

IN THE CIRCUIT COURT HELD AT ACHIMOTA, ACCRA ON TUESDAY, THE 10TH
DAY OF OCTOBER, 2023 BEFORE HER HONOUR AKOSUA ANOKYEWAA
ADJEPONG (MRS.), CIRCUIT COURT JUDGE

CASE NO.: D6/015/23

THE REPUBLIC

VRS

ABUBAKARI SWALLAH @ BAWA

ACCUSED PERSON PRESENT

A.S.P. STEPHEN AHIALE FOR THE REPUBLIC PRESENT

NO LEGAL REPRESENTATION FOR THE ACCUSED PERSON

JUDGMENT

The accused person herein was arraigned before this court charged with Defrauding by False Pretences contrary to *section 131 of the Criminal Offences Act, 1960 (Act 29)*.

He pleaded not guilty after the charge had been read and explained to him in Twi, being his choice of language.

The facts of the case as presented by the prosecution are that the complainant Yussif Iziya is a business man residing at Maamobi whilst accused Abubakari Swallah @ Bawa is a driver and also residing at Maamobi. That during the year 2022, the accused demanded and collected cash the sum of GH¢58,000.00 from the complainant to secure him Cuban visas for his five clients but failed to do so. That several

attempts made by the complainant for the accused to refund the money proved futile. That on 8th June 2023 the complainant lodged a complaint at Kotobabi police station against the accused and he was arrested. During investigation the accused admitted the offence and refunded GH¢28,000.00 to the police. After investigation the accused was charged with the offence to appear before this honourable court.

The prosecution called two (2) witnesses in proving its case.

PW1 who is the complainant herein told the court in his evidence that he lives in the same community with the accused person. That he needed to help some five people to travel outside the country and the accused person approached him that he has someone in the United States of America who can help with the process. That the accused person also claimed that he has a confirmed link to Belize where his people intend to travel to. That the accused person then charged him \$1,500.00 for each of the prospective travelers to secure all the necessary documents to take his people to Cuba. *PW1* further stated that he was fine with the said arrangement and paid the accused person a total of GH¢58,000.00 which was equivalent to \$7,500.00 at the time, for the five applicants. That after paying the money the accused person arranged and took them to the Cuban Embassy. That the applicants told him that they were not allowed to enter the premises of the embassy. That they said one man approached them and told them their passports are empty which means they do not have any travelling experience and therefore cannot be granted the Cuban visa. That they were not allowed to even enter the premises of the embassy. That they went to the embassy on two different days and met the same scenario. That he demanded for the documents the accused person had acquired so far to show to the parents of the applicants as evidence that something has been started but the accused person and his partner told him they do not give out their documents so they cannot give him any documents. That he demanded for all monies paid to the accused person but he

failed to pay after giving him 20th October 2022 to refund the monies. That the accused person later got one Agyemang arrested by the police in relation to this case but he was granted bail and the accused person later dropped the case against him. That he later got to know that the arrest of the Agyemang was staged by the accused person in order to confuse him. That he therefore made a complaint against the accused person and he was arrested and subsequently brought to court.

PW2, Detective Chief Inspector Gloria Fiamafle Kpoh (investigator herein) told the court in her evidence that on 5th June 2023 she commenced investigations and the accused person was cautioned. *PW2* tendered the caution statement of the accused person as exhibit 'A'. *PW2* repeated the evidence in chief of *PW1* as what was revealed during her investigations. She further stated that the accused had lodged a complaint against one Agyemang in respect of this same matter, alleging fraud against him that he was the one he has given the monies he took from the complainant to. That the said Agyemang was arrested by the police and was later released. However the accused person later withdrew the case against the said Agyemang. That the release of the said Agyemang did not go down well with the complainant so he went back to the police and lodged another complainant against the accused person. *PW2* continued that when the accused person was arrested he failed to provide the Agyemang and also refused to assist the police to get in touch with the said Agyemang to assist in investigations. That the accused person only made some payments in addition to what he claimed the Agyemang had paid at the time he was arrested, and has so far paid a total of GH¢28,000.00 which was produced in court. *PW2* concluded that the accused person was then charged with the offence. She tendered the charge and further statements of the accused person as exhibits 'B' and 'C'.

Thereafter, the prosecution closed its case.

After the close of the case of the prosecution, the Court examined the evidence of the prosecution witnesses to determine whether a prima facie case had been made by the prosecution to warrant the accused person to open his defence. The Court then gave a ruling that a prima facie case had been made and the accused person was called upon to enter into his defence.

In view of the above, the Court found that the accused person had a case to answer. The court however explained the rights of the accused person to him that he can decide to keep quiet and not say anything; or give a statement from the dock or enter the witness box and give evidence. The court also reminded the accused person of the charge against him. The accused person in response told the court that he does not have anything to say and he does not have any evidence to give.

The accused person did not also call a witness.

The legal issue to be determined is whether or not the accused person herein, with the intent to defraud, did obtain the consent of the complainant to part with cash the sum of GHc58,000.00 by falsely representing that if the said amount was given to him he could secure Cuban Visas for five of his clients, which statement he well knew to be false at the time of making it.

After the trial, I had to examine the cogency of the evidence to determine whether or not the evidence adduced by the prosecution could ground a conviction against the accused person on the above offence.

The fundamental rule in all criminal proceedings is that the burden of establishing the guilt of the accused person is on the prosecution and the standard of proof required by the prosecution should be proof beyond reasonable doubt as provided in the *Evidence Act, 1975 (NRCD 323)*, per *sections 11(2) and 13(1)*.

In the case of *Republic v. Adu-Boahen & Another* [1993-94] 2 GLR 324-342, per Kpegah JSC, the Supreme Court held that:

“A plea of not guilty is a general denial of the charge by an accused which makes it imperative that the prosecution proves its case against an accused person... When a plea of not guilty is voluntarily entered by an accused or is entered for him by the trial court, the prosecution assumes the burden to prove, by admissible and credible evidence, every ingredient of the offence beyond reasonable doubt”.

Section 132 of Act 29 provides:

“A person defrauds by false pretences if, by means of a false pretence, or by personation that person obtains the consent of another person to part with or transfer the ownership of a thing.”

From the above, the elements of defrauding by false pretences are as follows:

1. The use of false pretence or personation,
2. To obtain the consent of another person,
3. So that the person parts with or transfers the ownership of something.

Section 133 of Act 29, in defining defrauding by false pretences, lays out the following ingredients:

1. Representing the existence of a state of fact,
2. Either with the knowledge that such representation is false or without the belief that it is true,
3. The representation should be made with the intention to defraud.

After a careful examination of the evidence led at the trial, I made the following findings of facts and observations:

The prosecution witnesses told the court that the complainant paid an amount of GH¢58,000.00 which was equivalent to \$1,500.00 at the time to the accused person after he had approached the complainant and told him that he has someone in the United States of America who can help with the process and further charged the complainant \$1,500.00 each for five people to secure them the necessary documents to travel to Cuba. Therefore from the case of the prosecution the complainant paid the said amount to the accused person, after he had been convinced by the accused person to pay the said amount.

From the evidence of PW1 who is also the complainant, the accused person made him believe that the money he charged him will secure all the necessary documents to take his people to Cuba which made him pay the said money to the accused person as he was induced by that representation by the accused person. However, from the evidence on record which the accused person did not rebut by way of cross examination, the said five people whose money were paid to the accused person by the complainant were not even allowed to enter the Cuban Embassy when they got to the premises of the Embassy. The accused person from the evidence on record failed to hand over to the complainant the said documents he had prepared for the five people to apply for the said visa when the complainant demanded same to use as evidence to show to the parents of the said five people. Thus, the accused person had nothing to show that indeed processes had commenced for the visa application.

From the investigation caution and charge statements of the accused person which were duly tendered in evidence without any objection from him, the accused person admitted

that all that the complainant said in his statement is true and also admitted that he has collected GH¢58,000.00 from the complainant under the pretext of giving it to one Jeff based in America to secure Cuban visa for the complainant's clients.

These statements were taken from the accused person in compliance with all the relevant provisions of *Section 120 of the Evidence Act, 1975 (NRCD 323)* applicable to the taking of confession statements and which was designed to protect accused persons.

Akamba JSC in the case of *Ekow Russel v. The Republic [2016] 102 GMJ 124 SC*, stated as follows:

*"... A confession is an acknowledgment in express words, by the accused in a criminal charge, of the truth of the main fact charged or of some essential part of it. **By its nature, such statement if voluntarily given by an accused person himself, offers the most reliable piece of evidence upon which to convict the accused.** It is for this reason that safeguards have been put in place to ensure that what is given as a confession is voluntary and of the accused person's own free will without fear, intimidation, coercion, promises or favours ..."* (Emphasis mine)

From the evidence before this court, the investigation caution and charge statements of the accused person is not very different from the case of the prosecution on the issue of the accused person knowing very well that he was not in the position to secure visa for the complainant's clients at the time of taking their money but he still went ahead and collected their money that he has someone in America who can help with the process.

There is no evidence on record that the accused person gave the said GH¢58,000.00 he collected from the complainant to the said Jeff or his agent Agyemang, as he stated in his caution statements.

PW2 in her evidence told the court that it came to light during investigations that the accused person had caused the arrest of one Agyemang after he lodged a complaint of fraud against him but he later withdrew the case against the said Agyemang which did not go down well with the complainant as he saw the arrest of the said Agyemang was staged.

According to PW2 when the accused person was arrested, he failed to provide the said Agyemang and also refused to assist the police to get in touch with him to assist in investigations.

The accused person after stating that he gave the said money to the said Agyemang ought to have given information about him to enable the police extend their investigations to him but he did not.

It is not reasonably probable that the accused person who stated in his caution statement that the said Agyemang is the one he gave the money to, to be given to the said Jeff, did not have any information about him, if indeed there exists such a person. The accused person should at least have the contact details of the said Agyemang and ought to have given same to the investigator to conduct investigations on his allegation that he gave the GH¢58,000.00 to that person but he did not.

The House of Lords, in *Welham v. Director of Public Prosecutions* [1961] A.C. 103, held, as stated in Archbold, Criminal Pleading, Evidence and Practice (36th ed.), paragraph 2043 at page 753 that:

“Intent to defraud means an intent to practice a fraud on someone and would therefore include an intent to deprive another person of a right, or to cause him to act in any way to his detriment ...”

In the case of Asiedu v. The Republic [1968] GLR 1-8, Amissah J.A. stated thus:

“An intent to defraud is an essential element of the offence of defrauding by false pretences whether the method of fraud adopted was personation or a false representation”.

In the instant case, the accused person falsely represented the fact that he has someone in the United States of America who can assist in securing travelling documents for the said five prospective travelers and therefore asked the complainant to pay GH¢58,000.00 to secure all the necessary documents for the said five people to travel to Cuba when he knew very well that what he told the complainant was not true. He now claims that he gave the said money to one Agyemang but did not give any information about this person he allegedly gave the money to, to the police for further investigations. Therefore from the evidence of the prosecution witnesses, the accused person represented facts to the complainant and took his money knowing very well that the statement he made to the complainant that, when the said GH¢58,000.00 is paid to him, it will secure all the necessary documents to take the complainant’s people to Cuba were false statements because the said people were not even allowed to enter the Cuban embassy, not to talk of their application for visa being entertained for it to be granted or denied.

There is also no evidence on record that the accused person even initiated the process of the application for the visa for these five people after taking GH¢58,000.00 from the complainant for that purpose. There is equally no evidence before this court that the accused person knows someone in United States of America he gave the said money to, and who was supposed to make that arrangements for the complainant’s people on whose behalf the complainant paid the said money to the accused person.

On the question of false representation, it is apparent from the evidence of the prosecution witnesses that the accused person falsely made representations to the complainant as stated above and as a result of this he was induced to pay the amount of GH¢58,000.00 to the accused person.

Archer J. (as he then was) in the case of *Blay v. The Republic* [1968] GLR 1040-1050 stated:

“In a charge of defrauding by false pretences, if the evidence showed that the statements relied on consisted partly of a fraudulent misrepresentation of an existing fact and partly of a promise to do something in future, there was sufficient false pretence on which a conviction could be based”.

At page 1049 the court in the case of *Blay v. The Republic* (supra), stated:

“If a man makes statements of fact which he knows to be untrue, and makes them for the purpose of inducing persons to deposit with him money which he knows they would not deposit but for their belief in the truth of his statements, and if he intends to use the money thus obtained for purposes different from those for which he knows the depositors understand from his statements that he intends to use it, then, although he may intend to repay the money if he can, and although he may honestly believe, and may even have good reason to believe, that he will be able to repay it, he has an intent to defraud.”

In the instant case not only was the representation to the complainant false, the accused person took advantage of the deceit and defrauded the complainant as it is not reasonably probable that there exists any Jeff in the United States of America who can help with the process of securing all the necessary documents for the said five people to travel to Cuba since he could not even give information on either the said Jeff or Agyemang to the police for further investigations.

After evaluating all the pieces of evidence adduced during the trial, I find that the evidence points to only one irresistible conclusion that the accused person defrauded the complainant by false pretence as discussed *supra*.

In the case of *Commissioner of Police v. Isaac Antwi* [1961] GLR 408-412, it was held that the accused person is not required to prove anything. All that is required of him is to raise a reasonable doubt as to his guilt.

This is further emphasized by *sections 11(3) and 13(2) of the Evidence Act, 1975 (NRCD 323)*. *Section 11(3)* provides that:

“In a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.”

Section 13(2) provides that:

“Except as provided in section 15 (c), in a criminal action, the burden of persuasion, when it is on the accused as to a fact the converse of which is essential to guilt, requires only that the accused raise a reasonable doubt as to guilt.”

All that the accused person needed to do was to raise a reasonable doubt in the case of the prosecution. The accused person did not give evidence to attempt to raise a reasonable doubt in the case of the prosecution. From the evidence on record, the accused person did not have any defence to the charge against him and so could not raise a reasonable doubt as to his guilt.

I support my decision with the dictum of Denning J. (as he then was) in the case of Miller v. Minister of Pensions [1947] 2 All E.R. 372 at p. 373 where he said:

“Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable,’ the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

I also rely on the case of Lutterodt v. Commissioner of Police [1963] 2 GLR 429–440, where Ollennu J.S.C, delivering the judgment of the Supreme Court stated that:

“If quite apart from the defendant’s explanation, the court is satisfied on a consideration of the whole evidence that the accused is guilty, it must convict”.

Apaloo JA (as he then was) in the case of Asare & Others v. The Republic (No. 3) [1968] GLR 804-925 stated:

“The offence of fraud by false pretences seeks to punish anyone who deceives another to his detriment and which deceit operated to the material advantage of the deceiver”.

From the evidence on record, I do find that the prosecution has been able to prove beyond reasonable doubt that the accused person is guilty of the offence he has been charged with.

From the foregoing reasons, I pronounce the accused person herein, guilty of the offence of defrauding by false pretences and I convict him accordingly.

Court: Any plea in mitigation before sentence is passed?

Accused person: I plead with the court that I am still paying the money and that today I even paid GH¢10,000.00 to the prosecutor and I am ready to pay the rest of the money. I plead with the court to give me some time to pay the rest of the money.

Court: Is the accused person known?

Prosecutor: No, he is a first time offender. I wish to confirm that the accused person brought GH¢10,000.00 to be given to the complainant so I pray for a restitution order on that. The complainant is in court. The accused person is left to pay GH¢20,000.00 to the complainant.

By Court:

In sentencing the accused person, the court takes into consideration the fact that he is a first time offender and also considers his plea in mitigation. The Court has also considered the fact that the accused person has made part payment of GH¢38,000.00 of the amount involved, to the complainant. The Court has also considered the youthful age of the accused person (36 years old). In accordance with *Article 14(6) of the 1992 Constitution*, time spent in custody is considered.

However to serve as deterrent to the accused person and others in the community that the Courts do not tolerate such fraudulent actions, the Court hereby imposes the following sentence on the accused person:

The accused person is sentenced to serve a term of imprisonment of six (6) months in hard labour. The accused person shall in addition pay a fine of 500 penalty units. In default of the fine, the accused person shall serve a term of imprisonment of 12 months in hard labour.

Restitution Order

In accordance with *section 146 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30)*, the accused person is ordered to refund the remaining amount of GH¢20,000.00 to the complainant herein. The complainant shall enforce this order through civil means.

The prosecutor is ordered to release the amount of GH¢10,000.00 paid by the accused person to the complainant with immediate effect.

[SGD.]

H/H AKOSUA A. ADJEPONG (MRS)
(CIRCUIT COURT JUDGE)