IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ADO EKITI JUDICIAL DIVISION
HOLDEN AT ADO EKITI
ON MONDAY THE 18TH DAY OF FEBRUARY, 2019
BEFORE HIS LORDSHIP, HON. JUSTICE TAIWO O. TAIWO
JUDGE

CHARGE NO: FHC/AD/7C/2015

BETWEEN:

INSPECTOR GENERAL OF POLICE ..... COMPLAINANT

VS

ARIYO BALOGUN MUSA ..... ACCUSED

JUDGEMENT

This criminal charge was filed in the registry of this court on the 16th of February, 2015 against the defendant herein, Ariyo Balogun Musa by the Police in the name of the Inspector General of Police. It is a two (2) counts charge to wit:

1. That you Ariyo Balogun Musa 'm', and others now at large on the 4th day of June 2014 at number 6, beside Spotless Hotel GRA, Ado Ekiti, in the Ado Ekiti Judicial Division, did conspire among yourself to defraud Mr Ijalana Sunday. Thereby committed an offence punishable under section 8 (a) of the Advance Fee Fraud and other Fraud related Offences Act 2006.
2. That you Ariyo Balogun Musa 'm', and others now at large on the 4th day of June 2014 at the same place, in the aforesaid

CERTIFIED TRUE COPY
REGISTRAR
FEDERAL HIGH COURT

judicial division, did fraudulently with false pretence obtained the sum of Three Million Naira (N3,000,000:00) from Mr Ijalana Sunday with the pretence of purchasing a mark Tipper lorry for him. Thereby committed an offence contrary to section 1 (1) © and punishable under section 1 (3) of the Advance Fee Fraud and other Fraud Related Offences Act 2006.

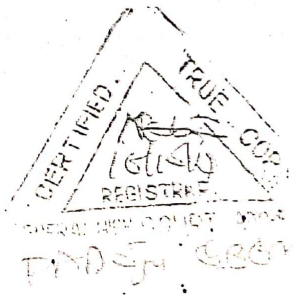
The plea of the defendant was taken on the 23rd of February, 2016 and he pleaded not guilty to the two counts charge.

Trial started immediately after the plea of the defendant was taken. The first duty imposed on a court when considering its judgment is, to first and foremost find the facts, and then draw from those facts, inferences of fact. This duty arises especially where the essential facts are in dispute and where the witnesses gave conflicting versions of those essential facts. In such a case, the court has a duty of weighing the evidence of either side, of rejecting one side and accepting the other side whose evidence induces belief and then making specific findings as dictated by the balance of credibility.

In deciding which side to believe, the court usually has to decide which account considered in the light of all the surrounding circumstances bears the impress of probability, for the stamp of probability is also generally the

stamp of truth. However, this is not to say that the duty imposed on the prosecution to prove it's case beyond reasonable doubt can be overlooked by the court in it's quest to finding the truth which may also be hidden from the court even from the facts presented by the parties vide the evidence before the court.

The prosecution called four (4) witnesses. These are Ijalana Sunday, the complainant to the police as PW1. All the other witnesses i.e PW2, PW3 and PW4 are police officers. Out of the three (3) police officers that came to testify, only two (2) were said to have investigated the case. The other one, i.e PW4 is the exhibit keeper, though gave evidence in chief and was cross-examined, only tendered the sum of N338,000 kept with him as the exhibit keeper. This was recorded by the court as exhibit "E". Other exhibits tendered were exhibits "A" and "A^1" tendered through PW1 being the statements made by him at the police station on the 1st day of July, 2014. Exhibits "B" and "B^1" being the statement made by the defendant dated 18th of June 2014, tendered through PW2 and exhibit "C", the bench warrant. Exhibits "D", "D^1" and "D^{2}" the statements made by the defendant on the 1st of July, 2014 were tendered through PW2. The defendant tendered no document either through him or any other witness.



The defendant gave evidence in his own defence as DW2 while his wife gave evidence as DW1. From the charge before the court, the facts as stated is that the defendant and others at large conspired among themselves and fraudulently with false pretense obtained from PW1 the total sum of N3 Million. From the totality of the evidence before me, there are certain facts that are not in contention. These are the facts that PW1 and the defendant have known each other for sometimes before the incident leading to the charge before the court and that the defendant knew PW1 through the wife of PW1 before they were married.

However, there were divergent facts about what actually transpired between the complainant i.e PW1 and the defendant. While PW1 stated in his evidence in chief in this court and in his statement to the police i.e in exhibits "A" and "A^1" and also maintained the position under cross examination that he gave the sum of N3 Million to the defendant for the purchase of a Mark Brand Tipper Lorry from Cotonou. The defendant stated in his statements to the police, in his evidence before the court at some point and under cross examination, that the money was given to him by the complainant in other to kill some persons.

I will briefly state the salient points in the evidence of the witnesses before the court, where the evidence is important and not trivial. PW1 stated how

he met the defendant after a long time outside his office i.e First Bank branch, Ado Ekiti, how the defendant followed him inside his office, how they exchanged numbers and how the defendant called him thereafter to offer prayers for him. PW1 stated how the defendant on a visit to his office heard him discussing on the phone about engaging in transport business and as such wanted to buy a tipper lorry. This was how according to him, the defendant offered to assist him since he, the defendant, had procured vehicles for persons from Cotonou.

PW1 stated how he gave the sum of N3 Million to the defendant at First Bank, Adebayo in Ado Ekiti on the 4th of June, 2014. PW1 stated that the defendant promised to delivered the tipper lorry within a week and that the balance of the said agreed price of N3.5 Million would be ready. PW1 stated further that, rather deliver the tipper lorry within a week the defendant told him that he had to pray against sudden death and therefore to avert same, he had to do prayers. PW1 was then taken by the defendant to Igede Ekiti where he met eight (8) persons dressed in Islamic way who asked him to kneel down naked, tied his eyes with cloth and gave him a knife as a symbol of god of Iron.

PW1 stated how their prayers turned into incantation after which he was asked to get up. PW1 stated that a week thereafter, he asked the

defendant for the lorry and all the defendant told him was about vision of death not related to the lorry. He then went to the police station. PW1 stated how the defendant was arrested and granted administrative bail when he pleaded to settle with him. PW1 stated how the matter could not be settled because a lawyer who was present at the meeting told him to forget the matter so as not to implicate himself.

PW1 stated how the defendant went to his office and met the Business Development Manager, his boss that he, PW1 asked the defendant to kill her, the group head in charge of the whole of First Bank in South West and the Executive Director of First Bank in South West. He mentioned them as **ABIOLA LUFADEJU, SUNDAY AKINPELU** and **GBENGA SHOBO**. He stated that he was asked to go on suspension due to the death threat but had his employment was terminated on the 17th February, 2016.

Under cross examination, PW1 stated that there was nobody there when he gave the defendant, whom he claimed never denied taking the money from him the sum of N3 Million. PW1 stated when asked if he told his wife that he gave money to the defendant, that he did not, but that his wife knew he wanted to buy a tipper. PW1 stated that the accused person took him to Igede Ekiti but he stated that he did not take police officers to Igede for any arrest.

CERTIFIED TRUE COPY REGISTRAR

When put to PW1 that it was because a huge sum of money was found in his account through a customer and his bosses in the office knew about it and he wanted to kill them, that was why he ran to the defendant. PW1 stated that no money could enter his account without the knowledge of the management and that only his salaries and allowances are paid into his account. PW1 denied that he wanted to kill his bosses whose names were reeled out by the learned counsel for the defendant during cross examination. When asked how the defendant got to know the names, PW1 stated that he innocently gave the defendant the names because the defendant asked him to pray against those who wanted to implicate him in his office. PW1 also stated that he did not collect any hand note from the defendant when he gave him the money as he gave him the money in good faith.

Still under cross examination, PW1 stated that he did not know the date the defendant was arrested when put to him that PW1 gave N3 Million to the defendant on the 4th of June, 2014 but he was arrested on the 8th of June 2014 which is less than one week, the defendant promised to deliver the lorry. PW1 stated that the defendant promised to deliver in a week.

PW2, as aforesaid a police investigator gave evidence and rehearsed the allegation of the complainant to the police against the defendant. He

tendered the statements that he wrote for the defendant at the defendant's direction in English Language. He stated that the defendant took the police to Igede Ekiti but no arrest made since 2014. He stated that those alleged to be killed were not invited by the police. PW3 is another police officer, who read the case file when it was transferred to him for further investigation. He stated that the nature of the defendant's statement is confessional in nature but with little controversy. PW3 stated that the defendant admitted that N200,000 out of the N338,000 found in the house of the defendant's wife belong to him while N138,000 belong to his wife. PW3 stated that the sum of N3,000,000 was given to the defendant in his house along Spotless Hotel, GRA, Ado Ekiti. Under cross examination PW3 stated that he did not invite the wife of PW1 to know the relationship between her and the defendant. He stated further that he did not see any petition and thus could not confirm that the issue of tipper lorry was mentioned therein. PW3 also stated that the money was collected from the complainant's office and that the sum of N338,000 was recovered by the IPO who conducted the preliminary investigation. PW4 as stated earlier only tendered as exhibit keeper the sum of N338,000.

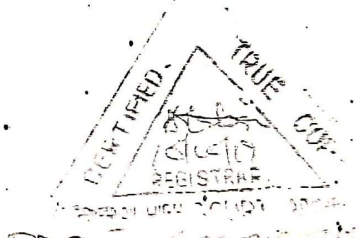
At the close of the case for the prosecution, the defence opened its case and called two witnesses as aforesaid. DW1 stated how her mother in law

called her since she was not living with her, the defendant, that her husband was arrested. She stated that the complainant from what her husband told her is his customer being an Alfa. She stated that the defendant was taken to her house and the sum of N338,000, stabilizer, CD player and television were taken from her house. DW1 stated that her properties has not been returned to her despite asking for them to be returned to her including the money.

Under cross examination, DW1 confirmed that she lives apart from her husband. She denied that it was as a result of the fraudulent activities of her husband that she lives apart from him. She denied that she came to say what her husband asked her to say. She confirmed that she is a trader and also a hairdresser. She confirmed that she wanted to travel to the market the following day her husband was arrested. She stated that the money taken from her house are in N1000, N500 and N200 denominations. When asked how much she was given out of the N3,000,000, she stated that she did not see any money with her husband and was not given any either.

DW2 gave evidence in Yoruba Language. DW2 confirmed that he knew PW1's wife. He denied the testimony of PW1 that they met at a bank after 8 years where they exchanged number. He denied that he called PW1 to tell

him about any vision. He denied collecting N3 Million from PW1 as he is not a tipper lorry seller and that he had not been to Cotonou before. He denied collecting any money from PW1 at First Bank branch, Adebayo along Iworoko Road, Ado Ekiti. He denied agreeing to supply a tipper lorry to PW1 for N3.5 Million out of which N3 Million was given to him. DW2 stated how PW1 gave him the names of three (3) persons who are his bosses to kill since they knew about the issue of money usually loaned out to Civil Servants. DW2 stated that PW1 wrote the names in a piece of paper for him and also sent the names by test. He mentioned the names of a policeman, Patrick Nwoye whom he said saw the test with the names on his phone. DW2 stated that the police also retrieved a hand written note with names. DW2 also stated that it was when he was charged to court that he knew that the charge against him was to that he wanted to help PW1 to purchase a tipper. DW2 stated that he asked the policemen particularly Johnson Okunade and Tosin Adesina to investigate the handwritten note and the text messages but they did not. DW2 denied that he informed the police that he wanted to settle with PW1. DW2 stated that he went to report at PW1's place of work because the police refused to investigate the names he gave them. DW2 stated that he called by his boss, PW1 confessed that he was the one that sent the names to him i.e DW2.



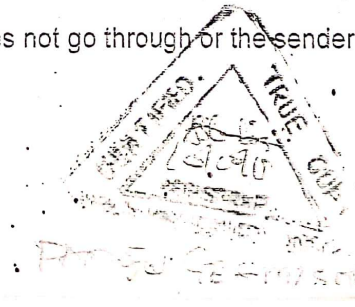
DW2 stated that he signed exhibits "B" and "B[1]" after he was beaten and that he did not make any statement before PW3 other than the statement PW3 was given. He denied collecting any money from PW1 at all.

Under cross examination, he stated that he did not report that he was engaged to kill any one by PW1 at any police station. DW2 stated further that he decided to report PW1 at his office because the police did not take any step on the case. He stated that he was not aware that PW1 was dismissed from his office. He insisted that he did not lie against PW1 in his office. He further informed the court, still under cross examination that PW1 wrote the names of those he wanted to eliminate on a paper which he gave the police and that he also sent the names to his phone i.e DW2's phone. The names **ABIOLA EMIOLA LUFADEJU, SUNDAY AKINPELU** and **FRANCIS GBENGA SOBO** were read from DW2's telephone no 08032229633. He confirmed his bio data as contained in his statement, which he claimed was written for him. He stated that only N23,000 was given to him.

In unravelling the issue of the names, the court asked that the sender's number, time and date be read to the court from DW2's phone. The court saw the message, time and date and the name MR IJALANA written boldly on top of the message. However, there was no message tied to the name

of Sunday Ijalana on the contents on the phone of DW2. This made the court to summon the Manager of MTN, Ado Ekiti to appear in court on the 23rd of October 2018. A summons was issued to that extent. On the 23rd of October, 2018, the prosecution concluded it's cross examination of DW2 and there was no re-examination.

The manager MTN, Ado Ekiti, Mr Aluko Raphael appeared as ordered and the court was grateful and commended his appearance to shed light on the issues, when messages are sent from one phone to another. Mr Aluko informed the court that when a message is sent from someone to another, an alert is received and that the message is automatically saved but can only be manually deleted. M. O. Osakile who appeared for the defendant holding the brief of J. J. Tijani asked Mr Aluko how best one can know if a number actually sent a message to another number. Mr Aluko answered that by going through the two phones if the message has not been deleted manually by the sender. Osakile Esq of counsel also asked, if he received a text message, it will be in his inbox but not as a sent item. Mr Aluko answered in the affirmative. The court asked further how a test message sent and stored by his company can be retrieved. He stated that it can only be retrieved by an order of court. The court further asked what happened if a text is sent, but does not go through or the sender changes his mind.



Mr Aluko stated that it stays as draft on the phone, if the person who changed his mind did not delete it. The case for the defence was closed on the 22nd of November 2018 and the court adjourned for adoption of written addresses to the 10th of January 2019 which indeed took place on that day. This judgment ought to have been read on the 31st of January 2019 but it was not ready. It was adjourned to the 18th of February 2019 by the time I had reported due to my transfer to Abuja.

I have read the addresses of both the prosecution and he defence. I have also gone through the exhibits tendered and admitted before the court that is the statements made in the course of the investigation of this case. As stated earlier, the first duty imposed on the court when considering it's judgment is to first and foremost find the facts and then draw from those facts inferences of facts. This duty arises where the essential facts are in dispute and where witnesses gave conflicting versions of those essential facts.

The defendant before the court, was said to have with others at large defrauded Mr Ijalana Sunday (PW1) by obtaining the sum of N3,000,000 (Three Million Naira) from him with pretence of purchasing a Mark Tipper Lorry for him. By virtue of the provision of section 1 of the Advance Fee

Fraud and Other Related Offences Act, any person who by false pretence and with intent to defraud:

(a) Obtain from any other person in Nigeria or in any other country for himself or any other person

(b) Induces any other person in Nigeria or in any other country to deliver to any persons; or

(c) Obtains any property whether or not the property is obtained or it's delivery is induces through the medium of a contract induces by false pretence, is guilty of an offence under the Act.

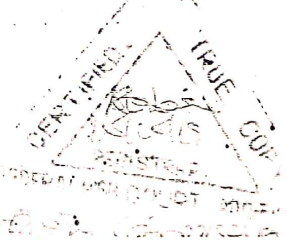
By virtue of Section 8 of the Advance Fee Fraud and other Related Offences Act a person who:

(a) Conspired with, aids abet or counsels any other person to commit an offence; or

(b) Attempts to commit or is an accessory to an act or offence; or

(c) Invites, procures or induces any other person by any means whatsoever to commit an offence under this Act, is guilty of the offence and liable on conviction to the same punishment as is described for that offence under the Act.

It is trite law as settled in decided cases and by virtue of section 138 (1) of the Evidence Act 2011, that the burden on the prosecution in a criminal trial



which must be discharged in order to secure a conviction, is to prove the offence charged against the accused being tried beyond reasonable doubt. See **AMADI vs FRN (2008) 18 NWLR (pt 276) SC 259, DURU vs THE STATE (1993) 3 NWLR (pt 281) 285, EHINMIYEN vs STATE (2016) 16 NWLR (pt 1538) SC 173 and JUA vs STATE (2010) 4 NWLR (pt 1184) 217**, to mention just a few in a long line of cases. I have stated the law under which the defendant has been charged to court. The prosecution must also prove the ingredients of the offence in other to secure a conviction.

The first charge is on the issue of conspiracy. Most unfortunately, only the defendant is before the court while the others are said to be at large. It must be noted that the absence of other persons is not a pointer to the fact that conspiracy has not occurred between the defendant before the court and others at large. Conspiracy can be a charge on it's own and may be a count with other counts as in this case. The point is that being criminal in nature, it must also be proved beyond reasonable doubt. While it is the law that proof beyond reasonable doubt does not mean that the prosecution must prove its case to the point of mathematical certainty, the evidence to support a conviction must not create room for speculation. The evidence in

other words, must be cogent. See Anekwe vs State (2014) All FWLR and Ikpo vs State (2016) 3 – 4 MJSCI.

Where there is a charge of conspiracy, the conspiracy as laid down in the charge must be proved and the person charged must have engaged in it. See Daboh vs The State (1977) LPELR – 904 (SC). In Shurumo vs The State (2010) LPELR – 3069 (SC). Conspiracy was held to consist of 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. From a long line cases, it has been held that conspiracy is an offence that is often deduced or inferred from the acts of parties and not usually be direct evidence of the meeting of minds.

The reasons being, simply that discussions and agreements to do an illegal act or carry out a legal act by illegal means are transactions in secret and normally shrouded from those not part of the deal.

The dictum of the Supreme Court per Adekeye JSC (as she then was now retired) in the case of Onyekwe vs State (2012) 6 SC (pt 111) quoted in the case of Adekoya vs State (2017) 1 SC (pt 11) 1 with approval is useful and I quote:

> "In effect conspiracy can be inferred from the acts of doing things towards a common and where there is no direct evidence

in support of an agreement between the accused persons. The conspirators need not know themselves and need not have agreed to commit the offence at the same time. The courts tackle the offence of conspiracy as matter of inference to be deduced from certain criminal acts or inactions of the parties concerned"

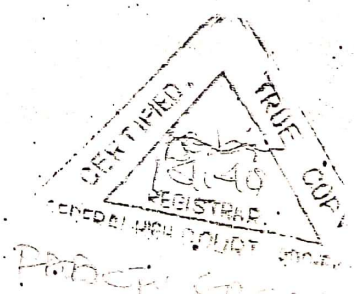
In the case of Oyediran vs Republic (1966) 4 NSCC 252 Coker JSC, explained the modes of forming conspiracy, when His Lordship (of blessed memory) stated and said

"Conspiracy may be formed in one of the following ways:

a. The conspirators may all directly communicate with each other at a particular place and time and enter into an agreement with a common design.

b. There may be one person who is the hub around whom the others revolve like the centre of a circle and the circumstances.

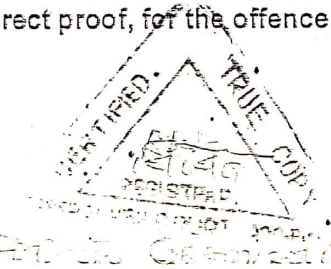
c. A person may communicate with A and A with B, who in turns communicates with another, and so on. This is what is called chain conspiracy.



2 In order to establish conspiracy therefore, it is not necessary that the conspirators should know each other. They do not have to know each other so long as they know of the existence and the intention or purposes of the conspiracy".

Under what circumstances can the offence of conspiracy be purported on accused persons? This question was succinctly put by Coker JSC (of blessed memory). In the case of **Njovens & Ors vs The State (1973) LPELR – 2042 (SC) 1** at para A – F as follows:

> "The overt act of omission which evidence conspiracy is the actus reus and the mens rea each and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius Caesar, were seen together coming out of the same place at the same time and indeed conspirators need not know each other. See R. V. Meyrick and Ribuff (1929) 21 C App R 94. They need not all have started but some persons may be joined at a later stage or alter stages by others. The gist of the offence of conspiracy is the meeting of the mind of the conspirators. This is hardly capable of direct proof, for the offence of conspiracy is



a matter of inference from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common between them and in proof of conspiracy, the acts or omissions of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators".

The ingredients of the offence of conspiracy which are essential lies in the bare agreement and association to do an unlawful thing which is contrary or forbidden by law. See **Okafor vs The State (2016) 4 NWLR (pt 1502) 248**. The evidence of the prosecution in proving conspiracy must not only be compelling and convincing but must also be conclusive. What is the evidence before the court with respect to count 1? Can this court ground a conviction with respect to count 1 from the evidence before the court? The offence of conspiracy is completely consummated (committed) the very moment two or more persons have agreed to do, either, immediately or at some future time certain things. There is no gain saying that the prosecution must lead evidence to prove all the ingredients of conspiracy namely;

a. That there was an agreement between two or more persons

b. That the agreement was to do or cause to be done an illegal act or to do a legal act by illegal means.

Let me briefly state the facts of this case. The complainant herein PW1 alleged that he was induced by the defendant to part with the sum of N3 Million for the purchase of a Mark Tipper Lorry which the defendant neither delivered nor refunded his money. The defence on its part said that was not the case. The defence alleged that the complainant gave him money for the purpose of terminating the lives of three persons. It appears that the prosecution must establish the meeting of minds of DW2 and others said to be at large for the purpose of establishing count 1.

I have gone through the written address of the learned prosecutor, I do not find any submission on count 1. He merely posited an issue for determination i.e "whether the prosecution has proved the case against the defendant" For the defence too, nothing concrete was submitted with reference to count 1 either.

This is not to say that the court cannot look at the evidence viva voca and the exhibits tendered in coming to its conclusion. After all, the submissions of counsels, no matter how brilliant cannot take the place of evidence, conversely, the fact that no submission exists does not derogate from the power of court to evaluate the evidence before it with respect to count 1.

Was there an agreement between the defendant and the others at large to do or cause to be done, an illegal act? The evidence before this court and the exhibits before it particularly exhibits "A" and "A1", "B" and "B1" and "D", "D1" and "D2" are very germaine.

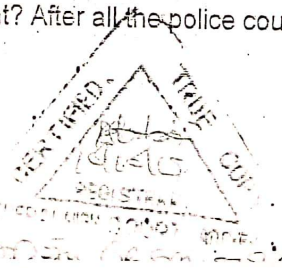
PW1 in his evidence before the court and in his statement never mentioned anyone involved aside the defendant when he allegedly gave him the sum of N3 Million. He stated in open court thus **"One day I was in my office when he came in at the time I was discussing on the phone to buy a tipper lorry for business purposes. After the call he asked me to be very careful with motor dealers, that he can assist me in getting one form Cotonou at the rate of N3.5 Million".** He stated further that the defendant said he was involved in getting company vehicles for a one time governor of Ekiti State.

The issue of the complainant being taken to Igede Ekiti, where according to him, he met eight (8) men dressed in Islamic way happened after the complainant had allegedly parted with the money and failed to receive the Mark Tipper Lorry from the defendant as promised. On the part of the defendant, he stated that the complainant asked him to kill some people who were the bosses of the complainant. The defendant insisted that the complainant came to him for spiritual assistance without much ado. It is

pertinent to note that counts 1 and 2 are meant to be proved together even though the fact that a defendant is discharged of the main offence does not mean that conspiracy can still mot be upheld by the court. The question is, has the prosecution proved that the defendant conspired with others at large to defraud the complainant under the pretence that they will either jointly or severally deliver to the complainant a Mark Tipper Lorry?

I have looked at the evidence before the court thoroughly, through the witnesses before the court and of course the exhibits i. e the statements. I also note that none of the others alleged to have conspired were investigated by the complainant and the defendant which the police ought to have investigated thoroughly in other to unravel the deeply divergent facts of this case from the perspective of the complainant and that of the defendant.

What efforts did the police make in getting arrested, these people mentioned by the defendant in exhibits "B", "B^1", "D", "D^1" and "D^2". What efforts did the police make in ascertaining the allegation of the defendant that the complainant asked him to kill some named persons whose names, identities and addresses are known to the police. What efforts did the police make in getting to the root of the names said to have been sent to the defendant by the complainant? After all the police could have applied



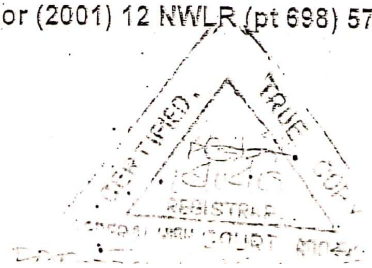
for an order directed at MTN to produce the log of calls and messages between the complainant and the defendant. What efforts did the police make when it was stated unchallenged by the defendant that he gave the police the handwritten names the complainant allegedly contracted him to kill. The written note was not even tendered. The police did not even tender the complainant's phone and that of the defendant in other to investigate the weighty issues thrown up by the parties i.e the complainant and the defendant.

This is a court of law and law alone where the prosecution has a duty to prove its case beyond reasonable doubt. The prosecution must discharge its duty beyond reasonable doubt. I am of the firm view that there's no credible evidence adduced to establish the offence alleged in count 1. against the defendant. Speculation has no place in law and courts have been enjoined not to act on speculations which is bereft of proof. In **Isah vs** The State (2007) NWLR (pt 1049) 582 at 615 CA the Court of Appeal held thus "A trial court must not base its decision on speculations and extraneous matters not supported by evidence before the court as this will occasion miscarriage of justice. In other words, the courts findings must be supported by concrete and real evidence and not speculations. See Onuoha vs State (2002) 1 NWLR (pt 748) 406;

Agholor vs State (1990) 6 NWLR (pt 155) 141; Oshodin vs State (2001) 12 NWLR (pt 726) 217, Onyinrimbar vs A.G Bendel State (2002) 11 NWLR (pt 777) 83".

Therefore, I find and hold that the prosecution has not proved count 1 in line with the law beyond reasonable doubt. I hereby discharge and acquit the defendant with respect to count 1. As stated earlier the offence of conspiracy is different from the main offence. The discharge of one, does not mean the other one may or may not succeed. The general principle of law apply to both scenario. This is the fact that the prosecution must prove its case beyond reasonable doubt. The prosecution need not to call several witnesses to testify. The court is only interested in the quality of the evidence and so one qualitative witness may be enough, so long as the charge is not one that needs corroboration.

Again it is a settle principle of law that the prosecution is not bound to call every persons that was linked to the scene of crime by physical presence or otherwise, to give evidence on what he perceived. Once persons who can testify to the actual commission of the crime and the other ingredients have done so, it will suffice for the satisfaction of the principle of beyond reasonable doubt. See Shurumo vs The State (supra) The State vs John Oghubunjo & Anor (2001) 12 NWLR (pt 698) 579. It is not incumbent on



the prosecution to call every eye witnesses to testify, in order to discharge the onus placed on it by the law of proving criminal case beyond reasonable doubt. As a matter of fact, a single witness who gives cogent eye witness account of the incident can suffice in certain cases.

In count 2, the defendant was defendant was also charged to have conspired with others at large, with fraud by collecting the sum of N3,000,000 (Three Million Naira) from PW1 under false pretence that he will supply a Mark Tipper Lorry to PW1 which he never did. The meaning of fraud and when offence is committed was determined by the Supreme Court in the case of **Amadi vs FRN (2008) 18 NWLR (pt 1119) 529 SC.** The Supreme Court held inter alia that the offence can be committed in the taking of the thing capable of being stolen if done fraudulently. Fraud, the noun variant of fraudulent is:

i. An action or a conduct consisting in a knowing misrepresentation made with the intention that the person receiving that misrepresentation should act on it.
ii. The misrepresentation resulting in the action or conduct.
iii. An action or a conduct in representation made recklessly without any belief in its truth, but made with the intention that

the person receiving that misrepresentation should act on it and so on and so forth.

A fraudulent action or conduct conveys an element of deceit to obtain some advantage for the owner or the fraudulent action or conduct or another person or to cause loss to other person. In fraud, there must be deceit or an intention to deceive flowing from the fraudulent action or conduct to the victim of that action or conduct. It is committed if the action or conduct is a deceit to make, obtain or procure money illegally. It means knowingly obtaining another person's property by means of misrepresentation of fact with intent to defraud.

For the offence of obtaining by false pretences to be completed, the prosecution must prove that the accused had an intention to defraud and the thing is capable of being stolen. An inducement on the part of an accused to make his victim part with a thing capable of being stolen or to make his victim deliver a thing capable of being stolen will expose the accused to imprisonment for the offence.

In the case of Onwudiwe vs FRN (2006) All FWLR (pt 319) 77, the Supreme Court provided seven (7) elements and/or ingredients of the offence of obtaining by false pretence. These are

i. That there is a pretence.

ii. That the pretence emanated from the accused person

iii. That it was false

iv. That the accused person knew of it's falsity or did not believe in it's truth.

v. That there was an intention to defraud.

vi. That the thing is capable of being stolen

vii. That the accused person induced the owner to transfer his whole interest in the property.

See also the case of **Michael Alake & Anor vs The State (1991) 7 NWLR (pt 205) 567 at 797** to the effect that intent to defraud is one of the essential elements to be proved in other to secure a conviction of the offence of obtaining false pretences.

Has the prosecution proved its case beyond reasonable doubt in line with section 138 Evidence Act 2011? There appears to be no eye witness to what happened between the complainant and the defendant and so the court is saddled with the evidence before it. The complainant's allegation is contained in his evidence before the court and the statements he made to the police i.e exhibits "A" and "A1". PW2, PW3, and PW4 are police officers. I have stated their evidence briefly above. PW4, a police officer Jimoh Ariyo only tendered the sum of

N338,000 (Three Hundred and Thirty Eight Thousand Naira) said to have been recovered from the defendant. PW2 and PW3 are investigating police officers who as police officers, were not at the scene. Investigation comes after the crime had been committed. Investigating police officers, IOPs obtain statements from the accused persons and witnesses alike and they thereafter testify in court giving a synopsis of what they did during the investigation. They tender statements of the accused and at times that of the witnesses. Documents and exhibits are also tendered through them especially the ones obtained during investigation. The IPO therefore gives direct evidence of what happened during the investigation of the crime. The IPO must thoroughly investigate a crime reported to him. It behooves on the IPO to investigate the crime in details not only from the report lodged by the complainant but the defence put up by the defendant.

In our criminal jurisprudence law and practice, the burden of proof lies on the prosecution and the standard of such proof is beyond reasonable doubt. The burden only shifts, if the prosecution had adduced evidence which includes circumstantial evidence which shows that the accused is guilty of the offence charged. The burden of proving that he is innocent

thereafter shifts to the accused. I have stated the facts as presented by the complainant and the defendant. The facts from either side are not similar in the light of the charge. i.e count 2 before the court. Exhibits "A" and "A^1" are the statements of the complainant made on the 1st of July, 2014. Exhibits "B" and "B^1" written in English on behalf of the defendant are both dated 18th June 2014 while the statements received in evidence as exhibits "D", "D^1" and "D^2" are dated 1st of July, 2014.

One issue that is on my mind from all the statements is, when was the complaint lodge in the light of the fact that one statement was made on the 18th of June, 2014 by the defendant and none was made by the complainant till the 1st of July, 2014. Was there a petition on the crime by the complainant before the 18th of June, 2014? As stated earlier, the prosecution must establish the guilt of the accused person with compelling and conclusive evidence. The allegation made out by the complainant is not the same in response by the defendant.

Are exhibits "B", "B^1", "D", "D^1", and "D^2" confessional statements? I posed this question because of the conclusion of the prosecution that it is. Furthermore, the Superior Courts have also laid down in its judgments ways of establishing the guilt of an accused person. In Okanlawon vs State (2015) 17 NWLR (pt 1489) AC 445, the Supreme

Court stated that the guilt of an accused person can be established by any or all of the following:

(a) The confessional statement of the accused

(b) Circumstantial evidence

(c) Evidence of an eye witness.

See Alufohai vs State (2015) 16 NWLR (pt 1445) 1172, Adeyemo vs State (2015) 16 NWLR (pt 1485) SC 311, where it was stated by the Supreme Court that the commission of a crime can be proved by any of the following three ways:

(i) By direct evidence

(ii) By confessional statement of the accused or by

(iii) Circumstantial evidence.

It is also the position of the law that while the onus remains on the prosecution to establish the charge against an accused person, any lacuna in prosecutorial facts cannot ground a conviction. See Ayo vs State (2015) 16 NWLR (pt 1486) CA 531. It is also the position of the law that once there is doubt in the prosecution's case, the accused must be acquitted and discharged by the trial court. See Audu vs State (2016) 1 NWLR (pt 1494) SC 557. See also Sani vs State (2015) 15 NWLR SC 522.

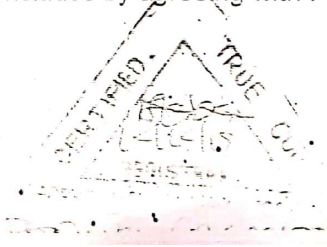
It must be noted that the defendant herein has pleaded not guilty to the charges against him. I have gone through the statements made by the defendant, it does not in any way appear as a confessional statement. A confession or confessional statement has been defined in several cases by the Supreme Court as an admission made by an accused person stating or suggesting that he committed the crime which is the object of the charge proffered against him. It is an acknowledgement of the crime by the accused. See section 28 Evidence Act 2011 and section 29(1) which I hereby reproduce **"In any proceeding a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuant of this section?** See also **Nkie vs FRN (2015) 11 NCC 179.**

From my perusal of exhibits "B","B^1", "D" "D^1" and "D^2", I find and I hold that they are not confessional within the meaning of the Evidence Act and as such will not be treated as such. Now the allegation of the complainant and the charge before the court is that the defendant took the sum of N3 Million from him. He who alleges must prove especially in the light of the facts presented by the defendant in his statements to the police made on the 18th of June, and 1st of July, 2014 severally.

The complainant is an educated person and a banker of many years of banking experience. He gave N3 Million to the defendant without collect any form of document or receipt in proof. He gave the money to the defendant without telling his wife, whom there is evidence before the court knew the defendant. In his statement i.e exhibit "A" he wrote that he called the defendant who came and he handed him the sum of N3 million in front of First Bank, Adebayo on the 4th of June, 2014. He also stated this in open court in his evidence in chief. He also reiterated this under cross examination, that he gave the defendant the money in good faith.

It may have been easy to believe the testimony of PW1 if there are other factors like eye witnesses or documentary evidence of receipt of the money. I used the word "may" in the light of the statements made by the defendant which painted a different picture entirely of what transpired between the complainant and the defendant. The defendant insisted that the money was not for the purpose stated or reported to the police by the PW1. However and quite disheartening the investigating police officers failed to properly investigate the facts presented by the defendant.

Just like when I considered count 1, a lot of questions played on my mind. How did the defendant get to know the names of the bosses of PW1? This may appear easy if the court concludes by agreeing with PW1 that the



defendant asked for them in order to pray in line with what the defendant said he saw. Why these people were not in investigated too especially where the total scenario led to the dismissal of PW1. Why did the IPO fail or neglected to investigate whether there was money in the account of PW1 that may have put him in trouble and thus at the mercy of the defendant? Where did PW1 withdraw or got the whopping sum of N3 million from?

As stated earlier how many persons were arrested and questioned even where names and locations were supplied in the statements of the defendant? Furthermore, I find and I hold despite exhibit "C" i.e the bench warrant, because there was unchallenged evidence by DW1 and DW2, that the money in exhibit "E" N338,000 was found in the house of the defendant's wife. It is also my finding that the evidence of DW1 that the money belonged to her as a trader and hairdresser who was about to embark on a trip is unchallenged and uncontroverted.

The position of the law is that the court must believe an uncontroverted and unchallenged evidence.

The prosecution did not also controvert the evidence of both DW1 and DW2 that other properties belonging to the wife of the defendant were carted away and yet to be released to the owner. I have said it that

speculation has no place in law. There are too many gaps in the facts on either side if I must say. Sentiments have no place either. What the law demands is legal evidence, where a statement is not confessional and where a defendant has not pleaded guilty to the charge proffered against him. The law is that lying by the defendant assuming he lied is not proof of guilt. Any doubt in law created in the mind of the court which has no supernatural means to know the truth must be resolved in favour of the defendant.

I hold that the prosecution just like in count 1 has not proved the offence contained in count 2 in line with the law. On the whole from my findings above, I am of the respectful view that the prosecution has failed to prove the offences contained in the charge filed on the 16th of February, 2015 against the defendant, I so hold. As such you Ariyo Balogun Musa is hereby discharged and acquitted on all the counts in the charge.

I further make a consequential order for the release of any exhibits belongings to the wife of the defendant or the defendant himself in the possession of the police.

CERTIFIED TRUE COPY
REGISTRAR

The registrar of this court shall release the sum of N338,000 tendered by the prosecution and marked as exhibit "E" forthwith to the defendant.

This is my judgment.

Hon. Justice Taiwo O. Taiwo
18/02/19

T. J. TIJANI for defendant. Osobu for prosecution

Hon. Justice Taiwo O. Taiwo
18/02/19

CERTIFIED TRUE COPY
REGISTRAR

PMO for GEGMIS (EO)