

SUPREME COURT OF NIGERIA

SUIT NO: SC.41/2003 DR. EDWIN UDEMEGBUNAM ONWUDIWE

Vs FEDERAL REPUBLIC OF NIGERIA

Friday, 28th April, 2006

Facts:

On or about the 16th of August, 1994, the appellant, who was at the material time, the Chairman of Ivory Merchant Bank Ltd., had a meeting with one Mrs. Nkechi Justina Nwaogu, an ex-banker, who was the Managing Director of a Company called Liberal Investment Limited. The said meeting took place at a restaurant called Ndafia Restaurant, 39, Milverton Road, Aba. The said Mrs. Justina Nwaogu, who testified as PW1, told the trial tribunal, that the appellant told her that he was in Aba to look for a buyer for some foreign exchange belonging to his bank in an offshore account. That the bank had one million US Dollars for sale but that what was available for immediate disposal was the sum of \$345,000.00 US Dollars. And that the bank wanted to conduct the transaction discretely without attracting publicity, as the bank was trying to shore up its revenue base.

They agreed that the sum of N16.56 million was the equivalent of the 345,000 US Dollars the bank wanted to sell. It was further agreed that if PW1 could find a buyer for the dollars she would be entitled to brokerage fees. PW1 initially located an Indian businessman in Lagos who was willing to buy the foreign exchange. The Indian made a bank draft for the sum of N16.56 million being the agreed naaira equivalent and gave a photocopy of the draft to PW.1, insisting that the original would only be released after the foreign exchange was credited to his account abroad. The appellant refused and insisted on an immediate payment of the Naira equivalent in the sum of N16.56 million. The said draft was crossed and marked, "Not Negotiable, Account Payee Only". According to the PW1, it was the appellant who requested that the draft be in the name of Ivory Merchant Bank Ltd and that all the parties were under the impression that they were dealing with Ivory Merchant Bank Ltd.

On 23/8/94, PW1 and an official of Partnership Investment Ltd, visited the premises of Ivory Merchant Bank Ltd, and there handed to the appellant the draft, exhibit C. Although exhibit C was in the name of Ivory Merchant Bank Ltd and was crossed and marked "Not Negotiable, Account Payee Only", yet it was paid into the private account of the appellant with Ivory Merchant Bank, which then had a debit balance. The appellant paid the said draft exhibit C into his private account together with a letter to the bank indicating how he wanted the said money disbursed. The appellant withdrew the rest of the money from the account and left a debit balance.

On 5/9/94, when Partnership Investment Limited still did not receive the foreign exchange, it demanded a receipt from the appellant, the appellant obliged by issuing exhibit G. On 19/10/94, the appellant, in purported refund of the principal amount of N16.56 million plus interest, issued a cheque to the aforesaid company, but the cheque was dishonoured. Investigations carried out by the Central Bank of Nigeria, Nigeria Deposit Insurance Corporation, and the Directors of Ivory Merchant Bank on the petition of Partnership Investment Ltd., when they failed to get the foreign exchange or the refund of their money and interest, revealed that the appellant was dubiously acting alone in the transaction. Ivory Merchant Bank Ltd therefore refused to accept responsibility for the refund and or the fraud.

Partnership Investment Limited went to Court and obtained judgment in the sum of N21 million against both the appellant and Ivory Merchant Bank Ltd. The company levied execution by way of garnishee proceedings, and thereby forced Ivory Merchant Bank Ltd to refund to it the sum of N16.56 million.

Consequently, the appellant and one other person were arraigned before the Failed Banks Tribunal Zone IV, Lagos. The appellant was specifically concerned in the amended charge with the count relating to fraudulent commission, obtaining under false pretence, granting unsecured advances and loans, corrupt enrichment, engaging in unlawful activities, among others. The charges were brought under general enactments including the Criminal Code and the Failed Banks Decree No.18 of 1994. The appellant pleaded not guilty to the counts concerning him.

On conclusion of trial, the Tribunal found the appellant guilty on counts 3,5,6 and 8 and sentenced him accordingly. Dissatisfied with his conviction and sentence, the appellant appealed to the Court of Appeal. The Court of Appeal, unanimously dismissed the appeal and affirmed the conviction and sentences imposed by the Tribunal. Still dissatisfied, the appellant further appealed to the Supreme Court.

The appellant contended, amongst others, that the Failed Banks Tribunal had no jurisdiction to try him for the offences of stealing and obtaining by false pretences under the Criminal Code as they were not offences relating to the operations or business of a bank. The appellant also argued that the Tribunal had no jurisdiction to try him for the offence of corrupt enrichment under the Recovery of Public Property (Special Military Tribunals) Act 1990, (as amended by Decree No.33 of 1991), because the Tribunal only came into existence in 1994 and had no retroactive application.

The Supreme Court unanimously dismissed the appeal and HELD :

1. ***On Scope of jurisdiction of the Failed Banks Tribunal under Section 3(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No.18 of 1994 -***

The provision of Section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No.18 of 1994 confers jurisdiction on the Failed Banks Tribunals to try any other offences relating to the business or operation of a bank under any enactment. This simply means that where the facts of a case reveal that the transaction complained of relates or deals with bank business or operation in the ordinary course of events, which constitutes an offence, that offence can be tried by the Failed Banks Tribunal. The offence needed not have arisen under the Decree No.18 of 1994. Even if it arose or was created under any other enactment, the Tribunal would have jurisdiction to try the offence in so far as it related to business or operation of a bank. In effect, the provision confers jurisdiction and power on the Tribunal to try other offences not specified in the Decree. Section 3(1)(d) of the Decree vested in the Tribunal power to enforce other existing penal statutes.

2. ***On Scope of offences triable by the Failed Banks Tribunal -***

Section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No.18 of 1994 anticipated the existence of offences to be tried by the Failed Banks Tribunal; and they were those enumerated under (b) and (c) of the Section. Subsection (d) vested jurisdiction on the Tribunal apart from 3(1)(a),(b) and (c). The offence must be related to the business or operation of a bank, and of course, an enactment must provide for it.

3. ***On Jurisdiction of the Failed Banks Tribunal to order confiscation of property and to decline to impose necessary penal sanctions -***

The Failed Banks Tribunal had the jurisdiction to order confiscation of property where an accused was found guilty of an offence under Section 20 of Decree No.18 of 1994, which also sets out the penalties for conviction under Cap.389 of the Laws of the Federation of Nigeria 1990 (as amended). The Tribunal had the discretion under section 20(5) of Decree No.18 to reduce or decline to impose the penalty specified in subsection (1) of the Section. In the instant case, the appellant voluntarily surrendered the properties to the victim of the crime, Ivory Merchant Bank Ltd., and as a result the Tribunal in exercise of its discretion under Section 20(5) of the Decree did not impose any sentence

on the appellant on counts 6 and 8 for which the appellant was convicted. There was, therefore, no double punishment.

4. ***On When an Offence of Stealing Committed under Section 383(2) of the Criminal Code -***

Although the disjunctive conjunction “or” is not used at the end of each of the sub-items of Section 383(2) of the Criminal Code, it is the meaning of the subsection that an offence of stealing is committed if any of the conducts of the sub-items of section 383(2) is committed. In other words, it is not the meaning of section 383(2) that all the sub-items in Section 383(2) must be present before an offence of stealing is committed. This is clear from the following opening words of section 383(2); “if he does so with any of the following intents”. As it is, the offence can only be said to be committed if the taking of the thing capable of stolen is done fraudulently. (P.429, paras. E-G).

5. ***On Meaning of “Fraud”***

Fraud, the noun variant of fraudulently, is:

- (a) an action or a conduct consisting in a knowing misrepresentation made with the intention that the person receiving that misrepresentation resulting in the action or conduct;
- (b) the misrepresentation resulting in the action or conduct;
- (c) an action or a conduct in a 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 of the fraudulent action, or conduct, or another person, or to cause loss to any other person. In fraud, there must be a deceit or an intention to deceive, flowing from the fraudulent action or conduct to the victim of that action or conduct. An offence is said to be committed fraudulently, in the context of the instant case, if the action or conduct is a deceit to make, obtain or procure money illegally. By the fraudulent action or conduct, the accused deceived his victim by pretending to have abilities or skills that he does not really have. In one word, he is an impostor.

6. ***On Meaning and Ingredients of the Offence of Obtaining by false pretences -***

The offence of obtaining by false pretences means knowingly obtaining another person’s property by means of a misrepresentation of fact with intent to defraud. Section 419 of the Criminal Code provides for the offence of obtaining by false pretences that any person who by false pretence, and with intent to defraud, obtains from any other person anything capable of being

stolen or induces any other person to deliver to any person anything capable of being stolen, is guilty of a felony, and is liable to imprisonment for three years. For the offence of obtaining by false pretences to be committed, 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 of the offence.

7. ***On Ingredients of Offence of Obtaining by false pretences***

In order to succeed in a charge of obtaining by false pretences, the prosecution must prove:

- (a) that there is a pretence;
- (b) that the pretence emanated from the accused person;
- (c) that it was false;
- (d) that the accused person knew of its falsity or did not believe in its truth;
- (e) that there was an intention to defraud;
- (f) that the thing is capable of being stolen;
- (g) that the accused person induced the owner to transfer his whole interest in the property.

The offence could be committed by oral communication, or in writing, or even by conduct of the accused person. However, an honest belief in the truth of the statement on the part of the accused which later turns out to be false, cannot found a conviction on false pretence. The above adequately presents the law as in Section 419 of the Criminal Code.

8. ***On Nature of Offence of Conversion***

Conversion is both an offence and a tort. Conversion does not have a life of its own in the Criminal Code, but is parasitic on the offence of stealing. As a matter of law, the definition of stealing under Section 390 of the Criminal Code includes larceny, embezzlement and fraudulent conversion. It is the fraudulent nature that separates it from the tort of conversion.