IN THE COURT OF ANAMBRA STATE OF NIGERIA
IN THE HIGH COURT OF NNEWI JUDICIAL DIVISION
HOLDEN AT NNEWI:

BEFORE HIS LORDSHIP, THE HON JUSTICE O. M. ANYACHEBELU ON MON THE 22ND DAY OF JAN 2018.

SUIT NO HN/ 10C/2015:

BETWEEN:

THE STATE : : : : : **APPLICANT**

AND

EMEFO NNAMDI : : : : **DEFENDANT**

JUDGMENT

The initial charge in respect of this case was filed on 26th June 2015. It was a one count charge of issuance of Due Cheque contrary to Section 1 (b) of the Dishonoured Cheque (offences) Act Cap 102 Laws of the Federation of Nigeria 1990. The particulars of the offence were supplied.

Trial proceeded and on the 28th day of March 2017, at the end of cross-examination of DW1, the prosecution sought leave to amend the charge in terms of the amended charge filed on 16th March 2017. This was not opposed and so was granted as prayed. That brought about the birth of a substituted charge.

Fresh plea was taken thereto on the said 28th March 2017, whereupon the sole Defendant pleaded not guilty.

From the amended charge, the statement of offence in respect of this case reads as follows;

"Issuance of dud cheque contrary to Section 1 (1) (b) of the Dishonoured Cheques (offences) Act Cap D11 2004.

The particulars of the offence read as follows:
"Emefo Nnamdi on the 25th day of September 2012 at Uruagu Nnewi in Nnewi Judicial Division with intent to defraud did issue to Mr. Basil Ude, a UBA Plc Cheque No 33603116 of NACO EF GLOBAL VENTURES LIMITED for the sum of One Million eight hundred thousand Naira ?(N1,800,000.00) when you knew that there was insufficient fund in your account to pay the sum and which cheque when presented for payment was dishonoured and you thereby

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HIGH COURT
NNEWI

committed an offence punishable under Section 1 (1) (b) of the Dishonoured Cheques (Offences) Act CAP D11 2004.

As already indicated, the Defence pleaded not guilty to the amended charge as read. Actual hearing commenced on 11th May 2016 with the evidence of PW1.

Altogether, the prosecution fielded two witnesses while the Defence was featured as a lone witness. The testimonies of the prosecution witnesses are hereinbelow summarized.

PW1 was one Basil Udeh who incidentally is the complainant in this case. His case was that the Defendant is a trader at Nkwo Market whose business name is NACO EP GLOBAL VENTURES LIMITED. He is also known as an Evangelist. PW1 stated that on 27th June 2012, the Defendant came to his office at No 2 Progressive Line Nkwo Nnewi requesting for the sum of one million, eight hundred thousand Naira (N1,800,000.00) to enable him clear the goods (tin tomatoes) he imported. The PW1 and the Defendant have known for over 10 years as PW1 being a wholesaler supplies items to the Defendant, on credit at times, or even loan money to him. The Defendant usually pay the money back into the account of the Complainant (PW1) and thereafter show him the payment teller.

Accordingly, when he requested for the N1,800,000.00, the PW1 in turn demanded for collateral to be deposited as the amount in question was bulky sum. The Defendant gave him the documents of a plot of land behind Chikason Factory allegedly owned by the Defendant. PW1 then gave him the money which was to be refunded on or before 25th August 2012.

However on 24th August 2012, PW1 was invited to Zenith Bank by the Defendant and on arrival, PW1 informed him that the goods were delayed. He requested that PW1 should return the land document and take a cheque instead because he wanted to secure loan from the bank. PW1 asked him to suspend everything till the next day being 25th August. On that day, PW1 took the Defendant to the office of Barr. K. O. Okonkwo where he briefed the lawyer. Finally the cheque of N1,800,000.00 was issued to PW1 which was to be cleared on 25th September 2012.

On 25th September 2012, PW1 went to withdraw the cheque at the Bank but after scrutinization, the bank officer wrote "DAR" and returned the cheque to him without paying him the money. PW1 called the Defendant on phone and the Defendant came to see the PW1 pleading to be given a little time to pay back the money.

On 19th November 2012, the Defendant again approached the PW1 rejoicing that the said goods were now on its way and that he needed only three hundred thousand Naira (N300,000.00) to settle the transporter's bill. PW1 again gave him the said sum which the Defendant later paid back into the PW1's account on 4th December 2012.

In May 2013, he once again paid the sum of two hundred thousand Naira (N200,000.00) into the account of the PW1. The said N200,000.00 paid was out of the outstanding N1,800,000.00 thereby bringing the outstanding balance down to N1,600,000.00.

All efforts made to recover the balance from the Defendant failed. PW1 consulted Ike Obeta & Co and they invited the Defendant. Defendant still promised to pay but he never paid. PW1 further reported to the police and made statement.

The certified true copy of the UBA Cheque for the sum of 1.8 million dated 25/9/2012 was admitted and marked as Exhibit P1.

Under cross-examination, the PW1 admitted that before this incident, the Defendant had been repaying him any loan he took from him which were all without interest. He maintained that the money the Defendant paid him before the date on the cheque was an old outstanding money in respect of another transaction and that the cheque of N1.8million was given to him to be cashed and not as collateral.

He stated that in other transactions done with the Defendant, he never issued him cheque or collateral because they were smaller transactions. PW1 only demanded for collateral as this was a huge amount.

PW1 denied that it was the dispute over the interest on the loan that prompted the presentation of the cheque and insisted that he did not ask for interest on the said loan. He further maintained that he returned the land document back to the Defendant because he issued him a cheque in place of the document and not because the Defendant had paid him the money.

PW1 further denied that the Defendant informed him not to present the cheque to the bank because he had some business issues.

PW2 was one Sgt Henry Agbo – Force No 373823, attached to Department of Operations, Police Headquaters, Awka. He recalled the 18th of September 2013, when the complainant (PW1) came to the station at Central Police Station Nnewi where PW2 was formerly working, made allegations

about the Defendant and volunteered his statement which was recorded by PW2.

Consequent upon the complaint, the Defendant was arrested, cautioned and he volunteered his own statement written and signed by himself.

The statement by Nnamdi Emefo (Defendant) at CPS Nnewi dated 18/9/2013 was admitted and marked as Exhibit P2.

The complaint in question was with respect to issuance of dud cheque. In the course of investigation, the PW2 visited UBA Plc Nnewi and through the Magistrate Court Order obtained the statement of account of the Defendant.

The copy of the statement of account for NACO EP GLOBAL VENTURES LTD from 10/11/2009 to 23/01/2013 was admitted and marked as Exhibit P3.

After the investigation, the PW2 made a report. Copy of the investigation report dated 2/11/2013 was admitted and marked as Exhibit P4.

Under cross-examination, PW2 stated that he was not aware of the call by the Defendant after the cheque bounced, where the Defendant apologized and explained to the PW1 that it was as a result of bad business. He maintained that the Defendant had only paid N200,000.00 out of the N1,800,000.00 making the outstanding balance to be N1,600,000.00 (one million, six hundred thousand Naira).

With the conclusion of the evidence of PW2 on 10/11/2016, the prosecution closed their case.

Defence opened on 9/2/2017. The Defendant testified as DW1. He denied all the allegations made by the complainant. His evidence in defence is to the effect that sometime in 2012, he obtained a loan of N1,300,000.00 (one million, three hundred thousand Naira) for business on the condition that he will pay back with interest of 10 percent per month. The money was to be used for two months. The interest the money will yield for the said two months will amount to N300,000.00 (three hundred thousand Naira).

The PW1 insisted that the Defendant should write a cheque of N1,800,000.00 before the loan will be given to him and the Defendant complied. In February 2012, PW1 brought the money but it was N1.3 million instead of the agreed sum of N1.8 million. Since the Defendant had already given the PW1 the cheque of N1.8 million as demanded, they then deliberated

on what the interest would be on the said N1.3 million on the ground that the Defendant will use it for 8 months but still on the 10% interest rate.

PW1 insisted that the Defendant would be paying into his account any amount of money he has and he gave the Defendant his first bank account number. Defendant paid in N150,000.00 (one hundred and fifty thousand naira) in March 2012. In April 2012, he once again paid another N150,000.00. In June 2012, he paid the PW1 N80,000.00 (eighty thousand naira) and N100,000.00 (one hundred thousand naira) via his bank account.

The 4 number deposit slips evidencing the payments by the Defendant to the PW1 were admitted and marked as Exhibits D1, D2 (a) – (c) respectively.

The Defendant contended that when he was arrested by the police in respect of this transaction, he went to his house, assembled the tellers relating to the transaction and explained to the police that he had made some payments and that the cheque is not a dud cheque.

The D.P.O. however charged him to court for the court to make its decision

The Defendant gave details of how and when he made payments to the PW1's account with first bank as follows:

1. In December 2012 he paid N300,000.00
2. In January 2013 he paid N100,000.00
3. In February 2013 he paid N200,000.00
4. In March 2013 he paid N100,000.00
5. In June 2013 he paid N200,000.00

The Defendant contended to have paid N1,630,000.00 (one million, six hundred and thirty thousand naira) on the whole, the balance unpaid being N170,000.00 (one hundred and seventy thousand naira). He then pleaded with the PW1 to exercise patience as he encountered problems in his business. PW1 agreed but subsequently caused his arrest. Defendant stated also that what was on the cheque was 25th August 2012 but was later changed to 25th September 2012 when the PW1 and the Defendant recalculated the interest rate and it fell into September. The cheque was then issued with the new date so as to tally with the new repayment date.

The Defendant conceded that he intended selling the land in question with the help of the PW1 who told him that he was a land agent and could buy or sell land. Acting on what the PW1 told him, the Defendant handed the land document to him but demanded the return of the documents on noticing that the PW1 was lowering the price offered by the people who had interest in purchasing the land.

The Defendant maintained that as at 25th September 2012, there was no sufficient fund in his account. He maintained that the cheque he offered the PW1 was merely as a collateral which was not meant to be cashed.

Under cross-examination, DW1 admitted that the PW1 usually lends money to him of which he issues him cheque in return. The cheque is then returned as soon as the DW1 makes payment. However, he admitted to have made some payments to the PW1 in cash without any receipt issued to him. He contended that when the PW1 gave him the money in dispute as loan, no receipt was issued by the DW1 to the Complainant to that effect.

With the close of the case for defence, both counsel filed written addresses duly adopted as final addresses on 25/10/2017.

I have read the charge, record of proceedings, exhibits. I have also noted and appreciated the written addresses of both counsel. I commend both counsel for their input and industry without prejudice to my judgment.

Let me also stress that the addresses are documented and form part of the proceedings as incorporated. Details are therefore not reproduced subject to references where and when necessary.

As already indicated, the charge against the Defendant is a single count charge of issuance of dud cheque contrary to Section 1 (1) (b) of the Dishonoured Cheques (Offences) Act Cap D11 2004.

Both counsel formulated and argued one issue each. The contents are essentially to the same effect. Having perused and appreciated, I adopt same as the lone issue in the following terms

Whether from the evidence before the court, the Prosecution proved the case beyond reasonable doubt as to achieve conviction?

It is conceded that in criminal trials like the instant, the onus remains on the Prosecution to prove the case beyond reasonable doubt. It is not for the defence to prove his innocence. As a matter of fact, the Defendant is entitled to remain silent.

See Section 135 (1) of the Evidence Act.
See further Section 36 (5) of the 1999 Constitution of the Federal Republic of Nigeria.

It is also conceded as rightly submitted by the learned Deputy Director for the Prosecution that proof beyond reasonable doubt is not tantamount to proof beyond all shadow of doubt.

In the case of **OKOH VS THE STATE** **2014 31 WRN 65**, the court in considering the implication of proof beyond reasonable doubt had this to say.

"...proof beyond reasonable doubt stems out of compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the Prosecution must be proof beyond reasonable doubt, not beyond shadow of any doubt that the accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure including the administration of justice....".

The relevant provision under which the Defendant is charged reads thus;

(1) Any person who

(a) Obtains or induces the delivery of anything capable of being stolen either to himself or to any other person or

(b) Obtains credit for himself or any other person by means of a cheque, that, when presented for payment not later than 3 months after the date of the cheque, is dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn, shall be guilty of an offence and on conviction, shall

i. In the case of an individual, be sentenced to imprisonment for 2 years without the option of a fine, and

ii. In the case of a body corporate, be sentenced to a fine of not less than N5,000=

From the provisions of the relevant law, the following ingredients are obvious,

1. There must be a delivery of credit, goods or/a services in favour of a drawer or his agents.

2. A presentation to a bank.

3. A communication/marking made by bank on the cheque, or any means showing that there is insufficient fund in account holders' Account and often times, bank may be summoned to show Account statement to establish deficit on the date of presentation of cheque.

Having noted as stated above, how far can it be said that the State progressed in discharging the said burden of proof beyond reasonable doubt in the circumstances. I must add that the task is one that is onerous and sacrosanct.

The prosecution called two witnesses. The PW1 was one Basil Udeh, who incidentially is the complainant in the case. The evidence is already summarized. What are the important aspects of his evidence bearing in mind the necessary ingredients.

1. The PW1 is a businessman based at Nnewi. He has known the Defendant whom he referred to also as a businessman and an Evangelist. According to the PW1, he gave the Defendant a total of N1.8m on his request to enable him clear his goods (tin tomatoes) he imported. They had known for more than 10 years and in the past years, the PW1 had been giving Defendant monies, which he has been refunding by paying into the Account of PW1. Apparently there had not been any disagreement in the past.

   Upon request of an amount of N1.8m, due to the high volume, the PW1 requested for collateral. Defendant provided land document, which was later withdrawn and substituted with a UBA Cheque for the said N1.8m made payable on 25th September 2012.

From the evidence, it is clear that the PW1 gave the Defendant a credit in terms of cash. PW1 insisted it was N1.8M. The Defence as a matter of fact on his own conceded 1.3M in addition to N300,000 which he termed as interest effect totaling N1.6M. However, consequent upon subsequent re-negotiation, on the repayment date, the parties agreed on the N1.8M based on which the Defendant issued the said cheque. Indeed the undisputed cheque was full evidence of an obligation on the part of the issuer i.e. the Defendant.

The Certified True Copy of the said UBA Cheque was tendered in evidence and admitted as Exhibit P1. It was not challenged by the Defendant and I accept same as the true position in proof of that fact.

Under cross-examination, the DW1, stated

Q – It is true that you issued Exhibit P1, to Basil Udeh as a result of your indebtedness to him?

Ans – yes, that is true.

With respect, as I have tried to show, it is clear, and I so find that based on the status of evidence, the prosecution proved the fact that there was delivery of credit to the Defendant, duly acknowledged by the issuance of Exhibit P1 i.e. the Cheque in question.

It is also not in dispute that on the said 25th September 2012, which is the date on the cheque, that the PW1 presented the cheque for payment at UBA Plc. The PW1 gave uncontroverted evidence to that effect. According to him, upon presentation, the cheque was not paid. Rather DAR (Drawers Attention Required) was inscribed on the cheque. The important thing is that the cheque was returned as dud in the sense that it was not paid.
On the requirement of accepting uncontroverted evidence and/or evidence not challenged under cross-examination, counsel referred to the cases of

(1) **OLUDAMILOLA VS THE STATE**
2010 8 NWLR PART 1197
Pg 568.

(2) **OFORLETE VS THE STATE**
2000 12 NWLR PART 681
Pg 415.

The next issue is why was the cheque not paid? From the evidence of the PW1 and PW2 (IPO), it is clear it was due to insufficiency of fund in the Account as at the material time.

While testifying in chief, the Defendant himself conceded that as at the relevant date, there was no sufficient fund in the said Account at UBA Plc. He tried to put up a case that the cheque was to be used as a collateral, on the notion that it was supposed not to be presented for payment. However, that contention did not make sense to me but viewed as mere afterthought in a bid to scout for a defence. In normal parlance, a collateral is used to guarantee repayment. A creditor has right to bounce on the collateral to recover his money in case of

default. If viewed in that perspective, then a creditor is automatically entitled to present cheque used as collateral upon maturity and debt not repaid.

Even though the Defendant tried to contend that he has substantially repaid the credit but the receipts he tendered did not show that as some of the alleged payments were effected after the said 25/9/12. While testifying in chief, the Defendant referred to payments effected in December 2012, January 2013, February 2013, March 2013 and June 2013. Obviously these dates fell after the 25/9/2012.

PW2 also tendered the relevant statement of Account as obtained from the Bank covering the relevant period. It was admitted and marked as Exhibit P3. It was not challenged. It showed that from 1 – 9/2012 to 28/9/12, the credit balance in the Account was just N49.91=

It means from the inception, the Defendant knew the cheque will not be paid upon presentation. He admitted that fact under cross-examination.

The ingredient of proof that the cheque was not paid due to insufficiency of fund was therefore obviously proved.

As it were, it appears that the Prosecution had thereby been able to prove beyond doubt, the stated ingredients with regards to the said offence.

Notwithstanding the above, the defence counsel had submitted that contrary to the perception by the Prosecuting counsel, that the offence cannot be said to always be a strict liability issue.

He referred to the provision of subsection 3 of Section 1 of the Act to the effect that a person is not guilty of the offence if at the time of issuance of the cheque he believed that when presented it would be honoured.
He submitted that issue of state of mind of Defendant ("I believe" is therefore put in issue.

Let me however stress that the above provision does not help the defence. This is so, because the issue of belief as in this case must be substantiated which area is totally out of tune in the defence. There is nothing from the totality of the evidence to show that the Defendant believed it will be paid. He knew that he did not have enough fund. The Account indeed was virtually dormant.

The Defendant's counsel made interesting submissions to the effect that the Prosecution had burden to prove that the Defendant had mens rea and actus reus i.e. guilty mind and guilty ac

He relied on the case of **ABEKE VS STATE**
2007 NWLR PART 1040
Pg 411 at 415 where Supreme Court stated thus

"To convict an accused on the provision of section 1 (1) (b) of dishonoured cheques (Offences) Act, the prosecution must prove that the accused had mens rea and actus reus. Mens rea means a guilty mind. And actus reus means a guilty act. In cases of strict liability, mens rea comes before actus reus. In other words, the accused develops the guilty mind before the guilty act. The guilty mind instigates the guilty act or flows into the guilty act. The period of time between the two cannot be determined in vacuo but in relation to the factual situation in each case dictated by the state of criminality of the accused at the material time. There are instances where the mens rea is automatically followed by the actus reus. The above element of proximity apart, there could be instances of spontaneity too. In the instant case, the prosecution proved the mens rea and the actus reus of the offence charged through the evidence of the prosecution witnesses PW.2, PW3 and exhibit B.

As I have tried to stress, the above did not salvage the defence. The Prosecution showed that the ingredients for the offence were established. Indeed, the Defendant never intended that the cheque be paid on presentation at the material time and it is clear from his evidence even under cross-examination that he knew it will not be honoured.

Under cross-examination he stated thus;

Q – It is true that when you issued the said Exhibit P1, to the complainant, you did not have sufficient fund in your Account.

Ans – That is true. He gave the money to me to use for business.

The burden was therefore for the defence to prove otherwise as to what he had in mind. According to him, he had intended same to be used as collateral. As I stated earlier, that did not add value to the defence. If the Defendant proved that he had fund but stopped the cheque or that for some other reasons, the cheque was unpaid, it will have been a different issue.

Let me also reinstate that the fact that some specific repayments were effected with reference to the alleged indebtedness was subject to proof and this is not a forum for making such finding bearing in mind that there is a pending civil suit.

On the whole therefore, having considered this case on the merits, and found as indicated, I hold that the prosecution with respect proved the offence as charged beyond reasonable doubt. Accordingly I find the Defendant guilty as charged.

HIGH COURT
NNEWI
DATE 22/12/18

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Allocutus
Defendant's counsel – says the Defendant is a bread winner with tender children.
Reminds the court that parties had been friends. He had been borrowing and paying back.
Says he is taking care of the mother who is diabetic.
The Defendant is a first offender. Urges the court to temper justice with mercy.

Prosecution counsel – Records show that he is regular in court with many fraud cases though with no connection. Submits that the term of sentence is mandatory. Urges court to sentence accordingly.

COURT – I have listened to the submissions of both counsel made as Allocutus. I have noted in particular the plea for leniency by the Defence on the grounds as put forward before the court.

However, the court must be conscious of the mischief intended to be achieved curtailed or eliminated by that law.

Furthermore contrary to the submission of learned Deputy Director, pursuant to Section 17 of the Interpretation Act, it is clear that specific mention of term of years renders such term of years as maximium. In the instant case, what is mandatory is that there is no option of fine.

Having noted and appreciated as indicated, I hereby pronounce the following sentence.

Sentence – The Defendant Mr. Nnamdi Emefo having been convicted is hereby sentenced to Six (6) Months imprisonment without option of fine.

Certification ₦10
Certified True Copy ₦20
Fine Paid, ₦340 on 27-12-18

O. M. ANYACHEBELU
Judge.
22nd Jan 2018.

Parties – Defendant is present. He is on bail.

Appearances – N. J. Nwankwo Esq. Deputy Director with J. C. Ogunwa Esq. Senior State Counsel for the State.

O. J. Chikaelo Esq. for the Defendant.

Paid on CR No 1086646 27/12/18

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HIGH COURT
NNEWI
DATE 27/12/18