

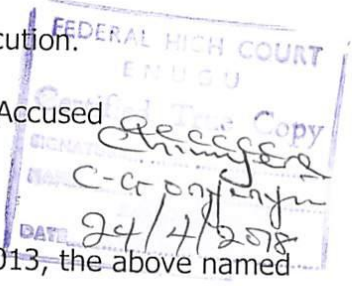
**IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU
ON FRIDAY THE 17TH DAY OF JANUARY, 2014
BEFORE THE HONOURABLE JUSTICE M. L. SHUAIBU**

CHARGE NO: FHC/EN/CR/15/2013

BETWEEN:

**FEDERAL REPUBLIC OF NIGERIA - COMPLAINANT
AND
AGHA MONDAY - ACCUSED**

J. A. OJOBANE (with M. A. Ekwu) for the prosecution.
E. N. Onyibor (with Chidiogo Edum Miss) for the Accused



JUDGMENT

By the charge dated the 10th day of April, 2013, the above named Accused person was arraigned on a four counts charge of conspiracy to obtain money by false pretence and obtaining various sum of money by false pretences contrary to sections 8 (a), 1(1) (a) and punishable under section 1 (3) of the Advance Fee Fraud and other Fraud Related Offences Act, 2006.

The prosecutions called four (4) witnesses and tendered Exhibits A, B, C series, D series, E, F series, G series, H and H1, J, K and K1, L and M series. The Accused also testified in his own defence but called no other witness.



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The respective counsel filed and adopted their final written addresses. In his final written address Learned defence counsel Mr. Onyibor identified the following issues:-

- A) Whether it is appropriate from the facts and circumstances of this case for the prosecution to have included the charge of conspiracy (court I) when he has no distinct evidence to prove same than the one he has in proving the substantive offences in counts 2, 3 and 4.
- B) Whether count 2 has been proved beyond reasonable doubt considering the evidence before the court in proving same.
- C) Whether Exhibit "M" series are not bound to be disregarded in consideration of the Judgment of this Court same having being admitted through inchoate trial within trial.
- D) Whether count 3 and 4 have been proved beyond reasonable doubt.

Respecting issue number one, it was contended that it is inappropriate for the prosecution to have included the charge of conspiracy (Count I) when there is no distinct evidence to prove same than the evidence in prove of the substantive offences. Reliance was placed on CLAKE -V- STATE (1986) 4

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NWLR (part 35) 381 at 401 and AIYEOLA –V- STATE (1969)1 ALL NLR 303. Further RELIANCE WAS PLACED ON ABACHA –V- STATE (2002) 9 MJSC 1 at 11 to the effect that the best evidence of conspiracy is usually obtained from one of the conspirators or from inference and that there was none in the instant case also relying on OGUGU –V- STATE (1990) 2 NWLR (part 134) 539.

On issue number two, the defence contended that the prosecution is duty bound to lead credible evidence in proof of each count and that from the evidence of PW1, same clearly shows that he was not sure of the person he gave the N350,000. Thus, the doubt should be resolved in favour of the Accused person. Relying on ORJI –V- STATE (2008) 6 MJSC 169 at 172, KALU –V- STATE (1988) 4 NWLR (part 90) 503 and NNOHN –V- STATE (1989) 3 NWLR (part 283) 569.

It was contended that parties were not allowed to address the court after the evidence led at the trial within trial and that led to a wrongful admission of Exhibit "M" series. Reliance was placed on OLUKAYODE –V- ALADE (1976)2 SC 183 to the effect that where a court wrongfully admit in

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admissible evidence it ought to disregard the inadmissible evidence in the consideration of the Judgment in the matter.

The court was further urged to disregard Exhibit "M" series as there is no independent evidence outside what is contained in it to establish Exhibit "M" or a corroborative evidence outside Exhibit "M".

It was contended that all the evidence in regards to account 3057250855 for First Bank are hearsay as none of the ATM cards recovered from the Accused relates to the said account. And that the passport in Exhibit H and H1 are not the same. Thus, it was submitted that the prosecution has not prove count three of the charge relying on OLU DOTUN -V- STATE (2010) 15 NWLR (part 1217) 490 at 500 to the effect that a court can not draw an inference of guilty from mere suspicion. Also the failure on the part of the prosecution to call a staff of First bank is fetal to its case.

Respecting count four, the defence contended that although the petitioner and Diamond Bank staff testified on behalf of the prosecution but there is no evidence before the court that can serve as a veritable aid for assessing the oral evidence of PW1, PW2 and PW3. In other words, the failure

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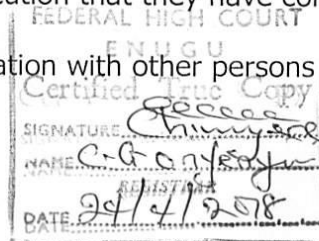
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on the part of the prosecution to tender the extra-judicial statements of PW1, PW2 and PW3 amounts to withholding evidence under section 167 (d) of the Evidence Act, also relying on OGBODU –V- STATE (1987)2 NWLR 21 in urging the court to discharge and acquit the Accused person.

Learned prosecuting counsel Mr. Ekwu on his part identified the following issues for determination and these are:-

1. Whether the prosecution has proved the offence of obtaining money by false pretence against the Accused person beyond reasonable doubt.
2. Whether the prosecution has adduced sufficient evidence linking the Accused person with the offence in count four of the charge.
3. Whether the prosecution has adduced sufficient evidence linking the Accused person with the offence in count three of the charge.
4. Whether the prosecution has adduced sufficient evidence linking the Accused person with the offence in count two of the charge.

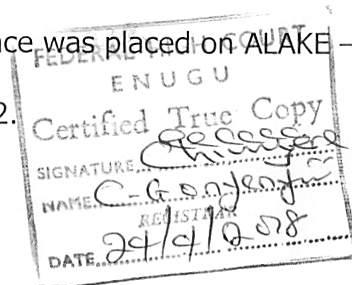
It was the contention of the prosecution that they have conclusively proved that the Accused had in collaboration with other persons induced PW1



with false pretence of awarding him a contract to supply NNPC Abuja with Electrical Ring purportedly used by NNPC pipeline protection and fraudulently obtained from him the cumulative sum of N805,500.00. That the ingredients of establishing the offence of obtaining money by false pretence includes the followings:-

- 1) There must have been a pretence
- 2) That the said pretence emanated from the Accused
- 3) That the said pretence was false.
- 4) That the Accused knew of the falsity or did not believe in its truth.
- 5) That there was intention to defraud
- 6) That the thing is capable of being stolen and
- 7) That the Accused induced the owner to transfer his whole interest in the property.

Thus, it was submitted that the evidence adduced by the prosecution has established the above elements. Reliance was placed on ALAKE -V- STATE (1991)7 NWLR (part 205) 567 at 592.



As to whether the prosecution has adduced sufficient evidence linking the Accused with the offence in count four, reliance was placed on the evidence of PW1 in which he stated how he was induced to pay N155,000.00 into a Diamond Bank account No 0022156386 with the Name Okoh Sunday. That PW2 said the said account 0022156386 with the Name Okoh Sunday Nnachi belonged to the Accused person as evident in Exhibits C and C1, the account opening package bearing the Accused's photograph. That also the evidence of PW3 has corroborated that account 0022156386 with the Name Okoh Sunday Nnachi belonged to the Accused person as he caused the arrest of the Accused while attempting to open another account with a different name ie Mpume Cletus using the same fictitious and non existing address. Therefore, the prosecution has established a nexus between the Accused and the allegation in count four of the charge.

It was also argued by the prosecution that from the evidence of PW1 and PW4, PW1 was induced into paying N300,000.00 into First Bank Account No. 3057250855 with the Name Cletus Odachi Mpume. That upon the analysis unto the said account, the particulars confirmed that the account was

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operated by the Accused. Thus, the documents alone suffice and that there was no need to call any of the Bank official.

On the allegation in count two the prosecution contended that it adduced sufficient oral and circumstantial evidence linking the Accused with the said allegation relying on section 125 of the Evidence Act and the case of OLADUN -V- STATE (2010) 15 NWLR (part 1217) to the effect that all facts except the content of documents may be proved by oral evidence and that circumstantial evidence is the best evidence in proving facts beyond reasonable doubt. And the court was finally urged to convict the Accused person as charged.

Replying on point of law Learned defence counsel submitted that for a circumstantial evidence to warrant conviction, it must be cogent and compelling and that there must be no aspect of the case which weakens or destroys any inference as to the guilt of the Accused person. Reliance was placed on ATANO -V- STATE (2005) 4 ACLR 25 at 30.

The issue arising for consideration in this case is simply –

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Whether or not the prosecution has proved the allegations contained in the four counts charge against the Accused person beyond reasonable doubt.

The elementary principle regarding the burden of proof is that generally. Criminal cases are proved beyond reasonable doubt because, in criminal cases, there is a compelling presumption of innocence which must be proved unless the evidence proves beyond reasonable doubt that the Accused was guilty of the offence charged.

As stated right from the onset that count one deals with conspiracy to obtain money by false pretence wherein, the Accused person together with others now at large conspired to obtain various sum of money from the nominal complainant. The nominal complainant who testified as PW1 gave graphic account on how he received a phone call from one Engineer Chris Ezea requesting him to supply Electrical Rings on his behalf to NNPC Abuja. The said Engineer Chris Ezea also introduced the nominal complainant via the telephone call to Engineer Benson Banigo, the Store Manager of Nigerian Brewery Ltd, 9th Miles, Enugu as regards the said supply of the Electrical Rings which was said to be with one Mr. Nwadike alias Papa.

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PW1 got in touch with papa and agreed at the cost of the ring. PW1 told Nwadike that he was coming to collect from him but the latter said, he was going to send his son with it to Enugu with the sample. And that he should go to I.M.T Bus Stop and wait which he did by also explaining his mode of dress for ease of identification. That someone came to him with a parcel containing some rings and he inturn gave the person the sum of N350,000.00. Meanwhile, Engineer Banigo who was to look for the Electrical ring called to tell him that he was with the Depot Manager at Enugu and later, the Depot Manager also called to confirmed that Banigo was with him and that they were reviewing the contract. And that since he was not registered with NNPC, he was given an account to pay N300,000.00 being registration with NNPC, Kaduna and that they were working with other colleagues at that end in order to facilitate the said registration. At the same time, Mr. Nwadike the purported store manager called to say he could not also collect goods from the Nigerian Brewery Ltd without registration which also cost N155,000. PW1 was given account numbers to pay both the N300,000 and N155,000 in the Names of Cletus Odachi and Okoh Sunday Nnachi at First Bank and diamond Banks respectively.

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It is imperative to note at this juncture that conspiracy as an offence is the agreement by two or more persons to do or cause to be done an illegal act or a legal act by illegal means. Thus, the actual agreement alone constitute the offence and it is not necessary to prove that the act has infact been committed. And because of the nature of the offence of conspiracy, it is rarely or seldom proved by direct evidence but by circumstantial evidence and inference from certain proved facts.

In OMOTOLA –V- STATE (2009) 7 NWLR (part 1139) 148 at 191 and 192 it was held that there must be an overt act from which to infer the conspiracy. Also where as in the instant case a person is charged with a conspiracy and with offence committed in pursuance of it, care must be taken in considering the conspiracy and to keep the several issues clear. See also OBIAKOR –V- STATE (2002) 10 NWLR (part 774) 612.

Learned defence counsel has made an allusion that it is inappropriate to charge conspiracy with the substantive offence when there is no distinct evidence to prove same. The Court of Appeal in CLARK –V- STATE (supra) being relied upon by the defence it was held that it is not the law that once

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conspiracy is charged in one count and the substantive offence is charged in another, the accused person is necessarily entitled to be acquitted on either count unless it is shown that the evidence in support of each count is distinct. Nonetheless, the principle of election is applied where there is an effective and sufficient charge of a substantive offence so that the addition of the charge of conspiracy become undesirable. At any rate, each case must be considered on its own merit. The Supreme Court held in OMOTOLA –V- STATE (supra) that is not the requirement of the law that a person charged with the offence of conspiracy to murder and murder must first be found guilty of conspiracy before he can be found guilty of the offence of murder. There was also a similar argument in BALOGUN –V- A.G. OGUN STATE (2002) 6 NWLR (part 763) 521 at 533 as to the propriety or otherwise of including a count for conspiracy to commit an offence in an information aswell as a count for actual committing it; where evidence to support the two counts is the same. It was held that such practice should be discouraged but where both counts are included, the conspiracy does not merge in the substantive offence.

Furthermore, a conviction for conspiracy does not become inappropriate simply because the substantive offence has not been successfully proved.

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This is because, conspiracy to commit an offence is a separate and distinct offence which is independent of the actual commission of the offence to which the conspiracy is related. Thus, the offence of conspiracy may be fully committed even though the substantive offence may be abandoned or aborted or may have become impossible to commit. In the instant case, the evidence of conspiracy to obtain money by false pretence is separable with that of obtaining money by false pretence. And I have held elsewhere in this judgment that conspiracy to commit an offence is quite often inferred from circumstantial evidence. It is very clear from the evidence of PW1 that the men ie Engr. Chris Ezea, Nwadike alias Papa, Engr. Benson Banigo both (at large) and the Accused person Agha Monday had a common purpose, namely, to obtain money from the nominal complainant by false pretence. That was precisely what can be inferred that they conspired to do.

The substance of the allegations in counts two, three and four of the charge was that the Accused and others at large obtained the sum of N350,000.=, N300,000.= and N155,000.= from the Nominal complainant by false pretences.



The evidence of PW1 was that he paid the N350,000 for the purported electrical rings while the N300,000 and N155,000 were meant to facilitates registration with NNPC, Kaduna and Nigeria Breweries Ltd respectively. Thus, the total money he paid was N805,000. Both in cash and through fund transfer.

The evidence of PW1 and PW2 both staff of Diamond were consistent with one another that the Accused person was the same person who owns account No. 0022156386 belonging to Okoh Sunday Nnachi in which the sum of N155,000.= was paid. The account opening packages in the said account as shown in Exhibit "C" series contained exactly the same information with the subsequent ones provided by the Accused in Exhibit D series except that in the former, the name was Okoh Sunday Nnachi while in the latter, the name was Mpume Odachi Cletus. The photograph is the same, telephone No the same as well as the residential address.

While cross examined PW2 emphatically stated that "the name in the previous driver's license is Okoh Sunday Nnachi while the name in the New Driver's license is Odachi Cletus Mkpume". Also in his evidence PW3 said "on

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sighting the necessary documents, ie 2 passports and driver's license I remember seeing the passports with the same address used earlier in opening the previous account". In an answer to the question put to PW3 in the course of cross examination he said:-

"The passport photos are the same with the previous ones but the name is different".

It is also pertinent to note that the findings in Exhibits K, K1 and L are that Driver's Licenses and the Utility bills presented by the Accused in opening the Account are not genuine and thus, did not emanate from the relevant organizations.

In her evidence PW4 said in the course of investigation she discovered that N155,000 was paid into Diamond bank account of the Accused person by the Nominal Complainant and also the sum of N300,000 was transferred from the complainant's account into the Accused's account. That she checked the utility bills and the driver's license used in opening the 2 accounts and discovered two different addresses. She visited the said addresses and found that they are fake and thus caused letters for investigation activities. PW1

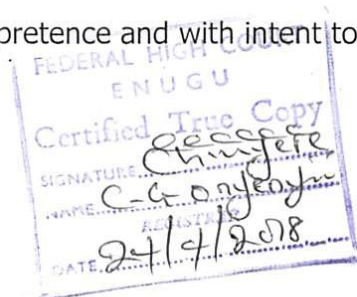
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also discovered that the Accused used the same passport photographs in opening all these accounts.

While cross examined, PW4 said the account No 3057250855 as shown in Exhibit H was the one in which the sum of N300,000 was paid and it is the same account in the petition Exhibit A. The court has also considered Exhibits H series which relates to account 3057250855 in question as well as Exhibit H1 relating to account 3044462713 which has no bearing with the charge before the court. In Exhibit H1, it contained the photograph of the Accused person with the account name of Cletus Odachi Mkpume as the sole signatory. Also contained in the said Exhibit H is the statement of account indicating that on 10th August, 2012, there was a fund transfer by Dr. Paul Ozioko of the sum of N300,000.00.

The provision of section 1 (1) (a) of the Advance fee fraud and Other Fraud Related Offences Act 2006 provides that –

1 (1) notwithstanding anything contained in any other enactment or law, any person who by any false pretence and with intent to defraud –



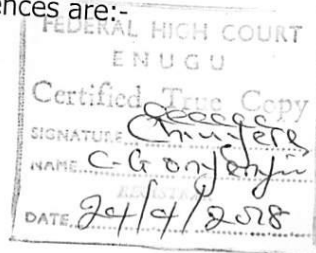
- (a) Obtains from any other person, in Nigeria or in any other country, for himself or any other person, or ...

Further in subsection (3) thereof, it provides –

- (3) A person who commits an offence under subsection (1) or (2) of this section is liable on conviction to imprisonment for a term of not more than 20 years and not less than 7 years without the option of a fine.

The burden on the prosecution as stated earlier on is to prove the guilt of the Accused person beyond reasonable doubt. Proof beyond reasonable doubt is not proof beyond shadow of doubt. Therefore, the degree of proof that would amount to reasonable doubt need not reach certainty; but it will carry a high degree of probability. In *NWANKWO –V- FRN* (2003) 4 NWLR (part 809) 1 at 35 – 36 it was held that once the ingredients of the particular offence the Accused person is charged with are proved, that constitutes proof beyond reasonable doubt. And in *ALAKE –V- STATE* (1991) 7 NWLR (part 205) 567 at 591 it was held that the ingredients of offence of inducing delivery of money by false pretences are:-

- (a) that there was a pretence,



- (b) that the pretence emanated from the Accused person,
- (c) that it was false,
- (d) that the Accused person knew of its falsity or did not believe in its truth,
- (e) that there was an intention to defraud
- (f) that the thing is capable of being stolen,
- (g) that the Accused person induced the owner to transfer his whole interest in the property.

In the instant case, the Accused person had falsely and fraudulently presented himself to the Nominal complainant as a result of which he obtained by false pretence the sums of N300,000, and N155,000 respectively. The Accused person knew that he is neither Okoh Sunday Nnachi nor Cletus Odachi Mkpume. As to the meaning of the word pretence, the Court of Appeal in ALAKE -V- STATE (SUPRA) defines it to mean the act of pretending or to make a person believe in a situation which in reality is not true. Also section 20 of the relevant Advance Fee Fraud and Other Fraud Related Offences Act, 2006 defines false pretence to mean a representation whether

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deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or law, either past or present, which representation is false in fact or law, and which the person making it knows to be false or does not believe to be true.

The totality of the evidence placed before the court in this case clearly shows that the Accused person has deliberately and recklessly made representation which he knows to be false and does not believe to be true at the material time of making it.

The defence has urged the court not to ascribe any weight to the evidence of PW4 in relation to count three of the charge. And that the failure to call official from First Bank is detrimental to the case of the prosecution. The court has held earlier that Exhibit H series clearly shows the Accused person to be the owner of the account in which the sum of N300,000 was transferred from the nominal complainant. After all a party needs not call numerous witnesses to establish his case. It suffice if he calls one witness whose evidence is credible enough to establish his case. In AGBI -V- OGBEH (2005) 8 NWLR (part 926) 40 at 134 it was held that credible evidence is

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evidence worthy of belief. And a piece of evidence is worthy of believe only when it proceeds from a credible source and is natural, reasonable and probative having regard to the transaction which it describes or to which it relates. PW4 was explicit that she got Exhibit H series consequent to the letters of investigation activities she wrote to the bank. Thus, the evidence of PW4 is worthy of believe as same proceeded from a credible source having regards to the circumstances to which it related. I am however, not unmindful to the answer to the question put to PW1 respecting the allegation in count two wherein he said "I handed over the sum of N350,000 to the person that gave me a ring. I am not sure if that person was the Accused in the dock". While reasonable doubt was cast in the guilt of the Accused person on the allegation in count two of the charge, the failure to call any of the First Bank officials did nothing to improve the clear oral and documental evidence of the prosecution witnesses in proving counts one, three and four of the charge.

As regards the admissibility of Exhibit "M" series, the Accused's extra-judicial statements , none of the parties indicated any interest in addressing



the court after the trial within trial. In any event, the address of counsel has never been a substitute to evidence.

In the light of the above, and considering the totality of the evidence of the prosecution, the allegation in count one, three and four of the charge have been proved against the Accused person beyond reasonable doubt. The court has nonetheless considered all the available defences open to the Accused person but none avail him. In effect, the Accused person is hereby found guilty as charged in count one, three and four but discharged and acquitted on count two of the charge as the doubt therein was resolved in his favour.

Sentence : The convict being a first offender is hereby sentenced to (7) seven years imprisonment on each of the 3 counts with effect from the first day of his arrest ie 26/2/13. And the sentence to run concurrently. The money Exhibits that is the sum N455,000.00 is to be released to the nominal complainant.

M. L. Shuaibu

M. L. SHUAIBU
JUDGE
17/1/14

