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AN APPRAISAL OF THE OFFENCES AND PUNISHMENTS UNDER THE DISHONOURED CHEQUES (OFFENCES) ACT IN NIGERIA

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ABSTRACT

This paper appraises the offences and punishments under the Dishonoured Cheques (offences) Act in Nigeria. It notes that there are discriminatory penalties or punishments for the offences in relation to individual and body corporate. It further notes that the penalties are less severe and are not capable of deterring potential violators. The paper also examines the statutory defences as contained in the Act and argue that such defences may operate to defeat the very purpose of the Act from the way and manner the said defences are couched out in the Act. The paper further discusses the offences and punishments in other jurisdictions and concludes that the said penalties are more severe and capable of deterring potential violators of the offence. The paper therefore recommends a review of the penalties to make them more severe and capable of deterring potential violators as well as other appropriate measures to address the inadequacies in the Act.

Keywords: Deterrence, Criminality, Proportionality Of Punishment, Criminal Law, Nigeria.

1. INTRODUCTION

The offence of dishonoured cheques was originally provided under section 419 of the then Criminal Code indirectly on grounds of "false pretences". It was difficult to convict an accused person charged under that law. In view of this difficulty, the law was amended in Lagos only in respect of the Criminal Justice (Miscellaneous provision) Act, 1966 to loosen the unfortunate grip of "false pretences" on the enforcement procedure. The following amendments were made; (i) "Any other fraud" was added to false pretences; and, (ii) Greater room to ensure that the accused person was convicted was provided in a new section 419B theory.[1] However, in 1976, the Okigbo committee on Nigerian Financial System was set up and one of the recommendations of the committee was the need for a nation-wide penal legislation to prohibit the use of worthless cheques in commercial transactions. This recommendation was accepted by the Federal Government which subsequently enacted the 1977 Act a few months after. Thus amendment of the Criminal Justice (Miscellaneous provision) Act 1966 was dispensed with.

[1] Anifalaye, J. "Dishonoured Cheques Offences Acts, 1977. No.44:2 years after" Ajibola B. and Awa U.K.. (eds) *Banking and other Financial Malpractices in Nigeria* (Lagos and Oxford, Malthouse Press, 1990) p. 57

For instance, the term "false pretences" was removed and the time limit which was specified i.e. "three months" was removed and replaced with a reasonable time.[2]

1.2 Offences and Punishments

(a) Offences by Individual

Under section 1 of the Act[3] an offence would be committed in either of the following circumstances. Where any person obtains or induces the delivery of any thing capable of being stolen either to himself or to any other person or obtains credit for himself or to any other person by means of a cheque which when presented for payment within a limited period of three months from the date of the cheque is dishonor on the ground that there is insufficient funds or no funds were standing to the credit of the drawer of the cheque with a paying banker shall be guilty of offence. On conviction, an individual would be sentenced to improvement for two years without the option of fine[4] and in the case of a body corporate, it would be sentenced to a fine of not less than ₦5,000[5].

To convict an accused person on the provision of Section 1 (1) (b) of Dishonoured Cheques (offences) Act, the prosecution must prove that the accused had mens rea and actus reus. Mens rea means a guilty mind. An actus rus 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 the guilty act. The guilty mind instigated 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[6].

Where a person is charged with the issuing of dud cheque by virtue of the provisions of section 1 (1) b of the Dishonoured cheques (offences) Act, the prosecution must prove the following[7].

(a) That the accused person obtained credit by himself;
(b) That the cheque was presented within 3 months of the date thereon, and;
(c) That on presentation the cheque was dishonoured on the ground that there was in sufficient fund standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn.

In *Abeke v State*[8], the appellant was charged for issuing a dud cheque under section 1 (1) b of the Dishonoured Cheques (offences) Act No44 of 1977. It was alleged that he obtained a credit of ₦3,300.00 (Three Thousand, Three Hundred Naira) from one Ganiyu Ajayi by means of cheque No, UDB130480 Nigeria- Arab Bank Nigeria Ltd and the said cheque when presented on the 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. Both the prosecution and accused person called witnesses. The main defence of the accused was that she did not issue the cheque. In its judgement, the trial court found the appellant guilty as charged. It sentenced her to a two – year term of imprisonment. On appeal to the court of Appeal, it was dismissed on further appeal to the supreme court, the supreme court considered the provision of section 1 (1)

[2] *ibid.*
[3] Cap DII Laws of the Federation 2010
[4] Section 1 (b) of the Act. Section 1 (b)I does not provide for option of fine – see *Nzekwesi v FRN* (2003) FWLR (pt 155) at 721
[5] *Ibid*
[6] *Abeke v State* (2007) 9 NWLR(pt 1040) 41 at pp429-430
[7] Ibid at p. 460 par. C - E
[8] *Supra*

(2) (3) of the Act and found that the prosecution duly discharged the burden of proof. The Appeal was accordingly dismissed.

(b) Defences

An accused person would be acquitted of an offence under this section if he can convincingly prove before the trial court that even through his cheque had been dishonoured for lack of funds or of insufficient funds, nonetheless, at the time he issued the cheque there were reasonable grounds for him to believe that it would be honoured when duly presented for payment by the payee within 3 months of the date on that cheque and that in fact, he entertained that believe at that time.[9]Anifalaye has lamented on the vitiating effect of this defense on the fundamental provision of section 1 (1) of the Act. He stated thus:

> It is hardly in doubt that the statutory defense is a condonation of iniquity for it effectively denies that any bank customer has a duty to take care that his account is actually in funds before drawing any cheque. That regrettable defense has considerably vitiated the force and effect of the fundamental provision in section 1 (1) of the Act and therefore has rendered the entire 1977 Act less meaningful[10].

The writer equally shares in this lamentation by the erudite author. Indeed, it was this defense that the accused person in the following case put up and was discharged and acquitted. In *State v Esho*[11], the accused person was charged with a two - count charge of obtaining money by false pretence contrary to section 359 of the Criminal Code Vol. 1, cap 28, Laws of Western Nigeria, 1959 and issuing a dishonoured cheque contrary to and punishable under the section 1 (i) (b) of the Dishonoured Cheques (Offences) Act 1977. The defense of the accused person was that he had an expectation that his bank would credit his account with some funds since the bank had promised to grant his overdraft facilities, before he issued the cheque. The court held that if the accused person had reasonable ground to believe that his cheque would be paid when he issued it, then he would not be guilty. But in *FRN v Lawal*,[12] the accused person was found guilty and convicted under section 1 (i) (b) of the Act because his belief that sufficient money was available in his account for payment was not based on reasonable ground.

It is writer's view that the term "reasonable ground" is vague and susceptible to subjective view point. This is based on the fact that the Act does not define what reasonable ground means and therefore it becomes a matter of fact depending on the circumstances. It is suggested that the term reasonable ground should be defined to clear any ambiguity.

(c) Offences by Body Coporate

Under section 2 of the Act, the veil of a body corporate is lifted to the extent that any director, manager, secretary or other similar company staff or any person purporting to act in such capacity who has been exposed by relevant proof in the course of the trial of a company to have aided by consenting to or conniving at, or to have facilitated by any "neglect" of his official duties, the criminal issue of a cheque under this Act, must be held jointly guilty of the same offence for which the company is also guilty and punishment meant for an individual under section 1 (1)b of the Act, must be meted out accordingly to that staff.

[9] Ibid Section 1 (3) 9 of the Act
[10] "Dishonoured cheques (offences) Act. 1977 NO. 44 12 years after" op. cit p. 59
[11] (1976 - 1984) 3. N.B. L. R. p. 661
[12] (1976 - 1984) 3 NBLR p. 850

In *Oladele Fajemirokun v Commercial Bank (Nig) Ltd & Anor*[13], the applicant/appellant was the chairman of Broad Based Mortgage Finance Ltd and the finance Company to the knowledge of the chairman was indebted to the 1st respondent in the sum of ₦2 Million. Broad Based Mortgage Finance Ltd issued two cheques exhibits 'A' and 'B' which were however, returned. This happened in November, 1993 and in January, 1994 two cheques exhibits 'C' and 'D' were issued for the same purpose and which were also unpaid. The case was lodged or reported to the FIIB and the Police invited both the managing director and the chairman of Broad Based Bank for interrogation and was detained by the police. On an application by the chairman of the Finance company for the enforcement of his fundamental human right, the trial court held in substance, that the issuance of dud cheques by the Finance Company was a criminal offence and therefore the arrest and detention of the applicant did not infringe his fundamental right and the application was accordingly dismissed. The appeal before the court Appeal was dismissed and on further appeal to the Supreme Court, it was unanimously dismissed by the Supreme Court. The Supreme Court considered section 2 of the Dishonoured Cheque (offences) Act and himself as a person with the capacity to act for and on behalf of Broad Based Mortgage Finance Ltd and therefore was soiutly liable for the offence of issuance of the dud cheque. The dud cheque was dishonoured on the ground that appellant had not sufficient funds in her account to cover the face value of the said cheque. Both the prosecution and the accused called witnesses to testify for them. In its judgement, the trial court found the appellant guilty as charged. It sentenced her to a two year term of imprisonment. The appellant appealed to the court of Appeal which dismissed the appeal. On further appeal to the supreme court, the supreme court considered the provisions' of section 1 (1) (2) (3) of the Dishonoured Cheques (Offences) Act and found that from the facts the prosecution duly discharged the burden of proof as provided in the afor-mentional provision. The Supreme Court unanimously dismissed the appeal.

1.3 Summary Trial

Offences under the Act are summarily tried by the High Court of the state where the offence was committed.[14] It is here suggested that both the magistrate court and the High Court of the State should have concurrent jurisdiction to try the offences under this Act. This is based on the summary nature of the trial.

1.4 Efforts to Check Cases of Issuance of Dishonoured Cheques by Regulatory Authorities

There have been renewed efforts by Central Bank of Nigeria to check cases of issuance of dud/dishonoured cheques. These have been through paid adverts in Daily Newspapers, Television and Radio across the country. There are also posters in the banking halls, all of which warn people from issuing dud/dishonoured cheques and the risk of being convicted and sentenced to two years imprisonment without option of fine. The former Managing Director and Chief Exective of IBTC Chartered Bank, Mr. Atedo Peterside had once called for life imprisonment for anyone caught in the act[15]. It is suggested that CBN should carry its enlightenment programme to the market places as well as other public places like churches, schools rather than restricting it to the banking halls. Some of the people who issue dud or dischonoured cheques are illiterate traders or businessmen who erroneously believe that there is no law punishing issuance of such cheques. The paid adverts should be rendered in our local languages especially for the benefit of the illiterate traders. The call for life imprisonment is unnecessary. Rather, there should be strict enforcement of the Act with punishment meted out

[13] (2009) 21 WRN at 1
[14] Section 3 of the Dishonoured Cheques (offences) Act cap. DII Laws of the Federation 2010
[15] The Guardian, Wednesday September 13, 2006. P. 27

to the offenders in accordance with the provisions of the Act. The penalties for violation of Act appear to be discriminatory. While in the case of individual, he shall be sentenced to imprisonment for two years without an option of fine[16], the penalty for violation of the act by a body corporate shall be fine of not less than N5,000[17]. It is our view that the punishment prescribed for violation of the Act by an individual is severe and capable of deterring intending violators. However that of a body corporate is grossly inadequate and less severe to serve as a deterrent.

In *Nzekwesi v FRN*[18] appellant as the second accused was charged before the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal in Lagos for obtaining credit for himself by means of cheques which when presented for payment within 3 months of the date of the cheque, were dishonoured on the ground of no funds or insufficient funds standing to the credit of the appellant in the bank on which the cheques were drawn contrary to and punishable under section 1 (b) (i) of the Dishonoured Cheques (offences) Act cap 102 LFN 1990. He was convicted and sentenced to two years imprisonment or N100,000.00 fine in lieu of the count of issuing dud cheques. Appellant not satisfied with the judgment of the Tribunal appealed to the Court of Appeal particularly on the sentences passed by the tribunal. The Court of Appeal stated as follows:

> The sentences are not only outstandingly lenient but also patronizing. It is ridiculous that a person who after refunding N58,022,757.00 the bank was defrauded still has more, that N199,747,138.10 to refund could be sentenced to such paltry terms of imprisonment or fine. The sentence does not serve as a determent at all rather it does encourage financial crime which was so prevalent at the material time and even now to warrant the government establishing tribunal specially to combat the menace of the crime…section 1 (i) does not provide for option of fine but the learned Tribunal Chairman gave an option of fine.

While the writer is not totally against the award of option of fine, it is our view that fine should only be awarded when the law has provided for it. In this case, section 1(i) b(i) does not provide for option of fine. The Tribunal Chairman therefore lacked the jurisdiction to award such fine. Notwithstanding the above, we suggest that section 1(i) b(i) should be amended to provide for option of fine only in exceptional circumstances. The amount of the fine to be paid should be very substantial.

2. A LOOK AT OTHER JURISDICTIONS

In USA, check kitting which is a similar offence attracts a fine of $1,000,000.00 or imprisonment for up to 30 years or both[19]. The above is a federal remedy, but in addition to that, state law often provides for alternative civil and criminal consequences. Law will vary from state to state. For instance, under the Ohio Law, it is stated as follows:

> No person, with purpose to defraud, shall issue or transfer or cause to be issued or transfer a check or other negotiable instrument knowing

[16] Section 1 (i) bi of the Dishonoured Cheques (offences) Act. Cap DII Laws of the Federation 2010
[17] Ibid. Section 1 (1) b (ii)
[18] (2003) FWLR (pt 155) at 721
[19] http://en.wikipedia.org/wiki/check 22/7/2015 4. pm

> that it will be dishonoured or knowing that a person has ordered or will order stop payment on the check or other negotiable instrument[20].

Interestingly, there are more defenses in the statutory provisions in the State Law which also provide for alternate civil and criminal consequences. For instance, under the Indiana statute; it is a defense if the person issuing the check "pays the payee or holder the amount due, toghter with protest fees and any service fee or charge which may not exceed $27.50 or 5% but not more than two hundred and fifty dollars ($250) of the amount due, that may be charged by the payee or holder, within 10 days after the date of mailing by the payee or holder of notice to the person that the check, draft or order has not been by the credit institution[21],

Furthermore, it is not a crime if the payee or holder knows the person has insufficient funds to ensure payment or that the check, draft, order is post-dated or insufficiency of funds or credit result from an adjustment to person's account by the credit institution without notice to the person. It is the writer's view that these defenses under the state laws in USA on check knitting could be adopted and incorporated into our own law but however, with modification to suit our peculiar circumstances.

It is further interesting to note that the United State provisions on check kitting appear to be more comprehensive or unrestrictive. For instance, it is not only issuance of dud cheque that is a crime, issuance of other negotiable instruments like Draft, Promissory note, Bill of Exchange etc which are dishonoured on presentation is equally a crime. Under the Dishonoured Cheques (Offences) Act, it is only the issuance of a dud cheque, that is a crime. The writer vehemently suggest the amendment of the Dishonoured Cheques (Offences) Act to make the issuance of other dud negotiable instruments other than a cheque a crime. It is our further suggestion that the penalty for issuance of a dud cheque by a body corporate which is a fine of not less than N5,000 should be increased to not less than N500,000.00

In England, issuance of dud cheque is a crime under the English Theft Act of 1968. In *Director of Public Prosecution v Turner*[22]**.** The House of Lord held that the accused, who had paid a debt by cheque which he knew would be dishonoured was properly convicted of dishonestly obtaining for himself a pecuniary advantage, i.e. the evasion of a debt for which he was then liable by deception, contrary to section 16(2) (a) of the Theft Act, 1968. However, the effect of the decision has now been amended in that section 16 (2) (a) has been repealed by the Theft Act, 1978. Under the new provision in the Theft Act, 1978 a debtor who by deception gains more time to pay a debt does not commit an offense unless he intends never to pay.

In *Metropolitan Police Commissioner v Charles*[23]**,** the House of Lords held that the offense of obtaining a pecuniary advantage by deception contrary to section 16(i) of the Theft Act, 1968 was committed by the holder of a cheque card who in the course of one evening at a gaming club, drew 25 cheques each for 30 pounds and backed by the cheque card, which, when presented, put his bank account into debit far beyond the limit of his authorized overdraft. Anifalaye has suggested that a new legislation on dishonoured cheques ought to compel bankers to disclose relevant information to investigation police officers concerning the account balances of bank customers suspected of using worthless cheques with fraudulent intention[24].

It is submitted that the learned author is advocating the inclusion of a clause in the Dishonoured Cheques (Offences) Act to revoke the Bank Secrecy Rule. This writer is unable to agree with him because it will amount to a violation of the constitutional right of the customer which is the right to privacy even though such right is not absolute and may be derogated upon in certain circumstances.

[20] Revised Code 2913.11 (2) B
[21] Indiana's Statute IC 35 – 43-5-5
[22] (1974) ACT 357
[23] (1976) Act 234
[24] Anifalaye, S., *op. cit*. p. 64

However, where such provision is to be included, due process must be followed. A valid court order must be sought and obtained by the investigating police officer to compel the bank to disclose the account balances of the bank customer. The customer must be put on notice to ensure fair hearing. However, where the matter is already pending in court there may be no need to put the customer on notice since the matter is already in court and the affected customer is attending the court proceedings. The prosecutor may only apply to the court for an order to enable the police to have access to the account balance of the customer. Thus, the customer is given opportunity to either oppose such application or consent to it. In that case, there is fair hearing and also the constitutional right to privacy of the customer is not violated. The court frowned against this violation of the private rights of the citizen especially by the police, who often times, obtained court orders to inspect the bank accounts of suspected offenders and obtain relevant evidence when there was no proceeding pending in court. In *International Merchant Bank Nigeria Ltd. V. Magistrate Titus Agbolade, Inspector General of Police, and Attorney- General of the Federation*[25]**,** the learned judge, Justice Omotoso quoting from the ruling of Taylor C.J. (as he then was) had observed as follows:

> It is difficult for me to imagine for one moment that the practices, such as a practice taking place in all magistrate courts, in truth and in fact takes place. I find it hard to believe that such a grave violation of private rights can be sanctioned by our courts without hearing of the person affected, without any proceedings civil or criminal being before the courts.

It is therefore suggested that due process must be absolutely followed by the investigation police officers if the suggestion for an amendment of the Dishonoured Cheques (Offences)Act to compel the bank to disclose the account balances of the customers to the investigation police officers is to be adopted.

3. CONCLUSION

The Dishonoured Cheques (Offences) Act is a fine legislation intended to check cases of issuance of dud cheques in Nigeria. It metamorphosed from the criminal Justice (miscellaneous provision) Act 1966 which was then applicable only in Lagos. The Act has not undergone any review since its enactment in 1977. Some of the provisions of the Act especially the ones prescribing penalties for the offences require urgent amendment to meet with the present exigencies. Indeed, a wholistic review of the Act is advocated to meet with best practices and in line with what is obtainable in other jurisdictions. There is also the need for aggressive public enlightenment campaign on the provisions of the Act.

[25] Suit No M/126/86 unreported