CONVICTION ON THE UNCORROBORATED EVIDENCE OF A TAINTED WITNESS: A GROUND FOR CHALLENGE?

[1] **Gesiye-Emi Emiemokumo**

[1] Faculty of Law, Niger Delta University, Delta State

gemiemokumo@gmail.com, 08147624946

ABSTRACT

It is well-established as a general rule that corroboration of evidence in the course of judicial proceedings is an absolute necessity only when the law demands it. This is true even in criminal trials. Trial Courts are free to convict on the evidence of a sole witness, as long as there is no statute which specifically calls for the contrary. Although this is the law, one cannot help but inquire as to whether the absolute requirement for corroboration extends also to tainted witnesses. Admittedly, judicial decisions generally posit that a trial Judge can convict on the evidence of a tainted witness if he warns himself as to the safety of doing so and is satisfied with the evidence; but is this true? Is corroboration not required all the time? This paper sets out to examine existing case law on the concept of a tainted witness and the nature of the evidence given by such a witness, in a bid to proffer an answer to these questions and determine whether a conviction will be quashed if it is based solely on the evidence of a tainted witness.

INTRODUCTION

Corroboration is an integral part of Evidence. It refers to independent pieces of evidence presented to support or reinforce some other piece of evidence; evidence supplementary to that already given tends to strengthen it. It is additional evidence of a different character to the same point.[1]

The law is settled under **Section 200 of the Evidence Act, 2011** that except as provided in Sections 201 to 204 of the Act, no particular number of witnesses shall, in any case, be required for the proof of any fact.[2] This has been given credence in a myriad of judicial decisions[3]. The Evidence Act also provides for other instances where corroboration is required, such as the unsworn evidence of a child under 14 years in **Section 209,** as well as in actions for breach of promise of marriage in **Section 197.**

Essentially, the law is that the testimony of a single witness may suffice in all cases and corroboration is mandatory only where the law requires it[4]. However, circumstances abound in practice where although there is no statutory requirement for corroboration, the Courts, over time, have consistently leaned

[1] *See* Saliu v State (2014) LPELR-22998(SC)
[2] Mfoniso Katherine Ogunleye, 'Victim's Perspectives' Towards Rape, Sexual Violence and Abuse of Women during Internal Armed Conflicts in Nigerian' (2019), Doctoral thesis, University of Central Lancashire, available at http://clok.uclan.ac.uk/34357/2/34357%20Mroniso%2C%20Ogunleye%2C%20PhD%20Thesis.pdf accessed May 23, 2021
[3] *See* Adamu v State (2017) LPELR-41436(SC); State v Ekanem (2016) LPELR-41304(SC)
[4] Adepoju v State (2014) LPELR-23312(CA)

towards the requirement thereof—such circumstances where it is considered unsafe or unreasonable to act upon the uncorroborated evidence of one witness.[5] Such instances include where a witness giving testimony is declared to be a tainted witness. If corroborative evidence is not adduced in any of the instances statutorily provided, the conviction based on the evidence is irrefutably vitiated. Whether this is also the case for uncorroborated testimony of tainted witnesses is the issue of controversy, which this paper seeks to address.

WHO IS A TAINTED WITNESS?

The definition of a tainted witness is not provided for in the Nigerian Evidence Act, 2011, but a definition has been judicially propounded, receiving continued endorsement by the Courts. The renowned definition was stated in **Oluwatoyin v State**[6], to wit: "a tainted witness is either an accomplice or one who, by his evidence, could be regarded as having some purposes of his own to serve." **Ngwuta, JSC** explained in **Akindipe v State**[7] that such a witness is one who testifies in a case with a purpose to serve and that is to see that the side for whom he testifies in the dispute is vindicated.

[5] *See* Posu v The State (2011) LPELR-1969(SC)
[6] (2018) LPELR-44441(CA)
[7] (2012) LPELR-9345(SC)

The case of **Mbenu v State**[8] aptly illustrates this position. The facts of that case reveal that on the morning of 8th July 1981, at 2 a.m., armed men, including the 1st and 2nd accused persons, besieged the premises of Miss Beatrice Abazie, a teacher, and shot her brother in the head. At the trial of the accused persons, Miss Beatrice testified as PW2. The presentation of evidence revealed the following facts: it was her brother who was killed in such gruesome circumstances; the 1st accused person was her ex-lover who seemed, on her evidence, to have resented the break-up of their relationship and threatened to kill her; the 2nd accused was a co-teacher who made unsuccessful attempts to make love to her and turned her enemy in school, even withdrawing his son from her class. The Supreme Court held that it was clear from her evidence that she was a tainted witness; the tendency that she was out in pursuit of a personal interest other than the interest of justice was high, and that her evidence needed to be carefully scrutinized.

It has been held that such a witness is not spontaneous but calculating. Accordingly, he must be watched closely and everything he says must be put to test because he "often speaks out of malice and he pours out venom as lethal as that of a

[8] (1988) LPELR-1855(SC)

serpent."[9] In **Irrechukwu v. State**[10], a tainted witness was described as one who is using the machinery of the trial to seek the punishment of his enemy and comes to use the opportunity of the trial to shout "*crucify him!"* It also happens where the witness is an accomplice in the crime and uses the opportunity of the evidence to divert attention from his involvement as long as the trial lasts, or to seek others to go down with him if he is indicted.

But, it is important to emphasize that whether or not a witness is a tainted witness is a matter of fact and not speculation. It is imperative that the interest be established. It is absolutely necessary. Otherwise, the witness cannot be regarded as tainted. It must be by evidence, not assumptions or insinuations. In **Tanko v FRN**[11]**,** it was held as follows:

> "…Now is PW8 a tainted witness? The basis of the allegation is because PW8 was initially arraigned along the Appellant but charges were later withdrawn and she was made a prosecution witness. Can that make her a tainted witness? That alone cannot make her a tainted witness, because there is no personal interest to her benefit from the entire trial. It was not shown that PW8

[9] Adewunmi v Nigerian Eagle Floor Mills (2014) LPELR-22557(CA), Per Dongban-Mensem, JCA at Pp. 31 – 32, Paras. G – D
[10] (2015) LPELR-25608(CA)
[11] (2020) LPELR-50294(CA)

> is an accomplice or that she has an interest of her own. What could be the interest in this case? The burden to establish that the witness is a tainted witness rests squarely on the Appellant…. The burden was not discharged by the Appellant because all the insinuations are not within what Courts consider as evidence to label a witness a tainted witness. The primary element is to establish the interest that is sought to be served by the evidence."[12]

Similarly, in **Egberetamu v State**[13]**,** the appellant merely alleged that PW1 was a tainted witness. There was nothing in all the evidence adduced by both parties to indicate, in the least, that PW1 had any other purpose to serve other than to be a witness at the trial of the appellant. The Court held that the allegation, not supported with grounded and solid facts and evidence, was insufficient.

A GROUND FOR CHALLENGE?

Say, an accused person has been arraigned for stealing a car. Trial is ongoing. The prosecution's only eyewitness is called to the stand, takes the oath and testifies that he saw the accused steal the car. There is no other evidence to back this – not even

[12] Ibid, Per Nimpar, JCA at Pp. 37 – 38, Paras C – F; *See also* Asuquo v State (2016) LPELR-40597(SC)
[13] (2014) LPELR-22615(CA)

circumstantial. The defence counsel then comes up to cross-examine the witness. Cross-examination reveals that the witness and the accused have been in deep quarrel over land for years. Subsequent evidence from the accused and other defence witnesses show that the witness and the accused are sworn enemies and that the witness had vowed to deal with the accused. The witness is apparently tainted. Evidence closes, final arguments are made, and judgment is delivered. The trial Judge finds that he believes the truth of the prosecution's uncorroborated evidence and convicts the accused. The accused appeals. IS THERE A GROUND FOR CHALLENGE?

Given that there is no statutory requirement for the corroboration of the evidence of a tainted witness, the answer, ordinarily, is No. In fact, cases reveal that there is no requirement for corroboration at all. What exists is a requirement for the trial Judge to warn himself as to the safety of convicting upon the uncorroborated evidence of a tainted witness. And even then, the requirement is not provided by law. Essentially, if the trial Court thoroughly scrutinizes the evidence of the tainted witness, is satisfied with it, and warns itself, the conviction is valid. **Nnamani, JSC** explained this in **Adekunle v State**[14]**,** thus:

[14] (1989) LPELR-108(SC)

> "In Nathaniel Mbenu & Anor v The State (1988) 3 NWLR (Pt. 84) 515, 625 to which learned counsel made reference, I did say that – "The court has always held that the evidence of such a witness (tainted witness) should be treated with considerable caution and should be examined with a tooth comb. Indeed, trial Courts have been advised to be wary in convicting on the evidence of such witnesses without some corroboration." But I did say too, "The requirement that a trial Judge should in such circumstances warn himself as one would in the case of accomplices, is one dictated by prudence, not by law." Admittedly, in the present case, the learned trial Judge did not warn himself, but I never suggested anywhere that such failure in every case must be fatal. The central point is that the learned trial Judge must be wary in such circumstances. In other words, he must be fully satisfied with such evidence before convicting on it."[15]

The above position regardless, one cannot deny the reality that the evidence of a tainted witness is, from surrounding circumstances, not weighty; at least, not enough to solely ground a conviction. Surely, because of the ulterior motives for testimony that may be harboured by this kind of witness, a red

[15] Ibid at Pp. 12 – 13

flag is raised as to the credibility and truthfulness of his evidence, which affects the probative value thereof. What the trial Court basically has to go on is the word of the tainted witness against that of the accused, who is innocent until proven guilty. Inarguably, the "I did not do it" of the accused carries far more weight than the "he did it" of the lone tainted witness. With the suspicion that lingers over the testimony, it just is not evidence enough to secure a conviction.

In **Egwumi v State**[16]**, Rhodes-Vivour, JSC** said, so long as the charge is not one that needs corroboration, the Court is only interested in the testimony of a quality witness. Is a tainted witness a quality witness? Certainly not. The fact of that he is tainted—the fact that there has been established an external interest or purpose to serve—casts doubt on the evidence, and deprives the evidence of conviction-worthy weight.

It need also to be pointed out that realistically, the trial Judge "warning himself" and then accepting the evidence as credible, cannot save the conviction. Quite frankly, that requirement is one of mere cosmetic importance, as exemplified in **Adiele & Ors v State**[17]**.** In that case, there was a shooting that led to the death of the deceased. The 1st Appellant was convicted at the trial Court primarily on the evidence of DW3, an accomplice,

[16] (2013) LPELR-20091(SC), restated in Isah v State (2017) LPELR-43472(SC)
[17] (2011) LPELR-8835(CA)

who was found tainted because he had his own purpose to serve, in that he wanted to save himself from the consequences of the shooting. **Ogunwumiju, JCA (now JSC)** held:

> "There is no doubt in my mind that the evidence of DW3 should be regarded as tainted…. In such a case, the Court should have been circumspect before convicting solely on his evidence. I would, with great humility, say that the Court should have looked for any evidence to corroborate that of DW3…. The learned trial judge at page 201 of the record cautioned himself thus: "I have painstakingly and cautiously considered the evidence of DW1, DW2, DW3, DW4, DW5, and DW6 who are co-accused persons." However, I have gone through the evidence at the trial Court, there is no direct and positive evidence from any other eyewitness that could serve as corroboration that the 1st Appellant actually participated in the shooting which culminated in the death of the deceased."

Undoubtedly, the trial Judge warned himself in this case. But it was immaterial. The learned Justice of the Court of Appeal made it clear that although the authorities say the Court should be wary and warn itself before convicting on the uncorroborated evidence of a tainted witness, the cautiousness is one of substance, not of form. The judge must not merely indicate on

the record that he is aware of his duty to be cautious and that he has warned himself – which is a matter of form; he must demonstrate that he heeded the warning – that is a matter of substance.

Essentially, it was concluded that the learned trial judge did not substantially address the issue of the fact that the proof of only one tainted witness who was a co-accused with his own interest to serve in shifting the blame to the 1st Appellant, had proved the charge against the 1st Appellant. It was unequivocally held that **the evidence of an uncorroborated tainted witness cannot be proof beyond reasonable doubt.**[18]

The requirement that the trial Judge must demonstrate that he heeded the warning as a matter of fact was expounded in **Agbanyi v State**[19]**.** There have to be reasons for the Judge's findings. The Judge has to explain why the testimony is credible and why he believes it, and give pointers of truthfulness from the evidence. He has to give reasons as to why he was so sure that the witness was not just trying to settle scores; how he could tell, without any support, that this tainted witness was telling the truth, which is an impracticable undertaking. The Court in that case made it a point to stress that:

[18] Ibid at Pp. 19 – 25, Paras. D – D
[19] (1994) LPELR-14108(CA)

> "…it was wrong for the learned trial Judge in such circumstances to say that he "disbelieved" the appellant and was "satisfied" that the prosecution had proved its case beyond reasonable doubt and thereby convicted the appellant. There is neither magic nor sanctity in the words "I believe or disbelieve" or "I am satisfied". They should represent the Court's reaction towards proven facts, possibilities and probabilities based on facts accurately assessed and established…. A judgment convicting a man of the offence charged must be seen to be a product of prudent and logical thinking, based upon admissible evidence, in which the facts leading to his conviction are clearly found, and the legal deductions therefrom, carefully and rightly made."[20]

According to the Court, the benefit of doubt, even a lingering doubt, must be exercised in favour of the accused, and that is precisely what the evidence of a tainted witness does – it raises doubt. It does not amount to prudent and logical thinking or reasonable reaction to proven facts, possibilities and probabilities, to evaluate such evidence as credible and ascribe so much probative value to it, that it warrants a conviction. Indeed, even in **Adekunle v State**[21]**,** conviction was not based on

[20] Per Orah, JCA at Pp. 25 – 29, Paras. A – B
[21] Supra (n13)

the evidence of tainted witnesses. Page 14 of that judgment reveals that the witnesses in question were, in fact, held to be not tainted.

Of course, the fact that such a witness has other personal interest of his own to serve is, by itself, not sufficient to reject his evidence.[22] Nonetheless, even if the evidence is not completely disregarded, it should be taken with a pinch of salt[23]. That is the bottom line, in view of which the answer to the question initially put forward, as to whether a conviction on the uncorroborated evidence of a tainted witness constitutes a ground for challenge, becomes YES. Yes, it is a ground for challenge, irrespective of the absence of a statutory requirement for corroboration, simply because the evidence, by its very nature, is of too little probative value to secure a conviction uncorroborated. Corroboration is absolutely necessary in all such cases.

CONCLUSION

Theoretically, a trial Judge may elect to act on the uncorroborated evidence of a tainted witness, and where he so acts, his decision is not vitiated merely by the fact that the witness was tainted. After all, it is settled that the requirement that a trial Judge should in such circumstances, warn himself, is

[22] Pius v State (2015) LPELR-24446(SC)
[23] Agu v State (2017) LPELR-41664(SC)

one dictated by prudence, not law. Noteworthy, nevertheless, is the reality that it is uncommon to find a judge acting upon the uncorroborated evidence of a tainted witness. So uncommon that it has become trite. The judicial practice, and quite honestly, common sense, dictate in actual fact, that corroboration is required for the evidence of any tainted witness. This is further reinforced by the fact that the Courts consistently warn against the unchecked extension of the concept of tainted witness, as doing so would operate to compromise the merits of many single-witness cases[24].

It is recommended hence, that the position be made clear and unequivocal. The use of the words "should", "caution", "is advised to be wary", "warn itself" in decisions, is misleading and only operates to create confusion. It should be clear from judicial pronouncements that while statute does not require corroboration for tainted witnesses, corroboration is not just desirable, it is a necessity.

[24] *See* Ogunlana v State (1995) LPELR-2341(SC)