ndibe*.[6]

It is essential to note that in none of three stated instances or ways of application of the rule in *Smith v. Selwyn* was the criminal prosecution ever struck out, stayed or prevented from proceeding because of a pending civil litigation on the same transaction of the criminal charge. It was always the civil action that had to await the criminal prosecution. This was illustrated in the case of *Ndudi v. Anglo*,[7] *Haco v. P. V. Udeh*[8] and *Ibekwe v. Pearce*.[9] Further, the rule was considered anachronistic and was abolished in England by the Criminal Justice Act[10]

2. 0. JUDICIAL POWERS OF COURTS IN NIGERIA

The judicial power of courts in Nigeria[11] is enshrined in the Constitution of the Federal Republic of Nigeria. The jurisdiction of the court is a hard matter of law that can only be determined in the light of the enabling statute. A court of law cannot add to or subtract from the provisions of a statute. As a matter of law, a court must blindly follow and apply the jurisdictional limits and limitations as contained or

[3] Ibid

[4] Ibid

[5] (1880-81) 6 QBD 561

[6] (1998) 5 NWLR (Pt. 551) 632)

[7] (1958) NRNLR 96;

[8] (1959) NRNLR 61

[9] (1960) NRNLR 12

[10] Criminal Justice Act 1967; Section 1

[11] Id, Section 6 (6) (a) & (b)

provided in a statute. The statute is the master and all that a court of law can do is to interpret the provisions of a statute to obtain or achieve the clear intentions of the lawmaker. A court cannot do more than this.[12] Thus, there is no statutory or principle of law that forbids a trial court from hearing a criminal charge brought against an accused person on the ground of there being a pending civil litigation against the accused person for the same transaction[13]

The words judicial power was defined by the Court of Appeal in the case of *Mbanefo v. Molokwu & Others*[14] as the right to determine actual controversies arising between diverse litigants duly instituted in courts of proper jurisdiction. Also, it is also described in the case of *Anakwenze v. Aneke & Others*[15] to include all the inherent powers and sanctions of a court of law puts the matter beyond that it has power to deal with anyone who flouts its orders. It is also described as the power that a sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects whether the right relates to life, liberty or property

Furthermore, the right of an individual to invoke judicial powers especially in a matter that affects his person causing him injury was fortified in the case decision of the Supreme Court in the case of *Attorney-General Federation & Others v. Abubakar & Others*[16] which is to the effect that, an individual is at liberty to invoke judicial power if he can show that either his personal interest will immediately be affected by the action or that he had sustained injury to himself and which interest is over and above the interest of the general public. This being the case, an individual whose interest has been affected can simultaneously seek civil relief while criminal charge is slammed on an accused/suspect

3.0. Application of the Rule in Smith v. Selwyn in Nigeria

It is essential to note that, there are two kinds of proceedings under the Nigeria legal system namely, civil and criminal proceedings. The difference in the two proceedings is appreciated in the manner of proving each proceeding in the court of law. Whereas, a civil proceeding requires proof on the preponderance of evidence, criminal proceedings require proof beyond reasonable doubt. The time within which criminal matters are prosecuted in Nigeria calls for concern and it will work injustice on a victim if he has to wait till the final determination of the criminal charge against the accused/suspect before he brings action for remedy against the wrong done him. Also, the issue of limitation period is another factor that needs be considered. An aggrieved party needs to bring and seek redress in some civil wrongs within a time prescribed by law. Failure to explore the right to so do may bar him from ever litigating on the issue if he waits to the end of the determination of a criminal charge.

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[12]Atiku v. Bodinga (1988) 2 NWLR (Pt. 76) 369; Oloba v. Akereja (1988) 3 NWLR (Pt. 94) 508 and Anibi v. Shotimehin (1993) 3 NWLR (Pt. 282) 461

[13]Federal Republic of Nigeria v. Lalwani (2013) LPELR-20376 (CA)

[14](2008) LPELR-3696 (CA)

[15](1985) LPELR-481 (CA)

[16](2007) LPELR-3 (SC)

To further illustrate the applicability of this rule, the Court of Appeal of Nigeria in the case of *Okafor & Another v. Madubuko & Another* [17] was confronted to interpret Section 9 of the Actions Law of Anambra State. Ubaezonu, JCA has this to say

"This appeal turns entirely on the interpretation of Section 9 91) of the Actions Law of Anambra State. It provides: "9 (1) Subject to any written law in force in the State where an act constitutes a felony and at the same time infringes some right of, or causes damages to a person, the person whose right is thus infringed or who thus suffers damages shall not bring an action against the person doing the felonious act until such person shall have been prosecuted for the felony, unless satisfactory explanation is given for non-prosecution". The above provision of the Statute seems to me to be an importation into our law of the old English rule enunciated in *Smith v. Selywn* (1914) 3 K.B 98 popularly known as the Rule in *Smith v. Selywn*… It is surprising that a Rule which was abolished in England in 1967 was copied into the Statute Book of Anambra State in 1986-Nineteen years after it had been abolished in England. It is no wonder that the learned brother Tobi JCA in *Veritas Insurance Co. Ltd v. Citi Trust Investment* (1993) 3 NWLR (Pt. 281) 349 at 365 stated that the rule does not apply in this country and that… it does not even seem to be a sensible thing to stop a plaintiff from instituting an action merely because the criminal action in the same matter has not been prosecuted.

The purport of the above is that the entire policy behind *Smith v. Selwyn* will work injustice, particularly in Nigeria where it, at time stakes so much time to apprehend an accused person. And what is more, proof of criminal matter as stated earlier is quite different from proof of civil matter and there is really no justifiable reason why the two should be so related in terms of prosecution. Thus, the rule in *Smith v. Selywn* has been dead and buried in England but in Nigeria, it seems to rule us from the grave. It is a rule that does nobody any good. It is anachronism.

Another classical example of the sort of problem is the case of *Ndibe v. Ndibe*[18] where a criminal act of assault and battery was committed against the Plaintiff in May 1991. A report was duly made to the Police but the Police did not immediately commence prosecution until almost 5 years had elapsed. The Plaintiff sued, called his witnesses and closed his case. The Police thereafter commenced prosecution. When the appellant was to open his case, he filed a motion for stay of proceedings pending the completion of the criminal prosecution. The High Court refused a stay of proceedings at that stage. On appeal, the Court of Appeal per Salami JCA in a well reasoned and properly articulated judgment dismissed the appeal. Supposed the fact in this case disclosed a felony at the time the plaintiff commenced his action almost 5 years after the commission of the act, the plaintiff in the case could claim to have come under the 2nd limb of Section 9 (1) of the Actions Law of 1986 of Anambra State. When the police subsequently commenced prosecution, what does the plaintiff do? Withdraw his action? No. His action will either continue or be stayed pending the completion of the prosecution. The discretion of the court shall be paramount depending on the circumstances of the case. In this case, the court rightly refused to stay proceedings holding that it would be inequitable to do so in the circumstances of the case

[17](1999) LPELR- 5550 (CA)

[18](1985) 5 NWLR (Pt. 551) 632

Furthermore, in the case of Ibe v. Ibhaze[19] , Adefope-Okojie JCA stated that

"…where a person is accused of criminal offence is accused of a criminal offence, he must be tried in a Court of law where the complaint of his accusers can be ventilated in public and where he would be sure of getting a fair hearing. His Lordship, Fasanmi JCA, was however emphatic that he should not be misconstrued in standing against disciplinary proceedings where criminal allegations are involved, but that "once criminal allegations are involved, care must be taken that the provisions of Section 33 (4) of the Constitution are adhered to." That case is however, no authority for the proposition that where criminal proceedings are brought, the same must be concluded before civil proceedings can be commenced. In *Onoh v Maduka Enterprises (Nig) Ltd* (2007) 13 WRN Page 176 at 186 lines 20-25, it was held by Ogebe JCA (as he then was)as follows: "... once a claimant has set in motion the prosecution of the felon by ensuring that the matter is charged before a Court, he has accomplished his role in prosecuting the matter. The outcome of the prosecution is not within his control and I cannot see the rationale for him to await the outcome of the prosecution before he commences his civil action. See Okonkwo a Obunlesi Supra". Underlining Mine. In the case referred to above by Ogebe JCA (as he then was) of *Okonkwo v Obunseli* (1998) 7 NWLR (Pt.558) 502, the dispute was whether the Respondents, as Plaintiffs in the Court below, were right in instituting a civil action against the Appellants (Defendants) while the criminal prosecution of the Appellants was still going on at the Chief Magistrates Court or whether the Respondents should have waited for the completion of the said prosecution before instituting the civil action. The Court of Appeal (Enugu Division) in the lead judgment of Akpabio JCA held at page 572 Para A-B as follows: "On the totality of the foregoing, I am of the firm view that this appeal has been a hopeless waste of judicial time, as the appellants have been unable to point to any section of any written law that stipulates that unless and until the Appellants have been "prosecuted to conclusion" no civil proceedings can be instituted against them in respect of the same subject matter." Underlining Mine Tobi JCA (as he then was), concurring, added at page 512:- "...the entire policy behind Smith v. Selwyn will work injustice particularly in Nigeria where it, at times, takes so much time to apprehend an accused person. And what is more, proof of a criminal matter is quite different from proof of a civil matter and there is really no justifiable reason why the two should be so related in terms of prosecution." From the foregoing authorities, it is clear that there is no law that precludes the Respondent from instituting the action before the lower Court, even though there was pending a criminal prosecution against some of the Appellants"

There are authorities of our Court of Appeal that are of the view that the rule is no longer applicable in Nigeria - *Veritas Insurance Co Ltd. v. Citi TrustInvestment*,[20] *Ndibe v. Ndibe* (supra), *Okafor v. Madubuko* (supra) and *Ekerete v. United Bank for Africa*[21] Thus, apart from specific local legislations such as the Tort Law of Anambra State, as was noted by the Court of Appeal in *Ndibe v. Ndibe* (supra), *Okafor v. Madubuko* (supra), there is nothing preventing a simultaneous prosecution of a criminal charge along with a civil suit arising from the same transaction. And even where such specific local legislations

[19](2016) LPELR-41556 (CA)
[20](1993) 3 NWLR (Pt 281) 349,
[21](2005) 9 NWLR (Pt 930) 401

exist, it is the civil matter that awaits the criminal prosecution, and not vice versa.

The application of the rule has since stopped in England. However, the rule has been followed in a number of cases in Nigerian Courts. Such cases include (1) *Ojikutu. v.African Continental Bank*[22] . (2) *Haco Ltd. v. Udeh*[23] and (3) *Fulani v. Idi*[24]

In the case of *Alao v.Nigerian Industrial Development Bank*[25] , the appellant in his brief of argument contended that the rule, is still in force in Nigeria as no decree or act has been promulgated repealing it nor has the Supreme Court, the highest court of the land, overruled its earlier decisions where in which it applied the rule. On the other hand, the respondents, through its brief of argument contended that the rule has constituted a clog in the wheel of proper administration of justice and this is an anachronism. It defeats the end of justice. It further contended that the combined effect of Section 5 of the Criminal Code Act 1958 (now Cap 77 of the Laws of the Federation, 1990) and Section 8 of the Interpretation Act is that a pending criminal matter must never be allowed to stand in the way of an aggrieved person from seeking a redress in the court of law. Section 5 of the Criminal Code provides: "When by the code any act is declared to be lawful, no action can be brought in respect thereof. Except as aforesaid, the provisions of this Act shall not affect any right of action which any person would have had against another if this Act had not been passed." Section 8 of the Interpretation Act 1964 provides: "An enactment shall not be construed as preventing the recovery of damages in respect of injury attributable to any act by reason only of the fact that the enactment provides forfeiture or punishment in respect of the act." Let me say straightaway that Nigerian Courts preserve and follow, stricto sensu, the common law doctrine of stare decisis - which literally translated means that a lower court must for all times hold itself bound by the decisions of a higher court or better put by the decisions of the Highest court of the land until they are seen to have been overruled. The highest court of our land undoubtedly, is the Supreme Court. Such decisions of the Supreme Court can only be annulled by legislation, or a Decree or by rules regulating the practice and procedure as given by the judicial decision of the Supreme Court itself given intra judicially when it is satisfied that its previous decision was reached per incuriam or that it would perpetuate injustice. See *Bucknor-Maclean v. Inlaks Ltd*.[26] . It follows that it is only the Supreme Court, sitting as a full court that can depart from its previous decisions. See *Yonwuren v. Modern Signs (Nig.) Ltd*[27] and *Ojokobo v. Alamu*[28] . I shall now examine the cases in which Nigerian Courts have considered the applicability of the rule in *Smith v. Selwyn*. In *Ojikutu v. African Continental Bank* (supra) which touches on banking transaction and the Supreme Court considered the circumstances for the application of the rule in Smith and Selwyn. In that case the defendant had averred in his statement of defence paragraph 5 thereof thus:- "The defendant avers that there is a written agreement for a loan of £13.000.00 between the plaintiff and defendant and that the said agreement was altered and forged without the knowledge and consent of the defendant." Based on this

[22](1968) 1 All NLR 40;
[23](1959) NMLR 61
[24](1990) 5 NWLR (Pt.150) 311
[25](1999) LPELR- 6673 (CA)
[26](1980) 8-1 1 S.C. 1
[27](1985) 1 NWLR (Pt.2) 244; (1985) 2 S.C. 86
[28](1987) 3 NWLR (Pt.61) 377

averment the counsel for the defendant had, argued before the Supreme Court that the application was sufficient to bring the rule into force. That argument had been overruled by the trial Judge. The Supreme Court said at page 45: "Mr. Ojikutu submitted to us that the principle in *Smith v. Selwyn*...was that the plaintiff must be deprived from benefiting from his felonious act and so could not be permitted to sue if the defendant alleged that he based his claim on a felonious act. We do not see that *Smith v. Selwyn* decided anything of the sort. It was dealing with exactly the opposite situation where a plaintiff was bringing an action against a defendant for damages based on a felonious act of the defendant...No authority was cited to us to show the converse applied and we consider the learned trial Judge was right to reject the submission that *Smith v. Selwyn* could be extended in the way that was suggested." It will be seen from the above quotation that the Supreme Court never held that the rule in *Smith v. Selwyn* was applicable to the case before it. In the recent case of *Okonkwo & Others v. Obunseli & Another*[29] in which the dispute was as to whether the respondents (plaintiffs in the court below) were right in instituting a civil action against the appellants (defendants in the court below), while the criminal prosecution of the appellants was still going on or pending at the Chief Magistrates Court or they should have waited for the completion of the said prosecution before instituting this action, this court (Enugu Division) per the leading judgment of Akpabio JCA said at page 511:- "In my respectful view, I think that the emphasis in both the Torts Law and the Law of Actions Law including even the rule in *Smith v. Selwyn* (supra) itself was on the commencement of prosecution rather than on its conclusion. This is borne out of the fact that even in Section 5 (1) of the Torts Laws 1987 under the last two subparagraphs (b) and (c) set out above, it is not even necessary that any prosecution should have been commenced. Under sub-para. (b) it is sufficient that a mere report is made to the police who fail to prosecute or sub-para. (c) reasonable excuse is offered for failure to prosecute the felony." In the same case Tobi JCA added at page 512 and I quote:- In the light of the state of the statutory laws at the Federal level which make the English Common Law rule in *Smith v. Selwyn* no more applicable in Federal matters it is a matter of some serious concern why Section 9 (1) of the Law of Actions Laws (1981) and Section 5(1) of the Torts Law 1987 of Anambra State should still operate. That apart, the entire policy behind Smith v. Selwyn will work injustice particularly in Nigeria where it, at times, takes so much time to apprehend an accused person. And what is more, proof of a criminal matter is quite different from proof of a civil matter and there is really no justifiable reason why the two should be so related in terms of prosecution." Section 8 of the Interpretation Act 1964 now embodied in the Laws of the Federation 1990 Cap. 192 Section 8(2) thereof which I quoted above is a Federal Legislation: it is unambiguous; the wordings are very clear and straight forward and giving same the ordinary and simple grammatical meaning and connotation which the law enjoins. See *Olanrewaju v. Arewa*[30] the only conclusion I can reach and which I reach is that the English Common Law Rule in *Smith v. Selwyn* is no more applicable in Nigeria. To hold otherwise is to deny an aggrieved person the right to seek a redress in the citadel of justice. The Limitation Law with all its excruciating weight will be allowed to descend on him prostrate having been tied down by that rule. Even in England where process of seeking justice is not tardy as here, the rule in *Smith v. Selwyn* has in their collective wisdom

[29](1998) 7 NWLR (Pt.558) 502
[30](1998) 11 NWLR (Pt.573) 239;

been rendered out of operation. To encourage its application in this country giving the prevailing conditions is to allow for the rolling out of a clog in the wheel of administration of justice

4. 0. Conclusion and Recommendations

Conclusively, it is essential to note that the rule in Smith v. Selwyn has for sometime rule us from the grave since it was died and buried in England in 1967. The rule hitherto forbids and hinders a citizen from access to court simultaneously while a criminal charge is slammed on accused/suspect has been abolished and individual could now access to court to seek civil relief while the criminal charge is on- going. This is really in tune with the powers of the court to adjudicate on all matters between individuals who approach court for relief. It is also in accordance with the provision of the Constitution of the Federal Republic of Nigeria on right of a citizen to gain access to court. The abolishment of the rule regarded to be anachronistic is in tandem with reasoning most especially when the time and resources put together to prosecute criminal cases in Nigeria is unpredictable. Citizen no longer need to await the outcome of the criminal charge before approaching court to seek civil reliefs

It is therefore suggested that every citizen should have access to court unhindered. Citizen needs not to await the outcome of the criminal charge on the same subject-matter before gaining access to court to seek civil reliefs

Also, since the role of the court is to interpret and apply law in the law courts in matters arising between individuals and other authority, the legislatures are commended to enact a law to abolish the Rule in its entirety in our judicial system so that access to court by an aggrieved citizen could become unhindered as being erroneously apply in Nigerian courts

Above all, members of the judiciary are commended to abreast themselves with the trend of the law and stop living in the past. The era of applying archaic principles of law is gone and gone forever. The time is ripe to administer justice on the modern principles of law in our courts so as to continuing to uphold the rule of law and justice