IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS

COURT:28

DATE: 7TH JUNE, 2022

FCT/HC/CR/109/2021

BETWEEN:

INSPECTOR GENERAL OF POLICE---------- **COMPLAINANT**

AND

BINTA AUDU---------- **DEFENDANT**

JUDGMENT

The prosecution filed a four count charges against the Defendant on 29th March, 2021; said charge was later amended and filed on 15th November, 2021. The Defendant was charged as follows;

Count I

That you Binta Audu 'F' of 'B' Close, Avenue, Setraco, Gwarimpa, Abuja and others still at large, sometime in September, 2020 at Gwarimpa Abuja within the Judicial division of this Honourable Court did conspire among yourselves to commit an offence to wit; obtaining money by false pretence and thereby committed an offence punishable under section 8(a) of the Advance Fee Fraud and other Related Offences Act.

Count II

That you Binta Audu 'F' and others still at large within the same period and place, in the aforesaid judicial division did by false pretence, and with intent to defraud obtain from one Aroh Chukwu 'F' of 3rd Avenue, Gwarimpa, Abuja, the sum of Two Hundred and Seventeen Thousand Naira (N217, 000) and thereby committed an offence contrary to section 1(1) (3) of the Advance Fee Fraud and Other Related Offences Act.

Count III

That you Binta Audu 'F' and others still at large, did conspire among yourselves to commit an illegal act to wit: Cheating and thereby committed an offence punishable under section 97 of the Penal Code Act of Northern Nigeria.

Count IV

That you Binta Audu 'F' and others still at large within the same period and place did, by deceiving Miss. Aroh Chukwunonso 'F' fraudulently induced her to transfer the sum of Two Hundred and Seventeen Thousand Naira (₦217,000.00) to three different bank accounts belonging to person or persons only known to you with the belief that you would repay her the said amount in cash at her point of service and thereby committed an offence contrary to section 322 of the Penal Code Act of northern Nigeria.

The original charge was read to the defendant on 9th November,2021, and she pleaded not guilty to all the charges. The amended charge was read and interpreted to the Defendant on 16th Novenber,2021, and the Defendant pleaded not guilty to all the charges.

On that same date, the prosecution opened its case and examined in chief, PW1, one Miss Aro Chukwu. PW1 in her testimony narrated that the Defendant came to a POS Center where she worked on 23rd October,2020, and gave her phone to PW1 to discuss with a stranger. That the caller asked her to make transfers to some bank accounts, and that when she asked the Defendant who would pay for the transfers, she told her not to worry. PW1 went ahead to transfer the total of N217, 000 into the accounts as follows:-

i. ₦100,000 was paid into the Access Bank with account No: 123407560
ii. ₦48,500 was paid into Firstbank with account no: 3157284163
iii. ₦20,00 was paid into the Access Bank with account No: 123407560
iv. ₦48,500 was paid into the Access Bank with account No: 123407560

PW1 said that upon completion of the transfers, she asked the Defendant for cash for the transfer made, but the defendant refused to pay, claiming that she did not know the man at all, and that the man merely asked her to go to any POS close to her and she accepted. At the point, PW1 said that she screamed and attracted the attention of passerby's and neighbor who forced the defendant to follow PW1 to the house of her employer. It was at the residence of PW1's employer, that the Police was contacted to arrest the Defendant, who thereafter was taken to the Police Station.

During cross examination by the Defendant's Counsel, the Statements of PW1 dated 23rd October,2020, and 21st December,2020 were tendered and admitted as exhibits 1 and 1A respectively. The account statement of one of the beneficiaries, Joy Idoma dated 1st January,2016 – 30th September,2020 was tendered and admitted as exhibit 2.

On that same date, PW2 was led in evidence by the Prosecution, and she narrated what may be regarded as a recap of what PW1 had earlier said in evidence. During cross examination, PW2 stated that the registered name of the POS is payless and that the service provider is Providence bank. She also admitted that after reporting the matter to the police, the identity of the beneficiaries of the alleged transfer was ascertained but that she did not write any petition against the beneficiaries.

On 4th March, 2021, PW3, one Inspector David of the Legal Department, Force Headquarters was led in evidence by the prosecution. The statement of PW3 dated 14th November, 2021 was tendered and admitted in evidence as exhibit 3. PW3 stated that his findings revealed that the Defendant actually approached PW1 and asked her to send money to one person she does not know, and that she actually sent the money. He also stated that he recorded the statement of the Defendant. The statement of the

Defendant dated 14th January,2021 was tendered and admitted in evidence.

On 17th March, 2021, the Defendant was not in Court. On that date, Counsel to the Defendant led in evidence DW1, one Mr. Obute Godwin, who works with a financial technology company, Allausa Infinity Company Nigeria Limited, and also owns a POS business. In his testimony, DW1 claim to have been in the business of POS for about 4 to 5 years. He stated that flowing from his experience in POS business; he is of the opinion that there was negligence on the part of the operator of the POS machine in this case (i.e. PW1). That she ought to have ascertained the amount to be transferred, the person to pay for it, as well as the charges before making the transfer. He was cross examined accordingly.

The Defendant's final written address dated 21st March, 2022, was filed by learned Counsel to the Defendant on 24th March, 2022. In his final written address, Counsel argued that the charge of conspiracy as presently constituted against the defendant is incompetent and cannot be sustained. Counsel opined that in order to convict for the offence of conspiracy, the prosecution has to prove that: (i) there was an agreement between two or more person to do or cause to be done, some illegal act or some act which is not illegal by illegal means (ii) where the agreement was done by one or more of the parties in furtherance of the agreement, and (iii) each of the accused individually participated in the conspiracy. He relied on the case of ***OSHO V STATE (2018) 13 NWLR (PT.1637) 474 @ 488 paragraphs A-B.***

Counsel submitted that the prosecution failed to name the co-conspirators, and they were not charged for the alleged offence of conspiracy. Counsel cited the case of ***SULEIMAN V. STATE (2009) 15 NWLR (PT.1164)258 @ 280 paragraph E*** *and* ***BUKOLA V. STATE (2017) LPELR -43747 (CA) pg 42-43****, w*here it was held that a single person cannot be charged for the offence of conspiracy.

Counsel to the Defendant further contended that the evidence led by the Prosecution is at variance with the charge before the Court. That on the fact of the charge the defendant was alleged to commit the alleged

offences sometime in September, 2020, meanwhile the evidence before the Court including the oral evidence of PW1 and PW2 as well as the documentary evidence in Exhibit 1 and 1A clearly reveals that the PW1 was specific that the alleged offence was done on the 23rd of October, 2020. Counsel submitted that was a fundamental defect that vitiates the entire charge.

On the whole, Counsel argued that the Prosecution did not discharge the burden of proof placed on it beyond reasonable doubt. That from the facts of the case, the Defendant gave no instruction for the transfers culminating into the charge, and that she neither authorized nor provided the account details, the account was not the defendant's account, no evidence was led to show the link between the defendant and the beneficiaries, and the defendant did not abscond after the purported fraud, but stayed till a logical conclusion. That from the foregoing facts, the defendant did not have the intention to commit the alleged crime (mens rea).

In response, the complainant in its written address dated and filed on 5th May, 2022 argued that the Defendant in this case can be charged, prosecuted and convicted alone of the offence of conspiracy even where the other conspirators are at large and were not present when the offence was committed. He referred the Court to the case of ***KAYODE V. STATE LOR(12TH FEBRUARY,2016) SC***, *and* requested the Court to draw an inference from the circumstances of the case that there was indeed a conspiracy. Counsel to the Complainant submit that the prosecution has been able to establish the charge of obtaining by false pretence contrary to section 1(3) of the Advanced Fee Fraud and other Fraud Related Offences Act against the Defendant. Counsel further urged the Court to disregard the testimony of DW1, as DW1 is not a credible witness, having not witnessed what transpired.

The law is settled beyond pre-adventure, that the prosecution has a burden to prove the offence as charged beyond a reasonable doubt. See ***ALABIV.STATE (1993) 7 NWLR (Pt. 307) P.511 at 531***

A critical issue to be raised therefore, is whether the prosecution has proved all the offences charged against the defendant beyond reasonable doubt.

Count one on the charge sheet bothers on conspiracy to obtain money by false pretence contrary to section 8(a) of the Advance Fee Fraud and other Related Offences Act. That section defines conspiracy as the act of conspiring with, aiding, abetting or Counselling another person to commit an offence.

In other to establish conspiracy, there must be some evidence pointing to an agreement between two or more persons to do or cause to be done, some illegal act, or to do an act which is not illegal, by illegal means. See ***OSHO V. STATE (Supra)***. It is practically impossible for a lone person to commit the offence of conspiracy. It is equally an impossibility to prove agreements with persons whose identity are unknown or whose identity are known, but who have not been interrogated to ascertain whether there was any conspiracy or not. Formation of a common intention or agreement between conspirators cannot be a matter of conjecture or speculation, and it is unwise for the Court to draw inference, where there has been no concrete evidence linking the accused with the unknown purported co-conspirators. The case of ***BUKOLA V. STATE (2017) LPELR- 43747 (CA) pg. 42-43***, is very instructive in this respect.

In this case, the police had an opportunity to have fully investigated the case to unravel the identities of the beneficiaries from the account details that were provided, yet they failed to do so. They also failed to provide concrete evidence, establishing a common intention between the Defendant and the person who spoke with PW1 on the phone. Apart from the fact that the Defendant handed over her phone to PW1 to speak with her church member, there is nothing to show that she had a common intention with the caller, to obtain money by false pretence. It is too risky to draw an inference of conspiracy in this instance. I therefore hold that the Prosecution has not proved the allegation of conspiracy in count 1 beyond reasonable doubt.

On the charge of obtaining by false pretence and cheating, which forms the crux of count II and III, it is instructive to note that the Supreme Court has clearly defined the elements that must be proved in a charge of obtaining by false presence contrary to section 1 (1) (a) of the Advance Fee Fraud Act. In the case of ***OMOREDE DARLINGTON V. FRN (2018) LPELR, 43850***, which was cited by the Defendant's Counsel, the Supreme Court stated as follows:-

1. That there was a false pretence made by the accused to the person defrauded.
2. That the thing stolen or obtained is capable of being stolen
3. That the accused did same with intent to defraud.

The testimony of PW1 clearly reveals that it is the stranger who spoke with her over the phone that gave her the bank account details to which she made transfers to. It was also the stranger that assured her that he will repay. The conflicting statements of PW1 at the Gwarimpa Police Station and Force CID, also raise reasonable doubt as to whether there was any definite promise of payment by the Defendant, inducing PW1 to make the said transfer. The testimony of PW2 is a mere hearsay evidence and not qualified to corroborate the testimony of PW1, to enable the Court decide whether the Defendant indeed induced PW1 to effect the said transfers.

The law is trite that in the process of establishing the guilt of an accused, the prosecution has to prove all the essential elements of an offence as contained in the charge. See ***FABIAN NWATURUOCHA V. THE STATE (2011) 6 NWLR (Pt. 1242) p.170 at 188***. I am of the view that the Prosecution in this case has failed to establish all the ingredients of the allegations leveled against the defendant. Where the Prosecution fails to discharge this burden, the Court is left with no other option than to set the Defendant free, for as it often said, it is better for 99 criminals to be set free, than for one innocent accused person to be sent to prison. It is a principle of law that an accuse person is proven innocent until the contrary is proven. See provision of section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria as amended our system of criminal justice is accusatorial criminal justice system. In otherwords it is the sole duty of the prosecution to establish the guilty of the accused person from the

available evidence I am not convinced at all that the prosecution has established the essential ingredient of offence alleged to have been committed by the accused.

From the available evidence all the prosecution apart from PW1 all the remaining prosecution witnesses that testified in this trial has not satisfied the requirement of the law in that the Court cannot act on hear say evidence. I have gone through the record of proceedings and the entire evidence even the evidence adduced by PW1 was not strong enough to sustain the charges brought against the accused.

The investigation of the prosecution done by the police if any cannot sustain the charge, of the prosecution Counsel have failed woefully to establish the guilt of the Defendant. The law is trite that Court can not speculate neither on a judge attach sympathy on matter brought before the Court as in this case the Court is expected to try and decide matters dispassionately the effect of non compliance with the provision of the constitution like in this case section 36(5) is a clear breach of the law of the land which must be discouraged.

It is settled law in a criminal trial that the onus remains with the prosecution to prove or establish the charges against the accused person beyond reasonable doubt and that onus or burden of proof never change /shift see ***AHMED VS STATE (2003) 426 at 433 -177. ANEKWE VS STATE (1998) ACLR 426 At 433, OBIEKEW VS THE STATE (2002) 6 SCNJ 193*** from the evidence adduce before the Court apart from the fact that the substantial part of the evidence was hearsay more importantly there is nothing to sustain the charge the prosecution failed to link the accused with alleged offences. It is not the duty of an accused to prove his innocence as a matter of law, there is also a presumption of innocence in favour of an accused. The standard of proof beyond reasonable doubt .it is not enough for the prosecution to suspect a person for having committed a criminal offence, there must be evidence which identified the person accused with the offence. However proof beyond reasonable doubt does not mean proof beyond shadow or doubt while discharging the responsibility of proving all the ingredient of the offence vital witnesses must be called to testify during the proceedings. Before a trial Court comes

to the conclusion that an offence had been committed by an accused person, the Court must look for the ingredient of the offence and ascertain entirely which act of the accused comes within the confines of the particular of the offence charged see ***AIGBADIAR VS STATE (2000) 4 SC (pt1) AGBE VS STATE (2006)6 NWLR (pt1977) 545.*** It becomes necessary to add the ways by which the prosecution can prove its case that there are basically three ways:-

1. Evidence of eye witness
2. Confession or admission voluntary made by the Accused and
3. Circumstantial evidence which is positive, compelling and points to the conclusion that the accused committed the offence *See* ***ALMUSTAPHA (MAJOR VS STATE (2008)10B NWLR (PT 1094) 31.***

Having substantially analyzed the evidence led by the prosecution witness in this trial without much ado I don't intend to go further or even attach any consideration to the respective addresses filed by the two learned gentlemen in the whole Trial . I have no doubt in my mind that this Court has no option than to discharge and acquit the Defendant principally on lack of material evidence as provided by law. Consequently I so hold. The accused is hereby discharged and acquitted.

HON. JUSTICE M.S IDRIS
(Presiding Judge)

APPEARANCE

EU Uzowuru:- Holding the brief of P.A Amadi for the prosecution

Y.M Zakari:- Appearing with O.A Makinde holding the brief of M.J Numa for the Defendant.