

CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON TUESDAY, 4TH APRIL, 2023

SUIT NO. D7/41/21

THE REPUBLIC

VRS

EKOW SAM

JUDGMENT

The accused person was arraigned before this Court on the 30th day of August, 2021 for the offence of defrauding by false pretences contrary to *Section 131 (1) of the Criminal Offences Act, 1960 (Act 29)*.

The particulars of offence are that in the month of November, 2020 at Community 8, Tema in the Tema Metropolis and within the jurisdiction of this Court, with intent to defraud, he obtained the consent of Mary Mingle to part with cash the sum of thirty eight thousand, seven hundred and sixty Ghana cedis (Ghs 38,760) under certain false pretences; that if the amount is given to him, he could purchase an unregistered Nissan Van –NV 200 white in colour from the U.S.A and upon such false representation, he succeeded in obtaining the said amount from Mavis Mingle which statement he knew to be false at the time of making it.

Accused person pleaded not guilty to the offence. The accused person per his plea of not guilty, stood shielded by the law as per *Article 19 (2) (c) of the 1992 Constitution*, he is presumed innocent until proven guilty.. According to the case of *Davis v. U.S. 160*

U.S 469(1895) "Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from the evidence".

He had also by the same plea put in issue all the relevant elements necessary to establish the offence he had been charged with. Prosecution thus bore the burden of leading cogent and credible evidence to establish a prima facie case against him. It is only then that the accused person would be called upon to lead evidence to raise a reasonable doubt in the mind of the court. Where prosecution fails to establish such a prima facie case, the court must acquit and discharge the accused person.

Denning J (as he then was) in the celebrated case of *Miller v. Minister of Pensions [1947] 1 All ER 372 at 373* held that. "The constitutional presumption of innocence of an accused person is that an accused is presumed to be innocent unless he pleads guilty or convicted by a court. The presumption is rebutted when the prosecution establishes a prima facie case against the accused person and the accused shall be called upon to raise a reasonable doubt as to his guilt." See also the dictum of Dennis Adjei JA in the Court of Appeal case of *Philip Assibit Akpeena v. The Republic (2020) 163 G.M.J 32*

Prosecution in proof of its case called two (2) witnesses; the complainant and the investigator.

According to PW1, the accused person came to her shop to purchase clothing for his children. He was driving a white Nissan Urvan with a for sale sign. She expressed interest in acquiring same whereupon the accused person told her he could get her a better one from the U.S.A.

Accused person later sent her pictures of some vehicles and she chose one and paid him the asking price of thirty eight thousand, seven hundred and sixty Ghana cedis (Ghs 38,760) equivalent to USD 6,800 at an exchange rate of USD 5.70. Accused person gave him sometime for the arrival of the car but same did not materialize. That she confronted the accused person and he told her on the 13th of February that the vehicle had been shipped and would arrive on the 25th day of February, 2021.

That one of accused person's colleagues said he would take the matter up and asked to be given time till the 28th of February, 2021. She continued that later, one Richard who claims to be their manager sent her documents of the car that indicated that same would arrive on the 25th day of February, 2021.

That she did not receive the car on the said date and neither has she seen the accused person.

PW2 is the investigator. According to him, PW1 reported the matter to the police on the 23rd day of March, 2021. That accused person was arrested and he gave an investigation caution statement. Same was tendered in evidence as exhibit A.

That accused was granted police enquiry bail but failed to appear at the police station per the terms of the bail with the excuse that he had travelled. On the 19th day of July, 2021, he re arrested he accused person at the Dawhenya police station where he was being held for another issue. Accused person was formally charged with the offence after investigations. He tendered in evidence EXHIBIT B as the charge statement of the accused person.

PW2 also tendered in evidence documents which PW1 handed to him during investigations as well as photographs sent to her by the accused person. They were admitted into evidence and marked as EXHIBIT C and D respectively.

On the charge of defrauding by false pretences, *Section 132* defines the offence of defrauding by false pretences to be thus '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. The prosecution in order to succeed on a charge of defrauding by false pretences in this particular case need to prove that;

- the accused made a false pretence
- that by means of the false pretence , the accused obtained the consent of the complainant to part with or transfer their ownership of a thing or property (money)
- the accused did so with an intention to defraud.

By a false pretence, the prosecution must prove that the accused, knowing that a statement or representation he was making was false, made such a false representation to the complainant with the intention that he should rely on the said false statement.

On the first element, the accused person does not dispute the evidence of PW1 that he represented to her that he would purchase a white Nissan Van for her. In cross

examining PW1, he did not dispute this. He had only asked her whether she later requested for a 2020 model to which she had replied in the affirmative.

Then on the second element, PW1 says that based on the false representation, she parted with the total sum of thirty eight thousand, seven hundred and sixty Ghana cedis (Ghs 38,760) which was the Ghs equivalent of USD 6,800 to the accused person. Here again, the accused person under cross examination, only disputed the Ghs equivalent of the money to be thirty five thousand Ghana cedis (Ghs 35,000). He did not dispute that PW1 relied on his representation and was induced by the said representation to part with her money.

On the third and final element, prosecution must prove that the accused did so with an intention to defraud. *Section 16 of the Criminal Act, 1960 (Act 29)* provides that:

“for the purposes of any provision of this Code by which any forgery, falsification, or other unlawful act is punishable if used or done with intent to defraud, an intent to defraud means an intent to cause, by means of such forgery, falsification, or other unlawful act, any gain capable of being measured in money, or the possibility of any such gain, to any person at the expense or to the loss of any other person”.

Prosecution’s case is that the accused person upon receipt of the money promised PW1 that she would receive the car in no time. When that failed, he later promised her that she would receive the car by 25th February, 2021. In proof of that, prosecution tendered in evidence EXHIBIT C and D series.

EXHIBIT C series are photographs of a white van whilst EXHIBIT D is an invoice for a Nissan van on the letter head of All Access Auto Dealers dated 7th November, 2020. EXHIBIT D1 is a receipt evidencing payment of 2019 Nissan NV 200 Black coloured vehicle. It shows that the said vehicle was purchased by auction and the date of payment is 15th December, 2020. The VIN Number is 3N6CMOKNOKK711393.

EXHIBIT D2 is an invoice bill to Splendy Mart indicating the shipment of a 2019 Nissan NV 200. The last six digits of the VIN number are the same as that on EXHIBIT D. That is to say that it is the very vehicle that was purchased at auction via EXHIBIT D1 which was shipped via EXHIBIT D2. The invoice date is 14th January, 2021 and the vessel is Maersk Columbus. The expected date of arrival is 25th February, 2021.

To begin with, the agreement with PW1 was for a white coloured Nissan van. Per the documents supplied to her ie EXHIBIT D, the colour of the Nissan vehicle that was purchased on auction was black and not the agreed white. That would not in itself be considered as an intent to defraud.

However, the fact that the accused person further handed to her EXHIBIT D2, which shows that the said vehicle had been shipped in January, 2021 and was expected to be in Ghana by the 25th day of February, 2021 only for the said date to arrive and for PW1 not to receive any vehicle from thence to now leads to an inference that the accused person made a false representation to her knowingly.

When a vehicle has been shipped, save for some unforeseen circumstances, the rules of trade are able to provide a safe estimate as to the arrival date of the vessel. EXHIBIT D1 gives the estimated arrival date of the vehicle. Thus unless other supervening events occur, had the vehicle truly been shipped, it should have arrived at the shores of the

destination country on the date same was estimated to arrive give or take a few days prior of after.

The complainant reported the matter to the police a month after the expected due date of arrival of the vessel carrying her vehicle which had supposedly been shipped. Accused person could still not produce the vehicle and when admitted to bail, went into hiding until he was re arrested in July, 2021. He could still not provide the vehicle to PW1.

His actions which he does not challenge under cross examination leads to a strong inference that he had intended to defraud PW1 all along. That he made the false statement to induce her to part with her money and when he did, he obtained that money as a benefit to himself at her expense.

At the close of prosecution's case, the court determined that it had established a prima facie case against the accused person. I found that prosecution had led evidence to establish all the elements of the offence of defrauding by false pretences against the accused person. Furthermore, prosecution's evidence was not so discredited under cross examination such that the evidence was unreliable and the evidence on record also lent itself to only one conclusion; that prima facie, the accused person defrauded PW1. See the cases *Apaloo & Others v. The Republic* [1975] 1 GLR 156), *Gyabaah v. The Republic* [1984-86] 461 C.A and *Tsatsu Tsikata v. The Republic* [2003-2004] SCGLR 1068).

Accused person was called upon to open his defence. An accused person when called upon to open his defence does not have a duty to prove his innocence. His only duty if at all at this stage, is to raise a reasonable doubt in the mind of the court concerning the

prima facie case established against him by the prosecution. Where he is able to raise a reasonable doubt in the mind of the court, he must be acquitted and discharged. See *Bruce-Konuah v. The Republic* [1967] GLR 611 and *Section 11(2) and (3) of NRCD 323*.

In arriving at whether an accused has raised a reasonable doubt, the court must first consider whether his explanation is acceptable i.e whether it believes the explanation given by the accused. If it does not, it must proceed to find out whether the the explanation by the accused is reasonably probable. If that fails, then thirdly, the court must consider the whole evidence on record and see if it raises any defence in favour of the accused. In any of these instances, the court must acquit and discharge the accused. If quite apart from the defence's explanation, the court is satisfied on a consideration of the whole evidence that the accused is guilty, it must convict. See the case of *Bediako v. The State* [1963] 1 GLR 48.

In his evidence in chief said he was supposed to supply PW1 with a Nissan Van, NV200 and he could not do so. That although they agreed that he would supply the vehicle within a specified time, he could not do so because his boss outside the county defaulted in the payment of tax and evaded taxes and so his company was closed down.

That his said boss was not answering my calls and so my elder sister who is also in the USA went to see my boss and he told her that his matter was now in court and so he would return whatever money accused person had paid to him so that he can also pay the people he was supposed to supply.

Accused person continued that people owe him and so he tried to retrieve the moneys to pay the complainant. That he paid her some moneys and then asked her for time.

Under cross examination by the prosecutor, he had this to say at page 20 and 21 of the record of proceedings;

Q: When did you tell PW1 that you were going to bring her the car?

A: One month, 2 weeks. After the period, she began to give me pressure and so sometimes because I do not want to lie to her, I do not pick her calls.

Q: I further put it to you that in Exhibit D1, you gave PW1 a buyer receipt from the USA indicating that the car was on its way.

A: Yes, my lord. My boss sent me the receipt and so I had to find out if it is authentic or not since I took PW1's money. I realized that the receipt was not authentic and so for two weeks after I had received it, I did not send to PW1. PW1 kept insisting and so after she went to my workplace, one of my colleagues insisted that I send her the receipt. I sent it to my colleague to check its authenticity and he in turn sent it to PW1.

Q: So you would agree with me that you were not to buy a car for her but rather to defraud her by giving her fake receipts which you have rightly indicated to this court.

A: My lord, I did not send the receipt to PW1. This is my business, I sell cars to people.

Q: You also went ahead and gave PW1 a shipment form indicating the vessel number which was carrying the said Nissan NV200 car.

A: It is my friend and colleague who forwarded it to PW1 and not that I gave it to PW1 myself.

At the close of accused person's case, I find that I neither find his explanation believable or reasonably probable.

Accused person appears to be of the belief that his line of work entails delays as a norm. He had said this in his evidence in chief that there are delays in his work and under

cross examination said these delays end up in him being taken to Court. That he is a businessman and has not defrauded PW1.

At page 17 of the record of proceedings, in his evidence in chief, he had answered;

Q: Have you had an issue with any of your clients in the exception of those that have brought you to court?

A: For some, it delays and it leads to issues.

Then at page 21, under cross examination, he had answered;

Q: You would agree with me that you have similar cases before a different court Circuit Court A.

A: My lord, when I have issues with my client about delivery, it goes to court. I am not a person who defrauds people. I am a car dealer and I even purchased the vehicle that Mr. Asamani, a prosecutor, in this court and one of his sons currently use.

The question is if delays are a normal part of his work, then as someone who has been in the business for ten (10) years as he says, one would expect him as a reasonable businessman to factor this delay into the time of delivery he gives to his clients and most importantly inform them about such expected delays at the time of entering into the agreement.

He failed to do this with PW1. He admits that in November, when she paid him the cost of the vehicle, he promised her six weeks for delivery. When that failed, rather than

explain any delays to her, he stopped answering her calls until she saw him and accosted him on the 13th of February, 2021. He then promised her delivery by the 25th of February and one of his colleagues intervened to extend the time to 28th February, 2021.

Accused person tendered in evidence EXHIBIT 1. It is an undertaking which he entered into with PW1. In same, he undertakes to hand to PW1 a Nissan NV 200 car, 2019 model, white colour with Chassis No. 3N6CMDKN9KK698711 within six weeks as replacement for a car he promised to buy for her for which she paid him USD 6,800 and for which he failed to honour his promise. The six weeks was to be due by the 10th May, 2021.

Accused person admits that he could not honour this agreement and went into hiding. Under cross examination, he had answered that his boss's issue led to his boss not answering his calls for two months. I do not believe him. However, even if I am to give him the benefit of the doubt, from his own evidence, he knew about his boss's issue which had led to a delay in the car before PW1 met and accosted him in February, if indeed he was acting as a bona fide businessman, why did he not simply inform her about the issue and ask her for time to deliver?

Rather than inform her about the issue, he had gone ahead to make her a further promise of another firm date of delivery. When that failed and he was reported to the police, rather than tell the police that story if it was the truth, accused person had given a different story about his cousin and not a supposed boss in his investigation caution statement.

Accused person in his investigation caution statement given on the 25th day of March, 2021 literally repeated the evidence in chief of the complainant as to how they met and agreed on him purchasing a vehicle for her. He continued that after they had agreed on a 2019 Nissan van, he went to PW1's shop on the 7th day of November, 2020 and she paid him thirty nine thousand Ghana cedis (Ghs 39,000) whereupon he issued her with a receipt of full payment.

That it is his cousin in the U.S.A who was to purchase the vehicle and so when his cousin sent him some documents indicating that the vehicle would arrive on 25th February, 2021, he in turn forwarded it to PW1. That it is some changes which they made later that brought the delays. However, his cousin had promised to ship the vehicle in no time. He relied on the same statement in his charge statement.

Accused person's statement to the police clearly differs from his evidence to this Court. In the case of *State v. Otchere [1963] GLR 463*, it was held that "*a witness whose evidence on oath is contradictory of a previous statement made by him whether sworn or unsworn, is not worthy of credit. Such evidence cannot be regarded to be of any importance in the light of the previous contradictory statement, unless the witness is able to give a reasonable explanation for the contradiction*".

Accused person's evidence before this Court is clearly an afterthought. He had not only given a statement to the police, but had gone ahead to execute EXHIBIT 1, an undertaking with PW1 based on his statement to the police. This time, he was to deliver the vehicle by May, 2021. He could not do so once again.

It is for the above reasons that I neither believe the accused person or find his story to be reasonably probable. I have also combed through the evidence to see if it raises any

defence in his favour. It does not. Accordingly, at the close of the trial, I find that prosecution has established the guilt of the accused person beyond reasonable doubt. I hereby convict him of the offence of defrauding by false pretences.

PRE SENTENCING HEARING

According to prosecution, the convict is not known. That he has paid the full amount involved to the complainant.

In mitigation, convict says he prays that the court begs the complainant to forgive me. It is not that I defraudd her. I owe several people. It is not my fault that I find myself in this situation. It is someone who did this to me. I can barely sleep. I have a 6 month old baby.

Counsel for the convict

My lord it is a fact that he has a 6 month child. He has shown remorse throughout this trial and throughout the trial, he wanted to pay the money he owes complainant. After the trial, his head of family has fully paid the money to complainant. We pray that the court visits upon us the very minimum punishment. We have already learnt our lesson. By and large, we have satisfied the complainant who interest is pecuniary. We pray accordingly

The offence of defrauding by false pretences falls under the 2nd degree felony offences that carry a maximum imprisonment term of 25 years. From the evidence, convict is a first time offender. He is also a father to a baby. He has made restitution to the complainant.

I take note that he made restitution after he breached the terms of his bail. Judgment in this case was fixed for 23rd January, 2023. The accused person failed to appear in court and the judgment was adjourned 10 times. A bench warrant was issued for his arrest.

He also chose to take prosecution through a full trial that has involved time and resources even though he had no reasonable defence. He considers making false representations to people and having them rely on same to their detriment and to his benefit, to be as normal as the sun rising every morning.

It is necessary that I hand down a sentence that sends a message to persons not to engage in such crimes within this jurisdiction and also ensure that the convict upon his release, would turn over a new leaf. The sentence should however not be too harsh taking into account the age of the convict, the restitution he had made and the fact that he is responsible for a six (6) month old child.

Accordingly, he is sentenced to a twenty (20) month term of imprisonment. He is also to enter into a self recognizance bond to be of good behavior and to keep the peace for a period of twelve months after his release from custody. In default, he would serve a three (3) month term of imprisonment.

(SGD)

**H/H BERTHA ANIAGYEI (MS)
(CIRCUIT COURT JUDGE)**

A.S.P STELLA ODAME FOR THE REPUBLIC

PRINCE KWAKU HODO FOR THE ACCUSED PERSON