

**SUPREME COURT OF NIGERIA**  
30th MARCH, 2007 SC. 271/2005  
**CORAM:- I. L. KUTIGI CJN, N. TOBI, G. A. OGUNTADE,**  
**A. M. MUKHTAR, W. S. N. ONNOGHEN, JJSC**

BOLANLE ABEKE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

---

CRIMINAL PROCEDURE - Cheques - Witnesses - Exhibits - Dishonoured cheque issued by appellant - Cannot be seen as only a documentation of loan transaction (H1)

CRIMINAL PROCEDURE - Defences - Dishonoured Cheque - Appellant's counsel's fanciful submission - Is different from her defence - Circumstances of this case - Do not exempt from liability (H2)

CRIMINAL LAW - Dishonoured Cheque - Conviction - Where appellant issued a dishonoured cheque - Under an enforceable contract - Her conviction by lower courts are proper (H3)

**FACTS**

This appellant was charged on an information before the Abeokuta High Court of Ogun State for an offence of issuing dishonoured cheque. It was alleged that appellant obtained a credit of N3,300 from one Ganiyu Ajayi (P.W.2). It was when P.W.2 requested that the loan transaction be documented that appellant opted to give postdated cheque. Being an illiterate, she brought out her cheque book which she requested P.W.2 to write for her in respect of the loan granted. P.W.2 wrote the cheque which the appellant signed and rubber Stamped. On the date that P.W.2 paid the cheque into his account, the cheque was dishonoured. Several other things happened between the parties unto appellant causing P.W.2 to be arrested and prosecuted on the ground that he stole her cheque. But he was discharged and acquitted.

The appellant was thereafter charged for issuing a dishonoured cheque. She testified in her own defence, denied issuing the cheque but admitted that P.W.2 granted her a loan of N1,500 out of which she paid back N500. The trial judge found the appellant guilty as charged and sentenced her to 2-years term of imprisonment. Appellant's appeal to the Court of Appeal was dismissed. Still dissatisfied, she has further appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*“Whether the learned Justices of the Court of Appeal were right in affirming the decision of the trial court that the prosecution had proved its case beyond reasonable doubt in the circumstance of this case.”*

**HELD** (Unanimously dismissing the appeal per **OGUNTADE JSC**)

***Cheques- Witnesses - Exhibits***

1. A perusal of the above passage of the evidence of P.W.2 only shows that he had requested from the appellant a documentary proof of the transaction between him and the appellant. Perhaps a simple agreement evidencing the loan transaction would have satisfied the P.W.2. But that is now a speculation. The evidence of P.W.2 shows that it was the appellant who offered to have the transaction documented by the issuance of her cheque. The issuance of a cheque has certain connotations in law. A cheque issued by a drawer and accepted by the drawee serves two purposes. One is that of documenting the particular transaction. The other is that, it is a medium of payment, the issuance of which has far reaching implications in law. I am unable to accept the argument of appellant's counsel that the cheque issued by the appellant was to be seen only as a documentation of the loan transaction between the appellant and P.W.2; and that exhibit 'B' be held not to possess the attributes ascribed by law to such an instrument. (p. 1090 H)

***Dishonoured Cheque - Appellant's counsel's fanciful submission***

2. In any case, the submission of the appellant's counsel is utterly fanciful in the circumstances and unrelated to the defence put up by the appellant. The defense of the appellant was that she did not issue exhibit 'B',

not that she understood it to be a mere statement of account. Did not the appellant know the implication of post-dating a cheque against a specific date? I do not think that the submission by appellant's counsel on this score can be considered as a reasonable one. It was not the first time the appellant was handling a cheque. The standards set by law as to the liability imposed upon the drawer of a cheque cannot be varied in the circumstances of this case. (p. 1091 D)

### ***Dishonoured Cheque - Conviction***

3. On the facts as found by the two courts below, there was no doubt that the appellant had committed an offence under Section 1(2)(b) above. She had issued a cheque in settlement of an obligation arising under an enforceable contract, which said cheque was dishonoured when presented not later than three months after the date of the cheque.

I am of the firm conviction that the guilt of the appellant was established before the trial court and that her conviction and sentence were properly affirmed by the court below. (p. 1092 F)

## **NOTABLE POINTS OF INTEREST**

### **TOBI JSC**

#### ***1. Need for counsel not to be rude to Judges***

Learned counsel for the appellant argued that although the learned trial Judge said that lying is no evidence of guilt, he got “*totally soaked into the lies of the appellant as shown in his outburst of emotions at page 47 of the Record.*” That is a fairly rude one on a Judge and I condemn it. Parties do not win cases by aspersion on a Judge who has no opportunity to defend himself beyond the cold records of appeal. A trial Judge, in my view, can call a witness a liar in his judgment if that is borne out from the evidence. That is exactly what Popoola, J. did. I do not think he deserves the sledge-hammer of counsel. I am clearly with the learned trial Judge that the appellant is a liar. I equally agree with him that the “*accused has not made a clear breast of the whole sordid affair. She has borrowed money to prosecute a project from PW2 (and) instead of being grateful to PW2, has repaid him with terrible lies...*” Let counsel refrain from bring-

ing the Judge, the unbiased umpire so to say, to the theatre of the litigation and rub him with muck. That will be tantamount to reducing the height that the law has bestowed on the Judge. (p. 1097 B)

B *2. Cheque - Definition and purpose of*

C Counsel also submitted that the intention of the parties as established in evidence was that the cheque should serve as documentation, receipt, acknowledgment, evidence, just to have a piece of documentary evidence of the transaction not an instrument for payment as a legal tender. This is quite a new one for me to learn. I do not think I am prepared to learn it. How can learned counsel say that a post dated cheque serves as a document, receipt or acknowledgment? A cheque is a written order to a bank to pay a certain sum of money from one's bank account to oneself or to another person. It is for all intents and purposes an instrument for payment. It metamorphoses into physical cash on due presentation at the bank and that makes it legal tender. It is interesting that learned counsel conceded at page 9 of the brief that "truly a cheque is always regarded as a legal tender or an instrument for payment once it is duly completed, and signed with date. That is the correct position and the reverse position taken by counsel is not at all available to him. (p. 1097 E)

F **REPRESENTATION**

Oladipo Okpeseyi (Emeka Okpala Esq. with him) for the Appellant.  
Mrs. Y. Oresanya for the respondent.

G **CASES REFERRED TO**

MIA & SONS LTD. V. FHA (1991) 8 NWLR (PT. 209) 295, 298  
DR AINA V. M. A. JINADU & ANR. (1992) 4 NWLR (PT. 233) 91, 98  
EGBOGBONOME V. STATE (1990) 7 N.W.L.R. (PT.306) 383 388 - 391  
FERGUSON V. COMMISSIONER FOR WORKS & HOUSING LAGOS  
H STATE (1999) 4 N.W.L.R. (Part 638) 315 at 328  
CHUKWU V. D. ALA (1999) 6 NWLR. (Part 608) 674 at 681  
BOSHALI V. ALLIED COMMERCIAL EXPORTERS LTD. (1961) 2 SCNLR 322

Abayonu Adelenwa v. The State [1972] 10 S.C

Mohammed v. State [1991] 5 NWLR (Pt. 192) 438

Nwosu v. State [1986] 4 NWLR (Pt. 35) 348

Alabi v. State [1993] 7 NWLR (Pt.307) 511

Ibodo v. Enarofia 1980 5-7 S.C. 42

B

Aseimo v. Abraham 16 NWLR part 738 page 20

Chinwendu v. Mbamali 1980 3 - 4 S.C.31

**STATUTE REFERRED TO**

Dishonoured Cheques (Offences) Act, LFN 1990 S. 1(1) - 3

C

**LEAD JUDGMENT BY OGUNTADE JSC**

The Appellant, Bolanle Abeke, was charged on an information, before the Abeokuta High Court of Ogun State for an offence under Section 1(1)(b) of the Dishonoured Cheques (Offences) Act No.44 of 1977. It was alleged that the appellant obtained a credit of N3,300.00 (three thousand three hundred Naira) from one Ganiyu Ajayi by means of Cheque No. UDB 130480, Nigeria-Arab Bank Nigeria Ltd., Odeda and, the said cheque when presented on due date was dishonoured on the ground that the appellant had not sufficient funds in her account to cover the face value of the said cheque.

The offence was tried by Popoola J. The prosecution called seven witnesses. The appellant testified in her own defence and called three other witnesses. On 11-10-95, Popoola J. in his well-written and comprehensive judgment found the appellant guilty as charged. The appellant was sentenced to a two-year term of imprisonment. Dissatisfied with her conviction, the appellant brought an appeal before the Court of Appeal, Ibadan (hereinafter referred to as ‘the court below’). The court below (coram: Roland, Ibiyeye and Tabai JJ.C.A.) in a unanimous judgment on 04-07-2005 dismissed the appellant’s appeal and affirmed the conviction of and the sentence imposed by the trial court. Still dissatisfied, the appellant has come before this Court on a final appeal. In the appellant’s brief filed, appellant’s counsel has formulated a solitary issue for determination in the appeal. The said issue reads:

*“Whether the learned Justices of the Court of Appeal were right in affirming the decision of the trial court that the prosecution had proved its case beyond reasonable doubt in the circumstance of this case.”*

The respondent in its brief agreed with the issue formulated for determination by the appellant. It is necessary to examine the case made against the appellant at the trial court by the prosecution in the consideration of the only issue for determination in this appeal. The case may be summarized thus: On 4-9-81, the appellant sought from P.W.2, a loan of N2,000.00. She wanted to apply the money to execute a contract awarded to her by the Ogun State Ministry of Agriculture. P.W.2 gave the appellant the loan sought from him. A week later, the appellant approached P.W.2 for a further loan of N2,000.00. P.W.2 gave the appellant N1,300.00. He however requested that the transaction be documented. The appellant opted to give a post-dated cheque for the total sum of N3,300.00 covering both loans. Being an illiterate, the appellant brought out her cheque book which she requested the P.W.2 to write up for her evidencing the loan grant. The P.W.2 wrote the cheque which the appellant signed and rubber-stamped. The wife of P.W.2 had been present on the two occasions when the appellant came seeking the loan. She testified as P.W.3. The cheque leaf was postdated to 29-9-81. On that date P.W.2 paid the cheque into his account. The cheque Exhibit ‘B’ was returned unpaid.

The appellant, notwithstanding the pressure brought on her by P.W.2 to pay the money, did not do so. Rather, she sent emissaries to P.W.2 pleading for time. She wrote Exhibits A-A1 appealing to P.W.2. In 1989, some eight years after the loan was granted to the appellant, P.W.2 learnt that the Ogun State Ministry of Agriculture had paid the appellant on the contract. Still, the appellant did not pay up. In frustration, the P.W.2 brought a suit against the appellant for the recovery of the sum of N3,300.00. The appellant, in reaction to the suit by P.W.2, reported to the Police that P.W.2 had stolen her cheque for N2,000.00. P.W.2 was arrested and prosecuted. P.W.2 was discharged and acquitted. The appellant was thereafter charged for issuing a dud cheque.

I stated earlier that the wife of P.W.2 testified as P.W.3 and gave evidence as to the events which she had witnessed leading to the issue-

ance of the cheque leaf exhibit 'B'. P.W.4 was a handwriting analyst, who upon a comparison of the specimen signature of the appellant with the signature on the cheque leaf exhibit 'B' stated that exhibit 'B' in fact bore the signature of the appellant. P.W.5 was the accountant at the Nigeria Arab Bank, Odeda where the appellant kept an account. He tendered B the statement of account of the appellant for the period 6/2/81 - 29/12/81 as Exhibit 'H'. Exhibit 'H' shows that appellant's account with the Odeda branch of Nigeria Arab Bank was in the red to the tune of N494.80 with effect from 18/9/81 to 29/9/81. when exhibit 'B' issued by the appellant C was lodged by P.W.2 into his account. P.Ws. 6 and 7 were the Investigating Police Officers.

The appellant testified in her own defence. She denied issuing the cheque exhibit 'B' to P.W.2. She admitted that P.W.2 granted her a loan D of N1,500.00 out of which she paid back N500.00. She said further that her cheque book was lost in 1981 and she reported the loss to her bank in writing in 1982.

In reacting to the solitary issue for determination in this appeal, it is important to bear in mind the findings of fact made by the trial court. E This is against the background that, when evidence is found to be incredible by the court of trial, such evidence becomes incapable of sustaining a defence built on it. At pages 44 to 46 of the record, the trial court held:

*"There is evidence before me that the accused signed Exhibit B. F PW4 testified here as having examined Exhibit B, he compared the signature thereon with the handwriting and signature of Exhibit A (A letter of apology handwritten by the accused to PW2) as well as Exhibits D - D5 with comparative table shown on Exhibit E which vividly revealed G features of similarity' and came to the conclusion that the writer of Exhibit A (i.e. the accused ) is the same as the writer of Exhibits D - D5 as well as the signature on Exhibit B - (the offending cheque) which he said was even obvious to a lay man to see and compare. I believe the evidence of PW4. He has done a good job and the explanation even under H devastating cross examination was clear and straight forward - maintaining a steady stand and unshaken. This in turn confirmed PW2 whose evidence I also accept and believe. It is noted-that this PW4 - the expert*

was not contradicted, and was not cross-examined as to the accused not signing Exhibit B, and to me his credibility remains untainted due to failure to elicit any evidence adverse to the opinion of PW4, which is a basis to believe the said PW4 See: *M.I.A. & Sons Ltd. v. FHA* (1991) 8 B N.W.L.R. (Pt. 209) 295, 298 *HOLDING* 7 p.313 paras. E – H.

Besides the evidence of the Handwriting Expert PW4, I have myself examined the signature on the said cheque - Exhibit B, with the letter and signature on Exhibit A - Letter hand written by the accused as well as the specimen signatures on Exhibits D - D5 and the comparative able in Exhibit A, B, D, E, thereon and have compared them as well as Exhibit E with the disputed signature on Exhibit B and I have formed my opinion that they were all written and signed by the accused, which I believe I have power to do, being an option open to me, assuming I am not bound D by the evidence of the expert witness (PW4) I am reinforced in this belief by the decision in *DR. AINA V. M. A. JINADU & ANOR.* (1992) 4 NWLR (Pt. 233) 91, 98 *HOLDING* 18 p. 107 paras. F - G - plus also the fact that the accused in one breath said she lodged a written report, she E next said, oral report but, that Exhibit L was issued to her in replacement. PW5 or DW4, her own witness, testified that Exhibit L i.e. 104-010 series having nothing to do with Exhibits B, as '104' series were meant for debtors - i.e. those on Overdraft and cheques issued thereunder could F never go into the Current Account 101-289 - whereas the impression the accused gave, was that she was issued Exhibit L when she reported the loss of Exhibit B - which she later found in her house after 8 years. I hold the strong view also, that Exhibit L having no connection or relevance with Exhibit B, it is irrelevant in this case.

G The accused admitted signing portions marked 'B' 'D' 'E' on Exhibit E which incidentally are the signatures on Exhibit A, Exhibit B and Exhibits D-D5 - what an irony - her sins have found her out.

In Exhibit J the accused admitted not reporting any loss of any H cheque leaf either to the Bank or the police but in her testimony she first said she reported in writing, later still, that it was orally. Exhibit J is inconsistent with her testimony. In cases like this, the trial court is entitled not only to reject the earlier extra judicial statement but also not to



*act upon the evidence in court - which will be treated as unreliable, and in the place of both the earlier statement and such evidence, the court will instead rely on the evidence adduced by the prosecution, and the witness (i.e. the accused here) treated as unreliable - but both the statement and her testimony must be assessed and evaluated by the Court together with other relevant evidence in order to reach a just decision - all or which I have done in this case. See: EGBOGBONOME V. STATE (1990) 7 N.W.L.R. (PT.306) 383 388 - 391 HOLDINGS 4, 5, 6"*

The court below in its judgment at pages 71 to 72 of the record affirmed the findings of the trial court in these words:

*"It is common ground that the appellant issued exhibit B in favour of the P.W.2. It is also common ground that exhibit B was returned to the P.W.2 (the drawee of exhibit B) unpaid. The implication of that was that the cheque issued in favour of the P.W.2 was dishonoured for reason of insufficiency of funds to the appellant's credit.*

*No useful purpose will be served by considering the denial of the appellant as regards issuing exhibit B to the P.W.2. There is sumptuous evidence albeit uncontroverted that the appellant issued exhibit B. See FERGUSON V. COMMISSIONER FOR WORKS & HOUSING LAGOS STATE (1999) 4 N.W.L.R. (Part 638) 315 at 328; CHUKWU V. D. ALA (1999) 6 NWLR. (Part 608) 674 at 681 and BOSHALI V. ALLIED COMMERCIAL EXPORTERS LTD. (1961) 2 SCNLR 322. It is trite that when evidence of a party to a suit is not debunked or challenged by the opposite party which had the opportunity to do so, the trial Court or tribunal seised of the proceedings ought to accept and act on it. The worthlessness of the appellant's denial is amply supported by the evidence of the PW.2, the P.W.3 and the P.W.4 who are respectively the drawee of the dishonoured cheque, his wife and handwriting analyst who confirmed the fact of issuing exhibit B and that the signature on exhibit B was that of the appellant."*

Before us in this Court, the main plank of the argument of appellant's counsel was that exhibit 'B', the dishonoured cheque, should not be viewed as a medium, of payment by the appellant to P.W.2 but rather as merely a documentation of the loan transactions between P.W.2 and the appellant.

In other words, counsel argued that exhibit ‘B’ could not be regarded as being issued “to obtain credit”. At page 7 of the appellant’s brief, it was argued thus:

“PW2 admitted the Appellant was an illiterate who could only sign her name. PW2 said since Appellant did not issue a receipt he needed some form of documentation. Appellant produced her cheque book, handed it over to PW2 to fill it.

The only interpreter, beneficiary or victim therefore is PW2. He has said the purpose of issuing Exhibit B was to capture or document the transaction. Any other meaning or presumption drawn would be absurd, extraneous to the transaction. The Appellant can only be deemed to understand what PW2 said, that he wanted documentation of the transaction.”

Appellant’s counsel relied on the following cases: *Abayonu Adelenwa v. The State* [1972] 10 S.C.; *Egboghonome v. State* [1993] 7 NWLR (Pt. 306) 383; *Mohammed v. State* [1991] 5 NWLR (Pt. 192) 438; *Nwosu v. State* [1986] 4 NWLR (Pt. 35) 348 and finally *Alabi v. State* [1993] 7 NWLR (Pt.307) 511.

In reacting to the submission of the appellant’s counsel, it is necessary to bear in mind the relevant evidence of P.W.2. At page 12 of the record of proceedings P.W.2 testified thus:

“A week later she again begged for another N2,000.00 but he asked her to come back and he later gave her N1,300.00 because that was what he could afford. His wife was present on both occasions but he on the second occasion insisted to have both documented-but accused said instead she would issue a post-dated cheque for both amounts. She opened her bag and brought out the cheque book but said she could only sign her name and put her stamp but could not write and even in the Bank she is always assisted to write her cheques. He obliged her and she signed the cheque and stamped it with her stamp and delivered same to him a post-dated cheque dated 29/9/81.”

[Please note that the trial judge recorded the evidence of P.W.2 in the third person rather than in the first person.]

**A perusal of the above passage of the evidence of P.W.2 only**

shows that he had requested from the appellant a documentary proof of the transaction between him and the appellant. Perhaps a simple agreement evidencing the loan transaction would have satisfied the P.W.2. But that is now a speculation. The evidence of P.W.2 shows that it was the appellant who offered to have the transaction documented by the issuance of her cheque. The issuance of a cheque has certain connotations in law. A cheque issued by a drawer and accepted by the drawee serves two purposes. One is that of documenting the particular transaction. The other is that, it is a medium of payment, the issuance of which has far reaching implications in law. I am unable to accept the argument of appellant's counsel that the cheque issued by the appellant was to be seen only as a documentation of the loan transaction between the appellant and P.W.2; and that exhibit 'B' be held not to possess the attributes ascribed by law to such an instrument. B C D

In any case, the submission of the appellant's counsel is utterly fanciful in the circumstances and unrelated to the defence put up by the appellant. The defense of the appellant was that she did not issue exhibit 'B', not that she understood it to be a mere statement of account. Did not the appellant know the implication of post-dating a cheque against a specific date? I do not think that the submission by appellant's counsel on this score can be considered as a reasonable one. It was not the first time the appellant was handling a cheque. The standards set by law as to the liability imposed upon the drawer of a cheque cannot be varied in the circumstances of this case. E F

Section 1(1), (2), (3) of the Dishonoured Cheques (Offences) Act, Cap. 102, Laws of the Federation, 1990 provides: G

*'1.(1) Any person who -*

- (a) obtains or induces the delivery of anything capable of being stolen either to himself or to any other person; or* H
- (b) obtains credit for himself or any other person, by means of a cheque that, when presented for payment not later than three months after the date of the cheque, is dishonoured on the ground that no funds*

*or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn, shall be guilty of an offence and on conviction shall -*

(i) *in the case of an individual be sentenced to imprisonment for two years, without the option of a fine, and*

(ii) *in the case of a body corporate be sentenced to a fine of not less than N5,000.00.*

2. *For the purposes of subsection (1) of this section -*

(a) *the reference to anything capable of being stolen shall be deemed to include a reference to money and every other description of property, things in action and other intangible property;*

(b) *a person who draws a cheque which is dishonoured on the ground stated in the subsection and which was issued in settlement or purported settlement of any obligation under an enforceable contract entered into between the drawer of the cheque and the person to whom the cheque was issued, shall be deemed to have obtained credit for himself by means of the cheque notwithstanding that at the time when the contract was entered into, the manner in which the obligation would be settled was not specified.*

3. *A person shall not be guilty of an offence under this section if he proves to the satisfaction of the court that when he issued the cheque he had reasonable grounds for believing, and did believe in fact, that it would be honoured if presented for payment within the period specified in subsection (1) of this section."*

**On the facts as found by the two courts below, there was no doubt that the appellant had committed an offence under Section 1(2)(b) above. She had issued a cheque in settlement of an obligation arising under an enforceable contract, which said cheque was dishonoured when presented not later than three months after the date of the cheque.**

**I am of the firm conviction that the guilt of the appellant was established before the trial court and that her conviction and sentence were properly affirmed by the court below.**

**This appeal has no merit. It is dismissed.**

### KUTIGI CJN

I have had the privilege of reading in advance the judgment just delivered by my learned brother Oguntade, JSC. I entirely agree with him that the appeal has no merit. There is abundant evidence on record which shows that the Appellant committed the offence for which she was charged and convicted. I am clearly of the view that she was rightly convicted by the trial Court and her conviction and sentence were also properly upheld by the Court of Appeal. The appeal is accordingly dismissed.

### TOBI JSC

This is an appeal involving a dishonoured cheque. The case of the respondent can be briefly stated. The appellant was a contractor. She was a business associate of PW2. She secured a contract from the Ministry of Agriculture Ogun State to build a house. She ran out of funds. She approached PW2 for a loan. PW2 gave her an initial loan of N2,000.00. That was on 4<sup>th</sup> September 1991. A week later, the appellant returned for another loan of N2,000.00. This time around, PW2 did not give her the whole sum. He gave her N1,300.00. The total value of the loan came to N3,300.00. PW2 requested for the documentation of the two transactions. Instead of documentation of the transactions, appellant gave PW2 a post dated cheque to cover the two loans. This was acceptable to PW2. After all, cheque is money. .

On 29<sup>th</sup> September, 1991 date of honouring the cheque, PW2 presented it for honour but the cheque bounced, using the common market expression. In commercial and banking language the cheque was returned unpaid with the remark "Return to Drawer".

Appellant was charged-for an offence under section 1(1)(b) of the Dishonoured Cheque (Offences) Act. No. 44 of 1977. In her evidence, appellant denied that she issued the dishonoured cheque. Popoola, J. did not believe her story. He rather believed that of the prosecution.

Appellant was sent to prison for two years. Her appeal to the Court of Appeal was dismissed. She has come to this court.

The crux of the case of the appellant is that the prosecution failed to discharge the burden of proof in the case. She has danced around *Exhibit B* the dishonoured cheque. On the contrary, it is the case of the respondent that the prosecution proved its case against the appellant beyond reasonable doubt.

Reasonable doubt is doubt founded on reason which is rational; devoid of sentiment, speculation or parochialism. The doubt should be real and not imaginative. The evidential burden is satisfied if a reasonable man is of the view that from the totality of the evidence before the court, the accused person committed the offence. The proof is not beyond all shadow of doubt. There could be shadows of doubt here and there but when the pendulum tilts towards and in favour of the fact that the accused, person committed the offence, a court of law is entitled to convict even though there are shadows of doubt here and there.

It is the submission of learned counsel for the appellant that the prosecution did not prove the mens rea and the *actus reus* of the section 1(1)(b) of Dishonoured Cheques (Offences) Act, 1990 offence. Let me quickly read the subsection:

*“Any person who obtains credit for himself or any other person by means of a cheque that when presented for payment not later than three months after the date of the cheque is dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn shall be guilty of an offence.”*

I entirely agree with the appellant that to convict on the above subsection, the prosecution must prove that the accused had mens rea and *actus reus*. Put in common simple parlance, mens rea means a guilty mind. And *actus reus* means a guilty act. In cases of strict liability, mens rea comes before *actus reus*. In other words, the accused develops the guilty mind before guilty act. Put in another language, the guilty mind instigates the guilty act or flows into the guilty act. The period of time between the two cannot be determined in vacuo but in relation to the

factual situation in each case dictated by the state of criminality of the accused at the material time. There are instances where the mens rea is automatically followed by the actus reus. The above element of proximity apart, there could be instances of spontaneity too.

It is clear to me from the evidence of the prosecution witnesses, PW2, PW3 and *Exhibit B* that the prosecution proved the mens rea and the actus reus of the offence charged. While I do not know when the appellant formed or developed the mens rea (a knowledge only available to the Almighty God) the actus reus is on *Exhibit B*.

The appellant in her evidence in-chief and under cross-examination denied issuing or signing *Exhibit B*. She said in her evidence in-chief at page 25 of the Record:

*"I did not issue Exhibit B to PW2."*

Under cross-examination, she said at page 26 of the Record:

*"I did not issue Exhibit B. I did not sign Exhibit B. I lost my cherub book in 1981 but I reported in 1982."*

Against the above is the expert evidence of PW4, the handwriting analyst. He said in his evidence in-chief at page 16 of the Record:

*"I took Exhibit B to the laboratory where I examined the signature therein with the aid of a video spectra comparator. The examination revealed evidence of natural execution devoid of simulation of a known model signature. On comparison with the signature with Exhibits A and D-D5 I found them, characteristically identical. I equally carried out a comparison of the handwriting on Exhibit B with the specimen on Exhibit C-C5 and found features of similarity peculiar to one writer, i.e. The writer of Exhibit C to C5 wrote the handwriting contained in Exhibit B."*

Reacting to the above evidence, the learned trial Judge said at pages 44 and 45 of the Record:-

*"There is evidence before me that the accused signed Exhibit B. PW4 testified here as having examined Exhibit B, he compared the signature thereon with the handwriting and signature on Exhibit A (letter of apology handwritten, by the accused to PW2) as well as Exhibits D - D5 with comparative table shown on Exhibit E which vividly revealed fea-*

tures of similarity and came to the conclusion that the writer of Exhibit A (i.e. the accused) is the same as the writer of Exhibits D - D5 as well as the signature on Exhibit B (the offending cheque) which he said was even obvious to a lay man to see and compare. I believe the evidence of PW4. He has done a good job and the explanation even under devastating cross examination was clear and straight forward - maintaining a steady stand and unshaken. This in turn confirmed PW2 whose evidence I also accept and believe.

It is noted that this PW4 - the expert was not contradicted, and was not cross-examined as to the accused not signing Exhibit B, and to me his credibility remains untainted due to failure to elicit any evidence adverse to the opinion of PW4, which is a basis to believe the said PW4. See MIA & SONS LTD. V. FHA (1991) 8 NWLR (PT. 209) 295, 298 HOLDING 7 P. 313 PARAS E - H.”

The learned trial Judge did not stop there. He examined the exhibits and came to the conclusion that Exhibit B was signed by the appellant. He said at page 45:

“Besides the evidence of the Handwriting Expert PW4, I have myself examined the signature on the said cheque - Exhibit B, with the letter and signature on Exhibit A - Letter hand written by the accused as well as the specimen signatures on Exhibits D - D5 and the comparative table in Exhibit E, ‘B’, ‘D’, ‘E’, thereon and have compared them as well as Exhibit E with the disputed signature on Exhibit B and I have formed my opinion that they were all written and signed by the accused, which I believe I have power to do, being an option open to me, assuming I am not bound by the evidence of the expert witness (PW4) I am reinforced in this belief by the decision in DR AINA V. M. A. JINADU & ANR. (1992) 4 NWLR (PT. 233) 91, 98 HOLDING 18 p.107 PARAS. F-G.

Plus also the fact that the accused in one breath said she lodged a written report, she next said, oral report but, that Exhibit L was issued to her in replacement. PW5 or DW4, her own witness, testified that Exhibit L, i.e. 104-010 series having nothing to do with Exhibits B, as ‘104’ series were meant for debtors – i.e. those on Overdraft and cheques is-



*sued thereunder could never go into the Current Account 101-289 - whereas the impression the accused gave, was that she was issued Exhibit L when she reported the loss of Exhibit B - which she later found in her house after 8 years. I hold the strong view also, that Exhibit L having no connection or relevance with Exhibit B, it is irrelevant in this case.”* B

Learned counsel for the appellant argued that although the learned trial Judge said that lying is no evidence of guilt, he got “*totally soaked into the lies of the appellant as shown in his outburst of emotions at page 47 of the Record.*” That is a fairly rude one on a Judge and I condemn it. Parties do not win cases by aspersion on a Judge who has no opportunity to defend himself beyond the cold records of appeal. A trial Judge, in my view, can call a witness a liar in his judgment if that is borne out from the evidence. That is exactly what Popoola. J. did. I do not think he deserves the sledge-hammer of counsel. I am clearly with the learned trial Judge that the appellant is a liar. I equally agree with him that the “*accused has not made a clear breast of the whole sordid affair. She has borrowed money to prosecute a project from PW2 (and) instead of being grateful to PW2, has repaid him with terrible lies...*” Let counsel refrain from bringing the Judge, the unbiased umpire so to say, to the theatre of the litigation and rub him with muck. That will be tantamount to reducing the height that the law has bestowed on the Judge. C D E

Counsel also submitted that the intention of the parties as established in evidence was that the cheque should serve as documentation, receipt, acknowledgment, evidence, just to have a piece of documentary evidence of the transaction not an instrument for payment as a legal tender. This is quite a new one for me to learn. I do not think I am prepared to learn it. How can learned counsel say that a post dated cheque serves as a document, receipt or acknowledgment? A cheque is a written order to a bank to pay a certain sum of money from one’s bank account to oneself or to another person. It is for all intents and purposes an instrument for payment. It metamorphoses into physical cash on due presentation at the bank and that makes it legal tender. It is interesting that learned counsel conceded at page 9 of the brief that “truly a cheque is always regarded as a legal tender or an instrument for payment once it is F G H

duly completed, and signed with date. That is the correct position and the reverse position taken by counsel is not at all available to him.

Let me recapitulate the events that led to the cheque issued by the appellant to PW2. I had earlier mentioned them. After the second loan, B PW2 requested that the transaction be documented. Appellant suggested that instead of documentation of the transaction, she would issue a post dated cheque. This she did and the cheque was dated to 29<sup>th</sup> September, 1991. Where then lies the argument of learned counsel that the cheque C was not intended to be an instrument of payment or legal tender but as a mere documentation, receipt or acknowledgment? In my humble view, the position should have really reflected the submission of counsel if the appellant acceded to the request of PW2 that the transaction be documented. By the post dated cheque, the appellant's real intention was to D pay the loan.

I think I can stop here. It is for the above reasons and the more comprehensive reasons of my learned brother, Oguntade, JSC, in his judgment that I too dismiss the appeal. If has no merit at all.

E \_\_\_\_\_

### MUKHTAR JSC

The judgment just delivered by my learned brother Oguntade JSC F has been read by me. I agree with the reasoning and conclusion reached therein, that the appeal has no merit whatsoever. I would however like to make a short addition by way of emphasis.

The provision of Section (3) of the Dishonoured Cheques (of- G fences) Act, Cap. 102, Laws of the Federation, 1990 has made exemption for who may not come within the provision of Section 1(1) of the said law.

By virtue of Section 1 (3) -

H *“A person shall not be guilty of an offence under this Section if he proves to the satisfaction of the court that when he issued the cheque he had reasonable grounds for believing, and did believe in fact, that it would be honoured if presented for payment within the period, specified in subsection (1) of this section.”*

It is on record that the appellant signed an Arab Bank cheque dated 29<sup>th</sup> September, 1981, Exhibit 'B', when her account was already in debit, as is evidenced by the evidence of the Branch Accountant (PW 5) who testified inter alia thus:-

*"As at 6/8/81 a cheque of N6,370.00 was lodged and as from that date to 18/9/81 the balance in the Account was N494.80 Debit - meaning the account was in red and the Bank had given her an overdraft of N494.80. As at 29/9/81 no transaction account still in RED."*

However the defense of the appellant was a total denial of ever issuing the cheque, but that the cheque book containing the cheque leaf Exhibit "B" had been stolen. The learned trial judge was not satisfied with this defense and found thus in his judgment:-

*"There is evidence before me that the accused signed Exhibit B. PW4 testified here as having examined Exhibit B, he compared the signature thereon with the hand writing and signature on Exhibit A (letter of apology hand written by the accused to PW2) as well as Exhibits D - D5 with comparative table shown on Exhibit E which vividly revealed features of similarity and came to the conclusion that the writer of Exhibit A (i.e the accused) is the same as the writer of Exhibits D - D5 as well as the signature of Exhibit B - (the offending cheque) which he said was even obvious to a lay man to see and compare. I believe the evidence, of PW 4..... This in turn confirmed PW 2 whose evidence I also accept and believe."*

It is the prerogative of a trial judge who sees and listens to witnesses to choose which to believe and ascribe probative value to his or her evidence. It is not the place of an appellate court to evaluate evidence, which has already been evaluated by a trial court which has not been shown to be perverse, and the position of the law is very clear on this. An appellate court will not interfere with findings based on such evaluation unless it is found to be erroneous. See *Chindo Worldwide Ltd. v. Total (Nig.) PLC* 2001 16 NWLR part 739 page 291.

The lower court was correct when in its lead judgment the learned justice said inter alia, *"I hold that the findings of fact by the trial court is not perverse. I am guided by the foregoing principle and accordingly*

*restrained myself from interfering with the findings of the trial court”.*

In this wise I have no doubt whatsoever in my mind that the appellant did not avail herself of the provision of Section 1(3) of the Dishonoured cheques Act supra. This is an appeal on concurrent findings of facts which this court will not ordinarily disturb unless the findings are not supported by credible evidence and are thus perverse. In the present case the findings are not so perverse. See *Ibodo v. Enarofia* 1980 5-7 S.C. 42, *Aseimo v. Abraham* 16 NWLR part 738 page 20, and *Chinwendu v. Mbamali* 1980 3 - 4 S.C.31.

In view of the above discussion and the fuller reasoning in the lead judgment I also dismiss the appeal in its entirety.

D

### ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Ibadan in appeal No. CA/1/36/2003 delivered on 4<sup>th</sup> July 2005 dismissing the appeal of the appellant against the judgment of the Ogun State High Court holden at Abeokuta in charge No. AB/5C/93 delivered on 11/10/1995 in which the Court convicted and sentenced the appellant to a term of two years imprisonment under section 1(1)(b)(i) of the Dishonoured Cheques (Offences) Act, Cap. 102, Laws of the Federation of Nigeria, 1990.

The facts of this case are very simple and straight forward. The appellant who is a contractor, is a close associate of PW2, one Ganiyu Ajayi. In the course of carrying out her trade, appellant secured a contract from the Ministry of Agriculture, Ogun State to build a house but later on ran out of funds and approached PW2 for a loan. PW2 lent appellant the sum of N2,000.00 on 4/9/91 but appellant returned a week later for another loan of N2,000.00 but PW2 could only afford N1,300.00 which was handed over to the appellant with a request that the two transactions be documented. Appellant rather preferred to issue a post dated cheque to cover the two loans, which she did. The cheque was presented on 29/9/91 for payment but was later returned unpaid with the remark “Return to Drawer”. The matter was reported to the Police and

the appellant was charged to Court for issuing a dishonoured cheque and was tried, convicted and sentenced as earlier stated in this judgment.

The issue for determination as stated in the appellant's brief filed on 17/7/06 by learned counsel for the appellant is:

*“whether the learned Justice of the Court of Appeal were right in affirming the decision of the trial court that the prosecution had proved its case beyond reasonable doubt in the circumstance of this case.....”*

*In arguing the appeal, learned counsel for the appellant submitted that there is no evidence before the court to the effect that appellant induced the complainant, PW2, to give or loan her money for which she pledged her cheque and thereby secured credit; that evidence on record is that appellant had been given a N2,000.00 loan earlier and later N1,300.00 but for want of written evidence in relation to the transaction appellant offered her cheque; that the cheque, exhibit B was issued without giving the impression that appellant had money or would have money but “strictly to capture the transaction for the records as demanded by the complainant (PW2)..... In this very case both parties mutually agreed that the cheque would be evidence of the transaction not a legal tender”.*

*In the first place I have to observe that the above position of learned counsel is very different from the case of the appellant at the trial where she stated that at the material time her cheque book was stolen and she did not sign the cheque in issue. That denial made it necessary for the prosecution to call PW3, a handwriting expert who testified to the contrary and whose evidence was believed by the trial court, whose decision was affirmed by the lower court. Even with regard to the present position of the appellant which accepts issuing the cheque but for the purpose of documenting the transaction instead of simply writing out an i.o.u or a simple agreement acknowledging the debt, the facts of the case as accepted by the trial court demonstrate clearly that appellant knew what she was doing particularly, as she obtained the loans of N2,000.00 and N1,300.00 from PW2 and when it was requested by the said PW2 that the transaction be reduced into writing appellant rather issued her post-dated cheque for the total sum due and payable by the appellant to the said PW2 which cheque was returned unpaid upon*

presentation. I do not think that learned counsel for the appellant is pretending not to know the purpose for which cheques are issued in transactions of the nature under consideration. I do not also think and, there is no evidence on record which was believed by the learned trial judge, B that the cheque, exhibit B, was anything but means by which appellant obtained credit from the said PW2 and that the said exhibit B was dishonoured upon presentation for payment. There is no dispute that appellant obtained a credit of N3,300.00 from PW2 for which she issued C the post dated cheque, exhibit B for refund or repayment which was dishonoured.

Section 1(1)(b) of the Dishonoured Cheques (Offences) Act Cap. 102 1990 provides as follows:-

D “Any person who obtained credit for himself or any other person by means of a cheque that when presented for payment not later than three months after the date of the cheque is dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn shall be E guilty of an offence.....”

From the above, the duty on the prosecution is to prove:

(a) that appellant obtained credit by herself

(b) that the cheque was presented within three months of the date F thereon; and

(c) that on presentation the cheque was dishonoured on the ground that there was no sufficient funds or insufficient funds standing to the credit of the drawer of the cheque in the bank on which the cheque was G drawn.

From the facts it is clear that the prosecution duly discharged that burden of proof.

The above notwithstanding, section 1(2)(b) of Cap. 102 supra provides thus:

H “(2) for the purposes of subsection (1) of this section

a. ....

b. a person who draws a cheque which is dishonoured on the ground stated in the subsection and which was issued in settlement or purported

*settlement of any obligation under an enforceable contract entered into between the drawer of the cheque and the person to whom the cheque was issued shall be deemed to have obtained credit for himself by means of the cheque notwithstanding that at the time when the contract was entered into, the manner in which the obligation would be settled was not specified”.* B

It is my considered view that having regard to the facts of this case and the applicable law the trial court was right in convicting and sentencing the appellant for the offence charged and that the Court of Appeal was right in affirming that decision. C

It is also to be noted that this appeal is on concurrent findings of facts and the appellant has not satisfied this Court that this case is a proper one under the law for which this court should intervene to set aside the concurrent findings of facts made by the lower courts. I hold the view that the failure of the appellant to so satisfy this Court is fatal to the appeal. D

I therefore agree with the reasoning and conclusion of my learned brother OGUNTADE JSC that the appeal lacks merit and should be dismissed. I dismiss it accordingly. E

Appeal dismissed.

F

G

H