

CHAPTER ONE

THE EMERGENCE OF PLEA BARGAINING IN NIGERIA

1.0 Introduction

In this chapter, the author examines the evolution of plea bargaining in Nigeria; meaning and types of plea bargaining. The issue of the constitutionality of plea bargains and the underlying problems in the administration of criminal justice that provided the environment for the evolution of plea bargains are also examined. Chapter one is the foundation for the other issues examined in other chapters of the book such as procedure for plea bargains; the roles of the court, the prosecution, and defence; and the impact of Sentencing Guidelines.

1.1 Emergence of Plea Bargaining in Nigeria

Plea bargain in criminal cases emerged on the legal scene in Nigeria in the year 2005 in relation to the prosecution of economic crimes by the Economic and Financial Crimes Commission (EFCC) established under the Economic and Financial Crimes Commission (Establishment, etc.) Act (EFCC Act).¹ There were allegations then that EFCC was engaging in plea bargaining with persons accused of economic and financial crimes.² The sudden and unexpected guilty pleas of defendants standing trial for economic and financial crimes,

¹ Cap E1 Laws of the Federation of Nigeria 2010.

² See Tobi Soniyi, "Balogun Withdraws Suit Against EFCC", *The Punch*, November 18, 2005 at p. 8 (reporting that Tafa Balogun has withdrawn a suit instituted against EFCC challenging the powers of EFCC to prosecute him and speculating that the withdrawal might not be unconnected with alleged plans for a plea bargain).

who had vigorously contested the criminal charges against them lent credence to the allegations. The cases involved guilty pleas entered by Mr. Emmanuel Nwude³ and Tafa Balogun.⁴ At that time, officials of EFCC consistently denied the existence of any plea bargaining with any of the defendants.⁵

The denial of any plea agreement by EFCC then was not surprising in view of the absence of any clear-cut legal provision to support the practice of plea bargaining. The only legal provision then which allowed EFCC to settle criminal cases with defendants is section 14(2) of the EFCC Act that empowered EFCC to compound any offence punishable under the Act by accepting such sums of money as it thinks fit not exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.

³ See Kayode Kotefe, “\$242m Scam: “Nwude, Okoli Bag 22 years Respectively” *Saturday Punch*, November 19, 2005. The report indicated that Emmanuel Nwude and Nzeribe Okoli who stood trial for defrauding a Brazilian Bank of the sum of \$ 242m pleaded guilty and were convicted. The report noted that the original charges against the accused persons were reduced from 91 to 16 because of plea bargain entered into by all the parties with a view to reaching a quick conclusion of the case). The report also referred to the earlier case of Mrs. Amaka Anajemba who was earlier convicted and sentenced when she pleaded guilty to the amended one count charge of “non-disclosure of assets” on January 15, 2005.

⁴ See Lemmy Ughegbe, “Tafa Balogun Pleads Guilty” *The Guardian* Wednesday Nov. 23, 2005 at pp. 1-2 (reporting that Tafa Balogun pleaded guilty to money laundering and other charges against him after which he was sentenced.

⁵ See Adeniyi Adeshina, “EFCC Breached Pact with Balogun – Abayomi” *The Punch* Friday, December 9, 2005 p.9. (reporting that lead counsel to Tafa Balogun alleged that EFCC reneged on plea bargaining agreement reached with Tafa Balogun and the reaction to the allegation by EFCC denying any such agreement). See also A. O. Alubo, “Plea Bargaining: History and Origin” in E. Azinge & L. Ani eds. *Plea Bargaining in Nigeria: Law and Practice*, (Nigerian Institute of Advanced Legal Studies, 2012) 1 at p. 21.

Plea bargaining is deeply entrenched in the administration of criminal justice in the US. It is however less favorably tolerated in common law countries such as England, Wales, Australia and Scotland.⁶ It is, therefore, not surprising that Nigeria with its common law heritage had no specific provision on plea bargaining in Nigeria before 2007. It is however significant that in the US, the practice of plea bargaining predated its legal recognition, beginning with a series of Supreme Court decisions,⁷ which gave judicial support to the practice. The emergence of informal plea bargaining in Nigeria around 2005 tracks the USA experience of the emergence of the practice of plea bargaining before the evolution of a legal framework.

The first enactment in Nigeria, providing a legal framework for plea bargaining, is the Administration of Criminal Justice Law of Lagos State 2007 (ACJL 2007). The ACJL 2007 was later repealed and replaced with the Administration of Criminal Justice Repeal and Re-enactment Law of Lagos State 2011 (Lagos State ACJL). The Federal Administration of Criminal Justice Act 2015 (ACJA) and a host of other State legislations have since followed. Other recent developments impacting the practice of plea bargain in Nigeria include the adoption of Sentencing Guidelines across the States, Practice Directions and the emergence of Plea Bargain Manual issued by the Attorney General of Lagos State and other prosecuting authorities.

1.2 Meaning and Types of Plea Bargains

Section 494(1) of the ACJA defines a plea bargain as the process in criminal proceedings whereby the defendant and the

⁶ See Susan R. Moody, & Jacqueline Tombs “Plea Negotiations in Scotland” *Criminal Law Review*, Jan- Dec (1983) 297 at p. 298).

⁷ *Santobello v. New York* 404 U.S. 257, (1971); *Corbitt v. New Jersey* 439 U.S. 212 (1978) and *Bordenkircher v. Hayes* 434 U.S. 357 (1978).

prosecution work out a mutually acceptable disposition of the case; including the plea of the defendant to a lesser offence than that charged in the complaint or information and in conformity with other conditions imposed by the prosecution, in return for a lighter sentence than that for the higher charge subject to the Court's approval.

From this definition, a plea bargain usually involve a charge bargain with the prosecutor agreeing to drop some counts or reduce the charge to a less serious offence in exchange for a guilty plea or no contest from the defendant.⁸ A plea bargain may also take the form of a sentence bargain in which the prosecutor agrees to recommend a lighter sentence in exchange for a plea of either guilty or no contest from the defendant.⁹ A sentence bargain involves the exchange of a guilty plea for a promise of prosecutorial leniency. Here, although the charge may accurately reflect the conduct for which the defendant is charged, the prosecutor recommends a lenient sentence.¹⁰

A plea bargain may also involve a charge and sentence bargain. It is in this context that section 76(1) of the Lagos State ACJL provides that the prosecutor and the defendant or his legal practitioner may before the plea to the charge, enter into an agreement in respect of - (a) a plea of guilty by the defendant to the offence charged or a lesser offence of which he may be convicted on the charge, and (b) an appropriate sentence to be imposed by the Court if the defendant is convicted of the offence to which he intends to plead guilty.

⁸ Bryan A. Garner, ed. *Black's Law Dictionary*, 9th Edition, Thomson Reuters, at p. 1270.

⁹ Ibid.

¹⁰ James F. Parker, *Plea Bargaining*, [1972] 1 Am. J. Crim. L. 187 at p. 188.

The ACJA allows the prosecution generally to conclude a plea agreement with a defendant without specifically indicating a charge and sentence bargain although it expressly allows the prosecution and defence to agree on an appropriate sentence to be imposed by the court.¹¹ While a charge and sentence bargain may be different species of plea bargain, they are not mutually exclusive. A charge bargain is usually accompanied by a sentence bargain. The ultimate result of a charge or sentence bargain is that the accused person ends up getting a lighter punishment.

Whichever form a plea bargain takes, an important feature is that the plea agreement is not binding on the court and is subject to the approval of the court. Where a plea bargain includes a charge bargain and a sentence bargain, the agreed sentence is only a recommendation to the court. The court is not bound to impose the agreed sentence. The court reserves the power and discretion to decide whether the sentence is the appropriate sentence for the offence having regard to the sentence prescribed for the offence by substantive criminal law and the provisions of any applicable Sentencing Guidelines.¹²

A charge or a sentence bargain may also involve a fact bargain by the parties. Where, for instance, the prosecution decides to offer a defendant a reduced charge of manslaughter in place of murder, the facts, which would be presented by the parties as basis for the plea agreement would reflect the elements of the offence of manslaughter. The defendant would plea to the agreed facts and if the court accepts the recommended sentence for manslaughter, the court will convict. The position in the US is that while judges can review the charges filed to ensure there

¹¹ Section 270(4)(b) ACJA.

¹² The ACJLs and ACJA empower the court to accept or reject a recommended sentence contained in a plea bargain agreement. This is discussed fully in Chapter Two.

is sufficient evidence to support them, they cannot add or modify counts or replace the charges with more serious ones to ensure that the charges fully reflect the facts of the case. Once the parties have agreed to a charge bargain, Judges can either accept or reject the agreement but cannot modify it.¹³ This is also the position in Nigeria. The prosecution, pursuant to sections 174 and 211 of the Constitution exercises prosecutorial discretion to decide what charges to file. The Nigerian Supreme Court has held in *State v. Ilori*¹⁴ that the exercise of prosecutorial powers is not subject to judicial review. Therefore, a court cannot modify a charge forming the basis of a plea agreement to insert a more serious offence. The court is however obliged to ensure that there is evidence supporting the charge. The court is also required to ensure that the defendant knowingly and voluntarily entered into the agreement. Once the prosecution reviews the facts and the defendant pleads guilty to facts, which supports the essential elements of the offence, the only option left for the court is to decide whether to accept or reject the recommended sentence.

1.3 The Constitutionality of Plea Bargains

The author has argued elsewhere that the power to plea bargain is conceivable within the general discretionary powers of the Attorney General conferred by the Constitution.¹⁵ The Attorney General of the Federation (AGF) and the Attorney General of a State (AGS) are conferred with prosecutorial discretionary powers under sections 174 and 211 of the Constitution to institute, take over, and discontinue criminal prosecution. The

¹³ Jenia Iontcheva Turner “Prosecutors and Bargaining in Weak Cases: A Comparative View” at p 3, available online at https://scholar.smu.edu/cgi/viewcontent.cgi?article=1312&context=law_faculty (accessed on 17th February 2020).

¹⁴ [1983]1 S.C.N.L.R. 94.

¹⁵ Akeem Olajide Bello, “Plea Bargaining and Criminal Justice in Nigeria: Issues, Problems and Prospects” in (2006) 1 *Current Law Series*, 42 at p. 49.

Supreme Court in *State v. Ilori*¹⁶ has held that the prosecutorial powers of the AGF and AGS is not subject to judicial review. The prosecutorial power to plea bargain is within the wide powers granted to the AGF and AGS by the Constitution. Therefore, the ACJLs and the ACJA are not the sources of the power of the AGF and AGS to plea bargain. The Laws merely provide a framework for the exercise of the powers of the AGF and the AGS for plea bargaining in our courts.

It is important to underscore the fact that a defendant does not have a constitutional right to demand or insist on a plea bargain with the prosecution. A defendant is guaranteed a constitutional right to fair trial and legal assistance and not a right to plea bargain. Whether a defendant is offered a plea bargain depends entirely on the exercise of prosecutorial discretion. In *Lafler v. Cooper*,¹⁷ Justice Scalia dissenting stated that “There is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.”¹⁸ The author submits that the same position applies in Nigeria.

The support given to the practice of plea bargain by the US Supreme Court in a series of cases¹⁹ has not succeeded in stifling the clamour of those who have argued that plea bargaining is unconstitutional.²⁰ Plea bargaining implicates

¹⁶ See supra note 14.

¹⁷ 132 S. Ct. 1376, 1395 (2012).

¹⁸ Justice Scalia quoted *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977).

¹⁹ *Santobello v. New York* 404 U.S. 257, (1971); *Corbitt v. New Jersey* 439 U.S. 212 (1978) and *Bordenkircher v. Hayes* 434 U.S. 357 (1978).

²⁰ Timothy Lynch, *The Case Against Plea Bargaining* (arguing that government officials use their powers to pressure people who have been accused of crime and who are presumed innocent to confess their guilt and waive their constitutional rights to a formal trial) available online at <http://www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf>. (accessed on 14 March 2020); see also “The Unconstitutionality of Plea Bargain” *A Report by The President’s Commission on Law*

some constitutional rights of defendants. The rights implicated by plea bargaining in the US Constitution and similar rights under the 1999 Constitution are: (i) presumption of innocence until proven guilty;²¹ (ii) the right to a fair hearing in public;²² (iii) the privilege against self-incrimination;²³ and (iv) the right to examination of witnesses called by the prosecution.²⁴ When a defendant enters into a plea agreement, the presumption of innocence in his favour is displaced. The prosecution is not required to prove defendant's guilt beyond reasonable doubt. A plea agreement is an act of self-conviction by a defendant, which negates his right against self-incrimination. When a plea agreement is reached the court proceeds to conviction and sentence without the need for any public trial and public examination of the witnesses for the prosecution by the defendant.

The crucial issue here is whether an agreement to plea bargain by a defendant violates constitutional rights or whether a defendant is permitted to waive them. The starting point for a consideration of this issue is the decision of the Nigerian Supreme Court in the case of *Ariori v. Elemo*.²⁵ The Supreme Court held that a waiver presupposes that the person who is to enjoy a benefit or who has the choice of two benefits is fully aware of his right to the benefits but he either neglects to exercise his right to the benefits or where he has a choice of

Enforcement And Administration of Justice, Task Force Report: The Courts (1967) *Harvard Law Review* Vol. 83 p. 1387. See also Samuel Oguche, "Plea Bargain in Nigeria: Constitutional Questions" in E. Azinge & L. Ani, eds. *Plea Bargaining in Nigeria: Law and Practice*, (Nigerian Institute of Advanced Legal Studies, Lagos, 2012) 26 at p. 50.

²¹ Section 36(5).

²² Section 36(4).

²³ Section 36(11).

²⁴ Section 36(6)(d).

²⁵ (2001) 36 WRN 94.

two decides to take one but not both. On the issue of the extent to which a person could waive fundamental rights, the court drew a distinction between fundamental rights that are for the sole benefit of the private individual and those that are for the benefit of the litigant and the public. The Court held that rights for the sole benefit of the private individual can be waived while waiver of the second category of rights is not permissible. The Court gave as example the right to speedy trial which a litigant can waive by asking for adjournments of the case. The Court however ruled that waiver of a right to a speedy trial is not permissible where the adjournment requested is of such a nature that the court will lose the advantage it has of accurate assessment of the witnesses it had observed in the course of trial. The court noted that such an adjournment would lead to injustice and that it is against public policy to compromise illegality. The Court also noted that having regard to the comparative educational backwardness, the socio-economic and cultural background of Nigerians, it would be wary in adopting constitutional interpretations from other countries. The court reasoned that the aforementioned factors impose a duty on the court to scrutinise every case of waiver of fundamental rights to see that the right waived falls within the first category.

The author has argued elsewhere that the constitutional rights of defendants implicated in plea bargaining fall within the first category of rights as classified by the Supreme Court. The said rights are for the sole benefit of defendants. If the law permitting plea bargaining stipulates substantive and procedural safeguards to prevent abuse of prosecutorial powers and prevents unfair treatment of defendants, the waiver of defendants' rights should be upheld as constitutional. Applying the decision in *Ariori v. Elemo*, a challenge to the constitutionality of plea bargaining in Nigeria is not likely to

succeed.²⁶ The laws regulating plea bargaining (examined in subsequent chapters) contain procedural and substantive safeguards to protect defendants and to ensure that they knowingly and voluntarily waive their rights.

1.4 The Case for Plea Bargaining in Nigeria

The need to promote the efficiency of the criminal justice system has been identified as the overriding cause for entering plea bargaining negotiations.²⁷ Plea bargaining enables prosecutors and the courts to process criminal cases speedily and efficiently. Available data indicates that in the US, Federal District Courts in 1998, 69,769 cases were filed and 60,958 entered plea agreements.²⁸ It is generally accepted that without the plea bargaining option the legal system would simply “crumble under the weight of cases requiring Juries and Judges.”²⁹

The administration of criminal justice in Nigeria has been plagued with several problems. These include delays in the administration of justice, inadequate judicial infrastructure (both human and material) to enhance speedy determination of cases, high crime rate,³⁰ overburdened prosecutors with heavy caseload, overcrowding in correctional facilities occasioned by high number of defendants awaiting trial and unavailability of funds to provide the support services required to ensure smooth administration of criminal justice. Plea bargaining provides an

²⁶ Akeem Olajide Bello, *supra* note 15, at pp. 55-56.

²⁷ See F. Herssick III and R. Saujani “Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defence Counsel, and the Judge,” (2001-2002) 16 *B.Y.U Journal of Public Law* 189.

²⁸ See C. Pastore and K. Macguire, (ed) *Sourcebook on Criminal Justice Statistics*, (United States Dept. of Justice, 1999) 419, Table 5.21, quoted in F Herssick III and R Saujani, *ibid*, p. 192.

²⁹ F Herssick III and R Saujani, *supra* note 27.

³⁰ See Summary of Crime Statistics in Nigeria, <http://www.cleen.org/crime.html> (accessed 20th March 2020).

option to address some of the problems plaguing the administration of criminal justice particularly the problem of heavy criminal caseload and cost to taxpayers of protracted criminal trials.

While it is important to carry out in-depth and detailed statistical surveys to verify some of the problems confronting the administration of criminal justice particularly the relationship between the volume of criminal cases and the time it takes to conclude criminal cases, there are some indications of delays in criminal trials in Nigeria. A survey of the length of time it took to process one hundred and thirty criminal cases from trial courts to the Supreme Court revealed that it took an average of eight years.³¹ It took an average of two years and eight months to complete a trial at the High Court.³² A number of reservations may be made on the result of the survey. First, the survey only covered reported criminal cases that went all the way to the Supreme Court. Unreported cases obviously have been omitted. Second, the survey did not cover cases in respect of which there were no appeals. Third, there is no indication of the geographical spread of the cases. While there may be heavy caseload in heavily populated cities, the same cannot be said of other less populated cities. The survey, therefore, cannot be relied on as presenting a good representation of the length of trials for criminal cases in Nigeria. The reservations notwithstanding, the survey demonstrates the problem of delay in criminal trials.

Plea bargaining will also enable the efficient use of public funds in the prosecution of criminal cases. Substantial

³¹ See J. Ogunye, *Criminal Justice System in Nigeria –The Imperative of Plea Bargaining* (Lagos: Lawyers League for Human Rights and Open Society Initiative for West Africa: 2005) pp. 150-159.

³² The computation was arrived at by adding up the length of time it took to conclude the cases and dividing the total with the number of cases.

resources are required to build courts, provided infrastructure, provide for Judges, prosecutors and support services for the justice sector. Plea bargaining would allow prosecuting authorities to efficiently allocate resources and concentrate resources where public interest demands that a criminal case should be prosecuted. The adoption of plea bargaining in the ACJLs across the States hopefully would result in increased use of the procedure to resolve criminal cases. There is the need to build the capacity of prosecutors to use plea bargain appropriately. The British Council in Nigeria is implementing the European Union funded programme, providing training on plea bargaining for Judges, Magistrates' Prosecutors and Defence Counsel.³³

1.5 Conclusion

This chapter examined the emergence of plea bargaining in Nigeria, the meaning and types of plea bargains, the constitutionality of plea bargains and the factors that provided the background for the emergence of plea bargaining in Nigeria. This chapter sets the background for Chapter Two, which focuses on procedural issues concerning plea bargaining in Nigerian courts

³³ The author has been involved in facilitating Plea Bargain/Sentencing Guidelines Training for Judges, Magistrates, and Defence Counsel, in Lagos, Cross River, Edo, Anambra and Kaduna States.