

**IN THE CIRCUIT COURT 3 HELD AT ACCRA ON WEDNESDAY THE
4TH DAY OF JANUARY 2023 BEFORE HER HONOUR SUSANA EDUFUL
(MRS.), CIRCUIT COURT JUDGE**

COURT CASE NO. C6/195/2019

THE REPUBLIC

VRS

- 1. DANIEL DUMENU (death with)**
- 2. FOSTER AFOMALE**
- 3. KWAKUY AGBETOR**
- 4. KAFUI DUMENU**
- 5. BERTHA DUMENU**

JUDGMENT

The First and Second Accused have been charged on three counts for the offence of; Conspiracy to commit crime to wit; Obtain Electronic Payment Medium Falsely and Defrauding by False Pretences contrary to **Section 23(1) of the Criminal Offences Act 1960 (Act 29), Section 114 of the Electronic Transactions act 2008 (Act 772), Section 119 of the Electronic Transactions Act 2008 (Act 772), and Section 131 of the criminal Offences Act 1960, (Act 29) under Count 1. Count 2 and 3, A1 and A2 have been charged with the offence of Obtaining Electronic Payment aMedium Falsely contrary to Section 119 of the Electronic Transaction Act, 2008 (Act 772) and Defrauding by False Pretence Contrary to Section 131 respectively. The third, fourth and fifth Accused Persons have been charged with one count**

each for the offence of Abetment of Crime to wit; Obtaining Electronic Payment Medium Falsely and defrauding by False Pretences Contrary to **section 20 of the Criminal Offences Act 1960 (Act 29) sections 112 of the Electronic Transactions Act, 2008 (Act 772) and Defrauding by False Pretence Contrary to Section 131 respectively under count 4,5 and 6**

The Brief Facts: The facts of the case as presented by Prosecution are that “Complainant in this case is a police officer stationed at the Airport Police Station. First Accused person (A1) Daniel Dumenu claims to be a driver and currently serving a jail term at the Maximum-Security Prisons at Ankafu. Second accused person Foster Aformale is a mechanic residing at Kwabenya. The third accused person (A3) Kwaku Agbetor is a Togolese from Adangbe and claims to be a mason. Fourth accused person (A4) Kafui Dumenu is a tricycle rider and resides at Hohoe. Fifth accused person (A5) Bella Dumenu is at large.

Sometime in October 2018, the complainant received a text message from a US phone number with the text introducing himself as Captain Richmond Tawiah, a Ghanaian military officer on UN Mission to the United States. The supposed military officer expressed his desire to purchase two cars for himself and the complainant. Thereafter, the supposed military officer sent the contact number of an agent who he claimed was to clear the two cars at port for them. The complainant contacted the clearing agent who asked her to pay an amount of GHC 60,000.00 as clearing fees, and subsequently gave her A3’s GCB bank account number. The complainant after making payments did not

receive the cars and was also not able to reach the supposed military officer and the agent. The pictures of the military officer were used to trace him at Burma Camp. Upon investigations, the military officer who identified himself as Captain Randy Tawiah denied any involvement and stated that a couple of ladies have reached him to complain about someone using his pictures to defraud them. Police investigations have confirmed the military officer's assertion and statement obtained from some of the victims.

On 14th January 2019, police investigations led to the arrest of the bank account holder, A3 at Aflao who also led police to arrest A2 who he claimed opened the bank account for him to receive the money. A2 admitted to have received the money and mentioned A1 as the one who made him to open the bank account to receive the money. That he sent the money to him through mobile money. Police investigations was extended to Ankaful Prisons where A1 was interrogated and he corroborated A2's assertion.

Further investigations however revealed that A2 and A3 after withdrawing the money from A3's bank account deposited it into a mobile money account. Analysis on that mobile account also revealed that the monies were sent to other mobile money accounts which included that of A4. However, large sum of the money was sent to a mobile money merchant at Hohoe. A follow up on that merchant account holder revealed that the monies were received on behalf of A4 and A5 who came to withdraw same. Police intelligence led to the arrest at Hohoe. A5 is at large and efforts are being made to locate and arrest her. Accused persons were charged and are before you."

Prosecution called three witnesses and tendered exhibits in evidence. On July 29, 2021 the court ordered A2 A3 A4 and A5 to open their defence after prosecution had made a prima facie case against them. Both Counsels for Accused Persons have filed their addresses and this court has perused and considered it in coming out with this judgement.

EVIDENCE OF PW1:

PW1 is Florence Antwi, a public servant with the Ghana Police Service. She indicated to the court in her evidence that on 22nd October 2019, she received a text message from +14042710396. That A1 sent a couple of messages to introduce himself but she did not reply to the text messages. Later, on the said day A1 gave a detailed introduction of himself with a picture of him in uniform. According to PW1, A1 told her over the phone via caller number +14242835029 that he is Richmond, a military officer who worked in 4BM at Kumasi. PW1 stated that she made A1 aware that she did not know him but A1 insisted that he knew her from Kumasi and that he found her number in his old diary, however, PW1 told A1 that she did not know anything that has to do with him.

PW1 further indicated that, she informed A1 that she did not know anyone from Kumasi but would have been convinced enough if it was Accra where she knew many soldiers from Burma Camp as she was once a dispatch rider had distributed police letters but added that it could be true. That from that point in time, she started communicating with A1 and through their telephone conversations and A1 made her aware that he was on UN Mission in the USA

and will be returning back to Ghana on 20th December 2018. That A1 made her to know that cars were cheap there and that if she was interested, he would send her some to choose from which she did. On 8th November 2018, A1 sent her images and videos of cars to choose, which A1 told her he had bought to be sent to Takoradi Harbour on the 14th of November, 2018.

That, on Monday 10th December, 2018, A1 introduced A3 to PW1 as the clearing agent and sent her A3's name, A3's GCB bank account details and MTN phone number, for payment of the import duty and other cost and told her that the cars had arrived. That she paid an amount of GHC 60,000.00 into A3's GCB bank account number..., Dome branch. That after paying the money, she started sensing danger because A1 and A3's contact numbers were not going through.

PW1 stated that she later found out the actual soldier is Captain Tawiah on contact number 0208558550. PW1 indicated she quickly contacted the actual soldier and he confirmed it.

EVIDENCE OF PW2:

PW2 is Detective Sergeant Seth Amaniampong Oduro is a police investigator formally stationed at CID Headquarters and currently at Wuhan China. PW2 indicated that on 21st December 2018, a case of impersonation and defrauding by false pretences reported by PW1 originally being investigated by Airport Police was referred to him to investigate.

According to PW2, on 14th January 2019, police intelligence led to the arrest A3 at Aflao. A3 informed police that A2 requested him to use his Voter ID card to open

a bank account for him to receive money from his brother abroad because he A2 does not have an ID to open the account.

That on 14th January 2019, A3 led police to arrest A2. That A2 confirmed A3's assertion and further stated that A1, is a convict prisoner at Ankafu Maximum Security Prison, directed him to have someone open an account to receive money from his brother abroad. That the money received in the GCB bank account of A3 was sent to an MTN mobile money account given to him by A1.

PW2 indicated that, police investigations revealed that A2 bought an MTN sim card for A3 and took him to GCB Bank Dome branch to open the account and further requested him to use the said Sim card number for the account opening. After which A2 kept the Sim Card that was used for the account opening.

That further investigations revealed that, on 11th December 2018, after the complainant deposited the first tranche of the total amount of GHC60,000.00, being cash sum of GHC30,000.00 into the account of A3, A2 received an alert message to that effect and called A3 who was in Togo to inform him. A3 came from Togo and met A2 at GCB Bank Afloa branch to withdraw the money for A2, after which A2 gave A3 an amount of GHC1,000.00.

On 14th December 2018, PW1 again deposited the remaining amount of GHC30,000.00 in to the same account. A3 again came from Togo after being called by A2 and met A2 at Aflao to withdraw the money for him. A2 gave A3 GHC 500.00 as his share.

That on 18th December 2018, A2 deposited a total amount of GHC53260.00 into an MTN mobile money merchant account given to him by A1 and kept a total amount of GHC3000.00 as his share. That A2 used his share of the money to purchase a container shop at Kwabenya.

PW2 also indicated that, further investigations revealed A2 has a GCB bank account through which he received cash sum of GHC 30,500.00 from one Evelyn Bobie on behalf of A1, under the pretence of being Captain Richmond Tawiah.

That pictures of the military officer were used to trace the military officer at Burma Camp he was identified as Captain Randy Tawiah of 6BN Tamale. That he was invited to assist police investigations. That he denied involvement. That it was also revealed that the accused persons downloaded the picture of Captain Randy Tawiah from his Facebook account and used same to impersonate him.

PW2 further indicated in his evidence that, Police investigations conducted on the mobile money account into which the monies were deposited revealed that, the holder of the account on receipt of the monies immediately disbursed the monies into different MTN mobile money account. One of the mobile money accounts was a merchant account with the name "Max Phones" located at Hohoe.

Further investigations revealed that A4 and A5 went to the two Assistants of Maxwell Mensah and informed them that A1, their brother in Kumasi will occasionally send them money and would like to receive the money through

their merchant account. That the agents agreed to the proposal and subsequently gave monies to A4 and A5, as and when money was sent for them. That A4 stated during investigations that A1 asked him to go for the monies and further directed him on how to expend the money but failed to state the total amount of money he had received on behalf of A1.

PW2 tendered 3 exhibits in evidence to prove the charge.

EVIDENCE OF PW3

PW3 is Detective Corporal Nash Kyeremeh, a police officer stationed at the CID Headquarters, Accra and attached to the Cybercrime Unit. According to PW3, on 21/12/2018, a case of impersonation and defrauding by false pretences was reported by the PW. The case which was originally being investigated by Airport Police was referred to a team of investigators led by PW2 for continuation.

That investigations led to the arrest of A2, A3 and A4. They were cautioned and charged by Detective Sergeant Seth Amaniapong Oduro. The investigations established that A1 is a convict prisoner at Ankaful Maximum Security Prisons.

PW3 indicated in his evidence that the four accused persons were put before court and in the course of the prosecution, A5 who was at large reported in court after a Bench Warrant was issued for her arrest. That he cautioned and charged A5 and put A5 before Court for prosecution.

PW3 tendered in evidence A5 investigation caution statement and charge statement.

The Burden of Proof

At the close of trial the court directed that counsel file his address by April 25, 2022 but not do so till June 3, 2022.

Prosecution's duty was to prove the charge preferred against him beyond reasonable doubt in accordance with *Section 13 (1) of the Evidence Act, 1975, (NRCD 323)*.

Reasonable doubt was explained by Denning J (as he then was), in **Miller v. Minister of Pensions [1947] 2 All ER 372 @ 373** as "...it need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice" Under *section 11(2) of NRCD 323*, in criminal cases the burden of proof is on the prosecution throughout. The prosecution is required to produce sufficient evidence on a fact essential to establish the guilt of the Accused, so that on all the evidence a reasonable mind could find the existence of that fact beyond reasonable doubt. In the case of the accused except in cases where a statute throws the burden upon him, he is not obliged to prove anything. All that the law requires of him is to raise a reasonable doubt as to his guilt on the fact in issue. But then unless and until Prosecution has discharged the burden of proving the guilt of the accused to the requisite degree, no burden will be shifted on to the accused or assumed by him.

EVALUATION OF THE EVIDENCE

The First and Second Accused Persons have been charged with the offences of; Conspiracy to Obtain Electronic Payment medium falsely and Defrauding by False Pretences, and the substantive offence Obtaining Electronic Payment Medium Falsely, however the 1st Accused has been dealt with. The Third, Fourth and Fifth Accused Persons have been charged with the offence of Abetment of Obtaining Electronic Payment Medium Falsely and defrauding by False Pretences.

Thus, the burden on the prosecution was to prove it's against the accused persons by adducing sufficient evidence to prove the essential ingredients of the offences charged against the accused persons, at the close of the prosecution's case.

Count 1, 2 and 3, are against 2nd Accused

This court will consider all three counts against A2 all together.

The Charge of conspiracy to obtain electronic payment medium falsely and defrauding by false pretenses:

Section 23(1) on Conspiracy under the Criminal Offences Act 1960, (act 29) provide that "If two or more persons agree to act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime, as the case may be".

The Supreme Court speaking through Dotse JSC in the case of **FRANCIS YIRENKY v. THE REPUBLIC** (Unreported) Criminal Appeal No. J3/7/2015 dated 17th February, 2016 explained the formulation on the offence of conspiracy as follows:

“In this new formulation, the only ingredient that has been preserved is

(1) The **agreement to act to commit** a substantive crime, to commit or abet that crime.”

The High Court, in the case of **The Republic v. Baffoe-Bonnie & 4Ors** supra, in following the decision in the YIRENKYI case expressed itself as follows:

“What used to be rendered as two or more persons **agreeing or acting** together with a common purpose has now been changed to one of **agreement to act together**. For the prosecution to be deemed to have established a prima facie case, the evidence led, without more, should prove:

- i) That there were at least two or more persons
- ii) That there was an agreement to act together
- iii) That the sole purpose for the agreement to act together was for a criminal enterprise
- iv) That it will be immaterial if the two or more persons had a previous agreement to act together or not.”

The Court continued:

“It must emphatically be noted that **it is no defence for an accused to claim when found acting together with others to contend that it cannot be used as evidence of a prior concert or deliberation.**”

As was held by the Supreme Court in **LOGAN v THE REPUBLIC [2007-2008] SCGLR 76 @ 78**, in conspiracy charges where there is no direct evidence, **“the conspiracy is a matter of inference, deduced from the certain criminal acts of the persons accused, done in pursuance of an apparent criminal purpose in common between them”**.

Similarly, Section 114 of the Electronic Transactions Act 2008, (Act 772), further provide that **“Section 23 of the Criminal Offences Act, 1960 (Act 29) on conspiracy applies with the necessary modification to any person who conspires to commit an offence whether the medium used in whole or in part was an electronic medium or an electronic agent’**.

The essential ingredients under the offence of conspiracy to commit crime that the prosecution is under obligation to prove beyond reasonable doubt, against the accused are that; the prosecution ought to establish that;

1. The Accused did agree to commit crime,
2. That in furtherance of the agreement, the accused did agree to act together with a common purpose to commit or abet the crime.

In the case of **FRANCIS BOAFO @ CUDJOE V. THE REPUBLIC (2017) JELR 63751. SUIT NO: H3/9/2013, dated 4th MAY 2017**; the Court of Appeal in determining whether or not the prosecution has sufficiently proved the Charge of Conspiracy to commit crime against the Appellant to warrant the conviction, noted inter alia, that; In short it has to be proved that the Appellant agreed with the other Accused persons to act together to commit the robbery or that he abetted the commission of the robbery. It is irrelevant whether he never actually met the others physically or whether plans for the commission of the offence had

already been set in motion when he became involved. What is important is proof that he and the others came to an agreement to act together to achieve the purpose of executing the robbery in question.

What this court, as a finder of fact, is required to determine, is whether or not there was evidence of a common purpose; and if so if each of the accused persons was a party to it. To sum up on the charge of conspiracy against the accused persons, the prosecution had a burden to prove an agreement to act together for the common purpose of defrauding PW1. In proving this, I will weigh both direct and circumstantial evidence adduced by the prosecution before this court.

On the evidence of Obtaining Electronic Payments and Defrauding by false pretence against A2. The First Accused Person admitted the offence and has been sentenced. The Prosecution's case is that complainant parted with an amount of GHC60,000.00 to A1 and A2 by relying on representations made to her by A1 that he bought two cars from the USA, which he imported into the Country. In the instant case, the first accused person pleaded guilty to the offence. The second accused admitted in his investigation caution statement (exhibit F) and stated that 1st Accused called him on phone and told him to find someone who has a bank account to enable him make a deposit into the said account. 2nd Accused therefor is discussed with 3rd Accused and he agreed. Therefore the 2nd Accused accompanied him to open an account at Ghana Commercial Bank Dome. The 2nd Accused sent details of the bank account opened by A3 to A1 whom he knew was serving a prison sentence at Ankaful Prison. Few days later A1 informed A2 that he has sent GHC30,000.00 into the account so he should meet A3 at Aflao to cash the money. A2 met A3 who was

living in Togo after opening the bank account at Aflao and A3 withdrew the money. The money was used as directed. A2 in his further investigation caution statement dated February 8, 2019 exhibit F2 stated that, A1 called him A2, whom he has not seen and heard from to a long time on phone. And directed him to open an account to enable him send money to him and so he did and he was directed to send the amount of about GHC35,000.00 received in about 4 to 5 installment payments, to a mobile account number 02409979 which he did.

Considering the evidence on record as a whole the court finds that Accused (A2) in exhibit F1 states that he knew A1 was serving a prison sentence. In F2, A2 stated that A1 told him he was abroad. From A2's evidence, he did not have any contact with A1 after they left primary school until he received a call from him to open a bank account.

In the evidence of Accused Person (A2) he states that A1 was his class mate at primary school and A3 is his neighbour at Kwabenya. That around 2018 A1 with whom he had no contact after their primary education contacted him on phone requesting for A2's bank account details so he can make deposit into the account. A2 told the court that A1 had initially made deposit into his account, but he has not attached his own bank account details to prove same. A2 stated that A1 does not know A3, it was he A2 who upon instruction by A1 contacted A3 to open the said bank account to receive the deposit. It is very questionable why A1 will not make the deposit into the bank account of A2 whom he knows but rather into the bank account of stranger whom he does not know. It is also not clear why it was A1 rather who called A2 to meet with A3 at Aflao while even A1 does not know A3 and it was A2 who instructed A3 to open an Account and so A2 and A3 could

have had that communication. Again, the investigation caution statement of A2 exhibit F1 and his further statement Exhibit F as well as his evidence are incoherent and inconsistent. According to Prosecution A2 through several telephone conversations with PW1 presented himself as the clearing agent tasked by A1 to clear the two cars from the port.

A1 indeed set out with A2 to open a bank account and registered a mobile money transfer account for the purpose of defrauding PW1. Subsequent to that, he took steps to convince A3 to open a GCB bank account and connect the account to A3's phone number to enable A2 who kept the sim card to receive alert, to facilitate the receipt of monies from PW1, following the agreement between him and A1.

The court can only conclude by accepting the prosecution's evidence that A1 and A2 hatched the plan together for a common purpose to commit a crime against PW1 and reject A2's evidence as not being reasonably probable.

THE CHARGE OF OBTAINING ELECTRONIC PAYMENT MEDIUM FALSELY

Section 119 of the Electronic Transactions Act provide that, provides "A person who makes or causes to be made either directly or indirectly, a false representation to procure the issue of an electronic payment medium personally or to another person commits an offence and is liable on summary conviction to a fine of not more than five thousand penalty units or to a term of imprisonment of not more than ten years or to both".

Section 114 of the Electronic Transactions Act 2008 (Act 772)

defines electronic payment medium to include “any medium issued to a holder capable of being used to make an electronic financial transaction”.

The prosecution is required to prove under this charge are that;

- 1. Whether or not A1 and A2 obtained electronic payment medium.**
- 2. Whether or not the electronic payment medium was obtained falsely.**

PW1 indicated in her evidence that she paid a total amount of GHC60,000.00 into A3's GCB bank account. This version of PW1 statement was also collaborated by PW2, the first investigator in the case. The prosecution tendered in evidence exhibits B and B1; being photocopies of two GCB bank cheques dated 11th December 2018 and 17th December 2018, respectively. As well as A3's GCB bank account statement marked exhibit 'C', to prove payments made by PW1 into A3's GCB account and subsequent withdraws of the money from A3's GCB account. The GCB bank account statement clearly reflected that PW1 made payments directly by cash and a bank cheque, in two instances. The account statement also reflected that, the monies were withdrawn via two GCB bank cheques issued by A3.

A2 directed A3 to use his voter ID card to obtain an MTN sim card and was registered as a mobile money transfer account and this is what was used to open the bank account at GCB Dome branch hence the bank account was connect to mobile money account to give alert to the holder of the sim (A2) any time money is deposited to the account. The prosecution's case is that

even though it was A3 who procured the Sim Card through regular means it was not used by A3. Rather A2 took the said sim Card from A3. It is prosecution's evidence that by A2 obtaining the Sim card from A3 and keeping it, when he was not actually the owner in order to that he could aid A1 to defraud PW1 as he A2 will be alerted of any deposit made.

According to Prosecution this will give A2 the opportunity to confirm to PW1 when deposits are made by her. This swift confirmation of deposit to PW1 will also earn PW1's trust in the whole transaction as payment into the bank account will be promptly monitored to PW1 to receive feedback as if he is the direct receiver of the money.

From the evidence on record exhibit C which is the bank statement of A3 confirms that A3's statement that it was A2 who gave him an initial GHC80.00 to open the bank account and it was this account which was used as a medium to receive the GHC60,000 which constitutes a crime against from PW1. So, the first time A3 opened the account he deposited the GHC80.00 given to him by A2. This is a confirmation that A1 and A2 caused A3 to open the bank account to facilitate their act to commit crime. Prosecution's evidence is therefore reasonably probable and therefore reject A2's defence.

The court accordingly finds that the Prosecution has been able to prove the charge beyond reasonable doubt and A2 has not been able to raise a doubt.

THE CHARGE OF DEFRUADING BY FALSE PRETENCES

Under **Section 131 of the Criminal and Other Offences Act, 1960 (Act 29)**, "Whoever defrauds any person by any false pretence shall be guilty of a

second-degree felony.” **Section 132 of Act 29** provides that “A person is guilty of defrauding by false pretences if, by means of any false pretence, or by personation he obtains the consent of another person to part with or transfer the ownership of anything.”

For the Prosecution to succeed on a charge of defrauding by false pretences, it must prove that: (i) there was a mis-statement or impersonation by the first and second Accused persons which in law amounts to a false pretence, (ii) that the falsity of the pretence was known to the accused persons, (iii) that the first and second Accused thereby obtained the consent of another person to part with or transfer the ownership of anything and (iv) that the first and second Accused acted with intent to defraud.

In the case of **SEFA v COMMISSIONER OF POLICE [1963] 2GLR 33**, Apaloo J. (as he then was) noted inter alia that; it is of the essence of this offence that a false representation must have been made by the accused and that such falsity must have been known to the accused at the time of making it. The burden of establishing these is, without doubt, on the Prosecution.

It is quite apparent from the evidence on record that A1 impersonated one Captain Randy Tawiah, a Military Officer stationed at 6BN, Tamale. He represented to PW1 that he bought two vehicles in the USA, which he imported into the country one for himself and one for the complainant, a representation which he well knew at the time of making it to be false. A1 knew he was in Ankaful Prison serving a Jail sentence but not in the USA.

A1 further represented to PW1 that A2 was the clearing agent at the port and gave A3's GCB Bank account details to PW1 to pay an amount of GHC60,000.00 as cost for the clearing the cars from the port to further convince PW1 to pay the said amount. A2 falsely represented to PW1 that he was A3 when in fact he was not and also that he clearing agent and had several telephone communications with PW1 confirming the representation made by A1 which he well knew to be false. The Complainant believed in the representations made by A1 and A2. Acting on that believe, she paid a total amount of GHC60,000.00 into A3's GCB bank account ostensibly to facilitate the clearing of the two cars from the port in Takoradi.

In this case, the evidence led by the prosecution clearly establishes the parting with a sum of GHC60,000.00, which PW1 paid through A3's GCB Bank account. The monies were withdrawn on the same day the payments were made with a very unusual withdrawal pattern. That on 11th December 2018, after the Complainant deposited the first tranche of GHC30,000.00 into the account of A3, A2 received an alert SMS message to that effect and called A3 who was in Togo to inform him. A3 came from Togo and met A2 at GCB Bank Aflao branch to withdraw the money for A2, after which A2 gave A3 an amount of GHC1,000.00.

On 14th December 2018, PW1 again deposited the remaining amount of GHC 30,000.00 in to the same account. A3 again came from Togo after being called by A2 and met A2 at Aflao to withdraw the money for him on the same day.

Contrary to A2's presentation to PW1 that he is a clearing agent as Prosecution asserted A2 has indicated in his evidence that he is a mechanic. The court upon examining the evidence on record will accept prosecution version that A2 presented to PW1 that he was a clearing agent as this was to confirm A1's presentation to PW1 that he had shipped two cars which had arrived at the port and due for clearing. This piece of evidence shows that A2 knew of the falsity of the presentation made by A1 and also had the intention to defraud PW1

The prosecution further proved that the A1 and A2 intended to defraud PW1 as no cars had been shipped into the country by A1 to warrant the payment for its clearing by A2 but to lure PW1 to make the said payment. That A2, acting on the instructions of A1, later paid an amount of GHC53,000.00 into a mobile money account number given to him by A1, while the remaining balance was shared between A2 and A3. The court is of the opinion that the prosecution has proved its case against the accused A2 beyond reasonable doubt on the two counts charged; the offence of, Conspiracy to commit crime contrary to sections 23(1); to wit Obtaining Electronic Payment Medium Falsely and defrauding by False Pretences Contrary Section **131 of the Criminal**

Offences Act 1960 (Act 29) and sections 112 of the Electronic Transactions Act, 2008 (Act772). Also the substantive offence of Obtaining Electronic Medium and Defrauding by False Pretences contrary to sections 131 of the Criminal Offences Act, 1960 (Act 29) and Section 112 of the Electronic

Transaction Act 2008 Act 772 respectively. The court accordingly convict A2 of the offence charged.

THE CHARGE OF ABETMENT OF OBTAINING ELECTRONIC PAYMENT MEDIUM FALSELY AND DEFRAUDING BY FALSE PRETENCES

A3, A4 and A5 have been charged with the offence stated above. **Section 112 of the Electronic Transactions Act 2008 (Act 77) provide that,**

Sections 20 and 21 of the Criminal Offences Act, 1960 (Act 29) on abetment of crime applies with the necessary modification to any person who abets a crime whether the medium used in whole or in part was an electronic medium or an electronic agent.

Section 20 of the Criminal Offences Act 1960, (Act 29), provide that “ a person who, directly or indirectly, instigates, commands, counsels, procures, solicits, or in any other manner purposely aids, facilitates, encourages, or promotes, whether by a personal act or presence or otherwise, and a person who does an act for the purposes of aiding, facilitating, encouraging, or promoting the commission of a criminal offence by any other person, whether known or unknown, certain or uncertain, commits the criminal offence of abetting that criminal offence, and the of abetting the other person in respect of that criminal offence”.

The Third, Fourth and Fifth Accused Persons have been charged with one count each for the offence of Abetment of Obtaining Electronic Payment Medium Falsely and Defrauding by False Pretences Contrary

to **sections 112 of the Electronic Transactions Act, 2008 (Act 772) and section 20 of the Criminal Offences Act 1960 (Act 29).**

For the Prosecution to succeed on a charge of abetment of obtaining Electronic Payment Medium Falsely and Defrauding by False Pretence, it must prove that: the third, fourth and fifth Accused persons directly or indirectly, instigated, commanded, counselled, procured, solicited the commission of the crime, or (ii) in any other manner purposely aids, facilitates, encourages, or promotes the commission of the crime whether by a personal act or presence or otherwise, (iii) that the third, fourth and fifth Accused persons acted with intent to aid and abet the commission of the crimes.

It is trite learning that the liability of an abettor is derived from that of the perpetrator of the criminal offence. Thus, in **R V BRYCE [2004] Crim. L.R.936**, the court held that, “The act must in fact assist the perpetrator; the aider and abettor must have done the act deliberately, realizing that it was capable of assisting the offence; he must have foreseen the commission of the offence as a real possibility; and he must when doing the act have intended to assist the perpetrator”.

In the case of the **REPUBLIC V PHILIP ASSIBIT & Anor (2018) JELR 107130**, the High Court in discussing liability of abetment of crime, quoted with approval provisions of **Professor Henrietta J.A.N Mensa-Bonsu book; THE GENERAL PART OF CRIMINAL LAW – A GHANAIAN CASEBOOK (VOLUME 2) page 489**, inter alia, “The crime of abetment is committed when a person renders assistance to another for the purpose of

committing crime, and thereby makes a contribution to the doing of a criminal act...For instance, in a scheme to rob a bank, there would be several participants, i.e the master-brain who devised the whole scheme; the financier of then scheme; the insider who produced the plans of the premises to be robbed; the carpenter who manufactured the special ladder to be used, the driver of the get-away car; the watchman who agreed to be absent on that day to facilitate the operation; the look-out whose job it was to ensure that the principals would be warned if the police approached the scene; and those who purported to provide spiritual strength to the scheme such as the pastor or jujuman or mallam who blessed the scheme or provided potions to guarantee the success of the scheme; all of whom would be linked by a common design to commit one crime.”

For the Prosecution to succeed on the charge against A3, A4 and A5 the prosecution is required to prove the actual or constructive knowledge of the three accused persons to aid or abet the commission of the crime by A1 and A2. However, the prosecution cannot establish knowledge by direct evidence as knowledge in law is almost incapable of being established by direct means and evidence of overt acts for which the court can draw inference is used.

In the case of **SOKOTO v. REPUBLIC** [1972] 2G.L.R 372, though on narcotics, the court held concerning proof of knowledge that: ‘In discharging the burden of proof the prosecution need not establish actual knowledge in the accused person. Evidence from which the knowledge of

the accused person may be justifiably inferred is sufficient' this will necessitate that the Court draws inferences from the facts that the prosecution proves and the court finds.

Section 18 (2) of the Evidence Act, 1975, (NRCD 323) states that: 'An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action'.

The prosecution led evidence to prove that, A3 facilitated A2 and A1 to defraud the complainant. The evidence on record established that, an amount of GHC60,000.00 was paid by PW1 into A3's GCB bank account which A2 directed him to open. This account is connected to A3's phone number. This facilitated A1 and A2 to receive monies from PW1. That A3 was given a share of the money by A2. According to prosecution, if a person calls you from Togo to open an account in Ghana and register a sim card with mobile money transfer and then take it from you and only calls you to withdraw money for him when payment is made into the account and then receive remuneration GHC1000.00 and GHC500.00 on two separate occasions for no work done but for only facilitating a process, then it is deemed that A3 has knowledge that the activity was for a criminal enterprise.

In defence A3 told the court that he is a mason living in Kwabenya in the Greater Accra Region. He told the court that A2 is his neighbour at Kwabenya Accra. He however, does not know A1, A4 and A5. According to A3 in the year 2018 A2 asked him to assist him with my bank account details to enable

him receive money meant for his brother A1 which he obliged. A3 was in Aflao his hometown when A2 called him to inform him monies have been transferred into his account. A2 travelled with him to Aflao where he A3 went to withdraw the money from the bank and handed it over to A2. The amount was GHC30,000.00 and A3 was given GHC500.00 for the services rendered. After 2 weeks A2 called again and they met at Aflao for the withdrawal and this time A3 was given GHC1000.00 out of the second GHC30,000.00 for the services rendered.

However, A3 states in his investigation caution statement that “Barely two months ago a certain man I only know as Foster told me that his brother who is in the United Kingdom wants to send him money but he does not have an identity card so if I have some I should help. A3 confirmed to the person he had one. The person then took A3 to Dome GCB bank to open the account in the name of A3. He deposited an amount of GHC80.00 in the account.

From the evidence of A3 he wants the court to believe that he had a bank account with GCB already and A2 only sought to use the account. This is contrary to his investigation caution statement where he stated that it was A2 who took him to open that bank account with an initial deposit of GHC80.00. Exhibit C which states that opening balance as at December 1, 2018 was GHC80.00 confirms this. The court thus infers that by this explanation A3 only seeks to throw dust into the eyes of the court as confirming that A2 opened the account for him will only depict to the court that he allowed himself to be used as a conduit to facilitate and abet a

crime. But the court finds that was exactly what A3 did. The action of A2 ought to have put A3 on enquiry and not yield of to his baits.

Again, the opening of this bank account assisted A1 and A2 to perpetrate fraud against the Complainant as already described.

The evidence adduced by the prosecution to prove the charge against A4 and A5 are that A4 and A5 received monies via a mobile merchant in Hohoe on the instructions of A1, which was subsequently paid into different money account given to A4 and A5 by A1.

PW2 indicated in his evidence in chief that his investigations revealed that A4 and A5 went to an Assistant of Maxwell Mensah, the mobile merchant and informed that their brother in Kumasi will occasionally send them money and would like to receive the money through their merchant account. When they in fact knew their brother A1 was in prison at Ankafu near Cape Coast. This piece of evidence indicates that A4 and A5 knew A1 was up to a criminal enterprise.

From the cross-examination of A4 by prosecution the following ensued:

Q. You gave Investigation Caution Statement to the Police, you remember?

A. Yes.

Q. Your Caution statement exhibit 'L' without any objection.

A. Yes.

Q. In the said statement you stated that your brother A1 told you that a certain woman abroad will send you money for A1's appeal, is that correct?

A. I did not mention any one abroad but what A1 told me is that he has found a lady that would like to send money for his appeal and later get married to her.

Q. I am reading an extract line 8 of exhibit 'L' back page "she is abroad". You mentioned in exhibit 'L' that the woman was abroad.

A. I did not state that to the Police, if they wrote that I did not state that.

Q. I am putting it to you that you are not being truthful to the court.

A. I am telling the court the truth.

Q. Did you receive that money from the money that you alleged in your Caution Statement exhibit 'L'?

A. No.

Q. So money received on your mobile money in respect of this case who sent them to you?

A. A1 told me that when the woman brings him money he would give it to the officer and the officer will send the money to me.

Q. So who is that officer?

A. I am not there so I don't know.

Q. You also received money through a merchant at Hohoe.

A. Yes, that is correct.

Q. What is the name of the merchant that you received the money from?

A. I don't know his name.

Q. I am putting it to you that it is Success Max phones Enterprise.

A. I don't know that is his name.

Q. I am also putting it to you that you received four (4) tranches of money from this merchant.

A. That is not correct, it is only twice.

Q. I am putting it to you that you are not telling the truth on exhibit 'L' line 20 back page I read "I have gone to collect money from that merchant about 3 or 4 times."

A. I only received money from the merchant twice.

Q. I am putting it to you that you received about GH¢40,000.00 from this merchant Success Max Phone Enterprise.

A. That is not true. I have never received such money.

Q. So how much did you receive from the merchant?

A. I can't actually remember the amount but the first time I went for GH¢1,000.00 and sent it to his Lawyer.

Q. Did you know where that money came from?

A. Yes, the lady promised to help A1 for his appeal, she called me to tell me she sent the money.

But you earlier on told the court that you never received any money from the woman.

A. Yes.

Q. If you are not telling this court that the woman called you to go and receive the money do you want the court to believe you since the two statements are different?

A. What I am telling the court is that A1 called me that the lady had sent him money and I should go to the merchant at Hohoe opposite the Ghana Commercial Bank to receive the money.

Q. So when you earlier told this court that you had not received any money from the woman you were deceiving the court.

A. Yes, my lord. I have not received any money from the lady.

Q. So the money you received from the merchant that your brother told you to go and receive where is the money from?

A. A1 told me that someone wants to help me appeal the case so the lady has sent the said money to give it to his Lawyer.

When A5 was cross-examined by prosecution the following ensued;

Q. But you collected the amount received from the mobile money merchant.

A. Yes.

Q. I am putting it to you that the money received was part of the GH¢60000.00 case before this court.

A. I don't know anything about it.

Q. I am also putting it to you that you and A4 received over GH¢40,000.00 of GH¢60,000.00 money A2 and A1 defrauded the Complainant.

A. I don't know anything about it.

Q. Did you have a mobile money account at the time of receipt of the money?

A. No.

Q. I am putting it to you that because you know the source of the money that is why you received it through the merchant.

A. I don't know anything about it.

Q. Who gave the merchant's number to the person who sent you the money?

A. I don't know.

Q. How did the merchant get the mobile money number that sent the money to her?

A. I don't know.

Q. I am putting it to you that you went to the merchant Codillia Waponde and gave her the number to receive the monies for you.

A. I don't know anything about it.

Q. I am also putting it to you that all the monies you received were sent by A2 Foster Afomale.

A. I don't know.

Q. A2 Foster Afomale sent the money to Kwesi through Blessing Enterprise a mobile money merchant and he forwarded it to Hohoe to Success Max Phone Enterprise before you received it,

I put it to you.

A. I don't know anything about it.

A4 and A5 earlier on informed the Mobile money agent of their intention to cash money from the mobile money account. The agent agreed to the proposal and subsequently gave monies to A4 and A5, as and when money was sent for them.

A4 in his oral evidence told the court stated that A1 is his brother but does not know A2 and A3. According to A4 he has a mobile phone number which is 0249824045 but denied knowledge about the amount of GHC60,000.00 in issue.

That A4 stated in his investigation caution statement that A1 asked him to go for the money and further directed him on how to expend the money. A4 further stated he together with A5 that were instructed by A1 to pay the monies received into different money accounts, one account meant for A1's lawyer to pursue a case on appeal on behalf of A1, and the other, a man referred to as A1's Juju Man.

A5 in her oral evidence to the court stated that she knows A1 and A4 as her nephews but does not know A2 and A3. According to her she is not aware of the payment of GHC60,000.00 by the Complainant. She does not know about any plan by A1 and A2 to Defraud Complainant. All she knows is that she was instructed by A1 to receive money at Hohoe. Indeed, the said money was sent and she received it. A5 further stated that she received a text message which gave her a contact number to transfer the money into and so the said mobile number was given to the merchant to send it to A1's lawyer. The money was sent twice and on the second time she again sent the money received to number given to her but this time she did not know the person the money was sent to.

A5 also stated in his investigation caution statement that A1 was giving her GHC100.00 anytime she received money through a merchant. It is ridiculous how A4 and A5 believed that a philanthropist would like to sponsor the

activity of a juju man and also A5 believe that that a philanthropist would sponsor her upkeep for no work done as well as pay the legal fees for the appeal. By this A4 and A5 will be imputed with constructive knowledge that the monies they receive was from a criminal enterprise. This ought to have put them on enquiry since both accused persons knew their family relation A1 was in prison custody. The fact they did not reject the direction given to them by A1 shows that they were deeply involved and hatched the intention to assist A1 in the role they played to perpetuate the fraud against Complainant. The money A4 and A5 received was a remuneration for the role they played.

The court is therefore of the opinion that A3, A4, A5 facilitated and aided A1 and A2 to accomplish the crime they hatched (to defraud PW1) because they were used as conduit through which A1 and A2 will receive payment from PW1.

The court is of the opinion that the prosecution has proved its case against the accused A3 A4 and A5 beyond reasonable doubt on the offence of, Abetment of Crime to wit; Obtaining Electronic Payment Medium Falsely and defrauding by False Pretences Contrary to **section 20 and 131 of the Criminal Offences Act 1960 (Act 29) and sections 112 of the Electronic Transactions Act, 2008 (Act 772) to and Defrauding by False Pretences contrary to sections 131(1), of the Criminal Offences Act, 1960 (Act 29)** The court accordingly convicts your A3 and A4 and A5 of the offence charged.

SENTENCE

Prosecution has submitted to the court that the Accused Person is not known. In passing sentence the court is not supposed to exercise its power in a capricious manner nor make the sentence harsh or excessive. But to determine harshness or excessiveness due regard must be had to the nature of the offence, mode of its commission and lack of remorse shown as well as the need to send the right signal to others of Accused's kind that the court will deal firmly with them. Having regard to the four theories on sentencing – retribution, deterrence, prevention and rehabilitation, I find deterrence to be the greatest imperative in this case.

The punishment under the law with respect to the offence charged, defrauding by false pretence and abetment of this offence the offence charged is imprisonment from one day to 25 years and or a fine.

I have also taken into consideration the upsurge of cyber and electronic transaction related offences in this country and would therefore impose a sentence that would be both punitive and also serve as a deterrent to others but will exercise a balance as Accused person is not known.

On count 1, 2 and 3 the court sentence Accused Persons (A2) to a term of 5 years imprisonment I. H. L. the sentences will run concurrently

On count 4 the court Sentence Accused Person (3) to a fine of 1,000 penalty unites and in default 48 months' imprisonment I. H. L Bench warrant is issued for the arrest of A3. A3 sentence starts upon his arrest

On count 5 Accused Person (A4) is sentenced to a fine of 800 penalty units and in default 36 months' imprisonment.

On count 6 Accused Person (A5) is sentence to a fine of 800 penalty units and in default 36 months' imprisonment

PROSECUTOR

ASP. EMMANUEL NYAMEKYE

LEGAL REPRESENTATION

YAW ANOKYE FOR A2, AND A3

ALEX OWIREDU DANKWA FOR A4 AND A5

H/H SUSANA EDUFUL (MRS)

(CIRCUIT COURT JUDGE)