IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE APPELLATE DIVISION
HOLDEN AT ABUJA
THIS 7TH DAY OF APRIL, 2014

CASE NO: CR/83/2009
APPEAL NO: CRA/58/2013
BETWEEN:

ADEDIPE OLUWAFEMI - ACCUSED/APPELLANT

AND

COMMISSIONER OF POLICE - COMPLAINANT/RESPONDENT

JUDGMENT

This is an appeal against the judgment of Chief Magistrate Court, Wuse Zone 2, presided over by His Worship O.O. Oyewumi (Mrs.), delivered on the 27th of March, 2013, wherein the Accused/Appellant was convicted for the offences of conspiracy, criminal breach of trust and theft by servant, contrary to Sections 97, 315 and 289 of the Penal Code Law. The Accused in this case was earlier arraigned through an FIR dated 9th December, 2009 for the above offences.

Dissatisfied with the judgment, the Accused/Appellant filed this appeal through an Amended Notice of Appeal dated 13th November, 2013 and filed on 14th November, 2013. The grounds of appeal as contained in the Notice of Appeal are as follows:

Ground 1;
The decision of the Chief Magistrate Court is unreasonable, unwarranted and cannot be supported having regards to the evidence before the Court.

Ground 2:

The trial Chief Magistrate Court erred in law in finding the Appellant guilty when the offences charged were not proved beyond reasonable doubt.

Particulars:

1. It is trite law that every person charged with a criminal offence should be presumed innocent until the contrary is proved.
2. The weight of evidence adduced during the trial is not enough to warrant a conviction under Section 97, 315 and 289 of the Penal Code Law.
3. The trial court heavily relied on inadmissible evidence wrongly admitted to convict the Appellant.
4. It is settled law that where ever there is doubt in the evidence of the prosecution as to the guilt of the Appellant, then the burden of proof beyond reasonable doubt has not been discharged.
5. It is settled law that a crime is constituted by mental and physical elements which the prosecution is required to prove in order to secure a conviction.

Ground 3:

The trial Chief Magistrate Court erred in law in admitting and relying on an involuntary confessional statement in finding the Appellant guilty.

Particulars:

1. It is the law that only a free and voluntary confessional statement is admissible in evidence under Sections 27 and 28 of the Evidence Act.
2. The confessional statement was not unequivocal.
3. The weight of evidence adduced by the prosecution during the trial within trial was not enough to have convinced the Court that the confessional statement was made freely and voluntarily.
4. It is settled law that the onus is always on the prosecution to prove that a confession is free and voluntary before admitting and relying on same.

5. It is trite law that where evidence is uncontroverted it is regarded as true version.

Ground 4:

The Learned Chief Magistrate erred in fact and law when she held vide the judgment as follows:

> "It is on record that the accused in this case helped his friend Ebenezer to open an account which was eventually the conduit through which some funds were withdrawn by the Accused. It is obvious from the record that the said account was opened for the said purpose as agreed by the accused and his school mate Ebenezer. The circumstances of this case point irresistibly to the fact that the accused was in ad idem with the said Ebenezer to commit the crime. Consequently the accused is hereby convicted for the offence of criminal conspiracy contrary to section 97 of the Penal Code."

Particulars:

1. The testimonies of the prosecution witnesses did not prove the ingredient of the offence of conspiracy.
2. The record before the Chief Magistrate Court showed that the said account was opened in Sokoto long before the accused was appointed one of the Customer Service Managers to oversee the affairs of Military Pension trabsactions.

Ground 5:

The learned Chief Magistrate misdirected himself in law and on the fundamental principle of burden of proof in criminal cases when he held vide the judgment thus:

> "The accused did not call any witness to cooroborate his testimony on oath. Exhibits P1, P2, P3 and p4 which were admitted without any objection by the defence are all applications for withdrawal of money from Ebenezer's account made by the accused to withdraw various sums of money from

the said account. These are credible evidence pointing to the guilt of the accused."

Particulars:

1. It is settled law that the burden of proof in criminal trial rests on the prosecution and this burden does not shift at any time on the accused to prove his innocence.
2. The trial court heavily relied on inadmissible evidence wrongly admitted to convict the Appellant.

Reliefs Sought:

1. An order setting aside the judgment of the Chief Magistrate Court delivered on the 27th of March, 2013 as it affects the Appellant.
2. An order setting aside the conviction and sentence of the Appellant by the trial Chief Magistrate Court.
3. An order discharging and acquitting the Appellant on the counts of FIR for which he was found guilty by the trial Chief Magistrate Court.
4. And for such orders as this Court may deem fit to make in the circumstance.

When the appeal came up for hearing on the 26th of March, 2014, the Respondent's Counsel informed the Court that he did not file any brief of argument because the Appellant's Notice of Appeal was out of time and when he got across to the Appellant he indicated that he had filed an Amended Notice of Appeal which was never served on the Respondent. Upon examination of the record of the Court however, it was discovered that the said Amended Notice of Appeal and all necessary records were duly served on the Respondent and were personally acknowledged by Simon Lough Esq, the Respondent's Counsel. Consequently the Court proceeded to hear the appeal.

In the Amended Brief of Argument filed by the Appellant dated 13th November, 2013 and filed on 14th November, 2013, he raised the following two issues for determination:

1. Whether the prosecution adduced such evidence at the court below as to ground a conviction of the Appellant for the offences of criminal conspiracy, criminal breach of trust and theft by servant.

2. Whether the trail Chief Magistrate Court was right to have admitted and relied on the confessional statement of the Appellant without proper evaluation of same, thereby occasioning a miscarriage of justice.

We shall proceed to determine the appeal based on the above two issues raised by the Appellant. The stated by him, the first issue is linked to the 1st, 2nd, 4th and 5th grounds of appeal, while the second issue is related to the 3rd ground of appeal.

On the first issue of whether the prosecution has adduced such evidence as to ground the conviction of the Appellant, it was submitted on behalf of the Appellant, with regard to the offence of conspiracy, that the prosecution was only able to show that the Appellant was a university mate of Ebenezer Adaramoye who opened an account with Diamond Bank and that the Accused assisted him on 7th August, 2009 to haste his transaction due to the crowd in the banking hall and nothing more. It was argued that the prosecution had failed to show that there was an agreement between the Appellant and Ebenezer Adaramoye to commit an offence in any way.

We have examined the submission of the Appellant and the evidence led and exhibits tendered by the prosecution in this case. It is evident from the testimonies of PW1, PW4 and PW5 that the Accused person had stated under interrogation as well as in his statement that he collaborated with Ebenezer in was admittedly the one who opened the account for Adaramoye Ebenezer, a university mate at the Diamond

Bank, Sokoto in January, 2007 when he was the Customer Service Manager and that no transaction happened on the account until June, 2008 when the sum of N60,000 was deposited in Kubwa Branch where the Accused had moved to as Customer Service Manager. It was also in the consistent evidence of the said prosecution witnesses that the Accused was the one who doctored the names of beneficiaries for military pensions and diverted about N11.9 Million to the account he opened for Ebenezer, signed and collected the ATM card and pin for the account and was using the card to withdraw the money. In addition, the testimonies of the said witnesses were to the effect that the Accused admitted during interrogation and in the reply to the query and two statements he made that he collaborated with the said Ebenezer. (See the testimonies of the said witnesses on pages 8 – 41 of the record).

In addition, the said statements of the Accused Person were admitted as Exhibits Q2, S1 and S2 wherein he admitted that he collaborated with Adaramoye Ebenezer. In particular, Exhibit S2 was admitted after a trial within trial was conducted by the trial court.

We have also examined the evaluation of evidence made by the learned trial Chief Magistrate in arriving at his decision with respect to the offence of conspiracy. As rightly stated by him it is not necessary in proving conspiracy that there should be direct communication between each conspirator and every other, but the criminal design alleged must be common to all. Indeed one conspirator may be in one town and the other in another town and they may never have seen each other but there would be acts on both sides which would lead the Judge to the inference. See: ERIM v THE STATE (1994) 5 NWLR (Pt.346) 522 or (1994) LPELR-1159(SC), per Ogwuegbu, JSC at pages 17 – 18, paras. F – A; and SULE v THE STATE (2009) 17 NWLR (Pt. 1169) 33 S.C or (2009) LPELR-3125(SC), per Ogbuagu, JSC at pages 33 – 34, paras. A – E.

From the consistent evidence of the Prosecution witnesses and the exhibits tendered, it is clear to us that there is common design between the Appellant and Ebenezer Adaramoye, in diverting money meant for

the Military pensions and sharing same. We therefore find that the prosecution had adduced such evidence at the court below as to ground a conviction of the Appellant for the offences of criminal conspiracy.

As for the offences of criminal breach of trust and theft by servant, we observe that their ingredients are similar. It is trite that to establish the these offences, the prosecution must prove that (a) that the accused was entrusted with property or with dominion over it; (b) that he misappropriated, converted or disposed of it; (c) that he did so in violation of any direction of law, any legal contract or he intentionally allowed some other persons to do so; and (d) that he acted dishonestly. See: BRAHIM & ORS. v C.O.P (2010) LPELR-8984(CA), per Peter-Odili, JCA (as he then was) at pages 17 - 18, paras. E - B; and ONUOHA v THE STATE (1988) 3 NWLR (Pt. 83) 460 (SC).

We have examined the evidence of the five prosecution witnesses contained on pages 8 – 41 of the record. The evidence led has clearly show that as a banker, the Appellant who was entrusted with the responsibility of handling monies belonging to military pensions, had connived with one Ebenezer Adaramola, his university mate to divert the military pension monies into the latter’s account which the Appellant had helped to open and subsequently converted the monies to their own use. It is observed that right from the time when the Accused helped his mate, Ebenezer to open the account in Sokoto Branch of Diamond Bank where the Accused was the Customer Service Manager, the transactions in the account had only followed the Accused persons to Kubwa branch where the offences were perpetrated. This fact is further established by Exhibits S1 and Q2, the statement and response to the query made by the Appellant, as well as Exhibits P1, P2, P3 and P4 which were all applications for withdrawal of money from the account made by the Appellant.

From the evidence and exhibits on the record, we have seen no need to disagree with the evaluation of evidence made and conclusions reached by the learned trial Chief Magistrate with regard to the offences of criminal breach of trust and theft by servant with which the Appellant was charged. We are satisfied with the evaluation made and conclusion reached by the learned trial Chief Magistrate to the effect that the offences of criminal breach of trust and theft by servant have been proved by the prosecution beyond reasonable doubt.

Consequently, we hereby resolve issue one in the affirmative and hold that the prosecution adduced such evidence at the court below as to ground the conviction of the Appellant for the offences of criminal conspiracy, criminal breach of trust and theft by servant.

On issue two, the argument of the Appellant was that the learned trial Chief Magistrate was wrong to have admitted and relied on the confessional statement of the Appellant without proper evaluation of same and as such had occasioned a miscarriage of justice. But from the record, the Accused/Appellant had at the point of tendering the confessional statement raised the issue of its voluntariness, as a result of which a trial within trial was duly conducted by the learned trial Chief Magistrate. In the trial within trial, the prosecution led two witnesses in proof of the voluntariness of the statement, while the Appellant also produced two witnesses to counter same. It was after the trial Chief Magistrate had evaluated the evidence led that he ruled ad admitted the confessional statement and relied on same. In relying on the confessional statement, he stated on page 22 of his judgment that:

> I wish to state that it is very difficult for the Court to discountenance with Exhibit S1 and Q2 being the statement and response to a query issued to the accused. A closer perusal of both shows that the accused took time to write both narrations. The content of both are almost one and the same. As was held in the ruling on the trial within trial held to determine the veracity or otherwise of the confessional statement, the Court would be taken aback if he being a reasonable man by all standard could

> make statement admitting to the commission of an offence after weighing all options as he stated be said to have made the statement involuntarily. Why did he weigh all options if he knew he did not commit the crime? He is an adult who has his free will to take reasonable decisions. A scrutiny of the confessional statement reveals that the accused gave a vivid account of his involvement in the crime and even stated his own share of the loot..

From the foregoing, it is evident that the trial court duly conducted a trial within trial to determine the voluntariness of the statement before admitting same. It is the law that once a confession is not impeached by failure to prove any vitiating factor, a confessional statement is relevant and even if standing alone can secure conviction no matter how weighty the charge is. See: KASA v THE STATE (1994) 5 NWLR (Pt. 344) 269 at 286. What a judge is enjoined to test the truth thereof before relying on same. See: ALARAPE & ORS v STATE (2001) LPELR-412(SC), per Iguh, JSC at pages 23 – 24, paras. G – C. The tests to be applied to such a confessional statement are: (i) Whether there is anything outside the confession to show that it is true; (ii) Whether the statement is corroborated, no matter how slightly. (iii) Whether the facts contained therein, so far as can be tested, are true; (iv) Whether the accused person had the opportunity of committing the offence. (v) Whether the confession of the accused person was possible; and (vi) Whether the confession was consistent with other facts which have been ascertained and proved in the matter. See: ALARAPE & ORS. v STATE (supra) at pages 24 – 25, paras. E – B.

In the instant case not only do the testimonies of other prosecution witnesses indicate the truth of the Appellant's confessional statement, the other exhibits such as P1, P2, P3 and P4, S2, etc., which were admitted without objection, have corroborated the confessional statements. We have therefore found no miscarriage of justice in the admission of and reliance on the confessional statement by the learned trial Chief Magistrate. Hence, we also resolve the second issue for determination in the affirmative and hold that the trial Chief

Magistrate Court was right to have admitted and relied on the confessional statement of the Appellant and that same was properly evaluated by him and no miscarriage of justice has been occasioned.

Having resolved all the two issues for determination against the Appellant, we hereby dismiss the appeal for lack of merit.

A.A.I. BANJOKO
JUDGE

A.B. MOHAMMED
JUDGE