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Nigeria: Plea Bargaining – A Mockery of Criminal Justice Administration?

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Abstract
Proponents of the incorporation of Plea bargain as a feature of Criminal Justice Administration in Nigeria have argued strenuously that it remains a useful tool in aiding criminal justice administration and would solve the totality of the problems of delay in the criminal justice system. However, plea bargaining may potentially result in a backdoor perpetuation of corruption by errant public officers. The practice may also lead to a situation whereby the prosecution will overstate the charge in the first instance so that when it is time for bargaining, it would have a stronger bargaining power. This is unjust, inequitable and oppressive. Consequently, this article seeks to consider the concept of plea bargaining and its practice in Nigeria. Efforts will also be made in this paper to contend that if not properly handled, it may result in backdoor perpetuation of corruption by public officers and therefore not achieving the overall goal of justice for all. It may also be a subterfuge or an escape route for corrupt public officers.
Keywords: Plea Bargaining, Criminal Justice, Mockery, subterfuge

1. Introduction

Although Plea Bargaining is 'stricto sensus' not part of Nigerian Criminal Justice system, it has nevertheless become popular in the legal and socio-political lexicon in the country today. Many high profile cases instituted by the Economic and Financial Crimes Commission (EFCC), have in recent times been concluded on the basis of Plea bargaining. The first was the celebrated case of the world's biggest single scam of $242m by certain Nigerians- Mr. Emmanuel Nwude, Mrs. Amaka Anajemba and Mr. Nzeribe Okoli against a Brazilian Banker, Mr. Nelson Sakagu Chi and his bank, Banco Nor ceste SA, Sao Paulo, Brazil. The second case involved the alleged stealing of about N14b against the former Inspector General of Police, Mr. Tafa Balogun. In both cases, there were negotiations between the accused persons and the prosecutor (EFCC). The facts of the above cases will be considered in this work. Under the Nigerian law, where an accused person is willing and able to plead to a charge read against him, he may enter any or a combination of the following pleas.

(a) Plead to the jurisdiction of the court
(b) Plead to the defect in the charge
(c) Plead that he has been pardoned
(d) Plead autrefois Acquit or autrefois convict, that is, where an accused person shows that he had been tried by a court of competent jurisdiction for a criminal offence and had either been convicted or acquitted for the offence or for a criminal offence having the same ingredients as that offence.
(e) Plead guilty or not guilty
(f) Plead not guilty by reason of insanity (Oluwatoyin Doherty 1990).

In view of the fact that, Plea bargaining has not really been part of our criminal justice system until recently, a comprehensive meaning and or definition of Plea Bargaining will be given. The merits and demerits of Plea Bargaining will be considered as well as what Nigeria stands to benefit from the plea if it is adopted. We would also make necessary suggestions on the reforms required for it to be beneficial to the Nigerian Criminal Justice system. It will also be contended in this discourse that notwithstanding the merits of Plea bargaining and considering the way it is currently being applied by our courts, it may lead to backdoor perpetuation of corruption and a subterfuge for errant public office holders.

However, in United States of America, Plea bargaining is a significant part of the criminal justice system. In fact more than 90% of convictions come from negotiated pleas, which mean less than 10% of criminal cases result in a trial.

The United States Supreme Court had in several cases recognized Plea bargaining as an essential and desirable part of the criminal justice system (Santobello V. New York 1971)

In some common law jurisdictions, such as England and Wales and the Australian State of Victoria, Plea bargaining is permitted only to the extent that the prosecutors and the defense can agree that the defendant will plead guilty to some charges and the prosecutor will drop the remainder.

The courts in those jurisdictions have made it plain that they will always decide what the appropriate penalty will be and that no bargaining takes place over the penalty.

2. Meaning of Plea Bargaining

Plea Bargaining is defined in Merriam – Webster's Dictionary of law (Merriam-Webster 1996) as "the

negotiation of an agreement between the prosecution and the defense whereby the defendant pleads guilty to a lesser offence or to one or some of multiple offences in exchange for more lenient sentencing recommendations, a specific evidence or dismissal of other charges". Osborne's Concise Law Dictionary (Roger Bird 1976) defines it as "an arrangement by which a defendant to criminal proceeding may agree to plead guilty to one or more charges in return for the prosecution extending some advantage to him e.g. dropping another charge". Such a bargain will be closely scrutinized by the court and a judge should never indicate what sentence he has in mind to induce a defendant to change his plea. Simply put, plea Bargaining is a negotiation between an accused person and his lawyer on one hand and the prosecutor on the other, just as the accused person agrees to plead 'guilty' or 'no contest' to some crimes in return of either the reduction of the charges or dismissal of some of the charges. In some cases, an element of the bargain may recommend that the accused person reveal some information such as the disclosure of the location of stolen goods or giving information about fellow accused person(s) involved in the crime or promising to testify against the other accused persons.

One salient element of plea bargaining is that the judge must agree to the terms of the bargain or else the bargain is cancelled. It may also involve a guilty plea as charged with the prosecution recommending leniency in sentencing. The judge is however not bound to follow the prosecution's recommendation. It is instructive to note that the imperatives of plea bargaining make the system appealing to some Nigerians, as the country's justice administration is characterized with delays in the determination of cases. Perhaps it is apposite at this juncture to briefly discuss the facts of the cases earlier referred to in this article as it will further give an insight into the concept of plea bargaining and how it had been applied.

In Nwudes case, one of the accused persons in the said $242m scam case, Mrs Anajembe, who was involved in the original charge of conspiracy and obtaining money through false pretence, had her charge reduced to "non disclosure of assets". She pleaded guilty to that count, released some properties that were adjudged proceeds of the scam while Hon. Justice Joseph Oyewole of the Ikeja High Court sentenced her to six-month imprisonment on July 15, 2005. The other co-accused persons, Messrs Nwude and Okoli also made a dramatic volte-face, thanks to a mutually agreed plea bargaining on September, 22, 2005 and pleaded guilty to a reduced charge. Nwude and Okoli were accordingly sentenced by Justice Oyewole to five and four years imprisonment terms respectively. Similar situation also arose in Tafa Balogun' case (former Nigerian Inspector General of Police). After pleading to a reduced charge, he was sentenced to six months imprisonment. Balogun was initially arraigned on the alleged offences of stealing billions of Police Funds. After plea bargaining, the charges against him were reduced to eight count charge of "failure to cooperate with EFCC men probing him for alleged money laundering". He pleaded guilty and was sentenced to Four years and Eight months imprisonment on November, 22, 2005. However, he forfeited a number of properties and was also ordered to pay N4m fine.

Another case where plea bargaining was invoked was the case of the former Governor of Bayelsa State, Late Chief Diepreye Alamieyeseigha who was also prosecuted by EFCC for money laundering, false declaration of assets and illegal acquisition of properties. He however entered into a plea bargaining with the EFCC and was convicted on lesser charges and consequently sentenced to two years from the date of his arrest. He thereafter regained his freedom- supposedly benefiting from plea bargaining. The above mentioned cases have been highlighted to explain and elucidate the meaning of plea bargaining.

2.1 Arguments for and against Plea Bargaining

Suffice it to state at this juncture that, controversy has trailed the introduction of plea bargaining in our criminal justice system. While some analysts insist that there is no provision for the system in our criminal justice system, other schools of thought contend that plea bargaining remains a useful tool in aiding the administration of Justice. A constitutional lawyer once said **"**Although it is not expressly provided for in our law, it is part of the administration of justice just as the 'prerogative of mercy' by the President is part of the administration of Justice, once it is entered, it is binding in honour"(Tunji Abayomi 2008). Another Lagos based Legal practitioner opined as follows: "It is our belief that if the law allows criminal offenders to plea bargain and admit to the commission of crimes in order to obtain a downward departure from punishments, persons standing criminal trials and their lawyers will be less inclined to play all sorts of technical pranks in order to frustrate the prosecution of trials and that the plea bargaining procedure could turn out to be the magic wand that will solve the totality of the problems of delay in the criminal justice system."(J.T. Ogunye 2008). Some proponents of Plea bargaining had further argued that even though there are complications with the practice, this is true for most things in life and that when the pros and cons are considered, the pros far outweigh the cons. Nevertheless, from the various arguments and propositions, the following are some of the arguments in favour of plea bargaining.

- It reduces the time that would otherwise be consumed in criminal prosecution. Defendants (accused persons) can avoid the time and cost of defending themselves at trial, the risk of harsher punishment and the publicity a trial could involve.
- It removes the uncertainty of judicial prosecution as both parties know their fate beforehand. By adopting the plea, the prosecution is assured of obtaining a conviction. The prosecution

may wage a long, expensive and valiant battle and still lose the case as did prosecutors in O.J. Simpson murder trial in America and also in Nigeria regarding the trial of the current Senate President, Dr. Bukola Saraki at the Code of Conduct Tribunal where the prosecution lost the case in spite of the incriminating evidence against him.

- It helps the state to recover the looted and stolen properties or to obtain information on more important criminals which would not have been disclosed during full trial.
- It also helps the victim of the crime to have inputs in the overall determination of the case as well as he is usually co-opted into the negotiation scheme.
- It assists the court in managing the caseload and relieves pressure on the judicial institution. The court system is saved the burden of conducting a trial on every crime charged.

However plea bargaining has the following disadvantages.

- Plea bargaining amounts to judicial distortion of statutory provisions in that an accused person may be charged with an offence far lesser than those he committed and therefore gets far lesser punishment than statutorily prescribed for offences actually committed.
- It often times depend on the negotiation skill of a lawyer, rather than obtaining justice on its merit.
- The practice may lead to the prosecution overstating the charge in the first place so that when times come for bargaining, it would be at an advantage to negotiate.
- Being an informal process, it is not usually reduced into writing, therefore if the prosecution wants to dishonour the agreement, the other party may be helpless.
- The state may be 'under-bargained' and the accused person gets away with a lot of loot not disclosed to the state while getting a nominal and inconsequential punishment in return.
- One of the drawbacks in the use of Plea bargaining is the fact that an innocent defendant may be coerced into a confession and accept the guilty plea out of fear for a severe penalty if they are convicted (George Fisher. Stanford).
- Plea bargaining is also criticized, particularly outside United States, on the ground that its close relationship with rewards, threats and coercion potentially endangers the correct legal outcome. Perhaps the views of Martin Yant in his book(Hevmann Milton 1977)summarizesthe short comings of plea bargaining when he said as follows:

"Even when the charges are more serious, prosecutors often can still bluff defense attorneys and their clients into pleading guilty to a lesser offence. As a result, people who might have been acquitted because of lack of evidence, but also who are in fact truly innocent, will often plead guilty to the charge. Why? In a word, fear. And the more numerous and serious the charges, studies have shown, the greater the fear. That explains why prosecutors sometimes seem to file every charge imaginable against defendants."

2.2 Plea Bargaining and Criminal justice system in Nigeria

There is no doubt that the criminal justice system in Nigeria is in dire need of reforms as there are so many problems and undue delays in the dispensation of justice. The criminal justice system in Nigeria therefore needs to be reformed in order to give confidence to all stakeholders ranging from the states, prosecutors and the accused persons. For instance, the criminal prosecution process is in breach of the right of an accused person to a speedy determination of the charges that are brought against him. More often, the right of the accused person to fair hearing is breached and the accused is not even sure of a fair trial (Kenon V. Tekam 2001). It is pertinent to state that in 2008, Lagos State Government, in its bid to enhance Criminal justice administration passed a law on Criminal Justice Administration in the High Courts and Magistrate Courts of Lagos State and for other connected purposes called "Law No. 10" published as a supplement to Lagos State Government Official Gazette Extraordinary No 21, Vol. 41 of 20th March, 2008. Sections 75 and 76 made extensive provisions on Plea bargaining and the circumstances in which it will apply.

The Attorney General is empowered under the Administration of Criminal Justice law 2007 to consider and accept plea bargaining from any person charged with an offence "if it is in the public interest, interest of justice and the need to prevent abuse of legal process." Undoubtedly, these are wide powers which are difficult to determine. However, every case will be decided on its own merit and in the light of the prevailing circumstances.

Also, the state spends enormous resources in prosecuting accused person resulting in endless court adjournments. The judiciary that is congested with cases loses precious adjudicatory time to long criminal trials and determination of appeals thereon. Consequently, the accused persons wait endlessly for justice and therefore loose the confidence and faith in the tortuous judicial process. Little wonder then, there is a mounting criticism against court processes which can be really frustrating to litigants and their lawyers Proponents of Plea

Bargaining have contended that in view of the observed lapses in the criminal justice delivery in the country, plea bargaining would resolve some of the key issues in the criminal justice administration and could potentially be a form of criminal justice reform package without loosing sight of other solutions and or reforms that may be put in place by our policy makers. Like in America, many states also encourage diversion programmes that remove less serious criminal matters from the full, formal procedures of justice system. Typically, the defendant will be allowed to consent to probation without having to go through a trial. If he or she successfully completes the probation –e.g. undergoes rehabilitation or makes restitution for the crime, the matter will be expunged from the records.

It is pertinent to state that in 2015, the Administration of Criminal Justice Act (ACJA) was passed to provide for the administration of criminal justice in the courts of the Federal Capital Territory, other Federal Courts in Nigeria and for related matters. The purpose of the Act is "to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of society from crime and protection of the rights and interests of the suspect, the defendant and the victim.

Consequently, the ACJA made copious provisions and guidelines in sections 270- 277 on Plea Bargaining. To all intents and purposes, the ACJA is a more comprehensive enactment on the issue of plea bargaining and the act succinctly detailed out the guidelines for achieving plea bargaining and this includes the fact that the prosecutor must be satisfied that the offer or acceptance of a plea bargaining is in the "interest of justice, the public interest, public policy and the need to prevent abuse of legal process".

However, in spite of the merits of Plea bargaining, it remains to be seen how it will solve the totality of the problems of delay in the criminal justice system without a comprehensive reform of the criminal justice system. The reforms will inter-alia include the amendment of the Nigerian criminal and penal codes, the criminal procedure laws with a view to updating them, a comprehensive reorganization of the police, restructuring of the ministries of Justice, the Judiciary, the prison, and of course the amendment of the constitution.

3. Conclusion And Recommendation

We have in this paper considered extensively the meaning and scope of plea Bargaining. The arguments for and against Plea Bargaining have also been discussed with a view to determining whether Plea Bargaining remains the panacea to the multifarious and multifaceted problems bedeviling criminal justice Administration in Nigeria or whether it is indeed a mockery of our Criminal Justice Administration.

Although, Plea Bargaining has not, until recently, been a part of the criminal justice reform agenda in Nigeria, it has not been given any serious consideration or thoroughly debated to determine its suitability in our jurisdiction.

However, it is worrisome that the way Plea Bargaining is practiced in Nigeria as indicated in the aforementioned cases leaves much to be desired and will not in any case achieve its desired objective. Many of accused persons tried on the basis of Plea Bargaining as indicated above kept a large chunk of the stolen funds and are still known to have retained many assets running into billions and trillions of Naira. It is our view that any Plea Bargaining deal which allows suspects to keep some of the stolen money and assets or not serving a prison term is a mockery of the system and will never deter anyone. Without a prison term, people will continue to steal from government coffers. Many corrupt politicians will continue to steal more government funds in order to have enough to 'Plea Bargain' with law enforcement agencies when caught. It could be a subterfuge for errant public officers and an indirect form of perpetuating corruption. Governments at all levels should show genuine commitment in the fight against corruption while anti-corruption agencies should be fully independent to discharge their duties effectively. There is the need to amend some of the provisions of the EFCC Act to give the commission the independence and courage to fight corruption. The appointment of EFCC Chairman and some of the officials of the commission should be reviewed to enable the commission achieve its objectives and functions as set out in the EFCC Act. Paying lip service to the concept of rule of law in order to shield errant public officers will not help the nation in its quest for sustainable development.

More importantly, if Plea Bargaining is to be adopted in Nigeria, it necessarily must be backed up by statutory sentencing guidelines and prosecutions policies that will regulate its operation. Many states in America have written rules that explicitly set out how plea bargaining may be applied and accepted by the courts. Therefore, there should be a benchmark that will serve as a guide to judges in sentencing accused persons who have pleaded guilty as a result of plea bargaining.

Furthermore, a holistic approach should be adopted in reforming the criminal justice system in the country if the gains of Plea Bargaining are to be realized. Otherwise, the plea will continue to be another form of entrenching corruption and a 'soft landing' vehicle for powerful public figures in Nigeria. This will certainly not be in the overall public interest. The views of the former chief Justice of Nigeria, Dahiru Musdapher (JSC) are instructive in this regard when he opined inter-alia that "Plea bargain is a novel concept of dubious origin. It has no place in our law, substantive or procedural. It was invented to provide soft landing for high profile criminals

who looted the treasury entrusted to them".

In view of the aforementioned and having regard to the foregoing expositions, there is no doubt that the way the concept of plea bargaining is being practiced in the country leaves much to be desired and indeed has the potentials for perpetuating and or entrenching fraud and corruption in the country, thereby making a mockery of criminal justice administration in Nigeria.

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See generally section 36(1) of the 1999 constitution of the Federal Republic of Nigeria (as amended) which relates to the right to fair hearing. See also the instructive views of Ogwuegbu JSC in KENON V. TEKAM (2001) 7SCNJ 620 at 632 &634 where he emphasized on the importance of fair hearing the idea of fair hearing under the constitution.
Economic and financial Crimes Commission Act (EFCC Act 2004) sets out the functions of the EFCC as including (a) the enforcement and due administration of the EFCC act (b) the investigation of all financial crimes, (c) the coordination and enforcement of all Economic and finical crimes, laws and enforcement functions conferred on any other person or authority (d) adoption of measures to eradicate the commission of economic and financial crimes (e) examination and investigation of all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies or groups involved e.t.c.
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