

IN THE DISTRICT COURT, DZODZE HELD ON THURSDAY THE 16TH OF
FEBRUARY, 2023 BEFORE HIS WORSHIP NELSON DELASI AWUKU DISTRICT
MAGISTRATE.

Case No. B1/16/22

THE REPUBLIC

VRS

BERTHA AGBOGAH

JUDGMENT

PARTIES

COMPLAINANT PRESENT

ACCUSED PRESENT

REPRESENTATION

CHIEF INSPECTOR HAMID MOHAMMED FOR PROSECUTION PRESENT

BACKGROUND

The accused was arraigned before this Court on 15th February, 2022 on a charge of
defrauding by false pretence contrary to Section 131 of the Criminal Offences Act, 1960
(Act 29).

BRIEF FACTS

The brief facts as attached by the Prosecution stated that the complainant Victoria Dzakah is a seamstress and a mobile money merchant resident at Kave-Dzodze whilst the accused Bertha Agbogah is a trader and a resident of Pokuase in Accra.

The Prosecution stated that, on 4th February, 2022 the accused went to the house of the complainant for a transaction and as part of the process handed over to her a phone to speak with a caller who she indicated to her was her brother who wanted to send her some money.

The Prosecution stated that, the complainant in the course of her engagement with the person on phone gave out her merchant number as requested by him and in the process of effecting an E-cash withdrawal of GH¢100.00 based on an SMS message sent to her merchant account, an E-cash amount of GH¢6, 150.00 was rather withdrawn from her account.

The Prosecution stated that when the attention of the accused person was drawn to the development, she denied knowing or having any relationship with the caller whom she earlier informed the complainant was her brother.

The prosecution stated that, the accused was arrested and handed over to the police but denied the offence in her investigation caution statement and was arraigned before this Court after investigation with a charge of the offence of defrauding by false pretence.

PLEA OF ACCUSED

The accused pleaded not guilty to the offence when the charge and particulars of the offence were read and interpreted to her and was admitted to bail.

Witness statements of witnesses of prosecution together with charge statement and investigation caution statement of the accused were filed by the prosecution and served on the accused for trial.

THE CASE OF PROSECUTION

The prosecution called three witnesses, including the complainant and investigator to prove his case.

In her evidence to the Court, the first prosecution witness who was the complainant stated that on the 4th of February, 2022, the accused came to her in the house for a transaction and handed to her a phone, indicating to her that her brother who wanted to send her money was on the phone and wanted to speak with her.

PW1 stated that, in the cause of their engagement, she gave out her merchant number to the brother of the accused upon request and she later received an SMS message of an amount of GH¢100.00 from G-Money account number 0000001476594672 with the account name GOD FIRST Mobile Ventures 2.

PW1 stated that the brother of the accused informed her to use code number 233248155605 to withdraw the amount sent to her via the SMS message but in the process, an amount of GH¢6,150.00 was withdrawn from her merchant account.

PW1 stated that, when she confronted the accused and asked her if her brother works in a bank, she responded in the affirmative but said that was a long time ago.

PW1 further stated that when the accused was informed about the development, she denied knowledge of the offence and then stated that the caller was not her brother as mentioned earlier. Based on that, she was arrested and sent to the Dzodze Police Station.

In her evidence, PW2 stated that she is the sister of PW1 and was with her in the house on the 4th of February, 2022 when the accused came and handed over a phone to her and informed her that her brother wanted to send her money through her mobile money account.

PW2 stated that, she later heard PW1 asking the accused if her brother works at the bank and she responded in the affirmative.

PW2 stated that she heard PW1 saying afterwards that all the money in her account had been withdrawn and when she called one Godwin Akpalu to inform him about the incident, he told them they have been defrauded.

PW2 stated further that, with the assistance of others they took the accused to the Police station and made a report.

CASE OF ACCUSED

In his evidence the accused stated that she is a trader and a native of Akatsi but currently lives in Pokuase in Accra.

The accused stated that she lost her husband some time ago but met another man who promised to marry her so she accompanied him to his hometown Kave to know where he comes from.

The accused stated that whiles in the town she needed to withdraw money from her phone so was directed to the complainant who assisted her to withdraw GHC50.00.

The accused stated that, a day after the withdrawal, she received a call from someone who mentioned her name and asked her where she was and she mentioned Kave.

The accused stated that the caller told her he wanted to send her an amount of GH¢100,00.00 so she should go to a nearby merchant.

The accused stated that she went to the complainant and handed over the phone to her and the complainant engaged the caller in a conversation over a long period.

The accused stated that, the complainant did not give her any money but asked her to wait for her to confirm from his brother if a certain code can be used to withdraw money, only for them to inform her later that money had been stolen from their merchant account.

The accused denied defrauding the complainant and stated that the allegation against her is false.

THE LAW

Burden of Proof

In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind will find the existence of the facts beyond reasonable doubt. *See Section 11(2) of the Evidence Act, 1975 (NRCD 323) and the cases of Kingsley Amankwah (a.k.a Spider) v. The Republic [2021] DLSC10793 at pages 25-26 per Dotse JSC and Frimpong alias Iboman v. The Republic [2012] 1 SCGLR 297.*

In the case of **Ali Yussuf Issa (No.2) v. The Republic [2003-2004] SCGLR 174**, it was held that the burden of proof has two components, the duty to lead evidence on any fact

required to be proved and the duty to provide sufficient evidence to persuade a reasonable mind as to the existence of any such fact. **See also Kweku Quaye alias Torgbe vs. The Republic [2021] DLSC10794 at page 9-10 per Prof. Mensa Bonsu, JSC.**

Section 13(1) of the Evidence Act 1975 (NRCD 323) provides the extent of proof or the burden on the prosecution in a criminal action thus;

“In civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt”.

The extent of the onus on the defence on the other hand is provided by section 13(2) of the evidence Act 1975 which states;

“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”. **See also the case of COP v. Antwi [1961] GLR 408.**

Defrauding by false pretence

A person who defrauds another by false pretence commits a second degree felony under section 131 (1) of the Criminal Offences Act, 1960 (Act 29).

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. See Section 132 of the Criminal Offences Act, 1960 (Act 29).

Under Section 131 of the Criminal Offences Act, 1960 (Act 29), two forms of defrauding by false pretence are created, therefore whenever a person is charged under the provision, it must be stated as to whether the charge is under section 131(1) or (2) of Act 29.

The charge sheet did not indicate which of the provisions the accused was charged under, but the particulars of the charge were notably in conformity with Section 131(1).

In the case of **Sosu Raphael v. The Republic [2020] Criminal Law Report of Ghana at 456**, it was held by the Court of Appeal that, *“failure to specify the particular provision under section 131 on which the accused was charged is a mere defect in the charge sheet and does not go to the root of the matter”*.

ANALYSIS AND EVALUATION OF EVIDENCE

In the case of **the Republic v. Selormey [2001-2002] 2 GLR 424**, it was held that for a charge of fraud by false pretences to succeed, the prosecution must prove by evidence that;

- i) *The accused made a representation either by written or spoken words or any other means whatsoever.*
- ii) *That the said representation was in regard to the existence of a state of facts.*
- iii) *That the said representation was false or made without the belief that it was true.*
- iv) *That by the false representation of the accused the complainant parted with the amount the subject matter of the charge.*

Under Section 133 of the Criminal Offences Act, 1960 (Act 29) a false representation is defined as a representation of the existence of a state of facts made by a person, with the knowledge that the representation is false or without the belief that it is true, and made with an intent to defraud.

A) Whether or not the accused made any representation to the complainant and whether the said representation was false or made without the belief that it was true?

It is the case of Prosecution that the accused person on the 4th of February went to PW1 for a transaction and in the process handed to her a phone, describing the caller as her brother who wanted to send her money and wanted to speak with PW1.

In her witness statement filed on 15th December, 2022, the accused stated that, when she got to the complainant on that day, she handed over her phone to her and informed her that somebody wanted to send her money.

She did not state in her witness statement that she introduced the caller to PW1 as her brother, but in her investigation caution statement to the police did admit that she responded in the affirmative when PW1 asked her if her brother works at the bank.

It turned out however that, the representation by the accused was false as the caller was not her brother, she did not know him and also did not know for a fact that the person worked with the bank at the time she made that admission to the complainant.

B) Whether the complainant parted with the stated amount as a result of a representation by the accused?

It is the case of prosecution that, an amount of GH¢6,150.00 was withdrawn from the account of PW1 by the caller.

To be able to connect the development to the accused, the expectation was that, evidence of the statement of account of PW1 would have been tendered in prove of the claim that, the amount was actually withdrawn and that the withdrawal actually occurred on the same day and time.

The evidence given by PW3, the investigator fell short of such evidence and was only limited to the statements obtained from the complainant and accused person at the station.

If the necessary evidence had been adduced in confirmation that there was a withdrawal and that the withdrawal was made on the date and time alleged, then it will be reasonable to infer that the physical presence of the accused and what she is alleged to have told the complainant played a part in her willingness to engage the caller which led to the withdrawal of her money.

However, it is important to observe that, the prosecution has not been able to establish that the complainant parted with her money or that it was the accused who withdrew the amount from the account.

Apart from the allegation that she handed over her phone to the complainant and informed her that her brother or somebody, whatever the situation was, wanted to send her money so wanted to speak with her, the evidence does not disclose that the accused said anything more or played any further role leading to the alleged actual withdrawal.

PW1 also failed to disclose full details of the actual conversation she had with the caller which led to the giving out of her merchant number or code for transactions.

It must be emphasized at this point that, it is in consideration of the risk and recent operations of some charlatans that Telco providers have consistently sought to remind subscribers or account holders to not under any circumstances disclose their unique identity codes to third parties.

The impression created under the circumstance is rather that, the accused if anything at all, played a role which may have contributed to or facilitated the incident.

Under Section 20(1) of the Criminal Offences Act, 1960 (Act 29), a person who in any manner purposely aid, facilitates, encourages or promotes whether by a personal act or presence or otherwise, and 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 a criminal offence of abetting that criminal offence and of abetting the other person in respect of that criminal offence.

However, in the case of **National Coal Board v. Gamble [1959] 1 QB 11** cited in the book **Contemporary Criminal Law in Ghana by Dennis Dominic Adjei at page 84**, it was held that the offence of abetment requires a proof of the intention by the accused to aid another to commit an act, as well as knowledge of the circumstances constituting the offence.

In paragraph 5 of her witness statement, the accused stated that, after she handed her phone to the complainant, she started chatting with the person and even left her presence and they spoke in the English language which she did not understand for about an hour.

The argument could be made on the back of the above assertion that once the phone was handed to the complainant, the accused had no part to play in what transpired between the two in the cause of their conversation and that the complainant ought to have exercised some due diligence before parting with her merchant number or code.

But in the case of **Republic v. Osei Wusu (Winfred) Unreported; Suit No. FT/0036/2016; Decided on 29th June, 2016; Coram Mrs Afia Serwaa Asare – Botwe J**, it was held that, *“one cannot use the lack of due diligence on the part of the person who parts with something of value on the basis of the misrepresentations made as an excuse”*.

C) Whether or not the accused made the representation with intent to defraud?

Intent to defraud is an essential ingredient in the offence of defrauding by false pretences and it is necessary in all cases that it is proved. See **Commissioner of Police v. Muntari [1960] GLR 201, C.A and the State v. Agyemang, Asem and Boamano [1962] 2 GLR 67.**

The test to determine the intention of an accused is provided for in the case of **Bonsu @ benjillo v. the Republic [2000] SCGLR 112** where it was held that, the proof of knowledge or mens rea is not capable of direct proof but may be inferred from established facts as stated in section 18(2) of the Evidence Act, 1975 (NRCD 323).

With respect to the case of false pretence however, where on the evidence as a whole an innocent object of the false pretence can be inferred the accused cannot be convicted of defrauding by false pretence even though the false representation may have induced another person to part with the ownership of something to the person making it.

The accused is said to have gone to the complainant and handed her phone to her to speak with a person who the accused represented as her brother and in the process of their engagement the complainant gets money withdrawn from her account after giving out her merchant number.

In recent times, the activities of charlatans seeking to defraud on the internet or through the mobile phone has become very common and it is possible for unsuspecting individuals to receive such random calls from such unscrupulous persons and possibly fall prey to their activities.

In order to prove that the accused is not just a victim of the circumstance, the prosecution should have adduced further evidence and particulars to link her to the activities of the caller and establish that she did anything more to contribute to the incident beyond handing over her phone to the complainant.

CONCLUSION

The Court finds that, the prosecution failed to lead sufficient evidence in prove of the fact that the accused rather than being a victim of the circumstance had the intention and did play a significant role in the complainant yielding to offer her merchant number or code that facilitated the alleged withdrawal from her account.

In the circumstance, the court holds that the burden of proof as pertains to the elements of the offence of defrauding by false pretence has not been sufficiently discharged. The accused is therefore acquitted and discharged.

NELSON DELASI AWUKU
MAGISTRATE