IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)
PWAMANG, JSC
TORKORNOO (MRS.), JSC
HONYENUGA, JSC
PROF. MENSA-BONSU (MRS.), JSC

CRIMINAL APPEAL
NO. J3/06/2020

4TH NOVEMBER, 2020

RICHARD KWABENA ASIAMAH ..... APPELLANT

VRS

REPUBLIC ..... RESPONDENT

JUDGMENT

TORKORNOO (MRS.), JSC:-

In her book **'Murder on the Orient Express', Agatha Christie (1934)** tells the story of how the famous fictional detective Hercule Poirot discovered that all of the twelve passengers on board of the Orient Express train, though at first glance unrelated, were co-conspirators in the plot to murder the thirteenth passenger.

In a case reminiscent of this fictional tale by the famous Agatha Christie, the appellant was one of four persons charged with two offences. Though only four people were charged, the facts of the case revealed several people involved in the transaction that led to the crime prosecuted, apart from several people in the shadows of the crime whose roles were not identified.

The appellant was charged with the offence of conspiracy to defraud by false pretences contrary to **Section 23 (1) and 131 (1) of the Criminal Offences Act, 1960, Act 29**. The particulars of offence was that in the month of January 2014, the Appellant acted together with the other charged persons with a common purpose to commit the crime of defrauding by false pretences. Two of the other persons he was charged with were charged with the offence of defrauding by false pretences contrary to **Section 131 (1) of Act 29**.

The facts as borne out by the charge sheet and the undisputed evidence from the trial are that one Leticia Acquah, (Acquah) the first accused person and an officer at the Lands Commission informed the complainant, Mr. Ernest Ofori Sarpong, that there was a parcel of land for sale at Airport Residential Area and she had a power of attorney to sell the land on behalf of the owner.

The owner was said to be one Theresa Duncan Enninful. Together with his brother, the complainant decided to purchase the land. Acquah gave what she presented to be a copy of the indenture on the land to the complainant and negotiated with him to sell the land to him at $2.7 million. A contract of sale was drawn up in the name of Theresa Duncan Enninful and Osei Kwame. Accounts were also opened with UT Bank, the bankers of the Complainant, for Acquah and the alleged owner of the land, Theresa Duncan Enninful, to enable payment.

The complainant visited the site of a plot of land at the Airport Residential Area, which was supposed to be the site described in the indenture, with Acquah. The land was walled and gated with a padlock. Acquah handed over the key to the padlock on the gate to the complainant, and he instructed his bankers UT Bank to pay $1,650,000 into the newly opened account of Theresa Duncan Enninful and $350,000 into the newly opened account of Acquah. Thereafter, the complainant travelled outside Ghana only to be alerted by his bankers that they suspected fraud in the transaction because most of the money paid into the account of Theresa Duncan Enninful had been withdrawn in the space of two weeks. Investigations later showed that $650,000 out of that 1,650,000 was paid into the account of the 4th accused person called Seth

Kwapong. The 2nd accused person, Ruby Wotordzor, found to have impersonated the alleged owner called Theresa Duncan Enninful, never signed any Deed of Assignment, and the land was found to belong to a company called Wilmur Africa Ltd.

The Appellant before us, Richard Kwabena Asiamah, (the 3rd accused person charged before the high court) pleaded not guilty. The High Court convicted him of the crime of conspiracy after a thorough evaluation of the evidence.

The Appellant appealed to the Court of Appeal, which dismissed his appeal. He has now appealed to the Supreme Court on two grounds:

1. That the Court of Appeal erred in law by failing to consider adequately the defence of appellant
2. That the Court of Appeal erred in upholding the conviction and sentence imposed on the Appellant

In his Statement of Case, Appellant's Counsel submitted that the trial judge '*looked at the Appellant in the box with jaundiced eyes, and wrote that he was not a credible witness, words which the Court of Appeal bought lock stock and barrel*'. He submitted that if the court of appeal had adequately considered the solid defence of the appellant, they would have upheld the appeal. This defence is that his only role in the transaction that turned out to be a hoax was that of an estate agent who introduced a prospective buyer to the owner of the land.

We have considered the submissions of Appellant counsel and cannot agree with him in any material particular. In the extremely considered judgment of the Court of Appeal, they examined the record with the following focus articulated on page 3 of their judgment '*Whether the prosecution was able to discharge its burden of proof with regards to the charge of conspiracy in count one of the charge sheet. Was the evidence adduced by the prosecution capable of sustaining the charge ad the conviction of the appellant?*'

After reviewing the law on conspiracy, the law on how the burden of proof is discharged by either the prosecution or the accused within the rules for evaluating evidence in criminal trials in general and on a charge of conspiracy in particular, and the totality of the evidence, the court concluded on page 16 of their judgment that the appellant *'was deeply involved in the fictitious land transaction from the fact that all the other parties reverted to him whenever an important decision had to be taken. The appellant was the convener of all the meetings between all the other agents, A1 and prospective buyers, and A2 the alleged owner of the land. The appellant's central involvement is most evident in the fact that even whilst pre-occupied with his wife's funeral he did not delegate his role but A1 and Patrick Agyei were still contacting him. Clearly the prosecution discharged the burden of establishing a prima facie case of conspiracy from which the guilt of the appellant could be presumed. The prosecution established the link between A3 and the crime committed and further managed to prove A3's contribution to achieving the purpose of the crime'*

We wholly agree with this evaluation of the Court of Appeal and cannot fault it on an evaluation of the record.

Act 29 defines conspiracy and defrauding by false pretence as:

Section 23—Conspiracy.
*(1) Where two or more persons **agree to act** together with a common purpose for or in committing or abetting a criminal offence, whether with or without a previous a concert or deliberation, each of them commits a conspiracy to commit or abet the criminal offence.*

Section 131—Defrauding by false pretences.
(1) A person who defrauds any other person by a false pretence commits a second degree felony.

Section 132—Definition of defrauding by false pretence.

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

Section 133—Definition of and provisions relating to, a false pretence.

(1) A false pretence is a representation of the existence of a state of facts made by a person, with the knowledge that such representation is false or without the belief that it is true, and made with an intent to defraud.

(2) For the purpose of this section—

(a) a representation may be made by written or spoken words, or by personation, or by any other conduct, sign, or means of any kind;

(b) *the expression "**a representation of the existence of a state of facts**" includes a representation as to the non-existence of a thing or acondition of things, and a representation of any right, liability, authority, ability, dignity or ground of credit or confidence as resulting from any alleged past facts or state of facts, but does not include a mere representation of an intention or state of mind in the person making the representation, nor a mere representation or promise that anything will happen or will be done, or is likely to happen or be done;*

(c) a consent is not obtained by a false representation as to the quality or value of a thing, unless, the thing is substantially worthless for the purpose for which it is represented to be fit, or to have been substantially a different thing from that which it is represented to be; and

(d) subject to paragraphs (a) (b) and (c), if the consent of a person is in fact obtained by a false pretence, it is immaterial that the pretence is of a kind that would not have an effect on the mind of a person using ordinary care and judgment.

The offence of conspiracy therefore requires agreement between at least two people to act with one purpose – committing or abetting a criminal offence. The elements of conspiracy as just stated were outlined in **Republic v. Baffoe Bonnie and Others**

(Suit No. CR/904/2017) (unreported) dated 12 May 2020 by **Kyei Baffour JA sitting as an additional justice of the High court** in these words**:**

> '*For prosecution to be deemed to have established a prima facie case, the evidence led without more, should prove that:*
>
> 1. *That there were at least two or more persons*
> 2. *That there was an agreement to act together*
> 3. *That sole purpose for the agreement to act together was for a criminal enterprise*.

The criminal enterprise of defrauding by false pretence requires these people to agree to get a third person, to give consent to part with or transfer the ownership of a thing. They may obtain the consent directly or through personation of another person. For the charge of achieving this purpose by false pretence to succeed, these two or more people should have represented the existence of a state of facts, with the knowledge that such representation is false, or without the belief that it is true. They should also have made this false representation with an intent to defraud.

When these elements of the offence of which the Appellant has been convicted are viewed in the light of the facts before the courts, it is not clear why Appellant's counsel persists in this appeal. There could be no stronger case of the availability of proof beyond reasonable doubt of conspiracy to defraud by false pretences, than such as occurred in this case. And all the proof has the Appellant at the center of the arrangements made to achieve the results they obtained.

As cited by the Court of Appeal, the Supreme Court, through Appau **JSC**, stated in the case of **Akilu v. The Republic [2017-2018] SCGLR 444 at 451**:

> *The double- edged definition of conspiracy arises from the undeniable fact that* ***it is almost always difficult if not impossible, to prove previous agreement or concert in conspiracy cases. Conspiracy could therefore be inferred from the mere act of having taken part in***

> ***the crime*** *where the crime was actually committed. Where the conspiracy charge is hinged on an alleged acting together or in concert, the prosecution is tasked with the duty* ***to prove or establish the role each of the alleged conspirators played in accomplishing the crime****. (emphasis mine)*

In the present case, the prosecution had no difficulty in presenting evidence on the roles played by the co-conspirators, neither did the court face the difficulty of making inferences from mere acts regarding the roles played by Appellant and the other alleged conspirators. This is because two of the accused persons, Acquah, (A1), and Wotordzor (A2), explained the roles played by A2 and the Appellant in executing the deception that led to the defrauding of the complainant.

From the testimony of Acquah, two estate agents she knew called Joseph Agyekum and Patrick Adjei went to her office at Lands Commission and told her that a lady they regarded as mother wanted to dispose of her property at the Airport Residential area. This mother was supposed to be in poor health, and so they would bring her son to see her. A few days later, these men took the Appellant to see Acquah as the 'son' of the ill owner of the land in Airport that was the subject of the transaction in issue.

Acquah went on to testify that it was the Appellant who led the cohort of Agyei and Agyekum to take her to inspect the land at Airport. He provided access to the land, enabling her to take the complainant to the land and also give him access enough to convince both Acquah and complainant that the land was available for sale. When Acquah noted that in the records of Lands Commission, there was an un-discharged mortgage on the land in issue, it is the Appellant who brought her a Deed of Discharge of the recorded mortgage over the property, to enable her go ahead with finding buyers for the land.

When Acquah wanted to meet the 'vendor' of the land in issue, it is Appellant who arranged for her to meet 'his mother'. Once again, in the company of the cohort of

Agyei and Agyekum, Appellant posed as the son of the sick mother vendor, and hosted Acquah in a property at Trasacco estates to meet 'his mother'.

Acquah was clear and firm that Appellant was part of the conversations that determined the value that would be presented to the buyer who would part with money for this property. According to her, it was Appellant who witnessed the power of attorney given to her to act on behalf of the woman posing as Enninful and owner of the property.

Acquah undertook a second visit to the Trasaco property with a potential buyer, met with the Appellant still acting as 'the son' of the imposter posing as Enninful, and it was Appellant who produced the ostensibly original copy of the indenture on the property when the buyer asked to see it – at the direction of 'Enninful', whose real identity was actually Wotordzor.

When eventually the complainant came forward to buy the property, Acquah's testimony was that it was Appellant she contacted to ensure that an account was opened for 'his mother' at UT bank. Appellant went on to do this, including taking measures to correct the first Identity card that 'his mother' tried to open the account with which was rejected by the bank.

After the purchase price was part paid into the accounts of 'Theresah Enninful', and there was delay in obtaining the signed Deed of Assignment from her, it was the testimony of Acquah that it was the Appellant she contacted, and it was Appellant who gave her various reasons why he and 'his mother' were not in Accra. After Acquah got sufficiently suspicious of the continued absence of Appellant and his mother, she went with the same Agyekum and Agyei to the Trasacco house, only to discover that no one knew them in the area. The house was closed and Appellant and his mother were gone. This was the trail of activities surrounding Appellant, with the active collaboration of Agyei, Agyekum and Ruby Wotordzor, who pretended to be Appellant's mother and the alleged seller of the land through which the complainant was convinced to part his money for.

Now Appellant's counsel could not in any way shift all these threads of definitive testimony given by Acquah. Acquah's testimony provided proof beyond reasonable doubt that the Appellant was at the center of the agreement to act together in the criminal enterprise to get a purchaser to part with payment of money for this land in issue. And it is no wonder that Appellant's and his counsel could not make an effort to shift these threads of testimonies, because they were corroborated by Wotordzor, the self-confessed conspirator in the deception to sell a property by false pretences.

Ruby Wotordzor, who pretended to be Theresah Enninful, totally corroborated the story of Acquah and described how the Appellant was introduced to her by one Sammy. She said that the Appellant met with her at Wato and made her understand that she was being recruited to pretend to be the mother of Appellant. She was also to pretend to be the owner of this land in Airport, and resident in a Trassaco house. She was directed by Appellant to deceive Acquah and the 'potential buyers' of the land that she was Theresah Enninful. She was also clear that it was Appellant who took her to UT bank to open an account to receive the proceeds of her pretentious sale of land she did not know, did not own, and in a name that was not her name. It is appellant who directed how much money she was to withdraw from the account opened in the name of Theresah Enninful, and it was appellant who gave her 10,000 Ghc everytime she made withdrawals which she handed over to him.

As stated by the court of appeal, '*There are details in the evidence which are very compelling. The evidence given by A1 (Acquah) was mostly corroborated by A2 (Wotordzor*). We agree with the Court of Appeal.

In contrast with the evidence of the first two accused persons, Appellant's defence was that he was introduced to the transaction of selling the airport land by colleague estate agents. According to him, it was one Kwaku Boakye whose mother was supposed to be Theresah Duncan Enninful and who introduced her to him. Thus he was as much a guest as the other estate agents including the Agyei and Agyekum mentioned by Acquah, in the house of Wotordzor, who presented herself as Theresah

Duncan Enninful. According to him, he never pretended to be the son of Wotordzor, and was not the instigator of the scheme for her to pretend to be called Theresah Duncan Enninful.

Appellant explained how he accompanied Wotordzor to the bank for the opening of her account and presented that he was only assisting her at the direction of Patrick Adjei and Acquah. According to him, because of his journeys to Larteh, he was not in Accra when the money was paid to Wotordzor and he was still in Larteh when he was arrested.

The only difficulty with this presentation is that it totally lacked corroboration in the face of the testimonies of both Acquah and Wotordzor on the role he played in pretending to be the son of Wotordzor. Wotordzor was clear that it was Appellant who recruited her into the deception to act as his mother. She was clear that it was Appellant who hosted her in the Trasacco house to pretend to be Enninful while he pretended to be her son. She presented no knowledge of a Boakye, and Acquah presented no knowledge of a Boakye. Wotordzor testified of actual domestic arrangements at the Trassaco house that included children of the Appellant living there with him, and she spending the night there in order to meet prospective buyers. Thus in reviewing Appellant's version of events, apart from the lack of total corroboration, an extremely pertinent consideration is whether that version is credible at all. Because in the normal course of business of estate agents, is it a practice for an estate agent to stay with an elderly woman in the same house in order to meet prospective buyers, even if the agent is trying to sign a high priced property belonging to the woman? Clearly not. Appellant made no effort to explain this obviously strange activity that is not usual in the normal course of business of estate agents. The only inference that can arise from this totally incongruous activity therefore is that the corroborated reasons proffered by both Acquah and Wotordzor constitute the truth. As testified by Acquah and Wotordzor, the charade in the Trasacco house was undertaken to mislead prospective buyers into believing that Wotordzor was Appellant's mother.

Wotordzor was clear that it was the Appellant who provided the identity documents with which an account was opened for her and it was the Appellant who shepherded her in the opening of the account and withdrawals of the moneys.

Appellant was not able to produce the Boakye or any of his colleague estate agents who allegedly introduced him to the transaction, or even produce a fragment of evidence to show how he was himself inveigled into the scheme by these alleged colleagues, save for his simple statements. To quote the Court of Appeal once again, '*A3 (Appellant) gave a* ***totally different uncorroborated*** *version of the whole occurrence*' (**my emphasis**)

It is trite law that the decisions of courts are required by law to turn on the quality and sufficiency of evidence before them. The following sections of the Evidence Act, 1975, NRCD 323 are important in this evaluation, and I set them out in extensor.

Section 10 Burden of persuasion defined

(1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court

(2) The burden of persuasion may require a party

a. To raise a reasonable doubt concerning the existence or non-existence of a fact or

b. To establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond reasonable doubt

Section 11 Burden of producing evidence defined

1. *For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party*
2. *In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to*

produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt

3. *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, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence*

13. Proof of crime

1. *In a 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*

2. *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*

14. Allocation of burden of persuasion

Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting

15. Burden of persuasion in particular cases

Unless it is shifted

a. *the party claiming that a party has committed a crime or wrongdoing has the burden of persuasion on that issue*

17. **Allocation of burden of producing evidence**

Except as otherwise provided by law,

a. *the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof*
b. *the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact*

In the face of the quality and clarity of evidence provided by both Acquah and Wotordzor, the burden of proof shifted to the Appellant to give an answer or explain how their testimonies could not be true. Once again, to quote the court of appeal on page 17 of their judgment, '*the prosecution established the link between A3 (appellant) and the crime committed and further managed to prove A3's contribution to achieving the purpose of the crime. Once such a prima facie case was established, the burden of explanation shifted to the appellant to give an answer or explanation*'.

The failure of Appellant to corroborate his own version of events by proving that it was Boakye, and not he, who pretended to be Wotordzor's son, was fatal to his case. Now since according to Wotordzor, the sole reason for the charade of posing as the son of the ill woman, was to procure the assistance of Acquah in getting another party with the wherewithal to consent to the purchase of this land that ostensibly belonged to the ill woman, the court needed an absolutely reasonable explanation from Appellant on how he was found staying in the Trasacco house, pretending to be the son of Wotordzor, going with her to the bank, providing identity documents to her to open account for the proceeds of the crime, and helping her to withdraw same. His explanations were neither reasonable nor corroborated. The courts below could draw no other inference from the thread of events practiced by Appellant, than that together with Agyekum, Adjei, and Wotordzor, Appellant had agreed to be part of the scheme of fraud testified to by Wotordzor, and had implemented the activities corroborated by Acquah and the other witnesses.

With these heavily corroborated evidence of collaboration with others in a series of events that led to defrauding by false pretences, it is not clear why Appellant counsel

would want to present to this court that the trial court and Court of Appeal committed errors by failing to adequately consider the defence of appellant.

We think that on top of the oral testimonies, even more damning are the documentary pieces of evidence beginning with the power of attorney that was tendered as exhibit B. Just as testified by both Acquah and Wotordzor, it was signed by Wotordzor pretending to be Enninful, and witnessed by a person called Kwame Amoako, with a signature that spelled Asiamah. Wotordzor and Acquah agree that this Asiamah is Appellant, whose name is truly Asiamah. The Appellant's testimony failed to explain how he ended up witnessing this Power of Attorney if his 'friend' Boakye was the one presented to him and Acquah as the 'son' of Wotordzor aka Enninful.

Then there is Exhibit C, the alleged Lease given to Theresah Enninful in 2011 by Lands Commission. Acquah was clear that she obtained a copy of this from the records of Lands Commission, and the identical forms of signatures satisfied her that the person who gave her the power of attorney was genuinely Theresah Enninful. A cursory look at the signature confirms how similar this signature of Theresah Enninful conformed with that placed by Wotordzor on the Power of Attorney and witnessed by Appellant.

The only difficulty is that the eventual records on this land from the same Lands Commission revealed that it had never belonged to a Theresah Enninful. So who created this false Theresah Enninful lease that Acquah, as a senior officer at the Commission, saw and became convinced that the land belonged a Theresah Enninful? Could Acquah sincerely be said to have been speaking the truth when she points to this Theresah Enninful lease as the genesis of her revelation that she was leading a genuine transaction? Or prior to her involvement, a shadowy figure from the same Lands Commission had managed to plant and alter Lands Commission's records with these Theresah Enninful records?

To my mind, it raises more questions than answers regarding the real role of Acquah in her capacities as a senior officer of Lands Commission. She it was who, having once dealt with PW1 before in a previous transaction, was trusted enough to put PW1 off

his guard in the fraud he walked into, as a seasoned businessman. She managed to interpose herself between PW1 and Enninful by getting a Power of Attorney from Enninful to represent her. She and the position she represented, successfully blocked every occasion for PW1 to verify whether the information he had been given on the land and the persons involved in the transaction, were accurate. To my mind, the similarity of signatures on that lease and the Power of Attorney, and the alleged records that Acquah found regarding the ownership of the land, which proved to be false later, reflects a carefully thought out plan that included how Wotordzor signed her name in the documents that would be used in the transaction. These trail of circumstances go back to the active hand of someone with a deep knowledge of records in the archives of Lands Commission, and an unseen hand assisting these alleged 'estate agents' with records from Lands Commission to perpetrate the scheme of fraud that robbed the complainant of more than one million dollars. Like as happened in '**Murder on the Orient Express'**, the choreography of events raise questions about how many people were involved in this fraud – from estate agents, officers at lands commission, those who may know the whereabouts of Agyekum, Agyei, and the 4th accused who has the rest of the unrecovered money, and other persons who facilitated the fraud of the fraudsters.

P.K Twumasi in his book "Criminal law in Ghana", Ghana Publishing Corporation, 1985 at page 111 to page 112 states this on the law of conspiracy:

> "In conclusion, *the legal position is that a conspiracy may be proved in one of two ways. The first mode of proof is by direct evidence which admittedly is very rare to obtain. Such evidence may be offered by a person who may have concurred in the conspiracy for the sole aim of detecting and punishing the actual conspirators or by the confession statements of some of the conspirators themselves, or by any eye witness account. The second and the most regular mode of proof is by establishing evidence of overt acts. The overt acts are done to carry out the criminal objective*."

In this case, both modes of proving the role of Appellant in the conspiracy that led to the defrauding of the complainant were presented to the trial court. There was the

direct evidence of Wotordzor, a co-conspirator who pointed to the Appellant as the person who directed her activities and provided the resources for her role in the fraud, and there was the evidence of overt acts from Acquah. She pointed clearly to Appellant as the one who pretended to be the son of Wotordzor, and the one who coordinated all activities between meeting potential buyers, providing documentations, and ensuring the opening of bank accounts for Wotordzor, to receive the proceeds of the fraud.

We disagree with Appellant counsel that the testimony that led to the conviction of Appellant was that of PW5. We find that the testimonies of the two accused persons who stood trial with Appellant provided direct evidence on how the conspiracy was hatched with Appellant at the center of the false pretences undertaken and directed by Appellant, and how the complainant was defrauded into parting with $2 million to pay for land that somehow stood in the records of lands commission as belonging to Theresah Enninful at the time of the fraud, and yet changed into the name of Wilmar Africa Ltd, after the fraud was completed, from a simple search. The appeal is dismissed. The conviction and sentence are affirmed.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA
(JUSTICE OF THE SUPREME COURT)

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