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Nuel Oji

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Solving the Jigsaw Puzzle: A Critical Analysis of the Evidence of an Accused

Implicating a Co-accused under the Nigerian Law of Evidence

By

Oji Nuel, LLB

Introduction

It appears settled that an accomplice is a competent witness and that a conviction, subject to a prior warning by the judge, shall not be illegal merely because it is based on his uncorroborated evidence. This is provided for in section 198(1) of the Evidence Act. However, section 199 of the same Act goes on to provide that “where defendants are tried jointly and any of them gives evidence on his own behalf which incriminates a co-defendant, the defendant who gives such evidence shall not be considered to be an accomplice.” This section unlike section 198 of the Evidence Act, has given rise to divergent opinions despite its seemingly clear words. Fifty-one years ago, Bairamian JSC (as he then was), in *Ukut and Others v The State*¹, decried the inelegance of section 199 of the Evidence Act (then section 178(2) of the Evidence Act). The distinguished jurist stated that the section was drafted with a “terseness which has given rise to misunderstandings....” This statement, in hindsight, was not just a reflection of the constant misinterpretation of the above section at that time but also an ominous sign of the controversy which would follow the continued existence of the above section in the Evidence Act. Three years after the decision in Ukut’s case, the Supreme Court, in *Malaiya v The State*², held that though, from the provisions of the Evidence Act, corroboration was not a statutory requirement it was necessary that corroborative evidence be sought before convicting an accused on the evidence of a co-accused. However, the judicial

¹ (1965) ANLR 325, 326
² (1968) 1 ALLNR 116
consensus was apparently that when such evidence is given, a judge must be wary of such evidence but neither corroboration nor a warning was needed. The case of Okoro v State\(^3\) turned this practice on its head. In that case, it was held, by a majority judgement, that a warning was not only required for the admissibility of such evidence but corroboration was just as necessary. This reflected the fickleness of the judicial attitude towards section 199 of the Evidence Act and a host of varying decisions inexorably followed. Interestingly, scholars have also been at opposite ends as to the legal consequence of section 199 and have expressed vastly different opinions\(^4\). Recently, in Ononju v The State\(^5\), the practice of warning with respect to such evidence was strongly reinforced and the gates to debate were thrown open once again. This work, therefore, aims at giving a clear guide as to the interpretation of section 199 which has become a “jigsaw puzzle” both on the bench and among writers.

The Meaning, Nature and Importance of Corroboration

Corroboration is any independent piece of evidence which supports or strengthens another piece of evidence. It has been judicially defined as “evidence which confirms or supports or strengthens other evidence adduced at a trial and rendering the later more probable.”\(^6\) The general rule is that a party may prove his case even with a sole witness. Hence the Evidence Act states that “except as provided in sections 201 to 204 of this Act, no particular number of witnesses shall, in any case, be required for the proof of any fact.”\(^7\) Relying on this section, the

\(^3\) (1988)3 NSCC 275
\(^4\) See pages 17-18
\(^5\) (2014) 8 NWLR (Pt 1409) 345 S.C.
\(^6\) Okoh v Nigerian Army(2013) 1 NWLR
\(^7\) Section 200
Court of Appeal in **Ezeugo v The State**\(^8\) held that the evidence of the prosecution witnesses, who had seen the crime being committed themselves, was sufficient to ground the conviction of the accused and corroboration in any form was unnecessary. However, as seen in the above section, statute demands corroboration on some occasions. The rationale behind corroboration is that some offences are, by their very nature, committed in such a manner that it would be desirable to have at least some piece of evidence, apart from the evidence of the complainant, implicating the accused such as offences of a sexual nature or the claim of breach of promise to marry.

For corroborative evidence to be valid, it must not just show that an offence has been committed but also that the offence was committed by the accused. This was aptly explained in the classic exposition of Lord Reading in **R v Baskerville**\(^9\). The law lord stated:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.\(^10\)

Thus in **Akpan v The State**\(^{supra}\), the Supreme Court held that the evidence of PW2, PW3, and PW4 could not be regarded as corroboration because it was a mere repetition of what PW1 had said and was therefore not independent.

Corroboration may be direct, circumstantial, oral, documentary or real, provided that it materially supports a given piece of evidence. In the case of **Nguma v A.G. Imo State**\(^{11}\), it was held that the pistol, life cartridges and axe found at the appellant’s house corroborated

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\(^8\) (2011) 9 NWLR(pt. 1360)
\(^9\) (1916) 2 KB 658
\(^10\) This was adopted in Akpan v State(2014)LPELR-22741(CA)
\(^11\) (2014) 7 NWLR (Pt 1405) 119 S.C.
the appellant’s confessional statement. Also in R v Kumi\textsuperscript{12}, the accused was found during police investigation in a taxi carrying stolen goods which were alleged to have been received knowing them to be stolen. When the police stopped the taxi and inquired as to the owner of the goods. The driver and other passengers in the taxi pointed at the accused as the owner. He said nothing. When he was also personally asked the same question, he continued his silence. At the trial it was held that in the circumstances, the accused could be rightly said to have admitted being the receiver if the stolen goods. This was affirmed by the West African Court of Appeal.\textsuperscript{13}

In civil proceedings, corroboration is largely unnecessary and is generally not required except in claims for breach of promise to marry. Hence, section 197 of the Evidence Act states that “no plaintiff in any action for breach of promise to marriage shall be entitled to succeed unless his or her testimony is corroborated by some other material evidence in support of such promise; and the fact that he had promised to marry the plaintiff is not such corroboration.” In criminal proceedings, however, there are three categories into which offences which may or may not require corroboration fall into:

(a) **Cases which require corroboration by statute**: These include treason\textsuperscript{14}, perjury\textsuperscript{15}, exceeding speed limit\textsuperscript{16} and sedition\textsuperscript{17}.

(b) **Cases which do not require corroboration by statute but a statutory warning**: Some pieces of evidence do not require corroboration but the judge has a statutory duty to warn himself as to the danger of convicting an accused on such uncorroborated evidence. The classical example of this is the evidence of an accomplice. The meaning of the word “accomplice” as used in section 198 of the Evidence Act is provided by the Act. It defines an

\textsuperscript{12} (1949) 12 WACA 338.
\textsuperscript{14} Section 201 of the Evidence Act
\textsuperscript{15} Ibid, Section 202
\textsuperscript{16} Ibid, Section 203
\textsuperscript{17} Ibid, Section 204
accomplice as “any person who pursuant to section 7 of the Criminal Code may be deemed to have taken part in committing the offence as the defendant or is an accessory after the fact to the offence of a receiver of stolen goods.\textsuperscript{18}” Section 7 of the Criminal Code states as follows:

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and may be charged with actually committing the offence:

(a) Every person who actually does the act or makes the omission which constitutes the offence;

(b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) Every person who aids another person in committing the offence;

(d) Any person who counsels or procures any other person to commit the offence.

Thus, an accomplice is that category of people listed in section 7 of the Criminal Code above in addition to an accessory after the fact to the offence of receiving stolen goods. Section 198(1) governs the uncorroborated evidence of an accomplice. It states as follows:

An accomplice shall be a competent witness against a defendant, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice-

Provided that in cases when the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular implicating the defendant, the court shall direct itself that it is unsafe to convict any person upon such evidence.

The above sub-section is unambiguous and has been subject to very little controversy. It explicitly states that a judge may convict a defendant based on the uncorroborated evidence of an accomplice but if such evidence of an accomplice is the only evidence implicating the

\textsuperscript{18} Ibid, 198(2)
defendant, the judge has a statutory duty to warn himself as to the danger of convicting the accused based on such evidence. The consequence of a breach of this statutory duty imposed in a judge is that the conviction of the defendant will be quashed on appeal unless it occasioned no miscarriage of justice. The case of Zakari v The Nigerian Army\(^\text{19}\) is instructive as to the interpretation of section 198(1). In this case, the appellant, an ex-captain of the Nigerian army, arrested a member of staff of Chayoma Ventures Ltd following a tip-off that the company was used for illegal business. The member of staff was handed over to Mr Isaac Odibo(PW 1) who was a customer engineering manager with instructions to investigate the file of Chayoma Ventures Ltd. Later on, Mr Isaac Odibo gave him an envelope which contained the sum of 40,000 naira, an amount given to the appellant by the managing director of Chayoma Ventures Ltd. The Nigerian army, in the belief that the amount was given to the appellant as gratification for the release of the arrested member of staff of Chayoma Ventures Ltd, convened a court martial where the appellant was charged with the offence of “conduct prejudicial to service discipline”. Mr Isaac Odibo was called as a witness for the prosecution. At the conclusion of the trial, the court martial convicted the appellant. On appeal, one of the issues that arose was whether the PW1 was an accomplice, and if he was. Whether the appellant could be convicted based on his uncorroborated testimony. The Court of Appeal, per Okoro JCA stated that assuming the PW1 was an accomplice, the court martial still had the power to convict the appellant based on the uncorroborated evidence of the PW1 because section 198(1) provided that the reliance on such evidence to convict is not illegal. The court however noted that it is safer for the court to insist on some corroboration where available in view of the proviso to the sub-section.

(c) Cases where neither corroboration nor warning is required by statute but the courts demand corroboration as a matter of practice: for some other offences, the courts as a matter of practice demand corroboration, though a conviction could be based on the

\(^{19}\) (2012) 5 NWLR (Pt. 1294)
uncorroborated testimony of the complainant. Those offences are usually sexual offences. In Lucky Jacob v The State\(^{20}\), the accused was charged with rape. One of the issues for determination was whether the prosecution had proved its case beyond reasonable doubt. The defence argued that as the evidence of the PW2 was not corroborated the prosecution couldn’t have proved its case beyond reasonable doubt. The court held that though it was desirable in an offence such as rape that the evidence of the victim be corroborated, it was not mandatory and if the trial judge, having exercised caution and considered the entire evidence of the accused, believes the evidence of the prosecution to be credible, the accused could be convicted.

**The Evidence of an Accused\(^{21}\) Implicating a co-accused under section 199 of the Evidence Act**

Section 199 of the Evidence Act provides as follows:

> Where defendants are jointly charged and any of them gives evidence on his own behalf which incriminates a co-defendant the defendant who gives such evidence shall not be considered to be an accomplice.

The above section forms the fulcrum of this work. Before going to the nitty-gritty of this section, it is worth noting that for a defendant to come within this section, he must not only be tried jointly with another defendant or other defendants but must “give evidence on his own behalf”. The rule as to “giving evidence on his own behalf” must be distinguished from two other situations that may occur when defendants are tried jointly. The first situation is contained in section 29(4) of the Evidence Act. It states that “where more persons than one are charged jointly with an offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, the court shall

\(^{20}\) (2014) LPELR-22740 (CA)

\(^{21}\) In this work, the term “accused” is used synonymously with “defendant”
not take such statement into consideration as against any of such persons in whose presence it was made unless he adopted the said statement by words or conduct”. This provision contemplates a situation where an accused has given evidence where an accused has made a confessional statement which implicates his co-accused. It has been long recognised by the courts that such a statement cannot ground the conviction of a co-accused unless the co-accused adopts the statement. In Yahaya v The State,\textsuperscript{22} the appellant, along with three other males, was charged with conspiracy to commit felony and other offences. At the trial court, his conviction was largely based on the confessional statement of his co-accused. Aggrieved with the decision of the trial court, he appealed to the Court of Appeal. The Court of Appeal, after restating the established law that an accused cannot be convicted on the confessional statement of a co-accused unless adopted, set aside the decision of the trial court. In Joseph Olanrewaju v The State, however, the appellant had “tacitly adopted the confessional statement of the co-accused by his own confession stating the particular role he played in the commission of the crime.”\textsuperscript{23} His conviction was consequently affirmed by the Court of Appeal.

The second situation which is not contemplated by section 199 of the Evidence Act is when a defendant makes a statement to the police which, though not a confession by any means, implicates a co-defendant. In this case, though the statement made by the statement made by the defendant implicates his co-defendant and is not a confessional statement, it cannot be used against a co-defendant by the judge because it is not a statement made when the defendant “gives evidence on his own behalf”. And as it is with a confessional statement, it must be adopted by the co-defendant. In Ozaki v The State,\textsuperscript{24} the trial judge relied on the statement of the 2\textsuperscript{nd} appellant made to the police in convicting the 1\textsuperscript{st} appellant. At the

\textsuperscript{22} (2014)LPELR- 24083 (CA)
\textsuperscript{23} (2014) LPELR- 23811 (CA)
\textsuperscript{24} (1990) 1NWLR, Pt 124, Pg 92
Supreme Court, the action of the trial judge was condemned in very strong terms. Obaseki JSC (as he then was), who read the leading judgement, stated:

> It is an error in law to convict an accused on the statement of another accused to the police. It is a travesty of justice and gross violation of all known rules of evidence.

In Dele v The State, the Court of Appeal, affirming this position of the law, stated:

> It is the law that a statement of a co-accused is different and distinguishable from his evidence in court. A statement made by an accused person remains his statement and not his evidence and it is binding on him only. Where the prosecution intends to use the statement against the co-accused, a copy of the incriminating statement must be made available to him.

**The Necessity or Otherwise of Corroboration or a Warning in Respect of the Evidence of a Defendant under Section 199 of the Evidence Act**

The jigsaw puzzle in section 199 is however finding the true intention of the draftsman who has stated that a defendant under section 199 “shall not be considered to be an accomplice”. The phrase apparently does not yield itself easily to interpretation. The meaning of an accomplice and the treatment of his evidence has already been discussed. But the question which inescapably arises in construing section 199 is the extent of the section. What is the scope of section 199? Does it absolutely exempt a defendant from the definition of an accomplice under section 198(2) or absolutely exempt him from the requirement of section 198(1)? Its lack of clarity notwithstanding, two things with respect to section 199 are undoubtedly clear and free of controversy. The first is that it is not aimed at turning an alleged accomplice into a novus homo or, as Bairamian JSC (as he then was) stated in Ukut & others v The State (supra), it was not meant “to promote an incriminating defendant to a spotless angel or endue him with a nimbus of immunity”. It does not provide that a defendant

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25 (2015) LPELR- 24296 (CA)
26 New man
who is accused of being a party to an offence shall not be an accomplice in all circumstances but only for a particular purpose. Thus, section 199 does not make a defendant who is allegedly an accomplice suddenly fall outside the definition of an accomplice under section 198(2) for the sole reason that his evidence implicates a co-accused. He may still be convicted as an accomplice within the definition in section 198(2) if from the evidence before the court he comes within that definition. The consequence of regarding a co-accused under section 199 as an accomplice for all purposes was vividly stated by Bairamian JSC (as he then was) in Ukut & Others v The State(supra):

One of the learned counsel suggested that subsection (2) (now section 199) ought to be read independently and literally. That, however, leads to results that are both impossible and absurd. For example, if a defendant gives evidence to the effect that he was an accomplice, it becomes impossible to regard him as anything else. Again, if at one stage the trial judge treats a defendant as not being an accomplice and later solemnly pronounces that he was one by convicting him, the judgement becomes inconsistent and illogical.

Also, the particular purpose section 199 seeks to achieve relates to the statutory duty imposed on a judge in section 198 (1) to warn himself. Thus, the opinion of Hubbard J. in Oriaku and Another v Police\(^{27}\) that the words “shall not be considered to be an accomplice” ought to be read as meaning that a defendant shall not be considered an accomplice merely because his evidence incriminates a co-defendant but if the court finds him guilty and the case against the co-defendant rests on his evidence, then corroboration is necessary for his evidence is that of an accomplice was rightly rejected in Ukut v The State (supra).

The real question that has eluded a unanimous answer is, therefore- how far has section 199 discharged a judge from the duty to seek corroboration or warn himself with respect to the

\(^{27}\) (1952) 20 NLR 74
One of the first Supreme Court cases to consider the effect of section 199 on the necessity of corroboration or a warning is the case of R v Agbeze Onuegbe. In this case, the four appellants and one Ejembi were charged with murder. A nolle proseque was entered in respect of Ejembi, who later gave evidence for the prosecution. On the evidence he was clearly an accomplice. The first appellant gave evidence in his own defence and while doing that incriminated the other appellants. The Federal Supreme Court held that while the evidence of Ejembi needed corroboration or a warning, that of the first appellant did not need a warning. The Court went on to say as follows:

It has long been held in England that the necessity of administering such a warning only applies in the case of an accomplice who is called as a witness by the prosecution....Section 177(2) of the Evidence Ordinance (now section 199 of the Evidence Act 2011) merely enshrines in legislation a principle of law which, as already said, has over a long period prevailed in England. The wording of the subsection is precise and unambiguous and it is the duty of the courts to expound those words in their natural and ordinary sense. In our view, the subsection means what it says, and it necessarily follows that the necessity of administering a warning which arose in the case of the evidence of Ejembi Edache, did not arise in the case of the evidence of the co-accused, Agbeze Onuegbe.

The court went further to state:

The learned trial judge construed the section as leaving the court with a (sic) discretion as to whether or not it should administer a warning in such a case. If the legislature had so intended it would, no doubt, have said ‘it shall not be obligatory upon the court to consider such a person an

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28 (1957) 2 FSC 10
accomplice’, but it did not, it said ‘shall not be considered to be an accomplice’. In saying this, we trust that it will not be thought we mean to convey that it is not open to a trial it is not open to a trial court to reject the evidence of a co-accused on some other grounds, for example, that it does not believe the witness.

In essence, the court was of the opinion that section 199 directs a judge not to give a warning in the case of a co-accused or seek corroboration of a co-accused’s evidence; provided he believes the evidence of the co-accused or it’s not inadmissible on some ground.

However, eight years later, the Supreme Court in Ukut & Others v The State (supra) disagreed with this line of reasoning. Bairamian JSC, who read the judgement of the court, stated:

Subsection (1) (now section198) imposes a statutory duty on the trial judge to warn the jury (or himself as the jury) that it is unsafe to convict solely on the uncorroborated evidence of an accomplice, although they have the right so to do if they wish.... Subsection(2) exempts the judge from that statutory duty in the case of a defendant who testifying on his own behalf in a joint trial incriminates a co-defendant; that duty does not extend to him, and the omission to give that warning in his case does not necessarily carry that consequence.

After quoting the dictum of the Supreme Court in R v Onuegbe(supra), the court held that it “must desist from that interpretation”. The court reviewed authorities which decided that since an accomplice, whether as the prosecution’s witness or as a co-defendant, had an interest to serve, the trial judge ought to warn himself as to the danger of convicting an accused on the uncorroborated evidence of a co-accused. The Supreme Court stated that the interpretation given by the Supreme Court in R v Onuegbe ran counter to “a number of English decisions- for example Meathheld, Garland, Rudd....” and this was the result of
interpreting section 199 in isolation, that is, without reference to section 198. It concluded as follows:

Thus, it is prudent for the trial judge to remind the jury or himself of the need for caution in regard to any witness, including a defendant, who has an interest to serve. Subsection (2)(now section 199) does not debar the judge from treating a defendant’s evidence as the facts of the case may require. There is no hard and fast rule, but a judge is expected to act with good sense, and the appellate court may think that his lack of caution led to a substantial miscarriage of justice in a given case.

The court’s opinion in Ukut v The State (supra) can therefore be summarised as follows:

- Though a section 199 relieves a trial judge of the statutory duty to warn himself with respect to the evidence of an accused implicating a co-accused, the co-accused remains a witness with an interest to serve, being an accomplice.

- Owing to the fact that he is such witness, it is desirable that a court warns itself of the danger of convicting a defendant based on such uncorroborated evidence.

- Thus, a statutory duty may be absent but there still exists a judicial duty to give such warning.

The line between the opinions in Ukut’s case and Onuegbe’s case is very thin. While Onuegbe’s case says that the absence of a statutory duty of warning is the absence of a need for a judge to warn himself, whether by practice or otherwise, Ukut says the absence of a statutory warning does not prejudice the practice of warning for a judge must be wary of the evidence of a co-accused.
The opinion in Ukut’s case formed the foundation upon which the majority of subsequent decisions were built. In Oyediran v Republic\(^2^9\), the appellants were charged with forgery. The 1\(^{st}\) and 3\(^{rd}\) appellants gave evidence as to the part played by the 5\(^{th}\) appellant in the preparation of the forged payment voucher on which counts 5, 6 and 7 were based. There was no independent evidence of someone else corroborating the 1\(^{st}\) and 3\(^{rd}\) appellants evidence. The Supreme Court relying on the case of Ukut held that section 199 of the Evidence Act would not operate to avoid the necessity of corroboration of the evidence of a self-confessed accomplice. The court also stated that the trial judge having failed to consider that, the convictions of the appellants on counts 5, 6, and 7 must be quashed.

The Supreme Court was even more emphatic in Osarodian Okoro v The State (supra). The facts of that case are as follows: on the 10\(^{th}\) of December 1983, while PW 2 was in a nearby bush, he heard an unusual noise coming from the direction of his house. On proceeding to the road, he saw some people beating the deceased with fists, legs and sticks. When he asked the assailants to stop beating the deceased, they refused. When he attempted to physically stop them, he was violently pushed to the ground. The assailants consequently left, leaving the deceased on the ground. PW2 attempted to give the deceased first aid but he did not respond to the treatment. Shortly after, the deceased person’s brother came out of the bush and helped PW 2 to carry the deceased to the hospital. He subsequently died. Although there was evidence that the 6\(^{th}\) and 7\(^{th}\) accused persons were present at the place the crime was committed, there was no evidence as to the part they played in the assault of the deceased, they were discharged and acquitted. The court had only the case of the first accused person to consider. He found him guilty as charged. In sentencing the appellant to death, the court relied, inter alia, on the evidence of the 6\(^{th}\) and 7\(^{th}\) accused persons. His appeal to the Court of Appeal was dismissed. Hence he appealed to the Supreme Court. He contended that it was improper to convict him based on the testimony of the 6\(^{th}\) and 7\(^{th}\) accused persons. By a

\(^{29}\) (1967) NMLR 122 at 127
majority of 3-2, the Supreme Court set aside the conviction of the appellant. Karibi Whyte JSC, who delivered the lead majority judgement stated:

In Uku(t(supra), this court observed that notwithstanding that neither corroboration nor warning was necessary in relying on the evidence of a co-accused, caution was necessary in relying on the evidence because such witness has his own interest to serve. Thus, in Uku(t, the practice became established that though the evidence of a co-accused is not to be regarded as the evidence of an accomplice, it does require corroboration or warning. Obviously, a co-accused is a person who has his own purpose to serve. The evidence of such a witness, however, must be suspected and regarded with considerable caution....

The judicial attitude, therefore, despite the clear words of section 177(2)(now section 199) of the Evidence Act, is that although the evidence of an accomplice which requires corroboration, to be relied upon it was necessary to find corroboration outside the evidence of the accused persons.

The above decision undoubtedly informed the Supreme Court’s far-reaching dictum in The State v Onyeukwu\(^3\) to the effect that:

A statement of an accused person cannot be used as evidence against a co-accused, without corroboration. The evidence when not corroborated goes to no issue.

However, just when it seemed like the decision in Uku(t’s case had become firmly established, the Supreme Court reverted to the line of reasoning in R v Onuegbe(supra) in Ozaki v The State barely two years after the decision in Okoro v The State. Uwais JSC (as he then was) in Ozaki’s case stated:

Now since the 2\(^{nd}\) appellant did not testify as an accomplice but as a co-accused, his testimony could not have come within

\(^3\) (2004) ALL FWLR (Pt. 221) 1388
the ambit of section 177(1) of the Evidence Act (now section 198 of the Evidence Act 2011) and by virtue of the provisions of subsection (2) of section 177 of the Evidence Act (now section 199), the trial judge was not under any obligation to warn himself before accepting or acting on the testimony of the 2nd appellant.

Placing reliance on Ozaki v The State, the Supreme Court in Oyakhire v The State stated that while the court is expected to regard the evidence of an accused against a co-accused with circumspection, the law did not impose a duty on it to warn itself before convicting the accused.

Ononuju v The State (supra), the latest Supreme Court’s decision on section 199 of the Evidence Act, is, nevertheless, on the side of the reasoning in Ukut v The State (supra) and Okoro v The State (supra). In this case, the deceased and PW2, while travelling in a car, refused to stop at the police checkpoint where the appellant, the 4th, 5th and 6th accused were stationed. As a result of this, the appellant and DW 4, DW 5, and DW 6 allegedly shot at the deceased’s car and killed the deceased. At the trial court, the 4th, 5th and 6th accused while giving evidence stated that the appellant had shot the deceased. The trial judge, relying on the evidence of the co-accused persons, convicted the appellant. Aggrieved, he appealed to the Court of Appeal which dismissed his appeal. He further appealed to the Supreme Court. The Supreme Court, allowing his appeal, stated as follows:

Could the evidence of DW 4, DW 5 and DW 6 who are co-accused persons not have been corroborated? Could the learned trial judge not have warned or advised himself of the dangers in not seeking such corroboration? Learned counsel for the respondent has drawn the attention of this court to page 201 of the records where the learned trial judge warned or cautioned himself in these words, “I have painstakingly and

31 (2006) 15 NWLR (Pt 1001), Pg 163
cautiously considered the evidence of DW 1, DW 2, DW3, DW4, DW 5, and DW 6 who are co-accused persons in this case and whose portions of evidence incriminated some of the co-accused persons.” How “painstakingly” and “cautiously” has this self caution been? On appeal the lower court’s decision is that the evidence of DW4, DW5, DW6 being co-accused persons do not need corroboration and that the trial court is not bound to look for corroboration. Is this legal postulation sacrosanct and settled on the authorities?

The court went on to cite, with approval, the cases of Ukut v The State and Okoro v The State then concluded that the evidence of a witness who has an interest to protect must not be accepted without great caution.

Legal writers are similarly on either side of the divide. After a brief examination of the decisions in R v Onuegbe(supra) and some subsequent decisions, Aguda states that “ the conclusions to be drawn from all the cases is that the evidence of an accused person which incriminates a co-accused person requires no corroboration, neither does it require, as a matter of practice, that such a direction should be given to the jury, but the court is free to do so.” However, he failed to draw the distinction between the reasoning in R v Onuegbe and Ukut & Others v The State neither did he examine the case of Okoro v The State. Also, the decision in Ononuju v The State came after his work was published.

Nwadialo gives a very superficial analysis of the reasoning in R v Onuegbe and its adherents and thus failed to draw attention to the dichotomy with respect to section 199 of the Evidence Act.

Nweze, however, gives a detailed examination of divergent opinions surrounding the evidence of a defendant implicating a co-defendant. After reviewing the cases of Ukut, Malaiyi, and Okoro, he states that the above opinion in Aguda is not in accordance with the

33 F. Nwadialo, op.cit. Pgs 450-451
decision in Okoro v The State. Approving the decision in Okoro v The State(supra), he
describes it as the modern trend that has now become the toast of writers.\(^{34}\)

Akinseye is also in complete agreement with the decisions in Ukut v The State and Okoro v
The State. He states that he feels:

> Inclined towards the ‘modern approach’ of Karibi Whyte and
Agbaje JSC to the effect that in handling the evidence of a co-
accused which incriminates another accused, not only should
the judge apply caution and good sense, he should also warn
himself that it is unsafe to convict on the uncorroborated
evidence of a co-accused.

In other words, the evidence of a co-accused under section
177(2) (now section 199) of the Evidence Act should be
treated in exactly the same way as that of an accomplice under
section 177(1) (now section 198).\(^{35}\)

Recent commentators are however firmly behind the reasoning in R v Onuegbe. Atsegbua
states section 199 and concludes that:

> From the above subsection (sic), a co-accused is not an
accomplice; consequently, his evidence requires no
corroboration or warning required under subsection (1) of
section 198 of the Act. Such evidence must however be acted
upon with utmost caution.\(^{36}\)

Similarly, Imhanobe quickly states that there is no need for the court to observe the
mandatory statutory warning in the proviso to subsection 198(1) of the Act. However, he

\(^{34}\) C.C. Nweze, *Contentious Issues And Responses In Cotemporary Evidence Law In Nigeria*, Volume Two, 1st

Nweze, op.cit., Pg 157

states that in practice, courts are very cautious in convicting a defendant based on the uncorroborated evidence of a co-defendant.  

Hon, unlike the above writers, seems to be on the fence. After stating that neither a warning nor corroboration is necessary based on Ozaki v The State(supra), he concluded by saying that the “current judicial thinking is that uncorroborated evidence of a defendant against a co-defendant goes to no issue and does not relieve the prosecution of the duty to prove the guilt of such co-defendant beyond reasonable doubt.” In support of this, he cites The State v Onyeukwu (supra).

**The Right Path: Onuegbue or Ukut?**

The conflicting opinions with respect to the evidence of a defendant implicating a co-defendant are not surprising. Section 199 creates a judicial dilemma. The courts are faced with giving a literal but seemingly dangerous interpretation to section 199 on the one hand and interpreting it so as not to abolish the practice of warning or demanding corroboration even if no statutory duty to do such exists on the other. However, both Onuegbue and Ukut agree as to the following:

(a) The uncorroborated evidence of an accomplice by virtue section 198(1) may ground the conviction of an accused though the court must warn itself of the danger of doing such.

(b) Thus, corroboration is not *always* required with respect to the evidence of an accomplice and its necessity is determined by the facts of the case.

(c) Section 199 seeks to take away the statutory duty imposed on the judge to warn himself.

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From the above, it is incontrovertible that the evidence of an accomplice does not require corroboration. This has already been discussed earlier. It has also been earlier stated that a co-accused under section 199 is an alleged accomplice and the provisions of section 199 only distinguish him from an accomplice under section 198(1) when it relates to the warning requirement. Thus, for all other purposes a co-accused is one and the same as an accomplice as defined in section 198(2) and the first limb of section 198(1) certainly applies to him. From this analysis, it is unarguable that the evidence of co-accused under section 199 does not require corroboration in the same way the evidence of an accomplice does not require corroboration. The case of Okoro v The State (supra) was, with the greatest respect to the learned justices, therefore wrongly decided in so far as it held that the evidence of a co-accused requires corroboration. It represents an extreme interpretation of the dictum of Bairamian JSC (as he then was) in Ukut v The State(supra), for the case of Ukut did not deal with the necessity or otherwise of corroboration but the propriety of a judge failing to warn himself of the danger of convicting an accused on the uncorroborated evidence of a co-accused. Hence, Okoro v The State extended the dictum of Bairamian JSC (as he then was) to corroboration which it was not intended to apply to. Furthermore, the statement that “the judicial attitude therefore, despite the clear words of section 177(2) (now section 199), is that although the evidence of a co-accused incriminating another is not to be regarded as the evidence of an accomplice which requires corroboration to be relied upon, it was necessary to find corroboration outside the evidence of the accused persons” is, with respect, a contradiction. It also implies that there could validly exist a divergence between the provisions of a statute and the judicial attitude towards it. A subscription to this opinion would be a dangerous precedent, to say the least. This is because a judge is completely bound by the clear and unambiguous words of a statute, its defects notwithstanding. This is of course without prejudice to a judge’s unrestrained right to criticise it and make a loud cry for
change. In Amoshima v The State, 38 the trial judge found the accused guilty of armed robbery and consequently sentenced him to death. At the Supreme Court, the accused argued, inter alia, that the trial court was wrong in sentencing the accused to death, despite the clear words of section 1(2) (a) and (b) of the Robbery and Firearms(Special Provisions) Act which provides for a death penalty for armed robbery. Counsel for the accused argued that the constitution vests the courts with unmitigated inherent powers and that the discretion in sentencing is an inherent part of the constitutional functions and powers to be exercised by the court, the Supreme Court, dismantling this argument, stated:

It is trite law that whereas it is the duty of the legislature to enact laws, that of the judiciary is to interpret the laws so made. It follows therefore that where there is dissatisfaction with the state of the law as it exists, and a desire for a change thereof is expressed by the people, it is the duty of the legislature which made the law in the first place to effect the needed reforms by amendment thereto. The duty to make and amend laws so made belongs, exclusively, by constitutional arrangement, to the legislature as provided under section 4 of the constitution of the Federal Republic of Nigeria, 1999.

The case of B.M. Ltd v Woermann-Line and Umarco(Nigeria) Plc 39 is a textbook illustration of the dictum of the Supreme Court above. In this case, the appellant sued the respondents for the value of the appellant’s consignment of goods short-delivered by the respondents and incidental expenses incurred by the plaintiff as a result of the defendant’s negligence and loss of profits on the goods. The claim of the appellant was based on a bill of a lading in which the appellants was not named as a consignee nor an endorsee but was merely a notify party. However, the appellant had paid the freight and the cost of the goods. At the trial court, it was held that the appellant had no locus standi

38 (2011) 6 iLAW/SC.283/2009
to institute the suit as section 375(1) of the Merchant Shipping Act provided that only a consignee or endorsee of the bill of lading named in such bill could sue on it. Dissatisfied, the appellant appealed to the Court of Appeal which upheld the decision of the trial court. Still dissatisfied, the appellant appealed to the Supreme Court. At the Supreme Court, the appellant argued that previous decisions of the Supreme Court holding that a notify party had no locus standi to sue on a bill should be overruled. Dismissing the appeal of the appellant, the Supreme Court, per Adekeye JSC (as she then was) stated as follows:

Since the issue of locus standi on the bill of lading derives from section 375(1) of the Merchant and Shipping Act, and is thereby statutory, it requires a radical change in the law- which is a legislative act.... Where the cases are based on legislation or statutes it obviously requires an amendment to the particular statutes to overrule such cases. I, however, encourage the learned counsel for the appellant to continue to lead the crusade for a change in that particular statute so as to eradicate any inherent injustice in implementing section 375(1) of the Merchant Shipping Act, 1990.

Likewise, the Supreme Court in Okoro v The State should have called for an amendment of section 199 of the Evidence Act if it was of the opinion that it was unjust.

It is also submitted that the statement that the evidence of a co-accused or an accomplice can ground the conviction of an accused without corroboration provided the judge warns himself is the rule and not the exception. The implication of this is that it is not the law that a judge should first look for corroboration when a co-accused or accomplice gives evidence and when he does not find it he can then consider whether it is safe to convict the accused on such evidence. Rather, the judge should consider the evidence of a co-accused or accomplice with no presumption that it ought to be
corroborated and if it is not corroborated, he should then make the statutory warning, having already cautiously examined the entire facts of the case. In Ononuju v The State (supra), Alagoa JSC stated as follows:

I must not be misunderstood as saying that corroboration is always necessary. That would be tantamount to unilaterally changing the true position of the law which I neither have the competence not the desire to do.

This statement, with respect to the learned justices, wrongly presumes that corroboration is necessary but not always necessary. The position should however be that corroboration is not necessary provided the judge warns himself on the danger of convicting the accused on such uncorroborated evidence. An approach such as this will help a trial judge avoid the temptation of immediately looking for corroboration and, consequently, hold that such evidence requires corroboration at arm’s length. This will be in accordance with the intention of the legislature.

The necessity or otherwise of a judge warning himself presents a trickier situation and that is where the opinions in Onuegbe and Ukut actually conflict. To piece the puzzle of warning together, the history of the obligation to warn is relevant. The obligation to warn traces its roots to trial by jury in England. At the time, it was usual for a judge to warn the jury of the danger of convicting an accused on the uncorroborated evidence of an accomplice. This was a way of telling the jury, in informal terms, “be careful, you know he can lie to save his head.” In R v Baskerville (supra), it was firmly established as a practice by the English courts. Over time, it became an established rule of law. However, the English common law had placed a premium on the warning requirement. In its rigidity, the common law deemed a warning by a judge to be evidence of caution
by the jury, rather than evidence of a direction to be cautious. In Davies v DPP,\(^4\) the
defunct House of Lords stated:

Where the judge fails to warn the jury in accordance with this
rule, the conviction will be quashed even if in fact there be
ample corroboration of the evidence of the accomplice, unless
the appellate court can apply the proviso to section 4(1) of the
Criminal Appeal Act, 1907.

The above dictum glaringly defeats the purpose for which the rule was made. If the sole
aim of the warning requirement is to ensure caution in the absence of corroboration,
why would a conviction be quashed when a judge fails to warn himself, even when
ample corroboration- the absence of which gave rise to a warning in the first place- is
present? Apparently, the common law had placed more value on the lesser than the
greater. It is possibly in view of this fact that the warning requirement was abolished by
section 32(1) of the Criminal Justice Act.

In the Nigerian legal system, The Evidence Ordinance of 1943, having been largely
based on Stephen’s Digests of the Law of Evidence (a codification of the English
common law on evidence), retained the warning requirement. Subsequent Evidence
Acts, including the present one, did not do otherwise and a judge is directed to warn
himself in light of the abolishment of trial by jury. The continued existence of the
warning requirement is retrogressive. The present Evidence Act need not have directed
a judge to remind himself to be wary of the evidence of an accomplice in the words “the
court shall direct itself that it is unsafe to convict any person upon such evidence” in the
absence of a trial by jury. It should have directed a judge to be cautious by stipulating
that a judge shall “exercise caution before convicting any person upon such evidence.”
This would have prevented the rigid interpretation under the common law as seen

\(^4\) Cited by Bairamian JSC in Ukut v The State(supra)
above. Regrettably, the Nigerian courts have slavishly adopted the common law position. Instead of giving the warning requirement a purposive interpretation, they have likewise interpreted it as being identical with caution and not a reminder that a judge must be cautious. In Nwanchi v The State (supra), the Supreme Court adopted the above dictum in Davies v DPP and that has since been the law.

The obligation on a judge to warn himself is most certainly an obligation to remind himself that he has to be careful considering that one accused person is likely to be tempted to exculpate himself at the expense of his co-accused. It is not by any stretch of the imagination evidence of caution. For a judge may very well exercise caution without literally warning himself of the danger of convicting an accused based on the evidence of a co-accused and may fail to be wary of such evidence despite literally warning himself from the record of proceedings. A warning is only effective if after such warning, the trial judge goes on to critically examine the case to see whether it is safe to convict the accused; it is suo moto ineffective. The proper approach to the issuance of warning was stated in Batiri and Anor v Police:\textsuperscript{41}

\begin{quote}
The proper approach is not for the court to say I may convict if I warn myself that it is unsafe to convict, but to say: it is unsafe to convict on uncorroborated accomplice evidence; can it be safe to convict on the uncorroborated evidence of this accomplice? And the trial court must not convict unless it sees clearly that it can safely do so in the particular case.\textsuperscript{42}
\end{quote}

Thus the proper approach is twofold: (a) a literal warning by the judge and (b) an exercise of caution by the judge by ensuring he “sees clearly that it can safely do so in the particular case” In addition, the courts, both the trial court and the appellate courts,

\textsuperscript{41} (1968) NMLR 448
\textsuperscript{42} Page 40
must bear in mind as earlier noted that (b) above is far more important than (a) which is only imperative because the statute uses the words “shall direct itself that it is unsafe”.

The failure of to appreciate the true intention of the warning requirement and the adoption of the common law’s rigid attitude of treating the warning requirement as identical with caution are, it is submitted, what caused the divergence between the opinions in Onuegbe’s case and Ukut’s case. A closer examination of the decision in Ukut shows that the court had misinterpreted the dictum in Onuegbe’s case. The Supreme Court in Ukut disagreed with the opinion in Onuegbe’s case which was to the effect that a judge should not warn himself as to the danger of the evidence of an accused implicating a co-accused. It interpreted this opinion as a direction that caution should not be exercised by the judge. But this was borne out of the misconception that the absence of a warning by a judge is the absence of caution rather than the absence of literal reminder to exercise caution. Barring this misconception, the Supreme Court in Ukut would have had no reason to disagree with the reasoning in Onuegbe v The State. Instead, it held that the court had misinterpreted section 199 by interpreting it in isolation to section 198(1) which had the disastrous effect of a co-accused not being an accomplice in all circumstances. A scrutiny of the dictum of Onuegbe v The State, however, shows that the court had adverted its mind to the fact that section 199 was enacted in relation to section 198(1). The trial judge in Ukut’s case, who purported to follow the principle in Onuegbe’s case, also gravely misinterpreted the reasoning in Onuegbe’s case to mean that a co-defendant under section 199 shall not be considered to be an accomplice in all circumstances. The Supreme Court in Onuegbe v The State was also explicit to the fact that though a judge should not warn himself, he must exercise caution as a judge would normally do. For as it categorically stated: “in saying this, we trust that it will not be thought we mean to convey that it is not open to a trial court to reject the evidence of a co-accused on some other grounds, for example,
that it does not believe the witness.” Thus, the court indicated that a judge must exercise caution by analysing the whole evidence before it and if for any reason the evidence of an accused implicating, it has the duty to reject such evidence. This caution which must be exercised by a judge is regardless of the presence or absence of a warning. The cases of Ukut v The State and Ononuju v The State, the foremost authorities on the obligation of a warning, ironically, illustrate this fact. In Ononuju v The State (supra), the Supreme Court observed that the 4th, 5th and 6th accused persons had made a completely different statement to the police without implicating the appellant only to change it while giving evidence in court. They were therefore clearly not trustworthy witnesses and the Supreme Court was absolutely right in holding that the conviction of the appellant should not have been based on their evidence as their honesty was seriously in question. However, the trial judge’s error was not borne out of his failure to state on the record of proceedings that he had warned himself, as the Supreme Court implied. For even if he had done so, he could have, nonetheless, failed to attach little value to the evidence of the 4th, 5th and 6th accused persons due to their inconsistency. His lack of caution was therefore evidenced by his poor examination of the evidence of the accused persons as contained in the record of proceedings. Also, in Ukut & Others v The State, the 1st and 4th defendants were convicted based on the evidence of defendant No 2 and defendant No 6 who were defendants. However, their evidence as to burglary was corroborated by that of the 10th prosecution witness, Hannah Inyang, who was in the house which was alleged to have been burgled by the 1st and 4th defendants and others. She stated in evidence that defendant No 1 and No 4 were two of the burglars and her rapists. She also mentioned the name of defendant No 1 to the police. The 13th prosecution witness, police constable Joel Osugwu, also gave evidence that Hannah had mentioned the 1st defendant’s name. The court, however, acquitted the 1st defendant of all counts including the offence of burglary which was corroborated. The court seemed to have
been clouded by the presumption that the judge was not wary due to his failure to warn himself. However, corroboration was present with respect to the charge of burglary and the requirement of warning should not have been extended to the charge of burglary. Also, the presence of such corroboration should have been eloquent evidence of the trial judge’s caution with respect to the charge of burglary.

The departure from the reasoning in Onuegbe’s case by the Supreme Court in Ukut’s case in preference for the rule that a warning with respect to the evidence of a co-accused still subsists by practice despite the abolishment of the statutory duty to warn is, it is submitted, in conflict with section 199. The mischief sought to be suppressed by section 199 is, without doubt, the establishment of a warning requirement with respect to the evidence of a co-accused implicating an accused. It seeks to limit the warning requirement to only situations where an accomplice is a witness for the prosecution and not otherwise. It should thus be interpreted ut res magis valeat quam pereat. In the English case of Noakes v Doncaster Almalgamated Collieries Ltd, Viscount Simon L.C. stated that:

> Where there are two choices of interpretation, the courts must avoid the choice which would reduce the legislation to futility and should rather accept the other choice on the principle that the legislature would legislate only for the purpose of bringing about an effect.

This dictum was quoted with approval by Aniagolu JSC in Ifezue v Mbadugha. Unavoidably, the establishment of such practice has given rise to many questions difficult to answer. Assuming that such a practice is valid, as the courts have stated, what is the legal consequence of a failure to follow such practice? Will the conviction of

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43 That is, in such a way the intention of its provisions shall have effect rather than be inefficient.
44 (1940) A.C. 1014 at 1022
45 (1984) 5 S.C. 79
the accused have to be quashed despite the provisions of section 199? If it won’t, what is then the legal significance of such a practice? It is no wonder that the courts which affirm a requirement of warning by practice have resorted to quashing the conviction of the accused in the event of a failure by a judge to warn himself as a matter of practice. Clearly, the enthronement of a practice of warning as the Supreme Court in Ukut’s case impliedly did is tantamount to affirming the unambiguous words of section 199 and turning around to frustrate its object, which is the abolishment of the warning requirement in respect of the evidence of a co-accused implicating an accused. This is more so when it is realised, as explained above, that the absence of a warning is merely the absence of a direction to be cautious not necessarily the absence of caution itself. Moreover, as pointed out by the Supreme Court in Onuegbe’s case, the word “shall” used in section 199 is mandatory. In Federal University of Technology, Akure & Anor v ASUU, the Court of Appeal, per Gumel, JCA, held that “shall” “is a word of command which must be given an obligatory meaning as denoting compulsion and has the invaluable consequence of excluding the thought of discretion....” Therefore, to establish a requirement of warning under any guise would amount to tearing apart the clear words of section 199.

**Conclusions and Recommendations**

Having painstakingly analysed the evidence of an accused implicating a co-accused under section 199, the following conclusions can be drawn:

(a) A co-accused under section 199 is not an accomplice for all purposes.

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46 (2013) LPELR-20323(CA)
(b) He is only deemed not to be an accomplice only for the purpose of the statutory requirement in section 198(1).

(c) The question as to necessity or otherwise of corroboration of the evidence of a co-accused under section 199 does not arise as it has been clearly answered by section 198(1).

(d) The obligation to warn is an obligation to direct oneself to be careful and not evidence of caution.

(e) Such a warning has been abolished under section 199 of the Evidence Act.

(f) Nevertheless, a court must exercise caution for the evidence of a co-accused is that of a tainted witness, that is, a person who has his own interest to serve.

(g) Such caution is evidenced by an analysis of a trial judge’s entire examination of the pieces of evidence before him, not by a literal warning of himself.

(h) There cannot be a practice of warning in the light clear provisions of section 199 and the inescapable consequences that follow such a practice.

In view of the above conclusions, it is recommended that the Supreme Court should depart from its reasoning in Ukut and Others v The State, Okoro v The State and Ononuju v The State in favour of the reasoning in Onuegbe’s case and should seek evidence of caution, not in a mere sentence whereby the judge warns himself in the record of proceedings but from a total examination of the record of proceedings.

A lasting solution is, however, legislative reform. Thus, it is also recommended that, regardless of a change in the present judicial attitude as recommended above, the legislature should amend section 198(1) to bring it in tandem with a more modern approach by substituting the words “direct itself that it is unsafe to convict any person upon such evidence” for “exercise caution before convicting any person upon such evidence.” Section 199, in consequence of this, should then be deleted to avoid an excluding an accused’s
evidence which implicates a co-accused from being treated with caution. With this, every doubt as to the true intention of the legislature will be dispelled.