

IN THE MAGISTRATE COURT OF ONDO STATE

IN THE AKURE MAGISTERIAL DISTRICT

HOLDEN AT AKURE

BEFORE HIS WORSHIP J.O.A ADEPOJU (CHIEF MAGISTRATE)

TODAY, TUESDAY, 15<sup>TH</sup> DAY OF SEPTEMBER, 2020

CHARGE NO MAK/0/195C/2018

BETWEEN

COMMISSIONER OF POLICE

COMPLAINANT

V

FEMI DOTUN OLUWABUSUYI

RESPONDENT

JUDGEMENT

The case was transferred to this court and trial started denovo on 18/9/2019.

The charge reads thus:

Count 1: that you Femi Dotun Oluwabusuyi, male and others now at large sometime in the year 2011 at 10.00am at Goke Camp Ala in Akure Magisterial District did conspire together to commit felony to wit prohibited (sic) produce advance fees and thereby committed an offence contrary to and punishable under section 516 of the Criminal Code, Cap 37 Vol 1, Laws of Ondo State of Nigeria 2006.

Count 2: that you Femi Dotun Oluwabusuyi, male and others now at large on the same date, time and place in the aforementioned magisterial district did collect the sum of seven hundred and thirty two thousand, two hundred and sixty naira only from Mr Fredrick Olowogbade on the pretence to supply him dried cocoa beans in November 2011 cocoa season but failed to do so nor return the advance so made and thereby committed an offence contrary to section 41 and punishable under section 42 (a) of the Produce Adulteration Prohibition Laws, Cap 118, Vol 1, Laws of Ondo State of Nigeria 2006.

Count 3: that you Femi Dotun Oluwabusuyi, male and others now at large sometimes January 2014 at Ala, Goke Camp in Akure magisterial district did conduct yourself in a manner likely to cause breach of the peace by running away from Mr Olowogbade Fredrick not to supply dried cocoa beans, since then till date and thereby committed an offence contrary to and punishable under section 249(d) of the Criminal Code, Cap 37 Vol 1, Laws of Ondo State of Nigeria 2006; was read to the defendant in the English language, translated to Yoruba language for his benefit by the court registrar- Mrs. Adesina.

The defendant elected summary trial and pleaded as follows

**Count 1 - not guilty**

**Count 2 - not guilty**

**Count 3 - not guilty**

The prosecution called two witnesses to prove its case. The defendant testified himself and called another witness. The following were admitted as exhibits.

**EXHIBIT A: AGREEMENT LETTER DATED 23-1-14**

**EXHIBIT B: EVIDENCE OF TRANSACTIONS (BREAKDOWN OF MONIES GIVEN TO THE DEFENDANT)**

**EXHIBIT C – PARTLY SIGNED AGREEMENT**

**EXHIBIT D – LETTER OF 9-2-11**

The following is a brief recap of the respective testimonies.

**PW1**

PW1 is the complainant – Fredrick Olowogbade, a cocoa merchant testified on oath and cautioned in accordance with section 206 of the Evidence Act 2011.

In 2011, I saw the defendant and his brother, Pastor who came to my house to beg that I give the defendant some money to buy and supply cocoa. I told them my apprehensions but the defendant's brother told me he had collateral. So we went to my lawyer who prepared a document to the effect that if the defendant owes me, I can be the beneficiary of the defendant's

cocoa produce. Afterwards, we all went to the defendant's father's but met his absence. The defendant's brother, Pastor advised I leave the document with them. It was later on that I observed that it was not the defendant's father's signature on the document so I refused to countersign the document but left a copy with them. I started giving the defendant money based on the trust that the defendant's brother is a pastor. I gave the defendant N782, 260.00K.

The defendant never brought any cocoa to me and absconded with the money. On 5-2-11, I reported the defendant to the Area Command, Oba Adesida Road and the defendant was arrested. His family pleaded that the cocoa they used as collateral would be sold and the money returned to me but this was never done. The defendant changed his number, moved homes and was nowhere to be found.

On 23-11-14, I saw the defendant's brother- Pastor and he gave me N50, 000.00K and wrote a letter promising to pay the balance by the end of March 2014, this he never fulfilled. In January 2018, I met someone who knew the defendant's house so upon a petition to the police, he was arrested. Minus the fifty thousand naira the defendant's brother gave me, the money owed by the defendant is N732, 260.00K. I have the agreement between the parties and the breakdown of money given to the defendant admitted by the court as Exhibits A and B respectively. The defendant collected money from me on four occasions, first he collected N185,000.00K and he delivered cocoa to me; N1,035,700.00K and he delivered cocoa to me; in 2010, he collected N785,700.00K and he delivered cocoa to me. In 2011, he collected N782, 260.00K from me but till date has not delivered the cocoa to me.

Under cross examination by learned counsel to the Defendant, the PW1 confirmed that there is an agreement between the parties, but it is unsigned; marked as Exhibit C. He admitted that Exhibit C was prepared by his lawyer and that the portion for the signature of the guarantor bears one MR BUSUYI who he does not know. PW1 admitted that he instructed his lawyer to write a letter to the defendant's guarantor informing him of the money owed by the defendant- admitted by the court as Exhibit D. the PW1 also confirmed that EXHIBITS B, C, D all relate to the

2010 cocoa season and that he had no further agreements with the defendant to supply cocoa in November 2011. PW1 stated that Exhibit D was written after the defendant visited the police station and the defendant's brother made a payment of fifty thousand naira. PW1 denied knowledge of one Pastor Busuyi Adeolu who witnessed the agreement and that was the reason why he refused to sign the agreement. PW1 also responded in the negative under cross examination when asked if there was any time the defendant acted in a manner to disrupt peace. There was no re-examination and PW1 was discharged.

## PW2

PW2 – testified on oath as follows and cautioned in accordance with section 206 of the Evidence Act 2011.

My name is Sgt Onome Michael attached to Ala Area Command. I investigated the matter and on 22-4-18, the defendant in the company of his brother, one Gbenga Busuyi and three other friends came to the station following the complaints of PW1 who brought his ledger book and alleged that the defendant collected N732, 260.00K from him sometime in 2011 on promise to supply him dry cocoa beans but the defendant failed to supply same and absconded. The defendant volunteered his statement which was recorded. It was discovered that the first born of the defendant's family – one Pastor Busuyi introduced the defendant to the PW1. PW1's ledger book was shown to the defendant who admitted that he collected N732, 260.00 from the PW1 in the presence of his brother and that he failed to supply the dry cocoa beans and this is why he is being charged in Count 2.

On 23-4-18, when both parties could not resolve their difference, the Area Commandant directed the matter be charged to court. I saw a letter- Exhibit A which was made on 23-01-14 and the defendant promised to pay all outstanding debts by 30-3-14. I have never seen Exhibits C and D. From my investigation, I found that the defendant and his brother Pastor Busuyi (who introduced the defendant to PW1) who is now nowhere to be found conspired together per Count 1. My finding per count 3 is that, the defendant is charged with the offence of breach of peace because he ran away from 2014 to 2018 and failed to return PW1's money and supply the cocoa.

Upon cross examination, PW2 confirmed the investigation was carried out per the ledger book and the allegation of the PW1 against the defendant. PW2 stated that the defendant had twenty four hours between the time of his arrest (22-4-18) and the time he was first arraigned in court (23-4-18) to prepare his defence. There was no re-examination. PW2 was discharged. With the testimony of PW2, the prosecution formally closed its case.

In defence of the action, the defendant was sworn on oath and cautioned in accordance with section 206 of the Evidence Act 2011. He testified in Yoruba language, translated to English language by the court registrar.

#### DW1

Femi Dotun Oluwabusuyi is the defendant who denied committing the alleged offences. His evidence is that:

I am a farmer and a cocoa merchant. I deny all the counts in the charge. In 2010, I worked with the PW1 as a broker supplying him cocoa. He said he would give me money to supply cocoa but I needed to provide collateral of my father's cocoa plantations. We visited the place and thereafter visited the PW1's lawyer- one Lawyer Dare to sign an agreement that if I owe the PW1 any money, the collateral will revert to him. I identify the agreement dated 12-1-11 marked as Exhibit C. After some time, the PW1 took over the collateral because I owed him and there was a letter to that effect - marked as Exhibit D dated 09-2-11. I did not return to the farm. In 2014, my brother called that he saw the PW1 who told him I did not pay his money. My brother told me he gave the PW1, fifty thousand naira and I challenged my brother because the PW1 already took over the collateral. In 2001 when I was arrested, the police released me after the PW1's lawyer informed my lawyer that PW1 had taken over the collateral. I plead with the PW1 to leave me as he has seized my collateral.

Upon cross examination, the defendant confirmed that the sum in question was N732, 260.00K. He confirmed Pastor Busuyi to be his brother and guarantor. He clarified that the sum of fifty

thousand naira was paid while the matter was going on in court 3 – the previous court because the court advised parties to settle the matter and his collateral will be returned to him. DW1 stated that his father's farmland is the collateral, though not inherited but released by his father, who signed Exhibit C as his guarantor. He further stated he has evidence that the farmland belongs to his father- Kolawole Oluwabusuyi. DW1 also stated that the PW1 and his lawyer visited the farmland before drawing up the agreement in Exhibit C and he has not stepped on the farmland in about ten years since the time the PW1's lawyer served his father with Exhibit D- the letter dated 09-2-11. He stated that he was rushed to court by the police and not given the opportunity to show the police the identification of the said land/collateral. There was no re-examination.

#### DW2

was sworn on oath and cautioned in accordance with section 206 of the Evidence Act 2011. He testified in Yoruba language, translated to English language by the court registrar as follows:  
I am Mr Oluwabusuyi of Oluwatuyi quarters, a transporter and the elder brother of the defendant. When my brother was arrested in 2011, the PW1's lawyer- Mr Dare was called and my brother was released after the lawyer intervened and confirmed the PW1 had taken over farmland collateral.

Upon cross examination, he confirmed he is not a signatory to the agreement but is aware that his father released his farmland cocoa plantation as collateral for his brother. He said he does not know if the farmland has documentation as it is a cocoa plantation and in the olden days, ropes were used to measure land. He reiterated that the farmland is genuine, not in a government reserved area and belongs to his father and that the PW1 is aware of these facts. There was no re-examination and DW2 was discharged.

#### RESOLUTION

I have carefully and calmly reviewed and analyzed the evidence adduced in this matter. I have carefully related these ingredients to the evidence of the prosecution witnesses on record. I have

also at the beginning of this judgment given a deliberately comprehensive account of the testimonies of all the witnesses, the evidence on both sides as it clearly provides the necessary facts and legal template for the resolution of the issues in this case.

The issue for determination in this matter which requires the most circumspect of consideration is **WHETHER THE PROSECUTION HAS PROVED THE CHARGE AGAINST THE DEFENDANT TO WARRANT HIS CONVICTION.**

Under our criminal justice system, the onus is on the prosecution to prove the guilt of an accused person beyond reasonable doubt.

See **SECTION 135 OF THE EVIDENCE ACT 2011**

**NWATUROCHA V STATE (2011) 6 NWLR (PT 1242) 170**

It is settled that in a criminal trial, the prosecution should discharge the burden placed on it by proving the ingredients of an offence and the guilt of an accused person beyond reasonable doubt in any of the following ways:

1. by the confessional statement of the accused which passes the requirement of the law or
2. by direct evidence of eye witnesses who saw or witnessed the commission of the crime or offence or
3. by circumstantial evidence which links the accused and no other person to or with the commission of the crime or offence charged.

See **EMEKA V STATE (2011) 14 NWLR (PT 734) 668**

**IGABELE V STATE (2006) 6 NWLR (PT 975) 100**

Being mindful of these well settled principles and authorities, I shall proceed to examine the instant charge in light of the evidence adduced by the prosecution and defence in order to determine whether or not the prosecution has established the charges against the defendant beyond reasonable doubt.

## Count 1

Count 1 deals with the offence of Conspiracy to commit a felony, contrary to and punishable under section 516 of the criminal code cap 37, Vol 1, laws of Ondo State of Nigeria 2006.

The question that the court is left to determine is whether there is an established case of conspiracy against the defendant. I will now go ahead to do just that. Conspiracy is one of those offences predicated on circumstantial evidence which is evidence not on the fact in issue but of other facts from which the facts in issue can be inferred.

See F.Nwadialo, **Modern Nigeria Law on Evidence**, 1989

It is settled in law that conspiracy to commit an offence is a separate and distinct offence from the actual commission of the offence to which the conspiracy relates. Each is independent and must therefore be established. What the Court is concerned about here, is whether there was an agreement between the defendant and others to commit a felony as alleged relating to count 2. Was there a meeting of two or more minds to carry out the unlawful purpose or to carry out a lawful purpose in an unlawful way?

See **ISOLA V STATE [1972] 10 SC 63;**

**UPAHAR V STATE [2003] 6 NWLR [PART 816] 230.**

The ingredients that constitute the offence of criminal conspiracy are:

- (1) there must be an agreement of two or more persons to do an unlawful or a lawful act by unlawful means;
- (2) that the actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed;
- (3) that the external or overt act of the crime of conspiracy is the concert by which mutual consent to a common purpose is exchanged; and
- (4) That the agreement is an advancement of an intention conceived secretly in the mind of each person. The overt act is the proof of the intention, mutual consultation and agreement.

See the cases of:

GABRIEL OKEKE & ANOR V THE STATE (1992) 2 NWLR (PT 590) 246

OBIAKOR V STATE (2002) 1 NWLR (PT 776) 612

UPAHAR V STATE (2003) supra

It is trite law that in a charge of conspiracy, direct positive evidence of the plot or design or agreement between the co-conspirators is hardly capable of proof. The offence of conspiracy therefore more often than not, is established by circumstantial evidence which is evidence not of the fact in issue but of other facts from which the fact in issue can be inferred.

See OBIAKOR V STATE (2002) 36 WRN 1

STATE V OSOBA (2004) 21 WRN 131

I have considered the surrounding circumstances of the case per the evidence adduced by the witnesses for the prosecution. The PW1 and PW2 in their testimonies did not at any time establish any ingredients and circumstance relating to the offence of conspiracy apart from the statement made by PW2 that :

*"Pastor Busuyi, elder brother to the defendant introduced the defendant to PW1 and paid fifty thousand naira as part payment to PW1 for failure of the defendant to supply the cocoa seeds...Pastor Busuyi is yet to be found".*

The mere fact that the defendant's brother introduced him to the PW1 and signed as a witness in Exhibit C and also made an undertaking per Exhibit C is not conclusive that he and the defendant conspired. For a charge of conspiracy to succeed, the overt act or omission is the actus reus and this actus reus must be referable. To make the defendant criminally responsible, the prosecution ought to establish a common intention and design between the defendant and another or others at large and not just make mere statements. I am unable to establish any evidence of complexity of the defendant with any other person. Consequently, my finding is that the prosecution has failed to make out a case against the defendant in respect of count 1. The

defendant is hereby found not guilty for the offence in Count 1 and thus discharged and acquitted on this Count 1.

Count 2

Section 41 of the Produce Adulteration Prohibition Law Cap 118, Vol 1, Laws of Ondo State of Nigeria 2006 states:

- (1) Any produce dealer who having accepted payment in advance from any person for the purpose contained in section 40 of this Law
  - (a) Fails to purchase the produce or
  - (b) Fails to return the advance so made or any part thereof, commits an offence

Section 40 of the same law states:

- (1) Every produce dealer to whom an advance is made for purpose of purchasing produce or the financing of any matter incidental thereto or connected therewith for and on behalf of the person making the payment shall:-
  - (a) purchase the whole of the produce or finance fully the matter for the person who provided the advance or
  - (b) return the advance so made or any part thereof not utilized for the agreed purpose to the person who made the advance.

For emphasis, the summary of the testimony of PW1 are that:

- There was a suggestion re collateral before he provided the advance
- He took the defendant to his lawyer to document the agreement
- He left the said written agreement with the defendant
- He refused to countersign the agreement because he discovered it was not the defendant's father's signature appended
- He still went ahead to advance the defendant

- He gave his lawyer instructs to write the guarantor on the failure of the defendant to honor his obligation and that he, PW1 was taking over the collateral.

While it is very clear that the defendant has been unable to supply the dried cocoa beans to PW1, the defendant has also thrown up a defence that, there is an agreement between him and the PW1 which he has fulfilled thereby he is absolved from any liability and thus, cannot be said to have failed to return the advance.

This defence cannot be overlooked and the court has considered all the evidence and Exhibits before it.

On the evidence before the court, it is not in doubt that the defendant and the PW1 are both ad idem that PW1 furnished money to the defendant to supply dried cocoa pods. The court observed some discrepancies and inconsistencies per the testimony of PW1 in his examination in chief and cross examination on whether it was the 2010 or 2011 cocoa season the money was collected for.

There is also the argument of the prosecution that Exhibit C is a worthless document as it is unsigned by PW1 and should thus be disregarded. On the other hand, the defence counsel has submitted that Exhibit C is valid and properly before the court as the document was made per the instruction of PW1 to his lawyer. Furthermore, that PW1 had since 2011 impliedly consented to the agreement Exhibit C when he instructed his lawyer per a letter Exhibit D dated 09-02-11.

Exhibit A before the court is a letter of undertaking dated 23-01-14 written by one Pastor Busuyi Adeolu that he undertakes to pay the debt owed by the defendant.

Exhibit B tendered by PW1 speaks for itself. It shows the transactions between the PW1 and the defendant started on 13-10-2010.

Exhibit C is the document dated 12-10-2010 prepared upon the instruction of PW1 to his lawyer. It bears the signatures of BUSUYI OLUWAFEMI (DEBTOR); BUSUYI KOLAWOLE (GUARANTOR); and witnessed by one PASTOR ADEOLU. The Creditor/PW1 did not sign this document.

Exhibit D is a letter dated 09-02-11 from the lawyer of PW1 to the defendant and his guarantor.

In summary, Exhibit D confirms the existence of Exhibit C. I will write out some parts of Exhibit D for fuller understanding:

*"we are solicitors to Fredrick Olowogbade...we have the instruction of our client to write this letter to you as follows..*

*On 12<sup>th</sup> October, 2010, you entered into an agreement wherein you agreed to use your two cocoa farms land lying and situate at Malato, Ala, Idanre, Ondo as collaterals in favor of our client for the money he advanced to your son Busuyi Oluwafemi...*

*Our client informed us that he advanced the sum of N782,260.00 to your son last year and he ought to have supplied him cocoa beans valued the said sum latest by the end of January 2011.*

*He failed to do so...*

*It must be noted with emphatic clarity that clause 4 of the said agreement is as follows: if the debtor fails to supply the cocoa beans to the creditor valued the money received from him or before the expiration of the cocoa season, the said farm land shall be forfeited to the creditor and he shall take absolute immediate possession and ownership of same.*

*Therefore, since your son has failed to supply the cocoa beans to our client as stipulated above, you have forfeited the said two cocoa farm land to him. Our client has now taken absolute possession and ownership of the said farms.*

*In view of the above, you must never enter the two farms again as full ownership has now reverted to our client. You will be arrested and prosecuted accordingly if you go to those farms again..."*

So what are the legal implication of all these documents?

The prosecutor submitted that the court should not rely on Exhibit C because it is not signed by PW1. This argument with respect cannot hold water in the circumstances of this case because the PW1 under cross examination confirmed the antecedent of Exhibit C was per the instructions he gave to his lawyer.

In the case of

**AWOLAJA & ORS V SEATRADE G.B.V (2002) LPELR 651**, the Supreme Court held that *"the existence of a contract cannot be impugned on the ground that the document embodying the terms they have agreed to was unsigned, unless the parties have made such a condition of their being bound"*.

It is also trite law that oral evidence is inadmissible either to add to or subtract from the contents of a document as a document speaks for itself.

See **BONGO V GOVERNOR ADAMAWA STATE (2013) 2 NWLR (PT 1339) 403**

As observed earlier, the PW1 did not deny the fact that he continued giving the defendant money and carrying on with the transactions in accordance with Exhibit C. Thus, this Court, following the Appellate Courts' decision in the case of **ADEDEJI V NBN LTD (1989) 1 NWLR (PT 96)** where it was held that it is morally despicable for a person who has benefitted from an agreement to turn around and say that the agreement is null and void or unenforceable. I apply the ratio in the above case and that of **MTN NIGERIA COMMUNICATION LIMITED V CORPORATE COMMUNICATION INVESTMENT LIMITED (2019) LPELR 47042** in this case. I am not persuaded by the submission by the PW1 that the agreement is not valid. The documents and the conduct of the PW1 speak for themselves and I hold that the Exhibits C and D have probative value in this case.

The prosecution also alleged that the said collateral was not genuine but failed to prove the existence of that allegation in spite of the opportunities during the cross examination of DW1 and DW2. As said earlier, in a criminal case, it is not for the defendant to prove his innocence. The burden of proving that a person has been guilty of a crime or wrongful act is on the prosecution and it must be beyond reasonable doubt. If the prosecution fails to prove any of the elements that makes up the offence, then the defendant is entitled to an acquittal. I am not

satisfied beyond reasonable doubt in light of the exhibits tendered and evidence before the court that the guilt of the defendant has been established in Count 2.

There is also a huge question mark in respect of the investigation conducted by the police. I do not believe per the evidence elicited during the cross examination of PW1, PW2 and the defendant that the police was abreast of all the facts leading up to the transactions between the parties before the defendant was arrested and charged to court. The PW2 admitted that it was only the breakdown of the transactions between the parties that PW1 presented at the police station and nothing more. Which makes me wonder, why the PW1 did not lay all his cards bare at the police station to enable the conduct a proper investigation? I believe the defendant and per the Exhibits C and D before the court that the PW1 had taken over the collateral following the defendant's inability to fulfil the transaction terms. I also believe the DW1 and DW2's testimonies that the first time the defendant was arrested by the police, the PW1's lawyer intervened and informed the police that PW1 had taken over the collateral of the guarantor to defray the outstanding money for the unsupplied cocoa beans. The court observed that the prosecution did not challenge these pieces of evidence from the defence witnesses. It is trite law that where there are doubts, it must be resolved in favor of the defendant. For all the above reasons, the Defendant is accordingly discharged and acquitted under count 2 of the charge.

### Count 3

This count alleges that the defendant conducted himself in a manner likely to cause breach of peace. To succeed in such a charge, the prosecution must establish all the ingredients of the offence of breach of peace which includes that "every person who in any public place conducts himself in a manner likely to cause a breach of peace..."

The question now is, is Ala, Goke Camp, Akure a public place? The phrase public place means a place for use by everyone or the general public. If the answer is in the negative then an essential element has not been proved. From the evidence before the court, the prosecution has not been

able to prove that Ala, Goke Camp is a public place. In fact, there is even no evidence before the court relating to same and as such the defendant has no business being charged under this section 249(d) of the Criminal Code.

In addition, under cross examination, the PW1 was asked-

*Defence Counsel: "was there any time the defendant acted in a manner to disrupt peace?"*

*PW1: "no time"*

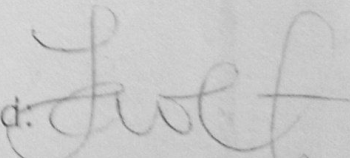
It is trite law that facts admitted need no further proof.

See **DURU V DURU (2017) LPELR 42490**

**OKEREKE V STATE (2016) LPELR 4001**

The court relies on the admission of the PW1 that the defendant did not act in any manner to cause breach of peace. More importantly, the prosecution failed to prove the elements of the offence in count 3. Consequently, the defendant is discharged and acquitted of count 3.

In conclusion, in a criminal case, it is not for the defendant to prove his innocence. The burden of proving that a person has been guilty of a crime or wrongful act is on the prosecution which does not shift and it must be beyond reasonable doubt. If the prosecution fails to prove any of the elements that makes up the offence, then the defendant is entitled to an acquittal. I am not satisfied beyond reasonable doubt in light of the exhibits tendered and evidence before the court that the guilt of the defendant has been established. The defendant is discharged and acquitted.

Signed: 

Mrs. J.O.A. Adepoju

CHIEF MAGISTRATE

15 SEPTEMBER 2020