IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
ON MONDAY THE 4TH DAY OF FEBRUARY, 2013.
BEFORE THE HONOURABLE JUSTICE M. L. SHUAIBU
JUDGE

CHARGE NO. FHC/KD/28C/2008

BETWEEN

FEDERAL REPUBLIC OF NIGERIA - COMPLAINANT

AND

1. VALANTINE AYIKA
2. CLEMENT AYIKA
3. CALISTUS CHUKWUDEUBEM
4. RALPH ABATI

- ACCUSED PERSONS

JUDGMENT

By Amended Charge dated 17th July, 2007, the above-named Accused persons stood trial on various Counts of offenses under the Money Laundering (Prohibition) Act, 2004. At the trial, the Prosecution called five witnesses and tendered some documentary Exhibits. All the Accused persons gave evidence but called no further witness. In the end, their respective Counsel adopted their Final Addresses.

On behalf of the 4th Accused person, three issues were identified for consideration and these are:

1. Whether presentation and leading the same evidence for the multiple Charges of conspiracies and substantive offences against the 4th Accused person have not violated the Fundamental Rights of the 4th Accused person to Fair Hearing and Fair Trial and have not also vitiated the trial of the 4th Accused person in the above Charge?

2. Whether the evidence presented and led in proof of the Counts of Charges against the 4th Accused person in the above Charge, disclosed the ingredients and elements of the offences that the 4th Accused person is charged with in the said Counts of Charges?

3. Whether the Prosecution discharged the burden of proof beyond reasonable doubt in respect of the offences in the Counts of Charges against the 4th Accused person in the above Charge?

Respecting the first issue as formulated above, Learned Counsel, Mr. Okoye, submitted that out of the thirty Exhibits tendered, only **Exhibits "G", "H", "H1", "J", "J1", "J2", "L", "L1", "M", "M1", "M2", "N", "N2", "P", "P1", "P2"** and **"P3"** have relevance to the Charges against the 4th Accused person which are mainly respective statements of the Accused persons. The contents of these statements, according to Mr. Okoye, are the same evidence on which the Charges of conspiracies as well as the substantive offences which prejudice the 4th Accused. The consequential effect is that the 4th Accused was forced to defend himself four times over the same facts and evidence. The Court is equally put in a difficulty of evaluating same evidence for conspiracy and the substantive offences. Thus, it was submitted that same violates the Fundamental Rights of the 4th Accused, relying on Section 36(4) of the 1999 Constitution. Further reliance was placed on ***Mohammed Vs Kano Na (1968) ANLR 411*** and ***Ikonne Vs State (1981) 2 NCR 264*** to the effect that the Charge of conspiracy should not have been included with that of the substantive offence.

It was also submitted on behalf of the 4th Accused that the evidence led by the Prosecution respecting Counts 1, 2, 4 and 5 have woefully failed to disclose any of the ingredients of the Charges preferred against the 4th Accused person. Reliance was placed on ***Gbadamosi Vs State (1991) 6 NWLR (Prt. 196) 182*** and ***Shodiya Vs State (1992) 3 NWLR (Prt. 230) 457 at 472*** to the effect that for an act to constitute the conspiracies that the 4th Accused is charged with; must be such acts that are conclusively related to substantive Money Laundering Offences. Thus, the only acts of the 4th Accused person as related to the said counts of conspiracies either generally or as to substantive Charges of Money Laundering.

Learned Counsel, Mr. OKoye, contended further that the evidence that the 4th Accused person may have received the sum of USD400,000 from one Mathew Oluese, whose name was struck out from the Charge, and thereafter handed same over to the 2nd Accused, are unreliable and materially contradictory. Reliance was placed on ***Abubakar Ibrahim Vs State (1991) 4 NWLR (Prt. 186) 399 at 415*** and ***Attah Vs State (2010) 3 NJSC 139 at 161*** to the

effect that such contradictions should be resolved in favour of the 4th Accused person.

Assuming that the offences under Section 17 or 15 of the Money Laundering Act may be strict liability offences, the Prosecution still has to prove the *actus reus* or physical acts which the Prosecution did not do in respect of the 4th Accused person.

On whether the Prosecution has discharged the burden of proof beyond reasonable doubt against the 4th Accused, Mr. Okoye contended that the 4th Accused is charged with offences of making and accepting payments of USD400,000. Both PW2 and PW5 testified that the said monies were paid for by Captino Global Concept Limited, through the account of Captino Global Concept Limited in Spring Bank Plc where the 3rd and 4th Accused persons were Branch Managers. That the 1st and 2nd Accused persons are the signatories to the said account of Captino Global Concept Limited. PW2 and PW5 also admitted that it was two licensed Bureau de Change (Flash Securities and Currency Exchange), who were paid for the Dollars and who purchased from the Central Bank

of Nigeria and handed over to the said Mathew. Therefore, it cannot have been the responsibility of the 4th Accused to begin to inquire into the exact sums purchased by the 1st and 2nd Accused persons from licensed Bureau de Change and whether those financial institutions followed the appropriate rules in payments of the sum concerned. It was thus submitted that the 4th Accused person did not conspire with any one and neither made payments of or accepted payment of the Dollars in question. The Court was urged to discharge and acquit the 4th Accused person.

A similar submission was made by Mr. Okoye also on behalf of the 3rd Accused who was specifically charged on Counts 1 and 9, 2 and 10, all dealing with conspiracy to make and accept cash payments of USD400,000 and USD100,000 respectively. Counts 6 and 12 against the 3rd Accused relates to accepting cash payment and Count 13 deals with making cash payments of the said USD400,000 and of USD100,000.

It was submitted that the acts of the 3rd Accused do not disclose conspiracies either generally or as to the substantive

Money Laundering Charges. This is premised on the fact that the level of interaction between the 3rd and 4th Accused persons in the inquiries for a licensed Bureau de Change in which Dollars could be purchased from, was the same normal interaction between professional colleagues, that is, Bank Managers. Furthermore, the meeting at Chicken Licken Restaurant, where the 3rd Accused for the first time met with Mr. Mathew, was not pre-arranged or premeditated.

Also, as regards to the allegations of accepting and making cash payments, it was Mr. Okoye's submission that there is no evidence or proof of essential ingredients of either making or accepting cash payments as alleged against the 3rd Accused.

On behalf of the 1st and 2nd Accused persons, a sole issue was identified for determination, that is:

> "Whether the Prosecution has proved the Charges levelled against the 1st and 2nd Accused persons beyond reasonable doubt to warrant their conviction for same"?

Learned Counsel for the 1st and 2nd Accused persons, Mr. Ejezie, submitted that the acts alleged against them did not constitute any offence under the Money Laundering (Prohibition) Act, 2004 to have warrant their trial, relying on Section 36(8) of the 1999 Constitution to the effect that the primary element of any offence under the said Act is that the money in question must have been illegally obtained. To that extent, the Prosecution has failed to discharge its burden of proof as the evidence of PW2 and PW5 clearly shows that the 1st Accused was never convicted for drug offences nor was the analysis conducted on their sales books reveals that any incriminating thing was found. In effect, the source of their money was not illegal as required by the enabling Act. Reliance was placed ***on Onagoruwa Vs State (1993) 7 NWLR (Prt. 303) 49 at 85*** to the effect that an element without which the offence cannot be sustained in Law is the important element of the offence.

Mr. Ejezie contended further that Counts 6 and 7 of the Charge against the 2nd Accused and Counts 8 and 14 against the 1st Accused are in respect of offences created by Section 1 and

punishable under Section 15(2) of the Act simply restricts cash payment or receipt which individual or body corporate can make or accept. Thus, it implies that the financial limits set by the Section can be exceeded once the transaction is made through a financial institution. That in the case at hand and by the evidence of PW2 as well as **Exhibit "F1"**, these transactions were made through financial institutions namely: Flash Securities and Currency Exchange. It was therefore submitted that if the Bureau de Change were under Legal obligation to pay the Dollar equivalent of the money given to them, the purchaser has a corresponding obligation to accept same. In other words, acceptance of cash payment of a sum in excess of the limits from a financial institution is not in contravention of Section 1 of the Act. And the transaction of the purchase of USD500,000 by Captino Global Concept Limited from the two Bureau de Changes which passed through a financial institution did not constitute an illegal act under the Money Laundering (Prohibition) Act, 2004. It was also submitted that the 1st Accused did not accept any cash payment of USD100,000 from the 3rd Accused because there was no business transaction between them. Also all the Accused persons who allegedly handed the

money in question, did so either as agents of the Bureau de Change or Captino Global Concept Limited. And in the light of the foregoing, the Prosecution, according Mr. Ejezie, did not establish the offences of making and accepting cash payment in Counts 1, 2, 6, 7, 8, 9, 10 and 14.

It was also contended by Mr. Ejezie that Section 2 of the Act deals with fund transfer to or from a foreign country which must be reported to the Central Bank of Nigeria. Thus, by Subsection (3) of Section 2, it is the responsibility of the Nigerian Customs Service who shall report to the Central Bank of Nigeria and not the 1st Accused. Likewise, the provisions of Section 12 of the Foreign Exchange (Monitoring and Miscellaneous Prohibition) Act, 1995 enjoins the declaration of foreign exchange at the Ports for statistical reasons and that no punishment is prescribed for non-declaration of foreign exchange by that Law. Thus, the 1st Accused and his company Captino Global Concept Limited had fulfilled the duty placed on them when they opened their corporate account with Spring Bank Plc. And assuming the Court will hold otherwise, Mr. Ejezie contended further that the Prosecution has woefully

failed to prove the ingredients of the offence in Count 15 of the Charge which comprises of –

(a) Intentional transfer of funds;

(b) Not reporting the said transfer to the Central Bank of Nigeria;

(c) That the funds transfer was carried out by the 1st Accused.

Reliance was placed on the definition of funds transfer by Black's Law Dictionary, 8th Edition, at page 698 to the effect that funds transfer entails a series of transactions between computerized banking systems. That what is glaring from the evidence of PW2 was that the 1st Accused transported the sum of USD508,000.00 to Liberia and the money was found on his person. It was submitted that the charge is in respect of international transfer whereas the evidence adduced is that of physical transportation of the funds. In effect, the evidence is at variance with the Charge, relying on ***Alor Vs State (1997) 4 NWLR (Prt. 501) 511*** in urging the Court to hold that the Prosecution has

failed to prove the essential elements of the Charge. The Court was also urged to disregard **Exhibits "E" and "E1"**, the letter of inquiry and reply respecting the funds transfer, on the grounds that the maker was not called to be cross-examined on same and that the evidence of PW3 in that respect is in relation to one Mr. Vincent Ogbonna, an entirely different person from the 1st Accused. Reliance was placed on ***Osuoha Vs State (2010) 16 NWLR (Prt. 935) 160 at 170*** to the effect that documents admitted in evidence, no matter how useful they could be, would not be of much assistance to the Court in the absence of admissible oral evidence by persons who can explain their purport. Further reliance was placed on ***Agbi Vs Ogbe (2006) 7 MJSC 1 at 23*** to the effect that **Exhibits "E" and "E1"** are not worthy of belief in the sense that the inquiry is dated 11th October, 2006 while the reply is dated 9th October, 2006.

Respecting Count 16 of the Charge, it was submitted on behalf of the 1st Accused that same is defective for failure to explain what is meant by the allegation that USD508,000 is proceeds of illegal act. This failure constitutes a breach of Section 36(a) of the 1999

Constitution. Also the omission to give the details of an offence in a Charge is fetal, relying on ***C.O.P. Vs AGI (1980) NCR 234*** and ***Akpan Vs Police (1958) 3 FSC 40***.

Another shortcoming of the evidence of the Prosecution according to Mr. Ejezie is that both Counts 15 an 16 of the Charge deal with the sum of USD508,000.00, the evidence on the two Counts was in respect of USD508,200.00 as such the 1st Accused is entitled to acquittal, relying on ***Onagoruwa Vs State (1993) 7 NWLR (Prt. 303) 49 at 93***.

It was finally argued that where an Accused is discharged and acquitted on a Charge of the substantive offence, a conviction on a Count of conspiracy to commit the substantive offence is unreasonable and therefore cannot stand.

Also on behalf of the Prosecution, a sole issue is for determination, that is –

"Whether the Prosecution has proved its case beyond reasonable doubt to warrant the conviction of the Accused persons"?

What the Prosecution is required to prove in a Charge of conspiracy, according to Mr. Olusesi, the Prosecuting Counsel, is an agreement between two or more persons to carry out an unlawful act or lawful act through unlawful means, relying on ***Shodiya Vs State (1992) 2 NWLR (Prt. 230) 457 at 477***. That the testimonies of the Prosecution witnesses and the totality of the evidence before the Court have shown that the Accused persons conspired to commit the offences for which they are charged, concluded Mr. Olusesi on behalf of the Prosecution. It was submitted that all the Accused persons conspired to make a cash payment and did conspired to receive a cash payment of the sum of USD400,000. Also the 1st, 3rd Accused persons and one Mathew Oluese and one Usman (now at large), did conspired to make cash payment of the sum of USD100,000.

To achieve their intention, they all agreed to play various roles as established in the evidence before the Court, thus; the 1st Accused wanted to embark on a business trip to Monrovia, Liberia and he needed United States Dollars. The 1st and 2nd Accused persons then engaged the 3rd and 4th Accused persons to source for Dollars. The said Mathew and one Usman (now at large) facilitated for the exchange of Naira to dollar and as a result the 1st Accused got Dollars equivalent to USD500,000 from the Bureau de Change. That there is evidence of meeting by the Accused persons at Chicken Licking, Marina, Lagos, where the USD400,000 was exchanged between the 2nd Accused acting on behalf of the 1st Accused and the 3rd and 4th Accused in which the money was handed over by one Mathew Oluese. That there was also the evidence of the said Mathew who admitted being paid brokerage not by the Spring Bank but by the 4th Accused. Thus, it was contended that conspiracy does not require physical meeting of the minds in a predetermined or known place. All that needs to be established is that the criminal design alleged is common to all of them. Proof of how they committed the offence is not necessary. Reliance was placed on ***Osundu Vs FRN (2000) 12 NWLR (Prt. 682) 483 at 501***

and ***Etim Vs State (1994) 5 NWLR (Prt. 346) 522 at 533.*** Further reliance was placed on ***Ime David Idiok Vs State (2006) 12 NWLR (Prt. 993) 1***, that once a criminal act is committed by two or more persons acting in concert and in furtherance of their common intention, each and every one of them is liable for the consequence of the act. It does not matter which of the Defendants did what. In other words, where two or more persons act in concert in committing an offence, any one of them can be convicted for that offence. Thus, the Prosecution has proved the elements of conspiracy against all the Accused persons.

As regards offences of making and accepting cash payment of the sum of USD100,000 as contained in Counts 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14 of the Charge, it was submitted that Section 15(2)(b)(i) must be read with Section 1 of the Act which create the offences of making and accepting cash payments of the sum exceeding the sum of N500,000 or its equivalent in the case of an individual. The issue before the Court according to Mr. Olusesi is whether the transaction that took place on the 5th September, 2006 at Chicken Licken, Marina, Lagos and 7th September, 2006

respectively constituted offences under Section 1 and punishable under Section 15(2)(b)(i) of the Money Laundering (Prohibition) Act, 2004. That vide **Exhibits "G", "H", "H1", "J", "L", "L1", "M", "M1", "O", "O1", "P – P3"** respectively and evidence of the said Mathew under cross examination, the USD400,000 was physically handed over to the 4th Accused who in turn handed over same to the 2nd and 3rd Accused persons which ultimately gave same to the 1st Accused. The USD100,000 was handed over to the 1st Accused through the 3rd Accused. It was therefore submitted that the Prosecution has proved beyond reasonable doubt the offense in Counts 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14 of the Charge.

On the transfer of the sum of USD508,200 from Lagos to Liberia without reporting same to the Central Bank of Nigeria as contained in Count 15, reliance was placed on **Exhibits "E"** and **"E1"** and the 1st Accused person's extra-judicial statements, **Exhibits "G", "H - H1","L - L1",** which shows that the 1st Accused did not declare the sum of USD508,200 in his possession while travelling to Monrovia, Liberia on 10th of September, 2006 before the Nigerian Customs. That the retraction of the 1st Accused's

confessional statement in the course of this trial is of no moment, relying on ***Akinmoju Vs State (2000) 6 NWLR (Prt. 662) 608.*** Further reliance was placed on ***Nwaeze Vs State (1996) 2 NWLR (Prt. 428) 1*** and ***Akpan Vs State (2008) 4 – 5 SC (Prt.11) 1*** to the effect that the statements of the Accused persons are part of the case for the Prosecution.

Learned Prosecuting Counsel, Mr. Olusesi, contended that the alleged acts of transferring funds is punishable under Section 15(2) of the Money Laundering (Prohibition) Act, 2004 as the act intended to punish either the individual or a financial institution or a body corporate. Therefore, the respective acts of the Accused persons on the 5th and 7th September, 2006 are illegal and same constituted an offence. It was also submitted that the evidence of PW2, an Investigation Officer, cannot be regarded as hearsay, relying on ***Oladejo Vs State (1994) 6 NWLR (Prt. 348) 101 at 121***. Furthermore, the oral evidence of PW3 according to Mr. Olusesi, cannot in any way alter the content of **Exhibits "E"** and **"E1"** as they both relates to the 1st Accused. And on the alleged discrepancy between the figures transferred, that is, USD508,200

and the USD508,000 contained on the Charge Sheet, is immaterial and therefore incapable of occasioning injustice to the Accused persons. Reliance was placed on ***Omoju Vs FRN (2008) 2 – 3 SC (Prt. I) 21 – 23***. In all, the Court was urged to convict the Accused persons as charged.

The issue as identified by the Prosecution as well as Counsel to the 1st and 2nd Accused person is apt, that is –

> "Whether the Prosecution has proved its case beyond reasonable doubt to warrant the conviction of the Accused persons".

It is settled Law that the onus of proof rest squarely on the Prosecution to prove the guilt of the Accused beyond reasonable doubt. In plethora of Judicial Decisions including the case of ***Akalezi Vs State (1993) 2 NWLR (Prt. 273) 1 at 13*** that a case is said to be proved beyond reasonable doubt when the evidence is so strong against the Accused as to leave only a remote probability in his favour which can be dismissed with a sentence "of course it is possible; but not therefore least probable".

The allegations against the Accused persons in this case are grouped into three, namely: conspiracy, making and accepting cash payments as well as transferring the sum of USD508,200 without reporting same to the Central Bank of Nigeria. The allegation of conspiracy in the charge are contained in Counts 1, 2, 9 and 10 wherein all the Accused persons allegedly conspired to make a cash payment of the sum of USD400,000. They also conspired to accept a cash payment of the sum of USD400,000. The 1st, 3rd Accused persons and one Usman (now at large) as well as the said Mathew Oluese, conspired to make cash payment of the sum of USD100,000 while the 1st, 3rd Accused persons with Mathew and one Usman (now at large), conspired to accept a cash payment of the sum of USD100,000.

In ***Oduneye Vs State (2001) 1 SC (Prt. I) 1 at 7***, a conspiracy is said to consist not merely in the intention of two or more but in the agreement of two or more to do an unlawful act by unlawful means. So long as design rests in intention only, it is not indictable. When two agree to carry into effect the very plot, is an

act in itself, and the act of each of the parties promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. What is also being chorused in the decisions of ***Patrick Njovens Vs State (1973) 5 SC 17; Dabo Vs State (1977) 5 SC 222*** and ***Erim Vs State (1994) 5 NWLR (Prt. 364) 535*** is that for the offence of conspiracy to be established there must exist a common criminal design or agreement by two or more persons to do or omit to do an act criminally. Since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties, it is rarely capable of direct proof; it is invariably an offence that is inferentially deduced from the acts of the parties thereto which are focused towards the realization of their common or mutual criminal purpose.

It is imperative to note at this juncture that conspiracy is established if it is shown that the criminal design alleged is common to all the Accused persons. Proof of how they connected with or among themselves is not necessary. Indeed, the conspirators need not know each other. They need not have started

the conspiracy at the same time. It is sufficient even though the conspiracy had been started and some persons joined at a later stage. The bottom line of the offence is the meeting of the minds of the conspirators. Since it is a difficult offence to prove directly, inference from certain criminal acts of the parties concerned in pursuance of an apparent criminal purpose will suffice. In ***Nwosu Vs State (2004) 15 NWLR (Prt. 897) 466 at 487***, it was held that when a charge of conspiracy is tried along with other substantive charges, rules as to admissibility of evidence are generally relaxed. However, the Prosecution always has its primary duty to lead distinct evidence of the existence of the conspiracy and what part each of the conspirators played. Thus, each Accused is entitled at the onset to have the evidence properly admissible against him considered alone; and it is only when after such evidence so considered, he is found to be a party to the conspiracy if any, that the acts of other conspirators can be used against him.

Premised on the fact that conspiracy is often established through inference from the acts of the parties who may not even have met. And considering the affirmty of the conspiracy

allegations in this case with the substantive offences, consideration by this Court will await the ultimate consideration of the substantive offences charged.

I have stated elsewhere in this Judgment that the substantive allegations relates to making and accepting cash payment of USD400,000 and USD100,000 respectively contained in Counts 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and14 of the Charge.

The provisions of the relevant Sections 1 and 15(2) of the Money Laundering (Prohibition) Act, 2004 read as follows:

> "1. No person or body corporate shall except in a transaction through a financial institution, make or accept cash payment of a sum exceeding –
>
> (a) N500,000 or its equivalent in the case of an individual; or
>
> (b) N2,000,000 or its equivalent in the case of a body corporate".

"15. A person who commits an offence under Subsection (1) of this Section shall be liable on conviction –

(b) in the case of an offence under paragraphs (d) to (f) where the offender,

(i) is an individual, a fine of not less than N250,000 or more than 1Million Naira or a term of imprisonment of not less than 2years or more or both fine and imprisonment".

From the evidence of PW2 as well as the contents of **Exhibits "D", "E", "F" and "K"**, the 1st Accused was on the 10th of September, 2006 arrested at the Roberts International Airport, Monrovia, Liberia for being in possession of USD508,200 which was concealed in his pair of socks. That consequent to his repartrition, the 1st Accused was investigated by the NDLEA and later by the EFCC. The subsequent investigation by the EFCC revealed the respective roles played by other Accused persons in procuring the said USD508,200. In essence, the Naira equivalent of USD508,200

was used to buy the Dollars from the Bureau de Change. The totality of the evidence of the Prosecution including the statements of the Accused persons was that the 1st and 2nd Accused persons are Directors of Captino Global Concept Limited, a company that maintained an account with Spring Bank to which both the 3rd and 4th Accused persons are Managers. It is also evident from **Exhibit "F1"** that two Cheques No. 63 and 64 were issued by the 2nd Accused in the sum of N25,860,000.00 each and withdrawn from the Spring Bank account of Captino Global Concept Limited on 5th of September, 2006. That it was the sums used in the purchase of USD400,000 from Currency Exchange and Flash Bureau de Change. Also evident from **Exhibit "F1"** was that the sum of N12,940,000.00 was withdrawn by the 2nd Accused on 7th of September, 2006 with Cheque No. 66 from Spring Bank account of Captino Global Concept Limited which sum was as well used for the purchase of USD100,000 from Flash Bureau de Change. The question is what was the mode of these transactions? Perhaps, it may be necessary to state that the said Mathew Oluese who is an agent of the Bureau de Change collected the USD400,000 and USD100,000 and handed over to the 2nd, 3rd and 4th Accused

persons at Chicken Licken and the 3rd Accused through one Usman respectively. For the avoidance of doubt the provisions of Section 24 of the Money Laundering (Prohibition) Act, 2004 defines "financial institution" to include Bureau de Change. Thus, the transactions in this case were done through a financial institution.

Learned Prosecuting Counsel has alluded to the fact that transaction leading to the taking physical cash to Chicken Licken by the said Mathew and handing over same to the 4th Accused who in turn handed over the cash to the 2nd and 3rd Accused persons was unauthorized. Likewise, the delivery of USD100,000 to the 3rd Accused by Mathew through one Usman (now at large).

The cumulative substance of the defence is that the acts of the Accused persons do not constitute a money laundering offences as the primary element is that the money in question must have been illegally obtained. The Act did not define the words "make" or "accept" but the ordinary meaning of "to make" is to cause to exist and or do, perform or execute etc. And to accept is to receive with approval or satisfaction. Thus, to accept is to receive with intent to

retain. The evidence of the Prosecution in relation to the allegations of both making and accepting payments of the sum of USD508,200 was that the 1st Accused on whose possession the said money was recovered has not been convicted of any drug related offences either in Liberia or in Nigeria. The said money was found to be a proceed of Cosmetics business as revealed from the sales books of Captino Global Concept. The defence also contended that the allegation relating to making and accepting as well as transferring the USD508,200 from Nigeria to Liberia are not offences created by Law. Reliance was placed on Section 36(8) of the 1999 Constitution.

By virtue of Section 36(8) of the Constitution of the Federal Republic of Nigeria, 1999, no person is to be held guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute an offence, and no penalty was to be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed. Thus, the Section upheld the fundamental principle of constitutional liberty based on the notion that a person is not to be punished for an act which was

not a crime at the time it was done. Refer to ***FRN Vs Ifegwu (2003) 15 NWLR (Prt. 842) 113 at 177***.

The transactions in the instant case was through a financial institution within the contemplation of the relevant Money Laundering (Prohibition) Act, 2004 but transfer of funds from one country to another irrespective of whether the money is obtained legitimately or not must necessarily be declared if it is in excess of the limit prescribed by Law. For instance, Section 12(2) of the Foreign Exchange (Monitoring and Miscellaneous) Act provides that Foreign Currency in excess of USD5,000 or its equivalent whether being imported into or exported out of Nigeria shall be declared on the prescribed form for reason of statistics only.

However, Section 2(1) of the Money Laundering (Prohibition) Act, 2004 on the other hand provides that –

> "(1) A transfer to or from a foreign country of funds or securities of a sum exceeding US$10,000 or its equivalent by any person or body corporate shall be

reported to the Central Bank of Nigeria or Securities and Exchange Commission".

Whereas, Section 12(2) of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act Cap. F14 LFN, 2004 imposes a duty without penalty, Section 2(1) of the Money Laundering (Prohibition) Act, 2004 imposes obligation and prescribes a punishment under Section 15 of the Act. In Section 15(1)(e) of the Act, a person who fails to report an international transfer of funds or securities required to be reported under the Act, commits an offence. Wherein Section 2(b)(i) of the Act provides that, where the offender is an individual, a fine of not less than N1Million Naira or a term of imprisonment of not less than 2 years or to both fine and imprisonment. Also, Subsection 1(d) of Section 15 of the Act prohibits making or accepting cash payments exceeding the amount unauthorized under the Act.

I have in the course of this Judgment reproduced the pertinent provisions of the Laws relating to the allegations of making and accepting cash payments exceeding the limit prescribed by Law as

well as the failure to report the transfer. The next substantive allegation is the transfer of the said USD508,000 with aim of concealing the nature of the proceeds of illegal act. Section 14(2) not Subsection 2(b)(i) of the Money Laundering (Prohibition) Act, 2004 as erroneously contained in the Charge punishes the act of concealing the genuine nature of resources derived directly or indirectly from illicit traffic in narcotic drugs or psychotropic substances or any other crime or illegal act.

The evidence of the Prosecution did not link the recovered USD508,200 from the 1st Accused to illicit traffic in narcotic drugs or psychotropic substances or any other crime. The issue as to whether the said money has link with any illegal act is dependent upon the subsequent finding by this Court on the legality or otherwise of the transactions culminating in the manner in which the Dollar was sourced.

The defence has made a heavy weather as to the fact that what the 1st Accused did was transportation of the money but not transfer which entails banking/electronic transfer. To transfer is to

convey or remove from one place or one person to another. Also, transporting is an act of carrying or conveying something from one place to another. That being the position, the mere fact that the word transfer was used as against transport in the Charge is of no moment as no prejudice was shown to have been occasioned to the Accused persons.

The next issue is whether the 1st Accused has transferred or transported the money in question? Learned Counsel on behalf of the 1st Accused, Mr. Ejezie, has urged the Court not to ascribe any probative value to **Exhibit "E"** and **"E1"**, the letters of inquiry and reply, on the ground that the makers are not called to enable the Accused to cross examine them and that the evidence of PW3 relates to one Mr. Vincent Ogbonna, a completely different person. In ***Alao Vs Akano (2005) 11 NWLR (Prt. 935) 160 at 178***, it was held that documents admitted in evidence, no matter how useful they could be, would not be of much assistance to the Court in the absence of admissible oral evidence by persons who can explain their purport.

However, the provisions of Section 83(1) of the Evidence Act, 2011 is to the effect that a document is admissible even where the maker is not called as a witness where the maker is dead or unfit to give evidence and it is practically impossible to secure his attendance or there are circumstances warranting his absence. In this case, the documents, **Exhibits "E"** and **"E1"**, were tendered through PW2, the EFCC Investigating Officer. The fact that **Exhibit "E"** and **"E1"** were procured in the course of investigation, same are admissible in evidence. Therefore, the failure to call the makers at least to explain the apparent discrepancy in the dates and even the name contained therein will undoubtedly affect the weight and or their probative value. It is to be noted also that the 1st Accused in his extra-judicial statement, **Exhibit "G"**, gave graphic account on how he transferred the money in question to Monrovia, Liberia. It is to be noted that all the statements credited to the 1st Accused, that is, **Exhibits "G", "H"** and **"L"**, were tendered and admitted without any contest and thus became integral part of the case of the Prosecution. In ***Egbogbonome Vs State (1993) 7 NWLR (Prt. 306) 383 at 428***, it was held that a confession is not a defence. It only strengthens the case of the Prosecution and in a proper case

reduces the problem of establishing the guilt of an Accused. To that extent, the 1st Accused could not deny transferring the sum of USD508,200 to Liberia.

Learned Counsel to the 1st and 2nd Accused persons also urged the Court to discharge and acquit the 1st Accused on Counts 15 of the Charge on the ground that the totality of the evidence of the Prosecution has failed to discharge the onus of establishing a single ingredient of the offence. Also the allegation in Count 16 was not explained to the 1st Accused. This absence of details amounts to denial to provide the Accused with facilities of preparing his defence.

I have already held the view that the transferred funds in question was not proceeds of any illegal act as clearly stated by the Prosecution witnesses. There is also no evidence before the Court showing that the aim of the 1st Accused in transferring the funds to Liberia was to conceal its genuine origin. Therefore, it is my considered view that the allegation in Count 16 was not established by the Prosecution.

On the allegation of non-declaration of funds in Counts 15, the 1st Accused in **Exhibit "G"** has admitted not declaring the funds with the Customs at the Murtala Mohammed Airport, Ikeja, Lagos. The statement is *in tandem* with the contents of **Exhibit "E1"**, which states that the Nigerian Customs has no record of my currency declaration by Mr. Valentine Ogbonna Ayinka. Both the allegation in Count 15 and the evidence of the Prosecution was not consistent with one another. While the Charge alleges non-declaration with Central Bank of Nigeria, the evidence was that of non-declaration with the Nigerian Customs. The 1st Accused having admitted that he did not declare the currency with Nigerian Customs, he is estopped from denying that fact. It was held in plethora of Judicial Decisions that proof beyond reasonable doubt does not require absolute proof of facts that may transcend the ordinary memory of a human being. Also, it does not involve the remembrance of every minute details of an incident which any ordinary man may not commit to memory. Therefore, proof beyond reasonable doubt should not be taken as proof beyond all shadow of doubt. In ***Lateef Vs FRN (2010) All FWLR (Prt. 539) 1171 at***

1193, it was held that failure to establish even one of the ingredients of the offence amounts to failure to prove the guilt of the Accused beyond reasonable doubt. Any doubt arising in the circumstance must be resolved in favour of the Accused. It was also held that not every discrepancy, contradiction and or inconsistency that will affect the substance of a criminal case that has been proved with credible and unchallenged evidence. Such contradiction as would result in upsetting the Judgment of a Trial Court to upturning a decision must be relevant and of great magnitude that it would cause miscarriage of justice. For a contradiction to have a negative effect, it must be sufficient to affect the credibility of the evidence. The substance of the Prosecution's case as regards to Count 15 was failure by the 1st Accused to report the transfer of USD508,000 to Monrovia, Liberia to the Central Bank of Nigeria. The evidence of all the Prosecution's witnesses centered on failure to make such declaration to the Nigerian Customs. These inconsistencies may, in my view, impact negatively the overall case of the Prosecution. Refer to ***State Vs Azeez (2008) 4 SC 188*** and ***Dibbie Vs State (2007) 3 SC (Prt. 1) 176***.

The Court has carefully and meticulously considered the evidence of the Prosecution vis-à-vis the allegation in the said Count 15 as regards to the exact amount transferred by the 1st Accused. The evidence was that the 1st Accused transferred USD508,200 while the allegation as per the Charge was the transfer of USD508,000. The Court of Appeal decision in ***Onagoruwa Vs State (Supra)*** is that if an Accused is charged with stealing a particular amount or named amount; the Prosecution must stand or fall by proving the particular amount or by failure to prove same respectively. That the Legal position is as exact as that. A contrary position will not only be oppressive to the Accused but will certainly run against the Provision of Section 33(5) of the Constitution of the Federal Republic of Nigeria, 1979 where the Accused is presumed innocent until he is proved guilty. This principle is no doubt applicable to the present case as the amount allegedly transferred is equally in an indivisible Charge. Therefore, the Prosecution cannot also be said to have proved this Count of Charge beyond reasonable doubt.

On the allegations of making and accepting cash payment as contained in Counts 3, 4, 5, 6, 7, 8, 10, 11, 12, 13 and 14 of the Charge, the evidence of the Prosecution revealed that the Naira component involved in procuring the Dollar are proceeds of Cosmetics business and that same was channeled through the accounts of both Flash Bureau de Change and Currency Exchange respectively. Thus, the argument of the Prosecution that the handlings/exchanges of the Dollars at the Chicken Licken disclosed and offence is not supported by any Law. The same applies *mutatis mutandi* as to the intendment of Section 1 of the Money Laundering (Prohibition) Act, 2004 as same did not prohibit transaction in private places. The Act merely prescribed punishment for transaction in cash above the specified trash-hold save through financial institutions. And taking the entire transactions in this case into account from the point of sourcing the Naira component, procuring the agents of the Bureau de Change upto the point of delivery to the 1st Accused, the allegation of making and accepting cash payment within the contemplation of the Act has not been made out by the Prosecution.

On the allegations of conspiracy in Counts 1, 2, 9 and 10 of the Charge, Learned defence Counsel, Mr. Okoye, on behalf of the 3rd and 4th Accused persons, has made an allusion that the said Counts should not have been included with the substantive offence. Being an agreement between two or more persons to do or cause to be done an illegal act or a legal act by illegal means, the actual agreement alone constitutes the offences of conspiracy. In ***Bologun Vs A.G., Ogun State (2002) 6 NWLR (Prt. 763) 512 at 533***, it was held that a conviction for conspiracy does not become inappropriate simply because the substantive offence has not been successfully proved. Thus, conspiracy to commit an offence is separate and distinct offence which is independent of the actual commission of the offence to which the conspiracy is related. In other words, 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.

Conspiracy as rightly submitted is a matter of inference deduced from certain criminal acts of the parties accused that are done in pursuance of an apparent criminal purpose common to

them. In the instant case, there was no conspiracy to make and accept cash payment by any of the Accused persons charged. Also, the evidence before the Court did not disclose any conspiracy to transfer any money to Monrovia, Liberia. In ***Omotola Vs State (2009) 7 NWLR (Prt. 1139) 148 at 191 – 192***, the Supreme Court restated the correct Legal position that in order to get conviction on a count of conspiracy, the Prosecution must establish the element of agreement to do something which is unlawful or to do something which is lawful by unlawful means which has not been done in this case.

In the light of the above and considering the apparent failure of the Prosecution to establish the allegations against the Accused persons beyond reasonable doubt, the Accused persons are entitled to an acquittal. The Accused persons are therefore ***discharged*** and ***acquitted*** of the allegations in this case.

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JUSTICE M. L. SHUAIBU
JUDGE
04/02/2013