IN THE MAGISTRATE COURT EDO STATE OF NIGERIA
IN THE OREDO MAGISTERIAL DISTRICT
HOLDEN IN BENIN CITY

BEFORE HIS WORSHIP A. P. SAIKI (ESQ.) MAGISTRATE GRADE II
ON TUESDAY THE 21ST DAY OF MAY, 2018

CHARGE NO. MOR/474C/2016.

BETWEEN:

COMMISSIONER OF POLICE

VS.

EBHOTA OSAGIE DAVID

JUDGEMENT

The Accused Person was arraigned denovo before this Honourable Court on a three – count charge pursuant to sections 419 and 390 (6)(a) of the Criminal Code Cap. 48, Vol. II Laws of the defunct Bendel State of Nigeria 1976 as applicable to Edo State. The accused person elected summary trial and pleaded not guilty to the three counts of the charge.

In proof of the prosecution's case, it called four witnesses and tendered seven Exhibits, while the accused person testified for himself, called one witness and tendered five Exhibits.

The summary of the prosecution's case is as follows: -

PW1 is Arasanyin Emmanuel Olumide. He told court that he is an auditor in Ultra – Trade Nigeria Ltd and that on the months of January, 2015 to June 2015, an act of fraud was discovered in their office in Benin where he was asked to carry out a proper audit report in Benin and Warri offices. That it was later discovered that 94 cases or trays of redbull were missing in warri depot while 24 trays were missing in Benin depot. He state that the accused person who is the Area sales executive was in charge of the stock keepers and wholesale executive activities in both Benin and Warri depot. He stated that the 94 trays of redbull that was missing was meant for a customer in Warri but the customer did not pick the stock because it did not have enough space in his warehouse which meant that the 94 trays were posted but not delivered to the customer. He further stated that the 24 trays of redbull was tagged working capital, that is, stock that was given to customers on credit to pay on an agreed time. That the 24 trays was posted out, given to the accused person to deliver to customers but was later discovered that the customers have all paid and the accused person did not remit the money into the company's account. PW1 told court that it made the total trays missing to be 118 trays of redbull worth ₦5788,200.00 and that it was in his findings that he discovered the above fact. The investigation report dated 4/6/15 was admitted and marked as EXHIBIT 'A'.

Under cross – examination, PW1 told court that the accused person has been working in his company since the year 2013 and that since then, there has never been any criminal record against him to the best of his knowledge. He stated that the accused person is not in charge of keeping records of teller and that he is aware that goods are given to customers on credit. He stated that whenever customers pay, they submit tellers to the stock – keeper and that there was no written complain of Zino Wine Shop in respect of the 94 trays that was discovered missing in Warri depot. He told court that he does not have any written record of how the 94 trays came in and out but that there was a stock-keeper on ground to tell them how stock was been moved in and out. He stated that there was no written query to the accused person and that he reported the matter to the police as directed by the company's management. That the police suggested the matter be settled but with a written undertaking where both parties signed and that the accused person failed to fulfill charged to court by the IPO as directed by the company's management.

PW2 is Oyewole Bola Taiwo. He told court that he works with Ultra Trade Nigeria Ltd and that he was transferred from Abuja to Benin in the year 2015 as an Area Sales Executive in charge of Redbull department. That after his resumption, he discovered some discrepancies on working capital totaling the sum of ₦117,600.00. He told court that 24 cartons of redbull was allocated as working capital which was to be given to certain customers on credit and money ought to be remitted. That when he came he discovered that this working capital had not been remitted because he was been sent the outstanding payment from the customers who were owing on a weekly basis. He further stated that all efforts to locate the customers proved abortive because there were no contact addresses or phone numbers of the customers. PW2 told court that he reported this to his superior, who is the Regional Sales Manager who told him to go to the Police Station to make his statement. That the accused person was the Area Sales Executive in Benin as at the time he discovered the discrepancies.

Under cross – examination, PW2 told court that he did not draw the attention of the accused person to the discrepancies when he discovered same because the accused person was no longer coming to the office. That it is correct that goods are been given to customers on credit and that a store keeper is different from a sales executive. He stated that he is not aware that tellers are sent to the store keeper after customers make payment and that he was not brought to Benin to supervise the accused person.

PW3 is Isah Abdullahi. He told court that he is the security manager of Great Brands Nigeria Ltd, the parent company of Ultra Trades Nigeria Ltd. Then in the month of June, 2015, an audit was carried out and it was later discovered that 118 trays of Redbull Energy drink valued at ₦578,200.00 had disappeared in the company's stock. He further stated that neither the stock nor the value was paid into the company's account and that the sum of ₦80,000.00 was given to the accused person who then was the Area Sales Executive but he could not pay in the money into the company's account. PW3 further stated that the total shortages accrued to the tune of ₦658,200.00 and that October, 2015, the accused person wrote an undertaking at the police station to pay the sum of ₦100,000.00 on/or before the 31st day of December, 2015 and subsequently promised to paying the sum of ₦50,000.00 monthly until the whole debt is liquidated.

The investigation report and the written undertaking were admitted and marked as EXHIBITS 'A1' and 'A2'.

Under cross – examination, PW3 told court that the accused person is not the stock – keeper but the Area Sales Executive in charge of Redbull and that he does not know if goods are given to the accused person supply on credit. He stated that he did not tell court what PW1 told him and that he went to the police station to report the case and carried out his investigation before he reported to the police. That the police advised that the issue be resolved between the accused person and the company, that was why the undertaking was written and that the accused person defaulted. He stated that it is not true that it was agreed that the accused person should be working and the money deducted from his salary. He stated that when goods are paid for, the teller for the goods paid are submitted to the store keeper and not the sales manager.

PW4 is Sergent Amuda Fatai with Force No.433211 attached to Ogun State police Command. He told court that he was the investigating police officer when he was serving at Adesuwa police station, Edo State Command. That on the 6th day of October, 2015, a case of obtaining money by false pretence and stealing was reported by one Mrs. Sandra Adisele against the accused person involving a cash sum ₦80,000.00 and Redbull Product valued more than ₦500,000.00 which the accused person collected in the name of customers. He further stated that the money and the Redbull product belong to Afro Ocean Bridge Nigeria Limited located at No. 269, M. M. Way, Benin City. That he recorded statement from the complainant and also arrested the accused person, cautioned him in English language, volunteered, his statement which he recorded in his own handwriting and charged him with the offence of obtaining money by false pretence and stealing.

The statement of the accused person was admitted and marked as EXHIBIT 'A3', same was read out in the open court by PW4.

PW4 stated that the accused person and the complainant brought a memorandum of understanding to him wherein the accused person agreed to pay the shortage of the redbull and the sum of ₦80,000.00 cash he received from the complainant. PW4 further identified EXHIBIT 'A2'. That based on EXHIBIT 'A2', they were all asked to go and the accused person asked to keep his promise. He stated that the accused person paid the sum of ₦66,000.00 out of the agreed sum in EXHIBIT 'A2' and disappeared, but was later arrested sometime in the year 2016. That the sum of ₦66,000.00 was paid by the accused person in installments as follows: - ₦46,000.00 which was endorsed on EXHIBITS 'A2', while the two subsequent installmental payment was ₦10,000.00 each. Documents evidencing the payment of the above was admitted and marked as EXHIBITS 'A4' and 'A5'.

He stated that the accused person made an additional statement to the effect that EXHIBIT'A2' was not made under duress. The said additional statement was admitted and marked as EXHIBIT 'A6'. He stated that the sun of ₦80,000.00 and the Redbull stock belong to Great Brand Nigeria Limited.

Under cross – examination, PW4 told court that it was Sandra Adisele that reported a case to him and that she did not tell him that goods were supplied to her. That the accused person admitted receiving the sum of ₦80,000.00 from the said Sandra Adisele. He stated that he investigated what the accused person said in his statement relating to the expenses incurred on transportation. He stated that EXHIBIT 'A2' was brought to him and that he was not present when EXHIBIT 'A2' was prepared. He stated that no customer told him that the accused person delivered or did not deliver goods to them, that it was the accused person that said so in his statement and that he obtained statement from Mrs. Sandra Adisele.

The summary of the defence of the accused person is that he was the Area Sales Executive of Redbull department covering Edo, Delta and Ondo States. He stated that he did not obtain 118 trays of Redbull valued ₦578.200.00 fraudulently and did not steal same. That he also did not steal the sum of ₦80,000.00 from one Mrs. Sandra Adisele.

The accused person told court that Zion wine shop was a customer of Blue Arrow Nigeria Limited who were previously in charge of Redbull. That Zion wine shop ordered

For 200 plus 13 trays of redbull, afterwhich the Regional Sales Manager, one Mr. Kunle Kazeem called him to confirm the order from Zion wine shop. He stated that although Zion wine shop was already registered with Blue Arrow Nigeria Limited, but still had to pass through a verification process with Ultra Trade Nigeria Limited. That Great Brand Nigeria Limited is the parent company of ultras trade Nigeria Limited and Blue arrow Nigeria limited. The accused person further stated that he had to travel to Warri and confirmed the order from Zion wine shop and that it was after more than two weeks that his Regional Sales Manager called him that the customer had seen verified and that the head office had posted the sales (i.e) 200 13 trays of redbull as credit. Then That when he got to Warri, Zion wine shop refused to collect the 200 plus 13 trays of redbull because they were supplied 150 trays of power Horse Energy Drink and that he was able to convince Zion wine shop to collect 100 plus 7 trays of Redbull. He told court that he informed his regional sales manager before he supplied the said 100 plus 7 trays of redbull and that store – keeper of ultra trade Nigeria Limited, Mr. Ahmed, was left with a 100 plus 6 trays of redbull which was already posted to Zion wine shop from the head office. That the said 100 plus 6 trays of redbull was left with the store – keeper of ultra – trade, one Mr. Ahmed. He further stated that he did not carry the but he only went there to inform him of the order and that it was his Regional sales manager that initiated the order. The accused person stated that in EXHIBIT ‘A’, the 24 trays of redbull was part of a national scheme from the head office to give inactive customers 3 trays of redbull as working capital or credit. He told court his Area (Benin) got 22 customers which was generated by the head office from their office and in April, 2015, his Regional office sent 66 trays of redbull to cover the 22 customers where each customer was given 3 trays of redbull. He further stated that 14 customers out of the 22 customers were able to pay while 8 customers asked him to return the stock to the depot because they were going to expire in the month of November, 2015. That the 24 trays of redbull given to the 8 customers was taken the depot but that the stock – keeper refused to accept them because he did not have the authority to recall goods, so he informed his regional sales manager, Mr. Kunle Kazeem of the development, who told him that it is only the National Logistic Manager that has the authority to recall goods. The accused person told court that the 24 trays of redbull was outside the store within the premises of the company while his Regional Sales manager was trying to obtain documents to recall the goods into the system. He further told court that 94 trays were not delivered but that they were with the store – keeper while the 24 trays were also with the store – keeper but he refused to allow them into the main depot. That there was cash shortage of ₦908,000.00 but after reconciliation, the amount was reduced to ₦658,200.00; inclusive of the 24 trays that was in the depot and that the said ₦658,200.00 was part of the unpaid expenses amounting to ₦203,000.00. That the company usually pay him expenses to his regional office.

The receipts of expenses incurred by the accused person were admitted and marked as EXHIBITS B1, B2 and B3.

The accused person stated that he collected the sum of ₦80,000.00 from Mrs. Sandra Adisele and paid ₦75,000.00 to the company's account while the balance sum of ₦5,000.00 was used to supply 110 (a wine shop) on the instruction of his Regional sales manager. Hr stated that teller he used in paying the ₦75,000.00 is with the stock keeper.

The letter written to ultra trade Nigeria Limited to produce its statement of account and the reply to same were admitted and marked as EXHIBITS 'C1' and 'C2' respectively.

He told court that he paid the sum of ₦73.500.00 directly to the sales account, paid ₦1,500.00 to the store – keeper for haulage. That he wrote EXHIBIT 'A2' because he had a verbal agreement with his company to retain his job if he agrees to pay back and that his unpaid expenses amounting to ₦203,000.00 for Warri expenses will be paid in arrears by the company. He stated that after he made EXHIBIT 'A2', in the month of October, 2015, he was able to savage 13 trays of redbull which he sold and paid to the police, the sum of ₦66,000.00.

Under cross – examination, the accused person told court that 118 trays of redbull was given to him and that the 118 trays was a combination of 94 trays in the depot and the 24 trays which was returned to the company. He stated that the shortages were not caused by him but because of his unpaid expenses and missing tellers in the custody of the stock – keeper. The stated that he continued working for the company uptill the month of August, 2015 and no query was given to him. He told court that EXHIBIT 'A3' is not the only statement he made to the police, that he made his first statement in June, 2015 before the verbal agreement with the company.

DW2 is Godwin Etiukogho. He told court that he is a retired Assistant Superintendent of Police. That sometime in the year 2016, Great Brand Company located along Murtala Muhammad Way, Benin City under the jurisdiction where he served at Adesuwa Police Division, reported a case of stealing/fraud and same was referred for investigation. He stated that one of his IPO, named Fatai was detailed to investigated and report. That in the course of investigation, he interviewed both parties and that they later came back with a written agreement signed by both of them, a copy was served on him and he gave same to the IPO to be kept[in the file. He stated that what the discovered in the agreement was that it was a debt and shortage of goods supplied as against theft/fraud. He stated EXHIBIT 'A2' was the agreement that was served on him. He stated that he asked his IPO to stay action since there was no case of stealing as earlier alleged and having agreed to settle. That the month the accused person was supposed to pay, he came to tell him that his schedule had been taken over and that someone has been assigned to take over his job. He stated that the accused person told him that some of the goods regarded as shortages are in the warehouse and he directed the IPO to follow them to the warehouse afterwhich they came back to tell him that a reasonable number of redbull were found there but that they were expired or close to expiration date.

Under cross – examination, DW2 stated that he is not a worker of Great Brand Company Limited and that the shortage were traced to the accused person. That the accused person agreed to pay because he knew the customers to collect the money from but the whole thing was aborted when they stopped his job.

Counsel to the accused person filed her written address dated the 28th day of March, 2018 and adopted same on the 13th day of April, 2018. She urged court to discharge the accused person on the three counts of the charge.

I have carefully and thoroughly considered the evidence of the prosecution witnesses, the defence and his witness, the Exhibits tendered as well as the written address filed on behalf of the accused person. I find the following facts established by evidence;

(1.) The accused person was the Area Sales Executive of Great Brand Nigeria Limited in charge of redbull department covering Edo, Delta and Ondo states.

(2.) That it was discovered that 118 trays of redbull valued ₦578,200.00 were missing.

(3.) That the accused person entered an undertaking to pay the money at the police station.

(4.) That the accused person defaulted in line with the undertaking, afterwhich he was charged to this Honourable Court.

In my opinion, the issue for determination is whether the prosecution has been able to prove the alleged offences as contained in counts I, II, and III of the charge beyond reasonable doubt as required by law.

It is trite law that in criminal cases, the prosecution has a duty to prove the case against the accused person beyond reasonable doubt as mandated by the provision of section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) by which an accused person is presumed innocent until proved guilty. Furthermore, section 135(1) of the Evidence Act 2011 also provides that an allegation of crime even in a civil proceeding must be proved beyond reasonable doubt. See Idi V State (2017) 274 LRCN, 89, Ratio 2. It is evident to state also that before a court including this court comes to the conclusion that an offence had been committed by an accused person, the court must look for the ingredients of the offence and ascertain critically that the acts of the accused person come within the confines of the offence charged.

The accused person is charged in count I for fraudulently obtaining 118 trays of redbull valued ₦578,200.00 an offence punishable under section 419 of the criminal code. For the prosecution to succeed, it must prove the following ingredients;

(1.) That there was pretence.

(2.) That the pretence emanated from the accused person.

(3.) That it was false.

(4.) That the accused person knew of its falsity.

(5.) That there was an intention to defraud.

(6.) That the thing is capable of being stolen.

(7.) That the accused induced the owner to transfer his whole interest in the property.

See Onwdiwe V FRN (2006) 141 LRCN 2336, Ratio 13.

As to pretence, it must be as to an existing fact. The offence of false pretences is committed where a person fraudulently represents as an existing fact that which is not n existing fact and as a result obtaining money. The offences could be committed either by oral communication in writing or even by conduct of the accused person. A honest belief in the truth of the statement on the part of the accused person which later turns out to be false, cannot found a conviction on false pretence. See Alake V State (1991) 7 NWLR Pt. 205, 567 @ 591.

It is clear from the evidence before court that the issue that gave rise to the charge before this Honourable this court is over a failed agreement entered between the accused person and his company, Great Brand Nigeria Limited over payment of shortages amounting to the sum of ₦658,200.00. There is also evidence before court that the accused person paid the sum of ₦66,000.00 and N46,000.00 as seen in EXHIBIT

"A2' and installment payments of ₦10,000.000 each as seen in EXHIBITS 'A1' and '15' respectively. The failure to fulfill his promise in EXHIBIT 'A2' did not amount to false pretence under section 419 of the criminal code. This is a clear case of a breach of agreement between the accused person and Great Brand Nigeria Limited. There is no law known to me where a breach of an agreement between two parties, which has no element of criminality as in this case, can result in a criminal charge and subsequent conviction. At best, it can be a breach of a contractual relationship which the criminal law lacks capacity or competence to enforce and punish and I so hold. See Onagoruwa V State (1998) 1 ACLR, 435 @ 446, Ratio 31. There is no evidence before this court that the accused person fraudulently obtained 118 trays of Redbull valued ₦578,200.00.

The prosecution tendered EXHIBITS'A' and 'A1' to prove his case. It is clear to me that EXHIBITS 'A' and 'A1' are the same, they are evidence of the stock posted that were not delivered, working capital posted and cash collected by the accused person which was not paid into the company's account, amounting to the sum of ₦658,200.00. PW 1 told court that he does not have any written record of how the 94 trays came in and out but that there was a stock – keeper to tell them how stock was been moved in and out. The stock – keeper was not called as a witness for the prosecution. I am afraid that failure to call the store keeper is a witness is fatal to the case of the prosecution. The Supreme Court has held that failure to call a witness who knows something significant about a matter or whose evidence may determine the case on way or the

Other is fatal to the prosecution's case. See Ochiba V State (2012) 204 LRCN 146, Ratio 11. It is not enough for the prosecution to tender EXHIBITS 'A' and 'A1', it would have gone beyond tendering same by calling the store – keeper as a witness in this case. In the circumstance, I shall attach no weight to EXHIBITS 'A' and 'A1', they are accordingly discountenanced. PW2 told court that he came when he discovered that his working capital had not been remitted because he was been sent the outstanding payment from the customers who were owing on a weekly bases. On the other he told court that all efforts to locate the customers proved abortive because there was no a contact address or phone numbers of the customers. It is trite law that where testimonies of the prosecution witnesses clearly conflicts, it is not open to pick and choose between the testimonies, it is also not open to credit one and discredit the other unless a proper foundation is laid for such a course. In a such a situation, the doubt that naturally flows is to be resolved in favour of the accused person. See C. O. P. V. Amuta (2017) 263 LRCN 8, Ratio 4. What is more, none of the customers were called to testify for the prosecution. It is not enough for the prosecution to suspect a person of having committed a crime, there must be evidence which linked the person with the offence alleged. See Ajayi V State (2013) 222 LRCN (Pt.1) 147.

It is for the above reasons; I hold that the prosecution has failed to prove the ingredients of the offence in count I of this charge beyond reasonable doubt as required by law.

In count II and III prosecution must establish the followings ingredients;

(1.) The ownership of the thing stolen.

(2.) That the thing stolen is capable of being stolen.

(3.) The fraudulent conversion or taking.

See Adejobi V State (2011) 198 LRCN 41, Ratio 9.

In count II, there is no evidence before this court that the accused person stole the said 1198 trays of Redbull value ₦578,200.00 vital witnesses to wit; the store keeper and some of the customers not called as witnesses for the prosecution. It is to be noted that courts of law including this court are paragons of justice they rely on what is produced before them as evidence cannot be given in the air. Failure to call these vital witnesses raises a lot of doubt in my mind. It is well settled that when there is doubt in the commission of crime by an accused person, such doubt should be resolved in favour of the accused person. See Adekoya V State (2012) 209 LRCN 125, Ratio 3.

In count III, the prosecution for best reasons known to it failed to call the said Mrs. Sandra Adisele as a witness. PW4 told court that the accused person admitted receiving the sum of ₦80,000.00 from Mrs. Sandra Adisele. In a criminal trial, the onus lies throughout upon the prosecution to establish the guilt of the accused person beyond reasonable doubt, this burden does not shift, even where an accused person in his statement to police admitted to the commission of the offence the prosecution is still not relieved of that burden. See Aigbadion V State (2001 2 ACLR, 48, Ratio 10. The accused person admitted receiving the sum of ₦80,000.00 from Mrs. Sandra Adisele in his statement as per EXHIBIT 'A3', same does not in anyway prove the guilt of the accused person. In respect of this court and I so hold.

There is unchallenged evidence before court that EXHIBIT 'A2', was given to the police to carry out their investigation. It should be noted that the police should focus squarely on their statutory functions of investigation, preventing and prosecuting crimes and should resist being used by overzealous and/or unscrupulous characters for the recovery of debts arising from simple contracts, loans or purely civil transactions. There is a saying that "the beauty of salt is in its taste. Once salt loses its own taste, its value is irredeemably lost. I must say this now a debt recovery agency that is the position and it has not charged, its functions are well spelt out in the 1999 Constitution of the Federal Republic of Nigeria (as amended) and the Police Act. The police had no business in carrying out their investigation upon receipt of EXHIBIT 'A2' knowing same to be a purely civil matter.

It is not part of the duty function of this court to manufacture evidence for any of the parties. A party wins on the strength of his evidence and loses where his evidence is patently weak, unsupportable and unjustifiable. See Ayan V State (2014) 229 LRCN 242, Ratio 10.

In the circumstance I hold that the prosecution has failed to prove counts II and III of this charge beyond reasonable doubt as required by law.

It is trite law that where the prosecution fails to prove its case beyond reasonable doubt, the accused person should be discharged and acquitted. See Shehu V State (2010) 182 CRCN 1, Ratio 8.

Accordingly, I hold that the prosecution has failed to prove the offences in counts I, II and III of this charge beyond reasonable doubt as required by law. I find the accused person not guilt in the three counts charge; he is hereby discharged and acquitted.

A. P. SAIKI (ESQ.)
MAGISTRATE GRADE II

Accused person is present.

Inspector M. S. Shuaibu for the prosecution.

N. F. Okafor (Mrs.) for the accused person.