

127

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE AKURE JUDICIAL DIVISION
HOLDEN AT AKURE
ON TUESDAY, THE 26TH DAY OF JUNE, 2018
BEFORE HIS LORDSHIP: THE HONOURABLE
JUSTICE A . DOGO - JUDGE

SUIT NO: FHC/AK/34C/15

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA COMPLAINANT

AND

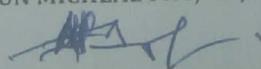
OGUNLEYE OLUSEGUN MICHAEL DEFENDANT

JUDGMENT

On 8/2/16 this case started denovo before me. On the same date the defendant was arraigned before this Honourable Court afresh in respect of a one count charge dated 27/4/15 and filed same date brought against him by the complainant in this case through one of its agencies, the Nigeria Police Force, Ondo State Command, Akure.

The one count charge, to which the defendant pleaded not guilty, reads thus:

“That you Ogunleye Olusegun Michael ‘M’ on or about the 6th day of May, 2014 in Akure within the jurisdiction of this Honourable Court did, with intent to defraud, fraudulently obtain the sum of N500,000.00 only from Ogunbayo Adepeju under the pretence of investing same in refining gold and pay back with monthly ten percent interest rate which you know to be false and thereby



committed an offence contrary to section 1(1) and punishable under section 1(3), the Advance Fee Fraud and Other Related Offences (Amendment) Act, 2006.”

The complainant, in its effort to prove the allegation contained in the charge against the defendant beyond reasonable doubt called a total of three witnesses and tendered six exhibits between 19/4/16 and 19/6/17. The prosecution closed its case on 19/6/17.

The defendant opened his defence on 29/11/2017. He testified for himself in his defence, but did not call any other witness or tender any exhibit. He closed his defence on 29/1/18.

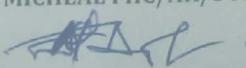
After the defendant closed his case the Counsel on both sides on same 29/1/18 agreed to file Final Written Addresses within two weeks each, with the defendant being the one to file first. The case was then adjourned to 8/3/18 for the adoption of the final written addresses of the parties.

However, as at 8/3/18 only the defendant filed his written address. The complainant has not, and there was no cogent explanation. Therefore on the same 8/3/18 the prosecution’s right to file final written address in reply to the defendant final written address was fore closed on the application of the defendant’s counsel. Judgment was also on the same date reserved. Thereafter the complainant filed an

application for leave to file its final written address which this Honourable Court reluctantly granted on 17/4/18. Judgment was reserved again afresh.

Let me at this juncture state, briefly, the complainant's case against the defendant as presented to the Court through the oral testimonies of its witnesses and documentary and real evidence.

The prosecution's case is that in September, 2013 the defendant was introduced to the complainant to the police, one Mrs. Ogunbayo Adepeju Catherine (PW1), by one Ibrahim Dede (PW3) for the purpose of obtaining loan from the PW1. The PW1 gave the defendant N500,000.00 loan. It was alleged that the defendant did not repay the loan in accordance with the terms of the grant of the loan to him. However, that is not the issue before the Court. After the grant of the loan to the defendant, he, in May 2014, met the PW1 and introduced a business proposal to her. That he told the PW1 that he was into gold mining business. That if the PW1 invests in the business it will yield 20% profit which would be shared equally between her and the defendant. That he took her to his house and showed her some stones he called "raw gold" and some powder he called "chemical" which is allegedly used to refine the gold. The PW1 said she was then convinced and she decided to invest N500,000 .00 into the business. That the defendant told her that the business will start yielding profit within one month.



The PW1 said after she gave the money to the defendant she did not see him again up to a year. That whenever she calls him he will tell her that he was in Akure or Kaduna or Sokoto for the business. She then suspected that she has been defrauded by the defendant. She therefore reported him at the SARS'S Office.

The defendant was invited by the police at SARS. One Sgt.Adebo Lateef (PW2) was a member of the team of investigators led by one Insp. Odike Innocent mandated to investigate the complaint lodged by the PW1 against the defendant. The complaint was, allegedly, obtaining money under pretence. The PW2 recorded the defendant's statement after he was duly cautioned. That the defendant claimed in his statement that the additional N500,000.00 given to him by the PW1 was also a loan. The defendant's house was also searched by the police where sample of stone alleged to be Gem-stone and grinded stones were recovered. The PW2 alleged that his investigation revealed that the first loan was used by the defendant in his school and because the money was not enough he came-up with the gold mining business in order to get more money from the PW1.

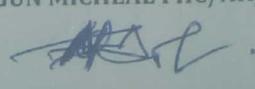
The prosecution tendered in evidence the following:

1. the extra-judicial statement of the defendant and attestation form annexed to it
-Exhibits A and A1 respectively;
2. Loan agreement form-exhibit B;

- 3. Search warrant allegedly executed on the defendant's premises – exhibit C; and
- 4. The stone and grinded stone allegedly recovered from the defendant's House – exhibits D1 and D2 respectively.

The defendant in his defence admitted that he was introduced to the PW1 by his friend (PW3) and he collected N500,000.00 loan from her company; Adepe Multipurpose Investment. That he made five instalmental payments of N75,000.00 monthly towards liquidating the loan. When he was unable to repay the loan fully, the PW1 reported him to the police. That she alleged that he took four persons to her house to kill her, but he denied ever knowing her house. That the police asked him to pay ₦1m to the PW1 because of the delay in repaying the loan of N500,000.00 he took from her, and that he agreed so that peace would reign. However he was subsequently invited by the police and served with a summons alleging that he received money from the PW1 under false pretence contrary to the initial complaint of threat to life.

The defendant stated that as at 2014 he knew nothing about Gem Stone. That it was discovered at his backyard in 2015. That when he was arrested by the police after the PW1 complained against him, he told the police that he was in possession of Gem Stone, and that if he is able to sale it he will repay the PW1 her money. That when the police came to search his house, they did not find anything incriminating.



But they asked him to show them the Gem stone which he did. He said he did not give the police the stone, exhibit D1, tendered by the prosecution, but the grinded stone in a container, exhibit D2.

The defendant also stated that the loan he applied from the PW1 was ₦1M, but he was given ₦500,000.00 only. When they wanted to give him the balance of ₦500,000.00 they made him to sign the loan form, exhibit B, not knowing that they were going to arrest him.

The foregoing are basically the prosecution and defendant's cases respectively. As earlier state above, after the close of the defendant's case the parties filed and exchanged final written addresses, which they respectively adopted thereafter on different dates. I would like to, at this juncture state, briefly the submissions of the defendant and prosecution's Counsel respectively. I will start with the defendant's Counsel's submission.

The defendant's final written address was dated 10/2/18 and filed on 12/2/18. The learned defendant's Counsel did not identify any issue for determination in the written address. He submitted, among other things, that the burden of proving the guilt of the defendant beyond reasonable doubt is on the prosecution. He submitted that the PW1 testified that loan was granted to the defendant in 2013 and 2014, and that the PW3 said it was because the defendant failed to repay the loan the PW1

reported him to the police. He submitted that it is not a crime to take a loan, and if the defendant failed to repay the loan the remedy is in civil not criminal action.

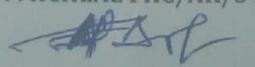
The learned defendant's Counsel also submitted that the prosecution has failed to prove the essential ingredients of the offence charged, particularly, that the defendant obtained the sum of ₦500,000.00 from the PW1 under the pretence of investing the money in refining gold and to pay back with monthly interest of ten percent. He submitted that the failure of the prosecution to call the PW1's husband, whom the PW1 said, under cross examination, that he was present when she gave the defendant the second ₦500,000.00 was fatal to the prosecution's case, as the PW1's husband was a vital witness. He urged this Honourable court to invoke the provision of section 167(d) of the Evidence Act against the prosecution for its failure to call the PW1's husband. He referred this Honourable Court to the cases of Archibong v. The State (2006)5 SCNJ 203 at 219 – 220 and Okpolor v. State (1990) 7 NWLR (Pt. 164) 581 at 592, paragraphs A – B.

He also submitted that the defendant testified that it was when the PW1 demanded for the repayment of her loan that he showed her exhibit D1, the alleged Gem Stone. He said the statement of defendant, exhibit A, and the PW2, during cross examination, also confirmed that fact. He argued that those pieces of evidence showed that the loan was given to the defendant before he showed the PW1 exhibit D1.

The learned defendant's Counsel also alleged material contradictions in the evidence of the prosecution regarding who granted the loan to the defendant between the PW1 and her company; and also between the evidence of the PW1 and PW3 on the presence of the PW3 when the defendant showed the PW1 the stone. He submitted that any doubt in the prosecution's case must be resolved in favour of the defendant. He referred to *Uzoka v. State* (1990)6 NWLR (Pt. 159) 680 at 690 and *Udoebre v. State* (2001)5 MJSC 146 at 149.

The learned defendant's Counsel further argued that PW1 and 2 under cross-examination stated that same Adepot Multipurpose Investment who gave loan to the defendant in 2013 gave him another loan in 2014 which was not reduced into writing. He urged this Honourable Court to invoke the provision of section 167(C) of the Evidence Act and presumed that the terms of the first loan in 2013 as contained in exhibit B are also applicable to the second loan in 2014. If that is done, he argued, the Court would find that the allegation of obtaining under false pretence brought against the defendant cannot stand as the additional N500,000.00 given by the PW1 to the defendant would simply be regarded as a mere civil transaction.

He finally urged this Honourable Court to hold that the prosecution has failed to prove the charge against the defendant beyond reasonable doubt, and consequently discharged and acquit him of the charge.

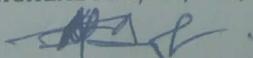


The prosecution's final written address was dated 12/3/18 and filed 15/3/18. The learned prosecuting Counsel identified a single issue for determination in the written address, namely; "Whether the prosecution has proved its case against the defendant beyond reasonable doubt for court (sic) to convict the Defendant for the offences (sic) charged."

The learned prosecuting Counsel submitted that the ingredients of the offence of obtaining under false presentence have been established by the courts of the land. He identified the ingredients of the offence as follows:

- "(i) That there was pretence;
- (ii) That the pretence emanated from the accused person;
- (iii) That the pretence was false;
- (vi) That the accused person knows that the pretence was false or does not believe in it truth;
- (v). That there was an intention to defraud;
- (vi) That the accused person by the pretence induced somebody to part with or transfer his whole interest in the property; and
- (vii) That the thing is capable of being stolen"

The learned prosecuting Counsel thereafter submitted, while making reference to the evidence adduced before the court by the prosecution, that the prosecution has



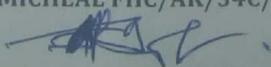
proved that there was pretences and same emanated from the defendant. He also submitted that the prosecution has proved that the pretence was false and the defendant has intention to defraud the PW1.

He thereafter responded to some of the submissions made on behalf of the defendant in the defendant's final written address.

On the contention of the defendant's Counsel that the charge was brought against the defendant in order to recover the loan granted to him by the PW1, it was submitted that the contention is not correct. The learned prosecuting Counsel submitted that the PW1 testified on how she was deceived by the defendant to invest in a non-existent gold refining business, and that the defendant confessed to the commission of the crime in his statement tendered a exhibits A and A1.

The learned prosecuting Counsel also argued that contrary to the assertion of the defendant's counsel in paragraph 1.4 of the defendant's final written address, the PW1 did not testified that she granted loan of N500,000.00 only twice to the defendant but that the second N500,000.00 was an investment in the defendant's gold mining business.

On the contention of the learned defendant's Counsel that the prosecution ought to call the PW1's husband to prove that the defendant collected the second N500,000.00, it was submitted on behalf of the prosecution that the prosecution has proved that fact through the testimonies of the PW1 and 2 and the confession of the



defendant.

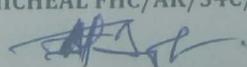
On the allegation of contradiction in the prosecution's case, it was argued that there was none, and that, assuming but without conceding there was any, it was not material.

The learned prosecuting Counsel further submitted that the defendant is not worthy of credit as his oral testimony is allegedly in contradiction with his allegedly confessional statement which he did not retract. He referred to the cases of **Emmanuel Edoko v. The State (2015) ALL FWLR (Pt. 772) 1728 @ 1752 and Sule v. State (2009) ALL FWLR (Pt. 481) 1977.**

He finally submitted that the prosecution has proved the charge against the defendant beyond reasonable doubt and urged this Honourable Court to so hold and convict the defendant accordingly. He also urged this Honourable Court to order the defendant to pay the sums of N800,000.00 only as restitution and N1,000,000.00 only as damages to the complainant to the police (PW1).

The foregoing are also the submissions of the Counsel on both sides. I will now proceed to consider the evidence adduced by the parties with the view to finding whether the prosecution has proved the charge against the defendant beyond reasonable doubt.

As earlier stated above and/or as contained in the charge reproduced above, the



defendant is charged with the offence of obtaining property by false pretence contrary to section 1(3) of the Advance Fee Fraud and Other Related Offences Act 2006 (hereinafter simply referred to as the Act). The offence of obtaining property by false pretence is defined or prescribed in section 1(1) of the Act thus:

“Notwithstanding anything contained in any other enactment or law, any person who by any false pretence, and with instent to defraud:

- a. obtains, from any other person, in Nigeria or in any other country for himself or any other person, or
- b. induces any other person, in Nigeria or in any other country, to deliver to any person; or
- c. obtains any property, whether or not the property is obtained or its delivery is induced through the medium of a contract induced by the false pretence, Commits an offence under this Act.”

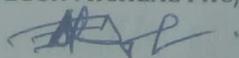
The learned prosecuting Counsel in his final written address identified seven essential ingredients of the offence of obtaining property by false pretence, which I have reproduced above. I agree with the learned prosecuting Counsel to a very grate extent. The only reservation I have is in respect of the last ingredient, which is “that the thing is capable of been stolen”. Section 1(1) of the Act says “any property” which I believe is wider.

Both Counsel agree that the prosecution bears the burden of proving all the

essential ingredients of the offence charged beyond reasonable doubt. I will therefore consider the ingredients of the offence the defendant is charged with vis-a-vis the evidence adduced before the Court with the view of finding whether the prosecution has proved all the essential ingredient of the offence against the defendant beyond reasonable doubt. I will consider ingredients numbers (i) to (iv) as identified by the prosecuting Counsel together. They are:

- “ i. that there was pretence;
- ii. that the pretence emanated from the accused person;
- iii that the pretence was false;
- and
- iv. That the accused person knew that the pretence was false or did not believe in it truth.”

The evidence adduced by the prosecution in proof of the fact that the defendant made false pretence to the complainant to the police (PW1) came mainly from the PW1. She testified that in May, 2014 the defendant, after she had given him a loan of ₦500,000.00 in 2013, met her and introduced a gold mining business to her. That he told her that the business will, within one month, yield profit of 20% on the investment, which would be shared equally between him and her. That he also took her to his house and showed her some stones which he called “raw gold” and a powder which he called “chemical to refine the gold”. That on the basis of the above



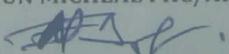
representation by the defendant she decided to invest the sum of ₦500, 000.00 in the proposed business by handing over the said amount to the defendant. That after giving the said amount to the defendant she did not see him again and did not here any positive result from him. The defendant in his oral testimony in his defence denied making the above representation or any such representation to the PW1.

I have carefully considered and thought over the portion of the PW1's testimony referred above. I have, in my mind, reasonable doubt regarding the truth of her claim, and I will give the reasons for my doubt. In my view the PW1's testimony regarding the alleged pretence is lacking in details. She did not state in her testimony before the Court where the defendant made the alleged pretence to her. Was it in her office or her house? She also did not state whether any other person was present when the defendant made the alleged pretence to her or if any other person saw the defendant with her on the date of the alleged pretence or saw when the defendant came to see her. Or if nobody was present or saw when the defendant came to meet her, then the time and place she met with the defendant, so as to give this Honourable Court the opportunity to determine whether the circumstances was such that no any other person would be aware of the meeting between her and the defendant. All the above identified details are lacking in the PW1's testimony. That in my view, gave room for the thought, in my mind, of the possibility of the PW1 making up the allegation of false pretence against the defendant. That suspicion was

141

strengthened by other circumstances disclosed by the evidence before the Court. I will state some of them right away.

Under cross examination by the defendant's Counsel the PW1 said her husband was present when she gave the ₦500,000.00 she allegedly invested in the gold mining business to the defendant. The PW1's husband was not called by the prosecution. I am aware of the position of the law that the prosecution is not bound to call a host of witnesses or any particular witness; so long as it is able to establish its case through the witness (es) called. However, in my humble view, in the instant case the evidence of the PW1's husband is necessary at least to establish or corroborate the evidence of the PW1 on the purpose of the payment of the ₦500,000.00 to the defendant. This is so because, contrary to the claim of the learned prosecuting Counsel, the defendant in his statement to the police, exhibit A, did not admit that he collected additional ₦500,000.00 from the PW1 as an investment in a gold mining business he allegedly introduced to her. Rather he said it was also a loan. The PW2, who is a member of the investigation team and who recorded the statement of the defendant, said, in his evidence in chief, that the defendant claimed that the second ₦500,000.00 he collected from the PW1 was also a loan. So in my humble view, the evidence of the PW1's husband is vital to at least prove or corroborate the evidence of the PW1 on the purpose of the subsequent payment of ₦500,000.00 to the defendant. If the PW1's husband was present when



she allegedly paid the money to the defendant it is probable that he will also know the purpose of the payment. Since the PW1's husband was available but not called as a witness by the prosecution it would not be out of place to presume that his evidence if called will not be favourable to the prosecution.

Again under cross-examination by the defendant's Counsel the PW1 said the PW3, Mal. Ibrahim Dede, was present when the defendant allegedly showed her in his house, the stone he allegedly called "raw gold". However the PW3 under cross examination by the defendant's Counsel said apart from the initial ₦500,000.00 loan which he served as a guarantor to the defendant, he does not know any other transaction between the PW1 and the defendant. This is a clear contradiction of the PW1 on her claim that the PW3 was present when the defendant showed her the alleged stone called "raw gold". This fact further shows the unreliability of the PW1's testimony and her desperation to make this Honourable Court believe her claim.

Similarly in the charge it was alleged that the defendant, with intent to defraud, obtained the sum of ₦500,000.00 only from Ogunbayo Adepeju (PW1) under the pretence of investing same in refining gold and pay back with monthly ten percent interest rate which he knew to be false. The claim that the money was to be paid back with ten percent monthly interest was reiterated in the synopsis of the PW1's testimony contained in the proof of evidence annexed to the charge. However

the PW1 in her oral evidence before the Court said it was 20% profit to be shared equally between her and the defendant. I think this was an after thought to further make this Honourable Court believe that the money was not a loan to the defendant but an alleged investment.

Based on the foregoing findings, I am unable to believe the PW1's claim that the defendant made false representation to her that he was involved in gold mining business and asked her to invest in the business because it yields high returns on investment and as a result of the representation she paid the sum of ₦500,000.00 to him. I am more inclined to accept what was stated by the defendant in his statement to the police, exhibit A, that the second ₦500,000.00 he collected from the PW1 was also a loan. It appears to me that because the second loan was not reduced into writing and because of the fear that she might loose her money in view of the provision of the Money Lenders Law of Ondo State regarding the documentation of loan transaction, the PW1 decided to make up the allegation that the defendant obtained the money from her by false pretence.

I am not unaware of the fact that the prosecution during the cross-examination of the defendant and in it final written address is contending that the defendant in his statement to the police, exhibit A, admitted that he showed to the PW1 an alleged Gem Stone, and also that he invested the money he collected from the PW1 in gold mining business. It is true that the defendant made such remarks in his statement,

however, not in the context being portrayed by the prosecution. A careful and wholistic consideration of the defendant's statement would reveal that the defendant admitted taken loan of ₦500,000.00 only from the PW1 on two occasions with a varying interest rate. He also said he invested the money in a gold mining business, which he said did not mature. He further said he showed the PW1 the sample of the gem stone and promised that after disposing the gem stone he will settle the debt he is owing the PW1, but the promised failed. In my view the above referred remarks made by the defendant in his statement do not constitute an admission that he made false pretence to the PW1. It is simply an admission that he took ₦500,000.00 loan twice from the PW1 and what he did with the loan he took. Also the presentation of the sample of the alleged gem stone to the PW1, as rightly argued by the defendant's Counsel, came after the collection of the loan and in the course of effort by the defendant to repay the loan. The PW2, who was part of the investigation team, admitted under cross examination, that the defendant in his statement said it was when the PW1 asked him to refund the loan that he told her to give him time to sale the gem stone and pay the money to her. I am therefore of the firm view that the defendant did not confess to the commission of the offence he is charged with in his statement to the police.

Section 28 of the Evidence Act defines confession thus:

“A confession is an admission made at any time by a person charged with a

crime stating or suggesting the inference that he committed that crime.”

It is also settled that a confession must be direct, positive and unambiguous to ground conviction. See the cases of **Eragua & Ors. V. The A. G. Bendel State (1994) LPELR – 1153 (SC) P. 11, paras. A – C** and **Giki v. State (2014) LPELR – 22722 (CA) P. 24, paras. C – G**. The defendant’s statement, exhibit A, in the instant case, which is erroneously referred to as a confession by the prosecution, is lacking in any of the above qualities. I hold that it is not a confessional statement.

Let me also state at this juncture, that I observe, as rightly argued by the prosecuting Counsel that there are some material contradictions between the defendant’s oral testimony and statement, exhibit A. The contradictions include the number of times he collected loan from the PW1 and whether he showed the PW1 the alleged gem stone or not. However, in my humble view, that does not relieve the prosecution of the burden placed on it to proof the charge against the defendant beyond reasonable doubt.

It is settled that the burden of prove placed on the prosecution to prove the charge against the defendant is beyond reasonable doubt and it is static, it does not shift. See the cases of **State v. Azeez (2008) ALL FWLR (Pt. 424) 1423 at P. 1450, para. F; John v. State (2013) LPELR – 20536 (CA) P. 21, paras. E – F** and **Ebufor v. State (2013) LPELR – 20688 (CA) PP. 40 – 42, paras. B – C**. Therefore notwithstanding the contradictions between the statement and oral testimony of the

defendant, the prosecution still has the burden of proving the charge against the defendant beyond reasonable doubt.

Having regard to the foregoing findings I found that the prosecution has failed, woefully, to prove beyond reasonable doubt:

- (i) that there was pretence;
- (ii) that the pretence emanated from the defendant;
- (iii) that the pretence was false; and
- (iv) that the defendant knew that the pretence was false or that he did not believe in its truth.

It also follows, based on the above finding, that the prosecution did not prove that the defendant intended to defraud the PW1. If the defendant did not make any false pretence to the PW1, there is no basis for finding that he intended to defraud the PW1. In my humble view, the transaction between the PW1 and defendant was simply a loan transaction which is civil not criminal.

In the same vein, I found that the PW1 did not give to the defendant the second ₦500,000.00 as result of any false pretence from the defendant. The defendant simply obtained a loan from the PW1, which is a civil transaction.

My final finding and conclusion, based on the foregoing, is that the prosecution has failed, woefully, to prove the charge against the defendant beyond

reasonable doubt. I therefore found that the defendant is not guilty of the offence he is charged with in the charge brought against him. He is accordingly discharged and acquitted of the charge.



A. DOGO
JUDGE
26/6/18

COUNSEL APPEARANCE:

D. C. NWOKOLO FOR THE PROSECUTION

L. K. DARE WITH O. E. OKAFOR EZE FOR THE DEFENDANT.