**MAJOR I. O. AMACHREE**

**V.**

**NIGERIAN ARMY**

IN THE COURT OF APPEAL (LAGOS JUDICIAL DIVISION)

THE 10TH DAY OF JULY, 2002

SUIT NO: CA/L/309/2000

**LEX (2002) - CA/L/309/2000**

OTHER CITATION:

(2002) LPELR-CA/L/309/2000

[2003] 3 NWLR (Pt. 807)256

**BEFORE THEIR LORDSHIPS**

GEORGE ADESOLA OGUNTADE, JCA

PIUS OLAYIWOLA ADEREMI, JCA

CHRISTOPHER MITCHELL CHUKWUMA-ENEH, JCA

**BETWEEN**

MAJOR I. O. AMACHREE - Appellants

AND

NIGERIAN ARMY - Respondents

**ORIGINATING COURT**

GENERAL COURT MARTIAL (GCM)

**REPRESENTATION**

FRED AGBAJE, Esq. - For the Appellants

P. ONIOGI (MRS.) - For the Respondents

**ISSUES FROM THE CAUSE(S) OF ACTION**

MILITARY LAW – COURT MARTIAL - OFFENCE OF CHEATING:- Offence of cheating as prescribed under section 113 of the Armed Forces Decree 1993 – Proof of – Comparison to section 421 of the Criminal Code -Whether the gist of the offence of cheating has all the hallmarks of the offence of obtaining by false pretences

MILITARY LAW – COURT MARTIAL - DUTY OF COURT:- Power of the Court Martial like every other court under section 223 of the Evidence Act, 1990, to raise questions as to enable the court clear some doubts and ambiguities in any proceedings – Duty of court not to misuse same as a licence to descend into the arena abandoning its primary function as the umpire holding the scales of justice between the contesting parties before it – Effect of failure thereto

CRIMINAL LAW AND PROCEDURE - RETRACTION OF CONFESSIONAL STATEMENT:- Where the accused retracts his confession – Duty of Court thereto – Failure of Court Martial to exercise the necessary caution – Legal effect

CRIMINAL LAW AND PROCEDURE - OFFENCE OF CONSPIRACY:- Where a substantive offence has been preferred - Whether a charge of conspiracy is undesirable

CRIMINAL LAW AND PROCEDURE - OFFENCE OF CONSPIRACY:- How the offence is constituted - Agreement formed by two or more minds with the intention to do what is agreed, to wit, an unlawful act – Whether may involve several overt acts

CRIMINAL LAW AND PROCEDURE - OFFENCE OF CHEATING:- Material element constituting the offence of cheating – Whether involves deception occasioning loss or the risk of it to a person – What the prosecution must prove to succeed

CRIMINAL LAW AND PROCEDURE - INDICTMENT:- Proper approach to an indictment containing conspiracy charge and substantive charges – Duty of court to deal with the substantive charges first and then proceed to see how far the conspiracy count should be there at all and whether it was made out

CRIMINAL LAW AND PROCEDURE - DUTY OF THE PROSECUTION:- Duty of Court discharge its onus of proof beyond reasonable doubt – Failure thereto – Legal implication

CRIMINAL LAW AND PROCEDURE - CONFESSIONAL STATEMENT:- Settled law that only free and voluntary statements not induced by threat or promise is admissible - Section 28 Evidence Act 1990 - Import of the words "promise" or "threat" within the context of section 28 of the Evidence Act, 1990

CRIMINAL LAW AND PROCEDURE - CONFESSIONAL STATEMENT:- Confessional statement obtained against the background of inducement of threat or promise – Admissibility of - Requirement that the inducement must be made by a person in authority- Whether Police qualifies as such authority

CRIMINAL LAW AND PROCEDURE - CONFESSIONAL STATEMENT:- Where a confessional statement has admitted all the essential elements of an offence and shown unequivocally direct and positive involvement of the accused in the crime – Duty of the court to rely on same alone to convict the accused – Basis of - Section 27(1) Evidence Act, 1990 in review

**PRACTICE AND PROCEDURE ISSUES**

COURT - BIAS:- Constituents of bias or likelihood of bias – Settled law that mere suspicions is insufficient to ground either bias or likelihood of bias - Test of bias or likelihood of bias – Where a bystander comes to the conclusion that the conduct of the proceedings was unfair to the aggrieved party – Legal implication – Proper order for court to make

**MAIN JUDGMENT**

CHUKWUMA-ENEH, J.C.A. (DELIVERING THE LEADING JUDGMENT):

The appellant Major I.O. Amachree, an officer in the Directorate of Army Policy and Plans, Army Headquarters, Lagos, was the second accused person, arraigned before the General Court Martial (GCM for short) in this matter charged with the following offences:-

(a) Statement of Offence:

Conspiracy, contrary to section 114(1) of the Armed Forces Decree, 1993, No. 105 and punishable under section 516, Criminal Code Cap. 77, Laws of Federation of Nigeria, 1990.

Particulars of Offence:

In that he, on or about 1996, at Lagos, together with one Zamani Karfa, conspired to cheat one Mr. Jude of No.30 Idowu Taylor Street, Victoria Island, of the sum of One hundred and Ninety thousand Naira (N190,000.00) on the pretext of being members of the Task Force on Trade Malpractices.

(b) Statement of Offence:

Cheating contrary to section 113(1) of the Armed Forces Decree, 1993 No. 105.

Particulars of Offence:

In that, he on or about 1996, at Lagos, together with Zamani Karfa cheated one Mr. Jude of No.30, Idowu Taylor Street, Victoria Island, of the sum of One hundred and Ninety thousand Naira (N190,000.00) on the pretext of being member of the Task Force on Trade Malpractices.

The accused pleaded not guilty to the two-count charge. Evidence was led by the prosecution in proof of the offences. The appellant's confessional statement was tendered and admitted in evidence after a trial, within trial as exhibit AZ. The appellant testified in his defence and called no witness.

The General Court Martial found for the prosecution and convicted the appellant as charged and sentenced him to 2 years on each of the two counts of the charge to run concurrently.

Aggrieved, by the decision, the appellant appealed against the whole decision to this court on a notice of appeal, containing five grounds of appeal. The parties have in compliance with the rules of this court, filed and exchanged their briefs of argument. Three issues for determination were formulated by the appellant in his brief of argument filed in this matter and they are as follows:-

"1. Having regard to the prosecution case inclusive of evidence led, could the prosecution be said to have proved its case beyond reasonable doubt?

2. Having regards to the purported trial-within-trial to determine the admissibility of the accused statement, can it be said that the admissibility of the accused statement can be said that the court martial properly evaluated the legal implications of the evidence led by the prosecution before proceeding to admit the accused person's statement?

3. Did the accused have a fair hearing in this case, particularly with the endless intervention by the court martial during the proceedings?"

The respondent in its brief raised two issues for determination and they are as follows:-

"1. Whether or not there was sufficient evidence at the trial of the appellant upon which the General Court Martial convicted him.

2. Whether or not the appellant had a fair hearing before the General Court Martial."

Adverting to sections 516 and 517 of the Criminal Code, Cap. 77, Laws of Federation of Nigeria, 1990, defining conspiracy, the appellant debunked the said charge as not availing the respondent in this matter as it takes two or more persons to conspire together to effect an unlawful purpose or to effect a lawful purpose by an unlawful means. See: Nigerian Army v. Ofu & Ors. (1964) NNLR 113. And that it was moreso here, particularly, when there was nothing in the prosecution's case to suggest conspiracy notwithstanding the evidence of PW2 - PW5 and not even as per exhibit C1 that is, the confessional statement further relied upon by the prosecution to establish conspiracy as it was obtained by duress. Setting the particulars of the offence of conspiracy against the evidence of J.O.J. Nwodo, before the court martial it was also submitted that the evidence of J.O.J. Nwodo was unrelated to the present matter of conspiracy and should not have been proffered nor used to prove the same. The appellant raised doubts as to the identity of the true complainant whether it was Mr. Jude or J.O.J. Nwodo. Jude was of 30 Idowu Taylor Street, while J.O.J. Nwodo was of Block 3, Shop 2, Agric, Odun Ado, Lagos. And that the mystery surrounding the complainant deepened as nothing was said or heard of Jude throughout the rest of the proceedings.

Examining the offence of cheating, the appellant submitted that it was closely related to the offence of obtaining by false pretences and so it would be "cheating" within the meaning of "cheating" as prescribed in section 421 of the Criminal Code. See: Lababedi and Absi v. The Queen (1959) SCNLR 118, (1959) NSCC (Vol. 1) 40; Rex v. Ogbonna (1941) 7 WACA 139 and Felix Ireto v. Inspector General of Police (1959) SCNLR 136, (1959) NSCC (Vol. 1) 45.

On the contention surrounding exhibit A - the alleged confessional statement, the appellant submitted it was induced and procured by intimidation. To buttress this, various extracts from the testimony of the appellant in the record were referred to and it was argued that their cumulative effect was that exhibit A was not voluntarily obtained and therefore, the appellant did not get a fair hearing.

The appellant having retracted the statement, that the weight to be attached to it, the appellant submitted was further weakened and as it was also made under duress and so the court should have sought for corroboration outside outside A2 to make it authentic observing that having failed to do so exhibit A2 was further weakened; see: Rex v. Skyes (1913) cited in Emmanuel N. Nwaebonyi v. State (1994) 5 NWLR (Pt. 343) 138 (1994) 5 SCNJ 86 at 192, Onochie v. The Republic (1966) NMLR 307; Obosi v. State (1965) NMLR 129, The Queen v. Obiasa (1962) 2 SCNLR 402, (1962) 1 ANLR 651 and Daniel Itodo v. State (1968) NMLR 1.

On the third issue for determination, the appellant challenged the manner of the General Court Martial's conduct of the case by its constant interference to raise questions not necessary to clear ambiguities; see: Col. Mohammed v. Nigerian Army (1998) 7 NWLR (Pt.557)232. The appellant had to list examples of such questions aimed at justifying the torture (meted to the appellant and others) too exacting and intimidating in the circumstances. See: Olaye v. Chairman Medical and Dental Practitioners Investigating Panel (1997) 5 NWLR (Pt. 506) 550 at 563-564 (H - D). On the current judicial attitude to the question of bias raised by the appellant he relied on David Uso v. C.O.P (1972) 11 SC 37 at 45 - 47. See also Nigerian Army v. Oyenubi Exparte Ojo (1993) UILR 156; Okoduwa v. State (1988) 2 NWLR (Pt.76) 333; Obiora v. Osele (1989) 1 NWLR (Pt.97) 279; Abodunrin v. Araba (1995) 5 NWLR (Pt.393) 77; Col.

Mohammed v. Nigerian Army (supra) and Akinfe v. State (1988) 3 NWLR (Pt.85) 729 at 741 -744 and 747-753. Also, the appellant expatiated on the question of likelihood of bias on the part of the President of the court martial that is to say within the context of the proceeding and for the same he referred and relied on Chief Opeola v. Opadiran I (1994) 5 NWLR (Pt. 344) 368; Deduwa v. Okorodudu (1974) 6 SC21; Abiola v. Federal Republic of Nigeria (1995) 7 NWLR (Pt.405) 1 at 23 - 24; Anyebe v. Adesiyun (1997) 5 NWLR (Pt. 505) 403 at 423 (F-H), 424 (B-C) and L.P.D.C. v. Fawehinmi (1985) 2 NWLR (Pt. 7) 300.

For all this, the court was urged to allow the appeal and order the appellant's reinstatement into the Nigerian Army.

The respondent on its part argued strongly that there was abundance of evidence upon which the Court Martial rightly convicted the appellant. On the question of conspiracy, it relied on the testimonies of PW3 and PW4 that corroborated the respondent's case of a discussion on the award of contract to Mr. Nwodo in the car on the parties' way to Yobe Guest House. Similar activities between the appellant and Mr. Karfa with respect to cheating others including Mr. Jude to part with his money were highlighted to the Court Martial. On the substantive offence of cheating the evidence of the PW3 and PW4 was again relied on to assert how the appellant and others representing themselves as members of a Special Task Force, which they were not extorted money from Mr. Jude. It was also submitted that the charge of conspiracy could be and had to be inferred from the various acts of the accused persons; see Onochie v. State (1966) NMLR 307; and Njovens v. The State (1973) 5 SC 17 at 68. The respondent went on to submit that having proved that the appellant was not a member of the Special Task Force and that he used fraudulent means or trick or devices to extort money from Mr. Jude, the offence under section 113 Armed Forces Decree was conclusively established. And so the court should not disturb the findings of fact by substituting its own view on the facts; see Woluchem v. Gudi (1981) 5 SC 29 1 at 320 and Oparaji v. Ohanu (1999) 9 NWLR (Pt.618) 290, (1999) 70 LRCN 1822;

On exhibit A2, the respondent argued that the Court Martial rightly admitted the same after a thorough trial-within-trial had established the voluntariness of the appellant's confession to the offence. The allegation of threat or promise held out to the appellant was debunked as an afterthought. The court was urged to uphold exhibitA2.

On the question of fair hearing, the respondent adverted to the guidelines as set out in Adio v. Oyo State (1986) 2 NWLR (Pt. 24) 581, (2000) 78 LRCN 1521 at 1555-1556 and submitted that there was nothing on the record to support favouring one side at the expense of the other. On the point that the Court Martial asked questions during the proceeding, the respondent submitted that the questions were permissible and raised to clear doubts or ambiguities. And so, the contention of bias or likelihood bias could not stick moreso when the appellant's right to cross-examination was not in any way impaired or infringed. See Olaye v. Chairman, Medical and Dental Practitioners Investigating Panel (1997) 5 NWLR (Pt.506) 550 or 563-564.

In sum, the respondent urged the court not to interfere with the findings of fact of the Court Martial, nor the final verdict as the appellant had not shown that there was a miscarriage of justice in the circumstances.

Firstly, looking at the issues formulated for determination by the parties in this matter, they are substantially identical although the respondent on its part had condensed the issues for determination to two as against three by the appellant. It should be noticed that issues one of the respondents brief of argument has encompassed issues one and two of the appellant's brief while issue three of the appellant's brief and issue two of the respondent's brief are conterminous in all respects; they raised the same question of fair hearing. The two sets of issues emanated from the grounds and the judgment in this matter. That being the case, I have opted to be guided by the issues as raised by the appellant.

It is trite law that the onus of proof in this matter of the two count charge of conspiracy and cheating preferred against the appellant beyond reasonable doubt rested squarely on the prosecution and it never shifts. For the instant matter to succeed the prosecution was required to produce conclusive evidence of the ingredients of conspiracy and cheating charges. It now remains for me to see if there is any miscarriage of justice. I intend to take the matter of the substantive count of cheating first. I do this in line with the view eloquently expressed in the case of R v. Dawson (1960) 1 AER 558 applying the case of R. v. Luberg cited therein. I do so advisedly because of the peculiar circumstances of this case. In this matter, if I may point out the prosecution preferred a charge of conspiracy against the accused persons i.e. between the respondent and Zamani Karfa and tried to substantiate it by several overt acts which were within the purview of the substantive charge of cheating. The instant case to say least is one of considerable complexity. As between the particeps criminis there were allegations of various acts of extortion to cheat and defraud various persons at various times for a period of some years. The prosecution attempted to bring them under one count of conspiracy to cheat and defraud side by side the substantive offence. The question to ask is whether the charge of conspiracy should be there at all. In Dawson's case, there were fourteen substantive counts and one count for conspiracy to cheat and defraud. The court frowned at the charge of conspiracy. The principle that emerged from that case is whether conspiracy charge should also be charged where there are substantive charges in relation to the same conduct. I shall answer to this question anon. This established principle in Dawson's case has come to this, that the proper approach to an indictment containing conspiracy charge and substantive charges is to deal with the substantive charges first and then proceed to see how far the conspiracy count should be there at all and whether it is made out. The answer to the question decides the fate of the charge of conspiracy. In view of the complexity of this matter, I have opted for this line of approach as evinced as per Dawson's case in resolving the issue of the charge of conspiracy.

Firstly, however, the offence of cheating as prescribed by section 113 of the Armed Forces Decree 1993, runs thus:-

"A person subject to service law under this Decree who by means of a fraudulent trick or device -

(a) obtains from another person anything capable of being stolen; or

(b) induces another person-

(i) to deliver to any person a thing capable of being stolen; or

(ii) to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered, but for the trick or device, is guilty of an offence under this section and liable, on conviction by a court martial, to imprisonment for a term not exceeding five years."

It is stating the obvious to say that section 113 of Armed Forces Decree, 1993, is identical to section 421 of the Criminal Code. So that the cases that construed its provisions guide the courts as regards the provisions of section 113 (above).

There can be no doubt from examining the provisions of section 113(1) above, that the gist of the offence of cheating has all the hallmarks of the offence of obtaining by false pretences. The prosecution to establish its case under the said section is not necessarily required to show among other things that the property in question, as in the instant case, the sum of N190,000.00, is capable of being stolen albeit by means of fraudulent trick or device. All the same the import of the words "fraudulent trick or device" had to be ascertained for proper application. The issue in the case of Ahmed Jamil Lababedi and Absi v. The Queen (1959) SCNLR 118, (1959) 4 FSC 48 was whether a false document could be a "fraudulent device."

The Supreme Court after examining the words "fraudulent device" within the context of section 421 of the Criminal Code decided that in proving a charge under section 421 of the Criminal Code, it was not necessary to show that the goods were obtained under circumstances amounting to stealing. Again, there can be no doubt that the gist of the offence under the said section that is 113(1) above encompasses intent, a material element constituting the offence of cheating and it involves deception occasioning loss or the risk of it to a person, that is to say in this matter - Mr. Jude from whom the sum of N190,000.00 was extorted. And as clearly established by a long line of cases and exemplified by such cases as R. v. Abuah (1961) 2 SCNLR 283, 1961) ANLR 635; R. v. Anijoloja (1936) 13 NLR 83 and R. v. Ogbonna (1941) 7 WACA 139, evidence of previous similar offences is admissible to prove intent in this regard. To establish the necessary intent, the prosecution had in this matter relied on evidence of similar offences. This included the evidence of PW3 which showed that the accused and Zamani Karfa were driven by PW3 to Mafoluku on one of their escapades of extortion and also, to 30 Idowu Taylor Street, Victoria Island. I shall expatiate on this angle of the question later.

What otherwise would constitute a trick or device in contradistinction to mere false pretence has been dealt with in the case of Ireto v. Inspector-General of Police (1959) SCNLR 136, (1959) 4 FSC 57. In the cited case, the accused told a lie which induced the complainant to pay him #10; no trick or device was employed, so held the Supreme Court. But in this case, evidence was led to show that the appellant represented himself as a member of the said Task Force on Trade Malpractices, which he was not and thus, extorted N190,000. From one Mr. Jude. It must be asked whether the circumstances here went beyond mere representation as in Ireto's case so that there was established the intent to defraud by trick on the part of the appellant in this matter. I have within the context of the above resume covered the legal position and assumed other constituents of the offence of cheating being equal.

On the other hand, the facts and peculiar circumstances of the case against the appellant on count two were amply set out in the particulars of the offence. In short, the appellant and one Zamani Karfa as alleged cheated one Mr. Jude, of 30 Idowu Taylor Street, Victoria Island, to the tune of N190,000.00 on the pretext of being members of the Task Force on Trade Malpractices. The prosecution's case was that the appellant was never a lawful member of the said Task Force. It relied on the evidence of PW3 and PW4 particularly to submit that the appellant falsely presented himself to Mr. Jude as a member of the said Task Force and tricked him to part with his N190,000.00. The appellant in his brief has contended that Mr. Jude of 30 Idowu Taylor Street, mentioned in the charge was not the same person as J.O.J. Nwodo, who testified on oath before the Court Martial and that the mix-up broke the back of the prosecution's case. If it were so, it is fatal to the prosecution's case. The appellant has consequently raised a pertinent poser at paragraph 1.04 of his brief thus:-

"... could an accused person like the appellant, be arraigned for cheating a particular person and the evidence later led never tallied?"

It was also contended that none of the prosecution witnesses either in their statements or oral evidence mentioned Mr. Jude of 30 Idowu Taylor Street, Victoria Island and that Jude did not make any statement, nor was he called as a witness at the trial. And so the appellant alleged a miscarriage of justice, However, I must say that the submissions with respect are far from the true position, the point has to be made here that PW3 and PW4 in actual fact in their respective testimonies before the Court Martial and which testimonies were accepted by the said court implicated the appellant with regard to extorting money for instance N190,000,00 from Mr Jude; thus at p,128 of the record against PW3 - Sakiru Abudu at LL 18 - 24, the Court Martial recorded thus:-

"He narrated how Major Amachree took part in various operations to extort money from 419 people at Azuani, Ajao Estate, Oko-Oba and so on, He could not remember the addresses and names of the victims. He claimed that he was the one who drove Lt, Col. Iberia to MOD Car Park to bring Mr. J.O.J. Nwodo to Yola Guest House, where the man was cheated under the pretext that contract was to be awarded to him,"

The PW4 also at p. 169 of the record LL 11 - 14 is shown to be saying thus:-

"He also testified to the effect that he accompanied his boss, Zamani and Major Amachree to 30 Idowu Taylor Street, Victoria Island, where one Mr. Jude, was accosted for 419 deal and some money exchange hands. That Major Amachree was part of the operation."

There can be no gainsaying that based on the facts of this matter Mr Jude looked every inch a crucial witness for the prosecution, but he was not called to testify. In my view, his evidence is so critical to the prosecution's case particularly as the appellant opposed vehemently exhibit A2 - the accused's confessional statement on grounds of duress. There is therefore strong basis for contending that Mr. Jude existed in the imagination of the prosecution as it were moreso as no statement was obtained from him in the first place. One cannot help regarding the wishy-washy evidence of PW3 and PW4 in this regard as too outlandish to be believed. Even if believed the cumulative effect could not proof the prosecution's case against the appellant beyond reasonable doubt. So far the prosecution case hangs on the tenuous fate of exhibit A2 being legal evidence.

I now advert to the implication of exhibit "A2" in the scenario. The controversial confessional statement - exhibit 'A2' was written by the appellant himself. It went to town on their escapades (i.e. by the appellant and his cohorts) to Idowu Taylor Street, Victoria Island, albeit to one Mr. Jude from whom the sum of N190,000.00 was extorted. There seems to be no doubt that the appellant appeared to have made a clean breast of the crime of cheating in exhibit A2. It is now settled that exhibit 'A2' is part of the prosecution's case. The appellant has challenged its voluntariness in the light of the case of inducement levelled against Lt. Ebulue and Lt. Col. Frank in obtaining the confession. The next important question to consider is whether the appellant was induced and intimidated as he alleged to make in exhibit A2 and could the appellant still contest the admissibility of exhibit A2 as a voluntary statement, even after it was received in evidence at the trial-within-trial before the Court Martial. There can be no doubt he could on appeal.

The appellant to highlight the inducement and intimidation set forth some examples at paragraph 3.01 of his brief. At pages 16 to 19 of the record that is the trial-within-trial the appellant raised serious allegations of his encounter viva voce with Lt. Col. Frank thus:

“(1) I was surprised when Lt. Col. Frank said after given you seven (7) years, you will forget your wife and your friends will fork your wife, I was weak.

(2) We are not after you... just go and admit what this woman said - I will see you free.

(3) ...He kept me on chain throughout and followed me with a report that I was going to escape."

At page 18 of the record, particularly the Court Martial recorded thus:

Prosecution Question: "Is that the statement dictated to you?"

Answer: "I didn't say dictated, it is by point."

Prosecution Question: "Is it the one you are given point by point?"

Answer: "Yes."

The foregoing fact situation is a matter for weighty consideration in the context of the said inducement. The appellant submitted that the picture that emerged from the above scenario was one showing that exhibit 'A2' was not voluntary. One aspect of the grouse against exhibit 'A2' as per issue two in the appellant's brief of argument amounts to non-evaluation of the legal implications of the evidence led by the prosecution before exhibit 'A2' was admitted. In this respect, I must say I agree. If the foregoing did not in the circumstances amount to inducement, I wonder what could. It was not refuted that Lt. Col. Frank made the promise of seeing the appellant freed, if he confessed. I have no reason to doubt that Lt. Col. Frank made the promise to the appellant and that the appellant confessed on the assumption of being freed. I shall now examine the matter in depth.

It must also be noted that for admitting a confessional statement as exhibit 'A2' in evidence, it must be shown to be free and voluntary. See: section 28 Evidence Act 1990. That is to say, that it is not induced by threat or promise. For the import of the words "promise" or "threat" within the context of section 28 of the Evidence Act, 1990, I refer and rely on Madu Fatumani v. R (1950) 13 WACA 39 and R v. Baba Haske (1961) SCNLR 90, (1961) ANLR 330.

A confessional statement obtained against the background of inducement of threat or promise is inadmissible. It is settled law that the inducement must be made by a person in authority and Police has been so held. See Ebdomien & Ors. v. R. (1963) 1 All NLR 365, (1963) 1 ANLR 365.

The crucial question to decide in this matter encompasses whether there was any inducement amounting to threat or promise held out to the accused and whether it was referable to the charge, and to the making of the aforesaid statement (i.e. exhibit 'A2') and whether shown to have been obtained by someone in authority. At the trial-within-trial in this matter, it was the oath of the appellant against that of Lt. Col. Ebulue. There can be no doubt that on the peculiar setting of the matter that Lt. Col. Frank and Lt. Ebulue (they investigated the matter) were both persons in authority vis-a-vis the appellant. And from the above scenario, it is clear that the inducement by Lt. Co. Frank as stated above operated as an inducement on the appellant at the time of making of exhibit 'A2'. I must also observe that failure to call Lt. Col Frank as a witness at the trial-within-trial or at all as he was heavily implicated by the appellant in this regard, must greatly affect the case of the prosecution. Why he was not called at all in this matter has to be rationalised within the context of section 149(d) of the Evidence Act that he might not have been favourably disposed to the prosecution's case. It is no moment that the appellant wrote exhibit 'A2' himself or that Lt. Col. Frank was not physically present at the material time of making of exhibit 'A2'. It is enough that the inducement he exerted operated on the appellant at the making of exhibit 'A2' and the appellant so responded. The complaint by the appellant that the statement was given point by point showed teleguiding of the appellant and it was also not refuted. The clamping of chains around the appellant's legs at the interrogation and the making exhibit 'A2' if anything were to strike fear and to intimidate the appellant and it was not denied nor that exhibit 'A2' was made under a friendly atmosphere as alleged by the prosecution an answer to these acts.

The fact that the appellant was tortured came out vividly during the trial-within-trial. At page 19 of the record, the Court Martial itself raised suo motu in one of its probing questions methods of interrogations suggesting that torture might have been used and that SYG GP had existed.

In the light of the above, exhibit 'A2' is anything but voluntary, that is, in the face of the overwhelming evidence. The prosecution's case fumbled further, when the appellant having also retracted his confession the Court Martial ought to have seen the necessity of exercising caution as regard exhibit 'A2' by subjecting it to the tests as prescribed in the case of Bature v. State (1994) 1 NWLR (Pt.320) 267, thus, the uselessness of exhibit 'A2' would have become clearer against the backdrop of -

(1) Whether there is anything outside the confession to show that it is true;

(2) Whether it is corroborated;

(3) Whether the facts stated in it, are true in so far as can be tested;

(4) Whether the accused confession is possible;

(5) Whether the confession is consistent with other facts which have been ascertained.

In conclusion, exhibit 'A2' is totally in-admissible evidence having been procured by inducement of threat and promise, referable to the instant charge and exerted at the making of exhibit 'A2' by Lt. Col. Frank and Lt. Ebulue (as persons in authority). It should not have been admitted by the Court Martial and so to rely on it to convict the appellant was a grave error. It ought to have been rejected outright and so marked. And I accordingly, so order and also that exhibit 'A2' be expunged from the record.

The implication of expunging exhibit 'A2' from the record is that there is no ground upon which to sustain the prosecution's case to stand to support the conviction of the appellant on the charge of cheating having earlier shown that the cumulative effect of other pieces of evidence by PW3, PW4 and PW5, that is, as otherwise deficient in proving the prosecution's case beyond reasonable doubt.

And once the prosecution has failed to discharge its onus beyond reasonable doubt in a case as this one, it must fail.

The point has to be made, all the same, that where a confessional statement has admitted all the essential elements of an offence and shown unequivocally direct and positive involvement of the accused in the crime, the court can rely on the confessional statement alone to convict the accused. See section 27(1) Evidence Act, 1990 and Odua v. Federal Republic of Nigeria (2002) 5 NWLR (Pt.761) 615 at 637 Per OGUNTADE, JCA. Even then as in this matter, exhibit 'A2' cannot take the place of Mr. Jude, the witness to the overt acts, which was what the prosecution set out to achieve by tendering exhibit 'A2' and to close its case without calling Mr. Jude (a material witness from whom the sum of N190,000.00 was extorted.) See Omisade v. The Queen (1964) 1 ANLR 233. Thus, I conclude my discussion of the substantive count of cheating. It cannot be sustained on exhibit 'A2' having declared it rejected.

Reverting to the charge of conspiracy, and simply put, it is constituted by the agreement formed by two or more minds with the intention to do what is agreed. And where what is agreed to do is an unlawful act the parties are guilty of conspiracy. See R. v. Thompson (1966) 50 Cr. App. Rep.1. No doubt one conspiracy may involve several overt acts as alleged in the instant matter. Equally valid is the proposition that several acts of an accused person can be said to be in furtherance of a common purpose also as alleged in the instant case as submitted by the prosecution. In view of my reasoning and conclusions on the substantive offence, I have to be brief on the matter of the conspiracy charge.

On this count i.e. of conspiracy, the Court Martial relied on the commission of the substantive offence by each of the accused persons and others to infer conspiracy. In other words, both counts of the charge were based on the same conduct of the accused persons. Having held that the evidence of PW3, PW4 and PW5 have fallen short of proving conclusively the commission of the substantive offence based on the various alleged acts of the accused persons the same fate that befell the substantive offence goes for the conspiracy. See: Njovens v. The State (1973) 5 SC 17 at 68. To hold otherwise in this regard would look preposterous; the conspiracy charge must fail.

I have however, to refer to Dawson's case and the important point that emerged from the case is to the effect that, a charge of conspiracy is undesirable, where a substantive offence has been preferred; and I think the principle holds good in this case, based on its peculiar facts. I can find no usefulness of raising a separate charge of conspiracy to be inferred from the commission of the substantive offence by the accused persons. If anything, it serves to limit the scope of the witnesses that could otherwise be available to be called in his defence and therefore, highly prejudicial to the defence. With this brief observation, I hold that the offence of conspiracy not having been conclusively established therefore fails.

I find that each of the two-count charge preferred against the appellant was not proved beyond reasonable doubt and this court has rightly intervened to avert a miscarriage of justice.

On issue three what has to be resolved is whether the Court Martial under the guise of clearing any doubt and ambiguities in the course of the proceeding, took over the conduct of the case by jumping into the arena to take side. See: Col. Mohammed v. Nigerian Army (1998) 7 NWLR (pt.557) 232.

To substantiate the complaint of probing questions from the Court Martial, the following extract at pages 36 to 39 of the record of proceeding have been reproduced thus:

"Question: They have asked this question and I will like to ask again. How did you come about Lt. Col. Maxwell?

Answer: It was on the day Mr. Nweze and Emmanuel booked appointment for me to come to MOD. He was the one who received me. I never met him before.

Question: Did he introduce himself as Lt. Col. Iberi or as Lt. Col. Maxwell?

Answer: Lt. Col. Maxwell.

Question: Did you appreciate that the supplies being given to you was capital intensive and you were not capable of doing it?

Answer: I felt I don't have such money.

Question: You were not capable, but you continue to succumb to the team pressure of demand for money to facilitate in one way or the other. This situation was very clear to you, yet you continue to provide the money. Are you honest? (emphasis mine)

Answer: As at the point in time that I tried to pull out, they threatened. My life was in danger. They were trailing me.

Question: You told this court you are 48 years old, you cannot change word (intimidation)

I don't think a man of 48 years, will easily give up to black-mail, what effort did you take to protect yourself? etc.

(italics mine)."

The foregoing is but, the tip of the iceberg as regards the nature of the instant court's interference albeit obtrusively with the court proceeding to subject the appellant to a gruelling session of highly probing and tendentious questioning. That the instant Court Martial like every other court is allowed a wide latitude under section 223 of the Evidence Act, 1990, to raise questions as to enable the court clear some doubts and ambiguities in any proceedings is not disputed but it is no licence in doing so to descend into the arena and abandon the primary function as the umpire of holding the scales of justice between the contesting parties before it. Any bystander watching the above scenario before the instant Court Martial, would be put to immediate apprehension of the likelihood of bias perpetrated by the court itself. In the instant matter, the questioning not only became so incessant and clearly partial, but were directed to filling the factual gaps in the prosecution's case. The attitude of the court to this kind of unfairness in court proceedings abound. I shall come to that later.

Without delving too deeply on the constituents of bias or likelihood of bias as such in this matter, it must be pointed out however, that mere suspicions is insufficient to ground either bias or likelihood of bias. The test of bias or likelihood of bias as I anticipated earlier in this judgment is objective and not subjective. That is to say, whether there is a reasonable suspicion of bias or likelihood of bias has to be looked at from the objective position of a reasonable bystander. Once a bystander comes to the conclusion that the conduct of the proceedings was unfair to the aggrieved party as the appellant in this matter in the sense that, the court did not treat fairly and equally with the parties in the matter a case of bias or likelihood of bias is proved. See Akoh & Others v. Abuh (1985) 3 NWLR 696. The court may in such circumstances, order that the accused be discharged and acquitted or order a retrial. See Akinfe v. The State (1988) 3 NWLR (Pt. 85) 729.

I find that in the conduct of the proceeding, the Court Martial did not treat the parties fairly and equally and so a case of bias or likelihood of bias has been made out. See Akoh & other v. Abuh (supra). The court may therefore, order that the accused be discharged and acquitted or order a retrial. See Akinfe v. The State (1988) 3 NWLR (Pt. 85) 729. In other words, the appellant's complaint as encompassed under issue three is sustained.

The issue of bias was further considered in David Uso v. C.O.P (1972) 11 SC 37 at 45 to 47. See also Nigerian Army v. Onyenubi exparte Ojo (1993) 3 UILR 156; Okoduwa v. Nigerian Army (1988) 2 NWLR (Pt. 76) 333; Obiora v. Osele 1 (1989) 1 NWLR (Pt. 97) 279; Abodunrin v. Arabe (1995) 5 NWLR (Pt. 393) 77; Col. Mohammed v. Nigerian Army (1998) NWLR (Pt. 557) 232.

The prosecution having failed to prove the two-count charge preferred against the appellant in this matter beyond reasonable doubt, this appeal should be allowed. I allow it and set aside the sentence and conviction passed on the appellant by the aforesaid Court Martial. I order that the appellant be acquitted and discharged on all the counts.

**OGUNTADE, J.C.A.:**

I have had a preview of the lead judgment by my learned brother, Chukwuma-Eneh, JCA. He has comprehensively discussed the facts and the applicable principles of law.

I am in agreement with him that the prosecution failed to establish the guilt of the appellant beyond reasonable doubt as required by law. I would also allow this appeal; I discharge and acquit the appellant.

**ADEREMI, J.C.A.:**

I agree with my brother, Chukwumah-Eneh, JCA, whose reasons for judgment I had the privilege of a preview that the appeal is metitonous. I would also allow it and set aside the sentence and conviction foisted on the appellant by the Court Martial.

As a corollary, I would also order his discharge and acquittal on all the counts.

Appeal allowed.